Ecologically sustainable development as a constitutional value: South African perspectives

RE Chikuruwo
Orcid.org/0000-0002-1558-4892

Thesis accepted in fulfilment of the requirements for the degree Doctor of Laws in International aspects of Law at the North-West University

Promoter: Dr CB Soyapi

Graduation: April/June 2022
Student number: 31350224
# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acta jurid</td>
<td>Acta Juridica</td>
</tr>
<tr>
<td>AFJCLJ</td>
<td>African Journal of Criminal Law And Jurisprudence</td>
</tr>
<tr>
<td>Am J Comp Law</td>
<td>American Journal of Comparative Law</td>
</tr>
<tr>
<td>Am J Int Law Contemp Probl</td>
<td>American Journal of International Law and Contemporary Problems</td>
</tr>
<tr>
<td>Am J Int Law</td>
<td>American Journal of International Law</td>
</tr>
<tr>
<td>Am U Int’l L Rev</td>
<td>American University International Law Review</td>
</tr>
<tr>
<td>BP</td>
<td>BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation Environment &amp; Land Affairs</td>
</tr>
<tr>
<td>Colo J Int'l Envtl L &amp; Pol'y</td>
<td>Colorado Journal of International Environmental Law and Policy</td>
</tr>
<tr>
<td>Comp Econ Stud</td>
<td>Comparative Economic Studies</td>
</tr>
<tr>
<td>Cornell L Rev</td>
<td>Cornell Law Review</td>
</tr>
<tr>
<td>CILSA</td>
<td>Comparative and International Law Journal of Southern Africa</td>
</tr>
<tr>
<td>Commun Cult Crit</td>
<td>Communication, Culture &amp; Critique</td>
</tr>
<tr>
<td>CCR</td>
<td>Constitutional Court Review</td>
</tr>
<tr>
<td>CROP</td>
<td>Comparative Research Programme on Poverty</td>
</tr>
<tr>
<td>Dev Pract</td>
<td>Development in Practice</td>
</tr>
<tr>
<td>Discourse Soc</td>
<td>Discourse &amp; Society</td>
</tr>
<tr>
<td>Duke Envtl L &amp; Pol'y F</td>
<td>Duke Environmental Law and Policy Forum</td>
</tr>
<tr>
<td>Ecol Appl</td>
<td>Ecological Applications</td>
</tr>
<tr>
<td>Ecol Econ</td>
<td>Ecological Economics</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
</tr>
<tr>
<td>ESD</td>
<td>Ecologically Sustainable development</td>
</tr>
<tr>
<td>Ecology LQ</td>
<td>Ecology Law Quarterly</td>
</tr>
<tr>
<td>ECA</td>
<td>Environmental Conservation Act</td>
</tr>
<tr>
<td>Environ Dev Sustain</td>
<td>Environment, Development and Sustainability</td>
</tr>
<tr>
<td>EIA</td>
<td>Environmental Impact Assessment</td>
</tr>
<tr>
<td>Environ Manage</td>
<td>Environmental Management</td>
</tr>
<tr>
<td>ESPR</td>
<td>Environmental Science and Pollution Research International</td>
</tr>
<tr>
<td>Environ Values</td>
<td>Environmental Values</td>
</tr>
<tr>
<td>Eur J Int'l L</td>
<td>European Journal of International Law</td>
</tr>
<tr>
<td><em>E-cadernos CES</em></td>
<td><em>E-cadernos Centro De Estudos Sociais</em></td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
</tr>
<tr>
<td>GAIA</td>
<td>GAIA-Ecological Perspectives for Science and Society</td>
</tr>
<tr>
<td>GDARD</td>
<td>Gauteng Department of Agriculture and Rural Development</td>
</tr>
<tr>
<td>Geo Envtl L Rev</td>
<td>Georgetown Environmental Law Review</td>
</tr>
<tr>
<td>Glob Environ Change</td>
<td>Global Environmental Change</td>
</tr>
<tr>
<td>Hastings Int'l &amp; Comp L Rev</td>
<td>Hastings International and Comparative Law Review</td>
</tr>
<tr>
<td>Harv L Rev</td>
<td>Harvard Law Review</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>Int Environ Agreements</td>
<td>International Environmental Agreements</td>
</tr>
</tbody>
</table>
Int J Sustain Dev  International Journal of Sustainable Development and World Ecology
ILM  International Legal Materials
IJAH  International Journal of Arts and Humanities
IJIL  Indian Journal of International Law
Int J Const Law  International Journal of Constitutional Law
IUCN  International Union for Conservation of Nature
JOAAG  Journal of Administration & Governance
J Agric Environ Ethics  Journal of Agricultural and Environmental Ethics
J Contemp Hist  Journal for Contemporary History
J Court Innov  Journal of Court Innovation
J. Environ. Law  Journal of Environmental Law
J Rural Stud  Journal of Rural Studies
KJ  Kritische Justiz
Law Democr Dev  Law, Democracy and Development
Law Q Rev  Law Quarterly Review
LEAD  Law Environment and Development Journal
Macquarie Law J  Macquarie Law Journal
MIT Press  Massachusetts Institute of Technology Press
MDG  Millennium Development Goals
Mt Res Dev  Mountain research and development
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>NEMA</td>
<td>National Environmental Management Act</td>
</tr>
<tr>
<td>NZLJ</td>
<td>New Zealand Law Review</td>
</tr>
<tr>
<td>Organ Stud</td>
<td>Organisation Studies</td>
</tr>
<tr>
<td>Ottawa L Rev</td>
<td>Ottawa Law Review</td>
</tr>
<tr>
<td>Oxf J Leg Stud</td>
<td>Oxford Journal of Legal Studies</td>
</tr>
<tr>
<td>PAIA</td>
<td>Promotion of Access to Information Act</td>
</tr>
<tr>
<td>PAJA</td>
<td>Promotion of Administrative to Justice Act</td>
</tr>
<tr>
<td>Perspect Educ</td>
<td>Perspectives in Education</td>
</tr>
<tr>
<td>Perspect Politics</td>
<td>Perspectives on Politics</td>
</tr>
<tr>
<td>Phylon Q</td>
<td>Phylon Quarterly</td>
</tr>
<tr>
<td>PER/PELJ</td>
<td>Potchefstroom Electronic Law Review</td>
</tr>
<tr>
<td>Resour Conserv Recycl</td>
<td>Resources, Conservation and Recycling</td>
</tr>
<tr>
<td>Rev Eur Comp Int</td>
<td>Review of European, Comparative &amp; International Environmental Law</td>
</tr>
<tr>
<td>SAJELP</td>
<td>South African Journal of Environmental Law and Policy</td>
</tr>
<tr>
<td>SAJHR</td>
<td>South African Journal on Human Rights</td>
</tr>
<tr>
<td>SALJ</td>
<td>South African Law Journal</td>
</tr>
<tr>
<td>SAPL</td>
<td>South African Public Law</td>
</tr>
<tr>
<td>Sask L Rev</td>
<td>Saskatchewan Law Review</td>
</tr>
<tr>
<td>SAYIL</td>
<td>South African Yearbook of International Law</td>
</tr>
<tr>
<td>Stell LR</td>
<td>Stellenbosch Law Review</td>
</tr>
<tr>
<td>Tamara Journal</td>
<td>Tamara: Journal for Critical Organization Inquiry</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

**LIST OF ABBREVIATIONS** ................................................................. ii

**DEDICATION** .................................................................................. xii

**ACKNOWLEDGEMENTS** ................................................................... ii

**ABSTRACT** ...................................................................................... ii

**CHAPTER 1** .................................................................................... 1

**INTRODUCTION** ............................................................................. 1

1.1 Introduction .................................................................................. 1

1.1.1 ESD as a constitutional value in the development of environmental rights jurisprudence ...................................................... 4

1.1.2 'Ecologically' sustainable development, its meaning and purpose in the context of section 24 ...................................................... 8

1.1.3 The environmental rule of law as an avenue to achieving the outcomes of ESD ................................................................. 9

1.1.4 'Ecologically' sustainable development in South Africa's courts .. 11

1.2 Research question ......................................................................... 12

1.3 Objectives ..................................................................................... 13

1.4 Hypothesis and assumptions ......................................................... 13

1.5 Methodology ................................................................................ 14

1.6 Framework of study ..................................................................... 15

**CHAPTER 2** .................................................................................... 16

**PERSPECTIVES ON CONSTITUTIONAL VALUES IN SOUTH AFRICA** .... 16

2.1 Introduction .................................................................................. 16

2.2 The history of constitutional values in South Africa ...................... 19
2.2.1 The Apartheid era in South Africa ........................................ 19
2.3 Purpose or significance of constitutional values in South Africa ........ 29
  2.3.1 Values, rights, rules and principles ..................................... 41
2.4 Advancing constitutional values through transformative constitutionalism .............................................................................. 43
  2.4.1 A Post-liberal interpretation of the Constitution ....................... 49
2.5 Transformative Adjudication ....................................................... 57
  2.5.1 Transformative adjudication through the lens of substantive reasoning ........................................................................ 60
2.6 Location of values in the Constitution ......................................... 63
2.7 Conclusion .................................................................................. 70

CHAPTER 3 ..................................................................................... 72
PERSPECTIVES ON 'ECOLOGICALLY' SUSTAINABLE DEVELOPMENT .. 72
3.1 Introduction ................................................................................ 72
3.2 Historical evolution of sustainable development ............................ 74
  3.2.1 Sustainability ......................................................................... 76
3.3 From sustainable development to ecologically sustainable development: a reappraisal ....................................................................... 97
  3.3.1 Intergenerational equity .......................................................... 102
  3.3.2 Intra-generational equity ......................................................... 109
  3.3.3 Integration .............................................................................. 116
3.4 Conclusion .................................................................................. 127

CHAPTER 4 ..................................................................................... 129
ENVIRONMENTAL RULE OF LAW AS AN AVENUE TO ACHIEVING
ECOLOGICALLY SUSTAINABLE DEVELOPMENT ...............................129

4.1 Introduction ............................................................................................................ 129

4.2 Rule of law ............................................................................................................. 131
   4.2.1 A brief note on the historical origins of the rule of law .................. 131

4.3 The rule of law in South Africa ............................................................................. 146

4.4 Environmental rule of law ..................................................................................... 149

4.5 Environmental rule of law as a means to achieving the outcomes of
   ESD .......................................................................................................................... 158
   4.5.1 ESD as a means to realising ecological integrity .............................. 159
   4.5.2 ESD as a means to realising environmental justice ..................... 166
   4.5.3 ESD as a means to realising poverty reduction .............................. 169

4.6 Conclusion ............................................................................................................. 173

CHAPTER 5 ..................................................................................................................175

THE PURSUIT OF 'ECOLOGICALLY' SUSTAINABLE DEVELOPMENT IN
SOUTH AFRICA'S COURTS .....................................................................................175

5.1 Introduction ............................................................................................................. 175

5.2 Judicial review in environmental law adjudication .......................................... 176

5.3 The pursuit of 'ecologically' sustainable development by the judiciary . 183

5.4 BP Southern Africa ............................................................................................... 186
   5.4.1 The framework of the Court's decision ............................................. 190
   5.4.2 An annotation of the Court's approach to ESD ......................... 193
   5.4.3 The extent to which the court has; could have; or should have
        applied the ESD as a constitutional value ................................. 195
5.5 Fuel Retailers .................................................................................................................. 202
  5.5.1 The framework of the Court's decision ................................................................. 206
  5.5.2 An annotation of the Court's approach to ESD ................................................. 209
  5.5.3 The extent to which the court has; could have; or should have
          applied the ESD as a constitutional value ......................................................... 213

5.6 VEJA 221
  5.6.1 The framework of the Court's decision ................................................................. 224
  5.6.2 An annotation of the Court's approach to ESD ................................................. 227
  5.6.3 The extent to which the court has; could have; or should have
          applied the ESD as a constitutional value ......................................................... 230

5.7 Earthlife .......................................................................................................................... 234
  5.7.1 The framework of the Court's decision ................................................................. 236
  5.7.2 An annotation of the Court's approach to ESD ................................................. 239
  5.7.3 The extent to which the court has; could have; or should have
          applied the ESD as a constitutional value ......................................................... 242

5.8 Conclusion ...................................................................................................................... 248

CHAPTER 6 .......................................................................................................................... 250

SUMMARY AND CONCLUSION ................................................................................... 250

6.1 General background ...................................................................................................... 250

6.2 Research question and objectives ............................................................................... 251

6.3 Summary of the analysis ............................................................................................. 252
  6.3.1 The meaning and significance of constitutional values in general
          and in environmental rights adjudication in particular ................................. 252
  6.3.2 The history, meaning and purpose of ESD ....................................................... 254
6.3.3  The environmental rule of law as a means to achieving the outcome(s) of ESD

6.3.4  'Ecologically' sustainable development in South Africa's courts

6.4  The way forward

6.5  Future research

BIBLIOGRAPHY
DEDICATION

To my butterflies, Rufaro, Atarah and Athalie.
The information used and presented in this thesis is correct and up to date until 20 November 2021 when research for this thesis was concluded. Any later political, social and/or legal developments have not been considered.
ACKNOWLEDGEMENTS

The writing of this thesis has been with the support of a global village. It will be difficult to individually single out everyone who has been part of the writing of this thesis. It is fitting to first acknowledge God, our creator. You have made the completion of this thesis possible, and you have blessed me with wonderful people who have contributed to the quality of this thesis. I am forever indebted to you. I would also like to briefly give thanks to the following persons:

My promoter: When I approached you to be my supervisor, I had no idea I would find a source of inspiration, mentor and supporter. When I had no money to register for the second year of my LLD, you gave me a bursary, for which I will forever be grateful for. Your invaluable comments on my thesis made me want to know more, read more and understand more about environmental law. You were always willing to explain and assist me whenever the writing got difficult. The completion of this thesis is because of you. Seriously!

Dr Rufaro Garidzirai, my husband: My love, you have been my biggest supporter since day one. Thank you so much for encouraging me to pursue my LLD and for the many words of motivation that you would offer every time the writing of this thesis got difficult. You believed in me and told me I could do anything. Thank you for taking care of our kids, whilst I was at the library studying. You never, not once, complained about the dirty house and dirty dishes that would pile up because I was so fixed on writing this thesis. All you would say is: “Don’t worry my love, school comes first. The house can wait”. I love you for that. This would not be possible without your support. I love you.

Atarah and Athalie: My children, you made the sleepless nights bearable. Just the thought of you motivated me to complete this thesis so that I could give you a better life.

My family and friends: Thank you Rumbidzai Chikuruwo, Laura Garidzirai, Kenneth Chikuruwo, Frank Garidzirai, Blessing Chikuruwo, Rudaviro Garidzirai, Bridget
Machaka, Dr Felix Dube and Mai Muporofita for your great support in the writing of this thesis. I also acknowledge Dr John Mambambo for the language and technical editing of this thesis.

Faculty of law: The faculty awarded me the faculty bursary, which assisted me during the writing of this thesis. Thank you for the support.
ABSTRACT

In South Africa, constitutional values generally play a vital role in the adjudication of disputes. This is aligned with section 39(2) of the Constitution which mandates courts to promote the values underpinning an open and democratic society. However, in the adjudication of environmental law disputes, courts have not sufficiently developed a specific constitutional value to help guide the adjudication of such rights. Fortunately, the environmental right in section 24 of the Constitution could provide guidance on this matter. Notably, section 24(b) (iii) provides for the right to have the environment protected through 'ecologically' sustainable development. It is upon section 24(b) (iii)'s particular injunction for environmental protection through 'ecologically' sustainable development that this thesis is premised. It argues that 'ecologically' sustainable development could, through the environmental rule of law, be developed and applied by courts as a constitutional value in environmental rights adjudication. When applied through the environmental rule of law, 'ecologically' sustainable development promotes development within the parameters of ecological sustainability. Thus, 'ecologically' sustainable development ensures that economic and social development is not pursued at the expense of the environment. Consequently, it is only when 'ecologically' sustainable development is fully operational that we could hope to achieve ecological integrity, environmental justice and poverty reduction.

This thesis is an original contribution that is ground breakingly examining the use of a clear constitutional value in environmental adjudication in South Africa. Thus, as far as this thesis could ascertain, no comprehensive research has been conducted, specifically on the manner in which the judiciary has applied ESD as a constitutional value in developing the jurisprudence on the environmental right. Cumulatively, the topicality of this thesis is hinged on it being the first to examine the manner in which ESD could be employed in the adjudication of environmental disputes in South Africa for the purpose of realising section 24.
**Key words**: 'ecologically' sustainable development, environmental rule of law, constitutional value, sustainability, sustainable development, environmental rights adjudication.
CHAPTER 1
INTRODUCTION

1.1 Introduction

Every human being is inherently endowed with some fundamental rights.¹ These rights are indispensable and have been bestowed to attain certain outcomes. This denotes that there is a 'value element' that every right seeks to realise.² Put differently, there is a 'value' that constitutes why each right is worthy of protection.³ It is notable that values inform the manner in which constitutions and other laws are interpreted.⁴ In the context of this thesis, values refer to those that are enumerated in section 1 of the Constitution of the Republic of South Africa, 1996 (herein referred to as the Constitution) or those values found outside the text of the classically defined values in section 1 of the Constitution, but within the rest of the constitutional text.⁵

Noteworthy is the text in section 39 of the Constitution, which mandates courts to interpret the Bill of Rights in a manner that "promotes the values that underlie an open and democratic society".⁶ The framework of values that underpin the Constitution has been described by South Africa's Constitutional Court (herein...

¹ Fundamental human rights have been strengthened internationally through the United Nation's (UN's) adoption of the Universal Declaration of Human Rights 1948. See Darraj Milestones in Modern World History 80-88; Martin "Rights" 4617; Jayawickrama The Judicial Application of Human Rights Law 25-27.
³ Bray 2004 Perspect Educ notes that constitutional values determine the limits and nature of rights and also provide a context within which fundamental rights function.
⁴ United Democratic Movement V President of the Republic of South Africa 1 2002 11 BCLR 1179 (CC) para 19.
⁵ Section 1 of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution) states that: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." Roederer "Founding Provisions" 13-3, 13-8 opines that the Constitution also embodies extra textual founding provisions such as "the values of Ubuntu and transformation". Sections 39 (2) of the Constitution is a further constitutional directive for a value-based interpretation.
⁶ Section 39 of the Constitution.
referred to as the Constitutional Court) as embodying an "objective, normative value system".\(^7\) Such "objective, normative value system" requires, among other things, an analysis of "the purpose of the right or freedom in question" with reference to the Constitution. Furthermore, it requires "the language chosen to articulate the specific right or freedom" as well as the history "of the concept enshrined". Where relevant, it also requires the purpose and meaning "of the other specific rights and freedoms" within the text of the Constitution.\(^8\) Michelman\(^9\) states that values "serve as reasons for rules" and "rules (if they are any good) serve to implement values". Thus, 'values' are the substantive underpinnings of laws.

The importance of values in relation to rights could be conceptualised and understood from how some rights are protected and the reasons for protecting such rights. For instance, the recognition and complete satisfaction of human existence\(^10\) is the value element embodied and enshrined within the right to life. One could therefore argue that section 11 of the Constitution highlights that life itself is worth protecting and is a necessity for the enjoyment of other rights.\(^11\) The right to life and many other such rights largely exhibit the natural law principle which dictates that laws must be founded on ethics, morality and on what is right.\(^12\) Approaching and understanding the law from the ambit and scope of natural law is a sharp distinction from strict positive law which consists of common law or statutes.\(^13\) A

---

8. Makwanyane para 9; Zuma para 15. See also Ackermann "The Legal Nature of the South African Constitutional Revolution" 42.
11. The right to life has been acknowledged as so pertinent such that the Constitutional Court abolished the death penalty in Makwanyane.
notable example is that of South Africa's apartheid policies to which the researcher shall return below.\textsuperscript{14}

Worthy of note is that although the apartheid laws went against international human rights law, they were nonetheless legal in a narrow sense, i.e. when considered from a formal rule of law standpoint. To put it plainly, during the apartheid era, South African laws conformed to the rule of law's formal aspect, i.e. the laws were general, certain, public and equal in application.\textsuperscript{15} However, the value outcome of the apartheid policies was problematic, in that the content of the laws was unfair and founded on the racial discrimination of the black majority.\textsuperscript{16}

In this light, the legality of the apartheid policies was only from a strict and narrow perspective of the interpretation of the procedural aspects of the rule of law. Thus, apartheid policies did not consider the substantive aspect of the rule of law which, also, requires laws to be fair and just.\textsuperscript{17} The researcher notes that the Constitution attends to such limitations by prescribing that all laws be based on and interpreted in line with certain values such as human dignity and equality.\textsuperscript{18} This means that the values that are enshrined in the Constitution apply to all laws, including environmental law. Given that values establish the standards to be followed in judicial interpretation,\textsuperscript{19} it is pivotal that the judiciary, when deciding on environmental law disputes, promote the values reflected in the Constitution. In other words, section 39 of the Constitution directs courts to adopt values when adjudicating on environmental law disputes.\textsuperscript{20} It is important to mention that the transformation and application of the values reflected in the Constitution is not limited to courts alone, but could include other spheres of government or civil

\textsuperscript{14} See chapter 2, section 2.2.1 and 4.2.1.4.
\textsuperscript{15} Ellis 2010 \textit{U Pitt L Rev} 194; Agrast, Botero and Ponce 2011 \textit{Wjp Rule of Law Index} 9.
\textsuperscript{16} Agrast, Botero and Ponce 2011 \textit{Wjp Rule of Law Index} 9; Ellis 2010 \textit{U Pitt L Rev} 194. An example of such segregationist laws is the \textit{Extension of University Education Act} 45 of 1959 which prohibited "a non-white student to register at a formerly open university without the written permission of the Minister of Internal Affairs";
\textsuperscript{17} Ellis 2010 \textit{U Pitt L Rev} 194; Agrast, Botero and Ponce 2011 \textit{Wjp Rule of Law Index} 9.
\textsuperscript{18} See sections 1, 2, 7 and 8 of the Constitution.
\textsuperscript{19} Venter 2014 \textit{Tul Eur & Civ LF} 91.
\textsuperscript{20} Section 39 (1) of the Constitution.
However, as argued in paragraph 2.3.1, the constricted scope of this thesis will limit its analysis to the application and use of constitutional values by the judiciary. Accordingly, it is necessary to address the questions: What are constitutional values and what role do they play in the adjudication of environmental disputes?

1.1.1 ESD as a constitutional value in the development of environmental rights jurisprudence

Many scholars of note, who have written on constitutional values, have avoided specifically defining them. Such omission perhaps finds justification in Kroeze's argument that an objective and clear meaning should not be ascribed to constitutional values, but, courts must at the very least give meaning to constitutional values in a specific case. In giving meaning to constitutional values in a specific case, it is essential to first understand their generic role. For instance, Bray posits that constitutional values determine and establish the nature and limitations of fundamental rights as well as the context within which they function. In other words, constitutional values assist the judiciary in their interpretation of rights.

Furthermore, constitutional values legitimise the legal, political, cultural, economic and social system of a state. In addition to that, constitutional values validate other laws, rights and principles. They also function as a standard by which a state can create new rights, principles and standards. Ultimately, constitutional values serve as interpretive aids to the judiciary. The functions of constitutional values, as enumerated above are aligned with South Africa’s use of constitutional values,

---

22 Kroeze 2001 Stell LR 273.
23 Bray 2004 Perspect Educ 40; Geduld Ubuntu as a Constitutional Value 24.
24 Rodriguez Constitutional Values 54.
25 Rodriguez Constitutional Values 57.
26 Rodriguez Constitutional Values 58.
27 Rodriguez Constitutional Values 58.
particularly the legitimising function, interpretive function and their role as a standard for other laws, rights and principles.\textsuperscript{28}

If indeed one of the key roles of constitutional values is the interpretation and limitation of rights, it therefore becomes necessary to examine the interpretive role of the judiciary.\textsuperscript{29} The scope of this thesis is thus limited to the use of constitutional values by the judiciary. As Gargarella \textit{et al}\textsuperscript{30} contend, courts play a fundamental role through their application of constitutional values. As a result, litigation "instigates political action and influence over public debate". It also cultivate a custom of legal struggle that constantly inspires and informs "future generations to challenge oppressive practices".\textsuperscript{31} This thesis therefore, focuses on the judiciary as an important organ of state that is mandated with the promotion of constitutional values as per section 39 of the\textit{ Constitution}.

Additionally, promoting constitutional values in the adjudication of cases has become all the more essential since the\textit{ Constitution} is recognised as a transformative document.\textsuperscript{32} To this end, courts in particular, ought to transform in line with the type of society envisioned by the\textit{ Constitution}.\textsuperscript{33} In other words, the kind of society envisioned by the\textit{ Constitution} requires courts to engage in a project of transformative constitutionalism. Transformative constitutionalism, as formulated

\textsuperscript{28}See sections 2, 7(1), 8, 39 and 195 of the\textit{ Constitution}. See also Venter\textit{ Constitutional Comparison} 141; Venter 2014 \textit{Tul Eur & Civ LF91}.

\textsuperscript{29}In examining the interpretive role of the judiciary, the discussion will show that chapter 2 takes notice of the fact that constitutional values could assign obligations on civil society or on other spheres of government. Such issues, however, do not form part of the scope of this thesis.

\textsuperscript{30}Gargarella, Pilar and Theunis "Courts, Rights and Social Transformation: Concluding Reflections" 273.


\textsuperscript{32}Soobramooney \textit{V Minister of Health Kwazulu Natal} 1997 12 BCLR 1696 (CC) 8 (hereinafter \textit{Soobramooney}); Davis and Klare 2010 \textit{SAJHR404}.

\textsuperscript{33}Klare 1998 \textit{SAJHR156}. This thesis, however, notes in part 2.4 that the validity of transformative constitutionalism has been criticised by a number of notable scholars such as Sibanda 2011 \textit{Stell LR} 490-495; Sibanda 2020 \textit{Law Democr Dev} 388, 389, 405; Madlingozi 2017 Stell LR 123; Modiri 2018 \textit{SAJHR} 300.
by Klare, originates from the Constitution's values, goals, rights as well as other provisions.  

Concerning the origins of transformative constitutionalism, the discussion will argue that transformative constitutionalism originates from South Africa's positive obligation to uphold fundamental human rights, including environmental protection and socio-economic entitlements. Given that the Constitution is accepted as a transformative document, it has been interpreted as a post-liberal document that constitutes a post-liberal model of democracy. The Constitution as a post-liberal document considers transformation as necessitating both political and socio-economic change. Furthermore, this thesis argues that a post-liberal interpretation of the Constitution is at the crux of transformative constitutionalism which demands a remodelling of adjudicative reasoning. In other words, judges are encouraged to engage in transformative adjudication which pursues the application of constitutional values and avoids the straightjacketed mechanical interpretation or application of the law.

Pursuant to the courts' transformative mandate, judges are required to engage in legal reasoning that adopts transformative constitutionalism as an interpretive style, as well as a foundation for a substantive, social justice centred model of adjudication. Such legal reasoning is often referred to as substantive reasoning. Transformative constitutionalism, therefore, dictates that constitutional values are an important aspect of adjudication. Of note is that constitutional values can be found within the text of the classically defined values in section 1 of the Constitution (textual values) or outside the text of section 1, but within the rest of the

---

34 Considering the Preamble of the Constitution, read with sections 1, 7(1) and 7(2), one can deduce that the goals of the Constitution include the pursuit of a society that "is based on democratic values, social justice and fundamental human rights". See also Klare 1998 SAJHR 153-156. 
35 See chapter 2 below. 
36 Soobramooney 8; Davis and Klare 2010 SAJHR 404. 
37 Klare 1998 SAJHR 151-157, 163-164. See also Geduld Ubuntu as a Constitutional Value 64. 
38 Du Plessis "Interpretation"32/42. 
39 See chapter 2, section 2.5.1 below. 
40 Klare 1998 SAJR162.
In other words, the content of constitutional values will not always be gleaned from the text of section 1 of the Constitution, but can also be found beyond section 1 of the Constitution or within the rest of the text of the Constitution, although not explicitly labelled as value bearing. On this note, although some scholars have written on both textual and extra-textual constitutional values (e.g. Ubuntu), none (as far as this thesis could ascertain) have written on how constitutional values can be applied in environmental adjudication. Specifically, as far as the researcher could ascertain, no scholar has written on how ecologically sustainable development (hereinafter ESD), as expressed in section 24(b) (iii) of the Constitution, could be applied as a constitutional value in environmental rights adjudication, nor has there been any South African research on how courts could employ the environmental rule of law to reach the outcomes of ESD. Hence, this thesis argues that, although ESD has never been submitted as a constitutional value in environmental rights adjudication, it could be applied as one by virtue of its place within section 24.

Simply put, given that section 24(b) (iii) declares ESD as an important factor to be considered in furthering environmental protection, one could safely argue that courts ought to develop and apply ESD as a value in environmental rights adjudication. Applying ESD as a value in environmental rights adjudication, however requires courts to fully comprehend what ESD means. As examined in Chapter 3 of this thesis, one could extrapolate the meaning of ESD from the concept of sustainability.

---

41 Kroeze 2001 Stell LR267.
42 'Ecologically' sustainable development is expressed in section 24(b) (iii) of the Constitution which provides everyone the right 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.
1.1.2 'Ecologically' sustainable development, its meaning and purpose in the context of section 24

It is worth mentioning that sustainability has been described as preserving the conditions that life depends on. In other words, sustainability entails preserving the essential natural resources that are essential for human survival. In examining sustainability, Chapter 3 argues that the narrative and discourse on how humanity could use natural resources in a sustainable manner ushered in the concept of sustainable development. Writing on sustainable development, Tladi avers that sustainable development seeks to ensure that development conforms with social and environmental considerations. However, the environmental and social factors attendant to sustainable development have often been ignored, camouflaged and submerged under economic considerations. Accordingly, there is a need to shift from sustainable development to the original meaning of sustainability if we are to ever give due primacy to environmental considerations in cases that involve the exploitation of natural resources. This means that sustainable development only finds credence, value and meaning if it is linked to idea of ecological sustainability.

Notable is that ecological sustainability denotes 'ecologically' sustainable development. Textually, South Africa had shifted away from the oft-cited sustainable development to 'ecologically' sustainable development. As argued in Chapter 3, section 24(b) (iii) of the Constitution acknowledges that environmental protection can only be a reality if measures that secure 'ecologically' sustainable development and not just sustainable development are adopted. Thus, at the core of ESD lies the complex link between environmental and developmental issues i.e. integration. This thesis, however, notes in Chapter 3 that integration is an

---

43 Bosselmann *The Principle of Sustainability* 9. Also see Johnston *et al.* 2007 *Environmental science and pollution research international* 60-63.
44 Tladi *Sustainable Development in International Law* 34-35.
45 Johnson 2002 *UN Chron* 8. Also see the Johannesburg Declaration para 11.
46 Bosselmann *The Principle of Sustainability* 11. Also see Harding 2006 *Desalination* 229, 233-235.
inadequate means of protecting the environment because it implies that there is no conflict between economic development and environmental protection.\footnote{See section 3.3.3 below.}

In this light, this thesis suggests a reconsideration of the concept of sustainable development and integration. That is, this thesis proposes that for sustainable development to attain its initial goal of sustainability and the protection of ecological systems, a shift from sustainable development to 'ecologically' sustainable development is imperative. Thus, a proper comprehension of integration and sustainable development requires one to prioritise environmental concerns in issues of economic or social development, hence the need for the adjective 'ecologically' in sustainable development.

The Constitution's express incorporation of the adjective 'ecologically' in section 24(b) (iii) potentially eliminates the indeterminacy of sustainable development. This means that the once open loophole that ushered in different interpretations, including cases where sustainable development was interpreted by industry and business as 'economically' sustainable development,\footnote{See for instance German Advisory Council On Global World in Transition 89.} could be closed. In this respect, although ESD is expressly provided for in the Constitution, academic literature is scanty on the meaning of ESD in the South African context or on how ESD could be used as a constitutional value in environmental rights adjudication. In this light, this thesis argues that when ESD is fully operational as a constitutional value, ecological integrity, environmental justice and poverty reduction could be realised as outcomes of ESD. In this context, this thesis examines how these outcomes could be achieved, by considering the environmental rule of law.

1.1.3 The environmental rule of law as an avenue to achieving the outcomes of ESD

As already alluded to earlier, the application of ESD as a constitutional value could result in outcomes such as ecological integrity, environmental justice and poverty reduction. These outcomes could be attained through the application of the
environmental rule of law. The environmental rule of law has been described as a process that incorporates and applies the principles of the rule of law within the environmental context.\textsuperscript{49} The 2016 International Union for Conservation of Nature, World Declaration on the Environmental Rule of law (hereinafter the 2016 IUCN) defined the environmental rule of law as the legal framework of substantive and procedural rights and duties that incorporates the principles of ESD.\textsuperscript{50} Based on this definition, one could argue that the environmental rule of law cannot exist in a legal system that does not embody ESD.

It should be borne in mind that, the environmental rule of law, as Chapter 4 argues, encompasses a broader application of fairness and justice, which not only encompasses protecting human beings but also encapsulates the non-human world. Legal protection in this context also entails preserving nature even in instances where humanity does not stand to benefit from such protection. The import of the argument above is that the environmental rule of law ought to prohibit laws that legalise environmentally harmful conduct. South Africa has stepped up to the task of condemning and proscribing environmentally destructive conduct by affording everyone the right to have the environment protected through measures that secure 'ecologically' sustainable development.\textsuperscript{51} This means that section 24 of the Constitution requires courts to advance and promote the objective of securing 'ecologically' sustainable development by developing and applying it as a constitutional value. In engaging in such value laden adjudication, courts could employ the environmental rule of law, as a process pertinent to realising the outcomes of ESD. Put differently, and as argued in Chapter 4,\textsuperscript{52} ESD strengthens the environmental rule of law by promoting outcomes such as ecological integrity, environmental justice and the reduction of poverty in South Africa. In this light, this

\textsuperscript{49}Iucn World Declaration on the Environmental Rule of Law 2016 2; Kreilhuber and Kariuki 2020 Geo Envtl L Rev 592.
\textsuperscript{50}Iucn World Declaration on the Environmental Rule of Law 2016 2.
\textsuperscript{51}Section 24(b) (iii) of the Constitution.
\textsuperscript{52}See section 4.5 below.
thesis proffers that the judiciary plays a pivotal role in developing the environmental rule of law and the outcomes of ESD through processes such as judicial review.

1.1.4 ‘Ecologically’ sustainable development in South Africa’s courts

It should be noted that judicial review on the grounds of the environmental rule of law requires that the public and private sphere account fully for environmental values whenever decisions that could affect the environment are being made.53 Thus, when engaging in judicial review, judges ought to engage in legal reasoning for the purpose of protecting an individual’s rights as entrenched in the Constitution.54 In the context of this thesis, Chapter 5 argues that judges, in the judicial review of environmental law disputes, ought to strive to engage in developing and applying constitutional values such as ESD. Regrettably, as this thesis advances courts have arguably avoided to confront scientific concerns pertaining to the environmental context of environmental law cases.55 In this respect, courts ought to engage in scientific concerns involving ESD when determining environmental law cases.

For this reason, in Chapter 5, this thesis analyses, South Africa's developing environmental rights jurisprudence with the aim of illustrating the need for a nuanced conceptualisation of section 24(b) (iii)’s injunction for environmental protection through ‘ecologically’ sustainable development. In addressing these concerns, Chapter 5 will, with reference to BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs (hereinafter BP);56 Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, 2004 (5) SA 124 (W) (hereinafter BP).

54 Lenta 2004 SAJHR 567.
56 BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs 2004 (5) SA 124 (W) (hereinafter BP).
Mpumalanga Province (hereinafter Fuel Retailers);\textsuperscript{57} Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance (hereinafter VEJA)\textsuperscript{58} and Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism (hereinafter Earthlife),\textsuperscript{59} examine the manner in which ESD could be used by courts as a constitutional value in environmental rights adjudication through the environmental rule of law. In examining these judgements, Chapter 5 argues and advances that South Africa’s courts have not yet accepted ESD as a constitutional value in environmental rights adjudication. Although all of these cases recognised that section 24(b) (iii) of the Constitution mandated decision makers to employ ESD, none of them attempted to give content to ESD or how it relates with the environmental right. In light of the aforementioned cases, Chapter 5 stresses that courts have arguably not fully concretised section 24 in environmental rights adjudication. Although the critique extended in this thesis is backward looking, it also helpfully illustrates how ESD could be applied by courts as a constitutional value in future environmental law disputes towards realising ecological integrity, poverty reduction and environmental justice.

1.2 Research question

How could ecologically sustainable development be used as a constitutional value in environmental rights adjudication, and how could courts employ the environmental rule of law to reach the outcomes of ecologically sustainable development?

\textsuperscript{57} Fuel Retailers Association of Southern Africa V Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 6 SA 4 (CC) (hereinafter Fuel Retailers).

\textsuperscript{58} Company Secretary of ArcelorMittal South Africa V Vaal Environmental Justice Alliance 2015 (1) SA 515 (SCA) 2015 (1) SA 515 (SCA) (hereinafter VEJA).

\textsuperscript{59} Earthlife Africa (Cape Town) V Director-General: Department of Environmental Affairs and Tourism 2005 (3) SA 156 (C) (hereinafter Earthlife).
1.3 Objectives

The primary objective of this thesis is to determine how ESD could be used as a constitutional value in environmental rights adjudication, and how courts could employ the environmental rule of law to reach the outcomes of ESD.

This primary objective is explained by specific objectives which include:

- To examine how constitutional values have developed in South Africa, their meaning and significance, if any, especially in environmental rights adjudication;\(^{60}\)
- To arrive at an understanding of what ESD means in general, and for South Africa in particular;\(^{61}\)
- To examine what the environmental rule of law actually means, and how it relates to the rule of law in South Africa;\(^{62}\)
- To examine how the environmental rule of law could be used as a means to achieving the outcomes of ESD in South Africa;\(^{63}\) and
- To examine how courts could employ ESD as a constitutional value in developing and realising the outcomes of ESD.\(^{64}\)

1.4 Hypothesis and assumptions

This study is premised on the following central hypothesis:

- ESD, by virtue of its place in section 24 of the *Constitution* could be used as a substantive constitutional value to realise the outcomes of ESD.

The inquiry is based on the following assumptions:

---

\(^{60}\) See chapter 2.

\(^{61}\) See chapter 3.

\(^{62}\) See chapter 4.

\(^{63}\) See chapter 4.

\(^{64}\) See chapter 5.
Applying constitutional values in decision making could be key to developing and realising section 24;

ESD could be employed as a constitutional value that could inform environmental adjudication;

ESD as a constitutional value, could be a key element to achieving transformative environmental constitutionalism.

1.5 Methodology

The nature of this research calls for an analytic discourse analysis, and the adopted research methodology is doctrinal legal research (or black-letter law). The study relied on international, regional and national materials on ESD and environmental rule of law. These were reviewed alongside South Africa's Constitution for the purpose of determining how ESD could qualify as a constitutional value in environmental adjudication. The theoretical basis on ESD, and how it could play out as a constitutional value, formed the foundation for the analysis of how South African courts could achieve the outcomes of ESD. It is upon this theoretical foundation that ESD could be employed as a constitutional value that enriches environmental rights jurisprudence in South Africa’s legal framework. The analysis of how ESD could be applied by courts in the adjudication of environmental law disputes was conducted through a critical interrogation of the relevant international and domestic legislation, case law, textbooks, journal articles and electronic material.

To date, no studies have been conducted on a clear constitutional value that could be employed in environmental adjudication in South Africa. Related studies are often focused on the environmental right (section 24) in general, where the normative value of section 24 is often included as an ancillary issue. Furthermore, as far as this study could ascertain, there is no comprehensive research specifically on the manner in which the judiciary has applied ESD as a constitutional value in

65 See Feris 2008 CCR; Dire 2008 CCR.
developing the jurisprudence on the environmental right. Thus, no study has been done to date on how the judiciary in South Africa has interpreted and applied ESD as a constitutional value to realising section 24. Consequently, the significance, originality and novelty of this study is hinged on its analysis of ESD as a possible constitutional value in environmental adjudication in South Africa. This thesis is the first of its kind to examine the manner in which ESD could be employed in the adjudication of environmental disputes in South Africa for the purpose of realising section 24.

1.6 Framework of study

This study is structured into the following Chapters:

Chapter 1: Introduction

Chapter 2: Perspectives on constitutional values in South Africa and section 24 of the Constitution

Chapter 3: Perspectives on 'ecologically' sustainable development

Chapter 4: Environmental rule of law as an avenue to achieving ecologically sustainable development

Chapter 5: The pursuit of 'ecologically' sustainable development in SA's courts

Chapter 6: Summary and Conclusion
CHAPTER 2
PERSPECTIVES ON CONSTITUTIONAL VALUES IN SOUTH AFRICA

2.1 Introduction

All human beings are endowed with indispensable fundamental rights. These rights serve as protection from abuse by those yielding power. Each right is in place to attain a certain outcome. Resultantly, every right has a potential 'value element' that it aims to achieve. That is to say, there is a 'value' that forms the basis for the protection of each right. Of importance is that values "inform the interpretation of the Constitution and other law" and prescribe "positive standards with which all law must comply in order to be valid".

In the context of this thesis, values refer to those that are found inside the text of section 1 of the Constitution or those values found outside the text of the classically defined values in section 1 of the Constitution.

The injunction to interpret all legal provisions in accordance with the Constitution calls for a values-based interpretation as opposed to a strict literalist interpretation that

---

1 Fundamental human rights have been strengthened internationally through the United Nation’s (UN’s) adoption of the Universal Declaration of Human Rights 1948 (herein referred to as the UDHR). In its Preamble, the UDHR states that it was drafted as "a common standard of achievement for all peoples and nations". Furthermore, the UDHR for the first time in the history of humanity set out basic civil, economic, political, social and cultural rights that every human being should enjoy. Over time, the UDHR has been widely accepted as the fundamental norms of human rights that should be respected and protected by everyone. The UDHR, together with the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966) are at times referred to as the International Bill of Human Rights. See generally, Humphery 1976 Wm & Mary L Rev 527-542; Darraj Milestones in Modern World History 80-88; Martin "Rights" 4617; Jayawickrama The Judicial Application of Human Rights Law 25-27.


3 Bray 2004 Perspectives in Education 39 notes that constitutional values determine the limits and nature of rights and also provides a context within which fundamental rights function.

4 United Democratic Movement V President of the Republic of South Africa 2002 11 BCLR 1179 (CC) 19.

5 Section 1 of the Constitution. See also Roederer "Founding Provisions"13-3, 13-8 who opines that the Constitution also embodies extra textual founding provisions such as "the values of Ubuntu and transformation". Sections 39 (2) of the Constitution is a further constitutional directive for a value-based interpretation.
dominated South Africa prior to independence. Notable is the text in section 39 of the Constitution, which mandates courts to interpret the Bill of Rights in a manner that "promotes the values that underlie an open and democratic society". Hence, as Venter points out, courts are often inclined to follow a value-orientated approach in the interpretation of fundamental rights. South Africa's Constitutional Court has elaborated on the framework of values underpinning the Constitution as embodying an "objective, normative value system".

Furthermore, it should be noted that the place of values in rights could be deduced from how some rights are protected and the rationale for the protection of such rights. For instance, the 'value element' within the right to life is the recognition and "full enjoyment of human existence, without which, life would be meaningless". In plain language, life itself is worth protecting and it is a requirement for one to enjoy all other rights. Such an assertion is underscored in section 11 of the Constitution. Values, or the rationale for the protection of rights such as the right to life and many other rights reflect, to a greater extent, the principle of natural law which demands laws to be based on morality, ethics

---

6 Zuma paras 15-18 (hereinafter Zuma); Dugard 1971 SALJ 181.
7 Section 39 of the Constitution reads as follows: "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.
   (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
   (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill".
8 Venter Constitutional Comparison 140-141. See also Roederer "Founding Provisions" 13-3, 13-8.
9 Makwanyane para 9; Zuma para 15.
10 Serfontein 2015 IJA 11-13; Serfontein 2015 PER/PELJ 2266. See also Currie and De Waal The Bill of Rights Handbook 258-260.
11 The right to life has been acknowledged as so pertinent such that the CC abolished the death penalty in Makwanyane.
and what is right.\textsuperscript{12} Such an understanding of law is in stark contrast to strict positive law which comprises of common law or statutes that may or may not incorporate natural law.\textsuperscript{13} A prime example is that of South Africa’s segregationist Apartheid policies.\textsuperscript{14}

In a bid to address such segregationist laws and policies, the \textit{Constitution} prescribes values such as human dignity and equality by which all laws should be based and understood.\textsuperscript{15} Values in terms of the \textit{Constitution} can either take the form of textual values (values found inside the text of section 1) or extra-textual values (values found outside the text of section 1, but within the rest of the constitutional text).\textsuperscript{16} These values, apply to all laws, including environmental law. Simply put, since values establish standards for judicial interpretation.\textsuperscript{17} It is important that courts promote the values enshrined in the \textit{Constitution} when dealing with environmental law disputes. In other words, there is a need for a value-based interpretation in environmental adjudication. Such a contention is based on section 39, a constitutional directive for a value-based interpretation when adjudicating on laws.\textsuperscript{18} Section 39 in this respect gives the judiciary authority to develop values based "on an open and democratic society"\textsuperscript{19}.

\textsuperscript{12} Dworkin \textit{Taking Rights Seriously} 47, 326, 327, 340; Finnis \textit{Natural Law and Natural Rights} 26-27; Friedrich \textit{The Philosophy of Law in Historical Perspective} 59; Van Blerk \textit{Jurisprudence: An Introduction} 10, 20.
\textsuperscript{13} Van Blerk \textit{Jurisprudence: An Introduction} 4, 5, 13; Hart \textit{The Concept of Law} 140, 183; Mill \textit{Utilitarianism} 70-71; Davis 2004 \textit{Acta jurid} 47, 326, 327, 340.
\textsuperscript{14} See for an example, the \textit{Extension of University Education Act} 45 of 1959 which prohibited "a non-white student to register at a formerly open university without the written permission of the Minister of Internal Affairs"; the \textit{Native Building Workers Act} 1951 which legalised the "training of blacks in skilled labour in the construction industry, but limited the places in which they were permitted to work". Sections 15 and 19 prohibited "blacks to work in the employ of whites performing skilled labour in their homes"; the \textit{Prohibition of Mixed Marriages Act} 1949 prohibited "marriages between white people and people of other races".
\textsuperscript{15} See sections 1, 2, 7 and 8 of the \textit{Constitution}.
\textsuperscript{16} Kroeze 2001 \textit{Stell LR} 267; Du Plessis 2005 \textit{SALJ} 608.
\textsuperscript{17} Venter 2014 \textit{Tul Eur & Civ LF} 91.
\textsuperscript{18} Section 39(1) of the \textit{Constitution}.
\textsuperscript{19} Section 39(1) of the \textit{Constitution}. An example where the courts developed values based on an open and democratic society would be the \textit{Makwanyane} case. In this case, the Constitutional Court developed \textit{Ubuntu} as a constitutional value. See 2.6 below.
While the preceding Chapter introduced the study, this Chapter will argue that, to date and as far as this research could ascertain, no constitutional value has been applied with sufficient certainty in environmental rights adjudication. It is upon this averment that this Chapter explores how constitutional values were developed in South Africa in a generic conceptual manner; what they mean; their significance, if any, especially in environmental rights adjudication. Such an exposition of constitutional values is a means to determine how ESD could be developed and applied as a constitutional value by the courts in environmental rights adjudication. The rationale adopted in this Chapter is that an analysis of constitutional values provides a practical foundation upon which to probe how ESD could be used as a constitutional value in environmental rights adjudication.

2.2  The history of constitutional values in South Africa

The development of constitutional values in South Africa can be traced back to the apartheid era. To fully comprehend the significance of constitutional values in South Africa, one thus needs to delve deeper into the history of South Africa, its overall impact on the environment and ultimately into South Africa's new constitutional order. These foregoing moments in relation to constitutional values are discussed below seriatim.20

2.2.1  The Apartheid era in South Africa

The apartheid era is infamous for its long racial segregationist and white supremacy laws.21 Racial segregation and white supremacy bore roots from the period of colonialism, where the overwhelmingly black majority were excluded from political franchise.22 The

---

20 The following section will only discuss, in brief, the history of apartheid, impact of apartheid on the environment and the new constitutional order because these do not form the crux of the thesis but are necessary for comprehending the significance of constitutional values in South Africa.


22 Section 46(c) of the Republic of South Africa Constitution Act 32 of 1961 (hereinafter the 1961 Constitution) disqualified Blacks, Coloureds, and Indians from being part of parliament. The 1961 Constitution was later repealed by the South Africa Constitution Amendment Act 105 of 1984 (hereinafter the 1984 Constitution) which established in section 52 a tricameral parliament which gave limited political representation to Indians and Coloureds, yet Blacks were still excluded and not represented in parliament.
white minority exploited their economic and political power to protect and promote their dominant economic, political and social position. During this time, the doctrine of parliamentary sovereignty, an English law principle, was entrenched in the then Constitution of South Africa. The extent of parliament's unquestionable power is summed up in the 1934 Appellate Division case, where Stratford CJ stated that:

Parliament may make any encroachment it chooses upon the life, liberty, or property of any individual subject to its sway ... and it is the function of the courts of law to enforce its will.

Furthermore, former Chief Justice Arthur Chaskalson, in his work on "Dignity As a Constitutional Value", propounds that under apartheid, segregation and racial discrimination was enforced in all spheres of the lives of the black majority. Over 80% of land was exclusively owned and occupied by the white minority, who comprised less than 20% of the country's population. The majority of blacks were subjected and committed to impoverished, underdeveloped and overpopulated homelands. It was a criminal offence for blacks to leave their assigned homelands without a government permit. In addition, the apartheid government promulgated laws that denied blacks access to decent education; restricted their mobility; their right to work and live in any part of the country, other than as a migrant labourer on white-owned farmlands, or in unskilled and

---

24 Sections 59-65 of the 1961 Constitution; section 30 of the 1984 Constitution. See also Chaskalson 2010 Am U Int'l L Rev 1377; and Hatchard and Slinn Parliamentary Supremacy & Judicial Supremacy 7, who characterise South Africa's apartheid-era form of the "Westminster model of parliamentary sovereignty" to be a "rubber stamp of a tyrannical executive" which was unable to protect people from unjust laws. Similarly, Olivier "Parliamentary Sovereignty and Judge-Made Law; Judicial Review of Legislation" 55 states that "... apartheid could never have come into being without the system of parliamentary sovereignty...".
25 Sachs V Minister of Justice 1934 A.D. 11 (A) 37. See also Hatchard and Slinn Parliamentary Supremacy & Judicial Supremacy 55.
26 Chaskalson 2010 Am U Int'l L Rev 1378.
27 Chaskalson 2010 Am U Int'l L Rev 1378.
28 See generally sections 1, 2 of the Natives Land Act 27 of 1913 (hereinafter the Natives Land Act). See also Chaskalson 2010 Am U Int'l L Rev 1378.
29 See generally sections 1, 2 of the Natives Land Act and Chaskalson 2010 Am U Int'l L Rev 1378.
menial posts in white managed industrial and commercial sectors.\textsuperscript{30} The very few blacks permitted to live in the supposed "white areas" were forced into segregated, overcrowded, underdeveloped settlements in urban areas, or into "single-sex hostels" located close to their work stations.\textsuperscript{31} Moreover, "blacks were voteless, landless and impoverished,"\textsuperscript{32} regardless of being the great majority of the country.

All these segregationist laws culminated in an intense and incessant struggle against the power of the state. As a result, draconian laws were passed to reinforce security and counter resistance.\textsuperscript{33} However, the struggle was unrelenting, many were imprisoned and others died during its course.\textsuperscript{34} The first step that led to what became a police state in the country was the promulgation of the \textit{Suppression of Communism Act} in 1950, which declared the Communist Party of South Africa to be unlawful.\textsuperscript{35} Section 11 of the \textit{Suppression of Communism Act} created various offences that proscribed communism. In addition, the \textit{Suppression of Communism Act} defined communism in section 1 as any unlawful conduct, including any scheme aimed at executing social, economic, political or industrial change within South Africa.

Further to the above, the \textit{Criminal Law Amendment Act} 8 of 1953 was later passed to counter any passive resistance. Thus, the \textit{Criminal Law Amendment Act} criminalised conduct by persons who protested against any law of the apartheid government.\textsuperscript{36} In 1960, the apartheid government further declared illegal any other communist

\footnotesize{\textsuperscript{30} See generally the \textit{Extension of University Education Act 45 of 1959}; the \textit{Native Building Workers Act 1951}; \textit{Natives Resettlement Act 1954}; \textit{Native Laws Amendment Act 1952} to name but a few.  
\textsuperscript{31} See generally the 1954 \textit{Natives Resettlement Act}; the \textit{Natives Urban Areas Act 1923}; the \textit{Natives Land Act 27 of 1913}.  
\textsuperscript{32} For a general account of the effects of apartheid on the day to day lives of people see Sampson \textit{Mandela: The Authorized Biography} part 4, 5. See also Chaskalson 2010 \textit{Am U Int’l L Rev} 1378.  
\textsuperscript{33} Sonneborn \textit{The End of Apartheid in South Africa} 18-70.  
\textsuperscript{34} Sonneborn \textit{The End of Apartheid in South Africa} 18-70.  
\textsuperscript{35} \textit{Suppression of Communism Act} 44 of 1950 (hereinafter the \textit{Suppression of Communism Act}).  
\textsuperscript{36} Sections 1, 2, 3 of the \textit{Criminal Law Amendment Act} 8 of 1953 (hereinafter the \textit{Criminal Law Amendment Act}).}
organisation, other than the Communist Party of South Africa. As a result, the African National Congress and other anti-apartheid parties, which had until then been at the centre of peaceful opposition to apartheid rule, were declared illegal. It therefore became an offence to be affiliated to any such parties or to further their purpose.

Apartheid's draconian security legislation resulted in the detention of political prisoners without trial. The police were authorised to hold detainees incommunicado, and to legally deny them access to legal representation or personal medical assistance. At the outset, detention was for 90 days, then extended to 180 days, and ultimately indefinitely. Interference with the powers of the judiciary was common, as illustrated by section 17(3) of the General Laws Amendment Act 37 of 1963, which stripped courts of their jurisdiction to pronounce *habeas corpus* orders with regard to detainees. As a result, the functions and powers of the judiciary were limited as part of the Westminster system that promoted parliamentary sovereignty. The powers of the judiciary were constrained to the extent that courts were unable to declare any legislation invalid, and therefore had limited authority when it came to judicial review.

The ousting of the jurisdiction of the judiciary and the isolation of political prisoners led to torture and other human rights abuses. Olivier laments that the ousting of the

---

37 Sections 1, 2, 3 of the *Unlawful Organisations Act* 34 of 1960 (hereinafter the *Unlawful Organisations Act*).
38 Section 1, 2 of the *Unlawful Organisations Act*.
40 See generally the *General Laws Amendment Act* 37 of 1963 (hereinafter the *General Laws Amendment Act*) which permitted political prisoners to be lawfully detained without trial for ninety days; the *Criminal Procedure Amendment Act* 96 of 1965 (hereinafter the *Criminal Procedure Amendment Act*) which permitted political prisoners to be lawfully detained without trial for 180 days, and the *General Laws Amendment Act* 83 of 1967 (hereinafter the *General Laws Amendment Act* 1967) which allowed political prisoners to be detained without trial for an indefinite period as part of the *Terrorism Act* 83 of 1967 (hereinafter the *Terrorism Act*).
41 See the *General Laws Amendment Act*; the *Criminal Procedure Amendment Act*; and the *General Laws Amendment Act* 1967.
42 Wesson and Du Plessis 2008 *SAJHR* 190; Olivier "Parliamentary Sovereignty and Judge-Made Law; Judicial Review of Legislation" 55.
43 Wesson and Du Plessis 2008 *SAJHR* 190; Olivier "Parliamentary Sovereignty and Judge-Made Law; Judicial Review of Legislation" 55.
44 Olivier "Parliamentary Sovereignty and Judge-Made Law; Judicial Review of Legislation" 55.
judiciary's power in this regard could never have happened if "the system of parliamentary sovereignty" had not reigned in South Africa. The author further notes that South Africa had no Bill of Rights, and that "all constitutions prior to the new post-liberation Interim Constitution of 1993" prohibited the judicial review of legislation.\(^{45}\) Hence, in addition to the horrible effects of apartheid on millions of South Africans, especially the black, Indian and coloured people, "apartheid and the system of sovereignty had a debilitating and humiliating effect on our judiciary".\(^{46}\)

Moreover, censorship was implemented, black community newspapers were banned, and a state of emergency was declared in 1985 and 1986 respectively.\(^{47}\) The state of emergency endowed security forces with a wide array of discretionary powers.\(^{48}\) However, the draconian security laws only fuelled resistance, as widespread protests and strikes increased in the country, which in turn garnered the attention of the international community. Ultimately, this led to an imposition of economic and other sanctions against the apartheid government.\(^{49}\) The draconian apartheid rule was finally ended through a series of negotiations which occurred from 1990 to 1993.\(^{50}\) However, the aftermath of apartheid left a severely crippled economy, "a fragmented and traumatised society,

\[^{45}\text{Olivier "Parliamentary Sovereignty and Judge-Made Law; Judicial Review of Legislation" 55.}\]
\[^{46}\text{Olivier "Parliamentary Sovereignty and Judge-Made Law; Judicial Review of Legislation" 55.}\]
\[^{47}\text{The 1985 state of emergency was declared by Adriaan Vlok, the then Minister of Law and Order after a string of gruesome neck lacings of Blacks suspected to be under President Botha's regime. See Stapleton A Military History of South Africa 152-190; Van der Waag 2015 Sci Mil 199-203; Sonneborn The End of Apartheid in South Africa 79-82.}\]
\[^{48}\text{Sonneborn The end of apartheid in South Africa 81 states that the police were given the authority to torture and arrest people without formally charging them. See also Stapleton A Military History of South Africa 152-190; Van der Waag 2015 Sci Mil 199-203.}\]
\[^{49}\text{Noteworthy in this regard is that the UN responded to apartheid in South Africa by imposing a number of economic and military embargos as well as by labelling apartheid a 'crime against humanity'. See UN General Assembly Resolution A/RES/1761 1962; UN General Assembly, Policies of apartheid of the Government of South Africa, A/RES/3151 1973; United Nations Security Council Resolution 418, 1977. Sonneborn The End of Apartheid in South Africa 81 also states that apartheid not only resulted in sanctions being imposed on South Africa, but also stirred moral outrage in people, globally. For instance, the Comprehensive Anti-Apartheid Act 1986 imposed sanctions on South Africa. These sanctions could only be lifted if the system of apartheid came to an end.}\]
\[^{50}\text{Van der Waag 2015 Sci Mil 199, 203; Sonneborn The End of Apartheid in South Africa 85-88.}\]
poverty, underdevelopment, and corruption".\(^{51}\) The environment was not exempt from the negative effects of apartheid, as some scholars observe that apartheid had a very deleterious impact on the environment.\(^{52}\) This therefore mean that, South Africa's infamous apartheid laws were not exclusive to economic, social and political injustices alone, but they extended their tentacles to environmental injustices as well.\(^{53}\) In this respect, Stull, Bell and Ncwadi\(^{54}\) have coined the term 'environmental apartheid', which refers:

> to the deliberate use of the environment to marginalise racially defined groups, as well as the subsequent consequences of that marginalisation.

Thus, rural space was used as an "environmental means for marginalising groups", i.e. 'rural marginalisation'.\(^{55}\) The apartheid administration wielded rural locations as a way of denying blacks their political rights, by relegating "them to the least healthy and least productive ecological contexts", and by making them "economically dependent upon distant white-owned capital".\(^{56}\) Thus, rural marginalisation that prevented the black majority from accessing resources pertinent to their well-being, livelihood and political power was threefold; i.e. "first order, second order, and third order rural marginalisation".\(^{57}\) Worth noting is that "first order rural marginalisation", refers to the forcible transfer of blacks to rural spaces far away from the cultural and economic

\(^{51}\) Chaskalson 2010 *Am U Int'l L Rev* 1380. For the purpose of relevance and brevity the discussion will not delve into the impact of apartheid on the economy or society. However, for further reading see generally Carmody 2002 *J South Afr Stud* 255-275; Thaver and Ekanayake 2010 *The International Journal of Business and Finance Research* 11-22; Bhattacharya and Lowenberg 2010 *Comp Econ Stud* 38-61; Stevens and Lockhat 1997 *S Afr J Psychol* 250-255; Lynn and Lea 2003 *Discourse Soc* 425-452.

\(^{52}\) Steyn 2005 *Globalizations* 391-402; Stull, Bell and Ncwadi 2016 *J Rural Stud* 369-380; Beinart and Hughes *Environment and Empire* 355; Dickinson 2012 *Commun Cult Crit* 57-74; Bullard 2001 *Phylon Quarterly* 151-171.

\(^{53}\) Stull, Bell and Ncwadi 2016 *J Rural Stud* 370.

\(^{54}\) Stull, Bell and Ncwadi 2016 *J Rural Stud* 370. By offering the term "environmental apartheid", the authors seek to draw attention to situations wherein the environment is a crucial element "in building and maintaining racial segregation".

\(^{55}\) Stull, Bell and Ncwadi 2016 *J Rural Stud* 370.

\(^{56}\) Stull, Bell and Ncwadi 2016 *J Rural Stud* 370.

\(^{57}\) Stull, Bell and Ncwadi 2016 *J Rural Stud* 370.
advantages controlled by whites. Additionally, "second order rural marginalisation", refers to how blacks were "generally relegated to the worst lands within these distant rural spaces". Lastly, "third order rural marginalization" refers to the constant neglect and isolation of blacks "within first and second order rural marginalisation". These three instances of rural marginalisation resulted in "major eco-health implications and incessant consequences" that cannot be detached from the comprehension of economic, social and political repercussions of apartheid laws.

It should be noted further that rural marginalisation forced the majority of South Africans into "slave-like employment" in distant factories, mines, as well as other services for whites. Furthermore, rural marginalisation is manifested in environmental apartheid, which in turn manifests itself in the general phenomenon of environmental racism, the:

Policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or colour.

However, Stull, Bell and Ncwadi assert that the orthodox "use of the term environmental racism" reflects "the environmental abuse of a racially-defined marginalised group", whilst "environmental apartheid is the reverse logic of power" because it employs "environmental abuse in order to marginalise a racially defined group". This means that environmental racism and environmental apartheid often operate in consort with some variable degrees. Hence, environmental apartheid equally becomes the cause and consequence. In other words, environmental apartheid aimed to:

58 Stull, Bell and Ncwadi 2016 *J Rural Stud* 370.
59 Stull, Bell and Ncwadi 2016 *J Rural Stud* 370.
60 Stull, Bell and Ncwadi 2016 *J Rural Stud* 370.
61 Stull, Bell and Ncwadi 2016 *J Rural Stud* 370.
63 Stull, Bell and Ncwadi 2016 *J Rural Stud* 370-372. See also Bullard 2001 *Phylon Quarterly* 151-171; Dickinson 2012 *Commun Cult Crit* 57-74 who state that environmental racism, is a "critical term that highlights environmental framings which disproportionally negatively affect people of colour and advantages whites".
64 Stull, Bell and Ncwadi 2016 *J Rural Stud* 370-372. See also Bullard 2001 *Phylon Quarterly* 151-171; Dickinson 2012 *Commun Cult Crit* 57-74.
Create a large population of poor, desperate people who would therefore be essentially forced to migrate to the White areas of South Africa to accept low-wage, menial work with virtually no rights. First, second, and third order rural marginalisation kept labour cheap and without rights, while also ensuring that blacks were subordinate and disorganized (MacDonald, 2006). In other words, the point of apartheid was not to keep Blacks and Whites separate. Whites and Blacks interacted closely on a daily basis during apartheid. Rather, the point was to keep Blacks powerless and willing to work for Whites for very little. Separateness was the means; marginalization was the end.65

It is this above contextual background which sets the stage for extensive and monumental changes in the South African political, governance and importantly, constitutional set up. As a means to address the deleterious impact of apartheid, the present and prevailing Constitution guarantees everyone (regardless of race) the rights to a healthy environment,66 equality,67 human dignity,68 freedom of movement and residence,69 political rights,70 labour rights,71 property right,72 housing,73 healthcare74 to mention but a few.75 That is why, by global standards, the South African Constitution is considered to be extremely progressive.76 This Constitution was adopted following a series of negotiations77 that led to the adoption of the Constitution of the Republic of South Africa

66 Section 24 of the Constitution.
67 Section 9 of the Constitution.
68 Section 10 of the Constitution.
69 Section 21 of the Constitution.
70 Section 19 of the Constitution.
71 Section 23 of the Constitution.
72 Section 25 of the Constitution.
73 Section 26 of the Constitution.
74 Section 27 of the Constitution.
75 See sections 5 to 39 of the Constitution for the full list of rights. See also Currie and De Waal The Bill of Rights Handbook for a discussion of all the rights entrenched in the Constitution.
76 Langa 2006 Stell LR 115. Kende Constitutional Rights in Two Worlds 4, 135 also notes that although the Constitution is relatively new, it has been hailed as "the most admirable constitution in the history of the world" by notable scholars such Harvard Law professor Cass Sunstein, in her seminal work, Sunstein Designing Democracy: What Constitutions Do 261. The author gives the example that South Africa was the first nation to prohibit sexual orientation discrimination in its Constitution (section 9 and 15) thereby making it very progressive by world standards. Kende further states that, "the South African Constitution’s framers surveyed the world’s constitutions for the best ideas". See also Sarkin 1998 U Pa J Const L 181 who explains "that the framers relied heavily on Canadian and German constitutional developments, as well as international human rights principles".
77 For the purpose of relevance, this thesis does not delve into an extensive account of the negotiations that led to the end of apartheid or the adoption of the Constitution. However, this thesis succinctly
200 of 1993 (hereinafter the *Interim Constitution*), a Government of National unity, and a date for the "first truly democratic elections" in South Africa.\(^78\)

At the crux of South Africa's independence were certain institutional changes pronounced by Justice Ackermann in the following terms:

> On April 27, 1994, the omnicompetence of the South African legislature, at all levels of government, simply ceased to exist and the *Constitution* became the supreme law of the Republic, binding all legislative, executive and judicial organs of state at all levels of government, and resulting in any law or act inconsistent with its provisions, being of no force and effect to the extent of the inconsistency.\(^79\)

Pursuant to the 1994 elections, a new parliament was appointed and tasked with the drafting of a final constitution.\(^80\) The drafting of South Africa's current *Constitution* was completed in 1996 and its adoption became a historic milestone that was coupled with the end of apartheid.\(^81\) Sonneborn\(^82\) also commends the *Constitution* as "one of the most progressive constitutions in the world" because it was:

> Written in simple, easily understood language, it outlined ideas of democracy, equality, and freedom similar to those found in the Constitution of the United States. But its list of fundamental rights also included the right to higher education, to decent housing, and to strike for improved working conditions. It also called for equal rights for women and articulates the negotiation process for the sake of comprehending the history of constitutional values in South Africa. It is worthy of note that negotiations that led to South Africa's independence and ultimately the adoption of the *Constitution* commenced after FW De Klerk took over from Botha and announced the release of Nelson Mandela and other political prisoners, in 1990. De Klerk also lifted the ban that had been levelled against the African National Congress and other 33 political organisations. What followed was a series of reforms and negotiations mostly from the National Party and the African National Congress. These political parties met at the Convention for a Democratic South Africa (CODESA) in December 1991 and May 1992. However, it was the Multi-Party Negotiating Process that resulted in the adoption of the *Constitution of the Republic of South Africa* 200 of 1993 (hereinafter the *Interim Constitution*) and the Government of national Unity. For an extensive read on the foregoing see Clark and Worger *South Africa: The Rise and Fall of Apartheid* 92, 105, 154; Sonneborn *The End of Apartheid in South Africa* 87; Cornell and Fuller "Introduction" 2, 3; Bray 2004 *Perspect Educ* 37-47.

