

**Environmental Courts: an analysis of their viability in South Africa  
with particular reference to the Hermanus Environmental Court**

**Imraan Chohan**

Submitted in partial fulfilment of the requirement of the  
degree of Master of Laws (LLM)

College of Law and Management Studies  
School of Law, University of KwaZulu-Natal  
Pietermaritzburg  
December 2013

## **Declaration**

I, IMRAAN CHOCHAN declare that:

- (i) The research reported in this dissertation, except where otherwise indicated, is my original work.
- (ii) This dissertation has not been submitted for any degree or examination at any other university.
- (iii) This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
- (iv) This dissertation does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers.

Where other written sources have been quoted, then:

- (a) their words have been re-written but the general information attributed to them has been referenced;
  - (b) where their exact words have been used, their writing has been placed inside quotation marks, and referenced.
- (v) Where I have reproduced a publication of which I am an author, co-author or editor, I have indicated in detail which part of the publication was actually written by myself alone and have fully referenced such publications.
- (vi) This dissertation does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the source being detailed in the dissertation and in the References sections.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

**Imraan Chohan**

-----  
As the candidate's Supervisor I agree/do not agree to the submission of this dissertation.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

**Professor E Couzens**

Associate Professor, School of Law, University of KwaZulu-Natal

## **Acknowledgements**

I thank my supervisor, Professor Couzens, for his assistance in all the stages of the dissertation. Without his help, time and expertise, this dissertation would not be possible.

I would also like to extend a personal thank you to all my lecturers who taught me in my LLB and LLM degrees. I value their dedication and commitment to excellence in passing on knowledge.

I would also like to thank the University of KwaZulu-Natal for having accepted me into the LLM programme.

I am extremely grateful to my family for having supported me during the process. Due to their encouragement and support, I was able to accomplish this dissertation.

Finally, I would like to thank God for providing me with the opportunity to learn.

# Table of Contents

<b>Introduction.....</b>	<b>2</b>
<b>Methodology.....</b>	<b>3</b>
<b>1. The role of the judiciary.....</b>	<b>4</b>
<b>2. A Specialist Environmental Court: Introducing the Concept.....</b>	<b>12</b>
<b>2.1. Access to Justice.....</b>	<b>12</b>
<b>2.2. Advantages and Disadvantages of Environmental Courts.....</b>	<b>15</b>
<b>3. Environmental Courts in South Africa.....</b>	<b>36</b>
<b>3.1. A Constitution Implicitly Supportive of a Specialist Environmental Court..</b>	<b>36</b>
<b>3.2. The Hermanus Environmental Court.....</b>	<b>41</b>
<b>3.3. The future of environmental courts in South Africa: an extinct species?...</b>	<b>58</b>
<b>4. Conclusion.....</b>	<b>62</b>
<b>Annex I: Criminal Jurisdiction of the Land and Environment Court of New South</b>	
<b>Wales.....</b>	<b>65</b>
<b>Annex II: Civil jurisdiction of the Land and Environment Court of New South</b>	
<b>Wales.....</b>	<b>66</b>
<b>Annex III: Environmental Management Inspectorate Basic Training Curriculum.....</b>	<b>67</b>
<b>Bibliography.....</b>	<b>68</b>

## Introduction

This dissertation explores issues surrounding the use of specialist environmental courts. This is a relevant issue because, as will be seen later in the dissertation, while there is a worldwide increase in the number of specialist environmental courts and tribunals their institution is still a relatively recent phenomenon and there are important advantages and dangers to be considered.

The dissertation will, in Chapter 1, provide some background to the concepts of sustainable development as well as its nexus with the judiciary. Chapter 2 centres on the debate regarding the advantages and disadvantages of environmental courts and tribunals. In considering this debate, the experience of Australia's Land and Environment Court of New South Wales will be briefly explored. This specialist court has been chosen for inclusion in this dissertation for three reasons. Firstly, this court is important from a historical perspective because it is the first superior environmental court to have been established in the world. Secondly, the court appears to have significant political support which, as will be seen later in this dissertation, is a crucial ingredient to the ability of a specialist court to exist. Thirdly, the statistics which the court has provided indicates that it can be classified as a 'success'. For this reason, it will be useful to learn from the experiences of the court. In an effort to broaden the discussion of the advantages and disadvantages of environmental courts, reference will be made to materials from other jurisdictions. The aim of this approach is to try to include a broad selection of viewpoints regarding environmental courts. This is important because of the fact that environmental courts are relatively recent additions to the judicial system.

Having discussed various arguments put forth regarding the value of environmental courts, this dissertation then takes a South African focus in Chapter 3, by looking at the history of the Hermanus Environmental Court, from inception to closure.<sup>1</sup> This, it is submitted, will prove useful in gaining an understanding of the role of environmental courts in South Africa, their usefulness as well as any possible obstacles to the formation of such a specialist judicial structure. Ultimately, this will inform the present writer's opinion as to whether environmental courts should become a permanent part of the judicial system.

---

<sup>1</sup> Department of Justice and Constitutional Development *Annual Report 2003/04* (2004) 71, available at [http://www.justice.gov.za/reportfiles/anr200304/0304anr\\_fullreport.pdf](http://www.justice.gov.za/reportfiles/anr200304/0304anr_fullreport.pdf), accessed 20 October 2013. In this document, the court in Hermanus is referred to as the 'Hermanus Environmental Court'. This dissertation will consider this to be the official name of the court.

## **Methodology**

Research for this dissertation is based on journal articles, statutes, case law. No empirical research was used. However, journals and government publications which provided statistical information were used. Such statistical information has the potential to prove useful in making recommendations.

Environmental courts are a specialised area and, despite many being established, much research in the field has been on analysing the features of an environmental court within a particular country. Notwithstanding this, research publications of a more comparative nature are also utilised. This is useful in highlighting both similarities and differences in the manner in which jurisdictions approach the issue of environmental courts. By being exposed to a wide array of arguments, recommendations are more informed.

## 1. The Role of the Judiciary

In South Africa's previous political dispensation Parliament was supreme.<sup>2</sup> The promulgation of the 1996 Constitution<sup>3</sup> has, however, done away with this idea as it provides for constitutional supremacy.<sup>4</sup> Regarding the judiciary, s 165 of the Constitution<sup>5</sup> states that:

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

The effect of this change is that the judiciary is 'subject only to the Constitution and the law'.<sup>6</sup> This demonstrates that South Africa's judiciary has an important role to play in the enforcement of any laws. It is implicit that the effectiveness of the judiciary is related to the efficiency with which it makes decisions. Hence, measures aimed at enhancing the efficiency of the judiciary should be considered. In this spirit, this dissertation will consider whether environmental courts can enhance the efficiency and effectiveness of the manner in which South Africa's environmental laws are applied by the judiciary.

Section 24 of the Constitution refers to the environment.<sup>7</sup> The focus that the Constitution places on the environment is amplified by the reference to the environment in various other statutes. By applying environmental law to specific scenarios which were brought to its attention, and thereby developing environmental jurisprudence, legal certainty can be created. Furthermore, environmental awareness can be created and justice served. It is therefore imperative that the application of environmental law by the judiciary is par excellence.

At the outset, this statement regarding the important role of the judiciary in relation to environmental law must be qualified. There must be environmental laws which the judiciary can utilise. These laws must be relevant, appropriate, informed by clear objectives and based on the latest knowledge. Furthermore, the judiciary must be aware of the laws and be competent in applying them.

---

<sup>2</sup> ID de Vries 'Courts: the weakest link in the democratic system in South Africa; a power perspective' (2006) 25(1) *Politeia* 44.

<sup>3</sup> Constitution of the Republic of South Africa, 1996.

<sup>4</sup> *Ibid* at s 2.

<sup>5</sup> *Ibid* at s 165.

<sup>6</sup> *Ibid* at s 165(2).

<sup>7</sup> *Ibid* at s 24.

Section 165(2) of the Constitution (as quoted above) refers to the independence of the South African judiciary. de Vries<sup>8</sup> has pointed out that the separation of powers between the judiciary, executive and legislature is a characteristic which distinguishes a democracy from a dictatorship.<sup>9</sup> By being independent, the judiciary's application and interpretation of the law is given a degree of legitimacy, which ultimately results in the society having trust in the judicial process. In order for the judiciary to earn and maintain this trust, cases must be correctly heard and the judgments given must be legally acceptable. It is submitted that, in order for this to take place in environmental cases, judges require both a sound knowledge of environmental law and a certain amount of understanding of understanding of the 'context'. By context, one is referring to basic principles of the new jurisprudence relating to environmental matters. This is relevant because the legislation itself is directed at preventing something from occurring or remedying it after it has occurred.

Following the promulgation of the Constitution, South Africa has promulgated a whole suite of environmental statutes.<sup>10</sup> The availability of numerous environmental statutes is certainly a reason to be grateful. However, in order for the aims of such legislation to be achieved, it has to be correctly applied. Thus, the time is ripe for the judiciary to develop environmental jurisprudence and promote some certainty in the field of environmental law. The impact of the judiciary is not merely limited to developments 'on paper' (environmental jurisprudence), but also extends to the realm of the everyday. This is because law, essentially, governs the actions of society. A judge of the Brazilian High Court highlighted this concept in his statement that:

as we know, cities will not rise or evolve with words alone. But words spoken by judges can indeed encourage destruction or legitimize conservation, endorse speculation or guarantee urban environmental quality, consolidate the errors of the past, repeat them in the present, or enable a sustainable future.<sup>11</sup>

This quote can be supported by a comment made by Robinson<sup>12</sup> that:

[w]ithout such adjudication, the rule of law is weakened. As environmental protections are lost, the quality of the environment deteriorates, and the public and nature are harmed.

The commonality of these two quotes is that they both highlight the important role judicial officers can play in the realm of environmental protection. It is therefore important for

---

<sup>8</sup> de Vries note 2 at 43.

<sup>9</sup> Ibid.

<sup>10</sup> Just three examples include the National Water Act 36 of 1998, the National Environmental Management: Protected Areas Act 57 of 2003 and the National Environmental Management: Biodiversity Act 10 of 2004.

<sup>11</sup> AH Benjamin 'We, the judges, and the environment' (2012) 29(2) *Pace Environmental Law Review* 590-591.

<sup>12</sup> NA Robinson 'Ensuring access to justice through environmental courts' (2012) 29(2) *Pace Environmental Law Review* 367.

strategies to be tabled which ensure the correct and appropriate application of environmental law by members of the judiciary.

Having briefly discussed the important role that the judiciary can play, it is necessary to highlight why environmental law should deserve special attention. This may address a possible belief that environmental law should not be given special attention, especially in the form of a specialised environmental court.

Worldwide, the environment is facing threats in the form of pollution, loss of biodiversity, climate change and rising sea levels.<sup>13</sup> In addition, population levels have increased, resulting in increased pressure on earth's resources.<sup>14</sup> Fortunately, environmental pressures (such as pollution and loss of biodiversity) have prompted action on both the international and the national stages. Conferences such as the 1972 United Nations Conference on the Human Environment<sup>15</sup> and the 1992 United Nations Conference on Environment and Development,<sup>16</sup> by virtue of their international reach, demonstrate a global concern for environmental issues.

A core principle of environmental law is sustainable development.<sup>17</sup> The United Nations Commission of Environment and Development document *Our Common Future*<sup>18</sup> defines sustainable development as:

development that meets the needs of the present without compromising the ability of future generations to meet their own needs.<sup>19</sup>

Section 24 of the Constitution<sup>20</sup> is significant in that it establishes sustainable development as part of South African law. The National Environmental Management Act<sup>21</sup> (NEMA), in giving effect to sustainable development, defines it 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.<sup>22</sup>

Section 2 of NEMA leaves no doubt that sustainable development is a concept which must be implemented in South Africa.<sup>23</sup> Furthermore, s 2(4)(f) provides for participation from all

---

<sup>13</sup> Ibid at 371.

<sup>14</sup> Ibid at 370.

<sup>15</sup> United Nations Conference on the Human Environment, Stockholm (1972).

<sup>16</sup> United Nations Conference on Environment and Development, Rio de Janeiro (1992).

<sup>17</sup> M Kidd *Environmental Law* 2 ed (2011) 17.

<sup>18</sup> United Nations Commission of Environment and Development *Report of the World Commission on Environment and Development: Our Common Future* (1987).

<sup>19</sup> Ibid at Chapter 2, paragraph 1.

<sup>20</sup> Note 3 at s 24(b)(3).

<sup>21</sup> Act 107 of 1998.

<sup>22</sup> Section 1.

<sup>23</sup> Section 2(3).

stakeholders in environmental governance.<sup>24</sup> It also states that the ‘all people must have the opportunity to develop the understanding, skills and capacity’<sup>25</sup> for ‘equitable and effective participation’.<sup>26</sup> Hence, one can use this section as a basis for furthering the environmental law knowledge of members of the judiciary.

According to Markowitz and Gerardu,<sup>27</sup>

sustainable development depends upon good governance; good governance depends upon the rule of law; and the rule of law depends upon effective compliance and enforcement.<sup>28</sup>

This quote demonstrates that, for the objects of a law to be achieved, compliance and enforcement are required. As the judiciary can be called on to assess whether there is compliance with the law, it is necessary for the judiciary to be as well-equipped as possible to assess degrees of compliance (or of non-compliance). An environmental court may be one possible way in which to ensure that environmental law is correctly applied.

The United Nations Environment Programme (UNEP)<sup>29</sup> attaches great importance to the role of the judiciary. Some proof of this can be seen in UNEP forming the Division of Environmental Law and Conventions (DELIC), which is tasked with addressing issues related to international environmental law, policy and governance.<sup>30</sup> Publications initiated by UNEP, such as the *Judicial Handbook on Environmental Law*<sup>31</sup> and the *Judicial Training Modules on Environmental Law*<sup>32</sup> also serve to demonstrate the importance of the judiciary in the eyes of UNEP. The following quote from 2002, by the then Executive Director of UNEP, Klaus Töpfer, serves to provide some insight into why the judiciary deserves special attention within the field of environmental law:

at the national level, law remains the most effective means for translating sustainable development policies into action. A judiciary well informed of the rapidly expanding

---

<sup>24</sup> Section 2(4)(f).

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> KJ Markowitz and JJA Gerardu ‘The importance of the judiciary in environmental compliance and enforcement’ (2012) 29(2) *Pace Environmental Law Review* 540-541.

<sup>28</sup> Ibid at 540.

<sup>29</sup> UNEP was formed in 1972 and is a programme of the United Nations (UN). Its aim is to ensure sustainable development on a global level. For more information see the UNEP website at: <http://www.unep.org>, accessed 5 September 2013.

<sup>30</sup> DELIC *About DELIC* available at <http://www.unep.org/delic/Home/tabid/6092/Default.aspx>, accessed 3 January 2013.

<sup>31</sup> D Shelton and A Kiss *Judicial Handbook on Environmental Law* (2005) available at <http://www.unpei.org/PDF/policyinterventions-programmedev/Judicial-Handbook-Environmental-Law.pdf>, accessed 23 December 2012.

<sup>32</sup> UNEP *Judicial Training Modules on Environmental Law* available at <http://www.unep.org/delic/JudicialTrainingModulesEnvironmentalLaw/tabid/102283/Default.aspx>, accessed 14 December 2012.

boundaries of environmental law and law in the field of sustainable development, and sensitive to their role and responsibilities in promoting the rule of law in regard to environmentally friendly development, can play a critical role in the vindication of the public interest in a healthy and secure environment through the interpretation, enhancement and enforcement of environmental law.<sup>33</sup>

In keeping with this statement, UNEP hosted the Global Judges Symposium on Sustainable Development and the Role of Law (the Symposium) in South Africa in 2002.<sup>34</sup> Despite the Symposium being held a decade ago, a brief analysis of the comments made by a speaker at the Symposium, as well as of certain features of the Johannesburg Principles on the Role of Law and Sustainable Development<sup>35</sup> (the Johannesburg Principles) will be useful in the context of this dissertation. This is because they both share a common message of the importance of sustainable development as well as the critical role the judiciary can play in its implementation.<sup>36</sup>

Weeramantry,<sup>37</sup> a former Vice-President of the International Court of Justice, emphasised the need for law to address issues beyond those which affect the present generation. He stated that in order for one to solve any human problem (which will therefore encompass environmental problems), one must consider the present generation, those who are not yet born and lastly those who have already passed on. These latter two groups must be considered for the following two reasons. Firstly, those who are not yet born (in addition to the poor) are unable to attest to any of their rights. Secondly, the traditions and practices of previous generations can be of relevance in overcoming environmental problems. It is submitted that this can be extended in that one can also learn from the harmful practices of people in the past, in the hope that past mistakes will not be repeated.

According to Weeramantry, the value of sustainable development<sup>38</sup> is that it serves to unshackle law from any form of short-sightedness. It therefore serves to protect the interests of future generations. Sustainable development is therefore compatible with the view outlined

---

<sup>33</sup> UNEP *UNEP Executive Director's background paper to the Global Judges Symposium* (2002) 1, available at [http://www.unep.org/law/Symposium/Pre\\_session.htm](http://www.unep.org/law/Symposium/Pre_session.htm), accessed 15 August 2012.

<sup>34</sup> For further information about the Judges Symposium, and access to relevant documents, see [http://www.unep.org/law/Symposium/Judges\\_symposium.htm](http://www.unep.org/law/Symposium/Judges_symposium.htm), accessed 15 August 2012.

<sup>35</sup> *The Johannesburg Principles on the Role of Law and Sustainable Development*, 2002.

<sup>36</sup> Ngcobo J referred to the Symposium in the case of *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) at para 102-104. He highlighted the important role of the judiciary in giving effect to policy aimed at protecting the environment.

<sup>37</sup> CG Weeramantry 'Main Presentation-Session 2' (2002), transcript available at [http://www.unep.org/law/symposium/Documents/SESSION\\_2.doc](http://www.unep.org/law/symposium/Documents/SESSION_2.doc), accessed 15 August 2012.

<sup>38</sup> See note 19 for the definition of sustainable development as stated in the Brundtland Commission's *Our Common Future*.

in the previous paragraph that any problem must be approached bearing in mind the present generation as well as future and past generations.

Weeramantry also brings attention to the legal status of sustainable development. In terms of modern environmental law, Weeramantry concluded that sustainable development is part of customary international law. Furthermore, Weeramantry also stressed that sustainable development is a feature found in a variety of cultures and civilizations. The fact that sustainable development is legally recognised, together with it being a part of human society, justifies its importance.

The judiciary, which Weeramantry has described as ‘the highest custodian of justice’,<sup>39</sup> has an important role in trying to implement this concept. It is submitted that Weeramantry’s wish for sustainable development to be applied by the judiciary can only occur if two conditions are met. Firstly, laws and policies must imbibe the spirit of sustainable development. Secondly, the actions of government, citizens and courts must conform to the requirements of sustainable development. The former factor therefore stresses the need for reforms on paper, whilst the latter underlines the importance of implementation by all stakeholders in society.

Discussions regarding the viability of environmental courts are important in that such courts *may* result in enhanced implementation of sustainable development. Possible advantages posed by environmental courts on a ‘micro’ level (such as quicker, cheaper hearings and judgments being made by competent personnel) can therefore result in sustainable development being achieved on a ‘macro’ level. At this stage it should be noted that various arguments regarding the benefits and shortcomings of environmental courts will be explored in Chapter 2.2 of this dissertation.

Having recognised the importance of sustainable development, it is indeed fortunate that South African law has incorporated sustainable development, as seen in s 24 of the Constitution and s 2 of NEMA. It is submitted that this legal base should make it easier to develop strategies which implement sustainable development within the judiciary. Commenting on the Australian experience of environmental law, Stein<sup>40</sup> has expressed that Australian judges are fortunate in that they have the necessary tools (laws) to apply to an environmental issue. This demonstrates that the correct legal base makes the achievement of sustainable development easier to achieve. Stein’s comments also highlight the importance of

---

<sup>39</sup> Ibid.

