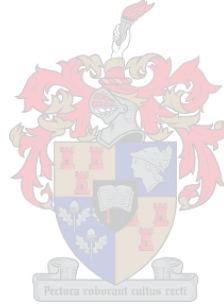


**Advancing the constitutional goal of social justice through
a teleological interpretation of key concepts in the
environmental rights in section 24**

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ABSTRACT

The protection and conservation of the environment is essential for the continued existence of humankind, particularly in light of the challenges of climate change and environmental degradation. Along with these environmental concerns, South Africa faces challenges of poverty and inequality which can exacerbate environmental degradation. It is also often the poor who bear the brunt of the impacts of pollution and environmental degradation. Any effective approach to environmental protection must be mindful of the need for poverty alleviation, while any socio-economic development must bear in mind the absolute necessity of the environment for the existence of humankind. Section 24(a) of the Constitution provides for the right to an environment not harmful to health or well-being, while environmental protection is included in section 24(b). A handful of cases have dealt with this right, but its meaning has not been developed or sufficiently defined. This thesis looks at the interpretation of the key concepts of “environment”, “health or well-being”, and “sustainable development” in section 24. This is done through a teleological interpretation of the right which is mindful of the role of the interdependence of rights, and the context of the Bill of Rights and the Constitution as a whole. In light of the transformative goals of the Constitution it is important that section 24 is construed with due regard to the influences and challenges of socio-economic concerns such as poverty, unemployment and inequality. This thesis argues that the environmental right in section 24 can and should be interpreted to advance the needs of the poor and improve their quality of life alongside the protection of the natural environment.

OPSOMMING

Die beskerming en bewaring van die omgewing is essensieël vir die voortbestaan van die mensdom, veral as dit beskou word in die lig van die uitdagings van klimaatsverandering en die agteruitgang van die omgewing. Saam met hierdie bekommernisse oor die omgewing, het Suid Afrika ook uitdagings van armoede en ongeluk wat die agteruitgang van die omgewing kan vererger. Dit is ook gewoonlik die armes wat die skok van die impak van die besoedeling en omgewingsagteruitgang moet dra. 'n Effektiewe benadering tot omgewingsbewaring moet die behoefte aan armoedeverligting in ag neem, terwyl enige sosio-ekonomiese ontwikkeling weer die absolute noodsaaklikheid van die omgewing vir die menslike voortbestaan in gedagte moet hou. Artikel 24(a) van die Grondwet voorsien vir die reg tot 'n omgewing wat nie skadelik is vir die gesondheid of welstand van mense nie en artikel 24(b) maak weer voorsiening vir die beskerming van die omgewing. 'n Handjievol sake het die reg behandel, maar die betekenis daarvan is nog nie ontwikkel of voldoende gedefinieer nie. Die tesis kyk na die interpretasie van die kernbeginsels “omgewing”, “gesondheid of welstand” en “volhoubare ontwikkeling” in artikel 24. Dit word gedoen deur 'n teleologiese interpretasie van die reg, wat die interafhanklikheid van regte en die konteks van die Handves van Menseregte in die Grondwet as geheel, in gedagte hou. In die lig van die transformatiewe doelwitte van die Grondwet, is dit belangrik dat artikel 24 gekonstrueer word met inagneming van die invloede en uitdagings van sosio-ekonomiese kwelpunte soos armoede, werkloosheid en ongeluk. Hierdie tesis argumenteer dat die omgewingsreg in artikel 24 tot voordeel van die behoeftes van die armes en tot die verbetering van hulle lewenskwaliteit, saam met die beskerming van die omgewing, geïnterpreteer moet word.

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List of abbreviations

ACHPR	African Commission on Human and Peoples' Rights
CESCR	Committee on Economic Social and Cultural Rights
ECHR	European Commission on Human Rights
HELI	Health and Environment Linkages Initiative
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
UNEP	United Nations Environment Programme
WCED	World Commission on Environment and Development
WHO	World Health Organisation

1 Introduction

1 1 Introduction to research problem

Section 24 of the Constitution of South Africa (entitled “Environment”) 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.¹

As Anél Du Plessis has noted, this broadly phrased right is “loaded with *potential* meaning”.² While a handful of cases have dealt with this right, the potential meaning of the environmental right has not been developed or sufficiently defined. The “paucity of jurisprudence” dealing with section 24 offers little to guide our understanding of this right.³

This thesis will consider the interpretation of key concepts in section 24 with the goal of clarifying its content and scope. The environmental right must be interpreted and understood in order for it to be effectively realised, as “we can only meaningfully realise laws which we fully comprehend”.⁴ While the scope of this thesis will not allow for an exhaustive study of the meaning of section 24, it intends to make some contribution to the project by examining certain key concepts in this constitutional provision so as to promote the use (and usefulness) of the right.

¹ Section 24, Constitution of the Republic of South Africa, 1996.

² Du Plessis A “South Africa’s Constitutional environmental right (generously) interpreted: What is in it for poverty?” (2011) 27 *SAJHR* 279 303.

³ Feris L “Constitutional environmental rights: An under-utilised resource” (2008) 24 *SAJHR* 29 30.

⁴ 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. Du Plessis argues that judicial interpretation of section 24 is necessary in order to interpret environmental legislation in accordance with the Constitution.

The motivation of this research lies in the untapped potential of section 24 for an interpretation that could serve the needs of the poor and promote social justice.⁵ There is a great discrepancy between the quality of the environments to which various sectors of South African society are exposed. This is due, among other factors, to the displacement of communities under the apartheid government and current levels of poverty.⁶ The extent of poverty and inequality in South Africa is evident from a recent household survey.⁷ The 2013 survey revealed that 28 percent of South Africans do not have access to tap water either in their home or on site.⁸ In addition to this, 38 percent of the population do not have access to a flush toilet. Of that 38 percent, almost four percent have no access to any form of toilet, and another one percent use bucket toilets.⁹ The survey also found that almost 29 percent of South Africans use their own refuse dump, while three percent simply dump anywhere.¹⁰ All of these factors have a negative impact on the health and well-being of the poor, while also contributing to environmental degradation. Any relevant and effective interpretation of the environmental right must take the socio-economic and environmental circumstances of the poor into consideration.

Under a Constitution that emphasises human dignity and equality and entrenches the socio-economic rights of all people, the environmental right cannot be restricted to the protection of wildlife and the natural, non-human environment. Kidd, for example, argues that such a narrow understanding of the term environment “tends to reinforce perceptions that environmental concerns are concerns of middle-class (largely white) people, which are not relevant to the majority of the population”.¹¹ These perceptions are, of course, not an absolute reflection of the reality. Many indigenous communities, for example, have a profound connection to the natural environment and are deeply concerned about its preservation. However, the historical approach to environmental conservation in South Africa was to cherish the

⁵ Anél du Plessis proposes that “a striking interface exists between the spirit and meaning of the substantive constitutional environmental right, poverty, and people’s health and well-being” in Du Plessis (2011) 27 *SAJHR* 283. Much of this research is inspired by this article and will be a development and expansion of propositions made there.

⁶ For an overview of some relevant statistics see Kidd M *Environmental Law* 2 ed (2011) 298-301.

⁷ Statistics South Africa “General household survey 2013” (18-06-2014) <http://beta2.statssa.gov.za/?page_id=1854&PPN=P0318&SCH=6005> (accessed 16-08-2014).

⁸ Statistics South Africa “General household survey 2013” 133.

⁹ Statistics South Africa “General household survey 2013” 150.

¹⁰ Statistics South Africa “General household survey 2013” 155.

¹¹ Kidd *Environmental Law* (2011) 4.

natural environment while showing little concern for the impact on individuals. This is illustrated in the case of many national parks which were established following forced removals of the communities that occupied the now protected areas.¹² The preservation of the natural environment remains essential for the continued existence of humankind, but this cannot be achieved without being mindful of the poor and their relationship to the environment. Poverty contributes to environmental degradation and any real attempt to preserve and sustain the natural environment must recognise the importance of poverty alleviation. This suggests that there is a need to develop the interpretation of the constitutional environmental right in a way which recognises this relationship between poverty and the environment, and which is responsive to the needs of the poor.

Du Plessis suggests that the interpretation of section 24 should focus on “the interconnectedness of socio-economic rights [and] the continued existence of poverty among the people of South Africa”.¹³ Feris similarly identifies the need “for jurisprudence that defines section 24 in the context of the specific economic and social conditions prevalent in South Africa”.¹⁴ Glazewski calls for a recognition of the relationship between socio-economic conditions and environmental concerns as follows:

In facing [the challenges of environmental degradation], both international and domestic law have to confront the growing divide between rich and poor nations as well as the increasing income disparities within countries, including South Africa, where the alleviation of poverty and the creation of employment are inherently linked with the challenges around the environment.¹⁵

In light of the transformative goals of the Constitution it is important that section 24 is construed with due regard to influences and challenges of socio-economic concerns such as poverty, unemployment and inequality in relation to the environment.¹⁶ As Kidd points out:

¹² Kidd *Environmental Law* (2011) 300.

¹³ Du Plessis (2011) *SAJHR* 307.

¹⁴ 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 *SAPL* 194 206.

¹⁵ Glazewski J “The nature and scope of environmental law” in J Glazewski & L Du Toit (eds) *Environmental Law in South Africa* (OS 2013) 1-2.

¹⁶ The preamble of the Constitution of the Republic of South Africa, 1996 states that the Constitution is adopted with the aim to “[i]mprove the quality of life of all citizens and free the potential of each person”. See Klare K “Legal culture and transformative constitutionalism” (1998) 14 *SAJHR* 146-188.

The litany of environmental ills suffered by many South Africans is inextricably tied up with their socio-economic status. Any attempts to redress the situation, therefore, cannot be divorced from the quest for social justice in South Africa.¹⁷

The position of socio-economic interests in the interpretation of section 24 was noted in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*:

By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach which takes into consideration, inter alia, socio-economic concerns and principles.¹⁸

The constitutional context of section 24 establishes the ideal setting for an interpretation of the environmental right which is mindful of the need for social justice as well as the role of the environment in achieving it.

In order for the right in section 24 to be useful and effective in protecting and promoting the rights of all in South Africa, it is necessary to understand the entitlements of its beneficiaries. Understanding the content of the right is equally important for those officials tasked with the realisation of the right.¹⁹ As Du Plessis has argued:

[A] deep, substantive basis must be laid down for understanding the normative meaning of a particular right for that right to be optimally useful for everyone living under the protection of South Africa's transformative Constitution.²⁰

1 2 Research aims and methodology

The aim of this thesis is to contribute to our understanding of this largely unexplored right and to highlight its potential for protecting the poor from the environmental risks to which they are regularly exposed. I do not endeavour to present a comprehensive analysis of section 24 in its entirety as the scope of this research does not allow for this. Instead my aim is to make a contribution to the interpretation of a few key concepts in the environmental right. I have chosen to focus on three contentious and open-ended concepts which have the potential to enhance social justice if

¹⁷ Kidd *Environmental Law* (2011) 300.

¹⁸ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W) para 144B-D.

¹⁹ Du Plessis (2011) *SAJHR* 303.

²⁰ Du Plessis (2011) *SAJHR* 303.

interpreted teleologically: “environment”, “health or well-being” and “sustainable development”.

The primary method used will be teleological constitutional interpretation. Teleological (or purposive) interpretation in this context involves examining a particular right in light of the text as a whole (the Bill of Rights and, more broadly, the Constitution) and examining the purpose for which it was created.²¹ Teleological interpretation has been described as an approach which “aspires in the interpretation of individual constitutional (and statutory) provisions, to realise the ‘scheme of values’ on which the constitutional order is premised”.²² The directions given under the interpretation clause in section 39 play an important role in determining the scheme of values which should inform the interpretation of fundamental rights.²³

Teleological interpretation requires the Bill of Rights to be treated as a whole rather than a list of independent and unrelated rights. Under this approach the fundamental rights included in the Bill of Rights are indicative of the values that should inform a purposive interpretation section 24. The interconnectedness and interrelationship of the rights in the Bill of Rights will be important in the interpretation of the environmental right. As the goals of the Constitution have a central function in teleological interpretation, the preamble serves as a valuable guide to constitutional interpretation. An interpretation of section 24 which incorporates the constitutional goals will be preferred to one which does not. This thesis ultimately aims to determine how the advancement of social justice can be facilitated through a teleological interpretation of key concepts in the environmental right in section 24.

The interpretation of the three key concepts will be approached by examining the meaning given to them in the following contexts: the ordinary linguistic meaning of the concept; the meaning within the context of section 24 as a whole; the definitions in relevant environmental legislation; the interpretations found in South African

²¹ Du Plessis L “Interpretation” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 32-35.

²² Du Plessis “Interpretation” in *CLOSA* 32-55.

²³ Section 39, Constitution of the Republic of South Africa, 1996. Section 39(1) states:

When interpreting the Bill of Rights, a court, tribunal or forum—

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

jurisprudence; the interpretation of the concept in the international law context; and finally, the interpretation of the concept in academic literature. The interdependence of rights and the influence of constitutional goals and values will be considered throughout.

1 3 Overview of chapters

In chapter 2 the interpretive approach to section 24 will be discussed. This chapter argues for the teleological approach to the interpretation of the environmental right that will be employed in the subsequent chapters. The significance of the interdependence of rights as well as the constitutional values and goals that should inform the interpretation of rights will be explored. This chapter also includes an interdependent interpretation of section 24 in relation to a selection of relevant rights in order to draw attention to the purposes of the right. The rights to equality, human dignity, life, freedom and security of the person, housing, health care services and water are discussed, in order to investigate their relevance for the interpretation of the environmental right. The rights, values and purposes underscored by this interdependent interpretation will be important for the interpretation of the key concepts of section 24.

Chapter 3 examines the first of the key concepts: “environment”. In order to understand the scope of the environmental right’s application, it is necessary to define what is meant by the central concept of “environment”. Van der Linde and Basson note that “[n]either international law, nor academic writing, nor legislation provides a uniform answer to this question”.²⁴ There is, however, consensus on the fact that, at a minimum, “environment” does include the natural, non-human environment. The possible definitions provided by the Environmental Conservation Act 73 of 1989 and the National Environmental Management Act 107 of 1998 will be examined along with case law, international law and academic opinions on the matter. It will be suggested that an interpretation of environment must be broader than the natural environment and include aspects of the anthropogenic environment

²⁴ Van der Linde M & Basson E “Environment” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 2 2010) 50-12.

if it is to be effective in advancing social justice and promoting human dignity and equality.

The concepts of “health” and “well-being” are addressed in chapter 4. The two terms appear alongside one another in section 24, and harm to either health or well-being constitutes a violation of the right. As there is a great deal of overlap between the two, the broader notion of well-being will receive more attention in this chapter. The interpretation of harm will briefly be addressed as it has a significant influence on whether the environmental right is infringed. The concept of well-being is a nebulous and “potentially limitless”²⁵ one. Most commentators agree that well-being refers to something wider than physical and mental health,²⁶ but beyond that it remains unclear how it should be understood in the context of section 24. I aim to show that an interpretation of well-being should be mindful of the influence of socio-economic rights and conditions, and the relationship between poverty and well-being. The context of the Bill of Rights as a whole and the constitutional vision of “free[ing] the potential of each person” will be important in the interpretation of the term.²⁷ The Bill of Rights offers constitutional protection to certain essential aspects of the human experience in the form of rights, and I intend to show that these rights should be considered essential components of an interpretation of well-being in section 24.

Chapter 5 deals with the notion of “sustainable development”. The concept originates in the international arena, so international law has an important role in the interpretation of sustainable development. It is, however, necessary to interpret the term in its immediate context of section 24 and the Bill of Rights as well as the broader South African context. Sustainable development is widely understood as a balancing of the three “pillars”, namely environmental, social and economic interests. While there is some case law shedding light on sustainable development under section 24, exactly how the balancing of these interests should take place remains uncertain. How social and economic interests relate to inequality, poverty and unemployment will be important in achieving sustainable development that promotes

²⁵ Glazewski J “The Bill of Rights and environmental law” in J Glazewski & L Du Toit (eds) *Environmental Law in South Africa* (OS 2013) 5-16.

²⁶ Van der Linde & Basson “Environment” in *CLOSA* 50-16; Feris & Tladi “Environmental rights” in *Socio-Economic Rights* (2005) 260; Glazewski “The Bill of Rights and environmental law” in *Environmental Law* 5-16.

²⁷ Preamble of the Constitution of the Republic of South Africa, 1996.

constitutional goals and values. In determining how these three pillars should be balanced I will consider the influence of the Bill of Rights, particularly the socio-economic rights conferred on everyone in South Africa. I will investigate the role of other fundamental rights at stake in the balancing of social, economic and environmental concerns.²⁸ Ultimately I aim to show that the interpretation of sustainable development should be informed by the rights, values and purposes of the Bill of Rights as well as the interdependence of rights.

The environmental right in section 24 can and should be interpreted to advance the needs of the poor and improve their quality of life alongside the protection of the natural environment. Precisely how the concepts of environment, health or well-being, and sustainable development should be interpreted will be examined in the chapters that follow.

²⁸ Glazewski "The Bill of Rights and environmental law" in *Environmental Law* 5-20–5-21; Feris & Tladi "Environmental rights" in *Socio-Economic Rights* (2005) 262; *Fuel Retailers v Director-General: Environmental Management* 2007 6 SA 4 (CC) para 45.

2 Constitutional interpretation and section 24

2 1 Introduction

In order to accord meaning to the environmental right, it is necessary to have an understanding of the principles of constitutional interpretation. The first part of this chapter examines various approaches to constitutional interpretation and rights interpretation. Ultimately, I argue for an integrated, teleological method of constitutional interpretation. This approach seeks to give effect to the purposes of the text. These purposes should be established through the application of grammatical, systematic, historical and comparative interpretation. The role of the theory of transformative constitutionalism and the interdependence of rights will also be emphasised.

In the second part of this chapter I will examine the environmental right in section 24 and reveal some of the purposes underlying the right as required by a teleological approach. These purposes will be identified through a discussion of the relationship between the constitutional goals and values, and the environmental right. An interdependent interpretation of the right in relation to a selection of other rights will also assist in uncovering purposes of the right that should guide its interpretation. It will be argued that the purposes distilled from the Constitution and the right itself indicate that the environmental right in section 24 should be understood as protecting human needs and interests as they relate to the environment and not merely as conserving the natural environment for its own sake. The proposed approach to the interpretation of section 24 could shape this right into an important tool for advancing social justice and addressing the needs of the poor.

2 2 Constitutional interpretation

2 2 1 Introduction

Constitutional interpretation involves the task of ascribing meaning to a written text. There are multiple meanings which can be given to any text and there are also various possible approaches to this task, as Lourens Du Plessis notes:

The text of the Constitution-in-writing is open-ended and generates more and more – instead of being limited to only certain – meanings. Methodological pluralism manifesting as multiple strategy interpretation is preferable to methodological monism seeking to establish a one and only correct manner in which to arrive at ‘the best’ or the ‘most correct’ interpretation of *the Constitution*.¹

Using the work of Du Plessis on interpretation as a point of departure, various methods of interpretation and interpretive guides will be discussed. As noted above, a single interpretive approach is not advisable, as no method is complete or absolutely conclusive when it comes to the nature of language and interpretation.

The methods of interpretation that will be discussed are grammatical interpretation, historical interpretation, systematic interpretation, purposive or teleological interpretation and, finally, international and comparative interpretation. The role of various interpretive guides in delineating the meaning of a provision will also be addressed. The interdependence of rights will be emphasised here as it is an important guide which is consistent with systematic interpretation and can contribute to a teleological interpretation of the Constitution.

2 2 2 Methods of interpretation

2 2 2 1 Grammatical interpretation

Constitutional interpretation requires the interpretation of written text and the point of departure is therefore the text itself. Grammatical interpretation has been described as interpretation which “concentrates on ways in which the conventions of natural language can assist the interpretation of enacted law and can help to limit the many

¹ Du Plessis L “Interpretation” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 32-191.

possible meanings of a provision”.² An interpreter must be mindful of the particular words, phrasing, grammar and syntax used in a provision as these are all indicators and regulators of meaning.

The language of a provision can limit the many possible meanings of the text, but it rarely, if ever, contains a single objective meaning. Du Plessis notes that “[n]atural language is always open-ended and makes for a proliferation of meanings”.³ This is especially true of the text of the Constitution as it is

meant to be a long-lasting text and its expansively formulated provisions must have the quality of being able to cater for an inestimable number of unpredictable situations. The Final Constitution by its very nature thus unsettles the assumption of clear and unambiguous language.⁴

While the open-ended text of the Constitution allows for a range of possible meanings, the language used must be respected as it delineates the boundaries of those meanings. As Kentridge AJ states in *S v Zuma*:⁵

I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.⁶

This judgment of Kentridge AJ points out that the interpreter’s “personal intellectual and moral preconceptions” can shape their interpretation of the Constitution. These preconceptions must be restrained by the meaning of the words used in the Constitution. Kentridge AJ warns that the expansive wording of the Constitution is not a licence to ascribe any desired meaning to the text, but rather an invitation to find the best interpretation for the current circumstances within the boundaries provided by the text.

As language alone cannot provide a clear, unambiguous meaning (and can even serve to conceal the interpreter’s own influential preconceptions), constitutional interpretation cannot be limited to grammatical interpretation alone. Further interpretive strategies are required to demarcate the broad and variable terrain generated by the language of the Constitution.

² Du Plessis “Interpretation” in *CLOSA* 32-159.

³ Du Plessis “Interpretation” in *CLOSA* 32-32.

⁴ Du Plessis “Interpretation” in *CLOSA* 32-161.

⁵ 1995 2 SA 642 (CC).

⁶ Para 17.

2 2 2 2 *Historical interpretation*

Historical interpretation “situates a provision in the tradition from which it emerged” by allowing information concerning the historical period in which the text was created to guide the interpreter.⁷ Relevant sources of historical information include the broader historical events around the time of the conception of the text, as well as details regarding the drafting of text itself.

In the South African context this mode of interpretation is particularly significant as the shift from parliamentary sovereignty and apartheid rule to constitutional democracy is a dramatic (and relatively recent) one. The enactment of the Constitution is “a historical event at a particular point in time” and interpreters must be mindful of this.⁸ The Constitution and the rights therein need to be interpreted in light of the era of racism and apartheid rule they are reacting to and denouncing. The Constitution should be understood as “the remedy to a fundamental tripartite mischief in South Africa’s history, namely colonialism, racism and apartheid”.⁹ Of particular importance in the field of socio-economic rights are the patterns of disadvantage and discrimination that have historical roots and continue to exist under the constitutional democracy. The Constitution represents a break from apartheid rule, and should be interpreted as such.

2 2 2 3 *Systematic interpretation*

Systematic interpretation places a specific provision within its broader context or “textual setting”.¹⁰ Du Plessis explains:

[I]ndividual provisions of an enacted instrument-in-writing [...] are understood in relation to and in light of one another and of other components of the more encompassing instrument of which they form part, drawing on the ‘system’ or ‘logic’ or ‘scheme’ of the written text as a whole.¹¹

⁷ Du Plessis “Interpretation” in *CLOSA* 32-160. Historical interpretation seeks to place the text within its broader historical context. This should be distinguished from originalism which aims to ascertain the original authors’ intent in drafting the text. See Du Plessis “Interpretation” *CLOSA* 32-61.

⁸ Du Plessis “Interpretation” in *CLOSA* 32-170.

⁹ Du Plessis “Interpretation” in *CLOSA* 32-170.

¹⁰ Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 143.

¹¹ Du Plessis “Interpretation” in *CLOSA* 32-162.

Systematic interpretation recognises that a provision does not exist in isolation, but forms part of a greater whole and should be interpreted in light of this.¹² Interpretation requires an awareness of all the parts of the text that make up the whole. It is this mode of interpretation that, for example, allows for sound reliance on the preamble in the interpretation of other portions of the Constitution.¹³

Constitutional interpretation calls for an appreciation of the dynamic, interrelated nature of provisions and the role of constitutional values in the scheme of the text. The relevant constitutional values include those foundational values outlined in section 1 as well as human dignity, equality and freedom as referred to repeatedly in the Bill of Rights.¹⁴ These values form part of the fabric of the Constitution and must be recognised when interpreting any rights in the Bill of Rights.¹⁵

This systematic form of constitutional interpretation has been endorsed by the Constitutional Court, most notably in *Matatiele Municipality and Others v President of the Republic of South Africa and Others (No 2)*.¹⁶ In this case the court commented on the importance of contextual interpretation:

Like the German Constitution, [the South African Constitution] “has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.” Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole.

The process of constitutional interpretation must therefore be context-sensitive. In construing the provisions of the Constitution it is not sufficient to focus only on the ordinary or textual meaning of the phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or

¹² Scott C & Alston P “Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney’s* legacy and *Grootboom’s* promise” (2000) 16 *SAJHR* 206 218.

¹³ Du Plessis explains that “[i]ntra-textual, systematic interpretation [...] lays the basis for relying on textual elements such as the preamble, schedules to and the long title of an enacted instrument in the interpretation of any of its specific provisions”. Du Plessis “Interpretation” in *CLOSA* 32-163. See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) para 1; *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 9.

¹⁴ The foundational values are found in section 1, while human dignity, equality and freedom appear in sections 1, 7, 36 and 39.

¹⁵ See *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC) para 34-35.

¹⁶ 2007 6 SA 477 (CC).

scheme of the Constitution. This provides the context within which a provision in the Constitution must be construed.¹⁷

In addition to the role of overarching principles and values, the interaction between various rights is also essential to consider in rights interpretation, and the concept of the interdependence of rights can be seen as stemming from a systematic interpretation of the Bill of Rights as a whole.¹⁸ There is a complex network of relationships between the rights in the Bill of Rights. This interdependence means that we cannot, for example, consider the right to housing without also reflecting on the impact of the right to human dignity.¹⁹

This systematic method of interpretation has been described as an integration of the text.²⁰ Tribe and Dorf²¹ identify two opposing approaches which should be guarded against in such an interpretive exercise. Du Plessis explains the two approaches:

Dis-integration, on the one hand, turns a blind eye to the systematic interconnectedness of text components and then tries to understand them in splendid isolation from one another. *Hyper-integration*, on the other hand, links text-components which, according to the scheme of the text, are not inherently coherent.²²

An interpretation of the right to life which, for example, relies heavily on section 192 which deals with the establishment of an independent broadcasting authority could be seen as inappropriate as there is no 'inherent coherence', but it would be equally inappropriate to consider the right to emergency health care *without* considering its interaction with the right to life.²³

Systematic interpretation ultimately demands that we pay attention to the unity of the Constitution as a whole and the interactions between its various parts, including those values or principles which are not explicitly mentioned but are evident in the overall scheme of the text.

¹⁷ Para 36-37 (footnotes omitted).

¹⁸ Interdependence is discussed in further detail at 2 2 3 5.

¹⁹ Although focused on the value of human dignity and not the right itself, the relationship between the right to housing and dignity was discussed in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) para 83.

²⁰ Du Plessis "Interpretation" in *CLOSA* 32-163.

²¹ Tribe LH & Dorf MC *On Reading the Constitution* (1991) 19-30.

²² Du Plessis "Interpretation" in *CLOSA* 32-163.

²³ See *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 14-19.

2 2 2 4 Purposive interpretation

The aim of purposive interpretation is to interpret a provision so as to give effect to its purpose. Purposive interpretation looks further than the literal meaning of the words of a provision and asks what goal lies behind the existence of the provision. This approach is based on the assumption that the provision is not arbitrary, and has been enacted for a purpose.²⁴

Du Plessis points out that the process of interpreting purposively does not involve merely giving effect to an accepted purpose, but that interpretation is required to ascertain the purpose itself:

[T]he purpose of a provision can simply not be known *prior to* interpretation. ‘Purpose’ can be established only *through* interpretation. The interpretation of enacted law is by its very nature *purpose-seeking*.²⁵

Purposive interpretation is then interpretation that seeks to establish the purpose of a provision and to give effect to that purpose.

There are dangers in using an *exclusively* purposive approach to constitutional interpretation. Du Plessis warns against treating it as the answer to all problems of interpretation as interpretive processes “are too complex to be captured in one essential(-ist) or predominant catchword”.²⁶ Murphy notes that for some lawyers and judges purposive interpretation represents the “disregard of words” or “straining their ordinary grammatical meaning” which results in uncertainty.²⁷ He also recognises the fear that judges who place too much emphasis on purposive interpretation “might resort willy-nilly to relying on context (including the shifting values of the Constitution) to interpret legislation to mean whatever they want it to mean”.²⁸ Murphy responds to this fear by pointing out that purposive interpretation does not require “a total departure from, or ignoring of, the language used in the text”.²⁹ However, an exclusively purposive approach remains a risky one.

²⁴ Du Plessis “Interpretation” in *CLOSA* 32-168.

²⁵ Du Plessis “Interpretation” in *CLOSA* 32-55.

²⁶ Du Plessis “Interpretation” in *CLOSA* 32-54.

²⁷ Murphy JR “Judicial independence and purposive interpretation” (2011) 24 *Advocate* 27 29.

²⁸ Murphy (2011) *Advocate* 29.

²⁹ Murphy (2011) *Advocate* 30.

In order to guard against an “*ad hoc* purposivism”, a more integrated approach is necessary.³⁰ The links between systematic and purposive interpretation have been recognised, and Du Plessis argues that “[a] purposive or purposeful reading of the Final Constitution [...] must be a holistic (and historically sensitive) reading”.³¹ The purpose of a provision must be sought not only within the provision itself, but in the context of the purposes of the Constitution as a whole. Currie and De Waal describe this approach as follows:

Purposive interpretation is aimed at teasing out the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom and then to prefer the interpretation of a provision that best supports and protects those values.³²

This more integrated purposive approach can be described as teleological interpretation. Often used interchangeably with purposive interpretation, teleological interpretation is a deeper, fuller form of purposive interpretation which recognises the role of the “scheme of values” of the Constitution in ascertaining the purpose of a provision.³³ Du Plessis describes it as

an enriched version of purposive interpretation [that] moves from the effectual acknowledgement of the purpose of a particular provision to the realization and fulfilment of values and purposes key to the legal and constitutional order as a whole.³⁴

The Constitutional Court has shown support for a purposive approach to interpretation.³⁵ *S v Zuma* has frequently been referred to with approval for its reliance on the Canadian approach set out in *R v Big M Drug Mart*.³⁶

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language

³⁰ Du Plessis “Interpretation” in *CLOSA* 32-55.

³¹ Du Plessis “Interpretation” in *CLOSA* 32-164.

³² Currie & De Waal *Bill of Rights Handbook* 136. See also Klug H *The Constitution of South Africa: A Contextual Analysis* (2010) 121.

³³ Du Plessis “Interpretation” in *CLOSA* 32-55.

³⁴ Du Plessis “Interpretation” in *CLOSA* 32-56.

³⁵ *S v Makwanyane and Another* 1995 3 SA 391 (CC) para 9; *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 16.

³⁶ See *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 41; *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) para 46; *S v Makwanyane and Another* 1995 3 SA 391 (CC) para 9. See also Cornell D & Friedman N “In defence of the Constitutional Court: Human rights and the South African common law” (2011) 5 *Malawi Law Journal* 1 12.

chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than legalistic one aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection.³⁷

Cornell and Friedman maintain that the Constitutional Court “adopts a teleological approach to interpretation [...] in which the constituent parts of the Constitution are interpreted so as to cohere with one another and to further the purposes of the Constitution as a whole”.³⁸ This teleological interpretation creates room for interpretation that considers the text, textual context, historical context, scheme of the text and the values and principles underlying the text itself. The goals and purposes of the text can be established using these factors. The jurisprudence clearly establishes that a purposive or teleological approach to interpretation has met with approval from the Constitutional Court.

2 2 2 5 International and comparative interpretation

2 2 2 2 1 International law

Section 39(1)(b) states that international law *must* be considered when interpreting the Bill of Rights. Liebenberg notes that it is important to distinguish this interpretive injunction from binding international law which is incorporated through sections 231 and 232 of the Constitution.³⁹ In the context of the interpretation of the rights in the Bill of Rights, the instruction to *consider* international law in section 39(1)(b) is significant.

While both binding and non-binding international law must be considered in constitutional interpretation, the status of the particular international law remains relevant. Where an international instrument is binding in South Africa, there is an obligation to apply it. This could demand a specific interpretation in line with international obligations rather than requiring a mere consideration of international law in the interpretation of a right.

³⁷ *R v Big M Drug Mart* (1985) 13 CRR 64 as quoted in *S v Zuma and Others* 1995 2 SA 642 (CC) para 15.

³⁸ Cornell & Friedman (2011) *Malawi Law Journal* 12-13.

³⁹ Liebenberg *S Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 103.

Section 232 of the Constitution renders customary international law part of South African law where it is not “inconsistent with the Constitution or an Act of Parliament”.⁴⁰ Dugard explains how courts assess customary international law in practice:

[C]ourts may take judicial notice of [international law] as if it were part of our own common law. In practice this means that courts turn to the judicial decisions of international tribunals and domestic courts, both South African and foreign, and to international law treatises for guidance as to whether or not a particular rule is accepted as a rule of customary international law on the ground that it meets the twin qualifications of *usus* [state practice] and *opinion juris* [accepted as law].⁴¹

Where a rule or principle is considered part of international customary law it is then incorporated into our law and will be binding rather than merely influential in interpretation.

The position of treaties in South African law is addressed in section 231 of the Constitution which requires explicit incorporation of treaties by national legislation (with the exception of self-executing treaties).⁴² In *Glenister v President of the Republic of South Africa*⁴³ Ngcobo J commented on the status of treaties in South African law:

An international agreement that has been ratified by Parliament under section 231(2) [...] does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated in our law cannot be a source of rights and obligations.⁴⁴

Where a treaty forms part of our law in accordance with the guidelines of section 231, it becomes binding in South Africa and *must* apply. Non-binding international law, on the other hand, does not apply directly, but must still be considered in the interpretation of the Bill of Rights.

Important for the purposes of interpretation is the inclusion of binding and non-binding public international law in the scope of the interpretation clause. Referring to the interpretation clause of the Interim Constitution in *S v Makwanyane and*

⁴⁰ Section 232, Constitution of the Republic of South Africa, 1996.

⁴¹ Dugard J *International Law: A South African Perspective* 4 ed (2012) 51.

⁴² Section 231, Constitution of the Republic of South Africa, 1996. For a discussion of self-executing treaties, see Dugard *International Law* 56-60.

⁴³ 2011 3 SA 347 (CC).

⁴⁴ 2011 3 SA 347 (CC) para 92. See Dugard *International Law* 56.

Another,⁴⁵ the Constitutional Court explained the position of binding and non-binding international law:

In the context of s 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of Chapter Three [the Bill of Rights].⁴⁶

This decision establishes that international law agreements which have not been ratified by South Africa should still have a bearing on the interpretation of the Bill of Rights.⁴⁷

Du Plessis points out that “[t]he South African Constitution, and its Bill of Rights in particular, reflects the influence of a wide range of international human-rights law instruments: international declarations, covenants and conventions”.⁴⁸ Although there are overlaps and similarities between the Bill of Rights and international sources due to the latter’s influence on the drafting of the Constitution, the rights in the Bill of Rights must be interpreted as “domestic highest law” and it is possible for the same (or a similar) provision to have a different meaning in South African law than that which it is given in the international law context.⁴⁹ This does not mean that international law is insignificant or unpersuasive. Liebenberg argues:

[I]nternational instruments and their interpretation by treaty bodies remain an important guide in interpreting relevant socio-economic rights provisions, particularly where it can be shown that the particular international jurisprudence is consistent with, if not identical to, our constitutional provisions and is appropriate in the South African context.⁵⁰

⁴⁵ 1995 3 SA 391 (CC) (*‘Makwanyane’*).

⁴⁶ Para 35.

⁴⁷ Currie & De Waal *Bill of Rights Handbook* 147.

⁴⁸ Du Plessis “Interpretation” in *CLOSA* 32-174–32-175.

⁴⁹ Du Plessis “Interpretation” in *CLOSA* 32-175. See also Scott & Alston (2000) *SAJHR* 232 where it is argued that “[h]uman rights treaties must be viewed, presumptively, as floors for national human rights protections, not ceilings”.

⁵⁰ Liebenberg S “The interpretation of socio-economic rights” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2003) 33-12.

Scott and Alston argue that the similarities between the content and values of the Bill of Rights and the UN human rights treaties indicate “the justifiability of a presumption of protection at least as great as that under the treaties”.⁵¹ They suggest that this presumption should be rebutted when international law is in conflict with the values of the Bill of Rights.⁵²

Relevant international law is a valuable guide in interpreting the provisions of the Bill of Rights, particularly where there is a lack of domestic case law on the right in question. Section 39 does not demand the adoption of international law, but its consideration is essential for interpretation of the Bill of Rights.

2 2 2 2 2 Foreign law

As opposed to the mandated consideration of international law, the Constitution *permits* the use of foreign law in interpreting the Bill of Rights in section 39(1)(c). This consideration of foreign law must be approached with some caution as legal systems vary throughout the world.⁵³ The uniqueness and distinctiveness of each jurisdiction indicates that we should be wary of uncritically adopting foreign understandings or legal principles.⁵⁴

The nature and characteristics of the foreign jurisdiction will impact the extent to which it could add value to our interpretation of the Constitution. Du Plessis points out that certain foreign constitutional texts “have had a definite impact on the making [of] the South African Constitution”.⁵⁵ This lends favour to the use of these foreign constitutions to illuminate our interpretations of the Constitution. The greater the similarities between the South African Constitution and the constitutional text of a foreign democracy, the more persuasive a comparative interpretation will be. In *K v*

⁵¹ Scott & Alston (2000) *SAJHR* 231.

⁵² Scott & Alston (2000) *SAJHR* 231.

⁵³ See *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) para 26 where the court warned that “the use of foreign precedent requires circumspection”.

⁵⁴ See *Du Plessis and Others v De Klerk and Another* 1996 3 SA 850 (CC) para 127. Kriegler J points out the uniqueness of the South African Constitution that must be borne in mind when engaging in comparative interpretation. See also Foster J “The use of foreign law in constitutional interpretation: Lessons from South Africa” (2010) 45 *University of San Francisco Law Review* 100. Foster argues that “[t]he distinctiveness of the Constitution in regards to socioeconomic rights may militate against continued reference to foreign law as jurisprudence develops”.

⁵⁵ Du Plessis “Interpretation” in *CLOSA* 32-186. Du Plessis also notes that the Constitution has been “modelled on an array of foreign constitutions” and provides the examples of “the German Basic Law, the Canadian Charter, the US Constitution and Indian Constitution”. Du Plessis “Interpretation” in *CLOSA* 32-183.

*Minister of Safety and Security*⁵⁶ the Constitutional Court cautions that “it is important to be astute not to equate legal institutions which are not, in truth, comparable”.⁵⁷

Liebenberg offers a similar warning:

Apart from practical difficulties relating to language differences and the differing legal systems of various jurisdictions, constitutional provisions acquire a distinctive meaning through their operation in concrete political economic and social contexts. Thus it is very difficult, if not impossible, to understand the true import and implications of comparative constitutional law and jurisprudence without a deep understanding of the relevant contexts.⁵⁸

Despite these cautions, foreign law can still be valuable in the interpretation of the Constitution. In deciding on the constitutionality of the death penalty in *Makwanyane* the Constitutional Court maintained:

The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention.⁵⁹

Foster similarly discusses the increased probability of the use of foreign law by the Constitutional Court in circumstances where “the challenged practice is identical to a practice challenged in foreign jurisdictions”.⁶⁰

The use of foreign sources is also valuable when a matter has not yet been decided on under the South African Constitution, but has been addressed extensively abroad. In *Sanderson v Attorney-General, Eastern Cape*⁶¹ the Constitutional Court held that “[c]omparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies”.⁶²

In addition to exercising caution in deciding when to use foreign sources, it is also necessary to pay attention to *how* these sources are used in interpretation. An understanding of the context of the legal system and its history is necessary if we are to avoid a superficial (and inappropriate) transfer of legal principles into our law. This may require knowledge of a foreign language and a broader study of the relevant

⁵⁶ 2005 6 SA 419 (CC).

⁵⁷ Para 34.

⁵⁸ Liebenberg *Socio-Economic Rights* 118.

⁵⁹ 1995 3 SA 391 (CC) para 34.

⁶⁰ Foster (2010) *University of San Francisco Law Review* 101.

⁶¹ 1998 2 SA 38 (CC).

⁶² Para 26.

legal system. We must rely on foreign law that is correctly understood.⁶³ Foster argues that “the use of foreign law is most persuasive when both the existence of relevant foreign decisions and the reasoning behind these decisions is fully considered”.⁶⁴

Finally, it is important to bear in mind that while foreign law can be valuable and illuminating, it is not binding. The Constitutional Court reiterates this in *Makwanyane*. In reference to the interpretation clause under the interim Constitution, the court held that the section dealing with foreign law “in permissive terms allows the Courts to ‘have regard to’ such law. There is no injunction to do more than this”.⁶⁵ While foreign law is not constraining, section 39(1)(c) does mean that courts are free to consider foreign law where it is appropriate and could possibly assist in the interpretation of the Constitution.

Although foreign law has an important influence on the interpretation of rights in the Bill of Rights, I will not be addressing this influence in the subsequent chapters of this thesis. The scope of this research does not allow for the necessary contextual study of various foreign jurisdictions which is demanded by comparative interpretation. The treatment and interpretation of environmental rights in foreign law does, however, remain an important area of study worth consideration.