\(^{78}\) Sonneborn *The End of Apartheid in South Africa* 87, 88.

\(^{79}\) Ackerman 2004 *NZLJ* 1643.

\(^{80}\) Cornell and Fuller "Introduction" 4; Sonneborn *The End of Apartheid in South Africa* 93-94; Chaskalson 2010 *Am U Int'l L Rev* 1381.

\(^{81}\) Cornell and Fuller "Introduction" 4; Sonneborn *The End of Apartheid in South Africa* 93-94; Chaskalson 2010 *Am U Int'l L Rev* 1380, 1381.

\(^{82}\) Sonneborn *The End of Apartheid in South Africa* 94.
homosexuals and established an obligation to protect the environment and all children from abuse and neglect.

The Constitution considerably further changed, the nature of adjudication in South Africa. That is to say, the powers of the judiciary were extended to include their entrenched independence and power to review and declare invalid any legislation that would be in conflict with the Constitution. The Constitution also bases its legitimacy on a number of democratic values. As stated above, section 1 of the Constitution states that South Africa is a sovereign and democratic nation that is founded on values such as human dignity, equality, the rule of law, supremacy of the Constitution, universal adult suffrage just to mention but a few. Furthermore, section 39 of the Constitution mandates courts to interpret the rights enshrined in the Bill of Rights in a manner that promotes "the values that underlie an open and democratic society...". As a result, the Constitution also accommodates values that are not classically contained in the text of section 1, but values that are reflected in or implied from the rest of the constitutional text.

These values are important to the establishment of a rechtsstaat, which demands all levels of government to promote the "values of the Constitution through the development of an objective normative order". As a result, "laws that do not promote the ... values of the Constitution, or worse yet, run against them, are invalid". However, all this narrative and discourse about constitutional values raises a number or pertinent questions: What are constitutional values? What purpose do they serve in the realisation of rights and guarantees enumerated in the Bill of Rights?

---

83 Section 165(2) of the Constitution provides that "the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice".
84 Section 39(1) of the Constitution.
85 See chapter 4 where a rechtsstaat is discussed.
86 Cornell and Fuller "Introduction" 4.
87 Cornell and Fuller "Introduction" 4.
2.3 Purpose or significance of constitutional values in South Africa

As stated above, the *Constitution* making process was twofold. First, an *Interim Constitution* was adopted in 1993 to pave way for the adoption of a final *Constitution* by a democratically elected Constitutional Assembly. The *Interim Constitution* explicitly introduced the notion of values through section 35(1), read with section 35(3). Section 35 (1) states that:

In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

In giving effect to section 35(1), section 35(3) reads that:

In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purpose and objects of this Chapter.

However, the *Interim Constitution* did not articulate what the values that underlie "an open and democratic society" could be. Therefore, what ensued was a creative set of recommendations from a number of scholars and, the constitutional energetic endeavour

88 See Klug 2000 *SAJHR* 145-149.
90 Section 35(1) of the *Interim Constitution*.
91 Section 35(3) of the *Interim Constitution*.
92 Although the *Interim Constitution* only recognised values in a single section, it allowed for a “broader search for and application of constitutional values”. Commenting on the wording of section 35, Van Wyk 2000 *Constitution and Law IV: Developments in the Contemporary Constitutional State* asserts that section 35(1) "was simply understood to have a two-fold role: first, to guide the courts in interpreting the *Constitution* (including the Bill of Rights- and not the other way round); second, to incorporate values associated with a democratic order into the *Constitution* (and the Bill of Rights)". When compared to the *Interim Constitution* and "judging by the number of times the word 'values' appears in it" ["One finds 'values' in the plural in the preamble and in sections 1, 7(1), 39(1), 143(2)(a), 195(1) and the heading of the section, 195(3) and 196(4)(a), (d) and (e)". Where the word "appears in singular form, the word 'value' deals with more mundane matters such as the market value of land (s 25(3)), the value of the Rand (s 224(1)), and value added tax". Sections 228(1) and 229(1) of the *Constitution* gave prominence to values. "In doing so, it converted the narrow formal base on which values rested in the 1993 *Constitution*, a single subsection directing the courts in their understanding of the Bill of Rights, to the plinth course of the whole constitutional structure". See also Du Plessis and Corder *Understanding South Africa’s Transitional Bill of Rights* 119-120.
to put flesh on the bone.\textsuperscript{93} Thus, even before the coming into force of the \textit{Interim Constitution}, Botha\textsuperscript{94} and Erasmus\textsuperscript{95} listed possible constitutional values that could underlie "an open and democratic society". Botha\textsuperscript{96} identified national unity, equality, limited government and liberty as "values and principles" in the \textit{Interim Constitution}. Erasmus\textsuperscript{97} referred to the \textit{Interim Constitution} as "basic-values-oriented". To Erasmus, the constitutional principles enumerated in schedule 4 of the \textit{Interim Constitution} reflected values.\textsuperscript{98} He went on to single out constitutionalism, democracy, equality, the freedom of information, the rule of law, the separation of powers, freedom, the protection of fundamental rights, an open society and the independence of the judiciary as constitutional values.\textsuperscript{99}

Like Botha, Erasmus\textsuperscript{100} also reiterates that constitutional values should always be viewed against the backdrop of our past. In Nishihara's words, constitutional values in South Africa constitute an effort to "heal the division of the past, as it reads in the preamble of the final and current \textit{Constitution}!".\textsuperscript{101} Nishihara proceeds to note that healing the division of the past is an import of constitutional values.\textsuperscript{102} That is to say, without constitutional values, constitutional practice faces the risk of preferring certain constitutional principles and ideologies in a biased manner. This means that such a legal system would pervert values and rights into something that legitimises injustice in furtherance of constitutional law. This would apply if, for instance, democracy as a value justifies a dictatorship founded on a one-way popular election (just like Hitler's regime which was defended and

\textsuperscript{93} Cockrell 1996 \textit{SAJHR} 1.
\textsuperscript{94} Botha 1994 \textit{South African Public Law} 242-243. Also see Botha \textit{The Legitimacy of Law and the Politics of Legitimacy} 331-348, and in general chapter 5 of the thesis.
\textsuperscript{95} Erasmus "Limitation and Suspension" 629.
\textsuperscript{96} Botha 1994 \textit{South African Public Law} 241-243.
\textsuperscript{97} Erasmus "Limitation and Suspension" 633-637.
\textsuperscript{98} Erasmus "Limitation and Suspension" 633-637, 636. See also schedule 4 of the \textit{Interim Constitution} titled 'Constitutional Principles' which enumerates a lengthy set of principles that form the basis of the \textit{Interim Constitution}.
\textsuperscript{99} Erasmus "Limitation and Suspension" 633-637, 636.
\textsuperscript{100} Erasmus "Limitation and Suspension" 636.
\textsuperscript{101} Nishihara 2001 \textit{PER/PELJ} 11.
\textsuperscript{102} Nishihara 2001 \textit{PER/PELJ} 11.
justified to be democratic), or if, for instance, equality as a value is recognised "by state planning which guarantees perfect equality of result, rejecting human freedom,"103 or the freedom of the judiciary to make ground-breaking pronouncements as was the case with apartheid.104

For this reason, Erasmus105 advances that a system of constitutional values requires courts "to give concrete meaning to constitutional values in the context of specific disputes". Cockrell106 avers that the Constitutional Court has, with vigour, given concrete meaning to constitutional values. However, this thesis contends that much needs to be done by the judiciary in discharging its role of giving content to values in environmental rights adjudication as mandated by section 35 (1) of the Interim Constitution and section 39 of the Constitution.107 In this regard, it should be noted that, although the Interim Constitution only mandated courts to "promote the values which underlie an open and democratic society", it nonetheless avoided to lucidly articulate on what these constitutional values could be.108

On this note, Van Wyk109 contends that the Interim Constitution, by its indefinite wording, has given constitution makers, writers, applicators, interpreters, commentators, and onlookers the latitude to expand on the meaning of 'values' over a conceptual backdrop strikingly distinct in assumption, emphasis, understanding, tradition and experience. Van Wyk110 proceeds to state that given the suggestions for some of the values for the Interim Constitution, the meaning of 'values' had been stretched to a point where 'values' overlapped into other words and meanings, such that they no longer met the distinct

103 Nishihara 2001 PER/PELJ 11, 12.
104 See section 17(3) of the General Laws Amendment Act.
105 Erasmus "Limitation and Suspension" 636.
106 Cockrell 1996 SAJHR 37.
107 Particularly in environmental right adjudication. See 2.6 below where I submit that the judiciary is yet to develop and give content to ESD as a constitutional value entrenched in section 24 of the Constitution.
108 See section 35 of the Interim Constitution.
profile outlined in the dictionary. Van Wyk\(^{111}\) then refers to the Collins dictionary which defines values as a person’s or society’s moral standards. In this respect, it is essential to note that stretching the meaning of values in the *Interim Constitution* to a point where they overlap into other words could be justified by the argument that although the dictionary is a convenient and obvious starting point, it however, is not the final authority over interpretation or meaning. In other words, and as argued below, constitutional values need not have a precise or dictionary definition.

Van Wyk\(^{112}\) advances an interesting argument on the significance of the constitutional values in the *Constitution*. That is to say, the author asserts that the *Constitution* has perverted the concept values, although to a mild extent.\(^{113}\) The author begins by laying out the lofty and oft-quoted section 1 of the *Constitution*. For the purpose of section 1’s relevance throughout this whole Chapter, it will be cited in full below:

> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
> (b) Non-racialism and non-sexism;
> (c) Supremacy of the constitution and the rule of law; and
> (d) Universal adult suffrage, a national common voters’ roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness.\(^{114}\)

Van Wyk\(^{115}\) concedes that "human dignity, equality, human rights and freedoms and universal adult suffrage could be values". The author proceeds to state that his argument that endorses the aforementioned as values is not influenced by the fact that these values

\(^{111}\) See Van Wyk 2000 *Constitution and Law IV: Developments in the Contemporary Constitutional State* 20 who refers to meaning number 5 of the Collins Concise English Dictionary (2019) which defines values as "(pl.) the moral principles or accepted standards of a person or group".


\(^{114}\) Section 1 of the *Constitution*.

also amount to clear rights to "human dignity", equality, the enjoyment of "freedoms" and "universal adult suffrage". Van Wyk further states that "non-racialism and non-sexism sound like typical values"; whereas, supremacy of the constitution is an unequivocal fact. The rule of law, Van Wyk adds, is a collection of values, norms and principles with soft edges. In other words, what Van Wyk seeks to contend is that the rule of law represents or embodies values, and can thus not be a value. Van Wyk's argument probes if the rule of law can be both a collection of values, norms and principles; and also constitutional value? This line of inquiry, however, is not part of the scope of this thesis.

In addition, Van Wyk avers that it is difficult to fathom the trio of a "national common voters' roll, regular elections and a multiparty system of democratic government" as constitutional values, save for when one reads them together with the phrase "to ensure accountability, responsiveness and openness". However, the author prefers "accountability, responsiveness and openness" as constitutional values. In addition to his stimulating argument, Van Wyk poses a number of thought provoking questions; Is equality the constitutional value, or is the achievement of equality the constitutional

---

116 Section 10 of the Constitution states that "Everyone has inherent dignity and the right to have their dignity respected and protected".

117 Section 9(1) of the Constitution states that "Everyone is equal before the law and has the right to equal protection and benefit of the law".

118 Section 9(2) of the Constitution states that "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance person, or categories of persons, disadvantaged by unfair discrimination may be taken".

119 Section 19(3) of the Constitution states that "Every adult citizen has the right: (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret...".


121 See section 2 of the Constitution which states that "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".


value? Is universal adult suffrage a constitutional "value, or that which it is intended to help assure, or both"? To Van Wyk, "the achievement of equality and the advancement of human rights and freedoms" reflects process as opposed to values. Although Van Wyk's argument is quite interesting, this thesis posits that the advancement of human rights and freedoms or the achievement of equality could reflect constitutional values provided they can be applied as a standard of good that sets out requirements for the Constitution's desired interpretation and application.

Section 195 of the Constitution also makes reference to constitutional values by asserting in subsection 1 that public administration must be regulated by "the democratic values and principles enshrined in the Constitution". When sculpted against section 1 of the Constitution, Van Wyk contends section 195 and the principles mentioned therein could

---


129 Also see Venter 2001 PER/PELJ 6; Venter Global Features of Constitutional Law 56; Venter 2014 Tul Eur & Civ LF 91 for a discussion of values as standards or measures of good.

130 Section 195 of the Constitution is titled "Basic values and principles governing public administration". Section 195(1) particularly reads as follows: "Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

a. A high standard of professional ethics must be promoted and maintained;
b. Efficient, economic and effective use of resources must be promoted;
c. Public administration must be development-oriented;
d. Services must be provided impartially, fairly, equitably and without bias;
e. People's needs must be responded to, and the public must be encouraged to participate in policy-making;
f. Public administration must be accountable;
g. Transparency must be fostered by providing the public with timely, accessible and accurate information;
h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated; and
i. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation".

instead be stated as values. He proceeds to state that when considering the merits of his argument,

one is tempted to think aloud: are some of the values in section 1 perhaps democratic principles, rather than values? Or, to push the point to some conclusion: can every reference in the Constitution to 'values' safely be read to mean (a) 'values' in the typical sense and (b) ideas and principles which are not strictly speaking values, but which bolster democracy, an open society, human dignity, freedom, equality, accountability and so on?\textsuperscript{132}

Van Wyk\textsuperscript{133} immediately states that his argument is not meant to accuse "the framers of the Constitution of slipshod drafting", but is just asserting that the Constitution has in some minor way "devalued constitutional values". His final critique is that "a common voters' roll will never be a constitutional value", notwithstanding the Constitution's proclamation that it is.\textsuperscript{134} However, this thesis notes that the values enumerated and pronounced in the Constitution ought to be applied and promoted regardless of the questionable diction and choice of phrasing in the language of values. As Du Plessis\textsuperscript{135} rightly argues:

The open community of constitutional interpreters presupposes that language allows for more than one (equally) valid reading of the Constitution.

It should be noted however that, the Constitution's positive contribution to 'values' should not be overlooked as a result of Van Wyk's argument above. The Constitution not only declares values as interpretive aids,\textsuperscript{136} but also declares that constitutional values must be respected and promoted.\textsuperscript{137} Put differently, the Constitution binds all organs of state, all courts of law, all institutions of civil society, all public servants, and all groups and

\textsuperscript{132} Van Wyk 2000 Constitution and Law IV: Developments in the Contemporary Constitutional State 21.
\textsuperscript{133} Van Wyk 2000 Constitution and Law IV: Developments in the Contemporary Constitutional State 21.
\textsuperscript{134} Van Wyk 2000 Constitution and Law IV: Developments in the Contemporary Constitutional State 21-22.
\textsuperscript{135} Du Plessis 1996 SAJHR 220.
\textsuperscript{136} Section 36 of the Constitution; Venter Constitutional Comparison 141.
\textsuperscript{137} See section 39 (2) of the Constitution which provides that "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". The objects of the Bill of Rights can be deduced from section 1 which entrenches the values that underlie the drafting of the Constitution. See also sections 2, 7(2), 8, 39 and 195.
persons in South Africa, to respect the values espoused within it. To put it simply, because the language on values espoused in the Constitution elevates it high above any legal document, all persons in South Africa are then mandated to respect the values within the Constitution.

In terms of its Preamble, the Constitution was developed to be the principal official proclamation of our goals and hopes as a nation: "we, the people of South Africa". Borrowing from the oft-quoted dictum of S v Acheson, the Constitution is verily envisioned to be the mirror of South Africa's soul. The Preamble further mandates everyone to establish a society that is founded on democratic values, and that we therefore accept the foundational constitutional values of our democratic state (notwithstanding the reservations propounded above on how the Constitution articulates these values). This means that everyone ought to respect the different fundamental rights enumerated in the Bill of Rights and that all persons entrusted with governing South Africa, in whatever capacity, do so in a manner that is value conscious.

It is therefore incumbent on academics and the legal profession at large to make the Constitution relevant and applicable. Former Chief Justice, Arthur Chaskalson alludes to this in his Bram Fischer lecture. Although, this section of his lecture made headlines, it is worth reiterating:

The Constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another. We are capable of realising this vision but in danger of not doing so. We seem to have temporarily lost our way. Too many of us are concerned about what we can get

---

138 See sections 2, 7(2), 8, 39 and 195 of the Constitution.
139 The Preamble of the Constitution reads as follows: "We, the people of South Africa... adopt this Constitution as the supreme law of the Republic so as to- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights...".
141 Preamble of the Constitution states that "We, the people of South Africa... adopt this Constitution as the supreme law... based on democratic values, social justice and fundamental human rights.
142 See section 195 and 196 of the Constitution.
143 Chaskalson 2000 SAJHR 205.
from the new society, too few with what is needed for the realisation of the goals of the Constitution ... All of us have an obligation to make the Constitution work, and it is in all of our interests that this be done.\textsuperscript{144}

This means that we need to be more critical and creative in our efforts to realise our rights and constitutional values. As Du Plessis\textsuperscript{145} argues:

seemingly colourless constitutional mechanisms can often do more to bring constitutional values to life than a rhetorically hollow invocation of sweet-sounding value statements.

In this light, this thesis posits that it is necessary to be critical and creative in our efforts to realise all rights, including environmental rights. That is to say, we need to be creative and critical in applying and developing constitutional values that will enhance our realisation of the environmental right envisioned in section 24 of the Constitution. Such an endeavour will not only give breath to the Constitution, but will ensure that the Constitution’s reference to promoting ESD in section 24 is not reduced to being a dead letter. Without digressing from the discussion on the significance of constitutional values, it is essential to state what constitutional values actually entail. Thus, probing if constitutional values have a precise and objective definition?

Many notable scholars who have contributed to the whole gamut of knowledge on constitutional values have evaded to lucidly define constitutional values. Perhaps, such omission is justified when one considers Kroeze’s\textsuperscript{146} suggestion that constitutional values should not have an objective and clear meaning, rather, the courts must at the very least explain the meaning attached to constitutional values in a specific case. Nonetheless, Venter defines constitutional values as:

\begin{itemize}
\item \textsuperscript{144} Chaskalson 2000 \textit{SAJHR} 205.
\item \textsuperscript{145} Du Plessis 2000 \textit{Stell LR} 192. See also Van der Walt 2000 \textit{Stell LR} 240 who reminds us that, one of the gravest hazards facing our country is “complacency about our constitutional order”. That is to say, “the problem is... that traditional notions and assumptions will be smuggled in through a complacent, uncritical, massaging of the new constitutional order as a supposedly benign, innocuous source of stable common-sense meaning”.
\item \textsuperscript{146} Kroeze 2001 \textit{Stell LR} 273.
\end{itemize}
A standard or measure of good, that sets requirements for the appropriate or desired interpretation, application and operationalisation of the Constitution and everything dependent thereupon.\(^{147}\)

Venter's definition does not conflict with Kroeze's suggestion not to have a certain and explicit meaning attached to constitutional values. However, Venter provides guidance on the role of constitutional values in realising the provisions enumerated and pronounced in the Constitution. That is why Venter\(^{148}\) supports his argument by stating that constitutional values play a particular role in filling lacunae or yawning gaps in the law. Lacunae are inevitable in the law because the law is not tailor made to fit every circumstance or issue.\(^{149}\) In Venter's words:

Using a framework of constitutional values (and/or principles) for the development of the law does make sense, given the reality that the law is not composed of a simple set of blind rules providing a wall-to-wall cover of all contingencies of human life.\(^{150}\)

Therefore, constitutional values should not have fixed meanings, just like equality which could have different meanings to different interpreters, faced with different set of facts.\(^{151}\) Hence, in understanding the true meaning of constitutional values, it is imperative to first comprehend the generic role of constitutional values.

Constitutional values seek to establish the context "within which fundamental rights function and also determine their nature and limitation".\(^{152}\) This means that constitutional values assist the judiciary in the interpretation of rights. Bray\(^{153}\) contends that the law is not value-free. In response, Geduld\(^{154}\) asserts that, while Bray may be right, she "fails to realise that values are not neutral or value-free either". Put simply, the very constitutional "values that ideologically inform rights need a particular interpretation itself".\(^{155}\)

---

\(^{147}\) Venter 2001 PER/PELJ 6; Venter Global Features of Constitutional Law 56; Venter 2014 PER/PELJ 91.

\(^{148}\) Venter 2014 PER/PELJ 99.

\(^{149}\) Venter 2014 PER/PELJ 99.

\(^{150}\) Venter 2014 PER/PELJ 99-100; Venter 2014 PER/PELJ 37-40.

\(^{151}\) Venter 2014 PER/PELJ 99, 100.

\(^{152}\) Bray 2004 Perspect Educ 40; Geduld Ubuntu as a Constitutional Value 24.

\(^{153}\) Bray 2004 Perspect Educ 39.

\(^{154}\) Geduld Ubuntu as a Constitutional Value 24, 25.

\(^{155}\) Geduld Ubuntu as a Constitutional Value 24.
Concerning the interpretation of values, Botha\textsuperscript{156} contends that the Constitution demands a value-orientated approach which requires the use of "transcendental truths" and "metaphysical speculation" just like in the natural law tradition. Botha\textsuperscript{157} further opines that the interpretation of the Constitution is historically and culturally situated, to the extent that historical, comparative and social texts have to be consulted during interpretation. Cumulatively, what Botha is trying to say is that constitutional values indicate the society that South Africa wants to depart from.\textsuperscript{158} This assertion corresponds with the transformative vision of the Constitution, as provided for in its Preamble.

In addition to that, it must be pointed out that constitutional values are a reflection of international norms.\textsuperscript{159} This aptly situates and positions South Africa in the international arena against the backdrop of "internationalisation and universalisation of human rights".\textsuperscript{160} For this reason, it is also worthwhile to consider scholars who have written on the narrative and discourse of constitutional values outside the South African jurisdiction. After all, this discourse on constitutional values is not exclusive to South Africa. Subsequent to the devastating effects of World War II, various countries began to incorporate values into their constitutions.\textsuperscript{161} In this light, Rodriguez\textsuperscript{162} categorises various

\textsuperscript{156} Botha 1994 South African Public Law 237.  
\textsuperscript{157} Botha 1994 South African Public Law 237.  
\textsuperscript{158} Botha 1994 South African Public Law 237.  
\textsuperscript{159} Bray 2004 Perspect Educ 39.  
\textsuperscript{160} Bray 2004 Perspect Educ 39.  
\textsuperscript{161} See for instance article 1 of the Constitution of Cuba 1976 (hereinafter the Constitution of Cuba) which states that: "Cuba is a democratic, independent and sovereign socialist State of law and social justice, organized by all and for the good of all, as an indivisible and unitary republic, founded by the labour, dignity, humanism, and ethic of its citizens for the enjoyment of liberty, equity, justice, and equality, solidarity, and individual and collective well-being and prosperity". Articles 1-4 of the Constitution of the Federative State of Brazil 1988 also states that the "Federative State of Brazil" is founded on among other values and principles dignity, sovereignty, equality, citizenship, self-determination, national independence to mention but a few. The Preamble and article 1 of the Constitution of Namibia 1990 grounds the legal system in values such as human dignity, equality, freedom and justice, and in "principles of democracy, the rule of law and justice for all". The Preamble of the Constitution of India 1950 includes values such as secularism, sovereignty, justice, equality, liberty, human dignity, fraternity and the unity and integrity of the state.  
\textsuperscript{162} Rodriguez Constitutional Values 1-77 particularly focuses on the Constitution of Cuba as a point of reference.
roles of constitutional values by consulting Latin American constitutions. First, Rodriguez\textsuperscript{163} notes that constitutional values legitimise the legal, political, cultural, economic and social system of a state.

Second, constitutional values guide the state and all its organs towards achieving certain goals.\textsuperscript{164} Third, constitutional values are a standard by which one measures actions, decisions, behaviours and other legal standards.\textsuperscript{165} Fourth, constitutional values validate other laws, rights and principles.\textsuperscript{166} Fifth, constitutional values are a standard by which a state can create new rights, principles and standards.\textsuperscript{167} Finally, constitutional values serve as an interpretive aid to the judiciary.\textsuperscript{168} The functions of constitutional values in other jurisdictions enumerated above are aligned with and coincide with South Africa's use of constitutional values, particularly the legitimising function, interpretive function and their role as a standard for other laws, rights and principles.\textsuperscript{169} However, the function of constitutional values as a standard for other rights and principles has been subject to scrutiny, particularly concerning the question of whether there exists a difference between rights and principles? Thus, in an attempt to answer this question, Venter\textsuperscript{170} notes that a constitutional principle "gives expression to a constitutional value". However, the author adds that in their differences, both values and principles manifest the same phenomena that establishes standards for judicial interpretation.\textsuperscript{171} In pursuit of a better comprehension of constitutional values, which is one of the main aims of this Chapter, it is therefore important to distinguish values from rights, rules or principles.

\textsuperscript{163} Rodriguez \textit{Constitutional Values} 54.
\textsuperscript{164} Rodriguez \textit{Constitutional Values} 54.
\textsuperscript{165} Rodriguez \textit{Constitutional Values} 57.
\textsuperscript{166} Rodriguez \textit{Constitutional Values} 57.
\textsuperscript{167} Rodriguez \textit{Constitutional Values} 58.
\textsuperscript{168} Rodriguez \textit{Constitutional Values} 58.
\textsuperscript{169} See sections 2, 7(1), 8, 39 and 195 of the \textit{Constitution}. See also Venter \textit{Constitutional Comparison} 141; Venter 2014 \textit{PER/PELJ} 91.
\textsuperscript{170} Venter 2014 \textit{PER/PELJ} 91.
\textsuperscript{171} Venter 2014 \textit{PER/PELJ} 91.
2.3.1 Values, rights, rules and principles

It is common cause that the term values can be potentially conflated with other terms such as rules, rights and principles. In the first instance, it is important to distinguish values from rights. O’Regan in *Dawood v Minister of Home Affairs* attempts to distinguish values from rights.¹⁷² O’Regan¹⁷³ confirms that constitutional values, in particular the value of human dignity, should be employed when interpreting and limiting rights in terms of the *Constitution*. She further notes that despite the fact that "the value of dignity might be offended", the right to dignity must still be enforced.¹⁷⁴ Accordingly, values are distinguishable from rights in that constitutional values are not entitlements that require enforcing, but are aids in judicial interpretation. However, the courts have in certain instances confused values and rights. For instance, in *S v Makwanyane*, where the court noted that:

> Respect for life and dignity, which are at the heart of s 11(2), are values of the highest order under our *Constitution*. The carrying out of the death penalty would destroy these and all other rights.¹⁷⁵

The court's referral to values as rights in the *S v Makwanyane* case is confusing and flawed, because values, unlike rights, are not entitlements, but interpretive aids that give content and meaning to rights. In addition, constitutional values need to be distinguished from constitutional principles. Venter¹⁷⁶ maintains that although constitutional values are distinguishable from constitutional principles, they nonetheless manifest the same

¹⁷² *Dawood V Minister of Home Affairs; Shalabi V Minister of Home Affairs; Thomas V Minister of Home Affairs* 2000 3 SA 936 (CC) para 35 (hereinafter Dawood).
¹⁷³ *Dawood* para 35.
¹⁷⁴ *Dawood* para 35.
¹⁷⁵ *Makwanyane* para 111. See also Kroeze 2001 *Stell LR* 269-271 on how courts have confused principles and rights. Furthermore, in *City of Tshwane V Afriforum* 2016 6 Sa 279 (Cc) para 11, the court mistakenly interpreted *Ubuntu* as a right that establishes an enforceable obligation by noting that everyone should adhere to *Ubuntu*.
¹⁷⁶ That is, both constitutional values and principles are manifestations of the same phenomenon, namely qualitative standards underlying substantive rules of law that determine the interpretation of the meaning and effect of those rules. Kroeze 2001 *Stell LR* 91.
phenomenon, namely standards for judicial interpretation. However, a simple illustration of the difference between values and principles according to Venter is that:

A constitutional value may be understood to be a standard or measure of good, to set requirements for the appropriate or desired interpretation, application and operationalization of the Constitution and everything dependent thereupon. A constitutional principle might then be understood to be founded upon and to give expression to a constitutional value: if for example justice is a foundational value of a Constitution, a principle that would be founded upon it would be that the law should be applied fairly.177

It could therefore be argued that values appear to be more broadly formulated than principles. South African law, for instance, is replete with principles that have been taken up in legislation. An illustration can be found in section 2 of NEMA which embodies various environmental management principles.178 Environmental justice is one such principle, which must be applied so that disadvantaged and vulnerable persons do not suffer unfair discrimination.179 Environmental justice, as embodied in section 2 of NEMA, is clearly a principle because it gives expression to the value of ESD,180 and provides standards for interpretation and judicial decisions without setting out a particular legal consequence or outcome.181

This corresponds with Venter’s argument that values and principles set standards for judicial interpretation.182 Arguably, although different, values, rights, principles and rules do establish standards within law. It is rights and rules that establish enforceable

---

177 Venter 2014 Tul Eur & Civ LF 91; Venter Constitutional Comparison 141-144.
178 See sections 2(1)- 2(4) of the National Environmental Management Act 107 of 1998 (hereinafter NEMA).
179 Section 2(4)(c) of NEMA states that “environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons”.
180 I pause to assert that, it is partly against this backdrop that, this thesis argues for ESD to be developed as a constitutional value. This is accredited to the fact that, unlike a principle which only set standards for decision-making and judicial interpretation without producing any particular legal consequence or outcome, ESD actually sets out a number of outcomes, one of which is environmental justice. The outcomes of ESD are discussed in chapter 4 below.
181 Geduld Ubuntu as a Constitutional Value 58. See also Venter Constitutional Comparison 140-144; Venter 2014 PER/PELJ 91, 92, 99.
182 Venter Constitutional Comparison 141-144; Venter 2014 Tul Eur & Civ LF 91, 92, 99.
entitlements, whilst values and principles are viewed as standards of interpretation. In other words, when interpreting the law, the judiciary has to take cognisance of constitutional values and principles. How the courts go about employing constitutional values or the manner in which courts give content to these values is discussed below. This implies the centrality of examining the nexus between constitutional values and the judicial system in South Africa. Therefore, having established that the interpretation and limitation of rights is one of the key functions of constitutional values, it is impracticable to conclude such discussion without examining the interpretive role of the judiciary.

In examining the interpretive role of the judiciary, this thesis notes that constitutional values could assign obligations on other spheres of government or equally on civil society. However, such issues fall outside the scope of this thesis. As Gargarella et al. note, courts play a pivotal role in the "constitutionally mandated transformation" and the basis for utilising constitutional values. Accordingly, litigation serves "to instigate political action and influence over public debate" and "to foster a 'culture of legal struggle'" that constantly inspires and informs "future generations to challenge oppressive practices." This thesis is therefore, limited to the use of constitutional values by the judiciary.

2.4 Advancing constitutional values through transformative constitutionalism

As established earlier, the new constitutional dispensation changed the nature of adjudication in South Africa. That is, the erstwhile limited powers of the judiciary were extended to include extensive jurisdiction, even in the interpretation of laws. The

---

183 Venter *Constitutional Comparison* 141-144; Venter 2014 *Tul Eur & Civ LF* 91, 92, 99.
184 As Hodgson 2015 *Acta jurid* 200 states, the transformation and application of constitutional values mandated by the *Constitution* is not exclusive to courts, but also extends to include "constitutional literacy" of the public in general. This means that courts are not the sole guardians of the *Constitution* or the only route to pursuing constitutional transformation.
185 Gargarella, Pilar and Theunis "Courts, Rights and Social Transformation: Concluding Reflections" 273.
187 Section 165(2) of the *Constitution*. See also Wesson and Du Plessis 2008 *SAJHR* 190; Du Plessis 2015 *PER/PELJ* 1332.
change in the powers and function of the judiciary resulted in the parallel change of the court's methodology in constitutional and statutory interpretation. Customarily, only theories of common law were used to interpret statutes. These common law theories include intentionalism, literalism, literalism-cum-intentionalism, objectivism, contextualism and purposivism. However, the advent of the *Constitution* has changed the traditional approach to interpreting legislation. For instance, section 39 of the *Constitution* places a mandate on courts to "promote the values that underlie an open and democratic society" when interpreting the Bill of Rights.

Furthermore, section 39 mandates courts to consider constitutional values as well as the spirit and purpose of the Bill of Rights when interpreting legislation and when developing common law or customary law. This means that the *Constitution* is value-laden. However, Davis propounds that the fact that the *Constitution* is value-laden could complicate constitutional adjudication since values do not come with pre-determined meanings. In other words, the *Constitution* in this regard, opens room for various interpretations, depending on the ideological perspective of the judge. In addition, each

---

188 Du Plessis 2015 *PER/PELJ* 1335.
189 Du Plessis 2015 *PER/PELJ* 1335.
190 Intentionalism suggests that determining the intention of the legislature is essential in the interpretation of statutes. See Du Plessis 2015 *PER/PELJ* 1335.
191 Literalism signifies that one can deduce the meaning of a provision from the plain language of the clause or text. See Du Plessis 2015 *PER/PELJ* 1335.
192 literalism-cum-intentionalism is an amalgamation of the intentionalist and literalist approach to statutory interpretation. See Du Plessis 2015 *PER/PELJ* 1335.
193 Objectivism means that once a law has been enacted, it must only be put into practice or formalised by the courts. See Du Plessis 2015 *PER/PELJ* 1335.
194 Contextualism refers to an approach where the context is key in ascertaining the meaning of a provision. See Du Plessis 2015 *PER/PELJ* 1335.
195 Purposivism means that the purpose of the provision is essential in ascertaining the meaning of a provision. See Du Plessis 2015 *PER/PELJ* 1335.
196 Section 39 of the *Constitution*.
197 Section 39(2) of the *Constitution*.
199 Davis 2004 *Acta jurid* 104.
200 Davis 2004 *Acta jurid* 104.
judge has to provide justification for his/her particular ideological and adjudicative perspective.\textsuperscript{201}

The role that constitutional values play in the adjudication of cases has become all the more essential since the \textit{Constitution} is recognised as a transformative document.\textsuperscript{202} To this end, the South African community in general, and the legal fraternity and courts in particular, ought to transform in line with the type of society envisioned by the \textit{Constitution}.\textsuperscript{203} A society wherein the "quality of life of all citizens" is improved, and "the potential of each person" is realised.\textsuperscript{204} To achieve the kind of society envisioned by the \textit{Constitution} requires a project of transformative constitutionalism. The term transformative constitutionalism is credited to Klare's\textsuperscript{205} seminal work on "Legal Culture and Transformative Constitutionalism". According to Klare,\textsuperscript{206} transformative constitutionalism demands a shift of South Africa's power relationships as well as social and political institutions, "in a democratic, participatory and egalitarian direction... through processes grounded in law".

Transformative constitutionalism, as couched by Klare, originates from the \textit{Constitution's} values, goals, rights as well as other provisions.\textsuperscript{207} These collectively demonstrate the

\begin{itemize}
\item Davis 2004 \textit{Acta jurid} 105. See 2.5.1 where I discuss substantive reasoning.
\item Soobramooney 8; Davis and Klare 2010 \textit{SAJHR} 404.
\item Klare 1998 \textit{SAJHR} 156.
\item See the Preamble of the \textit{Constitution}.
\item Klare 1998 \textit{SAJHR} 146-188.
\item Klare 1998 \textit{SAJHR} 150.
\item Considering the Preamble of the \textit{Constitution}, read with sections 1, 7(1) and 7(2), one can deduce that the goals of the \textit{Constitution} include the pursuit of a society that "is based on democratic values, social justice and fundamental human rights". In \textit{Kaunda V President of the Republic of South Africa} 2005 (4) SA 235 (CC) para 156, the Constitutional Court highlighted the importance of these goals and how they relate with constitutional values: "As a nation, we have committed ourselves to establishing a society based on democratic values, social justice and fundamental human rights. The very first provision of the \textit{Constitution} sets out the founding values upon which our constitutional democracy is founded. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms. Our democratic state is therefore committed to the advancement and protection of fundamental human rights. This commitment is immediately apparent in the Bill of Rights, which is the cornerstone of our constitutional democracy and which affirms democratic values of human dignity, equality and freedom". In addition, the late Justice Langa propounded that the post amble of the \textit{Interim Constitution} presents an additional basis for transformative constitutionalism by pronouncing the goal of the \textit{Constitution} as: "a historic bridge
\end{itemize}
overarching and self-conscious obligations of social reconstruction and transformation, participatory governance and redistributive (substantive) equality, as opposed to formal equality.208 In this light, and without deviating from the origins of transformative constitutionalism, Murcott,209 whilst citing Agyeman, notes that transformative constitutionalism contemplates:

The pursuit of social justice in a substantive sense (by promoting the equitable distribution of goods and bads in society in a way that recognises the equal moral worth and dignity of all human beings), and in a procedural sense (by providing for a participatory democracy that shows due recognition of "all people's membership of the moral and political community... and ensuring their inclusion in political decision-making").

Murcott's reasoning of social justice in the context of transformative constitutionalism is arguably a reflection of ESD in the sense that ESD could facilitate environmental justice by advocating for movements such as the environmentalism of the poor. That is, as already asserted and averred in the preceding Chapter, ESD seeks, as with social justice, to promote the equitable distribution of environmental goods and burdens.210 As will be expounded by this thesis, South Africa's judiciary has in a number of judgements embraced transformative constitutionalism's social justice oriented imperative. However, as Chapter 5 will show, the courts are yet to fully engage in transformative constitutionalism's environmental imperative. Nonetheless, it is salient to note that

---

208 Formal equality is the "belief that, for fairness, people must be consistently or equally treated at all times". Substantive equality, on the other hand, "goes beyond the basics of recognising the equality of everyone and identifies differences among groups of people with the long-term goal of greater understanding". Put simply, substantive equality is an integral component of human rights law. It is concerned with equal opportunities and equitable outcomes for marginalised and disadvantaged people or groups in society. Substantive equality therefore requires that governments "must in practice venture to make people more equal in terms of material wealth. This has manifested in the form of employment equity, quotas, and general racial-preferencing". See Smith 2014 Afr Hum Rights Law J 611-614; Albertyn 2007 SAJHR 253-254; Fredman 2016 Int J Const Law 712-713; Du Plessis 2015 PER/PELJ 1350-1354.


210 See chapter 2 at 2.4.2 and 2.6.
Moseneke, the former Deputy Chief Justice of South Africa, explains that social justice, is under the *Constitution*, "a vital component" of the rule of law, which ought to be invoked in fulfilment of the country's post-apartheid democratic agenda "to push back the frontiers of racism, poverty and inequality". Moseneke further encourages the courts to give effect to the *Constitution's* transformative mandate by engaging more extensively with the rule of law as an instrument for social justice.

Returning to the origins of transformative constitutionalism, it is notable that transformative constitutionalism is born out of South Africa's positive obligation to uphold fundamental human rights, including socio-economic entitlements and environmental protection. Lastly, transformative constitutionalism originates, at least in part, from the *Constitution's* capacity to apply horizontally, which is a transformative attribute given that systemic and structural racism and inequality were deeply entrenched in both public and private relationships. In this regard, Pieterse describes transformative constitutionalism in the following manner:

South African constitutionalism attempts to transform our society from one deeply divided by the legacy of a racist and unequal past, into one based on democracy, social justice, equality, dignity and freedom.

Similarly, Langa argues that the *Constitution's* transformative mandate requires a shift to a genuinely equal society – one founded on substantive equality. Although commendable, transformative constitutionalism has been criticised by a number of...
notable scholars. Sibanda,\textsuperscript{217} for instance argues that transformative constitutionalism has promised more than it could ever deliver, in that there has been little improvement in the life opportunities and material living conditions of South Africans, post-apartheid. In addition, Madlingozi\textsuperscript{218} argues that government’s transformative initiatives on education, affirmative action, health care, housing programs to mention but a few, have dismally failed to create a miracle equal in material and structural change that "matches the much celebrated transformative constitutional miracle". Madlingozi,\textsuperscript{219} Modiri\textsuperscript{220} and Sibanda\textsuperscript{221} all contend that government's transformative initiatives have instead largely left the economic, racial, epistemic and cultural hierarchies related to/with colonial-apartheid intact and untouched. Accordingly, post-apartheid South Africa has achieved a "transformation from the colonial to the neo-colonial" constitutionalism in that the black majority remain structurally excluded till date.\textsuperscript{222}

Although the aforementioned debate is excluded from the scope of this thesis, the researcher acknowledges its validity and proceeds to note the need for a substantive or material transformation as opposed to a formal transformation of the \textit{Constitution}. The judiciary, as the relevant branch of government in terms of this thesis, ought to engage in a substantive or material transformation of the \textit{Constitution}, thereby advancing transformative constitutionalism's goal of social justice through facilitating equality of previously disadvantaged groups. In other words, courts could engage in the substantive transformation of the \textit{Constitution} by developing and applying constitutional values in its decisions. For instance, courts could develop and apply ESD as a constitutional value in environmental rights adjudication to facilitate poverty reduction and environmental justice among South Africa's previously disadvantaged groups. By so doing, courts not only

\begin{footnotesize}
\begin{itemize}
\item Sibanda 2011 \textit{Stell LR} 490-495; Sibanda 2020 \textit{Law democr Dev} 388. 389, 405.
\item Madlingozi 2017 \textit{Stell LR} 123.
\item Madlingozi 2017 \textit{Stell LR} 123.
\item Modiri 2018 \textit{SAJHR} 300.
\item Sibanda 2020 \textit{Law democr Dev} 388.
\item Sibanda 2020 \textit{Law democr Dev} 388, 405; Madlingozi 2017 \textit{Stell LR} 123, 125.
\end{itemize}
\end{footnotesize}
engage in transformative constitutionalism (by responding to the poor's socio-economic hardships), but also engage in transformative environmental constitutionalism.

Transformative environmental constitutionalism builds on the notions of social justice, environmental justice and transformative constitutionalism. It does so through recognising that the poor's socio-economic hardships include environmental issues by which environmentalism must address. Thus, this thesis contends that courts could engage in the substantive transformation of the Constitution by developing and applying ESD as a constitutional value in environmental rights adjudication so as to reach outcomes such as poverty reduction and environmental justice. Such outcomes are linked to the Constitution's transformative mandate. Resultantly, realising such outcomes prevents the Constitution's transformative goals from being reduced to a dead letter.

On the basis of the argument above, it is imperative to succinctly lay out the philosophical ontology that underpins this thesis's argument on constitutional values. As alluded to earlier, the role of constitutional values in adjudication has become all the more important, given that the Constitution is accepted as a transformative document. In other words, the Constitution as a transformative document has been interpreted and accepted as a post-liberal document that embodies a post-liberal model of democracy.

2.4.1 A Post-liberal interpretation of the Constitution

The transformative mandate of the Constitution has been deemed to embody "an empowered model of democracy", that has to be interpreted as a "post-liberal document". The Constitution is a post-liberal document because, unlike a classical liberal document, it "embraces a vision of collective self-determination parallel to (not in place of)" its firm "vision of individual self-determination". Moreover, the Constitution encapsulates certain political commitments which call for "communitarian" and "caring"

---

223 Murcott "Introducing Transformative Environmental Constitutionalism in South Africa" 287.
224 Soobramooney B; Davis and Klare 2010 SAJHR 404.
225 Klare 1998 SAJHR 151.
interpretations.\textsuperscript{227} Simply put, the strict division between politics and law that informs a classical liberal philosophy would not be maintained in the post-liberal interpretation of the \textit{Constitution}. On this note, Sibanda\textsuperscript{228} notes that there are two approaches to constitutionalism in South Africa: the classical liberal approach to constitutionalism and the transformative approach to constitutionalism (or post-liberal approach to constitutionalism).

For better comprehension of these approaches, it is necessary to first determine what constitutionalism is in the context of this thesis. Constitutionalism refers to a system of governance that is founded on the basis of a constitutional document whose main functions are to structure, distribute, delineate and limit the power of the state within a distinct geo-political community.\textsuperscript{229} Attendant to such an understanding of constitutionalism is the notion that constitutional values are not predetermined, but are rather a result of the social, economic, political and cultural history prevailing during the time of the adoption of a constitution.\textsuperscript{230} This means that constitutional values in South Africa are not fixed or arranged in advance, but are instead a product of the country's prevailing economic, social, political and cultural history that prevailed at the time of the adoption of the \textit{Constitution}. As already mentioned, constitutionalism in South Africa has been characterised based on the classical liberal philosophy and the post-liberal philosophy.

Notable is that the classical liberal philosophy or approach to constitutionalism considers post-apartheid South Africa as gradually transforming from autocratic rule to a constant liberal democracy.\textsuperscript{231} In providing credence to the classical liberal philosophy, its proponents refer to a peaceful and successful transition; a universal respect for the rule

\begin{itemize}
\item \textsuperscript{227} Klare 1998 \textit{SAJHR} 152; Roux 2009 \textit{Stell LR} 280-281.
\item \textsuperscript{228} Sibanda 2011 \textit{Stell LR} 483, 500.
\item \textsuperscript{229} Fombad 2007 \textit{The American Journal of Comparative Law} 6-10; Devenish \textit{A Commentary on the South African Constitution} 4; Sibanda 2011 \textit{Stell LR} 484.
\item \textsuperscript{230} Devenish \textit{A Commentary on the South African Constitution} 4.
\item \textsuperscript{231} Sibanda 2011 \textit{Stell LR} 484; Michelman 2011 \textit{Stell LR} 707, 708.
\end{itemize}
of law; an arguably free media; a stable democratic government; a multiparty system of representative democracy; regular, free and fair elections; and an independent judiciary that enjoys powers of substantive judicial review. In sum, proponents of the classical liberal philosophy emphasise the benefits of political transformation and placing limits on the power of the state post 1994.

However, the transformative approach to constitutionalism, (or what Klare refers to as post-liberal constitutionalism), while acknowledging the significance political transformation has had in ushering the country in a democratic era, also leaves its own footprint on constitutionalism. That is to say, post-liberal constitutionalism points out that regardless of the Constitution’s preambular promise to "improve the lives of all citizens" and the presence of socio-economic rights in the Bill of Rights, living conditions in the country from an socio-economic perspective remain deeply unchanged for most black citizens who continue to live in the reality of the multiple legacies of apartheid. A major concern for post-liberals is that, regardless of the political transformation (ascribed to the classical liberal philosophy above), South Africa continues to experience severe structural poverty; an increasing educational crisis; increasing income inequality; and intense increases in rural-urban migration. In brief, post-liberals consider transformation as necessitating both socio-economic and political change.

For the purpose of this thesis, a post-liberal reading of the Constitution will be used as the underlying philosophy for constitutional values in adjudication. In other words, this thesis will use a post-liberal interpretation of the Constitution because it is a central aspect of the argument in favour of transformative adjudication. As Klare posits, a post-liberal interpretation of the Constitution is at the crux of transformative constitutionalism. The

---

232 See Farinacci-Fernós 2018 Tulsa L Rev 2-6; Sibanda 2011 Stell LR 484.
233 See chapter 2 of the Constitution.
235 Terreblanche A History of Inequality 7; Sibanda 2011 Stell LR 485; Sibanda 2020 Law democr Dev 389, 403; Bhorat, Van der Westhuizen and Jacobs 2009 Income and Non-Income Inequality in Post-Apartheid South Africa: What Are the Drivers and Possible Policy Interventions? 5-15;
236 Klare 1998 SAJHR 151-157, 163-164. See also Geduld Ubuntu as a Constitutional Value 64.
post-liberal philosophy is credited to the "school of critical legal studies".\textsuperscript{237} Classified among the central claims of the critical legal studies movement is the disapproval of the classical liberal philosophy.\textsuperscript{238} In this respect, the critical legal studies movement disapproves the classical liberal philosophy on four grounds. These grounds include the contradiction of the law,\textsuperscript{239} indeterminacy of law,\textsuperscript{240} marginality and formality.\textsuperscript{241} Conversely, the proponents of the classical liberal philosophy criticise the school of critical legal studies on the grounds that it is void of a constitutive theory.\textsuperscript{242} In response, Geduld\textsuperscript{243} avers that the lack of a constitutive theory exposes "the fallibility of law". In other words, although critical legal studies has no constitutive theory, it nonetheless transcends the conventional, formalistic and liberal view of law and adjudication, hence, the expression 'post-liberal'.

It should be noted further that one of the criticisms propounded against Klare's post-liberal interpretation of the \textit{Constitution} is that he does not explain what a post-liberal

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{238} Hunt 1986 \textit{Oxford Journal of Legal Studies} 5, 8; Locke \textit{Second Treatise of Government and a Letter Concerning Toleration} 15.
\item \textsuperscript{239} Russell 1986 \textit{Ottawa L Rev} 8 states that inherent contradictions "arise from the fact that legal rules rely on competing types of norms with the implication that parties can argue from different sides". These inherent contradictions also lead to the aforementioned issues of unpredictability and indeterminacy in law. Moreover, "contradictory norms that are often referred to within the school of critical legal studies include that of individualism vs altruism, or differently stated, the self and the community". See also Altman "Critical Legal Studies and Liberalism" 113; Hunt 1986 \textit{Oxford Journal of Legal Studies} 21.
\item \textsuperscript{240} The law is perceived to be indeterminate because it cannot provide clear solutions to every possible situation: "[i]n other words, one might be able to state what a certain provision states, but one cannot predict the outcome of every case as situations vary". See Russell 1986 \textit{Ottawa L Rev} 8; Geduld \textit{Ubuntu as a Constitutional Value} 65.
\item \textsuperscript{241} Formalism can be described as the notion that "legal rules can be applied without recourse to extra-juridical factors" such as values, social goals, economic or political factors. Thus, "law and adjudication is objective and neutral". See Klare 1998 \textit{SAJHR} 151-157, 162-163; Russell 1986 \textit{Ottawa L Rev} 8; Unger \textit{The Critical Legal Studies Movement} 8.
\item \textsuperscript{242} Hunt 1986 \textit{Oxford Journal of Legal Studies} 8.
\item \textsuperscript{243} Geduld \textit{Ubuntu as a Constitutional Value} 66.
\end{itemize}
\end{footnotesize}
interpretation means.\textsuperscript{244} Roux,\textsuperscript{245} for instance, opposes Klare's use of the term "post-liberal" by asserting that:

I, for my part, would resist putting a label on the political ideology manifest in the \textit{Constitution}, since I think this would inevitably make it less than the sum of its parts. I would also, as I have said, certainly avoid the label 'post-liberal' because of its implications that liberalism has a conceptual termination point. If pressed, I would say that the \textit{Constitution} is a liberal \textit{Constitution}- of a particular type- certainly not a classical liberal \textit{Constitution}, but one that reflects the more statist and communitarian tradition within liberalism, and connects it with the indigenous African philosophy of Ubuntu... [Therefore in giving effect to the objects of the \textit{Constitution}, the Constitutional Court] should redouble its effects to develop a substantive "moral reading" of the \textit{Constitution}...Secondly, the court should return to the foundational distinction between the elaboration of the content of rights and the permissible grounds for their limitation, and develop a more coherent theorisation of the values underlying an "open and democratic society based on human dignity, equality and freedom". It is that theorisation, after all, that stands between South Africans and government by political faction.

Considering the statement above, as well as the fact that Roux concurs with Klare on 'political commitments' being ascribed to the \textit{Constitution}, it is evident that Roux's disapproval of the term 'post-liberal' is only semantic. That is, it implies, according to Roux's standards, that there is a start and an end to liberalism.\textsuperscript{246} Thus, both authors arguably concede that the \textit{Constitution} has very distinct features that separate it from a traditional liberal \textit{Constitution}, thereby requiring a transformative approach.\textsuperscript{247}

Notwithstanding, Roux's disapproval of the use of the term 'post-liberal', a number South African authors prefer a post-liberal approach to interpretation and adjudication of the \textit{Constitution} and other general statutes.\textsuperscript{248} Du Plessis,\textsuperscript{249} for instance, maintains that he disapproves of a theory of interpretation that proposes a formula or rigid rules to be

\begin{itemize}
\item \textsuperscript{244} Roux 2009 \textit{Stell LR} 279, 280.
\item \textsuperscript{245} Roux 2009 \textit{Stell LR} 280, 284.
\item \textsuperscript{246} Roux 2009 \textit{Stell LR} 280-284.
\item \textsuperscript{247} Distinct features such as the Constitution’s call to promote values during interpretation. See sections 1, 7, 39, 41 and 195 of the \textit{Constitution}.
\item \textsuperscript{248} Mureinik 1994 \textit{SAJHR} 31-32; Michelman \textit{et al} 1995 \textit{SAJHR} 485; Du Plessis 2005 \textit{SALJ} 611; Du Plessis 2015 \textit{PER/PELJ} 1340; Du Plessis 1998 \textit{Acta jurid} 18.
\item \textsuperscript{249} Du Plessis 2005 \textit{SALJ} 611; Du Plessis 2015 \textit{PER/PELJ} 1340; Du Plessis 1998 \textit{Acta jurid} 18.
\end{itemize}
complied with in any situation. Instead, Du Plessis\textsuperscript{250} proposes five broadly defined interpretive tools of statutory interpretation. These techniques include systematic interpretation, grammatical interpretation, historic interpretation, comparative interpretation and teleological interpretation.\textsuperscript{251}

The first technique is systematic interpretation, which is best described as contextualisation, i.e. the text found within the context of the wording of the whole statute.\textsuperscript{252} Second, grammatical interpretation permits the adjudicator to have recourse to the everyday or "natural language" use of the text.\textsuperscript{253} The next technique is what Du Plessis refers to as 'historical interpretation', a technique that permits judges to delve into the genesis of the text.\textsuperscript{254} Another technique identified by Du Plessis is comparative

\begin{itemize}
\item Du Plessis 1998 \textit{Acta jurid} 18.
\item Du Plessis 2005 \textit{SALJ} 600-601.
\item Du Plessis 1998 \textit{Acta jurid} 14; Du Plessis 1999 \textit{Sask L Rev} 31 avers that systematic interpretation leads judges to look into the schedule, long titles and preamble of legislation for meaning. He further highlights that the systematic and purposive interpretation techniques overlap in so much as "a purposeful reading needs to be a holistic reading". The link between the systematic and purposive methods of interpretation is apparent from how the long title and preamble describe the purpose of a statute as well as the context within which to apply the statute. Du Plessis further makes a distinction between intra-textual systematic interpretation and extra-textual systematic interpretation. On one hand, intra-textual systematic interpretation could overlap with grammatical interpretation because the systematic interpretation, just like the grammatical interpretation, requires one to refer to the definition, long title, preamble, and schedule of statutes so as to give meaning to a specific text. On the other hand, extra-textual systematic interpretation refers to "meaning generative signifiers" in the textual environment. These "meaning generative signifiers" include, \textit{inter alia}, the Constitution, international law, the \textit{Interpretation Act} 33 of 1957 (herein the \textit{Interpretation Act}), the legally recognised interests of society and the political and constitutional order. Extra-textual systematic interpretation further supports the view that constitutional values play a pivotal role not only in constitutional adjudication, but in statutory interpretation as a "meaning generative term". This way, adjudicators rely on "constitutional values as something outside the text to aid with interpretation". See also Du Plessis 2005 \textit{SALJ} 603-606.
\item The natural language of a text can be juxtaposed with "formal language", which refers to subject-specific or specialist terms. Thus, the language, or even natural language of a text, cannot be unambiguous and clear. Although, the grammatical interpretation can be the starting point in interpreting statutes it cannot, however, be the sole basis to be relied upon by an adjudicator because the meaning of values is never devoid of context or entirely straightforward. See Du Plessis 2005 \textit{SALJ} 601-602.
\item Du Plessis 2005 \textit{SALJ} 609-610 posits that the main focus is not on the historical facts of the text, but the spirit of history. Any reference to the predecessors and successors of statutes are all forms of historical interpretation that can help add meaning to a provision. See also Du Plessis 1998 \textit{Acta jurid} 15; Du Plessis 1999 \textit{Sask L Rev} 31.
\end{itemize}
interpretation. Comparative interpretation allows adjudicators to have recourse to international law and foreign law during statutory interpretation. However, Du Plessis quickly highlights that the comparative method of interpretation is likely to be used less frequently in the future as South Africa's constitutional dispensation progresses to become more established.

The last technique, and most relevant to this thesis is the teleological technique. Du Plessis illustrates teleological interpretation as purposive interpretation that recognises the values and objects of the legal system. He includes values and objects in his analysis because purposive interpretation was also employed during the pre-democratic era. Thus, referring to Botha, Du Plessis argues that the teleological approach really is a "value-activating interpretation", a preferred approach unlike the simple purposive approach to constitutional and statutory interpretation. According to Du Plessis, sections 1, 7, 39, 41 and 195 of the Constitution are the most authoritative sources of values. However, 'other' values can also be inferred when one considers the rest of the Constitution's text. Du Plessis concludes his averment on the teleological approach by arguing that the teleological and purposive interpretation should be used side by side the systematic interpretation as it is impossible to leave out subjective prejudices during

---

255 Du Plessis 2005 SALJ 610-611.
256 Du Plessis 2005 SALJ 610-611.
257 Du Plessis 2005 SALJ 610-611.
260 Du Plessis 1998 Acta jurid 15 however cautions adjudicators against a strict reliance on the teleological approach because it is impossible for one to know the purpose of a text before interpretation. The author also suggests that in employing the teleological approach, it is prudent for adjudicators to consider the historical method of interpretation. He proceeds to aver that any use of the teleological approach without recourse to history of the provision is empty. Any reference to the predecessors and successors of statutes are all forms of historical interpretation that can help add meaning to a provision. See also Du Plessis 2005 SALJ 609-610; Du Plessis 1999 Sask L Rev 31.
265 Du Plessis 2005 SALJ 608.
266 Du Plessis 2005 SALJ 608.
adjudication. In addition, Du Plessis advocates for transformative constitutionalism as a method of constitutional interpretation.267 Du Plessis perceives transformative constitutionalism as having:

Every potential to impact constitutional (and, more generally, legal) interpretation profoundly and guide, as a leitmotiv, both the interpretive mind-set (also read: theoretical position(s)) and the interpretive style (also read: methodology) of especially judicial interpreters of the Constitution, in an irrevocably new direction. South Africa's Constitution is furthermore thoroughly transformative in many respects, and in section 7(2) it invites (and arguably compels) the optimum realisation of the rights entrenched in the Bill of Rights, requiring the state not only to respect and protect, but (also) to promote and fulfil those rights.

The Constitution's transformative nature has far-reaching consequences for its interpretation and therefore necessitates a resolute makeover of adjudicative reasoning in the interpretation and application of enacted law.269 In this regard, Klare avers that:

The Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. By implication, new conceptions of judicial role and responsibility are contemplated. Judicial mind-set and methodology are part of the law, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance.

Klare's call for a makeover of adjudicative reasoning is in stark contrast to a classical liberal philosophy which compels judges to discard their personal and political viewpoints when undertaking adjudicative process, with the result that they interpret and apply the law in a mechanical manner.271 Klare vehemently argues, that it is improbable that the draftsmen of the Constitution intended for the ancient formal legal techniques to be

---

267 Du Plessis 2015 PER/PELJ 1341. Du Plessis further writes on the four leitmotivs to be used in constitutional interpretation. Worth noting is that, a leitmotiv is "a recurring keynote or defining ideas, motifs or topoi guiding instances of constitutional interpretation". Du Plessis's leitmotivs include monumental, memorial, transitional and transformative constitutionalism. Relevant to this thesis is the leitmotiv, transformative constitutionalism.

268 Du Plessis 2015 PER/PELJ 1351.

269 Du Plessis 2015 PER/PELJ 1352.

270 Klare 1998 SAJHR Rights 156.

271 Klare 1998 SAJHR 156. "Transformative constitutionalism thus inspires preference for non-formalist, non-legalist and non-literalist approaches to constitutional interpretation and, very importantly, it explodes the myth that an a- or non-political legal interpretation - and constitutional interpretation, in particular - is achievable". See Du Plessis 2015 PER/PELJ 1352; Langa 2006 Stell LR 354-359.

applied when interpreting the *Constitution* and its transformative values and goals. Concurring with Klare, Zitzke notes that such formalism would be flawed as it implies that adjudication and legal interpretation is simple arithmetic. Furthermore, such interpretation is problematic as constitutional values do not come with fixed or ready-made meanings. Instead, constitutional values have to be interpreted. The result being that the interpreter, in this case the courts, often have to rely on constitutional values that can be gleaned outside the law and text. By referring to constitutional values in the adjudication process, judges fulfil their transformative mandate, and therefore engage in what is known as transformative adjudication.

2.5 Transformative Adjudication

It is important to note that Klare's work on transformative constitutionalism indicates that the *Constitution* demands a more politicised form of rule of law and adjudication than under the apartheid era. Such form of adjudication and the rule of law ought to support and co-exist with the *Constitution's* aim for a fundamental shift in South Africa's society. Pieterse subsequently averred that transformative constitutionalism posed the most salient challenge to the legal community and the judiciary, since:

> Constitutional provisions come alive mainly through interpretation and by being applied in particular concrete contexts. This becomes controversial when the provisions that are to be interpreted and applied require that those tasked with interpretation and application aspire to achieve the political goals embodied by the provisions.

---

273 Zitzke *Transformation in the South African Law of Delict* 10 Zitzke avers that the legal formalism of the classical liberal tradition is best illustrated as F+R=C.
277 Klare 1998 *SAJHR* 166-171.
278 Klare 1998 *SAJHR* 166-171.
279 Pieterse 2005 *SAPL* 164.
The challenge propounded by Klare\(^\text{280}\) and subsequently by Pieterse,\(^\text{281}\) means that under the *Constitution*, judges are required to approach adjudication in a different manner.\(^\text{282}\) Basing his argument on the metaphor that the democratic transition in South Africa was a representation of a "a bridge from authoritarianism to a new culture of justification" wherein the exercise of power has to be justified, Klare\(^\text{283}\) submits that judges ought to model and innovate "intellectual and institutional practices appropriate to a culture of justification". Put differently, judges ought to engage in transformative adjudication, a form of legal interpretation and reasoning that advances the transformative purpose of the *Constitution*.\(^\text{284}\) As stated by Du Plessis,\(^\text{285}\) transformative adjudication serves to fulfil transformative constitutionalism by operating as an interpretive style and mindset that pursues "optimum realisation of the rights in the Bill of Rights".

By engaging in transformative adjudication, judges cease to interpret and apply the law in a mechanical way, but instead pursue the application of constitutional values in the adjudication process. However, as already articulated, relying on values in the adjudication process makes the task of judges cumbersome as values do not come with ready-made or fixed meanings.\(^\text{286}\) To this end, Moseneke\(^\text{287}\) rightly contends that, although transformative adjudication will be an arduous task, it must still be accomplished in quest of the *Constitution's* values. Transformative adjudication is further unequivocally mandated by section 39(2) of the *Constitution*, which directs courts to promote constitutional values during constitutional or statutory interpretation.\(^\text{288}\) In this respect, Currie and De Waal\(^\text{289}\) note that:

\begin{itemize}
\item \(^{280}\) Klare 1998 *SAJHR* 166-171.
\item \(^{281}\) Pieterse 2005 *SAPL* 164.
\item \(^{282}\) Moseneke 2002 *SAJHR* 318.
\item \(^{283}\) Klare 1998 *SAJHR* 147, Mureinik 1994 *SAJHR* 32.
\item \(^{284}\) Hoexter 2008 *SAJHR* 286-287.
\item \(^{285}\) Du Plessis "Interpretation" 32/80.
\item \(^{286}\) Klare 1998 *SAJHR* 157; Kroeze 2001 *Stell LR* 275-276.
\item \(^{287}\) Moseneke 2002 *SAJHR* 315.
\item \(^{288}\) Section 39(2) of the *Constitution*. See also Liebenberg *Socio-Economic Rights* 98.
\item \(^{289}\) Currie and De Waal "Application of the Bill of Rights" 57.
\end{itemize}
Section 39(2) places a general duty on every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. Statutory interpretation must positively promote the Bill of Rights and other provisions of the Constitution, particularly the fundamental values in section 1. In other words, the legislature is presumed to have intended to further the values underlying the Bill of Rights by passing legislation that is in accordance with the Bill of Rights, unless the contrary is established.