<sup>40</sup> P Stein ‘Comments made in Session 2 of the Symposium’ (2002), transcript available at [http://www.unep.org/law/symposium/Documents/SESSION\\_2.doc](http://www.unep.org/law/symposium/Documents/SESSION_2.doc), accessed 15 August 2012.

application of the tools (laws). By analysing environmental courts, this dissertation seeks to establish whether environmental courts can promote better application of environmental law in South Africa.

As stated earlier, an outcome of the Symposium was a statement adopted by all attending judges: the Johannesburg Principles. Aspects of the Johannesburg Principles which are relevant to the theme of this dissertation will now be briefly explored. The Preamble highlights the importance of the judiciary not only in ensuring compliance with environmental law, but also in developing environmental law. Another aspect of the Preamble is that it highlights capacity constraints experienced in sectors involved in environmental implementation and enforcement. The Johannesburg Principles contain four principles. These are:

- 1) A full commitment to contributing towards the realization of the goals of sustainable development through the judicial mandate to implement, develop and enforce the law, and to uphold the Rule of Law and the democratic process,
- 2) To realise the goals of the Millenium Declaration of the United Nations General Assembly which depend upon the implementation of national and international legal regimes that have been established for achieving the goals of sustainable development,
- 3) In the field of environmental law there is an urgent need for a concerted and sustained programme of work focused on education, training and dissemination of information, including regional and sub-regional judicial colloquia, and
- 4) That collaboration among members of the Judiciary and others engaged in the judicial process within and across regions is essential to achieve a significant improvement in compliance with, implementation, development and enforcement of environmental law.

Principle 1 reflects the message contained in the Preamble. This demonstrates that judges view the judiciary as an essential institution in implementing and developing the law. It is therefore appropriate for this dissertation to critically analyse the concept of specialist environmental courts, as such institutions may hasten compliance with Principle 1. Principles 3 and 4 demonstrate the importance of education, training and co-operation for the judiciary to be effective in its duties. One can infer from this that the mere formation of an environmental court will not necessarily result in a dramatic change in the manner in which environmental laws are implemented. Rather, it is one strategy in a suite of strategies to increase the effectiveness of the judiciary.<sup>41</sup>

Following the listing of the four principles, a 'programme of work' is outlined. Relevant examples include increasing environmental law education, improving public participation in environmental decisions and enhancing the capacity of those who fall within the compliance and enforcement sector (including members of the judiciary).

---

<sup>41</sup> The merits and weaknesses of environmental courts will be explored in Chapter 2.2 of this dissertation.

One can take from the Johannesburg Principles the notion that compliance with environmental law is not confined to passing of environmental laws. Supporting institutions, such as the judiciary, are also a factor in assisting compliance with the law. A discussion on methods to enhance the effectiveness of the judiciary is, therefore, clearly appropriate. This dissertation will focus on environmental courts as one possible way of resolving environmental disputes.

## 2. A Specialist Environmental Court: Introducing the Concept

### 2.1 Access to Justice

The Aarhus Convention<sup>42</sup> is an environmental treaty which is directed mainly at those states forming part of the United Nations Economic Commission for Europe;<sup>43</sup> however it is open for ratification by other states.<sup>44</sup> The Convention seeks to address three areas: access to information,<sup>45</sup> public participation in decision-making,<sup>46</sup> and access to justice.<sup>47</sup> The Rio Declaration on Environment and Development<sup>48</sup> also makes reference to these three areas.<sup>49</sup> It has been said that environmental democracy can only be achieved when these three elements are present.<sup>50</sup> Environmental democracy is where the government is accountable, transparent and involves ‘people in decisions that affect their environment.’<sup>51</sup> Essentially, environmental democracy addresses the relationship between government, on the one hand, and society, on the other,<sup>52</sup> and requires there to be openness in respect of environmental matters.

Access to justice, as mentioned in the previous paragraph, is the third element making up environmental democracy. Access to justice can be achieved by the government allowing concerned persons to resort to certain institutions in an effort to: address harmful environmental activities, seek compliance with environmental law and claim remedies because rights have been infringed.<sup>53</sup> Institutions such as courts and tribunals, therefore, facilitate access to justice, as they provide the arena in which to hear such grievances.

---

<sup>42</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998 (entered into force on 30 October 2001).

<sup>43</sup> Preamble and Article 17.

<sup>44</sup> Article 19(3).

<sup>45</sup> Article 4.

<sup>46</sup> Article 6.

<sup>47</sup> Article 9.

<sup>48</sup> Rio Declaration on Environment and Development, 1992.

<sup>49</sup> C Kiss and M Ewing *Environmental Democracy: An assessment of access to information, participation in decision-making and access to justice in environmental matters in selected European countries* (2006) 21, available at

<http://www.accessinitiative.org/sites/default/files/Environmental%20Democracy%20TAI%20Europe.pdf>,

accessed 11 September 2012.

<sup>50</sup> G Pring and C Pring *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2009) 6, available at

[http://www.accessinitiative.org/sites/default/files/Greening%20Justice%20Final\\_31399\\_WRI\\_0.pdf](http://www.accessinitiative.org/sites/default/files/Greening%20Justice%20Final_31399_WRI_0.pdf), accessed 14 June 2012.

<sup>51</sup> M Kerdeman *What Does Environmental Democracy Look Like?* (2008), available at

<http://www.wri.org/stories/2008/04/what-does-environmental-democracy-look>, accessed 14 September 2012.

<sup>52</sup> J Foti *Voice and Choice: Opening the Door to Environmental Democracy* (2008) 3-4, available at

[http://pdf.wri.org/voice\\_and\\_choice.pdf](http://pdf.wri.org/voice_and_choice.pdf), accessed 17 September 2012.

<sup>53</sup> *Ibid* at 9; Pring and Pring note 50 at 7.

In recent years there has been a major increase in the number of environmental courts and tribunals (collectively known as ECTs).<sup>54</sup> According to an article published in 2010, 360 ECTs (operating either nationally or sub-nationally in states) exist across the world.<sup>55</sup> Of note is that nearly half of these courts were formed during the years 2005 to 2010,<sup>56</sup> which shows a major upturn in the establishment of ECTs. Pring and Pring<sup>57</sup> have credited this dramatic increase in the number of ECTs to six factors. These six factors flow in a logical sequence, with preceding factors influencing later ones, and will now be discussed.

Firstly, environmental problems have increased, mainly as a consequence of development. These environmental problems contribute, secondly, to awareness amongst the public. The media is the primary manner in which awareness is created. However, the experiences of ordinary citizens are another method. This can occur where, for example, people have first-hand knowledge of polluting activities in their communities and are thus made aware of the negative consequences on the environment. The formation of environmental laws and treaties in order to address and prevent environmental problems is the third factor. Unfortunately, enforcement in many cases is not as effective as it ought to be. This failure in enforcement can result, fourthly, in environmental issues being brought to generalist courts. Despite the fact that issues are taken to a court, the court process may turn out to be ineffective and ultimately inhibiting justice from occurring. Possible reasons for the expectations of applicants not being met in a court include high costs, time issues, a lack of expertise and inconsistency on the part of deciding officers. The failure of the generalist courts to apply the law effectively is the fifth factor. Sixthly, the failure of the generalist courts can result in calls for ECTs to be established, in an effort to ensure remedy any failures in the generalist court system. This demonstrates that the failure of the generalist courts is a key catalyst for the formation of ECTs. Even where ECTs are not formed, it is submitted that the mere fact that there is criticism of the manner in which generalist courts are dealing with environmental issues can result in changes within generalist courts themselves, despite not going to the extent of forming a specialist ECT.

It is apparent, based on the above paragraph, that the progression (or regression!) of certain events results, ultimately, in calls for the formation of ECTs. It is now necessary to analyse

---

<sup>54</sup> R Carnwath 'Institutional innovation for environmental justice' (2012) 29(2) *Pace Environmental Law Review* 562.

<sup>55</sup> G Pring and C Pring 'Increase in environmental courts and tribunals prompts new global institute' (2010) 3(1) *Journal of Court Innovation* 12.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid* at 12-14.

environmental courts in more detail, by considering some arguments surrounding their viability. Note should be taken that this dissertation will focus mainly on environmental courts as opposed to environmental tribunals.

## 2.2 Advantages and Disadvantages of Environmental Courts

This section of the dissertation will entail critiquing the viability of Environmental Courts on the strength of various arguments postulated either in favour of, or against, the formation of ECTs. The outcome of this exercise is to try and distil those factors which will influence the formation of an environmental court in South Africa. An endeavour will be made to interrogate the various arguments from a South African angle, making the final judgment (whether or not South Africa should pursue a specialist environmental court) more credible.

A good starting point is an analysis of a specific environmental court in Australia; this being the Land and Environment Court of New South Wales (hereafter referred to as the Land Court).

The Land Court was established with the passing of the Land and Environment Court Act<sup>58</sup> (hereafter referred to as 'LECA') in 1979, and has the status of being the first superior environmental court in the world.<sup>59</sup> As it has been described as 'a model of a successful environmental court',<sup>60</sup> it is beneficial to explore this contention. This ought to be helpful in seeing whether any characteristics of the Land Court can be incorporated in the South African context.

LECA specifies that the Land Court is a superior court.<sup>61</sup> In the context of the judicial structure of the courts in New South Wales this is significant as the Land and Environment Court is placed on the same level as the Supreme Court and Industrial Relations Commission of New South Wales.<sup>62</sup> Only the Court of Appeal and Court of Criminal Appeal (both having jurisdiction within New South Wales) and the High Court of Australia (which has jurisdiction over all federal states of Australia) are superior.<sup>63</sup>

The Land Court is endowed with a high status within the judicial system of New South Wales. A diagrammatic representation of its hierarchy is provided for in Annex II and III of this dissertation. Annex I shows the criminal jurisdiction of the court while Annex II

---

<sup>58</sup> Act 204 of 1979.

<sup>59</sup> BJ Preston 'Benefits of judicial specialization in environmental law' (2012) 29 (2) *Pace Environmental Law Review* 398.

<sup>60</sup> *Ibid* at 440.

<sup>61</sup> Section 5(1).

<sup>62</sup> New South Wales Government *Land and Environment Court* available at <http://www.lec.lawlink.nsw.gov.au/lec/about.html?s=877771413>, accessed 26 September 2012.

<sup>63</sup> *Ibid*.

represents the civil jurisdiction of the court.<sup>64</sup> It is submitted that, solely on the hierarchy of the Land Court within the judicial structure of New South Wales, one can infer that there was a high degree of political will calling for an environmental court of such high standing. Strengthening this submission is the jurisdiction given to the Land Court.

Part 3 of LECA is the source of the Court's jurisdiction, and provides for eight separate classes where the court can exercise its powers.<sup>65</sup> Classes one to three cover areas of law relating to planning law,<sup>66</sup> local government issues,<sup>67</sup> land tenure and valuations.<sup>68</sup> What is noteworthy is that the Land Court will consider appeals in classes 1 to 3 on the merits.<sup>69</sup> This provides the Court with 'the same functions and discretions as the original decision maker'.<sup>70</sup> The result is that a person unhappy with a decision given by a government official can resort to the court for a rehearing.

A valid question at this point is how a court can decide on the merits when it is an expert in the law and not in other areas such as environmental science and planning. LECA addresses this issue by providing for the appointment of commissioners.<sup>71</sup> Cases falling within classes one to three can be heard by either a judge or a commissioner.<sup>72</sup> Commissioners have specialised skills in areas such as environmental science,<sup>73</sup> engineering,<sup>74</sup> local government,<sup>75</sup> natural resources,<sup>76</sup> and land rights (of Aborigines).<sup>77</sup> Furthermore, a commissioner can also be appointed if he or she is a qualified (Australian) lawyer.<sup>78</sup> LECA, by not limiting the role of the decision maker to a member of the judiciary, has thus widened the knowledge-base of the decision makers of the Land Court, thereby facilitating better judgments.<sup>79</sup>

---

<sup>64</sup> The images provided in Annex I and Annex II are obtained from: Land and Environment Court of New South Wales *Annual Review 2010* 8-9 available at [http://www.lec.lawlink.nsw.gov.au/lec/annual\\_reviews.html](http://www.lec.lawlink.nsw.gov.au/lec/annual_reviews.html), accessed 20 September 2012.

<sup>65</sup> Section 16(2).

<sup>66</sup> Section 17.

<sup>67</sup> Section 18.

<sup>68</sup> Section 19.

<sup>69</sup> Own emphasis.

<sup>70</sup> Preston note 59 at 404.

<sup>71</sup> Section 12.

<sup>72</sup> Section 33(1).

<sup>73</sup> Section 12(2)(c).

<sup>74</sup> Section 12(2)(e).

<sup>75</sup> Section 12(2)(a).

<sup>76</sup> Section 12(2)(f).

<sup>77</sup> Section 12(2)(g).

<sup>78</sup> Section 12 (2AA)

<sup>79</sup> P Stein 'The role of the Land and Environment Court in environmental assessment' (1992) 28(1-4) *Australian Zoologist* 19.

The significance of a court utilising specialised commissioners can be seen in the case of *Gilfillan v Wagga Wagga City Council*.<sup>80</sup> In this case, a developer wished to construct buildings in order to provide accommodation to visitors. The developer was not granted authorisation by the local authority and appealed to the Land Court.

The dispute centred on the nature of the proposed developments. If the development was classified as a hotel or motel, its construction would be prohibited in terms of the relevant legislation.<sup>81</sup> Not only did the Land Court consider evidence submitted by the applicant and respondent, it also visited the site in order to ascertain the views of local residents.<sup>82</sup>

The conclusion of the court (that the development was not permissible) is not of concern in the context of this dissertation. What is significant, however, is the fact that the dispute was heard by a commissioner who was a qualified architect and planner,<sup>83</sup> whose background was of benefit in understanding the dispute. One must also caution that, whilst such technical skill is useful, it is also imperative that decision makers have the appropriate legal skills. Thus, in order to address the danger of having a commissioner who is unskilled in the law, a conservative solution may be to ensure that in all disputes a legally trained presiding officer presides. Where it is deemed that specialised technical knowledge is required, then such an individual can *assist* the presiding officer. This can mitigate against the danger of having a presiding officer who, while being technical competent, may not have the necessary legal experience.

Notwithstanding the above-mentioned danger, expertise on the part of the decision maker (in areas outside the legal realm) can be extremely beneficial. Firstly, the fact that someone well versed in a particular field passes judgment contributes to legal certainty.<sup>84</sup> Secondly, judgments passed by specialist commissioners can be useful to both local authorities and the community.<sup>85</sup> If one takes the above-mentioned case, developers wishing to develop a similar structure in the future would have clear guidance on issues relating to permissibility. In addition, local authorities also obtain guidance from decisions. It is submitted that the presence of an expert also creates a sense of legitimacy to the decision. The result, therefore,

---

<sup>80</sup> [2012] NSWLEC 1253.

<sup>81</sup> At paragraph 5.

<sup>82</sup> At paragraph 13.

<sup>83</sup> The biography of A Tuor (the decision maker in this case) can be viewed at [http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/lec/m4203011729331/bio\\_tuorc.pdf](http://www.lec.lawlink.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011729331/bio_tuorc.pdf), accessed 17 September 2012.

<sup>84</sup> Preston note 59 at 436-437.

<sup>85</sup> *Ibid* at 437.

is that compliance with the law is enhanced. The third benefit is that, as matters can be heard on the merits, a degree of oversight is created.

Judicial decisions can be thus seen on a broader level as complementing environmental statutes. This fact, it is submitted, highlights the important role that judicial decisions can play in complementing statutes. This role appears to be enhanced in the case of the Land Court as specialist commissioners can hear appeals on the merits, thereby subjecting governmental decisions to scrutiny.

At this stage it is necessary to ask whether South Africa would be willing to follow New South Wales by allowing the judiciary to hear administrative appeals on the merits. The first hurdle is political: would the government be willing to give the judiciary powers to hear appeals on the merits, with the possible result that administrative decisions are overturned?

In administrative law, it is well established that courts have the power to review decisions and not to hear appeals.<sup>86</sup> Appeals enquire into the merits of a decision, whilst reviews focus on whether the process followed in reaching the decision was acceptable.<sup>87</sup> Allowing courts to hear appeals of administrative decisions may expose them to being 'guilty of usurping power'.<sup>88</sup> Hence, the judiciary will be exceeding its jurisdiction.

The second hurdle is a logistical one: are there enough experts willing to become commissioners? Measures would have to be put in place to make being a commissioner attractive; such as offering competitive salaries in order to make such positions attractive. Secondly, LECA<sup>89</sup> could be followed by including the option of part-time commissioner. This would be particularly useful where experts are hesitant in becoming full-time commissioners (perhaps because it would prejudice their career prospects) as it would allow them to continue with their 'normal' job. By making becoming a commissioner as attractive as possible to as wide a number of experts as possible a court would be able to attract a wide variety of skilled individuals to contribute to the achievement of justice.

Having discussed classes one to three of the Land Court's jurisdiction, it is necessary to discuss briefly the remaining areas of the Land Court's jurisdiction. Proceedings falling within class four relate to reviewing of administrative decisions and civil enforcement of

---

<sup>86</sup> C Hoexter *Administrative Law in South Africa* 2 ed (2012) 108.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Chief Constable of the North Wales Police v Evans* [1982] 3 AllER 141 (HL) at 154d.

<sup>89</sup> Section 13(3)(b).

environmental law.<sup>90</sup> Those within class five relate to criminal enforcement of environmental laws.<sup>91</sup> Appeals against environmental offences are dealt with in classes six and seven,<sup>92</sup> and class eight deals with matters concerning mining matters.<sup>93</sup> It is apparent, therefore that wide jurisdictional powers are given to the Land Court, thereby ensuring that, in theory, it is capable of receiving a wide variety of cases.

The latest statistics were published by the Court in its 2010 *Annual Review*.<sup>94</sup> According to these statistics there were 1 115 new registrations at the court in 2010. When compared to new registrations in the previous four years, this figure is the second lowest, with the highest number of new registrations being in 2008 with 1 442 new registrations.<sup>95</sup> Despite this fact, it is significant that there were 1 234 finalisations of cases in 2010.<sup>96</sup> This figure is greater than the number of new registrations as the court finalised cases which were registered in previous years in addition to the new registrations made in 2010. Upon an analysis of the actual number of cases pending at the end of each year (for the periods 2006-2010), 2006 has seen the lowest number of pending cases at 551.<sup>97</sup> The pending figure has been progressively decreasing over this period (the highest being 858 cases pending in 2006). This demonstrates that the court is demonstrating an ability to dispose of cases in a relatively quick time, with the result that lengthy time delays are being circumscribed, for the benefit of achieving justice.

The Land Court has addressed the time period in which cases ought to be finalised by adopting certain standards; the goal being to achieve the specific targets.<sup>98</sup> According to the particular category that a case falls into, a different time period for finalisation is seen as the ideal 'standard', ranging from six months to two years.<sup>99</sup> In light of 2010 having the lowest number of pending cases it appears that the Court is serious about achieving the standards.

LECA provides that the Land Court may set up a conciliation conference in cases falling in classes one to three of the Court's jurisdiction.<sup>100</sup> Mediation is also an option in cases falling under certain categories of the Court's jurisdiction, and can occur at the call of the court or

---

<sup>90</sup> Land and Environment Court of NSW *Annual Review 2010* 15.

<sup>91</sup> Section 21.

<sup>92</sup> Section 21 A and s 21 B.

<sup>93</sup> Section 21 C.

<sup>94</sup> Land and Environment Court of NSW note 90 at 27.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid* at 26-27.

<sup>98</sup> *Ibid* at 37.

