THE CONSTITUTIONAL OBLIGATIONS AND AUTHORITY OF PROVINCIAL ORGANS OF STATE IN SOUTH AFRICA TO PROTECT THE ENVIRONMENT THROUGH REASONABLE LEGISLATIVE MEASURES

By

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Statement of Originality

This project is an original piece of work which is made available for photocopying and for inter-library loan.

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TABLE OF CONTENTS **PAGE**

CHAPTER 1

INTRODUCTION

'We only think when we are confronted with a problem'[1]

1.1 Background and Outline of the Research Problem

A growing global awareness of environmental rights and obligations has in recent decades increasingly permeated the public discourse on topics as wide ranging as green buildings, electric cars, waste recycling, fur coats and climate change. What may be termed an 'environmental rights revolution' has given rise to the adoption of a number of legal instruments aimed at advancing environmental rights worldwide.[2] In South Africa this growing environmental consciousness prompted the adoption of an environmental right as part of the Bill of Rights in the Constitution,[3] which imposes obligations on the state to protect the environment for the benefit of present and future generations.[4] That right, in turn, underpinned the enactment of a substantial body of environmental legislation in South Africa by the *national* sphere of government.[5]

The rationale and impetus for writing this dissertation originated in a research problem that I identified as a member of a team[6] engaged in drafting new provincial environmental legislation for the KwaZulu-Natal Province. The envisaged new legislation had to respond to particular provincial needs and concerns identified by the provincial executive[7] and implementing agencies[8]. For instance, one of the key concerns expressed by them was the fragmented and outdated provincial legislation and the uncertainty and confusion that it

[1] Often attributed to John Dewey, but believed to be rather a conception by William F Russell in 1914 of Dewey's main point in his book *How We Think*, published in 1910 (quoteinvestigator.com 31/03/2016.).
[2] See, for example, RD Boyd *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (2012).
[3] Constitution of the Republic of South Africa, 1996 (Constitution), Bill of Rights, chapter 2.
[4] Ibid, section 24.
[5] Ibid, section 40 provides for national, provincial and local spheres of government in South Africa.
[6] The drafting team consists of Professor Michael Kidd (UKZN), the author of this dissertation (PKX Attorneys) and Martin Potgieter (PKX Attorneys).
[7] Constitution, op cit, see provisions of section 125(f).
[8] Such as *Ezemvelo* KZN Wildlife.

created. They wanted consolidated legislation for the Province. Other examples of needs and concerns identified related to: (a) the increasing loss of ecosystems, habitat and biodiversity in KwaZulu-Natal which was not adequately addressed by national legislation; and (b) pressure on natural resources within provincial protected areas. The drafting process led me to confront a number of questions relating to the nature of government in South Africa under a supreme Constitution;[9] and the role, powers and functions of provinces[10] (as a sub-national sphere of government) within such a system, with specific reference to the environment. Answers to these questions demanded an analysis of: (a) the South African system of multisphere government;[11] (b) the nature and scope of the environmental right in section 24 of the Constitution and the substantive obligations it imposes on organs of state to enact legislation for the protection of the environment; (c) the application of the Bill of Rights to provinces as organs of state;[12] (d) the constitutional authority of provinces to enact environmental legislation;[13] (e) existing environmental legislation enacted by the national sphere of government; and (f) existing environmental legislation in the nine[14] provinces.

A review of current scholarly analyses of the environmental right in section 24 of the Bill of Rights and its implications for government indicated that most studies had primarily been done through a national or international lens, with the environmental obligations of the local sphere of government increasingly becoming part of the discourse in South Africa.[15] This dissertation sets out to complement current research by providing a critical appraisal of the constitutional role, obligations and legislative authority of *provincial organs of state* in South Africa to protect the environment through *legislative* measures. I therefore considered it important to include the information gleaned from my research into existing provincial legislation on the environment in this dissertation as it revealed that most provinces still have outdated, fragmented and even unconstitutional old order environmental legislation on their statute books,[16] with little new provincial legislation in evidence.[17] This begged explanation

[9] Constitution, op cit, Preamble, sections 1 and 2.
[10] Ibid, section 103.
[11] Ibid, section 40.
[12] Ibid, section 8.
[13] Ibid, section 104, Schedules 4 and 5.
[14] Ibid, section 103.
[15] See, for instance, the LLD thesis of A Du Plessis, l 'Fulfillment of South Africa's Constitutional Environmental Right in the Local Government Sphere' listed in Appendix III below.
[16] Constitution, op cit, Schedule 6, section 1– 'old order legislation' means legislation enacted before the previous Constitution took effect; 'previous Constitution' means the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).

and prompted me to also include brief comments on some factors which may constrain provinces from exercising their legislative powers in respect of the environment. My comments are based on information gleaned from scholarly analyses and the Economic and Social Rights (ESR) Reports published by the South African Human Rights Commission (SAHRC).[18]

The analysis of national legislation on the environment ensured the alignment of the proposed new environmental legislation for KwaZulu-Natal with national legislation. However, since the focus of this dissertation is specifically on the *provincial* sphere of government, an analysis of national environmental legislation was excluded from the study because such a study poses a number of further research problems which fall outside the parameters of the specific research questions posed in this study. What seemed particularly relevant, however, was how the Constitution provides for conflicting laws.[19] The drafters of the provincial legislation clearly had to avoid provisions in the new legislation that would be in conflict with existing legislation. This dissertation therefore includes a detailed analysis in chapter 4 below of when legislative provisions would be in conflict and when not, as well as the status of legislation that does not prevail.

Further, the focus of this dissertation is on the original constitutional *legislative* authority of provinces, which is vested in their provincial legislatures,[20] and not the executive.[21] The executive arm of a provincial government has the authority to: (a) implement and administer legislation; (b) develop and implement provincial policy; (c) co-ordinate the provincial administration; (d) prepare and initiate legislation; and (e) perform any other functions assigned to it.[22] But the executive does not enact legislation. However, it bears noting that members of the executive and certain other persons or bodies may adopt subordinate (delegated) legislation under enabling provisions which determine the scope of such subordinate legislation.[23] A more detailed discussion on subordinate legislation poses

[17] See the discussion in chapter 5, part 1 below.
[18] See chapter 5 below, para 5.4.
[19] Constitution, op cit, 'Conflicting Laws' (sections 146–150).
[20] Ibid, section 104(1).
[21] See detailed discussion in chapter 4 below.
[22] Ibid, section 125.
[23] C Botha, *Statutory Interpretation: An Introduction for Students* 5th ed (2012) 25-27; also see comments by C Hoexter, *Administrative Law in South Africa (*2012, 4th impression) 178 – 182.

research questions which go beyond the scope of this dissertation and is therefore not included in this study. Likewise, a detailed analysis of the executive authority of organs of state, whether at the national, provincial or local spheres, falls outside the ambit of the research problem and has therefore been excluded. Thus reference is only made to the executive where it is of particular relevance to this study. The dissertation also does not include an in-depth discussion on the 'other' measures referred to in the environmental right, but confines itself to the 'legislative' measures which a provincial legislature may take.[24]

The background provided above led me to distil four key *objectives* to be achieved through this research, namely to determine:

(i) the nature and scope of the substantive obligations imposed on provincial organs of state by the Constitution to protect the environment through legislative measures;
(ii) the original legislative authority of provincial legislatures to fulfil these obligations;
(iii) the extent to which provinces are exercising their legislative authority in pursuit of their environmental obligations; and
(iv) constitutional and other factors which may constrain provinces from enacting environmental legislation in the fulfilment of their constitutional mandate.

In order to realise the objectives stated above, I consider what constitutional *obligations* and *authority* provincial organs of state in South Africa have to protect the environment through reasonable legislative measures; and whether provinces are giving effect to their obligations envisaged by section 24 of the Constitution, which together constitute the central research questions. Questions underlying the primary research questions are necessarily also addressed in the dissertation, namely:

(i) What are the main characteristics of the South African system of government which is constituted as national, provincial and local spheres of government, with particular reference to the provincial sphere?

[24] Constitution, op cit, section 24(b).

(ii) What is meant by constitutional supremacy and what is the role of the Constitutional Court in that regard?

(iii) What are the provisions on co-operative government in chapter 3 of the Constitution in relation to multisphere government in South Africa, and how have the courts interpreted those provisions?

(iv) Can co-operative government play a role in assisting provinces to meet their constitutional obligations to protect the environment?

(v) What is the relevance of international jurisprudence for the environmental right in the South African Constitution?

(vi) What is the nature and scope of the environmental right in section 24, with particular reference to the obligations it imposes on provincial government to take reasonable legislative measures to protect the environment?

(vii) What is the nature and scope of the legislative authority of provinces to enact legislation to fulfil the obligations imposed on them by section 24?

(viii) How have the South African courts, particularly the Constitutional Court, interpreted the constitutional obligations and legislative authority of provinces, with particular reference to the environment;

(ix) How does section 146 of the Constitution deal with conflicts between national and provincial legislation falling within a functional area of concurrent legislative competence in Schedule 4 of the Constitution; and how have the courts interpreted the constitutional provisions on conflicting laws?

(x) Are there constitutional and other constraints which inhibit provinces from fulfilling their obligations to protect the environment through legislative measures?

1.2 The Research Design

The Preamble to the Constitution makes it clear that the Constitution is an expression of the sovereign will of the people of South Africa, who, through their freely-elected representatives, adopted the Constitution as the supreme law of the Republic.[25] The obligations and legislative authority of provinces to protect the environment are derived directly from the Constitution, and answers to the primary research question are therefore firstly to be found in the Constitution itself. This demands an analysis of each of the relevant

[25] Constitution, op cit, Preamble.

constitutional provisions, together with a review of relevant case law and literature. This is followed by a case study on the drafting of provincial environmental legislation for the Province of KwaZulu-Natal.[26]

The case study on drafting provincial legislation for KwaZulu-Natal does not (and cannot) provide substantive answers to the primary and underlying research questions posed above, and how to deal with legislative challenges. However, it does highlight: (a) examples of pervasive misconceptions about the role, powers and functions of provinces – misconceptions that exist mainly within government itself; and (b) some of the difficulties involved in drafting provincial legislation for the protection of the environment, often arising from such misconceptions. The case study also assisted in the determination of the:

(i) main objectives of the research project; and
(ii) primary and underlying research questions that needed to be addressed.

1.3 The Research Methodology

The research will be conducted through a theoretical analysis of:

(i) relevant provisions of the Constitution;
(ii) selected international, national and provincial legislative and other instruments;
(iii) judgments of the Constitutional Court, in particular, as well as those of the Supreme Court of Appeal and High Courts, and case law from international jurisdictions; and
(iv) local and international literature on the primary research questions as well as the underlying questions listed in paragraph 1.1 above.

The theoretical analysis referred to above will be supplemented by: (a) the case study on drafting environmental legislation for the province of Kwazulu-Natal by discussing practical examples of some of the comments received on the published bill, which the drafters of the new environmental legislation for the province of KwaZulu-Natal had to consider and address; and (b) a review and analysis of existing environmental legislation on the provincial

[26] See chapter 5, part II.

statute books. Some factors that may constrain provinces from exercising their constitutional powers in the fulfilment of their environmental obligations will also briefly be discussed.

1.4 The Structure of the Dissertation

Chapter 1: Introduction

This introductory chapter provides the background to the research and states the research problem, clarifies the objectives of the research, and poses the primary and related research questions to be addressed in the study. It includes a brief overview of the research project informed by the research design and methodology. Finally, the structure of the dissertation and the purpose of each chapter are explained.

Chapter 2: Constitutional Democracy in South Africa

The four research objectives stated in paragraph 1.1 cannot be achieved in isolation and without consideration of the constitutional context within which the research questions are posed. Thus, the purpose of this chapter is to provide an overview of the main characteristics of constitutional democracy in South Africa, underpinned by the supremacy of the Constitution and the rule of law. The impact of constitutional supremacy on government and its institutions is also briefly explored, as well as the vital role that the Constitution assigns to the Constitutional Court in that regard. An examination of the complex nature of the South African system of multisphere government, constituted as national, provincial and local spheres follows, with a specific focus on the provincial sphere of government. The chapter is concluded with an overview of the provisions on co-operative government in the Constitution which lay down the principles which must guide all spheres of government and all organs of state on intergovernmental relations. This chapter therefore sets out the constitutional parameters within which the environmental obligations and legislative authority of the provincial sphere of government must be understood and interpreted.

Chapter 3: The Environmental Right in the Bill of Rights

The first research objective is to determine the nature and scope of the substantive *obligations* imposed on provincial organs of state by the Constitution to protect the environment through

legislative measures. The environmental right in section 24 of the Bill of Rights is the foundation on which such substantive *obligations* rest. The nature and scope of the environmental right also informs the content, purpose and objectives of legislative measures enacted to give effect to the right. The benchmarks provided by international environmental jurisprudence further assist by locating the environmental right within a wider jurisprudential context which fosters a greater understanding of the nature and genesis of this right. This chapter therefore provides a detailed discussion of the above issues which are directly related to the research problem and first key objective of this study formulated in paragraph 1.1 above. The chapter also gives an overview of the application and justiciability of the environmental right, which explains: (a) where the responsibility for the protection of the environment lies; and (b) the potential consequences of any failure to carry out such responsibility. A brief explanation of the relationship between the environmental right and the functional areas of concurrent and exclusive provincial legislative competence listed in Schedules 4 and 5 of the Constitution, respectively, concludes the chapter. These Schedules are discussed in greater detail in chapter 4 as they relate directly to the original legislative *authority* and functional areas of legislative *competence* of provinces.

Chapter 4: Enacting Provincial Legislation

The second research objective is to determine the original legislative *authority* of provincial legislatures to fulfil their obligations under the environmental right in the Constitution. In Part I of this chapter the legislative authority and functional areas of legislative competence of provinces to fulfil their constitutional obligations in respect of the environment is scrutinised. This analysis necessarily includes a discussion on Schedules 4 and 5 of the Constitution which list the functional areas of concurrent national and provincial legislative competence, as well as the functional areas of exclusive provincial legislative competence, respectively. Here, special reference is made to functional areas which fall within the broad concept ‘environment’. Part II deals with the constitutional provisions that govern the resolution of conflicts between national and provincial legislation, and the conclusions that may be drawn from such analysis.

Chapter 5: Meeting Provincial Obligations

This chapter addresses the last two research objectives stated in paragraph 1.1 of chapter 1, namely to determine the *extent* to which provinces are exercising their legislative authority in pursuit of their environmental obligations; and to identify possible constitutional and other factors which may *constrain* provinces from doing so. Part I therefore gives an overview of existing provincial environmental legislation, which is indicative of the extent to which provinces are taking legislative measures to protect the environment. It also provides brief comments on possible causes of what appears to be limited provincial legislative activity as far as enacting environmental legislation is concerned. In part II a case study on the drafting of new environmental legislation for the Province of KwaZulu-Natal, which provided the rationale for this research and assisted in crystallising the main and underlying research questions, is discussed. Examples of some of the common misconceptions on the role, powers and functions of provincial government are also provided.

Chapter 6: Discussion of Research Findings

In this final chapter the central conclusions reached in pursuance of the four objectives set for this dissertation are discussed under the following headings: a) The nature and scope of the substantive obligations of provinces to protect the environment through legislative measures; b) the original legislative authority of provincial legislatures to fulfil their environmental obligations; c) the extent to which provinces are taking legislative measures to protect the environment; and d) factors which may constrain provinces from playing their constitutional role in respect of the environment. In this regard consideration is given to whether the provisions on co-operative government examined in chapter 3 above may assist provinces in resolving some of the difficulties they experience in regard to the fulfilment of their obligations to protect the environment. This is followed by suggestions for future research.

CHAPTER 2

CONSTITUTIONAL DEMOCRACY IN SOUTH AFRICA

'Law is nothing unless close behind it stands a warm living public opinion'

- Wendell Phillips[27]

2.1 Introduction

The Constitution was adopted in the name of 'the people of South Africa' as 'the supreme law of the Republic'.[28] This affirms the notion that the Constitution is 'of the people, for the people, and by the people',[29] and that it is, therefore, the will of the people that law or conduct inconsistent with it is invalid, and that the obligations imposed by it must be fulfilled.[30] The words '[w]e, the people' in the Constitution emphasise the role of 'the people' in validating the government, as opposed to the government having power over the people.[31] The Preamble to the Constitution repeats verbatim not only the opening words of the Freedom Charter,[32] but also many of the other phrases in it. This is significant because it demonstrates the continuity between the 'will of the people' expressed in the Freedom Charter and later repeated in the Constitution.

Thus, in his address to the Constitutional Assembly on the occasion of the adoption of the 'New Constitution', then President Mandela said: 'As one, you the representatives of the overwhelming majority of South Africans, have given voice to the yearning of millions'. In reference to the last-minute negotiations and problems experienced to reach agreement, he reminded the Assembly that 'beyond these issues, lies a fundamental sea-change in South Africa's body politic that this historical moment symbolises'. He then added: 'Long before the gruelling sessions of the final moments, it had been agreed that once and for all, South Africa will have a democratic constitution based on that universal principle of democratic majority rule'.[33]

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[27] Wendell Phillips (29 November 1811–2 February 1884) was an American abolitionist; political activist; advocate for Native Americans, women's rights and universal suffrage; orator and lawyer.
[28] Constitution, op cit, Preamble.
[29] Lincoln, Abraham 'Gettysburg address', reportedly one of the most influential statements of national purpose.
[30] Constitution, op cit, section 2.
[31] See 'We The People' http://constitution.laws.com/we.
[32] Adopted at the Congress of the People, Kliptown, 26 June 1955.
[33] Address by President Nelson Mandela to the Constitutional Assembly on the occasion of the adoption of the New Constitution, 8 May 1996 www.anc.org.za.

The words and sentiments expressed above, whether in the Preamble to the Constitution, or said by Mandela, raise the following questions: What are the essential characteristics of the South African Constitution? What is meant by the term 'constitution' or 'constitutionalism'? What are the implications of a system of constitutional supremacy for government and its institutions, or, put differently, what are the implications of that 'fundamental sea-change' to which Mandela referred? Lastly, can a system of democratic majority rule be reconciled with a supreme constitution where 'law or conduct inconsistent with it is invalid'? In this chapter these questions are briefly examined, mainly from a theoretical perspective, because they provide the constitutional context within which the ensuing analyses of the obligations and authority of provincial organs of state in South Africa to protect the environment must be located and interpreted.

2.2 A Supreme Constitution and the Rule of Law

Freedman states that the South African Constitution has three important characteristics: it is a supreme constitution, it is a normative constitution and it is a rights-based constitution.[34] According to Maduro the answer to the question of what is in the name 'constitution' is influenced by the way in which we conceive of constitutionalism in general and the purpose it serves, as well as our concept of a political community and what kind of social and political relationship it embodies.[35] He argues, in summary, that constitutionalism is seen as a *limit to power*, an *expression of polity* and as *deliberation*. The extent to which constitutionalism can assume these different functions depends on the character of a particular political community.[36] The South African Constitution, in a quest to unite all South Africans in 'one, sovereign, democratic state'[37] establishes in its founding provisions a social order, or 'political community', based on a common South African citizenship where –

> 'All citizens are -
>
> (a) equally entitled to the rights, privileges and benefits of citizenship; and

[34] Freedman, Warren *Understanding the Constitution of the Republic of South Africa* (2013) 2.
[35] MP Maduro 'The importance of being called a constitution: Constitutional authority and the authority of constitutionalism' *A constitutional identity for Europe?* 332.
[36] Ibid, 332-333.
[37] Constitution, op cit, section 1.

(b) equally subject to the duties and responsibilities of citizenship.'[38]

In addition, the rights referred to above are entrenched in the Bill of Rights[39] which puts beyond dispute the fact that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'.[40] Furthermore, the President, as head of state, 'promotes the unity of the nation'.[41]

The supremacy of the Constitution is, significantly, not only reflected in the Preamble to the Constitution, but also provided for twice in its founding provisions.[42] The Republic of South Africa is thus founded on the values of supremacy of the Constitution and the rule of law, among other. These parameters set by the Constitution define how government and its institutions must conduct their business and exercise their powers. The corollary of constitutional supremacy is judicial review which allows courts to adjudicate whether law or conduct is constitutionally valid, and whether constitutional obligations are being fulfilled. The Constitution also provides for judicial authority vested in the courts, which are 'independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'.[43] In *Doctors for Life*, Ngcobo J reiterates that the Constitutional Court 'occupies a special place in the constitutional order. It is the highest court on constitutional matters and is the ultimate guardian of our Constitution and its values'.[44] In an address to the Helen Suzman Foundation, former justice of the Constitutional Court, Kate O'Regan remarked that in a constitutional democracy the relationship between the judiciary, executive and legislature is often tense, for the very reason that the relationship is structured to ensure that the power of each is checked by the other.[45] This is the doctrine of the separation of powers which protects the individual from the abuse of power by the state. The nature of the South African state places the Constitutional Court as the final court of appeal in the interpretation and enforcement of constitutional provisions, and only the

[38] Ibid, section 3 (2).
[39] Ibid, chapter 2.
[40] Ibid, section 9.
[41] Ibid, section 83(c).
[42] Ibid, sections 1(c) and 2.
[43] Ibid, section 165(1) and (2).
[44] *Doctors for Life International v The Speaker of the National Assembly and Others* CCT 12/05, para 22 (*Doctors for Life*).
[45] K. O'Regan 'A Forum for Reason: Reflections on the role and work of the Constitutional Court' (Helen Suzman Memorial Lecture 2011) Helen Suzman Foundation www.hsf.org.za.

Constitutional Court is able to declare legislation and Presidential conduct invalid. This 'cannot be seen as thwarting or frustrating the democratic arms of government - instead it must be seen as holding those who exercise public power accountable to the people'.[46]

Siyo and Mubangizi describe judges as the guardians of the Constitution, but warn that there have been challenges in South Africa to judicial independence.[47] They refer to periodic statements by politicians about the need to review judgments of the Constitutional Court with a view to possible constitutional amendments as a significant threat, not only to the independence of the judiciary, but also to the Constitution and democracy.[48] Political criticism of the judiciary brings to the fore the question of whether a system of democratic majority rule can be reconciled with a supreme constitution. When President Mandela addressed the Constitutional Assembly he apparently had no doubt that it was possible to have democratic majority rule *and* a supreme constitution, and that the Constitution was in fact 'our humble contribution to democracy and the culture of human rights world-wide; and it is our pledge to humanity that nothing will steer us from this cause'.[49]

But is South Africa today the 'same body politic as it was when President Mandela took the helm' and when the Constitutional Court first confronted what limited democratic rule would look like under the Constitution?[50] Issacharoff highlights the problems of democracy under a dominant party and the response of the Constitutional Court to what is essentially 'a democracy shorn of real electoral competition'.[51] He refers to emerging threats to democracy as a result of deference to policy initiatives of the ruling party which begin to invite a 'worrisome deference' as well to the consolidation of centralised political power, and asks whether the Court will be, or can be, a 'restraining influence on excessive consolidation of political power'.[52] He cites *Ramakatsa*[53] as an example of what signals a new constitutional jurisprudence emerging to address the threats to democratic governance coming not from the

[46] Ibid, 3.
[47] L Siyo & JC Mubangizi 'The independence of South African Judges: A Constitutional and Legislative Perspective' *PER/PELJ* 2015 (18) 4, 817-846.
[48] Ibid.
[49] See fn 33.
[50] S Issacharoff 'The Democratic Risk to Democratic Transitions' *Constitutional Court Review* (Volume V) 1–30.
[51] Ibid, 1.
[52] Ibid, 3.
[53] *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31, 2013 (2) BCLR 202 (CC) (*Ramakatsa*).

history of apartheid, but from a lack of electoral checks on the consolidation of power. In this regard, I submit that the deference to the policies and centralised political power of the ruling party, referred to by Issacharoff, could very well act as a more compelling constraint on organs of state inhibiting them from exercising their constitutional powers and meeting their obligations than any of the complex relationships created by the Constitution. This deference could be so strong that it has a paralysing effect on provincial leadership constraining them from initiating and enacting provincial legislation for fear of being seen to defy, or be out of step with, the centre. These issues will be further considered in chapter 5 where the extent to which provinces are meeting their environmental obligations is discussed.

The recent unanimous judgment by the Constitutional Court in *Economic Freedom Fighters* appears to be much more than a 'signal' of a new constitutional jurisprudence emerging to address the threats to democratic governance to which Issacharoff and others refer.[54] It places the binding nature of the Constitution and the principle that nobody is above the law at the centre of the judgment and the public discourse in no uncertain terms. The introductory remarks of Mogoeng CJ bear repeating:

> 'One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.'[55]

Mogoeng CJ then goes on to quote Madala J, with approval, when he said, in summary, that certain values in the Constitution have been designated as foundational to our democracy, and must be observed scrupulously. If these values are not observed and their precepts not carried

[54] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 (*Economic Freedom Fighters*).
[55] Ibid, para 1.

out conscientiously, 'we have a recipe for a constitutional crisis of great magnitude'.[56] The Court seems to live up to the words of Mandela who referred to the Constitutional Court as one of the critical institutions that have started doing their work in 'the most splendid manner, conscious of the fact that their first port of call is the people rather than government on high'.[57]

2.3 Multisphere Government

The first part of this chapter provided an overview of: (a) the essential characteristics of constitutional democracy in South Africa and the values that underlie the system of government; (b) the role of the Constitutional Court as the ultimate guardian of our Constitution and its values;[58] and (c) the fact that law or conduct inconsistent with the Constitution is invalid, and that the obligations imposed by it must be fulfilled. I now turn to the complex *nature* of what is usually referred to as 'multilevel' government in South Africa, with a continued focus on the provincial sphere. Since government in South Africa is 'constituted as national, provincial and local *spheres* of government which are distinctive, interdependent and interrelated' (emphasis added)[59] I refer in this dissertation to 'multisphere', rather than 'multilevel' government.

Many scholars have analysed the South African system of government. In this regard Davis remarks that even a cursory examination of the South African constitutional text 'reveals the extent to which it was shaped by comparative precedent'.[60] He argues that the reason for this 'constitutional borrowing' is, to a considerable extent, located in the history of negotiations that produced the constitutional structure of the country.[61] According to De Vos and Freedman South Africa, whilst not a fully-fledged federal state, displays several characteristics of a federal state.[62] The Constitution establishes what the authors describe as a 'quasi-federal' system of government through not only a vertical division of power between

[56] *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLC 865 (CC), para 80.
[57] See fn 33.
[58] *Doctors for Life*, op cit, para 22.
[59] Constitution, op cit, section 40(1).
[60] DM Davis 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' *I.CON* Volume 1, 2 (2003) 118-195.
[61] Ibid, 181.
[62] P De Vos & W Freedman (eds), *South African Constitutional Law in Context* (2014) Chapter 8.

the legislative, executive and judicial branches of government, but also a horizontal division between the national, provincial and local spheres of government. They draw a useful distinction between a 'divided model of federalism' where there is a strict division of subject matters in respect of which policies and laws may be made, such as in Australia, Canada and the United States, and an 'integrated model of federalism', such as in Germany and South Africa where some subject matters are allocated exclusively to one level or sphere of government, but most are concurrent or shared. In the latter model, the national government retains more power and influence over law making and policy formulation than is usual in a fully-fledged federal system.[63]

In *Limpopo II*[64] the Constitutional Court reiterated what it had said in *Limpopo I*[65] about the competence of a provincial legislature to pass a Bill dealing with its own financial management. The Court drew the following distinction between national and provincial legislative powers: 'while Parliament has plenary legislative powers, the legislative powers of provinces are circumscribed and are set out in section 104 of the Constitution'.[66] This accords with the distinction drawn by De Vos and Freedman, and their description of an 'integrated model of federalism'.

Murray and Simeon state that the South African constitutional model bears all the hallmarks of a federation—albeit a highly centralised one.[67] In this regard, it broadly follows the Indian model, described by Granville Austin as having a 'unitary tone, and strong centralizing features'.[68] Similarly, B.R. Ambedkar, who played a leading role in drafting the Indian Constitution, said at the time that the Draft Indian Constitution 'has sought to forge means and methods whereby India will have a Federation and at the same time will have uniformity in all the basic matters which are essential to maintain the unity of the country'.[69] Murray and Simeon point out that whilst South Africa did in the end adopt a federalist model, the term

[63] Ibid, 268.
[64] *Premier Limpopo Province vs Speaker of the Limpopo Provincial Legislature and Others CCT* 94/10 [2012] ZACC 3, para 2 (*Limpopo II*).
[65] *Premier Limpopo Province vs Speaker of the Limpopo Provincial Legislature and Others* CCT 94/10 [2011] ZACC 25 (*Limpopo I*).
[66] *Limpopo II*, op cit, para 2.
[67] C Murray, & R Simeon 'South Africa: Promises Unmet – Multilevel Government in South Africa' Rekha Saxena (ed) *Varieties of Federal Governance* (2010) 232–260.
[68] Quoted by Murray and Simeon, ibid, 233.
[69] Ibid, 233.

'federalism' was carefully avoided.[70] The authors also state that the South African constitutional model has clear similarities with the German model. The fact that the South African Constitution 'borrowed' from, among others, the German model, is generally accepted. However, the authors' characterisation of the similarities between the German and South African model as being 'most obviously in its conception of provinces as primarily administrative bodies, implementing legislation that is agreed nationally'[71] seems an overstatement, which is not supported by the provisions of the Constitution. Unfortunately, such assertions reinforce certain misconceptions about the role and powers of provinces. Similar misconceptions, rather than any provisions in the Constitution, may indeed have contributed to provinces in practice being primarily administrative bodies and implementers of national legislation. The case study on drafting provincial environmental legislation for KwaZulu-Natal presented in chapter 5 highlights some of these misconceptions. Further, whilst provinces *do* implement national legislation as part of their executive authority,[72] this dissertation will demonstrate that the Constitution itself does not reduce the provincial sphere of government to 'primarily administrative bodies' which implement legislation agreed to nationally. The Constitution specifically provides for the Executive Council of a province to exercise their executive authority by not only 'implementing provincial legislation', but also 'preparing and initiating provincial legislation'.[73] The extent to which provincial executives are *in practice* initiating legislation and provincial legislatures passing such legislation, is analysed in chapter 5 below.

In addition, the deliberate use in the Constitution of the term *spheres* of government, as opposed to 'tiers' or 'levels' of government, implies that the envisaged relationship between the three spheres of government is not hierarchical in nature. However, the Constitution does make provision for certain interventions by one sphere in another sphere of government. The key examples of interventions permitted by the Constitution are section 100 ('[n]ational intervention in provincial administration') and section 139 ('[p]rovincial intervention in local government'). In both instances the powers to intervene, the reasons for such intervention and the manner in which interventions must take place are clearly circumscribed by those sections

[70] I submit that this careful avoidance of the term 'federalism' can be located in the same 'history of negotiations' referred to by Davis in his article (cited in fn 60); see also the O'Malley Archives on the history of negotiations during the transition.
[71] Murray and Simeon, op cit, 238.
[72] Constitution, op cit, section 125 (2)(b) and (c).
[73] Ibid, section 125(2)(a) and (f), respectively.

and cannot be exercised in an arbitrary manner. Chapter 3 of the Constitution further clarifies the relationship between the three spheres of government by spelling out the principles of co-operative government and intergovernmental relations. The provisions of specific relevance to this study are examined more fully in paragraph 2.4 below.