It should be noted further that, as a general rule, disputing parties must themselves identify and present issues to be considered by a court. However, the court may engage in transformative adjudication in terms of section 39(2) of the Constitution by determining relevant norms *mero motu* (i.e. of their own volition or own accord) where the disputing parties have not raised them explicitly. The Constitutional Court has for instance, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* adopted a transformative approach in line with section 39(2) of the Constitution. In this case, the Constitutional Court considered an application for judicial review by virtue of section 6 of the *Promotion of Administrative Justice Act (PAJA)*, despite PAJA not having been pleaded. The Constitutional Court considered PAJA *mero motu* because it was "clear from the facts alleged by the litigant that the section is relevant and operative", but reasoned that it was necessary and "desirable for litigants...to identify clearly...the legal basis of their cause of action".

---

292. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) paras 25-27 (hereinafter *Bato Star*).
293. *Promotion of Administrative Justice Act* 3 of 2000 (hereinafter *PAJA*).
295. *Cusa V Tao Ying Metal Industries* 2009 (2) SA 204 (CC) para 68 case where in the context of constitutional adjudication, the Constitutional Court found that: "[w]here a point of law is apparent on the papers, but the common approach of the parties
the courts are expected to explain and justify their reasons for doing so. In other words, pursuant to their transformative mandate, judges ought to make their judgements openly and consciously. This means that judges have to engage in substantive reasoning, an element of transformative adjudication discussed below.

2.5.1 *Transformative adjudication through the lens of substantive reasoning*

As noted earlier, proponents of the classical liberalism philosophy object to transformative constitutionalism's (post-liberal) 'political nature'. That is to say, in the classical liberal philosophy, judges are proscribed from engaging in a "value-laden adjudicative style". In response to this objection, Langa comments on the role of courts under South Africa's transformative *Constitution* by pointing out that:

Judges bear the ultimate responsibility to justify their decisions not only by reference to authority but also by reference to ideas and values. This approach to adjudication requires an acceptance of the politics of the law. There is no longer place for assertions that law can be kept isolated from politics.

Hoexter concurs and argues further that it is "normal" and "inevitable" for the courts to be influenced by values since they are "social engineers, whether they know it or not". The *Constitution* makes available to judges, the choice of values and norms, and further requires that judges make such choices openly and consciously, "in pursuit of a culture of justification". In this respect, Du Plessis contends that pursuant to the courts' transformative mandate, judges are to engage in interpretation and legal reasoning in such a way that espouses transformative constitutionalism as an interpretive style and

---

296 Mureinik 1994 *SAJHR* 31, 32.
297 Hoexter 2008 *SAJHR* 283-284.
300 Langa 2006 *Stell LR* 353.
301 Hoexter 2008 *SAJHR* 283-284; Penfold 2019 *SAJLR* 87-88.
302 Hoexter 2008 *SAJHR* 283-284.
303 Du Plessis "Interpretation" 32/42.
mindset, as well as a foundation for a substantive, social justice centred model of adjudication.\textsuperscript{304}

Substantive reasoning, as Quinot\textsuperscript{305} rightly observes, is a "key element of transformative constitutionalism" as well as an important function of transformative adjudication. Substantive reasoning is therefore ideally suited to fulfil the Constitution's transformative agenda.\textsuperscript{306} Hence, judges are obliged to honestly and openly inform the public about the "substantive bases of their decisions", including the "values, policy objectives or political considerations" that truly motivated their final judgment.\textsuperscript{307} For this reason, Cockrell,\textsuperscript{308} one of the early scholars to evaluate the Constitution's call for value-based adjudication, states that:

\begin{quote}
The explicit intrusion of constitutional values into the adjudicative process signals a transition from a formal vision of law to a substantive vision of law in South Africa in terms of which judges are required to engage with substantive reasons in the form of moral and political values as opposed to the formal reasons that characterised pre-constitutional adjudication.
\end{quote}

Citing Mureinik, Klare\textsuperscript{309} similarly notes that the Constitution provides a normative framework on which societal transformation can be effected. Thus, South Africa's democratic transition "is intended to be a bridge from authoritarianism to a new culture of justification", a culture wherein "every exercise of power is expected to be justified".\textsuperscript{310} Furthermore, Klare\textsuperscript{311} rivetingly propounds that among the "types of law-making, adjudication is, or is supposed to be, the most reflective and self-conscious" of them all. Moreover, adjudication is, or is supposed to be, the "most grounded in reasoned argument and justification, and the most constrained and structured" by principle, text

\textsuperscript{304} Du Plessis "Interpretation" 32/42.
\textsuperscript{305} Quinot 2010 CCR 113.
\textsuperscript{306} Quinot 2010 CCR 113.
\textsuperscript{307} Quinot 2010 CCR 113.
\textsuperscript{308} Cockrell 1996 SAJHR 3.
\textsuperscript{309} Klare 1998 SAJHR 147; Mureinik 1994 SAJHR 31, 32.
\textsuperscript{310} Klare 1998 SAJHR 147; Mureinik 1994 SAJHR 31, 32.
\textsuperscript{311} Klare 1998 SAJHR 147.
and rule. Constitutional and statutory adjudication as a whole is therefore expected to model and innovate "intellectual and institutional practices appropriate to a culture of justification".

In light of the foregoing reflections, approaching transformative adjudication in a manner that embraces substantive reasoning is salient if courts are to develop and apply ESD as a constitutional value. In other words, courts are not only expected to develop and apply constitutional values in the adjudication of environmental law disputes, but are further required to provide reasons for their judgements by reference to values, and in this thesis's context, ESD to be precise. Former Chief Justice Langa captures this point clearly by noting that:

The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.

In this respect, substantive reasoning is in stark contrast to formalistic reasoning, an unduly conceptual, formal mechanistic or technical reasoning that shrouds questions about the underlying purpose or substance of the law. Klare asserts that formalistic reasoning deters the courts from determining the extent to which laws are plastic or pliable. Writing as a proponent of transformative adjudication, Cockerell propounds that

---

312 Klare 1998 SAJHR 147.
313 Klare 1998 SAJHR 147.
314 Langa 2006 Stell LR 351. Moseneke 2002 SAJHR 309, 316 succinctly lays out this point by stating that "courts should search for substantive justice". Commenting on Langa and Moseneke's work on substantive reasoning, Quinot 2010 CCR 113 notes that the former judges' "comments capture an important characteristic of the courts justificatory obligations under transformative constitutionalism. Courts are not simply required to explain their decisions, but required to provide substantive justification within the particular normative framework of the Constitution. Judges are thus obliged openly and honestly to tell us what the substantive bases of their decisions are, including what values, policy objectives or political considerations truly motivated a particular outcome".
316 Klare 1998 SAJHR 171.
formalistic adjudication is flawed as it entails a "formal vision of the law", unlike transformative constitutionalism which is the ideal principle in adjudication because it represents a "substantive vision of the law" in pursuit of social justice. Put differently, whilst a "formal vision of the law" uses "the hard edges of legal rules" to screen off substantive reasons by courts, a "substantive vision of the law" however accepts that substantive reasons are now constitutionally mandated.318

Penfold,319 more recently, propounds that whilst some administrative law judgments are "imbued with substantive reasoning", others persistently "stray into formalism". In addition, judges continue to invoke "judicious avoidance" or "judicious minimalism" as a means of justifying formalism and the limit in the kind of purposive and substantive legal interpretation and reasoning required by transformative adjudication.320 Dugard and Roux321 aver that the Constitutional Court has 'settled into' a form of adjudication that proves the court's reluctance to pronounce on issues that do not have to be determined for the sake of settling the case. As will be argued in Chapter 5, courts have invoked judicial avoidance in environmental adjudication by their reluctance to develop the meaning of ESD, in section 24 of the Constitution.

2.6 Location of values in the Constitution

As already mentioned, transformative constitutionalism directs that constitutional values are an integral component of adjudication.322 The Constitution enshrines the most authoritative source of values in sections 1; 7; 39; 41 and 195, as well as in the rest of the constitutional text.323 This is what Kroeze324 refers to as the location of constitutional

318 Cockrell 1996 SAJHR 10.
319 Penfold 2019 SALJ 111.
322 Klare 1998 SAJHR 162.
324 Kroeze 2001 Stell LR 267.
values. Noteworthy is that constitutional values can be found inside the text of the classically defined values in section 1 of the *Constitution* (textual values) or outside the text of section 1 the *Constitution* (extra-textual values). On the one hand, if constitutional values are contained inside the text of the classically defined values in section 1, they form part of the *Constitution* itself and such values are described as enshrined in, embodied in, identified by, defined in or entrenched in the *Constitution*. A typical example is the conventional triad of constitutional values (dignity, freedom and equality) encapsulated in section 1(a) of the *Constitution*. On the other hand, the Constitutional Court has referred to values as underlying, underpinning, or constitutional values that are contained in the text of the *Constitution*: (i) "values of the constitutional state, or the *regstaat* as detailed in section 33 of the *Interim Constitution* (Makwanyane 156); (ii) "respect for life in the context of the death penalty" (Makwanyane 111); (iii) "the values of openness and tolerance enshrined in the *Constitution*" (S V Lawrence, S V Negal, S V Solberg 1997 4 SA 1176 (CC) para 164); (iv) separation of powers (De Lange V Smuts No 1998 3 SA 785 (CC) para 178); "the fact that the prosecution must prove the guilt of an accused is regarded as a 'fundamental constitutional value'" (Prinsloo para 7); and "freedom of expression, freedom of conscience, religion, thought, belief and opinion are also constitutionally protected values" (National Coalition Jor Gay and Lesbian Equality V Minister of Justice 1999 1 SA 6 (CC) para 38). See also Kroeze 2001 *Stell LR* 267.

325 Kroeze 2001 *Stell LR* 267. Writing on *Ubuntu* as a constitutional value, Geduld *Ubuntu as a Constitutional Value* 69-70 cites Du Plessis 2005 *SALJ* 608 who also makes a distinction between extra textual interpretation and intra-textual interpretation. The author states that: "Intra-textual systematic interpretation refers to the scheme of the specific text to be interpreted... [and can] overlap with grammatical interpretation since a systematic interpretation requires reference to definition clauses in the text, for example, and since the preamble, long title and schedule assists in giving meaning to a specific text". However, extra-textual systematic interpretation refers to "meaning generative signifiers in the textual environment". Meaning generative signifiers could include, "the *Constitution*, [the Interpretation Act], the political and constitutional order, the legally recognised interests of society and international law". Extra-textual systematic interpretation also bulwarks the notion that constitutional values play a crucial role during constitutional adjudication and statutory interpretation, as a "meaning generative term". Consequently, judges can rely on extra-textual constitutional values as an aid of statutory or constitutional interpretation.

326 *Makwanyane* para 300; *Minister of Safety and Security; Curtis V Minister of Safety and Security* 1996 3 SA 617 (CC) para 63 (hereinafter *Curtis*).

327 *Makwanyane* para 300; *Du Plessis V De Klerk* 1996 3 SA 850 (CC) (hereinafter *Du Plessis*) para 60.

328 *Du Plessis* para 86; *Minister of Justice V Ntuli* 1997 3 SA 786 (CC) para 32.

329 *S V Prinsloo* 1996 2 SA 464 (CC) para 7 (hereinafter *Prinsloo*).

330 *Du Plessis* para 91. The Constitutional Court has also decreed that the following amount to constitutional values that are contained in the text of the *Constitution*: (i) "values of the constitutional state, or the *regstaat* as detailed in section 33 of the *Interim Constitution* (Makwanyane 156); (ii) "respect for life in the context of the death penalty" (Makwanyane 111); (iii) "the values of openness and tolerance enshrined in the *Constitution*" (S V Lawrence, S V Negal, S V Solberg 1997 4 SA 1176 (CC) para 164); (iv) separation of powers (De Lange V Smuts No 1998 3 SA 785 (CC) para 178); "the fact that the prosecution must prove the guilt of an accused is regarded as a 'fundamental constitutional value'" (Prinsloo para 7); and "freedom of expression, freedom of conscience, religion, thought, belief and opinion are also constitutionally protected values" (National Coalition Jor Gay and Lesbian Equality V Minister of Justice 1999 1 SA 6 (CC) para 38). See also Kroeze 2001 *Stell LR* 270.

331 *Coetee V Government of South Africa; Matiso V Commanding Officer Port Elizabeth* 1995 3 SA 631 (CC) para 46 (hereinafter *Coetee*); *S V Williams* 1995 3 SA 632 (CC) para 37 (hereinafter *Williams*); *Zuma* para 17.

332 *Curtis* para 100; *Williams* para 53.
reflected in the *Constitution*, where the constitutional values are located outside the text of section 1 and can be inferred from the rest of the constitutional text.

In this light, the content of constitutional values will not always be found inside the text of section 1 of the *Constitution*. This complicates adjudication as values outside the text of section 1 of the *Constitution* are needed to interpret legal texts. However these very "values have to be given content to as well". That is why judges, arguably, invoke judicial avoidance in such cases, to lessen the cumbersome task of developing and giving content to values that the disputing parties would not have raised as an issue. Differently stated, and as will be explained further in Chapter 5, courts have exercised judicial avoidance by not developing and giving content to ESD, a value that this thesis classifies as a constitutional value that is reflected within the *Constitution*, although it has never been argued as such. In giving content to extra-textual values, Klare refers to Justice Mokgoro, who in *S v Makwanyane* stated that:

> The interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself...To achieve the required balance will of necessity involve value judgments. This is the nature of constitutional interpretation.

Klare further refers to Justice Kriegler, who notes the following:

> The judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal considerations may loom large.

The statements by the above-mentioned judges bulwark the argument that extra-textual values play a significant role in adjudication, especially during constitutional adjudication.

---

333 *Makwanyane* para 227; *Williams* para 79.  
334 See Kroeze 2001 *Stell LR* 267-269 for a discussion of constitutional values outside the text of the *Constitution*.  
335 Geduld *Ubuntu as a Constitutional Value* 61.  
336 Geduld *Ubuntu as a Constitutional Value* 61.  
337 Klare 1998 *SAJHR* 158; *Makwanyane* para 302-304  
338 *Makwanyane* para 302-304.  
It therefore follows that these constitutional values are not packaged with pre-determined meanings. As Ackermann observes:

The judge may not rule *ipse dixit*, she may not simply declare that her word, by utterance alone, constitutes the law. What she says must reflect the law. In reality it is of course impossible to seek constitutional truth in such a disembodied way. It is always a human individual carrying on a dialogue with a text... 'One partner in the hermeneutical conversation, the text, speaks only through the interpreter. Only through him are the written marks changed back into meaning'. The text always speaks to an individual whose mind is not a clean slate when 'hearing' and responding to the text. The judges' slate contains the history of her own ideas through which the constitutional text filters. The influence of a filter like this cannot be avoided. At best the interpreter can remain aware at all times of her own history of ideas when seeking to apply 'objectively' the conventional interpretive tools. One of the most important of these tools is of course the purpose of the particular constitutional provision, determined in the context of the Constitution as a whole and its overall purpose.\(^340\)

Thus, the work of judges is not only to employ constitutional values in the limitation and interpretation of rights (i.e. transformative adjudication), but to further determine the meaning of constitutional values, albeit in a meticulous manner. To this end, transformative adjudication accords judges a great degree of discretion. A question is however raised: To what extent can such discretion be exercised? This question reveals the tension between constraint and freedom of adjudication. Addressing this perceived dilemma, Klare\(^341\) praises Justice Ackermann's inclination to delve into the content of constitutional values by making reference to scholars such as Isaiah Berlin. Klare,\(^342\) however, states that the judiciary still has a duty to explain why, for instance, the works of Berlin are preferred over those of Mandela or Biko.\(^343\) Klare\(^344\) convincingly contends that it is impossible to rid ourselves of the fact that judges will incorporate their personal ideological baggage into adjudication.\(^345\) Hence, as a measure of controlling the courts

---

\(^{340}\) Ackermann *Human Dignity* 27.

\(^{341}\) Klare 1998 *SAJHR* 176.

\(^{342}\) Thus Klare 1998 *SAJHR* 177 notes that it must not be accepted as self-evident and obvious why certain theories are used and preferred by the courts.

\(^{343}\) Klare 1998 *SAJHR* 177.

\(^{344}\) Klare 1998 *SAJHR* 177.

\(^{345}\) Klare 1998 *SAJHR* 162-163.
unrestrained discretion, judges must motivate their decisions in a transparent manner such that the public is able to critique such decisions. This thesis notes that by providing such transparent motivations, judges fulfil, in part, their obligation to engage in substantive reasoning.

In consideration of the above, it is noted that deducing constitutional values from outside the text of the classically defined values in section 1 of the Constitution is legitimised through section 39 of the Constitution which refers to values that are based "on an open and democratic society". Section 39 in this respect indicates that values not expressly mentioned in section 1 of the Constitution could be developed by the courts. An instructive case in this regard, where the court used its discretion to develop and apply a value not explicitly mentioned in section 1, is that of S v Makwanyane. In this case, the court developed and applied Ubuntu as a constitutional value.

Thus, the court's application of Ubuntu as a constitutional value gave meaning and content to the right to life since the value was seen to manifest in the principle of humanity and the respect of human dignity. Justice Langa, in particular, stated that the right to life had to be understood through the lenses of Ubuntu which required the respect of the dignity of a person. Therefore, dignity and Ubuntu were used as extra-

---

346 Van Marle 2009 *Stell LR* 294, 295, 298 echoes the same sentiments as Klare with regards to the indeterminacy thesis. Van Marle avers that two streams of thought can be identified when considering "transformative constitutionalism within the South African context, namely the functionalist approach and the critical approach". The functionalist approach is "associated with a separation between law and morality, [but functions] as free-market positivists". The critical approach however "consists of a radical critiquing of law and politics". Thus, the "project of transformative constitutionalism in South Africa is a process of questioning the theoretical and ideological underpinnings of concepts within the law". In other words, judges are under an obligation to critically and deeply engage with their decision of the content of a constitutional value.

347 Section 39 of the *Constitution*.

348 *Makwanyane* para 111.

349 *Makwanyane* para 307.


351 *Makwanyane* para 224.
textual constitutional values that gave meaning and content to the right to life.\textsuperscript{352} The aforementioned reflects that constitutional values are not restricted to explicit mentioning within the constitutional text, but can also be found beyond the text of the \textit{Constitution} or within text not explicitly labelled as value bearing. That is to say, constitutional values could be found within the constitutional text, although not explicitly mentioned therein. The same should be the case when it comes to environmental adjudication.

Environmental adjudication should be informed by constitutional values. To date and as far as this study could ascertain, no constitutional value has been applied with sufficient certainty in environmental adjudication.\textsuperscript{353} It is upon this lacuna that this thesis avers that ESD ought to be developed and applied by the courts as a constitutional value in environmental adjudication. In other words, ESD, is the 'value element' the environmental right in section 24 of the \textit{Constitution} aims to achieve. That is to say, 'ESD' is the value that forms the basis for environmental protection as per section 24 of the \textit{Constitution}. Hence, the reason why section 24 demands that environmental protection be achieved through "ecologically" sustainable development.\textsuperscript{354}

As mentioned earlier, section 24 envisages that environmental protection be achieved through development that "places the environmental value at the centre-stage", hence the referral to "ecologically" sustainable development.\textsuperscript{355} This means that without ESD, as a constitutional value, "a mere mechanical evaluation of environmental rights," social development rights and economic rights could result, with the consequence that

\textsuperscript{352} Dignity in this case is referred to as extra-textual because \textit{Makwanyane} was decided under the \textit{Interim Constitution}, which did not explicitly declare dignity as a constitutional value.

\textsuperscript{353} Although there is extensive literature on constitutional values (e.g., on Ubuntu, human dignity, equality), none, as far as this thesis could ascertain, have written on how ESD could be applied as a constitutional value in environmental rights adjudication. Although courts have mostly sought to give meaning to the ordinary sustainable development, none have attempted to give meaning and content to 'ecologically' sustainable development by construing it as a constitutional value in the context of section 24.

\textsuperscript{354} Section 24(b) (iii) of the \textit{Constitution}.

\textsuperscript{355} Van der Linde and Basson "Environment" 50-24; Feris 2008 \textit{CCR} 252.

\textsuperscript{356} Van der Linde "Environment" 50-24; Feris 2008 \textit{Constitutional Court Review} 252.
environmental protection and interests could be obscured or balanced away. This, as the thesis will show, is the current *status quo*.

Although some scholars have written on constitutional values, none (as far as this thesis could ascertain) have written on how constitutional values can be applied in environmental adjudication. To be precise, as far as could be ascertained, no scholar has written on how ESD, as articulated in the *Constitution*, could be used as a constitutional value in environmental rights adjudication, and how courts could employ the environmental rule of law to reach the outcomes of ESD. Thus, although judges have tried to develop and give content to constitutional values such as *Ubuntu*, the manner in which courts have attempted to develop constitutional values in the adjudication of environmental law matters is arguably less than satisfactory. It is on this basis that this thesis argues that, although ESD has never been argued as value bearing nor submitted as a constitutional value in environmental rights adjudication, it could be applied as one, given that it is reflected within the *Constitution*.

Although constitutional values can never have a single objective abstract and clear meaning, it remains obligatory for judges to determine their understanding of a value in a particular case. Kroeze adds that courts however fail to develop any substantial content of values, but rather choose to "simply state that something is not in line with a particular value". Thus, Kroeze states that she is not advocating for constitutional values to have clear and objective meanings, but for courts to at least elucidate and clarify the meaning of a constitutional value in a given case. Hence, during environmental

---

357 Kroeze 2001 *Stell LR* 273.
358 Kroeze 2001 *Stell LR* 273.
359 Kroeze 2001 *Stell LR* 264, 273, 275. The fact that judges often fail to give any content to constitutional values, is for Kroeze problematic as it shows that courts consider values as having certain and uncontested meanings. For Kroeze, such standpoint is proof of a larger problem, that courts are still rooted in formalism.
adjudication, courts ought to also develop and elucidate on constitutional values, particularly on ESD as a constitutional value within the Constitution.

As Murcott\textsuperscript{360} states, courts must "develop the normative content of the environmental right so as to pursue" an environmental, social and climate justice-oriented vision of the environmental right, which includes reference to ESD as provided for in the right. Thus, this thesis submits that ESD could, by virtue of its place within section 24, be applied as a constitutional value in environmental rights adjudication. Put plainly, since ESD is decreed, by section 24(b) (iii), as an essential factor to be considered when advancing environmental protection, one could conclude that courts ought to develop and employ ESD as a constitutional value in environmental rights adjudication. Applying ESD as a constitutional value in environmental rights adjudication could facilitate the realisation of outcomes such as ecological integrity, environmental justice and poverty reduction. However, ESD can only be applied as a constitutional value in environmental rights adjudication once courts fully comprehend what ESD entails, or at least what it should mean. This means that to fully apply ESD as a constitutional value, one must fully understand the history and principles that inform the concept. The following Chapter is an attempt at laying out the history and principles that inform ESD.

\subsection*{2.7 Conclusion}

This Chapter was an attempt at determining the function and nature of constitutional values. The scholarship discussed in this Chapter seems to suggest that the use of constitutional values is justified and relevant, although insignificant deviations on the use of constitutional values in constitutional and statutory interpretation were noted. The Chapter also noted that, the Constitution articulates several constitutional values in sections 1, 7(1), 39 and 195. Other constitutional values, although not expressly stated as such in section 1 of the Constitution, can also be gleaned by considering the

\textsuperscript{360} Murcott \textit{Towards a Social Justice-Oriented Environmental Law Jurisprudence} 29.
Constitution’s text. A case in point is the constitutional value of Ubuntu, which although not expressly articulated as a value by section 1 of the Constitution, has been accepted as one. Hence, certain extra-textual constitutional values can be deduced by considering the text of the Constitution. For instance, when one examines section 24 of the Constitution, ESD can be extrapolated as a constitutional value that is pertinent to ecological integrity, environmental justice and poverty reduction.

This Chapter further noted that all organs of state are bound by the values entrenched in the Constitution. The judiciary, in particular is mandated in terms of section 39 of the Constitution to promote constitutional values. The role of constitutional values in adjudication has become particularly essential, given that the Constitution has been interpreted and accepted as a post-liberal document that embodies a post-liberal model of democracy. This means that when interpreting laws, the judiciary must fulfil their transformative mandate by developing and applying constitutional values. Applying constitutional values means that courts have to embark on a cumbersome task of giving content and meaning to constitutional values. In the context of this thesis, courts ought to give content to section 24 by developing and applying ESD as a constitutional value in environmental rights adjudication. However, to fully apply ESD as a constitutional value, one must fully understand the history and principles that inform the concept. The following Chapter will lay out its history and principles in an attempt to provide a full comprehension of ESD.

---

361 Soobramooney 8; Davis and Klare 2010 SAJHR 404.
CHAPTER 3
PERSPECTIVES ON 'ECOLOGICALLY' SUSTAINABLE DEVELOPMENT

3.1 Introduction

In recent years, one of the seminal developments to ever permeate international environmental law has been the need to balance economic development and environmental protection.¹ Such economic development has resulted in policies that have been detrimental to poor people in mostly poor countries and have ultimately led to environmental degradation.² Put plainly, in contexts where economic concerns take centre stage, it is the environment and the poor of the community that suffer the most.³ It is against this backdrop that the concept of sustainable development was born.

Sustainable development has been defined by the World Commission on Environment and Development (hereinafter the Brundtland Report) as "development that meets the needs of the present" generation without compromising "the ability of future generations to meet their own needs".⁴ The Brundtland Report's definition has however raised

---


³ Du Plessis 2011 SAJHR 287; Ward "Only One Earth, Stockholm 1972" 5; Malviya 1996 Indian Journal of International Law 57, 58. An example of an economic policy that has been detrimental to the poor and the environment is the 1989 Washington Consensus, a development approach endorsed by the World Bank and the International Monetary Fund for the purpose of liberalisation, macro stability and privatisation. The Washington Consensus is responsible for promoting economic growth policies which have at times degraded the environment and negatively affected some of the most impoverished in poor countries See part 3.3.2 below that gives a brief discussion of the environmentalism of the poor. Also see Stiglitz Globalization and Its Discontents 67. On the impact of the Washington Consensus on poor societies see the complete work of Chossudovsky The Globalisation of Poverty: The Impacts of Imf and World Bank Reforms.

⁴ Brundtland Report 43. See part 3.2.1.3 below for a further discussion on the Brundtland Report.
numerous and conflicting interpretations of what sustainable development entails. Various notable scholars have raised the indeterminacy of the concept, thereby attracting questions such as: What needs to be sustained or developed? In this respect, Bosselmann notes that what needs to be sustained is the "integrity and continued existence of ecological systems". This ushers in the concept of 'ecologically' sustainable development, which requires that environmental considerations take precedence over economic and social considerations. In simple terms, the addition of the adjective 'ecologically' to sustainable development indicates the intention to provide efficacious environmental protection through a more robust environmental focus. Therefore, this Chapter argues that section 24 (b) (iii)'s reference to ESD imposes an injunction on the state to ensure environmental protection through 'ecologically' sustainable development. Put differently, this Chapter advances an argument that section 24(b) (iii)'s reference to ESD requires that economic and social considerations be measured against ecological sustainability as opposed to sustainable development, which has taken centre stage whenever considerations of environmental protection and development have arisen.

While the preceding Chapter described South Africa's laws on constitutional values and suggested the development of ESD as a constitutional value in environmental rights adjudication, this Chapter builds on that framework by attempting to provide a nuanced conceptualisation of ESD and its place within sustainable development discourse. Although there is considerable literature on sustainable development, this Chapter will

---

5 Various notable scholars have raised the indeterminacy of the Brundtland Report’s definition of sustainable development. See for instance Nelson 2004 Denver Journal of International and Policy 615 who states that the principle sustainable development "is probably suffering from its success as a buzzword. So frequently adopted by so many groups with wildly differing agendas, from the Sierra Club to the coal industry, the term might seem well on its way to becoming meaningless". Also see Porras "The Rio Declaration: A New Basis for International Co-Operation" 34; Bosselmann The Principle of Sustainability 53, 54; Tladi Sustainable Development in International Law 75; Holden, Linnerud and Banister 2014 Glob Environ Change 130.

6 Bosselmann The Principle of Sustainability 53.

7 See generally the full works of Faucheux and O'Conner Valuation for Sustainable Development; Redclift Sustainability: Sustainable Development; Mebratu 1998 Environ Impact Assess Rev; Mitcham 1995 Technol Soc; Sachs The Age of Sustainable Development; Krajnc and Glavič 2005 Resour Conserv
limit its scope to scholarly works necessary for the comprehension of ESD. The analysis is therefore limited to unearthing the thematic roadmap of ESD as a useful legal tool to achieving development that is sustainable. The rationale adopted in this Chapter is that a sturdy analysis of ESD will provide a practical theoretical foundation upon which to examine how ESD could be used as a constitutional value in environmental adjudication. Accordingly, this Chapter seeks to answer the following question: What does ESD generally entail? In examining this question, the Chapter will, as a starting point, discuss and explain the historical evolution of sustainable development. This is critical if one is to comprehend the normative content and practical application of ESD. Upon reviewing the historical development of sustainable development, the Chapter will provide a more nuanced understanding of ESD by discussing the need to move from the oft-cited sustainable development to the more practical ESD. Thus, the Chapter will examine the principles and importance of ESD.

3.2 Historical evolution of sustainable development

Sustainable development was described by Christopher Weeramantry, the former Vice President of the International Court of Justice (hereinafter the ICJ), in the 1997 case concerning the *Gabčikovo-Nagymaros* Project. The learned judge described sustainable development as "not merely a principle of modern international law", but a principle "of the most ancient ideas in human heritage". Referring to the antediluvian legal and agricultural systems in Asia, the Americas and the Middle East, Weeramantry commended how ancient civilisations were rooted in a value system that did not detach the natural

---

Recycl; Colombo 2001 Futures; Blowers, Boersema and Martin Is Sustainable Development Sustainable?; Holden, Linnerud and Banister 2014 Glob Environ Change.

8 *Gabčikovo-Nagymaros Project*, Hungary V Slovakia 1997 ICJ 37 ILM 162, separate opinion of Vice-President Weeramantry.

sphere from the human sphere.\textsuperscript{10} Weeramantry further stated how inconceivable the notion of seeking economic development at the expense of ecological sustainability was.\textsuperscript{11}

In other words, in ancient times, the exploitation and preservation of natural resources drew harmony from "the need for human activity to respect the requisites for its maintenance and continuance".\textsuperscript{12} Weeramantry's statement is similar to the Brundtland Report's definition of sustainable development, "development that meets the needs of the present" generation "without compromising the ability of future generations to meet their own needs".\textsuperscript{13} As will be discussed later, this definition is bristling with ambiguity and indeterminacy which has paved the way for various interpretations, including instances where the concept has been "hijacked by business and industry, and interpreted as just economically sustainable development".\textsuperscript{14}

However, Bosselman\textsuperscript{15} attempts to remedy such ambiguity by calling for development that is rooted on "ecological sustainability in order to meet the needs of people living today and in the future". The following section will thus attempt to provide an overview of the historical development of sustainable development. In laying out the evolution of sustainable development, terms such as sustainability and development will be examined. The analysis on the evolution of sustainable development over the years will be conducted as a means to an end of understanding the need to shift from sustainable development to 'ecologically' sustainable development. Thus, the legal value of ESD, as a concept, will be bolstered once the history and shortcomings of sustainable development to environmental protection are realised. Against this backdrop, this thesis, as a point of departure, explains the meaning and historical sketch of sustainability, a concept that

\textsuperscript{10} Gabčikovo-Nagymaros Project, Hungary V Slovakia 18.
\textsuperscript{11} Gabčikovo-Nagymaros Project, Hungary V Slovakia 18, 19.
\textsuperscript{12} Gabčikovo-Nagymaros Project, Hungary V Slovakia 18, 19.
\textsuperscript{13} Brundtland Report 43.
\textsuperscript{14} Murcott "Introducing Transformative Environmental Constitutionalism in South Africa" 291; Rees Defining" Sustainable Development" 3-5; Johnston et al 2007 Environmental science and pollution research international 60-61. See further Handl 1995 Sustainable Development and International Law 37 who posits that "the concept's latent ambiguities ... undermine its policy guidance function".
\textsuperscript{15} Bosselmann The Principle of Sustainability 11.
could help provide direction on why there is the need to move away from sustainable development to ESD.

3.2.1 Sustainability

Sustainability could be simplified as follows: If our goal is long term economic prosperity, we have to take care of the environment first. The concept of sustainability has been analysed and described in the annals of many academic writings. Bosselmann, one of the scholars to have analysed sustainability, describes the concept as both complex and simple. On the one hand, in its elementary context, sustainability "reflects pure necessity". The water that people drink, the air that people breathe, the soils that bring forth the food we eat are all essential for the survival of humans. Thus, the most elementary "rule of human existence is to sustain the conditions life depends on".

On the other hand, sustainability is complex in the sense that it is a challenge to categorically state what sustainability is. In this respect, sustainability cannot, therefore, be defined without reflecting on values and principles. This makes any discussion on

---

17 Bosselmann The Principle of Sustainability 9-43; Johnston et al 2007 Environmental science and pollution research international 60-63; Scoones 2007 Dev Pract 589-596. Also see Meyer 2014 Environmental Values 366-368; Vanderheiden 2015 Perspect Politics;Portney Sustainability 1-56; Dresner The Principles of Sustainability 31-40; 129-146; Caradonna Sustainability: A History 21-54, 176-232.
18 Bosselmann The Principle of Sustainability 9. Also see Johnston et al 2007 Environmental science and pollution research international 60-63.
19 Bosselmann The Principle of Sustainability 9. Also see Johnston et al 2007 Environmental science and pollution research international 60-63
20 Bosselmann The Principle of Sustainability 9. Also see Johnston et al 2007 Environmental science and pollution research international 60-63.
21 Bosselmann The Principle of Sustainability 9; Voigt Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and Wto Law 18; Tladi Sustainable Development in International Law 11-12, 36, 41. Also see McCloskey 1998 Duke Envtl L & Pol'y F 157 who notes that the complexity in defining sustainability makes the term "a fine phrase without meaning".
22 Bosselmann The Principle of Sustainability 9; Tladi Sustainable Development in International Law 11-12, 36, 41.
sustainability an ethical discourse.\textsuperscript{23} That is to say, ecology must inform any narrative and discourse on sustainability. In searching for sustainability, humanity ought not to "separate scientific facts from ethical values".\textsuperscript{24} Hence, when engaging sustainability, "finding facts is value-based and defining values is fact-based".\textsuperscript{25} Moreover, the discussion on sustainability becomes an ethical discourse because it addresses how humanity may properly allocate the benefits and burdens accrued from the use of natural resources. Sustainability further addresses the ethical issue concerning who bears the responsibility for championing the movement towards environmental protection.

It should be noted that sustainability has been equated to ideals such as justice in society.\textsuperscript{26} Such ideals are indispensable and fundamental to the functioning of any society.\textsuperscript{27} This thesis notes that although sustainability is equated to justice, much work still needs to be done in order to fully comprehend the importance of sustainability. In other words, the importance placed on sustainability, in contrast to other ideals such as justice leaves much to be desired. Bosselmann\textsuperscript{28} correctly avers that: If sustainability "refers to the continuity of human societies", why then do we regard it as a lesser ideal? More clearly:

If a person lives at the expense of others, we consider this to be 'unfair'. If rich societies live at the expense of poor societies, we consider this also to be 'unfair'. Why then should

\begin{itemize}
\item \textsuperscript{23} Bosselmann \textit{The Principle of Sustainability} 9, 10. Also see Tladi \textit{Sustainable Development in International Law} 11-12, 36, 41; Johnston \textit{et al} 2007 \textit{Environmental science and pollution research international} 64.
\item \textsuperscript{24} Bosselmann \textit{The Principle of Sustainability} ix, 9.
\item \textsuperscript{25} Bosselmann \textit{The Principle of Sustainability} ix, 9.
\item \textsuperscript{26} Voigt \textit{Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and Wto Law} 3; Lafferty "From Environmental Protection to Sustainable Development: The Challenge of Decoupling through Sectoral Integration" 192.
\item \textsuperscript{27} The usually adopted definition of justice is one by Aristotle as cited in Rackham \textit{Aristotle, the Nicomachean Ethics} 252-253. Aristotle defines justice as the "moral disposition which renders men apt to do just things and which causes them to act justly and to wish what is just." Voigt \textit{Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and Wto Law} 3; Lafferty "From Environmental Protection to Sustainable Development: The Challenge of Decoupling through Sectoral Integration" 192.
\item \textsuperscript{28} Bosselmann \textit{The Principle of Sustainability} 9, 10.
\end{itemize}
it be acceptable to live at the expense of future generations and the natural environment?\textsuperscript{29}

This calls for societies to rethink and reconsider the idea and importance placed on sustainability. After all, when one goes back to history, it is evident that societies and cultures could only function efficiently when ecological systems were sustained.\textsuperscript{30} Bosselmann\textsuperscript{31} however contends that when compared to justice, sustainability, appears to be harder to achieve because none of today's societies is sustainable. The author gives a solid example by stating that: the absence of an ideal such as justice is unbearable, unlike the absence of an ideal such as sustainability.\textsuperscript{32}

That is to say, the perpetual unjust treatment of people by states or political regimes, for instance, is not tolerated for a seemingly endless time as internal or external forces are likely to revolt against the state or political regime. On a different note altogether, unsustainable practices on the environment are usually tolerated because people are not immediately affected by its effects: "the distance in space (global environment) and time (future generations) prevent us from acting with urgency."\textsuperscript{33} However, sustainability should be accorded the same urgency and importance as justice because the distance between space and time is vanishing. A key example is that of climate change. The effects of climate change have for a long time been perceived as distant. However, this has changed since climate change and its impact are making headlines daily.

\begin{itemize}
  \item \textsuperscript{29} Bosselmann \textit{The Principle of Sustainability} 10.
  \item \textsuperscript{30} An ecological system has been defined as the ever-changing system of the "fundamental linkages among organisms" (such as plants, animals, and microbes) and their biological and physical environment (such as the biotic or living and abiotic or non-living environment). Humans are a component of an ecological system and have been described as the "dominant organism". For instance, humanity's unsustainable activities have affected the abiotic or non-living component of the earth's ecological system, thereby creating conditions such as climate change. See Alcamo \textit{et al} 2003 \textit{Ecosystems and Human Well-Being: A Framework for Assessment} 49-50. Although the dominant organism, humans depend on the earth's ecological system for sustenance. Bosselmann "Conclusion: The Ever-Increasing Importance of Ecological Integrity in International and National Law" 225 notes that "the ecological system is the most encompassing system", such that if it is not protected, all human development is unsustainable, and "literally without foundation".
  \item \textsuperscript{31} Bosselmann \textit{The Principle of Sustainability} 9, 10.
  \item \textsuperscript{32} Bosselmann \textit{The Principle of Sustainability} 10.
  \item \textsuperscript{33} Bosselmann \textit{The Principle of Sustainability} 10.
\end{itemize}
Holden, Linnerud and Banister\textsuperscript{34} lament that the societies we currently live in are not sustainable. Bosselmann\textsuperscript{35} similarly argues that societies today are "deeply engrained in wasteful production and consumption" such that they are unable to "realise their unsustainable character". The unsustainable character of humans today will certainly threaten the future of the planet.\textsuperscript{36} In other words, the current generation is failing to meet its most rudimentary obligation, which is to conserve natural resources for future generations. In this light, generations should conserve and not destroy their current natural resources such that future generations find a habitable world. This raises an ethical dilemma for sustainability: How can a fair distribution of goods and burdens be organised throughout the generations?\textsuperscript{37}

Providing for future generations is dependent on sustaining ecological systems.\textsuperscript{38} In this light, Diamond\textsuperscript{39} asserts that the sustainability of ecological systems is dependent on society's reaction to its environmental problems. This means that a society may choose to sustain its ecological systems through the way it reacts to environmental problems. Concurring with Diamond, Bosselmann\textsuperscript{40} adds that a society may "choose to incorporate or to ignore the need to live within" the limits of ecological sustainability. Sustainability has therefore always been the responsibility of society. Differently stated, the society has since time immemorial bore the responsibility to use natural resources in a way that sustains ecological systems. Therefore, the current discourse of sustainability is in no way novel, it only assumed a new focal point of sustainable development.\textsuperscript{41} In order for
sustainability to be better understood and enforced, its core idea must first be understood. This calls for an understanding of the history of the idea of sustainability.

3.2.1.1 Historical origins of sustainability

The notion of sustainability can be traced to the history of humankind. Sustainability has been described as the essence of humanity. That is, humans have the innate capability to live sustainably with the environment. However, when one considers the destruction caused by global consumerism and corporatism, one might conclude that humankind is incapable of living in harmony with and sustainably with nature. Weeramantry notes that current ecological hazards such as climate change have been caused by the formalism of modern legal systems. Hence, the existence of environmental law as a separate subject area attests to the fact that sustainability principles and values have not been incorporated into modern legal systems. Bosselmann contends that both international and domestic environmental laws do not reflect sustainability. Given the anthropocentric, resource oriented and non-integrative outlook of both international and domestic environmental laws, much focus is extended to modern industrialism as opposed to changing it to reflect sustainability.

44 Caradonna *Sustainability: A History* 21-54; Bosselmann *The Principle of Sustainability* 12.
46 *Gabčikovo-Nagymaros Project, Hungary V Slovakia* 18. Formalism in this sense refers to modern legal systems that no longer consider the principles and values of nature. That is to say, modern legal systems must be integrated into the body of the living law. Bosselmann *When Two Worlds Collide: Society and Ecology* 227 contends that the formalism of modern legal systems is due to European civilisation’s increasing distinction between morality and the law; and the dominance of positivism.
47 A concise critique of the environmental legal theory has been presented in Bosselmann 1985 *KJ* 345-361; Bosselmann 1986 *KJ* 1-22.
Historically, the term sustainability was coined during the Age of Enlightenment.\textsuperscript{50} It is during this period that, just like the Middle Ages, an ecological crisis led to the coining of the term sustainability.\textsuperscript{51} As such, the sustainability concept has for the longest of time, influenced the development of Europe's legal system,\textsuperscript{52} with a result that one could link the history of sustainability to the history of environmental law in Europe.\textsuperscript{53} This implies that, sustainability can be traced to the ecological crisis suffered in Europe between 1300 and 1351.\textsuperscript{54} Radkau\textsuperscript{55} avers that Europe's rapid and increased economic demands led to massive deforestation. As a result, economies in Europe's community were crippled since wood was essential in construction, shipyards, mining, household consumption and manufacturing.\textsuperscript{56} In response to the ecological crisis, local townships and municipalities enacted laws grounded on sustainability that promoted measures of extensive

\begin{itemize}
\item Caradonna Sustainability: A History 27, 30-39, 43; Horton and Horton 2019 One Earth 86, 87. The Age of Enlightenment brought about two salient developments; "the scientific revolution based on rational thinking and empirical observations" as well as a secular perspective on law and governance, where social norms, be it legal or moral, had to be reasoned (i.e. tested against scientific evidence and rationality). For an in-depth discussion on the Age of Enlightenment, see the full works of Sumner Sustainability and the Civil Commons; Dresner The Principles of Sustainability.\textsuperscript{50}
\item Cipolla Before the Industrial Revolution: European Society and Economy, 1000-1700 92, 232; Crosby Ecological Imperialism 215-218; Bowlus "Ecological Crises in Fourteenth Century Europe" 88; Hughes An Environmental History of the World: Humankind's Changing Role in the Community of Life 85-90.\textsuperscript{51}
\item Tladi Sustainable Development in International Law 12 also notes that the history of sustainable development is linked to international environmental law. Also see Adams Green Development: Environment and Sustainability in the Third World 14; Bowlus "Ecological Crises in Fourteenth Century Europe" 88; Cipolla Before the Industrial Revolution: European Society and Economy, 1000-1700 92, 232; Crosby Ecological Imperialism 85-88.\textsuperscript{53}
\item Diamond Collapse: How Societies Choose to Fail or Succeed 157-177. Between 1300-1350 timber use and agricultural development was at its pinnacle, which almost led to a complete deforestation. Severe consequences resulted from the loss of the land's ecological carrying capacity. The absence of forests meant that there was no timber for cooking, heating, tool making and house building. "Erosion, flooding and lowering of water table levels" were additional effects of the ecological crisis. At the same instance, an essential nutritional basis for pigs, cattle and deer disappeared and "with it the prospect for animal fertilisers necessary for growing crops". As a result, great starvations (1309-1321) and plagues (the Black death 1348-1351) followed which destroyed about 40 000 settlements in Europe and left the continent at a 'significant cultural standstill'. Also see Horton and Horton 2019 One Earth 86-88; Hughes An Environmental History of the World: Humankind's Changing Role in the Community of Life 85-90; Cipolla Before the Industrial Revolution: European Society and Economy, 1000-1700 92, 232.\textsuperscript{54}
\item Radkau Natur Und Macht: Eine Weltgeschichte Der Umwelt 245.\textsuperscript{55}
\item Radkau Natur Und Macht: Eine Weltgeschichte Der Umwelt 245-246.Evelyn Sylvia, or a Discourse of Forest-Trees\textsuperscript{56}
\end{itemize}
reforestation. It is also during such times that the discipline of Forest Science and Management was established. Its purpose was to study the conditions necessary for a sustainable field and sustained forestry.

In 1664, John Evelyn published a book titled, "Sylva, or a Discourse of Forest-Trees and the Propagation of Timber in His Majesties Dominions". In his notable work, Evelyn argued that humanity had to pay more attention to posterity. That is, "each generation is non sibi soli natus (not just born for itself), but born for posterity". It is in this context that Evelyn draws up his ethics of sustainability:

men should perpetually be planting, so that posterity might have trees fit for their (sic) service ... which it is impossible they should have, if we thus continue to destroy our woods, without this provisional planting in their stead, and felling what we do cut down with great discretion, and regard to the future.

Although Evelyn's formulation of sustainability is notable, credit for actually coining the term sustainability 'Nachhaltigkeit' has been given to German Engineer and Forest Scientist, Hans carl von Carlowitz. In his book, "Forest Economy or Guide to Tree Cultivation Conforming with Nature", Carlowitz investigates how the growing and

57 Cipolla Before the Industrial Revolution: European Society and Economy, 1000-1700 92, 232. Bosselmann The Principle of Sustainability 12-13 states that the idea behind such laws was not to "clear more wood than would grow again and to plant new trees so that future generations would benefit. From the end of the Fourteenth century, local laws in Middle Europe were guided by sustainability concerns". Also see Horton and Horton 2019 One Earth 86-88; Caradonna Sustainability: A History 21-54.


60 Evelyn Sylvia, or a Discourse of Forest-Trees 262-268, 270-279, 294. Also see Caradonna Sustainability: A History 33-38; Grober 2007 Deep Roots: A Conceptual History of 'Sustainable Development' (Nachhaltigkeit) 8-10.

61 Evelyn Sylvia, or a Discourse of Forest-Trees 262-268, 270-279, 294. Also see Caradonna Sustainability: A History 33-38; Grober 2007 Deep Roots: A Conceptual History of 'Sustainable Development' (Nachhaltigkeit) 8-10.

62 Evelyn Sylvia, or a Discourse of Forest-Trees 262-268, 270-279, 294. Also see

63 Quoted from the 1776 edition of Evelyn Sylvia, or a Discourse of Forest-Trees 205.

64 Carlowitz 1713. Sylvicultura Oeconomica foreword and 87, 43-98. Also see the seminal work of Grober who has written extensively on Carlowitz, Grober 2002 Natur und Kultur 116-128; Grober 2007 Deep Roots: A Conceptual History of 'Sustainable Development' (Nachhaltigkeit) 16-24; Bosselmann "Grounding the Rule of Law" 88.

65 Carlowitz 1713. Sylvicultura Oeconomica foreword and 87, 43-98. Carlowitz further propounds that greed and ignorance will ruin forestry and ultimately result in irreparable damage. Cited in Grober
conservation of timber can be achieved in order to continuously provide for the durability and sustained use of the timber. This was the first time the term sustainability/Nachhaltigkeit appeared in the text. Carlowitz\textsuperscript{66} further demands that sustainability be considered "an indispensable thing to ensure the continued existence of the country". Therefore, in pursuing economic prosperity, the overuse or exploitation of natural resources must be avoided.\textsuperscript{67} Put differently, ecological integrity\textsuperscript{68} ought to be respected and not compromised. Significantly, economic and social concerns are to, therefore, be measured against ecological sustainability.\textsuperscript{69} Carlowitz further grounds his submissions of sustainability in social justice, expressing concern for 'dear posterity' and 'poor subjects'.\textsuperscript{70} In other words, Carlowitz was of the view that in fulfilling its duty to promote sustainability, humanity also had to ensure the equitable distribution of natural resources, privileges, wealth and opportunities within the society. It is only when there is a fair distribution of natural resources, privileges, wealth and opportunities within the society that humanity could hope to truly respect ecological integrity.

\textsuperscript{66} Carlowitz 1713. \textit{Sylvicultura Oeconomica} 87, 106-107. Among his recommendations on fostering sustainability, Carlowitz suggests "the search for surrogates for wood' such as brown coal and peat, "the art of saving wood" through insulation, energy conservation etc., and systematically regrowing and planting wild trees. Cited in Grober 2007 \textit{Deep Roots: A Conceptual History of 'Sustainable Development' (Nachhaltigkeit)} 16-24; Caradonna \textit{Sustainability: A History} 35-38, 42, 53, 138; Bosselmann \textit{The Principle of Sustainability} 17-19; Bosselmann "Grounding the Rule of Law" 88.

\textsuperscript{67} Carlowitz 1713. \textit{Sylvicultura Oeconomica} 31, 39 as cited in Bosselmann \textit{The Principle of Sustainability} 17-19.

\textsuperscript{68} Ecological integrity denotes the ability of an ecosystem to maintain and support a diverse community of organisms as well as ecological processes "such as natural disturbance regimes that provide the structures and functions on which the full complement of species in an ecosystem or landscape depend". See Wurtzebach and Schultz 2016 \textit{BioScience} 447. Also see Kim and Bosselmann 2015 \textit{Review of European, Comparative & International Environmental Law} 203-206.


In 1757, Wilhelm Gottfried Moser modified Carlowitz's term 'sustained' (nachhalend) to 'sustainable' (nachhaltig). In defining Forest Management, Moser presents three principles on which the concept is based: sustainable economies with our forests; measures of preserving wood; and re-growing and planting new wood. Moser further stresses that the aforementioned principles be applied "with children and posteriors in mind" and that this approach was so reasonable, just, prudent and social to the extent that "no person lives only for themselves (non sibi soli natus), but also for others and those to come". It appears from the above that rich sustainability literature was linked to extensive sustainable forestry practices. Accordingly, sustainability was, at the beginning of the 19th century, accepted as analogous to "good forestry practice" and the notion of sustainability has subsequently been adopted as the ideal way for humankind to adapt to the natural processes like geological, geomorphologic, meteorological, hydrological, biological, cosmic and biogeochemical processes. However, Schanz opines that the notion of sustainability was not limited to forestry only, as it was extended and popularised among planners, development theorists and economists. This was because the devastating effects of the ecological crisis had far-reaching consequences beyond forestry.

---

76 For an extensive read on human interactions with the natural processes see the complete work of Govorushko *Natural Processes and Human Impacts* 3-400.
It is worthy of note that sustainability laws existed and were effective until around 1800 when traditional agricultural civilisation paved way for the Industrial Revolution. The Industrial Revolution significantly transformed the use of land and natural resources in three ways:

a. The environmental aspect: the pressures of the demographic-ecological crisis caused the agricultural system to 'expand' its natural boundaries;
b. The philosophical aspect: Newton's model of physics coupled with the mechanistic-atomistic image of nature favoured 'natural resource' exploitation over ecological sustainability; and

c. The energy aspect: renewable energy sources such as wood and wind were replaced by fossil energy, i.e. coal and later oil.

The Industrial Revolution re-oriented Europe from being sustainability oriented to a "private free enterprise" which was resource intensive and short term based. It was not until the second half of the 20th century that governments realised the need for environmental safeguards. However, the 1960s and 1970s new laws on the environment only added certain environmental duties to unrestricted private property rights. Perhaps, this explains why Bosselmann refers to environmental law as "the poor cousin of property and commercial law", only capable of promoting "insufficient measures at the periphery".

---

79 Sustainability laws were effective and accommodated in laws such as 'Allmende' in German and 'commons' in English. This Allmende system was to the effect that land is a public good that prescribes limitations to individual land use rights. The Allmende practice of "German principalities defined the difference between the public and the private: the functioning and integrity of ecosystems was of public concern; the use of resources could be private". Land use was regarded as a "heritage from the past and obligation for the future". The extent of individual land use rights was defined by "notions of heritage ('Erbschaft') for ancestors ('Ahnen') on one hand, and heirs ('Erben') and descendants ('Nachkommen') on the other". The advent of the 19th century eventually set aside the Allmende system. For an extensive read on the Allmende system see Sieferle 1998 GAIA 304-307; Hardin 2009 J Nat Resour Policy Res 1243-1248.

80 Caradonna Sustainability: A History 55-88; Bosselmann The Principle of Sustainability 15.

81 Caradonna Sustainability: A History 55-88; Bosselmann The Principle of Sustainability 13-16.

82 Bosselmann The Principle of Sustainability 13-16; Caradonna Sustainability: A History 55-88.

83 Caradonna Sustainability: A History 55-88; Bosselmann The Principle of Sustainability 13-16.

84 Bosselmann When Two Worlds Collide: Society and Ecology 58-62, 80-87, 227. Also see Bosselmann The Principle of Sustainability 16.
The rapid development of economies globally resulted in harmful impacts such as climate change and this grabbed the attention of world leaders into prioritising sustainability. Hence, although the concept of sustainability may have been buried by the advent of the Industrial Revolution, it nonetheless emerged from its state of dormancy, in the 1970s and 1980s through the global debut of sustainable development. The year 1972 ushered in discourse on how to use our natural resources in a sustainable manner. Thus, the main question to be addressed was: How economic growth could be reconciled with ecological concerns?

3.2.1.2 The development of sustainability from 1972

The modern history of the concept of sustainability is as Adams notes, firmly entrenched in and tied to the history of international environmental law and policy. Much of this history is attributed to the year 1972, which is usually marked as the genesis of the modern chronicles of sustainability. Notable developments in the year 1972 include the report published by the Club of Rome, the UN Conference on the Human Environment that was held in Stockholm (hereinafter the Stockholm Declaration), and the UN Environment Programme (UNEP) that was established in Kenya, Nairobi.

On one hand, the Club of Rome concluded that economic growth was in conflict with ecological sustainability. On the other hand, the UN was of the belief that the two should be reconciled. The latter approach shaped international environmental law which in turn

---

85 Adams Green Development: Environment and Sustainability in the Third World 14. Also see Bowlus "Ecological Crises in Fourteenth Century Europe" 88; Crosby Ecological Imperialism 85-88.
86 Meadows et al 1972 The Limits to Growth 9-205. Also see Malviya 1996 Indian Journal of International Law 57.
87 The United Nations Declaration on the Human Environment, 11 Ilm 874 1972 (hereinafter the Stockholm Declaration. Also see Malviya 1996 Indian Journal of International Law 57.
88 United Nations General Assembly Resolution 2997, 1972, established an environmental management body, later named the United Nations Environment Program (UNEP).
89 Meadows et al 1972 The Limits to Growth 185-197.
90 Stockholm Declaration para 4 of the Preamble for instance, recognises that in "the developing countries most of the environmental problems are caused by under-development", while in "industrialised countries, environmental problems are generally related to industrialisation and technological development". Principle 4 further provides that "nature conservation... must therefore receive
had an impact on important legal principles such as sustainability and precaution. In this light, Kiss and Shelton note that international environmental law has evolved as a new field in law that developed as a result of philosophy, science, politics, ethics and economics. However, Bosselmann avers that regardless of its multidisciplinary new principles and concepts, international environmental law continued to exist as a "mere branch of public international law". Thus, international environmental law was incapable of breaking the systemic relationship between international law, economic growth and states. This means that states persistently promoted the compatibility of sustainability and economic growth. The 1970s economic growth and sustainability paradigm attracted a divide between economic growth followers and economic growth critics; a debate which raged and continued to visibly shape the sustainability debate in the 1980s and 1990s.

Simply put, this divide distinguishes the ecologist approach to sustainability from the environmental approach to sustainability. Worthy of note is that the ecologist approach to sustainability is critical of economic growth and advocates for ecological sustainability, importance in planning for economic development", while principle 9 states that "environmental deficiencies generated by the conditions of under-development and natural disasters... can be best remedied by accelerated development...". 

91 Bosselmann The Principle of Sustainability 25.
92 Kiss and Shelton International Environmental Law 11-25. Also see Sands Principles of International Environmental Law 3-17.
95 On one hand, critics of the economic growth paradigm envisaged sustainability as the alternative to economic dominance. See generally Daly "Elements of Environmental Macroeconomics" 32-46; Meadows et al 1972 The Limits to Growth 9-205; Goldsmith The Way: An Ecological World-View. On the other hand, political camps were in favour of connecting the environment i.e., sustainability with development, which is economic growth. The end promise being that environmental protection would only succeed if it was in harmony with economic prosperity. See generally Beckerman Small Is Stupid: Blowing the Whistle on the Greens; Arrow et al 1995 Ecol Econ 91-95; Bartelmus Environment, Growth and Development; Nordhaus "Economic Growth on a Planet under Siege".
96 Steurer 2001 Zeitschrift fur Umweltpolitik und Umweltrecht 537-539. Also see Bosselmann The Principle of Sustainability 26.
97 Tladi Sustainable Development in International Law 77, 89-90, 111, 156, 249; Bosselmann The Principle of Sustainability 27.
i.e. strong sustainability. The environmental approach, on the other hand, validates economic growth and accords equal importance to environmental sustainability, economic prosperity and social justice i.e. weak sustainability.

It is important to bear in mind that the term sustainability had not been used at an international level when the international community first decided to officially integrate the environment and development in 1972. The essence of sustainability can however be deduced from principles of the Stockholm Declaration. For instance, principles 3 and 5 require the non-exhaustion of renewable natural resources as well as improvement and maintenance of "the capacity of the earth to produce vital renewable resource". Furthermore, principle 13 requires states to adopt:

An integrated and co-ordinated approach to their development planning as to ensure that their development is compatible with the need to protect and improve the human environment...

The Stockholm Declaration has been described as history's "first global action plan for the environment". It recognised that there was a link between development and the

---


101 Tladi Sustainable Development in International Law 16 notes that although the Stockholm process was not the first international milestone to give sustainable development international recognition, it nonetheless laid a solid foundation for the evolution of sustainable development as a legal concept and international policy.

102 Principle 3 of the Stockholm Declaration states that "the capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved"; Principle 5 provides that: "the non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind".

103 Principle 3 of the Stockholm Declaration.

104 Malviya 1996 Indian Journal of International Law 57.
The importance of the Stockholm Declaration in the context of sustainability is its emphasis on the link between development and environmental protection. Apart from the link between development and the environment, two crucial principles of sustainability can be discerned from the Stockholm Declaration; namely the principles of intergenerational and intra-generational equity.

Although the Stockholm Declaration brought awareness to the world on the need to reconcile environmental and developmental concerns, it did not provide any guidelines on how such reconciliation was to be achieved. For Adams, reconciliation of environmental and developmental concerns in this regard were just words without substance. In the same breath, Bosselmann notes that development, as per the Stockholm Declaration, was supposed to be defined within the boundary of ecological systems so as to qualify it as sustainable.

---

105 Paragraph 4 of the Preamble of the Stockholm Declaration acknowledges that in "developing countries, most of the environmental problems are caused by under-development", whereas "in industrialised countries, environmental problems are generally related to industrialisation and technological development". Furthermore, principle 4 provides that "nature conservation ... must therefore receive importance in planning for economic development.

106 Principle 8 and 11 of the Stockholm Declaration provide that development is essential for the maintenance of a working environment.

107 Intergenerational equity is the notion that the environment must be safeguarded for the sake of present and future generations. Intergenerational equity is embodied in principle 1 of the Stockholm Declaration which, for instance provides that humans "bear a solemn responsibility to protect and improve the environment for present and future generations". Similarly, principle 2 requires humans to safeguard the earth's natural resources "for the benefit of present and future generations". For a further discussion on intergenerational equity see 3.3.1 below. Intra-generational equity on the other hand, requires equity within the present generation and also recognises the special part developing countries play in development and environmental issues. The clearest principle of the invocation of intra-generational equity is found in principle 11 which provides that the "environmental policies of all states should enhance and not adversely affect the present or future development potential of developing countries". Moreover, principle 12 states that resources "should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries". Principle 5, similarly requires that the benefits that accrue from the exploitation of natural resources be "shared by all mankind". Intra-generational equity is further discussed below at 3.3.2.


The World Conservation Strategy (hereinafter the WCS) further adds that among the rudiments for development that is sustainable "is the conservation of the living resources". To this end, one can deduce that the original meaning of sustainability is preserved. Although the Stockholm Declaration was the first global effort in environmental protection, it also paved way for subsequent influential elements that would result in the mainstreaming of sustainability into international law.

3.2.1.3 The Brundtland Commission Report

In 1984, the UN World Commission on Environment and Development (hereinafter WCED) furthered the narrative and discourse on sustainability by publishing a report, "Our Common Future" (herein titled the Brundtland Report). The Brundtland Report is a landmark document, not only because it is the first institutional support of development that is sustainable, i.e. sustainable development, but because it was endorsed by the

---


111 The World Conservation Strategy para 3.2 proceeds to lay out that: "for development to be sustainable it must take account of social and ecological factors, as well as economic ones; of the living and non-living resource base; and of the long-term as well as the short-term advantages and disadvantages of alternative actions". Noteworthy is that the World Charter for Nature (Ga Res. 37/7, Un Gaor, 37th Session, 48th Plenary Meeting, Un Doc.A/37/7) 1983 (hereinafter the World Charter for Nature) also addresses sustainability in the sense that it sets out principles "by which human conduct affecting nature is to be guided and judged". The Preamble of the World Charter for Nature also defined the conservation of nature as a requirement for using natural resource and development planning. The Preamble of the World Charter for Nature further described humanity as "part of nature" and that "every form of life is unique, warranting respect regardless of its worth to man". Such an approach reflects the need to manage natural resources so as to "achieve and maintain optimum sustainable productivity" for present and future generations. Also see World Charter for Nature paras 4 and 10(a).

112 Report of the World Commission on Environment and Development: Our Common Future. Un General Assembly Document a/42/427 1987 (hereinafter the Brundtland Report). The WCED was established in 1983 by Un General Assembly Resolution 38/161 1983. The Brundtland Report is popularly known by its chairperson’s name, Gro Harlem Brundtland, the then Norwegian Prime Minister. The WCED was tasked with i. proposing "long term environmental strategies for achieving sustainable development by the year 2000 and beyond"; ii. recommending "ways in which concern for the environment may be translated into greater co-operation among developing countries and between countries at different stages of economic and social development and lead to the achievement of common and mutually supportive objectives that take account of the interrelationships between people, resources, environment and development"; iii. Considering "ways and means by which the international community can deal more effectively with environmental concerns"; and iv. Defining "shared perceptions of long term environmental issues and the appropriate efforts needed to deal successfully with the problems of protecting the environment". See the Brundtland Report 5.
However, Bosselmann asserts that the Brundtland Report's main concern was not to endorse sustainable development, but to counter and plead against global environmental degradation and the disparities of economic and social development between developed (North) and non-developed (South) countries. Put simply, the challenge was on how states could globally reconcile the unsustainable 'over-development' of the North with the 'under-development' of the South.

It should be noted that the Brundtland Report sought to address this challenge by searching for ecological sustainability. Of importance is that the Brundtland Report denounced the "accelerating pace and expanding scale of impacts on the ecological basis of development". It further noted how developed countries' "forms of development erode the environmental resources upon which they must be based" and how environmental degradation simultaneously impairs economic development. In calling for the realignment of humankind with the environment, the Brundtland Report demands a "new ethic to guide state behaviour in the transition to sustainable development".

The Brundtland Report further noted that it would be "futile to deal with environmental problems without a broader perspective" that includes factors "underlying world poverty and international inequality". The Brundtland Report is in essence a plea for an inclusive distributive justice between the rich and the poor people living presently and those that shall be living in the future; as well as humans and nature. This political plea is summed up in the Brundtland Report's famous phrase: "sustainable development is development that meets the needs of the present" generation "without compromising the ability of future generations to meet their own needs". This description of sustainable development...
development has sparked agitative debate on whether it provides sufficient guidance on sustainability and development. In fact, the description neither adds nor detracts any meaning from the principle of sustainability. It is basically silent about sustainability's meaning and central significance.

Given sustainability's ecological core, it is not prudent to interpret sustainable development exclusively in terms of human needs. Pallemaerts criticises such an approach as being excessively anthropocentric. The Brundtland Report may be interpreted as a step towards the recognition of the social aspect of sustainable development as well as the ecological aspect of sustainable development. Tladi however states that although sustainable development has clear human needs connotations, such needs should never be met outside the ecological boundaries. Bosselmann concurs and goes on to note that the Brundtland Report seems to have overlooked this fact since it fails to tell us: How social concerns and environmental concerns are related; and whether these concerns are equally important or not? This study therefore submits that the starting point that the Brundtland Report overlooked is defining key issues of sustainable development such as: What is sustainability? What is development? How do both relate to sustainable development? Nonetheless, the Brundtland Report served as an impetus for other subsequent instruments on sustainable development.