<sup>99</sup> *Ibid.*

<sup>100</sup> Section 34(1)(a).

the parties to the dispute.<sup>101</sup> In certain specified circumstances arbitration and conciliation procedures are compulsory.<sup>102</sup>

These alternative dispute resolution methods appear to be actively pursued by the court. This statement can be made based on statistics which show that the amount of conciliation conferences has increased on a yearly level for the periods 2006 to 2010 (the 632 conciliation conferences held in 2010 is more than twenty times greater than the conciliation conferences held in 2006).<sup>103</sup> Mediations conducted over the same period have decreased, with the Court attributing this to the increased use of conciliation conferences.<sup>104</sup> The use of these alternative dispute resolution methods has contributed, in part, to a significant number of cases being finalised before the commencement of trial proceedings.<sup>105</sup> In 2010, 61% of all matters were completed before a trial.<sup>106</sup> In the four previous years, the lowest percentage of cases finalised before a trial has been 54% (in 2007).<sup>107</sup> This demonstrates the significant role of alternative dispute resolution proceedings within the context of the Land and Environment Court.

By actively making use of these alternate methods to finalise cases, the advantages for the court flowing from the use of alternative dispute resolution can include time and cost savings for both the court and the parties to the dispute. The consequence of reaching finality more quickly is that, ultimately, the environment benefits.

At this stage it is useful to extrapolate certain key features of the Land Court which are relevant to the discussion of the advantages and disadvantages of ECTs. Firstly, the Land Court was created with relatively wide jurisdictional powers. This, together with its hierarchical status as a superior court, has afforded it the opportunity to resolve numerous disputes (as seen in the statistics published above), which is indicative of the public having a high degree of confidence in the Land Court.

The second point to make is that the method of resolving disputes is a mixture of traditional legal procedure and alternative dispute resolution methods. The latter has aided in speedy and more cost (and time) effective adjudications. Complementing this is the fact that the Land Court utilises methods designed to reduce the administrative burdens of litigation (such as the use of e-filing and telephone conferences).

---

<sup>101</sup> Land and Environment Court of NSW note 90 at 18.

<sup>102</sup> Section 34 AA

<sup>103</sup> Land and Environment Court of NSW note 90 at 18.

<sup>104</sup> Ibid at 19.

<sup>105</sup> Ibid at 27-28.

<sup>106</sup> Ibid at 28.

<sup>107</sup> Ibid.

The third point is the fact that the Land Court has both legal as well as ‘scientific’ experts. Having such types of experts can create consistency and legitimacy in decisions.<sup>108</sup> This has the effect of establishing a degree of legal certainty. The ultimate result, therefore, is that compliance with the law is enhanced, which, if the law itself is ‘good’ in an environmental sense, will facilitate environmental protection.

The fourth point to make is that there the Land Court appears to have a very strong political backing. Without such a progressive statute passed by the government, all the characteristics of the Land Court highlighted above would be very hard to establish. Hence, the characteristics of the Land Court are a consequence of political will. Such political will is required if an environmental court is to be established because courts are part of government, thus requiring governmental approval for any changes.<sup>109</sup> Governmental support would thus be a crucial requirement for the establishment of environmental courts in South Africa.

This requirement of political will was explored by Whitney in a 1973 article analysing the formation of an environmental court in the United States of America.<sup>110</sup> Whitney’s article analyses reasons given by a Task Force established to investigate the viability of an environmental court. This Task Force recommended *against* the formation of such a specialist court.<sup>111</sup> The Task Force provided four reasons for reaching that conclusion, which reasons Whitney did not particularly agree with.<sup>112</sup> However, briefly looking at the reasons given by the relevant body will be useful in illustrating possible disadvantages of an environmental court. Whitney’s article, then, will be useful in providing a framework upon which one can explore the debate surrounding viability of specialised environmental courts

The first reason given by the Task Force was that there was no clear category of environmental cases (which would be decided in the proposed environmental court).<sup>113</sup> This reason does appear to be a valid argument against the formation of a specialist environmental court; it would be a waste of resources to establish a special court if there was doubt as to the cases which that court can hear. Whitney, however, does not agree with this statement. He

---

<sup>108</sup> The presence of scientific experts can help the court understand complex factors. By being correctly informed, the legal experts have a better possibility of reaching the correct decision. Their presence, then, can help the judiciary keep pace with external developments in the environmental field.

<sup>109</sup> A du Plessis ‘Understanding the Legal Context’ in A Paterson and LJ Kotzé *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 30.

<sup>110</sup> SC Whitney ‘The Case For Creating A Special Environmental Court System – A Further Comment (1973) 15(1) *William and Mary Law Review* 33.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid* at 38.

argues that the conclusion of the Task Force (that there is no clear category of environmental cases) stems from their failure to explore the concept of an environmental matter.<sup>114</sup> It is submitted that this corroborates to a failure to define what environmental law is.

Whitney further contends that, together with a clear definition of what constitutes an environmental matter, a further obstacle to the formation of an environmental court may be the fact that, very often, cases are not limited to environmental issues,<sup>115</sup> meaning that a presiding officer may be required to consider other areas of law.<sup>116</sup> However, he rebuts this view by stating that presiding officers in other specialist courts (such as a court specialising in taxation law) also have to be knowledgeable in other areas of law.<sup>117</sup>

Altbeker<sup>118</sup> has suggested that the legal areas dealt with by specialist courts should be clearly outlined. Furthermore, such legal areas should be unique, as this will minimise the possibility of inconsistencies which may arise where specialist courts and generalist courts offer different interpretations.<sup>119</sup> Ensuring that specialist courts only deal with a unique area of the law may be problematic, because, as stated by Whitney above, a presiding officer may have to consider areas other than environmental law in an environmental case. According to the Scottish government, specialist environmental courts can cause fragmentation within the judiciary, which will create inconsistencies in sentencing and court procedures.<sup>120</sup> These views demonstrate that pigeon-holing certain areas of law for certain branches of the judiciary will not only prove to be difficult, but may result in inconsistencies.

It is submitted that, to resolve the issue of what an environmental matter is, the jurisdiction of the court must be very clear and detailed. The Land Court (which was discussed above) is an example of a court with very detailed provisions governing the issue of jurisdiction. In South Africa, sustainable development is a phrase which is expressly mentioned in South Africa's Constitution,<sup>121</sup> and which is given effect to in s 2 of NEMA.<sup>122</sup> Three core elements

---

<sup>114</sup> Ibid at 37-38.

<sup>115</sup> Ibid at 38.

<sup>116</sup> Ibid at 39.

<sup>117</sup> Ibid.

<sup>118</sup> A Altbeker *Justice Through Specialisation? The Case of the Specialised Commercial Crime Court* (2003) 33 available at <http://www.issafrica.org/publications/monographs/monograph-76-justice-through-specialisation-the-case-of-the-specialised-commercial-crime-court-antony-altbeker>, accessed 30 August 2013.

<sup>119</sup> Ibid at 28

<sup>120</sup> Scottish Executive Environment Group *Strengthening and Streamlining: The Way Forward for the Enforcement of Environmental Law in Scotland* (2006) 41 available at <http://www.scotland.gov.uk/Resource/Doc/155498/0041750.pdf>, accessed 17 September 2012.

<sup>121</sup> Section 24(b)(iii).

<sup>122</sup> Section 2 of NEMA contains a set of principles which must be followed for sustainable development to be achieved.

constitute sustainable development: environmental, social and economic considerations.<sup>123</sup> As the environmental requirement is linked with social and economic development, one could make the argument that an environmental court established in South Africa would be required to address not only environmental issues, but social and economic issues as well.<sup>124</sup> For this reason, it may be more correct to refer to an environmental court as a sustainable development court or tribunal as opposed to simply being an environmental court. The importance of clarifying the jurisdiction of a specialist environmental court is thus imperative in order to create legal certainty. More importantly, it will be necessary to have information regarding the jurisdiction of a proposed environmental court before a decision is made as to whether an environmental court is to be established or not. This would provide clarity to all concerned parties, and would be a crucial point in any debates.

A further note to add is that one argument against the formation of an environmental court is that it may be seen as being biased against developers and those commonly viewed as being responsible for causing harm to the environment.<sup>125</sup> If this line of thought is further developed, it would not be very far-fetched to imagine a situation in South Africa where ‘big industry’<sup>126</sup> would rally against the formation of an environmental court, on the ground that big industry would not receive a fair hearing in such a judicial institution.

Due to the importance of such industries to the economy, any arguments which they make will be given high priority. The problem with the argument that environmental courts will be biased against certain sectors of the society is that it ignores the fact that environmental courts are just tools to aid in the implementation of environmental laws already passed. The underlying argument *may* be that they do not wish environmental law to be better implemented. The notion of bias against certain sectors in industry is therefore false. It may even be that environmental courts, if they are consistent in the application of law, may benefit industry by providing them with clear guidelines on the law and speedier resolutions of problems.

It should also be noted that environmental courts are not created to favour a certain sector of society (and thus be biased). They would be *obliged* to imbue the features of sustainable

---

<sup>123</sup> This can be seen in the manner in which s 24 of the Constitution is constructed.

<sup>124</sup> This statement is made by the author based on the fact that sustainable development is not a concept which exclusively focuses on environmental issues.

<sup>125</sup> Pring and Pring note 50 at 18.

<sup>126</sup> ‘Big industry’ is a term referring loosely to those businesses and industries which engage in activities which appear to be detrimental to the environment. Examples can include the mining and manufacturing industries. It should be noted that it is not the writer’s intention to prejudice this ‘group’. The argument made above merely notes the *possibility* that certain sectors may feel threatened by an environmental court.

development; the effect being that environmental considerations would not be the only factors of relevance to the decision-makers. Hence, fears of bias (in favour of environmental protection) can probably be allayed.

A further possible problem is that specialist courts may provide opportunities for corruption.<sup>127</sup> This is because those involved in specialist courts (lawyers, prosecutors, members of the South African Police Service as well as the presiding officers) will become familiar with each other. Familiarity within the courtroom can also result in the normally adversarial nature of courtroom behaviour being lost, which Altbeker feels will be to the detriment of justice.<sup>128</sup>

Regarding corruption, one possible deterrent will be an efficient auditing system for courtroom activities. Unfortunately, this will most likely create administrative burdens as well as have budgetary implications.

If the pitfalls mentioned above are avoided, a specialist court can actually be of benefit to industry. The New South Wales Land Court is an example of a judicial structure that is efficient from both an administrative and a resource perspective. Furthermore, more certainty can be created by having experts (both legal and scientific) who possess the necessary knowledge required to hear environmental disputes. These two elements (certainty and efficiency) would, it is submitted, be welcomed by not only those in the business and development sector, but by all citizens. A consequence of this is that compliance with environmental law might even increase. A cynic might argue that it is perhaps this fear of having to comply with all the environmental laws that might sway certain sectors of society to oppose the formation of an environmental court. Naturally, this cannot be a valid argument against the formation of environmental courts. Nonetheless, this might play a role in influencing the political will of governmental decision-makers, which, as has been demonstrated above, is needed for the formation (and success) of an environmental court. To avoid such an occurrence, awareness regarding environmental courts would have to be created, in order to benefit those in government, the business sector and the general public. Having done so, open debate would do much to identify potential issues and resolve any misconceptions.

It is submitted that the primary role players which should be involved in driving any awareness campaign are members of the judiciary. This is not to say that people from other

---

<sup>127</sup> Altbeker note 118 at 30.

<sup>128</sup> Ibid at 29.

sectors do not have a role to play; on the contrary, representatives of governmental departments, academics (from legal, environmental and political fields) and NGOs can play significant roles in creating discussion about environmental courts. However, for any environmental court to be successful in practice, members of the judiciary need to be in full support. This is because the existence of an environmental court, to a large part, depends on the availability of judges willing to be part of such an institution. If those in the judiciary feel alienated from the process or, worse still, do not have confidence in the system, the likelihood of success of such an environmental court would appear to diminish.

India's establishment of its National Green Tribunal in 2010 was, to a large extent, the result of recommendations made by the judiciary itself.<sup>129</sup> Recommendations for a specialist court were made in judgments handed down by certain judges.<sup>130</sup> This judicial interest in an institution which deals specifically with environmental law is also seen in the Law Commission of India's *Proposal to Constitute Environment Courts*,<sup>131</sup> the first chapter of which document refers to some judgments where environmental courts were proffered as being advantageous. So influential has the role of India's judiciary been that Amirante<sup>132</sup> has said that 'we could define the establishment of a Green Tribunal in India as a "judge-driven reform".' It is submitted that this demonstrates, on a basic level, that the insights of the judiciary are relevant and should be valued (because they interact daily with the implementation of the law). On another level, it demonstrates the ability of the judiciary of a country being able to influence the political will of government. Naturally, the government must be open enough to be willing to hear and respond to the opinions of the judiciary (and all its citizens). Where a country is democratically run there is much hope that this will be the case.<sup>133</sup>

Continuing with Whitney's<sup>134</sup> article, the second reason provided by the Task Force in not recommending an environmental court related to whether special expertise was necessary in deciding an environmental case.<sup>135</sup> Answers to a questionnaire (which was issued by this Task Force) highlighted two different arguments concluding that specialist expertise was not

---

<sup>129</sup> D Amirante 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' (2012) 29(2) *Pace Environmental Law Review* 455.

<sup>130</sup> *Ibid* at 457-460. See particularly the case of *Mehta v India* (1986) 2 S.C.C. 176, 345 (India) where the judge recommends a specialist court headed by a judge together with two experts in ecological science.

<sup>131</sup> Law Commission of India *One Hundred Eighty Sixth Report on Proposal To Constitute Environment Courts* (2003) 5-6. *Ibid* at 456.

<sup>132</sup> Amirante note 129 at 456.

<sup>133</sup> Pring and Pring note 50 at 26.

<sup>134</sup> Whitney note 110.

<sup>135</sup> *Ibid* at 41.

necessary.<sup>136</sup> The first argument which one can draw from the questionnaire was that courts hear complex cases in the normal course of events.<sup>137</sup> As such, it is not necessary to establish a court specialised in environmental law as the judiciary has the ability and capacity to hear environmental issues. The second opinion was that special expertise was not necessary because an environmental case can extend across a wide variety of issues, making the requirement for a specialist in environmental law unnecessary.<sup>138</sup> These two positions are supported by the views of other commentators that a specialist court may result in the judiciary becoming fragmented.<sup>139</sup> This could, ultimately lead to environmental cases being marginalised in the judicial system, thereby decreasing the enforcement and effectiveness of the applicable environmental laws.<sup>140</sup> Altbeker,<sup>141</sup> however, suggests that the concentration of experts in a court can be beneficial because new areas of law can be developed through the consistent application of the law.

Addressing the opinion that a specialist court is not necessary because courts often ordinarily have to decide upon complex cases, Whitney<sup>142</sup> highlights that, based on the research which he conducted, there is no consensus amongst commentators with regard to this issue. Altbeker<sup>143</sup> writes that personnel employed by specialist courts (presiding officers and prosecutors) can be effective in ensuring that justice is dispensed in an efficient manner.

It is necessary now to pause in consideration of Whitney's analysis and to explore some of the advantages which environmental courts can bring, in greater detail than that which has been mentioned thus far. According to Preston,<sup>144</sup> the establishment of a specialist court results in the achievement of rationalisation and specialisation. Rationalisation entails the deciding of environmental cases in a unified structure rather than in fragmented judicial or administrative structures.<sup>145</sup> Specialisation relates to the fact that the court would have specialist people dealing with disputes, and that these disputes will fall under the exclusive jurisdiction of the court.<sup>146</sup> The advantage of this dual specialisation is that the court would be

---

<sup>136</sup> Ibid.

<sup>137</sup> Ibid at 42.

<sup>138</sup> Ibid.

<sup>139</sup> Pring and Pring note 50 at 17.

<sup>140</sup> Ibid.

<sup>141</sup> Altbeker note 118 at 28.

<sup>142</sup> Whitney note 110 at 46.

<sup>143</sup> Altbeker note 118 at 28.

<sup>144</sup> BJ Preston 'Judicial Specialization Through Environmental Courts: A Case Study of the Land and Environment Court of New South Wales' (2012) 29(2) *Pace Environmental Law Review* 604.

<sup>145</sup> Ibid at 605.

<sup>146</sup> Ibid.

able to achieve consistency in its decisions,<sup>147</sup> thereby facilitating effective enforcement of the law.

A specialist court allows the decision-makers to become proficient in a particular legal area.<sup>148</sup> Preston does not appear to argue that decision-makers in generalist courts cannot decide on environmental law cases. His argument is that, in generalist courts, ‘environmental matters become dissipated amongst the judges of the court’.<sup>149</sup> This is supported by a statement made in 2009 by the then Minister of Water and Environmental Affairs that the National Prosecuting Authority ‘will not prioritise the environment; it is not their core function’.<sup>150</sup> According to Preston, a problem of presiding officers not being exposed to environmental law is that they would not develop expertise in environmental law.<sup>151</sup> Preston’s argument, then, is that while environmental cases can be decided in the general court system, more effective decision-making can be achieved if a specialist judicial structure were to hear matters.

Another advantage of the establishment of a specialist court, and one that has made it popular in developing countries, is that training initiatives which relate to the jurisdiction of a particular specialist court are confined to those judges who are involved in that specialist court.<sup>152</sup> Hence, cost savings can be achieved. It may appear unfair to train a select group of the judiciary at the expense of other members, and it certainly does not appear to be an ideal situation. However, it is submitted that it must be borne in mind that where funding is scarce, it may be in the best interests of justice to train those for whom such training is directly applicable rather than training all judges, some of whom may never hear an environmental case.

Training a select number of judges may be unfair where a country has no specialist environmental court, as it would equip certain judges with a skillset at the expense of other judges. However, where a country has a specialist environmental court, it might be best to train those for whom the training will be directly applicable. Later, such training can be extended to other member of the judiciary in order to ensure that the judiciary as a whole is aware of any developments. This might also prove to benefit the specialist environmental

---

<sup>147</sup> Ibid.

<sup>148</sup> Ibid at 612.

<sup>149</sup> Ibid.

<sup>150</sup> S Mundy ‘Green crimes ignored’ *BusinessDay Live* 26 November 2009 available at <http://www.bdlive.co.za/articles/2009/11/26/green-crimes-ignored>, accessed 31 August 2013.

<sup>151</sup> Preston note 144 at 612.

<sup>152</sup> Amirante note 129 at 446.

court as future appointments to the specialist environmental court may come from the generalist courts. If those in the generalist court system are aware of key developments, any judge moving into a specialist court would be able to do so relatively smoothly.

A new judicial building is not a prerequisite to deriving the benefits posed by a specialist court.<sup>153</sup> What is meant by this is that, instead of forming a new brick and mortar environmental court (which may require expenditure and legislative approval), a green bench or green chamber is formed *within an existing generalist court*.<sup>154</sup> As no new court is established, this is referred to as internal specialisation within the judiciary.<sup>155</sup> It is thus not as far-reaching as the formation of a separate environmental court. However, as will be outlined below, it does possess some advantages over a pure generalist judicial system.

The process of internal specialisation is generally initiated by a senior member of the judiciary.<sup>156</sup> The result is certain judges are assigned environmental cases. Selection of these judges is generally voluntary, and not necessarily on a permanent basis.<sup>157</sup> The judges need not be so-called experts in environmental law.<sup>158</sup> However, it is not unreasonable to postulate that, due to constant interaction with environmental cases, judges forming part of the green bench may begin to display proficiency and expertise in environmental law.

Another benefit of internal specialisation is that a green bench is not isolated from the general judiciary as the specialisation occurs within the existing infrastructure. This, together with the fact that judges may be assigned on a temporary or ad-hoc basis, ensures, firstly, that the careers of judges are not placed at risk if they choose to become part of a green bench. This overcomes a possible disadvantage of specialist courts; that it can create friction between those employed in generalist courts and those employed in specialist courts.<sup>159</sup> A second benefit of internal specialisation is that those judges who become involved with environmental cases may develop expertise and interest in the field.<sup>160</sup>

The fact that judicial members are catalysts for internal specialisation may prove to be advantageous, as the decision rests with members of the judiciary and not an outside body (such as parliament). Hence, unlike a specialist ECT, parliamentary approval is not required.

---

<sup>153</sup> Ibid at 446-448.

<sup>154</sup> Pring and Pring note 50 at 23.

<sup>155</sup> Amirante op cit note 129 at 446.