Furthermore, the interpretation by the courts of the role of the different spheres of government also does not support a view of provinces as mere administrative bodies, as the discussion below illustrates:

In *DVB Behuising*,[74] the matter before the Constitutional Court was initiated by a private commercial company which succeeded in the High Court. In the Constitutional Court judgment Ngcobo J refers, amongst others, to the following 'central findings' which led Mogoeng J (as he then was) to grant the order sought by the applicant in the High Court:

> '(a) Provincial legislatures have a "clearly defined and very limited legislative authority" and have to operate "within the strict parameters" of that authority.
>
> (b) In construing the powers of provincial legislatures the relevant provisions of the Constitution must "… be given a strict interpretation. This is necessary to ensure that no provincial legislature is allowed to exercise the authority it does not have and thereby usurp the functions of Parliament" '[75]

Ngcobo J then comments as follows on the above quoted pronouncements of the High Court:

> 'I would point out immediately that I respectfully disagree with the view expressed by Mogoeng J that the functional areas of provincial legislative competence set out in the schedules should be "given a strict interpretation". In the interpretation of those schedules there is *no presumption* in favour of either the national legislature or provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable the national Parliament and the provincial

[74] *Western Cape Provincial Government and Others In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC) (*DVB Behuising*).
[75] Ibid, para 16.

legislatures to exercise their respective legislative powers fully and effectively' (emphasis added).[76]

In *Habitat Council*[77] the question before the Court was whether direct provincial intervention in particular municipal land use decisions is compatible with the Constitution's allocation of functions between local and provincial government. The Court had to answer two further questions: Firstly, are the provincial appellate powers in the Land Use Planning Ordinance (LUPO) constitutionally invalid; and, secondly, if so, what is the appropriate remedy? In answering these questions, the Court quoted Moseneke J in *Robertson*[78] with approval:

'The Constitution has moved away from a hierarchical division of government power and has ushered in a new vision of government in which the sphere of local government is interdependent, "inviolable and possesses the constitutional latitude within which to define and express its unique character" subject to the constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statute, otherwise moribund, save if imbued with power by provincial or national legislation. A municipality enjoys "original" and constitutionally entrenched powers, functions, rights and duties that may be qualified and constrained by law and only to the extent the Constitution permits.'[79]

The *Habitat Council* Court, per Cameron J, continues in a similar vein, quoting Mhlantla AJ (as she then was) with approval when she stated in *Lagoonbay*:[80]

'This Court's jurisprudence quite clearly establishes that: (a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government; (b) the constitutional vision of autonomous spheres of government must be preserved; (c) while the Constitution confers planning responsibilities on each of the spheres of government, those are

[76] Ibid, para 17.
[77] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* [2014] ZACC 9 (*Habitat Council*).
[78] *City of Cape Town and Another v Robertson and Another* [2004] ZACC 21; 2005 (2) SA 323 (CC) (*Robertson*).
[79] *Robertson*, op cit, para 60; see also *Habitat Council*, op cit, para 11.
[80] *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* [2013] ZACC 39; 2014 (1) SA 521 (CC) (*Lagoonbay*).

> *different* planning responsibilities, based on "what is appropriate to each sphere"; (d) "planning" in the context of municipal affairs is a term which has assumed a particular, well established meaning *which includes the zoning of land and the establishment of townships*; and (e) the provincial competence for "urban and rural development" is not wide enough to include powers that form part of "municipal planning" (footnotes omitted).'[81]

Cameron J goes on to state emphatically that municipalities are 'responsible for zoning and subdivision decisions, and provinces are not'.[82] He adds that all 'municipal planning decisions that encompass zoning and subdivision, no matter how big, lie within the competence of municipalities'.[83] With reference to the Court's analysis in *Gauteng Development Tribunal*,[84] Cameron J then states:

> 'Provincial and national government undoubtedly also have power over decisions so big (i.e. a major new town, for example "Sasol 4"), but their powers do not lie in vetoing zoning and subdivision decisions, or subjecting them to appeal. Instead, the provinces have coordinate powers to withhold or grant approvals of their own. It is therefore wrong to fear that a province would be powerless to stop the development of a 'Sasol 4. That development would depend on myriad approvals, some of them provincial, some of them national.'[85]

Although the statements by the Court in *Habitat Council* were made with particular reference to the local government sphere, I submit that it equally holds for provincial government, and that in terms of the Constitution a province is also not, in the words of the Court, 'a mere creature of statute, otherwise moribund, save if imbued with power by … national legislation'.[86] Provinces also enjoy original and constitutionally entrenched powers, functions, rights and duties that may be qualified and constrained by law but *only* to the extent the Constitution permits. This interpretation is supported by the Constitution, which describes the three spheres of government in exactly the same terms in section 40(1) cited above, under the heading 'Government in the Republic'. The principles of co-operative

[81] *Lagoonbay*, op cit, para 46; see also *Habitat Council*, op cit, para 12.
[82] *Habitat Council*, ibid, para 13.
[83] Ibid, para 19.
[84] *Johannesburg Municipality v Gauteng Development Tribun*al 2000 (1) SA 732 (CC) (*Gauteng Development*), paras 23 and 24.
[85] *Habitat Council*, op cit, para 19.
[86] Ibid, para 11 (quoted above).

government and intergovernmental relations give further credence to a non-hierarchical conception of government in South Africa.[87]

In *Kloof Conservancy*[88] the Supreme Court of Appeal overturned a High Court order which imposed a general obligation upon the Minister to oversee all organs of state to comply with the National Environmental Biodiversity Act 10 of 2004 (NEMBA). This was done having regard to the principles of legality, separation of powers and co-operative government.[89] Thus the Court held that -

> 'Such an order appears to misconceive the powers and responsibilities of a national Minister under our constitutional system of co-operative government. It seems to be based on the erroneous premise that our system of government is hierarchical, with national government having the power to supervise the performance of all organs of State in every sphere of government, and compel them to comply with their duties.'[90]

The Court then quotes Nugent JA in *Gauteng Development Tribunal*[91] where he observed that the structure of government authority under the present constitutional dispensation departs markedly from that which existed under the previous constitutional regime where all public power vested in Parliament and devolved upon the lower tiers of government by parliamentary legislation. Under the new regime, certain powers are conferred directly on the other spheres by the Constitution, to the extent that they exercise 'original constitutional powers and no other body or person may be vested with those powers'.[92]

In *Kloof Conservancy* the Supreme Court of Appeal therefore convincingly dispels a pervasive misconception that a Minister, or for that matter a national government department, can play 'big sister' to the other spheres of government. In reference to interventions in terms

[87] Constitution, op cit, section 41; see also discussion in paragraph 2.4 below.
[88] *Minister of Water and Environmental Affairs v Kloof Conservancy* (106/2015) [2015] ZASCA 177 (*Kloof Conservancy*).
[89] Ibid, summary in headnote.
[90] Ibid, para 10.
[91] *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA), para 14.
[92] Kloof Conservancy, op cit, para 10.

of section 100 and 139 of the Constitution, the Court stated that neither of those sections permits an intervention with regard to compliance with NEMBA, and that the order imposed by the High Court 'incorrectly assumes that the national government has a supervisory and ultimately a directory role in respect of the other spheres'. Such an order 'impinges (rather than upholds) the principle of co-operative government'.[93]

Tronox is one of the most recent judgments in which the Constitutional Court had further occasion to consider a matter which touches, in the words of Van der Westhuizen J, 'the heart of the South African constitutional dispensation, namely the distribution of power amongst the municipal, provincial and national spheres of government'.[94] He cites, with approval, *Gauteng Development Tribunal* which 'provided a ringing affirmation of the need for the various spheres of government to "respect the constitutional status, institutions, powers and functions of government in the other spheres" and "not assume any power of function except those conferred on them in terms of the Constitution" '.[95]

Based on the above analysis of the relevant provisions of the Constitution, I conclude that the relationship between the three spheres of government is not hierarchical in nature. The Constitution has moved away from a hierarchical division of government power and has ushered in a new vision of government based on the principles of co-operative government binding on all three spheres of government, discussed more fully immediately below. Furthermore, *DBV Behuising* left no doubt that in the interpretation of the functional areas of provincial legislative competence set out in Schedules 4 and 5 in the Constitution, there is no presumption in favour of either the national legislature or provincial legislatures. These functional areas must be purposively interpreted in a manner which will enable the national Parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively.[96] As previously mentioned, Schedules 4 and 5 are discussed in greater detail

[93] Ibid, para 11.
[94] *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* [2016] ZACC 2, para 1.
[95] Ibid, para 21.
[96] The purposive approach to statutory interpretation seeks to look for the purpose or intention of the legislation before interpreting the words (the 'mischief rule').

below. I now turn to the principles of co-operative government and intergovernmental relations[97] and how they relate to the system of multisphere government discussed above.

2.4 Co-operative Government

De Vos and Freedman state that an important consequence of the integrated model of government evident in the Constitution is that mechanisms must be put in place to regulate the overlap of power between the various spheres of government, and that the principle of co-operative government plays an important role in that regard.[98] In this respect I submit that one of the possible dangers of multisphere government is that it could result in fragmented and incoherent government, which then becomes ineffective and inefficient. In addition, it could lead to fragmented and inconsistent legislation. Such a situation has a negative impact on the well-being of people and the enjoyment of their rights. The inclusion of the binding provisions on co-operative government in chapter 3 of the Constitution is intended to prevent such fragmentation, incoherence and inconsistence. These provisions could in fact be described as the constitutional glue that holds the different spheres of government together. Thus, in reviewing intergovernmental relations and co-operative government in South Africa, Malan observes that the three spheres of government are required to 'forge strong, flexible goal-directed partnerships that can promote collaboration without weakening performance and accountability. This can only happen if political office-bearers and officials in the public sector change their mindset to embrace co-operation'.[99] Indeed, in *National Gambling Board* the Constitutional Court held that '[c]o-operative government is foundational to our constitutional endeavour'.[100]

The above comments underscore the importance of the binding constitutional provisions on co-operative government, as well as the Intergovernmental Relations Framework Act 13 of

[97] Constitution, op cit, chapter 3.
[98] De Vos & Freedman, op cit, 271.
[99] L Malan 'Intergovernmental relations and co-operative government in South Africa: the ten-year review' – UPSpace Home – University of Pretoria, http://hdl.handle.net/2263/4211, 240.
[100] *National Gambling Board v Premier, KwaZulu-Natal and Others* [2002] (2) SA 715 (CC), 2002 (2) BCLR 156 (CC) (*National Gambling Board*), para 32.

2005[101] (IGRFA). This dissertation will therefore not be complete without the brief analysis below of chapter 3 of the Constitution and the IGRFA.

2.4.1 Chapter 3 of the Constitution

Section 40(1) of the Constitution provides that government in South Africa is constituted as three distinctive, interdependent and interrelated spheres, namely the national, provincial and local spheres of government, as stated above. Section 40(2) is couched in peremptory terms, and places clear obligations on *all* spheres of government in respect of co-operative governance:

> 'All spheres of government must observe and adhere to the principles of this Chapter and must conduct their activities within the parameters that the Chapter provides.'

Section 41 deals with the principles of co-operative government and intergovernmental relations. The provisions of subsection 41(1) are also peremptory and place the following specific obligations in respect of co-operative government and intergovernmental relations on all organs of state within each sphere of government:

> '(1) All spheres of government and all organs of state within each sphere must –
>
> (a) preserve the peace, national unity and the indivisibility of the Republic;
> (b) secure the well-being of the people of the Republic;
> (c) provide effective transparent, accountable and coherent government in the Republic as a whole;
> (d) be loyal to the Constitution, the Republic and its people;
> (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
> (f) not assume any power or function except those conferred on them in terms of the Constitution;

[101] enacted to give effect to section 41(2) of the Constitution.

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) co-operate with one another in mutual trust and good faith by-

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.'

Subsection 41(2) obliges Parliament to enact what is now the Intergovernmental Relations Framework Act 13 of 2005 (IGRFA):

'(2) An Act of Parliament must –

(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and

(b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.'

Subsection 41(3) provides for intergovernmental disputes, again in obligatory terms:

'(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.'

Subsection 41(4), the only permissive subsection in section 41, refers to the powers of courts in relation to disputes between organs of state:

'(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.'

In reviewing intergovernmental relations and co-operative government, Malan notes that the principles spelt out in chapter 3 cannot be separated from the Bill of Rights in the Constitution, as the latter refers to the basic rights of individuals which find application in all laws, administrative decisions taken and acts performed.[102] I submit that, for the same reasons, these principles can also not be separated from the environmental right entrenched in section 24 of the Constitution. The constitutional provisions on co-operative government and intergovernmental relations are therefore pertinent to an examination of provincial obligations and authority to enact environmental legislation, which ideally requires considerable co-operation between the different spheres of government. The realisation of the environmental right may be hampered by the fact that significant intergovernmental co-operation and communication appears to be lacking. I elaborate on this point in chapter 5 under the discussion on possible constraints experienced by provinces in that regard.[103]

2.4.2 The Intergovernmental Relations Framework Act (IGRFA)

This Act was enacted in terms of section 41(2) of the Constitution[104] and establishes a framework for the national, provincial and local governments to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes; and matters related thereto.[105] To this end the Act establishes national, provincial and municipal intergovernmental fora and structures; and provides for implementation protocols and settlement of intergovernmental disputes.

[102] L Malan, op cit, 227.
[103] See paragraph 5.4 below.
[104] Various other Acts of Parliament also give expression to section 41(2) for certain *sectors* of government. For instance: The National Environmental Management Act 107 of 1998 (NEMA) provides for co-operative environmental governance; and the Intergovernmental Fiscal Relations Act 97 of 1997 promotes co-operation between the national, provincial and local spheres of government on fiscal, budgetary and financial matters.
[105] IGRFA, op cit, long title.

Of specific interest to this study is the fact that the IGRFA recognises in its Preamble the nexus between the realisation of constitutional rights (which obviously includes the environmental right) and effective, efficient, transparent, accountable and *coherent* government, by providing that:

> 'all spheres of government must provide effective, efficient, transparent, accountable and coherent government for the Republic to secure the well-being of the people and the *progressive realisation of their constitutional rights* (emphasis added).'

When this is read together with the point made by Malan[106] that the principles spelt out in chapter 3 of the Constitution cannot be separated from the Bill of Rights, it serves as an important reminder that failure to fulfil the binding obligations emanating from the Constitution, specifically as provided for in Chapters 2 and 3, impacts negatively on people and their rights. It also serves as a reminder that the Constitution was adopted as the supreme law of the Republic, by the people of South Africa, for the following specific purposes:

> '… so as to-
>
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law;
>
> Improve the quality of life of all citizens and free the potential of each person; and
>
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.'[107]

Further, the Constitution is the supreme law of the Republic and -

[106] See paragraph 2.4.1 above.
[107] Constitution, op cit, the Preamble.

'law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'[108]

2.4.3 Judicial interpretation of chapter 3

Woolman points out that during the first decade after the Constitution came into effect Parliament failed to enact the legislation required by the Constitution that would prevent 'different spheres of government and opposing organs of state from going to war (or court) over vital policy matters'; and that during that time the courts played their part in 'holding things together'.[109] He cites, for instance, the *First Certification Judgment* and the *National Gambling Board* judgments where, in both decisions, the Court drew a line between political and legal forms of dispute resolution.[110] Woolman also points out that when the IGRFA was finally passed, it adopted in many respects the Court's views on how intergovernmental conflicts should be resolved. Further, the Act defines intergovernmental relations as 'relationships that arise between different governments or between organs of state from different governments in the conduct of their affairs', and 'Government' as '(a) the national government; (b) a provincial government; or (c) a local government'.[111] However, the Act is silent on relations between provincial departments within a given province. This leads Woolman to the important observation that the language of section 125 of the Constitution which provides for the executive authority of provinces almost inexorably leads to the conclusion that the Premier and the Executive Council of a province may determine how policy is implemented and how various departments are to work together to that end. Moreover, to summarise Woolman's argument, if the Premier wants to establish dispute resolution mechanisms, which could be in the form of provincial legislation, 'there is nothing in the Final Constitution to prevent them from doing so'.[112] I submit that such legislation, although not directly on the environment, could assist provinces to give effect to their environmental obligations by specifically providing for closer co-operation between different departments within in a particular province on issues pertaining to the environment.

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[108] Ibid, section 2.
[109] S Woolman '*L'etat, C'est Moi*: Why provincial Intra-governmental disputes in South Africa remain ungoverned by the final constitution and the Intergovernmental Relations Framework Act – and how we can best resolve them' *Law, Democracy and Development* 63.
[110] Ibid.
[111] IGRFA, op cit, section 1.
[112] S Woolman, op cit, 68.

In *Minister of Police v Premier of the Western Cape*, Moseneke DCJ interpreted the provisions on co-operative government under the heading 'Chapter 3 obligations'. He held that chapter 3 of the Constitution has two parts: section 40(1) affirms that the three spheres of government are distinctive, interdependent and interrelated, whilst section 40(2) requires organs of state to comply with the principles of co-operative government spelt out in section 41. Section 41(3) requires an organ of state to: a) make every reasonable effort to settle an intergovernmental dispute using mechanisms and procedures provided for; and b) to exhaust all other remedies before it approaches a court to resolve a dispute. Of further importance is that a court has discretion to refuse to hear such a dispute if it is not satisfied that the parties have done so, although a court is not thereby precluded from hearing the dispute.[113] He then cites *National Gambling Board*, with obvious approval, where the same court held that the duty of organs of state to avoid litigation is at the heart of chapter 3, and that parties are duty bound to make a meaningful effort to comply with the requirements of co-operative government. This obligation entails much more than an effort to settle a pending court case – it 'requires of each organ of state to re-evaluate its position fundamentally'.[114] Moseneke DCJ adds that spheres of government and organs of state are obliged to arrange their activities in a manner that 'advances intergovernmental relations and bolsters co-operative governance'. If they do not, they breach peremptory requirements of the Constitution. He then observes that despite this an ever-increasing number of intergovernmental disputes end up in court, especially at the Constitutional Court, and that such litigation is always at the expense of the public purse from which they all derive their funding. Further, the litigation also often delays 'sorely needed services to the populace and other activities of government'. [115]

In conclusion, the binding provisions of chapter 3 of the Constitution discussed above and the pronouncements of the Constitutional Court in that regard place the pivotal role that co-operative governance ought to play in regulating the overlap of power between the different spheres of government beyond dispute. Yet, it appears that organs of state are not always in practice giving effect to their constitutional obligation to 'observe and adhere'[116] to the principles of co-operative government, at least not to the extent intended by the Constitution. Thus, the ideal of the three spheres of government co-operating with one another 'in mutual

[113] *Minister of Police v Premier of the Western Cape*, CCT 13/13 [2013] ZACC 33, para 58.
[114] Ibid, para 59; see also *National Gambling Board*, para 36.
[115] Ibid, para 64.
[116] Constitution, op cit, section 40(2).

trust and good faith'[117] has more often than not failed to be realised, despite the existence of an 'array of institutions (that) have greased the wheels of intergovernmental relations'.[118] The comments by Moseneke DCJ in *Minister of Police v Premier of the Western Cape* that more and more intergovernmental disputes end up in court support this observation.[119]

I have argued above that the principles of co-operative government and intergovernmental relations cannot be separated from the environmental right entrenched in section 24 of the Constitution, as these principles should find application in legislation enacted to give effect to the right. In that regard I submit that the environmental right informs the substantive *purpose* or *objective* of legislation enacted to realise the right as envisaged in the Constitution; and that an understanding of the environmental right is an essential precondition for taking meaningful legislative measures in pursuance of the right. Chapter 3 below therefore provides a detailed analysis of the substantive *content* of the environmental right and the *obligations* it imposes on, specifically, provincial organs of state. The legislative *authority* and functional areas of legislative *competence* are discussed in chapter 4 below, as previously stated.

CHAPTER 3

THE ENVIRONMENTAL RIGHT IN THE BILL OF RIGHTS

3.1 Overview

Provincial obligations to protect the environment, and the legislative authority of provinces to fulfil such obligations, are derived from the Constitution.[120] Any environmental legislation enacted by the provincial sphere of government must consequently be consistent with the enabling provisions in the Constitution. In this chapter I analyse the *obligations* imposed on provinces to protect the environment provided for in section 24 in the Bill of Rights. This

[117] Ibid, section 41 (1) (h).
[118] See S Woolman, T Roux & B Bekink '*Co-operative Government*', Chapter 14 [2nd Edition, Original Service: 06 – 04], 14-23 – 14-24.
[119] *Minister of Police v Premier of the Western Cape*, op cit, para 58.
[120] Constitution, op cit. See specifically sections 7(2), 8(1), 24 and 104, read with Schedules 4 and 5.

requires a detailed examination of the environmental right, and the nature, scope and content of the obligations it imposes on organs of state to protect the environment. In line with the stated objectives of this study, the analysis focuses on provincial obligations. Reference is also made to the principles distilled from international environmental jurisprudence, and their relevance to the environmental right in the South African Constitution. This is followed by a brief discussion of the application and enforcement of the environmental right and a summary of the main conclusions drawn from the analysis as a whole. The chapter is concluded with a brief mention of the relationship between the environmental right and Schedules 4 and 5 of the Constitution, which list functional areas of concurrent national and provincial legislative competence and functional areas of exclusive legislative competence, respectively.

3.2 The Bill of Rights and the Environmental Right

3.2.1 Introduction

The Bill of Rights is 'a cornerstone of democracy in South Africa', enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.[121] Subsections 7(2), which provides that the state must 'respect, protect, promote and fulfil the rights in the Bill of Rights', and 8(1), which provides that the Bill of Rights 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state', are of particular significance for the interpretation of rights in the Bill of Rights. These two subsections will be further discussed in chapter 4 (part I) when the legislative authority of provinces is examined. Entrenched in the Bill of Rights, the environmental right provides as follows:

> 'Everyone has the right—
>
> (a) to an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
> *(i)* prevent pollution and ecological degradation;
> *(ii)* promote conservation; and

[121] Ibid, section 7(1).

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'[122]

The substantive meaning of section 24 has to date only been directly considered by the South African courts in a limited number of cases. Therefore, I firstly draw on the principles distilled from international environmental jurisprudence, and discuss their relevance for the interpretation of the environmental right in the South African Constitution. Thereafter I analyse the provisions of section 24 itself, and the obligations imposed by it. This is concluded with a brief overview of the enforceability and justiciability of section 24.

3.2.2 International environmental jurisprudence

Cowen, in one of the early papers that deals with the environmental right in the Constitution[123] stresses that section 39 of the Constitution expressly requires every court, tribunal or forum to consider international law. Furthermore, sections 232 and 233 declare that customary international law is law in the Republic unless inconsistent with the Constitution or an Act of Parliament, and that when interpreting legislation, every court must prefer any reasonable interpretation that is consistent with international law. He stated his firm belief that several basic environmental principles were being developed at the level of international customary law, and moreover, that South African constitutional law and customary international law may well turn out to be mutually supportive of each other.[124] He then cites litigation between Hungary and Slovakia before the Permanent Court of International Justice[125] where two competing legal rights were involved, namely the right to development and the right to environmental protection. The court needed to find a practical way of balancing these sharply opposed contentions—environmental protection versus economic development. In order to achieve this, the Court was called upon to interpret and apply the principle of 'sustainable development' for the first time. In doing so, the Court restated what it said in 1996, namely that:

[122] Ibid, section 24.
[123]DV Cowen 'The new South African Constitution and opportunities for environmental justice in a democratic South Africa' *Environmental Justice, Governance and Law* 121-141, first presented at the conference on Environmental Justice and Legal Process held at the University of Cape Town in April 1998.
[124] Ibid, 136-137.
[125] The ICJ case Gabcikovo-Nagymaros Project (Hungary/Slovakia) (1998) 37 *International Legal Materials* 162.

> 'The environment is not an abstraction but represents a living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.'[126]

The Court also made it clear that the principle of sustainable development is fundamental to the determination of the competing considerations in the case before it. And although 'sustainable development' was a fairly recent concept, it was likely to play a major role in determining important environmental disputes in future. In deciding how to balance the right to develop and the right to environmental protection, the court held that it is clear that a principle must be followed which pays due regard to both rights, namely the principle of sustainable development which had become an established part of modern international law.[127]

Cowen further points out that it is important to note that sustainable development is not the only principle of modern international environmental law that has to be observed—a number of further principles are increasingly 'hardening':

(a) the polluter must pay;
(b) biodiversity must be maintained;
(c) the precautionary principle must be observed;
(d) intergenerational equity must be observed;
(e) effective environmental impact assessment procedures must be observed;
(f) the principle of internalising costs and of improved pricing and of providing incentive mechanisms must be observed; and all these goals should be kept in mind while
(g) promoting justifiable economic and social development.

He continues by saying that, fortunately, the above-mentioned broad propositions are all to be found either in section 24 of the Constitution, or in 'policy statements', or in either 'hard' or

[126] Threat or Use of Nuclear Arms Advisory Opinion (1997) 35(4) *International Legal Materials* 814 (see Cowen, op cit, 138).
[127] Ibid (see also Cowen, op cit, 138-139).

'soft' international law which ought to be observed by South Africa".[128] In this regard, Cowen mentions the work of Kidd and Henderson, who also emphasise the importance of international norms in environmental law.[129]

Davis reminds us of the international origins of the Bill of Rights, and the role 'constitutional borrowing' played in its drafting. He points out that the Bill of Rights in the interim Constitution (IC)[130] followed the Canadian Charter of Rights and Freedoms in its essential structure.[131] In this regard, Davis refers to the limitations clause which was a variation on section 1 of the Canadian Charter and the manner in which this section had been interpreted by the Canadian Supreme Court in *R v Oakes*,[132] which helped shape the final version of the limitations clause in section 36 of the Constitution. According to Davis, Professor Halton Cheadle introduced the concept of scrutiny into the limitations clause by drafting a provision that guaranteed that certain rights could be limited only where the limitation, in addition to being reasonable and justifiable in an open, democratic society based on freedom and equality, was *necessary*, thus introducing an American influence.[133] Article 19(2) of the German *Grundgesetz*, which holds that '[i]n no case may the essence of a basic right be infringed', also influenced the limitations clause. In the end, some significant changes were made to the Bill of Rights, including the addition of socio-economic rights and a concept of substantive equality, alterations to the property clause, express provision that the Bill of Rights be applied horizontally, and the eradication in the levels of scrutiny in the limitation clause. In its final form the 'Limitation of rights' in section 36 of the Constitution thus reads:

> '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including –
>
> (a) The nature of the right;
>
> (b) The importance of the purpose of the limitation;

[128] Cowen, op cit, 139.
[129] M Kidd *Guide to South African Environmental Law* (1997); and P Henderson, *Environmental Laws of South Africa* (1996), referred to by Cowen, ibid, 140.
[130] Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution).
[131] Davis, op cit (fn 60), 18 –195.
[132] [1986] S.C.R 103.
[133] Davis, op cit, 187.

(c) The nature and extent of the limitation;

(d) The relation between the limitation and its purpose; and

(e) Less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

Davis continues to say that despite the changes that were brought about in the final Constitution, 'the essential structure and content of the interim bill of rights was transported into the final document'.[134] He does, however, warn (by quoting a minority judgment by Kriegler J) about uncritical use of comparative law. Kriegler J pleaded for a more nuanced use of comparative law by saying 'where a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how jurists of that country have interpreted their precedential provision'.[135] On the other hand, he warned courts to be extremely careful before adopting North American jurisprudence with regard to freedom of expression as the two systems were 'inherently incompatible in that they stemmed from different common law origins and were located in materially different constitutional regimes'. He went on to say:

> 'The United States Constitution stands as a monument to the vision and libertarian aspirations of the Founding Fathers; and the first Amendment in particular to the values endorsed by all who cherish freedom. But they paint eighteenth century revolutionary insights in broad, bold strokes. The language is simple, terse and direct, the injunctions unqualified and the style peremptory. Our Constitution is a wholly different kind of instrument. For present purposes it is sufficient to note that it is infinitely more explicit, more detailed, more balanced, more carefully phrased and counterpoised, representing a multi-disciplinary effort on the part of hundreds of expert advisors and political negotiators to produce a blueprint for future governance of the country'.[136]

De Wet and Du Plessis point out that the Constitutional Court has not had sufficient opportunity to clarify the meaning of the positive obligations of the state imposed by the

[134] Ibid, 189.
[135] *Bernstein v Bester*, 1996 (2) SALR 133.
[136] *S v. Mamabolo* 2001 (3) SALR 409 (CC), para 40.

environmental right in section 24.[137] They therefore distil some of the positive obligations of a substantive nature implied by this section, with particular reference to substantive duties, by drawing on the way in which international human rights bodies have interpreted and applied similar provisions of the different human rights instruments, namely the International Covenant on Civil and Political Rights (ICCPR) , the African Charter of Human and Peoples' Rights (African Charter), the European Convention of Human Rights and Fundamental Freedoms (European Convention), the American Declaration of the Rights and Duties of Man (American Declaration) and the American Convention of Human Rights (American Convention). The authors do acknowledge the inherent limitations of international human rights jurisprudence in relation to positive obligations pertaining to the environment due to the fact that environmental protection *per se* is not yet a justiciable right before most international human rights bodies. They also point out that most human rights instruments were drafted before the emergence of environmental protection as a common concern, and therefore do not directly mention the environment, with the exception of the African Charter which explicitly recognises a human right to a 'satisfactory environment' in article 24 thereof.[138] They submit, however, that in accordance with the Constitution,[139] the benchmarks developed by these bodies may be a useful tool in clarifying the core content and scope of the obligations imposed by section 24, especially bearing in mind that South Africa, as a party, would in any event be bound to give effect to all obligations flowing from the African Charter and the ICCPR.