---

123 The Brundtland Report encapsulates the concept of needs of the world's impoverished, in particular development must meet the basic human needs of the poor. This can be interpreted as the social aspect of sustainable development. See the Brundtland Report, chapter 1 para 25, 70, chapter 2 part III, chapter 7 para 4, chapter 8 para 25, chapter 12 para 25. The Brundtland Report further demands that human activities, such as social organisation and technology must not disregard environmental limitations. This could be interpreted as the ecological aspect of sustainable development. See para 3 of Overview of the Brundtland Report. Also see Bosselmann The Principle of Sustainability 30-32; Tladi Sustainable Development in International Law 19-24.
124 Tladi Sustainable Development in International Law 19-24.
125 Bosselmann The Principle of Sustainability 29-32.
3.2.1.3.1 The Rio Declaration

Following the Brundtland Report, the UN General Assembly convened the UN Conference on the Environment and Development (UNCED).\textsuperscript{127} The UNCED was convened in 1992 in Rio De Janeiro. It resulted in the adoption of the Rio instruments.\textsuperscript{128} The most relevant outcome of this conference for this thesis is the 1992 Rio Declaration on the Environment and Development (hereinafter the Rio Declaration). Boyle and Freestone\textsuperscript{129} state that although sustainable development was given currency in international policy by the Brundtland Report, it was the UNCED and the Rio instruments that plunged the principle into the mainstream narrative and discourse of international law. For Sands,\textsuperscript{130} the UNCED and the instruments adopted therein are so essential in the evolution of the principle of sustainable development because they paved way for a new phase of "international law in the field of sustainable development" from which international environmental law functions.

The Rio Declaration, as had been the case with the Stockholm Declaration aims at striking a balance between environmental concerns and development concerns.\textsuperscript{131} Various cardinal principles articulated in the Stockholm Declaration are reiterated in the Rio Declaration. However, there are significant differences between the two instruments. These differences have an effect on how sustainable development can be conceptualised. A typical case in point is the principle on the exploitation of natural resources cited in principle 2 of the Rio Declaration. Worth noting is that, while the Rio Declaration provides

\textsuperscript{127} Un General Assembly Resolution 43/196 1988.
\textsuperscript{129} Boyle and Freestone "Introduction" 3. Also see Sands Principles of International Environmental Law, Vol I 49.
\textsuperscript{130} Sands Principles of International Environmental Law, Vol I 49. Also see Boyle and Freestone "Introduction" 3
\textsuperscript{131} See for instance Principles 2, 3 and 4 of the Rio Declaration.
that the right to exploit natural resources be exercised pursuant to a state's "environmental and developmental policies", the Stockholm Declaration, conversely, accords states the "right to exploit their own resources pursuant to their own environmental policies". This thesis notes that although the Rio Declaration's inclusion of the term 'development' is subtle, it nevertheless implies that equal priority should be given to both environmental and development factors. This could possibly limit the protection given to the environment when it comes to cases of natural resource exploitation, hence diluting sustainability's focus on conserving ecological systems.

Furthermore, the difference between the Stockholm Declaration and the Rio Declaration in the context of environmental protection is heightened by the phrasing of 'responsibilities' or 'duties' in the two instruments. In respect of the use of environmental resources, the Stockholm Declaration places emphasis on 'duties' or 'responsibilities'. For instance, principle 1 declares that everyone bears "a solemn responsibility" to protect the environment. Principe 2 places a duty on everyone to "protect the environment for present and future generations". Principle 4 further recalls that human beings have "a special responsibility to safeguard" the environment. There is however no equal priority on 'duties' or 'responsibilities' towards the protection of the environment in the Rio Declaration.

For instance, principle 1 of the Rio Declaration declares that human beings "are at the centre" of sustainable development. No mention is made however, of any 'duties' or

---

133 Principle 1 of the Stockholm Declaration states that "man ... bears a solemn responsibility to protect and improve the environment for present and future generations ...".
134 Principle 2 of the Stockholm Declaration states that "the natural resources of the earth ... must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate".
135 Principle 4 of the Stockholm Declaration states that "man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat ...".
136 Principle 1 of the Rio Declaration states that "human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature".
'responsibilities'. The aforementioned analysis of the two instruments indicates that the Stockholm Declaration is, to a greater degree, inclined towards environmental concerns, whilst the Rio Declaration is inclined towards economic concerns. Thus, one can conclude that the underlying aim of the Stockholm Declaration seemingly is the constraining of economic growth for the purpose of environmental and social considerations, as well as ensuring that environmental protection and development are socially beneficial.

That is to say, the Stockholm Declaration's priority on the responsibility of states to protect the environment places greater emphasis and importance on sustainability's ecological core, unlike the Rio Declaration's 'right to exploit natural resources' which indicates its priority and focus on economic concerns and not ecological concerns. The implication of the Rio Declaration's focus on resource exploitation could erroneously mean that humanity has a right to development, even if it is at the expense of natural resources or the earth's ecological systems. Therefore, the Rio Declaration's main focus is economic development and not sustainability. Nonetheless, as stated earlier, the Rio Declaration ushered sustainable development into mainstream international law. Ten years after the Rio Declaration, the UN called for the World Summit on Sustainable Development, in

---

137 'No mention' in the context of this thesis does not mean that the text of the Rio Declaration is void of the terms 'duties' or 'responsibilities', but means that their reference is seldom and not as strongly proclaimed. For instance, principle 2 of the Rio Declaration provides that "states have ... the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction". Moreover, principle 7 provides that "... developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command".

138 The Rio Declaration is filled with text that is economic growth oriented. For instance, principle 12 warns that; "trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade". For further discussion, see Pallemaerts "International Environmental Law from Stockholm to Rio" 17-19; Tladi Sustainable Development in International Law 28-29; Tladi 2002 SAYIL 157.
Johannesburg (hereinafter the Johannesburg Declaration) which was another milestone in the development of the normative content of sustainability.  

3.2.1.3.2 The Johannesburg Declaration

The Johannesburg Declaration was convened to implement the ideas on sustainable development that had been agreed upon over the years. As Schrijver observes, the Johannesburg Declaration was not intended to bring forth any new ideas on sustainable development. Nonetheless, the Johannesburg Declaration does set its own footprint on sustainable development's normative content. The Johannesburg Declaration emphasises on bridging the gap between "the deep fault line that divides human society between the rich and the poor" on two levels. First, the Johannesburg Declaration focuses on bridging the gap between "developed and developing worlds". Second, the Johannesburg Declaration seeks, in a generic way, to bridge the gap between the rich and the poor within societies. Hence, the theme of the Johannesburg Declaration seems to be the eradication of poverty. The priority of the Johannesburg Declaration on poverty eradication is not surprising given that the Johannesburg Declaration was convened two years after the Millennium Development Goals (MDGs) were adopted.

---

140 Pallemerts 2003 Environment, Development and Sustainability 286.
141 Schrijver De Verankering En Betekenis Van Duurzame Ontwikkeling in Het Internationale Recht 38.
142 Johannesburg Declaration 2 para 12 recognises that "the deep fault line that divides human society between the rich and the poor and the ever-increasing gap between the developed and developing worlds pose a major threat to global prosperity, security and stability".
143 Johannesburg Declaration 2 para 12.
144 Johannesburg Declaration 2 para 12.
145 The MDGs are founded on the "collective responsibility to uphold the principles of dignity, equality and equity at the global level". The MDGs, in particular principle 11, require states to free more than one billion people "from abject and dehumanising conditions of extreme poverty". Principle 21 of the MDGs also accords a strong premium on environmental protection for the "benefit of present and future generations". Principle 21 provides that "we must spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities ...". See Chapter II of the Johannesburg Declaration which talks about poverty eradication. Also see United Nations, Millennium Development Goals Report 2011.
The Johannesburg Declaration presents the eradication of poverty as both an essential and objective condition of sustainable development.\textsuperscript{146} Paragraphs 11 and 13 make reference to the importance of environmental protection in respect of social and economic problems.\textsuperscript{147} Paragraph 11, for instance, states that "protecting and managing the natural resource base for economic and social development" is a requirement and objective of sustainable development. This thesis submits that this provision reflects ecological sustainability and is also helpful in developing a nuanced conceptualisation of ESD. As Tladi\textsuperscript{148} notes, the protection of the natural environment as a priority issue is "conspicuous by its absence". Thus far, this thesis has discussed some of the landmark developments in the history of sustainability. Such historical exposition was done to lay a base and foundation on which the normative content of ESD will be explored and uncovered. To uncover the normative content of ESD, a shift from sustainable development to ESD is required. To this end, the meaning and purpose of ESD will now be examined.

\subsection*{3.3 From sustainable development to ecologically sustainable development: a reappraisal}

Tladi\textsuperscript{149} asserts that the purpose of sustainable development is to make development consistent with "environmental and social considerations". However, Johnson\textsuperscript{150} notes that environmental and social issues attendant to sustainable development have been

\begin{itemize}
\item \textsuperscript{146} Johannesburg Declaration para 11.
\item \textsuperscript{147} Para 11 recognises that "poverty eradication, changing consumption and production patterns and protecting and managing the natural resource base for economic and social development are overarching objectives of and essential requirements for sustainable development". Paragraph 13 states that "the global environment continues to suffer. Loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile land, the adverse effects of climate change are already evident, natural disasters are more frequent and more devastating, and developing countries more vulnerable, and air, water and marine pollution continue to rob millions of a decent life".
\item \textsuperscript{148} Tladi \textit{Sustainable Development in International Law} 33. According to paragraph 19 of the Johannesburg Declaration, priority should be placed on inter alia communicable and chronic diseases such as HIV/AIDS, tuberculosis as well as hunger, racial hatred and malnutrition. These problems relate to underdevelopment and are very important to poor societies.
\item \textsuperscript{149} Tladi \textit{Sustainable Development in International Law} 34-35.
\item \textsuperscript{150} Johnson 2002 \textit{UN Chron 8}. Also see the Johannesburg Declaration para 11.
\end{itemize}
overwhelmed by economic considerations. Glasby\textsuperscript{151} therefore notes that a shift from the "business as usual" paradigm is required so as to effectively provide for the integration of social and environmental concerns. A question then arises: Where should this paradigm shift lead humanity?

Without digressing from the current discussion, this thesis suggests that this paradigm shift requires humanity to, in its quest for economic growth, constrain its exploitation of natural resources. This means that activities linked to economic growth ought to be limited so as to conserve the ecological systems upon which human survival depends. Put differently, economic growth activities ought to be constrained for the purpose of conserving the earth's natural resource base for the benefit of present and future generations. The injunction to protect and conserve the natural resource base for the benefit of present and future generations also means that the paradigm shift mentioned above ought to cater for issues such as poverty and well-being. In other words, the paradigm shift envisaged herein ought to lead humanity to a situation where the earth's natural resource base is protected while poverty is concurrently eradicated as part of ecological sustainability.

It is noteworthy that sustainable development's emphasis on economic growth can be extrapolated from the Brundtland Report,\textsuperscript{152} which as Glasby\textsuperscript{153} notes, not only promotes economic growth, but further promotes a shift in the quality of economic growth. Thus, unlike the "business as usual" structure, economic activity is undertaken not for the benefit of growing economies, but for the purpose of improving social and environmental concerns.\textsuperscript{154} This thesis notes that such undertaking reflects that the underlying purpose

\textsuperscript{151} Glasby 2002. \textit{Environment, Development and Sustainability} 341 states that "creating a truly sustainable society should be contrasted with the business-as-usual scenario which will inevitably result in a seriously degraded planet by the end of the 21st century". Also see Taylor 2000 \textit{UCLA J Envtl L & Pol'y} 247 who posits of the climate change regime: "... the prevalent value is one of preserving current forms of economic prosperity, maintaining the economic status quo- business-as-usual".

\textsuperscript{152} The Brundtland Report 8, 31.

\textsuperscript{153} Glasby 2002. \textit{Environment, Development and Sustainability} 335.

\textsuperscript{154} The Brundtland Report 43, para 27, para 8.
of the Brundtland Report could be ESD. Tladi\textsuperscript{155} puts it clearly, the Brundtland Report's formulation of sustainable development means that "economic growth must be made subject to both environment and social needs".

The Brundtland Report, also stresses on attending to the needs of the poor.\textsuperscript{156} The needs of the poor also take centre stage in the Johannesburg Declaration.\textsuperscript{157} Menstrum,\textsuperscript{158} in this regard, states that despite not spelling out the means of poverty reduction, the Johannesburg Declaration nonetheless places poverty reduction as an objective and essential requirement of sustainable development. A difference is however noted with the Rio Declaration which seemingly promoted the three values of sustainable development (environmental protection, social concerns and economic growth).\textsuperscript{159} Although environmental and social concerns are considered, economic growth concerns seem to occupy a greater role in the Rio Declaration than in the other key instruments mentioned herein.\textsuperscript{160}

Furthermore and equally important, instruments from civil society, albeit not definitive, should not be disregarded.\textsuperscript{161} Two civil society instruments are particularly instructive in this regard. The ILA New Delhi Principles are the first.\textsuperscript{162} A cursory observation of principles 1, 2, 3 and 4 of the ILA New Delhi Principles reveals that their main concerns

\begin{itemize}
\item \textsuperscript{155} Tladi \textit{Sustainable Development in International Law} 35.
\item \textsuperscript{156} The oft-cited notion from the Brundtland Report that sustainable development addresses the "concept of needs, in particular the essential needs of the world's poor" speaks to this very point. See Brundtland Report 43.
\item \textsuperscript{157} The Johannesburg Declaration 2, para 12.
\item \textsuperscript{158} Mestrum 2003 \textit{Environment, Development and sustainability} 41.
\item \textsuperscript{159} Fuentes 2002 \textit{Int Environ Agreements} 110, 111; Bosselmann 2006 \textit{SAJELP} 39-49; Tladi \textit{Sustainable Development in International Law} 35, 36; Tladi 2004 \textit{SAJELP} 17, 28.
\item \textsuperscript{160} Although principle 5, the main provision on poverty eradication in the Rio Declaration, considers poverty eradication as "an indispensable requirement" of sustainable development, it however does not state it as the objective of the instrument unlike the Johannesburg Declaration and the Brundtland Report. See Johannesburg Declaration 2, para 12 and the Brundtland Report 43, paras 8, 27.
\item \textsuperscript{161} See the dissenting opinion of Judge Wynngaert in the \textit{Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo V Belgium)}, \textit{Icj}, 2002 para 27 where the court endorsed the use of opinions from civil society in determining the rules of customary international law.
\item \textsuperscript{162} ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development adopted by the International Law Association in 2002, reprinted in Schrijver \textit{De Verankering En Betekenis Van Duurzame Ontwikkeling in Het Internationale Recht} 86.
\end{itemize}
are environmental protection and poverty eradication.\textsuperscript{163} Although economic growth concerns are provided for, they are not given primacy.\textsuperscript{164} The second civil society instrument is the Earth Charter. The Earth Charter requires the respect and protection of the earth's ecological integrity.\textsuperscript{165} It also requires that poverty be eradicated as an ethical, environmental and social imperative.\textsuperscript{166} The Earth Charter, accordingly requires economic activity to promote environmental and social development and be subject to both these concerns.\textsuperscript{167}

In considering civil society instruments such as the Earth Charter, it can be deduced that sustainable development requires the application of the principle of sustainability.\textsuperscript{168} In other words, sustainable development only finds meaning and value if it is "related to the core idea of ecological sustainability".\textsuperscript{169} As Bosselmann\textsuperscript{170} puts it:

\begin{quote}
The notion of sustainable development, if words and their history have any meaning, is quite clear. It calls for development based on ecological sustainability in order to meet the needs of people living today and in the future. Understood in this way, the concept provides content and direction. It can be used in society and enforced through law. The legal quality of the concept of sustainable development firms up once its core idea is being realised.
\end{quote}

\begin{enumerate}
\item See for instance principles 1 "The Duty of States to Ensure Sustainable Use of Natural Resources", Principle 2 "The Principle of Equity and Poverty Eradication", principle 3 "The Principle of Common but Differentiated Responsibilities" and principle 4 "The Precautionary Approach to Human Health, Natural Resources and Ecosystems".
\item Economic concerns are reflected in principle 7 "The Principle of Integration and Interrelationship, in Particular in relation to human rights and social, economic, environmental objectives”.
\item Principle II of the Earth Charter.
\item Principle III of the Earth Charter.
\item Writing on the Earth Charter, Tladi 2004 SAJELP 17, 28 notes that: "it is perhaps not by accident that the Earth Charter, while containing principles calling for respect for the ecology and recognition of the intrinsic value of nature and eradication of poverty as an ethical, social, and environmental imperative, does not, similarly call for the further growth of economies. More importantly, the Earth Charter does not seek to limit its ecological and social aims by economic growth". The author goes on to state that "what the Earth Charter does do is to require respect for nature in all its diversity, care for the poor of the world and a commitment to human rights". Also see Tladi \textit{Sustainable Development in International Law} 39.
\item Harding 2006 \textit{Desalination} 229, 233; Holden, Linnerud and Banister 2014 \textit{Glob Environ Change} 131; Johnston \textit{et al} 2007 \textit{Environmental science and pollution research international} 61, 62.
\item Bosselmann \textit{The Principle of Sustainability} 11. Also see Harding 2006 \textit{Desalination} 229, 233-235.
\item Bosse\l lmann \textit{The Principle of Sustainability} 11. Also see Tladi \textit{Sustainable Development in International Law} 110-112.
\end{enumerate}
The relationship between sustainable development and concepts such as ecological sustainability is therefore crucial. Bosselmann\textsuperscript{171} avers that the concept of sustainable development equals 'ecologically sustainable development' and can be considered in the following manner:

no economic prosperity without social justice and no social justice without economic prosperity, and both within the limits of ecological sustainability.

Ecological sustainability has been held to denote 'ecologically' sustainable development. Ecological sustainability has been described as the duty to preserve and protect the "integrity and continued existence of the Earth's ecological systems".\textsuperscript{172} Of note is that ESD is peculiarly an Australian term that can be traced to a government-backed debate on sustainable development in 1990.\textsuperscript{173} Australia's National Strategy for Ecologically Sustainable Development defines ESD as "development that improves the total quality of life, both now and in the future" in a manner "that maintains the ecological processes on which life depends".\textsuperscript{174} Although peculiarly an Australian term, ESD has been adopted in the constitution of countries such as South Africa. That is, like Australia, South Africa has moved from the oft-quoted sustainable development to 'ecologically' sustainable development. As will be argued below, section 24(b) (iii) of the Constitution notably recognises that environmental protection can be achieved through 'ecologically' sustainable development and not just sustainable development.

Therefore, in order to fully understand the framework within which ESD could work, one must comprehend the manner in which the principle is conceptualised. This thesis attempts to achieve this by offering a reconceptualised understanding of 'sustainable

\textsuperscript{171} Bosselmann \textit{The Principle of Sustainability} 53.
\textsuperscript{172} Bosselmann \textit{The Principle of Sustainability} 53.
\textsuperscript{173} In 1990, the Common Wealth Government released the June 1990 Commonwealth discussion paper on ecologically sustainable development which defined ESD as "using, conserving, and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased". See Australia 1990 \textit{Ecologically Sustainable Development: A Commonwealth Discussion Paper}; Emmery 1994 \textit{An Overview of Ecologically Sustainable Development Processes in Australia 1990-1992} 1-3.
development' by refocusing on the ESD adjective, 'ecologically'. The conceptualisation of ESD will be done as a means of unearthing the normative content of ESD. The *terminus a quo* is therefore how ESD can be developed and properly conceptualised in line with the international instruments mentioned above. In this light, it should be noted that the Brundtland Report recognises two key aspects that can be useful in understanding ESD. The first pertains to the "essential needs of the poor, to which an overriding priority should be given". The second recognises the "idea of limitation... on the environment's ability to meet present and future needs". Citing Schrijver, Tladi states that the first aspect relates to "equity within generations". The second aspect implies "equity between generations". Thus, intergenerational equity and intra-generational equity can be extrapolated from the Brundtland Report. This thesis concedes that the principles of intergenerational equity, intra-generational equity and integration are key concepts that form the foundation for the conceptualisation of ESD. The following is a discussion of these key principles.

### 3.3.1 Intergenerational equity

The principle of intergenerational equity is enshrined in the Stockholm Declaration's recognition of the obligation to safeguard the earth and environment against degradation "for the benefit of present and future generations through careful planning or

---

175 The Brundtland Report 43.  
176 The Brundtland Report 43.  
177 Schrijver *De Verankering En Betekenis Van Duurzame Ontwikkeling in Het Internationale Recht* 1, 5 who notes that implicit in the definition of the Brundtland Report is the notion that the "*natuurlijke hulpbronne mogen niet door een kleine groep mensen (in industrielanden) worden opgesoupeerd*" ("natural resources must not be consumed by a small group of people (in industrialised countries)").  
178 Tladi *Sustainable Development in International Law* 40.  
179 Schrijver *De Verankering En Betekenis Van Duurzame Ontwikkeling in Het Internationale Recht* 6 as cited in Tladi *Sustainable Development in International Law* 40 contends that the definition of sustainable development in the Brundtland Report further implies that "*de huidige generatie toekomstige generaties van mensen niet mag opschepen met onherstelbare schade aan milieu, gezondheid of economie *...*" ("the present generation may not disadvantage future generations with irreversible damage to the environment, state of the economy *..."). Also see Tladi *Sustainable Development in International Law* 40.
Moreover, intergenerational equity is also arguably symbolised in the most comprehensive manner through the Brundtland Report. That is, "development that meets the needs of the present" generation "without compromising the ability of future generations to meet their own needs". The principle of intergenerational equity has thus gained recognition in the domain of international law. Even critics of the theory have conceded that the principle has significantly influenced the development of international environmental jurisprudence.

Apart from international instruments, intergenerational equity is also recognised in section 24 of the Constitution which provides for the right to have the environment protected "for the benefit of present and future generations". This means that the present generation ought to ensure that productivity, diversity and health of the environment is preserved or improved for the 'benefit of present and future generations'. Moreover, intergenerational equity has also been endorsed by a number of notable scholars. Weiss, for instance, describes the principle of intergenerational equity as one that suggests that the present generation owes future generations the duty to preserve

---

180 Principle 2 of the Stockholm Declaration. Needless to say, the principle of intergenerational equity predates the Stockholm Declaration. It can be extrapolated from the preamble of the International Convention on the Regulation of Whaling 161 Unts 72, 62 Stat. 1716 1946 which recognises "interests of the states of the world in safeguarding for future generations the great nature resources represented by the whale stocks".

181 The Brundtland Report 43.

182 Brown Weiss 1984 Ecology LQ 540 notes that intergenerational equity is an obligatio erga omnes. It has been incorporated, either expressly or implicitly, into various international environmental instruments and policy setting documents such as Principle 2 of the Stockholm Declaration; the Brundtland Report 33, 43; Principle 3 of the Rio Declaration; article 3(1) of the United Nations Framework Convention on Climate Change 31 Ilm 851 1992.

183 D'Amato 1990 The American Journal of International Law 190.

184 Section 24(b) (iii) of the Constitution.

185 Weiss In Fairness to Future Generations 2, although a number of suggestions expressed in this book were developed earlier in Brown Weiss 1984 Ecology LQ 495-582, a seminal contribution to understanding intergeneration equity. Also see Minors Oposa V Secretary of the Department of Environmental and Natural Resources 33 Ilm 173 1994 8 10, 16 wherein the applicants averred that the present and future Filipinos had a right to a balanced ecology. The court concluded that the applicants could sue not only on their behalf, but also on behalf of future generations.
the earth and leave it in no less a condition than they found it. Notably, the main thrust of Weiss's assertion is that:

Each generation receives a natural and cultural legacy in trust from previous generations and holds it in trust for future generations. This relationship imposes upon each generation certain planetary obligations to conserve the natural and cultural resource base for future generations.\(^{186}\)

Intergenerational equity acknowledges that present day developmental activities, particularly economic activities, could pose a burden to future generations.\(^{187}\) In other words, intergenerational equity is rooted in the notion that developmental activities strain natural resources at a greater rate than that which the natural resources can replenish themselves.\(^{188}\) If left to continue unabated, future generations would be striped of these life sustaining natural resources.\(^{189}\)

In other words, if developmental activities are unrestrained, future generations will be left without life sustaining natural resources, thereby defeating the purpose of ecological sustainability. Developmental activities should therefore be conducted within ecological limits. That is to say, in contemplating whether a certain developmental activity is within ecological bounds, humanity ought to ask the following questions: Whether the said activity will negatively impact the environment, (and the extent to which it would)? Whether the natural resource(s) being used can actually be replenished, (as opposed to window dressed replenishment through tick box fashioned Environmental Impact Assessments (hereinafter EIA))? And whether the particular developmental activity will not leave the environment in a worse off state than it already was (actual scientific specificities)? The purpose of engaging such questions is to ensure that future generations find an environment that is habitable. This is the essence of ESD.

\(^{186}\) Brown Weiss 1984 *Ecology LQ* 495-582; Weiss *In Fairness to Future Generations* 2.
\(^{187}\) Brown Weiss 1984 *Ecology LQ* 540; Weiss *In Fairness to Future Generations* 2; Tladi *Sustainable Development in International Law* 42.
\(^{188}\) The Brundtland Report 13. Also see Tladi *Sustainable Development in International Law* 42.
\(^{189}\) The Brundtland Report 13.
The Brundtland Report acknowledged that while "nature is bountiful ... it is also fragile", hence certain thresholds "that cannot be crossed without endangering the basic integrity of the system" and "the survival of life on earth" should be put in place. Moreover, the Rio instruments provide reference to the principle of intergenerational equity. The Rio Declaration, for instance, requires that the "right to development" be achieved so that the "developmental and environmental needs of the present and future generations" are equitably met. Intergenerational equity has been captured further in multilateral environmental agreements. For example, the United Nations Framework Convention on Climate Change (herein the Climate Change Convention) invokes the principle of intergenerational equity in article 3.

By having the purpose of providing equity for future generations, the principle of intergenerational equity, as Tladi argues, imbues "a forward-looking approach" into the sustainability and development discourse. In this respect, a close relationship is created between the principle of intergenerational equity and the precautionary principle, which also adopts a forward-looking approach. The precautionary principle has been

---

190 The Brundtland Report 33 has to this effect adopted the WCED's proposed legal principles on intergenerational equity, inter alia that "states shall conserve and use the environment and natural resources for the benefit of present and future generations". See principle 2 of the proposed Legal Principles for Environmental Protection and Sustainable Development adopted by the WCED Experts Group on Environmental Law. Also see Annex 1 of the Brundtland Report 348 for a summary.


192 Although the Rio Declaration in principle 3 captures the character of the principle of intergenerational equity i.e. requiring "the right to development" to "equitably meet developmental and environmental needs of present and future generations", it nonetheless is different from the Stockholm Declaration and the Brundtland Report's formulation. Tladi Sustainable Development in International Law 42 succinctly captures it by stating that "principle 3 as formulated, may be interpreted as placing the 'the right to development' as the central concern, and not the environment, as in previous formulations. Nevertheless, the principle further illustrates the centrality of the principle of intergenerational equity" in the sustainability and development discourse.

193 Article 3 of the United Nations Framework Convention on Climate Change 31 Ilm 851 1992 is titled 'Principles'. It provides that the "parties should protect the climate system for the benefit of present and future generations of humankind".

194 Tladi Sustainable Development in International Law 43.

195 Freestone and Hey "The Origin and Development of the Precautionary Principle" 3-5; Cameron and Abouchar "The Status of the Precautionary Principle International Law" 29; Freestone "Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks
incorporated into virtually all recent treaties and policy documents on the environment. Freestone and Hey note that the precautionary principle prevents environmental damage. However, the precautionary principle extends further and goes beyond preventative action. That is to say: although preventative action is applicable to known or foreseeable environmental damage, the precautionary principle requires "action even before there is full scientific evidence of the environmental harm". A classic formulation of the precautionary principle can be found in principle 15 of the Rio Declaration which establishes that:

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

In other words, the precautionary principle requires states to cease all developmental activity that could pose potential irreversible and long-lasting environmental harm, even where scientific facts concerning the environmental harm is inconclusive. Preventing the potential irreversible harm on the environment is also the purpose of ecological

---


197 Freestone and Hey "The Origin and Development of the Precautionary Principle" 3-5; Freestone "Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement" 287-289.

198 Cameron and Abouchar "The Status of the Precautionary Principle International Law" 29-33; Freestone "Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement" 287-289.

199 Principle 15 of the Rio Declaration.
proportionality, a process employed to achieve ecological integrity, an outcome of ESD, which is discussed in the Fourth Chapter of this thesis.

The relationship between ESD and the precautionary principle can be discerned with ease. Freestone\textsuperscript{200} asserts that the precautionary principle "occupies a central place in any realistic strategy" concerning development that is sustainable. ESD demands that humans be proactive not only in rehabilitating the harmed environment, but also in preventing the potential irreversible degradation of the environment.\textsuperscript{201} Hence, the precautionary principle requires states to implement measures to avert environmental harm when there is an elevated potential of environmental damage from a particular economic activity.\textsuperscript{202} The precautionary principle further requires states to implement measures that avert environmental damage in cases where an economic activity could result in irreversible or long-lasting damage to the environment.\textsuperscript{203} These precautionary measures ought to be implemented even where scientific knowledge concerning environmental damage is inconclusive. Hence, like ESD, the precautionary principle aims at protecting the environment for future generations. Thus, applying the precautionary principle, then becomes a process necessary for the realisation of ESD. To this end, the 1990, Bergen Ministerial Declaration, stipulates that in order to realise ESD:

\begin{quote}
    policies must be based on the precautionary principle. Environmental measures must anticipate, prevent, and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as reason for postponing measures to prevent environmental degradation.\textsuperscript{204}
\end{quote}

\begin{itemize}
\item \textsuperscript{200} Freestone "Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement" 287-290. Also see Trouwborst \textit{Precautionary Rights and Duties of States} 33.
\item \textsuperscript{201} Nollkaemper "What You Risk Reveals What You Value and Other Dilemmas Encountered in the Legal Assaults on Risk" 73-82.
\item \textsuperscript{202} Nollkaemper "What You Risk Reveals What You Value and Other Dilemmas Encountered in the Legal Assaults on Risk" 73-82.
\item \textsuperscript{203} Nollkaemper "What You Risk Reveals What You Value and Other Dilemmas Encountered in the Legal Assaults on Risk" 73-82.
\item \textsuperscript{204} Bergen Ministerial Declaration on Sustainable Development in the Ece Region, Un Doc. A/Conf 1990 para 7.
\end{itemize}
However, the Rio Declaration's formulation of the precautionary principle is somewhat different. In terms of the Rio Declaration, the obligation to take precautionary measures is constrained by cost effectiveness, and economic factors.\textsuperscript{205} Therefore one realises once again an uncomfortable compromise between environmental imperatives and economic concerns when it comes to environmental protection.\textsuperscript{206} The Rio Declaration's formulation of the precautionary principle lessens the importance placed on ESD. Thus, priority is moved away from environmental protection to conserving economies and their financial capability. Environmental protection only appears as an afterthought after economic and cost-effective factors have been given supremacy.

Of importance however is that intergenerational equity is not immune to criticism. The principal criticism against intergenerational equity stems from an ecocentric standpoint. Burchill and Linklater\textsuperscript{207} note that ecocentrism requires that the environment be protected for its own sake and not just for the interest of human beings. From an ecocentric standpoint, "intergenerational equity and an anthropocentric approach is flawed, ethically", and is therefore not sufficient to provide effective protection to the environment.\textsuperscript{208}

Ecocentrists argue that the motive for protecting the earth and environment must not be based on the duty humans owe to future generations, but rather on the duty humans owe to nature regardless of its benefit to humans.\textsuperscript{209} Fervent ecocentrists D'Amato and Chopra\textsuperscript{210} argue that an anthropocentric approach to environmental protection will result in less protection of the environment. Their argument is based on the assumption that

\begin{itemize}
\item \textsuperscript{205} This can be deduced from principle 15 of the Rio Declaration which states that: "in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities."
\item \textsuperscript{206} See Tladi \textit{Sustainable Development in International Law} 45.
\item \textsuperscript{207} Burchill and Linklater \textit{Theories of International Relations} 254. Also see D'amato and Chopra 1991 \textit{Am J Int Law} 21.
\item \textsuperscript{208} D'amato and Chopra 1991 \textit{Am J Int Law} 21, 23; D'Amato 1990 \textit{The American Journal of International Law} 191-195; Burchill and Linklater \textit{Theories of International Relations} 254.
\item \textsuperscript{209} D'amato and Chopra 1991 \textit{Am J Int Law} 23.
\item \textsuperscript{210} D'amato and Chopra 1991 \textit{Am J Int Law} 21, 23. Also see Gillespie \textit{International Environmental Law, Policy, and Ethics} 22; Burchill and Linklater \textit{Theories of International Relations} 254.
\end{itemize}
intergenerational equity, as an anthropocentric means of environmental protection, will tolerate the destruction of any environmental species that is not of value to present or future human beings.\textsuperscript{211} This thesis accepts the validity of this argument and proceeds to note that ESD requires intergenerational equity to recognise that future generations have the autonomy to determine what their needs will be. The result being that the present generation should conserve the environment in its entirety, whether beneficial to humanity or not, such that the natural resources available to future generations are not limited. This is consistent with the term 'ecologically' sustainable development.

Therefore, a proper comprehension of intergenerational equity demands that humans protect and not destroy all natural species, be it for the benefit of the present generation or not. To this end, future generations are able to meet their own needs, inclusive of the needs the present generation did not foresee. Thus, this thesis notes that intergenerational equity promotes humanity's duty to protect the environment as part of ESD. Intergenerational equity is therefore essential to promoting ESD since it accepts the need for development within 'ecological' bounds, as opposed to anthropocentric needs.

\textbf{3.3.2 Intra-generational equity}

The principle of intra-generational equity calls for equity within generations.\textsuperscript{212} It is mainly focused on the distribution of benefits and costs of development activities and environmental protection respectively.\textsuperscript{213} As Franck\textsuperscript{214} notes, intra-generational equity is primarily centred on distributive justice, "a prerequisite for a fair system of international law". Intra-generational equity in this respect could also overlap to encompass issues of environmental justice, in particular, the environmentalism of the poor.\textsuperscript{215} In furthering
environmental justice, 'environmentalism of the poor' also known as livelihood ecology or liberation ecology also contests the uneven distribution of environmental goods and burdens which result from economic growth.\textsuperscript{216} Environmentalism of the poor is distinct from the older environmentalism current (a movement which seeks to preserve nature without any human interference) as well as the more modern mainstream environmentalism current (which seeks eco-efficiency and ecological modernisation).\textsuperscript{217}

Environmentalism of the poor has become a "powerful current of environmentalism" and a strong force to achieving ESD.\textsuperscript{218} It has been included in a number of domestic legal frameworks as 'environmental justice'. South Africa's main environmental legislation, NEMA, incorporates environmental justice in section 2(4) (c).\textsuperscript{219} Writing on intra-generational equity in the South African context, Field\textsuperscript{220} contends that development that is sustainable entails the:

\begin{quote}
Moral choice to pursue equity in the light of a certain consciousness of the linkages between human and natural systems in the context of past and continuing unsustainable practices. [Thus], equity 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.
\end{quote}

\begin{flushright}
\textsuperscript{216} Martinez-Alier \textit{The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation} 10; Martinez-Alier 2014 \textit{Geoforum} 239-241; Anguelovski and Alier 2014 \textit{Ecol Econ} 167, 168.
\textsuperscript{217} Martinez-Alier \textit{The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation} 1-5; Martinez-Alier 2014 \textit{Geoforum} 239-241; Anguelovski and Alier 2014 \textit{Ecol Econ} 167, 168.
\textsuperscript{218} Anguelovski and Alier 2014 \textit{Ecol Econ} 167-170; Guha and Martinez-Alier "The Environmentalism of the Poor" 297-300; Guha and Alier \textit{Varieties of Environmentalism: Essays North and South} 3-21.
\textsuperscript{219} See section 2(4) (c) of NEMA states that "sustainable development must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons".
\textsuperscript{220} Field 2006 \textit{SALJ} 417.
\end{flushright}
This means that equity as part of the ecological sustainability narrative and discourse requires the pursuit of environmental justice both within the present generation, and future generations. Environmental justice, an alternative term to environmentalism of the poor is therefore a pivotal force to ensuring the conservation of the earth's ecological systems. Moreover, it should be noted that the environmentalism of the poor is evident through ecological conflicts, that involve claims of social justice and the struggle of impoverished communities against the state or private entities that are a threat to their cultural autonomy, health and livelihood. The environmentalism of the poor current is conceived from the resistance of the poor against the disproportionate use of natural resources and services by the wealthy and powerful. Ordinary citizens embark on movements to right the wrongs levelled on the water, air and land around them.

The environmentalism of the poor current contradicts the Brundtland Report which states that the poor contribute to environmental damage. In Davey's words, "the poor are not the problem, they are the solution". Therefore, by addressing the discrepancies caused by economic development on the environment, environmentalism of the poor promotes sustainability by requiring economic growth to be compatible with ecological sustainability. In other words, environmentalism of the poor promotes ESD by requiring states and private entities to prioritise environmental protection before development. By giving priority to ESD, the environmentalism of the poor seeks to ensure that the present generation's developmental activity does not prejudice or impoverish the poor. Therefore,

---

221 Guha and Martínez-Alier "The Environmentalism of the Poor" 297-300; Guha and Alier Varieties of Environmentalism: Essays North and South 3-21.

222 Anguelovski and Alier 2014 Ecol Econ 167-170; Guha and Martínez-Alier "The Environmentalism of the Poor" 297-301; Guha and Alier Varieties of Environmentalism: Essays North and South 3-21.

223 Examples include the Himalayas India Chipko movement in the 1970s and 1980s; the Chiko Mendes movement of the Seringueiros. For a discussion of the different movements see Martínez-Alier The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation 100-152; Guha and Martínez-Alier "The Environmentalism of the Poor" 297-314; Shiva and Bandyopadhayay 1986 Mt Res Dev 133-142.

224 The Brundtland Report para 8 states that: "poverty is a major cause and effect of global environmental problems". Also see foreword and paras 21, 27 of the Brundtland Report.

225 Davey 2009 Journal of Administration & Governance 2.

226 Martínez-Alier The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation 10.
if economic growth activities are pursued in line with ecological integrity, ESD is preserved and the environmentalism of the poor is addressed since ESD is also concerned with the equal distribution of the benefits of natural resources for present and future generations. The burdens that accrue as a result of the exploitation of natural resources should not only be left to the poor of the society but should be equitably distributed to everyone, hence the need for environmental justice. Environmental justice is discussed further in the Fourth Chapter of this thesis as an outcome of ESD.

The utility of intra-generational equity is based on the obligation to protect the environment and the recognition that developing countries have a justifiable right to development. Thus, the effort towards achieving ESD requires a consideration of the perilous developmental situation of non-developed countries. At the core of the principle of intra-generational equity can be found a two-fold recognition. First, developed countries are better equipped with financial means to foster environmental protection. Second, the primary environmental problems the world is facing came as a result of industrialisation activities that benefited developed states.

Intra-generational equity may be applied in various ways. It could imply different or fewer obligations for developing countries in the implementation of environmental policies and programmes. Furthermore, intra-generational equity may be used as a means to delay compliance with obligations. Intra-generational equity could also require the transfer

---

227 Tladi Sustainable Development in International Law 48.
228 Fuentes 2002 Int Environ Agreements 109, 122; Tladi Sustainable Development in International Law 48.
229 Fuentes 2002 Int Environ Agreements 109, 122; Tladi Sustainable Development in International Law 48.
230 See for instance articles 3 and 12 of the Unfccc Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 (hereinafter the UNFCC Kyoto Protocol) which, while imposing the commitment to reduce emissions on developed countries, does not provide for any such stringent commitments for developing countries.
231 See for instance, article 5 of the Montreal Protocol on Substances That Deplete the Ozone Layer 1987 (hereinafter the Montreal Protocol) which entitles developing countries a ten year delay in complying with control measures enumerated in article 2A-2E.
of technology or funds with the objective of implementing environmental programmes.\textsuperscript{232}

All these variations have a common element to the effect that developed countries are obligated to finance developing countries in their efforts towards environmental protection with special emphasis on the protection of the global environment. The principle of intra-generational equity is as Pearson\textsuperscript{233} notes, the distributional aspect of the Brundtland Report's interpretation of the relationship between sustainability and development.

Furthermore, Fuentes\textsuperscript{234} states that intra-generational equity is in international environmental law entrenched in the 'common but differentiated responsibilities' principle (hereinafter the CBDR principle). The rationale of the CBDR principle is reminiscent of ancient principles of justice such as "to each according to his ability", "to each according to need" and "to each according to his capacity".\textsuperscript{235} This is perhaps why many international environmental instruments recognise the CBDR principle. The Stockholm Declaration, for instance, recognises that the remedy for environmental deficiencies is "accelerated development through the transfer of substantial" amounts of technological and financial assistance.\textsuperscript{236} The Rio Declaration also invokes the CBDR principle in principles 5, 6 and 7.\textsuperscript{237} The Johannesburg Declaration also encapsulates the CBDR principle, though in a

\textsuperscript{232} See for instance article 20 of the Convention on Biological Diversity which requires developed states to "provide new and additional financial resources" that enable developing states "to meet their agreed full incremental costs" with regard to the implementation of "measures which fulfil the obligations of the Convention ... ".

\textsuperscript{233} Pearson \textit{Economics and the Global Environment} 469.

\textsuperscript{234} Fuentes 2002 \textit{Int Environ Agreements} 109, 122.

\textsuperscript{235} Franck \textit{Fairness in International Law and Institutions} 13.

\textsuperscript{236} See Principle 5 and 9 of the Stockholm Declaration.

\textsuperscript{237} Principle 5 requires \textit{inter alia} states to co-operate so as to decrease the discrepancies in the standards of living. Principle 6 states that the "special situation and needs of developing countries... shall be given special priority". The most compelling provision in this respect is principle 7 which provides that "states shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command". In this light, Mickelson 2000 \textit{Yearb Int Environ Law} 70 states that "what is striking about the principle of common but differentiated responsibilities is that depending on
more forward-looking and conversational tone.\textsuperscript{238} There is a minute difference between the manner in which the Rio Declaration and the Johannesburg Declaration formulate the CBDR principle. While the Rio Declaration explicitly places responsibility on developed states,\textsuperscript{239} the Johannesburg Declaration detracts from the obligation by directing the call to 'we'.\textsuperscript{240} This could be academic given that the Johannesburg Declaration was not intended to change or establish new principles on issues of sustainability and development. Nonetheless, while the Rio Declaration's formulation of the CBDR principle differs from that of the Johannesburg Declaration, the implications remain unchanged. That is to say, developed countries ought to bear the lion-share of obligations towards efforts to achieve the CBDR principle. The CBDR principle is, thus, important to achieving ESD because it requires developed states to assist developing states in their efforts towards environmental protection through sustaining the earth's natural resources.

\begin{footnotesize}
the perspective brought to bear on it, it can be seen to reflect totally different ways of thinking about the respective roles of South and North in addressing environmental degradation. On the one hand, it can simply reflect a pragmatic acceptance of, and response to, the fact of differing levels of financial and technological resources available to countries in different economic circumstances. On the other hand, it can be said to reflect an acknowledgment of the historic, moral and legal responsibility of the North to shoulder the burdens of environmental protection, just as it has enjoyed the benefits of economic and industrial development largely unconstrained by environmental constraints". In analysing Mickelson's text above, Tladi \textit{Sustainable Development in International Law} 50-51 notes that "the former view implies that common but differentiated responsibility, as a manifestation of intra-generational equity, is accepted in international environmental law because the North has the 'ability to pay'. The latter view implies that common but differentiated responsibility is justified because the North has the 'responsibility to pay' on account of the disproportionate share of benefits received from centuries of unsustainable development. Whatever the underlying rationale put forward for its existence, the principle of common but differentiated responsibility, as a reflection of intra-generational equity, is a firmly-entrenched" aspect of ensuring development that is sustainable. Also see Stone 2004 \textit{Am J Int Law Contemp Probl} 276, 290.

\textsuperscript{238} Johannesburg Declaration para 14 states that "the benefits and costs of globalisation are unevenly distributed, with developing countries facing special difficulties in meeting this challenge" and para 15 which provides that "we risk the entrenchment of these global disparities and unless we act in a manner that fundamentally changes their lives, the poor of the world may lose confidence in their representatives".

\textsuperscript{239} See principle 7 of the Rio Declaration.

\textsuperscript{240} See Johannesburg Declaration para 14, 15.
\end{footnotesize}
In addition to being based on distributional justice, the CBDR principle is in accordance with Franck's *maximin* principle.\textsuperscript{241} In terms of the *maximin* principle, the inequitable burdens placed on the rich in contrast to the poor is legitimate as these provide "expectations of the least fortunate group" in the global society.\textsuperscript{242} Despite the CBDR principle's intended benefit for the poor states, it also, as an environmental approach, accords benefit for the global world through improving the environment.\textsuperscript{243} In this light, the purpose of the CBDR principle, while mindful of the needs of the poor states, has an environmental perspective as well. By pursuing distributional justice and improving the environment, the CBDR principle, in turn, functions as a means of environmental protection for the benefit of, not only, the present generation but for the benefit of future generations as well. Hence, the CBDR principle in this light reflects ESD.

The CBDR principle's function in protecting the environment for the present and future generations is an illustration of how intra-generational equity can incorporate intergenerational equity. As Weiss\textsuperscript{244} propounds, intra-generational equity has an intergenerational equity dimension, in that if intergenerational equity did not incorporate intra-generational equity, the result would be that a generation could distribute the resources to some societies and distribute the burdens of safeguarding such resources to different societies, and still declare to have complied with their intergenerational obligations. In other words, the present generation's intergenerational equity obligation goes beyond preserving the earth's natural resources for the benefit of future generations. Thus, the present generation's intergenerational equity obligation also entrenches the need to ensure that the earth's natural resources and burdens of safeguarding such resources are distributed equally to all societies. Should the earth's

\textsuperscript{241} In terms of the *maximin* principle, inequality in the distribution of benefits and burdens "is only justifiable if it narrows, or does not widen, the existing inequality". See Franck *Fairness in International Law and Institutions* 18.

\textsuperscript{242} Franck *Fairness in International Law and Institutions* 18-19.

\textsuperscript{243} Franck *Fairness in International Law and Institutions* 18-19. Also see Tladi *Sustainable Development in International Law* 51.

\textsuperscript{244} Weiss 1990 *The American Journal of International Law* 201.
natural resources and burdens of safeguarding such resources be unequally distributed, the present as well as future generations will continue to experience environmental degradation as well as problems such as social justice.

However, as with intergenerational equity, there are critics of the intra-generational equity principle. For instance, Stone245 asserts that the intra-generational equity principle and the CBDR principle in particular are "neither necessary nor helpful". Stone246 explains that the CBDR principle would result in rich states being worse off in "the interests of righting the inequity of the status quo ante". In response, Tladi247 asserts that the principle of CBDR, "while certainly incorporating redistributive" objectives, "benefits the world community by facilitating global environmental protection". Tladi’s248 view of the principle of CBDR is consistent with Franck’s maximum principle which encapsulates advantages for its principal beneficiaries, and for the rest of the world. Although the intra-generational equity principle has been criticised by some as unnecessary,249 it can nonetheless be recognised as a normative principle of ESD, and modern international environmental law. This is reflected in the incorporation of intra-generational equity in numerous modern multilateral environmental agreements, and other instruments mentioned above.250

3.3.3 Integration

It should be borne in mind that at the heart of ESD lies the inextricable connection between environmental and developmental issues. That is to say, issues surrounding ecological sustainability have been merged with developmental issues, hence the reference to 'ecologically' sustainable development. This means that in developmental

247 Tladi Sustainable Development in International Law 55, 56, 57.
248 Tladi Sustainable Development in International Law 56-57. Also see Franck Fairness in International Law and Institutions 18-19, 366.
250 See for instance the Stockholm Declaration, the Brundtland Report, the Rio Declaration, the Johannesburg Declaration, article 3 and 12 of the UNFCC Kyoto Protocol; article 5 of the Montreal Protocol; article 20 of the Convention on Biological Diversity.
policy-making, environmental issues should be taken into account and vice versa. The notion of environmental issues having a bearing on developmental issues and vice versa is known as integration. Integration requires that institutions that cater for developmental activities effectively integrate environmental issues into their practice.

The Stockholm declaration, for instance, as the first global interstate initiative for the protection of the environment, refers to integration. The Stockholm Declaration acknowledges that there exists a relationship between environmental protection and development. To this end, principle 1 acknowledges that "environmental deficiencies are generated by the conditions of underdevelopment". Further to the above, principle 10 provides that for:

developing countries, stability of prices and adequate earnings for primary commodities and raw materials are essential to environmental management since economic factors as well as ecological processes must be taken into account.

Hence, principle 10 recognises the need to integrate economic factors with ecological processes in environmental management. Integration requires a holistic approach to development and environmental protection. The holistic approach in this regard can be seen in how the Stockholm Declaration includes, as necessities towards the concept of sustainability, the integration of many issues, including technology, science and education. Such issues are important especially in determining whether certain economic activities will not pose irreparable harm to the environment. Furthermore, incorporating issues such as technology and education can be used as an arsenal in fighting against global challenges such as climate change and global warming.

---

251 Malviya 1996 Indian Journal of International Law 57-60; Pallemaerts "International Environmental Law from Stockholm to Rio" 5, 17; Tladi Sustainable Development in International Law 58.
252 Matsui 2002 Int Environ Agreements 152; Tladi Sustainable Development in International Law 58; Pallemaerts "International Environmental Law from Stockholm to Rio" 5, 17.
253 Malviya 1996 Indian Journal of International Law 57-60; Tladi Sustainable Development in International Law 58.
254 Principle 10 of the Stockholm Declaration. Also see principles 8 and 13 of the Stockholm Declaration.
255 Tladi Sustainable Development in International Law 58.
256 Principle 19 of the Stockholm Declaration.
The Brundtland Report recognises that environmental problems are caused and exacerbated by an interlocking crisis.\textsuperscript{257} That is to say, the drastic changes in economic growth, technology and human population growth "have locked the global economy and global ecology together".\textsuperscript{258} The Brundtland Report's call for integration seeks to ensure development that is sustainable, since the economy and ecology have become "ever more interwoven... into a seamless net of causes and effects".\textsuperscript{259} Thus, the solution to environmental problems must include co-operation with industry,\textsuperscript{260} economic development,\textsuperscript{261} bulwarking existing environmental agreements\textsuperscript{262} and the involvement of Science.\textsuperscript{263}

The Rio Declaration also provides for integration. Principle 4 stipulates that "environmental protection shall constitute an integral part of the development process".\textsuperscript{264} Hence, the developmental process ought not to be considered in isolation from environmental protection. Some scholars such as Pallemaerts have however extended criticism of the integration principle. According to Pallemaerts:

\begin{quote}
The new discourse of 'integration' suggests that there is no longer any conflict between environmental protection and economic development, and that the latter has become a necessary complement, condition even, of the former. This obfuscates the very real and increasing conflict between economic development and environmental protection. It ambiguously stands as much for the subordination of environmental policies to economic imperatives.\textsuperscript{265}
\end{quote}

\begin{itemize}
\item \textsuperscript{257} Brundtland Report 4.
\item \textsuperscript{258} This means that it is important to consider "the impacts of ecological stress- degradation of soils, water regimes, atmosphere, and forests- upon our economic prospects". See the Brundtland Report 5.
\item \textsuperscript{259} Brundtland Report 5.
\item \textsuperscript{260} Brundtland Report 329.
\item \textsuperscript{261} Brundtland Report 334.
\item \textsuperscript{262} Brundtland Report 333.
\item \textsuperscript{263} Brundtland Report 326.
\item \textsuperscript{264} Similarly, in order to achieve ESD, principle 8 of the Rio Declaration states that to achieve a "higher quality of life for all people, states should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies". Principle 9 also acknowledges the vital role technological and scientific knowledge play in achieving sustainable development. Also see other international agreements which have included integration in their texts i.e. article XX of the General Agreement on Trade and Tariffs (Gatt) 1948. See further Schoenbaum 1997 \textit{Am J Int Law Contemp Probl} 268, 274.
\item \textsuperscript{265} Pallemaerts "International Environmental Law from Stockholm to Rio" 17.
\end{itemize}
Pallemaert’s argument is persuasive, especially when one considers the widely accepted sustainable development concept and how it seamlessly integrates economic concerns with environmental protection. In this light, this thesis suggests the restructuring of the concept sustainable development and integration. That is, the thesis suggests that for sustainable development to achieve its initial purpose, which is the sustainability and protection of ecological systems, a shift is required from sustainable development to 'ecologically' sustainable development. This is partly due to the fact that sustainable development, as presently conceived and pursued, could hinder the sustainability and protection of ecological systems for the benefit of present and future generations.

Thus, because of sustainable development's flexibility and lack of fixed content, the concept could result in different meanings to different people (the indeterminacy objection). Accordingly, sustainable development could undermine (or potentially undermine) the ability of environmental policy and law to protect the environment. The indeterminacy of sustainable development therefore means that a particular activity can be regarded as undermining or promoting "sustainable development depending on the vantage point of the analyst". The danger that sustainable development, through integration, could result in the subordination of environmental imperatives to economic imperatives is therefore imminent. In addition, sustainable development could also result in the subordination of environmental imperatives to social imperatives. This danger is as

---

266 Nelson 2004 Denver Journal of International and Policy 615. Also see Tladi Sustainable Development in International Law 75 who says "arguments around the indeterminacy of sustainable development relate to the numerous interpretations potentially attaching to the concept. The difficulty in defining or describing sustainable development begins with the flexibility of the concept and this, in turn, results from the fact that sustainable development involves the integration of various areas of law and policy". Weiss 1992 ILM 814. "Sustainable development can be used by environmentalists and those pursuing the ends of economic development respectively in support of opposite claims. For those advocating economic growth in defining sustainable development, the emphasis should fall on the economic growth value of sustainable development”. "For environmentalists the emphasis should fall not on development, but on the ecology. Thus, it is ecological conditions that should be sustained and not economic development”. Also see Tladi Sustainable Development in International Law 76.

267 Petersmann 2002 Eur J Int'l L 643. Also see Pallemarerts 2003 Environment, Development and Sustainability 280 who notes that the objective of sustainable development is “a vague concept without any agreed, unambiguous definition”.

119
a result of practice and perception. For instance, Field\textsuperscript{269} asserts that equity and not environmental protection, is the core of sustainable development. Simply put, similar to many other flexible political and legal concepts, sustainable development and integration can be misused, misunderstood or even abused to advance a particular agenda. Thus, a proper comprehension of and application of sustainable development and integration will require a prioritisation of environmental concerns in issues of development, hence the need for the adjective, 'ecologically' in sustainable development.

Scholars such as Tladi\textsuperscript{270} have attempted to provide a more nuanced understanding of integration by proposing three variations that can be used to achieve integration. The first is the economic growth variation wherein economic growth concerns trump social and environmental considerations.\textsuperscript{271} The second is the environment centred variation, wherein environmental considerations trump economic and social considerations.\textsuperscript{272} The third is the human needs centred variation wherein "the social needs and general well-being" of people trump environmental and economic considerations.\textsuperscript{273} Upon considering these variations, Tladi\textsuperscript{274} notes that the economic growth variation is not consistent with the purpose of ESD, as adopting an "economic growth centred variation of sustainable development" would not yield the purpose of ESD because it would have "the effect of simply dressing the emperor in new clothes". In other words, the economic growth variation does not reflect the purpose of ESD and therefore does not qualify as a variation of strong sustainability:

---

\textsuperscript{269} Field 2006 \textit{SALJ} 417.
\textsuperscript{270} Tladi \textit{Sustainable Development in International Law} 80 states that "These variations are distinguishable on the basis of the values that take pole position in cases of conflict. In the first variation, the economic growth-centred variation, economic growth takes top position. In cases of conflict, economic growth and related values are given priority. In the second variation, the environment centred variation, the natural environment is more important and in case of conflict it triumphs. Finally, the human needs-centred variation (referred to also as the social well-being or social needs centred variation), places the social needs and general well-being of humanity at the centre of its concerns".
\textsuperscript{271} Tladi \textit{Sustainable Development in International Law} 80.
\textsuperscript{272} Tladi \textit{Sustainable Development in International Law} 80, 111-112; Tladi 2004 \textit{SAJELP} 17.
\textsuperscript{273} Tladi \textit{Sustainable Development in International Law} 80, 111-112; Tladi 2004 \textit{SAJELP} 17.
\textsuperscript{274} Tladi \textit{Sustainable Development in International Law} 80, 111-112; Tladi 2004 \textit{SAJELP} 17.
Both the human needs-centred variation and environment centred variations of sustainable development, ... respond to the call for 'strong' sustainable development, while the economic growth-centred variation, by hanging on to a paradigm that elevates economic concerns over both environmental and social concerns (the business as-usual scenario) represents weak sustainable development.\textsuperscript{275}

Tladi's human needs-centred variation and the environment centred variation are a close reflection of ESD in that both environmental and human needs are considered as important whenever development is being considered. However, this thesis notes that the purpose of ESD is not to equate environmental to human needs whenever developmental issues are being considered. Instead, the purpose of ESD is to elevate the protection of the environment and the earth's natural resources whenever developmental issues are being considered. The purpose of ESD recognises that the environment and its natural resources should be conserved and protected for the benefit of present and future generations. From this standpoint, the environment is not reduced to a peripheral consideration, but instead becomes the central focus whenever issues of development are to be considered.

In this light, Bosselmann\textsuperscript{276} notes that integration does not mean that ESD has deviated from its 'ecological core'. The author proceeds to state that:

\begin{quote}
Only because of (integration) is it possible to relate the social and economic components of sustainable development to a central point of reference. As a consequence, the entire concept becomes operable: development is sustainable if it tends to preserve the integrity and continued existence of ecological systems; it is unsustainable if it tends to do otherwise.\textsuperscript{277}
\end{quote}

As stated earlier, this means that a holistic approach is necessary to realise development that is sustainable. In Bosselmann's\textsuperscript{278} words, this holistic "concept of sustainable development equals 'ecologically sustainable development'" and can be construed to

\textsuperscript{275} Tladi \textit{Sustainable Development in International Law} 112; Tladi 2004 \textit{SAJELP} 17. Also see Mayeda 2004 \textit{Colo J Int'l Envtl L & Pol'y} 37.

\textsuperscript{276} Bosselmann \textit{The Principle of Sustainability} 53.

\textsuperscript{277} Bosselmann \textit{The Principle of Sustainability} 53.

\textsuperscript{278} Bosselmann \textit{The Principle of Sustainability} 29, 53. Quoting chapter 4, para 78 of the Brundtland Report, Bosselmann notes that "the 'common interest' in environmentally sound development cannot be promoted if there is a neglect of economic and social justice within and amongst nations".
mean that there can be "no economic prosperity without social justice" and social justice cannot exist without economic growth, and both must be pursued "within the limits of ecological sustainability". Bosselman’s emphasis on ESD in developmental issues is reflected in South Africa’s environmental legal framework i.e. through section 24(b) (iii)’s injunction to consider environmental protection through 'ecologically' sustainable development.

Section 24(b) (iii)’s injunction to consider environmental protection through 'ecologically' sustainable development arguably reflects that the drafters of the Constitution must have envisioned that integration or sustainable development could not achieve environmental protection, hence its provision for ESD. Notable is that section 24(b) (iii) of the Constitution provides that everyone has the right:

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.

Thus, although ESD is peculiarly an Australian term, it has also been incorporated into South Africa’s constitutional setup. The Constitution’s express inclusion of the adjective 'ecologically' means that it requires a reconceptualisation of sustainable development to ESD. Hence, section 24 of the Constitution requires government to advance, achieve, protect, promote and respect its objective of securing of ESD. Furthermore, section 24 (b) (iii) plainly encapsulates the characteristics of both intergenerational and intragenerational equity, and further pronounces the constitutional objective to promote social and economic development through mechanisms that protect and conserve the natural resources on which present and future generations are dependent on.

---

279 On this note, section 24(b) (iii) of the Constitution provides for the right to have the "environment protected, for the benefit of present and future generations".

280 On this note, section 24(b) (iii) of the Constitution provides for the right to have the environment protected through ESD while promoting justifiable social and economic development
By adding the adjective, 'ecologically' to sustainable development, the Constitution potentially wards off the indeterminacy of sustainable development. The once open loophole that paved way for various interpretations, including instances where the concept was hijacked by industry and business and applied only as economically sustainable development, could be closed. This implies that the interpretation of ESD would require states and private organisations to prioritise the continued existence and integrity of the earth's ecological systems whenever issues of development are being contemplated. Put differently, ESD would require that development be pursued to improve the total quality of life of the present and future generations in a manner that conserves the earth's natural resources on which life depends. In fact, instead of integration one could adopt South Africa's injunction for environmental protection through ESD and justifiable social and economic development.

Justifiable social and economic development under section 24(b) (iii) of the Constitution could denote development that gives due reverence to planetary boundaries and a safe functional space for humanity. This means that social and economic development must be pursued within the parameters of ecology. Simply put, social justice and economic growth ought to be met from the environment’s perspective. The inclusion of the phrase "justifiable economic and social development" into section 24(b) (iii) of the Constitution addresses the concerns by some who may argue that ESD as contained within section 24 negates all other economic and social considerations which are necessary for human survival. In this regard, what section 24 does is emphasise on social and economic development that prioritises environmental protection before the growth of economies. Thus, although economic and social development concerns are provided for in section 24(b) (iii), they are not given primacy. The inclusion of the term 'justifiable' makes any

---

281 See for instance German Advisory Council On Global World in Transition 89 who contend that "there is no simple and straightforward correlation between economic growth and environmental pollution". Tracinski 2002 http://www.jewishworldreview.com/0802/tracinski.html also argues that the world needs capitalism to achieve sustainable development.


283 Bosselmann 2006 SAJELP 44.
economic and social development subject to environmental considerations. Accordingly, any social or economic activity ought to be subject to and promote environmental protection. Hence, social justice and economic prosperity ought to be pursued within the bounds of ecological sustainability.

In this light, without digressing from the current discussion, it is worth noting that conserving the earth's ecological systems (ESD) as provided for in the Constitution ought to be given effect to in other legislative frameworks as well. Worth mentioning is that NEMA is "South Africa's central environmental framework Act", and is deemed to give effect to section 24 and the "loftier constitutional ideals related to the right". NEMA, however, does not define what ESD, as entrenched in section 24, could mean/imply. Instead, NEMA limits its scope to sustainable development which it defines 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.

In this light, NEMA’s definition of sustainable development is contrary to section 24(b) (iii) because it overlooks the adjective 'ecologically' as encapsulated in the Constitution. NEMA’s definition thereby presents the impression that developmental, environmental and economic interests are of equal importance in the Constitution. Such position is clearly not the case. Instead, section 24(b) (iii)’s express addition of 'ecologically' to sustainable development means that it places ecological concerns and environmental protection at a pedestal over any other concerns such as economic or social developmental factors.

In addition, NEMA’s call for integrating environmental, economic and social factors into developmental planning is not what ESD seeks to achieve. This is because, NEMA’s call for integration equates the importance that should be placed on environmental, economic

---

284 Kotzé "Sustainable Development and the Rule of Law for Nature: A Constitutional Reading" 137. NEMA incorporates the whole of section 24 in its preamble, to the extent that it restated what section 24 provides verbatim.

285 Section 1 of NEMA.
and social factors in developmental planning. However, ESD calls for the recognition of social and economic factors of development under a central point of reference, which is ecological sustainability. In other words, instead of integration, ESD, embraces social development and economic growth within the confines of ecological sustainability. Such a perspective could reflect the kind of reconceptualisation of sustainable development envisioned by the *Constitution* because, by doing so, ecological sustainability is not taken as a secondary issue of development but is adopted as the main factor to be considered in social and economic developmental issues.

It should be noted that although ESD has been included in the *Constitution*, there is still paucity in South African scholarly literature on what ESD could mean in the South African context. Hence, this thesis' discussion has been seeking to contribute, however minimal to giving content and meaning to ESD as encapsulated in the *Constitution*. The paucity in scholarly literature on ESD could be attributed to the fact that most scholars view ESD and sustainable development as one and the same. For instance, Kidd\(^{286}\) describes the drafting of section 24 (b) (iii) as clumsy and needless because ESD and sustainable development in the provision refer to the same thing.

This thesis however notes that although the adjective 'ecologically' has not been sufficiently considered in South African jurisprudence, there is a distinction between sustainable development and ESD in the context of section 24(b) (iii) of the *Constitution*. In this light, Feris\(^{287}\) contends that the term ESD in section 24(b) (iii) "qualifies the type of sustainable development that is envisioned by the *Constitution*"; and that the

\(^{286}\) Kidd "Environment" 525. Kidd argues that "section 24(b) (iii)'s reference to sustainable development... is from a strictly linguistic perspective, if one considers ecologically sustainable development as requiring the integration of environmental, social and economic considerations (which is the most widely held social concept), then reference to 'while promoting justifiable economic and social development' would seem redundant". The author proceeds to state that "if however, ecologically sustainable development means something different from economic and social development, there would be no redundancy, which would usually be the preferable way of interpreting a phrase". However, Kidd concludes his argument by stating that, because no scholars have considered the difference between sustainable development and ESD in section 24, the drafting of the provision "is simply the result of clumsy drafting".

\(^{287}\) Feris 2008 *CCR* 252.
incorporation of ESD in the provision "places the environmental value centre-stage ". Van de Linde and Basson further state that, the particular reference to ESD in section 24(b) (iii) is pivotal in interpreting the provision because:

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.

Consequently, courts and decision makers ought not to undervalue or ignore the adjective 'ecologically' in section 24(b) (iii) of the Constitution. In Van de Linde and Basson's words, "they must ensure a result that allocates ecological benefits their proper weight". This thesis therefore notes that the incorporation of 'ecologically' sustainable development into the Constitution zooms in on the main focus of environmental protection as per section 24, which is ecological sustainability. That is to say, ESD is the benchmark that must be applied when considering environmental protection as well as justifiable social and economic development in the context of section 24. Hence, 'ecologically' sustainable development is a standard or measure of good, that could be used to set requirements for the desired or appropriate interpretation, operationalisation and application of section 24 of the Constitution.