<sup>156</sup> Pring and Pring note 50 at 23.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid

<sup>159</sup> Altbeker note 118 at 29

<sup>160</sup> Ibid at 28.

This, however, does not guarantee that internal specialisation will occur in a state, as the relevant members of the judiciary may not view internal specialisation as required. It can thus be stated that, in order for there to be successful internal specialisation, the vision of judicial members must be such that they view it as a worthwhile exercise to carry out.

Continuing with the discussion of Whitney's article, the third reason the Task Force provided for recommending against the formation of an environmental court was that there were insufficient environmental cases to warrant the formation of a specialist court.<sup>161</sup> This certainly appears to be a plausible argument, as it does not seem logical to construct a separate court (and incur administrative and financial burdens) if it is going to be under-utilised.<sup>162</sup> Scotland, for example, decided not to form a specialist environmental court due to their being an insufficient number of cases.<sup>163</sup>

Despite the fact that the number of cases a potential specialist environmental court would hear is an important factor, Whitney<sup>164</sup> cautions against using this as the sole factor for deciding on the viability of an environmental court. He states that, as cases dealing with environmental law 'tax judicial resources by raising complex and novel issues requiring familiarity with voluminous technical regulations and statutes',<sup>165</sup> they can be time consuming. According to this view, then, the fact that specialist environmental courts can overcome time delays is demonstrative of a significant benefit of environmental courts. In light of the fact that environmental cases may involve (in addition to the interests of the parties to the dispute) the possible result that the environment, in whatever form, may be irreversibly damaged, Whitney's argument certainly is valid. This point is supported by Altbeker,<sup>166</sup> who points out that the expertise that court officials gain through exclusively hearing environmental cases can result in better efficiency.

Despite the fact that specialised environmental courts can reduce the time of legal disputes, the number of cases that a court hears (or is predicted to hear) would, it is submitted, be a key ground upon which the success of any ECT would be based. In order to overcome the possibility that there might be too few cases, it is submitted that the jurisdiction of any environmental court is of vital importance. If it is too narrow, the chances are high that such an environmental court would become a victim of over-specialisation and occupying too

---

<sup>161</sup> Whitney note 110 at 49.

<sup>162</sup> Pring and Pring note 50 at 17.

<sup>163</sup> Scottish Executive Environment Group note 120 at 41.

<sup>164</sup> Whitney note 110 at 52.

<sup>165</sup> Ibid.

<sup>166</sup> Altbeker note 118 at 28.

narrow a niche. To understand the importance of jurisdiction, one only has to look at the Land and Environment Court in New South Wales to see how a single court can play such a large role in developing jurisprudence and dispensing justice. This particular court was expressly given wide jurisdiction, thereby ensuring that it had the potential to hear a wide variety of cases. Hence, a specialist environmental court can be sustainable if its jurisdiction is wide enough for it to be useful to the community (with jurisdiction in this context meaning the specific types of matters which the ECT can hear).

Jurisdiction is also of relevance in deciding the hierarchy of a proposed environmental court. Here one is referring to the particular status of an environmental court in the judicial hierarchy.<sup>167</sup> If, hypothetically, environmental courts are established in each magisterial district of the country, a potential advantage may be that such environmental courts, by being close to the people (so to speak), facilitate access to justice. A possible shortcoming with this arrangement is that it may not be very cost-effective for the government to establish specialised environmental courts in each magisterial district. Furthermore, opening up courts on such a wide scale would be a massive 'risk' by any decision-maker, and, if this move turned out to be failure, it may become highly political.

This problem can be circumvented to some extent if a specialist environmental court is established on a provincial (or possibly inter-provincial) level. Having fewer courts would mean that each court would have jurisdiction over a larger area (as compared to courts operating on a magisterial level), thereby ensuring that the amount of 'work' for each court is far greater than that of environmental courts established on a magisterial level. However, a very real shortcoming with this arrangement is that such courts may be very alienated from the public. Access to justice would not be reached, it is submitted, if potential litigants find it onerous to file a case with the court because it is so far away. However, this limitation can be overcome through the establishment flexible procedures to facilitate access to justice. The Land and Environment Court of New South Wales, for example, is a single court servicing the entire state of New South Wales. Although it is a single court, what appears to contribute significantly to its success is the fact that it employs mechanisms to facilitate access to justice.

Upon an analysis of the third factor relied upon by the Task Force, it is submitted that the number of cases a specialist environmental court hears would be critical to its viability. In

---

<sup>167</sup> Pring and Pring note 50 at 20.

order to ensure that an environmental court plays an active role in the justice system, the jurisdiction of an environmental court is thus an important factor. It is submitted that, in a country where the formation of a specialist environmental court is treated with caution, it is probably best to develop a green bench (as described above). The advantage of this is that it would serve to increase awareness around environmental law. At a later stage, there could be a discussion as to whether specialist environmental courts would add value to the judiciary. The advantage of this two-stepped approach is that the ‘shock value’ of a sudden call for a specialist environmental court would be greatly reduced as it would just be a modification of the existing green bench system. Furthermore, if the work of the green benches in courts across the country is met with support by stakeholders (lawyers, the public, NGO’s, government and the judiciary), there will be less opposition to the formation of an environmental court, and more focus on methods to ensure better justice. If, on the other hand, the common feeling is that the green bench was not successful, effort could be made to address issues of concern and rethink how environmental cases are dealt with. Essentially, then, the formation of a green bench or a full specialised environmental court relates to developing environmental awareness in the public and the judiciary. The optimist would undoubtedly be of the opinion that either of such measures would not be in vain.

The fourth point that the Task Force raised was that a specialist environmental court might not be able to possess sufficient institutional strength.<sup>168</sup> One result of this lack of institutional strength (according to answers submitted to the Task Force) is that the court would be easily influenced by external forces.<sup>169</sup> This argument against the formation of a specialist court thus postulates that justice would not be able to be served in a specialist court where ‘a court lacks active support from any of the influential interests to be affected by its operations’.<sup>170</sup>

The quote referred to in the previous paragraph deserves to be explored in further detail. It hints that the success of a judicial institution is dependent on the support of those who will be affected by its actions. In the environmental sphere, an environmental court would, it is submitted, affect industry and businesses, government and human (and environmental) rights activists. It is difficult to state with certainty whether members of the above-mentioned interest groups would view a specialist environmental court with favour or disdain without extensive empirical analysis. What can be stated is that it is quite possible for there to be

---

<sup>168</sup> Whitney note 110 at 53.

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

differences of opinion within each interest group. Within government, for example, certain departments may be supportive of a specialist institution while other departments may be opposed to the idea. Within the business sector, it is not far-fetched to imagine businesses being supportive of specialised environmental institutions if it would be quicker and cheaper than recourse to a generalist court system. The experience in the Land and Environmental Court of New South Wales does seem to support this view that business may be in favour of a court which resolves disputes quickly. Furthermore, businesses can benefit from more time savings if alternative dispute resolution methods are utilised. This demonstrates that it is quite possible for businesses to be in support of a specialist environmental institution because such an institution would facilitate time and money savings.

On the other hand, it is also quite possible that some businesses may be hesitant about the formation of a specialist environmental institution because it may result in increased environmental awareness and enforcement, thereby possibly placing cost ‘penalties’ on businesses who are not complying with the law. While it is quite possible (and perhaps understandable) for businesses to take this view, it is submitted that it is not a valid argument against the formation of a specialist environmental institution. This is because this argument seems to be opposed to an increase in compliance and enforcement in order to maintain the *status quo* (business as usual). However, despite the validity of this argument being in doubt, it cannot be ignored as a possible hurdle to those seeking a specialised environmental institution. It may, therefore, be a driver of other opposition arguments against specialised courts.

Altbeker<sup>171</sup> has also pointed out that, within a specialist court, individuals may become familiar with one another, thereby resulting affecting the usually adversarial environment and ultimately negatively affecting the manner in which justice is dispensed. He also points out that such an environment can be conducive for corrupt practices.

The argument presented by Oakes,<sup>172</sup> that pressure groups may exert a great amount of influence in the appointment of decision-makers to specialist institution, is, it is submitted, a very relevant argument against the formation of a specialist court. If such a situation did materialise, the result would be the appointment of judges who are highly opinionated about the issues relevant to environmental law. The outcome would be that judges in a specialist environmental institution would have very strong opinions (either pro-environment or anti-

---

<sup>171</sup> Altbeker note 118 at 28.

<sup>172</sup> JL Oakes ‘Development in Environmental Law’ (1973) 3 *E.L.R* 50012 in Whitney note 117 at 53.

environment). A result of this would probably be bias on the part of decision-makers in deciding cases, or judicial activism.<sup>173</sup> This, naturally, would not be in the best interests of justice, as the purpose for the formation of a specialised environmental institution would be to ensure that the law is correctly applied and not to advance a particular set of opinionated beliefs. If a situation arose where the appointment of judges was irregular (in order to further ulterior motives) the independence of the judiciary would undoubtedly be breached. In addition, it would be a sad day if judicial officers allowed themselves to be utilised in the furtherance of the interests of others and not in the interests of justice. One deeply hopes that the integrity of judicial officers would be enough to overcome this occurrence. However, great care would therefore need to be taken in the appointment of judges, in order to ensure that it is not a ploy to manipulate the judicial system.

If it is not possible for a specialised environmental institution to be free from external influence, then justice would ultimately be better served in the generalist court system, where it is probably less easy for interest groups to know precisely which judge (or judges) would sit on an environmental case. However, it must be stated that the generalist judiciary also faces a battle to be free from external influence. Speaking about the judiciary generally, van Zyl<sup>174</sup> explains how certain comments made about the judiciary taint ‘the bench as a whole, including all its constituent officers.’<sup>175</sup> This view of van Zyl hints at the idea that it is not unusual for the judiciary to face strong reactions by the public (and particularly by interested parties). In order for the judiciary (both generalist and specialist) to be able to withstand external influence, and thereby ensure that justice is served, it is imperative that members of the judiciary are guided by their ethical and constitutional duties.<sup>176</sup> This will ensure that the independence of the judiciary, as stated in s 165(2) of the Constitution, is maintained.<sup>177</sup> A valuable comment made by van Zyl is that, during the apartheid period, many judges were appointed with political motives ‘and were notorious for their regular findings in favour of the executive’.<sup>178</sup> This demonstrates that the challenges regarding the independence of the judiciary, which might be faced in a specialised judicial institution, are also relevant issues in the general judicial landscape. It is submitted that a very real fear (one which supports the views of those arguing against the formation of a specialised judicial institution) is that in a

---

<sup>173</sup> Pring and Pring note 2 at 18.

<sup>174</sup> D van Zyl ‘The judiciary as a bastion of the legal order in challenging times’ (2009) 12(2) *PER/PELJ* 2-3.

<sup>175</sup> *Ibid* at 3.

<sup>176</sup> *Ibid* at

<sup>177</sup> *Ibid* at 4.

<sup>178</sup> *Ibid* at 7.

specialised judicial institution attacks against the independence of the judiciary may be magnified and take a more concentrated form when compared to measures to undermine the independence of the judiciary in the generalist judiciary. For this reason it is imperative that the independence of the judiciary is always maintained, especially where a specialised judicial body is formed.

Commenting on Kenya's National Environmental Tribunal (NET), Kameri-Mbote<sup>179</sup> notes that it not an independent body as it is reliant on a governmental department.<sup>180</sup> Regarding the manner in which cases reach the NET, Kaniaru<sup>181</sup> notes that the NET does not have original jurisdiction. Rather, it can only hear referrals and appeals. Kameri-Mbote<sup>182</sup> regards this as a weakness of the NET, as this negatively impacts on access to justice. Kaniaru,<sup>183</sup> however, points out that this is not a unique occurrence as, amongst developing countries, no tribunals have original jurisdiction.

Even in light of these factors, the NET represents a stance by the Kenyan government to address access to justice in respect of environmental matters. Not only are matters heard by a minimum of three individuals, each offering expertise in a certain field, but external expertise can also be obtained.<sup>184</sup> The effect of this, and the fact that the NET can circumnavigate procedures which normal courts have to follow,<sup>185</sup> is that justice can be obtained more efficiently.

Upon reading the opinion of Kameri-Mbote, one is left with the feeling that the true potential of the NET is not realised. Increasing the budget, independence and jurisdiction of the NET appear to be the fundamental solutions offered by Kameri-Mbote. This demonstrates that the success of environmental courts and tribunals is very much dependent upon the support given by the government as well as the inherent strength of such structures. It is therefore difficult for weak courts or tribunals, with inadequate budgets and jurisdictions, to facilitate access to

---

<sup>179</sup> P Kameri-Mbote 'Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention' (2005) 1 *IELRC Working Paper* available at <http://www.ielrc.org/content/w0501.pdf>, accessed 5 August 2013.

<sup>180</sup> *Ibid* at 9.

<sup>181</sup> D Kaniaru 'National Environmental Governance: Role of National Environmental Tribunals' in T Honkonen and E Couzens (eds) *International Environmental Law –making and Diplomacy Review 2009* (2010) 174.

<sup>182</sup> Kameri-Mbote note 179 at 9.

<sup>183</sup> Kaniaru note 181 at 175.

<sup>184</sup> *Ibid* at 127.

<sup>185</sup> *Ibid*.

justice. The ultimate aim of any strategy should be that justice system is strengthened, and not that it is weakened.<sup>186</sup>

---

<sup>186</sup> Albeker note 118 at 29.

### **3. Environmental Courts in South Africa**

#### **3.1 A Constitution Implicitly Supportive of a Specialist Environmental Court**

In considering the judicial system of South Africa, a key starting point is the Constitution. Chapter 8 of the Constitution, entitled 'Courts and Administrative Justice', is the cornerstone to the functioning of the judiciary. A brief discussion of this chapter will provide insight into the makeup of the judiciary in South Africa.

Section 165 expressly provides that the courts in South Africa have judicial authority, and that decisions reached by these courts are binding. By virtue of this fact, it is clear that courts can play an effective role in enforcing the law. Furthermore, the binding nature of court decisions indicates the significant power which courts possess. For this reason, it is appropriate that s 165 also provides for the independence of courts. This should ensure that interference with the functioning of the judiciary should not occur. The twofold consequence of this is that, firstly, the law is applied without favour. The second consequence, it is submitted, is that this would lead to the judiciary possessing integrity. The importance of this, it is submitted, is that the general public would accept judicial decisions and be more willing to abide by them. This, ultimately, would result in further compliance with the law. Analysing s 165 from an environmental angle, it is apparent that courts can be instrumental in facilitating change at ground level. A significant factor is the ability of courts to make binding decisions. However, when coupled with courts that are independent and have the respect of citizens, it is clear that a judiciary which effectively applies environmental law is an important cog within the wider context of environmental compliance.

Keeping the above in mind, s 165(4) of the Constitution states that:

[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

This section clearly imposes an obligation on organs of state. Within the context of the application of environmental law by courts, it can be argued that this provision is a strong tool to ensure that courts are effective in the application of environmental law as well as being accessible. Thus, this provision can be relied upon as a catalyst for change within the judiciary; whether in the form of a specialist environmental court, internal specialisation within the current judicial regime or through other measures to increase the accessibility and effective implementation of the law by the courts.

Section 166 of the Constitution lists the various types of courts present in South Africa. These include the Constitutional Court, Supreme Court of Appeal, High Courts and Magistrates' Courts. Section 166(e) also provides for 'any other court established or recognised in terms of an Act of Parliament'. One can infer, then, that the formation of a specialist court would be consistent with the Constitution. On a deeper level, the reference to other courts in the Constitution can be seen as an implied admission that specialist courts are useful institutions in the application of the law.

Sections 167, 168, 169 and 170 of the Constitution elaborate on the jurisdiction of the Constitutional Court, the Supreme Court of Appeal, the High Courts and the Magistrates' Courts respectively. Upon reading these sections it is apparent that the various courts referred to above are arranged in a certain hierarchy, with the Constitutional Court at the apex of the judiciary. This is clearly substantiated in s 170, which states that:

Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

This section demonstrates the jurisdictional powers held by the various courts. Where an environmental court is formed, special attention must therefore be given to its hierarchical level and its jurisdictional powers. In all likelihood a specialist environmental court would be given a status below that held by High Courts, with the resultant reduced jurisdictional powers. While one can view this as a possible disadvantage of an environmental court, it is submitted that, in practice, this should not necessarily be the case. This is because the value of such a specialist court may lie in it being the first court to hear environmental disputes. According to the government, an increase in the volume of environmental legislation will result in magistrates hearing more environmentally related disputes.<sup>187</sup> It should be noted that Magistrates' Courts are created through legislation and have limited jurisdiction.<sup>188</sup> As they are below High Courts in the judicial hierarchy, they can only follow legislation and cannot, for example, question the constitutionality of legislation.<sup>189</sup> Since Magistrates' Courts are generally the first court to hear environmental cases, it is imperative that these courts (or, more specifically, magistrates) apply the law correctly. Where specialist environmental courts are to be considered, it is submitted that they should be the court of first instance. This will promote the correct application of the law at the initial stages of a dispute. In addition, it is

---

<sup>187</sup> Department of Water and Environmental Affairs, Department of Justice and Constitutional Development and Environmental Counsel *Judging Environmental Crime: A Bench Book for Magistrates* (2010) Final Draft at 11.

<sup>188</sup> ML du Preez 'The court structure' in L Meintjies-Van der Walt et al *Introduction to South African Law: Fresh Perspectives* (2008) 190.

<sup>189</sup> *Ibid.*

crucial that magistrates are well trained in environmental law in order to ensure that they are able to apply it correctly in a dispute. Such capacity training should occur whether specialist environmental courts are formed or not.

Section 180 of the Constitution contains two provisions which can be used to increase the efficiency and effectiveness of court decisions in relation to environmental law. The first of these (s 180(a)) provides that legislation can be passed dealing with ‘training programmes for judicial officers’. The second provision (s 180(c)) states that legislation can be implemented to ensure ‘the participation of people other than judicial officers in court decisions’.

Section 180(a) therefore authorises the training of members of the judiciary in environmental law. The resultant increase in environmental awareness could go a long way in ensuring consistent application of environmental law by the judiciary. Although specific legislation dealing with the training of judicial personnel in environmental law has not been passed, it is reassuring that the Department of Water and Environmental Affairs has initiated training programmes for both magistrates and prosecutors.<sup>190</sup> By implication, then, this demonstrates that the Department of Water and Environmental Affairs sees members of the judiciary (as well as prosecutors) as having an important role in environmental compliance and enforcement.

Section 180(c) would prove valuable if it were used to appoint people who possessed relevant scientific or legal knowledge in cases involving environmental law. A possible advantage of this is that decision-making may be more consistent, as decision-makers who are technically astute will be able to understand the exact nature of a dispute as well as assist other decision-makers in such understanding. Hence, the possibility of errors because of a dispute being highly technical can be minimised. In this way, judicial decisions would be more likely to be consistent.

If s 180(a) and s 180(c) are put into practice, then the formation of a specialist environmental court would merely be an extension of these two sections. This is because measures aimed at meeting the provisions of s 180(a) and s 180(c) would result in a judiciary better equipped at hearing environmental cases, with the further advantage of heightened awareness of environmental law amongst members of the judiciary. The formulation of a specialist environmental court would probably take this a step further. However, as has been

---

<sup>190</sup> Department of Environmental Affairs *Annual Report 2010/11* (2011) 21 available at [http://www.environment.gov.za/sites/default/files/reports/annual%20report\\_2010\\_2011.pdf](http://www.environment.gov.za/sites/default/files/reports/annual%20report_2010_2011.pdf), accessed 21 October 2012).

demonstrated earlier in this dissertation, there are many arguments for and against the formulation of a specialist environmental court. The result of such varied arguments is that one cannot guarantee whether an environmental court would be formed in South Africa. Even if one were to be formed, there is no guarantee that its existence would be perpetual. An environmental court established in Hermanus is a good example. Despite it apparently being effective, it had a relatively short existence. Notwithstanding this, it is submitted that any measures aimed at increasing awareness of environmental law amongst members of the judiciary is to be applauded.