2 2 3 Interpretive guides

2 2 3 1 Introduction

In addition to the methods of interpretation discussed above, there are other principles, theories and indicators that serve to guide constitutional interpretation. While these are not conclusive determinants of meaning, they assist in delineating the meaning of a constitutional provision. Those dealt with below are the generous

⁶³ Du Plessis “Interpretation” in *CLOSA* 32-188.

⁶⁴ Foster (2010) *University of San Francisco Law Review* 114.

⁶⁵ 1995 3 SA 391 (CC) para 37.

interpretation of rights, the goals and values set out in the Constitution itself, the principle of interdependence, and the theory of transformative constitutionalism.⁶⁶

2 2 3 2 *Generous interpretation of rights*

The Constitutional Court favours a generous interpretation of rights, which “entails drawing the boundaries of rights as widely as the language in which they have been drafted and the context in which they are used makes possible”.⁶⁷ A broad and generous interpretation should be preferred to a narrow, restrictive one. Klug suggests that this approach is “part of the response to the previous denial of rights that characterised South African legal history”.⁶⁸ Currie and De Waal argue that the most “plausible” reason for this approach is the limitations clause in section 36 which allows a “broad construction of the right in the first (interpretative) stage of the enquiry” and only then requires justification for the infringement of the right.⁶⁹ This approach favours the individual claiming the infringement as it makes a violation more likely and places the emphasis on the justification.⁷⁰

A generous interpretation does not, however, always correspond with a purposive interpretation of a right. A purposive interpretation could indicate that a right should be restrictively interpreted. Where there is such a contradiction between a generous interpretation and a restrictive, purposive interpretation, it seems courts will prefer the purposive approach above a generous construction of the right.⁷¹ This is because a generous interpretation is not necessarily in line with the goals and values of the provision and of the Constitution whereas a purposive interpretation is necessarily aligned with those purposes. As a result of this it could be argued that “the notion of generous interpretation does not contribute much to constitutional

⁶⁶ This is not a comprehensive list of guides valuable for constitutional interpretation, but rather a selection of those deemed most useful and relevant for the interpretation of the environmental right in section 24.

⁶⁷ Currie & De Waal *Bill of Rights Handbook* 138. See also *S v Zuma and Others* 1995 2 SA 642 (CC) para 14; *S v Mhlungu and Others* 1995 3 SA 867 (CC) paras 8 & 78.

⁶⁸ Klug *The Constitution of South Africa* 121.

⁶⁹ Currie & De Waal *Bill of Rights Handbook* 140.

⁷⁰ Currie & De Waal *Bill of Rights Handbook* 140. Of course this approach does not have the same effect where rights with internal limitations are concerned.

⁷¹ Webb H “The Constitutional Court of South Africa: Rights interpretation and comparative constitutional law” (1998) 1 *Journal of Constitutional Law* 205 236; Currie & De Waal *Bill of Rights Handbook* 140.

interpretation”.⁷² Despite the questionable practical use of this approach, it is a useful point of departure and serves as a reminder that the Bill of Rights should break away from the “denial of rights that characterised South African legal history”.⁷³

2 2 3 3 Constitutional goals

As discussed above, a teleological approach to interpretation involves giving effect to the values and purposes of the Constitution as a whole. In order to realise the purposes of the Constitution we must establish what those purposes are. The clearest statement of purposes is found in the preamble of the Constitution which states that the Constitution is adopted in order to break from the past and establish an open, democratic society which promotes social justice and human rights, where individuals are afforded equal protection under the law and their quality of life is improved.⁷⁴ Reliance on the preamble is supported by a systematic approach to interpretation as the preamble “informs the matrix of interpretative legitimacy”.⁷⁵ Du Plessis also points out that the Constitutional Court has displayed

a readiness to rely on constitutional preambles for interpretive purposes without imposing the qualification that such reliance is warranted only where the language of the Constitution is ambiguous and/or unclear.⁷⁶

As a clear statement of constitutional goals, the preamble can serve as a valuable interpretive tool.

The two most important of these goals for the purposes of this thesis are the goal of a society based on “social justice and fundamental human rights” and the aim to “[i]mprove the quality of life of all citizens and free the potential of each person”.⁷⁷ The content and implications of these will be analysed in further detail below.⁷⁸ The constitutional goals in the preamble serve as an important interpretive guide when the purposes of a specific provision are being determined. The purpose of a specific

⁷² Currie & De Waal *Bill of Rights Handbook* 140.

⁷³ Klug *The Constitution of South Africa* 121.

⁷⁴ Preamble, Constitution of the Republic of South Africa, 1996.

⁷⁵ Du Plessis LM “The evolution of constitutionalism and the emergence of a constitutional jurisprudence in South Africa: An evaluation of the South African Constitutional Court’s approach to constitutional interpretation” (1999) 62 *Saskatchewan Law Review* 299 314-315.

⁷⁶ Du Plessis “Interpretation” in *CLOSA* 32-119.

⁷⁷ Preamble, Constitution of the Republic of South Africa, 1996.

⁷⁸ See 2 3 3 1.

provision must complement and further the goals outlined in the preamble (or at least not contradict them) if it is to be deemed a legitimate purpose.

2 2 3 4 *Constitutional values*

It has been argued that “legal interpretation, especially in the human rights arena, is a value-laden activity that should not be cloaked by the pretence of value neutrality”.⁷⁹ The South African Constitution openly recognises the important role of values in interpretation. The values which should be relied on have been made explicit in the Constitution. It is not coincidental that the Constitution begins with a statement of values upon which the Republic of South Africa is founded. These values include human dignity, equality (with specific reference to sexism and racialism), the promotion of human rights and freedoms, the rule of law, and the accountability, responsiveness and openness of the government.⁸⁰

The values of human dignity, equality and freedom in Section 1(a) are repeated throughout the Bill of Rights. Section 7 affirms these values at the beginning of the Bill of Rights, section 36 requires that they are considered in assessing a justifiable limitation of a right and, most relevant here, section 39(1)(a) requires that they are promoted in the interpretation of rights.⁸¹

The Constitutional Court has recognised that the Constitution “embodies [...] an objective, normative value system”.⁸² The Bill of Rights directly refers to the role of the values and, as Liebenberg points out, “[s]ection 39 mandates an explicit value-orientated approach in the interpretation of the various rights in the Bill of Rights”⁸³ and “[s]ection 39(1)(a) also requires the court to actively *promote* these values”.⁸⁴ Scott and Alston note that the verb “promote” indicates “an assertive role for the courts” granting them an important “value-forging role”.⁸⁵ In addition to the direct instructions to consider these values when interpreting the Bill of Rights, a

⁷⁹ Scott C “The interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenants on Human Rights” (1989) 27 *Osgoode Hall Law Journal* 769 778.

⁸⁰ Section 1, Constitution of the Republic of South Africa, 1996.

⁸¹ See Scott & Alston (2000) *SAJHR* 220 where it is pointed out that the values of human dignity, equality and freedom are “both the genesis of rights and the basis for the principled limitation of those rights”.

⁸² *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 54.

⁸³ Liebenberg *Socio-Economic Rights* 130.

⁸⁴ Liebenberg *Socio-Economic Rights* 98.

⁸⁵ Scott & Alston (2000) *SAJHR* 219.

systematic and teleological approach to interpretation calls for them to be taken into account in the interpretation of *any* provision of the Constitution.

The Constitution gives interpreters the values of human dignity, equality and freedom to direct and inform the interpretation of the Constitution and to encourage interpretations that will further these values. With regard to the value statements in section 7, Du Plessis points out that these are “essentially presumptions that indicate that some understandings of the Bill of Rights are to be preferred to others”.⁸⁶ In this way the values assist in demarcating the boundaries of the potential meanings of constitutional provisions and, more specifically, fundamental rights.

2 2 3 5 Interdependence of rights

As noted above, interdependence is closely related to systematic interpretation. The distinction between the two is that systematic interpretation of the Constitution involves the interrelation and connectedness of *all* provisions of the Constitution whereas the concept of interdependence is used almost exclusively in the field of human rights.

The interdependence of rights is accepted as a key principle of international law.⁸⁷ It has been recognised that “[a]ll human rights are universal, indivisible and interdependent and interrelated”.⁸⁸ Scott describes interdependence as “the idea that values seen as directly related to the full development of personhood cannot be protected or nurtured in isolation”.⁸⁹ Interdependence appreciates that rights do not stand alone, but form a network of overlapping properties which together form “a full conception of personhood”.⁹⁰ Scott suggests that, rather than emphasising the rights themselves, interdependence should be concerned with “nurturing the capacity to be human”.⁹¹ In the South African context Liebenberg argues for an approach to the interpretation of rights which acknowledges this interdependence and “does justice to the holistic concept of human well-being endorsed by our Bill of Rights”.⁹² Such an

⁸⁶ Du Plessis “Interpretation” in *CLOSA* 32-120.

⁸⁷ Liebenberg S & Goldblatt B “The interrelationship between equality and socio-economic rights under South Africa’s transformative constitution” (2007) 23 *SAJHR* 335 338.

⁸⁸ UN General Assembly *Vienna Declaration and Programme of Action* (12 July 1993) UN Doc A/CONF.157/23 article 5.

⁸⁹ Scott (1989) *Osgoode Hall* 786.

⁹⁰ Scott (1989) *Osgoode Hall* 808. See also Scott & Alston (2000) *SAJHR* 218.

⁹¹ Scott (1989) *Osgoode Hall* 803.

⁹² Liebenberg *Socio-Economic Rights* 54.

approach which sees human well-being holistically would recognise the full spectrum of human need and ultimately “free the potential of each person” as aspired to in the preamble of the Constitution.

Scott distinguishes between two types of interdependence: organic interdependence and related interdependence.⁹³ This distinction can assist in determining how certain rights relate to each other and how they should be interpreted. In the case of organic interdependence, “one right forms a part of another right and may therefore be incorporated into that latter right”.⁹⁴ In a sense, the second right owes its existence to the first. Scott uses the example of the right to freedom of association and trade union rights.⁹⁵ Scott explains that “one right (the core right) justifies the other (the derivative right)”.⁹⁶ Another example of this would be the relationship between the right to health care and the right to life. In the given example, the right to life would be the core right which encompasses the right to health care as the derivative right.⁹⁷

Scott describes related interdependence as the situation where “the rights in question are mutually reinforcing or mutually dependent, but distinct”.⁹⁸ Here neither right is derived from the other, but they exist alongside one another and “are treated as equally important and complementary, yet separate”.⁹⁹ An illustration of this would be the relationship between the environmental right in section 24 and the right to administrative justice in section 33. Administrative justice cases do not always implicate environmental concerns. However, the right to the environment is advanced when administrative justice serves as an effective tool to question decisions that concern the environment. In this way sustainable development, conservation or a healthy environment can be supported by the promotion of effective avenues to address environmental concerns through the right to just administrative action. The right in section 33 is thus complementary to section 24, but remains separate.

⁹³ Scott (1989) *Osgoode Hall* 779.

⁹⁴ Scott (1989) *Osgoode Hall* 779.

⁹⁵ Scott (1989) *Osgoode Hall* 780.

⁹⁶ Scott (1989) *Osgoode Hall* 779-780.

⁹⁷ In *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) the court held that where two such rights are implicated in a case, the more specific right should be relied on. The court would not extend the right to life as this case related to health care services which are specifically dealt with in section 27. See para 19 of the judgment. This case is discussed further in 2.2.3.5 below.

⁹⁸ Scott (1989) *Osgoode Hall* 783.

⁹⁹ Scott (1989) *Osgoode Hall* 783.

The principle of interdependence has been recognised as part of the South African Constitution.¹⁰⁰ Liebenberg and Goldblatt assert that “[t]he inclusion of civil and political as well as economic, social and cultural rights [in the Constitution] reflects a commitment to the principle of the interdependency of all human rights”.¹⁰¹ Liebenberg similarly argues that “[o]ne of the distinguishing features of the final South African Constitution is its far-reaching commitment to the principle of the interdependency of all human rights”.¹⁰² The interpretation of constitutional rights cannot ignore the influence of interdependence.

The interdependence of rights has also been recognised by the Constitutional Court. In *Government of the Republic of South Africa and Others v Grootboom and Others*¹⁰³ the Constitutional Court affirmed the interrelationship of socio-economic rights:

The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. [...] Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.¹⁰⁴

It is clear that the court is in support of an interpretation of rights that pays due attention to the role of the interdependence and interconnectedness between rights.

The role of interdependence in the interpretation of rights is one of enhancing the protection which rights offer by highlighting intersecting forms of discrimination and disadvantage. The intersection of multiple forms of disadvantage is perhaps clearest in cases of poverty. Scott notes that “from the social reality of the poor and oppressed emerge dimensions of human need and personhood that other sectors of society ignore or deny”.¹⁰⁵ An interdependent approach to rights interpretation assists in drawing attention to those dimensions which are often overlooked or ignored.

¹⁰⁰ Pieterse M “The interdependence of rights to health and autonomy in South Africa” (2008) 125 *SALJ* 553-572; Liebenberg & Goldblatt (2007) *SAJHR*; Klug *The Constitution of South Africa* 122 & 127.

¹⁰¹ Liebenberg & Goldblatt (2007) *SAJHR* 338.

¹⁰² Liebenberg “The interpretation of socio-economic rights” in *CLOSA* 33-1.

¹⁰³ 2001 1 SA 46 (CC) (*‘Grootboom’*).

¹⁰⁴ Para 24.

¹⁰⁵ Scott (1989) *Osgoode Hall* 787.

Interdependence encourages a holistic approach to the protection of human welfare¹⁰⁶ and “promotes the transformative ethos of the Constitution”.¹⁰⁷ Liebenberg and Goldblatt propose an approach which they refer to as “interpretative interdependence” arguing that “[i]t encourages courts to consider how the values and purposes underpinning one right [...] may be relevant and useful to the development of the jurisprudence under another right”.¹⁰⁸ In the context of socio-economic rights Liebenberg contends that interpretation must be “sensitive to multiple, overlapping forms of deprivation and socio-economic marginalisation”.¹⁰⁹ The advantages of this approach to rights interpretation are clear when we consider specific examples.

Liebenberg and Goldblatt discuss the interdependence of socio-economic rights and the right to equality affirming an interpretation which is mindful of the “interrelationship” between the rights:

[An interdependent interpretation] is also more likely to be responsive to the reality that the most severe forms of disadvantage are usually experienced as a result of an intersection between group-based forms of discrimination and socio-economic marginalisation.¹¹⁰

They conclude that such an approach “would allow for the development of the equality right as requiring measures to address poverty”.¹¹¹ This interdependent interpretation creates room to address “the complex causes and manifestations of poverty and inequality in South Africa”.¹¹² Where people or communities experience a collective deprivation of, for example, equality, dignity, health services and water, an approach which considers each deprivation in isolation will fail to consider the links between various aspects of the rights and the cumulative effect of such disadvantages. Liebenberg and Goldblatt maintain that “[t]he striving to understand and respond to systemic disadvantage and injustice lies at the heart of transformative adjudication under our Constitution”.¹¹³ They contend that this objective can be achieved through “interpretative interdependence”.¹¹⁴

¹⁰⁶ Liebenberg “The interpretation of socio-economic rights” in *CLOSA* 33-1.

¹⁰⁷ Liebenberg *Socio-Economic Rights* 142.

¹⁰⁸ Liebenberg & Goldblatt (2007) *SAJHR* 339.

¹⁰⁹ Liebenberg *Socio-Economic Rights* 225.

¹¹⁰ Liebenberg & Goldblatt (2007) *SAJHR* 339.

¹¹¹ Liebenberg & Goldblatt (2007) *SAJHR* 347.

¹¹² Liebenberg & Goldblatt (2007) *SAJHR* 361.

¹¹³ Liebenberg & Goldblatt (2007) *SAJHR* 361.

¹¹⁴ Liebenberg & Goldblatt (2007) *SAJHR* 339.

Similarly, Pieterse argues for an interdependent interpretation of the rights to health and freedom (or autonomy). He highlights the “interconnectedness of health status, individual control and socio-economic vulnerability”¹¹⁵ indicating that health is necessary for the exercise of autonomy and that autonomy is equally necessary “to pursue optimal health through exercising informed choices”.¹¹⁶ The “indivisibility of rights to autonomy and to health [and] their co-implication in health-related constitutional matters” again emphasises the necessity of an interdependent interpretation of rights to adequately address cases of overlapping disadvantages.¹¹⁷

The relationship between the right to life and the right of access to health care services was briefly addressed in the case of *Soobramoney v Minister of Health (Kwazulu-Natal)*.¹¹⁸ It was held that the right to life could not be relied on in a case concerning health care services as the latter is specifically dealt with in section 27.¹¹⁹ Klug explains that the more expansive interpretation of the right to life was rejected in *Soobramoney*:

[T]he state’s positive obligations to provide access to health care are contained in section 27 and therefore the Court could not interpret the right to life to impose additional obligations [on the state] that were inconsistent with section 27.¹²⁰

The case has been criticised for not recognising the clear interrelationship between the right to health care services and the right to life.¹²¹ Liebenberg argues that these rights should not be “interpreted to protect mutually discrete interests and to suppress the significant interconnection between these two rights”.¹²² Scott and Alston are also critical of the court’s approach in this case:

[The court] seems to engage in a form of ‘negative textual inferentialism’ that is out of place in human rights jurisprudence. [...] [A]t face value, it would seem that both the right to life and the right to health must be *read down* in light of each other rather than drawing normative energy from each other.¹²³

¹¹⁵ Pieterse (2008) *SALJ* 554.

¹¹⁶ Pieterse (2008) *SALJ* 555.

¹¹⁷ Pieterse (2008) *SALJ* 570.

¹¹⁸ 1998 1 SA 765 (CC) (*‘Soobramoney’*).

¹¹⁹ Para 19.

¹²⁰ Klug *The Constitution of South Africa* 123.

¹²¹ See Scott & Alston (2000) *SAJHR* 233-256; Pieterse M “A different shade of red: Socio-economic dimensions of the right to life in South Africa” (1999) 15 *SAJHR* 372 382.

¹²² Liebenberg *Socio-Economic Rights* 143.

¹²³ Scott & Alston (2000) *SAJHR* 237.

While the existence of a right to health suggests it was not necessary to extend the right to life to cover emergency medical care, this should not render the right to life irrelevant to the interpretation of section 27(3). If the right to health is to be interpreted contextually and teleologically, a consideration of the interpretive influence of the right to life cannot be ignored.¹²⁴

An appreciation of the interdependence of rights is crucial for a systematic interpretation of the Constitution that recognises that rights violations do not manifest themselves in isolation, but as a complex web of relationships and experiences that impact on a range of rights. For a comprehensive understanding of any right, including the environmental right in section 24, the intersection and relationship with other rights in the Bill of Rights must be considered.

2 2 3 6 Transformative constitutionalism

Transformative constitutionalism sees the Constitution as a mechanism for moving away from the divided and unjust apartheid system towards the society envisioned by the Constitution itself – “a society based on democratic values, social justice and fundamental human rights”.¹²⁵ As a theory of constitutional interpretation, transformative constitutionalism requires that this far-reaching transformation be encouraged and promoted whenever the provisions of the Constitution are construed. In this context it serves as an important interpretive guide to the Bill of Rights.

Klare defines transformative constitutionalism as

a long-term project of constitutional enactment, interpretation, and enforcement committed [...] to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.¹²⁶

¹²⁴ Scott and Alston argue that the court's interpretation of section 27(3) leaves little purpose or meaning for section 27(3) that is not already covered by other provisions in the Bill of Rights. See Scott & Alston (2000) *SAJHR* 245-248.

¹²⁵ Preamble, Constitution of the Republic of South Africa, 1996. See Pieterse M “What do we mean when we talk about transformative constitutionalism?” (2005) 20 *SAPL* 155 158.

¹²⁶ Klare K “Legal culture and transformative constitutionalism” (1998) 14 *SAJHR* 146 150. See also Pieterse (2005) *SAPL* 159. Pieterse describes some of the major facets of transformative constitutionalism:

[C]onstitutional transformation in South Africa includes the dismantling of the formal structures of apartheid, the explicit targeting and ultimate eradication of the (public and private) social structures that cause and reinforce inequality, the redistribution of social capital along

This project of transformation is not an external initiative imposed on the Constitution, but one that is implicit (and at times explicit) in the Constitution itself. Du Plessis describes the Constitution as “thoroughly transformative in character” and argues that “it invites (and arguably compels) optimum realization of the rights entrenched in the Bill of Rights”.¹²⁷ A transformative interpretation in line with the goals of the Constitution must be one which achieves this “optimum realization” of rights.

Socio-economic rights and the goal of social justice are central to this transformation.¹²⁸ Liebenberg explains:

Transformative constitutionalism is committed to positive measures to redress both the legacy of the past as well as new and emerging forms of subordination that deny human dignity, equality and freedom to certain groups in our society.¹²⁹

The legacy of the past cannot be redressed without the realisation of socio-economic rights and the promotion of social justice. Where individuals in South Africa experience severe material deprivation, transformation of our society has not been achieved. As the court held in *Grootboom*:

There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.¹³⁰

For the purposes of interpretation, transformative constitutionalism means that an interpretation that promotes social justice and the transformation of “political and social institutions and power relationships in a democratic, participatory, and egalitarian direction” should be favoured above one that does not.

2 2 4 Conclusion

There are various approaches to constitutional interpretation and the danger of giving absolute preference to a single method has been noted. It is nevertheless

egalitarian lines, an explicit engagement with social vulnerability in all legislative, executive and judicial action and the empowerment of poor and otherwise historically marginalised sectors of society through pro-active and context-sensitive measures that affirm human dignity.

¹²⁷ Du Plessis “Interpretation” in *CLOSA* 32-80.

¹²⁸ See Pieterse (2005) *SAPL* 160 where it is argued that “the socio-economic upliftment of the majority of South Africans and the concomitant achievement of social justice may be classified as integral components of the constitutional transformation project”.

¹²⁹ Liebenberg *Socio-Economic Rights* 98.

¹³⁰ 2001 1 SA 46 (CC) para 23.

clear that the Constitutional Court has shown favour for the purposive approach to interpretation. This method should not, however, be used exclusively as the answer to all problems of interpretation.

It is therefore suggested that a teleological approach to interpretation should be used in conjunction with the other methods and guides discussed above. The purposes and aims of a provision should be ascertained through grammatical, historical and systematic interpretation while also using foreign and international sources where necessary. The interpretive guides discussed above also play an important role in delineating the meaning of a provision and can also shed light on possible underlying purposes.

An interpretation of a provision of the Constitution should be consistent with the language used in the text, the context of the provision, the other provisions of the Constitution and should promote the values and purposes underlying the specific provision and the Constitution as a whole.¹³¹

The remainder of this chapter will focus on the teleological interpretation of section 24. The values and purposes underlying the environmental right will be uncovered by applying the principles of interpretation discussed above. These purposes will inform the interpretation of the specific aspects of section 24 discussed in subsequent chapters.

2 3 Interpretation of section 24

2 3 1 Introduction

The interpretive methods and guides discussed in 2 2 above will be used throughout this thesis to determine how certain aspects of section 24 should be interpreted. The

¹³¹ Cornell & Friedman (2011) *Malawi Law Journal* 9. Cornell and Friedman highlight the importance of consistency when they argue that a “good interpretation” of a constitution should contain the following three elements:

(1) a good interpretation of a constitution must render the component parts of a constitution consistent (so far as possible); (2) relatedly, a good interpretation of a particular part or provision of a constitution necessarily considers and interprets other parts or provisions of the constitution (especially if we assume that a particular interpretation is part of and contributes to a broader, shared practice of interpreting the constitution as a whole); and (3) that interpretation takes place against the purposes and values of the constitution, i.e. against concepts of what makes the constitution valuable.

focus will be on the concepts of “environment”, “health or well-being”, and “sustainable development”. Before examining these specific aspects of section 24, the remainder of this chapter will deal with the role of constitutional goals and values as well as the interdependence of rights in interpreting the right as a whole. This is done with the intention of ascertaining the purposes of section 24 so as to apply the teleological approach argued for above. These purposes will inform the interpretation of the specific concepts dealt with in the later chapters.

2 3 2 Approaches to environmental rights

There are various approaches to environmental rights and, before addressing the specifics of section 24, it is important to establish which approach is consistent with the South African Constitution. The two central approaches which will be discussed here are anthropocentrism and ecocentrism.

The ecocentric or biocentric approach to environmental rights is rooted in a belief that the environment has value outside of its usefulness to mankind. Human beings form part of the environment along with all other creatures and organisms, and are not considered to be more superior or more significant.¹³² Ecocentrism sees the environment as possessing “intrinsic value which entitles it to an existence regardless of the interest of human beings”.¹³³ This approach approves of the use of natural resources only to the extent that such resources are necessary to satisfy basic human needs.¹³⁴

Anthropocentrism, as the term suggests, views the environment from the perspective of mankind. Pure anthropocentrism sees the environment “in terms of immediate human utility” and not as having purpose or value outside of this human utility.¹³⁵ The environment is not conserved for its own sake, but only where it is necessary to meet human needs. This approach has also been described as “ego-centric”.¹³⁶ Aside from this strict human-centred approach, there are other manifestations of anthropocentrism which demonstrate an appreciation for the

¹³² Theron C “Environmental rights: An overview of interpretations” (1997) 4 *SAJELP* 23 25.

¹³³ Feris L “Constitutional environmental rights: An under-utilised resource” (2008) 24 *SAJHR* 29 30.

¹³⁴ Feris (2008) *SAJHR* 30.

¹³⁵ Redgewell C “Life, the universe and everything: A critique of anthropocentric rights” in AE Boyle & MR Anderson *Human Rights Approaches to Environmental Protection* (1996) 71 73.

¹³⁶ Theron (1997) *SAJELP* 24.

environment outside of its ability to meet human need. Redgewell refers to a “dilute anthropocentrism which recognizes the interrelatedness and interdependence of the natural world of which human beings form a part”.¹³⁷ Feris similarly refers to “weak anthropocentrism” as a position which

does recognise the central locale that humans adopt in nature and the ways in which humans find value in the utility of the earth, but also recognises the value of the environment independent of its usefulness for human purposes.¹³⁸

This “weak anthropocentrism” or “indirect instrumentalism” does not see the environment “solely as a means to a human ends”.¹³⁹ Here the objective worth of the natural environment is recognised in tandem with the way in which the environment can meet human needs.

The anthropocentric approach to environmental rights has been criticised for its focus on human need and its failure to value the environment outside of its benefit to people. However, the protection of the environment and its usefulness to humankind need not be seen as mutually exclusive. Redgewell points out that the goal of protecting the environment could be “more effectively achieved” by “linking such protection to human preference”.¹⁴⁰ She recognises that humans and the environment cannot be detached from one another:

To the extent that a clean, healthy or decent environment is also a clean, healthy or decent non-human environment, there is a fortuitous spill-over effect to non-humans in the recognition of such a human right.¹⁴¹

The environmental right in the Interim Constitution¹⁴² received some criticism for its anthropocentric formulation.¹⁴³ The right in section 29 read as follows: “Every person shall have the right to an environment which is not detrimental to his or her health or well-being”. While section 24(b) in the Final Constitution includes direct references to areas of environmental concern such as pollution, ecological

¹³⁷ Redgewell “Life, the universe and everything” in *Human Rights Approaches* 73.

¹³⁸ Feris (2008) *SAJHR* 32.

¹³⁹ Redgewell “Life, the universe and everything” in *Human Rights Approaches* 73.

¹⁴⁰ Redgewell “Life, the universe and everything” in *Human Rights Approaches* 83.

¹⁴¹ Redgewell “Life, the universe and everything” in *Human Rights Approaches* 87.

¹⁴² Act 200 of 1993.

¹⁴³ Van der Linde M & Basson E “Environment” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 2 2010) 50-9.

degradation and conservation, the environmental right remains primarily anthropocentric in its formulation.¹⁴⁴

The anthropocentric character of section 24(a) is relatively clear.¹⁴⁵ While there has been some debate around the meaning of “everyone” and the position of animals in this regard, it is now accepted that section 24(a) is directed at humans and the fulfilment of their needs.¹⁴⁶ Section 24(b) includes more explicit references to the value of the environment when it calls for measures that “prevent pollution and ecological degradation”, “promote conservation” and “secure ecologically sustainable development”. Despite these explicit references to environmental protection and conservation, section 24(b) is also centred on human need. According to the formulation of the subsection, the rights in section 24(b) protect the environment for “the benefit of present and future generations” and not for the sake of the environment itself.¹⁴⁷

Whether or not one agrees with the underlying philosophies of the anthropocentric approach, it must be accepted that when dealing with the environmental right in section 24, environmental goals need to be defined in terms of human benefit and need.¹⁴⁸ Theron points out that the designation of an environmental right as a human right “is essentially anthropocentric”.¹⁴⁹ It would be senseless to have a human right that did not ultimately serve human needs.

The environmental right must then be understood to promote *human* rights and needs. The purposes of the right are to conserve and protect the environment for the benefit of human beings, and the interpretation of section 24 should reflect this.

¹⁴⁴ Kidd M “Environment” in Currie I & De Waal J (eds) *The Bill of Rights Handbook* 6 ed (2013) 516 517.

¹⁴⁵ 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 59.

¹⁴⁶ Du Plessis (2008) *SAJELP* 59.

¹⁴⁷ Glazewski J “The nature and scope of environmental law” in J Glazewski & L Du Toit (eds) *Environmental Law in South Africa* (OS 2013) 1-23; Theron (1997) *SAJELP* 28.

¹⁴⁸ This conclusion is also supported by Glazewski’s observation that the National Environmental Management Act 107 of 1998 “reflects the orthodox anthropocentric approach”. Glazewski “The Bill of Rights and environmental law” in *Environmental Law* 5-11.

¹⁴⁹ Theron (1997) *SAJELP* 35.

2 3 3 Constitutional goals and values as related to section 24

2 3 3 1 Constitutional goals

The focus in this section will be on two important constitutional goals for the purposes of section 24, namely the goal of a society based on social justice and that of “the improvement of the quality of life of all citizens”. These goals are articulated in the preamble of the Constitution and, as noted in 2 2 3 3 above, they are relevant to the interpretation of the Bill of Rights and therefore the environmental right.

Liebenberg discusses the role of constitutional goal of social justice in interpretation and argues:

The commitment to social justice in the preamble of the Constitution can provide an important interpretive guide for the entire Bill of Rights. It can support interpretations of rights that challenge systemic patterns of subordination in social relationships.¹⁵⁰

In the context of section 24, we cannot discuss social justice without also considering the concept of environmental justice which encompasses many of the environment-related facets of social injustice.¹⁵¹ The great socio-economic disparities prevalent in South Africa are central to these concerns. Interpreters of section 24 must be mindful of the “deep levels of poverty and socio-economic inequality [which] represent stark manifestations of social injustice in South Africa”.¹⁵² The commitment to social justice demands that the environmental right be interpreted in a way that best deals with material disadvantage and the disproportionate burden of environmental risk borne by the poor. A good illustration of this disproportionate burden is that of the south Durban industrial basin which had a number of polluting refineries and factories built next to poor black and coloured communities as a result of decisions made by the white-run council under apartheid. The community now deals with the brunt of the pollution from these industries including air pollution and contamination of soil and

¹⁵⁰ Liebenberg *Socio-Economic Rights* 130.

¹⁵¹ For a detailed exposition of environmental justice see Feris LA *The Conceptualisation of Environmental Justice within the Context of the South African Constitution* LLD dissertation Stellenbosch University (2000).

¹⁵² Liebenberg *Socio-Economic Rights* 101.

ground water. The consequences for the people living in this area are higher risks of respiratory disease, cancers and leukaemia.¹⁵³

Kidd argues that “all the rights must be seen in the context of the preambular exhortation that the Constitution is aimed at improving the quality of life of all citizens and freeing the potential of each person”.¹⁵⁴ This was argued in relation to understanding the concept of well-being in section 24, but it holds true for the rest of the right as well. One of the underlying purposes of section 24 must be to “improve the quality of life of all citizens”. A conservation measure, for example, that results in a diminished quality of life for affected citizens could be seen as falling short of the purposes of section 24. Throughout the interpretation and application of the environmental right, the improvement of citizens’ quality of life should be a central aim.

The eradication of material deprivation and socio-economic inequality are central to the purposes of the Constitution and should therefore be central to its interpretation. The transformed society envisaged by these goals must be promoted in the interpretation of the environmental right.

2 3 3 2 *Constitutional values*

The role of the constitutional values in interpretation has been noted in 2 2 3 4 above. The values of human dignity, equality and freedom are fundamental in the interpretation of any rights in the Bill of Rights as section 39 makes clear. The link between these abstract values and the pragmatic socio-economic rights is apparent in *Grootboom* where the Constitutional Court held that “human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter”.¹⁵⁵ For citizens to enjoy human dignity, freedom and equality they must have their basic needs met.

Human dignity, equality and freedom appear both as values and as rights in the Bill of Rights. The relationship between section 24 and each of these rights will be

¹⁵³ Adebayo AA, Musvoto GG & Adebayo P “Towards the creation of healthier city neighbourhoods for marginalised communities in South Africa: A case study of the south Durban industrial basin in the city of Durban” (2013) 24 *Urban Forum* 343 348-349; Späth A “Environmental racism in Durban?” (16-05-2013) <<http://www.news24.com/Columnists/AndreasSpath/Environmental-racism-in-Durban-20130513>> (accessed 13-01-2014).

¹⁵⁴ Kidd “Environment” in *Bill of Rights Handbook* 521.

¹⁵⁵ 2001 1 SA 46 (CC) para 23.

discussed in further detail at 2 3 4 below. The existence of the values of human dignity, equality and freedom together with their corresponding rights underscores the importance of these values in the transformed society envisaged by the Constitution. Even where the specific rights to human dignity, equality and freedom are not directly implicated in a case, the values must be promoted in the interpretation of the relevant rights. With reference to interpretation and section 39(1) Liebenberg argues that the goal of social justice declared in the preamble has a role to play in fleshing out the values of human dignity, equality and freedom.¹⁵⁶

In the context of the environmental right, the value of human dignity stresses the centrality of human need and suggests that the right should be interpreted to enhance human dignity as it relates to the environment, and not merely to protect the natural environment for its own sake. The value of equality emphasises the importance of environmental justice and the redress of harm caused by discriminatory environmental policies or practices in the past. Finally, freedom as a value suggests that environmental conditions should not be such that individual freedoms are restricted, and it also indicates the importance of individual autonomy. In this regard the participation of individuals in environmental decision-making which affects them and their communities should be valued and promoted.

As clearly indicated in section 39, the values of human dignity, equality and freedom must be promoted in the interpretation of the Bill of Rights. The interpretation of the environmental right in section 24 must therefore promote and advance these values.

2 3 4 Interdependent interpretation of section 24 and other rights

2 3 4 1 Introduction

This section will examine the interdependence of section 24 and a selection of relevant rights in the Bill of Rights with the goal of illuminating some of the underlying purposes of the environmental right. As discussed in 2 2 2 3, a right must be interpreted in light of its context, that is, in light of its interdependent relationship to

¹⁵⁶ Liebenberg *Socio-Economic Rights* 101.

the other rights in the Bill of Rights.¹⁵⁷ As the Bill of Rights functions as a whole, the purposes of a right may be gleaned from other related rights. Taking into account the scope of this work a handful of rights have been selected for this discussion of interdependence. The rights dealt with below are certainly not the only rights relevant to the environmental right, but they are those which perhaps offer the most insight into the meaning of section 24.¹⁵⁸

2 3 4 2 Equality

The right to equality is found in section 9 of the Constitution and, read purposively, supports substantive equality as opposed to mere formal equality.¹⁵⁹ Substantive equality places the emphasis on “the results or effects of a particular rule” and the material socio-economic circumstances of an individual as opposed to the superficial approach of formal equality which applies the same rule or standard to all but fails to consider the different consequences it could have.¹⁶⁰ Albertyn and Goldblatt maintain that the achievement of substantive equality requires

the dismantling of systemic inequalities, the eradication of poverty and disadvantage (economic equality) and the affirmation of diverse human identities and capabilities (social equality).¹⁶¹

It is clear that equality under the Constitution involves far more than neutral laws and the absence of discrimination. In the environmental justice context, Feris notes that an important aspect of substantive equality is that “it is geared at protecting not only individuals, but also groups”.¹⁶² This is significant because environmental harm typically affects groups of people (as opposed to isolated individuals) who are, for

¹⁵⁷ Kidd offers a good example of an interdependent approach to the interpretation of a concept in section 24 when he argues that “well-being incorporates several dimensions that would be addressed by other rights in the Bill of Rights, including slavery, servitude and forced labour; housing; health care; food and water; children’s rights; and education, not to mention equality and dignity.” Kidd “Environment” in *The Bill of Rights Handbook* 521-522. The interpretation of “well-being” in section 24 is discussed in chapter 4 below.

¹⁵⁸ The right of access to information and the right to just administrative action are examples of rights which play an important role in environmental law, but are more important for the implementation of section 24 than for the content of the right which is the focus of this thesis.

¹⁵⁹ Currie & De Waal *Bill of Rights Handbook* 214. For a discussion of distinction between the two forms of equality see Currie & De Waal *Bill of Rights* 213-215.

¹⁶⁰ Currie & De Waal *Bill of Rights Handbook* 213. For an analysis of substantive equality see Albertyn C & Goldblatt B “Equality” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2007) 35-5–35-7.

¹⁶¹ Albertyn & Goldblatt “Equality” in *CLOSA* 35-5.

¹⁶² Feris *Environmental Justice* 210.

example, living in the same polluted area or being exposed to the same toxic substances in their work environment.

The right to equality has an important contribution to make to the interpretation of the environmental right. The intersection of the environment and equality is captured by the concept of environmental justice which advocates that “nature’s environmental bounty should be equitably distributed and that certain sectors of society should not bear an unequal brunt of negative environmental impacts”.¹⁶³ The environmental right should be understood in a way which promotes substantive equality in the distribution of resources, services and negative environmental impacts. Substantive equality demands that the current socio-economic and environmental conditions of individuals be taken into consideration before simply applying the same policies across the country to achieve equality. Historical disadvantage could play an important role here. Kidd notes, for example, that the effect of the Group Areas Act 41 of 1950 under the apartheid government was the location of black areas “in proximity to polluting industries” which led to these neighbourhoods being exposed to greater degrees of pollution than their white counterparts.¹⁶⁴ While the Group Areas Act has been done away with, its legacy lives on in many previously ‘black’ neighbourhoods that remain situated in these polluted areas. Section 24 cannot promote substantive equality without a consideration of these socio-economic, environmental and historical circumstances.

The right to an environment which is not detrimental to health or well-being must be interpreted to include the necessary advancement of the needs of the poor where they bear the burden of society’s impact on the environment. It is often the case that the poor experience a disproportionate exposure to pollution, dumping and waste. More affluent communities contribute to the production of this pollution and waste yet remain separated from any consequences of their own environmental impacts.¹⁶⁵ Discrepancies in the quality of services relating to sanitation and clean water in different neighbourhoods are also indicative of inequality. Such situations fall within the scope of section 24 read with section 9 as well as the constitutional value of equality.

¹⁶³ Glazewski “The nature and scope of environmental law” in *Environmental Law* 1-20. For a comprehensive analysis of environmental justice see Feris *Environmental Justice*.

¹⁶⁴ Kidd M *Environmental Law* 2 ed (2011) 299-300.

¹⁶⁵ See Glazewski J *Environmental Law in South Africa* 2 ed (2005) 100.

Equality must also be promoted in the interpretation of subsection (b) of the section 24. The right to have the environment protected through measures that prevent pollution and ecological degradation must be understood to imply that pollution and ecological degradation should be prevented in a way that does not unfairly benefit certain people while ignoring the needs of others. Similarly, sustainable development and the distribution and use of natural resources must promote substantive equality by considering the material circumstances of individuals who bear the brunt of relevant developmental decisions.

In addition to the promotion of equality, sections 9 (3) and (4) also prohibit unfair discrimination.¹⁶⁶ Glazewski recognises the intersection of human dignity and equality when he suggests:

[I]n an environmental racism scenario, a court could adopt a view that discrimination [is] unfair on the ground that, for example, bearing the brunt of other people's waste is an impairment of the right to fundamental dignity.¹⁶⁷

Discrimination could also be present where natural resources are distributed in a way that affords undue benefit to one group while unjustifiably excluding another. In *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*,¹⁶⁸ for example, it was held by the African Commission on Human and Peoples' Rights that the right of the Ogoni people in Nigeria to "freely dispose of their wealth and natural resources" under section 21 of the African Charter of Human and Peoples' Rights¹⁶⁹ was violated. This was due to the fact that "the oil exploitation in Ogoniland was pursued in a destructive and selfish fashion without any material benefit to the local population".¹⁷⁰ This could be characterised as the inequitable distribution of the benefits of natural resource exploitation.

The purposes of section 24 with regard to the right to equality are the promotion of substantive equality through equitable distribution of environmental impacts, pollution and waste, and of natural resources as well as the prevention of discrimination

¹⁶⁶ Section 9(3)-(5), Constitution of the Republic of South Africa, 1996.

¹⁶⁷ Glazewski J *Environmental Law in South Africa* 2 ed (2005) 100.

¹⁶⁸ Communication No 155/96 (2001) ACHPR ('SERAC').

¹⁶⁹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

¹⁷⁰ Chirwa DM "Toward revitalizing economic, social and cultural rights in Africa" (2002) 10 *Human Rights Brief* 14 17.

against certain individuals through unjustifiable exposure to detrimental environmental factors.