ESD, in the South African context ought to adopt a holistic approach. In other words, economic growth and social justice in the context of section 24 all have to be within the bounds of ecological sustainability. Hence, it is not development which ought to be sustained, but the environment or ecology that must be sustained when considering ESD in the context of section 24. Hence, if 'ecologically' sustainable development- defined in terms of preserving the continued existence of the earth's ecological systems - is kept in sight as the means to realising section 24, there is a high likelihood that humanity will eschew economic or social undertakings that overexploit the finite resources on which humanity depends. In this light, the grand question arises: To what end, or for what

---

288 Van der Linde and Basson "Environment" 50-24.
289 Van der Linde and Basson "Environment" 50-25.
purpose must ESD be applied as a constitutional value in environmental rights adjudication? Framed differently, what can be expected of laws and policies when ESD is fully functional? As will be discussed in the subsequent Chapters, the conservation of the earth's ecological systems brings together social and economic factors of development to a central point of reference, which is ecological sustainability. In other words, preserving and protecting the continued existence and integrity of the earth's ecological systems could achieve:

- Ecological integrity;
- Environmental justice; and
- Poverty reduction

3.4 Conclusion

The foregoing has been an attempt to provide a conceptual analysis of ESD and what it means under international law in general, and in South African law, in particular. While this Chapter has not presented a comprehensive account of the conceptualisation of sustainable development, it has nonetheless provided an overview of ESD as a useful legal tool to achieving development that is sustainable. For the purpose of this thesis, this Chapter sought to address the following question: What does ESD generally entail in both international and South African law? In addressing this question, this Chapter established that ESD denotes development that improves humanity's well-being through activities and processes that preserve the continued existence of the earth's ecological systems.

The Chapter further established that there is a need to shift from the vague and oft-misunderstood concept of sustainable development to ESD. Thus, ESD is a vehicle that could facilitate the paradigm shift from an economic growth centred model of
sustainability, to one where environmental concerns are given paramount importance. It is this paradigm shift that helps frame the normative content of ESD. As a point of reference, this Chapter considered 'ecologically' sustainable development as provided in section 24(b) (iii) of the Constitution. The Chapter further noted that 'ecologically' sustainable development, in the context of section 24(b) (iii), reflects that it is not development which ought to be sustained, but the environment or ecology that must be sustained. In this respect, to what end must ESD be applied as a constitutional value in environmental rights adjudication? For the purposes of this discussion, when ESD is fully functional as a constitutional value, ecological integrity, environmental justice and poverty reduction could be realised. Against this backdrop, this thesis examines how these outcomes can be achieved, by considering the environmental rule of law. Thus, the following Chapter is an attempt at determining how the environmental rule of law can be used to facilitate the realisation of ESD and its outcomes (such as ecological integrity, environmental justice and poverty reduction).

———

290 Tladi Sustainable Development in International Law 37.
CHAPTER 4
ENVIRONMENTAL RULE OF LAW AS AN AVENUE TO ACHIEVING ECOLOGICALLY SUSTAINABLE DEVELOPMENT

4.1 Introduction

As a starting point for this Chapter, the environmental rule of law can be described as a principle that incorporates and applies the principles of the rule of law from within the environmental context.1 The environmental rule of law draws its significance from its precursor, the traditional rule of law.2 The 2016 IUCN states that the environmental rule of law is an amalgamation of substantive and procedural rights that recognise "the principles of ecologically sustainable development in the rule of law".3 Viewed within this prism, South Africa's environmental law subscribes to the environmental rule of law. That is to say, South Africa's legal framework on the environment consists of provisions that provide for environmental rights and obligations (section 24 of the Constitution consists of the substantive aspect/content of the environmental rule of law), as well as provisions for their effective implementation (sections 31, 32, 33 and 38 consists of the formal/procedural aspect of the environmental rule of law).

Based on the aforementioned, this Chapter submits that ESD is a value that ought to be mandatorily incorporated into environmental rights jurisprudence through the environmental rule of law. As was determined in the preceding Chapter, ESD denotes development that improves humanity's well-being through activities and processes that preserve the continued existence of the earth's ecological systems. Thus, ESD seeks to ensure that developmental processes promote ecological sustainability, through mechanisms that preserve and protect the continued existence and integrity of the earth's

---

1 Iucn World Declaration on the Environmental Rule of Law 2016 2; Kreilhuber and Kariuki 2020 Geo Envtl L Rev 592.
3 Iucn World Declaration on the Environmental Rule of Law 2016 2.
ecological systems. The previous Chapters have submitted that ESD, as incorporated in section 24 of the Constitution, has not been sufficiently developed, yet it could in fact be employed as a constitutional value in environmental rights jurisprudence. Moreover, as this thesis has indicated in Chapter 1, developing the meaning and content of ESD includes an analysis and understanding of the environmental rule of law. Thus, in general terms, the lack of a clear understanding and normative basis on the environmental rule of law could lead to subjective, unpredictable and arbitrary environmental governance. For example, the lack of the environmental rule of law could possibly hinder ESD and its outcomes such as ecological integrity, environmental justice as well poverty reduction.

To date, and as far as this research could ascertain, no study has been done on how the environmental rule of law can be employed to achieve the outcomes of ESD in environmental rights adjudication. It is this additional dearth and yawning gap in literature on the aforementioned discipline that this thesis attempts to address and fill.\(^4\)

While the preceding Chapter described South Africa's laws on constitutional values and suggested the development of ESD as a constitutional value in environmental rights adjudication, this Chapter builds on that framework by assessing the specific research question of how the environmental rule of law can be used as a means to achieving the outcome(s) of ESD in South Africa? In answering this question, this Chapter considers the meaning of the rule of law in general, as well as the meaning of the environmental rule of law and how it finds application in South Africa. In determining the application of the environmental rule of law in the South African context, this Chapter determines how the environmental rule of law can be used to achieve the outcomes of ESD. Ultimately, this Chapter is an attempt at showing that there is a need to bolster the environmental

\(^4\) The preceding chapters have identified and laid the foundation for the argument that, as far as could be ascertained, no constitutional value has been developed with sufficient certainty in the adjudication of environmental law disputes. The preceding chapters were a basis for the argument that: ESD as contained in section 24 of the Constitution has not yet been clearly defined, thereby resulting in courts misinterpreting ESD as sustainable development. See chapter 5 below.
rule of law through procedural and substantive scaffolding. Such an endeavour could be the key to achieving the outcomes or goals of ESD within the *Constitution*.

### 4.2 Rule of law

As already stated, the environmental rule of law incorporates and applies the principles of the rule of law into the environmental context. This makes it prudent for this thesis to first outline the elements of the rule of law before delving deeper into any discussion of the environmental rule of law. In order for one to grasp the modern understandings of the rule of law, one must first fathom its historical heritage. This Chapter's account of the rule of law extensively relies on Brian Tamanaha's seminal work on the rule of law, titled "On the Rule of Law: History, Politics, Theory". As a caveat, the account of the rule of law in this thesis is by no means a comprehensive and thorough exposition of it. Rather, it is merely a synopsis of what this thesis considers relevant for the comprehension of the rule of law, and ultimately the environmental rule of law. Since the scope of this thesis is limited to South African perspectives, the rule of law as it applies in South Africa will also be considered. By considering the aforementioned issues, this thesis hopes to clearly map the environmental rule of law, an important arsenal in achieving ecological integrity, environmental justice and poverty reduction.

#### 4.2.1 A brief note on the historical origins of the rule of law

The rule of law is said to have no single source because it has congealed roots in the slow and unplanned events of the Middle Ages. Although it is argued that Greek scholars could have contributed to the framing of the rule of law, it is widely accepted that the rule of law "took root" in the West during the Middle Ages. See Tamanaha *On the Rule of Law* 1-141.

---

5 Tamanaha *On the Rule of Law* 1-141.
6 Tamanaha *On the Rule of Law* 15 plots the Middle Ages as starting from the 5th century collapse of the Roman Empire to the 15th and 16th centuries Renaissance and Reformation periods respectively. Although it is argued that Greek scholars could have contributed to the framing of the rule of law, it is widely accepted that the rule of law "took root" in the West during the Middle Ages. See Tamanaha *On the Rule of Law* 7-15, 18; Sealy *The Athenian Republic: Democracy or the Rule of Law?* 146-149. Finer *The History of Government* 982 notes that major Greek political literature on the rule of law is in fragmentary quotes except Plato's 13th century writings. Hence, the reason why Tamanaha refers to the origins of the rule of law as taking root during the Middle Ages.
society. That is to say, one of Plato's latter dialogues, "The Laws", posits the notion that a government must be subservient to the law.\(^7\) In other words, Plato stresses the need for "a code of law as an instrument of government".\(^8\) Plato's work was subsequently refined by his apprentice, Aristotle in his work "The Politics", wherein he compared the rule of man, 'passion', with the rule of law, 'reason' to enlighten people on why a government must be bound by the law as a means of preventing the abuse of power and arbitrary rule.\(^9\) Both Plato and Aristotle agree that laws ought to be promulgated for the common good of everyone. As Aristotle\(^{10}\) notes:

[L]aws, when good, should be supreme; and that the magistrate or magistrates should regulate those matters only on which the laws are unable to speak with precision owing to the difficulty of any general principle embracing all particulars. But what are good laws has not yet been clearly explained; the old difficulty remains. The goodness or badness, justice or injustice, of laws varies of necessity with the constitutions of states. This, however, is clear, that the laws must be adapted to the constitutions. But if so, true forms of government will of necessity have just laws, and perverted forms of government will have unjust laws.

The works of the aforementioned Greek philosophers had a notable effect on Roman legal philosophers, most notably on Cicero, who highlighted in "De Legibus", that the law must be enacted for the good of the whole community, thereby subjecting the law to principles of justice.\(^{11}\) The works of the aforementioned philosophers would play a great role in developing the rule of law in Europe. Worthy of note is that following Emperor Constantine's shift of the Roman Empire's capital to Constantinople, thus establishing the Eastern Roman Empire, the western part of the Roman Empire underwent a steady and

\(^7\) Plato *The Laws. Trans. Trevor Saunders* 21, 26-26, 32. Regarding a government that is subject to the law, Plato contends that: "The Guardians [of laws], whose tenure and powers make them tolerably independent of popular pressures, should themselves obey the laws in all things, and interpret them when necessary in the spirit in which they were framed. Yet even they are not exempt from the general rule that every official must be accountable for his conduct: to scrutinise their record and that of all other officials, there is a powerful board of Scrutineers who can themselves be called to account if occasion arises. One authority must check another; firm government must not be allowed to degenerate into tyranny".


\(^9\) Aristotle *Politics. Trans C.D.C. Reeve* 82-100.

\(^{10}\) See Jowett *The Politics of Aristotle: Introduction and Translation* XI.

\(^{11}\) See Zetzel *On the Commonwealth: And, on the Laws* 32b-41, 42-48, 48-52.
protracted decline triggered by frequent invasions from the early fourth and fifth centuries Germanic tribes.\(^12\)

As a result, medieval society resorted to isolation by surrounding themselves with high solid walls to keep away menacing groups of plunderers or conquests by neighbouring kings.\(^13\) In addition to the above, there was no autonomous and professional organ of jurists as had previously existed during the pinnacle of Roman rule.\(^14\) Customary law and the feudal system coexisted and merged with ecclesiastical and Roman law.\(^15\) Furthermore, it is during the Middle Ages that the Roman Catholic Church was the only religious institution that traversed the entire Western empire.\(^16\) The Roman Catholic Church, possessed sophisticated official structures, and was a major hindrance to development in the West.\(^17\) Tamanaha\(^18\) posits that the hindrance to development was because the Roman Catholic Church immersed the community in Catholic doctrine or orthodoxy which disregarded the importance of commerce, proscribed charging interest on loans and required unquestioning devotion towards the Church. Reason was viewed as perilous to the future of the Church.\(^19\)

During the late eleventh and early twelfth centuries, the forerunners of the state system, materialised under the guise of effective tax collection methods, the courts, and the


\(^{13}\) See Van Creveld \textit{The Rise and Decline of the State} 50-52 who further notes that the deadlock caused by the increased pillaging resulted in travel being unsafe as well as a drastic decrease in merchants, a factor which negatively affected trade and the economy. See also Pirenne \textit{Medieval Cities} 46.

\(^{14}\) Finer \textit{The History of Government} 857-858; Tamanaha \textit{On the Rule of Law} 16.

\(^{15}\) Finer \textit{The History of Government} 857-858; Tamanaha \textit{On the Rule of Law} 16.

\(^{16}\) Tamanaha \textit{On the Rule of Law} 18-20; Tamanaha \textit{Law as a Means to an End} 74, 131-135.

\(^{17}\) Tamanaha \textit{On the Rule of Law} 18-20; Tamanaha \textit{Law as a Means to an End} 74, 131-135.

\(^{18}\) Tamanaha \textit{On the Rule of Law} 18-20; Tamanaha \textit{Law as a Means to an End} 74, 131-135.

\(^{19}\) Writing on reason, the law and the Church, Thomas Aquinas argues that reason is compatible with Church doctrine. Aquinas contends that judges are subject to the law, and that the law is founded on reason. Aquinas further claims that sovereigns could resolve to be subject to the law, although they are, as makers of the law, above it. Aquinas however acknowledges that divine and natural law was supreme and that final judgment on a person's wrongdoing could only be passed by God. See Figgis \textit{Studies of Political Thought: From Gerson to Grotius}, 1414-1625 6-7; Gilby \textit{Principality and Polity} 127, 142-144, 173-175; Finer \textit{The History of Government} 862; Tamanaha \textit{On the Rule of Law} 19; Neumann \textit{The Rule of Law} 55.
growth in legally trained people under the watchful eye of the nobility. Furthermore, the rediscovery of the Justinian code and Aristotle's work, along with the founding of the Universities of Bologna, Paris, Oxford and Cambridge was a signal of a noteworthy shift in the Middle Ages as the number of those educated increased. The late eleventh and early twelfth centuries also witnessed an increase in economic activity such as trade and production and also heralded the beginning of the expansion of the West. Within this broad historical context, a number of crucial medieval developments to the rule of law can be deduced: "the outcome of the power struggle between popes and kings", the development of "Germanic customary law", "the Magna Carta", the advent of Protestant Reformation and the Age of Enlightenment.

4.2.1.1 The power struggle between popes and kings

The first development, "the power struggle between popes and kings" can be understood through medieval society's Christian beliefs. During such time, the church was the only authority as all learning and political activities were carried out through it. A hallmark typical of the Western Empire was the emperor's particular position which constituted sacerdotal and regal power. Ullmann notes that the emperor's commands and decrees were the laws and decrees of "divinity made known through the emperor". Hence, "within the Christianised Roman Empire", the emperor was both the priest and the king.

However, following the downfall of the Western Empire and the emergence of the feudal system, primacy in power transferred to the clergy and a war for political supremacy was

---

20 Tamanaha *On the Rule of Law* 15.
21 Tamanaha *On the Rule of Law* 15. Also see Swart *Contending Interpretations of the Rule of Law in South Africa* 30.
22 Tamanaha *On the Rule of Law* 18.
23 Tamanaha *On the Rule of Law* 15-32.
24 Tamanaha *On the Rule of Law* 18-27; Finer *The History of Government* 857.
25 Southern *Western Society and the Church in the Middle Ages* 19; Finer *The History of Government* 856.
26 Ullmann *A History of Political Thought* 33.
27 Ullmann *A History of Political Thought* 33.
waged between popes and medieval monarchs. Of note is that Roman popes sought to extend their dominance over both religious and secular realms by adopting authoritarian and juridical qualities through the issuing of binding orders. Much like emperors preceding them, popes delegated themselves as the human agents of divine and natural law which in the medieval period regulated positive law as well as monarchs, with the only mitigating element on papal supremacy being the virtual weakness of their military power as compared to monarchs. The church was in control of coronation ceremonies including the Germanic secular belief that a King's principal duty was to protect the communities' law.

Significantly this oath was given to the community as well as the church and was confirmed through religious oath taking. Tamanaha asserts that "society was governed by a law identified with Christian justice", and like everyone else, "the monarch as a Christian was subject to this law". As a result, the monarch would make an oath "confirming his subjugation to the higher (natural, divine and customary) law and the positive law". The voluntary affirmations and repeated oath-taking could be construed as confirmation that monarchs were bound by natural, customary, divine and positive law which reinforced the notion that even rulers were obligated to obey the law. Furthermore, the subjugation of the monarch to oath taking reflects the supremacy of Christ during coronation ceremonies, which could be regarded and construed as medieval society's version of the rule of law.

---

28 Tamanaha *On the Rule of Law* 21-23.
29 Tamanaha *On the Rule of Law* 21-23.
30 Tamanaha *On the Rule of Law* 21-23. Also see Ullmann *A History of Political Thought* 101.
31 Tamanaha *On the Rule of Law* 21-23.
32 Tamanaha *On the Rule of Law* 21-23. Also see Morrall *Political Thought in Medieval Times* 24.
33 Tamanaha *On the Rule of Law* 23.
34 Tamanaha *On the Rule of Law* 23.
4.2.1.2 The development of Germanic customary law

The second medieval development in the rule of law tradition is the impact of Germanic customary law and the principle therein that a ruler is subject to, and bound by the law. Germanic customary law exerted influence on medieval Europe's large regions such as Spain, France and parts of England.\(^{35}\) Germanic customs are recognised for embedding the notion that both the king and his subjects had a mutual responsibility to preserve the law from corruption and infringement.\(^{36}\) Kern\(^ {37}\) further notes that rulers were bound by the law and were therefore proscribed from arbitrarily making new laws. Although, Kern\(^ {38}\) and Tamanaha\(^ {39}\) observe that in practice, the notion that the king was also bound by the law was not honoured, one could still deduce that Germanic customs amount to a crucial precursor to the principle of rule of law.

4.2.1.3 The Magna Carta

The third medieval development towards advancing the rule of law tradition is the 1215 Magna Carta.\(^ {40}\) The Magna Carta, which today is revered by many as a source of the rule of law, liberal constitutionalism and due process in the United States of America,\(^ {41}\) only

---

\(^ {35}\) Kern *Kingship and Law in the Middle Ages* 70-72, 86-88; Tamanaha *On the Rule of Law* 23.
\(^ {36}\) Morrall *Political Thought in Medieval Times* 16-17.
\(^ {37}\) Kern *Kingship and Law in the Middle Ages* 70-71. Also see Morrall *Political Thought in Medieval Times* 16-17.
\(^ {38}\) Kern *Kingship and Law in the Middle Ages* 86-88.
\(^ {39}\) Tamanaha *On the Rule of Law* 24-25.
\(^ {40}\) The Magna Carta (Translation) 1215 also known as the (Great Charter) is an agreement that guaranteed English political liberties. It was signed on the 15th of June 1215 at Runnymede by King John, following a revolt by the nobility against King John. The revolt was a result of King John's attempt to extract more financial resources from the nobility to fund war in France. Chapter 61 of the Magna Carta states that "twenty-five barons should be selected to ensure that the king upholds all of the provisions of the charter". Thus, when a king violates the law, the barons are authorised to seize the king's assets until he complies. Although this provision was not included in the subsequent reissues of the Magna Carta, it nonetheless imprinted the "memory of the barons' threat of military force against the king" which made the Magna Carta a "symbol of the supremacy of the law over the will of the king". Also see Holt *Magna Carta* 33-48.
\(^ {41}\) Dunham "Magna Carta and British Constitutionalism" 26; Kurland "Magna Carta and Constitutionalism in the United States: The Noble Lie" 48-75.
attained significance in England during the 17th century.\textsuperscript{42} The Magna Carta was a representation of the notion of protecting citizens from despotic kings by stating that "no free man is to be imprisoned, dispossessed, outlawed, exiled or damaged without" undergoing "lawful judgement of his peers or by the law of the land".\textsuperscript{43} Such a clause identifies ordinary courts as the appropriate avenue of obtaining redress for wrongful conduct as opposed to the will of kings.

The Magna Carta was therefore an attempt at restraining the power of kings. On this note, Tamanaha\textsuperscript{44} notes, the Magna Carta signifies an attempt by citizens to use the law as a means of protection from a sovereign. The Magna Carta could therefore be viewed as an important source of the rule of law in that it restructured the legal relationship between a sovereign and the people and also added to the legal system the institutionalised components of a jury of peers and the courts.

4.2.1.4 Protestant Reformation and the Age of Enlightenment

The development of the rule of law did not end with the Magna Carta but is continuously visible in the events that occurred from the Sixteenth century to the Eighteenth century. As already noted, the church's notions of natural and divine law had a stronghold on medieval society.\textsuperscript{45} As a result, the law was to some degree accompanied by notions of Christian justice. The monopoly held by the church was however broken with the advent of the Sixteenth century Reformation and the Eighteenth century Age of Enlightenment. The Sixteenth and Eighteenth centuries witnessed the upsurge of Science; the separation of the temporal and sacred; the separation of natural and divine law from statutory and

\textsuperscript{42} Although the Magna Carta "was legally valid for no more than three months", it was later re-issued in 1216, 1217 and lastly in 1225 with the final version becoming enforceable law. Holt \textit{Magna Carta} 33; Radin 1947 \textit{Harv L Rev} 1061.

\textsuperscript{43} Magna Carta (Translation) 1215 para 29. Also see Holt \textit{Magna Carta} 33-36.

\textsuperscript{44} Tamanaha \textit{On the Rule of Law} 25-27.

\textsuperscript{45} Figgis \textit{Studies of Political Thought: From Gerson to Grotius},1414-1625 153; Finer \textit{The History of Government} 857-858.
positive law. Accordingly, natural and divine law lost its stronghold over state affairs and legislative legal systems replaced customary legal systems.

Of importance is that the advent of Protestant Reformation played a vital role in ending the church’s stronghold on society. Essentially, the Reformation promoted individual thought and reason by declaring individuals as diviners of their religious lives. The Reformation became a precursor of the Age of Enlightenment, a period in which liberalism would be born. Tamanaha states that "the primary creed of the Enlightenment was the application of reason and science...". Enlightenment scholars applied the principles of logic and reason popularized by Natural Science, to moral, political, social, economic and legal fields of study. Thus, the unquestionable status of the traditions, customs and teachings of the church became the subject of scientific inspection. On this note, the rule of law became the end product of the Age of Enlightenment.

The Age of Enlightenment, the Magna Carta and the gradual separation of the state and church set the stage for the rise of liberalism. At the heart of liberalism lies the rule of law, under the guise of formal legality, wherein a society functions in terms of structured laws that confer freedom to individuals. For John Locke, liberty entails freedom from violence and restraint with the law assuming the role of preserving such freedom. Locke's argument is founded on a state of nature wherein everyone is equal, free and independent. Moreover, the idea of separation of powers between the executive and legislature in ensuring that government's conduct is in line with the law and that disputes are settled fairly is credited to Locke. Although the aforementioned is an extremely shortened account of Locke's theory, it nonetheless captures essential elements of the

---

48 Schmidtz and Brennan A Brief History of Liberty 99; Tamanaha On the Rule of Law 27, 39.
49 Tamanaha On the Rule of Law 27; Schmidtz and Brennan A Brief History of Liberty 99-100.
50 Tamanaha On the Rule of Law 39.
51 Tamanaha On the Rule of Law 39; Finer The History of Government Iii 1430-1431.
54 Locke The Second Treatise of Government 49-50.
liberal theory in the context of the rule of law. That is to say, the notion that all persons are equal before the law; that all persons ought to be free to act as they deem fit; and that a judiciary, within a government with a well-defined separation of powers, ought to be the adjudicator of disputes.

Locke's work set the stage for the future development of the rule of law. Notable is that Montesquieu, one of the great thinkers, in his 1748 work "L'Esprit des Lois", developed a theory of the separation of powers as a way of preventing governmental abuse and the preservation of liberty, which he described as "a right of doing whatever the laws permit". Montesquieu stresses that "power should be a check to power" so that the judicial, executive and legislative functions of government are possessed in separate hands. When contrasted with the preceding writers, Montesquieu devoted substantial attention to the role of the judiciary. From his perspective, the judiciary ought to be independent from the executive or legislature, although he contended the judiciary be composed entirely of juries as opposed to professional judges. For Montesquieu, the expense, burden and delays of judicial proceedings was a price worth paying for freedom and liberty.

Without digressing from the current discussion, this thesis notes, drawing from Montesquieu's view that the burden and cumbersome task faced by the judiciary in developing constitutional values is a price worth paying for liberty. As already noted in the preceding Chapter, the task conferred on judges in developing the meaning and content of constitutional values, especially in judicial review cases, is a cumbersome one. Thus, courts are encouraged to engage in judicial activism, where necessary and appropriate, when reviewing the decisions or laws passed by the executive or legislature.

---

55 Nugent The Spirit of the Laws 172-173.
56 Montesquieu argues that: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner". See Nugent The Spirit of the Laws 173.
58 Nugent The Spirit of the Laws 92.
Similarly, in environmental adjudication, judges ought to engage in the cumbersome task of developing constitutional values such as ESD in cases involving section 24 of the Constitution. By actively developing ESD, judges could help develop section 24, which in turn could yield a better understanding and pursuit of environmental protection, environmental justice and poverty reduction.

Reverting to the discussion at hand, the term "rule of law" was only brought into currency in the Nineteenth century through the writings of Albert Dicey, a British constitutionalist. His 1885 work titled, "Introduction to the Study of the Laws of the Constitution", explains what the rule of law requires in a liberal democracy. First, the rule of law requires that no one is "punishable or can be lawfully made to suffer in body or goods" save for a "distinct breach of law established in the ordinary Courts of the land". In essence this means that the rule of law is incompatible with any application or enforcement of wide, discretionary or arbitrary powers by government. Second, the rule of law means that "no man is above the law", and every man, regardless of "rank or condition, is subject to the ordinary law" of the land and "amenable to the jurisdiction of the ordinary tribunals".

This denotes that no government officer should enjoy special immunities and all government officers can be held accountable for their conduct before an ordinary court. Third, Dicey argued that the rule of law stems from the judicial recognition and respect of individuals' rights. Writing for Britain, which had a common law or rather a court-based constitution, Dicey stressed that judgments passed by judges amounted to principles of the constitution concerning the rights and duties of individuals.

Sixty years after Dicey's conception of the rule of law, philosopher and economist Friedrich Hayek resounded a number of Dicey's notions in his 1944 work, "The Road to

---

60 Dicey Introduction to the Study of the Law of the Constitution 147.
61 Dicey Introduction to the Study of the Law of the Constitution 149.
63 Dicey Introduction to the Study of the Law of the Constitution 149-150.
Serfdom”. According to Hayek, the rule of law demanded that laws should be certain, general, equal and able to provide recourse to judicial review. Laws ought to be general in that they must govern everyone’s conduct and must be set out, in abstract terms, and in advance. Laws ought to be equal in that rules should equally apply to everyone without any arbitrary variances in treatment. However, where distinctions do occur, such ought to be subject to an approved law, or to sufficient and legally acceptable justifications. Laws ought to be certain as well in that an individual must be able to determine, in principle, the legal consequences of his conduct and that of the others with whom he interacts. Finally, the rule of law necessitates judicial review by an independent court in all situations where the government encroaches on one’s person or property.

In states that subscribe to a civil code tradition, the rule of law was influenced by Hans Kelsen, an Austrian legal theorist who helped draft the 1920 Austrian Constitution. In Kelsen’s view, the rule of law (Rechtsstaat) demands that a legal order ought to have a hierarchy of norms, with the constitution as the apex of such legal order. All legal rules therefore become subject to the constitution, and government conduct also becomes constrained by such legal framework. The rule of law was carried over as a global ideal and given expression after the Second World War, through the adoption of the 1948 Universal Declaration of Human Rights (hereinafter the UDHR). The Preamble of the UDHR recognizes the importance of the rule of law through its proclamation that:

---

64 Hayek The Road to Serfdom 75-76. Hayek states that: "stripped of all technicalities [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge”.
67 For instance sections 4, 5 and 6 of the Diplomatic Immunities and Privileges Act 37 of 2001 which confers legal immunity to diplomats in certain circumstances.
70 Kelsen Pure Theory of Law 221-225.
It is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law.\textsuperscript{71}

This clause in the UDHR could be construed as permission to revolt against oppression and tyranny. The clause is an emphasis on how fragile and important the rule of law is, in that the powerful are reminded that they can disregard human rights at their own peril. That is to say, if people are not "to be compelled" to revolt against oppression, "human rights should be protected by the rule of law".\textsuperscript{72} The rule of law is therefore a principle that has garnered global attention and the approval of numerous world leaders and scholars.\textsuperscript{73}

Several notable scholars have also written on the importance of the rule of law in a legal system. Tamanaha,\textsuperscript{74} for instance, states that the rule of law can be described as a society wherein the populace and government officials abide by and are generally bound by the law. Tamanaha\textsuperscript{75} proceeds to outline the rule of law theories as being the formal theories on one end of the spectrum and the substantive theories on the other end. Notable is that formal rule of law theories are concerned with the manner in which procedure is followed in the promulgation of laws and not on the content of laws.\textsuperscript{76} Tamanaha\textsuperscript{77} lays out the most basic version of formal rule of law as requiring governmental conduct to be backed by legal rules or, put differently, government must only act through established legal rules.

\textsuperscript{71} Preamble of the Universal Declaration of Human Rights 1948.
\textsuperscript{72} Preamble of the Universal Declaration of Human Rights 1948.
\textsuperscript{73} See for instance the statement by former President of the USA, Barrack Obama, as cited in Okonkwo 2018 AFJCLJ 84. Obama recalled that adherence to "the rule of law serves as the foundation for a safe, free, and just society".
\textsuperscript{74} Tamanaha On the Rule of Law 91-92, 93-94. Also see Craig 1997 Public Law 469.
\textsuperscript{75} Tamanaha On the Rule of Law 91-92.
\textsuperscript{76} Tamanaha On the Rule of Law 91-92; Craig 1997 Public Law 469.
\textsuperscript{77} Tamanaha On the Rule of Law 91-92, 93.
Raz\textsuperscript{78} propounds a more advanced version of formal rule of law, i.e. formal legality. According to Raz,\textsuperscript{79} the rule of law as formal legality requires that laws be clear, general, public, relatively stable and prospective in application. In addition, Raz\textsuperscript{80} contrasts the rule of law with aspects such as rationality and arbitrary power. For Raz, the non-arbitrariness and rationality aspect of the rule of law ought not to include any link between the exercise of authority and the purpose intended to be served by the exercise of such authority.\textsuperscript{81} Such a consideration encompasses an examination of the subjective state of mind of the individual(s) exercising the authority, an exercise which, Raz\textsuperscript{82} says, is against the purpose of the rule of law as formal legality. Accordingly, rationality and arbitrariness as aspects of the rule of law only proscribe and classify as arbitrary the baseless exercise of authority for personal gain.

It should be noted however that the formal version of the rule of law is quite problematic. It provides a leeway for governments to be authoritarian or to be abusers of human rights, under the guise of complying with the rule of law, since their abusive actions or authoritarianism is sanctioned by law. Formal rule of law does not contribute to the restraining of government power, the purpose on which the rule of law was conceived. To solve this problem, a rule of law theory that is more content based is required. Thus, the need for substantive rule of law theories as well.

Tamanaha\textsuperscript{83} notes that substantive rule of law theories are an amalgamation of formal rule of law theories and numerous content requirements for laws. Substantive rule of law theories can be classified into the thinnest version of substantive rule of law and thickest version of substantive rule of law.\textsuperscript{84} The thinnest version of substantive rule of law

\textsuperscript{78} Raz 1977 \textit{Law Q Rev} 196-204.
\textsuperscript{79} Raz 1977 \textit{Law Q Rev} 196-204.
\textsuperscript{80} Raz 1977 \textit{Law Q Rev} 203. Also see Tamanaha \textit{On the Rule of Law} 94.
\textsuperscript{81} Raz 1977 \textit{Law Q Rev} 203. Also see Tamanaha \textit{On the Rule of Law} 94.
\textsuperscript{82} Raz 1977 \textit{Law Q Rev} 203. Also see Tamanaha \textit{On the Rule of Law} 94.
\textsuperscript{83} Tamanaha \textit{On the Rule of Law} 102. Also see Kruger 2010 \textit{PER/PELJ} 478-479.
\textsuperscript{84} Tamanaha \textit{On the Rule of Law} 91, 102-103, 112-113; Kruger 2010 \textit{PER/PELJ} 479.
demands that the content of laws be for the protection of individual rights. The thickest version of substantive rule of law requires the content of laws to focus on realising the socio-economic welfare of the society. Such a conceptualisation of the rule of law requires the actualisation of justice through commitment to the realisation of the right to dignity. On this note, the rule of law takes into account context-specific factors in addition to formal legality. In other words, the substantive theory of the rule of law takes into consideration the value element of laws, or rather the reason why a particular law is promulgated.

This, to a large extent, reflects the principle of natural law which demands laws to be based on morality, ethics and what is right. Such understanding of law is in stark contrast to strict positive law which comprises of common law or statutes that may or may not incorporate natural law. A prime example is that of South Africa's Apartheid policies. In 1948, South Africa's All-white National Party implemented a system of segregationist legislation against non-white South African citizens. The racist and segregationist laws led to the perpetration of numerous human rights violations against the then non-white population in South Africa.

However, although the Nuremberg laws and the Apartheid laws were in contravention of international human rights law, they were nonetheless legal, stricto sensu, when looked at from a perspective of the formal rule of law. Thus, during the apartheid era, South African laws complied with the formal aspect of the rule of law, i.e. the laws were general,

---

85 Tamanaha *On the Rule of Law* 91, 102-103, 112-113; Kruger 2010 *PER/PELJ* 479.
86 Tamanaha *On the Rule of Law* 91, 110-112, 113; Kruger 2010 *PER/PELJ* 479.
87 Tamanaha *On the Rule of Law* 110-112; Kruger 2010 *PER/PELJ* 479.
88 Dworkin *Taking Rights Seriously* 47, 326, 327, 340; Finnis *Natural Law and Natural Rights* 26-27; Friedrich *The Philosophy of Law in Historical Perspective* 59; Van Blerk *Jurisprudence: An Introduction* 10, 20.
89 Van Blerk *Jurisprudence: An Introduction* 4, 5, 13; Hart *The Concept of Law* 140, 183; Mill *Utilitarianism* 70-71; Dworkin *Taking Rights Seriously* 47, 326, 327, 340.
equal in application, public and certain. However, it was the content, substantive and value outcome of the law that was problematic, in that the content of the laws were inequitable and based on the racial discrimination of the black majority. In this light, Baxter states that prior to 1994, the rule of law did not exist in South Africa, instead it was rule by law. Ellis rightly notes that the downside of laws that conform to the strict formal definition of the rule of law is that such laws provide no regulation vis-à-vis regimes that provide clear legal rules "yet commit egregious human rights violations and flout international obligations."

In this light, the apartheid laws were in compliance with a narrow construction of the rule of law which requires laws to be clear, stable, publicised, and upheld by government officials who are accountable in terms of such laws. This legality is only from a strict application of the formal/procedural aspects of the rule of law to the exclusion of the substantive aspect which, in addition to the formal aspect, requires the content of laws to be fair and just. From this proceduralist standpoint, the fairness or justness of the laws was immaterial. Hence, the Apartheid laws were arguably illegal to some degree, because the 'value element' for protecting humanity and dignity were missing in the manner in which the laws were enacted, promulgated and enforced. The rule of law in South Africa has since changed following the advent of the Constitution. Against this backdrop, the discussion that follows considers the rule of law as it manifests in South Africa today. Examining the rule of law in South Africa is essential to this thesis as it lays the foundation for examining the manner in which nature has been incorporated into the rule of law i.e. the environmental rule of law.

---

92 Ellis 2010 U Pitt L Rev 194; Agrast, Botero and Ponce 2011 Wjp Rule of Law Index 9.
93 Agrast, Botero and Ponce 2011 Wjp Rule of Law Index 9; Ellis 2010 U Pitt L Rev 194; An example of such segregationist laws is the Extension of University Education Act 45 of 1959 which prohibited "a non-white student to register at a formerly open university without the written permission of the Minister of Internal Affairs".
94 Baxter Administrative Law 77. Also see Kruger 2010 PER/PELJ 497.
95 Ellis 2010 U Pitt L Rev 194.
4.3 The rule of law in South Africa

As already stated, prior to 1994, the legal system in South Africa was the rule by law. That is to say, although laws were general, clear and public, they nonetheless did not reflect the broad commitment to the larger freedoms and human rights people ought to enjoy. The advent of a constitutional democracy in 1994 altered South Africa's legal system; parliamentary sovereignty was replaced by constitutional supremacy and a justiciable bill of rights was introduced by the Constitution. Moreover, the Constitution lists "supremacy of the constitution and the rule of law" as some of the founding values of the democratic sovereign state of South Africa.

As already stated in the Second Chapter of this thesis, constitutional values occupy an integral place in the Constitution. Constitutional values serve to inform the manner in which the Constitution or other law is to be interpreted. Constitutional values also "set positive standards with which all law must comply in order to be valid". Therefore, the rule of law as a founding value of the Constitution ought to inform how courts interpret legal provisions. Thus, from a post-liberal reading of the Constitution, courts ought to engage in value-based interpretation which considers the rule of law as one of the transformative goals of the Constitution.

A review of how the rule of law has been applied in constitutional adjudication reveals that the Constitutional Court combines both formal and substantive interpretations of the

96 Baxter Administrative Law 77, 78, 301; Michelman "The Rule of Law, Legality and Supremacy of the Constitution" 11-1; Hoexter Administrative Law in South Africa 116.
97 Baxter Administrative Law 77, 78, 301; Michelman "The Rule of Law, Legality and Supremacy of the Constitution" 11-1; Hoexter Administrative Law in South Africa 116.
98 Section 2 of the Constitution.
99 Chapter 2 of the Constitution.
100 Section 1 of the Constitution reads as follows: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness".
101 United Democratic Movement V President of the Republic of South Africa (hereinafter United Democratic Movement) para 19.
rule of law, while still emphasizing on a formal interpretation of the concept. For instance, in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*, the Court held that although the *Interim Constitution* did not explicitly refer to the rule of law, it was nonetheless implicit in the form of legality. The Constitutional Court interpreted legality to mean that the executive and legislature are "constrained by the principle that they may exercise no power and perform no function" other than that "conferred upon them by law". Two years later, the Court in *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* confirmed the rule of law as legality, that requires those in power to act within the four corners of the law. An additional facet of the rule of law as legality was emphasized in *Dawood, Shalabi and Thomas v Minister of Home Affairs* wherein the Court stated that the rule of law demanded legal rules to be stated in an accessible and clear manner. The rule of law, as a principle that demands laws to be stated in an accessible and clear manner, was subsequently confirmed by the Court in the *Affordable Medicines Trust v Minister of Health and Kruger v President of the Republic of South Africa* cases.

---

102 Sachs J’s judgment in *Port Elizabeth Municipality V Various Occupiers* 2005 (1) SA 217 (CC) para 35 is an indication of the Court’s formal interpretation of the rule of law. Sachs J remarks that: "Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, PIE [the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998] treats these values as interactive, complementary and mutually reinforcing." Sachs J’s remark implies that "rule of law" is concerned with formalities, and content such as "the achievement of equality".


104 *Fedsure Life Assurance Ltd* para 58.

105 *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) (hereinafter *Pharmaceutical Manufacturers Association*) paras 19–20, 44, 50.

106 *Dawood* para 47.

107 *Affordable Medicines Trust V Minister of Health* 2006 3 SA 247 (CC) (hereinafter *Affordable Medicines Trust*) 108. Also see *Kruger V President of the Republic of South Africa* 2009 1 SA 417 (CC) paras 64-67.
The Constitutional Court has also offered a more substantive version of the rule of law in determining aspects such as non-arbitrariness and rationality.\textsuperscript{108} Unlike Raz,\textsuperscript{109} who insists on a narrow interpretation of the non-arbitrariness and rationality aspect of the rule of law, the Constitutional Court has opted for a fairly 'thicker' interpretation of the rationality aspect.\textsuperscript{110} In \textit{Pharmaceutical Manufacturers Association},\textsuperscript{111} the Constitutional Court expounded on the rule of law aspects of non-arbitrariness and rationality. Rationality, according to the Court was an essential requirement for the exercise of public power, and thus required an objectively evaluated rational link between "the exercise of power on the one hand, and the purpose for which the power was given on the other hand".\textsuperscript{112} Any exercise of public power devoid of such a rational relationship is irrational, unlawful and arbitrary. In this light, the rule of law within a post-liberal interpretation of the \textit{Constitution} requires decision makers to model and incorporate, in their judgments, institutional and intellectual practices that are appropriate to justifying and examining the substantive standards applicable to a particular context. These substantive standards could be justice, proportionality, fairness to mention but a few.

Accordingly, fairness, justice and proportionality become implicit values in the rule of law. In Bugge's words:

[The] rule of law does not mean citizens' full freedom, nor does it mean absolute security and physical integrity. What the rule of law requires is that any limitation and restraint in personal freedom, and any encroachment upon the individual's security and integrity must be found necessary and proportionate in order to protect other citizens' rights and interests or important public objectives and values. Furthermore, they must be laid down

\begin{flushleft}
\textsuperscript{109} Raz 1977 \textit{Law Q Rev} 94-96. \\
\textsuperscript{110} See \textit{New National Party v Government of South Africa} para 19; \textit{Pharmaceutical Manufacturers Association} paras 85, 90. \\
\textsuperscript{111} \textit{Pharmaceutical Manufacturers Association} paras 85, 90. \\
\textsuperscript{112} \textit{Pharmaceutical Manufacturers Association} paras 85, 90. Also see Kruger 2010 \textit{PER/PELJ} 483.
\end{flushleft}
in formal laws and based on due process, including the right to have one's rights and legitimate interests defended before an independent judiciary. In sum, the rule of law seeks to protect the freedom, integrity and security of human beings. A question then arises; Where does nature fit in? Phrased differently, can the rule of law be developed as a concept that not only protects human beings but also protects nature? This ushers in the concept of the rule of law for nature or what is referred to in this thesis as 'the environmental rule of law'.

### 4.4 Environmental rule of law

It should be borne in mind that humanity has reached a critical juncture in their effort to protect nature and conserve the human environment. Weiss notes that humanity has moved from the Holocene Epoch to the Anthropocene Epoch, a geological time scale wherein humans are the central force that affect the earth. Weiss propounds that the:

> Anthropocene Epoch sharply strengthens the fundamental message that all of us share a global environment, that we are for the foreseeable future locked into the same atmosphere and biosphere, and that what we do in one place, either individually or cumulatively, can significantly affect the local and global resilience and integrity of our planet. The scale and rapidity of change makes action urgent. We could invoke the analogy of a ship that has a big hole in it, which is expanding rapidly. Something needs to be done to ensure that the ship stays afloat.

This presents a challenge for humanity; to enact mechanisms that seek to sustain the integrity of the environment, whilst simultaneously ensuring that everyone benefits from the environment. On this note, law plays a vital role, for it mirrors our values and shapes...
humanity's behavior. The law obligates humanity to engage in or refrain from partaking in certain practices. Humanity's conduct should therefore be governed by the rule of law. The rule of law, or as Bugge notes, 'the role of law' "encapsulates the highest values and functions of law and the legal system". As stated in the preceding section, the rule of law means that all institutions, persons and entities, private and public, including the state, are governed by established legal rules and are accountable to independent legal institutions. This makes the rule of law an anthropocentric ideal which involves "human beings in their capacity as members of the society and subjects" to the formal authority of a state.

Viewed in this light, Bugge contends that the rule of law can be applied to nature or the environment (i.e. the environmental rule of law) on the basis of two arguments. First, according to Bugge, the environmental rule of law pertains to the need for proper laws that promote the effective "management of nature and natural resources". Thus, there is a need for the environmental rule of law to protect nature. Simply phrased: nature or the environment need specific and effective laws that can be efficiently implemented and enforced.

The second argument, adopted by Bugge, for the environmental rule of law is that essential elements of the rule of law ought to be extended, not only to include "human

118 Bugge "Twelve Fundamental Challenges in Environmental Law: An Introduction to the Concept of Rule of Law for Nature" 3.
120 Bugge "Twelve Fundamental Challenges in Environmental Law: An Introduction to the Concept of Rule of Law for Nature" 3-7.
121 Bugge "Twelve Fundamental Challenges in Environmental Law: An Introduction to the Concept of Rule of Law for Nature" 7.
beings as citizens to nature and natural values" but, to protecting nature from the detrimental effects of human activities. Thus, for Bugge:

Instead of being anthropocentric, [the environmental rule of law] even means a better legal protection of nature from human activities that may threaten or damage nature. Substantially it aims at the integrity and security of nature. It means that nature and natural values are protected by law from encroachments, deterioration and destruction in fundamentally the same way as citizens are protected by law. Of course, this does not mean that it shall be protected at any price and regardless of any other conflicting goal or interest. But these goals or interests must be strong enough to justify the environmental damage, and there must be procedural rules that ensure that the trade-off is made with due regard to nature's value and all other relevant facts.\(^{124}\)

From the aforementioned, one could deduce that protecting nature, in the same way as humans are protected by the law, promotes the security and integrity of nature, which in turn sustains the earth's ecological systems. Such argument is in line with the purpose of ESD, which is the preservation of the integrity and "continued existence of the earth's ecological systems".\(^{125}\) On this note, ESD becomes integral to the existence of the environmental rule of law. The importance of ESD to the environmental rule of law cannot be gainsaid and is clearly expressed in the 2016 IUCN's definition of the environmental rule of law. Notably, the 2016 IUCN stipulates that:

The environmental rule of law is understood as the legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically sustainable development in the rule of law. Strengthening the environmental rule of law is the key to the protection, conservation, and restoration of environmental integrity. Without it, environmental governance and the enforcement of rights and obligations may be arbitrary, subjective, and unpredictable.\(^{126}\)

From this definition, one could gather that there can be no environmental rule of law without ESD. In other words, the environmental rule of law cannot exist in a legal system that does not incorporate ESD. This is due to the fact that the environmental rule of law is an important tool in achieving ESD.\(^{127}\) The environmental rule of law also functions as


\(^{125}\) Bosselmann The Principle of Sustainability 53.

\(^{126}\) Iucn World Declaration on the Environmental Rule of Law  2016 2.

\(^{127}\) Iucn World Declaration on the Environmental Rule of Law  2016 2.
the legal basis for promoting outcomes such as ecological integrity, environmental justice and poverty reduction.\textsuperscript{128}

In addition, the environmental rule of law further encompasses a number of key governance principles that include developing, enacting and implementing strict, clear, effective and enforceable laws, policies and regulations that are administered efficiently through inclusive and fair processes so as to attain the highest levels of environmental quality.\textsuperscript{129} This means that the environmental rule of law incorporates elements such as security, predictability and the absence of bias and arbitrariness in decisions affecting nature.\textsuperscript{130} The environmental rule of law also requires that public and private entities fully account for environmental values when making decisions that could have an impact on the environment.\textsuperscript{131} Accordingly, and pursuant to a post-liberal interpretation of the \textit{Constitution}, the environmental rule of law requires courts to fully account for environmental values by engaging in transformative adjudication which requires judges to make their judgements openly and consciously. The environmental rule of law further requires a broader concept of fairness and justice, which not only includes human beings but also embraces the non-human world. This means that nature has "legal protection at a similar level as that of human beings as citizens".\textsuperscript{132} Legal protection in this regard also includes protecting nature even in cases where humanity does not stand to benefit from such protection.

\begin{itemize}
\item \textsuperscript{128} Iucn World Declaration on the Environmental Rule of Law 2016 2, 3.
\item \textsuperscript{129} IUCN World Declaration on the Environmental Rule of Law 2016 2.
\item \textsuperscript{130} Voigt \textit{Rule of Law for Nature: New Dimensions and Ideas in Environmental Law} xv; Bugge "Twelve Fundamental Challenges in Environmental Law: An Introduction to the Concept of Rule of Law for Nature" 7.
\item \textsuperscript{132} Bugge "Twelve Fundamental Challenges in Environmental Law: An Introduction to the Concept of Rule of Law for Nature" 8.
\end{itemize}
The environmental rule of law, therefore, encompasses both instrumental and intrinsic environmental or nature protection. Instrumental in the sense that the environmental rule of law seeks to protect nature for the spiritual and material welfare of human beings. In this respect, the spiritual and material welfare of human beings could also be addressed by looking at the environmental rule of law from a post-liberalism perspective which seeks to address South Africa's severe and increasing structural poverty; educational crisis; and income inequality. The environmental rule of law is also intrinsic in the sense that it seeks to protect nature for nature's sake, independent of any human interests. Hence, although there is a distinct legal difference "between nature as a value in itself and nature as a means for the satisfaction of human needs and interests", both aspects do require strong legal protection. Such robust legal protection can only be in the form of the environmental rule of law.

It should be noted further that Bugge avers that the environmental rule of law seeks to proscribe laws that legalise environmentally destructive conduct without a "sufficiently important reason and a corresponding procedure". For Bugge, such laws are neither fair nor just and are, thus, in violation of the broader purpose and principles of the traditional rule of law. On this note, while this thesis supports Bugge's earlier assertion, on protecting both the human and non-human world even in cases where humanity does

139 Bugge "Twelve Fundamental Challenges in Environmental Law: An Introduction to the Concept of Rule of Law for Nature" 8.
not stand to benefit from such protection, it nonetheless seeks to add a qualifier or condition to the assertion that: The environmental rule of law ought to proscribe laws, policies and actions that legalise environmentally destructive conduct without an important reason and corresponding procedure.

Thus, this thesis submits that the environmental rule of law ought to proscribe laws or actions that legalise environmentally destructive conduct, with little to no room for justification. This means that the judiciary, as "a key element in creating the environmental rule of law",140 ought not to adopt a deferential position when it comes to the judicial review of cases concerning environmentally destructive behavior.141 Instead, courts ought to engage in transformative adjudication as a means of responding to environmentally destructive conduct through judicial activism which, in this context, would seek to ensure that the conduct of the executive or parliament is consistent with section 24 of Constitution.

Simply put, there should be little room for laws that legalise environmentally destructive behavior, even when justified because it is such justification that has culminated in today's major environmental issues. Thus, it is such justification that has continuously led to climate change, environmental degradation, pollution and natural resource depletion.142

140 UN Environment Programme 2019 Environmental Rule of Law: First Global Report 25
141 Judicial review in general and on the basis of the Promotion of Administrative Justice Act 3 of 2000 (hereinafter PAJA) and (hereinafter PAIA) is discussed in chapter 5.
142 For instance, the World Bank 1992 World Development Report 1992: Development and the Environment 9-10 has dealt with the role of natural capital in the achievement of wealth. The World Bank suggested that states ought to first surrender environmental quality for the sake of economic growth. Environmental quality would later on be improved when the average income of states has improved as well. This hypothesis is based on the notion that the sustainability of ecological systems can be sacrificed on grounds such as economic growth. This approach is unsustainable and dangerous as it fails to consider humanity's long-term need for a sustainable ecological system. Put differently, such approach does not take into account ESD. If economic growth policies fail to advance ESD, an injustice is committed, which in Du Plessis's view, presents a "long-term impact of poor environmental quality on the lives of people", Du Plessis 2011 SAJHR 286. Du Plessis further asserts that such policies are "illogical and unsound" because "environmental quality' or a 'quality environment' transcends the conservation of natural resources". It further includes "people's health and well-being, access to water and sanitation, and land-use, for example" (also see Pearce "Managing Environmental Wealth for Poverty Reduction" 31, 34). An environment that promotes the health and well-being of people is one of the objectives of section 24 of the Constitution and could therefore be an outcome of ESD. This
After all, there will always be a reason or justification for exploiting natural resources. For instance, factors such as urbanisation and economic growth have always been reasons for justifying human activities such as the burning of fossil fuels; the reduction in forests and the expansion in residential and farming development; and the release by industries of carbon dioxide into the atmosphere. As a result, climate change, increased wildfires, declining water supplies, drought, reduced agricultural harvests and increased floods have become common human activities that continually destroy the environment.

Therefore, instead of trying to justify laws that cause environmental damage, humanity should in its use and exploitation of natural resources, devise and adopt practices that replenish that which it has consumed. The 2005 Millennium Ecosystem Assessment Report (hereinafter MA Report) records that 15 out of 24 (60%) of the ecosystem services are being consumed or degraded unsustainably.\textsuperscript{143} This includes ecosystem services such as fresh water, air and water purification, capture fisheries and the regulation of local and regional natural hazards, climate and pests.\textsuperscript{144} This means that the capacity of the earth to sustain human life and that of many other living organisms has been significantly compromised already and that the situation is being exacerbated by the incessant human assertion is discussed below at 4.5.3 Regarding economic growth as a justification for compromising on environmental quality, this thesis suggests that: in contrast to blindly adopting ecologically unsustainable policies, states through courts, for instance, ought to design development programs, laws and policies that take into account both the short term and long-term sustainability of ecological systems. This could be done by employing the environmental rule of law to achieve the outcomes of ESD.

\textsuperscript{143} Millennium Ecosystem Assessment 2005 \textit{Ecosystems and Human Well-Being} 1, 6.
\textsuperscript{144} Millennium Ecosystem Assessment 2005 \textit{Ecosystems and Human Well-Being} 1, 6. Cullinan "The Rule of Nature's Law" 103-104 interestingly notes that "most governments today accept that a range of human activities are generating such high levels of greenhouse gas emissions that the limits established by Nature for the maintenance of climatic stability on Earth have been violated. These actions jeopardize the survival of other species and undermine the health, integrity and functioning of the Earth community". From an ecocentric perspective such conduct is "contrary to the interests of the community as a whole and profoundly anti-social, and Earth is in the process of responding to this conduct through phenomena such as climate change". Accordingly, relying on humanity's ability to "escape the consequences of violating natural limits or laws is a potentially fatal mistake founded on the illusion of human exceptionalism". It is thus important to realise that if humanity is "to avoid being 'sanctioned' by nature, we must align our legal systems with the laws of nature and establish mechanisms for reviewing and invalidating decisions that contravene fundamental Earth laws". ESD could one such law that could be used by courts for better environmental protection.
activities mentioned above. Since the deterioration of the environment is continuing or rather accelerating, the current status of the environment could be substantially worse right now than that documented in the MA Report. It is therefore important that we replenish or use the earth's natural resources sustainably. By using the earth's natural resources sustainably, humanity in turn preserves the integrity of the earth's ecological system, an important aspect of ESD.

Replenishing and sustainably using the earth's natural resources not only benefits nature but benefits humanity even more, since we depend on nature for survival. Thus, both present and future generations stand to benefit from conserving and sustainably using natural resources. If the use of a natural resources is such that it cannot be replenished or used in a sustainable manner, then it would be prudent for us to leave such resource as is. It is therefore important for states to develop and enforce laws that seek to promote environmental protection. South Africa has stepped up to such task by according everyone the right to have the environment protected through measures that secure 'ecologically' sustainable development.145

In this regard section 24 shows that the Constitution recognizes the environmental rule of law. Of importance in this regard is the definition of the environmental rule of law documented by the 2016 IUCN.146 As cited above, the 2016 IUCN defines the environmental rule of law as the legal framework of substantive and procedural rights and obligations that integrate the principles of ESD. As aforementioned, a cursory note in this regard is that: If a state's substantive and procedural rights do not incorporate ESD, they fall short of meeting the condition for the existence of the environmental rule of law. In this regard, it is significant to note that South Africa's legal framework on the environment consists of provisions that provide for environmental rights and obligations (section 24 of the Constitution consists of the substantive aspect/content of environmental rule of law), as well as provisions for their effective implementation.

---

145 Section 24(b) (iii) of the Constitution.
146 Iucn World Declaration on the Environmental Rule of Law 2016 2.
(sections 31, 32, 33 and 38 consists of the formal/procedural aspect of environmental rule of law).

The thesis submits that South Africa's environmental rights legal framework incorporates the principle of environmental rule of law, as defined above, in that it makes provision for substantive and procedural rights and obligations that address the principles of ESD in the rule of law.\textsuperscript{147} In this respect, this thesis stresses that not all environmental laws embody the environmental rule of law. As argued above, the environmental rule of law can only exist meaningfully in a legal system that promotes the principles of ESD in its procedural and substantive laws. ESD therefore becomes a tool to achieving good environmental governance.

It is worth noting that in general terms, the lack of a clear understanding and normative basis on environmental rule of law may lead to subjective, unpredictable and arbitrary environmental governance.\textsuperscript{148} For example, the lack of environmental rule of law could possibly hinder the pursuit of ESD and outcomes such as ecological integrity, environmental justice and poverty reduction. Given that the environmental rule of law seeks to protect the environment and its natural resources through ESD, it is important to determine how this could be achieved. That is to say environmental protection as envisaged by section 24 could best be achieved through ESD, and its outcomes. Therefore, bolstering environmental rule of law through procedural and substantive scaffolding could be the key to achieving the outcomes or goals of ESD within the Constitution. The environmental rule of law, in this regard, becomes a crucial element to enforcing ESD and achieving its outcomes. This thesis submits that if section 24 does

\textsuperscript{147} Section 24(b) (iii) of the Constitution; Iucn World Declaration on the Environmental Rule of Law  2016 2.

\textsuperscript{148} Kotze "Environmental Governance" 107-108 defines environmental governance as: "a management process executed by institutions and individuals in the public and private sector to holistically regulate human activities and the effects of human activities on the total environment at international, regional, national and local levels; by means of formal and informal institutions, processes and mechanisms embedded in and mandated by law, so as to promote the common present and future interests human beings hold in the environment". Given Kotze's formulation of environmental governance, it can be distilled that the adjudication of environmental law disputes is a form of environmental governance.
indeed have ESD as a possible constitutional value, then it is through the environmental rule of law that we could deduce the outcomes of ESD. Distilling such outcomes could mean that courts would be engaging in transformative constitutionalism's value-laden adjudicative style, which could assist judges to fully realise the objective of section 24, i.e. environmental protection.

4.5 Environmental rule of law as a means to achieving the outcomes of ESD

As already determined in the preceding Chapters, ESD denotes development that improves humanity's well-being through activities and processes that preserve the continued existence of the earth's ecological systems. In other words, ESD in the context of section 24 seeks to ensure that the developmental process promotes environmental protection through mechanisms that preserve and protect the continued existence and integrity of the earth's ecological systems. The Constitution's express inclusion of the adjective 'ecologically' in section 24(b) (iii) means that it requires a reconceptualisation of sustainable development to 'ecologically' sustainable development. It is such reconceptualisation that could possibly assist in the pursuit of section 24's aim of environmental protection. Thus, section 24 of the Constitution requires government to advance, achieve, protect, promote and respect its objective of 'ecologically' sustainable development. This means that courts ought to develop and apply ESD as a constitutional value whenever section 24 is being considered.

In engaging in such value laden adjudication, courts could employ the environmental rule of law, as a process pertinent to realising the outcomes of ESD. Thus, as Knox\textsuperscript{149} avers, the rights to a healthy environment and to have the environment protected strengthen the environmental rule of law by filling lacunae in existing environmental laws, promoting stronger environmental laws, highlighting the significance of environmental laws in society, and offering procedural protections. Therefore, ESD as reflected within section 24 could provide for better environmental protection if applied through the environmental rule of law.

\textsuperscript{149} Knox 2014 Mission to Costa Rica 15.
rule of law. That is to say ESD strengthens the environmental rule of law by promoting ecological integrity, environmental justice and the reduction of poverty in South Africa. Stated differently, employing ESD as a constitutional value entrenched in section 24 of the Constitution could strengthen the environmental rule of law and result in outcomes such as ecological integrity, environmental justice and poverty reduction.

4.5.1 ESD as a means to realising ecological integrity

The first outcome of employing ESD as a constitutional value in environmental rights adjudication could result in promoting the ecological integrity of the environment. Thus, this thesis recognises the critical role that Science plays in saving the environment, reducing pollution and the effects of global warming. That is to say, we can turn to Science for knowledge on nature and on how to prevent or solve environmental problems, hence this thesis's focus on ecological integrity as an outcome of ESD. Ecological integrity has been employed as part of natural resource conservation for the purpose of efficiently monitoring and reporting on ecological conditions.150 As Westra, Bosselmann and Fermeglia contend, ecological integrity has not only been accepted as sound Science with regard to measuring ecosystem health, but has been expressed as a duty in many international environmental instruments.

For instance, principle 7 of the Rio Declaration requires states to protect, conserve, and restore the integrity of the earth's ecosystem.152 Moreover, article 2 of the International Union for the Conservation of Nature's Draft International Covenant on Environment and Development clearly states that "[t]he integrity of the earth's ecological systems shall be maintained and where necessary restored".153 The Earth Charter, global civil society's

---

150 Wurtzebach and Schultz 2016 BioScience 446.
151 Westra, Bosselmann and Fermeglia Ecological Integrity in Science and Law ix.
152 Principle 7 of the Rio Declaration.
reaction to the Rio Declaration, is also entirely established on ecological integrity. Its mission is to promote sustainable living and a "global society founded on a shared ethical framework that includes... ecological integrity". Although the term 'ecological integrity' is included in the aforementioned recent international and civil society instruments, its history can be traced back to 1949. Specifically, the origin of term ecological integrity dates back to Leopold's 1949 work titled "A Sand County Almanac". Leopold noted that:

[A] thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.

Building on Leopold's work, many scholars have debated on what ecological integrity entails. For instance, Karr vaguely defines ecological integrity as "the holistic health of the ecosphere or biosphere". In addition, Parrish, Braun and Unnasch define ecological integrity as:

The ability of an ecological system to support and maintain a community of organisms that has species composition, diversity, and functional organization comparable to those of natural habitats within a region. An ecological system has integrity when its dominant ecological characteristics (e.g., elements of composition, structure, function, and ecological processes) occur within their natural ranges of variation and can withstand and recover from most perturbations imposed by natural environmental dynamics or human disruptions.

Nevertheless, the oft-cited definition of ecological integrity in academic literature is that of Karr and Dudley who define ecological integrity as the ability to support and maintain a balanced, adaptive, integrated community of organisms that have a species composition, and "functional organisation comparable to that of [the] natural habitat of

---

156 Leopold A Sand County Almanac, and Sketches Here and There 224-225.
157 Leopold A Sand County Almanac, and Sketches Here and There 224-225.
159 Karr 1993 Yale J Int'l L 299.
161 Karr and Dudley 1981 Environ Manage 56.
the region". The aforementioned definitions of ecological integrity are however ambiguous and confusing. As, Bridgewater, Kim and Bosselmann\textsuperscript{162} contend, there is a need for a "more elaborate definition of ecological integrity for law in the Anthropocene". On this note, the authors describe ecological integrity as the maintenance of the biodiversity and ecosystem functions or processes that characterise a particular area at a given point in time.\textsuperscript{163} Thus, the ecological integrity of a specific area is compromised if its ecosystem process and biodiversity noticeably changes, such that it degrades the surrounding environment.\textsuperscript{164}

This means that the ecological integrity of a specific area is compromised once the environment is unable to sustain its surrounding biotic and non-biotic systems. In other words, an area has ecological integrity when it is able to sustain its biotic (living things within an ecosystem such as humans and animals) and non-biotic (non-living things in an ecosystem such as soil, water and the atmosphere) systems. Defined in this light, ecological integrity becomes both scientifically viable and justifiable as an important concept in international environmental law for the Anthropocene. Thus, given that the Holocene has paved way for the Anthropocene, where humans have become active drivers of change, it is necessary that we avoid attaching "protecting everything from human-induced change" to ecological integrity.\textsuperscript{165}

Simply put, since there is hardly any wilderness or untouched areas on earth, it is important that we maintain the earth in a manner that will sustain all of its living and non-living organisms. To maintain ecological integrity, humanity ought to establish policies and laws that are focused on promoting and safeguarding the earth's integrity.

\textsuperscript{162} Bridgewater, Kim and Bosselmann 2014 Yearb Int Environ Law 62.
\textsuperscript{163} Bridgewater, Kim and Bosselmann 2014 Yearb Int Environ Law 72. The authors use biodiversity in the context of the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems".
\textsuperscript{164} Bridgewater, Kim and Bosselmann 2014 Yearb Int Environ Law 72-73.
\textsuperscript{165} Bridgewater, Kim and Bosselmann 2014 Yearb Int Environ Law 75.
As Bridgewater, Kim and Bosselmann\textsuperscript{166} note, ecological integrity can only be maintained through policies that seek to preserve the earth's system, "while finding solutions to socio-economic development". In this light, this thesis argues that ESD could be used to preserve ecological integrity. In other words, in having its focus on preserving the earth's ecological systems, ESD concurrently promotes ecological integrity by requiring that the earth's finite resources be utilised in a manner that will sustain all of its living and non-living organisms.

Interestingly, as one of the solutions for developing and implementing ESD, the 2016 IUCN accords everyone the right to ecological integrity through the environmental rule of law.\textsuperscript{167} In other words, the environmental rule of law is essential in responding to the "increasing environmental pressures that threaten the ecological integrity of the earth".\textsuperscript{168} The environmental rule of law is, therefore, the legal foundation for promoting "global ecological integrity, and a sustainable future" for all generations.\textsuperscript{169} In addition, principle 2 of the 2016 IUCN provides that humanity and other living beings like animals have "a right to the conservation, protection, and restoration of the health and integrity of ecosystems". This means that the environmental rule of law recognises the importance of ecological integrity to both people and other living things such as animals and plants. Plainly put, the environmental rule of law extends ecological integrity to include other living organisms in the ecosystem. In this regard, ESD facilitates ecological integrity by ensuring that other living organisms in the ecosystem are protected by law from destruction, encroachments and deterioration in primarily the same way as people are protected by law.