Regarding the official name of the court established in Hermanus, the heading of a court document states that it is 'The Regional (Environmental) Court for the Region of the Cape, Held at Hermanus', with the abbreviation 'ECH' being used.<sup>191</sup> In a document published by the Department of Justice and Constitutional Development, the court was referred to as the 'Hermanus Environmental Court'.<sup>192</sup> This dissertation will use the latter name.

Before discussing the Hermanus Environmental Court, it is useful to look briefly at a 2003 Provincial Notice<sup>193</sup> which was published by the Department of Agriculture and Environmental Affairs in KwaZulu-Natal. 'Environmental conflict management' is the heading of s 4.2.9 of the Government Notice. Under this heading, two means of achieving better conflict management are listed. The first is the use of mediation to resolve disputes and the second is the formation of an environmental court. The fact that these two methods are mentioned can be seen as implying that there is (or was) dissatisfaction (within the KwaZulu-Natal Department of Agriculture and Environmental Affairs) with conventional means of resolving environmental disputes (through the judiciary). This statement can be supported if one looks at the concepts of mediation and the formation of a specialist environmental court in further detail.

According to the Government Notice, the underlying purpose for the use of mediation is to resolve conflicts without the conventional use of the judiciary. The KwaZulu-Natal Department of Agriculture and Environmental Affairs, therefore, appeared to view mediation as an effective tool with which to resolve conflicts. That mediation is a useful tool is not in doubt if one considers the widespread use of mediation (as well as other alternative dispute resolution techniques) in the Land and Environment Court of New South Wales (as discussed

---

<sup>191</sup> Case Number ECH 100/05, Plea and Sentence Agreement available at <http://www.cer.org.za/wp-content/uploads/2013/02/S-v-Acker-Waterbesoedeling.doc>, accessed 26 July 2013.

<sup>192</sup> Department of Justice and Constitutional Development note 1 at 71.

<sup>193</sup> GN 9 of GG 6205, 28 August 2003.

earlier in this dissertation). The fact that mediation is an example of an alternative dispute resolution technique, and thus a process which is different to normal court practice, supports the earlier point that the KwaZulu-Natal Department of Agriculture and Environmental Affairs is dissatisfied with conventional judicial means of resolving disputes. A further benefit of mediation is that it has the potential to save resources, for example in the form of time and money. It can be implied, then, that the KwaZulu-Natal Department of Agriculture and Environmental Affairs is concerned with lengthy time delays and excessive costs associated with litigation around environmental issues.

Even if one views this train of thought with scepticism, the fact that the KwaZulu-Natal Department of Agriculture and Environmental Affairs recommended a specialist environmental court appears further to support the view that there was dissatisfaction with the manner in which environmental law cases were being processed by the judiciary. If one has to look at s 5.3.3 of the Government Notice, the KwaZulu-Natal Department of Agriculture and Environmental Affairs stated that the main reason for calling for a specialist environmental court was because, when cases dealing with environmental law are heard by the generalist courts, 'many court officials do not have the necessary expertise or knowledge to conduct such cases effectively'. This quote demonstrates that a skills deficit is the main reason for calling for a specialist environmental court.

The reasoning by the KwaZulu-Natal Department of Agriculture and Environmental Affairs may be viewed as being overly critical of the judiciary. However, it is submitted that the Department did not intend to undermine the skillset of members of the judiciary. The fact is that environmental law is a relatively new area of the legal jurisprudence, one which is expanding both nationally and internationally and a field which is inexorably linked to the sciences.<sup>194</sup> This unique characteristic of environmental law therefore demonstrates why the judiciary may experience problem in dealing with environmental disputes. Furthermore, it demonstrates that the Department's call for an environmental court is merely an attempt to ensure that justice is reached in all environmental conflicts and that the law is correctly applied to the facts. Having discussed features of this Government Notice, it is necessary critically to explore the history of the Hermanus Environmental Court.

---

<sup>194</sup> E Christie *Finding Solutions for Environmental Conflicts* (2008) 2-3.

### 3.2 The Hermanus Environmental Court

The previous section of this dissertation discussed certain constitutional provisions which, firstly, recognise the high status of the judiciary and, secondly, are implicitly supportive of measures taken to equip the judiciary to successfully resolve disputes. The present writer's analysis is thus that the formation of a specialist environmental court would be consistent with the intention of the above-mentioned constitutional provisions. The previous section also discussed certain policy considerations expressed by the KwaZulu-Natal Department of Agriculture and Environmental Affairs in respect of dealing with environmental conflicts. One method was the use of mediation and the second was the formation of an environmental court. Following a discussion of these two strategies, the Hermanus Environmental Court was briefly mentioned above. The purpose of this section of this dissertation is to analyse the coming into existence (and then the demise) of this specialist court. The lessons learned from this court may provide guidance in the debate about the feasibility of environmental courts in South Africa.

The environmental court in Hermanus was opened with the intention of combating abalone<sup>195</sup> poaching, and came into existence after the government formed a policy based on the TURF ('territorial user rights fishery') policy.<sup>196</sup> In terms of this TURF policy, abalone fishing rights were distributed amongst individuals. The unique feature of the policy was that each fishing license extended to a certain portion of the coast. It was thus a tool to limit the catching of abalone to those who had licences. Furthermore, the hope was that licence-holders (and members of the community in each demarcated area) would be actively involved with government agencies in preventing poaching. The fact that the TURF policy granted licence-holders a sense of possession over 'their' area was thus a mechanism intended to instil a sense of duty toward protecting abalone from being poached.

According to Moolla,<sup>197</sup> the specialist environmental court was formed for four reasons.

first, the normal magistrates courts were overburdened by more "serious" crimes such as murder, rape and so forth. Second, environmental crimes were not considered as "important" as other crimes by the overburdened magistracy. Third, a specialised

---

<sup>195</sup> Abalones are marine snails which are found in warm waters. The shell of the abalone is used to make ornaments. The foot of the abalone is viewed as a delicacy. Information from: *Encyclopædia Britannica Online* 'abalone' (2013) available at <http://www.britannica.com/EBchecked/topic/376/abalone>, accessed 31 October 2013.

<sup>196</sup> S Moolla *Contextualising illegal, unregulated and unreported fishing of marine resources in South African waters* (2008) available at <http://www.feike.co.za/web/news/AbaloneISS%20Paper.pdf> (accessed 12 October 2012).

<sup>197</sup> *Ibid* at 12.

environmental crimes court would be able to deal with poaching crimes efficiently and expeditiously and a clear message could be sent to poachers and their bosses. Fourthly, the environmental crimes court would be staffed with properly trained judicial and prosecutorial officers who were experts in environmental law.<sup>198</sup>

Based on what has been said above, it is immediately apparent that the environmental court was formed primarily to combat abalone poaching. This demonstrates that stakeholders saw the formation of an environmental court as a useful tool with which to combat poaching, and is thus an implicit acknowledgement that environmental courts are useful institutions in facilitating compliance with the law.

If one has to consider the four reasons identified by Moolla<sup>199</sup> for the formation of the specialist court, it is noteworthy that one of the four reasons (having personnel who are knowledgeable in environmental law) was also mentioned by the KwaZulu-Natal Department of Agriculture and Environmental Affairs as a reason for forming an environmental court.<sup>200</sup> It is clearly worrying that arguments have been raised stating that the judiciary is not sufficiently equipped to deal with environmental law. However, this does not seem to be confined to South Africa, as Pring and Pring<sup>201</sup> have indicated that the most common reason which is given for forming an environmental court (or tribunal)

is the need for decision-makers who are knowledgeable experts about national and international environmental law.<sup>202</sup>

One should not, therefore, view South Africa's judiciary in too harsh a light, as this appears to be a worldwide problem. At a minimum, it is hoped that programmes to train members of the judiciary in environmental law (which the South African government is currently doing<sup>203</sup>) will be successful and far-reaching. Such training should be beneficial whether or not a specialist environmental court is formed.

If one now analyses the first two reasons given by Moolla,<sup>204</sup> one can deduce that both of these reasons stem from a warped view of the importance of the environment. The present writer is in no way trying to indicate that other crimes (such as rape and murder) and human rights issues (such as the quest for equality) are not deserving of their high 'status' and political worth. What is being said is that perhaps all of these issues have resulted in environmental issues being too marginalised in the eyes of the public. It is as important to

---

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Moolla note 196.

<sup>201</sup> Pring and Pring note 50 at 14.

<sup>202</sup> Ibid.

<sup>203</sup> Department of Environmental Affairs note 190 at 21.

<sup>204</sup> Moolla note 196 at 12.

focus on these issues as it is to focus on environmental issues. Doing so would conform to the notion of sustainable development, which is legally entrenched in the Constitution.<sup>205</sup> Environmental issues, then, are actually sustainable development issues and should not be marginalised by society.

Vogel and Kessler<sup>206</sup> have indicated that a key factor in ensuring that there is compliance with environmental law is public opinion. They state that public opinion about environmental issues is influenced by two factors: 'strength' and 'salience'. Strength refers to the extent to which people view environmental issues as matters of concern.<sup>207</sup> According to the authors, the strength factor has increased in the United States of America and Europe over the years, proof of which can be seen in the increasing environmental laws.<sup>208</sup>

Salience, on the other hand, refers to the immediate interest that members of the public have in environmental issues.<sup>209</sup> According to the authors, this will vary as it competes with other issues in gaining the attention of the public, such as the state of the economy.<sup>210</sup> During times of environmental disasters, salience can increase.<sup>211</sup> This flux in interest may pose a barrier to those seeking to explore avenues aimed at enhancing the capabilities of the judiciary.

If one has to analyse public opinion in South Africa (in relation to environmental issues) through the paradigm expressed by Vogel and Kessler<sup>212</sup> then one can with relative certainty state that the strength factor should be high in South Africa. The evidence for this would be the increase in environmental laws passed by Parliament. If one has to analyse the salience factor, however, it is clear that, as expressed by Moolla<sup>213</sup> above, crimes such as murder and rape receive more attention than environmental offences.

Looking at the public response to proposals by energy companies to prospect for shale gas in the Karoo, one can deduce that the issue is gaining a lot of interest. This indicates that 'salience' is present. This issue is multi-dimensional, because if sufficient quantities of shale

---

<sup>205</sup> S 24(b)(iii). 'Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures *that secure ecologically sustainable development and use of natural resources while promoting justifiable social and economic development*'. (Own emphasis).

<sup>206</sup> D Vogel and T Kessler 'How Compliance Happens and Doesn't Happen Domestically' in EB Weiss and HK Jacobson (eds) *Engaging Countries: Strengthening Compliance with International Environmental Accords* (1998) 30.

<sup>207</sup> *Ibid* at 31.

<sup>208</sup> *Ibid*.

<sup>209</sup> *Ibid*.

<sup>210</sup> *Ibid*.

<sup>211</sup> *Ibid* at 30-31.

<sup>212</sup> *Ibid*.

<sup>213</sup> Moolla note 196 at 12.

gas are found and extracted, South Africa's economy will benefit.<sup>214</sup> Furthermore, the process will be a new energy source, in addition to providing jobs.<sup>215</sup> At the same time, there are concerns that the extraction process could adversely affect the water in the Karoo.<sup>216</sup> This may qualify as a *potential* disaster according to Vogel and Kissler.

The latest development in this issue is that government has proposed regulations pertaining to the extraction of shale gas.<sup>217</sup> This has caused opposition to any extraction in the Karoo, with organisations such as AfriForum threatening to pursue legal action.<sup>218</sup> This demonstrates that the 'strength' factor is present. Using this example, one can deduce that the public is aware of and involved in the issue of mining in the Karoo. The presence of both 'strength' and 'salience' indicate the extent to which the public, in this case, is playing an oversight role of government action. (AfriForum's intention to pursue legal action confirm this).

Certain activities or issues may not qualify as disasters (or potential disasters as seen in the Karoo example above). This may result in such issues not receiving widespread publicity. However, it is just as important for these activities (which are largely outside of the public domain) to comply with all the laws. If the public plays an influential role in these 'other' environmental issues (which may not be classified as disasters and which do not fall under the definition of 'salient' as described by Vogel and Kissler) then the hope is that environmental disasters would be averted. It is in this vein that institutions such as environmental courts can assist. They can assist in ensuring the practice of sustainable development in all legal disputes, not just environmental disasters.

Of the four reasons that Moolla<sup>219</sup> has given for forming an environmental court in Hermanus, only the third reason remains to be discussed. This reason states that the environmental court would be efficient in dealing with environmental crimes and would at the same time have a strong deterrent effect on poachers.<sup>220</sup> That specialist courts can be

---

<sup>214</sup> E Cropley 'Karoo fracking: Water, wealth and whites' (2013) *Mail & Guardian* available at <http://mg.co.za/article/2013-10-28-karoo-fracking-water-wealth-and-whites>, accessed 29 October 2013.

<sup>215</sup> L Prinsloo 'Fracking in the Karoo takes a big step forward' (2013) *BusinessDay Live* available at <http://www.bdlive.co.za/business/2013/10/20/fracking-in-the-karoo-takes-a-big-step-forward>, accessed 29 October 2013.

<sup>216</sup> Cropley note 214.

<sup>217</sup> Proposed Technical Regulations for Petroleum Exploration and Exploitation, GN 1032 of GG 36938, 15 October 2013.

<sup>218</sup> L Donnelly 'Shabangu presents new regulations for fracking' (2013) *Mail & Guardian* available at <http://mg.co.za/article/2013-10-10-shabangu-presents-new-regulations-for-fracking>, accessed 29 October 2013.

<sup>219</sup> Moolla note 196 at 12.

<sup>220</sup> *Ibid.*

efficient in applying the law is supported by Preston.<sup>221</sup> According to Preston,<sup>222</sup> two objectives to be gained through the formation of a specialist environmental court are rationalisation and specialisation.

Rationalisation essentially means that all environmental issues are resolved in a single location.<sup>223</sup> It should be realised, however, that Preston's views regarding rationalisation were made in the context of the Land and Environment Court of New South Wales, a court which is expressly given quite a wide jurisdiction. In the case of a court with very limited jurisdiction, such as the Hermanus Environmental Court which was formed to address criminal transgressions, it is debatable whether rationalisation can be achieved.

A possible argument against rationalisation being achieved in a court with limited jurisdiction is that it may not be a seat for the hearing of all possible judicial cases which arise from a single incident. It may hear a criminal case, but not be able to hear a civil case arising from the same incident. On the one hand, such courts offer the advantage of having specialist adjudicating (and being counsel) in a finite legal area. Rationalisation is therefore achieved within the specific ambit of the jurisdiction of a specialist court. In the case of the Hermanus Environmental Court, this was criminal environmental law.

The second objective for forming an environmental court, as highlighted by Preston,<sup>224</sup> is specialisation. Specialisation refers to the fact that not only does an environmental court have exclusive jurisdiction in certain disputes, but also that its personnel may be experts in environmental law (or environmental science, depending on whether non-legal experts are employed by the court). Linked to the fact that experts may exist within an environmental court is the fact that, where capacity building occurs (pertaining to environmental law) this would be limited (at first) to those who have a direct benefit. By virtue of the fact that members of environmental courts will be the first to receive any capacity building programmes, Amirante<sup>225</sup> has highlighted that governments can in fact save money. This is because the entire judiciary need not receive such knowledge (at least at an early stage). This, according to Amirante, would result in governments saving money because instead of training *all* members of the judiciary, the government would prioritise those who are in direct need of such training (such as members of an environmental court). Where resources are

---

<sup>221</sup> Preston note 144 at 604.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid at 605.

<sup>224</sup> Ibid at 604.

<sup>225</sup> Amirante note 129 at 446.

scarce, this argument makes excellent economic sense. At this point the present writer must state that it is in no way suggested that other members of the judiciary (who are not dealing with environmental law on a regular basis) must be excluded entirely from capacity-building programmes dealing with environmental law. What is being said is that it is more prudent to transfer such specialist knowledge of environmental first to those who are in direct need of it, and who will apply it on a consistent basis, such as judges and prosecutors.

One can draw a similarity between this idea and the training programme for Environmental Management Inspectors (EMIs). EMIs are appointed in terms of s 31B and s 31C of NEMA,<sup>226</sup> and are to be found in all three spheres of government (municipal, provincial and national). EMIs have mandates of investigation and enforcement, and can issue administrative fines.<sup>227</sup> In addition, they can be of assistance to prosecutors.<sup>228</sup> Potential EMIs are required to complete a training course.<sup>229</sup> A copy of the curriculum is provided in Annex III of this dissertation.<sup>230</sup> Some areas of the curriculum include environmental law, administrative law, constitutional law and criminal law. Of note is that measures to train magistrates in environmental law have been explored.<sup>231</sup> Training of magistrates in other areas of the law has also occurred. In response to the large amount of sexual offences cases, for instance, approximately 200 regional magistrates received training earlier this year on specific statutes dealing with sexual offences.<sup>232</sup>

Related to this training is the re-establishment of specialised courts aimed at hearing sexual offences cases.<sup>233</sup> The Department of Justice and Constitutional Development plans to open twenty-two courts in total.<sup>234</sup> The re-establishment of a specialist court indicates that policy

---

<sup>226</sup> Act 107 of 1998.

<sup>227</sup> 'About Environmental Management Inspectorate (EMI)' available at [https://www.environment.gov.za/?q=content/about\\_environmental\\_management\\_inspectorate](https://www.environment.gov.za/?q=content/about_environmental_management_inspectorate), accessed 21 July 2013.

<sup>228</sup> Ibid.

<sup>229</sup> Qualification Criteria, Training and Identification of, and Forms to be Used by, Environmental Management Inspectors; Regulation 2(1) GN R494 in GG 28869 of 2 June 2006.

<sup>230</sup> Information regarding the curriculum was obtained from 'Environmental Management Inspectorate (EMI) Basic Training available at [https://www.environment.gov.za/?q=content/environmental\\_management\\_inspectorate\\_basicttraining](https://www.environment.gov.za/?q=content/environmental_management_inspectorate_basicttraining), accessed 21 July 2013.

<sup>231</sup> 'SA: Sonjica: Release of the National Environmental Compliance and Enforcement Report 2008/9, Pretoria' *Polity.org.za* available at <http://www.polity.org.za/article/sa-sonjica-release-of-the-national-environmental-compliance-and-enforcement-report-200809-pretoria-25112009-2009-11-25>, accessed 21 July 2013.

<sup>232</sup> F Rabkin 'Magistrates to get training' *BusinessDay Live* 14 March 2013 available at <http://www.bdlive.co.za/national/law/2013/03/14/magistrates-to-get-training>, accessed 22 July 2013.

<sup>233</sup> Department of Justice and Constitutional Development 'Justice in action as Minister Radebe launches the Butterworth Sexual Offences Court, Eastern Cape' (23 August 2013) available at [http://www.justice.gov.za/m\\_statements/2013/20130823-sxoc-butterworth.html](http://www.justice.gov.za/m_statements/2013/20130823-sxoc-butterworth.html), accessed 31 October 2013.

<sup>234</sup> Ibid.

can change over time. The Department of Justice and Constitutional Development created the Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (MATTSSO). MATTSSO then prepared a report which discussed the feasibility of sexual offences courts.<sup>235</sup> The report is noteworthy for the fact that it clearly details the reasons for concluding that sexual offences courts should be re-established.<sup>236</sup> It also lists challenges to the success of such specialist courts, such as limited court space, too few training programmes and problems in the management of court rolls.<sup>237</sup> These challenges may also be applicable in any debate pertaining to the establishment of environmental courts in South Africa. The report recommends that specialised courts should be established through statute.<sup>238</sup> This ensures uniformity amongst all the specialised courts.<sup>239</sup>

It is submitted that the report provides a helpful template should government decide to reconsider specialist environmental courts. This report (which favoured the formation of specialist courts dealing with sexual offences) together with the actual opening of the first court have persuasive value in the debate regarding environmental courts. It is submitted that it will be now be easier to present an argument for a specialist court. Furthermore, the Department of Water and Environmental Affairs will benefit from another Department having been through a process regarding a similar issue (specialised courts).