2 3 4 3 Human dignity

Along with its place as a foundational value, human dignity appears in the Constitution as a fundamental right. The existence of both the right and the value of human dignity underline the essential role that human dignity plays in constitutional interpretation. In *Dawood and Another v Minister of Home Affairs*¹⁷¹ O'Regan J affirmed this role:

Human dignity [...] informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights.¹⁷²

Similarly, in *Makwanyane* the right to dignity is described as “an acknowledgement of the intrinsic worth of human beings” that serves as “the foundation of many of the other rights that are specifically entrenched in [the Bill of Rights]”.¹⁷³ The central and vital place of human dignity in South Africa’s constitutional democracy cannot be doubted.

It is therefore clear that human dignity has an important role to play in the interpretation of section 24. Glazewski notes that the right to human dignity “goes to the heart of environmental justice, as the imposition of environmental injustices ultimately strikes at human dignity”.¹⁷⁴ Where individuals live in intolerable conditions due to, for example, exposure to unreasonable degrees of pollution and toxic waste or a lack of access to adequate sanitation, their ability to live dignified lives is clearly undermined. Linking human dignity to equality, Feris has argued that “when a specific group of people are disproportionately exposed to environmental degradation, such exposure not only amounts to unfair discrimination, but it also fundamentally impairs the dignity of each member of the group”.¹⁷⁵ It could be argued that an environment which is harmful to one’s health or well-being would also be damaging to human dignity. Living with illness or disease as a result of an

¹⁷¹ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC).

¹⁷² 2000 3 SA 936 (CC) para 35.

¹⁷³ *S v Makwanyane and Another* 1995 3 SA 391 (CC) para 328.

¹⁷⁴ Glazewski J *Environmental Law in South Africa* 2 ed (2005) 100.

¹⁷⁵ Feris *Environmental Justice* 217.

unhealthy environment could, for example, result in an inability to earn a living or compel an individual to rely on the care of others to survive. This would constitute an infringement of human dignity.¹⁷⁶ The interaction between human dignity and section 24(a) could also shed light on how the concept of well-being should be understood.¹⁷⁷

One of the purposes of the environmental right is to promote human dignity. This means that the interpretation of harm to health or well-being should be influenced by the right to human dignity. The needs of future generations could also be read as a recognition that they are “worthy of respect and concern”.¹⁷⁸ The concept of sustainable development should also be read as promoting the possibility of people to lead dignified lives by paying attention to the social and economic needs of human beings when addressing environmental issues.

2 3 4 4 *The right to life*

Section 11 of the Constitution states that “[e]veryone has the right to life”. Currie and De Waal note that this right is “textually unqualified” and can only be limited by the limitations clause in section 36.¹⁷⁹ This right is fundamental given that without life an individual cannot enjoy any other rights. The right to life could be understood as including a right not to be killed, a duty on the state to protect the lives of those within the country’s borders and, most importantly for the purposes of section 24, a right to a life worth living.¹⁸⁰

¹⁷⁶ See *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 6 SA 505 (CC) para 76; *Minister of Home Affairs and Others v Watchenuka and Others* 2004 1 All SA 21 (SCA) para 27.

¹⁷⁷ See Du Plessis A “South Africa’s constitutional environmental right (generously) interpreted: What is in it for poverty?” (2011) 27 *SAJHR* 279 296. Du Plessis argues that “[f]urther in-depth interpretation and analysis of the notion of ‘well-being’ is also likely to reveal scientifically valid links between well-being, dignity (a constitutional value), and the individual’s constitutional right to have his or her inherent human dignity protected”.

¹⁷⁸ *S v Makwanyane and Another* 1995 3 SA 391 (CC) para 328. Future generations do not have a direct enforceable right to human dignity under the Constitution, but the value placed on human dignity in the Constitution indicates that a concern for the life and dignity of future generations is appropriate.

¹⁷⁹ Currie & De Waal *Bill of Rights Handbook* 259.

¹⁸⁰ Currie & De Waal *Bill of Rights Handbook* 259-268.

The right to life emphasises the necessity of the protection of the environment, as the environment supports and sustains all life. As noted by the court in *Fuel Retailers v Director-General: Environmental Management*.¹⁸¹

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.¹⁸²

The right to life cannot be realised without the continued protection of the environment which is a prerequisite for life itself. Theron similarly points out that “[t]he right to a clean, balanced and protected environment is a fundamental one [...] because it is vital for the exercise of other individual rights and duties, including the right to life”.¹⁸³

Read with the right to life, the right to an environment not harmful to health or well-being must, at a minimum, be understood as a right to an environment which is not life-threatening.¹⁸⁴ In a situation where harmful toxins or pollutants cause life-threatening illness or death, it is suggested that both section 11 and section 24 would be infringed. Section 24, however, goes beyond the protection of life with the inclusion of “health” and “well-being”. The coexistence of these rights indicates that the Bill of Rights goes beyond the mere preservation of life and also protects aspects of the quality of life. O’Regan J points out in *Makwanyane*:

[T]he rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.¹⁸⁵

This reading of life and dignity supports the idea of what Currie and De Waal term “the right to a life that is worth living”.¹⁸⁶ Section 24 should be understood as furthering the right to life by providing certain conditions necessary for such a life worth living. According to Pieterse:

¹⁸¹ 2007 6 SA 4 (CC) (*Fuel Retailers*).

¹⁸² Para 102.

¹⁸³ Theron (1997) *SAJELP* 35.

¹⁸⁴ See Pieterse (1999) *SAJHR* 383.

¹⁸⁵ *S v Makwanyane and Another* 1995 3 SA 391 (CC) para 326.

¹⁸⁶ Currie & De Waal *Bill of Rights Handbook* 267.

This implies that it would constitute a violation of the right to life if living conditions only permit mere physical existence without what is needed to make such existence humane and dignified.¹⁸⁷

The guarantee of an environment not harmful to health or well-being is important in securing these conditions necessary for a humane and dignified life.

In light of the above reading of the right to life, it has been argued that socio-economic rights “appear to codify the state’s positive constitutional obligation to make life liveable”.¹⁸⁸ In this sense socio-economic rights make provision for specific aspects of the right to life. The rights to housing, water, health care and an adequate environment constitute elements of the right to life, not only improving the quality of life (enhancing a life worth living), but in many cases preserving life itself.

The rejection of the appeal to the right to life in *Soobramoney* could be understood as an indication that the role of the right to health care services is supplementary to the right to life.¹⁸⁹ The reasoning is that the existence of the more specific right means that the right to life cannot be relied on in such cases where a specific socio-economic right exists.¹⁹⁰ The criticisms against this approach have been noted.¹⁹¹ While reliance on the specific right relevant to the case at hand is necessary, this does not mean that other rights (the right to life in this case) have no interpretive role to play. A systematic, teleological interpretation of the right to life cannot ignore its interdependence with the other rights in the Bill of Rights.

Due to the interdependence of rights, the right to life contributes to the interpretation of the environmental right even where it is not directly relied on. The right to life indicates that section 24 should aim to promote the creation of an environment which is safe and does not pose a threat to life, as well as promoting an environment which allows for the enjoyment of a life of dignity.

¹⁸⁷ Pieterse (1999) *SAJHR* 380.

¹⁸⁸ Currie & De Waal *Bill of Rights Handbook* 268.

¹⁸⁹ 1998 1 SA 765 (CC) para 14-19.

¹⁹⁰ The existence of specific socio-economic rights distinguishes South Africa from India where the right to life has been given a broad interpretation to include the right to an adequate environment. This can be seen as a necessary extension of the right in a context which lacks a specific environmental right. Prior to *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) Glazweski argued that “[t]he right to life in the South African Constitution will probably not be invoked as intensively in environmental litigation [as in India] due to the inclusion of a justiciable environmental clause in South Africa’s Constitution”. Glazweski *J Environmental Law in South Africa* 2 ed (2005) 101.

¹⁹¹ See 2 2 3 5 above.

2 3 4 5 *Freedom and security of the person*

The right to freedom and security of the person is found in section 12 of the Constitution. The first subsection deals with deprivation of freedom, detainment, violence, torture and punishment, and does not have any clear links to section 24. Section 12(2), however, has implications for the interpretation of the environmental right. Section 12(2)(b) is particularly important here. It states that “[e]veryone has the right to bodily and psychological integrity, which includes the right– [...] (b) to security in and control over their body”. Section 12 has been described as “a right to be left alone” that “at least in relation to one’s body [...] creates a sphere of individual inviolability”.¹⁹²

In the context of the environment, an infringement of section 12(2)(b) could occur where a person is exposed to harmful pollutants from the dumping of toxic waste without any means to avoid or control it. This could constitute a violation of bodily integrity where the pollutants have serious health consequences. Currie and De Waal note that “where the intrusion is more subtle there is a need to determine whether it is a serious enough invasion of bodily security to require protection by the s 12(2)(b) right”.¹⁹³ This would require a clear link between the toxic waste and the health concerns of the applicant.

For the purposes of section 24, the right to bodily integrity sheds some light on how section 24(1) could be interpreted. An interdependent interpretation of the two rights alerts us to the possibility of infringements of bodily integrity that are more subtle and further removed than direct physical assault. The right to freedom and security of the person is then reinforced by the right to an environment which is not detrimental to health or well-being. As a result, one of the purposes underlying section 24 should be to protect against environmental invasions of bodily integrity which affect an individual’s health.

¹⁹² Currie & De Waal *Bill of Rights Handbook* 287.

¹⁹³ Currie & De Waal *Bill of Rights Handbook* 287.

2 3 4 6 Housing

Section 26(1) of the Constitution states that “[e]veryone has the right to have access to adequate housing”. This is a qualified right and the state is required to take measures to “achieve the progressive realisation of this right”.¹⁹⁴

The right to housing is also found in article 11(1) of the International Covenant on Economic, Social and Cultural Rights where it forms part of the right to an adequate standard of living.¹⁹⁵ While the constitutional right differs from the right to housing in the ICESCR in that it provides a right of *access* to housing, the concept of ‘adequate housing’ is central to both rights. The meaning of adequate housing has been expanded on by the Committee on Economic, Social and Cultural Rights.¹⁹⁶ What is relevant for the purposes of section 24 is the comment that “housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants”.¹⁹⁷ The location of housing plays a part in determining whether or not it can be deemed ‘adequate’. Housing that is located in an unsafe environment where, for example, polluted water poses a threat to the inhabitants’ health would encroach on the environmental right.

In light of the right to housing, section 24(a) should be understood as ensuring that the environment in which housing is located is free of harm to health and well-being. It is significant that section 24(a) is not subject to the progressive realisation found in section 26. This means that where individuals have housing located in an environment less than ‘adequate’ under section 26, they could potentially rely on section 24 for more direct relief if they experience harm to their health or well-being as a result. While adequate housing need not be provided immediately in terms of section 26, under the environmental right individuals could possibly argue for immediate relief on the basis that housing should, at a minimum, not be harmful to their health or well-being.

¹⁹⁴ Section 26(2), Constitution of the Republic of South Africa, 1996.

¹⁹⁵ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (‘ICESCR’).

¹⁹⁶ UN Committee on Economic, Social and Cultural Rights General Comment No. 4: *The right to adequate housing (Art. 11 (1) of the Covenant)* (1991) UN Doc E/1992/23.

¹⁹⁷ UN CESCR General Comment No. 4: *The right to adequate housing (Art. 11 (1) of the Covenant)* (1991) UN Doc E/1992/23.

The right in section 26 is also important for the interpretation of section 24(b), particularly the concept of sustainable development. Feris and Tladi argue:

For a truly integrated approach to sustainable development under the South African Constitution, the socio-economic rights protected, such as the housing rights, will have to be used to give content to the concept of sustainable development as found in section 24.¹⁹⁸

The balancing of factors in sustainable development must take into account the right of access to housing.¹⁹⁹ Where a proposed low cost housing development is located in an ecologically sensitive area, it must be kept in mind that section 24 is an anthropocentric right and must be read in conjunction with the right to housing. If no other suitable location exists, this interdependent reading suggests that the needs of individuals who have yet to receive access to housing should be placed above the needs of the natural environment. A weighing of the two rights in such a situation would, of course, need to include a consideration of the urgency of the need for housing and the extent of the potential impact of the development on the environment.²⁰⁰ One could argue that where the damage to the environment is severe and irreversible, and there is little urgency or threat to human life should the housing not be provided immediately, the obligation to protect the natural environment should outweigh the right to housing.²⁰¹

An interdependent interpretation of section 26 and section 24 indicates that the environmental right should include a right to a safe environment where an individual's home is located. The right to housing should also be promoted when "ecologically sustainable development" is balanced with "economic and social development" under section 24(b)(iii). While protection of the environment forms part

¹⁹⁸ Feris LA & Tladi D "Environmental rights" in D Brand & C Heyns *Socio-Economic Rights in South Africa* (2005) 249 262.

¹⁹⁹ Glazewski "The Bill of Rights and environmental law" in *Environmental Law* 5-20.

²⁰⁰ This is illustrated by the facts of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* 2001 3 SA 1151 (CC). Here section 26 was relied on to support the relocation of flood victims to temporary housing on a certain piece of land. At the time, the flood victims were living in appalling conditions, and the urgency of their need played an important role in the court's decision. The relocation was opposed by residents of the area who relied on section 24, but they ultimately could not prove the risk of environmental harm and section 24 was not a determining factor in the court's decision. See para 37 of the judgment.

²⁰¹ This tension between rights is discussed further with regard to sustainable development in chapter 5, 5 7 4 and 5 8. It is suggested that proportionality and reasonableness could assist in resolving such conflicts.

of section 24(b), it must be emphasised that it is an anthropocentric right which should be read with the right to housing to promote the needs of the poor.

2 3 4 7 Health care services

The Constitution does not include a right to a certain standard of health but rather a right to have access to health care services.²⁰² As with the right to housing, section 27 is a qualified right subject to progressive realisation.²⁰³

The existence of the right to health care services has implications for how section 24 is interpreted. The concept of health in the environmental right must mean more than access to health care services which is already covered under section 27.²⁰⁴ Glazewski points out that a harmful environment could “avoid falling foul of the right concerning health provided for in section 27”, indicating that the two rights offer distinct guarantees.²⁰⁵ He goes on to observe:

Given the serious health consequences of air and water pollution and the siting of waste disposal sites, “health” is unarguably a component of environmental concern and thus falls within the ambit of section 24. The environmental right accordingly goes beyond the right of access to health care established by section 27, which concerns the provision of health care services.²⁰⁶

As a result of the limited scope of section 27(1)(a), the environmental right has an important role to play in advancing health in South Africa, particularly for the poor.²⁰⁷ In an assessment of health ten years after the commencement of the Final Constitution, Ngwena argues:

The eradication of poverty; the levelling of income disparities; provision of adequate housing, clean water and sanitation; and general economic growth hold the key to the enhancement of health much more than the mere provision of health care.²⁰⁸

²⁰² Section 27(1)(a), Constitution of the Republic of South Africa, 1996. Section 27(3) is also relevant to health as it states that “[n]o one may be refused emergency medical treatment”.

²⁰³ See section 27(2), Constitution of the Republic of South Africa, 1996.

²⁰⁴ The concept of health in section 24 is discussed further in chapter 4 below.

²⁰⁵ Glazewski “The Bill of Rights and environmental law” in *Environmental Law* 5-15.

²⁰⁶ Glazewski “The Bill of Rights and environmental law” in *Environmental Law* 5-15.

²⁰⁷ See WHO-UNEP Health and Environment Linkages Initiative (HELI) *Health & environment: Managing the linkages for sustainable development: A toolkit for decision-makers: Synthesis report* (2008) 23-24 where it is pointed out that “[e]nvironmentally-related diseases not only affect the poor and vulnerable the most but also contribute to keeping them poor”.

²⁰⁸ Ngwena C “Health” in South African Human Rights Commission *Reflections on Democracy and Human Rights: A Decade of the South African Constitution* (2006) 79 82.

Section 24 arguably plays an important part in the “provision of adequate housing, clean water and sanitation”. Considering the impact that each of these could have on health, the environmental right is crucial to the promotion of health.²⁰⁹ In a report on the relationship between health and the environment, the World Health Organisation and United Nations Environmental Programme’s Health and Environment Linkages Initiative notes that around one quarter of the global burden of disease is attributable to environmental factors – and in sub-Saharan Africa the figure is more than a third.²¹⁰ The impact of environmental factors on health is evident in *SERAC* where the exploitation of oil reserves and dumping of toxic waste in a region of Nigeria ultimately led to a range of severe health consequences for those living in the area including “skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems”.²¹¹ The environmental right is undoubtedly linked to the promotion of health. It must also be noted that if the incidence of environmentally related diseases is reduced through the promotion of section 24, there will be greater resources available to contribute to the progressive realisation of access to health care services according to section 27.

If section 24 is interpreted in light of the right to health care services, it is clear that the purpose of the environmental right is to guarantee a certain quality of environment that is, at a minimum, not harmful to an individual’s health. This promotion of health is not subject to progressive realisation as with the right in section 27, and the concept of health in the environmental right must go beyond the concept of health care services in section 27.

²⁰⁹ The relationship between health and the environment is recognised in article 12.2 (b) of the ICESCR 993 UNTS 3. The UN CESCR elaborates on the right:

‘The improvement of all aspects of environment and industrial hygiene’ (art. 12.2 (b)) comprises, *inter alia*, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.

UN CESCR General Comment No. 14: *The right to the highest attainable standard of health (Art. 12 of the Covenant)* (2000) UN Doc E/C. 12/2000/4.

²¹⁰ WHO-UNEP HELI *Health & environment* (2008) 16-17. The major environmental risk factors identified are unsafe water and sanitation, poor hygiene, indoor air pollution, urban air pollution, climate change and lead exposure.

²¹¹ Communication No 155/96 (2001) ACHPR para 2.

2 3 4 8 Water

Along with the right to health care services and social security, section 27 contains a right of access to “sufficient food and water”.²¹² While the right to sufficient food is by no means insignificant, the right to water will be focused on here as it has a vital role to play in the interpretation of section 24.

The relationship between the environmental right and the right to water is an important one. Kidd recognises this and explains:

[T]he right of access to water is aimed at addressing people’s basic water needs – for drinking, food preparation, washing and sanitation. Access to water that is polluted would not be suitable for drinking and food preparation (at least), which reveals the clear connection between the environmental right in s 24 and the right of access to water in s 27.²¹³

Mosdell similarly explains that the right to water is “an indispensable element of other rights, particularly the rights to adequate food (nutrition), health [and] a clean and/or healthy environment”.²¹⁴

Section 24 emphasises that when interpreting the right to water, the *quality* of the water should be given due consideration. Regarding the quality of water under the right to water in the ICESCR, it has been held that “[t]he water required [...] must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health”.²¹⁵ The UN Committee on Economic, Social and Cultural Rights also stated that “[e]nvironmental hygiene [...] encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions”.²¹⁶

The right to water in section 27(1)(b), when read interdependently with section 24, indicates that an environment not harmful to health or well-being should be one where sufficient water is accessible, and the water supply is safe and healthy.²¹⁷ The

²¹² Section 27(1)(b), Constitution of the Republic of South Africa, 1996.

²¹³ Kidd “Environment” in *Bill of Rights Handbook* 525-526.

²¹⁴ Mosdell T “Water” in South African Human Rights Commission *Reflections on Democracy and Human Rights: A Decade of the South African Constitution* (2006) 91 91.

²¹⁵ UN CESCR General Comment No. 15: *The right to water (Arts. 11 and 12 of the Covenant)* (2003) UN Doc E/C. 12/2002/11.

²¹⁶ UN CESCR General Comment No. 15: *The right to water (Arts. 11 and 12 of the Covenant)* (2003) UN Doc E/C. 12/2002/11.

²¹⁷ The question of access to sufficient water was addressed in *Mazibuko and others v City of Johannesburg and others* 2010 4 SA 1 (CC). Here the Constitutional Court held that the Constitution

provision of safe and sufficient water has a great impact on the environment in which individuals live. The question of access to sufficient water was addressed in *Mazibuko v City of Johannesburg*.²¹⁸ Here the Constitutional Court held that the Constitution does not confer an immediate right to sufficient water, and that what constitutes sufficient water depends on various factors which the courts are not suited to decide on.²¹⁹ It must be noted, however, that section 24 is not subject to progressive realisation and many water related needs could possibly be more effectively addressed under section 24, particularly where the lack of access to water impacts on health.²²⁰ Water contributes to hygiene, sanitation, food preparation and even food cultivation and it plays a vital role in general health and well-being of communities.²²¹ The role of section 24 is particularly important where a community's source of water is located in the natural environment. The pollution of a river from, for example, sewerage or toxic waste could mean a lack of access to a sufficient water supply under section 27(1)(b), but it could also be argued that this constitutes an infringement of section 24.

In promoting an environment not harmful to health or well-being, the environmental right must serve to protect water sources and ensure that the water is safe for domestic use where it is needed for this purpose. The protection of the environment should aim to promote the accessibility of safe and sufficient water to all in South Africa.

2 4 Conclusion

This chapter has argued for an integrated teleological interpretation of section 24. This interpretation should be compatible with the language and context of the right,

does not confer an immediate right to sufficient water, and that what constitutes sufficient water depends on various factors which the courts are not suited to decide on. For an interesting environmental perspective on the case, see Kotzé L "Phiri, the plight of the poor and the perils of climate change: time to rethink environmental and socio-economic rights in South Africa?" (2010) 1 *Journal of Human Rights and the Environment* 135-160.

²¹⁸ 2010 4 SA 1 (CC).

²¹⁹ Paras 57 & 62.

²²⁰ Of course *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) would be an obstacle to such an approach as the court held in that case that the broader right cannot be relied upon in order to bypass the progressive realisation qualification. See para 19.

²²¹ See WHO-UNEP HELI *Health & environment* (2008) 17 where it is revealed that "[s]ome 94% of the 1.8 million annual deaths from diarrhoeal disease is attributable to environmental causes, particularly unsafe drinking-water and inadequate sanitation".

as well as other provisions of the Constitution. It should also promote the values and purposes implicit (or explicit) in section 24 itself and the Constitution as a whole. The interdependence of rights is an important interpretive tool supporting the cohesion of the Bill of Rights. An interdependent interpretation allows other rights to inform the interpretation of section 24 while also allowing those rights to be promoted through the interpretation of the environmental right.

It is clear from the language and context of section 24 that it is an anthropocentric right which aims to achieve more than the preservation of the natural environment. The constitutional goals of social justice and the improvement of the quality of life of all citizens call attention to the role that section 24 could play in their achievement. The values human dignity, equality and freedom also emphasise the anthropocentric nature of section 24. These values point to the meeting of the physical needs of individuals and the promotion of environmental justice through means that allow for the involvement and participation of those affected.

The interdependent interpretation of equality and the environmental right reiterates the need for environmental justice which eases the burden of negative environmental impacts borne largely by the poor. The right to human dignity reveals the role that section 24 should play in promoting dignified lives where environmental needs related to health and well-being are met. The right to life highlights the importance of the protection environment as it is a foundational condition for life itself. The interaction between the environmental right and the right to freedom and security of the person draws attention to the potential of violations of bodily integrity from environmental impacts.

Section 24 has a potentially beneficial role to play when understood in relation to other socio-economic rights. The lack of a “progressive realisation” limitation means that the environmental right could be a more effective tool for promoting the needs of the poor in certain cases. Section 24 understood alongside the right to adequate housing indicates that the adequacy of housing should take into account environmental aspects of the location, particularly those affecting health. Housing is also an important factor to be considered when clarifying the meaning of sustainable development. The right to health care services indicates that reference to health in section 24 should be understood as having a broader meaning than in section 27, and it also emphasises the many crucial links between health and the environment.

Finally, the right to water can also be promoted through the interpretation of section 24 as clean water is an essential component of a healthy environment.

Prior to the new constitutional dispensation Albie Sachs commented on the potential of an environmental right in the future and argued:

No serious environmental programme for South Africa can ignore the question of poverty, nor can any system of environmental rights fail to deal with the right to accessible and clean water, to electricity or gas, to sewage and rubbish disposal.²²²

An interpretation of section 24 as argued for in this chapter could address the concerns identified by Sachs and could make a substantial contribution to the quality of life of those living in poverty. The environmental right is important for the protection and conservation of the natural environment, but to limit its sphere of influence to concerns such as wildlife and national parks would be to ignore the context and purposes of the right and its capacity to improve the lives of the poor.

The following chapters will examine interpretation of specific aspects of section 24. The first of these is the term “environment” which is a fundamental concept in the environmental right. In order to understand the scope and meaning of the right, it is essential to first determine what is meant by the “environment”.

²²² Sachs *A Protecting Human Rights in a New South Africa* (1990) 141.

3 Environment

3 1 Introduction

Before the environmental right in section 24 can be understood, it is vital to understand what is meant by the most fundamental term: “environment”. It is crucial to understand this term as it determines the scope of the entire right. The meaning of environment will be explored firstly by examining the ordinary meaning of the term. It will then be contextualised by considering the immediate textual context of section 24, followed by interpretations offered in case law and legislation. The international construction of the environment must also be taken into account as required by the Constitution. Lastly, academic opinion on the meaning of the term will be examined. A definition for the term will then be proposed and discussed.

3 2 Ordinary meaning of environment

In order to understand the meaning of the term “environment” as it is used in section 24 it is necessary to begin with the ordinary meaning of the word. While it is by no means conclusive, the ordinary meaning of the word serves as a useful starting point.

The Oxford Dictionary defines “environment” as “the surroundings or conditions in which a person, animal, or plant lives or operates”.¹ The Collins dictionary describes the term in a similar manner:

1. external conditions or surroundings, esp. those in which people live or work.
2. *Ecology.* the external surroundings in which a plant or animal lives, which tend to influence its development and behaviour.
3. the state of being envired; encirclement.²

It is clear from these definitions that “environment” can be understood as anything that surrounds a person or thing (or plant or animal). The use of the term demands that there be a subject or central point which is surrounded by what is then called the

¹ *South African Concise Oxford Dictionary* (2002) 386.

² *Collins English Dictionary: Complete and Unabridged* 6 ed (2003) 549.

environment. Kidd points out that the environment is a relative concept “since it deals with the circumstances surrounding something or someone”.³ As the Collins definition above indicates, in some cases the term is associated specifically with ecology and what I will refer to as the natural environment,⁴ but it is not limited to this. As is discussed below, too narrow a definition of environment would be inappropriate for section 24, but it would be equally problematic to interpret environment in its broadest sense. Kidd explains why an overly broad interpretation would be problematic:

The definition [of environment as surrounding; surrounding objects, region or conditions] is not too helpful [...] since law is a component of humans’ surrounding circumstances and therefore *all* law is, according to this definition, environmental law.⁵

There is boundless potential for the application of the term “environment” and the situations in which the word is used are diverse and plentiful. The environment can refer to the physical place where a person lives, that is, their home or their neighbourhood. More broadly, it could also refer to ecological entities and systems which may not be in the immediate surroundings. One could refer to the protection of the environment with reference to, for example, the endangered polar bear which exists far from one’s immediate surroundings. Used in a more abstract sense, the term could refer to a non-physical space such as an abusive or violent family environment. A workplace rife with sexual harassment could likewise be described as a hostile work environment. The term “environment” in these contexts refers to emotional and psychological surroundings as opposed to the physical. Similarly one could speak of a political environment which would go beyond the physical surrounding objects and refer, amongst other things, to the government, to ideologies and policies, and to public opinion.

It is clear that the term environment has a wide range of possible applications and uses. The meaning of the term in the environmental right is, however, shaped by the context within which it is found. The whole of section 24 and the Bill of Rights as well as the legislation, case law and international sources dealing with the environment all play a part in contextualising and refining the term. What follows is an

³ Kidd M *Environmental Law* (2011) 1.

⁴ I will use the term “natural environment” to refer to the ecological environment or that which is not man-made – this includes the air, water, soil, plants and all living organisms and it excludes, for example, buildings, factories, vehicles and roads.

⁵ Kidd *Environmental Law* 1.

examination of the each of these contextual aspects and their impact on the meaning of the term “environment”.

3 3 Environment in section 24

It is important to locate the meaning of environment within its immediate context, that is, the language and context of section 24.⁶ The language of the right provides an important indication of the meaning and helps refine the broad scope of the ordinary meaning discussed above.

To begin with, when we construe the term environment it is important to establish *whose* environment is being identified. As seen above, the environment refers to the surroundings of a central subject. Environment could refer to the habitat surrounding a specific animal, for example. In the context of section 24, however, it is clear that the subject is “everyone”.⁷ It is accepted that the reference to “everyone” does not include animals or other living things, but rather signifies all people.⁸ The immediate surroundings of people are important for the right in section 24(a) which refers to an environment which is not harmful to “health or well-being”. The anthropocentric nature of the right affirms the centrality of human beings in the interpretation of the right. The environment spoken of is the environment of human beings.⁹ Du Plessis explains the impact of the anthropocentric approach on the term:

The term ‘environment’ as it appears in s 24 can therefore 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.¹⁰

The position of people as central to the right means that the definition of environment must include more than the natural environment. The environment in which people live includes, among other things, their homes, the roads they use,

⁶ See chapter 2, 2 2 2 1 and 2 2 2 3.

⁷ Section 24(a), Constitution of the Republic of South Africa, 1996.

⁸ 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 59.

⁹ While it could be argued that the same environment is shared by all animals and people, it is the perspective of the human being which is important here.

¹⁰ Du Plessis (2008) *SAJELP* 63-64.

their access to water and sanitation, the air quality and the public spaces they make use of such as town centres, parks and beaches.

Another significant textual indication of the meaning of environment is the use of the term “ecological” in section 24(b). Section (b) of the right refers to “ecological degradation” and “ecologically sustainable development”. The fact that the right does not refer to *environmental* degradation or *environmentally* sustainable development seems to indicate that the concept of ecology is separate or distinct from the concept of environment. The phrasing of the right suggests that the environment is a broader term than “ecology”. Environment then includes ecology, but goes beyond it.

The immediate textual context of “environment” in section 24 supports an interpretation of the term as anthropocentric. While the term includes the natural environment and ecology, these are viewed from a *human* perspective. This human perspective includes non-natural or man-made features of peoples’ surroundings into the term “environment”. The definitions and use of the term in legislation are also useful indicators of its meaning which will now be discussed.

3 4 Environment in legislation: NEMA and ECA

In addition to the constitutional text itself, there are legislative definitions of “environment” which offer some insight into how the term should be understood. While the Constitution is the ultimate authority and is not subordinate to legislation, this does not mean that legislation cannot be consulted in interpreting a right. How the environment has been understood by legislators is an important factor in determining the meaning in section 24.

Before examining the legislative definitions of the environment, it is necessary to say something about subsidiarity. The principle of subsidiarity demands that specific legislation on a certain matter be relied on in court before appealing to the Constitution.¹¹ This means that before relying on section 24 an individual would first need to rely on the environmental legislation. Where the legislation does not make provision for a specific matter, it could be possible to rely on the Constitution. The Constitution must also be relied on where it is argued that the legislation is

¹¹ Van der Walt *A Property and Constitution* (2012) 39.

unconstitutional.¹² Van der Walt points out that this does leave the Constitution without influence:

[T]hat does not mean that the effect of the Constitution is limited or that constitutional provisions or principles are not considered, since the legislation that does apply must be interpreted in view of the constitutional provisions that it is supposed to give effect to, which in turn must be seen in the context of other constitutional provisions.¹³

While most cases will necessarily involve a reliance on legislation because of the rules of subsidiarity, it is important to understand what is meant by section 24 in the Constitution in order to understand whether or not the legislation gives effect to the right adequately. The legislation can also assist in the interpretation of the Constitution as it provides insight into how the legislature has understood the provision.

The Environment Conservation Act 73 of 1989 (ECA) has been repealed almost entirely by the National Environmental Management Act 107 of 1998 (NEMA). The definitions of the ECA, however, remain in force. The ECA provides the following definition of “environment”:

'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.¹⁴

As Kidd indicates, this definition remains as broad and vague as the dictionary definition discussed in 3.2 above.¹⁵ It would be difficult to find an aspect of human life which is excluded from the term. This definition in the ECA indicates a preference for a more generous rather than restricted interpretation of environment, but the right needs a narrower scope than this in order to find practical application.

The enactment of NEMA was in partial fulfilment of the State’s obligation under section 24 to take legislative measures in realisation of the right.¹⁶ This link to section 24 is also evident in the preamble of NEMA which refers to the environmental right.¹⁷ NEMA serves as “environmental framework legislation” in South Africa and “provides

¹² Van der Walt *Property and Constitution* 39.

¹³ Van der Walt *Property and Constitution* 38.

¹⁴ Section 1, Environment Conservation Act 73 of 1989.

¹⁵ Kidd *Environmental Law* 2.

¹⁶ Van der Linde M “National Environmental Management Act 107 of 1998 (NEMA)” in HA Strydom & ND King (eds) *Fuggle & Rabie’s Environmental Management in South Africa* 2 ed (2009) 193 197.

¹⁷ Preamble, National Environmental Management Act 107 of 1998. See also Kidd *Environmental Law* 35.

general basic norms that may be used to introduce new environmental legislation or to amend or maintain existing legislation”.¹⁸ NEMA provides important principles and guidelines to be applied to all environmental legislation and is therefore influential in the environmental sphere.¹⁹ The following definition of environment is found in NEMA:

“**environment**” means the surroundings within which humans exist and that are made up of—

- (i) the land, water and atmosphere of the earth;
- (ii) micro-organisms, plant and animal life;
- (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.²⁰

It has been noted that this statutory definition of environment is an anthropocentric one.²¹ It refers to the “surroundings within which humans exist” and subsection (iv) of the definition explicitly refers to aspects of these surroundings “that influence human health and well-being”. It is clear that human needs and concerns are fundamental. Kidd identifies some implications of this anthropocentric approach:

Many people are adversely affected by environmental factors, such as pollution, and a definition such as that in NEMA would ensure that, for example, pollution that does not have a significant effect on the physical (non-human) environment, but does have an impact on human health, *would* be an environmental issue.²²

Despite the anthropocentric perspective of the NEMA definition, the environment remains limited to surroundings which are made up of land, water, atmosphere, micro-organisms and plant and animal life.²³ This apparently excludes the man-made environment including, for example, buildings and roads. Du Plessis argues that the anthropocentric focus of NEMA indicates that the term is not limited to the natural environment, but should “embrace the socio-economic and cultural dimension of the

¹⁸ Nel J & Du Plessis W “An evaluation of NEMA based on a generic framework for environmental framework legislation” (2001) 8 *SAJELP* 1 1-2. See the full article for an extensive discussion of NEMA as environmental framework legislation in South Africa.

¹⁹ NEMA of course remains subject to the Constitution.

²⁰ Section 1, National Environmental Management Act 107 of 1998.

²¹ Du Plessis A “South Africa’s constitutional environmental right (generously) interpreted: What is in it for poverty?” (2011) 27 *SAJHR* 279 292; Kidd M “Environment” in Currie I & De Waal J (eds) *The Bill of Rights Handbook* 6 ed (2013) 516 518.

²² Kidd *Environmental Law* 4.

²³ Subsections (i) and (ii) of the definition in NEMA.

inter-relationships between, for example, people and the natural environment”.²⁴ While the socio-economic and cultural dimensions of the environment in NEMA are broader than the natural environment on its own, the scope of the environment remains linked to the *natural* environment, thereby excluding human surroundings which are man-made.

Should the narrower definition of environment in NEMA be applied to section 24, it would prevent reliance on the right in cases involving built, man-made or urban environments. Harmful substances found in building materials used to build a home would be excluded from the ambit of the right to an environment not harmful to health or well-being. Kidd argues for a broader concept of the environment than that which is found in NEMA, one that “would include the place of humans in the urban environment, which would include the built environment and the work environment”.²⁵ Elsewhere he states that the application of the NEMA definition of “environment” to section 24 would result in the right being “unacceptably limited”.²⁶ Van der Linde and Basson similarly argue that the “needs, interests and values” of traditional and urbanised sectors of society need to be considered when defining the scope of environment in section 24.²⁷ In a diverse country such as South Africa, a human-centred approach to the term “environment” needs to remain attentive to the unique positions that various people find themselves in. The environmental right should offer protection to all people in South Africa, whether they live in a city, on a farm or in a rural village.

The statutory definition of environment found in NEMA is a useful starting point for understanding environment under section 24. The meaning of the term in section 24 should, at a minimum, include the definition in NEMA. It is clear, however, that in the constitutional environmental right the concept should be extended beyond this definition to include the built environment. The section that follows will take a closer look at how the courts have understood the concept of “environment” in South African jurisprudence on the environmental right.

²⁴ Du Plessis (2011) *SAJHR* 293.

²⁵ Kidd “Environment” in *The Bill of Rights Handbook* 519. See also Glazewski J “The Bill of Rights and environmental law” in J Glazewski & L Du Toit (eds) *Environmental Law in South Africa* (OS 2013) 5-15.

²⁶ Kidd *Environmental Law* 22.

²⁷ Van der Linde M & Basson E “Environment” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 2 2010) 50-12.

3 5 Environment in case law

Although case law on the environmental right remains scarce, there are a few cases where the right has been mentioned. These cases show where the right has found application and this gives an indication of the scope of the term “environment”.

The most extensive discussion of the meaning of environment is found in the case of *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*.²⁸ The High Court looked at the definition of environment found in the ECA and held that the “broad and inclusive definition” is in agreement with international law:²⁹

In line with international law, the environment is a composite right, which includes social, economic and cultural considerations in order to ultimately result in a balanced environment.³⁰

The court also points out that the wide definition of environment found in the ECA pre-dates the Constitution, presumably indicating that this understanding of environment would have influenced the intended meaning of environment when section 24 was drafted.³¹ The court describes the narrow definition of environment which is limited to the natural environment, to the exclusion of “the entire anthropogenic environment”.³² This is compared to the more extensive definition found in the ECA:

In promulgating the ECA, South Africa chose to embark upon the extensive approach to environment by giving it a comprehensive definition, which is as all-embracing as may be imagined. The broad definition of ‘environment’, in my view, would include all conditions and influences affecting the life and habits of man. This surely would include socio-economic conditions and influences.³³

The inclusion of social, economic and cultural factors in the sphere of environment is an important consideration in this case, and the court goes on to examine the definition of environment in NEMA as well as the principles set out in section 2 of the Act. While the court does not offer any commentary on the NEMA definition of

²⁸ 2004 5 SA 124 (W) (*BP*).

²⁹ Para 144G.

³⁰ Paras 144G-145A.

³¹ Para 145A.

³² Para 145B.

³³ Paras 145C-E.

environment itself, the importance of social, economic and cultural considerations throughout NEMA is emphasised in the judgment.³⁴ Ultimately it was held that the Minister's mandate to consider environmental factors when making a decision *included* the consideration of socio-economic factors.³⁵ *BP* clearly indicates the court's favour for an interpretation of environment that is broader than "God's created physical environment", one that is inclusive of social, economic and cultural conditions.³⁶

While few cases discuss the meaning of environment as expressly as *BP*, the scope of the concept can be inferred from the matters which are covered by the right in case law dealing with section 24. *Fuel Retailers v Director-General: Environmental Management*³⁷ contains similar facts to *BP* and the court demonstrates its support for an integrated approach to the environment which deems the environment and socio-economic factors inseparable.³⁸ In *MEC: Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Limited*³⁹ the court similarly emphasises the relationship between the environment and socio-economic growth.⁴⁰ The jurisprudence strongly suggests that the courts interpret the term environment to encompass social, economic and cultural factors or, at the very least, they acknowledge that the concept of environment should be intimately related to these factors.

In addition to the cases which address the relationship between the environment and socio-economic factors, jurisprudence on the environmental right also confirms more traditional views of the environment. In *Minister of Health and Welfare v Woodcarb (Pty) Ltd*,⁴¹ decided under the Interim Constitution, the quality of the air is (unsurprisingly) included within the concept of environment. This case dealt specifically with polluting smoke generated from a sawmill which infringed on the environmental right. The influence of the needs of future generations is also a factor in determining the scope of the term "environment". The ability of future generations to meet their needs is mentioned in *Director Mineral Development, Gauteng Region*

³⁴ Paras 145F-146D.

³⁵ Paras 151D-F.

³⁶ Para 145B.

³⁷ 2007 6 SA 4 (CC).

³⁸ Para 44.

³⁹ 2008 2 SA 319 (CC).

⁴⁰ Para 65.

⁴¹ 1996 3 SA 155 (N).

v Save the Vaal Environment.⁴² The role of future concerns indicates that the environment covered by section 24 includes not only the environment as it is currently, but also the state of the environment in the long term. This suggests that the environment as it will be experienced by the next generation should also not be harmful to health or well-being. A practice that causes no harm at the moment, but will result in inevitable degradation of the environment in future, could be covered by the environmental right. Heard in the Land Claims Court, *In re Kraanspoort Community*⁴³ confirms that the future of the environment is an important aspect included in the scope of the environment. Here the sustainable use of renewable resources was crucial and the court held that the land claim was subject to it.

In conclusion, the case law clearly indicates that the socio-economic and cultural aspects of the environment are included in the definition of “environment”. The quality of the environment as it will be enjoyed by future generations is also an important facet of the concept. In addition to our national sources of environmental law, the international law position must be considered in the interpretation of section 24. The international law understanding of environment will now be examined.

3 6 Environment in international law

As discussed in chapter 2,⁴⁴ the Constitution requires the consideration of international law when interpreting the Bill of Rights.⁴⁵ The meaning of environment must therefore be understood with consideration of the international law context. While there is a vast number of international sources dealing with the environment, the scope of this research only allows for a discussion of the most relevant of these.⁴⁶

⁴² 1999 2 SA 709 (SCA) 107.

⁴³ 2000 2 SA 124 (LCC) para 117. See also Kotzé L & Paterson A “South Africa” in Kotzé L & Paterson A (eds) *The Role of the Judiciary in Environmental Governance: Comparative Perspectives Volume 4* (2009) 557 585.