The authors highlight two main threads of substantive positive environmental obligations, which have crystallised in the jurisprudence of international human rights bodies, mainly (with the exception of the *SERAC*[140] case before the African Commission) distilled from non-environmental human rights. These are:

(i) A broad obligation to engage in environmental impact and risk assessments of activities that pose a danger to the environment or human health, or both. This obligation stretches beyond the mere execution of environmental assessments to the

[137] E De Wet & A Du Plessis 'The meaning of certain substantive obligations distilled from international human rights instruments for constitutional environmental rights in South Africa' (2010) 10 *African Human Rights Law Journal*, 345.
[138] Ibid, 350.
[139] Section 39(1)(c).
[140] *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

effective regulation, minimisation and prevention of environmental harm that may result from such activities. South Africa has a history of environmental impact assessments dating back to the 1970, and some of these obligations already exist in South African law.[141]

(ii) A positive duty to limit exploitation of natural resources and to prevent pollution of water, air and soil (derived from the rights of indigenous peoples, notably the right to life and the right to culture). The environmental right in section 24 of the Constitution extends the right to everyone in South Africa, and would include indigenous people and traditional communities, although the distinction between the two is blurred and the concepts overlap. This overlap is relevant if section 24 is to be interpreted in accordance with international human rights jurisprudence, as it indicates that a broad category of people in South Africa could potentially claim protection of their natural habitat in order to preserve their traditional way of life.[142]

In regard to the latter, De Wet and Du Plessis point out the importance of the view of international human rights bodies that the protection of the way of life of indigenous peoples requires a limitation of the economic exploitation of their natural habitat, the prevention of pollution of their environment, as well as the eradication of the consequences of pollution.[143] They furthermore state that at first glance it is more difficult to link the obligation to protect the way of life and culture of indigenous people to the text of section 24 of the Constitution, than is the case with the obligation to conduct environmental assessments. However, since the Constitution affords the environmental right to everyone in South Africa, De Wet and Du Plessis are of the view that it seems likely that the 'way of life' of indigenous people and traditional communities fits within the notions of a right to an environment that is not harmful to their 'health' or 'well-being' (section 24(a)) and 'social development' (section 24(b)(iv)), notions which are intrinsically part of human life.[144] Furthermore, section 31(1)(a) of the Constitution provides that persons belonging to a 'cultural, religious or linguistic community' may not be denied the right, with other members of that community, to enjoy their culture, practise their religion, and use their language. The authors therefore argue that section 24, read with section 31, may be interpreted as placing an obligation on the state to, for instance,

[141] De Wet & Du Plessis, op cit, 364; see also NEMA, section 2 and chapter 5, and the EIA Regulations promulgated in terms of NEMA.
[142] De Wet & Du Plessis, ibid, 369.
[143] Ibid, 369.
[144] Ibid, 371.

demarcate certain natural resources essential to the survival of indigenous people, and to limit or exclude certain commercial activities and development within such an area; to prevent pollution that could threaten the way of life of such communities; and to provide reparation where communities have suffered injury as a result of environmental degradation. They also point out that the National Heritage Resources Act (NHRA)[145] protects the cultural heritage resources of, among others, traditional communities and indigenous people. Such protection includes the protection of ancestral graves, royal graves and graves of traditional leaders, thus underscoring the view that cultural heritage, traditional communities and environmental protection go together.[146] I submit that it also demonstrates that the environmental right cannot be understood in isolation from other rights in the Constitution (I elaborate on this point in paragraph 3.2.6 below).

On the whole, therefore, the substantive obligations for the (indirect) protection of the environment, albeit somewhat general, illustrate the 'intertwining' of human life (health and well-being) and the environment, and also underscore the anthropocentric dimension of environmental protection. Furthermore, 'the explicit recognition of a right to a satisfactory environment would not relieve courts (or policy makers) from balancing the positive substantive obligations inherent in such a right with other legitimate public interests, including the economic development of an area'.[147]

The above analysis illuminates: (a) the nature and scope of the duties and obligations that section 24 may impose on provincial organs of state in respect of cultural, traditional, linguistic and even indigenous communities; and (b) the potential objectives, purpose and content of legislation enacted in pursuance of their environmental rights. This is of particular relevance in a province such as KwaZulu-Natal with its diverse population, and must be born in mind by organs of state when giving effect to their environmental obligations.

In considering the implications of international human rights jurisprudence for South Africa, De Wet and Du Plessis make the point that judicial interpretation and clarification of the

[145] Act 25 of 1999.
[146] De Wet & Du Plessis, op cit, 372.
[147] Ibid, 360-361.

state's obligations contained in the environmental right are 'crucial to guide the conduct of the legislature and the executive in relation to environmental governance'. They postulate that because international judicial interpretation is primarily based on the interpretation of non-environmental human rights, its scope is likely to be more limited than in the case of the explicit environmental right in section 24 of the Constitution. However, the South African environmental right is likely to include those obligations distilled from non-human rights instruments, and this overlap suggests that the positive obligations generated through international jurisprudence create a '*minimum threshold* for environmental protection (emphasis added)' in South Africa, which cannot be discarded through 'policy whims of the legislature and the executive'.[148]

3.2.2.1 Conclusions drawn from international jurisprudence

From the above analysis of international jurisprudence and the role it plays in interpreting the nature and scope of section 24 of the Bill of Rights, it is clear that the South African environmental right is deeply rooted in the global history of environmental rights, and must be understood within that history. Of particular importance are the following:

(i) Customary international law is law in the Republic unless inconsistent with the Constitution or an Act of Parliament, and when interpreting legislation, every court must prefer any reasonable interpretation that is consistent with international law.[149]

(ii) The international origins of the South African Bill of Rights and its evolution from the IC to its current form greatly assist in the interpretation of the nature and scope of the rights enshrined in the Constitution, including the limits of those rights.[150]

(iii) The positive obligations generated through international jurisprudence create benchmarks, i.e. provide a minimum threshold for environmental protection in South Africa, which cannot be ignored by legislatures and the executive.[151]

[148] Ibid, 375.
[149] See Cowen, op cit.
[150] See Davis, op cit.
[151] See De Wet & Du Plessis, op cit, 375

(iv) However, an *uncritical* use of comparative law without ascertaining whether the legal provisions stem from different common law origins, or are located in materially different constitutional regimes, should be avoided.[152]

3.2.3 Section 24 of the Constitution

Scholars generally agree that the inclusion of an enforceable substantive environmental right in the Constitution has sparked unprecedented development of the domestic environmental law and governance framework.[153] When read with section 7(2) of the Constitution, it is clear that whilst everyone in South Africa must respect this right, the state incurs an 'additional duty to take positive action towards its fulfilment'.[154] One of the stated objectives of this dissertation is to interrogate the nature and scope of the binding substantive obligation imposed on provincial organs of state to protect the environment through legislative measures. Such an analysis firstly requires a comprehensive overall understanding of the nature and scope of the environmental right provided for in section 24 of the Constitution, which is, significantly, situated within the Bill of Rights. As stated above, domestic judicial guidance in this regard is limited as the courts, particularly the Constitutional Court, have only directly considered the substantive meaning of section 24 in a few cases. This means that until the courts comprehensively clarify the 'meaning, scope and reach' of the environmental right, it is up to legislators, policy makers and decision makers to make sense on their own of their constitutional obligation to protect the environment through 'reasonable legislative and other measures'.[155] Du Plessis also points out that the environmental right has not yet been scrutinised to the extent that is sufficient for public authorities to be clear on the 'preventative, implementable and enforceable properties of the right in relation to such authorities' other constitutional powers and mandates'.[156] Fortunately, in the absence of sufficient guidance from the courts, the abundance of scholarly analyses of section 24 (read with available judicial decisions), provide invaluable insights into the nature and scope of environmental right, and the different perspectives on and approaches to the right.

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[152] See comments by Kriegler J quoted by Davis, op cit.
[153] LJ Kotzé & A Du Plessis 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa' *Journal of Court Innovation* 3:1 157-176.
[154] Ibid, 158.
[155] Ibid, 165-168.
[156] A Du Plessis 'Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere' LLD thesis (August 2008) 11.

I commence the analysis of section 24 with an overview of the dominant normative paradigms which could inform the interpretation of environmental rights to a greater or lesser extent, depending on the approach adopted. An understanding of these paradigms will lay the foundation for my approach to the interpretation of the obligations imposed on provincial organs of state by the environmental right in section 24 of the Constitution; and is therefore essential to realising the stated objectives of this dissertation.

3.2.4 Normative paradigms underpinning environmental rights

The rationale for protecting or conserving the environment has been the subject of 'ecophilosophical'[157] discourse for some time. The relevance of this debate to an analysis of the environmental right lies in the fact that an interpretation of section 24 demands an understanding of the normative values on which it is premised, or, put differently, what the provisions in section 24 are attempting to achieve. This, in turn, informs the *content*, *purpose* and *objectives* of legislation enacted to give effect to the right. I now turn to some pertinent scholarly analyses of the normative paradigms underpinning environmental rights:

Firstly, Du Plessis identifies three normative paradigms underpinning environmental rights generally, which consequently influence their interpretation and application, namely the *anthropocentric*, *ecocentric* and *theo-cultural* paradigms,[158] discussed in turn below.

According to Du Plessis, *anthropocentrism*, in the context of the environment, is based on the notion that a healthy and sustainable natural environment should be holistically maintained for the sake of human well-being, rather than for the sake of the environment itself. This human-centred approach presumes an unequal symbiotic relationship between humans and the natural environment with humans acting as the custodians of the environment, establishes a fundamental legal entitlement, and holds that fundamental environmental rights should be afforded to people.[159] She suggests that the anthropocentric approach is widely accepted as

[157] Ibid, 28.
[158] Ibid, 28.
[159] Ibid, 29-30.

the paradigm most suited to an understanding of the need for environmental rights as it seems 'particularly compatible with the notion of sustainable development with its explicit emphasis on human needs'; and fits well with notions of 'intergenerational equity' and 'rights based ethics'.[160]She goes on to say that anthropocentrism finds resonance with the idea of utilitarianism which is concerned with the 'greatest good for the greatest number of people for the greatest period of time'; as well as the argument that it is impossible to interpret constitutional provisions concerning the environment in a non-anthropocentric way given that constitutions are written for people.[161] Du Plessis concludes that section 24 of the Constitution has a clear 'anthropocentric nature' since it values the environment in terms of the 'human purposes it serves', i.e. its usefulness for individuals and humanity generally; and that the anthropocentric approach is entrenched in the framework of South African environmental law.[162]

Ecocentrism, Du Plessis explains, in its most extreme form, is the opposite of anthropocentricism, and suggests that rights should be afforded to the natural environment, and that existing environmental rights should not be interpreted in terms of its value to humanity, but in accordance with the intrinsic worth of the environment. This approach is directly related to so-called 'deep ecology philosophy', biocentrism and environmental ethics. The 'deep ecology' approach views humans as an integral part of the environment alongside all other organisms and does not distinguish between dominant and subordinate forms of life. Biocentrism requires that the potential effect of human actions on all living things (with their own right to existence) be considered in decision making. Environmental ethics relates directly to biocentrism and requires that activities affecting the environment be evaluated in terms of their impact on the environment, instead of their impact on people.[163]

Theocentrism is located in a belief that whilst the environment has intrinsic value, human beings should care for and preserve the earth as guardians, in the way demanded by their deity or their religious rules. Hence a theocentric approach to the protection of the environment stems from a sense of duty towards the environment set in a religious belief

[160] Ibid, 31.
[161] Ibid, 31.
[162] Ibid, 32-33.
[163] Ibid, 35-36.

system.[164] She also refers to Theron,[165] who distinguishes between an egocentric, anthropocentric and ecocentric approach, with the egocentric and anthropocentric approaches being very closely related and not meriting a distinction.

Secondly, Kidd, in his analysis, identifies essentially two kinds of environmental rights: the rights of humans to a safe and healthy environment, and the rights of the environment itself (i.e. trees, rocks, rivers and so on) not to be degraded.[166] However, he states that in South Africa, where human rights generally have only recently been given constitutional protection, we are a long way off affording rights to the environment *itself*. He suggests that section 24 is therefore essentially anthropocentric, rather than ecocentric. If read with section 38 of the Constitution (enforcement of rights), this anthropocentricity is further made clear.[167] Kidd refers to the right of the environment itself not to be degraded as the 'biocentric' approach to environmental rights, which includes different perspectives.[168] Firstly, there is the view that the richness and diversity of life has intrinsic value and humans do not have a right to reduce these resources, except to satisfy their basic needs. This approach rejects the idea that nature itself has rights, and prefers the idea of 'rightness' which acknowledges the 'intrinsic rightness of non-human existence and sensibilities'.[169] He points out that a similar viewpoint has recently been expressed in the Universal Declaration of the Rights of Mother Earth[170] which recognises that Earth itself has certain inherent rights. The second perspective referred to by Kidd regards nature *itself* as the rights holder.[171] Concerning the anthropocentric approach which regards the subject of rights as human beings, Kidd suggests that this approach may entail a purely utilitarian view of nature as a source of resources for humans, or it may 'place humans at the centre of nature and recognise the utilitarian aspect, yet accord some recognition of the value of the environment itself, independent of its utilitarian value'.[172]

[164] Ibid, 39.
[165] Referred to by Du Plessis, ibid, 29 (fn 125).
[166] M Kidd *Environmental Law* 2nd ed (2011) 21.
[167] Section 38 will be discussed in further detail below.
[168] I Currie & J De Waal *The Bill of Rights Handbook* 6th ed (2015) 516.
[169] Ibid, 516-517.
[170] Adopted April 22, 2010 at the World People's Conference on Climate Change and the Rights of Mother Earth at Cochabamba, Bolivia.
[171] Ibid, 517.
[172] Ibid.

3.2.4.1 Conclusions drawn from normative paradigms

Arising from the above analysis of the potentially different normative paradigms on which environmental rights may be based, I conclude that whilst the environmental right in the Constitution is essentially anthropocentric, there seems to be an implied or indirect right afforded to the environment *itself* in section 24. I base this view on the wording of section 24(b), which provides that everyone has a right to have '*the environment*' protected, for the benefit of present and future generations (my emphasis). I therefore submit that whilst section 24 clearly affords this right to people as indicated by the word 'everyone', and not to the environment *per se*, the end result may not be very different in practice, with the environment itself being the ultimate beneficiary of the protection afforded by the right. It appears, therefore, that the wording of section 24(b) may open the door to developing the notion that the environment itself has rights, as envisaged by Stone.[173] Du Plessis also raises the possibility of 'radical and extensive' legal development that accommodates the extension of rights to the natural environment, 'given the increasingly distressed state of the world environment'; and that in future the interpretation of environmental rights could compel a more ecological focus.[174]

For the purpose of this study I will therefore adopt a nuanced anthropocentric view of section 24, which places humans at the centre, but with the *caveat* that this does not exclude the possibility, firstly, of interpreting the right from a somewhat more ecocentric perspective, and, secondly; that environmental jurisprudence may develop to incorporate a more ecocentric approach to the environmental right. Furthermore, in giving effect to the obligations imposed on the state by the environmental right, it may be prudent for the legislative and executive arms of government to take cognisance of the various cultural and religious beliefs of the people who are the subjects of the environmental right, and how such beliefs shape their perception of the environment. This suggestion, although made with reservations, is based on the fact that laws made without popular support may be legal, but invariably lack legitimacy. Lastly, I suggest that the notion that the environment has intrinsic value should also inform the interpretation of section 24.

[173] CD Stone *Should Trees Have Standing? Law, Morality and the Environment*, 3rd ed (2010).
[174] Du Plessis, op cit, 37.

3.2.5 Interpretation of the provisions in section 24

The method of interpreting the Constitution and the Bill of Rights has been considered in a number of judgments of the Constitutional Court and the Supreme Court of Appeal. Currie and De Waal state that, in summary, these judgments hold that 'the language of the constitutional text must be interpreted generously, purposively and in context'.[175] According to the authors, the purpose of interpreting a provision in the Bill of Rights is to establish whether law or conduct is inconsistent with that provision. This involves two enquiries: firstly, the meaning or scope of the implicated right must be determined; and, secondly, it must be determined whether the challenged law or conduct conflicts with the right. A provision of the Bill of Rights can protect certain activities (which places a negative or defensive obligation on those bound by the right); or it can demand the fulfilment of certain objectives (which places positive obligations on those it binds); or it can do both.[176] The environmental right in the Bill of Rights is an example of a right which places both negative and positive obligations on the state. These obligations are discussed in detail below.

Section 24 consists of two parts, i.e. subsections (a) and (b), with subsection (a) being a fundamental human right, and subsection (b) 'more in the nature of a directive principle requiring the state to take positive steps towards the attainment of the right'.[177] Section 24(a) encompasses two aspects: 'everyone' has the right to (i) an environment that is not harmful to their health; and (ii) an environment that is not harmful to their wellbeing. Both aspects require an understanding of the meaning of 'environment'. In this regard Kidd argues that the definition of 'environment' in NEMA is too narrow and that it would be unacceptable to limit the meaning of environment in section 24 similarly, which should be understood more in line with the dictionary meaning of humans' surroundings (given that it is a human right).[178] He further observes that the right to health was recognised under the common law, and is therefore not new. However, it must be distinguished from the right of access to health care services, provided for in section 27 of the Constitution. The concept 'health' goes beyond mere physical health. The World Health Organisation (WHO) defines health as a 'state of complete physical, mental and social well-being', which consequently overlaps with the

[175] Currie & De Waal, op cit, 135.
[176] Ibid, 133.
[177] Ibid, 518.
[178] Kidd, op cit, 22.

notion of 'well-being'.[179] The meaning of the right to well-being, on the other hand, has only recently been considered by the courts.[180] In *HTF* the High Court suggested that the term is 'open ended and manifestly … incapable of precise definition. Nevertheless, it is critically important in that it defined for the environmental authorities the constitutional objectives of their task'.[181] The High Court also quoted Glazewski with approval:

> 'In the environmental context, the potential ambit of a right to well-being is exciting but potentially limitless. The words nevertheless encompass the essence of the environmental concern, namely a sense of environmental integrity; a sense that we ought to utilise the environment in a morally responsible and ethical manner. If we abuse the environment we feel a sense of revulsion akin to the position where a beautiful and unique landscape is destroyed or an animal is cruelly treated.'[182]

Kotzé and Du Plessis point out the potential challenge to the High Court's interpretation of the term 'well-being' as being open-ended and incapable of precise definition. This challenge comes to the fore in the Court's subsequent remark that the term is nevertheless 'critically important' in that it defined for the environmental authorities the constitutional objectives of their task.[183] I agree with the authors: there is clearly an inherent contradiction in the above-cited pronouncement of the High Court. A term manifestly incapable of *precise* definition cannot simultaneously *define* for the environmental authorities the constitutional objectives of their task in any precise or exact terms (as a definition should do). It can, at best, be indicative of the broad parameters of their task.

Kotzé and Du Plessis further point out that the Court wrongly interprets section 24(b) as being reminiscent of an 'aspirational' constitutional directive principle as opposed to an enforceable environmental right. Nonetheless, the authors acknowledge that the *HTF* court contributes to a deeper understanding of section 24 by showing that: (i) the content of section 24(a) cannot be separated from the positive obligations provided for in section 24(b); (ii)

[179] Currie & De Waal, op cit, 519; see also Preamble to the Constitution of the WHO (1978).
[180] Kidd, op cit, 22.
[181] *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism* 2006 (5) SA 512 (T) (*HTF*), para 18.
[182] Ibid, quoting J Glazewski *Environmental law in South Africa* (2000) 86.
[183] Kotzé & Du Plessis, op cit, 172-173.

constitutional environmental protection raises issues of intergenerational equality which imply a stewardship role on the part of the state; and (iii) the rights and interests of certain individuals may have to be limited in order to realise and protect the constitutional environmental right.[184]

In *Hichange Investments*, exposure to a 'stench' was regarded as being adverse to one's health and well-being.[185] However, the concept 'well-being' is not confined to situations where there is a direct impact on a person, but it includes notions of concern for the aesthetic and spiritual dimension of the natural environment, including the idea of a 'sense of place'. Thus knowledge of, or a reasonable anticipation of, a threat to the environment anywhere, and not only in close proximity to a person, may have an impact on a person's environmental well-being.[186] Kotzé and Du Plessis refer to section 24(a) as being 'exceptionally broad' with the notions of '"environment", "health" and "well-being" … being loaded with probable meaning'.[187] Citing various scholars, the authors postulate that the definition of 'environment' in NEMA indicates that the environment transcends mere ecological interests and also includes, for example, the socio-economic and cultural dimensions of the inter-relationship between people and the natural environment. In the context of section 24, 'health' refers to both mental and physical health to the extent that it can be negatively affected by external factors such as pollution or exposure to hazardous substances. 'Well-being' refers to a person's welfare and implies that people must be protected against environmental harm which may impact on their ability to be 'content and at ease', and has a spiritual and psychological meaning.[188]

Kidd introduces a further dimension to the idea of well-being, namely that poverty is the absence of well-being. Consequently, the meaning of 'well-being' is a critical component of the study of poverty and poverty alleviation in the social sciences.[189] In this regard Kidd refers to '3-D well-being', i.e. an 'interplay of three dimensions of well-being: the material,

[184] Ibid, 172.
[185] *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products* 2004 (2) SA 393 (E) (*Hichange Investments)*, para 415.
[186] Kidd, op cit, 23.
[187] Kotzé & Du Plessis, op cit, 166.
[188] Ibid, 166-167.
[189] Currie & De Waal, op cit, 521.

the relational and the subjective (also referred to as perceptual)'. This means that whereas the conventional discourse on poverty emphasised material deprivation, the role of both relationships and subjective experiences and emotions are now also receiving attention.[190] I therefore submit that in South Africa, with continued abject poverty amongst many communities, this needs to be borne in mind by policy and lawmakers when making sense of the multifaceted duties imposed on them by the environmental right, as well as by other rights, which exist within a Constitution which has transformation of society at its core.[191]

Turning to section 24(b), Kidd observes that 'conserved' is currently a more acceptable concept than 'protected' which is used in that section, although it is unlikely that it was a deliberate choice. In contrast, the notion of protecting the environment for the 'benefit of current and future generations' (which was not in the final draft of the Constitution) clearly was.[192] This internationally recognised concept embodies the notion of intergenerational equity, i.e. that the present generation holds the environment in trust for future generations. Furthermore, section 24(b) is more akin to a directive principle, as stated above, having the character of a so-called second generation right imposing a constitutional imperative on the state to secure the environmental rights through 'reasonable legislative and other measures'. This requires the state to take positive steps towards the attainment of the right, aimed at the objectives set out in subsection (b).[193] Section 24(b), however, does not only require the state to take 'legislative and other measures', but also that such measures must be 'reasonable'. In *Grootboom* the Constitutional Court considered how the state must meet such obligations imposed on it by the Constitution.[194] Although the judgment does not specifically refer to the obligations emanating from the environmental right, it does clarify the dual nature of the obligations imposed on organs of state by the Constitution, namely, to take 'legislative and other' measures, and to ensure that such measures are 'reasonable'. In this regard Yacoob J said:

> 'The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough.

[190] Ibid, 521.
[191] See, for instance, the Preamble and section 9(2) of the Constitution.
[192] Kidd, op cit, 24.
[193] Ibid, 22-23.
[194] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (*Grootboom*).

> The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well directed policies and programmes implemented by the Executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations.'[195]

In *BP* the High Court also pronounced, among other things, on the dual nature of the obligations that section 24 imposes on organs of state.[196] In this case, the High Court considered an application for the building of a new petrol station. The applicant contended that the legal mandate of the environmental authority was limited to a consideration of environmental matters, whereas the authority itself relied on section 24 of the Constitution and NEMA. The authority argued, successfully, that its mandate included both socio-economic and environmental considerations. The Court agreed, and held that environmental authorities had a constitutional duty to give effect to section 24, which duty included the taking of reasonable legislative and other measures. Such measures could include decision-making guidelines, which the authority in this case had developed. The Court further held that in addition to being 'reasonable', such measures must also contribute to the progressive realisation of the environmental right.[197]

In *Mazibuko* O'Regan J provided further clarity in relation to the 'reasonableness' of measures discussed above, summarising the Court's position in that regard by stating that the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways:

> 'If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom*, it

[195] Ibid, para 42.
[196] *BP Southern Africa (PTY) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs* 2004 (5) SA 124 (WLD) (*BP*) 22-23.
[197] Ibid.

is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No 2*, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.'[198]

Kidd states that compliance with the constitutional directive to take 'legislative measures' has been substantial, judging by the significant legislative activity in the environmental field in the new constitutional era.[199] Furthermore, the environmental right provides the 'underpinnings' of such environmental legislation.[200] A large body of environmental legislation has indeed been enacted by the *national* sphere of government in South Africa since the coming into effect of the Constitution, with NEMA providing the framework and principles applicable to the actions of all organs of state that may significantly affect the environment.[201] In contrast, *provinces* have enacted very little environmental legislation in pursuance of the same constitutional directive referred to by Kidd.[202] This apparent legislative inactivity by provinces is significant as the environmental right provides the same 'underpinnings' for provinces to take legislative and other measures to protect the environment as it does for the national government. Furthermore, the binding obligations imposed on provinces (as organs of state)[203] by the Bill of Rights generally, and the environmental right particularly, are couched in exactly the same terms as those imposed on the national sphere.[204] In view of this apparent discrepancy, an appraisal of the extent to which provinces have enacted legislation in pursuance of their constitutional obligations to protect the environment is done in chapter 5 of this study, as previously mentioned.

In addition to the provisions of subsection 24(b) discussed above, this subsection also lists three objectives that the envisaged legislative and other measures must achieve, namely to:

(i) prevent pollution and ecological degradation;

[198] *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) (2009) ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (*Mazibuko*), para 67.
[199] Kidd, op cit, 24.
[200] Ibid, 26.
[201] NEMA, section 2.
[202] Also see the comments in this regard by Kidd, op cit, 100-102.
[203] Defined in section 239 of the Constitution.
[204] Constitution, sections 7(2), 8(1) and 24.

(ii) promote conservation; and

(iii)secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

According to Kotzé and Du Plessis, the language in subsection (b)(i)-(iii) is less ambiguous than in the case of section 24(a), although the obligations imposed are 'void of any explanatory detail'.[205] Kidd argues that the first two objectives do not require much discussion, although objective (ii) is incomplete as it does not refer to the purpose of conservation, which can be assumed to be the environment. Objective (iii) expressly brings in the concept of 'sustainable development' (albeit somewhat clumsily).[206] Sustainable development also closely relates to the notion of 'well-being', discussed above.[207] In *BP* the Court emphasised the importance of sustainable development in South Africa, and expressed itself as follows:

> 'Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, *inter alia*, socio-economic concerns and principles.'[208]

Kotzé and Du Plessis provide a very succinct summary of the contribution of *BP* to a better understanding of section 24, which stems from the Court's:

(i) confirmation of the socio-economic factors in the relationship between people and the environment;

[205] Kotzé & Du Plessis, op cit, 167.
[206] Kidd, op cit, 25.
[207] Currie & De Waal, op cit, 524.
[208] *BP*, op cit, 25.

(ii) view that the entire environmental right must be interpreted in the context of both intergenerational environmental protection and sustainable development;

(iii) emphasis that the positive duties that the state incurs in terms of the environmental right require an integrated approach which takes into consideration environmental and socio-economic concerns and principles;

(iv) recognition that constitutional environmental protection requires the balancing of different rights and interests; and

(v) acknowledgement of the link between the environmental right and sustainable development in that a rights based approach to environmental governance elevates the status of environmental governance to a constitutional level, thus enabling the achievement of sustainability.[209]

In *Fuel Retailers,* the Constitutional Court for the first time dealt with the environmental right in a fairly comprehensive manner.[210] The Court pronounced on the nature and scope of an environmental authority's obligation to consider the social, economic and environmental impact of development (in this case the building of a proposed filling station, similar to *BP*); and whether the authority in question complied with its obligations. It also confirmed that socio-economic development had to be balanced against environmental protection, and that the environment and development are inexorably linked.[211] Here the Court referred to the explicit obligation to promote 'justifiable economic and social development' in section 24(b)(iii) and stated that:

> '[t]he Constitution recognises the interrelationship between the environment and development; indeed, it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) …. Sustainable development

[209] Kotzé & Du Plessis, op cit, 171.
[210] *Fuel Retailers Association of South Africa (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others* 2007 (10) BCLR 1059 (CC) (*Fuel Retailers*).
[211] Ibid, paras 44-45.

> and sustainable use and exploitation of natural resources are at the core of the protection of the environment.'[212]

The same Court also commented on the importance of protecting the environment, how this links to other environmental rights, and the trusteeship of the present generation, in the following words:

> 'The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out.'[213]

The Court further stated that decision-makers who are guided by the concept of sustainable development will ensure socio-economic development that is ecologically rooted,[214] and that the obligation to ensure that sustainability is reflected in government processes is primarily that of the judiciary.[215] In analysing the Constitutional Court's contribution in *Fuel Retailers* to an understanding of section 24, Kotzé and du Plessis lament the fact that the Court failed to bring new insights into the substantive meaning and scope of the environmental right itself (along with the *BP* and *HTF* judgments).[216] They conclude their article by stating that 'the elusive wording of section 24(a) and the ambiguity of the positive duties listed in section 24(b) still leave room for speculation about the scope of the protection afforded by the environmental right; and the courts have to date only confirmed the generally accepted meaning of section 24'.[217] In this regard, I suggest that it should not only be up to the courts to provide fresh insights into the meaning of the environmental right. Courts often are informed by scholarly analyses in a particular field - both domestic and international - especially where there is a paucity of primary authority on an issue. Such secondary

[212] Ibid, para 45.
[213] Ibid, para 102.
[214] Ibid, paras 58 and 79.
[215] Ibid, para 102.
[216] Kotzé & Du Plessis, op cit, 174.
[217] Ibid, 175.

authorities can be persuasive, although courts are not obliged to follow academic writing. In the case of the South African Bill of Rights, many legal scholars who contributed to the formulation of section 24 of the Constitution have made substantial contributions to its interpretation, and continue to do so. I therefore suggest that new insights should not only emanate from the courts, but also from further scholarly analyses of the environmental right. Such fresh insights could enhance future interpretation of section 24 by the courts. One possibility is to give the environmental right a more ecocentric (or biocentric) interpretation than is currently the case.

HTF was subsequently taken on appeal to the Supreme Court and finally came before the Constitutional Court.[218] Here the issue at stake was the interpretation of certain provisions that required an interpretation that gives effect to the environmental right in section 24.[219] In doing so, the late Skweyiya J quoted extensively from the earlier pronouncements of the same Court in *Fuel Retailers,* with obvious approval.[220] He confirmed that:

> 'Under our Constitution, therefore, environmental protection must be balanced with socio-economic development through the ideal of sustainable development. The concept of sustainable development provides a framework for reconciling socio-economic development and environmental protection.'[221]

3.2.6 The environmental right and other rights

There seems to be general agreement that the environmental right needs to be considered in relation to other rights in the Bill of Rights. In this regard Kidd states that while many of the rights are interconnected, it has been observed that it would be 'anomalous to derive more extensive obligations from a particular right in circumstances where the specific interests at stake are expressly protected in a more limited form by another set of rights'.[222] An in-depth

[218] *MEC: Department of Agriculture Conservation and Environment and Another v HTF Developers (Pty) Ltd* [2007] ZACC, para 25.
[219] Ibid, para 19.
[220] Ibid, para 60.
[221] Ibid, para 61.
[222] Currie & De Waal, op cit, 526, quoting Liebenberg *Socio Economic Rights* 142.

study of the relationship between the environmental right and other rights falls outside the direct objectives of this dissertation and will not be further pursued further in this study.

3.2.7 Application and enforcement of the environmental right

Kidd provides a useful working guide for the application of the environmental right as a whole by suggesting the following:

(i) The right could be invoked by any person where it is necessary for that person to protect his or health or well-being, although this might rarely happen because of the existence of a large body of environmental legislation which gives effect to the right. Direct reliance on the constitutional right would furthermore be rare because of the principle of avoidance, which requires that remedies should be located in common law or legislation before relying directly on constitutional remedies.