If calls for environmental courts are considered by the Department of Water and Environmental Affairs, it is suggested that they emulate the Department of Justice and Constitutional Development by appointing a special task team to prepare a report on the feasibility of environmental courts. The members of MATTSSO were from diverse backgrounds, such as the judiciary, the National Prosecuting Authority, the Foundation for Human Rights and Legal Aid of South Africa.<sup>240</sup> The Department of Water and Environmental Affairs can likewise seek the assistance of a variety of stakeholders. Doing so will allow for rigorous debate and a more informed final decision.

Where a specialist court is efficient, as will be argued in the analysis of the Hermanus Environmental Court later in this dissertation, deterrence can be achieved. It is worth remembering that deterrence was one of the four reasons for the creation of the Hermanus

---

<sup>235</sup> Department of Justice and Constitutional Development *Report on the Re-Establishment of Sexual Offences Courts* (2013) available at <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>, accessed 25 August 2013.

<sup>236</sup> *Ibid* at Chapter 7.

<sup>237</sup> *Ibid*.

<sup>238</sup> *Ibid* at 96.

<sup>239</sup> *Ibid*.

<sup>240</sup> *Ibid* at i.

Environmental Court.<sup>241</sup> Such deterrence can occur where the court attaches weight to environmental disputes, and treats any environmental crime as serious. In a specialist environmental court, this would arguably occur far more than in a generalist court, simply because the decision-makers in an environmental court possess the knowledge to understand the seriousness of environmental crimes. Furthermore, by hearing all environmental cases falling within the court's jurisdiction under one roof, the publicity of the court would increase, which would, in turn, create awareness about environmental crimes.

On a more basic level, the simple fact that a specialist environmental court is created would create awareness about environmental issues, and serve to inform the public in general (and poachers and other transgressors in particular) that the government regards environmental issues as serious. Lastly, it is submitted that a court can play a further role in deterring transgressors if prosecutions within it are successful. It is therefore clear that deterrence is closely linked to creating awareness. This awareness would serve to heighten the weight that the public gives to environmental issues which, as Vogel and Kessler<sup>242</sup> have demonstrated, is crucial to ensuring compliance and enforcement in environmental law.

In considering the above points, it is submitted that a common requirement for the success of both generalist courts and environmental courts is the need for skilled personnel. Thus, enhancing the education, capacity and experience of members of the judiciary (in relation to environmental law) should be a key strategy in facilitating environmental compliance within the realm of the judiciary.

Having discussed possible benefits of a specialist environmental court, it remains to discuss the Hermanus Environmental Court in greater detail. As a starting point, it is noteworthy to state that the formation of the court in February of 2003 was described as 'groundbreaking',<sup>243</sup> because it was seen as a measure to increase the priority of abalone related crimes, ensure an increase in the convictions for those crimes and address the problem of lenient sentences handed down by judicial officers.<sup>244</sup>

The abalone industry has been described 'as one of the most difficult fisheries to manage'.<sup>245</sup> The catching of this marine resource has led to disputes between enforcement officers,

---

<sup>241</sup> Moolla note 196 at 12.

<sup>242</sup> Vogel and Kessler note 206 at 30.

<sup>243</sup> M Hauck and M Kroese 'Fisheries compliance in South Africa: A decade of challenges and reform 1994-2004' (2006) 30 *Marine Policy* 78.

<sup>244</sup> *Ibid.*

<sup>245</sup> M Hauck 'Crime, environment and power: Revisiting the abalone fishery' (2009) 2 *SACJ* 233.

commercial fishermen, informal fishermen and communities situated near abalone rich waters.<sup>246</sup> The source of this problem is the high desirability, and consequent demand for, abalone, with over 95% of abalone being exported to South-East Asia legally as well as illegally.<sup>247</sup> This probably explains why black market trade is so rife within the abalone industry.<sup>248</sup> Not only is such demand reducing stock of abalone, but it can also be seen as a gatekeeper crime, meaning that it is linked to other crimes such as human trafficking, drugs, organised crime and trade in counterfeit products.<sup>249</sup> This demonstrates that environmental issues are not isolated from other issues seen in modern society. Hence, combating environmental issues (through measures such as a specialist environmental court) can result in widespread change, which reinforces the concept of sustainable development.

It is important to see the Hermanus Environmental Court within the context of other measures aimed at combating abalone poaching. Other measures taken by the government include the passing of a policy document regarding abalone, in addition to the application of legislation such Marine Living Resources Act.<sup>250 251</sup> Common between both the policy document and the legislation is the fact that they aim to distribute fishing rights, thereby ensuring some equity between formal and informal fishermen in the abalone market.<sup>252</sup> Disappointingly, however, this noteworthy aim was not realised.<sup>253</sup> The Marine Living Resources Act (promulgated in 1998) has been described as too cumbersome and only serving to benefit a few individuals in local communities.<sup>254</sup> In addition, the policy document (which was published five years later) has been unable to transfer its theoretical aims to practice.<sup>255</sup>

Other methods (besides the formation of an environmental court) were pursued by the government in an effort to increase compliance with the law.<sup>256</sup> As such, the government formed a special investigation unit and engaged the help of other governmental branches such as the South African National Defence Force.<sup>257</sup> One can witness South Africa's commitment to enforcing the rule of law in its assisting of Australia in the hot pursuit and arrest of a

---

<sup>246</sup> Ibid at 234.

<sup>247</sup> Moolla note 196 at 5.

<sup>248</sup> Hauck note 245 at 233.

<sup>249</sup> Moolla note 196 at 5.

<sup>250</sup> Act 18 of 1998.

<sup>251</sup> Hauck note 245 at 238.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> Ibid at 238.

<sup>255</sup> Ibid at 239.

<sup>256</sup> Hauck and Kroese note 243 at 77-79.

<sup>257</sup> Ibid.

certain Uruguayan vessel (the 'Viarsa 1') which was discovered fishing illegally in Australian waters.<sup>258</sup>

Despite progressive methods to combat abalone poaching, enforcement agencies were closed down and strategies were no longer followed.<sup>259</sup> This was the case despite the fact that the enforcement agencies had high success rates.<sup>260</sup> This hints that political will is necessary for the longevity of a programme, even a successful one. Success in combatting environmental issues therefore depends on the government being consistent in its approach. The important role that government strategy can play will also be seen in the discussion of the Hermanus Environmental Court (below), which was closed despite being seen as a success. Hence, there are similarities between the closure of the Hermanus Environmental Court and the halting of other enforcement strategies aimed at increasing compliance with the law. One can conclude, therefore, that methods aimed at enhancing compliance with environmental law (such as the formation of a specialist court, for instance) must exist contemporaneously with political will.

It remains to analyse the Hermanus Environmental Court in closer detail than has been done above. As a starting point, it should be pointed out that the court was seen as a pilot project,<sup>261</sup> and was not created through a legislative process.<sup>262</sup> This pilot project was a joint effort between Marine and Coastal Management (part of the then Department of Environmental Affairs and Tourism),<sup>263</sup> the National Prosecuting Authority and the Directorate of Public Prosecutions.<sup>264</sup> This appeared to be a national project, as the Department of Justice and Constitutional Development, in its *Annual Report 2003/04*,<sup>265</sup> viewed the formation of such a specialist environmental court as a target which they wished to achieve.<sup>266</sup> The same document also states that a 'needs assessment'<sup>267</sup> was to be

---

<sup>258</sup> Australian Government 'Poachers pursued over 7, 000 kilometers' (2004) 6 *Australian Antarctic Magazine* available at <http://www.antarctica.gov.au/about-us/publications/australian-antarctic-magazine/2001-2005/issue-6-autumn-2004/feature/poachers-pursued-over-7-000-kilometers>, accessed 30 October 2013.

<sup>259</sup> Moolla note 196 at 13.

<sup>260</sup> Ibid at 12-13.

<sup>261</sup> PJ Snijman 'Hermanus' Environmental Court: Does it protect the environment?' (2005) December *News & Views for Magistrates* 2.

<sup>262</sup> TRAFFIC *Environmental Courts Prove To Be Effective* 2 available at [www.traffic.org/non-traffic/Stop-illegal-fishing-case-study-1.pdf](http://www.traffic.org/non-traffic/Stop-illegal-fishing-case-study-1.pdf), accessed 27 October 2012.

<sup>263</sup> See SANBI *National Biodiversity Assessment 2011: Technical Report. Volume 4: Marine and Coastal Component* (2012) 10 available at [http://bgis.sanbi.org/nba/NBA2011\\_TechnicalReport\\_Vol4Marine.pdf](http://bgis.sanbi.org/nba/NBA2011_TechnicalReport_Vol4Marine.pdf), accessed 1 November 2013. According to this document, the Marine and Coastal Management branch separated in 2009 into an Oceans and Coast Branch (within the Department of Water and Environmental Affairs) and a Fisheries Branch (within the Department of Agriculture, Forests and Fisheries).

<sup>264</sup> Ibid.

<sup>265</sup> Department of Justice and Constitutional Development *Annual Report 2003/04* available at <http://www.justice.gov.za/reportfiles/anr200304/200304%20content.htm>, accessed 19 October 2012.

<sup>266</sup> Ibid at 27.

conducted to look at the viability of forming other priority courts.<sup>268</sup> This indicates that government policy at that time was to look favourably at specialist courts, and consider establishing them where required.

The Hermanus Environmental Court proved to be immediately effective; in the first year of its existence there was a 70% conviction rate,<sup>269</sup> which thereafter increased to 80% over the first 30 months of its existence.<sup>270</sup> A significant factor which contributed to the success of the court was that its wide jurisdiction, which extended throughout the Western Cape.<sup>271</sup>

Furthermore, according to Snijman,<sup>272</sup> the court has also been responsible for benefits other than impressive conviction rates. Firstly, the handling of evidence was professional,<sup>273</sup> thereby ensuring that those accused of crimes could not escape through technicalities. Secondly, public awareness about environmental issues was increased.<sup>274</sup> As has been demonstrated earlier in this chapter, public awareness is a significant factor in ensuring environmental compliance, and one which can influence political decisions. Thirdly, the court served to complement other strategies which were put in place to combat abalone poaching.<sup>275</sup> Fourthly, by utilising criminal sanctions (and that, too, quite successfully if conviction rates are analysed) deterrence was achieved.<sup>276</sup> This was complemented by the fact that some accused testified against others in an effort to obtain leniency in sentencing.<sup>277</sup> This demonstrates that the accused themselves realised the effectiveness of the court. Lastly, the court was not pigeon-holed into hearing only abalone-related cases; other environmental law cases were heard by the court, such as pollution offences.<sup>278</sup>

Despite the benefits that the court provided, it was closed in 2007.<sup>279</sup> According to the Department of Justice, in a report published in 2005, it was not cost effective to run this

---

<sup>267</sup> Ibid at 71.

<sup>268</sup> Ibid at 48.

<sup>269</sup> TRAFFIC note 262 at 1.

<sup>270</sup> Snijman note 261 at 2.

<sup>271</sup> TRAFFIC note 262 at 2.

<sup>272</sup> Snijman note 261 at 2.

<sup>273</sup> Ibid.

<sup>274</sup> Ibid.

<sup>275</sup> Ibid.

<sup>276</sup> Ibid at 3.

<sup>277</sup> Ibid.

<sup>278</sup> Ibid at 3.

<sup>279</sup> Parliamentary Monitoring Group *Hearing on the report of the Auditor-General on a performance audit of the handling of confiscated abalone by Department of Environmental Affairs & Tourism* 6 October 2009 available at <http://www.pmg.org.za/report/20091007-hearing-report-auditor-general-performance-audit-handling-confiscated>, accessed 26 September 2012.

regional court in Hermanus because 95% of the cases were classified as ‘not serious’.<sup>280</sup> This would suggest that, according to the Department of Justice, the closure of the court was due to financial factors as the cases heard by the court were not important enough to warrant the existence of the court. This can, however, be debated.

According to the Department of Justice, a case is classified as ‘serious’ if the monetary worth of the goods amounts to one million Rand or where there are multiple accused.<sup>281</sup> This definition of what constitutes ‘serious’ is, it is submitted, extremely arbitrary and irrational. This view is shared by the head of the nature conservation department of Overstrand Municipality, who stated that:

if a poacher is found with only R100 000 worth of abalone, it doesn’t mean he’s not a serious criminal, it could just mean he’s had a bad week’s poaching.<sup>282</sup>

The placing of such an arbitrary value in order to determine the seriousness of an environmental crime indicates that the Department of Justice does not truly appreciate the threat to the environment posed by poaching. This is clearly worrying, and (it is submitted) does not bode well for future calls for an environmental court.

The view held by the Department of Justice (regarding the usefulness of the Hermanus Environmental Court) appears to stand in contrast to the views expressed by other interest groups who have had dealings with the court. The prosecutor in the Hermanus Environmental Court, for example, stated that:

if we don’t have an environmental court with a prosecutor who specialises in environmental law, we will go back to what it used to be, with rich poachers hiring expensive lawyers who could run circles around the prosecutors and get these chaps off.<sup>283</sup>

This quote indicates that it is necessary to have prosecutors (as well as magistrates and judges) who are skilled in environmental law, whether within the context of a specialist environmental court or of a generalist court. In order for the justice system to be fair, it would appear that all those involved in the judiciary, not just the ‘expensive lawyers’, require skills and knowledge of environmental law. Perhaps consideration could be given to making environmental law a compulsory module at law schools and in justice training colleges? This will benefit lawyers working in all the various judicial sectors.

---

<sup>280</sup> M Gosling ‘Downgrading green court seen as setback’ *IOL* 16 November 2005 available at <http://www.iol.co.za/news/south-africa/downgrading-green-court-seen-as-setback-1.258911?ot=inmsa.ArticlePrintPageLayout.ot>, accessed 12 September 2012. (Own emphasis).

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.*

The Director-General of the Department of Environmental Affairs is also quoted in the media as being supportive of the Hermanus Environmental Court because it resulted in an increase in prosecutions of environmental crimes.<sup>284</sup> This opinion is further reinforced by the views of a municipal official involved in an anti-poaching programme,<sup>285</sup> as well as member of a residents' group involved in combating poaching.<sup>286</sup>

Glazewski, who was cited in Gosling's<sup>287</sup> article pointed out the irrationality of closing the court in light of the ever-increasing amount of environmental legislation being passed. This implicitly demonstrates that the large number of environmental laws justifies the establishment of an environmental court. Amirante<sup>288</sup> regards the application of environmental law as crucial. He stated that:

if the historical development of environmental law within the last fifty years is considered, it becomes apparent that the enforcement of the vast and articulated normative corpus of environmental legislation appears to be more important than the creation of new laws.<sup>289</sup>

This quote demonstrates a perception that once environmental laws have been passed, enforcement of those laws is a priority. An environmental court can assist in enforcement. Proof of this is seen in the fact that the Hermanus Environmental Court was so efficient that poachers were documented as relocating their illegal activities to the Eastern Cape, outside of the jurisdiction of the court in Hermanus, prompting a district environmental court to be established in Port Elizabeth.<sup>290</sup>

Kidd and Hoor, writing prior two years prior to the closure of the Hermanus Environmental Court, state that *perlemoen* (abalone) poaching within the Cape region was causing social as well as environmental harm. They view the formation of environmental courts in Hermanus and Port Elizabeth as one mechanism in which rampant poaching could be countered.<sup>292</sup> The courts, therefore, represent an institutional solution to the problem. Kidd and Hoor also refer to another strategy which could tackle poaching within the region. This

---

<sup>284</sup> Ibid.

<sup>285</sup> Ibid. According to the municipal official, 'it is short-sighted to judge the seriousness of the cases by the value of the confiscated goods'. The member of the resident's group stated that

<sup>286</sup> M Gosling 'Future of SA's green court in the balance' *IOL* 17 April 2006 available at <http://www.iol.co.za/news/south-africa/future-of-sa-s-green-court-in-the-balance-1.274307#.UEScgMHiYts>, accessed 12 August 2012. The individual stated that the residents' group has 'been working in the anti-poaching activities for 10 years now, and we know what a difference the green court has made'.

<sup>287</sup> Ibid.

<sup>288</sup> Amirante note 129 at 443.

<sup>289</sup> Ibid.

<sup>290</sup> TRAFFIC note 262 at 2.

<sup>291</sup> M Kidd and S Hoor 'Punishing Perlemoen Poaching – Developments Both Recent and Possibly Future?' (2005) *Obiter* 401.

<sup>292</sup> Ibid at 402.

is the amendment of laws, in order to make offences much more costly for offenders.<sup>293</sup> This, it is submitted, represents a policy solution to the problem. Hence, both institutional and policy changes can be pursued in an effort to increase compliance with the law. It is submitted that there is a symbiotic relationship between these two mechanisms. For example, it will be regarded as foolish if the government were to establish (at great expense) a specialised court dealing with a certain legal area when the legal provisions in that field are scanty and the policy is not yet developed. Such a situation will likely provoke outrage. Similarly, if policy is developed, but there the judicial institutions are incapable of effectively implementing such policy (when hearing cases) then the policy will be regarded as having failed (or, at best, as being effective only on paper). In the case study conducted by Kidd and Hooctor,<sup>294</sup> they express satisfaction with the manner in which the courts sentenced offenders. Reading into this, one can infer that that there was effective application of the law (the policy) by members of the judiciary (who are part of the judicial infrastructure). One can also infer from this that it is imperative that those within the judiciary have the necessary capacity and skills to effectively apply the law and thereby ensure that policy is connected with reality. The notion of capacity building will be referred to in Chapter 3.3.

The Hermanus Environmental Court, representing an institutional strategy to combat poaching, was closed. It is useful to try to explore the reasons behind the closure. In 2007, the Minister of Environmental Affairs was questioned about the closure of the Hermanus Environmental Court.<sup>295</sup> The Minister's response was that the Department of Justice was responsible for the closure. As to the reason for the closure, the Minister stated that 'a cost/benefit analysis *could* have been conducted'.<sup>296</sup> That the Minister is uncertain as to the exact reasons for the court being closed is of concern, as it would appear that there was no proper communication between the Department of Justice and the Department of Environmental Affairs.

According to one media source, the court was closed because 'the current justice ministry does not favour specialist courts'.<sup>297</sup> Another media report indicates that the court was closed because of cost issues, since the salary of a regional magistrate in the Hermanus

---

<sup>293</sup> Ibid at 402.

<sup>294</sup> Ibid at 403.

<sup>295</sup> Hansard *Internal Question Paper No. 38 of 2007*, Question No. 1648, 19 October 2007 available at [http://www.environment.gov.za/sites/default/files/parliamentary\\_updates/question1648.pdf](http://www.environment.gov.za/sites/default/files/parliamentary_updates/question1648.pdf), accessed 19 October 2012.

<sup>296</sup> Ibid. Own emphasis.

<sup>297</sup> Gosling note 286.

Environmental Court is greater than that of a district magistrate.<sup>298</sup> This appears to correspond to the statement made in Parliament by the (then) Minister of Environmental Affairs that a cost/benefit analysis was conducted. It would therefore appear that, despite the success-rate posed by the court, the cost/benefit analysis concluded that the costs to maintain the Hermanus Environmental Court were too high.

Following the closure of the court, a 2009 media report indicated that the then Minister of Water and Environmental Affairs, Buyelwa Sonjica, confidently predicted the establishment of dedicated environmental courts.<sup>299</sup> These dedicated environmental courts were to be within the existing judicial infrastructure, with environmental cases being heard on specific days every month. This demonstrates that dedicated environmental courts were still seen as viable and effective measures to enhance environmental compliance (by the Minister of Water and Environmental Affairs, at least).

However, this initiative would appear since then to have been scuppered. In 2011 the Department of Environmental Affairs published its *Annual Report*.<sup>300</sup> Under the section headed 'Environmental Quality and Protection' one performance indicator was the establishment of environmental courts or having dedicated environmental prosecutors in 2011.<sup>301</sup> The document mentions that there were pilot courts and that a dedicated environmental prosecutor was earmarked. However, the achievement of these two targets was not possible because of the outcomes of feasibility studies, which 'indicated that environmental courts were not an appropriate mechanism to pursue and that other options should be explored'.<sup>302</sup> No further information is given in the document. In the 2012 edition of the *Annual Report* there is no reference to environmental courts,<sup>303</sup> possibly indicating that environmental courts are no longer seen as a strategy by the Department and that their establishment is not a priority.