⁴⁴ See chapter 2, 2 2 2 5 for an overview of the status of international sources in South African law.

⁴⁵ Section 39(1)(b), Constitution of the Republic of South Africa, 1996.

⁴⁶ See Beyerlin U & Marauhn T *International Environmental Law* (2011); Kiss A & Shelton D *International Environmental Law* 3 ed (2004) for a more detailed discussion of international environmental law sources.

The earliest of these sources is the Declaration of the United Nations Conference on the Human Environment or the Stockholm Declaration.⁴⁷ The conference, held in Stockholm in 1972, was attended by 114 states along with various international institutions and non-governmental organisations.⁴⁸ It is not insignificant that the conference tackles the *human* environment. This suggests that the Stockholm Declaration, like section 24, is rooted in an anthropocentric view of the environment. The Declaration proclaims:

Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.⁴⁹

It is clear that here the environment means more than the natural environment. The principles set out in the declaration confirm this wide interpretation of the environment. They cover natural resources and ecosystems,⁵⁰ nature conservation,⁵¹ pollution,⁵² economic and social development, and living and working environments.⁵³ Each of these aspects forms part of the Stockholm Declaration's understanding of the environment which clearly encompasses both the natural and anthropogenic environment.

The next important source to consider is the Report of the World Commission on Environment and Development: Our Common Future or the Brundtland Report⁵⁴ which was drafted by the World Commission on Environment and Development (WCED) as established by the United Nations General Assembly.⁵⁵ The report reiterates the important link between the environment and development, indicating the complex relationship between the natural environment and socio-economic development.⁵⁶ In a foreword to the Brundtland Report the chair of the WCED succinctly clarifies the meaning of environment and development:

⁴⁷ Declaration of the United Nations Conference on the Human Environment (Stockholm, June 1972) UN Doc A/CONF.48/14/Rev.1.

⁴⁸ Kidd *Environmental Law* 52.

⁴⁹ Declaration of the United Nations Conference on the Human Environment (Stockholm, June 1972) UN Doc A/CONF.48/14/Rev.1 Proclamation 1.

⁵⁰ Principle 2.

⁵¹ Principle 4.

⁵² Principle 7.

⁵³ Principle 8.

⁵⁴ Report of the World Commission on Environment and Development: Our Common Future (1987) UN Doc A/42/427 (Brundtland Report).

⁵⁵ Kidd *Environmental Law* 54.

⁵⁶ See for example Report of the World Commission on Environment and Development: Our Common Future (1987) UN Doc A/42/427 (Brundtland Report) 141 & 239.

[T]he "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.⁵⁷

If it is to be understood as “where we all live”, the environment encompasses more than the natural environment, but rather extends to every part of the physical space that we as human beings find ourselves in. This broad understanding of the environment echoes what is found in the Stockholm Declaration.

The Rio Declaration on Environment and Development⁵⁸ is the result of the United Nations Conference on Environment and Development (UNCED) held in 1992. Principle 1 of the Declaration establishes that “[h]uman beings are at the centre of concerns for sustainable development”, taking an anthropocentric view of sustainable development and the environment. The crucial link between environment and development is emphasised throughout the Rio Declaration.⁵⁹ Unlike the Brundtland Report, no definition of the environment is presented in the case of UNCED. The documents it produced do, however, correspond with the broad view of the environment found in the earlier Stockholm Declaration and Brundtland Report.⁶⁰

Post 1992 and the Rio Declaration the international development of environmental issues has centred around sustainable development and climate change.⁶¹ While these are important to international environmental law, the terminology used means that these sources are less useful in identifying the scope of the term “environment”. Sustainable development has become central and unavoidable in international environmental law, and will be discussed in detail in chapter 5.

⁵⁷ Brundtland GH “Chairman’s Foreword” in Report of the World Commission on Environment and Development: Our Common Future (1987) UN Doc A/42/427 (Brundtland Report) 7.

⁵⁸ Rio Declaration on Environment and Development (Rio de Janeiro, June 1992) A/CONF.151/26.

⁵⁹ See for example principles 3, 4 and 25 of the Rio Declaration on Environment and Development (Rio de Janeiro, June 1992) A/CONF.151/26.

⁶⁰ See for example Rio Declaration on Environment and Development (Rio de Janeiro, June 1992) A/CONF.151/26 (Vol I); Agenda 21 (Rio de Janeiro, June 1992) A/CONF.151/26 (Vol I-II) and Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests (Rio de Janeiro, June 1992) A/CONF.151/26 (Vol III).

⁶¹ See for example Johannesburg Declaration on Sustainable Development (Johannesburg, September 2002) A/CONF.199/20; United Nations Framework Convention on Climate Change (20 January 1994) UN Doc A/RES/48/189; United Nations Conference on Sustainable Development: The Future We Want (27 July 2012) UN Doc A/RES/66/288.

In the regional context, the African Charter on Human and Peoples' Rights⁶² includes an environmental right in article 24:

All peoples shall have the right to a general satisfactory environment favourable to their development.⁶³

Not unlike section 24 of the South African Constitution, the right in the African Charter has been described as "vague and ambiguous".⁶⁴ What is revealing about the wording of the right, however, is that the environment is clearly linked to development, and this suggests that the African Charter intended a general satisfactory environment to cover more than the natural environment.⁶⁵ The mention of development indicates a recognition of the role of social and economic infrastructure in the environment in line with the broader international position.

The most detailed discussion of the right by the African Commission on Human and Peoples' Rights (the Commission) is found in the communication of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*.⁶⁶ Here the Commission confirms that the environment encompasses concerns regarding pollution, ecological degradation, conservation, sustainable development and natural resources.⁶⁷ The environment is understood not only as the natural environment, but inclusive of aspects of the man-made environment as they relate to sustainable development. Van der Linde and Louw note that this decision reveals the "great scope of protection" offered by this right "for human beings, the environment and the relationship shared between them".⁶⁸ The Commission views

⁶² African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 ('African Charter').

⁶³ Article 24.

⁶⁴ Van der Linde M "Regional environmental law under the auspices of the African Union" in HA Strydom & ND King (eds) *Fuggle & Rabie's Environmental Management in South Africa* 2 ed (2009) 165 177. See also Van der Linde M & Louw L "Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication" (2003) 3 *AHRLJ* 167 174.

⁶⁵ Van der Linde & Louw (2003) *AHRLJ* 176.

⁶⁶ *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria* Communication No 155/96 (2001) ACHPR ('SERAC'). For a detailed discussion of this case and article 24 see: Van der Linde & Louw (2003) *AHRLJ* 167; Ebeku KSA "The right to a satisfactory environment and the African Commission" (2003) 3 *AHRLJ* 149; Chirwa DM "Toward revitalizing economic, social and cultural rights in Africa" (2002) 10 *Human Rights Brief* 14.

⁶⁷ Communication No 155/96 (2001) ACHPR para 52. This case is discussed in further detail in Chapter 4, 4 6 and Chapter 5, 5 6 below.

⁶⁸ Van der Linde & Louw (2003) *AHRLJ* 177.

the environment as inclusive of the natural environment and socio-economic development.

The International Court of Justice addressed the meaning of environment in *Legality of Threat or Use of Nuclear Weapons (Advisory Opinion)*⁶⁹ and held that “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”.⁷⁰ This Advisory Opinion emphasises the important role of “living space” in the meaning of environment. Housing, public spaces and the neighbourhoods where people live are clearly within the scope of this definition and this has important implications for quality of life and health in the areas where people reside.

Under international law the environment is undoubtedly bound to development. This necessitates the inclusion of social, economic and cultural dimensions of the environment as well as aspects of the man-made environment. This position is echoed in the African regional context. The International Court of Justice has also indicated that the term must also be understood as including the areas where people live. These interpretations of the term must be considered in determining what environment means in the South African context. Following the discussion of the primary sources above, the academic opinion on the meaning of environment will be examined before a definition is proposed.

3 7 Academic opinion

Having studied the language of section 24, the relevant legislation, case law, and international law, academic interpretations of the term environment will now be explored. An appropriate definition for “environment” will then be proposed, followed by a discussion of its possible implications.

Glazewski has suggested that environment be understood broadly “to include not only our relationship with natural resources but also our cultural heritage as well as the urban environment”.⁷¹ Feris and Tladi similarly argue for a wide interpretation of the term which would include “the interrelationships between humans and the natural

⁶⁹ *Legality of Threat or Use of Nuclear Weapons (Advisory Opinion)* ICGJ 205 (ICJ 1996).

⁷⁰ Para 29.

⁷¹ Glazewski “The Bill of Rights and environmental law” in *Environmental Law* 5-15.

environment".⁷² They go on to emphasise the importance of including those aspects of the environment that are significant for indigenous cultures and communities.⁷³ Writing elsewhere Feris extends this definition by referring to the "inter-relationships between humans and between humans and the natural environment".⁷⁴ She argues that this definition "would incorporate both socio-economic and cultural dimensions of the inter-relationships".⁷⁵ This definition, taken at face value, is significantly broader than the one put forward earlier by Feris and Tladi. The inclusion of human interrelationships suggests the addition of a wide range of interpersonal concerns to the scope of environment. Kidd seems to approve of this wide definition and explains:

Feris argues that a broader approach would include the socio-economic and cultural dimensions of the inter-relationships not only between humans and the natural environment, but also between humans and other humans, in other words, the social environment.⁷⁶

Feris and Kidd thus support a very broad definition of environment. It is not clear what could be excluded from such an all-encompassing definition. Kidd argues that environment should be understood, as with the traditional dictionary definition as "humans' surroundings".⁷⁷ Such a limitless concept of the environment could be problematic as the environmental right would be too broad to be of any practical use. Kidd also suggests that a wider interpretation of environment should incorporate the urban environment which in turn should include the built environment and the work environment.⁷⁸ He notes that the term must be broader than the natural environment if it is not to "reinforce perceptions that environmental concerns are concerns of middle-class (largely white) people, which are not relevant to the majority of the population".⁷⁹

Not unlike the definitions above, Du Plessis suggests a definition beyond the natural environment and inclusive of "socio-economic and cultural dimensions of the

⁷² Feris LA & Tladi D "Environmental rights" in D Brand & C Heyns *Socio-Economic Rights in South Africa* (2005) 249 259.

⁷³ Feris & Tladi "Environmental rights" in *Socio-Economic Rights in South Africa* 259.

⁷⁴ Feris L "Environment" in Currie I & De Waal J (eds) *The Bill of Rights Handbook* 5 ed (2006) 525.

⁷⁵ Feris "Environment" in *Bill of Rights Handbook* 525.

⁷⁶ Kidd "Environment" in *Bill of Rights Handbook* 519.

⁷⁷ Kidd *Environmental Law* 22.

⁷⁸ Kidd "Environment" in *Bill of Rights Handbook* 519.

⁷⁹ Kidd *Environmental Law* 4.

inter-relationships between people and the natural environment”.⁸⁰ This definition is narrower than that suggested by Kidd and Feris as it remains linked only to the natural environment and seems to exclude interrelationships between people. The cultural and socio-economic dimensions are included to the extent that they relate to the natural environment and not as components of the environment in and of themselves. Du Plessis explains the interrelationship between people and the natural environment:

[It] encompasses all of the interests that people hold in the natural environment, whether they be of a cultural nature or whether they reflect the need for the provision of the services that the natural environment provides, such as water to drink, air to breathe, and food to eat.⁸¹

An important distinction between this conception of the environment and that of Kidd and Glazewski is that it is seemingly limited to the natural environment and would therefore exclude the anthropogenic environment. This is problematic where, for example, the work environment is concerned. Limiting the definition to relationships with the natural environment would exclude environments which South Africans are exposed to daily, such as potentially harmful work environments or living environments in informal settlements.

It is evident from these definitions that there are three possible components of the environment. These are the natural environment, the anthropogenic environment (which would include the built environment and aspects of the urban environment) and the social environment (which consists of the interrelationships between humans). Each of the authors suggests that environment should encompass some combination of these components. A definition of environment will now be proposed – one which includes the first two components (the natural and the anthropogenic environment) but excludes the social environment.

⁸⁰ Du Plessis (2008) *SAJELP* 63-64. See also Du Plessis (2011) *SAJHR* 292-293.

⁸¹ Du Plessis (2011) *SAJHR* 293.

3 8 Proposed interpretation

The proposed interpretation of the term “environment” in the context of the environmental right in the Constitution is the physical⁸² surroundings within which humans live and the interrelationship between humans and these surroundings. This definition encompasses all physical aspects of the environment whether natural or man-made, but excludes non-physical environments such as an emotional or political environment. The implications of such a definition will now be discussed.

Firstly, the exclusion of non-physical environments is important. As noted above, it is necessary to limit the potential scope of the term to avoid the absurd inclusion of every aspect of human life. The incorporation of interrelationships between humans within the environmental right would mean that interpersonal relationships between individuals would be covered by section 24. An emotionally harmful home environment resulting from a messy divorce could then potentially violate a child’s right to an environment not harmful to her health and well-being. A manipulative or disrespectful colleague at work could be seen as creating a psychologically harmful work environment which could potentially fall within the scope of section 24. These examples are far removed from the purposes of the environmental right examined in chapter 2.⁸³

The absence of human interrelationships in the definition of environment is not without challenges. Cramped living conditions due to overcrowding can have a significant impact on quality of life and can affect an individual’s health by contributing to the spread of disease.⁸⁴ This would be a situation involving human interrelationships which impacts on environmental health. Such a situation could be understood as a symptom of the physical environment of the built environment and housing infrastructure. It is the inadequate conditions of the physical environment which result in this kind of overcrowding. It is important to note that in such

⁸² “Physical” refers to everything in people’s surroundings that is tangible and material as opposed to abstract or immaterial. It is necessary to distinguish this from Kidd’s use of the term “physical environment”. In Kidd *Environmental Law* 4 he argues that the environment should not be limited to the physical environment. It is clear from the context that what he means by “physical environment” is what is referred to throughout this thesis as the natural environment.

⁸³ See chapter 2, 2 3.

⁸⁴ The World Health Organisation has noted that overcrowding is a factor in providing “a fertile ground for major epidemics, especially in urban areas”. World Health Organisation *Communicable Diseases 2000* (2000) WHO/CDS/2000.1 1.

circumstances the actual relationships between the individuals are irrelevant to their environmental health or well-being under section 24.

It should also be noted that the exclusion of the social environment from the definition of environment does not exclude social *aspects* of the environment. It is suggested that such aspects of the environment remain under the purview of section 24 to the extent that they are linked to the physical environment. By way of example, Feris argues:

An expanded definition of “environment” could be invoked to prevent the displacement and relocation of indigenous groups on the basis that the loss of culturally or historically significant sites violates section 24.⁸⁵

For such circumstances to be covered by the environmental right, social aspects of the right must be taken into account. This does not, however, mean that the right should protect the *social* environment of the indigenous groups. While there are social concerns relevant to the violation of the environmental right, in this case the violation is linked to the *physical* sites which are of cultural or historical importance. The relationship (which in this case is a social and cultural one) between the indigenous group and the physical environment remains part of the proposed definition of environment. Social aspects of the environment are not excluded from the right as long as they are linked to a physical component of the environment.⁸⁶

The inclusion of the man-made environment in the interpretation of environment is important as people who live in cities, for example, arguably come into contact with more of the anthropogenic environment than the natural environment on a daily basis. The proposed interpretation allows for the inclusion of public spaces such as town centres, public parks, libraries and shopping malls. These facilities are used by countless people and should also be free from harm to health and well-being. Included in this understanding of environment would be transport infrastructure including roads, railways and airports. It could be argued that many of these features of the environment are necessary for the well-being of an individual as they allow for

⁸⁵ Feris LA *The Conceptualisation of Environmental Justice within the Context of the South African Constitution* LLD dissertation Stellenbosch University (2000) 199. See also Feris “Environment” in *Bill of Rights Handbook* 525; Feris & Tladi “Environmental rights” in *Socio-Economic Rights in South Africa* 259.

⁸⁶ Similarly, psychological or emotional aspects of the environment are not excluded where they exist in relationship to the physical environment. The concept of well-being (discussed in chapter 4 below) could certainly cover some of these cases, but only where the source of harm is linked to the physical environment and not an interpersonal relationship with another individual.

access to facilities important for social, cultural and economic development. This would support the international law connection between environment and development. It could also be argued that a lack of transport infrastructure resulting in a child being unable to access a school near his home infringes on the right to an environment that is not harmful to health or well-being.⁸⁷ Similarly, the environmental right could be violated where harm to well-being is experienced by a disabled person bound to a wheelchair who cannot access a necessary socio-economic resource (for example, a home affairs office) due to the lack of a suitable ramp to enter the building. In these examples it is the individual's interrelationship with the physical environment that causes the harm. The man-made environment could also be harmful to health or well-being where it is simply unsafe. Roads that are poorly maintained or buildings constructed with harmful substances could infringe on the environmental right. Given that two-thirds of the South African population live in urban areas, the scope of section 24 must include the anthropogenic environment if it is to have any meaning for this sector of society.⁸⁸

Another vital component of the proposed definition is the inclusion of the work environment. A definition limited to the natural environment would rule out harmful work environments where many spend the majority of their time. The environmental right could, for example, be infringed in a factory where workers are exposed to harmful chemicals without any protective gear provided by the employer. An overcrowded, badly ventilated and poorly lit office space would also be covered by section 24 if harm to health or well-being could be shown.

One of the most important aspects related to the environment which must be included in any interpretation of the term is that of access to water and sanitation. They are vital to health and well-being and relate to both the natural and the anthropogenic environment. Clean rivers and unpolluted rain water are valuable sources of water for washing, drinking and preparing food in the same way that access to clean tap water is. Whether the source of clean water is natural or man-made, it is absolutely essential for health and well-being.⁸⁹ Access to sanitation

⁸⁷ Whether this could be considered a violation of section 24 would depend on the definition given to well-being. See chapter 4 below.

⁸⁸ South African Institute of Race Relations "Press Release: South Africa goes with the urbanisation flow" (22-01-2013) <http://www.sairr.org.za/media/media-releases/Urbanisation%20-%2022_Jan_2013.pdf/view> (accessed 10-01-2014).

⁸⁹ The relationship between water and the environment is discussed in chapter 2, 2 3 4 8 above.

requires suitable access to hygienic toilets. The environmental right covers access to natural sources of sanitation as well as the man-made infrastructure of taps and toilets. A lack of access to sufficient clean water (that is, the water necessary for health and well-being) would infringe on the environmental right, as would a lack of access to toilets. The importance of sanitation and hygiene for an environment not harmful to health or well-being applies equally to the work environment. It is suggested that a school or workplace that does not provide necessary access to clean toilets and clean water would be covered by section 24. Where an individual is required to use harmful substances in the course of their work, but not given access to sufficient clean water to wash these substances off, the right to an environment not harmful to well-being could be violated.⁹⁰

Given that the proposed definition is wide enough to include numerous aspects of the environment it is not feasible to address each possibility here. Some of the most important features of the environment which are covered by the definition have been highlighted above. A definition of the environment which covers a person's physical surroundings and their relationship to it would include social and cultural aspects of the physical environment, the man-made or built environment (including the urban environment), the work environment and access to water and sanitation.

3 9 Conclusion

The term "environment" can be understood as a broad and all-inclusive term. It is important to refine it according to the context of section 24, in order to allow the right to find effective application. The term has been examined in the context of environmental right itself; in light of South African legislation and case law; and in consideration of international law and academic opinion.

It is clear that the environment must be understood as referring to something broader than the natural environment, and that the social, economic and cultural dimensions of the environment cannot be ignored. The vital link between

⁹⁰ Lack of access to adequate sanitation and clean water also has important consequences for an individual's dignity and freedom. The ability to have control over the cleanliness of one's own environment and not to be forced to live in squalor is a mark of dignity and freedom.

environment and development must also remain central to the interpretation of the term.

Three potential components of the environment have been identified: the natural, anthropogenic and social environments. For the reasons discussed above, I have argued that the scope of the right would be too broad if the social environment were to be included in the meaning of environment. In light of this, I have proposed a definition which encompasses the two remaining components. It is therefore proposed that the most appropriate interpretation of the term “environment” in the context of section 24 of the Constitution encompasses the physical surroundings within which humans live, and the interrelationship between humans and these surroundings. Having developed an appropriate definition for environment, the following chapter will discuss the meaning of the next key terms of the right: “health” and “well-being”.

4 Health and well-being

4 1 Introduction

Section 24 contains a right to an environment not harmful to health or well-being. The meanings of “health” and “well-being” overlap to a certain extent and appear as a unit in the environmental right. The two should be considered together and therefore the interpretation of both terms will be addressed as far as possible. However, the scope of this chapter does not allow for an in-depth analysis of both terms and, as well-being is the more enigmatic of the two, a greater amount of time will be spent on investigating its meaning. I will begin by investigating the ordinary meanings of health and well-being. The terms will then be considered in light of the whole of section 24 where they appear. The interpretation of health and well-being by the legislature and the courts will then be examined. International law perspectives on health and well-being will be studied as they must be considered in the interpretation of the Bill of Rights. Following this, the opinion of commentators on section 24 and academics from legal and social studies disciplines will be discussed. I will conclude by proposing an interpretation of the term in line with a holistic and interdependent interpretation of the Bill of Rights.

4 2 Ordinary meaning of health and well-being

As established in chapter 2, the ordinary meaning of language is an important starting point in interpreting the law.¹ While the use of “health or well-being” in section 24 of the Constitution has a specific legal meaning due to its context, the ordinary meaning ascribed to the two terms is the point of departure for interpretation.

Health is described by the Oxford Dictionary as “the state of being free from illness or injury – a person’s mental or physical condition”.² The Collins Dictionary similarly defines health as “the state of being bodily or mentally vigorous and free

¹ See chapter 2, 2 2 2 1.

² *South African Concise Oxford Dictionary* (2002) 533.

from disease” or “the general condition of body and mind”.³ It is clear that health is seen to cover both the physical and mental condition of an individual. The inclusion of mental state under the concept of health is important to note as not all environmental impacts have visible physical consequences. These definitions of health, applied to section 24, would include the physical consequences of the environment on an individual’s health such as a child developing asthma due to pollution of the air in their neighbourhood.

Well-being is a much broader concept than health. The Oxford Dictionary defines well-being as “the state of being comfortable, healthy or happy”.⁴ The definition given in the Collins Dictionary is equally all-embracing: “the condition of being contented, healthy, or successful; welfare”.⁵ These definitions include in the ambit of well-being the concepts of comfort, happiness, contentment and success all of which have clear subjective dimensions and are difficult to delimit.

Well-being, as defined above, is broad enough to include an almost absurd range of harm from the sense of dis-ease somebody may feel because they do not like the red walls of their workplace, an individual’s discontentment because his garden is not as big as he wants it to be, to the unhappiness of a resident who dislikes the type of tree her municipality has planted in her street. While it is necessary for well-being to encompass certain subjective feelings and experiences, it must have boundaries to prevent every subjective discomfort resulting in the infringement of section 24.⁶ Liebenberg recognises that “something more is required than a sense of emotional insecurity or aesthetic discomfort before the section becomes applicable”.⁷ Precisely what that “something more” is, will be investigated in the remainder of this chapter.

The potential scope of “health or well-being” is vast. Many of the possible meanings would be absurd or impractical. The next section will assist in refining the interpretation of the terms by considering the immediate context of the right itself.

³ *Collins English Dictionary: Complete and Unabridged* 6 ed (2003) 754.

⁴ *South African Concise Oxford Dictionary* (2002) 1333.

⁵ *Collins English Dictionary: Complete and Unabridged* 6 ed (2003) 1822.

⁶ The meaning of harm will have implications for what is considered sufficient for a violation of the environmental right. See 4.3 for a brief discussion on the notion of harm.

⁷ Liebenberg S “Environment” in Davis D, Cheadle H & Haysom N (eds) *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 256 259.

4 3 “Health or well-being” in section 24

In order to understand what is meant by health and well-being in the environmental right, it is essential to understand the terms in context. The importance of considering the grammatical context when determining the meaning of a word or phrase is outlined in chapter 2.⁸ In addition to this, chapter 2 explains that the context of the provision as a whole must be taken into account.⁹ This section will examine health and well-being in the grammatical context within which the terms are found as well as within the context of the environmental right as a whole.

Before addressing the interpretation of health and well-being specifically, it is necessary to say something about harm. It is possible that an aspect of well-being could be impacted negatively without being considered harmful. The concepts of health and well-being in section 24(a) are qualified by the notion of harm. The environmental right is only infringed if the environment is *harmful* to health or well-being. While it is not clear what precisely would constitute harm, the requirement of harm creates a certain threshold for damage or negative impacts to be considered a violation of section 24. Harm requires an objective standard to prevent every minor negative impact qualifying as an infringement of the right. Examples of objective indications of harm are found where harm is linked to pecuniary loss (bearing in mind that it must still be linked to health or well-being to violate section 24) or certifiable, recognised harm to a person’s health or well-being. The latter would require medical proof of the damage caused by the environment. Particularly where emotional and psychological harm is concerned, the environmental harm would need to result in identifiable consequences recognised by the medical profession.¹⁰ In the absence of such an objective standard it could be possible to argue that any small change in a person’s surrounding environment could lead to an infringement of the environmental right.

⁸ See chapter 2, 2 2 2 1.

⁹ See chapter 2, 2 2 2 3.

¹⁰ See for example: American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders 5 ed* (2013) (‘DSM’). The conditions recognised in the DSM used by psychologists and psychiatrists should qualify as harm where the condition is caused by environmental factors. The DSM serves as an objective standard by which to judge the extent of the harm. That is not to say that conditions falling short of this standard could not be interpreted as harmful under section 24 but rather that *at least* those mental disorders appearing in the DSM should be accepted as harmful. Other objective, scientific study and proof could indicate that lesser damage should also be deemed harmful. The point here is that the harm should be linked to verifiable and objective proof.

The notion of harm appears in the private law sphere in the law of delict. It could be argued that a fundamental right which the state must promote and fulfil should, at a minimum, offer the protection that a party would be able to claim from a private party. The law of delict would then offer an indication of the base level of harm which should be considered an infringement of section 24. There is of course scope to argue that the state should provide protection that extends beyond that which is available in delict. The types of harm which are provided for in the law of delict are: physical injury to a person, damage to property, pure economic loss, pain and suffering (including psychiatric injury) and infringement of personality rights (including bodily integrity, dignity and privacy).¹¹ To reiterate, this harm would have to be linked to an individual's (or a community's) health or well-being in order to constitute a violation of the environmental right. This would be difficult to argue where the environmental harm consists of minor damage to property or minimal economic loss. It would also depend on the meaning given to well-being. The interpretations of health and well-being are of course essential in determining what is considered harmful under section 24.

The concepts of health and well-being appear in the disjunctive form in section 24. The right protects individuals from harm to either health *or* well-being. The inclusion of both of these concepts indicates that they do not have the same meaning. While there may be an overlap in their meanings, the inclusion of both concepts cannot be understood as superfluous or accidental. It is an intentional inclusion with implications for the meaning of these terms. The most important implication for the use of "health or well-being" in the right is that the broader term, well-being, must be understood as referring to something more than health. If the two were intended to convey the same meaning, well-being would be redundant. Well-being could be seen as encompassing health, but it must mean some broader and more inclusive than health alone.¹²

The environmental right in the Interim Constitution corresponds with section 24(a) of the Final Constitution (with the exception of the word "detrimental" in the Interim

¹¹ Loubser M, Midgley R, Mukheibir A, Niesing L & Perumal D *The Law of Delict in South Africa* (2010) 59. See 43-59 for a comprehensive discussion of delictual harm.

¹² Du Plessis A "South Africa's constitutional environmental right (generously) interpreted: What is in it for poverty?" (2011) 27 *SAJHR* 279 296.

Constitution in the place of “harmful”).¹³ There were no explicit references to conservation or sustainable development. Before the commencement of the Final Constitution it was argued that the term well-being was broad enough to include conservation related concerns, indicating that a lack of conservation could be considered detrimental to well-being.¹⁴ While the right in section 24 now includes conservation and the prevention of ecological degradation amongst other things, the recognition that the state of the natural environment affects human well-being remains important for interpretation of the term. This suggests that even where there are no direct physical consequences for an individual or community, the degradation of the natural environment is linked to their well-being. The destruction of a geographically remote natural landscape could impact on well-being even where it is not visible or even accessible by the individual.¹⁵

It could also be argued that the ultimate inclusion of section 24(b) in the 1996 Constitution is an indication that the integrity of the natural environment is regarded as an important concern worthy of constitutional protection and therefore important for well-being. The environment must be protected “for the benefit of present and future generations”,¹⁶ that is, for the sake of all humanity. This protection is necessary not only for the environment itself, but for the existence and well-being of the human species. Our ability to continue existing and to provide for our children’s survival forms an important part of human well-being.¹⁷

The role of sustainable development is also recognised in section 24(b) and is a central principle of international environmental law.¹⁸ Read holistically, the environmental right recognises the necessity of human development which balances economic, social and environmental concerns. Each of these three aspects of sustainable development should also form part of our understanding of what well-

¹³ Section 29, Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁴ The need to make provision for the protection of the natural environment could explain the inclusion of the term well-being, at least for the purposes of the Interim Constitution. See Du Bois F “Well-being’ and ‘the common man’: A critical look at public interest environmental law in South Africa and India” in Robinson D & Dunkley J (eds) *Public Interest Perspectives in Environmental Law* (1995) 136 142.

¹⁵ Kidd M “Environment” in Currie I & De Waal J (eds) *The Bill of Rights Handbook* 6 ed (2013) 516 522; Kidd M *Environmental Law* 2 ed (2011) 23; Du Plessis (2011) *SAJHR* 295; Kotzé LJ & Du Plessis A “Some brief observations on fifteen years of environmental rights jurisprudence in South Africa” (2010) 3 *Journal of Court Innovation* 157 166-167.

¹⁶ Section 24(b), Constitution of the Republic of South Africa, 1996.

¹⁷ This is in line with the anthropocentric view of section 24 discussed in chapter 2, 2 3 2.

¹⁸ See chapter 5.

being means. Well-being, as it appears in section 24, should encompass the individual's economic reality, social experiences and environmental context.

Health and well-being must be understood in the light of section 24 as a whole and the inclusion of section 24(b) is particularly important for this interpretation. Whether there has been an infringement of section 24(a) will also depend on how harm is interpreted. The use and interpretation of health and well-being in the framework environmental legislation will now be examined.

4 4 Health and well-being in NEMA

As noted in 3 4, the National Environmental Management Act 107 of 1998 (NEMA) has an important role to play in the interpretation of section 24. As it was enacted to give effect to the environmental right in section 24, NEMA provides an indication of how the legislature interprets section 24.

Using the language of the Constitution, "health" and "well-being" appear alongside each other throughout NEMA and are often treated as a unit. The preamble asserts that "many inhabitants of South Africa live in an environment that is harmful to their health and well-being" and it reaffirms the right to an environment not harmful to health or well-being.¹⁹ Health and well-being also form part of the definition of "environment":

- "environment"** means the surroundings within which humans exist and that are made up of—
- (v) the land, water and atmosphere of the earth;
 - (vi) micro-organisms, plant and animal life;
 - (vii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
 - (viii) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.²⁰

This definition indicates that the drafters of NEMA understood that human health and well-being can be influenced by certain aspects of the objects in (i) and (ii) of the definition. The physical, chemical, aesthetic and cultural dimensions of the environment can have an impact on health and well-being. According to NEMA, therefore, the aesthetic dimension of a particular environment has an effect on

¹⁹ Preamble, National Environmental Management Act 107 of 1998.

²⁰ Section 1.

human health and well-being. The definition of “pollution” in NEMA includes reference to a change in the environment which “has an adverse effect on human health or well-being”. This definition recognises not only the expected potential health impacts of pollution, but it also recognises that experiencing pollution could have an adverse effect on well-being. Pollution that does not have a direct effect on health could nevertheless be seen as harmful to an individual’s well-being and therefore in violation of the environmental right.²¹

Section 2 of NEMA sets out certain principles which must govern environmental management. Section 2(2) states:

Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.²²

These interests provide an indication of the aspects of the human experience with which environmental management should be concerned. Environmental management which seeks to realise the right to an environment not harmful to health or well-being is required by NEMA to serve the individual’s physical, psychological, developmental, cultural and social interests. With reference to the environmental right, Du Plessis argues that “[t]his principle [in section 2(2) of NEMA] and the cluster of interests included therein, arguably lays down a firm guideline for the courts as to the basic constituents of the notion ‘well-being’”.²³ NEMA clearly sees these interests as worthy of concern and central to environmental management and they provide a valuable guideline for the meaning of “health or well-being” in section 24.

NEMA indicates that health and well-being have aesthetic and cultural dimensions. It also recognises the importance of psychological, developmental, social and cultural interests thereby contributing to the interpretation of section 24. Many of these interests are recognised as part of well-being in case law, international law and by commentators on section 24 as will be seen below. The following section examines how health and well-being have been interpreted in South African case law.

²¹ A good example of this is *Fadeyeva v Russian Federation* Application No 55723/00 (1995) ECHR discussed in 4.6 below.

²² Section 2(2), National Environmental Management Act 107 of 1998.

²³ 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* 57-67.

4 5 Health and well-being in case law

While the phrase “health or well-being” in section 24 has not received much attention, there are some cases which shed light on how it should be interpreted. The mention of well-being in these cases (if it is indeed mentioned at all) is often brief and lacking in content. There is, however, some information and direction to be gleaned from these cases which can assist in the interpretation of health and well-being.

The first important case is that of *Minister of Health and Welfare v Woodcarb (Pty) Ltd*²⁴ which was decided under the Interim Constitution. The case concerned air pollution caused by the respondent’s sawmill operations. A ‘Rheese burner’, which burnt excess sawdust and other materials, generated a great deal of smoke containing noxious gases. The court held that such generation of smoke constituted an “infringement of the rights of the respondents’ neighbours to ‘an environment which is not detrimental to their health and well-being’”.²⁵ It is not clear if there were direct health risks due to this smoke or if it was the general well-being of the applicants that resulted in the infringement. Van der Linde and Basson note:

Although the *Woodcarb* court found a violation of the right to an environment that is not detrimental to health or well-being, it did not offer a meaningful interpretation of these concepts [in section 29].²⁶

Woodcarb may not have clarified the meaning of health or well-being very thoroughly, but the case does confirm that air pollution caused by such an industrial plant can lead to an infringement of the health or well-being of others.

The case of *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products*²⁷ similarly dealt with the emission of noxious gases from the tanning process used at the respondent’s tannery. In this case the hydrogen sulphide emanating from the tannery exceeded “both nuisance and public health guidelines” and also caused “considerable corrosion on the applicant’s premises”.²⁸ The court

²⁴ 1996 3 SA 155 (N) (‘*Woodcarb*’).

²⁵ Para 164. This infringement was noted by the court in addition to the legislative violation of the Atmospheric Pollution Prevention Act 45 of 1965 at issue in the case.

²⁶ Van der Linde M & Basson E “Environment” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 2 2010) 50-14.

²⁷ 2004 2 SA 393 (E).

²⁸ 2004 2 SA 393 (E) 640.

points out that the definition of pollution in NEMA includes a change in the environment caused by “odours” that have “an adverse effect on the human health or well-being”.²⁹ This indicates that even outside of a clear threat to health, the presence of the odour in this case could be sufficient to result in harm to well-being. Leach J argues that “[o]ne should not be obliged to work in an environment of stench and [...] to be in an environment contaminated by H₂S is adverse to one’s ‘well-being’”.³⁰ The unpleasant experience of exposure to the odour of the gas is deemed harmful to the well-being of those subjected to it.

In the High Court (Transvaal Provincial Division), the meaning of the environmental right is discussed in the case of *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism*.³¹ Murphy J states that the environmental right “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’”.³² This confirms that the notion of well-being in section 24(a) includes conservation and ecologically sustainable development. These concepts, which are commonly seen as existing for the benefit of the natural environment and not human beings, are deemed important and are seen by the court as integral to human well-being.³³ Murphy J continues by pointing out that while “[t]he term ‘well-being’ is open-ended and manifestly [...] incapable of precise definition”, it remains important to attempt to define it in order for environmental authorities to understand the constitutional objectives they must reach.³⁴ Glazewski is quoted with approval, having described well-being as “a sense of environmental integrity; a sense that we ought to utilize the environment in a morally responsible and ethical manner”.³⁵ Environmental integrity suggests that we should minimise our interference with the natural environment and its ecological equilibrium. The court’s appeal to this concept reinforces the idea that well-being is linked to the healthy existence of an environment which maintains a degree of independence and “integrity”.

²⁹ 2004 2 SA 393 (E) 649.

³⁰ 2004 2 SA 393 (E) 655.

³¹ 2006 5 SA 512 (T).

³² 2006 5 SA 512 (T) para 18.

³³ See chapter 3, 3.3 above.

³⁴ 2006 5 SA 512 (T) para 18.

³⁵ Para 18. See Glazewski J *Environmental Law in South Africa* (2005) 86.

The role of economic and social development in achieving well-being is recognised in *Fuel Retailers v Director-General: Environmental Management*.³⁶ The court points out the reference to economic and social development in section 24(b)(iii) and states that it is “essential to the well-being of human beings”.³⁷ In a footnote Ngcobo J points out the link between well-being and development as recognised in the Declaration on the Right to Development.³⁸ An important component of well-being is thus the capacity for economic and social development. Du Plessis argues that this “rather embryonic observation” about well-being in *Fuel Retailers* has caused confusion and points out that the primary focus of the court’s discussion was sustainable development and the role that economic and social development play in sustainable development.³⁹ She also notes that in *Fuel Retailers* “no attempt has been made to unpack the notion of ‘well-being’ as such”.⁴⁰ While the court could have provided more clarity on the meaning of well-being, this does not discount its recognition of the role of social and economic development in human well-being.

In *Paola v Jeeva NO*⁴¹ the derogation in value of property due to the loss of a view was addressed. This case does not deal directly with section 24 or environmental law, but it has been used in support of the contention that enjoyment of a view could be linked to well-being. Van der Linde and Basson argue:

The reduction in the value of the property that would result from the applicant’s inability to enjoy the magnificent views from his property forms part of the field of protection of the applicant’s right to an environment that is not detrimental to his well-being. The Court’s reasoning clearly recognizes that the aesthetic value (of a magnificent view or some other feature of the environment) falls within the protective ambit of FC s 24(a).⁴²

The ratio of the court’s decision was, however, not due to the owner’s loss of enjoyment of the view. Kidd points out that “the crux of the decision is the market

³⁶ 2007 6 SA 4 (CC) (*Fuel Retailers*).

³⁷ Para 44.

³⁸ Para 44. See footnote 38 of the judgment with reference to UN General Assembly *Declaration on the Right to Development* (4 December 1986) UN Doc A/RES/41/128. Ngcobo J quotes the Declaration’s preamble which defines development as “a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population”.

³⁹ Du Plessis (2008) *SAJELP* 67.

⁴⁰ Du Plessis (2008) *SAJELP* 67.

⁴¹ 2003 4 All SA 433 (SCA).

⁴² Van der Linde & Basson “Environment” in *CLOSA* 50-17.

value of the property and not the view”.⁴³ The derogation of the market value as a result of the view is not the same as the view itself. I would argue that this case cannot be read as support for the contention that the enjoyment of a view is linked to well-being.⁴⁴ To argue that the view in this case is linked to well-being under section 24 is to suggest that well-being is somehow linked to the market value of an individual’s assets. This would, in my opinion, be incorrect. The well-being derived from the aesthetics of the environment is not due to the economic value of property, but rather the subjective experience an individual has when appreciating the view, and the feelings of well-being that accompany that experience.⁴⁵

Lastly, the case of *Oudekraal Estates (Pty) Ltd v City of Cape Town*⁴⁶ illustrates some of the important elements of well-being and how they could find practical application. Although the court refers briefly to section 24, it neither elaborates on the right as a whole, nor the concept of well-being specifically. The case concerned a piece of land along the coast and on the western slopes of Table Mountain that Oudekraal Estates wanted to develop. The land has a cultural and religious significance for the Muslim community of Cape Town due to its historical importance and the location of treasured kramats and graves on the land,⁴⁷ and the court also pointed out the environmental importance of the flora on the undeveloped land.⁴⁸ In addition to this it was noted that the aesthetic beauty of the land contributed to its tourism value.⁴⁹ The facts of the case illustrate how cultural or religious well-being could be adversely affected by changes in the environment and the destruction of important sites. The land in question contributed to the spiritual, cultural and social well-being of the Muslim community and its destruction would have resulted in

⁴³ Kidd M “‘The view I behold on a sunshiny day’: *Paola v Jeeva NO*” (2004) 121 *SALJ* 556 562.

⁴⁴ That is not to say that an appreciation of the aesthetics of the environment should not be a component of well-being, but rather that this case does not support that view as has been suggested, and that a derogation in market value of a property should not be equated with harm to well-being.

⁴⁵ Many studies confirm that the enjoyment or appreciation of certain views can have a direct impact on well-being with regard to subjective positive, happy feelings and more objective impacts such as stress reduction and illness recovery. See White M, Alcock I, Wheeler BW & Depledge MH “Would you be happier living in a greener urban area? A fixed-effects analysis of panel” (2013) 24 *Psychological Science* 920; Thompson CW “Linking landscape and health: The recurring theme” (2011) 99 *Landscape and Urban Planning* 187; Velarde MD, Fry G & Tveit M “Health effects of viewing landscapes: Landscape types in environmental psychology” (2007) 6 *Urban Forestry & Urban Greening* 199; Zelenski JM & Nisbet EK “Happiness and feeling connected: The distinct role of nature relatedness” (2014) 46 *Environment and Behaviour* 3.

⁴⁶ 2004 6 SA 222 (SCA) (*‘Oudekraal’*).