Furthermore, it should be noted that the environmental rule of law recognises that ecological integrity is essential to "achieving human well-being and tackling poverty".\textsuperscript{170}

\textsuperscript{166} Bridgewater, Kim and Bosselmann 2014 \textit{Yearb Int Environ Law} 75.
\textsuperscript{167} Principle 2 of the Iucn World Declaration on the Environmental Rule of Law  2016.
\textsuperscript{168} Iucn World Declaration on the Environmental Rule of Law  2016 2.
\textsuperscript{169} Iucn World Declaration on the Environmental Rule of Law  2016 2.
\textsuperscript{170} Iucn World Declaration on the Environmental Rule of Law  2016 1.
Thus, maintaining the ecological integrity of earth could result in the preservation of ecosystems and the surrounding environments which are also important for sustaining humanity's daily needs such as clean air, water and food. However, as already stated ESD requires that humanity pursues development that does not compromise the ecological integrity of the earth. For development to compliment ecological integrity, there is a need to eschew the unjustifiable exploitation of the earth's finite resources. To prevent the unjustifiable exploitation of resources, the environmental rule of law prescribes engaging in a process termed 'ecological proportionality'.

Worthy of note is that Winter suggests that when considering issues of sustainability, it is important to take into cognizance ecological proportionality, a reformulation of the proportionality principle that specifically seeks to advance environmental protection. Winter further asserts that:

While [ordinary] proportionality shall primarily protect basic rights of citizens against governmental intrusions, ecological proportionality (or eco-proportionality) shall protect nature against intrusions by society (including nature-consuming governments). The reason for this new targeting of the principle of proportionality is the increasing scarcity of natural resources that are available for modern societies, be it biodiversity, water, clean air or a [habitable] climate.

In other words, ecological proportionality seeks to provide limitations on development that could harm the environment. By so doing, the environmental rule of law process of

---

173 See in this regard Fuel Retailers para 93, where the court's referral to proportionality could have been extended to incorporate ecological proportionality. Courts ought to apply ecological proportionality in environmental adjudication. Ecological proportionality is an outcome that can only be achieved if courts employ ESD as a constitutional value through the environmental rule of law. The current reference to proportionality by courts does not address issues of ESD, as mandated by section 24(b) (iii), in that it involves the balancing of environmental needs with developmental needs. Such a balance between environmental needs and developmental needs is not what section 24(b) (iii)'s injunction for "ecologically sustainable development" requires. Instead, section 24(b) (iii)'s injunction to promote ESD arguably requires that priority be given to preserving the integrity of the earth's ecological systems.
ecological proportionality facilitates ESD, through its protection of the ecological integrity of earth. It should be noted further that with ecological proportionality:

Human society is required to justify its interests in view of nature. Nature is no longer the "environment" of mankind, which is protected by physically limiting human encroachments. Rather it is a resource that must be spared unless there is good reason to consume it... Ecological proportionality [therefore] entails a fourfold test. If a developmental activity encroaches on natural resources: (1) the actor must pursue a justifiable societal objective; and (2) the activity shall prospectively be effective, i.e. capable of serving the objective; (3) necessary, i.e. not replaceable by an alternative that is less intrusive on natural resources; and (4) balanced, i.e. not excessively intrusive on natural resources in view of the importance of the societal objective.175

As aforementioned, the first test of ecological proportionality is whether a developmental activity pursues "a justifiable societal objective".176 This means that whoever seeks to engage in a developmental activity that involves the exploitation of natural resources is now obliged to give reasons for such exploitation. This requirement is understandable when one considers the ever-increasing scarceness of natural resources. Winter177 provides an example to this effect. The author contends that it would not be justifiable, for example, "to use agricultural products for biofuel where they are needed for human consumption".178

The second test for ecological proportionality is that a developmental activity must "prospectively be effective" to the extent that it is "capable of serving its objective".179 Thus, once it is established that a development activity is justifiable, it becomes necessary to establish that the means taken to achieve the development is adequate. For example, if the construction of a dam for the generation of hydropower is the developmental activity, then proof will have to be adduced that "the river will feed sufficient water into the reservoir".180

The third test for ecological proportionality, which according to Winter\textsuperscript{181} is the most crucial, is that a developmental activity must be such that it cannot be replaced by alternative, less intrusive methods on natural resources. An alternative development activity that is potentially least detrimental to natural resources ought to be preferred, although some balanced deviation is allowed since "not all alternatives will serve the objective" of the activity in precisely the same way.\textsuperscript{182} The choice of alternatives can be left objectively to the developer or it can take a subjective turn. For example, Directive 2011/92/EU on the environmental impact assessment of projects limits the alternative test to "the main alternatives studied by the developer".\textsuperscript{183} Directive 2001/42 on the environmental impact assessment of plans (herein Directive 2001/42) by contrast, expresses "reasonable alternatives".\textsuperscript{184} The objective language in Directive 2001/42 is more ideal as it is less susceptible to misuse by developers.

The final test for ecological proportionality is that the developmental activity must not be excessively invasive "on natural resources in view of the importance of the societal objective".\textsuperscript{185} In other words, once it is established that a developmental activity is justifiable, effective and necessary, it must then be proven that the activity, when weighed against its objective, does not have excessively adverse effects on nature. Winter\textsuperscript{186} provides a clear illustration to the effect that, if the expansion of a highway can only be completed "by crossing a nature reserve due to geographical factors, but this

\begin{footnotesize}
\begin{itemize}
\end{itemize}
\end{footnotesize}
would" only expand the road's transportation capacity by 5 percent, then the "adverse effect may be found excessive in relation to the objective".

It therefore appears that the main purpose of the aforementioned tests is preserving and maintaining the earth's ecological integrity. This speaks to the purpose of ESD which is also to ensure that any developmental process promotes ecological sustainability, through mechanisms that preserve and protect the continued existence and integrity of the earth's ecological systems. Hence, by applying ESD as a constitutional value through the environmental rule of law, courts stand in a better position to adequately protect the environment through outcomes such as ecological integrity. Accordingly, by applying ESD as a constitutional value through the environmental rule of law, courts engage in adjudication that is grounded in reasoned argument and justification; as well as adjudication that is structured by values and principles. Such style of adjudication conforms to post-liberal constitutionalism which makes it imperative for judges to engage in interpretation and legal reasoning that espouses transformative constitutionalism as a foundation for a substantive model of adjudication. Thus, courts could achieve ecological integrity by engaging in substantive adjudication through the application of ESD through the environmental rule of law processes such as ecological proportionality. It should be noted however that the environmental rule of law not only promotes ecological integrity, but also advances a number of principles that help facilitate environmental justice.187

4.5.2 ESD as a means to realising environmental justice

As discussed in the preceding Chapter, ESD incorporates the principle of intra-generational equity, which often overlaps to encompass issues of environmental justice. Environmental justice is a pivotal force to ensuring the conservation of the earth’s ecological systems. Thus, environmental justice not only proscribes humanity's unsustainable practices that have resulted in the disproportionate sharing of environmental goods and burdens, but also requires humanity to live in harmony with

187 Iucn World Declaration on the Environmental Rule of Law 2016 3.
the environment through respecting the earth's finite natural resources. Of importance is that environmental justice is defined as the equal treatment and meaningful involvement of all persons in the "development, implementation and enforcement of environmental laws, regulations, and policies" regardless of colour, race, national origin, or income. Environmental justice bridges the gaps between ecological and social justice issues by prioritising the rights and needs of "the poor, the excluded and the marginalised". In other words, environmental justice ensures that the poor and marginalised receive a fair and equitable share of the benefits of nature.

Of importance is that environmental justice as an outcome of ESD can only be achieved through the environmental rule of law. The 2016 IUCN states that the environmental rule of law is the legal foundation for environmental justice. This means that it is impossible to achieve environmental justice without a legal framework of substantive and procedural laws that promote ESD. The 2016 IUCN also provides for substantive principles that can be used to promote "environmental justice through the environmental rule of law". These principles include rights which have been extended to everyone so as to ensure that there is an equal sharing of the benefits and burdens of the environment.

For instance, principle 1 places an obligation on everyone to promote and care for the well-being of the environment. Conversely, principle 2 affords everyone the right to have the health and integrity of the ecosystem protected, preserved and restored. Principle 3 further affords the present and future generations the right to a clean, safe, sustainable, and healthy environment. In addition, principle 10 and 11 affords vulnerable and minority groups as well as indigenous and tribal people the right to participate in decisions that have an environmental impact on their lands. All these principles reflect the importance

---

189 Martinez-Alier The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation 10; Martinez-Alier 2014 Geoforum 239-241.
190 Iucn World Declaration on the Environmental Rule of Law 2016 1, 2.
191 Iucn World Declaration on the Environmental Rule of Law 2016 3.
the environmental rule of law places on promoting environmental justice as an intra-generational aspect of ESD. As principle 7 provides; the environmental rule of law must ensure that a legal system promotes a "fair and equitable sharing" of burdens, efforts, and the benefits of nature, "including appropriate access to ecosystem services". The equitable and fair sharing of burdens and benefits of nature not only speaks to the environmental rule of law, but also includes aspects pertaining to a post-liberal democracy which seeks to promote equality in living conditions, education etc. Overall, principle 7 requires that natural resources be "used and managed in an ecologically sustainable manner".

The aforementioned principles show that the environmental rule of law is a fundamental arsenal to the achievement of environmental justice. In turn, environmental justice promotes sustainability by requiring economic growth to be compatible with ecological sustainability. In other words, environmental justice promotes ESD by requiring states and private entities to prioritise environmental protection before development. In turn, prioritising environmental protection before development ensures that the present generation's developmental activities do not prejudice or impoverish the poor. Therefore, if economic growth activities are pursued in line with ecological integrity, ESD is preserved and environmental justice is addressed since ESD is also concerned with improving and maintaining a clean and sustainable environment for all, especially for people who have been exposed to and experienced the burdens of humanity's unsustainable developmental activities. The discussion above recognises that the environmental rule of law bolsters the relationship between environmental conservation and achieving environmental justice. However, this is not the only relationship that the environmental rule of law seeks to strengthen. In this light, the 2016 IUCN states that the environmental rule of law recognises the importance of preserving the environment as a means of ending

192  Iucn World Declaration on the Environmental Rule of Law  2016 3.
193  Martinez-Alier  The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation 10.
194  Iucn World Declaration on the Environmental Rule of Law  2016 1.
The following section discusses how ESD could help promote poverty reduction.

4.5.3 ESD as a means to realising poverty reduction

As already noted, the environmental rule of law recognises the "fundamental importance of ecological integrity" in achieving human well-being and tackling poverty. This means that a legal system that incorporates substantive and procedural laws on ESD is important to reducing poverty. It should be borne in mind that putting an end to poverty is the first goal of both the Sustainable Development Goals and the Millennium Development Goals. On this note, the environmental rule of law is crucial for achieving the sustainable development goals, in this case poverty reduction. For instance, in order to ensure the provision of basic needs to all the people, it is necessary for a legal system to implement laws that promote the sustainable use of the earth's finite resources which are in turn important for the provision of services only the natural environment can provide. These services include the air that we breathe, the water that we drink and the food we eat.

What the above argument implies is that substantive and procedural rights and obligations that address ESD could ultimately result in ensuring that the natural environment is properly preserved to the extent that no physical and/or mental harm is imposed on the health of the people. Given that ESD seeks to improve humanity's well-being through activities and processes that preserve the continued existence of the earth's ecological systems, the preservation of the environment and its natural resources therefore becomes necessary for the eradication of poverty.

---

195 Iucn World Declaration on the Environmental Rule of Law 2016 1.
196 Iucn World Declaration on the Environmental Rule of Law 2016 1.
197 Un General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, 21 October 2015, a/Res/70/1
Without digressing from the discussion at hand, it is important to note that the notion of poverty has been the subject of wide international scholarly discourse. However as Matunhu notes, regardless of the worldwide statistics and rapid accrual of literature on global poverty, no universally accepted definition of the concept exists. This thesis will not focus on the intricacies of poverty, but however notes that as of 2020, 62.1% of children in South Africa were living in poverty, whilst 49.2% of adults were living in poverty. Some striking aspects and indicators of poverty in South Africa include homelessness, insufficient access to housing, malnourishment (lack of food and water), overcrowding, bad or insecure social conditions, poor health conditions and public health in general.

A feature of the wicked problems of poverty in South Africa is inequality and the immense bearing that apartheid had on the environment. Writing on the impact of apartheid on the environment, Steyn notes that the apartheid government did not effectively regulate industrial activity or other forms of economic development. Instead, the apartheid government focused mostly on:

Conservation only for the benefit of the white minority, and failed to establish an environmental agenda that was responsive to pollution or the unhealthy state of overcrowded areas that poor South Africans were compelled to occupy as a result of apartheid's spatial planning laws.

The devastating impact of apartheid on the environment and people has extended to post-apartheid South Africa. In other words, poverty, as an effect of apartheid, not only

199 See for instance the works of Matunhu 2008 Tamara Journal 200-214; Spicker "The Rights of the Poor" 3-6; Spicker "Definitions of Poverty: Eleven Clusters of Meaning" 229-243; Baratz and Grigsby 1972 J Soc Policy 119-134.
200 Matunhu 2008 Tamara Journal 201.
204 Steyn 2005 Globalizations 393-397.
206 Butler Contemporary South Africa 4, 29, 100, 107.
affects people but the environment as well. Stated differently, "the poor (as do all people) depend on natural resources and ecosystem services for their survival" and therefore equally have an environmental footprint. This means that there is a relationship between poverty and ESD. That is to say ESD is necessary and essential to achieving poverty reduction. In other words, ESD is a precondition for poverty reduction. A failure to sustain the earth's finite resources will in turn result in a failure to end poverty.

With respect to the relationship between poverty and ESD, Swilling contends that ESD is primarily concerned with eradicating poverty in a manner that rebuilds natural resources and ecosystems. Similarly Pierce argues that: For development to be sustainable it must "require a rising average standard of living, and faster than average growth in the well-being of the poorest sections of society". This reasoning appears to be based on the notion that the sustainability of ecological systems can be sacrificed on grounds such as social and economic development. For instance, states could at times engage in unsustainable mining practices under the guise of reducing poverty. This approach is unsustainable as it fails to consider humanity's long-term need for a sustainable ecological system. Thus, economic growth policies that fail to advance ESD present a "long-term impact of poor environmental quality on the lives of people". Accordingly, ESD is primarily concerned with preserving the earth's natural systems and not poverty reduction. This means that a sustainable society in the context of this thesis is not measured by the number of poor people, but is instead measured by how successful a society has been in preserving its finite natural resources. Viewed in this light, poverty can never be an obstacle to achieving ESD, instead the failure to promote ESD is an indirect obstacle and hindrance to achieving poverty reduction. This assertion, in some way, addresses the argument to the effect that poverty reduction inevitably requires an

---

208 Swilling "Local Governance and the Politics of Sustainability" 77, 79.
209 Pearce "Managing Environmental Wealth for Poverty Reduction" 30.
210 Du Plessis 2011 SAJHR 286.
increase in the exploitation of natural resources so as to bolster access to food and wealth.\textsuperscript{211}

Consequently, this thesis submits that it would be fruitless to engage in unsustainable development activities that over exploit the natural resource base as such exploitation could leave future generations without any resources to live by, thereby leading to poverty. Put differently, ESD is not against development, but unsustainable development. In fact, ESD seeks to promote development that improves humanity’s well-being through activities and processes that preserve the continued existence of the earth’s ecological systems. In other words, ESD seeks to ensure that the developmental process promotes ecological sustainability, through mechanisms that preserve and protect the continued existence and integrity of the earth’s ecological systems for the benefit of present and future generations.

Furthermore, in response to the argument that poverty reduction inevitably requires an increase in the exploitation of natural resources,\textsuperscript{212} this thesis submits that the unsustainable exploitation of natural resources would actually leave the poor more impoverished. That is to say, the unsustainable exploitation of natural resources could lead to the pollution of the soil, air, ground and surface water resources which the poor mostly rely on for their livelihood. In this light, ESD becomes a precondition to achieving poverty reduction. There is, therefore, a delicate although unmistakable correlation between poverty and the inability to prioritise the conservation of an already limited natural resource base.\textsuperscript{213} This relationship is illustrated by Bosselmann \textit{et al.}\textsuperscript{214} who deduce a connection between inter-generational and intra-generational equity, poverty and sustainability in stating that:

The scope of sustainability ranges from maintaining the integrity of biophysical systems to offering better services to more people to provide freedom from hunger and

\begin{footnotesize}
\begin{enumerate}
\item Du Plessis 2011 \textit{SAJHR} 287; Scanlon, Cassar and Nemes 2006 \textit{Water as a Human Right}? 25.
\item Du Plessis 2011 \textit{SAJHR} 287; Scanlon, Cassar and Nemes 2006 \textit{Water as a Human Right}? 25.
\item Du Plessis 2011 \textit{SAJHR} 286-287.
\item Bosselmann, Engel and Taylor \textit{Governance for Sustainability: Issues, Challenges, Successes} 7.
\end{enumerate}
\end{footnotesize}
deprivation, as well as choice, opportunity and access to decision-making, which are aspects of equity within and across generations.

Therefore, what comes first is the integrity of the earth's ecological systems. Once sustained, the earth's ecological systems will be able to offer better services (food, water, air) to more people. Once the present and future generations are bestowed with life sustaining resources, social justice problems such as poverty and inequality could be reduced. Accordingly, eradicating poverty could also advance environmental protection, since reducing poverty might lead to a reduction of unsustainable and environmentally damaging practices employed by the poor. It is therefore important for legal systems to promote ESD through laws that take into consideration the needs and views of the poor. In other words, ESD can only promote poverty reduction if there is collaborative governance and management that involves the poor, or communities at large, as stakeholders in environmental decision making. Furthermore, ESD can only promote poverty reduction if a legal system incorporates substantive and procedural laws that address the effects of humanity's economic development on ecological stress (i.e. the degradation of soils atmosphere, water regimes, and forests). In view of the above, the notion that poverty reduction could be an outcome of employing ESD as a constitutional value is concretised by a post-liberal interpretation of the Constitution which requires judges to engage in value-laden adjudication.

4.6 Conclusion

This Chapter sought to determine how the environmental rule of law can be used to achieve the outcomes of ESD. The specific research question guiding this Chapter was how the environmental rule of law could be used as a means to achieving the outcome(s) of ESD in South Africa? In answering this question, this Chapter first considered the meaning of the rule of law in general. The historic origins of the rule of law was examined and established as having congealed roots in the slow and unplanned events of the Middle
The Chapter then proceeded to note that South Africa’s legal system subscribes to the rule of law. That is to say, all government agents are "constrained by the principle that they may exercise no power and perform no function" other than that "conferred upon them by law". The Chapter proceeded to determine that nature could also benefit from the protection of the rule of law, hence the environmental rule of law.

The environmental rule of law could be understood as the legal framework of substantive and procedural rights and obligations that integrate the principles of ESD. This Chapter further established that ESD is an important tool to realising the environmental rule of law in South Africa. Given that the environmental rule of law seeks to protect the environment and its natural resources through ESD, this Chapter deemed it essential to determine how this could be achieved. That is to say environmental protection could best be achieved through ESD, and its outcomes.

The outcomes of ESD were examined in this Chapter. Thus, it was argued that courts could engage in transformative adjudication by engaging in a value-laden style of adjudication that employs ESD as a constitutional value for the purpose of realising ecological integrity, environmental justice and poverty reduction. Having established the outcomes of ESD, the following Chapter will argue that the judiciary has an important role to play in developing environmental rule of law and the outcomes of ESD. The following Chapter will also attempt to provide guidance on how the judiciary could use ESD in the interpretation and application of environmental laws such as section 24.

---

215 Tamanaha *On the Rule of Law* 15.
216 Fedsure Life Assurance Ltd para 58.
CHAPTER 5
THE PURSUIT OF 'ECOLOGICALLY' SUSTAINABLE DEVELOPMENT IN SOUTH AFRICA'S COURTS

5.1 Introduction

The main research question informing this thesis is: How could 'ecologically' sustainable development be used as a constitutional value in environmental rights adjudication, and how could courts employ the environmental rule of law to reach the outcomes of 'ecologically' sustainable development? The preceding Chapters have sought to address the meaning of ESD, its place in South Africa's constitutional and environmental rights narratives and discourse as well as its outcomes when taking into account the environmental rule of law. The preceding Chapters, thus, established that ESD could mean development that seeks to conserve the continued existence of the earth's ecological systems. It was also established that employing ESD as a constitutional value could result in outcomes such as ecological integrity, environmental justice and poverty reduction.

Relying on the previous Chapters, the objective of this Chapter is to examine how courts have or could use ESD as a constitutional value in environmental rights adjudication for the purpose of realising ecological integrity, environmental justice and poverty reduction. Since the outcomes of ESD have already been discussed, this Chapter examines how courts can make such outcomes a reality through employing ESD as a constitutional value in environmental rights adjudication. This Chapter's objective is based on the assertion that; To date and as far as this study could ascertain, no specific constitutional value has been used in the adjudication of section 24 of the Constitution. ESD, as already suggested, could be of much constitutional value. There is therefore a need to examine how courts could develop ESD as a constitutional value in the adjudication of section 24.

Such exposition will require the examination of judicial review in environmental law cases. For the purpose of scope, length and relevance, the environmental law cases discussed
herein entail the interpretation and application of section 24 in judicial review proceedings. Moreover, as far as this research could establish, not much has been written on ESD and the cases that will form the crux of this Chapter. Consequently, a major portion of the critique relies on the researcher's own interpretation as opposed to commentaries. Upon completion, this Chapter hopes to provide a clearer comprehension of how South Africa's judiciary can develop and apply ESD as a constitutional value in the development and advancement of the country's environmental rights jurisprudence.

5.2 Judicial review in environmental law adjudication

As noted in the preceding Chapters, ESD could mean development that seeks to conserve or preserve the continued existence of the earth's ecological systems. Preserving the earth's finite resources has become a major goal of sustainability, globally, such that it has become a precondition for the existence of the environmental rule of law. It may be recalled that based on the 2016 IUCN, ESD is a precondition for the existence of the environmental rule of law in a legal system.\(^1\) Simply put, given that the 2016 IUCN regards the environmental rule of law as the legal framework of substantive and procedural "rights and obligations that incorporates the principles of" ESD in the rule of law,\(^2\) a legal system cannot function effectively without environmental substantive and procedural laws that provide for ESD.

It is therefore important for a legal system to have substantive laws that seek to protect the environment through measures such as ESD. However, if such substantive laws are implemented in a way that is not participatory, lawful, transparent, fair and/or reasonable or rational, "the environmental rule of law's procedural rights and obligations" create a basis upon which one can enforce the substantive rights and obligations in judicial review proceedings.\(^3\) Worth mentioning is that judicial review is a process whereby judges review the constitutionality of conduct undertaken by private parties, the executive or legislature

---

1. Iucn World Declaration on the Environmental Rule of Law 2016
2. Iucn World Declaration on the Environmental Rule of Law 2016
3. Iucn World Declaration on the Environmental Rule of Law 2016
and accordingly can declare such conduct invalid on the basis of being inconsistent with the Constitution.\textsuperscript{4} In South Africa, the grounds upon which the process of enforcing substantive laws through judicial review is generally through the right of access to information,\textsuperscript{5} the right to just administrative action\textsuperscript{6} and the principle of legality that emerges from the rule of law.\textsuperscript{7} These grounds for judicial review are discussed seriatim.

Section 32 of the Constitution affords everyone the procedural right of access to information. This procedural right imposes an obligation on both private actors and the state to provide access to information upon request. The right of access to information as entrenched in section 32 of the Constitution is given effect through the Promotion of Access to Information Act (PAIA).\textsuperscript{8} PAIA acknowledges that the apartheid system promoted a culture of unresponsiveness and secrecy amongst the private and public sectors, which brought about the "abuse of power and human rights violations".\textsuperscript{9} PAIA further states that the right of access to information is mandatory to promote a culture of accountability and transparency.\textsuperscript{10} Further, PAIA outlines the details of how one may lodge a request for access to information\textsuperscript{11} as well as the limited grounds that could warrant the refusal of such request.\textsuperscript{12} It is also noteworthy that should one request information from private entities, it must be for the purpose of protecting a right. That is to say, access to information could be for the protection of the environmental right where,

\textsuperscript{4} Hoexter Administrative Law in South Africa 108.
\textsuperscript{5} Section 32 of the Constitution.
\textsuperscript{6} Section 33 of the Constitution.
\textsuperscript{7} Section 1 of the Constitution states that South Africa is founded on values such as the rule of law and the supremacy of the Constitution.
\textsuperscript{8} Section 32 of the Promotion of Access to Information Act 2 of 2000 (hereinafter PAIA). An example of a section 32 and PAIA environmental law dispute is Veja (hereinafter VEJA), which concerned transparent environmental decision making in the private sector. In addition, an example of a section 32 and PAIA environmental law dispute is De Lange V Eskom Holdings Ltd 2012 (1) SA 280 (GSJ), which concerned transparent environmental decision making by the state.
\textsuperscript{9} Preamble of PAIA
\textsuperscript{10} Preamble of PAIA.
\textsuperscript{11} Sections 11 and 18 of PAIA provide for a request from a state organ. Sections 50 and 53 of PAIA provide for a request from the private sector.
\textsuperscript{12} Sections 33 to 46 of PAIA provide for grounds of refusal that a state may invoke and sections 62 to 70 of PAIA provide for grounds of refusal that private bodies may invoke.
for example, a community requests access to records from polluters whose conduct has been alleged to be negatively impacting upon the community's health and well-being.\textsuperscript{13}

Another ground for judicial review in South Africa could be based on section 33 of the \textit{Constitution}. Section 33 of the \textit{Constitution} provides for the procedural right to just administrative action (a particular type of public power).\textsuperscript{14} According to this right, all administrative action, including decisions by the executive in the course of implementing environmental laws, must be fair, lawful and reasonable.\textsuperscript{15} Furthermore, upon request, written reasons must be given for administrative action.\textsuperscript{16} Noteworthy is that the right to just administrative action is given effect through the \textit{Promotion of Administrative Justice Act (PAJA)}.

The objective of \textit{PAJA} is to promote good governance, an efficient administration, and a culture of openness, transparency and accountability in the exercise of public power.\textsuperscript{17} Moreover, \textit{PAJA}, among other things defines administrative action, outlines the requirements for procedurally fair administrative action, details the grounds upon which someone adversely affected by administrative action could rely on when considering judicial review, and offers remedies that could be granted in judicial review proceedings.\textsuperscript{18} Since \textit{PAJA}'s enactment, legal action "for the judicial review of administrative action now ordinarily arises in \textit{PAJA}".\textsuperscript{19} Environmental law cases that challenge environmental decision-making are mostly adjudicated in the framework of judicial review proceedings.

\begin{itemize}
  \item \textsuperscript{13} \textit{VEJA} paras 49-53.
  \item \textsuperscript{14} Section 33 of the \textit{Constitution}. The term "administrative action" is defined in section 1 of \textit{PAJA}. Quinot and Maree "Administrative Action" 76-93.
  \item \textsuperscript{15} Section 33 of the \textit{Constitution}.
  \item \textsuperscript{16} Section 33 of the \textit{Constitution}.
  \item \textsuperscript{17} Section 33 of the \textit{Constitution}.
  \item \textsuperscript{18} See \textit{PAJA}'s section 1 (definitions), sections 3 and 4 ("requirements for procedural fairness"), section 6 ("grounds of review") and section 8 (remedies).
  \item \textsuperscript{19} \textit{Bato Star} 25. The court in \textit{Minister of Health V New Clicks South Africa (Pty) Ltd} 2006 (2) SA 311 (CC) paras 92-96 has also advised litigants to rely on \textit{PAJA} and not on section 33 when seeking for judicial review of administrative action.
\end{itemize}
based on *PAJA*, since the implementation of laws such as *NEMA* and the Specific Environmental Management Acts (SEMAs)*20* largely amounts to "administrative action".*21*

The third basis for judicial review in South Africa is the rule of law.*22* The rule of law, as a constitutional value in terms of section 1 of the *Constitution*, creates a ground for the judicial review of public power with respect to the principle of legality on the basis that the exercise of the public power was inconsistent with the law or irrational.*23* The principle of legality has also been invoked to challenge public power in the judicial review of environmental decisions, where no other more definite ground for judicial review existed.*24* In other words, judicial review may be invoked on the basis of enforcing elements such as predictability and the absence of bias and arbitrariness in decisions affecting the environment.*25*

Judicial review based on the environmental rule of law would therefore require that the public and private sphere fully account for environmental values when making decisions that could have an impact on the environment.*26* This means that judicial review is part of South Africa's system of checks and balances. Stated differently, judicial review is part

---


21 *Earthlife* para 10.

22 Section 1 of the *Constitution*. Also see *Fedsure Life Assurance Ltd V Greater Johannesburg Transitional Metropolitan Council* (hereinafter *Fedsure*) paras 56, 57, 58.

23 *Fedsure* paras 56, 57, 58.

24 *Normandien Farms (Pty) Ltd V South African Agency for Promotion of Petroleum and Exploitation Soc Ltd* 2020 (6) BCLR 748 (CC) is an instructive example of the application of the principle of legality with regard to public power that concerns the implementation of environmental law.


of South Africa's model of separation of powers, which gives the judiciary the latitude to intrude into the jurisdiction of the executive and legislature.\textsuperscript{27} The judiciary is given such authority so as to ensure that the executive or legislature does not abuse its power, and to ensure that the rights enshrined in the \textit{Constitution} are fulfilled.\textsuperscript{28}

Pursuant to this system of checks and balances, the judiciary is vested with the authority to "interfere" in the exercise of power by the legislature or executive so as to uphold South Africa's constitutional values through transformative adjudication.\textsuperscript{29} Moreover, based on South Africa's constitutional design, the judiciary is not only an independent organ of the state, but is also subject to the \textit{Constitution} and the law alone.\textsuperscript{30} Liebenberg,\textsuperscript{31} thus, expounds that the \textit{Constitution} empowers the judiciary to ensure that the other organs of state act within the confines of the law, whilst fulfilling their constitutional obligations. The author further argues, the only appropriate method of fulfilling such task is through transformative adjudication.\textsuperscript{32} It thus bears repeating, that when engaging in judicial review, judges ought to engage in legal reasoning that accords protection to an individual's rights as entrenched in the \textit{Constitution}.\textsuperscript{33} In the context of this thesis, judges, in the judicial review of environmental law cases, ought to strive to enforce the rights to environmental protection and to an environment that is not harmful to the well-being and health of an individual. Arguably, such legal reasoning requires judges to engage in developing and applying constitutional values such as ESD.

\begin{flushright}
\textsuperscript{27} Gargarella, Pilar and Theunis "Courts, Rights and Social Transformation: Concluding Reflections" 260; Hodgson 2018 \textit{SAJHR} 76-77; Davis 2016 \textit{SALJ} 267; Liebenberg \textit{Socio-Economic Rights} 68-71.
\textsuperscript{28} Gargarella, Pilar and Theunis "Courts, Rights and Social Transformation: Concluding Reflections" 260; Hodgson 2018 \textit{SAJHR} 76-77; Davis 2016 \textit{SALJ} 267; Liebenberg \textit{Socio-Economic Rights} 68-71.
\textsuperscript{29} Davis 2016 \textit{SALJ} 267.
\textsuperscript{30} Section 165 of the \textit{Constitution}. Also see Economic Freedom Fighters \textit{V Speaker of the National Assembly; Democratic Alliance \textit{V Speaker of the National Assembly} 2016 (3) SA 580 (CC) para 1.
\textsuperscript{31} Liebenberg \textit{Socio-Economic Rights} 71.
\textsuperscript{32} Liebenberg \textit{Socio-Economic Rights} 71-75.
\textsuperscript{33} Lenta 2004 \textit{SAJHR} 567.
\end{flushright}
Furthermore, Liebenberg\textsuperscript{34} avers that judicial review requires judges not to only reason in a way that respects their institutional role, but in a way that also respects the institutional roles of the executive and legislature respectively. Thus, South Africa's separation of powers model requires that judges should, when engaging in judicial review and transformative adjudication, not entirely disregard the text of the law that they are tasked to interpret and apply.\textsuperscript{35} A complete disregard of the text of the law judges are tasked to interpret or apply would be unjustly encroaching into the domain of the legislature.\textsuperscript{36}

This means that when engaging in the judicial review of environmental law cases, judges must consider environmental laws such as section 24 of the \textit{Constitution} in general, \textit{NEMA} and the other SEMAs, where appropriate. That is to say, even in the judicial review of environmental law cases, judges are constitutionally obliged to promote, protect, respect and fulfil all rights enshrined in the Bill of Rights, including the environmental right in section 24. Thus, the constitutional separation of powers system of checks and balances requires judges to promote, protect, respect and fulfil the environmental right as provided for in section 24. Promoting, protecting, respecting, and fulfilling the environmental right requires judges to, in the course of judicial review, promote the values that underlie South Africa's democratic society.\textsuperscript{37}

Therefore, when engaging in the judicial review of environmental law cases, judges ought not to disconnect from the \textit{Constitution}'s goal of environmental protection through values such as ESD. As Langa\textsuperscript{38} notes, although judges are vested with the authority to make laws as part of the separation of powers model, they must also strive to bring the law in compliance with the rights and values envisaged by the \textit{Constitution}. In the context of this thesis, judges ought to, in the course of the judicial review of environmental law

\begin{itemize}
\item Liebenberg \textit{Socio-Economic Rights} 71.
\item Langa 2006 \textit{Stell LR} 357.
\item Langa 2006 \textit{Stell LR} 357.
\item Section 39 of the \textit{Constitution}.
\item Langa 2006 \textit{Stell LR} 357.
\end{itemize}
cases, strive to make all applicable laws conform with the environmental right and ESD as a value reflected within the *Constitution*. By seeking to conform all laws with ESD, judges simultaneously engage in substantive legal reasoning and transformative adjudication by embracing the substantive and procedural laws that afford everyone the right to have the environment protected.

As a consequence, judges take part in realising outcomes of ESD such ecological integrity, environmental justice and poverty reduction. For instance, as Hodgson\(^{39}\) contends, the constitutional model of separation of powers is designed not to only obligate all branches of government to promote, protect, fulfil and respect the rights in the *Constitution*, but to also work on eliminating inequality and combating poverty. The judiciary is therefore presented with the task of not only protecting the environment, but of promoting social justice issues such as environmental justice and poverty eradication. Hence, the adjudication of environmental law cases ought to be a platform wherein judges address and expose environmental injustices of the Anthropocene. As Collins expounds:

> As the arbiters of justice in the Anthropocene, judges have the potential to radically transform environmental governance in the public interest or, alternatively, to be mere spectators in the ongoing process of environmental degradation.\(^{40}\)

Accordingly, South African judges, as essential agents of environmental and social transformation, are constitutionally obligated to radically change environmental governance in the interest of the public so as to fully respond to realising environmental protection and an environment that is not harmful to the health and well-being of everyone. ESD operates as a constitutional value pursuant to which South African judges may do so. ESD, therefore, calls upon the judiciary, as a key governance actor, not to only consider the well-being of people, but also requires the judiciary to consider the well-being of the planet/nature, through the environmental rule of law. The section that follows aims at unpacking the manner in which the judiciary could have developed and

---

\(^{39}\) Hodgson 2018 *SAJHR* 66, 73, 88-89.  
\(^{40}\) Collins "Judging the Anthropocene: Transformative Adjudication in the Anthropocene Epoch" 310.
applied ESD as a constitutional value in environmental rights adjudication, particularly in the judicial review of environmental law disputes. The section also examines how courts could employ the environmental rule of law to realise ecological integrity, environmental justice and poverty eradication as outcomes of ESD.

5.3 The pursuit of 'ecologically' sustainable development by the judiciary

Ever since the introduction of section 24 in 1996, a myriad of environmental law cases have been adjudged by South African courts.41 As a result, a bulk of environmental law jurisprudence, post-apartheid, has been developed.42 A decade post the debut of the environmental right, Kidd43 noted that much of the country's jurisprudence on environmental law was relatively weak because of the judiciary's limited engagement with significant environmental laws. The author further avers that environmental considerations have not been given appropriate attention in the adjudication of environmental law disputes.44 For example, courts have, in the adjudication of a number of environmental law disputes, narrowed or even overlooked, the application of applicable provisions in NEMA.45

As a resolution of these concerns, Kidd46 advocated for "more consistency in the courts' correctly considering, interpreting and applying environmental law". Furthermore, Kidd47 expressed concern regarding how courts often addressed the environmental context as secondary, and instead focused on questions concerning administrative justice. What was observed was, therefore, a judicial unwillingness to confront scientific and/or technical

41 See for instance BP, Gongqose V Minister of Agriculture, Forestry, Gongqose and S (2018) 3 All SA 307 (SCA); Fuel Retailers; Earthlife etc.
43 Kidd 2006 PER/PELJ 72/118-78/118.
44 Kidd 2006 PER/PELJ 72/118-78/118.
45 For instance Kidd 2006 PER/PELJ 73/118-79/118 notes that All the Best Trading Cc T/a Parkville Motors V Sn Nayagar Property Development and Construction Cc 2005 (3) SA 396 (T) ignored NEMA, and Minister of Public Works V Kyalami Ridge Environmental Association 2001 (3) SA 1151 (CC) misinterpreted NEMA.
46 Kidd 2006 PER/PELJ 79/118.
47 Kidd 2006 PER/PELJ 80/118-83/118 referring to Earthlife.
concerns regarding the environmental context of environmental law cases. Such unwillingness, it was argued, resulted in jurisprudence that weakened the environmental right, thereby being prejudicial to the environment.

Worth noting is that the environmental right was first considered in detail in 2008, in the *Fuel Retailers* judgement. Henceforth, a number of scholars averred that notwithstanding the Constitutional Court's extensive engagement with the concept of sustainable development as per the environmental right, the case left a lot of stones unturned regarding the general development of South Africa's environmental law jurisprudence. Couzens, for example, asserts that the Constitutional Court, in *Fuel Retailers*, misread the content of applicable environmental laws, and consequently used inaccurate, erroneous and clumsy terminology when describing these laws. For Couzens, "the judiciary as a whole [was] still struggling to understand South Africa's" novel "environmental laws - both its jurisprudential basis; and the finer details of the laws themselves".

Not long post the *Fuel Retailers* judgment, Kotzé and Du Plessis, in their exploration of "Fifteen years of environmental rights jurisprudence in South Africa", observed that South African Courts have generally sought to uphold, interpret and apply the county's environmental laws, thereby contributing to law-making and to the deepening and comprehension of environmental discourse. The authors, however, acknowledged that South Africa's environmental law was "still in its infancy when compared to other legal disciplines in South Africa" and proceeded to point out some weaknesses in South Africa's

---

48 Kidd 2006 *PER/PEL* 80/118-84/118.
49 Kidd 2006 *PER/PEL* 80/118-84/118.
51 Couzens 2008 *SAJELP* 49-50.
52 Couzens 2008 *SAJELP* 55.
53 Kotze and Du Plessis 2010 *J Court Innov* 159-160.
developing environmental law jurisprudence. In this light, Kotze and Du Plessis observed that:

The courts have not taken the opportunity to concretize section 24 and have 'neglected' to interpret the environmental right where the facts and circumstances begged for this right to be applied in a concrete way.

Where Courts undertook to engage with the environmental right, such attempt was largely limited. Building on the aforementioned literature on South Africa's environmental law jurisprudence, the researcher acknowledges, without doubt, that 25 years post the debut of the environmental right, the judiciary's understanding of South Africa's jurisprudential detail and basis of environmental laws has heightened. However, courts have arguably not yet fully, developed a specific constitutional value to be used in environmental rights adjudication. Hence, this thesis examines how the judiciary has engaged with section 24(b) (iii)'s specific injunction of ensuring environmental protection through 'ecologically' sustainable development.

This thesis further examines the extent to which the judiciary has or could have, and should apply the environmental rule of law so as to reach the outcomes of ESD (ecological integrity, environmental justice and poverty eradication). For this reason, the thesis analyses South Africa's developing environmental rights jurisprudence from a *lex lata* standpoint to illustrate the need for a nuanced interpretation of section 24(b) (iii)'s injunction for environmental protection through 'ecologically' sustainable development. In addressing these concerns this Chapter examines a number of environmental law judgements, relevant to the context of this thesis. Accordingly, this thesis illustrates, with reference to *BP; Fuel Retailers; VEJA* and *Earthlife*, the manner in which ESD could be used by courts as a constitutional value in environmental rights adjudication through the

---

54 Kotze and Du Plessis 2010 *J Court Innov* 174.  
55 Kotze and Du Plessis 2010 *J Court Innov* 169 referring to *Minister of Public Works V Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) and *Minister of Health and Welfare V Woodcarb (Pty) Ltd* 2001 (3) SA 1151 (CC).  
57 *Veja* 2015 (1) SA 515 (SCA).
environmental rule of law. However, an important caveat in this regard is that, although
the cases to be discussed dealt with more facts and arguments, the facts retold here and
the discussion advanced is limited to the facts that the researcher considers relevant to
the purpose of the scope and length of the thesis. Thus, any other additional factors are
mentioned where necessary for contextual purposes.

5.4 BP Southern Africa

The Applicant (BP Southern Africa Pty Limited) sought, first, for an order to review and
set aside the ruling of the Gauteng Provincial Department of Agriculture, Conservation,
Environment and Land Affairs of Gauteng (hereinafter the Department).\(^{58}\) The
Department’s decision rejected the Applicant’s request with respect to section 22(1) of
the Environment Conservation Act (hereinafter the ECA)\(^ {59}\) for "authorisation to develop a
filling station on a property in a Midrand commercial area".\(^ {60}\) Authorisation by the
Department is crucial since filling stations are, in terms of section 21(1) of the ECA,
identified as activities that could substantially be detrimental to the environment.\(^ {61}\) In
considering the application, the Department took into account the Environmental Impact
Assessment (EIA) Administrative Guideline: Guideline For The Construction And Upgrade
Of Filling Stations And Associated Tank Installations (hereinafter the EIA Guideline),\(^ {62}\)

\(^{58}\) BP 1.

\(^{59}\) The Environment Conservation Act 73 of 1989 (hereinafter the ECA) has largely been replaced by
NEMA, although certain provisions still remain in force. For instance, section 50(2) of NEMA states that
sections 21, 22 and 26 of the ECA as well as any regulations and notices issued pursuant thereto will
be repealed by the Minister on a date to be published, once such Minister is satisfied that the notices
or regulations issued under "section 24 of NEMA have made the regulations and notices under sections
21 and 22 of the ECA redundant".

\(^{60}\) Section 22(1) of the ECA provides: "(1) No person shall undertake an activity identified in terms of
section 21(1) or cause such an activity to be undertaken except by virtue of a written authorization
issued by the Minister or by a competent authority or a local authority or an officer, which competent
authority, local authority or officer shall be designated by the Minister by notice in the Gazette."

\(^{61}\) Section 21(1) provides: "(1) The Minister may by notice in the Gazette identify those activities which
in his opinion may have a substantial detrimental effect on the environment, whether in general or in
respect of certain areas."

\(^{62}\) In 2001, the Gauteng Department of Agriculture, Conservation, Environment and Land Affairs
(GDACEL) (now Gauteng Department of Agriculture and Rural Development (GDARD)) developed the
EIA administrative guideline: Guideline for the Construction and Upgrade of Filling Stations and
Associated Tank Installation (hereafter referred to as GDACEL guideline). These guidelines serve to
which states *inter alia* that the Department will not approve the development of a new filling station if it will be "situated within three kilometres of an existing filling station" in a residential, urban or built up area.\(^{63}\)

The second order sought by the Applicant was for an order reviewing and ultimately setting aside the Department's decision to apply the EIA Guideline in rejecting its application.\(^{64}\) The third order sought to compel the Department to reconsider the Applicant's request for "authorisation to develop the filling station".\(^{65}\) In laying out the factual background of the dispute, the High Court noted that it was common knowledge that petroleum products sold by filling stations were hazardous substances regulated by national legislation.\(^{66}\) Section 26 of the *ECA*, thus provides "regulations relating to applications for the authorisation of activities which have been identified" by the Minister as hazardous under section 21 of the *ECA*.\(^{67}\)

Pursuant to section 26, Government Notice R1183\(^{68}\) provides further regulations regarding an application for authorisation in terms of section 22(1) of the *ECA*. Moreover, in terms of sections 5, 6, 7, 8 and 11 of Government Notice R1183, an application for authorisation should include a scoping plan and report, an environmental impact assessment plan and

---

\(^{63}\) *BP* 1.

\(^{64}\) *BP* 1, 3-6.

\(^{65}\) *BP* 1, 3-6.

\(^{66}\) *BP* 5.

\(^{67}\) Section 26 provides inter alia as follows: "The Minister or a competent authority, as the case may be, may make regulations with regard to any activity identified in terms of section 21(1) or prohibited in terms of section 23(2), concerning – (a) The scope and content of environmental impact reports, which may include, but are not limited to – (i) A description of the activity in question and of alternative activities; (ii) The identification of the physical environment which may be affected by the activity in question and by the alternative activities; (iii) An estimation of the nature and extent of the effect of the activity in question and of the alternative activities on the land, air, water, biota and other elements or features of the natural and man-made environments; (iv) The identification of the economic and social interests which may be affected by the activity in question and by the alternative activities; (v) An estimation of the nature and extent of the effect of the activity in question and the alternative activities on the social and economic interests". Also see *BP* 5.

\(^{68}\) Section 4 of *South Africa- Government Notice. R. 1183 (1997).*
report, as well as the procedure in which one may lodge an appeal. Following the aforementioned statutory requirements, the Applicant applied to the Department for "authorisation to develop the filling station on" its property in Midrand, and subsequently submitted a scoping report of the proposed development. With respect to the impact of the development on the environment, the scoping report covered the hydrology, geology and soils, climatic conditions, topography, fauna and flora, cultural, social and historical features and land use of the area. In this regard, the scoping report provided a geotechnical report which dealt with the impact of the proposed filling on soil chemistry and ground water. The geotechnical report provided that:

Minor to moderate perched water seepages were encountered from below a depth of 0.8m and proper damp-proofing precautions should be taken underneath structures. Cognizance should be taken of the perched water table in the design of subsurface containers and behind retaining walls.

In addition, the scoping report noted the existence of two existing filling stations, one approximately 1.8 kilometres to the North and the other approximately 1.4 kilometres to the South. The scoping report further noted that from an economic standpoint, no negative impact was envisaged between the existing filling stations and the proposed filling station. The scoping report's observation in this regard was based on the fact that each of the filling stations had "their own niche target market irrespective of the main arterial route through the area".

Upon consideration of the Applicant's application, the Department rejected the requested authorisation. In declining the Applicant's application, the Department submitted that the proposed filling station did not comply with the EIA Guidelines in that there existed "two

---

69 Section 5 of *South Africa- Government Notice. R. 1183 (1997).*
70 BP 6.
71 BP 7.
72 BP 7.
73 BP 7.
74 BP 7.
75 BP 7.
76 BP 7.
filling stations within three kilometres of the proposed site". The Department further stated that the application was not compatible with NEMA in that "no comparative assessment of feasible alternatives was done" and the assessment of impacts had not been "done according to the stipulated assessment criteria". The Department also reasoned that the development of the filling station was not economically, socially and environmentally sustainable as per section 2(3) of NEMA, because "there existed two filling stations within three kilometres of the proposed site". The Department further stated that its decision was informed by the application of a "risk-averse and cautious approach" which "took into account the limits of current knowledge about the consequences" of actions and decisions. Thus, the reference by the geological report to a "significant perched water table... at approximately 0.8m from the surface" on the proposed site influenced the Department’s "risk-averse and cautious approach".

The Applicant appealed to the MEC for Agriculture, Conservation, Environment & Land Affairs (hereinafter the Respondent) against the Department's refusal to grant authorisation. The appeal was unsuccessful as the Respondent upheld the Department's refusal, hence the application for review before the High Court. In the High Court, the Applicant contended that the basis of the Department's refusal was not because the proposed filling station was a danger to the surrounding environment, but rather, because of the existence of "two other filling stations within three kilometres" of the Applicant's site, a fact which made the two existing filling stations economically vulnerable. Thus, the Applicant contended that under the guise of 'environmental considerations', the

77 BP 8. Regarding the presence of two existing filling stations, the Department additionally stated that the application was in conflict with Section 3(c)(iv) of the Development Facilitation Act 67 of 1995 in that it compromised the "the promotion of optimum use of existing resources relating to transportation".
78 Sections 24O (b) (iv) OF NEMA; BP 8-9.
79 Section 2(3) of NEMA; BP 9.
80 Section 2(4) (vii) of NEMA, BP 9.
81 BP 9.
82 BP 12.
83 BP 13.
department had sought to regulate the economy on the basis of economic considerations which were completely unrelated to the environment.

In other words, the Applicant contended that the Respondent did not consider if the proposed filling station would pose a danger to the environment, but instead considered that there already existed "two other filling stations within three kilometres" of the Applicant's site. Developing a filling station in this area would therefore exert unnecessary economic pressure on the existing filling stations. In reviewing the application, the High Court accepted the Respondent's version regarding its broad legislative mandate which not only included environmental considerations but economic and social factors as well in the determination of authorisations for the development of filling stations. Put differently, the High Court considered section 1 of the ECA's broad definition of 'environment' which defines the environment as "the aggregate of surrounding objects, conditions and influences that influence" the habits and life of "man or any other organism or collection of organisms". According to Claassen J, section 1 of the ECA's wide definition of 'environment' included socio-economic influences and conditions. Therefore, the Respondent's reliance on economic considerations as a basis for its refusal constituted an environmental consideration in terms of section 1 of the ECA's broad definition.

5.4.1 The framework of the Court's decision

In framing the contention in BP Southern Africa, the High Court began by activating its role as custodian of the Constitution. Claassen J, began by laying emphasis on the importance of constitutional values as enumerated in section 1 of the Constitution, particularly the values of "the advancement of human rights and freedoms" as well as

---

84 BP 13.
85 BP 14-19.
86 BP 26.
87 BP 26.
88 See Labuschagne 2013 J Contemp Hist 126 on the role of the judiciary as the custodian of the Constitution.
the "supremacy of the Constitution and the rule of law".\footnote{BP 20.} The High Court further noted the government's obligation, in terms of section 7(2) of the Constitution,\footnote{BP 20.} to promote and sustain the values provided for in the Constitution.\footnote{BP 20.} The High Court also noted how the Bill of Rights was applicable to all persons in South Africa, in terms of section 8 of the Constitution.\footnote{BP 20.} In addition, the High Court stressed the importance of section 39(2) of the Constitution in all law-making, particularly, "that all statutes must be interpreted through the prism of the Bill of Rights".\footnote{BP 20.} And "all law-making authority must be exercised in accordance with the Constitution".\footnote{BP 20.}

Most notable is the High Court's explicit emphasis on section 24(b) (iii) of the Constitution which provides for the right to have the environment protected "through reasonable legislative and other measures" that secure 'ecologically' sustainable development and the "use of natural resources while promoting justifiable economic and social development".\footnote{BP 22.} The High Court further acknowledged how environmental constitutionalism was an important aspect to be considered in all "legal and administrative approaches to environmental concerns".\footnote{BP 22.} The High Court, thus, laid a basis upon which the Applicant's application for judicial review could be linked with environmental protection and ESD as provided for in section 24(b) (iii).

The High Court held that the Respondent's decision to approve or disapprove the construction of a filling station in terms of section 22(1) of the ECA was to be informed

\footnotesize

\footnote{BP 20.} \footnote{BP 20.} \footnote{BP 20.} \footnote{BP 20.} \footnote{BP 20.} \footnote{BP 20.} \footnote{BP 21.} \footnote{BP 21.} \footnote{BP 22.} \footnote{BP 22.} The Court remarked that "by virtue of section 24, environmental considerations, often ignored in the past", are now being "given rightful prominence by their inclusion in the Constitution".
by the constitutional imperative in section 24 of the Constitution. In other words, the question whether the decision of the Respondent was administratively fair was to be informed by considerations of environmental protection in terms of section 24 and NEMA. Environmental protection according to Claassen J required good environmental governance which takes into consideration economic, environmental and social factors in the "planning, implementation and evaluation" of environmental protection policies. Consequently, the Respondent's mandate, as per section 24, NEMA and the ECA, was to take into account "socio-economic factors" which are "an integral part of its environmental responsibility". As a result, the High Court rejected the Applicant's argument which contended that socio-economic considerations fell outside the mandate of the Department when it came to authorisation in terms of section 22 of the ECA. The High Court further held the Applicant’s argument that:

The Department was not permitted to apply the principles set out in NEMA in considering the application is also untenable as it flies in the face of section 2(1)(e) of NEMA which obliges all organs of state concerned with the protection of the environment to apply these principles when implementing NEMA "and any other law concerned with the protection or management of the environment".

Accordingly, the ECA invokes NEMA principles, which in the case at hand required the Department to consider whether the proposed development was socially, environmentally and economically sustainable. In dismissing the application, the High Court held that the Respondent’s decision to reject the Applicant's application to develop a filling station was fair in that it took into account all the relevant factors pertinent to promoting development that is economically, socially and environmentally sustainable. Thus, the Court accepted the Respondent’s contention that the proposed filling station could pose potential

---

97 *BP* 34, 48.
98 *BP* 27, 34.
99 *BP* 28.
100 *BP* 28, 36, 37.
101 *BP* 36.
102 *BP* 36, 37.
103 *BP* 35, 37.
pollution to underground water sources as well as cause unsustainable economic pressure since two filling stations already existed in the area.\textsuperscript{104}

Although Claassen J’s judgment is, at face value, favourable to the environment, it arguably contributed little to the body of environmental rights jurisprudence in South Africa. Notably, the High Court missed the opportunity to provide a nuanced understanding of ‘ecologically’ sustainable development under section 24 of the Constitution. As a result, the High Court missed the opportunity to elucidate further on considerations of ‘justifiable economic and social development’. Instead, the High Court’s focus was on promoting the integration of economic, social and environmental development, although this was also done in a vague manner. Thus, although the High Court’s decision is a step towards the development of the environmental rule of law in South Africa, it nonetheless left a lot to be desired, as will be explained below.

5.4.2 An annotation of the Court’s approach to ESD

The High Court’s decision in \textit{BP} has been considered as one of the cases that have sought to give content to and develop the exact import of the environmental right.\textsuperscript{105} In giving content to the environmental right, the High Court acknowledged that the state as well as all juristic and natural persons were required to promote the values of the Constitution.\textsuperscript{106} Although the High Court recognised its obligation to consider the values that underlie the Constitution, it failed to elaborate further on how constitutional values could be used or applied in the case before it. The High Court could have noted that under South Africa’s transformative Constitution, relying on the technical readings of the executive or legislation in providing justifications for their judgments is no longer sufficient. Thus, the High Court could have justified its judgement not only by making reference to section 24, but by reference to ideas and values such as ESD. Regrettably, upon stating its obligation to promote the values of the Constitution, the High Court

\textsuperscript{104} \textit{BP} 10, 12.
\textsuperscript{105} Kotze and Du Plessis 2010 \textit{J Court Innov} 170, 171.
\textsuperscript{106} \textit{BP} 20, 21.
immediately went on to reiterate its obligation to promote environmental protection through 'ecologically' sustainable development.\textsuperscript{107} The High Court did so without explaining what ESD actually means and what obligations it imposes. In other words, the High Court could have built upon its particular emphasis on section 24(b) (iii)'s injunction to consider 'ecologically' sustainable development and employed ESD as a constitutional value to be used as a standard and aid in judicial interpretation.

In addition, although the High Court placed special emphasis on the state's obligation to ensure environmental protection through 'ecologically' sustainable development, it failed to define and develop its normative content. Instead, the High Court stated that section 24(b) (iii) of the \textit{Constitution} reflected sustainable development.\textsuperscript{108} On this note the High Court interpreted section 24(b) (iii)'s injunction to consider 'ecologically' sustainable development to mean sustainable development, within the ordinary meaning.\textsuperscript{109} The High Court remarked that section 24(b) (iii)'s injunction to consider ESD required a balancing of environmental rights with competing economic interests and norms (i.e., sustainable development).\textsuperscript{110} That is, the High Court was engrossed in integrating economic, social and environmental considerations, and in turn neglected to interpret ESD within its true meaning of sustainability. Integration is, therefore, incompatible with ESD because it assumes that the conflict between economic development and environmental protection no longer exists, and that the former is a necessary condition or complement to the latter.

As a result, the increasing and very real conflict between environmental protection and economic development was obfuscated, thereby resulting in the subordination of environmental rules to economic policies. Accordingly, instead of integration, the High Court could have noted that ESD requires humanity to responsibly preserve and protect the natural resources and global ecosystems that support the health and wellbeing of

\textsuperscript{107} \textit{BP} 22.
\textsuperscript{108} \textit{BP} 25.
\textsuperscript{109} \textit{BP} 27-28, 34.
\textsuperscript{110} \textit{BP} 24, 25.
present and future generations. The responsibility to preserve and protect the earth's natural resources and global ecosystems would in turn promote ecological integrity, environmental justice and poverty reduction through South Africa's environmental laws that reflect ESD. This raises the question; Would the High Court's decision differ in outcome or approach had it developed and applied ESD as a constitutional value?

5.4.3 The extent to which the court has; could have; or should have applied the ESD as a constitutional value

As already noted, the High Court dismissed the Applicant's application to have the Department and Respondent's refusal for the development of its proposed filling station set aside. A question then arises: would the High Court's decision differ had it developed and applied ESD as a constitutional value, through the environmental rule of law? This thesis notes that had the High Court considered whether the proposed development would preserve and protect the earth's natural resources and global ecosystems that support the health and wellbeing of present and future generations, its decision could have been different in approach.

On this basis, had the High Court framed its judgment in line with ESD, it could have noted how 'ecologically' sustainable development as reflected within section 24(b) (iii) helps facilitate ecological integrity through the environmental rule of law processes such as ecological proportionality. It is worth reiterating that ecological integrity as an outcome of ESD could be achieved if humanity establishes policies and laws that are focused on promoting and safeguarding the integrity of the earth. In this regard, this thesis submits that the High Court could have built upon the Respondent's reliance on the precautionary principle, and proceed to make a determination of how ESD could realise ecological integrity through processes like ecological proportionality. By so doing the High Court could have realised that ESD demands that humanity be proactive in rehabilitating our degraded environment, and preventing the potential irreparable damage and harm on the environment. Hence, the environmental rule of law, in this regard, would require the
High Court to identify measures that avert environmental degradation whenever an elevated potential of environmental harm from a particular economic activity exists.

In view of the argument above, the High Court could have developed South Africa's jurisprudence on the environmental right by considering how the proposed filling station would affect the ecological integrity of the area to be developed. For instance, the High Court could have considered whether the proposed development would affect the biodiversity and ecosystem processes of the area such that it causes environmental degradation. Such considerations could only be done through ecological proportionality. The High Court could have noted that South Africa's environmental laws promote the environmental rule of law processes such as ecological proportionality through, for instance section 26(a) of the ECA and sections 23(2) (b) and 24(7) (a) (b) (c) of NEMA. Both the ECA and NEMA provide that environmental authorities must investigate, assess and communicate the impact proposed developments (such as the construction of a filling station) would have on the environment upon considering: the potential impact of the activity on the environment; any potential alternatives to address the activity's negative impact on the environment; and the impact the activity would have on the social and economic interests of the area to be developed.111

In light of the aforementioned provisions, the High Court could have noted that because filling stations could pose a danger to the environment, it was necessary to engage in ecological proportionality's fourfold test regarding the justifiability of the construction of the filling station. Thus, ecological proportionality as with section 26(a) (iv) (v) and sections 23(2) (b), 24(7) (b) of NEMA required that the Applicant first prove that the proposed filling station pursued a "justifiable societal objective".112 In casu, since the development of the filling station posed potential harm to the natural environment of the area (pollution of the water table), the High Court could have directed the Respondent

111 For a full description of the provisions, see sections 26(a) of the ECA, sections 23(2) (b) and 24(7) (a) (b) (c) of NEMA and BP 5-6, 30-31, 32.
to request of the Applicant, reasons why the proposed filling station was socially justifiable. In other words, the High Court could have requested the Applicant to provide proof of how the proposed filling station would benefit society. This would address ESD’s aim of protecting the natural resources and global ecosystems that support the wellbeing of present and future generations. By requiring proof of how the proposed filling station would be socially justifiable, the High Court would be addressing further outcomes of ESD such as environmental justice and poverty reduction. For instance, it could be that the proposed filling station would help address the poverty and inequality gap in South Africa by providing employment and by engaging in activities such as social responsibility. Furthermore, by requiring proof of societal justifiability, the High Court would have addressed section 24(b) (iii)’s injunction to consider environmental protection through ESD and justifiable social and economic development. Therefore, by not even considering these issues the High Court arguably erred by neglecting its role of engaging in transformative environmental constitutionalism in general and transformative adjudication in particular.

Second, the High Court could have engaged ecological proportionality by requiring the Applicant to prove that the proposed filling station would be prospectively effective and capable of serving its societal objective. This means that upon proving that the proposed filling station has a justifiable societal objective, the Applicant could have been required to prove that the means it would take to develop the filling station would be adequate. In the circumstances at hand, the Applicant would have to address, for instance, how it would address the Respondent’s concern that ground water pollution could occur due to "inadequate corrosion protection on tanks, spills and overfills, installation mistakes and pipe work failure".

Third, the High Court could have engaged ecological proportionality by requiring the Applicant to prove that the proposed filling station is necessary and "not replaceable by

---

114 BP 12.
an alternative that is less intrusive on natural resources". In this case, the Applicant had not provided information on other reasonable alternatives that would best meet the societal objective of the proposed filling station. Further, the High Court could have required the Applicant to prove that that the proposed filling station would be balanced, i.e. "not excessively intrusive on natural resources in view of the importance of the societal objective". In other words, the High Court could have requested that once it is proven that the proposed filling station is justifiable, effective and necessary, the Applicant also needed to prove that the proposed filling station, when weighed against its societal objective, does not have excessively adverse effects on nature. For instance, given its societal objective, the Applicant would have proven that the close proximity of the two other filling stations in the same area does not result in adverse effects on the biodiversity and ecosystem processes (ecological integrity) of the area. Put differently, since the surrounding area has a perched water table that could potentially be polluted by the development of just one filling station, would three filling stations in one area not adversely affect the perched water table?

In addition to the above, it should be noted that the High Court accepted the Respondent's contention that the sustainability of the proposed filling station was considered in the "context of existing the economic pressures facing existing filling stations". Put differently, the sustainability of the proposed filling station was considered in light of the economic viability and negative economic impacts it would cause on the other two existing filling stations in the area. In considering the sustainability of the proposed filling station, this thesis avers that the High Court could have noted that the sustainability of the filling station ought to be considered in light of 'ecologically' sustainable development as reflected within section 24(b) (iii) of the Constitution. In other

115 Section 26(a) of the ECA and sections 23(2) (b), 24(7) (a) (b); Winter "Ecological Proportionality: An Emerging Principle of Law for Nature" 115-116.
117 BP 10.
118 BP 10.
words, instead of basing the sustainability of the proposed filling station on economic pressures, the High Court could have noted that the sustainability of the proposed filling station ought to be based on whether the proposed development would negatively affect the natural resources and ecosystem of the area, such that the well-being and health of the people dependant thereon would be compromised.

Thus, the sustainability of the proposed filling station could have been based on the geological report's findings of a significant perched water table on the site to be developed. The sustainability of the proposed filling station could have further been based on the 'Report Evaluation Checklist' which noted that the proposed filling station would potentially contaminate the environment through "the seepage of spilled fuels into the soil, overfilling of USTs and leaking USTs and pipes". As a result, because filling stations were generally point sources of pollution, it was highly possible that ground water pollution of the area could occur due to overfills and spills, inadequate protection on tanks from corrosion, pipe work failure and installation mistakes. The pollution of the ground water table would, therefore mean that the sustainability of the proposed filling station is compromised.

Therefore, this thesis avers that had ESD been applied by the High Court in reaching its judgment, the Applicant could have been ordered to furnish more information on the impact the proposed filling station might have on ESD. In other words, in view of section 24(b) (iii)'s injunction to consider 'ecologically' sustainable development, the High Court could have approached the application differently by employing ESD as an interpretive aid to section 24(b) (iii). Approaching section 24(b) (iii)'s injunction to consider ESD from a constitutional value perspective could have enabled the High Court to establish the context within which section 24 functions i.e. ecological sustainability. In turn, applying ESD as a constitutional value could have enabled the High Court to develop South Africa's environmental rights jurisprudence, which could be applied as precedence in cases

---

119 BP 11, 12.
120 BP 11.
concerning the protection of the ecological integrity of areas zoned for the development of filling stations.

As mentioned above, had the High Court required proof of how the proposed filling station would be socially justifiable, it could have further addressed ESD's outcomes such as environmental justice and poverty reduction. The import of this argument is that, environmental justice and poverty reduction are the attendant outcomes that we could realise from preserving and protecting the natural resources and ecosystems that sustain our well-being. In *casu*, although the High Court noted that the Respondent was obliged in terms of section 24(b) (iii) to protect the environment through ESD and justifiable social and economic development,\(^{121}\) it did not elaborate on how the proposed filling station could be socially justifiable. Put differently, the High Court did not explain on how the well-being and health of present and future generations could benefit from the preservation of the natural resources and ecosystems of the area that was to be developed. Instead, the High Court stated that section 24(b) (iii)'s injunction to consider ESD included the "consideration of socio-economic factors as an integral part of environmental responsibility".\(^{122}\)

The High Court, arguably exercised judicial avoidance by not explaining on what these socio-economic factors were in the context of ESD and the facts of the case. The High Court could have taken the opportunity to talk about the impact of the proposed filling station on environmental justice and poverty reduction. Simply put, the High Court could have gone further to inquire on whether the well-being and health of present and future generations would benefit from the preservation of the natural resources and ecosystems of the area the proposed filling station was to be built on. To this end, the High Court could have engaged in transformative environmental constitutionalism by applying ESD as a constitutional value. When applied as a constitutional value, ESD could facilitate environmental justice and poverty reduction by preserving the earth's ecological systems.

\(^{121}\) *BP* 34.

\(^{122}\) *BP* 36.
so that the quality of life of present and future generations is improved, and the potential of each individual is realised.