This may raise the question as to whether environmental courts are an extinct species in the South African context. Providing a definite answer is difficult. In light of what has been

---

<sup>298</sup> Gosling note 280.

<sup>299</sup> E Swanepoel 'SA to have dedicated environmental courts next year-Sonjica' *Polity.org.za* 25 November 2009 available at <http://www.polity.org.za/article/sa-to-have-dedicated-environmental-courts-next-year-sonjica-2009-11-25-1>, accessed 29 July 2013.

<sup>300</sup> Department of Environmental Affairs note 190 at 21.

<sup>301</sup> *Ibid.*

<sup>302</sup> *Ibid.*

<sup>303</sup> Department of Environmental Affairs *Annual Report 2011/12* (2012) available at [https://www.environment.gov.za/sites/default/files/docs/environmental\\_affairs201112\\_annualreport.pdf](https://www.environment.gov.za/sites/default/files/docs/environmental_affairs201112_annualreport.pdf), accessed 21 October 2012).

discussed so far in this chapter, it would appear that environmental courts are not aligned to governmental strategy and policy. Governmental policy, however, can change. It would thus be short-sighted to make a blanket statement that environmental courts will never again be part of the South African judicial landscape.

What is (according to the present writer) of more concern is the fact that the South African government has not made public its reasons for not wishing to pursue environmental courts.<sup>304</sup> Further information, such as the factors used in the cost/benefit analysis conducted prior to the closing of the Hermanus Environmental Court, will prove helpful in understanding the argument to not pursue environmental courts. Such transparency can lead to informed debates regarding environmental courts, and greater oversight of any governmental policy regarding environmental courts.

To demonstrate the value of transparent government decisions, one can look at the experience in Scotland, where the establishment of environmental courts was considered by the Scottish Executive. The Environment Group, part of Scotland's Environment and Rural Affairs Department, made public (in a document) its reasons for rejecting the formation of an environmental court.<sup>305</sup> The document gives an insight into the reasoning behind the decision to not establish environmental courts. By reading this document, one is able to understand the governmental policy in the matter (even if one does not agree with it). In addition, one is able to make an informed critique of such policy, thereby facilitating objective debates and ultimately more legitimate decisions. This highlights the value of clear decision-making and provision of information.

In the present writer's opinion, the formation of an environmental court would not automatically result in enhanced environmental compliance. This is due to the fact that, again, in the writer's opinion, competent individuals are needed in order for an environmental court (or any specialist court) to be deemed a success. Hence, a pragmatic approach would be to focus on increasing capacity amongst lawyers within the judicial system. Such training will provide the nucleus for any further strategies aimed at enhancing environmental compliance and enforcement, such as having dedicated environmental courts. The Environmental Management Inspectorate, for example, has assisted in training prosecutors with the handling

---

<sup>304</sup> Because of this dearth of official information, media sources (and not governmental publications) have been the primary source of information in unpacking the history of the Hermanus Environmental Court for this dissertation.

<sup>305</sup> Scottish Executive Environment Group note 120.

of criminal environmental cases.<sup>306</sup> Methods to increase the knowledge of magistrates are also occurring, as demonstrated by a governmental publication which recognises that magistrates ‘are likely to adjudicate more prosecutions on the environment on a broader range of violations’.<sup>307</sup> The aim of this publication is to provide magistrates with an overview of environmental law, in order to assist them in courtroom application. It is submitted that, a positive outcome of this exposure is that magistrates may recognise the need for environmental law, and their role in ensuring that the objectives of environmental statutes are reached.

---

<sup>306</sup> Department of Environmental Affairs *National Environmental Compliance and Enforcement Report 2011-12*, 62 available at [https://www.environment.gov.za/sites/default/files/docs/necer2011\\_12.pdf](https://www.environment.gov.za/sites/default/files/docs/necer2011_12.pdf), accessed 16 May 2013.

<sup>307</sup> Department of Water and Environmental Affairs, Department of Justice and Constitutional Development and Environmental Counsel note 187 at 11.

### 3.3 The future of environmental courts in South Africa: an extinct species?

The fact that, even following the closure of the Hermanus Environmental Court, dedicated environmental courts were seen by the South African government<sup>308</sup> as a possible strategy to facilitate environmental compliance indicates that dedicated environmental courts not only pose benefits, but that they can materialise in South Africa. Nonetheless, the feasibility study conducted in 2011, as well as the cost/benefit analysis which *could* have been conducted prior to the closure of the Hermanus Environmental Court,<sup>309</sup> would appear to put a rest to any future calls for a dedicated environmental court. Be that as it may, what is (according to this writer) of more concern is the fact that the South African government has not made public its reasons for not wishing to pursue environmental courts.<sup>310</sup> As such, the conclusions reached by the present author are inferred from media sources rather than official statements. More information, especially detailing the factors used in the cost/benefit analysis, will prove helpful in understanding the argument to not pursue environmental courts. Such information will also be useful to uncover obstacles affecting the judiciary in general. If this information is made public, there is a greater possibility that potential solutions can be raised and interrogated.

By way of example, the establishment of environmental courts were considered by the Scottish Executive. The Environment Group, part of Scotland's Environment and Rural Affairs Department, made public (in a document) its reasons for rejecting the formation of an environmental court.<sup>311</sup> By giving reasons for not pursuing environmental courts, the public is made aware of the issues. This can be a stimulus for debate and, ultimately, for a better decision. In contrast, the South African government has provided minimal information concerning its reasons for rejecting environmental courts, with what little information being available being sourced through the media.

Based on the fact that calls for environmental courts have failed to yield permanent judicial changes, it appears to be logical that, in the short term at least, there appears to be very little likelihood that environmental courts will be formed. At the same time, governmental policy

---

<sup>308</sup> Swanepoel note 277.

<sup>309</sup> Hansard note 295.

<sup>310</sup> Proof of this is the fact that media sources (and not governmental publications) were the primary source of information in unpacking the history of the Hermanus Environmental Court.

<sup>311</sup> Scottish Executive Environment Group note 120.

may shift. Proof of this can be seen in the re-establishment of specialised courts dealing with sexual offences.<sup>312</sup>

Environmental courts are not a magical elixir to ensure that there is effective compliance with environmental law.<sup>313</sup> Furthermore, the existence of a specialist court is often dependent on government policy (which can fickle). Both the re-establishment of Sexual Offences Courts<sup>314</sup> and the closure of the Hermanus Environmental Court are proof of the important role that government policy plays in the existence of specialist courts. One commentator made the point that the re-establishment of the court may not result in actual change on the ground because '[w]e have fantastic structures but they're hollow'.<sup>315</sup> This may appear to be an overly pessimistic statement. However, it does serve to caution stakeholders that the success of specialist courts depends on the performance of court officials.

Kidd<sup>316</sup> has noted that court officials such as prosecutors and magistrates very often do not have the necessary expertise required for environmental cases. This is not an indictment on such court officials, as 'environmental prosecutions are few and far between'.<sup>317</sup>

To enhance the expertise of members of the legal system, one can focus on methods to increase knowledge of environmental law. This would do much to enhance the manner in which environmental law is applied in courts. It is submitted that knowledge, as opposed to institutions such as specialised courts, has greater permanency. Furthermore, knowledge can be seen as the foundation for the success of an institution. With environmental issues becoming more prominent in society, there is the very real possibility that future law graduates would be dealing with environmental law on a more frequent basis. Hence, measures can be put in place to make environmental law a compulsory module in law degrees.

Even if environmental courts are established, competent individuals would be required to ensure efficient running of the specialist court. Hence, a pragmatic approach would be to focus on increasing capacity amongst lawyers within the judicial system. Training and knowledge is, it is submitted, the nucleus for any further strategies aimed at enhancing environmental compliance and enforcement, such as having dedicated environmental courts.

---

<sup>312</sup> Discussed in Chapter 3.2 above at 46-47.

<sup>313</sup> Proof can be seen in the disadvantages of such specialist courts.

<sup>314</sup> Department of Justice and Constitutional Development note 233 and 235.

<sup>315</sup> S McLoughlin 'It's war... and innovation is key' *The Witness* 4 September 2013 at 7.

<sup>316</sup> Kidd note 17 at 273.

<sup>317</sup> *Ibid.*

The Environmental Management Inspectorate, for example, has assisted in training prosecutors with the handling of criminal environmental cases.<sup>318</sup>

Programmes aimed at increasing the capacity of magistrates are also taking place, as demonstrated by a governmental publication which recognises that magistrates ‘are likely to adjudicate more prosecutions on the environment on a broader range of violations’.<sup>319</sup> The aim of this publication is to provide magistrates with an overview of environmental law, in order to assist them in courtroom application.<sup>320</sup>

Increasing the capacity of those working in the judicial system, it is submitted, is the most practical manner in ensuring that environmental law is applied correctly in court cases. If at a later point in time there is a willingness on the part of government to establish environmental courts, there will be trained individuals to work within such specialised judicial structures. This bottom-up approach, which aims to enhance the capacity of individuals before considering institutional or structural solutions on a macro level, is, it is submitted, a pragmatic approach. An advantage of this strategy is that it encourages the organic growth of policy.<sup>321</sup> This is due to the contributions of interest groups, who are actively involved in the process.<sup>322</sup> Hence, interest groups not only benefit from receiving training, but can also contribute to the knowledge-base by identifying strengths and weaknesses.<sup>323</sup> This method is therefore symbiotic, in that it draws on the skills and experiences of interest groups in addition to providing them with training. This may be preferable to a dictatorial, top-down approach, where interest groups have no opportunities to make representations, voice concerns and facilitate the growth of policy decisions.

In considering whether environmental courts are feasible in South Africa, it is important to consider how environmental law is implemented generally. Glazewski<sup>324</sup> highlights two broad categories: judicial measures and administrative measures. This indicates that in a debate regarding the feasibility of environmental courts, it is important to look at all ways of enhancing the implementation of environmental law, not just judicial reforms.

---

<sup>318</sup> Department of Environmental Affairs note 306 at 62.

<sup>319</sup> Department of Water and Environmental Affairs, Department of Justice and Constitutional Development and Environmental Counsel note 187 at 11.

<sup>320</sup> *Ibid* at 12.

<sup>321</sup> European LEADER Association for Rural Development ‘The Bottom Up Approach’ available at [http://www.elard.eu/en\\_GB/the-bottom-up-approach](http://www.elard.eu/en_GB/the-bottom-up-approach), accessed 4 September 2013.

<sup>322</sup> *Ibid*.

<sup>323</sup> *Ibid*.

<sup>324</sup> J Glazewski *Environmental Law in South Africa* 2 ed (2005) 118

It may happen that improving the administrative capacity of government departments (at the national, provincial and local levels) may greatly improve the implementation of environmental law. Doing so may rectify the problem of inadequate policing of environmental law,<sup>325</sup> which can hamper judicial implementation because the judiciary can only hear matters brought to it. Inadequate policing therefore results in their being fewer passed to the judiciary for judgment. It is therefore necessary to consider other ways of increasing the effectiveness of environmental law. The state can achieve this by increasing the co-operation amongst government departments, having more public accountability, facilitating easy access to information and consolidating policy.<sup>326</sup>

In addition to the debate as to whether or not to form an environmental court, a further issue is the jurisdiction of an environmental court. Decisions will have to be made as to whether the court will hear all types of environmental issues or only certain types (such as marine issues). A further factor is whether the court will hear only criminal cases or whether individuals can have recourse to the court.

Enhancing the implementation of environmental law can therefore take many forms, with one form being specialised environmental courts. Whether or not an environmental court is established, it is crucial that any decision made must be informed by all the issues and by stakeholder opinions.

---

<sup>325</sup> Kidd note 17 at 272-273.

<sup>326</sup> K Müller 'Environmental Governance in South Africa' in HA Strydom and ND King *Environmental Management in South Africa* 2 ed (2009) 70-71.

## 4. Conclusion

Glazewski has pointed out that South Africa has comprehensive environmental laws.<sup>327</sup> Thus, South Africa possesses the necessary tools (laws) for judges to implement.<sup>328</sup> However, South Africa is viewed as being weak in implementation.<sup>329</sup> It can therefore be said that the ‘tools’ (laws) are not being put to use. In light of this shortcoming, this dissertation considered whether environmental courts could enhance the implementation of environmental law in the context of South Africa.

This dissertation has demonstrated that there are numerous arguments for and against the formation of environmental courts. This indicates that, in considering whether it is feasible for South Africa to pursue environmental courts or not, one cannot provide a simple answer. Rather, all factors would have to be balanced in order to make a decision. What this dissertation has demonstrated is the fact that governmental will is critical for the formation (and dissolution) of specialist courts. It is hoped that any decision-making process revolving around the formation of an environmental court will be transparent and open to external input. The views of academics, practitioners and decision-makers will prove beneficial in considering whether South Africa requires environmental courts.<sup>330</sup> Government can also gather empirical research by interviewing members of the legal community, members of the environmental sector (public and private) as well as other parties. Such research can hopefully demonstrate challenges in ensuring access to environmental justice and provide insight as to possible solutions, one of which is environmental courts.

If such a process is followed, not only will any decision reached be credible, but it will also be conducive to the best possible decision being reached. As an external commentator doing research on the Hermanus Environmental Court, the present writer was left with a sense that the decision to close the court was irrational in light of its success. My sense is that an injustice was committed in closing the court, but this sentiment may be largely due to a paucity of information from government regarding the court as opposed to the final decision itself. I am open to the fact that reasonable circumstances may have warranted the closure of

---

<sup>327</sup> Glazewski note 323 at 117.

<sup>328</sup> Stein note 40. Stein commented that Australian judges are fortunate in having environmental laws, which he termed ‘tools’.

<sup>329</sup> Glazewski note 323 at 117.

<sup>330</sup> A limitation of this dissertation is that it does not consider empirical analysis. Future research which focuses on empirical studies (by, for example, interviewing stakeholders regarding their opinions on environmental courts) will be highly valuable. Future research can also consider the recently formed Sexual Offences Courts in further detail. This will be useful in understanding the process behind the formation of specialised courts, the requirements and the obstacles.

the Hermanus Environmental Court. However, due to the lack of information available, it is not possible to analyse the detailed reasoning for the closure. If such information was made public, it would help research in the field of environmental courts, which may then inform policy development. It is therefore to be hoped that governmental transparency will be achieved in the future.

Whilst there may be differences in opinion as to the viability, utility and purpose of environmental courts, it is submitted that commentators on both sides will accept that capacity building (in the area of environmental law) is vital for all those involved in the judicial system. It is therefore my submission that, in considering whether environmental courts should be part of the South African landscape, a pragmatic approach would be first to focus on enhancing the environmental law knowledge of all those working in the judicial system. Only once South Africa has reached a stage where there are presiding officers, prosecutors and lawyers well versed in environmental law can the issue of the viability of specialised environmental courts be discussed.

Although this dissertation has focused on reforms which can occur in the judiciary, it must be noted that reforms outside the judiciary are also necessary, such as increasing governmental capacity, policing and co-operation amongst government departments and the effectiveness of administrative measures of compliance and enforcement.<sup>331</sup> Furthermore, citizen participation is crucial in facilitating change. However, their participation will only occur if they are aware of the importance of the environment as well as the laws already passed to protect it. Increasing the implementation of law thus requires all stakeholders in society (individuals, businesses, the legislature, the executive and the judiciary) to make informed decisions. If this occurs, then the sustainable development can be achieved.

The spirit of this dissertation was to enhance the implementation of environmental law. This dissertation focused on one possible way of doing so, namely the formation of environmental courts. Reflecting upon what has been discussed in the previous chapters regarding environmental courts, I think that one can identify three requirements needed to enhance environmental law. Firstly, it requires a government that is open and that is co-operative (both internally and externally). Secondly, an ‘environmental ethos’<sup>332</sup> must exist amongst individuals across society. This is a spiritual concept. It can potentially alter the behaviour of people as well of government. This can create the political will necessary to seek measures to

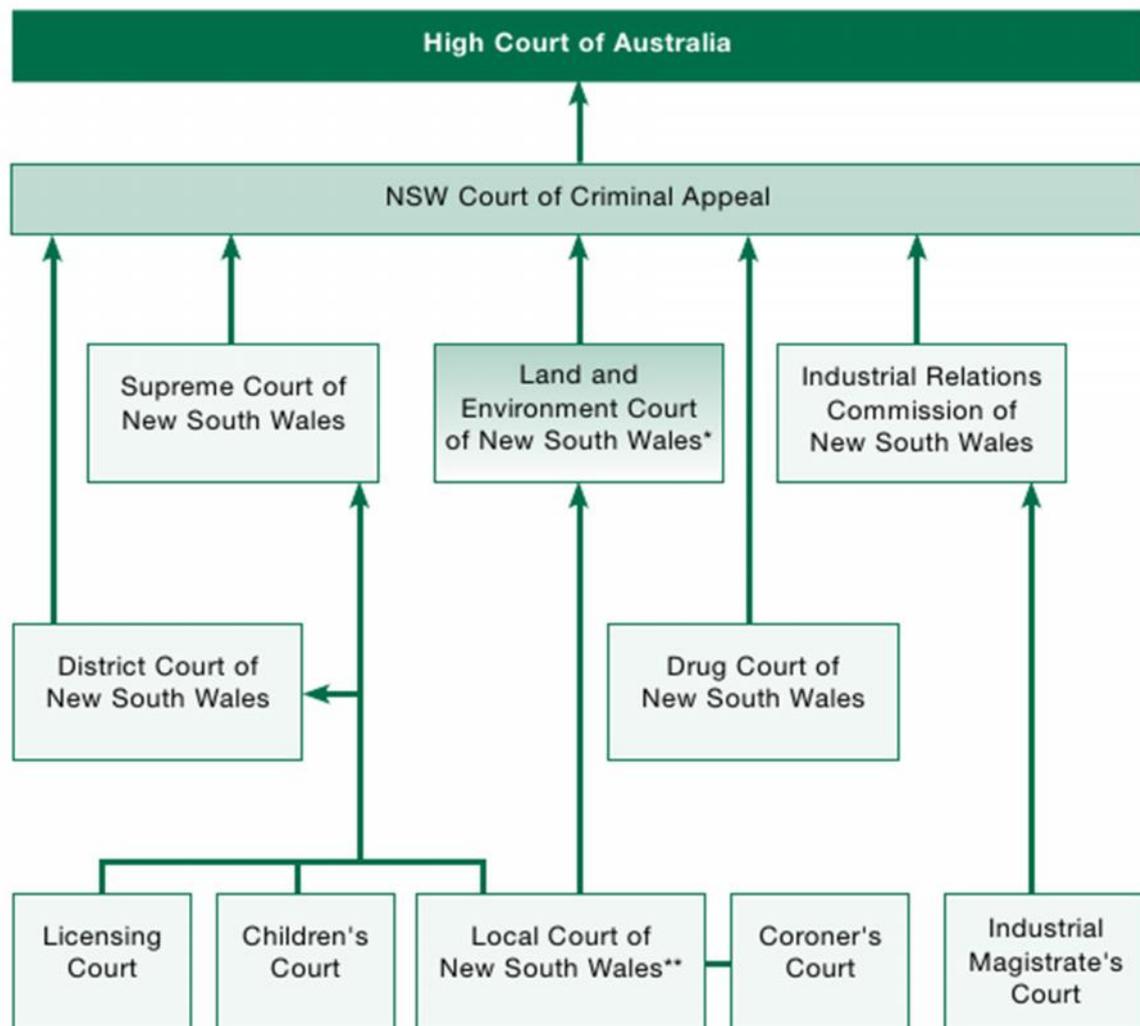
---

<sup>331</sup> Müller note 325 at 70-71.