(ii) The right could be used as a 'trigger' for invoking the standing provision in section 38 of the Constitution.

(iii) The environmental right should influence government actions, including legislative and executive decisions and policies, as it provides the underpinnings for enacting environmental legislation.

(iv) The right should act as a guide to the interpretation of both the common law and all legislation (not only so-called environmental legislation) through section 39 of the Constitution, which provides for the interpretation of the Bill of Rights.[223]

An analysis of the environmental right in section 24 would not be complete without briefly considering its enforcement, or justiciability, set out in section 38 of the Constitution, which reads:

> 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -
>
> (a) anyone acting in their own interest;

[223] Kidd, op cit, 25-26.

(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acing as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.'

De Vos and Freedman state that the Constitution has adopted a 'generous approach' towards legal standing,[224] and the Constitutional Court has held in a number of cases that a complainant does not have to show that he or she has a 'direct or personal interest' in the relief sought. All that is required is for a complainant to allege that one of the fundamental rights in the Bill of Rights has been infringed or threatened, and that one of the categories of persons listed in section 38 has a 'sufficient interest' in obtaining a remedy.[225] Kotzé and Du Plessis point out that the provisions in NEMA on standing largely mirror the equivalent provisions in the Constitution, but differ in a significant respect in that they also allow any person or group of persons to seek judicial recourse where that person or persons act *on behalf of the environment*,[226] and not only on behalf of that person or persons where their environmental interests are affected. This makes the NEMA provisions more ecocentric, as opposed to the more anthropocentric approach in the Bill of Rights.[227] Kidd submits that whilst the standing provision has been broadened significantly in the Constitution compared to the common law position, it is unlikely that section 38 will 'find much use in conjunction with section 24'.[228] The reason for this is that it would usually be more appropriate to use the standing provision in NEMA, rather than the provisions of section 38.[229]

The above analysis of the application and enforcement of the environmental right serves as an important reminder to organs of state that they can be challenged before a competent court for failure to fulfil the obligations imposed on them by section 24, on the basis that such failure infringes or threatens a complainant's environmental rights.

3.3 Summary of Obligations Imposed by section 24

[224] De Vos & Freedman, op cit, 326.
[225] Ibid, 327.
[226] NEMA, section 32(1)(e).
[227] Kotzé & Du Plessis, op cit, 164-165. Also compare section 32 of NEMA with section 38 of the Constitution.
[228] Currie & De Waal, op cit, 527.
[229] Ibid.

In this chapter of the study I did a detailed analysis of the nature and scope of the substantive obligations imposed on organs of state, more specifically on provincial organs of state, by section 24 (read with sections 7(2), 8(1) and 38) of the Constitution. This analysis lead me to the following conclusions:

(i) Provinces have an obligation to enact legislation and institute other measures for the protection of the environment that: (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

(ii) Such legislation must be reasonable and must be implemented reasonably.

(iii) The legislation must protect the environment for the benefit of present and future generations. Section 24 therefore places a trusteeship duty on the present generation.

(iv) Legislative measures by themselves are not likely to constitute compliance with the Constitution and have to be supported by other measures such as policies, guidelines and programmes to be implemented by environmental authorities and the executive.

(v) These policies, guidelines and programmes must also be reasonable, both in their conception and implementation, to constitute compliance with the state's obligations.

(vi) Section 24 provides the underpinnings for provincial organs of state to enact legislation and take other measures for the protection of the environment.

(vii) The environmental right is justiciable and, consequently, failure to comply with the obligations placed on organs of state by section 24 may be challenged in a competent court as provided for in section 38 of the Constitution.

However, the above conclusions on the substantive obligations of provinces to enact legislation for the protection of the environment lead one to ask whether these obligations *compel* a province to enact legislation, whether there is a need for such legislation, or not. I submit that that is not what is envisaged by the Constitution, nor is it implied in this study. Thus, where there is sufficient legislation in existence on a particular aspect of the environment, provinces are not *compelled* to enact legislation on the same matter. On the

other hand, where a province identifies specific environmental needs or has concerns not adequately provided for by national legislation and other instruments, a province must fulfil their environmental obligations. For instance, where a province identifies loss or potential loss of biodiversity in that province because of pressure on a particular species or subspecies of flora or fauna endemic to the province, not adequately catered for in national legislation, that province has an obligation to act. Another similar example of where a province should act is when there is progressive loss of habitat and ecosystems, such as in KwaZulu-Natal, which poses a serious threat to biodiversity. Of course, nothing prevents a province from discussing such issues at the appropriate intergovernmental fora established under the constitutional provisions on co-operative government and intergovernmental relations (discussed in paragraph 2.4 of chapter 2 above) and the National Environmental Management Act 107 of 1998 (NEMA). At executive level there are also intergovernmental fora, for instance the so called 'MINMECs'.[230] But, this often is a lengthy process which may only yield results once the harm has been done. Problems caused by long delays in finalising national legislative and policy measures were specifically brought to the attention of the drafters of the proposed new environmental legislation for KwaZulu-Natal. Another example of where provinces ought to give effect to their environmental obligations is where there remains fragmented, outdated and old order legislation, often containing unconstitutional provisions, on their stature books. This aspect is discussed in detail in chapter 5 below. Thus, in answer to the question on when provincial obligations to enact environmental legislation arise, I submit that the Constitution does not envisage such legislation as just a 'gap-filling' exercise, as will be clarified in the detailed analysis of the legislative authority of provinces in chapter 4 below. At the same time care should be taken to avoid overregulation and conflicting legislative provisions. Chapter 4 therefore provides a detailed analysis of the constitutional provisions on conflicting legislation.[231]

I conclude this chapter with a brief explanation of the relationship between the environmental right in the Constitution and the functional areas of concurrent and exclusive provincial legislative competence.

[230] Fora where a national minister and the members of the executive councils of the various provinces meet on their specific areas of responsibility, for instance on the environment.
[231] See discussion in chapter 4, part II.

3.4 The Relationship between the Environmental Right and Schedules 4 and 5

Schedules 4 and 5 of the Constitution list functional areas of concurrent national and provincial legislative competence and functional areas of exclusive legislative competence respectively. The Constitution also provides that a provincial legislature may pass legislation for its province on *any matter* within a functional area listed in Schedule 4 and Schedule 5.[232] The functional areas listed in Schedule 4 include 'Environment' as well as other areas that fall within the broad concept 'environment'. Schedule 5, in turn, also includes functional areas that fall within the wider notion of 'environment'. This means that there is clearly a direct link between the environmental right and Schedules 4 and 5 of the Constitution. This is dealt with in detail in chapter 4 below.[233]

CHAPTER 4

ENACTING PROVINCIAL LEGISLATION

4.1 Overview

Chapter 3 provided an analysis of the nature and scope of section 24 of the Bill of Rights and the *obligations* it imposes on, particularly, provincial organs of state to protect the environment through reasonable legislative measures. In line with the second research objective set for this dissertation, the enquiry now turns to the *legislative authority*[234] *and concurrent and exclusive competence of provinces*[235] to take legislative measures for the protection of the environment. Part I presents a detailed analysis of the constitutional provisions underpinning provincial legislative authority and the Constitutional Court's interpretation of those provisions, which, together, provide the jurisprudential foundation for the conclusions reached in that regard. Scholarly analysis further informs the study. Because 'environment'[236] is a functional area of concurrent national and provincial legislative competence, the potential for conflicts between national and provincial legislation arises. Part

[232] Constitution, op cit, section 104(b)(i) and (ii).
[233] See specifically paragraph 4.3.
[234] Constitution, op cit, section 104.
[235] Ibid, Schedules 4 and 5.
[236] Ibid, Schedule 4, part A.

II therefore sets out how conflicts between national and provincial legislation are to be resolved. This enquiry demands an analysis of section 146 of the Constitution, which provides for the resolution of such conflicts. The evolution of section 146 through its different guises to its current form is also tracked as it provides greater insight into the scope and purpose of the section.

Part I

The Authority of Provinces to Enact Legislation for the Protection of the Environment

4.2 Respecting, Protecting, Promoting and Fulfilling the Environmental Right

Heyns and Brand[237] point out that the most important general provision which describes the duties imposed on the state by the rights in the Bill of Rights is section 7(2). This subsection enjoins the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.[238] It follows that the environmental right in the Bill of Rights can be no exception, and consequently places an obligation on the state, including provincial organs of state, to respect, protect, promote and fulfil the environmental right. Heyns and Brand submit that whilst the exact meaning of these terms is not defined in the Constitution, international jurisprudence does provide some guidelines, namely: 1) the obligation to 'respect' means that the state itself has a negative duty not to interfere with the existing enjoyment of these rights; 2) the duty to 'protect' places a positive duty on the state to protect the bearers of these rights from unwarranted interference by private or non-state parties, or at least to provide effective remedies where that happens; 3) the obligation to 'promote' imposes a positive duty on the state to ensure that people are aware of their rights; and 4) the obligation to 'fulfil' refers to the positive obligation on the state to ensure the full realisation of the rights in question.[239] Liebenberg, in similar vein, states that the 'Constitution places an overarching obligation on the state', and that section 7 'establishes that the rights in the Bill of Rights impose a combination of negative and positive duties on the state'.[240] Furthermore, the binding nature

[237] C Heyns & D Brand 'Introduction to socio-economic rights in the South African Constitution' (1998) in 2 *Law, Democracy & Development* 157.
[238] Constitution, op cit, section 7(2).
[239] Heyns & Brand, op cit, 157-158.
[240] S Liebenberg 'The Interpretation of Socio-Economic Rights' Chapter 33 *Constitutional Law of South Africa* [2nd Edition, Original Service: 12-03] 33-6.

of these provisions on the state is made clear in section 8 (1) of the Constitution, which reads: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'.

From the above analysis of the duty to respect, protect, promote and fulfil the environmental right, I conclude that the general provisions in sections 7(2) and 8(1) do not only describe the overarching obligations imposed on the state by the environmental right, but also provide the context within which the legislative measures to be taken by provinces to meet those obligations must be understood. Further, it illuminates what the objectives and content of such legislative measures should include. Therefore, when enacting legislation in pursuance of their environmental obligations, legislators must bear in mind that their legislative task includes the obligation to respect, protect, promote and fulfil the environmental right. This task must also be informed by the meaning and scope of sections 24[241] and 104, read with Schedules 4 and 5 of the Constitution. The latter provisions are analysed immediately below.

4.3 Section 104 and Schedules 4 and 5 of the Constitution

This enquiry commences with an examination of what Madlingozi and Woolman refer to as 'substantive constraints on provincial legislative authority'.[242] The first step in the enquiry is a critical appraisal of the nature and scope of section 104 of the Constitution, which sets out the legislative authority of provinces. Of specific relevance to this study are the following provisions of the section:

> (1) The legislative authority of a province is vested in its provincial legislature, and confers on the provincial legislature the power -
>
> (a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143;
>
> (b) to pass legislation for its province with regard to
>
> (i) any matter within a functional area listed in Schedule 4;
>
> (ii) any matter within a functional area listed in Schedule 5;

[241] See detailed discussion in chapter 3 above.
[242] T Madlingozi & S Woolman 'Provincial Legislative Authority' Chapter 19 *Constitutional Law of South Africa* [2nd Edition, Original Service: 02–05] 19-7.

(iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation; and

(iv) any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and

(c) to assign any of its legislative powers to a Municipal Council in that province.

(3) A provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution, and must act in accordance with, and within the limits of, the Constitution and that provincial constitution.

(4) Provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes legislation with regard to a matter listed in Schedule 4.

(5) A provincial legislature may recommend to the National Assembly (NA) legislation concerning any matter outside the authority of that legislature, or in respect of which an act of Parliament prevails over a provincial law.[243]

I will now briefly analyse each of the above cited subsections, and then draw conclusions pertinent to the determination of the legislative authority of provinces to meet their environmental obligations.

4.3.1. Section 104(1)(a) - provincial constitutions

This subsection gives a province the authority to pass or amend a constitution for its province, in accordance with sections 142 and 143 of the Constitution. Madlingozi and Woolman argue that this competence appears to extend the legislative competence conferred on a provincial legislature by section 104, but that an analysis of the Constitutional Court provincial certification judgments suggests that sections 142 and 143 do not create a 'meaningfully independent basis for the exercise of power by provinces', and, unless the Court fundamentally changes its interpretation of the relevant constitutional provisions, or those provisions are amended, 'provincial constitutions will never amount to anything more than window dressing'.[244] I will briefly comment on this point under the analysis of the various certification judgments in paragraph 4.5 below.

[243] The Constitution, op cit, section 104.
[244] Madlingozi and Woolman, op cit, 19-11.

4.3.2. Section 104(1)(b)(i) and (ii) and Schedules 4 and 5

The Constitution allocates legislative powers between the national and provincial government on the basis of the subject matter of the legislation, and the nine provinces are entitled to legislate, amongst others, on the subjects listed as 'functional areas' in Schedules 4 and 5 of the Constitution, which must be read with section 104(1)(b)(i) and (ii).[245] For the purpose of this study I will focus on those listed functional areas which could be brought within the ambit of the 'environment' as envisaged by section 24.

4.3.2.1 Schedule 4 - concurrent national and provincial legislative competence

Schedule 4 lists 'Functional Areas of Concurrent National and Provincial Legislative Competence', and is divided into 'Part A' and 'Part B'. Part A lists a number of functional areas which could fall within the ambit of the concept 'environment'. Such functional areas are 'Administration of indigenous forests', 'Cultural matters', 'Nature Conservation, excluding national parks, national botanical gardens and marine resources', 'Pollution control', 'Regional planning and development', 'Soil conservation', 'Tourism', and 'Urban and rural development, with 'Environment' listed separately as an area of concurrent competence.[246] The list of functional areas in Part B is preceded by a provision that restricts their application to: '[t]he following local government matters to the extent set out in section 155(6)(a) and (7)'. An examination of Schedule 4 Part B falls outside the direct scope of this study and will therefore not be pursued in this dissertation.

Madlingozi and Woolman explain the term 'concurrent' used in Schedule 4 as meaning that both the national Parliament and the various provincial legislatures possess the power to pass laws on the same matters. They submit that concurrent legislative competence has several practical implications for the exercise of legislative authority by the national government, and that Parliament cannot: 1) prevent provincial legislatures from enacting legislation on any of

[245] V Bronstein 'Legislative Competence' Chapter 15 *Constitutional Law of South Africa* [2nd Edition, Original Service: 06-04] 15-1; and Schedules 4 and 5 of the Constitution.
[246] Constitution, op cit, Schedule 4 'Functional Areas of Concurrent National and Provincial Legislative Competence', Part A.

the listed functional areas; 2) veto provincial legislation; or 3) block provincial initiatives that deal effectively with matters over which they possess concurrent competence.[247]

4.3.2.2 Schedule 5 – exclusive provincial legislative competence

Section 104(1)(b)(ii) grants provinces exclusive original legislative authority over all matters listed in Schedule 5. This Schedule is also divided into 'Part A' and 'Part B'. In Part A the functional areas which could, similar to Part A of Schedule 4, be interpreted as falling within the ambit of the concept 'environment' are: 'Museums other than national museums', 'Provincial planning', 'Provincial cultural matters', also possibly 'Provincial recreation and amenities', 'Provincial roads and traffic', and 'Veterinary services, excluding regulation of the profession'.[248] Part B list 'local government matters to the extent set out for provinces in section 155(6)(a) and (7)'. For reasons stated above, I will not pursue an analysis of Schedule 5, Part B in this study.

There is often a perception that provinces only have *concurrent*, but not *exclusive* legislative competence on the environment. I submit that considering the subject matter of the various functional areas listed in Part A of Schedule 5, it could be argued that provinces do have exclusive legislative competence in respect of certain aspects included in the broad notion of 'environment', particularly in those areas cited above. In the *Liquor Bill* judgment the Court gives examples of concurrent Schedule 4 competences which could overlap with Schedules 5 competencies, and cites, amongst other, 'environment' and 'provincial planning'; 'cultural matters' and 'provincial cultural matters'.[249] However, it must be born in mind that whilst 'exclusive' provincial legislative competence does suggest that only provincial legislatures are competent to pass legislation in the areas listed in Schedule 5, section 44(2) of the Constitution permits the national legislature to intervene, i.e. to legislate in respect of functional areas of exclusive provincial legislative competence. This national authority may be exercised *only* to the extent that national legislation is:

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[247] Madlingozi and Woolman, op cit, 19-8; see also *Ex Parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill no 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC) (*National Education Policy Bill*).
[248] Constitution, op cit, Schedule 5 'Functional Areas of Exclusive Provincial Legislative Competence', Part A
[249] *Ex Parte President of the Republic of South Africa: In re: Constitutionality of the Liquor Bill* (CCT 12/99) [1999] ZACC 15; 2000 (1) SA 732; 2001 (1) BCLR 1 (*Liquor Bill*), para 47.

'*necessary* –

(a) to maintain national security;
(b) to maintain economic unity;
(c) to maintain essential national standards;
(d) to establish minimum standards required for the rendering of services; or
(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or the country as a whole' (emphasis added).[250]

In the *First Certification Judgment*, the Court stated that: '[t]his power of intervention is defined and limited. Outside that limit the exclusive provincial power remains intact, and beyond the legislative competence of Parliament.'[251] It also held that if regard is had to the nature of the exclusive competences in Schedule 5 and the requirements of section 44(2), 'the occasion for intervention by Parliament is likely to be limited'.[252] In the *Liquor Bill*[253] judgment (discussed in detail in paragraph 4.3.6 below) Cameron AJ (as he then was) refers to these pronouncements by the Court, thus reinforcing the Court's earlier interpretation of exclusive provincial legislative powers, and the limited scope for Parliament to intervene in such competences.[254]

In concluding the analysis above of section 104 and Schedules 4 and 5 of the Constitution, there can be little doubt that provinces have the legislative competence to pass legislation for the protection of the environment on: (a) the functional area '*environment*' and related areas (cited above) listed in Schedule 4 of the Constitution; and (b) the functional areas (cited above) included in the broad concept 'environment' listed in Schedule 5 of the Constitution. For instance, such legislation may afford protection to indigenous forests in a particular province in order to conserve ecosystems or threatened plant species that are under threat or exist only in that province. Further examples could be legislation on the control of invasive

[250] Constitution, op cit, section 44(2).
[251] *Ex Parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) (*First Certification Judgment*), para 257.
[252] Ibid.
[253] *Liquor Bill*, op cit, *fn* 249.
[254] Ibid, para 49.

species, other than alien species, growing on provincial road reserves which may only be a problem in a certain province; and the protection of cultural heritage sites threatened by development.

4.3.3 Section 104(1)(b)(iii) – matters assigned to provinces by national legislation

Section 44(1)(a)(iii) of the Constitution expressly provides that Parliament has the power to 'assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government'. This power is known as legislative inter-delegation, and requires an Act of Parliament. Such an assignment extends legislative powers to a provincial legislature for as long as the Act remains in force, and once a power to legislate is assigned to a province, Parliament is no longer competent to legislate in such an area, until the assignment is repealed by national legislation. If the assignment is repealed, provincial laws already made under the now repealed Act remain valid, although a province would no longer have the power to make any additional laws in respect of the matters that were assigned to them (and subsequently repealed) as it would no longer have the necessary assigned legislative competence. At the same time, Parliament would not have the power to repeal extant provincial laws as it does not have the legislative competence to repeal provincial legislation, whether made under an original or assigned authority.[255]

Following the above discussion on matters assigned to provinces by national legislation, I submit that the provisions of section 44(1)(a)(iii), which give the NA the constitutional authority to assign 'any' of its legislative powers (except the power to amend the Constitution) to any legislative body in another sphere of government, seem to open up the possibility (at least in principle) for the NA to assign its concurrent competence in respect of the environment and related matters to a provincial legislature. In the unlikely event that this should happen, provinces would have their legislative authority extended, and would consequently enjoy exclusive legislative competence in respect of the environment (i.e. until such assignment is repealed by Parliament).

[255] See in this regard the discussion by Madlingozi & Woolman, op cit, 19-12, as well as authorities cited by them; DVB *Behuising*, op cit; and *National Education Policy*, op cit, paras 16–19. See also S Budlender "*National Legislative Authority*", Chapter 17, *Constitutional Law of South Africa* [2nd Edition, Original Service: 06-04] 17-24–17-25.

4.3.4 Section 104(1)(b)(iv) – constitutional provisions which envisage enactment of provincial legislation

In *Limpopo I* the Court considered whether the power to pass legislation regulating the financial management of a provincial legislature was 'envisaged' by the Constitution. Pursuing the theme of maximum clarity in respect of the allocation of legislative powers to the various spheres espoused in the judgment, the Constitutional Court adopted a restrictive approach in their argument. It held that only those provisions in the Constitution which, 'in clear terms, provide for the enactment of provincial legislation', fell under section 104(1)(b)(iv). It went on to say that our constitutional scheme does not allow 'legislative powers to be implied'. The Court argued that if it were otherwise, the constitutional scheme for the allocation of legislative powers would be undermined, and the 'careful delineation between the legislative competence of Parliament and that of provincial legislatures would be blurred'. The Court also felt that implied legislative powers would result in uncertainty about the legislative powers of provinces.[256] The Court then cites section 155(5) of the Constitution, which provides that provincial legislation must determine the different types of municipalities to be established in a province, as an example of an express provision where the Constitution envisages the enactment of provincial legislation.[257] The Court also cites a number of other examples where the Constitution envisages the enactment of provincial legislation.[258]

Sections 142 and 143 (read with section 104(1)(a) are further examples of provisions which give a province the express constitutional authority to enact legislation in the form of a constitution for its province. This is relevant to this study because a provincial constitution may provide for a Bill of Rights which extends the environmental right in the Bill of Rights. In the *KwaZulu-Natal Certification*[259] judgment, the Constitutional Court held that a provincial bill of rights could (in respect of matters falling within the province's powers) place greater limitations on the province's powers or confer greater rights on individuals than does the IC, and it could even confer rights on individuals which do not exist in the IC. (This judgment is discussed in detail in paragraph 4.5 below.) In addition, section 24(b), discussed

[256] *Limpopo I*, op cit, para 52.
[257] Ibid, para 53.
[258] Ibid, para 54 and *fn* 45.
[259] *Certification of the Constitution of the Province of KwaZulu-Natal*, 1996 CCT 15/96.

in chapter 3 above, envisages 'reasonable legislative measures' to be taken by provinces for the protection of the environment. The Bill of Rights also places certain other binding obligations on provinces (as organs of state) to take legislative measures pertaining to the realisation of certain rights. Examples in this regard are sections 25(5) and (7) ('property'); 26(2) ('housing'); 27(2) ('health care, food, water and social security'); and 29(1)(b) ('education'). These sections all relate, at least to some extent, to the concepts 'health' and 'well-being' envisaged in the environmental right, and underscores the proposition that rights in the Bill of Rights are interrelated, and cannot be read in isolation from one another.

Following the discussion in the preceding paragraph on constitutional provisions which 'envisage' enactment of provincial legislation, I submit that the Constitution needs to be examined in its totality to determine which provisions envisage the enactment of provincial legislation which may impact directly or indirectly on the realisation of the environmental right. However, this dissertation focuses primarily on the enactment of provincial environmental legislation within the listed functional areas of provincial legislative competence related to the environment, and a more detailed analysis of where the Constitution 'envisages' the enactment of provincial legislation will not be pursued. However, this may be a fruitful area for future research.

4.3.5 Section 104(3) – provinces bound by the Constitution and provincial constitutions

A province derives original legislative authority from the Constitution, and in terms of section 104(3) is bound *only* by the Constitution and its own provincial constitution (where it exists). Therefore, when enacting provincial legislation for the protection of the environment, provinces must act in accordance with, and within the limits of the Constitution and their own provincial constitution where a province adopted a constitution (as was done in the Western Cape).[260]

4.3.6 Section 104(4) – provincial legislation reasonably necessary or incidental (incidental power)

[260] See the detailed discussion of the *Western Cape certification* judgments in paragraph 4.5 below.

This subsection confers incidental legislative powers on a province, and provincial legislation enacted under this provision is for all purposes legislation with regard to a matter listed in Schedule 4, i.e. concurrent legislation. This implies that where the incidental legislative power conferred on provinces by section 104(4) is invoked in the enactment of provincial legislation, the scope of Schedule 4 is effectively extended.

In the *Liquor Bill* case the Court held that the phrase 'reasonably necessary for, or incidental to' should be interpreted as meaning 'reasonably necessary for and reasonably incidental to'.[261] Bronstein states that in *DVB Behuising* the incidental legislative power was an important factor in the outcome of the matter.[262] She goes on to say that one of the central issues in this case turns on a simple question of categorisation, i.e. whether the Proclamation (which was the subject of the dispute) could be classified as fitting into the list of legislative competences of the provinces as set out in Schedule 6 of the IC.[263] In the majority judgment Justice Ngcobo held that:

> 'I am satisfied that the 'tenure' and deeds registration provisions of the Proclamation were inextricably linked to the other Provisions in the Proclamation and were foundational to the planning, regulation and control of settlements. These provisions were an integral part of the legislative scheme of the Proclamation and accordingly fell within schedule 6.'[264]

Hence, the Court held that the tenure provisions in the Proclamation were within the competence of the provincial government. However, Bronstein argues that one problem with *DVB Behuising* is that 'although the reasoning of the majority judgment is convincing, it provides no clear system for establishing the scope of the incidental power', and that the judgment may give the impression that there are no meaningful doctrinal grounds for judges to regard a particular power as incidental to a provincial power, or to regard a matter as one that should be reserved for the national legislature.[265] She says a second problem with the majority judgment is that it does 'not explore the proper perspective for looking at a

[261] The *Liquor Bill*, op cit *fn* 249, para 81.
[262] Bronstein, op cit, 15-14; see also *DVB Behuising*, op cit.
[263] Bronstein, ibid, 15-15.
[264] *DVB Behuising*, op cit, para 58.
[265] Bronstein, op cit, 15-16.

legislative scheme when assessing whether provisions – which are essentially out of place in a piece of provincial legislation- are acceptable on the basis of the incidental power.'[266] It follows that the perspective that one adopts will determine what you see – the broader your perspective, the more likely you are to see the provisions under scrutiny as necessary or incidental to a broader scheme.[267] Bronstein also suggests that in approaching the incidental power, comparative law must be used with caution in 'federalism cases', as each federal system 'reflects pragmatic and context-specific responses to political power relations in a particular country'.[268] She argues that there is clearly a need for a relatively straightforward and uncontroversial method of analysis to determine what must be incidental or necessary to what; and that the Canadian Supreme Court has provided a useful analytical framework in *City National Leasin*g.[269] The test laid down in this case requires the Court to: 1) inquire into the subject matter of the specific provisions being challenged (the 'impugned provisions'). The impugned provisions need to be interpreted naturally and in context, but after that their role must be looked at in isolation for the purpose of characterisation.[270] If the impugned provisions 'can stand alone' because they are within the powers of the particular legislature, they need 'no other support'. If not, the analysis must continue. If the impugned provisions intrude into the exclusive legislative sphere of another level of government, it is necessary to establish the extent of the incursion. That is, the court must determine how invasive the intrusion is. 2) The court must ask whether the impugned provision is part of a broader legislative scheme that is within the competence of a particular legislature. Once it is clear that the provision does intrude, the next task is to establish whether the impugned provision can be construed as valid in the context of the broad legislative scheme. Conceptually a legislative scheme may include the entire statute, or it may consist of part of a statute that could have been enacted alone and can be severed from the rest of the law, and in some cases a legislative scheme may consist of a number of statutes intended to govern different aspects of a common field. Once such a scheme has been identified, it must be decided whether the subject matter of the scheme is within the power of the enacting legislature. If so, 'the relationship between the particular impugned provision and the scheme' must be scrutinized. The court should then ask how well the provision is integrated into the scheme of the

[266] Ibid, 15-17.
[267] Ibid.
[268] Ibid.
[269] Ibid, 15-18; also *General Motors of Canada v City National Leasin*g (*City National Leasing*), para 54.
[270] *City National Leasing*, ibid, para 42.

legislation and how important it is for the efficacy of the legislation.[271] In this regard the Canadian courts follow a proportional exercise: the more a provision encroaches, the more essential the provision must be to an otherwise valid legislative scheme in order to be considered 'incidental'; the less it encroaches, the easier it will be to persuade a court that it should survive.[272] The *City National Leasing* Court cites various cases where courts have considered the nature of the relationship required between a provision which encroaches on provincial jurisdiction and a valid statute, for the provision to be upheld, and set down slightly different requirements in different courts, viz.: 'rational and functional connection', 'ancillary', 'necessarily incidental', 'truly necessary', 'intimate connection', 'an integral part', 'necessarily incidental', a 'valid constitutional cast by the context and association in which it is fixed as a complementary provision'. Here Dickson CJC commented that all the tests cannot be identical, because as the seriousness of an encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained.[273]

Bronstein states that at 'the point beyond which incidental power cannot go', the Canadian approach seems sensible, and coheres with the majority judgment in *DVB Behuising*. She argues that when interpreting the scope of the incidental power it seems best to start with a broad assumption that almost any impugned provision can be saved and found to be 'legislation with regard to a matter listed in Schedule 4' as envisaged in sections 44 (3) and 104 (4) of the Constitution. Such an assumption can be justified because 'any incidental power automatically operates in an area of de facto provincial and national concurrency', and when a court needs to 'draw a line beyond which a provincial legislature cannot go, it is not appropriate to limit the scope of the incidental power' – section 146 is the more appropriate place for such an analysis.[274] Bronstein also points out that another 'rule of thumb' that has been suggested to define the scope of the incidental power is where the 'end' intended by the legislation is competent, the 'means' are likely to be accepted.[275]

[271] Ibid, para 49.
[272] Ibid, para 53.
[273] Ibid. See also the discussion in Bronstein, op cit, 15-18 - 15-19.
[274] Bronstein, op cit, 15-20.
[275] Ibid, 15-20.

In considering the scope of the incidental power in relation to Schedule 5 competences, Bronstein points out that there is no specific constitutional provision which regulates this. In this regard the Court pointed out in the *First Certification Judgment* that the allocation of necessary ancillary powers is not expressly made in regard to the powers of provinces listed in Schedule 5, but since Schedule 5 'defines the exclusive powers of the provinces, the provinces would necessarily also be the repository of powers incidental to the powers vested in them in terms of NT[276] sch 5.'[277] The Court also held that although the NT does not specifically authorise provinces to enact legislation authorising the imposition of user charges, such a power would be within the 'express or implied power to legislate with regard to matters reasonably necessary for or incidental to the effective exercise of a NT sch 4 or 5 competence'.[278] Moreover, the court held that it cannot 'seriously be suggested that provinces cannot pass legislation making provision for a user charge for abattoirs, health services, public transport, etc. In so far as charges might be raised which are unrelated to the actual use of services provided, they would be within the general power to impose rates and levies'.[279] Although these comments specifically refer to 'user charges', I submit that the same principles would apply to incidental provincial powers to legislate with regard to matters reasonably necessary for, or incidental to, the effective exercise of any other competence, whether in respect of an area listed in Schedule 4 or 5.