Alternatively stated, applying ESD as a constitutional value could have addressed important questions such as; whether the proposed development could reduce poverty and in turn improve the quality of life of present and future generations through for instance creating employment for the poor. In addition, applying ESD as a constitutional value could have addressed whether the proposed development would promote environmental justice and in turn improve the quality of life of present and future generations through for instance ensuring that the construction of the filling station does not cause environmental damage and result in poor people having to experience the effects of such environmental damage. This means that ESD could ensure that the workers and communities surrounding the proposed filling station do not suffer from the effects of exposure to polluted water as a result of chemical pollution to the ground water table. Therefore, environmental justice in the context of ESD becomes an environmental concern.

Unfortunately, the High Court failed to note environmental justice as an environmental concern. Instead, the High Court noted that, because over 50% of filling stations were "operating at a net loss, the potential of future grave yard sites" that resulted from commercially failed filling stations was a real and valid environmental concern. Accordingly, had the High Court given content and meaning to ESD as reflected within section 24(b) (iii), it might have realised that environmental justice is also a real and valid environmental concern. In light of the arguments above, one could aver that had the High Court applied ESD as an interpretive aid to section 24(b) (iii), it could have developed the environmental rights normative content. Consequently, it could be argued that the High Court in *BP* underdeveloped section 24(b) (iii) by not linking the impact the proposed filling station would have on ESD and its outcomes.
5.5 Fuel Retailers

*Fuel Retailers* was a case concerning an application by Fuel Retailers Association of Southern Africa (hereinafter the Applicant) for leave to appeal against the judgment of the Supreme Court of Appeal. In July 2000 Inama Trust applied to the Department of Agriculture, Conservation and Environment, Mpumalanga Province (hereinafter the Department) for authorisation to develop a filling station in terms of section 22(1) of the *ECA*. Section 22(1) proscribes the undertaking of any activity identified in terms of section 21(1) as having a substantial prejudicial effect on the environment without consent from a competent authority. Accompanying Inama Trust’s application was a scoping report, geohydrological report and geotechnical report (hereinafter the Geo3 report). The scoping report addressed among other issues, socio-economic factors such as the impact of the proposed filling station on traffic, noise, municipal services, visual impacts, historical sites, noise, safety and crime. The scoping report also identified the existence of an aquifer, a "significant clean groundwater resource below the surface of the property" on the site/property. The aquifer had previously been used to augment the area's water supply. The scoping report therefore noted that protection from pollution was essential to keep the aquifer clean. As a result, the Geo3 report recommended "that the water quality of the aquifer through the borehole should be tested bi-annually". The Geo3 report further proposed that if required by the Department of Water Affairs and Forestry, an impermeable layer would be "installed in the base of the pit to ensure that no contaminants from the tanks reach the aquifer". In addition, to

---

123 The judgment of the Supreme Court of Appeal is reported as *Fuel Retailers Association of Sa (Pty) Ltd V Director-General, Environmental Management, Mpumalanga, and Others* 2007 (2) SA 163 (SCA).
124 Section 22(1) of the *ECA*.
125 *Fuel Retailers* para 8-9.
126 *Fuel Retailers* para 8, 9.
127 *Fuel Retailers* para 10.
128 *Fuel Retailers* para 10.
129 *Fuel Retailers* para 10.
130 *Fuel Retailers* para 10.
detect any leaks, the Geo3 report proposed that a reconciliation programme be put in place.\(^{131}\)

The Applicant objected to Inama Trust's development of the filling station on a number of grounds, including that "the quality of the water in the aquifer might be contaminated".\(^{132}\) The Applicant also alleged that the public participation process that had been conducted was inadequate as a number of interested parties had not been consulted.\(^{133}\) The Department noted the Applicant's objection and referred the matter to the Minister of Water Affairs and Forestry (herein Water Affairs and Forestry).\(^{134}\) Water Affairs and Forestry briefly responded by accepting the Geo3 report and requiring "[t]he proposed developer [to] ensure that no pollution of the groundwater" occurs and the aquifer be "monitored as set out in the report and in accordance [with] all the relevant Regulations" as prescribed by the Department.\(^{135}\) The response by Water Affairs and Forestry did not comment on the fitting of an impermeable layer, which the Geo3 report noted would only be installed if Water Affairs and Forestry mandated that it be so.\(^{136}\)

Regardless of the Applicant's objection, the "authorisation for the construction of the filling station" was granted.\(^{137}\) Key factors which influenced the authorisation were that "the property had been rezoned from 'special' to 'Business 1'" and that all perceived impacts had been identified and "satisfactorily dealt with in the scoping report".\(^{138}\) The Applicant lodged an appeal to the Department against the "authorisation for construction of the filling station".\(^{139}\) The "need, desirability and sustainability of the proposed filling station" was one of the grounds of appeal.\(^{140}\) The Applicant alleged that the scoping report
had not addressed this aspect.\textsuperscript{141} The appeal also noted that the location of the proposed filling station was undesirable as it was within a five kilometre radius "from six other filling stations that adequately served the needs of the community".\textsuperscript{142} In this light, the Applicant alleged that the area (White River) had recently witnessed a "decline in the growth of fuel consumption".\textsuperscript{143} Therefore, the "viability of existing filling stations would be affected" since the situation had already "been exacerbated by the introduction of three new filling stations in the area".\textsuperscript{144} As a basis, the Applicant relied on the Gauteng Guidelines which provide that authorisations for new filling stations will not be approved if they are located "within three kilometres of an existing filling station in urban, built-up or residential areas".\textsuperscript{145}

The Applicant's appeal was also based on the inadequacy of measures to prevent fuel leaks as contained in the Geo3 report.\textsuperscript{146} The Department considered and subsequently dismissed the appeal.\textsuperscript{147} Consequently, the Applicant launched an appeal in the Pretoria High Court (hereinafter the High Court) for an order to review and set aside the decision to grant authorisation. The Applicant based its cause of action on section 36 of the \textit{ECA},\textsuperscript{148} alternatively on the common law, alternatively on sections 6(2) (b), 6(2) (e)(iii) and 6(2)(i) of \textit{PAJA}.\textsuperscript{149} The most relevant ground of appeal according to the High Court was

\textsuperscript{141} Gauteng Provincial Government 2002 \textit{Agriculture, Conservation, Environmental and Land Affairs Eia Administrative Guideline: Guideline for the Construction and Upgrade of Filling Stations and Associated Tank Installations.}

\textsuperscript{142} \textit{Fuel Retailers} para 16.

\textsuperscript{143} \textit{Fuel Retailers} para 16.

\textsuperscript{144} \textit{Fuel Retailers} para 16.

\textsuperscript{145} \textit{Fuel Retailers} para 17.

\textsuperscript{146} \textit{Fuel Retailers} para 18.

\textsuperscript{147} \textit{Fuel Retailers} para 19.

\textsuperscript{148} Section 36 of \textit{ECA} provides: "(1) Notwithstanding the provisions of section 35, any person whose interests are affected by a decision of an administrative body under this Act, may within 30 days after having become aware of such decision, request such body in writing to furnish reasons for the decision within 30 days after receiving the request. (2) Within 30 days after having been furnished with reasons in terms of subsection (1), or after the expiration of the period within which reasons had to be so furnished by the administrative body, the person in question may apply to a division of the Supreme Court having jurisdiction, to review the decision."

\textsuperscript{149} \textit{Fuel Retailers} para 20.
the "need, desirability and sustainability in relation to the proposed filling station". In dismissing the appeal, the High Court upheld the Department's submission to the effect that:

Need and desirability are factors that are considered by the local authority when it approves the rezoning of a property for the purposes of erecting a proposed development under the *Town-Planning and Townships Ordinance*, 1986. The Department does not reconsider these factors. It is sufficient for an applicant for authorisation to state that the property has been rezoned for the construction of the proposed development. And if there is no reason to doubt this, based on this statement, the Department will... accept that need and desirability has indeed been considered by the Local Councils... [it is therefore] not necessary nor desirable to duplicate functions between the Local Council and the different Departments of Agriculture, Conservation and Environment of the different provinces.

Thus, the High Court stated that the "practice of leaving the consideration of need and desirability to the local authority" is in line with the principle of "intergovernmental co-ordination" and harmonisation of legislation, action and policies concerning the environment. The Applicant appealed to the Supreme Court of Appeal (hereinafter the Supreme Court) against the decision of the High Court. The Supreme Court upheld the decision of the High Court and reasoned that although "unsustainable filling stations that become derelict" may affect the environment "there was no evidence to suggest that there was a possibility of this happening". The Supreme Court further upheld the practice by the Director and Water Affairs and Forestry (hereinafter the environmental authorities) of leaving the consideration of need, desirability and sustainability" to local authorities. Upon having its appeals dismissed by both the High Court and Supreme Court, the Applicant lodged an appeal to the Constitutional Court on the ground that the environmental authorities had neglected to consider the "need, desirability and

---

150 *Fuel Retailers* para 20.
151 *Town-Planning and Townships Ordinance* 15 of 1986 (hereinafter the Ordinance).
152 *Fuel Retailers* para 22.
153 *Fuel Retailers* para 25.
155 *Fuel Retailers* para 27.
sustainability" of the proposed filling station. The Constitutional Court accordingly upheld the Applicant’s appeal based on the reasons provided in the account below.

5.5.1 The framework of the Court’s decision

As already noted, the Applicant alleged that the environmental authorities had neglected to consider the "need, desirability and sustainability" of the proposed filling station. The appeal largely relied on section 24(b) (iii) of the Constitution and sections 2(4)(a), 2(3), 2(4) (g), 2(4) (i), 23 and 24 of NEMA. In this light, the Applicant alleged that "need, desirability and sustainability" is broader than:

The requirement to assess the need and desirability of the proposed filling station under the Town-Planning and Townships Ordinance (hereinafter the Ordinance). This obligation requires the environmental authorities to assess, among other things, the cumulative impact on the environment brought about by the proposed filling station and all existing filling stations that are in close proximity to the proposed one. This in turn required the environmental authorities to assess the demand or necessity and

---

156 Fuel Retailers para 29.
157 Section 2(4) (a) of NEMA provides that: "Sustainable development requires the consideration of all relevant factors including the following: (i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied; (ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied; (iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied; (iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner; (v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and considers the consequences of the depletion of the resource; (vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised; (vii) that a risk-averse and cautious approach is applied, which considers the limits of current knowledge about the consequences of decisions and actions; and (viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.
158 Section 2(3) of NEMA provides that: "Development must be socially, environmentally and economically sustainable".
159 Section 2(4) (g) of NEMA provides that: "Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge".
160 Section 2(4) (i) of NEMA provides that: "The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment".
161 Section 23 of NEMA provides for the "general objectives" of integrated environmental management. Section 24 regulates environmental authorisations.

206
desirability, not feasibility, of the proposed filling station with a view to fulfilling the needs of the targeted community, and its impact on the sustainability of existing filling stations.\(^{162}\)

In considering the "need, desirability and sustainability" of the proposed filling station, the Constitutional Court clarified, as its starting point, the meaning of such a phrase.\(^{163}\) Thus, the Constitutional Court noted that the phrase was neither provided for in the \textit{ECA} nor \textit{NEMA}. The Constitutional Court, however, noted that the phrase "need, desirability and sustainability" was provided for in Schedule 7 of the Regulations promulgated in terms of the \textit{Ordinance} as one of the factors to be considered by the local authority when authorising the rezoning of a property.\(^{164}\) It is this aspect which the environmental authorities averred had to be determined by local authorities in "the context of an application for authorisation under section 22(1) of \textit{ECA}".\(^{165}\) Having noted the provisions of \textit{NEMA} and \textit{ECA}, the proper reference, according to the Constitutional Court, had to be 'socio-economic considerations'.\(^{166}\)

In response to the Applicant's claim that the "need, desirability and sustainability"/socio-economic considerations of the proposed filling station had not been considered, the environmental authorities noted that "need, desirability and sustainability" or socio-economic considerations of the proposed filling station had already been considered when the local authority rezoned the property as per section 56 of the \textit{Ordinance} as read with Schedule 7 of the Regulations promulgated in terms of the \textit{Ordinance}.\(^{167}\) However, the Applicant contended that rezoning by the local authority and the application for authorisation are two distinct processes. In other words, "the local authority considers an application for rezoning from a town-planning perspective" whereas, environmental

\(^{162}\) \textit{Fuel Retailers} para 30.

\(^{163}\) \textit{Fuel Retailers} para 24.

\(^{164}\) Item c of schedule 7 of the \textit{Ordinance} requires applicants to enclose a report which: "contains a motivation for the need and desirability of the amendment proposed".

\(^{165}\) \textit{Fuel Retailers} para 24.

\(^{166}\) \textit{Fuel Retailers} para 24.

\(^{167}\) \textit{Fuel Retailers} para 31.
authorities are mandated "to consider the impact of the proposed development on environment and socio-economic conditions".\textsuperscript{168}

Upon considering submissions from both parties, the Constitutional Court set aside the decision of the environmental authorities, the High Court and Supreme Court on the basis that the Department had failed to consider relevant socio-economic conditions.\textsuperscript{169} In this regard the Constitutional Court contended that the scope and nature of the "obligation to consider the impact of the proposed development on socio-economic conditions" has to be determined based on "the concept of sustainable development" as well as the principle of integration of the protection of the environment and socio-economic development".\textsuperscript{170} In essence, the Constitutional Court reasoned that the failure by environmental authorities to consider socio-economic considerations was equal to a failure to ground its decision on sustainable development. The Constitutional Court thus viewed sustainable development as comprising of a checklist that consists of three elements (economic, social and environmental factors).\textsuperscript{171} The failure by environmental authorities to consider these elements of sustainable development was equivalent, in the Constitutional Court's view, to a failure to observe the dictates of section 24 of the Constitution.\textsuperscript{172}

In a dissenting judgment, Sachs J, stated that he would refuse the appeal and uphold the Supreme Court's decision because the facts of the case did not fully establish that the proposed development would cause environmental damage to the White River area. Sachs J bases his judgment on the preamble of \textit{NEMA} which provides for "environmental protection and its relation to social and economic development".\textsuperscript{173} Thus, in terms of \textit{NEMA}, integration as an element of sustainable development does not treat "economic

\textsuperscript{168} \textit{Fuel Retailers} para 32.
\textsuperscript{169} \textit{Fuel Retailers} para 71.
\textsuperscript{170} \textit{Fuel Retailers} para 71.
\textsuperscript{171} \textit{Fuel Retailers} para 71.
\textsuperscript{172} \textit{Fuel Retailers} para 71, 75.
\textsuperscript{173} \textit{Fuel Retailers} para 113.
sustainability [as an] independent factor to be evaluated as a discrete element in its own terms".\textsuperscript{174} Instead, integration as an element of sustainable development entailed the reconciliation, accommodation and integration "between economic development, social development and environmental protection".\textsuperscript{175} Both the majority and minority judgments of \textit{Fuel Retailers} have been largely criticised as economic centred.\textsuperscript{176} Thus, this thesis submits that both judgments incorrectly relied on sustainable development as a legitimising base for their decision. Instead, the Constitutional Court could have relied on section 24(b) (iii)'s injunction to secure 'ecologically' sustainable development as its legitimising base. The following is an analysis of the Constitutional Court's judgment in relation to ESD and how it could have been facilitated through the environmental rule of law.

\textbf{5.5.2 An annotation of the Court's approach to ESD}

The \textit{terminus a quo} of this analysis is the acknowledgment that \textit{Fuel Retailers} is heralded as the first case that attempted to give content to the environmental right.\textsuperscript{177} Although the issues under consideration in \textit{Fuel Retailers} are similar to those in \textit{BP, Fuel Retailers} nonetheless distinguishes itself by having progressed all the way up to the Constitutional Court, thereby providing the apex court the opportunity to express itself on issues pertaining to the environmental right. In providing its judgment, the Constitutional Court emphasised that it had a duty to ensure that the present generation preserves the environment for future generations.\textsuperscript{178} In discharging this duty, the Constitutional Court could have emphasised on humanity's duty to ensure that development is 'ecologically' sustainable through the preservation and protection of the earth's ecological systems on which the welfare and health of humanity depends.

\begin{flushleft}
\begin{footnotesize}
\begin{enumerate}
\item \textit{Fuel Retailers} para 113.
\item \textit{Fuel Retailers} para 113.
\item Feris 2010 \textit{PER}/\textit{PELJ} 93-94.
\item Kotze and Du Plessis 2010 \textit{J Court Innov} 173; Dire 2008 \textit{CCR} 255-256.
\item \textit{Fuel Retailers} para 102.
\end{enumerate}
\end{footnotesize}
\end{flushleft}
Furthermore, in discharging its role as protector of the environment, the Constitutional Court arguably misconstrued its role as being based on sustainable development as per section 24 of the Constitution.\textsuperscript{179} To put it plainly, the Constitutional Court could have noted that it was discharging its role as the protector of the environment through 'ecologically' sustainable development and not sustainable development. The adjective 'ecologically' that section 24(b) (iii) adds to sustainable development has a bearing on the protection of the environment. Section 24(b) (iii)'s addition of the adjective 'ecologically' to sustainable development means that priority ought to be placed on protecting and preserving the environment upon which humanity's welfare and health are based. This argument creates the conundrum concerning how social and economic development could be pursued whilst protecting the environment.

As the Constitutional Court rightly noted, the facts before it raised concerns pertaining to the interaction between economic and social development and environmental protection.\textsuperscript{180} Such interaction was, according to the Constitutional Court, addressed by section 24(b) (iii) of the Constitution which recognised the need to protect the environment, whilst acknowledging social and economic development.\textsuperscript{181} However, the Constitutional Court, like the High Court in BP, stated that the environment could only be protected through the integration of environmental concerns with socio-economic development.\textsuperscript{182} According to the Constitutional Court, such integration meant that section 24(b) (iii) envisaged that "environmental considerations be balanced with socio-economic considerations through sustainable development".\textsuperscript{183} The Constitutional Court further noted that sustainable development was at the core of section 24(b) (iii)'s injunction to promote environmental protection. This thesis, however, argues that the Constitutional Court's interpretation of the interaction between economic and social development and

\textsuperscript{179} Fuel Retailers para 102.
\textsuperscript{180} Fuel Retailers para 1.
\textsuperscript{181} Fuel Retailers para 45.
\textsuperscript{182} Fuel Retailers para 45.
\textsuperscript{183} Fuel Retailers para 45.
environmental protection is arguably incorrect. To put it plainly, contrary to the Constitutional Court's view, sustainable development is not at the core of section 24(b) (iii). Instead, 'ecologically' sustainable development is the ideal that is at the core of section 24(b) (iii)'s injunction to promote environmental protection. The Constitutional Court could have realised that there is a difference between sustainable development in the ordinary sense and 'ecologically' sustainable development as contained within section 24(b) (iii) of the Constitution. That is, while, on one hand, sustainable development does indeed encompass the integration of environmental protection with socio-economic development, 'ecologically' sustainable development, on the other hand, primarily focuses on development that preserves the earth's natural resources and ecosystems. In other words, ESD focuses on conserving the productivity of the soil, waters and ecosystem by ensuring that developments like filling stations do not cause a negative impact on the natural environment on which the health and well-being of present and future generations depend on.

The argument above does not seek to invalidate any social or economic development, but instead recognises that any social or economic development will have to be justifiable as per section 24(b) (iii). Thus, if social or economic development poses a threat to the environment or causes environmental degradation, it could be considered unjustifiable. In essence social and economic development can only be promoted when the environment is protected. Similarly, the protection of the environment cannot be attained if social or economic development is pursued at the cost of environmental degradation.

Accordingly, the Constitutional Court's argument that sustainable development resolves any tensions between the need for socio-economic development on one hand, and environmental protection on the other hand is arguably incorrect.\textsuperscript{184} Thus, the researcher argues that the resolution of tensions between socio-economic development and environmental protection is not solved through sustainable development, but is instead

\textsuperscript{184} \textit{Fuel Retailers} para 57.
solved through section 24(b) (iii) which requires states to place environmental protection on a pedestal by requiring socio-economic development to be justified in light of its impact on the environment. Therefore, what section 24(b) (iii) requires is that socio-economic development remains firmly rooted to protecting and nurturing the earth's natural resources and ecosystems. After all, protecting and nurturing the earth's natural resources and ecosystems could in turn support present and future social and economic development.

Consequently, this thesis argues that the Constitutional Court could have noted that it was important for humanity to avoid development that compromises the integrity of the environment. Differently stated, ESD would require that section 24(b) (iii)'s injunction to consider justifiable social and economic development be construed to mean that development that causes environmental damage must not be justified. Instead, humanity should in its use of natural resources, devise and adopt practices that replenish that which it has consumed. However, Sachs J's dissenting judgment notes that there is a certain level of acceptable environmental damage whenever issues of socio-economic development arise. Thus, Sachs J states that:

If 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.  

This might be problematic, as the current environmental hazards (pollution and climate change for example) that currently beset humanity are as a result of such compromises. Those who seek to pursue economic growth will always justify such development by arguing that the environment will suffer insignificant damage from the development. However, what could be insignificant environmental damage to the present generation could in the long term cause significant environmental hazards for future generations. It is therefore necessary for states to avoid blindly adopting ecologically unsustainable policies. States through courts, for instance, could develop and apply socio-economic policies.

---

185 *Fuel Retailers* para 117.
development laws and policies that take into account both the short term and long term sustainability of ecological systems. 'Ecologically' sustainable development as provided for in section 24(b) (iii) of the Constitution could be such guideline. In light of the above, this thesis deems it necessary to address the question: Whether the decision in Fuel Retailers would have been different in outcome or approach had the Constitutional Court applied ESD as a constitutional value.

5.5.3 The extent to which the court has; could have; or should have applied the ESD as a constitutional value

As already established, the Constitutional Court granted the Applicant's application for leave to appeal and accordingly upheld the appeal. The Constitutional Court further set aside the decision of the environmental authorities and ordered that the application for authorisation of the filling station be considered in light of its judgment. This means that the environmental authorities were ordered to reconsider the matter by taking into account the need to balance environmental considerations with socio-economic considerations as per the concept of sustainable development. Given that this thesis has argued that the Constitutional Court's decision arguably promotes economic sustainability over ecological sustainability, the decision of the environmental authorities would have to be largely based on balancing environmental considerations with socio-economic considerations and not on 'ecologically' sustainable development, as required by section 24(b) (iii).

A question, however remains: Whether the Constitutional Court's decision would have differed had it developed and applied ESD as a constitutional value, by framing its decision within the ambit of the environmental rule of law? This thesis notes that the decision of the Constitutional Court might have been different in approach, had it considered if the filling station would ensure that White River's future generations enjoy the natural resources that enable them to live an equal, if not improved life as that of present
generations. In other words, although the Constitutional Court's decision would not have differed in outcome, it could have been differed in approach. An approach based on 'ecologically' sustainable development's true meaning could also mean a difference in the principles the environmental authorities would have to use in reconsidering the application for authorisation. Stated differently, had the Constitutional Court framed its decision within the ambit of the tenets of the environmental rule of law, it could have based its decision on 'ecologically' sustainable development and not on the general and oft cited sustainable development.

It bears repeating that according to Bugge\textsuperscript{187} the environmental rule of law protects nature from encroachments and destruction in "fundamentally the same way as citizens are protected by law". As such, this thesis argues that had the Constitutional Court decided the matter in light of laws that promote the enjoyment of the benefits of environmental protection by all "people and the planet" (the environmental rule of law),\textsuperscript{188} it could have linked the facts of the matter with the ecological integrity of the White River area. In other words, applying ESD as a constitutional value would have enabled the Constitutional Court to frame its decision in line with laws that give equal protection to the environment and to the people. To put it clearly, the Constitutional Court noted that section 2(2) of \textit{NEMA} requires environmental management to place "people and their needs at the forefront" of environmental protection by equitably serving their physical, developmental, psychological, social and cultural interests.\textsuperscript{189}

In light of this provision, the Constitutional Court could have framed its decision in line with 'ecologically' sustainable development. Thus, the Constitutional Court could have noted that placing "people and their needs at the forefront" of environmental protection,\textsuperscript{190} implies that priority should be given to economic and social development.

\textsuperscript{187} Bugge "Twelve Fundamental Challenges in Environmental Law: An Introduction to the Concept of Rule of Law for Nature" 7-8.
\textsuperscript{188} UN Environment Programme 2019 \textit{Environmental Rule of Law: First Global Report} 1.
\textsuperscript{189} \textit{Fuel Retailers} para 60, 63.
\textsuperscript{190} Section 2(2) of \textit{NEMA}.
factors. In other words, section 2(2) of NEMA could possibly limit the protection given to the environment in relation to cases of natural resource exploitation, hence compromising sustainability's focus on conserving ecological systems. Any proposed development would therefore have to be determined first on its impact on the integrity of the environment. In this regard, the Constitutional Court could have examined the impact the filling station would have on the ecological integrity of the White River area by, again, engaging the process of ecological proportionality.

Applied to the case at hand, ecological proportionality would require the Constitutional Court to acknowledge that since filling stations generally degrade the environment, it is necessary that they be constructed for a "justifiable societal objective"; and that the proposed filling station be effective and capable serving such societal objective. In addition, the proposed filling station ought to be necessary such that it cannot be replaced by an "alternative that is less intrusive on natural resources" in light of the "importance of the societal objective".

For instance, the construction of the filling station could have pursued the societal objective of creating employment for the people, thereby reducing poverty to a certain extent. However, although it can be alleged that the proposed filling station's societal objective is creating jobs for people, such objective is defeated when one considers the fact that six other filling stations were situated within five kilometres of the proposed development. Since evidence was adduced that fuel consumption in the White River had declined, it was possible that instead of creating more employment, the proposed filling station would result in the closure of other filling stations, leading to a loss of employment by their employees.

Upon examining the filling station's societal objective, the Constitutional Court could have examined whether the proposed development would cause any damage to the environment? Such an examination would require one to turn to Science by examining the effect of the proposed filling station on the integrity of the environment. Thus, the
Constitutional Court could have made a determination on the ecological integrity of the area by framing its decision within an environmental rule of law framework, which would require an examination of the Geo3 reports. Among other issues, the Geo3 reports recorded the existence of "a significant clean groundwater resource below the surface of the property", an aquifer. It was further noted in the Geo3 reports that the aquifer needed protection, which could be done through testing the quality of the aquifer's water bi-annually and installing an impermeable layer in the base pit to prevent any fuel leaks from reaching the aquifer. In considering the Geo3 reports, the Constitutional Court could have paid attention to addressing issues on the sustainability of the aquifer. For instance, the Constitutional Court could have noted that protecting the sustainability of the aquifer would be equal to protecting the integrity of the environment in general and aquifer in particular. In other words, since the Applicant had adduced evidence on the inadequacy of measures suggested for the protection of the aquifer, the Constitutional Court could have explicitly addressed the impact of the development on the integrity of the surrounding environment by noting that the protection of the aquifer would require, in addition to the measures already suggested, a detailed soil test of the aquifer's subsurface material. A soil test, as with other measures, would help protect the ecological integrity of the area by preserving the intended utilisation and future value of the aquifer, since it was once used to augment water supply in the White River area. Accordingly, since the proposed development could compromise the integrity of the environment by polluting the aquifer, the Constitutional Court could have addressed the issue of alternative locations for the construction of the filling station.

In other words, the Constitutional Court could have noted that sections 23(2) (b) and 24(7) (a), (b), of NEMA require that alternative locations for the proposed development

191 Fuel Retailers para 8, 10.
192 Fuel Retailers para 10.
193 Fuel Retailers para 10.
194 Fuel Retailers para 18.
195 Fuel Retailers para 10.
196 Fuel Retailers para 68, 69.
be considered since it presented a potential negative impact on the integrity of the environment, i.e. the sustainability of the aquifer. Thus, given that Inama Trust had noted that "various other locations do exist for the proposed development", the Constitutional Court could have noted that preserving the ecological integrity of the area would require that the proposed filling station be constructed elsewhere where it would not adversely affect the environment and its natural resources. Put differently, in considering the protection of the aquifer, ecological proportionality, in this context, would require, among other things, proof that the proposed filling station is necessary and not replaceable by another alternative development that is less intrusive on the environment and its natural resources. Thus, since the proposed filling station was situated in an area with an aquifer (which was once and could in future be used to augment water supply in White River), and could therefore contaminate the aquifer, the Constitutional Court could have directed the environmental authorities to, in future applications, consider if other alternative locations for developing the filling station existed. Such line of reasoning would place environmental protection (protection of the aquifer) above any other economic considerations. However, placing priority on protecting the integrity of the aquifer does not seek to negate socio-economic development. What it does is to make any socio-economic development subject to the protection of the aquifer. On this note, it should be noted that protecting the aquifer and preventing its pollution does not only preserve its integrity but also promotes the well-being of the surrounding community. This ushers in the preservation of the environment and its natural resources for the sake of environmental justice and poverty reduction.

As discussed in the preceding Chapters, ESD incorporates the principles of intergenerational and intra-generational equity which often overlap to encompass issues of environmental justice and poverty eradication. In Fuel Retailers, the Constitutional Court acknowledged that the application required one to consider the economic, social

\[197\] Fuel Retailers para 9.
and environmental benefits or disadvantages the proposed filling station would likely cause.\textsuperscript{198} Examining the social and environmental benefits or disadvantages of the proposed filling station would require among other things, a consideration of the impact of the development on environmental justice and poverty reduction. Regrettably, the Constitutional Court did not provide any information on how the facts of the case could be applied to address issues of environmental justice and poverty reduction.

This thesis argues that the Constitutional Court's failure to pronounce on issues of environmental justice and poverty reduction are due to the fact that it framed its decision in line with the ordinary sustainable development instead of 'ecologically' sustainable development in the context of section 24(b) (iii) of the \textit{Constitution}. Had the Constitutional Court framed its decision in line with section 24(b) (iii)'s injunction to consider 'ecologically' sustainable development, it would have realised that ESD required that priority be given to preserving the environment and its natural resources so that humanity's well-being and health can be improved. However, because the Constitutional Court invoked sustainable development's integration principle, it could not explicate further on issues of environmental justice and poverty reduction because integration generally does not say much about how social, environmental and economic concerns are supposed to be integrated. Hence, this thesis argues for interpreting section 24(b) (iii) in line with 'ecologically' sustainable development as opposed to the ordinary and often cited sustainable development. Framing its decision in this context would have enabled the Constitutional Court to realise environmental justice and poverty reduction as outcomes of ESD. In turn, framing its decision in line with 'ecologically' sustainable development would have enabled the Constitutional Court to address section 24(b) (iii)'s injunction to consider justifiable social development.

That is to say, The Constitutional Court could have noted that protecting the aquifer from pollution by the proposed filling station would improve the well-being of the surrounding

\textsuperscript{198} \textit{Fuel Retailers} para 4.
community. Clearly put, since the Geo3 report noted that the aquifer was once used to augment water supply in the White River area, its preservation could prove beneficial for future generations who might want to augment their water supply. Protecting the aquifer would therefore be beneficial to future generations who might want to increase water supply in the White River area, hence benefiting the community, especially the poor in the area who might have been living without basic needs such as water. On the contrary, the pollution of the aquifer could compromise water supply in the White River area, thereby potentially resulting in water supply shortages.

Accordingly, pollution of the aquifer could result in environmental injustice as the poor of the community are the most affected by water supply shortages. The Constitutional Court could have therefore framed its decision in a manner that encouraged the development of filling stations to be in harmony with the environment through respecting its finite natural resources. In the same vein, the Constitutional Court could have framed its decision in a manner that proscribed filling stations from engaging in future unsustainable practices that could result in the disproportionate sharing of environmental goods and burdens. In addition, the Constitutional Court could have noted that poor communities live in the most degraded and polluted environments, hence, polluting natural resources like the aquifer would only contribute to their poverty. Therefore, to end the number of people living without basic needs like water, the Constitutional Court could have based its decision on ESD by promoting the sustainable use of the aquifer. Protecting the aquifer would be important for the provision of services only the natural environment can provide. In the case at hand, these services would include the water we drink and consume for other basic uses.

Furthermore, the Constitutional Court could have framed its decision by addressing issues on environmental justice which require that there be adequate civic engagement when matters of development are being considered. That is to say, issues such as adequate public participation come to play. The environmental rule of law requires courts, in the adjudication of environmental law cases, to promote public participation as an aspect of
good environmental governance. In the case at hand, the environmental authorities decided on the authorisation of the filling station without having considered the submissions or views of the Water Utilisation and Water Quality Management departments of Water Affairs and Forestry. As averred by the Applicant:

Nothing was said about the installation of an impermeable layer, which according to the scoping report was to be installed if Water Affairs and Forestry required this. However, it subsequently transpired that the Water Quality Management and Water Utilization divisions of Water Affairs and Forestry had neither received nor commented on the Geo3 report. 199

Hence, the Constitutional Court could have recognised that the environmental authorities' failure to submit the application for comment by the Water Utilisation and Water Quality Management departments was against transparent civic engagement. Thus, had the Water Utilisation and Water Quality Management departments submitted their views on the proposed filling station, they might have noted that alternative locations could be considered for the construction of the filling station since the proposed location contained an aquifer which could be used by future generations for water supply. The reconsideration of the application by the environmental authorities could, thus, have been ordered on the condition that adequate participation from the Water Utilisation and Water Quality Management departments be done.

Applying 'ecologically' sustainable development to the Constitutional Court's decision in Fuel Retailers arguably exposes the inadequacy and ultimately unsatisfying applications of section 24(b) (iii) of the Constitution. Whilst the decision is at first glance respectable for the environment, it is arguably motivated by socio-economic considerations, thereby amounting to the application of economic sustainability as opposed to ESD as envisioned by section 24. Ultimately what section 24(b) (iii) of the Constitution requires is that decision makers employ ESD as a constitutional value, which in essence requires making a value-laden judgment in favour of the environment. Consequently, although applying ESD as a constitutional value would not have changed the decision generally, it would

have provided guidance and set precedent for subsequent environmental law cases on the meaning and content of 'ecologically' sustainable development in section 24(b) (iii). On this note, had the Constitutional Court applied ESD as a constitutional value, it would have helped develop a stronger environmental rights jurisprudence for South Africa. The Constitutional Court's inability to give content to ESD has arguably created a barrier that has prevented courts from fully developing the environmental right. Hence, till date all other judgments that have considered the environmental right have mistakenly interpreted section 24 in line with sustainable development and not 'ecologically' sustainable development.

5.6 VEJA

The VEJA case involved an appeal to the Supreme Court against an order of the Gauteng Local Division, Johannesburg (hereinafter the High Court). The High Court had ordered ArcelorMittal South Africa Limited200 (hereinafter the second Appellant) to provide the Vaal Environmental Justice Alliance201 (herein the Respondent) with the information it had requested. The appeal in the Supreme Court emanated from the second Appellant's refusal to grant the Respondent's request for information regarding its "past and present activities", including its "documented historical operational and strategic" methods to protect the "environment in the Vanderbijlpark and Vereeniging areas, in each of which" it operated a major steel plant.202

Worth mentioning is that, in the first instance, the Respondent had requested a copy of the second Appellant’s Environmental Master Plan (hereinafter the Master Plan) and any updated versions and related progress reports of the Master Plan.203 The Respondent's second request related to the second Appellant's "records of closure and rehabilitation of..."
the Vaal Disposal site in Vereeniging".\textsuperscript{204} The second Appellant refused the Respondent's requests on the grounds that it had not met the threshold requirements of section 50(1)(a), read with section 53 of \textit{PAIA}.\textsuperscript{205} At this stage it is apposite to provide a sketch of the relevant provisions of \textit{PAIA} that the Supreme Court had to consider. The Supreme Court stated that \textit{PAIA} also regulated "requests for information from private persons".\textsuperscript{206} Thus, section 50(1) of \textit{PAIA} obliged both the state and private persons to "provide access to information, subject to certain jurisdictional requirements":

(1) A requester must be given access to any record of a private body if –
(a) that record is required for the exercise or protection of any rights;
(b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
(c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.\textsuperscript{207}

Section 53 of \textit{PAIA}, when read with section 50(1)(a),\textsuperscript{208} provides that:

(1) A request for access to a record of a private body must be made in the prescribed form to the private body concerned..., and
(2) the form... must at least require the requester concerned..., (d) to identify the right the requester is seeking to exercise or protect and provide an explanation of why the requested record is required for the exercise or protection of that right.\textsuperscript{209}

In this light, the Respondent argued that the requested information was "relevant to its performance as an advocate for environmental justice" and that in this respect it relied on its right in section 24 of the \textit{Constitution}.\textsuperscript{210} Thus, this information was to help the Respondent "to monitor and ensure compliance" by the second Appellant "of its

\begin{thebibliography}{99}
\bibitem{204} \textit{VEJA} para 8.
\bibitem{205} \textit{VEJA} para 6.
\bibitem{206} \textit{VEJA} para 6.
\bibitem{207} Section 50(1) of \textit{PAIA}.
\bibitem{208} The relevant parts of section 53 of \textit{PAIA}, which must be read with s 50(1)(a), provide as follows: "(1) A request for access to a record of a private body must be made in the prescribed form to the private body concerned at its address, fax number or electronic mail address. (2) The form for a request for access prescribed for the purposes of subsection (1) must at least require the requester concerned-... (d) to identify the right the requester is seeking to exercise or protect and provide an explanation of why the requested record is required for the exercise or protection of that right".
\bibitem{209} Section 53 of \textit{PAIA}.
\bibitem{210} \textit{VEJA} para 38.
\end{thebibliography}
obligations in relation to the prevailing statutory regulatory regime". The second Appellant however, argued that the right the Respondent relied on, namely the environmental right entrenched in section 24 of the Constitution "was too generalised and vague" such that it did not meet the threshold in section 50(1) (a). The second Appellant went on to accuse the Respondent of being on a "fishing expedition". It also accused the Respondent of conferring itself as a 'parallel regulatory authority' which PAIA did not sanction. The second Appellant further asserted that the Respondent's contended rights could have been asserted through other statutory avenues other than PAIA.

The Supreme Court dismissed the second Appellant's appeal and held that the Respondent had not only relied on section 24 of the Constitution, but had also relied on sections 2(2), 2(3), 2(4) (b), 2(4) (f), 2(4) (k) of NEMA, sections 2(b) and (c) of the National Environmental Management: Waste Act 59 of 2008 (NEMWA) and

---

211 VEJA para 38.
212 VEJA para 38.
213 VEJA para 60.
214 VEJA para 38.
215 VEJA para 57.
216 Section 2(2) of NEMA provides that "[e]nvironmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably".
217 Section 2(3) of NEMA provides that: "[d]evelopment must be socially, environmentally and economically sustainable".
218 Section 2(4) (b) of NEMA provides that "Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option".
219 Section 2(4) (f) of NEMA provides that: "The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured".
220 Section 2(4) (k) of NEMA provides that: "Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law".
221 Two of the objectives of the National Environmental Management: Waste Act 59 of 2008 (hereinafter NEMWA) are set out in sections 2(b) and 2(c), namely: (b) "to ensure that people are aware of the impact of waste on their health, well-being and the environment; (c) to provide for compliance with the measures set out in paragraph (a)." Section 2(a) read with section 2(c) is designed to establish measures that minimise the consumption of national resources, and that minimise and avoid the generation of waste, whilst ensuring compliance. Section 2(d) provides that the general object of the
sections 2, 3(1) of the National Water Act 36 of 1998 (NWA). These provisions and statutes, according to the Supreme Court, recognised the significance of public participation in protecting the environment. The Supreme Court further stated that, because the second Appellant produces about 90 percent of the country's steel products which could negatively affect the environment, it was mandated to provide access to information of its past and present activities with respect to the protection of the Vanderbijlpark and Vereeniging areas.

5.6.1 The framework of the Court's decision

In framing its judgment, the Supreme Court sought to address the second Appellant's contention that its application be upheld because, although its activities "obviously" caused pollution, they nonetheless resulted in "a boon to the country's economic development". In tackling the second Appellant's assertion, the Supreme Court noted that the dispute juxtaposed two competing interests, particularly the associated significance of industrial activities for South Africa's economy and development, in contrast to concerns about environmental preservation "for the benefit of present and future generations". The Supreme Court, thus, noted that the dispute raised two "competing interests" captured in the environmental right through sustainable development.

Act is "to give effect to section 24 of the Constitution in order to secure an environment that is not harmful to health and well-being".

Section 2 of the National Water Act 36 of 1998 is designed: "to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors- (a) meeting the basic human needs of present and future generations", whereas section 3(1) provides: (1) "As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate".

VEJA para 71.
VEJA para 2.
VEJA para 3.
VEJA para 3.
VEJA para 4.
Citing the Constitutional Court's judgment in *Fuel Retailers*, the Supreme Court held that the "competing interests" between environmental protection and economic development could only be addressed by way of the "integration of environmental protection and socio-economic development". Thus, environmental considerations had to be "balanced with socio-economic considerations through the ideal of sustainable development" as encapsulated in section 24(b)(iii) which provides for environmental protection through securing "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development". However, as will be discussed in the next section, the Supreme Court regrettably failed to emphasise on the need to ensure that economic development is 'justifiable' and 'ecologically sustainable' as demanded by section 24 of the *Constitution*.

To be borne in mind is that, in compelling the second Appellant to disclose the requested information, the Supreme Court stated that:

> Industrial activities, impacting as they do on the environment, including on air quality and water resources, [have] an effect on persons and communities in the immediate vicinity and [are] ultimately of importance to the country as a whole.

In this light, it can be argued that the Supreme Court recognised the second Appellant's substantial contribution to pollution in the country. As Murcott notes, the Supreme Court's remarks in this respect recognised that: because the second Appellant was a substantial polluter, there existed "an environmentally-centred justification for its duty to disclose the information requested" by the Respondent. However, as discussed in the following section, the Supreme Court could have gone a step further to address issues of environmental justice concerning the poor communities in the second Appellant's immediate vicinity.

---

228  *Fuel Retailers* para 1, 45.
229  *VEJA* para 3, 4.
230  *VEJA* para 3, 4.
231  *VEJA* para 52.
In compelling the second Appellant to disclose the requested information, the Supreme Court found that the information required by the Respondent was indeed essential for the safeguarding of the environmental right entrenched in section 24 of the Constitution. The Supreme Court arrived at this decision by relying on numerous substantive and justice-oriented environmental provisions on which the Respondent relied on. The Supreme Court further reinforced the High Court's view that: denying access to the information requested by the Respondent "would hamper the organisation in championing the preservation and protection of the environment". Regrettably, as will be discussed below, other than engaging with environmental statutory provisions that give effect to section 24, the Supreme Court could have developed the normative content of the environmental right in a meaningful way, by employing the environmental rule of law to link ESD with the right to access to information.

In addition, in framing its dispute, the Supreme Court extended NEMA's jurisdiction to juristic persons, in this case corporations. Thus, the Supreme Court asserted that NEMA "must, in principle, apply to corporate decisions and activities that impact on the environment" and accordingly "implicate the public interest, particularly when their activities require regulatory approval". In this light, it could be that the Supreme Court extended NEMA's application on the basis of statutory interpretation that seeks to "promote the spirit, purport an objects of the Bill of Rights" as mandated by section 39(2) of the Constitution. In extending NEMA's application, the Supreme Court also applied the environmental right horizontally. Put differently, the Supreme Court recognised that the second Appellant has obligations under section 24 that justify the horizontal application of NEMA.

---

233 VEJA para 60-61.
234 VEJA para 60-61.
235 VEJA para 42.
236 VEJA para 66.
237 VEJA para 66.
238 VEJA para 78.
Moreover, it is notable from the Supreme Court's judgment that public participation in the quest for environmental protection cannot be gainsaid.\footnote{VEJA para 70-71.} Public participation, therefore, justified and afforded the Respondent "a seat at the table" in respect to environmental governance in the Vanderbijlpark and Vereeniging areas.\footnote{VEJA para 70-71.} The Supreme Court's perspective, in this regard, was most likely facilitated by the recognition that the Respondent is made up of "genuine advocates for environmental justice".\footnote{VEJA para 53.} The Respondent, as a legitimate environmental participant with whom the second Appellant had committed to contributing in its "collaborative corporate governance" efforts, was authorised to monitor the second Appellant's operations and its impact on the environment.\footnote{VEJA para 53, 71 and 80.} Although the Supreme Court's approach treated the environmental right, the "right to access to information" and the values of "accountability, responsiveness and openness" as mutually reinforcing,\footnote{Sections 32 and 1(d) of the Constitution which respectively provide for the right to access to information and the values of "accountability, responsiveness and openness".} it nonetheless could have provided guidance and content on ESD and its link to the right to access to information and environmental protection. This thesis attempts to address this issue below.

5.6.2 An annotation of the Court's approach to ESD

As noted in the preceding section, the Supreme Court extended the application of \textit{NEMA} to include the private sphere.\footnote{VEJA para 66.} Although this part of the Supreme Court's judgment is quite commendable, the judgment nonetheless could have gone further to fully develop the content of section 24 in line with ESD. The first remark of the Supreme Court in \textit{VEJA} was that "the world, for obvious reasons, is becoming increasingly ecologically sensitive".\footnote{VEJA para 1.} The Supreme Court further noted, rightly so, that the sustainability of the earth was at stake, and that South Africa, as a country, had to respond by "developing a
greater sensitivity" with regard to protecting and preserving the environment for future
generations.\textsuperscript{246} For Murcott,\textsuperscript{247} the Supreme Court, in this regard engaged in substantive
reasoning, by framing the dispute with respect to "ecological sensitivity and the need for
openness and responsiveness in response". However, instead of invoking sweet sounding
statements (ecological sensitivity), the Supreme Court could have been more critical and
creative in developing the value of ecological sustainability and how it develops sensitivity
with regard to preserving and protecting our environment.

In other words, in recognising the need for ecological sensitivity, the Supreme Court could
have gone further to develop 'ecologically' sustainable development as a constitutional
value. As a constitutional value, ESD could address the Supreme Court’s call for South
Africans to develop ecological sensitivity for the sake of the sustainability of earth.\textsuperscript{248} In
this context, ESD recognises that sustaining the earth and its natural resources requires
an increase in the degree of humanity's concern to preserve the environment and its
natural resources. On this note, humanity's concern to preserve the environment
(ecological sensitivity) was reflected in the Respondent's request for access to the second
Appellant's records. The Supreme Court could have, therefore, framed its decision in line
with ESD by linking the right of access to information with the sustainability of the
environment.

In addition, the Supreme Court stressed that the dispute involved "two competing
interests, namely environmental protection and economic growth concerns"\textsuperscript{249}. The
Supreme Court further cited with approval \textit{Fuel Retailers} judgment which recognised that
section 24(b) (iii)'s injunction to consider 'ecologically' sustainable development required
the integration of the protection of the environment with socio-economic development as
per the ordinary sustainable development principle. Thus, instead of using the integration

\textsuperscript{246} \textit{VEJA} para 84.
\textsuperscript{247} Murcott \textit{Towards a Social Justice-Oriented Environmental Law Jurisprudence} 193.
\textsuperscript{248} \textit{VEJA} para 84.
\textsuperscript{249} \textit{VEJA} para 3, 4, 73.
principle to address the case's competing interests, the Supreme Court could have based its decision on ESD, which required development be pursued for the sake of improving the total quality of life of South Africa's present and future generations in a manner that conserves the country's natural resources on which life depends. In this light, this thesis notes that the Supreme Court regrettably did not emphasise or explain on the need to limit economic development by making certain that it was 'justifiable' and in line with protecting and preserving the environment as demanded by section 24(b) (iii) of the Constitution.

Furthermore, the Supreme Court could have noted that the environmental rule of law facilitates harmony between any competing human rights and environmental protection. That is to say, the environmental rule of law recognises that ESD facilitates better environmental protection, which in turn strengthens a country's environmental laws, and places environmental concerns above any other competing interests such as economic development. However, this argument does not negate all other economic and social considerations which are necessary for human survival. On this note, this thesis argues that economic and social interests are addressed through section 24(b) (iii)'s injunction to consider justifiable social and economic development. In other words, in cases where there are competing interest between environmental protection and economic and social development, section 24(b) (iii) requires that priority be placed on environmental protection before the growth of economies. Thus, although economic and social development concerns are necessary for human survival, they are not given primacy. In light of the present argument, the Supreme Court could have strengthened South Africa's environmental rights jurisprudence by noting that ESD is a governing guideline in cases involving environmental protection and any competing interests. Regrettably, the Supreme Court, as the Court in Fuel Retailers, did not adequately expand on, and provide guidance on how the competing interests between environmental protection and

economic growth should be dealt with in line with ESD. The arguments presented thus far represent a different approach that the Supreme Court could have adopted. Hence, although approaching the dispute from an ESD perspective would not have changed the outcome of the case, it could have changed the approach taken to reach the decision. Such approach would have expanded on South Africa's environmental rights jurisprudence by giving content to section 24(b) (iii)'s injunction to consider 'ecologically' sustainable development.

5.6.3 The extent to which the court has; could have; or should have applied the ESD as a constitutional value

As already noted, the Supreme Court's decision in VEJA is commendable in some respects. It has expanded the importance of accountability in environmental protection to private persons. As a result, the Supreme Court contributed to some extent to a deepening of the country's environmental discourse. However, as noted in the preceding section, the Supreme Court could have gone a step further to expand and strengthen South Africa's environmental rights jurisprudence through substantially considering ESD as a constitutional value. The Supreme Court could have framed its judgment within the ambit of the precepts of the environmental rule of law by considering the dispute in terms of 'ecologically' sustainable development and not on the general and oft cited sustainable development. Framing the dispute in this regard would address concerns regarding the impact of the second Appellant's activities on environmental justice, poverty reduction and the ecological Integrity of the Vanderbijlpark and Vereeniging areas. In other words, approaching VEJA through ESD, as a constitutional value could have enabled the Supreme Court to legitimise principles such as ecological integrity, environmental justice and poverty reduction.

Of importance is that, the Supreme Court's approach to issues of environmental protection and environmental justice leaves much to be desired. Although the Supreme Court acknowledged the Respondent's role as an advocate for environmental justice, it
did not explicate further on how the facts of the case invoked issues of environmental justice. Although such issues were not raised by the parties, the Supreme Court could have *mero motu* considered whether the second Appellant's development activities would result in the disproportionate sharing of the Vaal area's environmental goods and burdens.

As the Supreme Court rightly noted, "industrial activities, impacting as they do on the environment, including on air quality and water resources", have an impact on communities and persons "in the immediate vicinity and [are] ultimately of importance to the country as a whole". 251 In other words, the second Appellant's contribution to pollution in the country was justification enough to compel access to its information. However, the Supreme Court could have gone further to expand on the second Applicant's contribution to pollution in South Africa in relation to the disproportionate sharing of Vaal environment's goods and burdens. The Supreme Court could have taken notice of the fact that, it is mainly Vaal Triangle's vulnerable and poor communities that are shouldering the impacts of the second Appellant's polluting activities. 252 The plight of the poor in Vaal Triangle was most immediately exacerbated by the second Appellant's polluting activities. Hallowes and Munnik 253 observe that the poor in Vaal Triangle experience climate and environmental injustice because they are exposed to a "disproportionate share of environmental burdens" which has made them vulnerable to ill-health. For instance, the Respondent argued that:

Pollutants from the plant's industrial waste have reportedly seeped through the ground, contaminated local aquifers and affected the groundwater of nearby communities. [Arcelormittal] is also one of the top three polluters of particulate matter, sulphur dioxide and carbon dioxide in the Vaal Triangle industrial region, where an estimated 65 percent of chronic illnesses in the area are reported to be caused by industrial pollution. 254

---
251 *VEJA* para 52.
252 See for instance Mzini *Community Food Projects* 2 who notes that around 51 percent of the population in the Sedibeng District Municipality, where the second Appellant is located, lives in poverty.
253 Hallowes and Munnik 2006 *Poisoned Spaces* 25-37.
254 Founding Affidavit in *VEJA* para 41.
This evidence of environmental injustice did not feature in any substantial manner in the Supreme Court’s judgment. Had the Supreme Court explicitly engaged ESD, it could have highlighted that prioritising environmental protection before development ensures that the present generation’s developmental activity (i.e. the second Appellant's development activity) does not prejudice or impoverish the poor in the Vaal Triangle area. Put differently, had the Supreme Court (as the second highest court in the land), strongly considered how the second Appellant's polluting activities disproportionately affect the poor in Vaal Triangle, it would have furthered ESD's material worth within the South Africa’s legal discursive fabric and perhaps even created a basis upon which similar discussions, in future cases might depart from.

In addition, since the Supreme Court accepted that industrial activities have a negative impact on communities, persons, and the environment, it could have gone further to apply the CBDR principle. Thus, although the CBDR principle mostly applies to states, this thesis notes that it could be applied to big corporations when considering issues of environmental justice. Because big corporations, such as the second Appellant, are largely responsible for environmental degradation, they have to pay and bear the lion-share of obligations towards achieving environmental protection. Hence, although everyone is responsible for protecting the environment, it is these big corporations who should be seen to be doing more, given that they are responsible for the industrial activities that negatively impact on communities, persons, and the environment.

It should be noted further that, framing the VEJA case in terms of 'ecologically' sustainable development and not on sustainable development, would not only address Vaal Triangle's issues on environmental justice and poverty reduction, but would also bring to the fore aspects of maintaining its ecological integrity. Of importance is that the Supreme Court quoted section 2(2) of NEMA which requires environmental management to "place people and their needs at the forefront of its concern". However, the Supreme

\footnote{See 3.3.2 above.}
\footnote{VEJA para 62.}
Court could have noted that 'ecologically' sustainable development, unlike NEMA requires environmental management to prioritise the integrity of the environment. This means that any economic development or social goals ought to be evaluated or assessed against preserving the integrity of the environment. Placing the integrity of the environment at the forefront of environmental protection reflects the environmental rule of law as it means that nature is protected in the same way as citizens. Socio-economic development is, therefore, not pursued at the expense of the environment. Any proposed development would therefore have to be determined first on its impact on the integrity of the environment.

In light of the above, although the Supreme Court's judgement can be commended for having expanded the application of NEMA principles to include private persons, its engagement with the environmental right could be regarded as limited as it repeated Fuel Retailer's economic-focused, integration-centred articulation of sustainable development. The Supreme Court, like BP and Fuel Retailers, mistakenly interpreted section 24's injunction to consider 'ecologically' sustainable development as the ordinary sustainable development. On this note, had the Supreme Court framed its decision within the ambit of the precepts of the environmental rule of law it could have realised that ESD is an important standard in achieving ecological integrity, environmental justice and poverty reduction. Approaching its judgment from the ambit of the environmental rule of law would have contributed to a deepening of South Africa's environmental rights jurisprudence. Giving content to ESD would have provided the Supreme Court with the opportunity to concretise the environmental right in relation to the right of access to information. By so doing, the Supreme Court could have also set a precedent which would prioritise ESD in environmental adjudication and not neglect but instead develop the environmental right.
5.7 Earthlife

*Earthlife* has been widely described as "South Africa's first and only climate change case". The High Court, Gauteng Division, Pretoria (hereinafter the High Court) was tasked to determine whether considerations for environmental review included considerations for climate change. Notably, is that Thabametsi Power Project (Pty) (hereinafter Thabametsi) applied to the Chief Director of the Department of Environmental Affairs (hereinafter the Chief Director) for authorisation to construct a coal-fired power station near Lephalale in Limpopo. The coal-fired power station was to operate until 2061.

The application for authorisation was submitted in terms of section 24 of *NEMA* which requires environmental authorisation before the commencement of any activities which are specified by the Minister of Environmental Affairs (hereinafter the Minister). One such activity is the construction of a coal-fired power station and the Chief Director is the designated competent authority to decide on such environmental authorisations. The authorisation applied for could only be granted if "all relevant factors", following an Environmental Impact Assessment, had been considered. Upon reviewing Thabametsi's application, the Chief Director, on 25 February 2015, granted environmental authorisation to construct the proposed coal-fired power station. Earthlife Africa Johannesburg (herein the Applicant) appealed against the Chief Director's decision to the Minister, who, on 7 March 2016, upheld the Chief Director's decision to authorise the construction of the coal-fired power station.

---

257 See for instance Humby 2018 *J Environ Law* 145; Ashukem 2017 *LEAD* 43.
258 *Earthlife* para 90.
259 *Earthlife* para 2, 3.
260 *Earthlife* para 1.
261 *Earthlife* para 2.
262 *Earthlife* para 5.
263 Section 240 (1) of *NEMA*; *Earthlife* para 5.
264 *Earthlife* para 2.
265 *Earthlife* para 2.
In her appeal decision, the Minister recognised that before issuing the environmental authorisation, the Chief Director had not "comprehensively assessed and/or considered" the impact the proposed development would have on climate change.\textsuperscript{266} Relying on the authority to vary an appeal decision,\textsuperscript{267} the Minister upheld the environmental authorisation by the Chief Director, but amended the authorisation by compelling Thabametsi to undertake a climate change impact assessment before commencing the development.\textsuperscript{268} The Applicant then lodged an appeal with the High Court seeking to review the decision to grant the authorisation as well as the Minister's appeal decision. The crux of the Applicant's appeal was that the Chief Director and Minister's authorisation for the construction of the proposed coal-fired power station had failed to consider the impacts of climate change.\textsuperscript{269} The Applicant argued that both the Chief Director and Minister's decisions were reviewable under section 8 of \textit{PAJA} on the grounds that the "absence of a climate change impact assessment" in the decisions was "unlawful, irrational and unreasonable".\textsuperscript{270} In providing judgment, the High Court stated that:

\begin{quote}
The absence of express provision in the statute requiring a climate change impact assessment does not entail that there is no legal duty to consider climate change as a relevant consideration and does not answer the interpretative question of whether such a duty exists in administrative law.\textsuperscript{271}
\end{quote}

Thus, the High Court noted that "a formal climate change assessment" on impacts of climate change was unquestionably relevant in terms of section 24O of \textit{NEMA}.\textsuperscript{272} The High Court however stated that the proportional remedy in the circumstances "was not to set aside the environmental authorisation", but the Minister's decision, instead.\textsuperscript{273} The High

\textsuperscript{266} \textit{Earthlife} para 7, 65.  
\textsuperscript{267} Section 43(6) of \textit{NEMA}.  
\textsuperscript{268} \textit{Earthlife} para 8; Minister of Environmental Affairs 2018 Appeal Decision Reference: Lsa 142346 (hereinafter Minister's Appeal Decision) para 10.5.  
\textsuperscript{269} \textit{Earthlife} paras 4-9.  
\textsuperscript{270} \textit{Earthlife} para 10.  
\textsuperscript{271} \textit{Earthlife} para 10.  
\textsuperscript{272} \textit{Earthlife} para 88.  
\textsuperscript{273} \textit{Earthlife} para 121.
Court remitted the matter for reconsideration of climate change impacts "on the basis of the new evidence in the climate change report". 274

Following the High Court's judgment, the Minister, on 30 January 2018, reconsidered the application for authorisation in light of a new "climate change impact assessment" and approved, once more, the environmental authorisation for the coal-fired power station. 275

The Minister propounded the reasoning that while the proposed development would have "significant GHG emissions and therefore cause climate change impacts", the benefits of the coal-fired station outweighed the harms. 276

On 26 March 2018, the Applicant challenged the decision of the Minister, and appealed to the High Court for an order setting aside the decision as unlawful for failing to "consider site-specific climate change impacts associated with the project". 277

On 19 November 2020, pursuant to an agreement between the parties to the dispute, the High Court, issued an order that set aside all governmental environmental authorisations for the proposed coal-fired power station. 278

Thabametsi's application for authorisation was further referred to the Chief Director for reconsideration. 279

5.7.1 The framework of the Court's decision

The framework of the High Court's decision focused on whether climate change was a relevant factor to be considered in the "Environmental Impact Assessment process", which would, as a matter of administrative law, result in the state having acted lawfully and reasonably in authorising the proposed coal-fired power station. 280

Stated differently, the High Court had to consider whether the Chief Director and Minister's administrative conduct was irregular due to their failure to recognise climate change impacts. That is to

274 Earthlife para 121; Minister's Appeal Decision para 2.3.
275 Minister's Appeal Decision para 4.
276 Minister's Appeal Decision para 4.
277 Earthlife Appeal Notice para 2.
280 Earthlife paras 77-78, 90.
say, was "a climate change impact assessment required before authorising a new coal-fired power stations"? The High Court held that "a formal climate change assessment" on the impacts of climate change was indisputably relevant in terms of section 24O of NEMA. The High Court propounded the reasoning that:

A plain reading of section 24O (1) of NEMA confirms that climate change impacts are indeed relevant factors that must be considered. The injunction to consider pollution, environmental impacts or environmental degradation logically expects consideration of climate change. All parties accepted in argument that the emission of GHGs from a coal-fired power station is pollution that brings about a change in the environment with adverse effects and will have such an effect in the future. All the relevant legislation and policy instruments enjoin the authorities to consider how to prevent, mitigate or remedy environmental impacts of a project and this naturally, in my judgement, entails an assessment of the project's climate change impact and measures to avoid, reduce or remedy them.

Considering the framework of the High Court's decision, this thesis concedes that the judgment is quite commendable as it recognises the problems attendant to climate change. Furthermore, the fact that the High Court insists that environmental authorities seriously consider climate change impacts in environmental impact assessments is a positive step towards developing South Africa's environmental law jurisprudence.

Moreover, the High Court noted that in interpreting section 24O of NEMA, a purposive approach that is in line with the spirit, objects and purport of the Constitution had to be adopted. In this respect, the High Court relied on section 24 of the Constitution and relevant international laws such as articles 3(3) and 4(1) (f) of the UN Framework Convention on Climate Change. The High Court's engagement with the environmental

---

281 Earthlife para 90.
282 Earthlife para 88.
283 Earthlife para 78.
284 Earthlife paras 80-81.
285 In this regard, Peel and Osofsky 2018 Transnatl Environ Law 60 note that: "While by no means a direct application of the South African environmental rights provision, this decision suggests that rights arguments were at least a relevant part of the 'extra-statutory context' taken into account by the Court in reaching its conclusion that an environmental authorization for a new coal-fired power station could not be issued without first having a proper assessment for the project's climate change impacts".
right could however be construed as very limited. On this note, the High Court stated that:

Section 24 recognises the interrelationship between the environment and development. Environmental considerations are balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Climate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures [to] protect the environment 'for the benefit of present and future generations' and hence adequate consideration for climate change. Short-term needs must be evaluated and weighed against long-term consequences.\(^{286}\)

As revealed in this passage, the High Court accepted that climate change poses a "substantial risk to sustainable development in South Africa".\(^{287}\) This line of reasoning, as will be argued in the next section, is arguably incorrect as it misconstrues section 24(b)(iii)’s injunction to consider 'ecologically' sustainable development as ordinarily sustainable development. In addition, the High Court's judgment further stressed on the importance of \textit{NEMA}'s directive principles in ensuring environmental protection. Particularly, that \textit{NEMA}'s directive guidelines guide the administration, interpretation and "implementation of \textit{NEMA}, and any other law concerned with the protection or management of the environment".\(^{288}\) According to the High Court, \textit{NEMA}'s directive principles "promote sustainable development" as well as the "mitigation principle that environmental harms must be avoided, minimised and remedied".\(^{289}\)

The High Court further stated that the "Environmental Impact Assessment process" was crucial for promoting sustainable development, by guaranteeing that the development activities are "sufficiently balanced with a full consideration of the environmental impacts

---

\(^{286}\) \textit{Earthlife} para 82.
\(^{287}\) \textit{Earthlife} para 82.
\(^{288}\) \textit{Earthlife} para 80.
\(^{289}\) \textit{Earthlife} para 80.
of a project with environmental impacts". In other words, the High Court acknowledged the importance of sustainable development to the "Environmental Impact Assessment process" through integrating and balancing environmental concerns with developmental concerns. Regrettably, the High Court, as with the courts in *BP, Fuel Retailers* and *VEJA*, engaged with the environmental right in a superficial manner by not addressing the relationship between environmental protection, ESD and climate change. Thus, the following section notes that as commendable as the judgment may be, the High Court could have gone further to develop the normative content of section 24, particularly with respect to ESD and its link to climate change.

### 5.7.2 An annotation of the Court's approach to ESD

As already noted, *Earthlife* is heralded as South Africa's first case to acknowledge the importance of climate change considerations in the assessment of environmental authorisations. The fact that the High Court engaged the global problem of climate change is quite commendable as it reflects a judicial appreciation of the severity of the climate emergency in the Anthropocene. For instance, by declaring that "climate change impacts are indeed relevant factors that must be considered" in terms of section 240 (1), the High Court potentially enhanced public awareness, narratives and discourse on the urgency of the problem of climate change in the country. In other words, the High Court legitimised any unresolved concerns of the links between South Africa's coal-fired power and climate change impacts. However, the High Court in its judgment could have gone further to provide the link between ESD and climate change.

Worth noting is that the High Court observed that the case needed to be interpreted in a purposive manner that is in line with the spirit, objects and purport of section 39 of the

---

290 *Earthlife* para 80.
291 *Earthlife* para 80.
292 Humby 2018 *J Environ Law* 145; Ashukem 2017 *LEAD* 43.
293 *Earthlife* para 78.
The High Court could have gone further to note that interpreting the case in a manner that is in line with the spirit, objects and purport of the Constitution requires an application of constitutional values. This means that the High Court could have noted that a purposive interpretation of section 24O (1) reflects a system of constitutional values, and that such system requires courts "to give concrete meaning to constitutional values in the context of specific disputes". In the context of the Earthlife case, the High Court could have given concrete meaning to ESD as constitutional value. Alternatively stated, because the High Court acknowledged that its duty to promote the spirit, objects and purport of the Constitution was activated by section 24, it could have gone further to concretise ESD as a constitutional value.