⁴⁷ Paras 9, 25, 41 & 70.

⁴⁸ Paras 5-8 & 71.

⁴⁹ Para 71.

significant harm to well-being. The tourism value of the land also serves as an example of how the destruction of a specific landscape can affect the economic interests of a community. The destruction of the landscape diminishes tourism revenue, which in turn influences employment, the economy and the economic well-being of the population.⁵⁰

The case law discussed above confirms that health and well-being in section 24 includes protection from pollution, concerns related to conservation, and socio-economic concerns related to development. The case of *Oudekraal* illustrates how environmental harm can impact on cultural and religious interests and suggests that these should be included in well-being. Ultimately well-being is an open-ended term which will need to continue evolving and adapting as the courts are faced with changing environmental circumstances and needs. The international law understandings of health and well-being can assist in guiding the courts as they give meaning to section 24. These are discussed in the following section.

4 6 Health and well-being in international law

As noted in chapter 2, international law is an important source to consult when interpreting rights in the Bill of Rights.⁵¹ There is a wide range of international law dealing with health and well-being, and the scope of this chapter unfortunately does not allow for a detailed discussion of all these. The most relevant of the available international sources will be discussed in this section, particularly those related to the environment.

The Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration)⁵² was one of the very first international documents that included a right to the environment. Principle 1 of the Stockholm Declaration reads as follows:

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

⁵⁰ Of course in order to constitute a violation of section 24 the causal link between the destruction of the landscape and the impact on the economy would need to be made clear.

⁵¹ See chapter 2, 2 2 2 2 1.

⁵² Declaration of the United Nations Conference on the Human Environment (Stockholm, June 1972) UN Doc A/CONF.48/14/Rev.1.

generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.⁵³

This first principle links the concept of well-being to dignity, while also implying that the prerequisites for a life of dignity and well-being are freedom, equality and adequate conditions of life. It is important to note that the protection and improvement of an environment that permits dignity and well-being is explicitly linked to the elimination of oppression, discrimination and segregation. This suggests that social and political aspects of the environment are considered to be essential features of well-being. It is particularly interesting to note the presence of the values which are foundational to constitutional interpretation in South Africa.⁵⁴ Freedom, equality and dignity each play a role in this right, and should, as is demonstrated by the Stockholm Declaration, play a central role in the achievement of human well-being. Well-being in section 24 should be understood to include these values and an environment which harms an individual or community's freedom, equality or dignity would be in violation of the environmental right.

The Stockholm Declaration also asserts that “[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being”.⁵⁵ This recognition of the role of the natural and man-made environments in well-being shows that well-being should include concerns relating to both. Well-being in the natural environment would be linked to concerns such as conservation and the protection of biodiversity, or the pollution of the environment, whereas the state of the built environment would impact upon well-being where, for example, damaged roads prevent access to basic services.

While the Stockholm Declaration does mention health, it is not in relation to the general right to the environment, but with reference to the impact of pollution in specific instances.⁵⁶ It is not unreasonable to suggest that the Stockholm Declaration's conception of well-being encompasses health and that it was therefore considered unnecessary to mention a right to an environment which permits a life of health and well-being. The right to health is, however, mentioned more frequently in

⁵³ Principle 1.

⁵⁴ See chapter 2, 2.3.3.2 with regard to the constitutional values of freedom, equality and dignity.

⁵⁵ Declaration of the United Nations Conference on the Human Environment (Stockholm, June 1972) UN Doc A/CONF.48/14/Rev.1 Proclamation 1.

⁵⁶ Proclamations 3, 4 & principle 7.

international law and therefore offers more direction for the interpretation of “health or well-being” in section 24.

The International Covenant on Economic, Social and Cultural Rights⁵⁷ includes a right to health in article 12. The Committee on Economic, Social and Cultural Rights elaborates on the right and notes that the right includes physical and mental health, and does not merely concern the right to health care.⁵⁸ It further explains:

[T]he right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.⁵⁹

The underlying determinants of health identified here could also be seen as determinants of well-being for the purposes of section 24 where they impact on quality of life and wellness but fall short of impacting on physical or mental health. The Committee also notes that health in article 12 does not have the meaning given to health by the World Health Organisation (WHO).⁶⁰ The definition of health used by the WHO describes health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.⁶¹ This definition affirms the role of physical, mental and social factors in human well-being. Despite the Committee adopting a narrower definition of health under the ICESCR, the WHO’s notion of health is still applicable for the interpretation of section 24. As noted in 3.3 above, “health or well-being” form a logical disjunction in section 24 and the right protects individuals from harm to health or well-being, so which of the two is relied on is largely immaterial as either will fall within the ambit of section 24(a). The features of both definitions adopted by the Committee on Economic, Social and Cultural Rights and the World Health Organisation should be covered by the scope of section 24.

⁵⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

⁵⁸ UN Committee on Economic, Social and Cultural Rights General Comment No. 14: *The right to the highest attainable standard of health (Art. 12 of the Covenant)* (2000) UN Doc E/C. 12/2000/4 para 4.

⁵⁹ UN CESCR General Comment No. 14: *The right to the highest attainable standard of health (Art. 12 of the Covenant)* (2000) UN Doc E/C. 12/2000/4 para 4. See also para 11.

⁶⁰ UN CESCR General Comment No. 14: *The right to the highest attainable standard of health (Art. 12 of the Covenant)* (2000) UN Doc E/C. 12/2000/4 para 4.

⁶¹ Preamble, World Health Organization Constitution (adopted June 1946 and entered into force 7 April 1948) 14 UNTS 185.

As indicated in 4 5 above, there are important links between development and well-being, and these are evident in international law. The preamble of the United Nations Declaration on the Right to Development describes development as follows:

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.⁶²

The right to development establishes a link between well-being and development. Development in this context is made up of economic, social, cultural and political aspects. As was noted above, *Fuel Retailers* makes reference to the right to development and the court's discussion of well-being has been criticised for being "embryonic" and leading to confusion.⁶³ However, in light of the clear link between environment and development in the international arena,⁶⁴ the mention in *Fuel Retailers* of the role that development plays in achieving well-being under section 24 seems appropriate. This means that the economic, social, cultural and political dimensions of development are all contributing factors to human well-being. It is also not insignificant that the environmental right in the African Charter on Human and Peoples' Rights (African Charter)⁶⁵ also emphasises development as it entitles people to "a general satisfactory environment favourable to development".⁶⁶

The African Charter also includes a right to development, which is linked to well-being in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.⁶⁷ Although the African Commission on Human and People's Rights does not explicitly endorse this interpretation, the complainants proposed interpretation of development is noted by the Commission:

[T]he Complainants argue [that] it is clear that development should be understood as an increase in peoples' well-being, as measured by capacities and choices available. The realisation of the right to development, they say, requires the improvement and increase in capacities and choices. They argue that the Endorois have suffered a loss

⁶² UN General Assembly *Declaration on the Right to Development* (4 December 1986) UN Doc A/RES/41/128.

⁶³ Du Plessis (2008) *SAJELP* 67.

⁶⁴ With regard to the link between environment and development see chapter 3, 3 6.

⁶⁵ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

⁶⁶ Article 24.

⁶⁷ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication No 276/2003 (2010) ACHPR ('Endorois').

of well-being through the limitations on their choice and capacities, including effective and meaningful participation in projects that will affect them.⁶⁸

It could be argued then, that development which is carried out without the participation of those affected, and which does not allow for flexibility and choice, could be deemed harmful to well-being. In light of the important role of development in international law, and the references to development in section 24 of the Constitution itself, development should be considered a component of well-being.

The position of indigenous communities, and the impact of development on their environment and well-being, has been recognised in the international context. The United Nations Conference on Environment and Development (UNCED) produced Agenda 21 which acknowledges “the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people”.⁶⁹ Agenda 21 suggests that sustainable development should consider of the impact of development on these communities and recognises that their environment plays a vital role in their cultural, social, economic and physical well-being.⁷⁰ This link between indigenous or traditional communities and the environment is similarly illustrated in *Endorois*.⁷¹ Amongst other violations, the Endorois community’s restricted access to religiously significant ancestral land was held to be a violation of the right to freedom of religion⁷² as well as their cultural rights.⁷³ The African Commission held that the protection of human rights “requires respect for, and the protection of their [minority groups] religious and cultural heritage essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues”.⁷⁴ This confirms the importance of culturally or religiously significant features of the environment for the well-being of individuals or communities.

⁶⁸ Para 129. See also para 277-278 where the African Commission confirms that the right to development requires participation and freedom of choice.

⁶⁹ Agenda 21 (Rio de Janeiro, June 1992) A/CONF.151/26 (Vol I-II) para 26.1.

⁷⁰ Agenda 21 (Rio de Janeiro, June 1992) A/CONF.151/26 (Vol I-II) para 26.1. See also Beyerlin U & Maruhn T *International Environmental Law* (2011) 404.

⁷¹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication No 276/2003 (2010) ACHPR (*Endorois*).

⁷² Para 44.

⁷³ Para 250.

⁷⁴ Para 241.

The case of *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*⁷⁵ demonstrates the extent of impact that environmental degradation can have on health and well-being. In this case the exploitation of oil reserves and dumping of toxic waste in a region of Nigeria ultimately led to a range of severe health consequences for those living in the area.⁷⁶ The African Commission noted that the rights to health and to a general satisfactory environment “recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual”.⁷⁷ *SERAC* confirms the important link between the environment, economic and social rights, and quality of life or well-being.

In *Maya Indigenous Community of the Toledo District v Belize* the Inter-American Commission on Human Rights recognises the physical, cultural and spiritual facets of well-being and how they are impacted by environmental degradation.⁷⁸ The case emphasises that these facets of well-being are particularly important for indigenous communities whose lifestyles are more intimately connected with the environment. The recognition of the way of life of indigenous communities in the interpretation of well-being reinforces the value of freedom in the Constitution as it emphasises the importance of allowing room for different lifestyles, cultures and religions.

Environmental harm has also been linked to the right to privacy and family life in international law. Despite the absence of an environmental right in the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),⁷⁹ De Wet and Du Plessis point out that the European Court “frequently makes reference to the impact of the particular environmental situation on the health and well-being of the claimants”.⁸⁰ The European Court is not clear on the meaning

⁷⁵ Communication No 155/96 (2001) ACHPR (‘*SERAC*’).

⁷⁶ The health consequences in this case included “skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems”. See para 2.

⁷⁷ Para 51.

⁷⁸ *Maya Indigenous Community of the Toledo District v Belize* Inter-American Commission on Human Rights Case 12.053, Report No. 40/04 (2004) para 150. See also Beyerlin U & Marauhn T *International Environmental Law* (2011) 397.

⁷⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953, as amended by additional protocols) 213 UNTS 222.

⁸⁰ De Wet E & Du Plessis A “The meaning of certain substantive obligations distilled from international human rights instruments for constitutional environmental rights in South Africa” (2010) 10 *AJHR* 345 357.

of health and well-being in the environmental context, but De Wet and Du Plessis note that the Court has recognised a link between well-being and the enjoyment of home and family life.⁸¹ This is evident in *López Ostra v Spain*:⁸²

[S]evere environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.⁸³

Similarly, in *Fadeyeva v Russian Federation*⁸⁴ the applicant was successful in claiming a violation of Article 8 of the European Convention despite failing to prove harm to her health.⁸⁵ In this case significant air pollution was caused by the operation of the Severstal steel plant in close proximity to the applicant's home. Although the applicant could not show quantifiable harm to her health as a result of the steel plant, the quality of her home life was adversely affected and this was sufficient.⁸⁶ Exposure to pollution can therefore affect the quality of an individual's life at home and could be an important indicator of environmental harm to well-being. Excessive pollution could, for example, impact on an individual's ability to be at peace and enjoy their own home, which ultimately impacts on overall well-being.

The international law discussed confirms that "health or well-being" is an extensive phrase which should include conservation, protection from pollution, cultural dimensions of the environment and, importantly, concerns related to development. Having considered some of the international law dealing with health and well-being, I will now turn to the views of various commentators and academics on the meaning of health and of well-being.

4 7 Academic opinion

Academic opinions on the notions of health and well-being are varied. A range of interests and concerns have been suggested as components of well-being, and

⁸¹ De Wet & Du Plessis (2010) *AJHR* 357.

⁸² *López Ostra v Spain* Application No 16798/90 (1994) ECHR.

⁸³ Para 51. See also Beyerlin U & Marauhn T *International Environmental Law* (2011) 400 and Shelton D "Using law and equity for the poor and the environment" in Le Bouthillier Y, Cohen MA, Marquez JJG & Smith AMS (eds) *Poverty Alleviation and Environmental Law* (2012) 11 26.

⁸⁴ *Fadeyeva v Russian Federation* Application No 55723/00 (1995) ECHR.

⁸⁵ Shelton "Using law and equity for the poor and the environment" in *Poverty Alleviation and Environmental Law* 27.

⁸⁶ Shelton "Using law and equity for the poor and the environment" in *Poverty Alleviation and Environmental Law* 27.

these will be discussed below. In addition to the views on the environmental right and section 24, there are also useful perspectives on well-being from other disciplines. These could inform the interpretation of the right and are also important to consider. I will begin by briefly examining interpretations of health while the remainder of this section will focus on the meaning of well-being.

Before defining health in the context of the environmental right, it is important to distinguish it from the right to health care services.⁸⁷ Glazewski points out that the right to a healthy environment is broader than access to health care in section 27.⁸⁸ He notes that “[a] particular environment may be damaging to a person’s health, yet avoid falling foul of the right concerning health provided for in section 27”.⁸⁹ Health has been linked to a sense of mental and physical integrity,⁹⁰ and can refer to individuals or to the greater public.⁹¹ Public health would be affected in situations where large scale pollution affects the health of entire communities. Du Plessis argues that health impacts on future generations should also be given consideration when interpreting health in section 24.⁹² She notes that “[p]henomena such as environmental change and, in particular, climate change, can [...] have severe impacts on the health conditions of future generations of people”.⁹³ This is particularly important in light of the principle of intergenerational equity which is referred to in section 24(b).

As noted in 4.3, the notion of well-being is broader than that of health.⁹⁴ Health forms a part of well-being, but well-being extends beyond this. There is a range of possible factors that could be included within well-being and there are different opinions about what the term should include. Most commentators agree, however, that well-being in section 24 is broad enough to cover concerns related to the natural environment such as conservation, environmental integrity, the protection of

⁸⁷ The relationship between section 24 and the right to health care services in section 27 is discussed in chapter 2, 2.3.4.7 above.

⁸⁸ Glazewski J “The Bill of Rights and environmental law” in J Glazewski & L Du Toit (eds) *Environmental Law in South Africa* (OS 2013) 5-15.

⁸⁹ Glazewski “The Bill of Rights and environmental law” in *Environmental Law in South Africa* 5-15.

⁹⁰ Du Plessis (2008) *SAJELP* 64; Kotzé LJ “The judiciary, the environmental right and the quest for sustainability in South Africa: A critical reflection” (2007) 16 *Review of European, Comparative & International Environmental Law* 298-300; Du Plessis A “South Africa’s constitutional environmental right (generously) interpreted: What is in it for poverty?” (2011) 27 *SAJHR* 279-293.

⁹¹ Du Plessis (2008) *SAJELP* 64; Kotzé (2007) *RECIEL* 300.

⁹² Du Plessis (2008) *SAJELP* 65.

⁹³ Du Plessis (2008) *SAJELP* 65.

⁹⁴ Du Plessis (2011) *SAJHR* 296.

ecosystems, biodiversity and natural habitats.⁹⁵ As seen in 4.3 above, the rest of the right supports such an interpretation. This confirms that a person's sense of well-being is linked to the well-being of the environment.⁹⁶

Feris argues that the inclusion of well-being in section 24 allows the right to encompass "important concerns of environmental law such as the conservation of fauna and flora or the maintenance of bio-diversity" which would not fall under the ambit of health.⁹⁷ Du Plessis similarly distinguishes the ambit of well-being from that of health:

Whereas the notion of 'health' covers issues of contamination, 'well-being' should be understood to afford protection against the destruction of natural habitats, which does not necessarily have direct health impacts.⁹⁸

Conservation and the protection of the natural environment are widely considered to be important aspects of the notion of well-being. Van der Linde and Basson suggest that "the desire to protect the 'fynbos' unique to the Western Cape from a hazardous building project might, for example, be captured under an expansive understanding of well-being".⁹⁹ Feris and Tladi also argue that well-being is dependent on "conservation and the maintenance of wilderness areas and biodiversity".¹⁰⁰ Glazewski elaborates on the inclusion of conservation under well-being:

⁹⁵ Kidd *Environmental Law* 23; Du Plessis (2011) *SAJHR* 295; Du Plessis (2008) *SAJELP* 65; Van der Linde & Basson "Environment" in *CLOSA* 50-16; Glazewski "The Bill of Rights and environmental law" in *Environmental Law in South Africa* 5-16-5-17; Feris LA & Tladi D "Environmental rights" in D Brand & C Heyns *Socio-Economic Rights in South Africa* (2005) 249 260; Feris L "Environment" in Currie I & De Waal J (eds) *The Bill of Rights Handbook* 5 ed (2006) 526; Glazewski J "Environmental rights and the new South African Constitution" in Boyle AE & Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1998) 177 188; Glazewski J "Environmental justice and the new South African democratic legal order" (1999) *Acta Juridica* 1 7; Loots C "The impact of the Constitution on environmental law" (1997) 4 *SAJELP* 57 58.

⁹⁶ See Du Bois F "'Well-being' and 'the common man': A critical look at public interest environmental law in South Africa and India" in *Public Interest Perspectives in Environmental Law* (1995) 142. Du Bois argues that it is possible to improve human well-being while simultaneously harming the environment, and suggests that this would result in a clash of interests under section 24. While there would be a conflict of interests of the environment versus the people concerned, it is important to remember that section 24(a) protects *people* from harm, and not the environment. However, where harm to the environment negatively impacts the well-being of individuals, the right is violated because human well-being *is* harmed. Of course the state's obligations under section 24(b) would also need to be considered in such instances.

⁹⁷ Feris "Environment" in *Bill of Rights Handbook* 526.

⁹⁸ Du Plessis (2008) *SAJELP* 65.

⁹⁹ Van der Linde & Basson "Environment" in *CLOSA* 50-16.

¹⁰⁰ Feris & Tladi "Environmental rights" in *Socio-Economic Rights in South Africa* 260.

[T]he term “well-being” encompasses the essence of environmental concern, namely a sense of environmental integrity; a sense that we ought to utilise the environment in a morally responsible, considered and ethical manner.¹⁰¹

This suggests that our well-being is dependent on that of the environment and that morally responsible behaviour can contribute to well-being.

Another aspect of well-being which many academics agree on is that it includes the aesthetic value of features of the environment.¹⁰² While there is some consensus on the inclusion of aesthetic elements in well-being, few commentators elaborate on precisely what that might mean or where it would find application. De Wet and Du Plessis suggest that well-being could refer to interests people have in the environment and, by way of example, they refer to “the aesthetic value of a wetland that attracts different bird species”.¹⁰³ Kotzé also refers to aesthetics as an example of an interest that people have in the environment and offers the example of an ocean view being included under well-being because of its aesthetic value.¹⁰⁴

This aesthetic value of a certain feature or portion of the environment has also been linked to the idea of a ‘sense of place’.¹⁰⁵ This is arguably as vague and elusive a concept as that of well-being, but it is associated with the aesthetics and specific identity of a place. A certain place has value to people for some reason (spiritual, psychological or cultural, for example) and is therefore linked to their well-being. Glazewski argues that a ‘sense of place’ was one of the reasons for not mining in St Lucia in Kwa-Zulu-Natal in the 1990s,¹⁰⁶ while Du Plessis links ‘sense of place’ to the built environment “when the identity or economic value of a particular setting or settlement has everything to do with the surrounding natural environment”.¹⁰⁷ In these examples it is the attachment that people have to the aesthetic appeal of the place which links it to their well-being. To destroy or damage such an environment

¹⁰¹ Glazewski “The Bill of Rights and environmental law” in *Environmental Law in South Africa* 5-17.

¹⁰² Kidd “Environment” in *Bill of Rights Handbook* 522; Kidd *Environmental Law* 23; Du Plessis (2011) *SAJHR* 295; Van der Linde & Basson “Environment” in *CLOSA* 50-17; Du Plessis (2008) *SAJELP* 65-66; Kotzé (2007) *RECIEL* 300; Feris “Environment” in *Bill of Rights Handbook* 526; Glazewski “Environmental rights and the new South African Constitution” in *Human Rights Approaches* 187.

¹⁰³ De Wet & Du Plessis (2010) *AJHR* 363, footnote 89.

¹⁰⁴ Kotzé (2007) *RECIEL* 300.

¹⁰⁵ Kidd “Environment” in *Bill of Rights Handbook* 522; Kidd *Environmental Law* 23; Du Plessis (2008) *SAJELP* 66; Glazewski “The Bill of Rights and environmental law” in *Environmental Law in South Africa* 5-16; Du Plessis (2011) *SAJHR* 295.

¹⁰⁶ Glazewski “The Bill of Rights and environmental law” in *Environmental Law in South Africa* 5-16.

¹⁰⁷ Du Plessis (2008) *SAJELP* 66.

would constitute harm to the individual who is no longer able to appreciate or enjoy that environment as it has lost its identity and that which made it appealing.

While aesthetics may seem like a superficial or trivial aspect of the environment, a closer look at studies on the impact of landscape and the appearance of environments illuminates the link between well-being and this appearance. A study by Thompson and Kent found that “the perceived ability to escape to green spaces away from noise and overcrowding was significantly linked to mental well-being”.¹⁰⁸ This would be particularly important where high density city living is concerned.¹⁰⁹ Exposure to natural landscapes with an aesthetic appeal has also been found to contain numerous benefits for individuals such as “reduced stress, improved attention capacity, facilitating recovery from illness, ameliorating physical well-being in elderly people, and behavioural changes that improve mood and general well-being”.¹¹⁰ Even the presence of “natural elements” in a home (gardens or indoor plants, for example) has a significant impact on cognitive functioning in children.¹¹¹ This handful of examples indicates that the aesthetic dimensions of the environment have far more to do with well-being than the brief pleasure of appreciation or a simple preference for a certain landscape. There are clear benefits to well-being which can be gained from the environment – particularly the natural environment – whether in the form of vegetation in a home, trees in an informal settlement or the preservation of a national park located hours from an individual’s home. These benefits range from highly subjective aspects of well-being such as feelings of happiness, to the more objective benefits of recovery from illnesses and cognitive functioning.

¹⁰⁸ Thompson S & Kent J “Connecting and strengthening communities in places for health and well-being” (2013) *Australian Planner* 1 4. It is interesting to note that a benefit to well-being is gained through the *perceived* ability to access these areas. Whether or not the people ever actually go there is another matter. This confirms the suggestion made by some commentators (discussed below) that harm to the environment *anywhere* could be seen as harm to well-being, regardless of whether people intend to visit the place in question.

¹⁰⁹ The availability of such ‘green spaces’ involves the knowledge of freedom of access to these places (whether or not it is exercised). This is important in light of the infringement of freedom under the apartheid regime such as, for example, the limited and segregated access to beaches. The value of freedom in the Constitution, read with the environmental right, suggests that such spaces should be protected and maintained in order that all South Africans have the opportunity to benefit from the capacity of natural landscapes to promote well-being.

¹¹⁰ Velarde, Fry & Tveit (2007) *Urban Forestry & Urban Greening* 210.

¹¹¹ Adams S & Savahl S “Children’s perceptions of the natural environment: A South African perspective” (2013) *Children’s Geographies* 1 4.

Although it is clear that the physical appearance of the environment (and the human response to it) is a component of well-being, it is important to note that this will not mean that every diminishment of aesthetics will result in harm to well-being. Harm to well-being would likely be easier to substantiate where more objective facets of well-being have been negatively affected.¹¹² As noted above, Liebenberg suggests that the right requires more than an “emotional insecurity or aesthetic discomfort”.¹¹³ The aesthetic qualities of a particular environment are often linked to other interests that could be affected if those qualities were lost. It has been noted that there could be cultural, spiritual or psychological interests that relate to the physical features of the environment.¹¹⁴ Aesthetic features of the environment could also have important links to tourism revenue.¹¹⁵ If it can be shown that the aesthetics of the environment have an impact on one of these interests it could be easier to argue that there has been harm to well-being. This link could avoid the unnecessary application of section 24 to instances of mere “aesthetic discomfort”.¹¹⁶

The spiritual and cultural significance of certain elements of the environment has been recognised as forming part of the notion of well-being.¹¹⁷ The significance of the environment in these respects could be general or specific. Specific “rock formations, water courses or soil” could have cultural or religious value to certain groups.¹¹⁸ Examples of cultural and spiritual or religious significance linked to physical features of the environment are seen in the cases of *Oudekraal* and *Endorois* discussed above.¹¹⁹

More broadly speaking, it has been proposed that “the notion of ‘well-being’ includes spiritual or psychological aspects such as the individual’s need to be able to

¹¹² See 4 3 above for a brief discussion of harm.

¹¹³ Liebenberg “Environment” in *Fundamental Rights in the Constitution* 259.

¹¹⁴ Du Plessis (2011) *SAJHR* 295.

¹¹⁵ See *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) and 4 5 above.

¹¹⁶ Liebenberg “Environment” in *Fundamental Rights in the Constitution* 259. Of course the aesthetics of the environment could also be linked to the more objective benefits noted in the paragraph above, such as reduction in stress, recovery from illness and increased cognitive functioning in children.

¹¹⁷ Kidd “Environment” in *Bill of Rights Handbook* 522; Kidd *Environmental Law* 23; Du Plessis (2011) *SAJHR* 295; Kotzé & Du Plessis (2010) *Journal of Court Innovation* 166-167; Du Plessis (2008) *SAJELP* 65-66; Kotzé (2007) *RECIEL* 300; Feris & Tladi “Environmental rights” in *Socio-Economic Rights in South Africa* 260; Feris “Environment” in *Bill of Rights Handbook* 526; Glazewski “Environmental rights and the new South African Constitution” in *Human Rights Approaches* 187.

¹¹⁸ Du Plessis (2008) *SAJELP* 66. See also Kotzé & Du Plessis (2010) *Journal of Court Innovation* 166-167.

¹¹⁹ See 4 5 and 4 6.

commune with nature”.¹²⁰ Glazewski also notes the importance of access to wilderness and wild places for human well-being.¹²¹ Numerous studies indicate the value of access to the natural environment, even in small doses such as the presence trees in public spaces.¹²²

In addition to the above components of well-being proposed by commentators on section 24, the social and economic dimensions of well-being have also been acknowledged.¹²³ Feris and Tladi note, for example, that indigenous groups often “depend on biodiversity as a source of nutrition and for its medicinal and cultural value” and the loss of this biodiversity could be considered harmful to their social well-being.¹²⁴ It has also been argued that well-being should include “the enjoyment of a sustainable livelihood”.¹²⁵ This suggests that where the environment impacts negatively on employment and businesses, it could result in harm to well-being.¹²⁶

The economic dimensions of well-being are particularly significant where poverty is concerned. The relationship between poverty and well-being is an important one as poverty impacts well-being in a variety of ways. Shelton examines the relationship between poverty, the environment and well-being and notes that “poverty is not merely about income or wealth, but encompasses the capability of an individual or group to access the various elements that contribute to well-being”.¹²⁷ In other words, the poor lack access to that which can improve their well-being. Du Plessis also recognises this link between poverty and well-being:

¹²⁰ Feris “Environment” in *Bill of Rights Handbook* 526.

¹²¹ Glazewski “Environmental rights and the new South African Constitution” in *Human Rights Approaches* 187; Feris & Tladi “Environmental rights” in *Socio-Economic Rights in South Africa* 260.

¹²² Ulrich RS “Human responses to vegetation and landscapes” (1986) 13 *Landscape and Urban Planning* 29 39; Thompson & Kent (2013) *Australian Planner* 2-4.

¹²³ Kotzé & Du Plessis (2010) *Journal of Court Innovation* 166-167; Kotzé (2007) *RECIEL* 300; Glazewski (1999) *Acta Juridica* 7.

¹²⁴ Feris & Tladi “Environmental rights” in *Socio-Economic Rights in South Africa* 260.

¹²⁵ Kotzé & Du Plessis (2010) *Journal of Court Innovation* 166-167. See also Du Plessis (2011) *SAJHR* 296.

¹²⁶ See for example *Sole NO v Minister of the Department of Agriculture, Forestry and Fisheries* (356/13) 2013 ZAWCHC 94 (13 June 2013) SAFLII <<http://www.saflii.org/za/cases/ZAWCHC/2013/94.html>> (accessed 26-08-2014). In that case the court did not grant an interdict preventing all fishery of the West Coast Rock Lobster (WCRL) due to lack of evidence that the species was in danger. It was held that the court “should also bear in mind the huge financial implications and social upheaval that would be caused”. The use of the WCRL as a natural resource allowed for the employment of many individuals, and it could be argued that preventing all fishery of WCRL could be harmful to the well-being of those whose livelihoods are imperilled. See para 21.

¹²⁷ Shelton “Using law and equity for the poor and the environment” in *Poverty Alleviation and Environmental Law* 14.

[L]iving in poverty results in an inadequate experience of well-being and [...] this has a direct impact on people's ability to be content with their environment, to enjoy a sustainable livelihood and to protect their inherent dignity. In fact, the notions of poverty and well-being appear to be mutually exclusive. The well-being of poor people is in most instances directly affected by factors related to poverty, their insecure, unhealthy and often intolerable work and living environments. But when poor people have to live off scarce natural resources and/or their living spaces are established in sensitive or protected ecosystems this could also impact on their well-being and that of future generations of other poor and non-poor people.¹²⁸

It is significant to note that the well-being of poor people, while having strong links to immediate material needs, is also bound up in the state of natural ecosystems and natural resources. The way the poor live today has an impact on the well-being of future generations. One could perhaps argue that there is a hierarchy of needs covered by the concept of well-being. The needs of the poor which relate to well-being are more immediate than others and possibly even life-threatening. In the interests of substantive equality it may be necessary to prioritise objective material deprivation over more subjective threats to well-being. For example, where the well-being of one community in relation to access to a public park comes into conflict with the urgent need of another community displaced by floods, the urgent material needs of the latter community should arguably come first.¹²⁹ An awareness of how poverty interacts with well-being alerts us to the tensions between the different dimensions of well-being and how they impact people differently.

The right and constitutional value of human dignity is also important for understanding how the environment affects well-being. Du Plessis emphasises this relationship between dignity and well-being:

Further in-depth interpretation and analysis of the notion of 'well-being' is also likely to reveal scientifically valid links between well-being, dignity (a constitutional value), and the individual's constitutional right to have his or her inherent human dignity protected.¹³⁰

Where an aspect of the physical environment impacts negatively on an individual's human dignity it could then be argued that this constitutes harm to well-being under section 24. This interpretation would be particularly important for the experiences of

¹²⁸ Du Plessis (2011) *SAJHR* 296.

¹²⁹ For an example of a similar situation see the facts of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 3 SA 1151 (CC).

¹³⁰ Du Plessis (2011) *SAJHR* 296.

the poor in, for example, informal settlements where lack of access to clean toilets could constitute an infringement of human dignity and of well-being.

Commentators have suggested well-being could be affected where the environmental harm takes place in a geographically remote location.¹³¹ Kidd maintains that well-being does not have to be connected to a person's immediate environment. While discussing the aesthetics of the environment and a 'sense of place' he argues:

[A] person's well-being may be detrimentally affected when there is a threat or damage to the environment in a place that is not only geographically distant from that person but also somewhere that person has never been nor intends to go in the future. For example, a person in Johannesburg may legitimately allege that her environmental well-being is detrimentally affected by a threat to the natural environment at St Lucia, one of South Africa's World Heritage Sites. This raises the idea that knowledge or reasonable anticipation of a threat to the environment anywhere may have an impact on a person's environmental well-being.¹³²

This idea has been reiterated by Kotzé and Du Plessis who include a threat to natural resources as a potential harm to well-being regardless of the location of the harm.¹³³

It is necessary to note here that the timing of harm should also be considered in the interpretation of well-being. As already noted with reference to health, the future impacts on well-being must be considered. Glazewski notes that an environment which does not harm well-being points to "a sense of stewardship, that people are the custodians of the environment for future generations".¹³⁴ This interpretation is supported by the reference to the needs of future generations in section 24(b), and is underscored by obligation to consider equality when interpreting the Bill of Rights.¹³⁵ Action taken today should therefore not be harmful to well-being immediately or in the future.

In addition to the legal perspectives on the meaning of well-being that I have discussed, well-being can also be interpreted from a social sciences perspective.

¹³¹ Kidd "Environment" in *Bill of Rights Handbook* 522; Kidd *Environmental Law* 23; Du Plessis (2011) *SAJHR* 295; Kotzé & Du Plessis (2010) *Journal of Court Innovation* 166-167.

¹³² Kidd *Environmental Law* 23.

¹³³ Kotzé & Du Plessis (2010) *Journal of Court Innovation* 166-167.

¹³⁴ Kotzé & Du Plessis (2010) *Journal of Court Innovation* 166-167.

¹³⁵ In this instance it is intergenerational equity which is at issue. While this is not a form of discrimination explicitly referred to in the right to equality, it should remain a consideration under the value of equality which must permeate all constitutional interpretation. See chapter 5, 5 7 3 2 below.

Kidd examines some of these extra-legal sources in order to examine how they have interpreted well-being.¹³⁶ McGregor's definition of well-being includes being with others, having needs met, a meaningful pursuit of goals and a satisfactory quality of life.¹³⁷ Doyal and Gough argue that health and autonomy are basic dimensions of human need.¹³⁸ Health relates to the state of the body and the material needs that must be met in order to maintain physical health such as food, water and shelter.¹³⁹ Autonomy relates to the individual's freedom to make decisions and achieve personal goals.¹⁴⁰ While health is not a novel concept, this inclusion of autonomy as a component of well-being could be helpful in illustrating how the value of freedom could be incorporated into the interpretation of the environmental right.¹⁴¹

Social sciences perspectives on well-being confirm the important links between poverty and well-being (or lack thereof) that have been recognised above. Kidd argues that "[p]overty involves, in short, the absence of well-being"¹⁴² but also notes that there is a move away from the emphasis on material deprivation in poverty studies. McGregor and Sumner refer to the idea of '3-D well-being' which suggests that there are three dimensions of well-being: "the material, the relational and the subjective (also referred to as perceptual)".¹⁴³ It is argued that all three of these should be considered when determining well-being.¹⁴⁴ This is important to note if we consider well-being as encompassing social and cultural elements as well. A poor rural community could be seen as lacking in well-being with regard to material needs, but it could be thriving where social and cultural needs are concerned. On the other hand, it is equally possible for a single wealthy city-dweller to experience extreme isolation and a lack of relational well-being despite all material needs being met. The poor are not bereft of all sense of well-being due to their economic status and neither are the wealthy guaranteed well-being because of theirs. The likelihood is of course that the poor experience more harm to well-being than the wealthy as a

¹³⁶ Kidd "Environment" in *Bill of Rights Handbook* 520-522. While this is a fascinating area for research into the notion of well-being, the scope of this thesis does not allow for more than an overview of Kidd's findings which are a result of his own brief foray into social sciences theories on well-being.

¹³⁷ Kidd "Environment" in *Bill of Rights Handbook* 520.

¹³⁸ Kidd "Environment" in *Bill of Rights Handbook* 520.

¹³⁹ Kidd "Environment" in *Bill of Rights Handbook* 520.

¹⁴⁰ Kidd "Environment" in *Bill of Rights Handbook* 520-521.

¹⁴¹ See chapter 2, 2 2 3 4 and 2 3 3 2.

¹⁴² Kidd "Environment" in *Bill of Rights Handbook* 521.

¹⁴³ Kidd "Environment" in *Bill of Rights Handbook* 521.

¹⁴⁴ Kidd "Environment" in *Bill of Rights Handbook* 521.

result of the lack of autonomy that accompanies a lack of financial resources. The wealthy are often in a position to access what is necessary in order to fulfil their own needs if it is not provided for them, whereas the poor are forced to make do with what they have. In considering the effect of poverty on well-being, it is important not to forget that well-being consists not only of a material dimension but, following McGregor and Sumner's approach, relational and subjective dimensions as well.

Kidd's discussion of these social sciences theories of well-being illustrates how useful these perspectives can be in understanding the possible application of well-being in the context of the environmental right. He notes that many of these ideas overlap with existing rights in the Bill of Rights:

What ideas such as those of McGregor, and Doyal and Gough, indicate is that well-being incorporates several dimensions that would be addressed by other rights in the Bill of Rights, including slavery, servitude and forced labour; housing; health care; food and water; children's rights; and education, not to mention equality and dignity. Their ideas emphasise human relationships and feelings, which ought, therefore, to be taken into account in how we delineate the concept of well-being in s 24.¹⁴⁵

This relationship between well-being and the rights in the Bill of Rights is important for an interdependent interpretation of section 24. The following section discusses the proposed interpretation of "health or well-being" which suggests that the other rights in the Bill of Rights should be incorporated into the concept of well-being in section 24.

4 8 Proposed interpretation

In light of the interdependence of rights and the importance of reading the Constitution holistically,¹⁴⁶ it is essential to interpret well-being in the context of the Bill of Rights as a whole. If we consider the preamble's commitment to improving the quality of life of each citizen,¹⁴⁷ it could be argued that the Bill of Rights aims to improve the well-being of the beneficiaries of its rights. The Bill of Rights provides a clear indication of what interests are considered worthy of constitutional protection, and those interests should be understood as contributing to well-being. A teleological and interdependent interpretation of the Bill of Rights and constitutional values

¹⁴⁵ Kidd "Environment" in *Bill of Rights Handbook* 521-522.

¹⁴⁶ See 2 2 2 3 and 2 2 3 5.

¹⁴⁷ Preamble, Constitution of the Republic of South Africa, 1996.

suggests that well-being should be understood as encompassing that which is considered necessary for a life of dignity, equality and freedom. The fundamental rights in the Bill of Rights are an indication of what is considered necessary to improve the quality of life of South Africans and to promote dignity, equality and freedom. While well-being probably includes aspects of the human experience which may not be explicitly protected in the Bill of Rights, well-being should, at a minimum, be interpreted to include those interests which *are* protected by the Bill of Rights.¹⁴⁸

Writing on well-being and the environment from an economic studies perspective, Dasgupta refers to human rights as “constituents of well-being” and argues that “the centrality of human rights in collective living is a reason why measures of social well-being must include them”.¹⁴⁹ Shelton notes that a rights-based approach to environmental protection and poverty alleviation is valuable as it “emphasizes the right to a certain quality of environment because that quality is linked to, indeed a prerequisite for, the enjoyment of internationally and domestically guaranteed rights”.¹⁵⁰ This affirms the link between human rights and well-being, and indicates that the state of an individual’s environment can impact their ability to access or enjoy other fundamental rights.¹⁵¹ I propose that where an aspect of the environment hinders the ability to exercise fundamental rights, it should be understood as harmful to well-being.

I will now turn to some practical examples of an interpretation of well-being which includes the rights in the Bill of Rights as components of well-being. Where a child’s ability to receive an education as set out in section 29 is hindered by the physical environment, such as a lack of school buildings to shelter students in the rainy

¹⁴⁸ See Glazewski (1999) *Acta Juridica* 7. Glazewski argues for an interpretation of section 24 which guards those interests not protected by another right in the Bill of Rights:

A person’s well being is harmed if his or her interests are harmed. Many of our interests are protected by other clauses in the Bill of Rights. But some are not. If one’s environment harms one of these interests – an interest important to one’s well-being and yet not protected elsewhere in the Bill of Rights, one will have to turn to the environmental clause for help.

¹⁴⁹ Dasgupta P *Human Well-Being and the Natural Environment* (2007) 15.

¹⁵⁰ Shelton “Using law and equity for the poor and the environment” in *Poverty Alleviation and Environmental Law* 24.

¹⁵¹ See Boyle A “Human rights and the environment: Where next?” (2012) 23 *The European Journal of International Law* 613 627 where the impact of the environment on human rights is also noted:

The virtue of looking at environmental protection through the impact of harmful activities on other human rights, such as life, private life, or property, is that it focuses attention on what matters most to individuals: the detriment to important, internationally protected values from uncontrolled environmental harm.

season, there would be an infringement of the right to an environment not harmful to health or well-being. The protection of cultural, religious and linguistic communities in section 31 indicates that the interests of these communities must be protected, so the destruction of a significant religious landmark would constitute a violation of the environmental right.¹⁵² Labour rights reinforce the importance of a safe work environment and the rights of arrested, detained and accused persons suggests that prisons and holding cells should also be safe and healthy environments.

In many of these cases the more specific right, and not section 24, would need to be relied on in practice.¹⁵³ In such cases the environmental right serves as a reminder that its interaction with, for example, the right to education, reinforces the necessity of a conducive physical environment for the realisation of section 29 in the form of school classrooms, toilets and access roads. There are, however, situations where the environmental right could have a more prominent role to play. Consider an informal settlement placed on the other side of a river from the centre of town, where access to the town is gained by way of a bridge. If the bridge is washed away in a flood or collapses due to a lack of maintenance, it could be argued that a failure to replace the bridge or provide alternative transport to those in the informal settlement constitutes an infringement of section 24. The ability of those individuals to realise their rights of access to just administrative action, access to courts or even access to information could be inhibited due to their physical lack of access to government buildings in the town centre where they would be able to pursue these rights. The rights themselves would not provide a right to that bridge, but the environmental right arguably means that the well-being of that community is dependent on access to the town centre, and therefore dependent on that bridge (in light the Constitution's conception of well-being in the Bill of Rights).