In line with the discussion on section 104(1)(b)(iii) above, Bronstein submits that legislation that was competent when it was passed cannot later become incompetent, and that such an approach seems to be the most coherent, although the answer is not always self-evident.[280] She illustrates this by posing the hypothetical question of what happens to a legislative provision that was valid because of the incidental power when the rest of the legislative scheme upon which it depends is repealed, and that provision is left standing. Bronstein contends that it is reasonable to conclude that such a provision would be invalidated on the grounds that it is no longer 'reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4'.[281]

[276] The Constitution of the Republic of South Africa, 1996 is referred to as the 'New Text' or 'NT' in the *First Certification Judgment*, op cit, para 16.
[277] *First Certification Judgment*, para 244.
[278] Ibid, para 438.
[279] Ibid.
[280] Bronstein, op cit, 15-21.
[281] Ibid.

The above analysis of the incidental legislative authority in section 104(4) indicates that rather than acting as a constraint on provincial legislative powers, this provision can at times serve to broaden and extend the legislative authority of provinces to a degree where a provincial legislature may even validly legislate in areas of exclusive national legislative competence.

4.3.7 Section 104(5) – recommendation by provincial legislature to National Assembly

Although this subsection forms part of section 104 which provides for the *legislative* authority of provinces, it only enables provinces to *recommend* to the NA legislation concerning any matter: a) outside the provincial authority; or b) in respect of which an Act of Parliament prevails. It does not give provinces the authority to *enact* such legislation themselves, and therefore falls outside the scope of this study and will not be pursued.

4.4 Legislative Constraints Imposed by the Legality Principle

Budlender points out that the legality principle which flows from the rule of law is binding on all legislative and executive organs of state in all spheres of government.[282] This principle was first articulated in *Fedsure*, where the Court held that the legality principle provided that legislative and executive organs of state 'may exercise no power and perform no function beyond that conferred on them by law'.[283] In *Pharmaceutical Manufacturers* the Court stated that 'the exercise of public power … should not be arbitrary'; and decisions must be 'rationally related to the purpose for which the power was given, otherwise they are in fact arbitrary and inconsistent with this requirement'.[284] The Court made it clear that the question whether a decision is rationally related to the purpose for which it was given, 'calls for an objective enquiry'.[285] The significance of the legality principle was further clarified in *New National Party***,** where Yacoob J stated that:

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[282] S Budlender 'National Legislative Authority' Chapter 17, *Constitutional Law of South Africa* [2nd Edition, Original Service: 06-04] 17-25.
[283] *Fedsure v Greater Johannesburg Metropolitan Council* 1999 (1) SA 347 (CC), 1998 (12) BCLR 1458 (CC) (*Fedsure*), para 58.
[284] *Ex Parte President of the RSA: In re Pharmaceutical Manufacturers Association of SA* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*), para 85.
[285] Ibid, para 86.

> 'Courts do not review provisions of Acts on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution.'[286]

The effect of these pronouncements by Yacoob J is that laws and acts that are not rationally related to a legitimate government purpose are unconstitutional, because arbitrariness is inconsistent with the legality principle. This was reaffirmed in *UDM*.[287]

However, Budlender cautions that the legality principle must not be conflated with the more stringent test of 'reasonableness'.[288] He cites *Pharmaceutical Manufacturers* where the court explained the rationality standard as follows:

> '[I]t does not mean that courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.'[289]

The above discussion makes it clear that provincial legislative authority must be exercised *rationally*, and legislation enacted for the protection of the environment must be related to a legitimate government *purpose*, for instance to address loss of biodiversity, to meet the test of constitutionality.

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[286] *New National Party v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) (*New National Party)*, para 24.
[287] *United Democratic Movement v President of the RS*A, para 55.
[288] Budlender, op cit, at 17-26; see also discussion above on the Constitutional Court's standard of reasonableness laid down in *Mazibuko*, op cit.
[289] *Pharmaceutical Manufacturers*, op cit, para 90.

4.5 The Legislative Authority of Provinces as Interpreted by the Courts

Provincial powers have been a contentious and vigorously contested terrain from the outset, and the Constitutional Court has been called upon to analyse and interpret the nature and scope of provincial legislative authority almost from its inception. This is demonstrated by the following judgments:

In the *First Certification Judgment* the Court concluded that the powers and functions of the provinces in terms of the new text before it (the NT) were 'less than and inferior to' the powers and functions which the provinces enjoyed under the IC.[290] The Court then turned to the difficult question whether they were 'substantially less than or substantially inferior' to such powers, and concluded that, to the extent set out in the judgment, they were indeed 'substantially less than and inferior to the powers and functions of provinces in the IC'.[291] The provisions of section 146 (discussed in detail in part II of this chapter) were an important factor in the Court's conclusion, specifically the so-called override provisions and the presumption in favour of national legislation, which were to apply to legislation in the entire field of concurrent powers. These provisions would have given added strength to national legislation and weakened the position of provinces should a conflict between competing legislation arise, and their 'combined weight' were 'sufficient to be considered substantial'.[292] The Court consequently decided not to certify the Constitution at that stage.

In the *Second Certification Judgment*[293] when the amended text (the AT) was placed before it, the central question facing the Court was whether the powers and functions of provinces in the AT were still substantially less than or inferior to those in the IC, and therefore still did not constitute compliance with constitutional principle (CP) XVIII.2.[294] The Court analysed the various provisions in the IC, the NT and the AT and concluded that the 'amendments to the NT contained in the AT 146(2) and (4) effectively restore the balance' which had been tilted against the provinces in the NT, despite the fact that the powers and functions of the

[290] *First Certification Judgment*, op cit, para 471.
[291] Ibid, paras 472 and 482.
[292] Ibid, paras 480-481.
[293] *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (CCT 37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 (4 December 1996), para 145–204.
[294] The IC, op cit, CP XVIII.2 provides that: 'The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution'.

provinces in terms of the AT are still less than or inferior to those accorded to the provinces in the IC, but 'not substantially so'[295].The Constitution was consequently certified on 4 December 1996. The effect of the changes made to section 146 in the AT is discussed in Part II of this chapter in greater detail.

The *KwaZulu-Natal Certification*[296] judgment was delivered on 6 September 1996, on the same day as the *First Certific*ation *Judgment.* This inescapably suggests that the Court would have considered the two constitutions submitted for certification from the same interpretative paradigm. In the *KwaZulu-Natal Certification* judgment, the Court stated that: 'a province cannot by means of the bootstraps of its own constitution confer on its legislature greater powers than those granted it by the Interim Constitution'.[297] However, on the chapter in the KwaZulu-Natal constitutional text containing the bill of rights, the court held that there 'can in principle be no objection to a province embodying a bill of rights in its constitution'.[298] In this regard the Court pointed out that section 160(1) of the IC, which conferred a general and unlimited right on a provincial legislature to pass a constitution, subject only to the inconsistency qualification in section 160(3), 'neither prescribes nor proscribes any form or structure or content of such constitution'.[299] The Court indicated that if this were the case, 'it would require the clearest indication in the interim constitution that no bill of rights, of any nature, could be embodied in a provincial constitution duly passed pursuant to section 160(1). There is no indication of any such proscription.'[300] In addition, the Court held that '... there is no indication in the interim Constitution that Chapter 3 was intended to deal "completely, exhaustively or exclusively" with fundamental rights at all levels of government. The only limitation on the content of a provincial constitution is the inconsistency provision in section 160(3); but where the Interim Constitution itself embodies a bill of rights it cannot be argued that the mere presence of a bill of rights in a provincial constitution is, without more, inconsistent with the Interim Constitution or the constitutional Principles'.[301] However, the Court points out that the powers of a provincial legislature to enact a bill of rights are limited in different ways. In the first place the legislature cannot provide for the provincial bill of

[295] Ibid, paras 203 and 204.
[296] *Certification of the Constitution of the Province of KwaZulu-Natal*, op cit.
[297] Ibid, para 8.
[298] Ibid, para 17.
[299] Ibid, para 17.
[300] Ibid.
[301] Ibid.

rights to operate in respect of matters which 'fall outside its legislative or executive powers'.[302] Nevertheless, the Court acknowledges that drafting a provincial bill of rights 'could present extremely difficult and complex drafting problems'.[303]

In respect of a 'law' which a province may competently make, the Court held that: 'there can, in principle, be no reason why the province may not limit its powers or confer rights, provided such provisions do not conflict with other provisions of the interim Constitution'.[304] For instance, a provincial bill of rights could (in respect of matters falling within the province's powers) 'place greater limitations on the province's powers or confer greater rights on individuals than does the interim Constitution, and it could even confer rights on individuals which do not exist in the interim Constitution'.[305] However, the Court made it clear that a province may not incorporate any provisions in its bill of rights which are 'inconsistent with' similar provisions in the Bill of Rights in the Constitution.[306] I submit that the Court used a bill of rights here as an example to illustrate a principle which would govern provincial law making generally. This submission is supported by the Court's comments in respect of a 'law' which a province could competently make, cited above.[307]

An important question posed by the *KwaZulu-Natal Certification* Court is when such provisions would be 'inconsistent with (onbestaanbaar met)'[308] the provisions of the IC. The Court then formulated the following test in respect of inconsistency:

> 'We are of the view that a provision in a provincial bill of rights and a corresponding provision in Chapter 3[309] are inconsistent when they cannot stand at the same time, or cannot stand together, or cannot both be obeyed at the same time. They are not inconsistent when it is possible to obey each

[302] Ibid, para 19.
[303] Ibid, para 30.
[304] Ibid, para 21.
[305] Ibid, para 23.
[306] Ibid, para 22.
[307] Ibid, para 21.
[308] Ibid, para 23.
[309] Of the IC.

without disobeying the other. There is no principial or practical reason why such provisions cannot operate together harmoniously in the same field.'[310]

In this regard, the Court stated that in applying this test it must be born in mind that the potential conflict in obedience arises when the provision in the provincial constitution has to be observed:

'The lesser limitation of power and the lesser right in Chapter 3 of the interim Constitution, postulated above, would be obeyed in the act of obeying the greater limitation of provincial power and the greater right in the provincial bill of rights, whereas there would be no room for inconsistency in respect of a new right, provided such new right did not, because of its particular nature or formulation, have the effect of eliminating or limiting a right protected in the interim constitution.'[311]

The Court also stressed that the test for inconsistency only applies to inconsistencies arising from provisions which fall *within* provinces' legislative competence. A different kind of inconsistency would be where a provincial legislature purports to provide in its constitution, whether in the bill of rights or elsewhere, matters *outside* of its legislative competence (emphasis added).[312] A province cannot usurp powers and functions which it patently does not have.[313] In such a case the purported provisions will not only be inconsistent, but also clearly unconstitutional. This is comprehensively demonstrated in this judgment, and was one of the primary reasons why the KwaZulu-Natal Constitution did not pass certification muster.

Based on the *KwaZulu-Natal Certification* judgment the following general principles in respect of provincial legislative powers (which include powers to enact of environmental legislation) can be distilled:

(i) Provinces can only legislate within their legislative authority derived from the Constitution, and attempts to usurp powers they do not have will be unconstitutional.

[310] Ibid, para 24.
[311] Ibid, para 25.
[312] Ibid, para 24.
[313] Ibid, para 27.

(ii) Different provisions in national and provincial legislation on the same matter are not necessarily inconsistent or in conflict, as long as such provisions comply with the test formulated by the Constitutional Court in respect of inconsistency or conflicts between legislation, namely that legislative provisions are inconsistent when they cannot stand at the same time, or cannot stand together, or cannot both be obeyed at the same time. They are *not* inconsistent when it is possible to obey each without disobeying the other. There is no principial or practical reason why such provisions cannot operate together harmoniously in the same field.[314] For instance: if a province were to enact legislation *allowing* persons in that province to carry out activities involving a specimen of a listed threatened or protected species without a permit, this would constitute a clear conflict with section 57(1) of NEMBA, which provides that a person 'may *not* carry out a restricted activity involving a specimen of a listed threatened or protected species without a permit'. Such different and contradictory provisions in provincial and national legislation will be inconsistent as they cannot stand together, and cannot both be obeyed at the same time. On the other hand, if a province wanted to impose *greater* restrictions on activities involving a specimen of a listed or protected species in that province, it will not constitute a conflict with NEMBA. This is so because the activities restricted in terms of NEMBA, as well as the more onerous restrictions in the provincial legislation, *can both be obeyed at the same time*, i.e. they can operate harmoniously in the same field.

(iii) In order to avoid conflicts between national and provincial legislation, the test for inconsistency laid down by the Constitutional Court must guide drafters and legislators of provincial legislation. This is equally so in the case of legislation aimed at protection of the environment, where there are a vast number of existing national legislative instruments.

(iv) The arguments of the Court in respect of a bill of rights in a provincial constitution are also pertinent, and may indicate that a provincial constitution could possibly amount to more than mere window dressing, as postulated by Madlingozi and Woolman.[315] However, avoiding conflicts between a provincial bill of rights and the Bill of Rights in the Constitution, especially in respect of the environmental right, may be a difficult and complex task, as stated by the Court.[316] I submit that such a task would involve,

[314] Ibid, para 24.
[315] Madlingozi & Woolman, op cit, 19-11.
[316] *Certification of the Constitution of the Province of KwaZulu-Natal*, op cit, para 30.

as a bare minimum, careful consideration of: (a) the nature and scope of the right in section 24 of the Constitution and its relationship to other rights and the functional areas of provincial legislative competence; and (b) the need for a provincial constitution with its own bill of rights which includes an environmental right. The latter enquiry is beyond the objectives of this dissertation and therefore not pursued

(v) In pursuance of its constitutional obligations to take legislative and other measures to protect the environment, a province may adopt a constitution for its province providing for an environmental right in a bill of rights which is greater (or lesser) than the environmental right in the Constitution, provided that such greater or lesser right does not have the effect of eliminating or limiting the right protected in the Constitution.

The *First Western Cape Certification*[317] judgment was decided in terms of the Constitution (the so-called 'New' Constitution (NC)). The Court concluded that the provisions relating to the constitution making powers of provinces under the IC and the NC are essentially the same.[318] Of significance in this judgment are the Court's pronouncements on the repetition of clauses of the NC in the Constitution of the Western Cape (WCC). In this regard, the Court stated that what appeared in the KwaZulu-Natal constitutional text was the repetition of matters which had nothing to do with provincial powers or competence. By contrast, in the WCC all of the provisions of the NC that are repeated 'relate to matters which directly affect governance within the province'. The Court concluded that: '[i]t would indeed have been difficult for the WCC to be coherent and comprehensible without the repetition of those NC provisions which form the matrix for the related provisions of the WCC. We can find no fault with such provisions.'[319] The Court elaborates on its pronouncements as follows: '[i]n particular the ANC objected to WCC 32 (1) on the ground that it purports to confer a competence on members of the Western Cape legislature to apply to the constitutional court for a declaration that a provincial Act is unconstitutional, thereby affecting the jurisdiction of this Court which is beyond the competence of the provincial legislature. We do not agree.'[320] The Court continues thus:

[317] *Certification of the Constitution of the Western Cape*, 1997 CCT 6/97 (*First Western Cape Certification*).
[318] Ibid, para 6.
[319] Ibid, para 23.
[320] Ibid, para 24.

> 'Certainly a provincial legislature does not have the power to expand or contract the scope of jurisdiction of the Constitutional Court. In particular, it has no power to regulate access to this Court. But WCC 32(1) does not purport to confer such power on the Western Cape legislature by virtue of the WCC itself. Rather, the challenged clause merely *mirrors* NC 122(1), the source of power to regulate access by provincial legislators to the constitutional court. It is not an attempt at usurpation of power such as disqualified the KZN constitutional text' (emphasis added).[321]

The Court therefore concluded that the objection cited above and similar objections '*must fail*'.[322] The Court cautioned, however, that: 'where provisions of the NC are repeated in the WCC, any future amendment of the NC provision in respect of a matter falling outside the competence of the provincial parliament under NC 104(1) or NC 143 would to that extent render the repeated provision in the WCC unconstitutional and of no effect'.[323] With regard to the provincial legislature being referred to as 'Provincial Parliament' in the WCC (as opposed to the term provincial 'legislature' used in the Constitution), the Court held that there was no express inconsistency – the 'difference is one of form and not substance'.[324] In reference to the signing, safekeeping, publication and commencement of a provincial constitution, the Court acknowledged that the provision repeats the provisions the NC 145, save that it requires additional publication of the provincial constitution in the official gazette of the province. However, the Court was of the view that it falls impliedly within the province's constitution-making power, and does 'not amount to an inconsistency with the NC'.[325] The Court therefore withheld certification of the WCC in this judgment on 'limited grounds of inconsistency only'.[326] These grounds all relate to areas where the Western Cape lacked constitution-making powers. After the Western Cape legislature dealt with the inconsistencies pointed out by the Court, the WCC was certified in a subsequent certification judgment.[327]

From the *Western Cape Certification* judgments, the following conclusions relevant to this study, particularly on the *content* of provincial legislation, may be drawn:

[321] Ibid, para 25.
[322] Ibid, para 26.
[323] Ibid, para 27.
[324] Ibid, para 39.
[325] Ibid, para 41.
[326] Ibid, para 86.
[327] *Certification of the amended text of the Constitution of the Western Cape*, CCT 29/97.

(i) Repetition (or 'mirroring') of provisions of national legislation in provincial legislation can be done, but only in areas where provinces have legislative authority conferred on them by the Constitution.

(ii) Provisions in a provincial Act legislating on matters that fall within an area of provincial legislative competence, which repeat provisions in a national Act, will not necessarily be rendered unconstitutional merely by virtue of an amendment to such provisions in the national Act. However, it is a possibility which should be born in mind when drafting provincial legislation.

(iii) Care should be taken not to confuse form and substance when drafting provincial legislation, and to be wary of reading a conflict into anything that appears different on the face of it.

(iv) A requirement in provincial legislation to publish the legislation in an official provincial government *Gazette* in addition to publishing it in a national *Gazette*, does not amount to an inconsistency with the Constitution.

The pronouncements of the Constitutional Court in the *Liquor Bill*[328] judgment, particularly in respect of areas of exclusive provincial legislative competence, are of great significance. Some of the issues the *Liquor Bill* Court had to consider were: a) whether Parliament could intervene in 'liquor licences', a functional area of exclusive provincial competence listed in Schedule 5; b) the Western Cape government's attack on the extent to which the Bill intruded in an area of exclusive provincial legislative competence by permitting national intervention in provincial powers to regulate retail liquor licensing; and c) whether such intrusion was *necessary*. The Court therefore felt it had to determine the scope of the exclusive provincial legislative competence within the functional area of 'liquor licences', which in turn required 'consideration of the national and provincial context against which that exclusive competence is afforded'.[329] In doing so the Court held that:

> 'The constitution makers' allocation of powers to the national and provincial spheres appears to have proceeded from a functional vision of what was appropriate to each sphere, and accordingly the competences itemised in Schedules 4 and 5 are referred to as being in respect of "functional

[328] *Liquor Bill*, op cit.
[329] Ibid, para 39.

areas". The ambit of the provinces' exclusive powers must in my view be determined in the light of that vision.'[330]

The Court also found it significant that section 104(1)(b) confers powers on each province to pass legislation 'for its province', which makes it clear from the onset that the Schedule 5 competences must be interpreted as conferring power on each province to legislate in the 'exclusive domain' of its own province only.[331] Therefore, 'where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially'.[332] The Court's comments on what may be deemed 'necessary' to justify national intervention in functional areas of exclusive provincial competence, as envisaged by section 44(2) of the Constitution, are instructive:

'While the Minister's evidence in my view shows that the national interest necessitated legislating a unified and comprehensive national system of registration for the manufacture and distribution of liquor, it failed to do so in respect of its retail sale. There, he averred only that "consistency of approach" is "important". This may be true. But *importance does not amount to necessity*, and the desirability from the national government's point of view of consistency in this field cannot warrant national legislative intrusion into the exclusive provincial competence, and no other sufficient grounds for such intrusion were advanced' (emphasis added).[333]

From the *Liquor Bill* judgment the following conclusions of direct relevance to provincial legislative authority and areas of competence may be drawn:

(i) The powers of the national and provincial spheres are derived from a functional vision of what is appropriate to each sphere, hence the use of the term 'functional areas' in Schedules 4 and 5. The ambit of provincial powers must be interpreted in accordance with that vision.
(ii) Provinces may only pass legislation applicable within their own provincial boundaries.

[330] Ibid, para 51.
[331] Ibid.
[332] Ibid, para 52.
[333] Ibid, para 80.

(iii) Evidence is required to establish whether a provision in national legislation is 'necessary' as opposed to merely 'important' (or even desirable) when deciding whether national legislation prevails over provincial legislation in terms of section 146(2)(c) of the Constitution (discussed in part II of this chapter).

I conclude part I of this chapter on the enactment of provincial legislation by emphasising the conclusions that may be drawn from the *Habitat Council* judgment, discussed above, which go to heart of this study, namely that provincial government, as a sphere of government in its own right, operating within a non-hierarchical system of government, enjoys original and constitutionally entrenched powers, functions, rights and duties that may only be constrained to the extent permitted by the Constitution.[334]

Part II
Conflicting Laws (section 146-150)

4.6 Introduction

The case study on the drafting of provincial environmental legislation for KwaZulu-Natal[335] highlights certain misconceptions. Firstly, there seems to be confusion about what constitutes a conflict between provincial and national legislation, and when different provisions in provincial and national legislation on the same subject can in fact 'operate together harmoniously in the same field.'[336] This confusion gives rise to a pervasive misconception that national legislation always prevails over provincial legislation. These perceptions were evident from many of the comments received following the publication of the first draft of the KwaZulu-Natal Bill. Considering and responding to the comments where conflict was alleged, prompted an in-depth analysis of the constitutional provisions on conflicting laws. The observations by Madlingozi and Woolman seem particularly apt in this regard: they suggest that the legislative authority shared between national and provincial legislatures provided for in sections 44(1)(a)(ii) and 104(1)(b)(i) of the Constitution seems to invite

[334] See *Habitat Council*, op cit, para 11 and the discussions of this judgment above.
[335] See chapter 5, part II, below for a detailed discussion.
[336] See *Certification of the Constitution of the Province of KwaZulu-Natal*, op cit, para 24, and the earlier discussion on the test laid down by the Court for inconsistency.

conflict, and that section 146 provides a 'rubric' for the analysis and resolution of such conflicts.[337] Section 146 provides as follows:

'(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing-

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for-

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across provincial boundaries;

(v) the promotion of equal opportunity or equal access to government services; or

(vi) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that-

(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or

(b) impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and the dispute comes before a court for resolution, the court must have due regard to the approval or rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply.

[337] Madlingozi & Woolman, op cit, 19-8.

(6) A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.
(7) If the National Council of Provinces does not reach a decision within 30 days of its first sitting after a law was referred to it, that law must be considered for all purposes to have been approved by the Council.
(8) If the National Council of Provinces does not approve a law referred to in subsection (6), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it.'

4.7 Evolution of section 146

Tracking the evolution of section 146 from the IC (section 126) to its current form illuminates: a) the political tension inherent in the allocation of powers between national and state (provincial) governments in a federal system; and b) some of the complexities involved in resolving conflicts between national and provincial legislation, especially where the national and provincial spheres have concurrent legislative competence. When the Constitutional Court concluded in the *First Certification Judgment* that, to the extent set out in the judgment, the powers and functions of the provinces in terms of the new text (the NT) were substantially less than or substantially inferior to their powers under the IC, the provisions of section 146 in the NT were a critical factor that contributed to that conclusion. Of particular concern to the Court were the so-called override provisions and the presumption in favour of national legislation, which would apply to legislation in the entire field of concurrent powers. These provisions gave added strength to national legislation in respect of such matters, and weakened the position of provinces should there be a conflict with competing provincial legislation. The Court consequently decided not to certify the Constitution at that stage.[338]

In the *Second Certification Judgment* the Court concluded that the effect of the amendments to section 146 in the AT was to remove the presumption in favour of national legislation, and the fact that national legislation had to be approved by the NCOP will not create any presumption in favour of national legislation.[339] This makes it clear that there is no presumption in favour of national legislation in the Constitution, and consequently national

[338] *First Certification Judgment*, op cit, paras 472 - 481 and conclusion in para 482.
[339] *Second Certification Judgment*, op cit, para 155.

legislation does not *automatically* prevail over provincial legislation. Furthermore, it was contended on behalf of those who objected to section 146(2)(b) of the AT that this section diminished the powers and functions of the provinces in terms of the IC by now permitting the need to express uniformity through mechanisms such as 'norms and standards', 'frameworks' or 'national policies'. The comparable provisions in IC 126(3)(b) and (c) referred to 'norms and standards' and 'minimum standards', but did not mention 'frameworks' or 'national policies'. It was the addition of the latter two categories that caused the objection, on the ground that it extended the likelihood of national legislation prevailing over provincial legislation.[340] The Court accepted that there may have been some increase 'in the range of national legislation which may now take precedence over provincial legislation', but was of the view that that was not a 'substantial increase'. Here the Court argued as follows: in terms of AT 146(2)(b), a 'framework or national policy' can only take precedence over provincial legislation if it is a framework or national policy which 'deals with a matter that, to be dealt with effectively, requires uniformity across the nation' and it provides that uniformity. This is effectively the same criterion that applied in terms of IC 126(3)(b). The Court went on to say that the criterion of *uniformity* is a '*significant limitation* of the range of national policies and frameworks which may override provincial legislation', and that it is an '*objectively justiciable criterion*' (emphasis added). Also, under the IC an override for the purpose of uniformity is permitted where legislation contained 'norms and standards'. In this regard the Court held that neither of these words is capable of precise definition. This, together with the criterion of uniformity, makes it unlikely that even under the IC framework legislation and national policies which establish uniformity through standards, rules or patterns of conduct 'would have been held to fall within the scope of "norms and standards"'.[341] The Court therefore held that the 'amendments to the NT contained in the AT 146(2) and (4) effectively restore the balance' which had been tilted against the provinces in the NT,[342] despite the fact that the powers and functions of the provinces in terms of the AT are still less than or inferior to those accorded to the provinces in the IC, but 'not substantially so'.[343] The Court's interpretation of the provisions of section 146 in the Constitution set out above is useful as it clarifies when national legislation will prevail over provincial legislation, and when not, and that there is not an automatic presumption in favour of national legislation.

[340] Ibid, para 158.
[341] Ibid, para 159.
[342] Ibid, para 203.
[343] Ibid, para 204(e).

4.8 Resolving conflicts

4.8.1 General

Klaaren submits that given the breadth of the provincial legislative competence and its concurrency with that of the national legislature, some degree of conflict between national and provincial legislation is inevitable. However, courts will generally attempt to harmonise potentially conflicting statutes; and where such provincial legislation is found not to conflict with national legislation, it is often termed 'complementary or supplemental legislation'.[344] He suggests that before asking the 'conflict' question concerning which legislation prevails, one should ask the prior 'competence' question, namely whether the two pieces of legislation are validly enacted.[345] Klaaren proposes a 'five part legislative competency and conflict test', where the first two parts relate to competence and the last three to conflict:

1. What is the matter with which the challenged legislation deals?
2. Does the matter of the challenged legislation fall within the competence of the originating legislature?
3. Is there any conflict between the challenged piece of legislation and another piece of legislation?
4. If yes, is the degree of conflict between the challenged legislation and the conflicting legislation constitutionally significant?
5. If yes, is the area of conflict one where the national legislature has an override?[346]

Bronstein, in similar vein, identifies the following four questions that require answers when solving problems of legislative conflict:

1. Is the national legislation competent and valid? If yes:
2. Is the provincial legislation competent and valid? If yes:
3. Is there conflict between the national and the provincial legislation? If yes:
4. Does the national legislation prevail in terms of section 146?[347]

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[344] J Klaaren, 'Federalism' Chapter 5, *Constitutional Law of South Africa* [Revision Service 5, 1999], 5-8.
[345] Ibid, 5-2A.
[346] Ibid, 5-5.
[347] Bronstein, Victoria 'Conflicts', Chapter 16, *Constitutional Law of South Africa* [2nd Edition, Revised Service 5: 01-13], 16-4.

The first two questions suggested by Bronstein also help to establish legislative competence. She states that it is 'logically impossible to have conflict in the absence of competent provincial legislation and national legislation'.[348] Once competence is established, the next step is to ask whether there is any conflict between the legislation (the 'threshold question')[349]. If there is conflict, then the provisions of section 146 must be engaged to find the answer. However, Bronstein warns that establishing true conflict is not an easy task.[350] In the *KwaZulu-Natal Certification* judgment (analysed in paragraph 4.5 of this chapter) the Court formulated the test for establishing inconsistency or conflicts between national and provincial legislation. Bronstein refers to this test, and similar tests in other jurisdictions, as the 'test for direct conflict'.[351] She submits that while this test does minimise legislative conflict, it tends to maximise regulation by, for instance, inducing 'multiple licensing requirements for businesses'; and also 'tends to function in a manner that leads to the proliferation of regulation in a mechanical, unconsidered manner'.[352] These are important observations, and, I submit, the danger of over regulation should be heeded by legislators when enacting legislation in an area of concurrent national and provincial competence.

4.8.2 Interpretation of conflicts

The interpretation of apparent conflicts between national and provincial legislation is governed by section 150 of the Constitution, which provides as follows –

> 'When considering an apparent conflict between national and provincial legislation, or between national legislation and a provincial constitution, every court must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.'

Bronstein, despite being quite critical of the so-called test for direct conflict, states that it does seem to 'resonate' with section 150 of the Constitution, which 'would ensure that the

[348] Ibid.
[349] Ibid.
[350] Ibid.
[351] Bronstein, Chapter 16, op cit, 16-5.
[352] Ibid, 16-6 - 16-8.

minimum number of cases would undergo scrutiny' in terms of section 146.[353] She also says that although no coherent rationale for defending the test in South Africa exists, it could be argued that section 150 requires the use of such a test.[354] However, Bronstein qualifies this by stating that section 150 cannot be properly understood in isolation and needs to be read with section 146. She foresees that eventually judges will have an opportunity to build a body of jurisprudence that clarifies the meaning of section 146 and its relationship to section 150.[355]

I now turn to the specific provisions of section 146 and examine them in turn below.

4.8.3 Section 146(1) – conflict between national and provincial legislation

Section 239 of the Constitution defines national and provincial legislation to include subordinate legislation, unless the context indicates otherwise. The general rule is that subordinate legislation validly made in terms of empowering legislation is part of that legislation for the purpose of section 146.[356] Section 146 consequently applies to all legislation falling within a functional area listed in Schedule 4, as defined.