Concretising ESD as a constitutional value would require the High Court to acknowledge that pursuing economic or social development at the expense of the environment is unjustifiable. It is worth mentioning that the Chief Director argued that while coal-fired power stations are heavy greenhouse gases emitters, they were nonetheless essential for the country's economic development, given the current energy crisis. In response, the High Court emphasised that the effects of climate change were a substantial threat to sustainable development in the country. The High Court further highlighted that section 24(b) (iii) provided for the balancing of environmental considerations with socio-economic considerations through ESD. In this light, this thesis argues that the High Court, like the courts before it ignored the adjective 'ecologically' in section 24(b) (iii), hence, its misconception of ESD as requiring the balancing of environmental interest with socio-economic development.

Earthlife para 80, 81.
Erasmus "Limitation and Suspension" 636.
Earthlife para 81.
Earthlife para 19.
Earthlife para 82.
Earthlife para 82.
Accordingly, the High Court could have highlighted that there can be no simple justification for development that directly causes climate change. Although coal fired power stations could address South Africa's economic growth and energy crisis, the negative effects they cause on the environment cannot be overlooked. In other words, no amount of development can be balanced or integrated with the environmental hazards attendant to climate change. The economic development to be achieved from coal fired power stations is no justification for the direct harm on people and animals caused by the intense and frequent storms, drought, rising sea levels, and heat waves attendant to climate change. Therefore, balancing or integrating unsustainable economic development with environmental protection is not ideal as it could promote economic growth at the expense of the environment. This contention addresses the argument by some who may argue that; Development which is sustainable requires a growth in the economy and standards of living. This thesis rejects this reasoning and argues that for the sustainability of ecological systems, the environment should not be sacrificed on such grounds as economic development.

Consequently, economic growth policies that fail to primarily advance ESD present an undesirable and long-term impact on the lives of future generations. ESD, in the context of climate change, therefore means that a sustainable society is not measured by the level of economic growth, but is instead measured by how successful a society has been in preserving and protecting the environment through measures and policies that prevent climate change by enhancing and protecting the quality of air, preventing air pollution and environmental degradation. Climate change is, therefore, a serious environmental hazard that should be avoided at all costs as it could leave future generations without adequate resources to live by. The aforementioned argument is a reflection of a different approach that the High Court could have used in framing its judgment. Again, although framing the dispute on the basis of 'ecologically' sustainable development as a constitutional value would not have changed the outcome of the case, it could have changed the approach adopted by the High Court. As a result, the High Court would have
been able to address issues pertaining to the relationship between climate change and ecological integrity, environmental justice and poverty reduction.

5.7.3 The extent to which the court has; could have; or should have applied the ESD as a constitutional value

In finalising its judgment, the High Court ordered that the Minister reconsider the application and take into account a "climate change assessment report", a paleontological report and comments from interested parties.\textsuperscript{300} This thesis, concurs with the High Court's final decision. However, had the High Court, approached the case from an ESD perspective in the first instance, it would have laid out principles to be followed by the Minister as guidance in reconsidering the application for authorisation. As already stated, after the first judgment of the High Court, the Minister re-approved the construction of the coal-fired power station on the grounds that, while the proposed development would have "significant GHG emissions and therefore cause climate change impacts", its benefits outweighed the harms it caused.\textsuperscript{301}

The Minister's decision constitutes a reflection of the consequences of not fully giving content to the environmental right. It reflects the High Court's arguably erroneous interpretation of ESD as sustainable development which requires balancing environmental concerns with economic development. Thus, the Minister's second decision was grounded on sustainable development as provided in the High Court's judgment and not on ESD. To put it clearly, the Minister's second decision to approve the construction of the coal-fired power station, on the grounds of its benefits outweighing the significant harm caused by the GHG emissions, is potentially a result of the High Court's judgment that emphasised on striking a balance between economic development and environmental interests i.e. sustainable development.\textsuperscript{302} Had the High Court highlighted on the significance of 'ecologically' sustainable development and how it places primacy on the

\textsuperscript{300} Earthlife para 126.3.
\textsuperscript{301} Minister's Appeal Decision para 4.
\textsuperscript{302} Earthlife para 34, 82.
protection of the environment, the Minister's second decision might have been different. The High Court could have emphasised that the motive for protecting the environment must not only be based on the duty humans owe to future generations, but rather on the duty humans owe to nature regardless of its benefit to humans. In this way the Minister would not have afforded importance to the benefits of coal-fired power stations before the interests of protecting the environment. Thus, the Minister would have realised that although coal-fired power stations could benefit the present generation, they nonetheless degrade the environment, which should also be protected for its own sake, regardless of its benefit to humans. Accordingly, it could be argued that the Minister's decision reflects the High Court's neglect or omission to explicate on issues of the importance of environmental protection in cases where developmental interest conflict with environmental preservation.

Although, the Applicant lodged a second appeal after the Minister's second decision, the High Court still did not provide guidance on how the Chief Director could secure environmental protection through ESD and justifiable social and economic development. All the High Court did was to set aside the Minister's authorisation and ordered that the application for authorisation be lodged again with the Chief Director.\(^\text{303}\) In its second judgment, the High Court could have directed the Chief Director to reconsider the application in line with ESD and its link with climate change. In other words, the High Court could have directed the Chief Director to reconsider the application by taking into account any precautionary measures that could be used to minimise, anticipate and prevent the causes of climate change. In the context of this thesis, the Chief Director would have to reconsider the application based on ecological proportionality. Thus, the Chief Director ought to take cognisance of article 3(3) of the UN Framework Convention which requires states and environmental authorities alike to implement measures that minimise, anticipate and prevent the causes of climate change even if there is "lack of

\(^{303}\) Earthlife 2019 Draft Order para 2.
full scientific certainty" of the harm climate change could cause. Article 3(3) further emphasises that all interested parties must be involved in combating climate change. This could mean that ecological proportionality in this context overlaps to cover issues of environmental justice and poverty reduction. Hence, the poor of the community become interested persons in climate change issues since they are the ones who suffer the most from the effects of climate change (such as increased droughts, storms and floods). Simplified, the argument is that the poor are interested persons in climate change issues because climate change hazards such as increased drought lead to poor food production, meaning more people, especially the poor, live without basic food. In addition, the increased storms and floods displace people and the poor are usually the most affected as they are left without shelter.

It should be noted further that ecological proportionality in the context of Earthlife would require environmental authorities to ensure that the country's power stations are neither sources of, nor the cause of climate change. This means that the High Court could have highlighted that a climate change impact assessment is important in assessing the sustainability of the proposed coal-fired power station. The sustainability of the proposed coal-fired power station would be dependent on its impact on the area's diminishing water supply, rising temperatures and extreme weather patterns. Such considerations are necessary for preserving the ecological integrity of the area (and beyond) so that its plants, animals and people are not prejudiced in any way by climate change impacts.

Moreover, in engaging in the process of ecological proportionality, the High Court could have taken notice of the evidence on file and applied it to addressing the impact of the proposed coal-fired power station on ecological integrity. In this respect, the High Court noted that the Applicant understandably considered "coal-fired power stations an inappropriate means to generate electricity" because there existed more sustainable "forms of power generation" that were "less damaging to the environment".\textsuperscript{304} Having

\textsuperscript{304} Earthlife para 23.
considered this assertion as well as the evidence on record on the pollution caused by coal-fired power stations, the High Court could have concretised the environmental right by noting that the sustainability of the proposed coal-fired power station could only be addressed through protecting the environment from excessive GHG. The High Court could have noted that although GHG are necessary for preventing our planet from getting too cold, their excess could be harmful, in that they trap heat on earth and prevent it from leaving the atmosphere. Thus, the Applicant's contention that there existed more sustainable sources of generating power that were less destructive to the environment could have been addressed by directing Thabametsi and the environmental authorities to consider other alternative power generation means that would be less intrusive on Lephalale's climate quality. Hence, although such approach would go against the existence of Thabametsi as a coal mine, emphasis ideally could have been on building cleaner, sustainable, less environmentally invasive and more efficient power stations.

As already stated, ecological proportionality and climate change overlap to encompass issues of environmental justice and poverty reduction. However, the High Court did not provide guidance on how ecological proportionality could be used to determine the impact a proposed development had on climate change. That is, this thesis argues that, because the High Court focused on sustainable development and the balancing of environmental considerations with socio-economic considerations, it could not explicate further on issues of climate change and inter as well as intra-generational equity. The High Court, instead merely made a passing remark of inter-generational equity as mandating an "adequate consideration of climate change" without providing any further content to the ideal of inter-generational equity as an aspect of ESD and the environmental right. That is to say, the High Court's judgment was limited to sustainable development as being "integratedly linked with the principle of intergenerational justice" which required states to "take reasonable measures to protect the environment for the benefit of present and future

---

305 *Earthlife* para 82.
generations". However, the High Court arguably failed to explain further on how the effects of climate change affect intra-generational equity. For instance, the High Court could have noted that the effects of climate change on the Lephalale area would be disproportionately spread, such that the poor would be the ones to suffer most from environmental hazards such as shortage of water supply, heat waves, drought etc.

Simply put, had the Court applied ESD as a constitutional value, it could have realised that the devastating effects of climate change on the environment also result in environmental injustice. In the case at hand, the High Court could have applied ESD to recognise and better address the environmental injustices being experienced by the people near the Lephalale area. Thus, the High Court could have meaningfully engaged with the evidence on record concerning the disproportionate effects the proposed coal-fired power station would have for the poor. For instance, the Court took cognisance of the following evidence:

The power station will require 1,500,000m3 of water each year in a highly water stressed region and hence is likely to aggravate the impact of climate change in the region by contributing to water scarcity, raising in turn questions about the viability of the power station over its lifetime.

The High Court further noted that the most noteworthy risk of the proposed power station as shown in the resilience report was "the threat of increasing water scarcity in the Lephalale district", which will "affect the operation of the plant and deprive the local communities of water". Reference to the deprivation that local communities would experience represents the High Court's only recognition of the links between humanity's well-being and environmental protection. In this light, had the High Court recognised that ESD improves humanity's well-being through promoting activities that preserve the earth's natural resources, it would have acknowledged the fact the 'local communities' largely comprise of the poor and vulnerable who experience environmental injustice and

---

306 *Earthlife* para 82.
307 *Earthlife* para 44.
308 *Earthlife* para 49.
whose health and well-being are substantially affected by water scarcity in the Lephalale area.

Furthermore, the High Court could have framed its decision within the framework of the environmental rule of law by engaging *mero muto* with the harsh effects of pollution on the poor in Lephalale. It is well recorded that the Matimba and Medupi power stations in Lephalale cause extremely high levels of pollution.\(^{309}\) On this note, Holland\(^{310}\) notes that the Medupi power station has been responsible for the highest rate of health impacts more than any other coal-fired power station in South Africa. Notable is that Medupi has been responsible for about 364 premature deaths yearly.\(^{311}\) In addition, 1552 children "between the ages of 6 to 12" were reported to have contracted bronchitis in a year, and about 15 412 children "between the ages of 5 to 19" had shown asthma symptoms.\(^{312}\) Holland\(^{313}\) further observes that the Matimba power station is responsible for about 262 premature deaths yearly and over 1117 children "between the ages of 2 to 12" having contracted bronchitis. The aforementioned shows that the health impacts of existing coal-fired power stations on Lephalale's neighbouring communities, especially the poor communities are already severe.

It is therefore arguably obvious that an additional coal-fired power station would only exacerbate the pollution and environmental injustice in Lephalale. The environmental injustice arising from Matimba and Medupi could have been acknowledged and given due importance by the High Court with reference to environmental protection and preserving Lephalale's environment, air quality and natural resources. The High Court accepted evidence on file that emissions emanating from the proposed power station were relatively high, and that there was a need to properly address their cumulative impacts.\(^{314}\)

\(^{309}\) *Earthlife* para 49.

\(^{310}\) Holland 2017 *Health Impacts of Coal Fired Power Plants in South Africa* 16.

\(^{311}\) Holland 2017 *Health Impacts of Coal Fired Power Plants in South Africa* 16.

\(^{312}\) Holland 2017 *Health Impacts of Coal Fired Power Plants in South Africa* 16.

\(^{313}\) Holland 2017 *Health Impacts of Coal Fired Power Plants in South Africa* 16.

\(^{314}\) In particular, the High Court in *Earthlife* paras 47, 64 noted that: "the power station will generate over 8.2 million tonnes of carbon dioxide per year and over 246 million tonnes of carbon dioxide over its
However, the High Court failed to address the disproportionate negative health impacts that arise from the failure to appropriately address pollution on the poor and vulnerable communities in Lephalale. Thus, the High Court could have highlighted in relation to environmental justice and poverty reduction that the poor are most likely to disproportionately suffer from the impact of climate change because they face more pollution effects than the rich, occupy more fragile and infertile soils, suffer more from premature mortality and morbidity, and rely more heavily on contaminated water. Accordingly, the High Court arguably overlooked the potential cumulative effects of power stations on environmental and climate injustice. In other words, the High Court arguably overlooked its role in promoting the environmental rule of law by applying values such as ESD.

5.8 Conclusion

This Chapter has established that South Africa's environmental rights jurisprudence has to a great extent developed. As Kotzé and Du Plessis note, courts have attempted to interpret, uphold and apply the country's environmental laws, thereby contributing to a deepening of environmental law-making and discourse. However, the authors also acknowledge that environmental law in South Africa is "still in its infancy when compared to other legal disciplines in South Africa" because of some weaknesses in its evolving jurisprudence on environmental law. Thus, as discussed in this Chapter, courts have not fully developed the normative content of the environmental right. As a result, South Africa's environmental law jurisprudence in general, and environmental rights jurisprudence in particular has not yet fully developed. Hence, the reason why courts still

315 Kotze and Du Plessis 2010 J Court Innov 159-160.
316 Kotze and Du Plessis 2010 J Court Innov 174.
ignore the adjective 'ecologically' in section 24(b) (iii). On this note, this Chapter examined four cases.

The Chapter examined the judgments in *BP, Fuel Retailers, VEJA* and *Earthlife*, and revealed that South Africa's courts have not yet embraced ESD as a constitutional value in environmental rights adjudication. Although all judgments acknowledged that section 24(b) (iii) of the *Constitution* required decision makers to employ ESD, none of them gave content to ESD or how it relates with the environmental right. Considering the aforementioned cases, this thesis argues that the courts could have emphasised that ESD recognises that it is not development which ought to be sustained but the environment or ecology that must be sustained. Therefore, applying ESD as a constitutional value could enable courts to create a firm precedent which serves as a basis upon which administrators can decide on administrative issues like EIA’s and applications for licenses. Thus, to date and as far as this study could be ascertain, no court has explicated on ESD or on how it can be used as a constitutional value in environmental rights adjudication. As a result, courts have arguably not fully concretised section 24 in environmental rights adjudication. The fundamental question then is “Where to from here?”
CHAPTER 6
SUMMARY AND CONCLUSION

6.1 General background

From the analysis in the preceding Chapters, it is evident that the protection of the environment through measures that secure 'ecologically' sustainable development remains an essential endeavour in realising section 24 of the Constitution. The judiciary is encumbered with the duty to protect the environment through measures that secure 'ecologically' sustainable development.¹ The judiciary discharges such duty by developing and interpreting environmental laws in line with the spirit, objects and purport of the Bill of Rights. Developing and interpreting environmental laws in terms of the spirit, objects and purport of the Bill of Rights must be done in a manner that promotes constitutional values.² In other words, courts ought to develop or rather give content to section 24 by developing and applying constitutional values. This thesis has argued that courts do not need to look too far, as section 24 itself embeds ESD. As such, this thesis attempted to exhibit how ESD could be applied as a constitutional value in environmental rights adjudication.

As already established, ESD denotes development that improves humanity's well-being through activities and processes that preserve the continued existence of the earth's ecological systems. In the context of section 24(b) (iii) of the Constitution, 'ecologically' sustainable development, reflects that it is not development which ought to be sustained, but the environment or ecology that must be sustained. In this respect, the environment or ecology could be sustained when ESD is understood as a constitutional value. This means that, to sustain the environment, ESD ought to be applied as a constitutional value by means of a legal framework of substantive and procedural rights and obligations that integrate the principles of ESD. Applying ESD through the environmental rule of law could

¹ Chapter 2 at 2.3.1.
² Section 39 of the Constitution.
in turn realise certain outcomes of ESD such as ecological integrity, environmental justice and poverty reduction.

Developing the environmental rule of law and the outcomes of ESD is an important role of the judiciary. Thus, courts could use ESD as a constitutional value in environmental rights adjudication for the purpose of realising ecological integrity, environmental justice and poverty reduction. The aforementioned submission is reflected in the assertion that; to date and as far as could be ascertained no specific constitutional value has been used in the adjudication of section 24 of the Constitution. ESD, as already suggested, could be such constitutional value. The researcher, therefore, saw the need to examine how courts could develop ESD as a constitutional value in the adjudication of section 24 of the Constitution. Related studies on section 24 are often on the environmental right in general, where the value standard of section 24 is often included as a secondary issue. Moreover, as far as could be ascertained, there is sparse research, particularly on how the judiciary has applied ESD in general, let alone as a constitutional value in developing the jurisprudence on the environmental right. There is, therefore, a gap in the literature on how the judiciary in South Africa has interpreted and applied ESD in realising section 24’s aspirations.

6.2 Research question and objectives

The principal research question this thesis sought to answer was: How could ecologically sustainable development be used as a constitutional value in environmental rights adjudication, and how could courts employ the environmental rule of law to reach the outcomes of ecologically sustainable development? This research question was addressed by the following objectives upon which each separate Chapter was built:³

- To examine the history of constitutional values in South Africa; their meaning and significance, if any, especially in environmental rights adjudication;

³ Chapter 1 at 1.3.
• To arrive at an understanding of what ESD means in general, and for South Africa in particular;

• To examine how environmental rule of law can be used as a means to achieving the outcome(s) of ESD in South Africa; and

• To examine how courts could employ ESD as a constitutional value to developing and realising section 24

6.3 Summary of the analysis

With respect to the aforementioned research question and objectives, the following is the summary and key findings of this thesis.

6.3.1 The meaning and significance of constitutional values in general and in environmental rights adjudication in particular

Chapter 2 sought to establish the meaning and significance of constitutional values. The research revealed that although many scholars have evaded ascribing a clear definition to constitutional values, they are nonetheless described as a standard of good that prescribes requirements for how the Constitution and other law should be interpreted, applied or operationalised. Describing constitutional values in this light reflects the general role of constitutional values, which includes assisting the judiciary in the interpretation rights. Hence, when interpreting the law, the judiciary, as the relevant sphere of government under study, has to take cognisance of constitutional values and principles as mandated by section 39 of the Constitution.

The research then demonstrated that the Constitution is value-laden and could, therefore, attract various interpretations, depending on the ideological perspective of the judge. Because the Constitution is value-laden, it has been accepted as a transformative document. Stated differently, the Constitution has been accepted as a post-liberal

---

4 Chapter 2 at 2.4.
document that embodies a post-liberal model of democracy. In this respect, Chapter 2 noted that post-liberal constitutionalism was the ontological and philosophical basis upon which this thesis was based. Thus, post-liberal constitutionalism requires a transformative approach to the interpretation and adjudication of the Constitution and other general statutes. A transformative approach to interpreting the Constitution reflects transformative constitutionalism which requires adjudicative reasoning that is based on the Constitution’s transformative goals and values. To put it simply, transformative constitutionalism requires judges to engage in legal reasoning and interpretation that advances the transformative purpose of the Constitution i.e. transformative adjudication. Transformative adjudication would in turn require judges to cease interpreting and applying the law in a straight-jacketed, generic and mechanical way. Instead, judges are encouraged to pursue the application of constitutional values in the adjudication process, including the adjudication of environmental law disputes. This would be in line with section 39(2) of the Constitution, which unequivocally mandates transformative adjudication by directing courts to promote constitutional values during constitutional or statutory interpretation.

In addition, Chapter 2 established that transformative adjudication not only requires of judges to develop and apply constitutional values in the adjudication of environmental law disputes, but further requires judges to provide reasons for their judgements by making reference to values such as ESD. Based on section 39 of the Constitution’s referral to values that are based "on an open and democratic society", ESD could be applied as a constitutional value in environmental rights adjudication. In other words, ESD could, by virtue of its place within section 24, be applied as a constitutional value in environmental rights adjudication. Put plainly, although ESD is not expressed as one of the constitutional values in section 1, nor has it ever been argued as value bearing in environmental rights adjudication.

---

5 Section 39 of the Constitution.
adjudication, it could be applied as a constitutional value given that it is reflected within section 24(b) (iii) of the Constitution.

Moreover, Chapter 2 argued that without ESD, as a constitutional value, "a mere mechanical evaluation of environmental rights," social development rights and economic rights could result, and environmental interests could be balanced away. This, as the thesis attempted to show in Chapter 5 is the prevailing status quo. Chapter 2 concluded by noting that courts could develop the normative content of the environmental right so as to pursue an environmental, social and climate justice-oriented vision of section 24, which includes reference to ESD as provided for in section 24(b) (iii). Since section 24(b) (iii) expresses ESD as a vital factor to be considered when advancing environmental protection, one could argue that courts ought to develop and employ ESD as a constitutional value in environmental rights adjudication. It was determined that ESD can only be applied as a constitutional value in environmental rights adjudication once courts fully comprehend what ESD entails, or at least what it should mean. This meant that to fully apply ESD as a constitutional value, one had to fully understand the history and principles that inform the concept.

6.3.2 The history, meaning and purpose of ESD

Chapter 3 commenced the discussion on ESD by noting that to fully understand ESD, one had to first consider its history through concepts such as sustainability. Sustainability was described as preserving the environment and conditions that life depends on. Put differently, sustainability is concerned with preserving the essential natural resources that are crucial for human survival: i.e., the air, water and soils that human life depends on for everyday survival. Chapter 3, emphasised on the importance of sustainability, by

---

6 Van der Linde "Environment" 50-24; Feris 2008 Constitutional Court Review 252.
7 Chapter 2 at 2.6.
8 Chapter 3 at 3.2.1.
noting that sustainability required that generations preserve their natural resources so that future generations find a habitable world.

In discussing sustainability further, Chapter 3 argued that the discourse on sustainability ushered in the concept of sustainable development, which has been defined as development that meets the present generation's needs without negatively impacting on the ability of future generations to provide for their own needs.\footnote{Chapter 3 at 3.2.1.} It was established that the purpose of sustainable development is to ensure that economic development conforms to social and environmental considerations. Unfortunately, the environmental and social factors associated with sustainable development have often been submerged under economic considerations. Accordingly, Chapter 3 argued that there was a need to move away from sustainable development to the original meaning of sustainability, if humanity is to ever give environmental protection due consideration in cases involving the exploitation of natural resources. Thus, sustainable development only finds value if it is linked to the main idea of sustainability i.e. ecological sustainability.\footnote{Chapter 3 at 3.3.}

In Chapter 3, it was further argued that ecological sustainability signifies 'ecologically' sustainable development. This discussion then revealed that textually and in constitutional terms, South Africa has, through section 24(b) (iii) moved away from the widely used concept of sustainable development to 'ecologically' sustainable development. Section 24(b) (iii) of the \textit{Constitution} affords everyone the right to have the environment protected through measures that secure 'ecologically' sustainable development and not just sustainable development. In this light, Chapter 3 noted that at the core of ESD lies the complex connection between environmental and developmental concerns. Plainly put, issues of ecological sustainability have been merged with developmental concerns, hence the reference to 'ecologically' sustainable development.
As a result, any economic or social development, ought to take into consideration environmental concerns and vice versa.

Chapter 3 further established that ecological sustainability and developmental concerns could be explained through intergenerational equity, intra-generational equity and integration. Intergenerational equity recognises that the present day developmental activities, principally economic activities, could be detrimental to future generations.\textsuperscript{11} Alternatively stated, if developmental activities are not controlled, future generations will be left without natural resources to sustain them, thereby defeating the objective of ecological sustainability. In addition, intra-generational equity refers to equity within generations. This means that the present generation's intergenerational equity obligation not only entails preserving the earth's natural resources for the benefit of future generations, but also encompasses the need to ensure that the earth's natural resources and burdens of protecting such resources are equally distributed to all societies. If ever the earth's natural resources and burdens of preserving such resources are unequally apportioned, both the present and future generations will continuously experience environmental degradation as well as problems such as social justice.

Another concept that could be used to explain the link between ecological sustainability and developmental concerns is the notion of integration. Chapter 3,\textsuperscript{12} argued that integration is inadequate when it comes to protecting the environment because it suggests that no conflict exists between economic development and environmental protection. Hence, integration recommends that environmental concerns be subject to economic development.\textsuperscript{13} In this light, Chapter 3 suggested that we rethink the concept sustainable development and integration. That is, it was proposed that for sustainable development to achieve its original goal of sustainability and the protection of ecological systems, a shift from sustainable development to 'ecologically' sustainable development

\textsuperscript{11} Chapter 3 at 3.3.1.
\textsuperscript{12} Section 3.3.3.
\textsuperscript{13} Chapter 3 at 3.3.3.
was imperative. This is partly attributed to the fact that sustainable development, as currently understood, could hinder the protection and sustainability of ecological systems for the benefit of both the present and future generations. There is, therefore, a need for a proper conceptualisation of integration and sustainable development. Such conceptualisation would require one to prioritise environmental concerns over economic or social development, hence the need for the adjective 'ecologically' in sustainable development. From this assertion, one could extrapolate the purpose of ESD as entailing the fair primacy of the protection of the environment and the earth's natural resources over any economic or social development considerations. From this standpoint, environmental protection is not limited to being a peripheral consideration, but is rather elevated to being the principal factor whenever economic and social development issues are being considered.

Chapter 3 further argued that section 24(b) (iii)'s express incorporation of the adjective 'ecologically' directs the state to promote and respect its objective of protecting the environment in a specific manner. Moreover, the Constitution's addition of the adjective, 'ecologically' to sustainable development, potentially wards off the indeterminacy of sustainable development. As a result, the once open option to interpret sustainable development as 'economically' sustainable development, could be closed. Accordingly, ESD requires that economic and social development be pursued for the purpose of improving the entire quality of life of the present and future generations through means that preserve the earth's natural resources on which humanity depends.

Chapter 3 concluded by arguing that, although ESD is expressly provided for in the Constitution, academic literature is still scanty on the meaning of ESD in the South African context or on how ESD could be used as a constitutional value in environmental rights adjudication. In this light, Chapter 3 argued that when ESD is fully comprehended as a

---

14 Chapter 3 at 3.3.3.
constitutional value, outcomes such as ecological integrity, environmental justice and poverty reduction could be realised through the environmental rule of law.

6.3.3 The environmental rule of law as a means to achieving the outcome(s) of ESD

Chapter 4 commenced by asserting that the application of ESD as a constitutional value could result in outcomes such as ecological integrity, environmental justice and poverty reduction. Ecological integrity, environmental justice and poverty reduction as outcomes of ESD can be attained through the application of the environmental rule of law. The environmental rule of law was described as a process that incorporates and applies the principles of the rule of law in the environmental context.\(^\text{15}\) The environmental rule of law concerns the need for proper laws that promote the effective management of natural resources and nature.\(^\text{16}\) Phrased simply, nature or the environment can only be protected through efficiently implementing and enforcing effective environmental laws. Chapter 4 established that effective environmental laws in the context of the environmental rule of law are laws that promote ESD. Hence, the 2016 IUCN defines the environmental rule of law as the legal framework of substantive and procedural rights and duties that incorporate the principles of ESD.\(^\text{17}\) On the basis of this definition, one could argue that the environmental rule of law cannot exist in a legal system that does not promote ESD. This could be owing to the fact that the environmental rule of law is an essential tool in realising ESD.

Furthermore, Chapter 4 argued that the environmental rule of law requires that public and private entities fully account for environmental values whenever decisions that affect the environment are being made.\(^\text{18}\) In addition, the environmental rule of law demands that concepts such as fairness and justice not only embrace protecting humanity but also include protecting the non-human world. To put it clearly, nature should be legally

\(^{15}\) Chapter 4 at 4.4.
\(^{16}\) Chapter 4 at 4.4.
\(^{17}\) Chapter 4 at 4.4.
\(^{18}\) Chapter 4 at 4.4.
protected in the same manner that human beings are protected. Legal protection in this respect includes protecting nature even in cases where human life does not stand to benefit from such protection. As a result, the environmental rule of law prohibits laws that permit environmentally harmful conduct, because it is such conduct that has been the major driver of climate change, pollution, natural resource depletion etc.

In a bid to provide equal protection to the environment and humanity, section 24(b) (iii) affords everyone the right to have the environment protected through measures that secure 'ecologically' sustainable development.\(^{19}\) The import of this assertion is that section 24 of the *Constitution* requires courts to advance its objective of promoting/facilitating 'ecologically' sustainable development by developing and applying it as a constitutional value. Such value laden adjudication requires courts to employ the environmental rule of law, as a necessary process in the realisation of the outcomes of ESD. In other words, and as argued in Chapter 4, ESD reinforces the environmental rule of law by promoting outcomes such as ecological integrity, environmental justice and the reduction of poverty in South Africa.

Having discussed the principles relating to the environmental rule of law, Chapter 4 went on to examine how the environmental rule of law process could facilitate the realisation of ESD and its outcomes. Chapter 4 noted that ecological integrity refers to the maintenance of the ecosystem function and biodiversity or processes that make up a particular area at a given point in time.\(^{20}\) This suggests that the ecological integrity of an area is jeopardised once the environment is unable to sustain its surrounding living and non-living organisms. In preserving the ecological integrity of a particular area, the environmental rule of law requires one to engage the process of ecological proportionality. The purpose of ecological proportionality is to preserve and maintain the earth's ecological integrity (which speaks to the goal of ESD as well), which is to also ensure that developmental processes promote ecological sustainability, through

---

19 Section 24(b) (iii) of the *Constitution*.
20 Chapter 4 at 4.5.1.
mechanisms that preserve the continued existence and integrity of the earth's ecological systems.

In addition to ecological integrity, Chapter 4 noted the principle of environmental justice as a further outcome of ESD. In this regard, Chapter 4 established that environmental justice not only proscribes the disproportionate sharing of environmental goods and burdens that are caused by humanity's unsustainable practices, but also recommends that humanity live in harmony with the environment by respecting the earth's limited natural resources. Chapter 4 further noted that the environmental rule of law is the legal foundation for environmental justice.\textsuperscript{21} It is, therefore, impossible to attain environmental justice in the absence of a legal framework of substantive and procedural laws that promotes ESD. Hence, environmental justice promotes sustainability by recommending that economic growth activities be in line with ecological sustainability. In other words, environmental justice promotes ESD by requiring humanity to prioritise environmental protection before economic development. Similarly, placing priority on environmental protection before economic or social development ensures that the present generation's developmental activities do not impoverish the poor. Therefore, should economic growth activities be undertaken in conformity with ecological integrity, ESD could be promoted and environmental justice could be addressed, since ESD also concerns itself with maintaining a sustainable environment for all, particularly for people who have experienced the burdens of humanity's unsustainable developmental activities.

Upon examining environmental justice as an outcome of ESD, Chapter 4 added the reduction of poverty as another outcome of ESD. Chapter 4 further added that ending poverty is the first goal of both the Sustainable Development Goals and the Millennium Development Goals.\textsuperscript{22} The environmental rule of law is relevant and crucial if humanity intends to achieve poverty reduction as a sustainable development goal. That is, for humanity to end the number of people living without basic needs, it is necessary and

\textsuperscript{21} Chapter 4 at 4.5.2.
\textsuperscript{22} Chapter 4 at 4.5.3.
important for a legal system to establish laws that promote the sustainable exploitation of the earth's limited resources which are essential for providing services only the natural environment can deliver. These services include the food that we eat, the air that we breathe and the water we drink. In view of the foregoing, Chapter 4 argued that the judiciary plays a pivotal role in developing the environmental rule of law and the outcomes of ESD through processes such as judicial review.

6.3.4 ‘Ecologically’ sustainable development in South Africa’s courts

Chapter 5 established that judicial review in the adjudication of environmental laws requires both the public and private sphere to be accountable for environmental values whenever judgments that likely affect the environment are being made.\textsuperscript{23} This means that judges, in the course of judicial review, ought to engage in value-laden legal reasoning so as to protect an individual's rights as enshrined in the Constitution. In the context of this thesis, Chapter 5 argued that judges, in the judicial review of environmental law disputes, ought to engage in value-laden legal reasoning by developing and applying constitutional values such as ESD. Therefore, judicial review in relation to the environmental rule of law could mean that judges ought to connect to the Constitution’s goal of protecting the environment through values such as ESD.

Chapter 5 further argued that the legislature specifically envisioned the importance of ESD in promoting the environmental right in section 24 of the Constitution. Accordingly, although judges possess the power to make laws, as part of South Africa's separation of powers model, they are in turn required to ensure that the law they are making conforms with the rights and values envisaged by the Constitution.\textsuperscript{24} Hence, judges ought to ensure that the judicial review process of environmental law disputes results in conforming all applicable laws with the environmental right and ESD as reflected within the Constitution. By ensuring that all applicable laws are in line with ESD, judges simultaneously engage

\textsuperscript{23} Chapter 5 at 5.2.

\textsuperscript{24} Chapter 5 at 5.2.
in transformative adjudication and substantive legal reasoning which incorporates the substantive and procedural laws that accord everyone the right to have the environment protected.

Although South African courts have since 1996 engaged in the judicial review of various environmental law cases, environmental considerations have still not been adequately considered.\(^{25}\) In response to these concerns, Chapter 5 accepted Kidd's\(^{26}\) suggestion for a more consistent interpretation and application of environmental laws by courts. Thus, courts ought to be willing to confront scientific issues that pertain to the environmental context of environmental law cases. In other words, courts could engage in scientific concerns such as ESD when determining environmental law cases.

On this basis, Chapter 5 sought to analyse South Africa's developing environmental rights jurisprudence with the objective of providing a nuanced understanding of section 24(b) (iii)'s injunction to have environmental protection through 'ecologically' sustainable development. In this light, Chapter 5 with reference to *BP; Fuel Retailers; VEJA* and *Earthlife*, examined the manner in which courts could apply ESD as a constitutional value in environmental rights adjudication through the environmental rule of law.\(^{27}\)

It was established in Chapter 5 that section 24 of the *Constitution* was relevant and applicable to all four cases. The courts in the judgments under study acknowledged the importance of section 24(b) (iii)'s injunction to promote environmental protection through ESD. Regrettably, the courts interpreted section 24(b) (iii) of the *Constitution* as requiring sustainable development. Thus, according to the courts, environmental considerations had to be balanced with economic and social considerations through the ideal of sustainable development as encapsulated in section 24(b)(iii). In this respect, the courts could have gone further to develop the normative content of section 24 by providing a nuance between ESD and sustainable development. In other words, what was required

---

\(^{25}\) Chapter 5 at 5.3.

\(^{26}\) Kidd 2006 *PER/PELJ* 79/118.

\(^{27}\) Chapter 5 at 5.4, 5.5, 5.6 and 5.7.
was for the courts to clearly express that section 24(b) (iii) does not provide for sustainable development but instead provides for environmental protection through measures that secure 'ecologically' sustainable development, while promoting justifiable social and economic development.

Put differently, the main objective of section 24(b) (iii) is to ensure that the environment is protected through measures that prioritise the preservation of the earth's natural resources. Thus, protecting the integrity of the environment takes primacy over any economic or social development. As the last section of section 24(b) (iii) states, economic and social development can only be considered once it is proven that it is justifiable. i.e. once it is established that it gives due reverence to planetary boundaries. Put differently, instead of integrating environmental concerns with economic and social development concerns, the courts should have noted that social and economic development must be pursued within the parameters of ecology. This means that any economic growth or social justice concerns ought to be met from the environment's perspective.

Understanding ESD from the aforementioned perspective facilitates better environmental protection as well as the realisation of outcomes such as ecological integrity, environmental justice and poverty reduction. As Chapter 5 argued, courts could realise ecological integrity, environmental justice and poverty reduction as outcomes of ESD if the earth's natural resources are preserved. The realisation of these outcomes is dependent on ESD and how it is applied within a legal framework. Hence, it is only when we are able to manage the degradation of soils, atmosphere, forests and water regimes that we hope we can fully realise environmental justice and poverty reduction. Having considered the aforementioned cases, Chapter 5 stressed that ESD requires that the environment or ecology be sustained in contrast with development. This means that courts ought to, in the determination of environmental law disputes, question whether a certain developmental activity is within ecological bounds i.e. whether the said activity will negatively affect the environment? Engaging in such enquiry would require courts to examine whether the natural resource being exploited can actually be replenished. Thus,
courts ought to, actually, examine issues on natural resource replenishment, and not just window dress such issues through tick box fashioned EIA's.

Consequently, to date and as far as this thesis could ascertain, no court has explicated on ESD or on how it can be used as a constitutional value in environmental rights adjudication. Accordingly, the judiciary has arguably not fully concretised section 24 in environmental rights adjudication. Although the appraisal extended in this thesis is retrospective, it nonetheless helpfully demonstrates how ESD could have been (in the past) and could be applied by courts as a constitutional value in future environmental law disputes towards realising ecological integrity, poverty reduction and environmental justice.

6.4 The way forward

For the most part, it is clear that courts at times fail to address crucial questions concerning the content of the environmental right that ought to inform the interpretation of statutes or the ecological sustainability issues underpinning environmental litigation. As was argued, the content of the environmental right could be addressed if courts employ ESD as an aid in the interpretation of section 24 and other environmental laws. In order to effectively implement ESD and to facilitate ecological integrity, environmental justice and poverty reduction, the judiciary should, in the adjudication of environmental law cases:

- Adopt a post-liberal interpretation of the *Constitution* which directs judges to interpret the *Constitution* in line with its transformative values and goals. In this respect, this thesis recommends that the judiciary ought to engage in transformative adjudication by interpreting section 24(b) (iii) in line with ESD as a constitutional value reflected within the constitutional text. In other words, courts should develop and apply ESD as a constitutional value in environmental rights adjudication;
• Shift from sustainable development to 'ecologically' sustainable development by refocusing its understanding of 'sustainable development' on the 'ecologically' adjective of ESD. In other words, the judiciary should note that ESD, and not sustainable development, is the 'value element' that forms the basis for environmental protection as per section 24 of the Constitution.

• Give section 24(b) (iii) normative value by not only quoting verbatim section 24(b) (iii), but by also defining and laying out the purpose of ESD. Providing section 24(b) (iii) with normative value through applying ESD as a constitutional value enables the judiciary to establish firm precedent that will, in future, serve as a foundation upon which administrators decide administrative issues like applications for licenses and EIA's and also a basis upon which future environmental disputes could be considered.

• Firmly establish that section 24(b) (iii)'s injunction to consider environmental protection through 'ecologically' sustainable development reflects that integration or sustainable development may not achieve environmental protection as envisioned in section 24. Hence, instead of integration the judiciary could adopt section 24(b) (iii)'s injunction for environmental protection through ESD and justifiable social and economic development, which denotes development that gives due reverence to planetary boundaries and a safe functional space for humanity.

• Employ the environmental rule of law, as a process pertinent to realising the outcomes of ESD. Put differently, this thesis recommends that the judiciary plays an important role in developing ESD as a constitutional value, which in turn strengthens the environmental rule of law by promoting outcomes such as ecological integrity, environmental justice and the reduction of poverty in South Africa.
• Engage in the judicial review of environmental law cases by connecting to the Constitution’s goal of environmental protection through values such as ESD. This means that judges could, in the judicial review process of environmental law disputes, bring all relevant environmental laws in conformity with the environmental right and ESD as a value reflected and enshrined within the Constitution.

• Engage in transformative adjudication in terms of section 39(2) of the Constitution by determining ESD as a constitutional value, *mero motu*, even where the parties in dispute have not raised them explicitly.

### 6.5 Future research

It became clear throughout the course of this thesis that some issues needed to be examined further and could, thus, benefit from future research. These issues are succinctly noted below and it is envisaged that they will be addressed in the doctoral candidate’s future research agenda:

• Because the scope of this thesis was limited to the application of constitutional values by the judiciary, future research could benefit from an investigation on the application and use of constitutional values by the other two spheres of government i.e. the executive and legislature. This might, however, require some empirical work.
BIBLIOGRAPHY

**Literature**

Aarts B "Ecological Sustainability and Biodiversity" 2009 *Int J Sustain Dev* 89-102

Ackerman LW "The Legal Nature of the South African Constitutional Revolution" 2004 *NZLJ* 633-679

Ackermann LWH *Human Dignity: Lodestar for Equality in South Africa* (Juta Cape Town 2012)


Albertyn C "Substantive Equality and Transformation in South Africa" 2007 *SAJHR* 253-276

Albertyn C and Kentridge J "Introducing the Right to Equality in the Interim Constitution" 1994 *SAJHR* 149-178


Anguelovski I and Alier JM "The 'Environmentalism of the Poor’revisited: Territory and Place in Disconnected Glocal Struggles" 2014 *Ecol Econ* 167-176


Arrow K et al "Economic Growth, Carrying Capacity, and the Environment" 1995 *Ecol Econ* 91-95
Ashukem J-CN "Setting the Scene for Climate Change Litigation in South Africa: Earthlife Africa Johannesburg V Minister of Environmental Affairs and Others" 2017 *LEAD* 35-43


Baratz MS and Grigsby WG "Thoughts on Poverty and Its Elimination" 1972 *J Soc Policy* 119-134


Baxter L *Administrative Law* (Juta Cape Town 1984)

Beckerman W *Small Is Stupid: Blowing the Whistle on the Greens* (Gerald Duckworth London 1995)

Beinart W and Hughes L *Environment and Empire* (Oxford University Press Oxford 2007)

Beretta I "Some Highlights on the Concept of Environmental Justice and Its Use" 2012 *Ecadernos CES* 136-162

Beukes M "Justice and Other Values: Does the Judiciary Have a Monopoly on Their Content?" 1997 *SAPL* 437-452


Bilchitz D "Citizenship and Community: Exploring the Right to Receive Basic Municipal Services in Joseph" 2010 *CCR* 45-78


Bosselmann K "Wendezeit Im Umweltrecht: Von Der Verrechtlichung Der Ökologie Zur Ökologisierung Des Rechts (Teil 1)" 1985 *KJ* 345-361


Bosselmann K *Im Namen Der Natur* (Scherz Munich 1992)

Bosselmann K "Strong and Weak Sustainable Development: Making Differences in the Design of Law" 2006 SAJELP 39-49

Bosselmann K The Principle of Sustainability (Ashgate Hempshire 2008)


Botha H "The Values and Principles Underlying the 1993 Constitution" 1994 South African Public Law 233-244

Botha H The Legitimacy of Law and the Politics of Legitimacy: Beyond a Constitutional Culture of Justification (South Africa) (Doctoral Thesis University of Pretoria 2000)


Bray E "Constitutional Values and Human Dignity: Its Value in Education" 2004 Perspect Educ 37-47


Dimensions and Ideas in Environmental Law (Cambridge University Press New York 2013) 3-26


Burchill S and Linklater A Theories of International Relations (Macmillan International Higher Education London 2013)

Butler A Contemporary South Africa (Palgrave London 2017)


Caradonna JL Sustainability: A History (Oxford University Press 2014)


Chaskalson A "Human Dignity as a Foundational Value of Our Constitutional Order" 2000 SAJHR 193-205

Chaskalson A "Dignity as a Constitutional Value: A South African Perspective" 2010 Am U Int'l L Rev 1377-1407


Clark NL and Worger WH South Africa: The Rise and Fall of Apartheid (Routledge New York 2016)

Cockrell A "Rainbow Jurisprudence" 1996 SAJHR 1-38


Colombo U "The Club of Rome and Sustainable Development" 2001 Futures 7-11


Cotta H *Anweisung Zum Waldbau* (Dresden Arnold 1817)

Couzens E "Filling Station Jurisprudence: Environmental Law in South African Courts and the Judgment in Fuel Retailers Association of Southern Africa V Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others" 2008 *SAJELP* 23-56


Currie I and De Waal J *The Bill of Rights Handbook* (Juta Cape Town 2016)

D'Amato A "Do We Owe a Duty to Future Generations to Preserve the Global Environment?" 1990 *Am J Int Law* 190-198


Davey I "Environmentalism of the Poor and Sustainable Development: An Appraisal" 2009 Journal of Administration & Governance 1-10


Davis D "Separation of Powers: Juristocracy or Democracy" 2016 SALJ 258-270

Davis DM and Klare K "Transformative Constitutionalism and the Common and Customary Law" 2010 SAJHR 403-509


Diamond J Collapse: How Societies Choose to Fail or Succeed (Penguin New York 2011)


Dresner S The Principles of Sustainability (Earthscan London 2008)


Du Plessis A "South Africa’s Constitutional Environmental Right (Generously) Interpreted: What Is in It for Poverty?" 2011 SAJHR 279-307

Du Plessis L "Legal Academics and the Open Community of Constitutional Interpreters" 1996 SAJHR 214-229
Du Plessis L "The Jurisprudence of Interpretation and the Exigencies of a New Constitutional Order in South Africa" 1998 Acta jurid 8-20


Du Plessis L "The (Re)-Systemization of the Canons and Aids to Statutory Interpretation" 2005 SALJ 591-613


Du Plessis L "Theoretical (Dis-) Position and Strategic Leitmotifs in Constitutional Interpretation in South Africa" 2015 PER/PELJ 1332-1365

Du Plessis L and Corder H Understanding South Africa's Transitional Bill of Rights (Juta Cape Town 1994)


Dworkin R Taking Rights Seriously (Harvard University Press Cambridge 1978)


Erasmus G "Limitation and Suspension" Rights and Constitutionalism: The New South African Legal Order (Juta Cape Town 1994) 629-650

Evelyn J Sylvia, or a Discourse of Forest-Trees, and the Propagation of Timber in His Majesties Dominions (Jo. Martyn & Ja Allestry London 1776)

Farinacci-Fernós JM "Post-Liberal Constitutionalism" 2018 Tulsa L Rev 1-48

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 *CCR* 235-253

Feris L "The Role of Good Environmental Governance in the Sustainable Development of South Africa" 2010 *PER/PELJ* 73-99

Ferreira G "Constitutional Values and the Application of the Fundamental Right to a Clean and Healthy Environment to the Private-Law Relationship" 1999 *SAJELP* 170-187

Field T-L "Sustainable Development Versus Environmentalism: Competing Paradigms for the South African Eia Regime" 2006 *SALJ* 409-436

Figgis JN *Studies of Political Thought: From Gerson to Grotius, 1414-1625* (Cambridge University Press Cambridge 1956)


Finnis J *Natural Law and Natural Rights* (Clarendon Press Oxford 1980)


Franck TM *Fairness in International Law and Institutions* (Clarendon Press Oxford 1995)


Friedrich C *The Philosophy of Law in Historical Perspective* (Chicago University Press Chicago 1963)
Fuentes X "International Law-Making in the Field of Sustainable Development: The Unequal Competition between Development and the Environment" 2002 *Int Environ Agreements* 109-133


Gilby T *Principality and Polity: Aquinas and the Rise of the State in the West* (Longmans, Green and Co. Ltd London 1958)


Glasby GP "Sustainable Development: The Need for a New Paradigm" 2002 *Environment, Development and Sustainability* 333-345


Govorushko SM *Natural Processes and Human Impacts: Interactions between Humanity and the Environment* (Springer London 2011)


Guha R and Alier JM *Varieties of Environmentalism: Essays North and South* (Routledge London 2013)

Handl G "Sustainable Development: General Rules Versus Specific Obligations" 1995 *Sustainable Development and International Law* 35-43


Harding R "Ecologically Sustainable Development: Origins, Implementation and Challenges" 2006 *Desalination* 229-239

Hart H *The Concept of Law* (Oxford University Press Oxford 1961)


Haydar B "Extreme Poverty and Global Responsibility" 2005 *Metaphilosophy* 240-253

Hayek FA *The Road to Serfdom* (Routledge Classics London 2001)

Hodgson TF "Bridging the Gap between People and the Law: Transformative Constitutionalism and the Right to Constitutional Literacy" 2015 *Acta jurid* 189-212

Hodgson TF "The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Toward a Distinctly South Africa Doctrine for a More Radically Transformative Constitution" 2018 *SAJHR* 57-90

Hoexter C "Judicial Policy Revisited: Transformative Adjudication in Administrative Law" 2008 *SAJHR* 281-299

Hoexter C *Administrative Law in South Africa* (Juta Cape Town 2012)


Holden E, Linnerud K and Banister D "Sustainable Development: Our Common Future Revisited" 2014 *Glob Environ Change* 130-139

Holt JC *Magna Carta* (Cambridge University Press Cambridge 2015)

Horton P and Horton BP "Re-Defining Sustainability: Living in Harmony with Life on Earth" 2019 *One Earth* 86-94
Hughes JD *An Environmental History of the World: Humankind's Changing Role in the Community of Life* (Routledge 2009)


Humby T-L "The Thabametsi Case: Case No 65662/16 Earthlife Africa Johannesburg V Minister of Environmental Affairs" 2018 *J Environ Law* 145-155

Humphery J "The International Bill of Rights: Scope and Implementation" 1976 *Wm & Mary L Rev* 527-542


James SP "Protecting Nature for the Sake of Human Beings" 2016 *Ratio* 213-227


Johnson HD "Whose Earth Is It Anyway?" 2002 *UN Chron* 8-11

Johnston P *et al* "Reclaiming the Definition of Sustainability" 2007 *Environmental science and pollution research international* 60-66


Karr JR "Protecting Ecological Integrity: An Urgent Societal Goal" 1993 *Yale J Int'l L* 297-306

Karr JR and Dudley DR "Ecological Perspective on Water Quality Goals" 1981 *Environ Manage* 55-68

Kelsen H *Pure Theory of Law* (The Lawbook Exchange Ltd New Jersey 2001)


Kern F *Kingship and Law in the Middle Ages* (Basil Blackwell Oxford 1939)

Kidd CV "The Evolution of Sustainability" 1992 *J Agric Environ Ethics* 1-26
Kidd M "Greening the Judiciary" 2006 *PER/PELJ* 72/118-186/118


Kim RE and Bosselmann K "Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law" 2015 *Review of European, Comparative & International Environmental Law* 194-208


Klare K "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146-188

Klug H "Hassen Ebrahim the Soul of a Nation: Constitution-Making in South Africa" 2000 *SAJHR* 145-149

Kotze L "Environmental Governance" in Paterson A and LJ K (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (Juta Cape Town 2009) 103-126


Krajnc D and Glavič P "A Model for Integrated Assessment of Sustainable Development" 2005 *Resour Conserv Recycl* 189-208

Kreilhuber A and Kariuki A "Environmental Rule of Law in the Context of Sustainable Development" 2020 *Geo Envtl L Rev* 591-598

Kroeze I "Doing Things with Values: The Role of Constitutional Values in Constitutional Interpretation" 2001 *Stell LR* 265-276

Kruger J "Is Interpretation a Question of Common Sense? Some Reflections on Value Judgments and Section 35" 1995 *CILSA* 1-20

Krüger R "The Silent Right: Environmental Rights in the Constitution Court of South Africa" 2019 CCR 473-496


Labuschagne P "Legislative Immobility and Judicial Activism: The Impact on the Separation of Powers in South Africa" 2013 J Contemp Hist 126-141


Langa P "Transformative Constitutionalism" 2006 Stell LR 351-360

Lenta P "Judicial Restraint and Overreach" 2004 SAJHR 544-576


Liebenberg S Socio-Economic Rights: Adjudication under a Transformative Constitution (Juta Cape Town 2010)

Lobel J "Losers Fools & Prophets: Justice as Struggle" 1994 Cornell L Rev 1331-1425

Locke J The Second Treatise of Government (Liberal Arts Press New York 1952)


London L et al "Environmental Justice: An International Perspective" 2019 Encyclopedia of Environmental Health 553-560


Madlingozi T "Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" 2017 Stell LR 123-147
Malviya R "Sustainable Development and Environment: Emerging Trends and Issues" 1996 *IJIL* 57-74


Martinez-Alier J "The Environmentalism of the Poor" 2014 *Geoforum* 239-241

Matsui Y "Some Aspects of the Principle of" Common but Differentiated Responsibilities"" 2002 *Int Environ Agreements* 151-170


McCloskey M "The Emperor Has No Clothes: The Conundrum of Sustainable Development" 1998 *Duke Envtl L & Pol'y F* 153-159

McDonald DA "What Is Environmental Justice?" in McDonald DA (ed) *Environmental Justice in South Africa* (University of Cape Town Press Cape Town 2002) 1-12


Mestrum F "Poverty Reduction and Sustainable Development" 2003 *Environment, Development and sustainability* 41-61

Meyer JM "Sustainability" 2014 *Environmental Values* 366-368


Michelman FI "Liberal Constitutionalism, Property Rights, and the Assault on Poverty" 2011 *Stell LR* 706-723

Michelman FI *et al* "Cases and Comments" 1995 *SAJHR* 477-510


Mill J *Utilitarianism: On Liberty ; Considerations on Representative Government ; Remarks on Bentham's Philosophy* (Dent London 1993)


Modiri JM "Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence" 2018 *SAJHR* 300-325

Morrall JB *Political Thought in Medieval Times* (Hutchinson London 1958)

Moseneke D "Transformative Adjudication" 2002 *SAJHR* 309-319


Moser WG *Grundsätze Der Forst-Ökonomie* (Frankfurt Leipzig 1757)


Murenik E "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 *SAJHR* 31-48

Mzini L *Community Food Projects as Tools for Promoting Sustainable Development at Sedibeng District Municipality* (LLM Dissertation North-West University 2006)


Nishihara H "The Significance of Constitutional Values" 2001 *PER/PELJ* 1-18


Nugent T *The Spirit of the Laws: Charles De Secondat, Baron De Montesquieu* (Batoche Books Kitchener 2001)

Okonkwo PO "The Rule of Law and Corruption in Nigeria: The Chicken and Egg Controversy" 2018 *AFJCLJ* 83-92


Parrish JD, Braun DP and Unnasch RS "Are We Conserving What We Say We Are? Measuring Ecological Integrity within Protected Areas" 2003 *BioScience* 851-860


Peel J and Osofsky HM "A Rights Turn in Climate Change Litigation?" 2018 *Transnatl Environ Law* 37-67

Penfold G "Substantive Reasoning and the Concept of Administrative Action" 2019 *SALJ* 84-111


Pieterse M "What Do We Mean When We Talk About Transformative Constitutionalism" 2005 *SAPL* 155-166


Portney KE *Sustainability* (MIT Press Cambridge 2015)


Quinot G "Substantive Reasoning in Administrative-Law Adjudication" 2010 *CCR* 111-139


Rackham H *Aristotle, the Nicomachean Ethics* (Wordsworth Editions Hertfordshire 1996)

Radin M "The Myth of Magna Carta" 1947 *Harv L Rev* 1060-1091

Raz J "The Rule of Law and Its Virtues" 1977 *Law Q Rev* 195-211

Redclift MR *Sustainability: Sustainable Development* (Taylor & Francis 2005)

Rees WE *Defining" Sustainable Development"* (University of British Columbia, Centre for Human Settlements Vancouver, BC 1989)

Rodriguez G *Constitutional Values: Their Functions in the Argumentation of Judgments in the Context of Civil Due Process in Cuba* (University of Antwerp 2018)


Roux T "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?" 2009 *Stell LR* 258-285


Sachs JD *The Age of Sustainable Development* (Columbia University Press 2015)


Schmidtz D and Brennan J *A Brief History of Liberty* (John Wiley & Sons New Jersey 2011)


Scoones I "Sustainability" 2007 *Dev Pract* 589-596

Sealy R *The Athenian Republic: Democracy or the Rule of Law?* (Pennsylvania State University Pennsylvania 1987)

Serfontein E "The Nexus between the Rights to Life and to a Basic Education in South Africa" 2015 *PER/PELJ* 2264-2298

Serfontein E "The Rights of South Africans to Life and to Strike: The Potential of Ubuntu to Balance the Scales" 2015 *IJAH* 11-23

Shi L *et al* "The Evolution of Sustainable Development Theory: Types, Goals, and Research Prospects" 2019 *Sustainability* 7158-7174

Shiva V and Bandyopadhyay J "The Evolution, Structure, and Impact of the Chipko Movement" 1986 *Mt Res Dev* 133-142

Sibanda S "Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty" 2011 *Stell LR* 482-500

Sibanda S "When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism" 2020 *Law democr Dev* 384-412

Sieferle RP "Wie Tragisch War Die Allmende?" 1998 *GAIA* 304-307


Sonneborn L *The End of Apartheid in South Africa* (Infobase Publishing New York 2010)

Southern RW *Western Society and the Church in the Middle Ages* (Penguin Books Ltd London 1970)


Spicker P "The Rights of the Poor" in Robson P and Kjonstad A (eds) Poverty and the Law (Hart Publishing London 2001) 3-16

Stapleton TJ A Military History of South Africa: From the Dutch-Khoi Wars to the End of Apartheid: From the Dutch-Khoi Wars to the End of Apartheid (Praeger California 2010)


Steurer R "Paradigmen Der Nachhaltigkeit" 2001 Zeitschrift fur Umweltpolitik und Umweltrecht 537-566


Stone C "Common but Differentiated Responsibilities in International Law" 2004 Am J Int Law Contemp Probl 276-301

Strong M Where on Earth Are We Going? (Texere New York 2000)


Sumner J Sustainability and the Civil Commons: Rural Communities in the Age of Globalization (University of Toronto Press Toronto 2005)


Swart C Contending Interpretations of the Rule of Law in South Africa (Doctoral Thesis Stellenbosch University 2013)


Tladi D "Can the Wolf Protect the Lamb? Free Trade Regimes as Instruments Towards Sustainable Development" 2002 *SAJIL* 149-158


Tladi D *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (Pretoria University Law Press Pretoria 2007)

Trouwborst A *Precautionary Rights and Duties of States* (Brill Nijhoff Leiden 2006)


Van Blerk A *Jurisprudence: An Introduction* (Lexis Nexis Durban 2007)

Van Creveld M *The Rise and Decline of the State* (Cambridge university press Cambridge 1999)


Van der Waag I "A Military History of Modern South Africa" 2015 *Sci Mil* 199-203
Van der Walt A "Modernity, Normality, and Meaning: The Struggle between Progress and Stability and the Politics of Interpretation (Part 2)" 2000 *Stell LR* 226-243

Van Marle K "Transformative Constitutionalism as/and Critique" 2009 *Stell LR* 286-301


Vanderheiden S "Sustainability" 2015 *Perspect Politics* 1143-1144

Venter F "Die Betekenis Van Die Bepalings Van Die 1996 Grondwet" 1998 *PER/PELJ* 1-62

Venter F *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (Martinus Nijhoff Publishers Leiden 2000)

Venter F "Utilizing Constitutional Values in Constitutional Comparison" 2001 *PER/PELJ* 1-22

Venter F *Global Features of Constitutional Law* (Wolf Legal Publishers Netherlands 2010)

Venter F "Filling Lacunae by Judicial Engagement with Constitutional Values and Comparative Methods" 2014 *Tul Eur & Civ LF* 79-99

Venter F "Utilizing Constitutional Values in Constitutional Comparison" 2014 *PER/PELJ* 20-41

Voigt C *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and Wto Law* (Brill 2009)


Weiss E "Introductory Note: Un Conference on Environment and Development" 1992 *ILM* 814-817


Westra L, Bosselmann K and Fermeglia M *Ecological Integrity in Science and Law* (Springer Switzerland 2020)


**Other literature**


Case law
Affordable Medicines Trust V Minister of Health 2006 3 SA 247 (CC)

All the Best Trading Cc T/a Parkville Motors V Sn Nayagar Property Development and Construction Cc 2005 (3) SA 396 (T)

Bato Star Fishing (Pty) Ltd V Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC)

Bp Southern Africa (Pty) Ltd V Mec for Agriculture, Conservation, Environment and Land Affairs 2004 (5) SA 124 (W)

Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo V Belgium), Icj, 2002

City of Tshwane V Afriforum 2016 6 Sa 279 (Cc)

City of Tshwane Metropolitan Municipality V Link Africa (Pty) Ltd 2015 (6) SA 440 (CC)

Company Secretary of Arcelormittal South Africa V Vaal Environmental Justice Alliance 2015 (1) SA 515 (SCA)

Cusa V Tao Ying Metal Industries 2009 (2) SA 204 (CC)

Coetee V Government of South Africa; Matiso V Commanding Officer Port Elizabeth 1995 3 SA 631 (CC)

Dawood V Minister of Home Affairs; Shalabi V Minister of Home Affairs; Thomas V Minister of Home Affairs 2000 3 SA 936 (CC)

De Lange V Eskom Holdings Ltd 2012 (1) SA 280 (GSJ)

De Lange V Smuts No 1998 3 SA 785 (CC)

Du Plessis V De Klerk 1996 3 SA 850 (CC)

Earthlife Africa (Cape Town) V Director-General: Department of Environmental Affairs and Tourism 2005 (3) SA 156 (C)

Economic Freedom Fighters V Speaker of the National Assembly; Democratic Alliance V Speaker of the National Assembly 2016 (3) SA 580 (CC)

Fedsure Life Assurance Ltd V Greater Johannesburg Transitional Metropolitan Council 1998 12 BCLR 1458 (CC)
Fuel Retailers Association of Southern Africa V Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 6 SA 4 (CC)

Fuel Retailers Association of Sa (Pty) Ltd V Director-General, Environmental Management, Mpumalanga, and Others 2007 (2) SA 163 (SCA)

Gabčíkovo-Nagymaros Project, Hungary V Slovakia 1997 ICJ 37 ILM 162

Gongqose V Minister of Agriculture, Forestry, Gongqose and S (2018) 3 All SA 307 (SCA)

Kaunda V President of the Republic of South Africa 2005 (4) SA 235 (CC)

Kruger V President of the Republic of South Africa 2009 1 SA 417 (CC)

Minister of Justice V Ntuli 1997 3 SA 786 (CC)

Minister of Health V New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC)

Minister of Health and Welfare V Woodcarb (Pty) Ltd 2001 (3) SA 1151 (CC)

Minister of Public Works V Kyalami Ridge Environmental Association 2001 (3) SA 1151 (CC)

Minister of Public Works V Kyalami Ridge Environmental Association 2001 (3) SA 1151 (CC)

Minister of Safety and Security; Curtis V Minister of Safety and Security 1996 3 SA 617 (CC)

Minors Oposa V Secretary of the Department of Environmental and Natural Resources 33 Ilm 173 1994

National Coalition Jor Gay and Lesbian Equality V Minister of Justice 1999 1 SA 6 (CC)

New National Party V Government of the Republic of South Africa 1999 3 SA 191 (CC)

Normandien Farms (Pty) Ltd V South African Agency for Promotion of Petroleum and Exploitation Soc Ltd 2020 (6) BCLR 748 (CC)

Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa 2000 2 SA 674 (CC)

Port Elizabeth Municipality V Various Occupiers 2005 (1) SA 217 (CC)
Sachs V Minister of Justice 1934 A.D. 11 (A)

S V Acheson 1991 NLR 1 (NmHC) 10; 1991 2 SA 805

S V Lawrence, S V Negal, S V Solberg 1997 4 SA 1176 (CC)

S V Makwanyane 1995 (3) SA 391 (CC)

S V Prinsloo 1996 2 SA 464 (CC)

S V Williams 1995 3 SA 632 (CC)

S V Zuma 1995 (2) SA 642 (CC)

Soobramooney V Minister of Health Kwazulu Natal 1997 12 BCLR 1696 (CC)

South African Police Service V Solidarity Obo Barnard 2014 (6) SA 123 (CC)

United Democratic Movement V President of the Republic of South Africa 1 2002 11 BCLR 1179 (CC)

Legislation


Comprehensive Anti-Apartheid Act 1986

Constitution of Cuba 1976

Constitution of India 1950

Constitution of the Federative State of Brazil 1988

Constitution of Namibia 1990

Constitution of the Republic of South Africa 200 of 1993

Criminal Law Amendment Act 8 of 1953

Criminal Procedure Amendment Act 96 of 1965

Development Facilitation Act 67 of 1995

Diplomatic Immunities and Privileges Act 37 of 2001

Environment Conservation Act 73 of 1989
Extension of University Education Act 45 of 1959
General Laws Amendment Act 37 of 1963
General Laws Amendment Act 83 of 1967
Interpretation Act 33 of 1957
Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
Promotion of Access to Information Act 2 of 2000
Promotion of Administrative Justice Act 3 of 2000
Prohibition of Mixed Marriages Act 1949
National Environmental Management Act 107 of 1998
National Environmental Management: Air Quality Act 39 of 2004
National Environmental Management: Biodiversity Act 10 of 2004
National Environmental Management: Protected Areas Act Act 57 of 2003
Native Building Workers Act 1951
Native Laws Amendment Act 1952
Natives Land Act 27 of 1913
Natives Resettlement Act 1954
Natives Urban Areas Act 1923
National Water Act 36 of 1998
Republic of South Africa Constitution Act 32 of 1961
South Africa Constitution Amendment Act 105 of 1984
Suppression of Communism Act 44 of 1950
Terrorism Act 83 of 1967

Town-Planning and Townships Ordinance 15 of 1986

Unlawful Organisations Act 34 of 1960

International instruments


Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa 30 ILM 773 (1551) 1991

Bergen Ministerial Declaration on Sustainable Development in the Ece Region, Un Doc. A/Conf 1990

Convention on Biological Diversity 31 Ilm 822 (1992)


General Agreement on Trade and Tariffs (Gatt) (1948)


IUCN World Declaration on the Environmental Rule of Law (2016)


Montreal Protocol on Substances That Deplete the Ozone Layer 1987


United Nations Agreement on Straddling and Highly Migratory Fish Stocks A/CONF.164/37 1995


United Nations Declaration on the Human Environment, 11 Ilm 874 (1972)

UN General Assembly Resolution 38/161 (1983)

UN General Assembly Resolution 43/196 (1988)

United Nations General Assembly Resolution 2997, (1972)


UN General Assembly, Transforming Our World : The 2030 Agenda for Sustainable Development, 21 October 2015, a/Res/70/1

United Nations Framework Convention on Climate Change 31 Ilm 851 (1992)

UN Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997


Universal Declaration of Human Rights (1948)


**Government publications**


_South Africa- Government Notice. R. 1183 (1997)_

**Internet sources**