Section 24 could also play an important role in relation to the right to freedom and security of the person in section 12 of the Constitution. Consider the following example. The right to an environment which is not harmful to health or well-being should include a right of access to clean toilets. This is particularly important for the health of communities in informal settlements. While clean toilets may be provided

¹⁵² *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA).

¹⁵³ See chapter 2, 2.2.3.5 where it is suggested that reliance on a more specific right, in accordance with *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC), does not detract from the interpretive role of that right in ascribing meaning to section 24.

for a certain area, the location of the toilets could be considered harmful to well-being if they are far from homes or difficult to access. In some areas women and children fear going to such toilets at night due to safety concerns and the high crime rate. While the toilets provided may be healthy and clean, the layout of the facilities and homes in this case results in a threat to safety and security for the individual who needs to walk through a dangerous area to use the toilet at night. The threat to a constitutionally protected right, for example, the right to bodily and psychological integrity in section 12(2), serves as an indication that the individual's well-being is detrimentally affected. This situation may not be covered by section 12 directly, but an interdependent interpretation of section 24 and the right to freedom and security of the person suggests that this should constitute harm to well-being under the environmental right. This approach to well-being is particularly important for the poor as they often experience multiple intersecting forms of disadvantage which may not be explicitly addressed in the Bill of Rights.

I suggest that where an aspect of the human experience, as envisaged and protected within the Bill of Rights, is diminished or infringed then there is an adverse impact on the individual's well-being. It must again be borne in mind that this does not mean that all such circumstances constitute an infringement of section 24. In order for a violation of section 24 to exist the environment must, in some way, cause harm to health or well-being. This requires a link to the physical environment as the cause of the harm, as well as damage which is significant enough to be considered harmful.

The proposed approach to well-being does not cover every facet of well-being. There are recognised aspects of well-being, such as the aesthetic dimensions, which are not included in any specific rights in the Bill of Rights. I am not recommending that these be excluded from the definition of well-being in section 24. However, a teleological and interdependent interpretation of section 24 in the context of the Bill of Rights should provide baseline for our understanding of well-being. At the very least well-being should encompass those interests already recognised by the Constitution as worthy of protection and integral to a life of equality, dignity and freedom.

4 9 Conclusion

Section 24 provides protection from environmental harm to “health or well-being”. The two terms are disjunctive and harm to either one will result in an infringement of the environmental right. According to their ordinary meanings, both terms are very broad and cover a wide range of interests. In order to determine which of these interests should be protected under section 24 it is necessary to delineate these meanings within their particular context. It must be borne in mind that a violation of the environmental right requires a link between the harm and the physical environment, and is also dependent on the interpretation of harm. The components of health and well-being identified here will therefore not always result in an infringement of the right. This chapter has investigated the meaning of health and well-being in the context of section 24, under relevant of South African legislation and case law, and considered international law and academic opinion.

Health has been interpreted to include physical and mental health. Some broader conceptions of health include, for example, social health. It is not necessary for the purposes of section 24 to differentiate between these definitions of health as both would overlap with well-being and therefore be included in the right. For this reason, the greater part of this chapter has focused on the meaning of well-being.

Considering the dictionary definitions of well-being, it is possible to include an array of subjective feelings and experiences within the scope of the term. While subjective aspects of well-being should be included in its interpretation, the environmental right should not be stretched to the point where it offers protection from any minor subjective discomfort. Where it may become necessary, the open-ended nature of the term allows the courts flexibility in adapting to changing needs as environmental issues develop. There are, however, certain aspects of well-being which are widely agreed upon. One of the most prominent of these is the protection of the natural environment.

The context of section 24 as well as the accompanying legislation, case law and academic opinion clearly indicates that concerns such as conservation are linked to the well-being of both present and future generations. Well-being in this sense includes an absence of pollution and environmental degradation, whether or not it has an impact on an individual's health. The aesthetic dimension of the environment

also has clear links to well-being. Positive responses to the appearance of the surrounding environment can contribute to well-being in a variety of ways. The environment is also often connected to cultural and spiritual or religious interests of individuals and communities. The well-being of these individuals and communities is directly affected when such an environment is damaged or destroyed. The cultural and spiritual connection to the environment is particularly important in the case of indigenous communities.

It is also evident that well-being is linked to socio-economic interests. Strong links exist between well-being, the environment and development, particularly in the international law context. This is an important recognition when one considers the relationship between well-being and poverty. Development, balanced with environmental protection, can contribute to well-being by contributing to economic stability and poverty alleviation. Some social science perspectives point out the role of health and autonomy in well-being as well as the importance of considering the relational and subjective aspects of well-being alongside the material aspects.

I have proposed that the interpretation of well-being should be informed by a teleological and interdependent interpretation of the Constitution. The Constitution offers a broad outline of those elements of human life which are considered important and worthy of protection. These are contained in the Bill of Rights and should be understood as necessary components of well-being. Where the enjoyment of any of the rights in the Bill of Rights are negatively affected or violated by an aspect of the environment, there would be harm to well-being. The proposed interpretation of well-being is not an all-inclusive one. There are certainly recognised interests, such as the aesthetic dimension of the environment, which are not covered by another right in the Bill of Rights. However, the interdependent interpretation of well-being suggested should provide a foundation for what is considered necessary for a life of dignity, equality and freedom under the Constitution and, therefore, for what must be included in the interpretation of “health or well-being” in the environmental right.

5 Sustainable development

5 1 Introduction

Section 24 includes explicit reference to the notion of sustainable development. Much has been written in the national and international sphere concerning the meaning of sustainable development and precisely what the content of the term is.¹ This chapter will examine these sources and attempt to ascertain what sustainable development should mean in the context of section 24 and the Constitution as a whole. I will begin by discussing the ordinary meaning of the term after which I will examine sustainable development in the context of the structure and content of the environmental right. The handful of South African cases which have dealt with sustainable development will then be considered. Thereafter, I will examine how sustainable development has been understood in the National Environmental Management Act 107 of 1998 (NEMA). The international law position on sustainable development is particularly important as the international sphere is where the notion originates. This will be considered as it informs the interpretation of sustainable development in the South African context. I will then analyse leading academic opinions on the meaning and content of sustainable development before concluding by proposing an interpretation and approach to the notion of sustainable development that recognises the central role of constitutional rights, values and purposes.

¹ See for example Tladi D *Sustainable Development in International Law: An Analysis of Key Environmental Instruments* (2007); Halvorssen AM "International law and sustainable development – tools for addressing climate change" (2011) 39 *Denver Journal International Law and Policy* 397-421; Marong ABM "From Rio to Johannesburg: Reflections on the role of international legal norms in sustainable development" (2003) 16 *Georgetown International Environmental Law Review* 21-76; Du Plessis W & Du Plessis AA "Striking the sustainability balance in South Africa" in M Faure & W Du Plessis (eds) *The Balancing of Interests in Environmental Law in Africa* (2011) 413-458; Field T "Sustainable development versus environmentalism: Competing paradigms for the South African EIA regime" (2006) 123 *SALJ* 409-436.

5 2 Ordinary meaning of sustainable development

As established in chapter 2, the ordinary meaning of language is an important starting point in interpreting the Constitution.² While “sustainable development” has a specific meaning in its constitutional context, the ordinary meaning ascribed to the term is the point of departure for interpretation.

At the most superficial level, sustainable development refers to development which can be maintained over a (potentially unlimited) period of time. This is not very helpful as it does not tell us what is being developed, or indeed what is being sustained. It could refer to social development which must be financially sustainable, or economic development which must be environmentally sustainable. Sustainable development is used in many spheres and often means different things depending on the context. As Murombo argues:

One could be forgiven for believing that to many industrialists, sustainable development means sustaining development and not the environment; hence the desire by many moderate environmentalists to use the term ‘sustainability’ and abandon ‘sustainable development’.³

It is evident that for sustainable development to have any meaningful application, it must be more clearly defined.

The Collins dictionary refers to sustainable development within its definition of “sustainable”:

1. capable of being sustained 2. (of economic development, energy sources, etc.) capable of being maintained at a steady level without exhausting natural resources or causing severe ecological damage; *sustainable development*.⁴

This definition in the Collins dictionary associates sustainable development with the preservation of natural resources and the prevention of ecological damage. At the same time it also indicates that sustainable development is often associated with economic development. The word “sustainable” suggests that sustainable development is not a quick fix but rather a long term project which requires steady

² See chapter 2, 2 2 2 1.

³ Murombo T “From crude environmentalism to sustainable development” (2008) 125 SALJ 503.

⁴ *Collins English Dictionary: Complete and Unabridged* (2003) 1624.

maintenance. It will presumably only become evident in the future whether or not sustainability has been achieved.

While sustainability seems concerned with maintenance of the current state over the long term, development is explicitly concerned with change. The Collins dictionary defines development as “1. the act or process of growing, progressing, or developing 2. the product or result of developing”.⁵ Development requires growth and expansion for the advancement of humanity, while sustainability requires stability and preservation of the environment for the survival of future generations. Sustainable development therefore requires a management of the tension between maintaining the current *status quo* in certain areas, while promoting development and change in others.

This ordinary meaning of sustainable development is very vague and general, and needs to be fleshed out in order to determine precisely what is meant by the term in the context of the Constitution. The following section will examine the influence of the context of section 24 on the meaning of sustainable development in the right.

5 3 Sustainable development in section 24

Before addressing the specific aspects of section 24 which impact on the interpretation of sustainable development, it is necessary to make a general observation on section 24(b). In the case of *HTF Developers v Minister of Environmental Affairs and Tourism*⁶ it was held by Murphy J that section 24(b) is an aspirational directive principle rather than a justiciable socio-economic right.⁷ As numerous commentators have argued, this is an incorrect interpretation of section 24.⁸ Section 38 of the Constitution provides for any of the listed persons or groups to approach the court for appropriate relief where a right in the Bill of Rights is

⁵ *Collins English Dictionary: Complete and Unabridged* (2003) 428.

⁶ 2006 5 SA 512 (T) ('*HTF Developers*').

⁷ 2006 5 SA 512 (T) para 17.

⁸ 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 71; Kotzé LJ “The judiciary, the environmental right and the quest for sustainability in South Africa: A critical reflection” (2007) 16 *Review of European, Comparative & International Environmental Law* 298 310; 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 *SAPL* 194 202, 205; Kotzé LJ & Du Plessis A “Some brief observations on fifteen years of environmental rights jurisprudence in South Africa” (2010) 3 *Journal of Court Innovation* 157 172.

“infringed or threatened”.⁹ There is no reason why access to appropriate relief should be arbitrarily limited where section 24(b) is concerned. It is clear from the Bill of Rights that section 24(b) contains a fully justiciable right which the state must “respect, protect, promote and fulfil” and it is certainly more than a mere aspiration.¹⁰ Feris asserts that the mandate in section 24(b) “reaches far beyond hopes and dreams and falls within the realm of real expectations”.¹¹

In considering “sustainable development” in section 24, it is important to construe the term within its immediate context of the environmental right. Section 24 states:

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

Sustainable development appears in the context of section 24(b) which deals with the right to have the environment protected. It is essential to interpret section 24(b)(iii) with this fundamental purpose of environmental protection in mind as it will certainly impact the interpretation of sustainable development. The environmental right also clearly indicates that the purpose of environmental protection is “the benefit of present and future generations” and not the maintenance of the environment for its own sake. The right emphasises the benefit of present generations, which implies the notion of intragenerational equity and environmental justice.¹² Intergenerational equity has been recognised as a key component of sustainable development and will be discussed in more detail below.¹³ The reference to present and future generations in section 24 reaffirms the anthropocentric nature of the right discussed in chapter

⁹ Section 38 states the following:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are–

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest, and
- (e) an association acting in the interest of its members.

¹⁰ Section 7(2), Constitution of the Republic of South Africa, 1996.

¹¹ Feris (2008) *SAPL* 205.

¹² See 5 7 3 3 below.

¹³ See 5 7 3. See also Kotzé (2007) *RECIEL* 300.

2.¹⁴ For now, it is important to note that environmental protection is central to sustainable development and is explicitly included in the environmental right as the overarching purpose of section 24(b). Another important aspect of section 24(b) which affects how we understand and apply sustainable development, is the instruction to use “reasonable legislative or other measures”. Reasonableness is introduced as a requirement for the measures used in the implementation of section 24(b), and therefore of sustainable development. The role of reasonableness in sustainable development decisions is discussed in further detail below.¹⁵

Sustainable development is qualified in the environmental right and described as “ecologically” sustainable development. This indicates that it is not development itself which must be sustained, but rather the ecology or environment that must be sustained when development takes place. If sustainable development is seen as a balancing of economic, social and environmental interests,¹⁶ the conception of sustainable development under the environmental right seems to place a greater emphasis on the environment. With reference to the inclusion of the term “ecologically”, Van der Linde and Basson note the importance of this attention to the environment in the interpretation of sustainable development:

The danger exists that without placing special emphasis on ecological interests, as the Final Constitution requires, a mere mechanical evaluation of environmental rights, economic rights and social developmental rights will result in environmental interests being ‘balanced away’.¹⁷

Feris similarly recognises the role of the term in the interpretation of section 24(b)(iii). She suggests that it “qualifies the type of sustainable development that is envisioned by the Constitution” and that the notion of sustainable development in the environmental right “places the environmental value centre-stage”.¹⁸ The importance of the environment in the Constitution’s conception of sustainable development is reinforced by the underlying goal of environmental protection in section 24(b).

¹⁴ See chapter 2, 2 3 2. See also Du Plessis W & Du Plessis AA “Striking the sustainability balance in South Africa” in M Faure & W Du Plessis (eds) *The Balancing of Interests in Environmental Law in Africa* (2011) 416 427.

¹⁵ See 5 8.

¹⁶ See 5 7 2.

¹⁷ Van der Linde M & Basson E “Environment” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 2 2010) 50-24.

¹⁸ 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* 235 252.

Section 24 also refers to the principle of sustainable use of natural resources which has been recognised as a principle of sustainable development in international law.¹⁹ Despite this clear emphasis on the environment, section 24(b)(iii) also includes explicit reference to economic and social development. This is significant in light of the anthropocentric nature of section 24 as well as the central purpose of environmental protection being the benefit of present and future generations. The environmental right requires that the need for economic and social development is not only taken into consideration, but actively promoted when measures are taken to protect the environment. Such development must, however, be justifiable.²⁰ This economic and social development is only justifiable under section 24 if it does not result in unsustainable use of the environment or of natural resources.²¹ Where economic or social development is considered unjustifiable due to the environmental harm caused, this should not be understood as a dismissal of human need. Section 24 remains anthropocentric and ecologically sustainable development – which trumps unjustifiable social and economic development – ultimately aims to provide for both present and future generations.

Sustainable development must also be construed in the context of section 24 as a whole. In light of section 24(a), sustainable development should, at a minimum, not be harmful human health and well-being. Section 24(a) underscores the social development portion of section 24(b)(iii). In order to further the realisation of the right, sustainable development should promote health and well-being wherever possible. This interaction between section 24(a) and (b) highlights the tension between meeting immediate human needs while promoting the environmental protection necessary for the existence of present and future generations.

Sustainable development, as it appears in section 24, includes the balancing of environmental protection with social and economic development, as well as the principles of sustainable use and intergenerational and intragenerational equity.²² As will be seen below, these features of sustainable development are also recognised in

¹⁹ See 5 6.

²⁰ Section 24(b)(iii), Constitution of the Republic of South Africa, 1996.

²¹ See *Fuel Retailers v Director-General: Environmental Management* 2007 6 SA 4 (CC) para 79 where it was held that “socio-economic development must be justifiable in the light of the need to protect the environment”.

²² See 5 7 3 for a discussion on equity as a central principle of sustainable development.

international law.²³ In the specific context of section 24 it is important to emphasise the anthropocentrism of the right as well as the express qualification of *ecologically* sustainable development. The following section will examine the use and interpretation of sustainable development in the environmental framework legislation.

5 4 Sustainable development in NEMA

As noted in chapter 3,²⁴ the National Environmental Management Act 107 of 1998 (NEMA) has an important role to play in the interpretation of section 24. As it was enacted to give effect to section 24, NEMA provides an indication of how the legislature interprets the environmental right.

NEMA defines sustainable development as:

the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations.²⁵

The recognition of the role of economic and social factors corresponds with the reference to justifiable social and economic development in section 24. The court in *Fuel Retailers v Director-General: Environmental Management (Fuel Retailers)*²⁶ notes that this definition “incorporates two of the internationally recognized elements of the concept of sustainable development, namely, the principle of integration of environmental protection and socio-economic development, and the principle of inter-generational and intra-generational equity”.²⁷ These internationally recognised principles will be discussed in more detail in 5 6 and 5 7 below.

Aside from the definition in NEMA, sustainable development also appears elsewhere in the Act. The preamble makes reference to the three pillars of sustainable development when it states that “the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone”.²⁸ This indicates that all three pillars of sustainable development implicate various rights in

²³ See 5 6.

²⁴ Chapter 3, 3 4.

²⁵ Section 1, National Environmental Management Act 107 of 1998. See also the preamble.

²⁶ 2007 6 SA 4 (CC).

²⁷ 2007 6 SA 4 (CC) para 59. See also Van der Linde & Basson “Environment” in *CLOSA* 50-23; Kotzé (2007) *RECIEL* 300.

²⁸ Preamble, National Environmental Management Act 107 of 1998.

the Constitution. Van der Linde notes that sustainable development is central to the principles of NEMA.²⁹ Section 2(3) clearly echoes the principle of integration (of social, economic and environmental interests)³⁰ and states that “[d]evelopment must be socially, environmentally and economically sustainable”.³¹ Section 2(4)(a) elaborates on some of the principles that should be included in sustainable development. While not identified as such, these principles are consonant with internationally recognised principles of sustainable development such as the precautionary principle,³² the preventive principle,³³ the equitable use of natural resources,³⁴ and the sustainable use of natural resources.³⁵ Section 2(4)(i) reiterates the principle of integration when it states that decision-making should consider, assess and evaluate “[t]he social, economic and environmental impacts of activities”.³⁶

Sustainable development is clearly the motivation for many of the principles and goals of NEMA. The Act makes repeated reference is made to social and economic factors or concerns and the integration of social, economic and environmental interests is promoted. It is evident, however, that the Act is designed primarily for the management and protection of the environment. It could be argued that this conception of sustainable development is in keeping with the environmental right’s mandate to protect the environment and to promote *ecologically* sustainable development while also promoting social and economic development. I turn now to the interpretation of sustainable development found in case law.

²⁹ Van der Linde M “National Environmental Management Act 107 of 1998 (NEMA)” in HA Strydom & ND King (eds) *Fuggle & Rabie’s Environmental Management in South Africa* 2 ed (2009) 193 199. Van der Linde points out that these principles guide all organs of state in decisions concerning provisions related to the environment and also “guide the interpretation, administration and implementation of NEMA and any other law concerned with the protection or management of the environment”. See Van der Linde “NEMA” in *Environmental Management in South Africa* 198.

³⁰ The principle of integration is discussed in detail in 5 7 4.

³¹ Section 2(3), National Environmental Management Act 107 Of 1998.

³² Section 2(4)(a)(vii).

³³ Section 2(4)(a)(i), (ii), (viii).

³⁴ Section 2(4)(a)(v).

³⁵ Section 2(4)(a)(iv), (vi).

³⁶ Section 2(4)(i).

5 5 Sustainable development in case law

As with other areas of the environmental right, sustainable development has not received much attention in South African jurisprudence. There are, however, a few cases that offer some insight into how the judiciary has understood sustainable development.

The most extensive discussion of sustainable development in South African jurisprudence is found in *Fuel Retailers*.³⁷ The Fuel Retailers Association of South Africa argued before the Constitutional Court that the environmental authorities had not considered the socio-economic impact of a proposed filling station when authorising the development under section 22(1) of the Environment Conservation Act 73 of 1989.³⁸ The court clarified the obligations of the environmental authorities and ultimately concluded that they failed to adequately consider the socio-economic impact of the proposed development.³⁹

What is important for the purposes of the interpretation of section 24 is the court's elaboration on the meaning of sustainable development.⁴⁰ In granting the appeal to the Constitutional Court, Ngcobo J affirms the need to take seriously concerns of development and environmental protection:

The need to protect the environment cannot be gainsaid. So, too, is the need for social and economic development. How these two compelling needs interact, their impact on decisions affecting the environment and the obligations of environmental authorities in this regard, are important constitutional questions.⁴¹

The interaction of these "two compelling needs", both of which implicate constitutionally protected rights, lies at the heart of sustainable development. Ngcobo J describes the intimate relationship between the environment and development which necessitates sustainable development:

³⁷ 2007 6 SA 4 (CC).

³⁸ 2007 6 SA 4 (CC) para 4-5. While the regulations referred to in the case refer to a consideration of the "need and desirability" of a development, Ngcobo J concludes that ultimately the obligation of the environmental authorities is wider than this and includes the obligation to consider the socio-economic impact of the development. See paras 24 & 82.

³⁹ Para 97.

⁴⁰ Feris notes that the focal point of this case is not the interpretation or content of section 24 itself, but that "the cause of action lies in administrative law and governance and it is through this prism that one of the concepts central to section 24, 'sustainable development', is explored, analysed and evaluated." See Feris (2008) CCR 236.

⁴¹ 2007 6 SA 4 (CC) para 41.

Economic and social development is essential to the well-being of human beings. [...] But development cannot subsist upon a deteriorating environmental base. 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.⁴²

The court clearly accepts that the environment and development are interests that must be promoted and protected. Sustainable development requires an approach which recognises the complex and integrated relationship between the environment and development. Ngcobo J confirms that this relationship is recognised within the Constitution:

The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment whilst at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development.⁴³

This integration of environmental protection and socio-economic development is widely recognised as a fundamental component of sustainable development.

The decision of *Fuel Retailers* provides important direction on the interpretation of sustainable development in the South African context. Feris highlights the court's recognition of the interrelationship between social, economic and environmental factors and the acknowledgement of the centrality of sustainable development in the environmental right.⁴⁴ She suggests that this indicates that the principle of integration is therefore "a central tenet of a 'South African jurisprudence' on sustainable development".⁴⁵

Despite the positive contribution the decision makes to our understanding of sustainable development, the *Fuel Retailers* judgment is not without criticism. Tladi points out that the court does not sufficiently distinguish between socio-economic rights, development and economic development.⁴⁶ Throughout the judgement these terms are conflated and as a result "the Court never stops to ask whether the factors

⁴² Para 44.

⁴³ Para 45.

⁴⁴ Feris (2008) CCR 247.

⁴⁵ Feris (2008) CCR 247. See 5 7 4 below for a discussion on the principle of integration.

⁴⁶ Tladi D "Fuel Retailers, sustainable development and integration: A response to Feris" (2008) 1 *Constitutional Court Review* 255 256-257.

that the Fuel Retailers Association requested that the environmental authorities consider are socio-economic or purely economic".⁴⁷ Tladi argues that this leads to the erroneous suggestion "that economic considerations are the same as social considerations".⁴⁸ He suggests that the court's approach is indicative of a definition of sustainable development which treats development (both social and economic) as a single entity in opposition to environmental protection rather than recognising the need to balance economic, social and environmental concerns.⁴⁹ Tladi explains the distinction:

Factors relevant for the economic growth variation [of sustainable development] are, for example, trade related concerns. Access to clean drinking water and food reflect a human well-being [or social] variation of sustainable development. They are not the same. [...] By blurring the distinction between social and economic concerns, our jurisprudence flirts with the undesirable outcome of preserving the *status quo*: namely, paying lip service to sustainable development and integration. The failure to distinguish more carefully between these values facilitates the instrumentalisation of sustainable development for economic ends. *Fuel Retailers* is a case in point.⁵⁰

Tladi thus argues that a disregard for the nuanced distinctions between social and economic development needs can lead to the advancement of purely economic interests under the guise of sustainable development. This then allows social needs to be ignored in the name of development. Murombo voices a similar objection to the judgment in *Fuel Retailers*:

[The decision] may unwittingly send the wrong message to industrialists who perceive the concept [of sustainable development] as being aimed at making 'development' sustainable and not to achieve integrated sustainability in the radical sense of scrutinizing activities that are not sustainable socially, economically and environmentally.⁵¹

It would seem that in order to guard against this conflation of social and economic interests, it is necessary to identify the respective social and economic aspects of development more explicitly. Tladi's proposed approach to sustainable development, discussed in 5 7 4 below, addresses this danger as it encourages transparency and the explicit recognition of those aspects of sustainable development which have informed a decision.

⁴⁷ Tladi (2008) CCR 257.

⁴⁸ Tladi (2008) CCR 257.

⁴⁹ Tladi (2008) CCR 258.

⁵⁰ Tladi (2008) CCR 258-259. Tladi's approach of the three variations of sustainable development will be examined in more detail at 5 7 below.

⁵¹ Murombo (2008) SALJ 503.

In his minority judgment in *Fuel Retailers* Sachs J adopted the view that the applicants' case was based mainly on economic concerns.⁵² The applicants challenged the decision to authorise the construction of the filling station by arguing that the socio-economic impact of the proposed station should have been, and was not, considered. Sachs J's implicit suggestion is that the applicants were not concerned about the well-being of the environment, but rather the threat of commercial competition. He maintains that because there was no "measurable threat to the environment", sustainable development should not have been considered at all.⁵³ The argument is that "social and economic considerations are only 'triggered' once the environment is implicated".⁵⁴ Sachs J explains further:

[I]f some damage to the environment were to be established, the economic sustainability of a proposed economic enterprise could be highly relevant as a countervailing factor in favour of a finding that on balance the development is sustainable.

However, in this case no such damage was found. Here sustainable development was used as a vehicle to promote economic interests and ward off commercial competitors. Du Plessis and Feris point out that "[i]n this instance the applicant focused not just on one pillar [of sustainable development], but on only one aspect of one pillar – namely competition".⁵⁵ While the approach of Sachs J in this case is instructive for the interpretation of section 24, it is important to note that these comments are specifically related to sustainable development as defined and prescribed by NEMA.⁵⁶

Sustainable development and the meaning of section 24 are also addressed in the case of *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs (BP)*.⁵⁷ In this case BP contested the refusal of an application to develop a filling station, arguing that the Gauteng Provincial Department of Agriculture, Conservation, Environment and Land Affairs should not have considered socio-economic considerations in making its decision. The court

⁵² 2007 6 SA 4 (CC) para 112.

⁵³ 2007 6 SA 4 (CC) para 112-113. Du Plessis W & Feris L "A rebellious step in the right direction? A note on the dissenting judgment of Sachs J in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*" (2008) 15 SAJELP 157 160.

⁵⁴ Du Plessis & Feris (2008) SAJELP 162.

⁵⁵ Du Plessis & Feris (2008) SAJELP 160.

⁵⁶ Du Plessis & Feris (2008) SAJELP 162.

⁵⁷ 2004 5 SA 124 (W) ('BP').

ultimately refused BP's application for review and setting aside of the decision. During the course of the judgment the court confirmed the importance of sustainable development.

Claassen J notes in *BP* that the balancing of rights necessary for sustainable development must be done "without any *a priori* grading of the rights".⁵⁸ The environmental right is on par with the other rights in the Bill of Rights and this should inform the way sustainable development is balanced. As Kotzé and Du Plessis note, the judgment indicates:

[T]here is an undeniable link between the environmental right and sustainable development in that a rights-based approach to environmental governance elevates the status of environmental governance to a constitutional level, which should enable the achievement of sustainability.⁵⁹

BP also acknowledges the role of intergenerational equity in the interpretation of sustainable development as indicated by the structure of s 24(b):⁶⁰

The balancing of environmental interests with justifiable economic and social development is to be conceptualised well beyond the interests of the present living generation. This must be correct since s 24(b) requires the environment to be protected for the benefit of 'present and future generations'.⁶¹

The case affirms the need to consider the environmental, social and economic interests of future generations in the implementation of sustainable development. Along with the principle of intergenerational equity, the principles of sustainable use and equitable use as well as the principle of integration are recognised as elements of sustainable development.⁶² The court confirms that sustainable development "constitutes an integral part of modern international law" and indicates that sustainable development forms the basis for South African environmental law.⁶³

Claassen J explains that sustainable development means that economic interests will no longer dictate development related decisions:

Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically

⁵⁸ Para 143B.

⁵⁹ Kotzé & Du Plessis (2010) *Journal of Court Innovation* 171.

⁶⁰ See 5 3.

⁶¹ 2004 5 SA 124 (W) paras 143C-E.

⁶² Paras 143 G-I & 144B-C. These principles are discussed further at 5 7.

⁶³ Paras 144A-B.

and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns.⁶⁴

The court does not suggest that economic concerns are irrelevant, but rather argues that sustainable development requires an integrated consideration of all factors. Economic factors should therefore not automatically trump social or environmental interests. *BP* explains that sustainable development demands an integration of different interests, a balancing of potentially conflicting rights and a recognition that environmental concerns deserve as much attention as social and economic ones.⁶⁵

The tension between environmental and social interests is seen in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)*.⁶⁶ Here section 26 was relied on to support the relocation of flood victims to temporary housing on a certain piece of land. At the time, the flood victims were living in appalling conditions, and the urgency of their need played an important role in the court's decision. The relocation was opposed by residents of the area who relied on section 24, but they ultimately could not prove the risk of environmental harm.⁶⁷ The urgency and desperation of the flood victims' circumstances was an important factor in this case. If the residents had been able to show a legitimate risk of severe and irreparable damage to the environment the court may have reached a different conclusion. This case illustrates some of the possible conflicts between the three pillars of sustainable development.

The Land Claims Court case of *In re Kraanspoort Community (Kraanspoort)*⁶⁸ demonstrates one of the ways in which sustainable development can be observed in practice. This case concerned the restitution of farm land from which a community was evicted in terms of the Group Areas Act 41 of 1950. The court recognised that along with restitution of the land came the "risk of unsustainable depletion of renewable resources on the farm".⁶⁹ The court held that it may impose conditions to prevent this unsustainable depletion of resources, and that such an approach would

⁶⁴ Paras 144B-D.

⁶⁵ See Kotzé & Du Plessis (2010) *Journal of Court Innovation* 171.

⁶⁶ 2001 3 SA 1151 (CC).

⁶⁷ Para 37.

⁶⁸ 2000 2 SA 124 (LCC).

⁶⁹ Para 117.

promote the spirit, purports and objects of the environmental right.⁷⁰ Conditions were attached to the restitution in order to ensure sustainable use of the farm's resources, and the court linked this to intergenerational equity by explaining that unsustainable use of the land would ultimately "prevent the younger members of the community from having equitable access to the restored asset in future".⁷¹ While not specifically addressing the interpretation of sustainable development, *Kraanspoort* affirms (and illustrates) intergenerational equity and the sustainable use of resources. In light of this decision, Kotzé argues that section 24 could restrict use of resources so as to ensure intergenerational equity:

Section 24 and other environmental provisions thus may serve as restrictive conditions on resource use in the sense that they may reduce or eliminate the risk of depletion of resources, ensure sustainability and thus ensure adequate availability of these resources for future generations.⁷²

The recent case of *Sole NO v Minister of the Department of Agriculture, Forestry and Fisheries*⁷³ illustrates how the court could approach conflicting interests in sustainable development decisions. In this case the applicant, on behalf of the public, sought an interdict suspending the commercial fishing of the South African West Coast Rock Lobster (WCRL).⁷⁴ *Sole* argued that the WCRL had been over-exploited and faced possible extinction. The respondents (representatives of the government and commercial fisheries) argued that there were "no factual, legal or scientific grounds" on which to grant the interdict.⁷⁵ The court noted that the Minister is given the power and responsibility to achieve sustainable development of marine living resources and to ensure that these resources are used to contribute to economic growth and employment.⁷⁶ The court examined the steps taken to preserve the WCRL, including the establishment of a scientific working group to study the WCRL and advise the Minister and the Department.⁷⁷ It was held that the Minister was aware of the danger to the WCRL and that "the department has, after

⁷⁰ Para 117.

⁷¹ Para 183.

⁷² Kotzé (2007) *RECIEL* 309.

⁷³ *Sole NO v Minister of the Department of Agriculture, Forestry and Fisheries* (356/13) 2013 ZAWCHC 94 (13 June 2013) *SAFLII* <<http://www.saflii.org/za/cases/ZAWCHC/2013/94.html>> (accessed 26-08-2014).

⁷⁴ Para 1.

⁷⁵ Para 2.

⁷⁶ Para 9. See Marine Living Resources Act 18 of 1998.

⁷⁷ (356/13) 2013 ZAWCHC 94 (13 June 2013) para 14.

considerable scientific and management intervention, determined that the continued utilisation of the WCRL resource is possible on a sustainable basis”.⁷⁸ The measures put in place by the Department were “scientifically justified and [...] received wide acclamation from experts in this field”.⁷⁹ Sole, on the other hand, had not produced any scientific evidence to support her contention that the WCRL were in as much danger as she had suggested.⁸⁰

The court refused to grant the interdict, and although the central reason for this was the lack of scientific evidence and proof, it also emphasised the potential consequences of granting such an interdict. The respondents pointed out that granting this order would have severe consequences for them:

[I]t would cause irreparable financial prejudice and hardship to the rights holders, which is not justified, especially having regard to the scientific and efficient manner in which the WCRL fishery is managed.⁸¹

After concluding that the applicant had not met the requirements for granting the interdict, the court emphasised that the economic and social consequences of the interdict would have counted against a decision to grant it:

[T]he court should also bear in mind the huge financial implications and social upheaval that would be caused by the granting of the interdict. [...] it would be totally irresponsible for the court to consider the granting of an interdict in these circumstances, particularly in the absence of any convincing evidence, thereby causing financial prejudice and social upheaval on such a grand scale.⁸²

While the case does not address sustainable development in any detail, it is clear that social and economic factors would play an important role in cases such as this. Although a precautionary course of action would have been possible in this case, the court indicated that the extent of the impact on economic growth in the industry and on the livelihoods of those with commercial fishing rights required an approach which did not elevate the environmental concern, but balanced it with social and economic considerations. The court’s consideration of the applicant’s case does, however, indicate that the right in section 24(b)(iii) could allow for an individual to act, on

⁷⁸ Para 14.

⁷⁹ Para 15.

⁸⁰ Para 16.

⁸¹ Para 2.

⁸² Para 21.

behalf of the public, for the protection of the environment.⁸³ This means that the extinction or endangerment of a species due to over-exploitation could constitute an infringement of section 24(b)(iii). Such cases will, however, always involve an integrated consideration of the environmental, social and economic factors concerned.

The cases discussed indicate an acknowledgment of the importance of including environmental concerns and the interests of future generations into developmental decisions, affirming the emphasis on environmental protection and intergenerational equity in section 24. The tension between economic and environmental considerations is also clear. These cases confirm that social, economic and environmental interests must be balanced and promoted simultaneously in order to achieve sustainable development, but it is not clear how this balancing act should be realised. In order to gain further insight into the meaning of sustainable development, the following section examines the concept in the international law context where it originated.

5 6 Sustainable development in international law

The notion of sustainable development has its origins in the international arena, which has given rise to a range of international conferences and instruments dealing with the meaning and application of sustainable development. The scope of this chapter does not allow for a detailed discussion of all the available international sources. The focus will therefore be on those sources which provide an indication of the meaning, content and principles of sustainable development as opposed to those which focus on practical implementation in the international sphere.

As a concept in international environmental law, sustainable development is often regarded as having been coined by the Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report) in 1987.⁸⁴ Tladi notes, however, that references to sustainable development were present in

⁸³ Para 4.

⁸⁴ Report of the World Commission on Environment and Development: Our Common Future (1987) UN Doc A/42/427 (Brundtland Report). See *Fuel Retailers v Director-General: Environmental Management* 2007 6 SA 4 (CC) para 47; Kidd M "Environment" in Currie I & De Waal J (eds) *The Bill of Rights Handbook* 6 ed (2013) 516 524.

the World Conservation Strategy of the International Union for Conservation of Nature and Natural Resources (IUCN) in 1980.⁸⁵

Prior to the explicit recognition of sustainable development, the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) was adopted.⁸⁶ The Stockholm Declaration recognises the relationship between the environment and development, acknowledging the “[e]nvironmental deficiencies generated by the conditions of under-development and natural disasters”,⁸⁷ the necessity for economic and social development,⁸⁸ the need to reconcile “conflict between the needs of development and the need to protect and improve the environment”⁸⁹ and the tension between the needs of “present and future generations”.⁹⁰ Although it is not identified as such, the Stockholm Declaration includes a description of what would today be termed sustainable development:

To defend and improve the human environment for present and future generations has become an imperative goal for mankind – a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development.⁹¹

This goal includes elements recognised as central to sustainable development today, namely integration (in this case of the environment, peace, and development) and intergenerational and intragenerational equity.⁹² As Beyerlin and Marauhn explain, the Stockholm Declaration was the first international document to emphasise “that environmental protection and economic development must be understood as compatible and mutually reinforcing goals”.⁹³

⁸⁵ Tladi D *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (2007) 16 footnote 19; Tladi (2008) CCR 256. See International Union for Conservation of Nature and Natural Resources *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (1980); Beyerlin U & Marauhn T *International Environmental Law* (2011) 74.

⁸⁶ Declaration of the United Nations Conference on the Human Environment (Stockholm, June 1972) UN Doc A/CONF.48/14/Rev.1.

⁸⁷ Declaration of the United Nations Conference on the Human Environment (Stockholm, June 1972) UN Doc A/CONF.48/14/Rev.1 principle 9.

⁸⁸ Principle 8.

⁸⁹ Principle 14.

⁹⁰ Principle 2.

⁹¹ Proclamation 6.

⁹² These elements of sustainable development are discussed in detail at 5 7.

⁹³ Beyerlin & Marauhn *International Environmental Law* 73.

A decade after the Stockholm Declaration came the Brundtland Report which brought the concept to the forefront of the international consciousness.⁹⁴ The Brundtland Report offered a concise definition of sustainable development which remains widely recognised:⁹⁵

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.⁹⁶

This definition emphasises the notion of intergenerational equity which demands consideration of the needs of future generations. The needs of the poor form part of the needs of the present generation and are given high priority in this conception of sustainable development. The Brundtland Report continues to emphasise the needs of the poor throughout and recognises the important relationship between poverty, inequity and environmental degradation:⁹⁷

The satisfaction of human needs and aspirations is the major objective of development. The essential needs of vast numbers of people in developing countries for food, clothing, shelter, jobs - are not being met, and beyond their basic needs these people have legitimate aspirations for an improved quality of life. A world in which poverty and inequity are endemic will always be prone to ecological and other crises. Sustainable development requires meeting the basic needs of all and extending to all the opportunity to satisfy their aspirations for a better life.⁹⁸

The recognition of the role of poverty alleviation in achieving sustainable development serves as a reminder that the social and economic development included in the notion of sustainable development should be understood as existing primarily for the poor. The Brundtland Report warns against living standards which encourage "living beyond the world's ecological means".⁹⁹ The report also reiterates

⁹⁴ Tladi *Sustainable Development* 16.

⁹⁵ Tladi *Sustainable Development* 24. See also Glazewski J "The nature and scope of environmental law" in J Glazewski & L Du Toit (eds) *Environmental Law in South Africa* (OS 2013) 1-15; Beyerlin & Maruhn *International Environmental Law* 74; Kidd "Environment" in *Bill of Rights Handbook* 524.

⁹⁶ Report of the World Commission on Environment and Development: Our Common Future (1987) UN Doc A/42/427 41.

⁹⁷ This relationship is discussed further at 5 7 3 3.

⁹⁸ Report of the World Commission on Environment and Development: Our Common Future (1987) UN Doc A/42/427 42-43.

⁹⁹ Report of the World Commission on Environment and Development: Our Common Future (1987) UN Doc A/42/427 42. The Report states:

the relationship between the environment and development and stresses that these are interlocking crises.¹⁰⁰

The next important milestone in the evolution of sustainable development is the 1992 United Nations Conference on Environment and Development (UNCED) which produced the Rio Declaration on Environment and Development (Rio Declaration).¹⁰¹ As with the Stockholm Declaration and the Brundtland Report, the link between the environment and development is emphasised throughout the Rio Declaration.¹⁰² The Rio Declaration begins with an unmistakable anthropocentric perspective when it states that “[h]uman beings are at the centre of concerns for sustainable development”.¹⁰³ In accord with the Brundtland Report, the Rio Declaration recognises the eradication of poverty “as an indispensable requirement for sustainable development”.¹⁰⁴ Human need is a central concern and the environment seems to be understood as a means of meeting human needs. Principle 8 refers to the elimination of “unsustainable patterns of production and consumption”, for the goal of “sustainable development and a higher quality of life for all people”.¹⁰⁵ The Rio Declaration includes fewer references to environmental duties or responsibilities, and Tladi suggests that it may suggest “an inclination towards economic concerns”, whereas the Stockholm Declaration placed a greater emphasis on environmental interests and human rights.¹⁰⁶

In 2002 South Africa hosted the World Summit on Sustainable Development (WSSD) in Johannesburg which produced the Johannesburg Declaration on

Living standards that go beyond the basic minimum are sustainable only if consumption standards everywhere have regard for long-term sustainability. [...] Perceived needs are socially and culturally determined, and sustainable development requires the promotion of values that encourage consumption standards that are within the bounds of the ecologically possible and to which all can reasonably aspire.

See also Tladi *Sustainable Development* 24.

¹⁰⁰ Report of the World Commission on Environment and Development: Our Common Future (1987) UN Doc A/42/427 13. See also Tladi *Sustainable Development* 24; Halvorssen AM “International law and sustainable development – tools for addressing climate change” (2011) 39 *Denver Journal International Law and Policy* 397 401.