4.8.4 Section 146(2) – national legislation that applies uniformly

This section provides that only national legislation that applies uniformly with regard to the country as a whole is capable of prevailing over provincial legislation. However, national legislation can only prevail if any of the conditions envisaged by subsections (a) (b) or (c) is met.[357] Bronstein argues that for purposes of deciding which legislation prevails in conflict cases, it is not sufficient to rely on what an Act *purports* its objects to be – a court needs to examine the *content* of such legislation carefully in order to establish whether an Act does indeed do what it purports to do. In this regards she points out that the long titles and preambles of national legislation are generally framed in a way that purports to meet the requirements of section 146, very often precisely for that reason.[358]

[353] Ibid.
[354] Ibid, 16-11.
[355] Ibid, 16-16.
[356] Bronstein, op cit, chapter 16, 16-29.
[357] Constitution, op cit, section 146(2).
[358] Bronstein, op cit, 16-20.

In the *First Certification Judgment,* the Court held that the courts would have jurisdiction to determine whether 'the interests of the country as a whole require a matter to be dealt with uniformly' for the purposes referred to in section 146(2); and that such an exercise involves both an objective and a subjective element. However:

> 'The test in each case is ultimately objective because it is not the subjective belief of the national authority which is the jurisdictional fact allowing the national legislation to prevail over the provincial legislation, but there is inherently some subjective element involved in the assessment of what the interests of the country require or what is necessary. Some deference to the judgment of the national authority in these areas is inevitable.'[359]

Section 146(2)(a) and (b)

Section 146(2)(a) provides that national legislation prevails in respect of matters that cannot be 'regulated effectively' by provinces individually; and section 146 (2)(b) provides that national legislation prevails if it deals with matters that 'requires uniformity across the nation'. Section 146(2)(b) specifically allows for national legislation to provide uniformity by establishing: 1) norms and standards; 2) frameworks; or 3) national policies. In the *Second Certification Judgment,* the Court considered these provisions in the AT and the addition of 'frameworks; or national policies' to this section, when the IC only allowed for framework legislation that established 'norms and standards and minimum standards'. The Court responded to the contention that the additional provisions in subsection (2)(b) extended the scope of the corresponding provision in the IC, by stating that:

> 'One of the definitions of "uniform" given in the Concise Oxford Dictionary is "conforming to the same standard, rules or pattern". The achievement of uniformity in the context of AT 146(2)(b) therefore requires the establishment of standards, rules or patterns of conduct which can be applied nationally. As we have stated above, this is an objectively justiciable criterion. Under the IC an override for the purpose of uniformity is permitted where legislation contained norms and standards. Neither of these words is capable of precise definition. The concise Oxford

[359] *First Certification Judgment*, op cit, para 337 (*fn* 277).

> Dictionary defines "standard" as an "object or quality or measure serving as a basis or example or principle to which others conform or should conform or by which the accuracy or quality of others is judged". "Norm" is defined as "a standard or pattern or type". Given the ill-defined import of the words norms and standards, and the governing criterion of uniformity, it is likely that even under the IC, framework legislation and national policies which sought to establish uniformity by establishing standards, rules or patterns of conduct would have been held to fall within the scope of norms and standards.'[360]

Section 146(2)(c)

In the *Second Certification Judgment*, the Court made it clear that the conditions that national legislation must meet before it can prevail, set out in this subsection, are objectively justiciable:

> 'The issue as to whether or not the particular national legislation dealt with a matter which was necessary for the maintenance of national security or economic unity or the protection of the common market or any of the other factors listed in NT 146(2)(c) is now objectively justiciable in a court without any presumption in favour of such national legislation.'[361]

The 'factors' listed in section 146(2)(c) referred to by the Court were clearly of concern to the legislators when drafting the Constitution, as evidenced by the fact that very similar provisions exist in section 44(2).[362] Unlike section 146 which applies to conflicting legislation falling within a functional area listed in Schedule 4, section 44(2) provides for national legislative intervention with regard to matters falling within a functional area of exclusive provincial competence listed in Schedule 5. Both sections give precedence to national legislation which is 'necessary' in the circumstances listed in those sections. Although Cameron J's comments in the *Liquor Bill* case regarding one such 'factor', i.e. the

[360] *Second Certification Judgment*, op cit, para 159.
[361] Ibid, para 155.
[362] Constitution, op cit, section 44(2)": 'Parliament may intervene, by passing legislation …, when it is necessary-
(a) to maintain national security;
(b) to maintain economic unity;
(c) to maintain essential national standards;
(d) to establish minimum standards for the rendering of services; or
(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or the country as a whole.'

maintenance of economic unity, were made in respect of section 44(2), they assist in understanding the issues that a court would take into consideration when deciding whether national legislation is *necessary*:

> 'In the context of trade, economic unity must in my view … mean the oneness, as opposed to the fragmentation, of the national economy with regard to the regulation of inter-provincial, as opposed to the intra-provincial, trade. In that context it seems to follow that economic unity must contemplate at least the power to require a single regulatory system for the conduct of trades which are conducted at a national (as opposed to an intra-provincial) level. Given the history of the liquor trade, the need for vertical and horizontal regulation, the need for racial equity, and the need to avoid the possibility of multiple regulatory systems affecting the manufacturing and wholesale trades in different parts of the country, in my view the economic unity requirement of section 44(2) has been satisfied … I am of the view that the Minister has shown, at least in regard to manufacturing and distribution of liquor, that the maintenance of economic unity necessitates for the purposes of section 44(2)(b) the national legislature's intervention in requiring a national system of registration in these two areas.'[363]

However, Bronstein suggests that the idea that national regulation of the manufacture and distribution of liquor is necessary for the maintenance of economic unity seems an overstatement;[364] and that the drafters of the Constitution could never have anticipated that the promotion of equal opportunity or equal access to government services might require identical treatment between citizens of all provinces in all circumstances.[365] She submits that the judiciary has a duty to promote national unity, but that duty does not require 'identical regulatory regimes throughout the country'. Hence, she cautions that the courts should 'not advance uniformity for uniformity's sake'.[366] The following pronouncement by the *Mashavha* Court is instructive in that regard:

[363] *Liquor Bill*, op cit, paras 75-78.
[364] Bronstein, chapter 16, op cit, 16-27.
[365] Ibid; see also section 146(2)(c)(v).
[366] Bronstein, Chapter 16, op cit, 16-21.

> 'It is inherent in our constitutional system, which is a balance between centralised government and federalism, that on matters in respect of which the provinces have legislative powers they can legislate separately and differently. That will necessarily mean that there is no uniformity.'[367]

I submit that the above cited dictum applies equally to provincial environmental legislation where provinces do have legislative powers.[368] The same dictum by the *Mashavha* Court is cited with approval in *FEDSAS,*[369] a recent case before the Constitutional Court where one of the central issues was whether certain amendments to provincial Regulations[370] were in conflict with the South African Schools Act.[371] The Federation of Governing Bodies for South African Schools (FEDSAS) contended that provincial legislation that conflicts with national legislation is unconstitutional and is 'required to be struck out'; and that the amended Regulations caused a conflict between national and provincial legislation.[372] Moseneke DCJ responded to this contention by providing a clear exposition of the law governing conflicts between national and provincial legislation:

> 'I think not. This contention ignores the provisions of the Constitution and the Schools Act. Education is a functional area of concurrent national and provincial legislative competence. Parliament may legislate on education and a province too. …The legislative competence of a province cannot be snuffed out by national legislation without more. The Constitution anticipates the possibility of overlapping and conflicting national and provincial legislation on concurrent provincial and national legislative competences.'[373]

He goes on to say that for this very reason the Constitution has extensive provisions geared to regulate envisaged conflict between national and provincial legislation; and the 'conflict resolution scheme of sections 146, 149 and 150 of the Constitution' departs from the conventional hierarchy that provincial legislation may not be in conflict with national

[367] *Mashavha v President of the Republic of South Africa & Others* 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC), para 49 (*Mashavha*).
[368] See detailed discussion in chapter 4, part I.
[369] *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC 14 (*FEDSAS*), para 26.
[370] Gauteng School Education Act 6 of 1995: Regulations Relating to the Admission of Learners to Public Schools, 2012, GN 1160 Provincial Gazette 127, 9 May 2012 (Regulations).
[371] 84 of 1996, section 5(5).
[372] *Fedsas*, op cit, para 25.
[373] Ibid, para 26.

legislation; and 'automatic repugnancy between the two classes of legislation does not arise'. Under the conflict resolution scheme 'provincial legislation prevails over national legislation except if the national legislation applies uniformly countrywide or the matter cannot be regulated effectively by respective provinces or the matter is one listed in the Constitution as requiring uniformity across the nation'.[374] Moreover, Moseneke DCJ held that even if there is conflict, Schedule 4 national and provincial legislation is not rendered invalid – a court must first attempt to avoid the conflict by 'preferring any reasonable interpretation of the two pieces of legislation which avoids conflict'. And, if the conflict persists, the provincial legislation prevails. National legislation 'may' enjoy supremacy over provincial legislation 'only in accordance with' the test laid down in sections 146(2) and (3), and in terms of section 148 if section 146 does not apply. This does not mean that such provincial legislation is struck down – it simply becomes inoperative for as long as the conflict remains.[375]

In concluding this analysis of national legislation that applies uniformly, I would argue that the Court's pronouncements in *Liquor Bill* in respect of the requirement of evidence to establish whether a provision is *necessary* as opposed to *important* (or even desirable), is of the utmost importance for the enactment of provincial environmental legislation.[376] This is so because section 146(2)(c)(vi) specifically lists legislation for the protection of the environment as legislation which prevails over provincial legislation *if* that legislation is 'necessary'. The *Liquor Bill* Court therefore assists provinces in understanding the issues that a court would take into consideration when deciding whether national legislation is *necessary* and therefore prevails over provincial legislation. This, in turn, will guide provincial legislatures on how to avoid potential conflicts when enacting provincial legislation on the environment.

4.8.5 Section 146(3) – preventing unreasonable action by a province

An analysis of subsection 146(3) on national legislation aimed at preventing unreasonable action by a province once again assists legislative drafters and provincial legislatures to understand what is meant by 'unreasonable action by a province' that will cause national

[374] Ibid, para 27.
[375] Ibid, para 28. See also Constitution, op cit, sections 150, 146(5) and 149.
[376] *Liquor Bill*, op cit, para 80.

legislation to prevail. This allows provinces to steer clear of such unreasonable provisions in their own legislation, including in environmental legislation. The override provision in this subsection is triggered by unreasonable action by a province that is prejudicial to the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policy.[377] Klaaren regards the standard of unreasonableness required for such an override as a 'high threshold'. He submits that once the threshold is reached, the national legislation need not apply uniformly across the country, but may target only a particular province.[378] Also, the override provision is clearly aimed at 'renegade or out-of-place provincial legislation' that could not be dealt with by one of the other provisions which allow national legislation to prevail. Klaaren argues that provincial legislation which either directly or indirectly discriminates against those outside the province without justification is more likely to be overridden by national legislation in terms of this section.[379] In *New National Party* the Court considered legislative unreasonableness, and the majority held that decisions as to the 'reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament'.[380] This statement is somewhat ambiguous as to whether it can be interpreted to mean that the reasonableness of provincial legislation is 'ordinarily a matter within the exclusive competence of the provincial legislature'; or, whether a court should 'defer to Parliament's assurance that "national legislation is aimed at preventing unreasonable action" by a province?'[381] Bronstein convincingly argues that the better interpretation is that national legislation intended to prevent unreasonable action by a province should prevail if it is 'objectively probable' that it will achieve that end.[382] She adds that '[e]xcessive deference' to the national legislature does not resonate with, firstly, the strength of the word 'unreasonableness'; and, secondly, the Court's insistence that the matters raised by section 146 are objectively justiciable.[383]

In *FEDSAS*, the issue of whether the disputed provincial Regulations were invalid because they are 'irrational or not reasonable nor justifiable' was also considered.[384] The Court held

[377] See subsections 3(a) and (b).
[378] J Klaaren 'Federalism', Chapter 5, *Constitutional Law of South Africa* [Revision Service 5, 1999], 5-16.
[379] Ibid.
[380] *New National Party*, op cit, para 24.
[381] Bronstein, chapter 16, op cit, 16-28 - 16-29.
[382] Ibid, 16-29.
[383] Ibid.
[384] *FEDSAS*, op cit, para 6.

that the Regulations were not so, as they clearly served a legitimate purpose.[385] One may therefore conclude that where provincial legislative provisions serve a legitimate government purpose, such as for instance preventing pollution of an ecosystem, or loss of biodiversity, such legislation will not be irrational and therefore reasonable and justified.[386]

4.8.6 Section 146(4) – approval or rejection by NCOP

This paragraph briefly explains how courts will resolve disputes on the necessity[387] of national legislation for a purpose set out in subsection 146(2)(c) where there was approval or rejection of the legislation by NCOP. Such an explanation is, once again, relevant to provinces when drafting and enacting provincial legislation. Subsection 146(4) provides that a court must have 'due regard to the approval or rejection of the legislation' by the NCOP in deciding a dispute as to whether national legislation is necessary for a purpose set out in subsection 2(c). The *Second Certification Judgment* Court explained that the fact that national legislation has been approved by the NCOP will not create any presumption in favour of the national legislation - all that the court must do is to have 'due regard' to the approval or rejection of the legislation by the NCOP. This simply means that 'the court has a duty to give to the approval or rejection of the legislation by the NCOP the consideration which it deserves in the circumstances.'[388] Citing these pronouncements by the Court, Klaaren submits that section 146(4) has two consequences: 1) it reinforces the commands of co-operative government and that a court and other constitutional organs should strive to interpret potentially conflicting laws co-operatively and consistently; and 2) it indicates that consideration should be given in that process to the actions of NCOP. He postulates that where the NA and the NCOP are in agreement it will enable a Court to 'find a national override in terms of section (2)(c)'; where the NCOP is opposed to the national legislation, the judiciary should be 'hesitant' to find an override. Furthermore, these consequences extend to each of the override provisions.[389]

4.8.7 Section 146 (5) – provincial legislation prevails

[385] Ibid, para 31 & 33.
[386] See the provisions of section 24(b)(i) of the Constitution and Schedule 4.
[387] Also see the discussion in paragraph 4.8.4 above.
[388] *Second Certification Judgment*, op cit, para 155.
[389] Klaaren, op cit, 5-9.

This subsection makes it clear that in the absence of circumstances or factors which specifically justify a national legislative override envisaged by subsections (2) or (3), provincial legislation will apply. In this regard Bronstein considers the 'direct conflict test' discussed above difficult to reconcile with subsection (5).[390]

4.8.8 Section 146 (6), (7) and (8) – role of NCOP

Klaaren submits that the Constitution is clear that both national and provincial subordinate legislation may prevail once it has passed through a political process.[391] Hence, in terms of section 146(6) a 'law' made in terms of an 'Act' of Parliament or a provincial 'Act' may prevail only if that subordinate law has been approved by the NCOP. Approval is assumed if the NCOP does not reach a decision within 30 days of its first sitting after the law was referred to it (subsection (7). Klaaren states that the Constitution does not specifically address conflicts between national and provincial subordinate legislation where neither has been approved by the NCOP, as such conflicts would fall into the residual category governed by section 148 which means national legislation would prevail.[392] Section 146(8) does not deal with conflicts per se, but simply provides for the NCOP to give reasons within 30 days where it does not approve a law.

4.8.9 Section 147 – other conflicts

Section 147(1) regulates conflicts between national legislation and provincial constitutions. Where there is such a conflict, provincial constitutions have 'no special status that elevates them above ordinary provincial legislation'.[393] In the *First Certification Judgment* the Court held that national legislation specifically required or envisaged by the Constitution, and national legislation enacted in terms of section 44(2) interventions, are given preference over the provisions of a provincial constitution. Thus, '[c]onflicts between national legislation and provisions of a provincial constitution in the field of concurrent legislative competences set

[390] Bronstein, Chapter 16, op cit, 16-8.
[391] Klaaren, op cit, 5-16.
[392] Ibid, 5-16.
[393] Bronstein, Chapter 16, op cit, 16-29 - 16-30.

out in Schedule 4 are to be dealt with in the same manner as conflicts in respect of matters between national legislation and provincial legislation'.[394]

Section 147(2) provides that national legislation referred to in section 44(2) prevails over provincial legislation in respect of matters within the functional areas of exclusive provincial competence, to the extent that it is necessary as set out in section 44(2)(a)-(e), as discussed above. This means that when section 44(2) applies, the national legislation automatically prevails. Bronstein states that for this reason disputes about Schedule 5 powers will tend to be primarily disputes about legislative competence rather the conflict, and that the *Liquor Bill* case (discussed above) illustrates this point.[395]

4.8.10 Section 148 – conflicts that cannot be resolved

Section 148 provides -

> 'If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over provincial legislation or provincial constitution.'

The Constitutional Court stated in the *First Certification Judgment* that it had 'some difficulty in understanding' the meaning of CP XXIII, which required 'precedence to be given to the legislative powers of the national government where a dispute between the national and provincial governments cannot be resolved by a court on a construction of the NT'. The Court's difficulty apparently lay in the fact that '[r]esolving such disputes is inherent in the judicial function and a court can hardly take a position that it is unable to do so'.[396]

4.9 The Effect of Conflict

In *KwaZulu-Natal Certification*, the Court considered how a conflict or potential conflict between legislation had to be resolved, and which of the conflicting provisions were to

[394] *First Certification Judgment*, op cit, para 269.
[395] Bronstein, Chapter 15, op cit, 15-5.
[396] *First Certification Judgment*, op cit, para 246.

prevail. In this regard the Court held: '[i]f the conflict is resolved in favour of one of the conflicting laws the other is not invalidated, "it is subordinate and to the extent of the conflict rendered inoperative." A law so subordinated is not nullified;'[397] The Court went on to say that such a law 'remains in force and has to be implemented to the extent that it is not inconsistent with the law that prevails, and if the inconsistency falls away the law would then have to be implemented in all respects. In effect the subordinated law, or relevant provision thereof, goes into abeyance.'[398]

4.10 Conclusions on Conflicting Laws

The following conclusions may be drawn from the above analysis of the constitutional provisions on conflicting laws:

(i) There is no presumption in favour of national legislation over provincial legislation in the Constitution.

(ii) The legislative authority of provinces is derived from the Constitution and not from Parliament.

(iii) Legislation on the environment and related matters listed in Schedule 4 are areas of concurrent legislative competence and may therefore be competently passed by Parliament as well as provincial legislatures.

(iv) The Constitution anticipates the possibility of overlapping and conflicting national and provincial legislation on concurrent provincial and national legislative competences, and courts will generally attempt to harmonise potentially conflicting statutes.

(v) Where provinces have legislative authority and competence, they can legislate separately and differently. That will necessarily mean that there is no uniformity.[399]

(vi) The 'uniformity' envisaged by the Court in the *Second Certification* judgment[400] clearly would only apply if any of the limited conditions provided for in section 146 (2)(a)(b) and (c) is met. In the absence of the conditions provided for in those

[397] *KwaZulu-Natal Certification*, op cit, para 9.
[398] Ibid.
[399] See *Mashavha*, op cit, para 49.
[400] *Second Certification Judgment*, op cit, para 159.

subsections, the Constitution does not require identical regulatory regimes throughout the country.

(vii) Different provisions in national and provincial legislation are not automatically in conflict with each other, or inconsistent. Provinces do have the power to enact legislation which is different from national legislation, provided that the test laid down in the *KwaZulu-Natal Certification* judgment is met.[401]

(viii) The conflict resolution scheme of the Constitution departs from the conventional hierarchy that provincial legislation may not be in conflict with national legislation. Provincial legislation prevails over national legislation,[402] except where national legislation applies uniformly countrywide *if* any of the following limited conditions is met: 1) such a matter cannot be regulated effectively by the respective provinces; or 2) to be dealt with effectively, the matter is listed as requiring uniformity; 3) the national legislation is necessary for the listed purposes.[403] National legislation aimed at preventing unreasonable action by a province also prevails.[404] Thus, national legislation prevails only in the limited circumstances envisaged by section 146(2) or (3).

(ix) Even if there is conflict, Schedule 4 national and provincial legislation is not rendered invalid – a court must first attempt to avoid the conflict by preferring any reasonable interpretation of the two pieces of legislation which avoids conflict.

(x) National legislation may enjoy supremacy over provincial legislation only in accordance with the test laid down in sections 146(2) and (3), and in terms of section 148 if section 146 does not apply. This does not mean that such provincial legislation is struck down – it simply becomes inoperative for as long as the conflict remains.[405]

(xi) National legislation intended to prevent unreasonable action by a province should prevail if it is 'objectively probable' that it will achieve that end.[406]

(xii) Approval of national legislation by the NCOP will not create any presumption in favour of the national legislation – but a court is required to have 'due regard' to the approval or rejection of the legislation by the NCOP.[407]

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[401] See particularly discussion in chapter 4, part I, 4.3 and part II - conflicting laws.
[402] Constitution, op cit, section 146(5).
[403] Ibid, section 146(2)
[404] Ibid, section 146(3).
[405] *Fedsa*s, op cit, para 28. See also Constitution, op cit, section 150, 146(5) & 149.
[406] Bronstein, chapter 16, op cit,16-29.
[407] *Second Certification Judgmen*t, op cit, para 155.

(xiii) National legislation specifically required or envisaged by the Constitution, and national legislation enacted in terms of section 44(2) interventions, are given preference over the provisions of a provincial constitution.[408]

(xiv) Conflicts between national legislation and provisions of a provincial constitution in the field of concurrent legislative competences are dealt with in the same manner as conflicts in respect of matters between national legislation and provincial legislation.[409]

(xv) In the event of conflicts between provincial legislation in an area of Schedule 5 exclusive provincial competence national legislation prevails when it is necessary; and evidence is required to establish whether national legislation is necessary as opposed to merely important, or even desirable.[410]

Chapter 4 provided a detailed analysis of the constitutional provisions that underpin the authority of provinces to enact legislation for the protection of the environment. This was done in two interrelated but distinct parts which focused on: (a) the constitutional authority of provinces to enact environmental legislation; and (b) the constitutional provisions on conflicting laws, respectively. Part I established that provinces have both the authority and concurrent and exclusive competence to enact legislation in respect of the environment and matters falling within the broad concept 'environment', listed in Schedules 4 and 5 of the Constitution. Part II provided insight into the provisions of the Constitution on conflicting laws, as well as how these provisions have been interpretation by scholars and the courts. The latter analysis is intended to guide provincial legislators on what constitutes legislative conflicts, a concept which is often misunderstood, with a view to avoiding true conflicts when enacting legislation for the protection of the environment. This chapter therefore addressed the second objective of this dissertation, namely to determine the original legislative *authority* of provinces to enact environmental legislation.

I now turn to a discussion on the extent to which provinces are exercising their legislative authority in pursuit of their environmental obligations and possible factors that may constrain them from doing so**.**

[408] See *First Certification Judgment*, op cit, para 269.
[409] *First Certification Judgment*, op cit, para 269.
[410] See *Liquor Bill*, op cit, para 80.

CHAPTER 5

MEETING PROVINCIAL OBLIGATIONS

'*It's not what the vision is, it's what the vision does*'[411]

Introductory comments

This chapter examines: (a) the extent to which provinces are exercising their legislative authority in pursuit of their constitutional environmental obligations; and (b) factors which may constrain provinces from exercising such authority to the extent provided for in the Constitution. This is done in two interrelated parts which both fall under the subject matter discussed in this chapter, but examine distinct aspects of the research questions posed in chapter 1. Thus, part I provides the information gleaned from my research into environmental legislation currently on provincial statute books; and also highlights possible causes of what appears to be considerable inactivity on the part of most provinces to enact environmental legislation. Part II consists of a case study on the drafting of environmental legislation for KwaZulu-Natal which highlights a number of misconceptions on the nature and scope of provincial legislative powers, which may inhibit provinces in the exercise of their legislative powers.

Part I – Provincial Environmental Legislation

5.1 Introduction

The Constitution has ushered in a new vision of a less hierarchical division of government power in South Africa.[412] Even so, a vision that is not realised in practice remains a mere vision. Are provinces giving effect to this new vision, or are they through legislative

[411] Peter Senge, senior lecturer Massachusetts Institute of Technology.
[412] See particularly the analysis in chapter 4, part I; *Habitat Council*, op cit, para 11; *Robertson*, op cit, para 60; and *Kloof Conservancy*, op cit, para 10.

inactivity reducing their constitutional roles to that of moribund creatures of statute, waiting to be imbued with power by national legislation?[413] It is beyond the scope of this research project to answer such a complex question comprehensively, but I will provide a broad overview of the current state of provincial environmental legislation in this part of the chapter, as well as the extent to which provinces have exercised their legislative authority to enact legislation to protect the environment. It was indeed the state of environmental legislation in one of the provinces that prompted Van der Westhuizen J to remark as follows in *Khohliso*:[414]

> 'It is rather odd that – 20 years into our constitutional democracy – we are left with a statute book cluttered by laws surviving from a bygone undemocratic era remembered for the oppression of people; the suppression of freedom; discrimination; division; attempts to break up our country; and military dictatorships. When these laws determine criminal liability, the situation looks even worse. It is not clear from the facts of the matter why this is the case. It is clear though, that people like Ms Khohliso and the rest of us – and indeed our much-valued vultures and other wildlife – deserve to be guided and protected by democratically elected Legislatures through clearer laws and a cleaner statute book.'

Khohliso concerned a traditional healer in the Transkei (part of the Eastern Cape Province) who was charged with and convicted of being in possession of two vulture's feet. The matter went on appeal to the Eastern Cape Local Division of the High Court, and finally ended up in the Constitutional Court. One of the issues before the Constitutional Court was the constitutional validity of certain sections of Decree 9 (Environmental Conservation) of 1992 (Transkei). The Decree was issued by the then President of the former Republic of the Transkei[415] on the advice of the territory's Military Council after a military coup, and is a remnant of South Africa's divided history. The reason why it is in force in the Transkei area of the Eastern Cape lies in the transitional provisions of the Constitution, which provide as follows:

> 'Continuation of existing law

[413] See *Habitat Council*, op cit, para 11 (quoted above).
[414] *Khohliso v S and Another* [2014] ZACC 33, para 53 (end note) (*Khohliso*).
[415] South Africa was the only country in the world to recognize this 'Republic'.

(1) All law that was in force when the new Constitution took effect, continues in force, subject to –

(a) any amendment or repeal; and

(b) consistency with the new Constitution.

(2) Old order legislation that continues in force in terms of subitem (1) –

(a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and

(b) continues to be administered by the authorities that administered it when the new Constitution too effect, subject to the new Constitution.[416]

These constitutional provisions were enacted in the interest of legal certainty, given the fact that different laws were in existence in the homelands and the rest of South Africa.[417] However, the Constitution leaves no doubt that old order legislation can be amended or repealed, and must be consistent with the Constitution. But are provinces giving effect to their constitutional legislative powers to amend, repeal and align old order environmental legislation with the Constitution, or to enact new environmental legislation? The survey discussed below provides some answers to these and other questions posed above.

5.2 Survey of Provincial Legislation

Tables 1 and 2 below reflect the results of a survey conducted to assess the extent of current provincial environmental legislation. However, the survey is not intended to be a qualitative assessment of provincial environmental legislation, or an attempt to determine whether such legislation adequately fulfils the obligations imposed on provinces by section 24 of the Constitution. The survey is merely a quantitative analysis to determine the degree to which provinces have been exercising their constitutional legislative authority since their establishment in 1994 to amend, repeal and enact environmental legislation. Table 1 below lists old order provincial environmental legislation[418] still on the statute books, and distinguishes between: 1) ordinances assigned to provinces; and 2) legislation emanating

[416] The Constitution, op cit, Schedule 6, item 2.
[417] *Khohliso*, op cit, para 7.
[418] Constitution, op cit, Schedule 6, item 1 (see fn 6 above for definition).

from the former homelands.[419] Table 2 lists provincial environmental legislation enacted after the new constitutional order in South Africa commenced;[420] as well as legislation enacted but subsequently repealed, enacted but not proclaimed, and enacted but not yet in operation – an analysis which assists in the assessment of the extent to which provinces are exercising their constitutional powers to protect the environment.

Table 1 – Old Order Provincial Environmental Legislation[421]

1.1 Chronological Table of Ordinances listed under the category 'Environment and Conservation' assigned to provinces[422]									
YR	**E/C**	**F/S**	**GAU**	**KZN**	**LIM**	**MPU**	**N/C**	**N/W**	**W/C**
1957							The Problem Animal Control Ordinance 26 of 1957 [423]		
1969		Nature Conservation Ordinance 8 of 1969							
1974	Nature and Environmental Conservation Ordinance 19 of 1974			Nature Conservation Ordinance 15 of 1974[424]			Nature and Environmental Conservation Ordinance 19 of 1974 [425]	Nature and Environmental Conservation Ordinance (Cape) 19 of 1974[426]	Nature and Environmental Conservation Ordinance 19 of 1974[427]
1978				Nature Conserva					

[419] Constitution, op cit, Schedule 6, item 1 – defines 'homeland' as a part of the Republic which, before the previous Constitution took effect, was dealt with in South African legislation as an independent or self-governing territory; see also article by W Du Plessis 'Integration of Existing Environmental Legislation in the Provinces' *The South African Journal of Environmental Law and Policy* (1995) Volume 2 (1), 23 – 36.
[420] *Juta's Statutes – Index, Table of Provincial Acts/Laws*, 1-345 to 1-392.
[421] Refer to abbreviations and colour key below Table 2.
[422] LexisNexis, Chronological Table of Ordinances.
[423] Repealed by Northern Cape Nature Conservation Act 9 of 2009 for Northern Cape Province.
[424] Sections 2 to 11, inclusive; section 11A; sections 12 – 14, inclusive; sections 17 and 18; and section 28 repealed by the KwaZulu-Natal Nature Conservation Management Act 9 of 1997.
[425] Repealed by Northern Cape Nature Conservation Act 9 of 2009 for Northern Cape Province.
[426] Will be repealed when the North West Biodiversity Management Act 4 of 2016 comes into effect.
[427] This Ordinance was amended by the Western Cape Nature and Environmental Conservation Ordinance Amendment Act 8 of 1999; and the Western Cape Nature Conservation Laws Amendment Act 3 of 2000 reflected in Table 2 - Provincial Environmental Legislation enacted since 1994.

				tion Expenditure Validation Ordinance 12 of 1978					
1981				Prevention of Environmental Pollution Ordinance 21 of 1981					
1982	Nature Reserves Validation Ordinance 3 of 1982						Nature Reserves Validation Ordinance 3 of 1982		Nature Reserves Validation Ordinance 3 of 1982
1983			Nature Conservation Ordinance 12 of 1983	Natal Parks, Game and Fish Preservation Board (Validation of Lease) Ordinance 27 of 1983	Nature Conservation Ordinance 12 of 1983, with amendments[428]	Nature Conservation Ordinance 12 of 1983 (Transvaal)[429]		Transvaal Nature Conservation Ordinance 12 of 1983[430]	
1984						Nature Conservation Amendment Ordinance 11 of 1984 (Transvaal)[431]			
1986				Nature Conservation Amendment Ordinance 12 of 1986		Nature Conservation Amendment Ordinance 18 of 1986			

[428] Repealed by Limpopo Environmental Management Act 7 of 2003 for Limpopo Province.
[429] Repealed by Mpumalanga Nature Conservation Act 10 of 1998 for Mpumalanga Province.
[430] Will be repealed when the North West Biodiversity Management Act 4 of 2016 comes into effect.
[431] Repealed by Mpumalanga Nature Conservation Act 10 of 1998 for Mpumalanga Province.