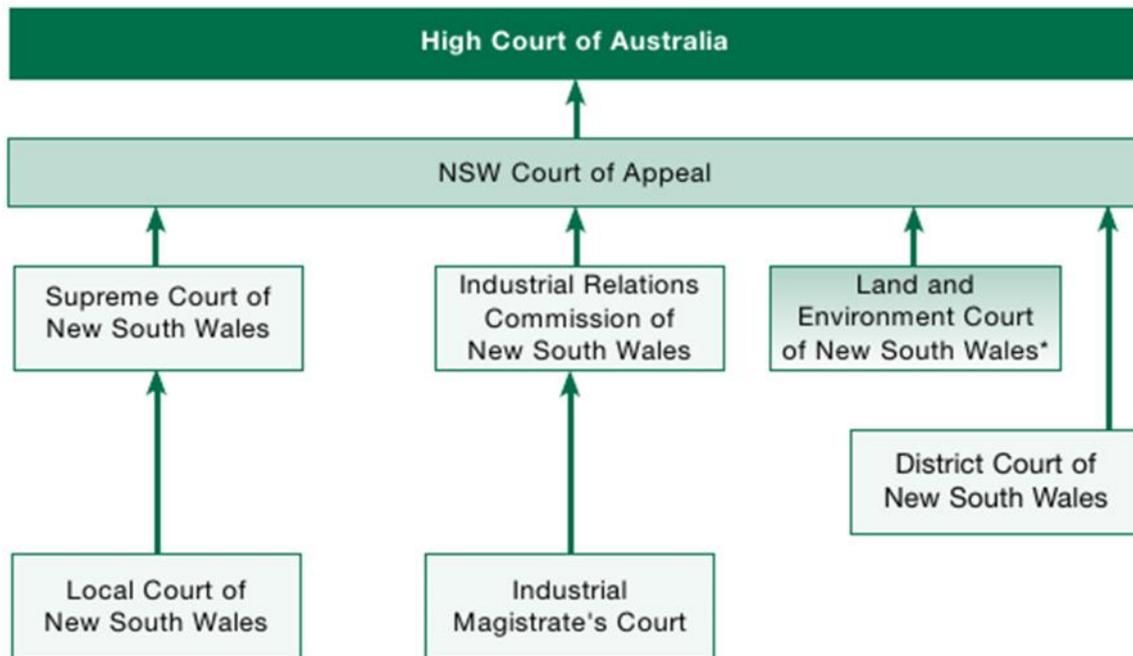
<sup>332</sup> Kidd note 17 at 273.

enhance the implementation of environmental law. I feel that this environmental ethos is growing in society. This bodes well for the implementation of environmental law in the future.

## Annex I: Criminal Jurisdiction of the Land and Environment Court of New South Wales



## Annex II: Civil jurisdiction of the Land and Environment Court of New South Wales



## **Annex III: Environmental Management Inspectorate Basic Training Curriculum**

Successful completion of the EMI Basic Training is the current requirement for designation as Grades 1-4 EMIs. The current curriculum for the EMI Basic Training includes the following modules and units:

### **Module 1: Legal Context for Environmental Compliance and Enforcement**

Unit 1: Introduction to environmental compliance and enforcement

Unit 2: Constitutional and Administrative Law

Unit 3: Environmental Law for EMIs

Unit 4: Criminal law and law of evidence

Unit 5: Introduction to Business Entities

### **Module 2: Becoming an EMI**

Unit 1: Mandate, functions and powers

Unit 2: Enforcement Ethics

Unit 3: Networks and resources

Unit 4: Operational Conflict Management

### **Module 3A: Pollution, Waste and EIA Compliance and Enforcement**

Unit 1: Health & safety

Unit 2: Conducting compliance inspections and investigation of non-compliance

Unit 3: Criminal and Administrative Enforcement

Or

### **Module 3B: Biodiversity, Marine and Conservation Enforcement**

Unit 1: Health & safety

Unit 2: Conducting routine compliance inspections and investigating non-compliance

Unit 3: Criminal and Administrative Enforcement

## Bibliography

### Books

Christie, E *Finding Solutions for Environmental Conflicts* Cheltenham: Edward Elgar, (2008).

Glazewski, J *Environmental Law in South Africa* Durban: LexisNexis Butterworths, (2005).

Hoexter, C *Administrative Law in South Africa* 2 ed Claremont: Juta, (2012).

Kidd, M *Environmental Law* 2 ed Cape Town: Juta, (2011).

### Chapters within books

Craigie, F; Snijman, P and Fourie, M 'Environmental Compliance and Enforcement Institutions' in A Paterson and J Kotzé *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* Cape Town: JUTA Law, (2009) 65-102.

du Plessis, A 'Understanding the Legal Context' in A Paterson and LJ Kotzé *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* Cape Town: JUTA Law, (2009) 11-40.

du Preez, ML 'The court structure' in L Meintjies-Van der Walt et al *Introduction to South African Law: Fresh Perspectives* Cape Town: Pearson Education and Prentice Hall, (2008) 175-211.

Müller, K 'Environmental Governance in South Africa' in HA Strydom and ND King *Environmental Management in South Africa* 2 ed Cape Town: Juta, (2009) 68-96.

Vogel, D and Kessler, T 'How Compliance Happens and Doesn't Happen Domestically' in EB Weiss and HK Jacobson (eds) *Engaging Countries: Strengthening Compliance with International Environmental Accords* Cambridge, MA: The MIT Press (1998) 19-37.

### Journal articles

Amirante, D 'Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India' (2012) 29(2) *Pace Environmental Law Review* 441-469.

- Benjamin, AH 'We, the judges, and the environment' (2012) 29(2) *Pace Environmental Law Review* 582-591.
- Carnwath, R 'Institutional innovation for environmental justice' (2012) 29(2) *Pace Environmental Law Review* 555-565.
- de Vries, ID 'Courts: the weakest link in the democratic system in South Africa; a power perspective' (2006) 25(1) *Politeia* 41-56.
- Kidd, M and Hoctor, S 'Punishing Perlemoen Poaching – Developments Both Recent and Possibly Future?' (2005) *Obiter* 398-403.
- Hauck, M 'Crime, environment and power: Revisiting the abalone fishery' (2009) 2 *SACJ* 229-245.
- Hauck, M and Kroese, M 'Fisheries compliance in South Africa: A decade of challenges and reform 1994-2004' (2006) 30 *Marine Policy* 74-83.
- Kaniaru, D 'National Environmental Governance: Role of National Environmental Tribunals' in T Honkonen and E Couzens (eds) *International Environmental Law –making and Diplomacy Review 2009* (2010) 163-181.
- Markowitz, KJ and Gerardu, JJA 'The importance of the judiciary in environmental compliance and enforcement' (2012) 29(2) *Pace Environmental Law Review* 538-554.
- Oakes, JL 'Development in Environmental Law' (1973) 3 *E.L.R* 50001 in Whitney, SC 'The Case For Creating A Special Environmental Court System – A Further Comment' (1973) 15(1) *William and Mary Law Review* 33-56.
- Preston, BJ 'Benefits of judicial specialization in environmental law' (2012) 29 (2) *Pace Environmental Law Review* 396-440.
- Preston, BJ 'Judicial Specialization Through Environmental Courts: A Case Study of the Land and Environment Court of New South Wales' (2012) 29(2) *Pace Environmental Law Review* 602-625.
- Pring, G and Pring, C 'Increase in environmental courts and tribunals prompts new global institute' (2010) 3(1) *Journal of Court Innovation* 11-21.
- Robinson, NA 'Ensuring access to justice through environmental courts' (2012) 29(2) *Pace Environmental Law Review* 363-395.

- Snijman, PJ ‘Hermanus’ Environmental Court: Does it protect the environment?’ (2005) *December News & Views for Magistrates* 2-3.
- Stein, P ‘The role of the Land and Environment Court in environmental assessment’ (1992) 28(1-4) *Australian Zoologist* 16-19.
- van der Westhuizen, J ‘A few reflections on the role of courts, government, the legal profession, universities, the media and civil society in a constitutional democracy’ (2008) 8 *African Human Rights Law Journal* 251-272.
- van Zyl, D ‘The judiciary as a bastion of the legal order in challenging times’ (2009) 12(2) *PER/PELJ* 2-13.
- Whitney, SC ‘The Case For Creating A Special Environmental Court System – A Further Comment (1973) 15(1) *William and Mary Law Review* 33-56.

### **Internet-based sources**

- ‘About Environmental Management Inspectorate (EMI)’ available at [https://www.environment.gov.za/?q=content/about\\_environmental\\_management\\_inspectorate](https://www.environment.gov.za/?q=content/about_environmental_management_inspectorate) accessed 21 July 2013.
- Altbeker, A *Justice Through Specialisation? The Case of the Specialised Commercial Crime Court* (2003) available at <http://www.issafrica.org/publications/monographs/monograph-76-justice-through-specialisation-the-case-of-the-specialised-commercial-crime-court-antony-altbeker>, accessed 30 August 2013.
- Australian Government ‘Poachers pursued over 7, 000 kilometers’ (2004) 6 *Australian Antarctic Magazine* available at <http://www.antarctica.gov.au/about-us/publications/australian-antarctic-magazine/2001-2005/issue-6-autumn-2004/feature/poachers-pursued-over-7-000-kilometers>, accessed 30 October 2013.
- Case Number ECH 100/05, Plea and Sentence Agreement available at <http://www.cer.org.za/wp-content/uploads/2013/02/S-v-Acker-Waterbesoedeling.doc>, accessed 26 July 2013.

Cropley, E 'Karoo fracking: Water, wealth and whites' (2013) *Mail & Guardian* available at <http://mg.co.za/article/2013-10-28-karoo-fracking-water-wealth-and-whites>, accessed 29 October 2013.

DELIC *About DELIC* available at <http://www.unep.org/delic/Home/tabid/6092/Default.aspx>, accessed 3 January 2013.

Department of Environmental Affairs *Annual Report 2010/11* (2011) 21 available at [http://www.environment.gov.za/sites/default/files/reports/annual%20report\\_2010\\_2011.pdf](http://www.environment.gov.za/sites/default/files/reports/annual%20report_2010_2011.pdf), accessed 21 October 2012

Department of Environmental Affairs *Annual Report 2011/12* (2012) available at [https://www.environment.gov.za/sites/default/files/docs/environmental\\_affairs201112\\_annualreport.pdf](https://www.environment.gov.za/sites/default/files/docs/environmental_affairs201112_annualreport.pdf), accessed 21 October 2012).

Department of Justice and Constitutional Development *Annual Report 2003/04* available at <http://www.justice.gov.za/reportfiles/anr200304/200304%20content.htm>, accessed 20 October 2013.

Department of Justice and Constitutional Development 'Justice in action as Minister Radebe launches the Butterworth Sexual Offences Court, Eastern Cape' (23 August 2013) available at [http://www.justice.gov.za/m\\_statements/2013/20130823-sxoc-butterworth.html](http://www.justice.gov.za/m_statements/2013/20130823-sxoc-butterworth.html), accessed 31 October 2013.

Department of Justice and Constitutional Development *Report on the Re-Establishment of Sexual Offences Courts* (2013) available at <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>, accessed 25 August 2013.

Donnelly, L 'Shabangu presents new regulations for fracking' (2013) *Mail & Guardian* available at <http://mg.co.za/article/2013-10-10-shabangu-presents-new-regulations-for-fracking>, accessed 29 October 2013.

Encyclopædia Britannica Online 'abalone' (2013) available at <http://www.britannica.com/EBchecked/topic/376/abalone>, accessed 31 October 2013.

European LEADER Association for Rural Development 'The Bottom Up Approach' available at [http://www.elard.eu/en\\_GB/the-bottom-up-approach](http://www.elard.eu/en_GB/the-bottom-up-approach), accessed 4 September 2013.

- Foti, J *Voice and Choice: Opening the Door to Environmental Democracy* (2008) 3-4, available at [http://pdf.wri.org/voice\\_and\\_choice.pdf](http://pdf.wri.org/voice_and_choice.pdf), accessed 17 September 2012.
- Gosling, M 'Downgrading green court seen as setback' *IOL* 16 November 2005 available at <http://www.iol.co.za/news/south-africa/downgrading-green-court-seen-as-setback-1.258911?ot=inmsa.ArticlePrintPageLayout.ot>, accessed 12 September 2012.
- Gosling, M 'Future of SA's green court in the balance' *IOL* 17 April 2006 available at <http://www.iol.co.za/news/south-africa/future-of-sa-s-green-court-in-the-balance-1.274307#UEScgMHiYts>, accessed 12 August 2012.
- Hansard *Internal Question Paper No. 38 of 2007*, Question No. 1648, 19 October 2007 available at [http://www.environment.gov.za/sites/default/files/parliamentary\\_updates/question1648.pdf](http://www.environment.gov.za/sites/default/files/parliamentary_updates/question1648.pdf), accessed 19 October 2012.
- 'Issues guide: Environment and rural affairs' *BBC* 20 April 2011 available at <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-12817707>, accessed 22 November 2012.
- Kameri-Mbote, P 'Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention' (2005) 1 *IELRC Working Paper* available at <http://www.ielrc.org/content/w0501.pdf>, accessed 5 August 2013.
- Kaniaru, D 'National Environmental Governance: Role of National Environmental Tribunals' in T Honkonen and E Couzens (eds) *International Environmental Law –making and Diplomacy Review* (2009)
- Kerdeman, M *What Does Environmental Democracy Look Like?*(2008), available at <http://www.wri.org/stories/2008/04/what-does-environmental-democracy-look>, accessed 14 September 2012.
- Kiss, C and Ewing, M *Environmental Democracy: An assessment of access to information, participation in decision-making and access to justice in environmental matters in selected European countries* (2006) 21, available at <http://www.accessinitiative.org/sites/default/files/Environmental%20Democracy%20TAI%20Europe.pdf>, accessed 11 September 2012.
- Moolla, S *Contextualising illegal, unregulated and unreported fishing of marine resources in South African waters* (2008) available at

- <http://www.feike.co.za/web/news/AbaloneISS%20Paper.pdf> (accessed 12 October 2012).
- Mundy, S 'Green crimes ignored' *BusinessDay Live* 26 November 2009 available at <http://www.bdlive.co.za/articles/2009/11/26/green-crimes-ignored>, accessed 31 August 2013.
- New South Wales Government *Land and Environment Court* available at <http://www.lec.lawlink.nsw.gov.au/lec/about.html?s=877771413>, accessed 26 September 2012.
- Parliamentary Monitoring Group *Hearing on the report of the Auditor-General on a performance audit of the handling of confiscated abalone by Department of Environmental Affairs & Tourism* 6 October 2009 available at <http://www.pmg.org.za/report/20091007-hearing-report-auditor-general-performance-audit-handling-confiscated>, accessed 26 September 2012.
- Pring, G and Pring, C *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (2009), available at [http://www.accessinitiative.org/sites/default/files/Greening%20Justice%20Final\\_31399\\_WRI\\_0.pdf](http://www.accessinitiative.org/sites/default/files/Greening%20Justice%20Final_31399_WRI_0.pdf), accessed 14 June 2012.
- Prinsloo, L 'Fracking in the Karoo takes a big step forward' (2013) *BusinessDay Live* available at <http://www.bdlive.co.za/businesstimes/2013/10/20/fracking-in-the-karoo-takes-a-big-step-forward>, accessed 29 October 2013.
- Rabkin, F 'Magistrates to get training' *BusinessDay Live* 14 March 2013 available at <http://www.bdlive.co.za/national/law/2013/03/14/magistrates-to-get-training>, accessed 22 July 2013.
- SANBI *National Biodiversity Assessment 2011: Technical Report. Volume 4: Marine and Coastal Component* (2012) available at [http://bgis.sanbi.org/nba/NBA2011\\_TechnicalReport\\_Vol4Marine.pdf](http://bgis.sanbi.org/nba/NBA2011_TechnicalReport_Vol4Marine.pdf), accessed 1 November 2013.
- 'SA: Sonjica: Release of the National Environmental Compliance and Enforcement Report 2008/9, Pretoria' *Polity.org.za* available at <http://www.polity.org.za/article/sa-sonjica->

[release-of-the-national-environmental-compliance-and-enforcement-report-200809-pretoria-25112009-2009-11-25](#), accessed 21 July 2013.

‘Scottish Election 2011: results map’ *The Telegraph* 6 May 2011 available at <http://www.telegraph.co.uk/news/uknews/scotland/scottish-politics/8495468/Scottish-Election-2011-results-map.html>, accessed 22 November 2012.

Scottish Executive Environment Group *Strengthening and Streamlining: The Way Forward for the Enforcement of Environmental Law in Scotland* (2006) available at <http://www.scotland.gov.uk/Resource/Doc/155498/0041750.pdf>, accessed 17 September 2012.

‘Second term for McConnell’ *BBC* 15 May 2003 available at [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/3029063.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/3029063.stm), accessed 22 November 2012.

Shelton, D and Kiss, A *Judicial Handbook on Environmental Law* (2005) available at <http://www.unpei.org/PDF/policyinterventions-programmedev/Judicial-Handbook-Environmenal-Law.pdf>, accessed 23 December 2012.

Stein, P ‘Comments made in Session 2 of the Symposium’ (2002), transcript available at [http://www.unep.org/law/symposium/Documents/SESSION\\_2.doc](http://www.unep.org/law/symposium/Documents/SESSION_2.doc), accessed 15 August 2012.

Swanepoel, E ‘SA to have dedicated environmental courts next year-Sonjica’ *Polity.org.za* 25 November 2009 available at <http://www.polity.org.za/article/sa-to-have-dedicated-environmental-courts-next-year-sonjica-2009-11-25-1>, accessed 29 July 2013.

TRAFFIC *Environmental Courts Prove To Be Effective* 1 available at [www.traffic.org/non-traffic/Stop-illegal-fishing-case-study-1.pdf](http://www.traffic.org/non-traffic/Stop-illegal-fishing-case-study-1.pdf), accessed 27 October 2012.

UNEP *UNEP Executive Director’s background paper to the Global Judges Symposium* (2002) 5-9, available at [http://www.unep.org/law/Symposium/Pre\\_session.htm](http://www.unep.org/law/Symposium/Pre_session.htm), accessed 15 August 2012.

Weeramantry, CG ‘Main Presentation-Session 2’, transcript available from [http://www.unep.org/law/symposium/Documents/SESSION\\_2.doc](http://www.unep.org/law/symposium/Documents/SESSION_2.doc), accessed 15 August 2012.

## **Conventions and International Documents**

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998 (entered into force on 30 October 2001).

Rio Declaration on Environment and Development, 1992.

United Nations Conference on Environment and Development, Rio de Janeiro (1992).

United Nations Conference on the Human Environment, Stockholm (1972).

## **Statutes**

### South Africa

Constitution of the Republic of South Africa, 1996

Marine Living Resources Act 18 of 1998

National Water Act 26 of 1998

National Environmental Management: Protected Areas Act 57 of 2003

National Environmental Management: Biodiversity Act 10 of 2004

### Australia

Land and Environment Court Act 204 of 1979

## **Case law**

*Chief Constable of the North Wales Police v Evans* [1982] 3 AllER 141 (HL) at 154d.

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

*Gilfillan v Wagga Wagga City Council* [2012] NSWLEC 1253.

## **Other sources**

Department of Water and Environmental Affairs, Department of Justice and Constitutional Development and Environmental Counsel *Judging Environmental Crime: A Bench Book for Magistrates* (2010) Final Draft.

GN 9 of GG 6205, 28 August 2003.

Law Commission of India *One Hundred Eighty Sixth Report on Proposal To Constitute Environment Courts* (2003).

McLoughlin, S 'It's war... and innovation is key' *The Witness* 4 September 2013 at 7.

Proposed Technical Regulations for Petroleum Exploration and Exploitation, GN 1032 of GG 36938, 15 October 2013.

Qualification Criteria, Training and Identification of, and Forms to be Used by, Environmental Management Inspectors; Regulation 2(1) GN R494 in GG 28869 of 2 June 2006.

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