¹⁰¹ Rio Declaration on Environment and Development (Rio de Janeiro, June 1992) A/CONF.151/26.

¹⁰² See for example Rio Declaration on Environment and Development (Rio de Janeiro, June 1992) A/CONF.151/26 principles 3, 4 & 25.

¹⁰³ Rio Declaration on Environment and Development (Rio de Janeiro, June 1992) A/CONF.151/26 principle 1.

¹⁰⁴ Principle 5.

¹⁰⁵ Principle 8.

¹⁰⁶ Tladi *Sustainable Development* 28. Halvorssen suggests that the Rio Declaration is indicative of “a compromise between the interests of developed and developing countries”. Halvorssen (2011) *DJILP* 402.

Sustainable Development (Johannesburg Declaration).¹⁰⁷ An important contribution of the Johannesburg Declaration is the identification of the three components which have become central to the principle of integration:¹⁰⁸

[W]e assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection.¹⁰⁹

In addition to this relationship between the three pillars, the Johannesburg Declaration also emphasises the need for poverty eradication,¹¹⁰ the problematic gap between rich and poor,¹¹¹ and the importance of human development.¹¹² It is also significant to note the reference to access to “clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity”,¹¹³ which suggests that socio-economic rights have a key role to play in advancing sustainable development. The Johannesburg Declaration emphasises human rights and the needs of the poor rather than the protection of the natural environment, suggesting that its conception of sustainable development involves a greater anthropocentric slant than the earlier instruments.¹¹⁴

While the Johannesburg Declaration was the major product of the WSSD, the International Law Association also presented the New Delhi Declaration on the Principles of International Law Relating to Sustainable Development (New Delhi Declaration) at the Summit.¹¹⁵ The New Delhi Declaration contends that the following principles, among others, are essential for achieving sustainable development: the

¹⁰⁷ Johannesburg Declaration on Sustainable Development (Johannesburg, September 2002) A/CONF.199/20.

¹⁰⁸ See 5 7 2 and 5 7 4.

¹⁰⁹ Johannesburg Declaration on Sustainable Development (Johannesburg, September 2002) A/CONF.199/20 para 5. See also Boyle A “Human rights and the environment: Where next?” (2012) 23 *The European Journal of International Law* 613 629; Halvorssen (2011) *DJILP* 404; *Fuel Retailers v Director-General: Environmental Management* 2007 6 SA 4 (CC) para 53.

¹¹⁰ Johannesburg Declaration on Sustainable Development (Johannesburg, September 2002) A/CONF.199/20 para 7, 11. See Tladi *Sustainable Development* 31.

¹¹¹ Johannesburg Declaration on Sustainable Development (Johannesburg, September 2002) A/CONF.199/20 para 12.

¹¹² Para 7, 11 & 18.

¹¹³ Para 18.

¹¹⁴ Tladi *Sustainable Development* 32. Tladi notes that the natural environment is “conspicuous by its absence”.

¹¹⁵ New Delhi Declaration on the Principles of International Law Relating to Sustainable Development (9 August 2002) UN Doc A/CONF199/8.

principle of sustainable use of natural resources;¹¹⁶ the principle of equity and poverty alleviation;¹¹⁷ the precautionary principle;¹¹⁸ and “the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives”.¹¹⁹ The New Delhi Declaration is more explicit in its reference to environmental protection than the Johannesburg Declaration is, and Tladi notes that “the central concerns are poverty eradication and environmental protection”.¹²⁰ The interrelationship between poverty and the environment is again highlighted as a fundamental issue in the achievement of sustainable development.

In 2012 the United Nations Conference on Sustainable Development was held in Rio de Janeiro. In the outcome document “The Future We Want”, later adopted by the United Nations General Assembly, poverty eradication was recognised as “an indispensable requirement for sustainable development”.¹²¹ The document also confirms the need to achieve sustainable development through reducing inequality, improving basic living standards and encouraging equitable social and economic growth.¹²² Considering all the international sources above, it is undeniable that the international community views poverty eradication as an absolute necessity for the promotion of sustainable development.

While there is little international jurisprudence dealing explicitly with sustainable development, the 1997 case of *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*¹²³ does refer to the concept. This case dealt with a dispute over the construction of a power plant on the Danube river with the aim of producing hydroelectricity.¹²⁴ The International Court of Justice (ICJ) described the underlying rationale of the concept of sustainable development as follows:

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

¹¹⁶ New Delhi Declaration on the Principles of International Law Relating to Sustainable Development (9 August 2002) UN Doc A/CONF199/8 principle 1.

¹¹⁷ Principle 2.

¹¹⁸ Principle 4.

¹¹⁹ Principle 7.

¹²⁰ Tladi *Sustainable Development* 36. See also Field T “Sustainable development versus environmentalism: Competing paradigms for the South African EIA regime” (2006) 123 *SALJ* 409 412-413 for a brief discussion of the New Delhi Declaration.

¹²¹ UN General Assembly *The Future We Want* (27 July 2012) Un Doc A/RES/66/288 para 2.

¹²² Para 4.

¹²³ ICGJ 66 (ICJ 1997) (*Gabčíkovo-Nagymaros*).

¹²⁴ Para 15.

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.¹²⁵

The ICJ noted the development of international environmental law and the notion of sustainable development. The principles of intergenerational equity and the integration of economic development and environmental protection are recognised by the ICJ. What is important about this case, and indeed the paragraph quoted here, is that it is referred to with approval by the South African Constitutional Court in *Fuel Retailers*.¹²⁶ This suggests that the ICJ's description of sustainable development should be instructive in the interpretation of sustainable development in the South African context, and particularly in the context of section 24. The more recent 2010 case of *Pulp Mills on the River Uruguay (Argentina v Uruguay)* also deals with sustainable development concerns, and the ICJ reiterates that the “essence” of sustainable development is “the balance between economic development and environmental protection”.¹²⁷ This definition is limited to *economic* development which is in contrast to the emphasis on social development, poverty and human rights concerns found in many of the international instruments discussed above.

The case of *Social and Economic Rights Action Centre (SERAC) v Nigeria*,¹²⁸ although it involves very little discussion of the meaning or application of sustainable development, is an excellent illustration of the concerns and conflicts at issue in sustainable development scenarios. The case concerned the exploitation certain oil reserves in the Ogoniland region of Nigeria which involved the Nigerian government (in the form a state-owned oil company – the Nigerian National Petroleum Company) as well as the Shell Petroleum Development Corporation. It was alleged that the oil reserves had been exploited “with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local

¹²⁵ Para 140.

¹²⁶ 2007 6 SA 4 (CC) para 54.

¹²⁷ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* ICGJ 3 (ICJ 2007) para 177.

¹²⁸ Communication No 155/96 (2001) ACHPR (‘SERAC’).

waterways”.¹²⁹ The oil companies’ failure to maintain facilities also resulted in oil spills “resulting in contamination of water, soil and air” in close proximity to certain villages.¹³⁰ *SERAC* is an indication of the potential consequences of economic development which is allowed to persist unhindered by social and environmental concerns. The African Commission on Human and Peoples’ Rights (the African Commission) held that the Nigerian government was guilty of a number of violations of the African Charter on Human and Peoples’ Rights,¹³¹ including the environmental right in article 24. Although article 24 of the African Charter does not mention sustainable development, the African Commission held that it should be included in the interpretation of the right:

[Article 24 of the African Charter] requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.¹³²

The African Commission acknowledges that the right to a general satisfactory environment favourable to development in article 24 necessarily includes the notion of sustainable development. On the tension between environmental protection and economic development in this case Van der Linde and Louw note:

[T]he African Commission gave clarity on the fact that although it can be balanced against development, the right to a satisfactory environment will not necessarily take a back seat if it impacts negatively on economic development.¹³³

The African Charter asserts that the environment should be favourable to development, but this does not mean that development always enjoys preference over the environment. Indeed in *SERAC* the environmental needs of the people (integrally connected to their livelihoods) were considered more important in the circumstances than the economic interests of the oil companies.

The case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*¹³⁴ highlights the

¹²⁹ Para 2.

¹³⁰ Para 2.

¹³¹ (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (‘African Charter’).

¹³² Para 52. This formulation is of course familiar as it is almost identical to that of section 24(b) of the South African Constitution.

¹³³ Van der Linde M & Louw L “Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples’ Rights in light of the *SERAC* communication” (2003) 3 *AHRLJ* 167 179.

¹³⁴ Communication No 276/2003 (2010) ACHPR (‘*Endorois*’).

important role of the right to development in article 22 of the African Charter.¹³⁵ This case concerned the development of a game reserve on a piece of land and the consequent eviction of indigenous communities for whom the land had cultural and spiritual significance. The Commission emphasised certain criteria for fulfilling the right to development in its decision:

[Development] must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important over-arching themes in the right to development.¹³⁶

Where sustainable development is implemented it could be argued that these criteria should be fulfilled. Development must be carried out with due regard for the dignity, equality and freedom of those affected. The criteria serve as a guide for development in “a democratic and open society”¹³⁷ which values “accountability, responsiveness and openness”¹³⁸ and should therefore be taken incorporated into the notion of sustainable development. In *Endorois* the African Commission noted that the Kenyan government had not provided necessary compensation or benefits and failed to provide alternative places for grazing and religious ceremonies central to the community’s way of life. As the Kenyan government had not provided for the needs of the Endorois community in the development process, the African Commission ultimately held that it was in violation of the right to development (this was amongst numerous other violations of the African Charter).¹³⁹

The status of the notion of sustainable development in international law is not entirely clear or agreed upon.¹⁴⁰ Some have argued that it should be considered a

¹³⁵ Article 22, African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217. Article 22 states:

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

¹³⁶ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication No 276/2003 (2010) ACHPR para 278.

¹³⁷ Preamble, Constitution of the Republic of South Africa, 1996.

¹³⁸ Section 1(d), Constitution of the Republic of South Africa, 1996.

¹³⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Communication No 276/2003 (2010) ACHPR para 298.

¹⁴⁰ See chapter 2, 2.2.2.1 for a discussion of the status of international law in South Africa.

part of international customary law,¹⁴¹ others consider it part of international soft law or a “political ideal” with no normative value.¹⁴² Beyerlin and Marauhn argue:

[T]here is much in favour of the assumption that sustainable development remains below the threshold of normative quality that is an indispensable prerequisite for ascribing the quality of a (legal) principle to it.¹⁴³

Although the ICJ dealt with sustainable development in *Gabčíkovo-Nagymaros*, it did not make any clear statement concerning the status of the concept. However, Weeramantry J, in a separate opinion of the case, maintained that sustainable development has indeed become part of international customary law:

The principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.¹⁴⁴

Although the status of sustainable development in international law is uncertain, sustainable development *has* benefitted from constitutional recognition in South Africa.¹⁴⁵ The international cases and instruments discussed should still influence the interpretation of section 24, which explicitly recognises sustainable development.¹⁴⁶

Feris and Tladi note that while the notion of sustainable development was largely formed in the international arena, it is important that it is “interpreted, applied and achieved primarily at a national level”.¹⁴⁷ International sources remain indispensable, particularly when it comes to sustainable development given that the concept is acknowledged in a range of international instruments and decisions of international adjudicative bodies. However, the environmental right must be interpreted within its

¹⁴¹ Beyerlin & Marauhn *International Environmental Law* 80; Sands P *Principles of International Environmental Law* (2003) 254.

¹⁴² Beyerlin & Marauhn *International Environmental Law* 80.

¹⁴³ Beyerlin & Marauhn *International Environmental Law* 81.

¹⁴⁴ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* ICGJ 66 (ICJ 1997) (Separate opinion Weeramantry) 95. See *Fuel Retailers v Director-General: Environmental Management* 2007 6 SA 4 (CC) footnote 64.

¹⁴⁵ See *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W) para 144A. Although it does not clearly settle the matter of its status, the Court in *BP* considers sustainable development a central feature of modern international law.

¹⁴⁶ See chapter 2, 2.2.2.1 on the role of international law in constitutional interpretation. The reference by the Constitutional Court to Weeramantry J’s opinion that sustainable development is part of international customary law suggests that the court is in agreement with him in that regard. See *Fuel Retailers v Director-General: Environmental Management* 2007 6 SA 4 (CC) footnote 64.

¹⁴⁷ Feris LA & Tladi D “Environmental rights” in D Brand & C Heyns *Socio-Economic Rights in South Africa* (2005) 249 261.

specific context, and sustainable development will have certain applications and implications in South Africa which would not arise in other contexts.

5 7 Academic opinion

5 7 1 Introduction

There is a broad range of approaches to sustainable development among academics of various disciplines. Many have defined sustainable development by identifying the elements or principles central to its meaning – some of these overlap with each other while others remain distinct. What seems to be agreed upon, however, is the need for sustainable development and the importance of its role in a world where the environment is increasingly threatened, which in turn threatens our way of life. The need for sustainable development is rooted in an awareness of the reciprocal or interdependent relationship between the environment and development.¹⁴⁸ Field describes sustainable development as “a state of consciousness or knowledge about the earth’s systems which includes knowledge of the linkages between human social and economic systems and environmental systems”.¹⁴⁹

There is a clear consensus on the need for change and an acknowledgment that unfettered development will have devastating consequences. Bray notes that “our current way of dealing with the environment clearly threatens the survival of humankind under conditions worthy of human beings”.¹⁵⁰ It is important to note that those who bear the disproportionate impact of environmental degradation are the poor. As Tladi points out, sustainable development is rooted in a recognition that “the current global pattern of development is detrimental for the environment and the social needs of the poor”.¹⁵¹ He suggests that it is necessary to “shift from the ruling economic growth paradigm to a paradigm where social and environmental considerations are prioritised”.¹⁵² Sustainable development is a means of

¹⁴⁸ See chapter 3, 3 6 above where the relationship between environment and development is discussed.

¹⁴⁹ Field (2006) *SALJ* 414.

¹⁵⁰ Bray E “Towards sustainable development: Are we on the right track?” (1998) 5 *SAJELP* 1 7.

¹⁵¹ Tladi *Sustainable Development* 34.

¹⁵² Tladi *Sustainable Development* 37.

acknowledging that the environmental impacts of development must be curtailed while recognising that development remains necessary.

5 7 2 Elements of sustainable development

There is no universal understanding of sustainable development. While many authors have identified certain essential elements of the term, few agree on what these elements are. There is, however, a significant amount of overlap and agreement on aspects of sustainable development. I will now review some of the prevalent interpretations to determine what aspects of sustainable development are agreed upon. Those aspects which enjoy widespread recognition should be incorporated into our understanding of sustainable development within section 24.

Sands divides sustainable development into four core elements: intergenerational equity, sustainable use of natural resources, equitable use of natural resources (or intragenerational equity) and the integration of environmental concerns with development.¹⁵³ Intergenerational equity requires the current generation to preserve the environment for the sake of future generations, and sustainable use insists on reasonable exploitation of resources so as not to deplete them. Intragenerational equity requires the use and distribution of natural resources to be equitable within the current generation, and the principle of integration demands the consideration and incorporation of environmental interests into social and economic development.

A similar set of core substantive elements of sustainable development is identified by Birnie and Boyle. They argue that sustainable development includes the integration of environmental protection and economic development; the right to development; the sustainable use and conservation of natural resources; intergenerational and intragenerational equity; and the polluter pays principle.¹⁵⁴ The importance and necessity of development is underscored by the inclusion of the right to development as an essential element of sustainable development, while the polluter pays principle emphasises the need for those responsible for environmental damage to bear the necessary costs.

¹⁵³ Sands *Principles of International Environmental Law* 253. See also Glazewski "The nature and scope of environmental law" in *Environmental Law in South Africa* 1-16; Kidd M *Environmental Law* 2 ed (2011) 17; Field (2006) SALJ 412.

¹⁵⁴ Birnie P & Boyle A *International Law and the Environment* 2 ed (2002) 86-95. See also Glazewski "The nature and scope of environmental law" in *Environmental Law in South Africa* 1-15–1-16.

Marong also identifies certain principles which give content to sustainable development. As Sands and Birnie and Boyle have done, he refers to intergenerational and intragenerational equity and integration. In addition to these he adds the duty not to cause environmental harm, the principle of sovereignty over natural resources and the principle of common but differentiated responsibility.¹⁵⁵ These additional principles are particularly relevant in the international context with reference to the sovereignty of each state over its own resources, and the common responsibility of all states with regard to environmental protection coupled with the recognition that the responsibility for environmental degradation rests more heavily on developed states.¹⁵⁶

Field divides sustainable development into two categories: seeing rightly and equity. Seeing rightly refers to those aspects of sustainable development linked to “an awareness of our profound lack of scientific certainty” with regard to the relationship between social, economic and environmental systems.¹⁵⁷ She argues that that the principle of integration, the precautionary principle and the preventive principle are all justified by the overarching notion of seeing rightly. Field explains that it is knowledge, that the environmental impact of economic activities may prevent such activity in the future, which necessitates a consideration of economic and environmental interests simultaneously (the principle of integration); lack of sufficient knowledge of the consequences of certain activities for the environment demands that we exercise caution (the precautionary principle); and an awareness of our inability to reverse certain environmental harm requires that we prohibit activities which would cause such harm (the preventive principle).¹⁵⁸

The second category of principles identified by Field is that of equity. She places much emphasis on the idea of equity and argues that “equity, not environmental

¹⁵⁵ Marong ABM “From Rio to Johannesburg: Reflections on the role of international legal norms in sustainable development” (2003) 16 *Georgetown International Environmental Law Review* 21 61-63. See also Field (2006) *SALJ* 413.

¹⁵⁶ The relationship between developed and developing states is an important aspect of intragenerational equity in the international context, and is often expressed in the principle of common but differentiated responsibilities. Developing states may be given less onerous obligations so that necessary development is not impeded too severely by environmental obligations. As this principle relates specifically to states and their international relationships, it will not be addressed here. See Tladi *Sustainable Development* 49-58.

¹⁵⁷ Field (2006) *SALJ* 414.

¹⁵⁸ Field (2006) *SALJ* 415.

protection, is the absolute core of sustainable development”.¹⁵⁹ Linking equity to the environment, she explains:

[E]quity requires, more than ever before, an enhanced understanding, consideration and respect for our precarious and finite natural environment, and the desire to transform our human systems so as to be in harmony with that environment.¹⁶⁰

The principles of sustainable development which are incorporated into the idea of equity are intergenerational and intragenerational equity (also described by Field as temporal and geographical equity).¹⁶¹ Field notes that unlike seeing rightly, the principles of equity involve moral choices and moral duties which relate to the need “to leave enough natural resources for future generations”, the need to meet the needs of the present generation and the need “to ensure that everyone bears the cost of past unsustainable practices equally”.¹⁶² She suggests that the achievement of equity should involve poverty alleviation, transformation and redress, and environmental justice.¹⁶³ Field’s conception of equity is clearly aligned to the goals and values of the Constitution as expressed in the preamble and the Bill of Rights.¹⁶⁴

Sustainable development, and more specifically the principle of integration, involves the balancing of the three pillars of social, economic and environmental interests. While sustainable development was initially understood as involving the relationship between the environment and development, this conceptualisation has been recognised as insufficient and it is increasingly “being defined as the integration of social, economic and environmental concerns”.¹⁶⁵ Tladi warns against treating social and economic concerns as mere elements of development and not as independent interests as this could contribute to “the instrumentalisation of sustainable development for economic ends”.¹⁶⁶ Some authors still choose to refer to the two elements of economic development and environmental protection. Murombo,

¹⁵⁹ Field (2006) *SALJ* 417.

¹⁶⁰ Field (2006) *SALJ* 417.

¹⁶¹ Field (2006) *SALJ* 415.

¹⁶² Field (2006) *SALJ* 415.

¹⁶³ Field (2006) *SALJ* 415-416.

¹⁶⁴ The preamble of the Constitution states that the people of South Africa adopt the Constitution in order to “[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights” and to “[i]mprove the quality of life of all citizens and free the potential of each person”.

¹⁶⁵ Tladi *Sustainable Development* 78.

¹⁶⁶ Tladi (2008) *CCR* 258.

for example, refers to the principle of integration as involving “concepts of development, or economic growth, and environmental protection or conservation”.¹⁶⁷

While the majority of commentators refer to the three pillars as social, economic and environmental,¹⁶⁸ some choose to use different language to describe these components of sustainable development. Glazewski offers an additional description of each pillar when he refers to “environmental protection, economic development and social upliftment”.¹⁶⁹ This expression of the three pillars clarifies the underlying goal of each aspect of sustainable development – to protect the environment, develop the economy and improve people’s lives. Van der Linde and Basson offer a more moderate, and perhaps watered-down, description of sustainable development being “environmentally appropriate, socially beneficial and economically viable”.¹⁷⁰ This suggests an integration that renders each pillar tolerable rather than actively promoting environmental, social and economic concerns. Field indicates support for Ruhl’s approach which includes the environment and economy, but replaces social concerns with equity as the third component of sustainable development and integration.¹⁷¹ As will be seen in the discussion of equity below, this substitution of social concerns with equity implicates transformation, poverty alleviation and equitable distribution of resources, which could all be understood as elements of the social pillar. There is a great deal of overlap between equity and social interests as pillars of sustainable development. As it is the more widely used formulation, I will be referring to sustainable development as comprising of the three pillars of social, economic and environmental concerns.

While there are many different conceptions of sustainable development, certain principles are consistently presented as central to the term. The two which have been consistently recognised and received the most attention in the literature are the principles of equity and integration. Equity includes both intergenerational and intragenerational equity, while integration refers to the relationship between

¹⁶⁷ Murombo (2008) *SALJ* 503. In doing this Murombo essentially equates development with economic growth and excludes the need for social development.

¹⁶⁸ Tladi *Sustainable Development* 79; Kidd *Environmental Law* 17.

¹⁶⁹ Glazewski J “The Bill of Rights and environmental law” in J Glazewski & L Du Toit (eds) *Environmental Law in South Africa* 5-20.

¹⁷⁰ Van der Linde & Basson “Environment” in *CLOSA* 50-22.

¹⁷¹ Field (2006) *SALJ* 417. See Ruhl JB “Sustainable development: A five-dimensional algorithm for environmental law” (1999) 18 *Stanford Environmental Law Journal* 31 40.

environmental, social and economic interests. These two essential elements of sustainable development will now be addressed in more detail.

5 7 3 Equity

5 7 3 1 Introduction

As noted above, equity is widely recognised as an essential component of sustainable development.¹⁷² The role of equity in the interpretation of sustainable development in the environmental right cannot be overlooked. The right to equality, the constitutional value of equality and the explicit reference to “the benefit of present and future generations” in section 24 all underscore the crucial role of equity in the interpretation of sustainable development. Equity in sustainable development terms can be divided into two categories: intergenerational equity and intragenerational equity. Intergenerational equity operates temporally and is concerned with the needs of future generations, while intragenerational equity operates geographically and is concerned with equitable distribution of resources and meeting needs within the present generation.

5 7 3 2 Intergenerational Equity

As discussed above,¹⁷³ much of sustainable development discourse is rooted in the awareness that current economic development, consumption and use of natural resources could threaten the ability of future generations to meet their own needs.¹⁷⁴ This gives rise to a moral obligation on the present generation to preserve the environment for the sake of future generations. Feris and Tladi explain:

Each generation receives a natural and cultural legacy in trust from previous generations and [...] there is an obligation on each generation to conserve the natural and cultural resource base for future generations.¹⁷⁵

This approach demands that the present generation makes decisions with an appreciation of the potential consequences for future generations. As Tladi notes,

¹⁷² See 5 7 2. See also Field (2006) *SALJ* 415.

¹⁷³ See 5 7 1.

¹⁷⁴ Tladi *Sustainable Development* 41.

¹⁷⁵ Feris & Tladi “Environmental rights” in *Socio-Economic Rights in South Africa* 253.

“intergenerational equity infuses a forward-looking approach into sustainable development discourse”.¹⁷⁶ The precise needs of future generations are not clear, and arguably unknowable, but Du Plessis explains that sustainable development should aim to give “existing and future generations [...] access to economic, social, cultural and environmental entitlements”.¹⁷⁷ This suggests that it is not merely the survival of future generations with which we are concerned, but also their ability to live full and dignified lives.

In order to achieve intergenerational equity it is necessary to establish approaches to development which take environmental consequences seriously and aim to minimise environmental degradation. The principle of integration is a means of achieving this.¹⁷⁸ Du Plessis explains that “cross-generational environmental justice requires of each existing generation to stay on a sustainable development track”.¹⁷⁹ Sustainable development is a long term project which must be employed by each generation in order to provide for the next.

The principle of intergenerational equity is, however, not without criticism. Tladi points out that “[f]rom an ecocentric perspective, intergenerational equity as an anthropocentric approach is ethically flawed and insufficient to ensure meaningful protection of the environment”.¹⁸⁰ Ecocentric environmentalists would argue that intergenerational equity is insufficient as it is solely concerned with human need and not, for example, biodiversity or the preservation of endangered species. In the context of section 24, however, conservation and ecological degradation receive explicit recognition, so there is less risk that environmental protection will be overshadowed by social and economic concerns. Considering the interpretation proposed for well-being in chapter 4 above it is also evident that conservation and environmental protection are important for the well-being of present and future generations. There is a clear constitutional imperative for measures to be taken to preserve these aspects of the environment for the benefit of present and future

¹⁷⁶ Tladi *Sustainable Development* 43. Tladi goes on to note that “the principle of intergenerational equity is closely related to the precautionary principle which is also forward-looking”.

¹⁷⁷ Du Plessis A “South Africa’s constitutional environmental right (generously) interpreted: What is in it for poverty?” (2011) 27 *SAJHR* 279 291.

¹⁷⁸ Integration is discussed at 5 7 4.

¹⁷⁹ Du Plessis (2011) *SAJHR* 290.

¹⁸⁰ Tladi *Sustainable Development* 45.

generations. Tladi argues, quite convincingly, that the principle of intergenerational equity need not be seen as a threat to the environment:

Inherent in this principle of intergenerational equity [...] is a recognition of the autonomy of future generations to determine for themselves what their needs may be. [...] The principle of intergenerational equity thus requires the present generation to leave the environment in as good a condition as it was found. [...] Thus, a proper understanding of the principle of intergenerational equity would require the protection, and not destruction, of all natural species and not only those that benefit us at present.¹⁸¹

The obligation to preserve the environment so as to leave it in “as good a condition as it was found” is reinforced by the recognition that we cannot, as the current generation, predict how the world will change in the future. Medical, technological and industrial needs could, for example, transform dramatically in the next century leading to unimagined demands for specific resources that seem worthless to the present generation. Tladi explains that the perceived threat to environmental protection posed by intergenerational equity is unfounded, as “[i]ntergenerational equity is concerned with *our duty* to protect the environment; not *our right* to destroy it”.¹⁸²

5 7 3 3 Intragenerational Equity

The principle of intragenerational equity is concerned with equity within the current generation.¹⁸³ This involves the equitable distribution of environmental resources and the recognition that development can contribute to the prevention of environmental harm. Tladi suggests that “[i]ntragenerational equity is concerned with the distribution of the benefits of development activities and the distribution of costs for environmental protection”.¹⁸⁴ In other words, the benefits of development and natural resources should be shared equitably among all those belonging to the current generation, and the costs of preserving the environment for the next generation should also be distributed equally. The equitable distribution of environmental assets

¹⁸¹ Tladi *Sustainable Development* 46.

¹⁸² Tladi *Sustainable Development* 47.

¹⁸³ This notion of intergenerational equity includes the relationship between developed and developing states and the principle of common but differentiated responsibilities. This relationship between states is beyond the scope of this thesis and will not be addressed here. See Tladi *Sustainable Development* 49-58 for a discussion of common but differentiated responsibilities.

¹⁸⁴ Tladi *Sustainable Development* 48.

and costs intersects with idea of environmental justice.¹⁸⁵ As noted above, environmental justice, (as with equity) highlights the connection between the environment and equality, both as constitutional right and constitutional value.¹⁸⁶

Intragenerational equity also emphasises the relationship between development and the environment. People's capacity for development is linked to their capacity for preventing environmental harm. Feris and Tladi have argued:

In the context of environmental rights, intragenerational equity recognises the inherent right of peoples to development. This means therefore that any recognition of environmental rights must be balanced with the right to development.¹⁸⁷

This conception of intragenerational equity overlaps with the principle of integration which balances social and economic interests with the environment.

Social justice and socio-economic rights are also implicated in the principle of intragenerational equity as it recognises the needs of the current generation as well as the environmental damage that this generation could do. The perpetrators of this damage are predominantly the poor who have no option other than to employ unsustainable practices in order to survive.¹⁸⁸ Feris describes intragenerational equity as follows:

The principle of intragenerational equity (equity within generations) is essentially an approach that takes cognisance of the distributional demands of social justice. This is premised on the belief that distributional inequalities are causally responsible for a great deal of environmental degradation. Reducing inequalities can therefore be held to be a necessary means of achieving sustainability. This is of particular importance in the South African context, given the enduring nature of socio-economic inequalities in the country.¹⁸⁹

It is clear that a conception of sustainable development which incorporates intragenerational equity (as defined by Feris) must include the goal of socio-economic transformation and poverty alleviation. Du Plessis describes the

¹⁸⁵ For more on environmental justice see Feris LA *The Conceptualisation of Environmental Justice within the Context of the South African Constitution* LLD dissertation Stellenbosch University (2000); Glazewski J "Environmental justice and the new South African democratic legal order" (1999) *Acta Juridica* 1-35; Kidd M "Environmental justice – a South African perspective" (1999) *Acta Juridica* 142-160.

¹⁸⁶ See chapter 2, 2 3 4 2.

¹⁸⁷ Feris & Tladi "Environmental rights" in *Socio-Economic Rights in South Africa* 254.

¹⁸⁸ Feris LA *The Conceptualisation of Environmental Justice within the Context of the South African Constitution* LLD dissertation Stellenbosch University (2000) 205.

¹⁸⁹ Feris L "Constitutional environmental rights: An under-utilised resource" (2008) 24 *SAJHR* 41.

relationship between poverty alleviation and sustainable development as a mutually beneficial one:

Environmental sustainability is necessary to achieving poverty reduction, and environmental or natural capital is necessary to ensuring wealth.¹⁹⁰

This suggests that successful sustainable development necessitates the alleviation of poverty.¹⁹¹ Feris argues that in order to achieve sustainability it is essential to reduce economic inequalities and address social welfare concerns.¹⁹² Kidd notes that this principle is evident in the environmental right. He argues that the health and well-being which is advanced through the environmental right in section 24(a) “consequently advances the objectives of s 24(b)’s concern with sustainable development”.¹⁹³

Poverty alleviation is, of course, not only necessary due to the environmental interests at stake. The relationship between poverty and environmental destruction also “has a direct impact on the enjoyment, realisation and improvement of other human rights and fundamental freedoms”.¹⁹⁴ The interdependent nature of the rights in the Bill of Rights becomes important here. The sustainable development required by section 24 exists alongside socio-economic rights which address poverty-related needs. These socio-economic rights must be incorporated into our understanding of section 24 to contribute to the poverty alleviation which ultimately aids sustainable development. Feris and Tladi explain:

For a truly integrated approach to sustainable development under the South African Constitution, the socio-economic rights protected, such as the housing rights, will have to be used to give content to the concept of sustainable development as found in section 24.¹⁹⁵

It is not only sustainable development which should incorporate socio-economic rights. Du Plessis argues that the converse is also true:

[S]ustainable development should be understood to require of the programmes and measures of the state that are aimed at poverty alleviation to be focused not only on

¹⁹⁰ Du Plessis (2011) *SAJHR* 285.

¹⁹¹ See Du Plessis (2011) *SAJHR* 290.

¹⁹² Feris (2008) *SAJHR* 43. See also Du Plessis (2011) *SAJHR* 289.

¹⁹³ Kidd “Environment” in *Bill of Rights Handbook* 525.

¹⁹⁴ Feris *Environmental Justice* 206.

¹⁹⁵ Feris & Tladi “Environmental rights” in *Socio-Economic Rights in South Africa* 262.

immediate social upliftment and/or economic relief, but to take account of the more inclusive need for environmental sustainability.¹⁹⁶

Sustainable development should be taken into account when interpreting other rights so as to achieve environmental sustainability in all spheres. This would contribute to the integration of environmental and developmental interests. The right of access to housing, for example, should be understood interdependently with section 24 and sustainable development so that housing policies and programmes consider the role of each of the three pillars of sustainable development.

Intragenerational equity, as an element of sustainable development, serves as a confirmation of the necessity of environmental justice and poverty alleviation in the achievement of environmental sustainability. It draws our attention away from purely environmental concerns to the human needs which must be addressed if we are to achieve sustainable development.

5 7 3 4 Conclusion

Equity demands an awareness of the needs of others and of the environmental consequences of our actions. Sustainable development, through the principle of equity, requires limits to be placed on consumption and depletion of environmental resources in order to allow others, both geographically and temporally, access to the resources they may need. Field explains that prioritising equity can minimise the exploitation of resources:

If equity – defined in terms of meeting basic needs both now and in the future – is kept in sight as the goal toward which we are moving, there is a good likelihood that we will eschew economic activities that overexploit the finite resource base on which we *all* depend.¹⁹⁷

It is important to note that the relationship between intergenerational equity and intragenerational equity places limits on the current generations' enjoyment of the environment and natural resources. Intragenerational equity should not overshadow the need for intergenerational equity. Willemien and Anél Du Plessis argue that "[t]he environmental right of the present generation can be protected and realised only to

¹⁹⁶ Du Plessis (2011) *SAJHR* 298.

¹⁹⁷ Field (2006) *SALJ* 419. See also Feris & Tladi "Environmental rights" in *Socio-Economic Rights in South Africa* 261.

the extent that it would not result in a negation of the availability of the same right for future generations".¹⁹⁸ There is therefore a continual interplay between benefit to the present generation and benefit to future generations. Equity requires a balance between these two. In addition to equity, the principle of integration is an essential element of sustainable development which be discussed below.

5 7 4 Integration

Turning to a more practical component of sustainable development, the principle of integration is a means of approaching environmental and developmental decision-making. Integration demands that environmental, social and economic concerns are considered simultaneously in order to, as far as possible, meet the needs of all three.¹⁹⁹ The need for integration is grounded in the realisation that environmental degradation cannot be prevented or minimised without paying attention to social and economic concerns. Willemien and Anél Du Plessis comment on this interrelationship between environmental, social and economic interests:

It is impossible to mitigate the known and unknown impacts of climate change in the absence of a concerted effort to level socio-economic interests with the protection of the natural resource base. Similarly, it is not possible to combat human and ecological vulnerability without having access to infrastructure, financial resources and food security mostly dependent on economic and agricultural activity, all of which have an environmental footprint.²⁰⁰

Integration recognises the interdependence of these factors. None of them can successfully be pursued in isolation, as they rely on each other. Integration requires "a holistic approach" to social, economic and environmental concerns.²⁰¹ Kidd explains that "[t]hese three pillars are equally important and must be pursued simultaneously and with equal effort".²⁰²

Achieving the integration of these three distinct elements is rarely a simple task. Conflicts of interests are inevitable, but this should not be a deterrent. Tladi points out that conflict between environmental, social and economic interests is precisely

¹⁹⁸ Du Plessis & Du Plessis "Striking the sustainability balance in South Africa" in *Environmental Law in Africa* 433-434.

¹⁹⁹ As noted at 5 7 2 different language can be used to describe these three pillars of sustainable development, but the majority of authors refer to environmental, social and economic interests.

²⁰⁰ Du Plessis & Du Plessis "Striking the sustainability balance in South Africa" in *Environmental Law in Africa* 445.

²⁰¹ Tladi *Sustainable Development* 58.

²⁰² Kidd *Environmental Law* 17-18.

why there is a need for integration.²⁰³ Integration requires us to find solutions which advance each sphere of interests rather than pitting them against one another. The principle of integration values compromise and incorporation of different interests over win-lose competition between conflicting interests.

Feris illustrates the unavoidable conflict between environmental, social and economic interests with reference to land restitution claims.²⁰⁴ She points out that many land claims concern land that is currently protected as with, for example, land in the Kruger National Park. A decision which takes cognisance of sustainable development would consider the environmental, social and economic consequences of such a claim concurrently. Feris demonstrates the tension between economic, social and environmental goals in such instances:

In making a decision on whether to award such claims decision-makers would have to take into account the possibility that claimants may not utilise the land for conservation purposes, but rather engage in other commercial ventures such as farming. This would clearly promote an economic and social goal as opposed to an environmental goal. However, whilst the environmental aim of preserving our natural heritage may weigh very heavy, equally so would the idea of restoring land to people who were unjustly deprived thereof in the past.²⁰⁵

Sustainable development does not prescribe the conclusion that such a decision-maker should come to, but it does demand that each of the three factors is considered. The decision-maker does not choose which of the three needs to fulfil, but rather attempts to satisfy all three simultaneously.²⁰⁶

Sustainable development, and more specifically integration, can be described as a problem-solving technique or algorithm.²⁰⁷ Ruhl argues that sustainable development “defines all social problems in terms of three parameters – environment, economy and equity – and projects them in the dimensions of geographic scale and time”.²⁰⁸ This approach expects the decision-maker to find the maximum benefit to each parameter within each dimension. In other words, it requires the decision-maker to “optimize all three parameters in both dimensions rather than maximize for any

²⁰³ Tladi *Sustainable Development* 64.

²⁰⁴ Feris (2008) *CCR* 249.

²⁰⁵ Feris (2008) *CCR* 249.

²⁰⁶ As will be seen in Tladi’s approach discussed below, a choice between social, economic and environmental interests is often inevitable as it is very rare to find a solution which can satisfy all three interests equally, forcing the decision-maker to prefer one over the others.

²⁰⁷ See Ruhl JB “Sustainable development: A five-dimensional algorithm for environmental law” (1999) 18 *Stanford Environmental Law Journal* 31.

²⁰⁸ Ruhl (1999) *Stanford Environmental Law Journal* 35-36. See also Field (2006) *SALJ* 417.

single parameter or dimension”.²⁰⁹ While this is a useful method for approaching sustainable development problems, it is clear that the integration of social, economic and environmental concerns is not a simple one. As Field notes, sustainable development involves “recognizing and working with a system that is complex, dynamic, adaptive and evolving”.²¹⁰

Murombo is critical of the principle of integration and its application in practice. He argues that the tension between these conflicting interests renders sustainable development ineffective:

[I]t is legitimate to argue that the continued meaninglessness of the concept of sustainable development is largely attributable to its attempt to reconcile the inherently irreconcilable and intricate concepts of development, or economic growth, and environmental protection or conservation.²¹¹

While these concepts may not be entirely “irreconcilable” as Murombo suggests, the cases where all three are satisfied equally are very rare. Tladi points out that decision-makers will almost always reveal a preference for one of the three pillars of sustainable development.²¹² He suggests that “[s]ustainable development can be used by environmentalists and those pursuing the ends of economic development respectively in support of opposite claims”.²¹³ Due to the variety of interests which could be protected under the areas of social, economic and environmental concerns, it is possible to disguise the advancement of a range of goals in the name of sustainable development. Tladi warns that, “[l]ike many other flexible legal and political concepts, integration and sustainable development can be misunderstood, misused or even abused to further particular positions”.²¹⁴ The biggest concern for those who champion environmental protection is that the principle of integration could allow economic interests to be dressed up as sustainable development, and therefore environmentally friendly interests, when in reality they only promote economic gain.

Field discusses the tension between environmentalism and sustainable development and argues that environmentalists would have a tendency to “maximize

²⁰⁹ Ruhl (1999) *Stanford Environmental Law Journal* 37. See also Field (2006) *SALJ* 417.

²¹⁰ Field (2006) *SALJ* 418.

²¹¹ Murombo (2008) *SALJ* 503.

²¹² Tladi *Sustainable Development* 76.

²¹³ Tladi *Sustainable Development* 75.

²¹⁴ Tladi *Sustainable Development* 66. See also Kidd *Environmental Law* 18.

the environmental parameter” rather than integrating social and economic interests alongside the environment.²¹⁵ Environmentalism is described as a linear way of thinking as opposed to the three-dimensional approach of sustainable development’s principle of integration.²¹⁶ According to Field, this insulation of environmental concerns “would breed linearity as ‘environmental measures’ were taken to address ‘environmental problems’ in order to produce ‘environmental solutions’”.²¹⁷ This environmentalist thinking is rooted in a concern for the protection of the environment and the fear that sustainable development thinking allows social and economic development to overshadow environmental issues.²¹⁸ Murombo voices this concern:

There is no evidence that the anthropocentric urge to develop and consume natural resources is about to change. On the contrary, there is increasing evidence that the radical environmental movement of the twentieth century is slowly being captured by economic interests.²¹⁹

Despite these criticisms of the principle of integration, Field argues that sustainable development thinking is necessary to advance environmental concerns.²²⁰ She suggests that the approach of the environmentalists is likely to be ineffective as they are at risk of becoming irrelevant. In South Africa environmental concerns must be managed within the context of the country’s history:

[P]olitically-engineered underdevelopment, the tragic association of environmental conservation with racial conflict, and the resultant perception that environmental issues only reflect the concerns of the white middle and upper classes.²²¹

It is because of this context that, despite the dangers of misuse, sustainable development thinking which integrates social, economic and environmental concerns, is a far better tool with which to tackle environmental problems than the linear approach of narrowly-focused environmentalists.

As already noted, the principle of integration does create opportunity for misuse and disguised bias. It is for this reason that Tladi advocates for a more transparent approach to sustainable development – one that recognises the preferred values that underlie a decision. He proposes

²¹⁵ Field (2006) *SALJ* 422.

²¹⁶ Field (2006) *SALJ* 422.

²¹⁷ Field (2006) *SALJ* 422.