						(Transvaal)[432]			
Repeal / amend	0	0	0	1 (only certain sections repealed)	1	3	2	0	1
Still in force	2	1	1	5	0	0	1	2[433]	2

1.2 Chronological Table of former Homelands Legislation on the Environment and Conservation[434]

YR	E/C	F/S	GAU	KZN	LIM	MPU	N/C	N/W	W/C
1973		Bophuthatswana Nature Conservation Act 3 of 1973			Lebowa Nature Conservation Act 10 of 1973[435]	Bophuthatswana Nature Conservation Act 3 of 1973[436] Lebowa Nature Conservation Act 10 1973[437]	Bophuthatswana Nature Conservation Act 3 of 1973	Bophuthatswana Nature Conservation Act 3 of 1973[438]	
1975					Gazankulu Nature Conservation Act 5 of 1975[439]	Gazankulu Nature Conservation Act 5 of 1975			
1976	Nature Conservation Act 7 of 1976 (Ciskei)[440]	Nature Conservation Act 5 of 1976 (QwaQwa)							
1978	Territorial Waters Act 39 of 1978 (Transkei)				Lebowa Nature Conservation Amendment Act 9 of 1978[441]	Lebowa Nature Conservation Amendment Act 9 of 1978[442] Nature			

[432] Repealed by Mpumalanga Nature Conservation Act 10 of 1998 for Mpumalanga Province.
[433] Will be repealed when the North West Biodiversity Management Act 4 of 2016 comes into effect.
[434] See W Du Plessis, op cit, 23 – 36.
[435] Repealed by Limpopo Environmental Management Act 7 of 2003 for Limpopo Province.
[436] Repealed by Mpumalanga Nature Conservation Act 10 of 1998 for Mpumalanga Province.
[437] Repealed by Mpumalanga Nature Conservation Act 10 of 1998 for Mpumalanga Province.
[438] Will be repealed when the North West Biodiversity Management Act 4 of 2016 comes into effect.
[439] Repealed by Limpopo Environmental Management Act 7 of 2003 for Limpopo Province.
[440] Amended by various Ciskeian Acts – see W Du Plessis, op cit, 29, fn 41.
[441] Repealed by Limpopo Environmental Management Act 7 of 2003 for Limpopo Province.
[442] Repealed by Mpumalanga Nature Conservation Act 10 of 1998 for Mpumalanga Province.

						Conservation in Black Areas Proclamation R.6 of 1978[443]			
1979	Plant Improvement Act of 1979 (Transkei) Sea Shore Act 60 of 1979 (Transkei)								
1980		Nature Conservation Amendment Act 58 of 1980 (Bophuthatswana)				Nature Conservation Amendment Act 58 of 1980 (Bophuthatswana)[444]	Nature Conservation Amendment Act 58 of 1980 (Bophuthatswana)		
1981	Hazardous Substances Act 12 of 1981 (Transkei)	Nature Conservation Amendment Act 17 of 1981 (Bophuthatswana)			Gazankulu Animals Protection Act 7 of 1981 Gazankulu Nature Conservation Amendment Act 9 of 1981[445]	Nature Conservation Amendment Act 17 of 1981 (Bophuthatswana)[446] Gazankulu Animals Protection Act 7 of 1981 KaNgwane Nature Conservation Act 3 of 1981[447]	Nature Conservation Amendment Act 17 of 1981 (Bophuthatswana)		

[443] Repealed by Mpumalanga Nature Conservation Act 10 of 1998 for Mpumalanga Province.
[444] Repealed by Mpumalanga Nature Conservation Act 10 of 1998 Mpumalanga Province.
[445] Repealed by Limpopo Environmental Management Act 7 of 2003 for Limpopo Province.
[446] Repealed by Mpumalanga Nature Conservation Act 10 of 1998 for Mpumalanga Province.
[447] Repealed by Mpumalanga Nature Conservation Act 10 of 1998 for Mpumalanga Province.

1982		Nature Conservation Amendment Act 36 of 1982 (Bophuthatswana)				Nature Conservation Amendment Act 36 of 1982 (Bophuthatswana)[448]	Nature Conservation Amendment Act 36 of 1982 (Bophuthatswana)		
1985	Atmospheric Pollution Prevention Act 14 of 1985 (Transkei)								
1986					Venda Nature Conservation and National Parks Act 20 of 1986[449] Gazankulu Corporation Act 12 of 1986	Gazankulu Corporation Act 12 of 1986			
1987	Nature Conservation Act 10 of 1987 (Ciskei)								
1988					Gazankulu Minerals Trust Act 16 of 1988	Gazankulu Minerals Trust Act 16 of 1988			
1992	Environment Conservation Decree 9 of 1992 (Transkei)			KwaZulu Nature Conservation Act 6 of 1992[450]	Lebowa Nature Conservation Amendment Act, 1992[451]				
1993		Nature Conservation				Nature Conservation	Nature Conservation		

[448] Repealed by Mpumalanga Nature Conservation Act 10 of 1998 for Mpumalanga Province.
[449] Repealed by Limpopo Environmental Management Act 7 of 2003 for Limpopo Province.
[450] Sections 4 – 6 repealed by the KwaZulu-Natal Nature Conservation Management Act 9 of 1997.
[451] Repealed by Limpopo Environmental Management Act 7 of 2003.

		Amendment Act 5 of 1993 (Bophuthatswana)				Amendment Act 5 of 1993 (Bophuthatswana) [452]	Amendment Act 5 of 1993 (Bophuthatswana)		
Repeal /amend	0	0	0	1 (only certain sections repealed)	6	9	0	1	0
Still in force	8	6	0	1	3	4	5	1	0

Table 2 – Provincial Environmental Legislation enacted since 1994

Chronological Table of Provincial Statutes on the Environment enacted since 1994									
YR	**E/C**	**F/S**	**GAU**	**KZN**	**LIM**	**MPU**	**N/C**	**N/W**	**W/C**
1995						Mpumalanga Parks Board Act 6 of 1995[453]			
1996					Limpopo Nature Conservation Amendment Act 7 of 1996 [454]				
1997				KwaZulu-Natal Nature Conservation Management Act 9 of 1997				North West Parks and Tourism Board Act 3 of 1997[455]	
1998						Mpumalanga Parks Board Amendment Act 9 of 1998; Mpumalanga Nature Conserva			Western Cape Nature Conservation Board Act 15 of 1998

[452] Repealed by Mpumalanga Nature Conservation Act 10 of 1998.
[453] Repealed by Mpumalanga Tourism and Parks Agency Act 5 of 2005
[454] Repealed by Limpopo Environmental Management Act 7 of 2003.
[455] Repealed by North West Parks Board Act 3 of 2015.

						tion Act 10 of 1998			
1999				KwaZulu-Natal Nature Conservation Management Amendment Act 5 of 1999 [456] KwaZulu-Natal Nature Conservation Amendment Act 7 of 1999 [457]					Western Cape Nature and Environmental Conservation Ordinance Amendment Act 8 of 1999
2000									Western Cape Nature Conservation Laws Amendment Act 3 of 2000
2002						Mpumalanga Parks Board Amendment Act 3 of 2002			
2003	Eastern Cape Provincial Parks Board Act 12 0f 2003 [458]				Limpopo Environmental Management Act 7 of 2003			North West Parks and Tourism Board Amendment Act 8 of 2003[459]	
2005						Mpumalanga Tourism and Parks Agency Act 5 of			

[456] Published on 22 September 1999 but not proclaimed to date.
[457] Published on 25 February 2000 but not proclaimed to date.
[458] Repealed by Act 2 of 2010.
[459] Repealed by North West Parks Board Act 3 of 2015.

						2005			
2009							Northern Cape Nature Conservation Act 9 of 2009[460]		
2010	Eastern Cape Parks and Tourism Agency Act 2 0f 2010								
2011									Western Cape Biosphere Reserves Act 6 of 2011[461]
2015								North West Parks Board Act 3 of 2015[462]	
2016								North West Biodiversity Management Act, No 4 of 2016 (not yet in force)[463]	
Total	2	0	0	3	2	5	1	4	4

Abbreviations:

Province of the Eastern Cape – E/C

Province of the Free State – F/S

Province of Gauteng - GAU

Province of KwaZulu-Natal - KZN

Province of Limpopo - LIM

Province of Mpumalanga - MPU

Province of Northern Cape – N/C

[460] Date of commencement 1 January 2012.
[461] Date of commencement 1 May 2013.
[462] Amended by Proc 33 in *PG* 7671 of 19 July 2016.
[463] Published in Provincial *Gazette* on 3 January 2017, but has not come into force.

Province of North West – N/W

Province of the Western Cape – W/C

Colour key:

Black = in force

Red = repealed

Blue = legislation published but not yet in force

5.3 Summary of Findings

(i) The Eastern Cape, Free State and Gauteng Province have not repealed or amended any of the Ordinances assigned to them, or any of the other old order legislation administered by them, and therefore the old order legislation remains in effect. Since the coming into being of the provinces in 1994, the Eastern Cape enacted the Eastern Cape Provincial Parks Board Act in 2003, which was repealed by the 2010 Eastern Cape Parks and Tourism Agency Act. However, the Free State and Gauteng have not enacted any legislation since their establishment.

(ii) KwaZulu-Natal has repealed only a limited number of sections of the Nature Conservation Ordinance 15 of 1974, the rest remain in force along with the other old order legislation. In 1997 the Province enacted the KwaZulu-Natal Nature Conservation Management Act 9 of 1997. Since then two Acts were adopted by the Legislature in 1999 in an attempt to consolidate and update the environmental legislation in the Province. However, despite their adoption, these Act have not been proclaimed to date and are therefore of no force and effect. Currently KwaZulu-Natal has a Bill in progress which will repeal the old order legislation and deal comprehensively with environmental matters once it becomes law. The difficulties encountered in this process will be discussed in part II below as a case study on drafting environmental legislation for the province.

(iii) Limpopo and Mpumalanga have repealed all their old order legislation, except for legislation emanating from the former homeland Gazankulu. In 1996 Limpopo enacted the Limpopo Nature Conservation Act, which was repealed by the Limpopo Environmental Management Act in 2005. Mpumalanga enacted legislation to deal with their parks board in 1995, which was amended in 1998 and repealed in 2005 by

the Mpumalanga Tourism and Parks Agency Act. Mpumalanga also enacted the Mpumalanga Nature Conservation Act in 1998.

(iv) The Northern Cape has repealed two out of three Ordinances assigned to them, but not the legislation emanating from the former homeland Bophuthatswana. In 2009 the Province enacted the Northern Cape Nature Conservation Act, but it only came into effect in 2012.

(v) The old order legislation in North West has not yet been repealed, but once the North West Biodiversity Management Act of 2016 comes into effect, their statute book will be cleared of all pre-constitutional legislation. Since 1994 they enacted the North West Parks and Tourism Board Act in 1997, which was amended in 2002, and repealed by the North West Parks Board Act 3 of 2015. As mentioned, their Biodiversity Management Act 4 of 2016 has not yet come into effect.

(vi) The Western Cape has amended their Nature and Environmental Conservation Ordinance twice, i.e. in 1999 and 2000, but has not repealed any of the Ordinances assigned to them. Apart from the two amendment Acts, the Western Cape enacted legislation in 1998 dealing with their nature conservation board, and in 2011 they enacted the Western Cape Biosphere Reserves Act 6 of 2011. None of the former homelands formed part of the territory of the Western Cape Province and consequently they have no old order legislation emanating from former homelands.

(vii) Since 1994 the nine provinces combined have enacted 21 pieces of legislation in total that may be described as related to the environment. However, out of those, 10 Acts deal primarily with institutional arrangements and structures such as parks boards, or parks and tourism boards or agencies, and not with conservation and protection of the environment *per se* as required by section 24 of the Constitution. Further, 3 of the 21 Acts that are on the statute books have not yet come into force, i.e. 2 in KwaZulu-Natal (enacted in 1999) and 1 in North West (enacted in 2016). It is unlikely that the 2 KwaZulu-Natal Acts of 1999 will ever come into force after so many years. Therefore, some twenty years after the nine provinces came into being, they have enacted a handful of Acts for the protection of the environment.

From the above analysis, it is evident that legislative activity in the provinces has been quite uneven as far as the environment in all its facets (as discussed in chapter 3) is concerned, and

some provinces have not enacted any environmental legislation at all. These findings suggest that provinces are generally slow in exercising their constitutional authority to meet their binding legislative obligations imposed by the environmental right in the Constitution, if at all. As stated previously, this legislative inactivity by the majority of provinces is significant as the environmental right provides the same 'underpinnings' for provinces to take legislative and other measures to protect the environment as it does for the national government. In addition, the binding obligations imposed on provinces by the Bill of Rights generally, and the environmental right in particular, are couched in exactly the same terms as those imposed on national government.[464] Yet, in most provinces the provincial laws are still fragmented and the statute books 'cluttered' by laws predating the constitutional dispensation in South Africa, with very little new legislation to replace such outdated and often obsolete laws. The remarks of Justice Van der Westhuizen quoted above that the public deserves to be 'guided and protected by democratically elected Legislatures through clearer laws and a cleaner statute book'[465] seem particularly apposite in this regard. Provinces may, therefore, through their own omission to meaningfully exercise their legislative authority in respect of the environment reduce their *de facto* role to that of being primarily administrative bodies and implementers of national legislation, reminiscent of provincial administrations before 1994.[466] This certainly does not accord with the new vision of a less hierarchical system of government ushered in by the Constitution.

5.4 Possible Causes of Provincial Legislative Inactivity

Literature suggests that the causes of provincial legislative inactivity are to be found in the political realm, rather than in the Constitution and the law. In this regard, the apparent political reluctance to grant provinces significant constitutional powers has been suggested as a possible constraint on provinces.[467] Kidd[468] (in the context of addressing the water crisis in South Africa) suggests some of the underlying causes of the crisis are 'inadequate leadership in water management', and severe skills shortages at an operational level. He submits that there are many reasons for this, but ultimately the means of addressing the problems probably

[464] The Constitution, sections 7(2), 8(1) and 24.
[465] *Khohliso*, op cit.
[466] See the provisions of the Provincial Government Act 69 of 1986 (now repealed).
[467] See for instance the papers by Issacharoff, op cit, and Murray and Simeon, op cit, referred to in chapter 2 above.
[468] M Kidd 'Poisoning the Right to Water in South Africa: What can the Law do?' UNE Paper (online).

lie in the 'realms of political decision-making rather than law'; and that improved political leadership is 'a prerequisite for effective use of legal tools that are available … '.[469] In this regard Kidd refers to numerous provisions in the Water Services Act[470] that *require* implementation, but are left unattended by the responsible authorities. In many instances organs of state are failing to fulfil their statutory duties and responsibilities, not just in the sphere of water services.[471] Kidd also makes reference to the fact that provinces have not used their powers in terms of section 139 of the Constitution to intervene, despite a 'pervasive failure' of municipalities to meet their obligations in terms of the Water Services Act.[472] This may suggest that there is indeed a reluctance, or, as stated by Kidd, 'lack of political will'[473] on the part of provinces to exercise their constitutional powers. He concludes that available legal mechanisms will have to be used 'in conjunction with political solutions ….'[474]

A number of the Economic and Social Rights (ESR) Reports published by the South African Human Rights Commission (SAHRC) are also of interest in analysing the extent to which provinces are taking legislative measures to realise the economic and social rights in the Bill of Rights, i.e. the right to housing, health care, food, water, social security, education and the environment.[475] It is generally acknowledged that these rights are interrelated, and that they either directly or indirectly affect the health and well-being of people.[476] However, in line with the objectives of this study I will focus on the SAHRC findings and comments that relate to the environmental right and legislative measures taken by provinces to give effect to their obligations in terms of this right. I will also highlight some of the problems identified by them in that regard.

[469] Ibid, 7.
[470] Water Services Act 108 of 1979.
[471] Kidd, 'Poisoning the Right to Water in South Africa: What can the Law do? op cit, 9 - 10.
[472] Ibid, 11.
[473] Ibid.
[474] Ibid, 18.
[475] See Constitution, op cit, section 184(3) which provides that the South African Human Rights Commission must require relevant organs of state to provide the Commission annually with information on measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.
[476] See earlier discussions; as well as the 5th ESR Report, 5-6.

In the 1st ESR Report[477] the SAHRC assesses whether organs of state understand their constitutional obligations to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.[478] Only six provinces submitted reports concerning environmental issues. After evaluating their responses, the Commission concluded that the responses were too general and did not focus on the key terms 'respect', 'protect', 'promote' and 'fulfil',[479] and generally lacked focus on environmental issues, particularly the environmental right in section 24 which was often not even mentioned.[480] In relation to the implications of rationalisation/non-rationalisation of laws and policies, the Commission notes that provincial legislation and regulations as well as laws and policies of the former homelands have 'an important and enduring relevance' to the process; and that there should have been more focus on 'how the rationalisation or lack of it, impacted and continues to impact on those victimised by discriminatory legal designs.'[481] This statement resonates with the words of Van der Westhuizen J in *Khohliso*, quoted above, when he comments on the same issue.

In their 3rd ESR Report,[482] the SAHRC states that it is clear from the responses from provincial departments that there were no significant legislative developments at the provincial sphere of government. They point out that matters relating to the environment fall within the functional area of concurrent national and provincial competence; and that provinces are therefore 'expected to pass their own legislation to protect the environment as required by s 24 of the Constitution'.[483] In addition, provincial departments generally provided information to the Commission on measures that were instituted at national level but could not explain the impact of those measures on their respective provinces.[484] In the 4th ESR Report[485] the SAHRC comments, somewhat curiously, that: 'The provinces did not pass any legislation, their mandate is generally to implement any legislative measures introduced

[477] South African Human Rights Commission *1st Economic and Social Rights Report* 1997-1998 (1st ESR Report).
[478] Constitution, op cit, section 7(2).
[479] Ibid.
[480] Ist ESR Report, op cit, Volume IV, 51-53.
[481] Ibid, Volume IV 46.
[482] South African Human Rights Commission *3rd Economic and Social Rights Report* (Chapter 9) 'Environmental Rights' (3rd ESR Report), 321-367.
[483] Ibid, 343.
[484] Ibid, 344.
[485] South African Human Rights Commission *4th Annual Economic and Social Rights Report*: 2000-2002 (4th ESR Report).

by national departments'.[486] This statement not only contradicts their 3rd ESR Report regarding the duty of provinces to pass legislation for the protection of the environment, quoted above, but is also not supported by the provisions of the Constitution. Such a comment in an official SAHRC Report is unfortunate as it reinforces the widespread erroneous perceptions of the role of provinces. In their 5th ESR Report entitled *The Right to a Healthy Environment*,[487] the SAHRC reports on only two of the nine provinces, namely the Free State Province which was reportedly 'in the process of drafting an updated ordinance on Conservation to replace the Conservation Ordinance of 1969 which is now outdated'; and Gauteng, which passed no legislation themselves, but 'followed the processes for the on-going national environmental law reform'.[488] In this report the Commission correctly reiterates that the responsibility for realising the right to a clean and healthy environment as well as environmental management is an area of concurrent national and provincial competence, and that it draws on 'the mandate of several spheres of government and organs of state'.[489]

Key finding in the 7th ESR Report was that a significant impediment to the realisation of rights stems from a 'conceptual misunderstanding by the government of its constitutional obligation to progressively realise economic and social rights.'[490] The Commission points out that one of the main problems with assessing the progressive realisation of rights is that the norms and standards of many of the state's constitutional obligations remain loosely specified, which implies a *lacuna* in how the state understands the notion of progressive realisation, the nature and content of the respective rights, as well as its obligations in respect of constitutional accountability. As a consequence, the state has a limited understanding and appreciation of 'what it means to adopt a rights-based approach to socio-economic development and how to fulfil its constitutional obligations in terms of the Bill of Rights'.[491] Although the findings were made in the context of government and the state in general, they do highlight some of the reasons which may underlie the failure of provinces to meet their

[486] Ibid, 37; see also 349 of the same report.
[487] South African Human Rights Commission *5th Economic and Social Rights Report* Series 2002/2003 Financial Year, 21 June 2004 'The Right to a Healthy Environment' (5th ESR Report).
[488] Ibid, 35.
[489] Ibid, 41-42.
[490] South African Human Rights Commission 7th Report on Economic and Social Rights 2006-2009 'Millennium Development Goals and the Progressive Realisation of Economic and Social Rights in South Africa' (7th ESR Report) vi.
[491] Ibid, 18.

environmental obligations to the extent required by the Constitution. Another important factor that may hamper the realisation of economic and social rights raised in the report is that such realisation requires significant intergovernmental cooperation and communication, and that 'the gaps in this regard are consistently raised in the submissions and literature on government performance'.[492]

In the 8th ESR Report[493] the Commission draws attention to the lack of compliance with the relevant provisions of the Constitution such as section 7(2), as well as section 237 which provides that all constitutional obligations must be performed diligently and without delay.[494] The Report reiterates that the right to a healthy environment is fundamental to the enjoyment of all human rights and is closely linked with the right to health, well-being and dignity, and is a fundamental part of the right to life and personal integrity.[495] On legislative and policy developments the report unfortunately only deals with such developments at a national level. In the recent ESR Report[496] the SAHRC does report on new environmental framework policies, strategies and legislation, but again limits it to the national sphere of government. It is not clear why the SAHRC has not included all spheres of government in their more recent reports. Ongoing information on the extent to which the provincial sphere of government is giving effect to their obligations in respect of the environmental right is of public importance, and may even assist in the realisation of the right. This aspect should find its way back into future ESR Reports.

Lastly, one may speculate that the complex provisions of section 146 of the Constitution (discussed in part II of chapter 4) may also constrain provinces from enacting provincial legislation for the protection of the environment. There may be real uncertainty and lack of understanding amongst provincial (and other) organs of state as to when provincial legislation dealing with matters provided for in national legislation would be in conflict with the national provisions. Judging from the case study discussed below, this may very well be the case. This could be a fruitful terrain for future research.

[492] Ibid, 22.
[493] South African Human Rights Commission *8th Economic and Social Rights Report* 2012 'Transforming Society, Securing Rights, Restoring Dignity'.
[494] Ibid, 1.
[495] Ibid, 35.
[496] South African Human Rights Commission *9th Economic and Social Rights Report* 2012-2013.

Part II

Case Study - Enacting Environmental Legislation for KwaZulu-Natal

5.5 Background

The KwaZulu-Natal Member of the Executive Council (MEC) responsible for Environmental Affairs initiated the drafting of new legislation for the protection of the environment in KwaZulu-Natal in 2014. To that end he appointed a drafting team to: (a) consolidate existing provincial environmental legislation; (b) give effect to the environmental right in the Constitution; and (c) to address the specific environmental needs of the Province not adequately addressed by national legislation, or where the province wants to enact stricter measures to protect the environment. This necessarily also required the repeal of outdated and unconstitutional old order legislation. The new legislation emanating from the process would therefore enable the Provincial Legislature to deliver 'clearer laws and a cleaner statute book'.[497] Thus the drafting team prepared a first draft of the KwaZulu-Natal Environmental, Biodiversity and Protected Areas Management Bill (the Bill), which was published for comment in an extraordinary KwaZulu-Natal Provincial Gazette on 25 February 2015. The case study discussed below is based on this exercise. The case study cannot provide substantive answers to the primary and underlying research questions[498] addressed in this dissertation, nor does it attempt to do so. However, it does highlight pervasive misconceptions about the role, powers and functions of provinces – misconceptions that exist mainly within *government itself*. Part II is concluded by listing specific examples of comments received on the published Bill and how the drafters responded to them.

5.6 General Observations

Following the publication of the Bill, a large number of submissions were received from organs of state, especially from the (national) Department of Environmental Affairs (DEA),

[497] *Khohliso*, op cit, para 53.
[498] See chapter 1, para 1.2.

as well as from members of the public and groups and organisations within civil society.[499] Many comments and suggestions were useful and therefore substantially or partly incorporated into the second draft of the Bill. However, a number of comments received appear to have been based on the erroneous premise that the South African system of government is hierarchical. This misconception seems to underlie many comments, not only in respect of the roles of the national and provincial executives, but also as far as the legislative authority of provinces is concerned. This was evident in a substantial number of comments emanating from organs of state, particularly from the national sphere of government. Some of their submissions seem to imply that provinces derive their legislative powers from national legislation rather than directly from the Constitution. This suggests that the nature and scope of provincial legislative authority and obligations are not fully appreciated (or accepted). The comments also often tended to overlook the fact that the environment and related functional areas are areas of concurrent national and provincial legislative competence listed in Schedule 4 of the Constitution; and that section 146 is of limited application, i.e. it only applies to a *conflict* between national and provincial legislation.[500] It is of concern that the High Court seems to have laboured under similar misconceptions in the *Kloof Conservancy* case[501] when it imposed a general obligation on the Minister of Environmental Affairs to ensure that all organs of state comply with NEMBA. As discussed earlier, the Supreme Court of Appeal overturned this High Court order and held that such an order appears to misconceive the powers and responsibilities of a national Minister, seemingly based on –

> 'the erroneous premise that our system of government is hierarchical, with national government having the power to supervise the performance of all organs of State in every sphere of government, and compel them to comply with their duties'.[502]

As discussed earlier, the SAHRC also highlighted a lack of understanding by government of the constitutional provisions, especially in respect of the realisation of rights in the Bill of

[499] The comments were consolidated and summarised in the *Close Out Report on Public Comments - KwaZulu-Natal Environmental, Biodiversity and Protected Areas Management Bill, 2015* (*Close Out Report*).
[500] See discussion in chapter 4, part II ('Conflicting Laws').
[501] See discussion of *Kloof Conservancy*, op cit, in chapter 2, part II ('Multisphere Government').
[502] *Kloof Conservancy*, ibid, para 10.

Rights, and a conceptual misunderstanding of the constitutional obligations of government.[503] I submit that such a conceptual misunderstanding extends to a lack of understanding of the constitutional roles and functions of the different spheres of government, as illustrated by the examples below.

5.7 Public Comments and Responses

Table 3 below provides pertinent examples of submissions and comments received following the publication of the first draft of the Bill, which illustrate misconceptions relating to: a) provincial powers and functions; and b) what constitute conflicts between national and provincial legislation. The responses to the submissions are based on the analysis of the nature and scope of the substantive constitutional *obligations*, as well as the *legislative authority* of provincial organs of state in South Africa to protect the environment through reasonable legislative measures.