²¹⁸ Field (2006) *SALJ* 423.

²¹⁹ Murombo (2008) *SALJ* 503.

²²⁰ Field (2006) *SALJ* 423.

²²¹ Field (2006) *SALJ* 423.

a more nuanced conceptualisation of sustainable development which not only accurately and expressly takes account of the values that sustainable development is supposed to integrate, but also, more consciously, identifies a hierarchy.²²²

The point of departure for Tladi is that the preference for one of the three elements of integration is unavoidable. He argues that this preference should be identified and recognised openly rather than ignored. Such transparency would allow us to investigate whether there is a basis for the preferred value or not.²²³ Feris explains:

Whilst the integration process is a value-driven process, the preferred value cannot be without a legitimate basis. In other words, a decision maker's decision should be grounded in law and there should be some justifiable base in law for the preferred value.²²⁴

Tladi suggests recognising these preferred values by identifying the use of one of three variations of sustainable development, each prioritising either social, economic or environmental concerns. The three variations which Tladi proposes are the economic growth-centred variation, the environment-centred variation and the human needs-centred variation.²²⁵ Each variation indicates "the values that take pole position in cases of conflict".²²⁶ The goal is still integration of *all three pillars* of sustainable development, but Tladi's approach recognises that there will be conflicts and that these conflicts will expose the decision-maker's bias and preferences. As one would expect, in the economic growth-centred variation, economic growth trumps the other values in cases of conflict; in the environment-centred variation, the environment is prioritised; and in the human needs-centred variation social needs and the well-being of humanity enjoys prominence.²²⁷

Although economic and social interests are often thought of as a unit, Tladi emphasises the need to distinguish between the two variations which prioritise these two related concerns. Both economic and social concerns are anthropocentric and seem to stand in opposition to environmental interests, but Tladi illustrates how different the two approaches are:

[T]hese two variations of sustainable development tend to pull in fundamentally opposite directions. While the human needs variation has, as its focus, basic human

²²² Tladi *Sustainable Development* 247. See also Feris (2008) *CCR* 253.

²²³ See Feris (2008) *CCR* 251.

²²⁴ Feris (2008) *CCR* 251.

²²⁵ Tladi *Sustainable Development* 80.

²²⁶ Tladi *Sustainable Development* 80.

²²⁷ Tladi *Sustainable Development* 80.

needs required for a life of dignity, under the economic growth variation the focus is on those activities that can lead to the growth of national economies. Thus, in social needs-centred variations the emphasis tends to be on issues such [as] poverty eradication, improved access to health facilities, education and meeting all other needs necessary for a life of dignity.²²⁸

Given the relationship between poverty and environmental degradation discussed above,²²⁹ it is important to note that the human needs-centred variation minimises the environmental harm caused by poverty and a lack of development. The economic centred-variation, as Tladi argues, is concerned with economic gain (which contributes to the national economy), but seems to hold no direct benefit for the environment or for the poor. He points out that the human needs-centred variation has social well-being as its objective and recognises that money and economic growth may be essential to advance social well-being.²³⁰ Under the human needs-centred variation economic growth would, however, be instrumental rather than an end in itself. Tladi ultimately concludes that both the environment-centred variation and the human needs-centred variation can be categorised as 'strong' approaches to sustainable development, whereas the economic growth-centred variation is clearly 'weak'.²³¹

In conclusion, the principle of integration demands that decision-makers attempt the optimal solution which will simultaneously meet social, economic and environmental needs. As it will rarely be possible to satisfy all three factors equally, it is important to encourage transparency where a choice must be made to favour one of the factors. Tladi's approach of the three variations of sustainable development offers a mechanism to recognise the preferred value in cases of conflict while demanding a legitimate legal basis for that preferred value. This approach to the principle of integration, and to sustainable development as a whole, is a useful one which will be discussed further below.

²²⁸ Tladi *Sustainable Development* 81 & 90.

²²⁹ See 5 7 3 3.

²³⁰ Tladi *Sustainable Development* 88.

²³¹ Tladi *Sustainable Development* 89-90.

5 8 Proposed interpretation

It is evident that sustainable development is a complicated, multi-faceted notion which is difficult to define and perhaps even more difficult to apply. It is necessary, however, to attempt to formulate an interpretation of sustainable development specific to South Africa, and specific to the environmental right in section 24.²³²

Reasonableness has an important role to play in sustainable development decisions. Section 24(b) requires that “reasonable legislative and other measures” are used to achieve sustainable development. Reasonableness provides a standard against which the State’s policies and programmes can be tested:

[Reasonableness review] subjects government’s choices to the requirements of reasonableness, inclusiveness, and particularly, the threshold requirement that all programmes must provide short-term measures of relief for those whose circumstances are urgent and intolerable.²³³

The principles of reasonableness review developed in socio-economic rights jurisprudence are important for evaluating reasonableness in sustainable development matters.²³⁴ The measures adopted by the State in fulfilment of section 24(b)(iii) with regard to sustainable development must meet these reasonableness requirements. This has important implications for how the three pillars of sustainable development are balanced. The requirement of short-term measures for urgent cases of immediate need implies that an emphasis should be placed on the pillar which can meet the urgent need of those living in intolerable conditions. This may require attention to be given to short term measures which fall under the social or economic pillar of sustainable development, while the long term needs of environmental protection are simultaneously advanced. Reasonableness review requires the prioritisation of short term needs of the poor while progressive realisation of the right is simultaneously promoted through long term policies and programmes. Section 24 does not include a progressive realisation qualification, but

²³² Feris & Tladi “Environmental rights” in *Socio-Economic Rights in South Africa* 261.

²³³ Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 174. See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) para 44.

²³⁴ See *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC); *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC); *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 6 SA 505 (CC).

the balancing of short-term and long-term needs is still relevant. The long-term projects of ecological sustainability and environmental protection require constant and consistent action for future benefits. These long-term projects must be balanced with current short-term social and economic needs. Reasonableness review emphasises the need to pursue these short-term and long-term goals simultaneously.

Quinot and Liebenberg explain that reasonableness review requires an assessment of the measures taken by the State to determine whether they “are sufficiently effective and expeditious in achieving the goal of the full realisation of the relevant socio-economic rights”.²³⁵ This assessment necessitates a clear understanding of the goals and purposes of the right in question. The constitutional goals and values as well as the interdependence of rights are important here as they can shed light on the purposes of the environmental right which need to be realised through these reasonable measures.

The plight of the poor is an important consideration in assessing the reasonableness of measures taken in the realisation of socio-economic rights, and therefore sustainable development. As Liebenberg points out, “the Court has acknowledged the poor as a vulnerable group in society, whose needs require special attention”.²³⁶ Consideration of the position of the poor is important in sustainable development matters, as the poor experience the impacts of unsustainable development and environmental degradation more than any other sector of society. The poor are also in more need of the social and economic development which is required to be advanced by the environmental right. The promotion of sustainable development must therefore involve a regard for the needs of the poor if it is to be deemed reasonable.

Any reasonable measures taken to achieve sustainable development should be effective in realising the goals and purposes of section 24. The way the three pillars of sustainable development are balanced should be in accordance with the specific circumstances of the case taking into account the short and long term needs involved as well as the urgent needs of the most desperate. It is important to

²³⁵ Quinot G & Liebenberg S “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” (2011) 3 *Stellenbosch Law Review* 656.

²³⁶ Liebenberg *Socio-Economic Rights* 174.

remember the poor and consider the impact that environmental degradation or a lack of social and economic development could have on them. All of these factors will influence the reasonableness of a decision, policy or programme which aims to advance sustainable development.

As noted above, sustainable development involves the constant integration and balancing of different interests. In the constitutional context this is similar to the task of balancing of conflicting rights:

All of these rights [to housing, water, property and freedom of trade] require a constant balancing of diverging interests – often interests forming part of the pillars of sustainable development and the factors underpinning sustainability.²³⁷

Sustainable development under the Constitution will often involve competing rights which need to be weighed against one another. There is no hierarchy of rights present in the Constitution, which means that there is a need “for the continuous balancing *inter alia* of economic, environmental, social and cultural interests”.²³⁸ Of course interests that enjoy constitutional protection should be given preference over those that do not.

The interests linked to each of the three pillars of sustainable development should be balanced in proportion to the need for each respective pillar. Where there is urgent and serious need for environmental protection of an endangered species, the emphasis on environmental interests should be in proportion to this need. In this case a reasonable and proportional balancing of environmental, social and economic interests would favour the environmental interests. Similarly, where an urgent or life threatening social need comes into conflict with environmental interests which do not demand immediate action, the social pillar of sustainable development should enjoy preference in proportion to the extent of the need. The consideration of any less restrictive means should be required in sustainable development decisions to ensure that the final balance of the three pillars is the least limiting and offers the broadest protection to all three pillars as is possible in the circumstances. Where other constitutionally protected rights are implicated this will of course impact the emphasis placed on the three pillars.

²³⁷ Du Plessis & Du Plessis “Striking the sustainability balance in South Africa” in *Environmental Law in Africa* 431.

²³⁸ Du Plessis & Du Plessis “Striking the sustainability balance in South Africa” in *Environmental Law in Africa* 432.

Turning to the environmental right itself, it has been established that section 24 has a distinctly anthropocentric character.²³⁹ As noted above, section 24(b) has the protection of the environment as its focus, but this environmental concern is for the sake of present and future generations, and not for the sake of the environment itself. Sustainable development is concerned both with environmental protection and social and economic development, but in section 24(b)(iii) the emphasis lies on the environment. The subsection refers to *ecologically* sustainable development and use of natural resources which should be carried out while promoting development at the same time. The structure of the right indicates that social and economic development is secondary to ecologically sustainable development.²⁴⁰ Section 24(b)(iii) protects human interests primarily through environmental protection and ecologically sustainable development which serves present and future generations. However, there may be instances where social or economic development serves the purpose of environmental protection. The relationship between poverty and the environment, for example, indicates that the eradication of poverty could potentially be advanced for the purpose of environmental protection as a reduction in poverty would result in a reduction in environmentally damaging or unsustainable practices employed by the poor.

The principles of equity, integration and sustainable use undoubtedly form a part of sustainable development in the environmental right as they enjoy explicit recognition.²⁴¹ The inclusion of certain principles in the interpretation of the term does not, however, shed light on how this concept should be applied in the South African context. Using Tladi's variations model, I would like to suggest an approach to sustainable development which is in harmony with the environmental rights and the Bill of Rights as a whole.

Tladi identifies three variations on sustainable development and suggests that a predetermined hierarchy exists in the decision-maker's mind when sustainable development is applied. In any given situation social, economic or environmental

²³⁹ See chapter 2, 2 3 2.

²⁴⁰ Of course the ultimate goal of sustainable development is the benefit to present and future generations, so overall the section remains anthropocentric. The distinction is that the right promotes *ecologically sustainable development* for the sake of present and future generations, and promotes social and economic development at the same time (but this development could be read as *not* primarily serving present and future generations).

²⁴¹ See 5 3.

concerns could be given precedence over the other two. As already noted, this allows for decisions promoting economic gain to be dressed up as relating to environmental protection when they are in fact not concerned with sustainable development. In order to combat this it is essential to identify the values and opinions that inform different approaches to sustainable development. Tladi proposes “a more nuanced conceptualisation of sustainable development” which recognises the values which underlie the notion and expressly identifies a hierarchy.²⁴² Feris agrees:

We therefore need a more principled, value-based approach to sustainable development that identifies the value that is being prioritised in particular circumstances. The variation approach to integration takes into account that certain norms and values will most often be paramount in sustainable development decision-making.²⁴³

A more nuanced and principled conceptualisation of sustainable development in the South African context would be one which corresponds with the rights and values in the Bill of Rights as well as the purposes of the Constitution as a whole. The rights, values and purposes of the Constitution should shape the notion of sustainable development within our specific national and constitutional context. This value-based approach to sustainable development is in line with the value-based approach promoted by the Constitution itself.²⁴⁴ When sustainable development is applied to a certain set of facts the approach taken should be supported by a “legitimate basis” in the form of constitutional rights, values and purposes.²⁴⁵

I will now examine how these variations of sustainable development are supported by the Constitution. Writing about Tladi’s three variations of sustainable development, Feris argues that the constitutional environmental right requires an environment-centred variation:

Section 24(b)(iii) of the Constitution refers to the need to ‘secure *ecologically* sustainable development’. [her emphasis] 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. Section 24 of the Constitution therefore mandates the environment-centred variation of sustainable development.²⁴⁶

²⁴² Tladi *Sustainable Development* 247.

²⁴³ See Feris (2008) CCR 253.

²⁴⁴ See chapter 2, 2.2.3.4 on the role of constitutional values in interpretation.

²⁴⁵ Feris (2008) CCR 251.

²⁴⁶ Feris (2008) CCR 252.

Considering the wording, structure and focus of the right I agree with Feris that the version of sustainable development demanded by the environmental right is an environment-centred one. This does not mean that social and economic interests are ignored, but it does mean that in the context of sustainable development in section 24 where there is a conflict with another interest, the environmental interest should prevail. Section 24(b) emphasises environmental protection and ecologically sustainable development, which indicates that these are primary goals of the right. The promotion environmental interests should be done while still maximising social and economic interests as much as possible. This emphasis on the environmental pillar of sustainable development is applicable where section 24 is the only human right at issue. Where there is no clear conflict of rights, and a case deals primarily with the environmental right, then the goals and purposes of the right indicate that environmental protection should enjoy preference.

The environment-centred variation of sustainable development should serve as a point of departure in the South African context, but this is not absolute. The Constitution protects a variety of interests, many of which are social or economic, and these could also serve as justifications or legitimate grounds for human needs-centred or economic growth-centred variations of sustainable development particularly where a set of facts implicates section 24 alongside other socio-economic rights. The presence of socio-economic rights to housing, health, food and water could, for example, form the basis for a human needs-centred variation. Whatever variation of sustainable development is applied in a certain case, it should always be endorsed by supporting constitutional rights and values.

Consider the example of choosing between the environmental protection of a certain piece of land or the use of that land for housing for the poor. The environmental right and the right to housing are in tension with one another in such a scenario, and the constitutional values could be used as further support for a certain variation of sustainable development in this case. In line with the principle of integration the ideal scenario is one where social, economic and environmental concerns are met simultaneously, but this is not always possible. In the example given, the value of human dignity could be cited as support for the use of the land for housing as the dignity of the homeless individuals is implicated. The value of equality could also be offered in support of the housing if the distribution of land is considered

an aspect of intragenerational equity. On the other hand, the value of equality could be relied on to emphasise intergenerational equity and the need to preserve this land for future generations due to the presence of endangered fauna and flora. Tladi's suggestion that preservation of the environment is important for the autonomy of future generations also suggests that the value of freedom could be argued for as a basis for environmental protection.²⁴⁷ The purposes of the Constitution are also instructive in such cases. The goals of social justice and improving citizens' quality of life could, for example, be cited as support for a human needs-centred variation of sustainable development which focuses on the needs of the poor.²⁴⁸

Sustainable development does not prescribe precisely which decision should be made in such situations. However, in the constitutional context there should be an obligation to legitimise the decision, not only by referring to the three pillars of sustainable development, but also by appealing to the rights, purposes and values of the Constitution. The urgency of the needs in the specific case could also be indicative of where the emphasis should lie in balancing the three pillars. It may be necessary to postpone the realisation of one interest in order to meet another immediate need which could have far-reaching consequences if not addressed. Such a postponement of significant interests must, however, be supported by the Constitution.

The human needs-centred variation of sustainable development should enjoy support not only because of the direct social justice impacts, but also the indirect impact on environmental protection. As I have argued, poverty alleviation is widely considered to be linked to the advancement of environmental protection.²⁴⁹ The eradication of poverty, and therefore the promotion of socio-economic rights in the Constitution, is essential for the well-being of the environment and the promotion of sustainable development as a whole. It is possible, then, to promote the human needs-centred variation of sustainable development with the ultimate purpose of environmental protection. The context of section 24 as a whole is also important to consider here. The existence of section 24(a) implies that the promotion of sustainable development should not be in conflict with a right to an environment which is not harmful to health or well-being. In order to remain consistent with the

²⁴⁷ Tladi *Sustainable Development* 46.

²⁴⁸ Preamble, Constitution of the Republic of South Africa, 1996.

²⁴⁹ See 5 7 3 2 and chapter 3, 3 7 above.

rest of the right, the realisation of sustainable development should address environmental harm to health or well-being wherever necessary. This may require an emphasis on the social pillar or, in other words, a human needs-centred variation of sustainable development. The Bill of Rights, and indeed section 24 itself, could therefore be relied on to legitimate the human needs-centred variation.

While the Constitution could be understood to support environmental or social needs through the vehicle of sustainable development, the economic growth-centred variation of sustainable development enjoys considerably less constitutional support. There may be cases where the value of freedom could be understood as supporting, for example, freedom of trade. Labour rights could also be in tension with environmental rights in some situations, for example in the mining industry where environmental harm could be in tension with the livelihoods of miners. However, constitutional rights, values and purposes express a clear bias towards social justice and a human needs-centred variation of sustainable development.²⁵⁰ The Constitution offers little support for a variation of sustainable development where economic needs trump both social development and environmental protection.

Despite the fact that there is less validation of the economic growth-centred variation of sustainable development, it is vital to remember that this does not mean that economic interests do not matter. To use Ruhl's paradigm, the three pillars of sustainable development must *all* be optimised, even where a conflict forces the emphasis to rest of one of them. As Willemien and Anél Du Plessis explain:

In light of section 24(b) it is evident that all environmental policies, plans, programmes and other regulatory tools must keep the sustainability equation in mind and may not only be construed to protect and promote strictly environmental, social or economic interests.²⁵¹

Integration demands that social, economic and environmental needs are *all* promoted concurrently. However, it would be unlikely that constitutional support could be found for the prioritising of economic interests above social and environmental interests where there is a clash between them. As Sachs J held in his minority judgment in *Fuel Retailers*, economic sustainability "is an element that takes

²⁵⁰ In the example of the miners there would be a stronger argument for their cause if their jobs were considered as part of the *social* pillar of sustainable development and not the economic.

²⁵¹ Du Plessis & Du Plessis "Striking the sustainability balance in South Africa" in *Environmental Law in Africa* 430.

on significance to the extent that it implicates the environment".²⁵² Economic concerns should be promoted as part of sustainable development for the purpose of the contribution to environmental protection and social development, not as an end in itself.

*Sole NO v Minister of the Department of Agriculture, Forestry and Fisheries*²⁵³ illustrates the complexities of the integration of economic, social and environmental factors in practice. This case involved the tension between the applicant's concern for the protection of the West Coast Rock Lobster (WCRL) and the need for the resource for the purposes of commercial fishing. The court had to decide whether or not to grant an interdict to prevent commercial fishing for the survival of the WCRL. The facts of the case serve as an example of the various considerations in sustainable development decision-making. In such a case the need to preserve the species (for the sake of environmental protection *and* for the sake of future generations who may need to use the resource in future) must be balanced with the economic need to continue using the resource. The social pillar is also implicated here as the livelihoods of many people are also at stake in such a case. Their livelihoods are paradoxically dependent on the continued ability to fish the WCRL as well as being dependent on the environmental protection and continued existence of the WCRL. It is necessary to examine the range of options and choose one which promotes all three pillars of sustainable development. The complete suspension of all WCRL fishery is not the only option available. Sustainable development requires the *balancing* of three pillars, which means that all three must be maximised and promoted simultaneously. This suggests that if there is a means to address the threat to the WCRL without such severe social and economic consequences, then this alternative should be considered before taking action which places all the emphasis on a single pillar of the sustainable development equation. The extent and urgency of the potential consequences should also be factored into such a decision. If the complete suspension of WCRL fishery is proven to be the only way to preserve the species, then it could be seen as a necessary means to protect the economic and social interests involved. However, if it is possible to preserve the WCRL without the drastic economic and social consequences of a complete suspension,

²⁵² *Fuel Retailers v Director-General: Environmental Management* 2007 6 SA 4 (CC) para 113.

²⁵³ (356/13) 2013 ZAWCHC 94 (13 June 2013). See 5 5 above for a discussion of the case.

then sustainable development demands reasonable measures which are in proportion to the extent of the urgency and need in the specific circumstance. As noted in 5.5 above, the court ultimately found that there was not sufficient evidence to suggest that granting the interdict was necessary for the protection of the WCRL and the court also noted the extent of the negative impact it would have on social and economic interests.²⁵⁴

In conclusion, sustainable development in the context of section 24 should include intergenerational and intragenerational equity and the integration of environmental protection with social and economic development. The central role of equality in the Constitution demands that the principle of equity informs all sustainable development. While the integration of social, economic and environmental concerns is required in the achievement of sustainable development, it is not realistic to expect an equal balance of these interests to be realised in all situations. As the concept of sustainable development is inherently flexible, it is not possible to prescribe a decisive solution to any set of facts.

Reasonableness has an important role to play in sustainable development decision-making. The requirement of reasonableness guides the prioritisation of the three pillars of sustainable development, and demands that both short and long term measures are taken in the fulfilment of the right. Tladi's approach of recognising which of the three factors has enjoyed preference is an appropriate one in our constitutional context. This approach encourages transparent and accountable decision-making and requires a legitimate constitutional basis for the sustainable development solution proposed. The legitimate basis should be rooted in constitutional rights, values and purposes. In light of this it is conceivable that the environment-centred and human needs-centred variations of sustainable development could find constitutional support, but less likely that substantiation could be found for a purely economic growth-centred variation within the Constitution. Ultimately the facts of the specific case and the particular intersection of rights involved would be indicative of the variation that should be used. The variation of sustainable development used should correspond with the principles of equity and integration which form the basis of sustainable development in section 24.

²⁵⁴ Paras 18-21.

5 9 Conclusion

Due to the impacts of environmental degradation and climate change, the notion of sustainable development has become central to national and international environmental and developmental concerns. This is evidenced by the explicit inclusion of sustainable development in the environmental right in section 24 of the Constitution. The right demands the promotion of sustainable development for the protection of the environment and for the benefit of present and future generations.

As is apparent in legislation, case law, international law, academic opinion and section 24 itself, the principle of integration is central to sustainable development. Underlying this principle is the recognition of the interdependent relationship between the environment and development. Linked to this relationship is an awareness of the role of poverty alleviation in the promotion of environmental protection. In order to preserve the natural environment it is essential to promote social and economic development and, in particular, the eradication of poverty.

The principle of equity is also a fundamental feature of the notion of sustainable development recognised in the structure of section 24 as well as South African jurisprudence, international law and academic opinion. The environmental right itself refers to intergenerational and intragenerational equity, while the Constitution also promotes equity through the inclusion of equality as a constitutional right and value. This emphasis on equity also underscores the need for environmental justice and a consideration of the needs of the poor.

As sustainable development is an intrinsically flexible concept, it is important to approach sustainable development decision-making with transparency. The integration of social, economic and environmental concerns will often involve conflict between one or more of the three concerns. A decision to prefer certain factors over others should be legitimated with reference to constitutional rights, values and purposes. Tladi's approach of the three variations of sustainable development is a useful mechanism for recognising the underlying bias and demanding valid grounds for a decision.

It is evident from the rights and values of the Constitution, as well as the environmental right itself, that decision-makers will more readily find constitutional

support for the environment-centred and human needs-centred variations of sustainable development. There may be circumstances where the economic growth-centred variation would be required, but I would argue that such instances would be rare.

Despite the recognition of certain preferences, sustainable development ideally aims to advance all three pillars of sustainable development simultaneously. If this can be done effectively, with the benefit of present and future generations in mind, the goals of poverty alleviation and environmental protection could be advanced together through the implementation of ecologically sustainable development.

6 Conclusion

The environmental right in section 24 entitles everyone to “an environment that is not harmful to their health or well-being” while also providing a right to the environmental protection necessary to sustain the environment.¹ The right itself is indicative of the need to balance human well-being with the protection of the environment and this is important for understanding our relationship with the environment. Rights are meaningless without a context and an environment within which to enjoy them. The continued existence of humankind depends on our ability to sustain the environment which sustains us. Protection of the environment is therefore essential for enjoyment of all rights.

This thesis has not sought to give a comprehensive analysis of every important facet of the environmental right. There are many aspects of section 24 not addressed here which may have important implications for the application of the right. I endeavoured to contribute to the interpretation of a few key concepts in the right. The concepts dealt with are those which I regard as most ambiguous and in need of delineation. However, it must be noted that these concepts represent only part of the environmental right and, ultimately, the right must be understood and interpreted in its entirety.

I have argued that the need to protect the environment must be understood in the social and historical context of inequality, discrimination and poverty in South Africa. The anthropocentric environmental right must be promoted in accord with the values of human dignity, equality and freedom. The pervasive poverty in our country threatens the rights of the poor while also threatening the environment. Environmental degradation and the depletion of natural resources are exacerbated by poverty and the eradication of poverty is therefore essential for successful protection of the environment. Our society is dependent on the well-being of the poor and of the environment.

Through its dual promotion of environmental protection and human well-being, the environmental right has the potential to advance the achievement of the

¹ Section 24, Constitution of the Republic of South Africa, 1996.

constitutional goals of social justice, transformation and improving the lives of all citizens. Section 24 should be interpreted with due regard for the constitutional values of equality, human dignity and freedom as well as the interdependence of rights.

In this thesis I have argued for a teleological interpretation of the key concepts in the environmental right which pays attention to the interrelationship of rights in the Bill of Rights and advances social justice. This approach was developed in chapter 2 where various interpretive tools were considered. The interdependence of rights and the values and goals of the Constitution have been emphasised as important interpretive guides. The instruction in section 39(1)(a) is critical here. The subsection states that the interpretation of the Bill of Rights “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”.² I suggested that any interpretation of section 24 must be compatible with the full range of rights in the Bill of Rights, the values of human dignity, equality and freedom, and the constitutional goal of advancing social justice and improving the lives of every citizen. A teleological interpretation seeks to give effect to the purposes and values underpinning the right. In addition to the environmental right itself, these purposes and values can be found in the preamble, the Bill of Rights as a whole and the interdependence between section 24 and various other rights.

I demonstrated that an examination of a selection of specific rights and their relationship to section 24 reveals the potential of the environmental right to promote and reinforce (and be promoted and reinforced by) other rights in the Bill of Rights. By paying attention to the intersection of rights important areas of need, particularly those impacting the on poor, were highlighted. The right to equality draws attention to the need for environmental justice which emphasises the equitable distribution of environmental resources and negative environmental impacts. In the environmental sphere, the promotion of substantive equality is important for the health and well-being of the poor. The right to human dignity emphasises the need to address intolerable conditions within which many people live. The interpretation of harm to health or well-being must include a consideration of the role of human dignity. An interdependent interpretation of the right to life and the environmental right suggests that the environment should not pose a threat to life while also promoting a life of

² Section 39(1)(a), Constitution of the Republic of South Africa, 1996.

dignity. The right to life also highlights the need for environmental protection which is essential for the enjoyment of the right to life for all of humanity. The right to freedom and security of the person alerts us to the potential for environmental invasions of bodily integrity which are more subtle than physical assault, but could be just as dangerous. An interdependent interpretation of the right to housing and the environmental right highlights the quality of housing and its impact on the health or well-being of its inhabitants. A poorly chosen location for housing can have a significant impact on the health or well-being of the inhabitants even where the building itself is adequate. The lack of a progressive realisation qualification suggests that the environmental right could be used to reinforce and enhance the right to housing in such circumstances. The right to health care services implies that the right to health in section 24 should be understood as broader than health care services already provided for in section 27. Finally, the right to water has an important relationship with the environmental right as water pollution poses a severe risk to the ability to access safe water. In order for an environment not to be harmful to health or well-being, safe and sufficient water should be accessible. The environmental right should promote the quality of natural and man-made sources of water. These rights emphasise the potential of section 24 and its wide scope of application. The context and purposes of section 24 examined in chapter 2 illustrate the capacity of the environmental right to promote equality, human dignity and freedom in a way that advances the constitutional goal of social justice and improves the lives of South African citizens, particularly those living in poverty.

Three key concepts in section 24 were examined in the subsequent chapters: “environment”, “health or well-being”, and “sustainable development”. The first of these, “environment”, was addressed in chapter 3. The meaning of the concept is pivotal to section 24 and has extensive implications for the interpretation and application of the right. The anthropocentric nature of the environmental right indicates that the term “environment” cannot be limited to the natural environment and must include aspects of the man-made or anthropogenic environment. I argued that the environment must be understood as broader than the natural environment if the right is to be effective in promoting dignity and equality and advancing social justice for the poor. An interpretation of the term “environment” must pay attention to

the social, economic and cultural dimensions of the environment as well as the relationship between the environment and development.

I proposed that the term “environment” in section 24 should be interpreted to include people’s physical surroundings and the relationship between people and these surroundings. This interpretation of environment allows for the inclusion of natural and anthropogenic environments as well as the social, spiritual and cultural aspects of people’s relationships to these environments. Important facets of the physical environment encompassed by such a definition include work environments, access to water and sanitation, and features of the urban environment such as libraries, schools, roads and railways. As I suggested, an understanding of the environment which embraces these features could be very valuable for the poor as they regularly encounter environmental risks in many of these settings.

Chapter 4 discussed the meaning of the terms “health” and “well-being”. As the two concepts appear as a unit and there is a degree of overlap between the two, I focused primarily on the broader concept of “well-being”. In the context of section 24, health should be understood to include both physical and mental health, and their relationship with the environment. I argued that the term “well-being” is extensive enough to include a vast range of experiences, but a negative impact on well-being (or health) must constitute harm before it infringes the environmental right.

I illustrated in chapter 4 how the inclusion of well-being in section 24 serves to highlight the various ways in which the human experience is affected by the environment. I suggested that the conservation and protection of the natural environment are important components of well-being and that human well-being is intimately connected to the well-being of the environment. The aesthetics of physical surroundings are also an important feature of well-being in section 24 and can impact on, for example, emotional health and recovery from illness. Well-being also includes cultural and spiritual facets which are particularly important for indigenous communities whose cultural and spiritual well-being is often fused with elements of the natural environment.

I emphasised the relationship between the environment and poverty and the role of this relationship in the interpretation of the right. The notion of well-being in the environmental right is significant for those living in poverty as it has strong links with

poverty. Poverty affects well-being in numerous ways and prevents the poor from gaining access to that which could improve their well-being. While poverty does not detract from all aspects of well-being, and wealth does not guarantee well-being in all spheres of life, I suggested that urgent material needs related to well-being should enjoy preference over those which are more immaterial and abstract. Such an approach would allow for a hierarchy of needs requiring the more urgent and dire violations of human well-being to be addressed before resources are spent on minor harm to well-being.

The notion of well-being must be interpreted in the context of the Bill of Rights within which it is situated. I proposed that the normative content and goals of the rights in the Bill of Rights should inform our understanding of well-being. The goals of improving citizens' quality of life and freeing the potential of each person in the preamble of the Constitution can be understood as a commitment to well-being. The Bill of Rights is indicative of what the Constitution deems necessary for a life of equality, dignity and freedom, and it is consequently indicative of the entitlements which underpin human well-being. I therefore suggested that where the condition of the physical environment impacts negatively on a right in the Bill of Rights, or on an individual's ability to access such a right, this could lead to a violation of section 24.

This interpretation of well-being is particularly important for the poor who experience intersecting forms of disadvantage which lead to impacts on well-being not specifically addressed by other rights. There may be situations where the right to an environment not harmful to well-being has a unique role to play in improving the lives of citizens and promoting social justice. An example of such a situation is that of damaged roads leading to a lack of physical access to certain sites necessary for the realisation of rights such as a municipality or home affairs office. I sought to show that an interpretation of well-being which considers the fulfilment of the full range of rights in the Bill of Rights, and their interdependence, is important for the marginalised and underprivileged who experience multiple forms of deprivation and disadvantage.

I proposed that the Bill of Rights be understood as a compilation of components of well-being as it identifies those facets of human life which are worthy of constitutional protection. Where an aspect of the human experience, as envisaged and protected within the Bill of Rights, is diminished or infringed by an aspect of the physical

environment, there is harm to the individual's or community's well-being and therefore a violation of section 24.

Finally, the notion of sustainable development was examined in chapter 5. Section 24 has a clear anthropocentric focus which is emphasised in the formulation of section 24(b). The right to have the environment protected through "ecologically sustainable development" is included in the environmental right for "the benefit of present and future generations".³ Sustainable development is rooted in a recognition of the risks and consequences of the use (and abuse) of the environment and natural resources. The environment must therefore be protected so as to enable continued development and availability of natural resources for future generations.

The relationship between the environment and development is recognised frequently in international environmental law. It is central to the notion of sustainable development. Sustainable development seeks to balance environmental protection, economic development and social development. Development cannot be sustained over the long term without the protection of the environment. I argued that it is important to distinguish between the economic and social facets of development as they serve different purposes and are promoted in different ways. Where these facets of development are conflated, there is a risk of advancing purely economic interests at the expense of environmental protection and social needs.

Poverty was once more emphasised as an important factor which must be considered when interpreting sustainable development. Extensive poverty, unemployment and social need require social and economic development, while conditions of poverty also contribute significantly to environmental degradation. The poor often employ unsustainable practices and deplete natural resources in order to survive. Environmental protection thus requires development in order to alleviate the environmental effects of poverty. I suggested that the socio-economic rights in the Bill of Rights have an important reinforcing role to play in this regard. As the socio-economic rights further the goals of poverty alleviation and development, environmental protection and sustainable development are indirectly promoted. Sustainable development demands the simultaneous promotion of social development and environmental protection.

³ Section 24(b), Constitution of the Republic of South Africa, 1996.

The concept of sustainable development has received much attention in international law and among environmental law academics. From the range of elements of sustainable development suggested in the literature, I identified and analysed those which are recognised in the formulation of section 24 and enjoy broad consensus. These are the principle of equity, which encompasses intergenerational and intragenerational equity, and the principle of integration which concerns the integration of environmental, social and economic interests in sustainable development decision-making.

Intergenerational equity is underscored by the constitutional value of equality and involves an obligation towards future generations. As is evident from its structure, I argued that section 24 requires us to consider the economic, social and environmental needs of both present and future generations. I noted that environmental protection and conservation play an important role in intergenerational equity. An appreciation of the freedom and autonomy of future generations suggests that the environment should be protected and preserved so that future generations can make their own decisions regarding environmental resources. As the present generation we should aim to preserve all natural resources as much as possible. The resources that are of no use today may prove invaluable to future generations. The notion of intergenerational equity also emphasises that sustainable development is a long term project which must be passed on to each new generation.

I argued, furthermore, that intragenerational equity draws attention to the necessity for sustainable development to address the needs of the current generation on an equitable basis. Equality and environmental justice have an important role to play here. I proposed that sustainable development should promote the equitable distribution of natural resources and the benefits of development. Alleviating poverty in the present generation is also an essential feature of sustainable development and intragenerational equity. The poor often bear the brunt of environmental risk without enjoying any benefit from environmental assets. In this regard I argued that socio-economic rights have an important role to play in addressing the needs of the poor, thereby advancing sustainable development, poverty alleviation and intergenerational equity.

The principle of integration involves the harmonisation of the three pillars of sustainable development: environmental protection, social development and

economic development. Sustainable development values compromise and consolidation of the three pillars in order to promote all three simultaneously rather than win-lose competition between the three conflicting goals. The balance of all three aspects of sustainable development is important, as a narrow environmentalist perspective which ignores human need risks becoming irrelevant and ineffective, particularly in the South African context.

I proposed that reasonableness should be considered in balancing the three pillars of sustainable development. The principles of reasonableness review developed in socio-economic rights jurisprudence provide an indication of those interests which should be prioritised in sustainable development matters. In this regard a consideration of both short-term and long-term needs is important. A consideration of the position of the poor and vulnerable who may be affected by a decision is also an important requirement for the reasonableness. I argued that the reasonableness requirement demands that sustainable development decisions contribute to the realisation of the goals and purposes of the environmental right.

As a perfect balance between the three pillars is rarely possible, I noted that decision-makers will regularly indicate a preference for one of the three pillars of sustainable development. In light of this, I proposed that the transparent approach developed by Tladi should be adopted.⁴ This approach involves the explicit recognition of the preferred pillar in sustainable development decisions. Tladi refers to the environment-centred variation, economic growth-centred variation and the human needs-centred variation of sustainable development. Each variation acknowledges which pillar of sustainable development has been given priority. I proposed that Tladi's approach of openly recognising the preferred value and its legitimising basis is appropriate in the context of section 24 and the Bill of Rights. This would require decision-makers to rely on a legitimate constitutional basis for their decisions. I further contended that more constitutional support can be found in the Bill of Rights for environment-centred and human needs-centred variations of sustainable development than for the economic growth-centred variation. This approach would guard against the abuse of sustainable development for the promotion of pure economic gain.

⁴ See Tladi D *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (2007).

Sustainable development often implicates competing rights in the Bill of Rights. As there is no inherent hierarchy of rights in the Constitution, it is not always clear which decision should be made in sustainable development problems. While a range of options may be open to a decision-maker, I propose that sustainable development should be understood as requiring reliance on the rights, values and purposes of the Constitution to legitimise such decisions. This approach will encourage sustainable development to promote the constitutional goals of social justice and improving the lives of the poor, due to the support found for these goals throughout the Bill of Rights.

As I pointed out, it must also be remembered that the environmental right aims to achieve *ecologically* sustainable development. I observed that the sustainable development remains anthropocentric as the protection of the environment is ultimately for the benefit of present and future generations. In light of the environmental emphasis in the right, I propose that where no other rights are involved, sustainable development should favour the environmental pillar. Where rights, particularly socio-economic rights, are implicated in a case the pillars must be balanced according to the extent and urgency of the need. How this balancing is done will depend on the urgency of the need, the other rights affected, and the impact of the various alternative balancing outcomes on the purposes and goals of the Constitution. I suggested, however, that little constitutional support exists for the promotion of purely economic interests or, in fact, for the promotion of economic interests above environmental or social interests.

This transparent and contextual interpretation of sustainable development requires a reliance on the Bill of Rights and the Constitution as a whole, emphasising the interdependence of rights and the importance of the unity of the Constitution. The proposed approach should therefore bring attention to the needs of the poor as it requires a constitutional basis and forces decision-makers to consider the full range of rights, values and purposes of the Constitution (all of which hold important benefits for the poor).

The importance of the environmental right is emphasised by the Constitutional Court in *Fuel Retailers v Director-General: Environmental Management* where it was held that the protection of the environment “is vital to the enjoyment of the other

rights contained in the Bill of Rights; indeed it is vital to life itself".⁵ I have attempted to show the potential of this pivotal right to advance not only environmental protection but also social justice and poverty alleviation, and I must agree with Feris that the environmental right is indeed an "underutilised resource".⁶

A holistic, teleological interpretation of the right which takes cognisance of the interdependence of rights could make an important contribution to the protection of the environment for the sake of humankind while promoting social justice and the needs of the poor.

In summary, I have suggested that a teleological interpretation which considers interdependence of rights and constitutional goals and values is the optimum methodology for giving content to section 24. I argued that the right should not be interpreted without taking South Africa's circumstances of poverty, unemployment and inequality into account. The constitutional context provides indications of how best to interpret section 24 in accordance with the rights, values and goals of the Constitution. I proposed that the constitutional context indicates that "environment" must be understood to include the anthropogenic environment in order for the rights and purposes of the Constitution to be effectively advanced. I argued that the constitutional context of rights, values and goals indicates which aspects of life enjoy constitutional protection and are therefore considered essential for giving content to the term "well-being". Finally, I suggested that constitutional rights, values and goals offer a means to guide and legitimise the complex balancing of interests necessary for sustainable development.

This thesis has endeavoured to shed light on how a teleological and interdependent approach to the interpretation of section 24 can address the needs of the poor and promote social justice. There are, however, many aspects of section 24 beyond the scope of this research which still require investigation. The notion of harm has important implications for the scope of "health or well-being" in section 24. I briefly addressed the meaning of harm in chapter 4, but a more extensive study of the term is needed in order to understand what would constitute an infringement of section 24(a). As illustrated by Kidd, the meaning of well-being could be informed by the interpretations and approaches to the term found in other academic disciplines.

⁵ 2007 6 SA 4 (CC) para 102.

⁶ Feris L "Constitutional environmental rights: An under-utilised resource" (2008) 24 *SAJHR* 29.

This calls for a thorough investigation of the various sources available and their interaction with well-being in the environmental right. The potential of section 24 as a socio-economic right is also in need of further study. Although the environmental right is a socio-economic right, it is also distinguished from other socio-economic rights in the Bill of Rights by the exclusion of a progressive realisation or available resources qualification. The absence of these internal qualifications has a range of potential implications for how section 24 is understood and implemented. This would also have an impact on how reasonableness is understood and applied in the context of section 24. Precisely what this could mean remains to be investigated. There is also a great need for more examination of the interrelationship between section 24 and other socio-economic rights. As I have argued in chapter 2, the presence of the environmental right in the Bill of Rights has consequences for the interpretation and scope of other rights. These possible consequences deserve further attention. Finally, it is clear that in order to clarify the meaning of the environmental right in section 24, the courts need to elaborate on the content and meaning of the right. As Du Plessis has argued:

[I]n order to avoid the perils of an impoverished and meagre development of constitutional environmental jurisprudence and in order to remain committed to the transformative purpose of the Constitution, the courts will have to concretise, albeit cautiously, the meaning of s 24 as soon as the opportunity reveals itself.⁷

The exciting potential of section 24 to advance social justice and promote a higher standard of living for the poor will not be fully realised without the judicial affirmation of a teleological and interdependent interpretation of the right.

⁷ Du Plessis A “South Africa's constitutional environmental right (generously) interpreted: What is in it for poverty?” (2011) 27 *SAJHR* 279 307.

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