Table 3 – Comments on published Bill

Comments	**Responses**
Different legal regimes in provinces	***Response***
It is a concern that the Bill will only be applicable to a certain province but not others.[504]	The legislative authority of a province is vested in its provincial legislature. The power of a particular provincial legislature to enact legislation is territorially limited, i.e. it may only enact legislation for *its* province.[505] In *Weare* the Constitutional Court pronounced on different legal regimes in provinces. The case concerned gambling legislation which falls (like the environment) within an area of concurrent national and provincial competence: 'Provinces have the right to regulate their own gambling industries. There can be no objection in this case to the KwaZulu-Natal legislative regime simply on the ground that it is different to that of other provinces. This is not to say that the situation in other provinces may not be referred to when challenging provincial legislation. But the fact that there are differences between legal regimes

[503] See discussion of ESR Reports in part I of chapter 5.
[504] *Close Out Report*, op cit, 27 (DEA).
[505] The Constitution, op cit, 104(1)(b).

	in provinces does not in itself constitute a breach of section 9(1).'[506]
Duplication/Repetition ('mirroring')	***Response***
Certain animals have already been declared as 'Threatened or Protected Species' (TOPS) in terms of NEMBA. Why are the species in question listed and regulated in the provincial Bill?[507]	Certain species in KwaZulu-Natal that are threatened or require protection are not included in the TOPS Lists. The Schedules to the Bill include those species in order to provide comprehensive *provincial* lists which include such species. Different national and provincial lists can co-exist harmoniously, provided that both can be obeyed at the same time.[508]
It is unclear why there is a need to list provincial protected areas in a schedule to the Bill – such areas should rather be listed under the National Environmental Management: Protected Areas Act (NEMPAA). This will avoid amending a schedule when new protected areas are declared.[509]	There are no constitutional impediments to provinces providing a schedule to legislation listing provincial protected areas, and to make provision for the amendment of such schedules as necessary. Furthermore, the proposed legislation will be incomplete and incoherent without listing provincial protected areas as many of the provisions relate directly to the management and control of such areas. Coherent legislation which does not require unnecessary cross-referencing ensures a cleaner and clearer statute.[510]
NEMPAA provides for the adoption of internal rules for the management of protected areas, and for their publication in the national *Gazette*. There is therefore no need for such provincial rules or for their publication in the provincial *Gazette*.[511]	There are no constitutional impediments to having provincial internal rules for the management of provincial protected areas, and such rules may even be stricter than those provided for in NEMPAA, provided there is compliance with the test laid down for inconsistency.[512] The same applies to the publication of those rules in both the national and provincial *Gazettes*.
The designation of Environmental Management Inspectors (EMIs) is provided for in NEMA.[513]	To effectively implement and enforce its environmental legislation, the Province needs to provide for EMIs to fulfil that function. This matter directly affects governance in the Province. Repetition (or 'mirroring') of provisions of national legislation in provincial legislation is permissible, but only in areas where provinces have legislative authority conferred on them by the Constitution. The

[506] *Weare and Another v Ndebele NO and Others* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC) *(Weare*), para 70.
[507] *Close Out Report*, 27 (DEA).
[508] *Certification of the Constitution of the Province of KwaZulu-Natal*, op cit, para 24.
[509] *Close out report*, op cit, 45.
[510] See discussion on the *First Western Cape Certification* judgment, op cit.
[511] *Close out report*, op cit, 46 (DEA).
[512] See *Certification of the Constitution of the Province of KwaZulu-Natal*, op cit, para 24, and the earlier discussions on the test for conflict.
[513] *Close out report*, op cit, 43 (DEA).

	environment is a functional area listed in Schedule 4 of the Constitution, and therefore provinces have the power to enact legislation on the environment. In addition, section 104(4) of the Constitution gives a province the authority to legislate on a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning a matter listed in Schedule 4. As stated in the *First Western Cape Certification* judgment: '[i]t would indeed have been difficult for the WCC to be coherent and comprehensible without the repetition of those NC provisions which form the matrix for the related provisions of the WCC. We can find no fault with such provisions'.[514]
Conflicting Provisions and Source of Provincial Power	***Response***
Buffer zones: There is a principled objection to provisions that enable a Member of the Executive to declare buffer zones as this is already provided for in section 28 of NEMPAA as 'protected environments', and MECs currently have the power to declare such protected environments under NEMPAA.[515] *Listed ecosystems*: The Bill empowers an MEC to list ecosystems that are threatened or in need of protection. There is no need to resort to provincial legislation in this regard, as NEMBA already provides for an MEC to list such ecosystems - any attempt at a similar provision in the Bill 'must be in conflict with NEMBA'.[516] *Prohibited and restricted activities in listed ecosystems*: How can the Bill provide the MEC with power in respect of Environmental Impact Assessments, when NEMA does not do so? The EIA process is already provided for in NEMA, and does not extend to the scenarios suggested in the Bill. How can the Bill provide such a power	The Constitution does not envisage a hierarchical division of power between the different organs of state. The province derives its powers directly from the Constitution – not from any other legislation, and therefore has original constitutional powers to legislate on areas of concurrent national and provincial legislative competence. Section 104(1)(b)(i) of the Constitution gives provinces the authority to legislate on 'any matter within a functional area listed in Schedule 4'. 'Environment' and 'Nature conservation, excluding national parks, national botanical gardens and marine resources' are such functional areas of concurrent national and provincial legislative competence.[518] Section 146 of the Constitution applies to situations where there are conflicts between national and provincial legislation falling within a functional area of concurrent legislative powers, but it does not prohibit a province from enacting legislation where it has the constitutional competence to do so, nor does it provide that national legislation necessarily prevails or that there is a presumption in favour of national legislation. In establishing whether there is in fact a conflict between legislation, Klaaren proposes a 'five part legislative competency and conflict test', where the first two parts relate to competence and

[514] *First Western Cape Certification* judgment, op cit, para 23. See also discussion of this case in chapter 4, part I.
[515] *Close out report*, op cit, 47 (DEA).
[516] Ibid, page 79 (Lax & Cox Attorneys (on behalf of TSA & FOSAF)).

if the national legislation does not empower it? This constitutes a conflict and is *ultra vires*.[517]	the last three to conflict: • What is the matter with which the challenged legislation deals? • Does the matter of the challenged legislation fall within the competence of the originating legislature? • Is there any conflict between the challenged piece of legislation and another piece of legislation? • If yes, is the degree of conflict between the challenged legislation and the conflicting legislation constitutionally significant? • If yes, is the area of conflict one where the national legislature has an override?[519] This makes it clear that only *if* a conflict is established, does the question as to whether national or provincial legislation prevails arise. In addition, the Constitution requires in section 150 that every court 'must prefer any reasonable interpretation of the legislation … that avoids a conflict, over an alternative interpretation that results in a conflict'.[520] There are also no constitutional impediments to the Province going beyond the provisions in NEMPAA, NEMBA, NEMA, or any other national environmental legislation, provided that the provisions in the Bill do not offend against the test laid down for inconsistency or conflicts.[521] Different provisions in national and provincial legislation do not *per se* constitute a conflict. In fact, it 'is inherent in our constitutional system, which is a balance between centralised government and federalism, that on matters in respect of which the provinces have legislative powers they can legislate separately and differently. That will necessarily mean that there is no uniformity'.[522] Moreover, NEMPAA does not deal explicitly with the specific purpose of buffer zones, neither does it provide that people living in buffer zones in the

[518] The Constitution, op cit, Schedule 4.
[517] Ibid, pages 78, 79 and 80; see also clause 40(4) of the Bill.
[519] Klaaren, op cit, 5-5.
[520] See detailed discussion in chapter 4, part II.
[521] *Certification of the Constitution of the Province of KwaZulu-Natal*, op cit, para 24.
[522] *Mashavha*, op cit, para 49.

	province must be assisted to secure 'appropriate and sustainable benefits'[523] from buffer zones, as the Bill does. The Bill therefore fulfils specific needs and objectives of the Province, and the Constitution empowers the Province to legislate in respect of such matters where they fall within the legislative competence of a province. In addition, NEMBA does indeed provide in section 52(1)(b) for an MEC to publish a provincial list of ecosystems that are threatened and in need of protection. However, the constitutionality of section 52(5) of NEMBA which purports to limit the power of an MEC to publish or amend a provincial list by providing that this may 'only' be done 'with the concurrence of the Minister' is questionable. In this regard, it is reiterated that an MEC does not derive his or her power to initiate environmental legislation from NEMBA, but from the Constitution itself. Lastly, clause 40(4) of the Bill provides that the MEC may list ecosystems for the purposes set out in section 40(1) of the Bill, and stipulate prohibited and restricted activities in such areas. There will be no conflict or inconsistency if both the national and provincial provisions can be obeyed at the same time, and operate together harmoniously in the same field.[524] Lastly, the Constitutional principles on co-operative government must be observed and adhered to by all spheres of government.[525] This means that both the MEC and Minister are constitutionally enjoined to respect the constitutional status of the different spheres of government which they represent, and to refrain from assuming any power or function 'except those conferred on them by the Constitution'.[526] (Co-operative government is discussed in more detail in chapter 6 below)

5.8 Conclusions

[523] See section 35 of the second draft of the KwaZulu-Natal Bill.
[524] *Certification of the Constitution of the Province of KwaZulu-Natal*, op cit, para 24.
[525] Constitution, section 40(2).
[526] Ibid, section 41(1)(e) and (f).

The above analysis of the extent to which provinces are exercising their constitutional authority to enact legislation for the protection of the environment and some of the misconceptions in that regard (as illustrated in the KwaZulu-Natal case study) lead to the conclusion that South Africa is a long way away from realising the constitutional vision of a less hierarchical division of power amongst the three spheres of government. It appears that such a vision is still confined to the pages of the Constitution and the judgments which pronounce on the vision, rather than living in the hearts and minds of people. In the words of Phillips - 'Law is nothing unless close behind it stands a warm living public opinion'.[527]

CHAPTER 6

DISCUSSION OF RESEARCH FINDINGS

6.1 Overview

The discussions in the preceding chapters leave little doubt that the South African system of multisphere government is complex. This research has also demonstrated that within the complex allocation of powers to the national, provincial and local spheres of government, the Constitution provides provinces with both the constitutional obligation and the original legislative authority to protect the environment, for the benefit of present and future generations, through reasonable legislative measures. However, the complexities inherent in such a constitutional scheme compel provincial organs of state to carefully navigate a way through the various provisions of the Constitution when initiating and enacting legislation on the environment - an area of concurrent national and provincial legislative competence, with a large body of national environmental legislation in existence. In this final chapter I reiterate the research question and the objectives of the study, and provide a summary of the central conclusions reached in pursuance of each objective. I conclude this dissertation with suggestions for future research.

6.2 Research Objectives

[527] Wendell Phillips, op cit.

I set out to examine the constitutional *obligations* and *authority* of provincial organs of state in South Africa to protect the environment through reasonable legislative measures. The primary objective of the research was to provide a critical appraisal of the constitutional role of *provincial* government in respect of the environment, thus complementing current research which has, in the main, been done from an international or national perspective. To this end, this dissertation focused in the preceding chapters on the following research areas, informed by the relevant provisions of the Constitution, as well as pertinent case law and scholarly analyses:

(i) the nature and scope of the binding substantive constitutional obligations imposed on provincial organs of state to protect the environment through legislative measures;
(ii) the nature and scope of the legislative authority of provinces to fulfil their environmental obligations;
(iii) the extent to which provinces are taking legislative measures in pursuance of their obligations in terms of section 24 of the Constitution; and
(iv) constitutional and other factors which may constrain provinces from fulfilling their constitutional role in respect of the environment.

This analysis lead to a number of findings summarised below.

6.3 Summary of Key Findings

6.3.1 The constitutional obligations of provinces to protect the environment[528]

(i) The South African environmental right is deeply rooted in the global history of environmental rights, and must be understood within that history.[529]
(ii) The provisions in sections 7(2) and 8(1) of the Constitution describe the overarching obligations imposed on the state in respect of the rights in the Bill of Rights, including the environmental right.[530]

[528] See specifically the discussion in chapter 3 – 'Provincial Obligations to Protect the Environment'.
[529] See discussion in chapter 3, 3.2.2 'International environmental jurisprudence'.
[530] See discussion in chapter 4, part I, 4.2 'Respecting, Protecting, Promoting and Fulfilling the Environmental Right'.

(iii) Section 24 of the Bill of Rights in the Constitution imposes an obligation on provinces, as organs of state, to enact legislation and institute other measures for the protection of the environment that: (a) prevent pollution and ecological degradation; (b) promote conservation; and (c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[531] Section 24 thus provides the underpinnings for provincial organs of state to enact legislation and to take other measures for the protection of the environment.[532]

(iv) Such legislation must be reasonable and must be implemented reasonably.[533]

(v) The legislation must protect the environment for the benefit of present and future generations. Section 24 therefore places a trusteeship duty on the present generation.[534]

(vi) Legislative measures by themselves are not likely to constitute compliance with the Constitution and have to be supported by other measures such as policies, guidelines and programmes to be implemented by environmental authorities and the executive. These policies, guidelines and programmes must also be reasonable, both in their conception and implementation, to constitute compliance with provincial obligations.[535]

(vii) The environmental right is justiciable and, consequently, failure to comply with the obligations placed on organs of state by section 24 may be challenged in a competent court as provided for in section 38 of the Constitution.[536]

6.3.2 The legislative authority of provincial organs of state to fulfil their environmental obligations[537]

(i) Provincial government is a sphere of government in its own right and operates within a non-hierarchical system of government. Provinces derive original and constitutionally entrenched legislative authority directly from the Constitution,

[531] Constitution, op cit, section 24. See also the discussion in chapter 3, 3.2.5 on 'Interpretation of the provisions of section 24'.
[532] Ibid.
[533] *Grootboom*, op cit, para 42.
[534] *Fuel Retailers*, op cit, para102.
[535] *Grootboom*, op cit, para 42.
[536] See discussion above in chapter 3, 3.2.7 on 'Application and enforcement of the environmental right'; also see *BP*, op cit, 25.
[537] See specifically the discussion above in chapter 4 – 'Enacting Provincial Legislation'.

and not from Parliament. Consequently, a province is bound only by the Constitution and its own provincial constitution, where it exists. When enacting legislation, it must comply in all respects with the Constitution, and, where applicable, its own constitution.[538]

(ii) A province may only pass legislation for its province, i.e. which applies within its own boundaries.[539]

(iii) In addition to describing the overarching obligations imposed on the state in respect of the rights in the Bill of Rights, sections 7(2) and 8(1) also: a) provide the context within which the legislative measures that provinces must take to meet those obligations must be understood; and b) illuminate what should be included in the content of such legislative measures. Thus, when enacting legislation in pursuance of their environmental obligations, legislators must bear in mind that their legislative task includes the obligation to respect, protect, promote and fulfil the environmental right.[540]

(iv) Provinces have the legislative competence to pass legislation for the protection of the environment on: a) the concurrent functional area 'environment' and functional areas related to the environment (cited above) listed in Schedule 4 of the Constitution; and b) the exclusive functional areas (cited above) listed in Schedule 5 of the Constitution, which fall within the ambit of the broad concept 'environment'.[541]

(v) The provisions of section 44(1)(a)(iii) of the Constitution, which give the NA the authority to assign 'any' of its legislative powers (except the power to amend the Constitution) to any legislative body in another sphere of government, create the possibility (at least in principle) for the NA to assign its concurrent competence in respect of the environment and related matters to a provincial legislature. Should this happen, provinces would have their legislative authority extended, and would

[538] Constitution, op cit, sections 2 & 104(3); see also discussion above in chapter 4, part I - specifically *Habitat Council*, op cit; and discussion in part II on conflicting laws.
[539] Constitution, op cit, section 104(1)(a) & (b); see also the discussion above on the *Liquor Bill* judgment in chapter 4, part I.
[540] See discussion above in chapter 4, part I, 4.2 on 'Respecting, Protecting, Promoting and Fulfilling the Environmental Right.
[541] See discussion in chapter 4, part I, 4.3 on 'Section 104 and Schedules 4 and 5 of the Constitution'.

consequently enjoy exclusive legislative competence in respect of the environment (i.e. until such assignment is repealed).[542]

(vi) The incidental legislative power of provinces can serve to broaden and extend the legislative authority of provinces to the extent where a province may validly legislate in areas of exclusive national competence.[543]

(vii) Provinces must exercise their legislative authority rationally, and legislation for the protection of the environment must be related to a legitimate government purpose in order to meet the test of constitutionality.[544]

(viii) If a province enacts its own constitution, there is no reason, in principle, why a province may not include a bill of rights in its constitution, provided that such a bill of rights only deals with matters falling within a province's legislative mandate. This implies that a province may have a bill of rights in its constitution that provides for environmental rights. There is also no reason, in principle why a province may not place greater limitations on its powers, or confer greater rights, even rights that do not exist in the Constitution, provided that those provisions are not inconsistent or in conflict with other provisions in the Constitution. The same principles apply to any law which a province is competent to pass. Where a province has the legislative competence to enact legislation, such legislation may thus go 'further' than national legislation.[545]

(ix) There is no problem with repeating, or mirroring national provisions in provincial legislation, provided that such provisions fall within an area of provincial legislative competence.[546]

(x) Different provisions in national and provincial legislation are not automatically in conflict with each other, or inconsistent. The test laid down by the Constitutional Court for inconsistency between national and provincial legislation on the same matter is that provisions are inconsistent when they cannot stand at the same time, or cannot stand together, or cannot both be obeyed at the same time. When it is possible to obey each of the provisions without disobeying the other, they are not

[542] See discussion in chapter 4, part I, 4.3.3 on matters assigned to provinces by national legislation.
[543] Constitution, op cit, section 104(4); see also discussion on the incidental power of provinces in chapter 4, part I, 4.3.6.
[544] See discussion in chapter 4, part I, 4.4 on 'Legislative constraints imposed by the legality principle'.
[545] *KwaZulu-Natal Certification* judgment, op cit, paras 17, 19 and 23, discussed in chapter 4, part I, 4.5.
[546] *First Western Cape Certification* judgment, op cit, para 23; see also discussion in chapter 4, part I, 4.5.

inconsistent, and there is then no reason why such provisions cannot operate together harmoniously in the same field.[547]

(xi) The conflict resolution scheme in the Constitution does not follow the conventional hierarchy that national legislation automatically prevails over provincial legislation. There is therefore no presumption in favour of national legislation over provincial legislation in the Constitution, nor does there necessarily have to be uniformity. The possibility of overlapping and conflicting provincial and national legislation is anticipated in the Constitution, and courts must prefer any reasonable interpretation of such provisions that avoids conflict, over an interpretation that results in conflict.[548]

(xii) Uniformity only applies when any of the limited conditions in section 146(2)(a)(b) and (c) of the Constitution is met.[549] This means that provincial legislation prevails over national legislation,[550] *except* where national legislation applies uniformly countrywide, and *if* any of the following conditions is met: 1) the matter cannot be regulated effectively by the respective provinces; or 2) to be dealt with effectively, the matter requires uniformity and the national legislation provides such uniformity; or 3) the national legislation is necessary for certain purposes.[551] National legislation aimed at preventing unreasonable action by a province prevails, but may only do so if it is 'objectively probable' that it will achieve that end.[552] Thus, national legislation prevails only in the limited circumstances envisaged by section 146(2) and (3). In there is a conflict, provincial legislation is, however, not struck down – it is merely rendered inoperative for as long as the conflict remains.[553]

(xiii) Approval of national legislation by the NCOP will not create any presumption in favour of the national legislation – but a court is required to have 'due regard' to the approval or rejection of the legislation by the NCOP.[554]

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[547] *KwaZulu-Natal Certification* judgment, op cit, para 24; see also discussion in chapter 4, part I, 4.5 and part II, 4.8.
[548] Constitution, op cit, section 150; see also discussion in chapter 4, part II, on conflicting laws and the *Mashavha* and *FEDSAS* judgments.
[549] See discussion in chapter 4, part II, 4.7 & 4.8, specifically 4.8.4.
[550] Constitution, op cit, section 146(5).
[551] Ibid, section 146(2).
[552] Ibid, section 146(3); see also discussion in chapter 4, part II, 4.8.5.
[553] See discussion in chapter 4, part II, specifically 4.9; and *FEDSAS*, op cit.
[554] Second Certification Judgment, op cit, para 55; see discussion above in chapter 4, part II, 4.8.6.

(xiv) National legislation specifically required or envisaged by the Constitution, and national legislation enacted in terms of section 44(2) interventions, are given preference over the provisions of a provincial constitution.[555]

(xv) Conflicts between national legislation and provisions of a provincial constitution in the field of concurrent legislative competences are dealt with in the same manner as conflicts in respect of matters between national legislation and provincial legislation.[556]

(xvi) In the event of conflicts between provincial and national legislation in an area of Schedule 5 exclusive provincial competence, national legislation prevails only when it is *necessary*. Evidence is required to establish whether national legislation is necessary as opposed to *merely important*, or even *desirable*.[557]

6.3.3 The extent to which provinces are taking legislative measures to protect the environment[558]

(i) An overview of the existing environmental legislation in the provinces[559] reveals limited legislative inactivity in the provincial sphere of government, despite provinces having both the constitutional *obligation* and *authority* to enact legislation to protect the environment. In most provinces, the provincial laws are still fragmented and the statute books still contain a number of laws predating the Constitution, with little new legislation enacted to replace outdated and often obsolete laws. This suggests that provinces are generally not exercising their constitutional authority to meet the obligations imposed on them by section 24 of the Bill of Rights to the extent provided for in the Constitution. As a result, provinces may in practice have become primarily administrative bodies and implementers of national legislation, as was the case with provincial administrations before 1994.[560]

[555] *First Certification Judgment*, op cit, para 269; see discussion chapter 4, part II, 4.8.9.
[556] Ibid.
[557] *Liquor Bill*, op cit, para 80; and discussion in chapter 4, part I, 4.3.2.
[558] See specifically discussion above in chapter 5 – 'Meeting Provincial Obligations'.
[559] See discussion in chapter 5, part I.
[560] See the provisions of the Provincial Government Act 69 of 1986 (now repealed).

6.3.4 Factors which may constrain provinces from fulfilling their constitutional role in respect of the environment[561]

(i) Literature suggests that the cause of limited provincial legislative activity lies essentially in the political realm, rather than in constraints imposed on provinces by the Constitution. Thus, deference to the policies and centralised political power of the ruling party may act as a more compelling constraint on provinces than any of the complex relationships between the different spheres of government created by the Constitution. This deference could be so strong that it inhibits provincial executives and legislators from initiating and enacting provincial legislation.[562] This is relevant to this study in that it offers an explanation for some of the underlying reasons why provinces are not exercising their constitutional powers to the extent permitted, and indeed *required*, by the Constitution. However, as important as political influences on provinces are in suggesting reasons why constitutional powers and obligations of provinces may in many instances exist on paper only, an extensive analysis of such influences will not be undertaken in this dissertation. Nevertheless, the relationship between politics and law remains important as it impacts on the legitimacy of legislation, particularly in a constitutional democracy. I will briefly return to this point in my concluding remarks.

(ii) The SAHRC reports that a significant impediment to the realisation of rights in the Bill of Rights (including the environmental right) stems from a limited understanding (or even a conceptual misunderstanding) by the government of: a) the nature and content of the respective rights; b) how to fulfil its constitutional obligations in terms of the Bill of Rights; and c) its obligations in respect of constitutional accountability.[563]

(iii) The case study on drafting environmental legislation for KwaZulu-Natal illustrated a similar misunderstanding of the role and functions of provincial government, which may have the effect of inhibiting provinces from meeting their constitutional obligations in respect of the environment.[564] It appears that the most fundamental misconception, namely that the South African system of government

[561] These findings are based on the overall analysis in this dissertation.
[562] See discussions in chapter 2, 2.2; also see general discussion in chapter 5, part I, 5.4.
[563] See the 7th ESR Report, discussed in chapter 5, part I.
[564] See discussion in chapter 5, part II – 'Case study: Environmental Legislation for KwaZulu-Natal'.

is hierarchical, lies at the heart of the problem. This apparent lack of understanding of how the Constitution conceives of the different *spheres* (as opposed to 'levels' or 'tiers') of government in the Republic gives rise to a number of additional misconceptions regarding the roles of the national and provincial executives, as well as the nature and scope of the legislative authority of provinces. The fact that provinces derive original powers directly from the Constitution, and not from Parliament, or national legislation, is also often overlooked. Consequently, the nature and scope of provincial legislative authority and obligations and the fact that the environment (and related functional areas) are areas of concurrent national and provincial legislative competence listed in Schedule 4 of the Constitution, does not seem to be generally recognised. Furthermore, the fact that national legislation does not automatically prevail over provincial legislation, and that section 146 is of limited application, also does not seem to be fully realised.[565] This leads one to postulate that: a) the implications of constitutional democracy in South Africa; b) the difference between parliamentary and constitutional supremacy; and c) the complexities inherent in the system of multisphere government in South Africa, have not yet been fully recognised, understood or accepted; and that such a lack of understanding may have a significant inhibiting effect on provincial governments which constrain them from fulfilling their constitutional role in respect of the environment.

(iv) The realisation of rights may be further hampered by the fact that it requires significant intergovernmental cooperation and communication, which appears to be lacking. Although the findings of the SAHRC in this regard were made in the context of government and the state in general, they do suggest further reasons which may underlie the failure of provinces to enact environmental legislation to the extent allowed by the Constitution.[566]

6.4. Concluding remarks

[565] See discussion in chapter 4, part II – 'Conflicting Laws'.
[566] See the 7th ESR Report, discussed in chapter 5, part I.

I conclude this study with the question, '*what, is to be done?*'[567]

The Constitution is the supreme law of South Africa, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[568] That is what constitutional supremacy and the rule of law, articulated in the principle of legality, means. Thus, from a constitutional perspective, quite simply, all spheres of government must observe and adhere to the principles of *co-operative government* and intergovernmental relations set out in Chapter 3 of the Constitution, and must conduct their activities within the parameters of those provisions. In provinces Premiers could establish dispute resolution mechanisms, which could be in the form of provincial legislation, to deal with environmental disputes between departments and organs of state within a particular province. Further, provinces must comply with the substantive *obligations* imposed on them by section 24 of the Bill of Rights to protect the environment in accordance with the specific needs identified in each province. Nothing in the Constitution prevents provinces from doing so. The Constitution also provides provinces with the necessary legislative *authority* to give effect to their constitutional obligations,[569] and they must exercise that authority. That is what is to be done. If provincial organs of state do not do so, they breach peremptory requirements of the Constitution. However, a number of provinces have not in some 20 years exercised their authority to protect the environment to the extent envisaged by the Constitution. In this regard I reiterate that the above statements are *not* intended to imply that provinces must enact environmental legislation whether there is a need for it or not. However, the research findings discussed in chapter 5 above[570] on the existing environmental legislation in provinces indicate that not all provinces have repealed outdated and even unconstitutional provisions still on their statute books, or consolidated fragmented legislation. This, as a bare minimum, should have been done. Furthermore, from the discussions in chapter 2[571] it appears that co-operative government is also not working as well as it should in practice. And it seems that it is at these points that politics meets (or collides with) law.

[567] This question refers to a pamphlet written by Vladimir Lenin in 1902, inspired by a novel of the same name by Nikolai Chernyshevsky.
[568] Constitution, op cit, section 2.
[569] Ibid, section 104.
[570] See specifically chapter 5, para 5.3.
[571] See chapter 2, para 2.4.

Earlier in this study I argued that deference to the policies and centralised political power of a dominant ruling party could be so strong that it has a paralysing effect on provincial leadership, thus preventing them from initiating and enacting provincial legislation to meet their constitutional obligations.[572] The case study discussed in chapter 5 above also highlights pervasive misconceptions and even inadequate understanding of the nature and scope of multisphere government in South Africa, resulting in a similar deference - even subservience - to the national sphere of government.[573] In this regard a paper by Barbara Oomen[574] on the relationship between law, politics and human rights makes for instructive reading. She emphasises the importance of the *legitimacy* of human rights, with legitimacy being the 'conceptual place where law and politics meet'.[575] Legitimacy is a term that has been defined in a 'myriad of different ways in different disciplinary traditions, invariably emphasising how legitimacy is *more* than legality, and also points to the *right to rule* that is involved'.[576] Oomen submits that if one accepts that legitimacy is subjective and 'in the eyes of the beholder', then one accepts that it can change over time, and is therefore not 'fixed' like the concept of legality.[577] In this regard I postulate that it may very well be the case in South Africa that the Constitution, including the environmental right in the Bill of Rights (and many of its other provisions) have lost a degree of *legitimacy* over time. This may be due to what Oomen calls the striking '*gap in knowledge* between professionals and the public at large, and the lack of o*ngoing public deliberation* on the value of human rights and their implementation that feeds and sustains such knowledge' (emphasis added).[578] Here Oomen mentions Habermas who considers this kind of deliberation as the '*core of the democratic process*', where legitimacy becomes the result of a *process* and the result of *general deliberation* – not the expression of a 'general will' (emphasis added).[579] Oomen also reminds us that human rights are not 'self-executing'; and that in the Netherlands the Universal Declaration of Human Rights (UDHR) 'is a present that we forgot to unpack'.[580] When the 'New Constitution' was adopted, President Mandela referred to a 'fundamental

[572] See discussion in chapter 2, para 2.2.
[573] See chapter 5, part II.
[574] B Oomen '"Where Law and Politics Meet"- Looking at Human Rights Law through the Lens of Legitimacy' *Netherlands Quarterly of Human Rights* (2015) 33(4), 506-516.
[575] Ibid, 509.
[576] Ibid, 509.
[577] Ibid, 510.
[578] Ibid.
[579] Ibid, also fn 26 & 28.
[580] Ibid, 511.

sea-change' in South Africa.[581] Have we in South Africa also forgotten to unpack that present? Or perhaps we assumed the Constitution would be 'self-executing'. It seems then, that in addition to implementing the provisions of the Constitution to protect the environment, South Africa also needs to restore the *legitimacy* of the Constitution by embarking on a process of ongoing public deliberation - that 'core of the democratic process' - to eliminate the knowledge gap to which Oomen refers. That, also, needs to be done.

Lastly, we saw in earlier discussions that the Constitution has adopted a 'generous approach' towards legal standing; and that the provisions in NEMA on standing are largely the same but also allow any person or group of persons to seek judicial recourse where that person or persons act *on behalf of the environment,* and not only on behalf of that person or persons where their environmental interests are affected.[582] Thus, organs of state can be challenged before a competent court for failure to fulfil the obligations imposed on them by section 24, on the basis that such failure infringes or threatens environmental rights.[583] South Africa does have an active civil society and strong environmental lobby groups – they too should exercise their power to enforce the environmental right in the Constitution to a greater extent than is currently the case.

6.5 Suggestions for Further Research

The research done in this dissertation lead me to suggest the following areas for future research:

- In chapter 3 of this dissertation I argued that whilst the environmental right in the Constitution is anthropocentric, there seems to be an implied or indirect right afforded to the environment *itself* in section 24 of the Constitution.[584] I based this view on the wording of section 24(b), which provides that everyone has a right to have 'the environment' protected, for the benefit of present and future generations. It therefore appeared to me that the wording of section 24(b) of the Constitution allows for a broader

[581] Address by President Nelson Mandela to the Constitutional Assembly 8 May 1996, op cit, fn 33.
[582] See discussions in chapter 3, paras 3.2.8 (application and enforcement of environmental right) and para 3.2.8.1 (justiciability of environmental right).
[583] See discussions in chapter 3, paras 3.2.8 ('Application and enforcement of environmental right') and para 3.2.8.1 ('…justiciability of the environmental right').
[584] See discussion in chapter 3, para 3.2.4 on 'Normative paradigms underpinning environmental rights'.

interpretation which includes the notion that the environment itself has rights.[585] This may be a fruitful area for further research.

- The SAHRC found that the realisation of rights requires significant intergovernmental cooperation and communication.[586] The IGRFA recognises the nexus between the realisation of constitutional rights and effective, efficient, transparent, accountable and *coherent* government.[587] Further research on the relationship between the Bill of Rights and the principles of co-operative government and intergovernmental relations spelt out in chapter 3 of the Constitution could be of value.
- The complex provisions of section 146 of the Constitution (discussed in part II of chapter 4 above) may constrain provinces from enacting provincial legislation for the protection of the environment. In the *Second Certification* judgment, the Constitutional Court held that the powers and functions of the provinces were 'less than and inferior to' those accorded to the provinces in the IC, 'but not substantially so'.[588] This statement invites further research on the constitutional provisions on conflicting laws and their possible effect on provincial legislative authority.
- It seems that the relationship between law and politics is becoming a vexing question in South Africa, especially in the context of a supreme Constitution and its implications for government. I suggest research into this problem, done from a legal perspective rather than the more traditional political science perspective, may be valuable.

APPENDICES

Appendix I

Table of Statutes & Policies

[585] Also see CD Stone *Should Trees Have Standing? Law, Morality and the Environment* 3rd ed (2010).
[586] See the 7th ESR Report, as discussed in chapter 5, part I.
[587] IGRFA, op cit, Preamble.
[588] *Second Certification* judgment, op cit, para 204(e).

South African National

Constitution of the Republic of South Africa, 1996

Constitution of the Republic of South Africa, Act 200 of 1993 (repealed)

Criminal Procedure Act 51 of 1977

Intergovernmental Fiscal Relations Act 13 of 2005

Intergovernmental Relations Framework Act 13 of 2005

Marine Living Resources Act 18 of 1998

National Environmental Management Act 107 of 1998 & Regulations

National Environmental Management: Air Quality Act 39 of 2004

National Environmental Management: Biodiversity Act 10 of 2004, Regulations, Guidelines and Biodiversity Framework

National Environmental Management: Integrated Coastal Management Act 24 0f 2008

National Environmental Management: Protected Areas Act 57 of 2003

National Environmental Management: Waste Act 59 of 2008

National Heritage Resources Act 25 of 1999

National Water Act 36 of 1998

Promotion of Access to Information Act 2 of 2000

Promotion of Administrative Justice Act 3 of 2000

Provincial Government Act 69 of 1986 (repealed)

Subdivision of Agricultural Land Act 70 of 1970

World Heritage Convention Act 49 of 1999

Water Services Act 108 of 1979

South African Provincial

KwaZulu-Natal

Natal Nature Conservation Ordinance 15 of 1974 & Regulations

KwaZulu-Natal Nature Conservation Management Act 9 of 1997 & Regulation

Procedures and Standard Terms and Conditions for Keeping Wild Animals in Captivity, KwaZulu-Natal, South Africa (2013)

Western Cape

Nature Conservation Ordinance 19 of 1974, as amended

International

Convention on International Trade in Endangered Species of Wild Fauna and Flora & Appendices I, II and III

Convention on Biological Diversity

Universal Declaration of the Rights of Mother Earth

Appendix II

Table of Cases

BP Southern Africa (PTY) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs 2004 (5) SA 124 (WLD)

Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996)

Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97

Certification of the Constitution of the Province of KwaZulu-Natal, 1996 (CCT 15/96)

Certification of the Constitution of the Western Cape, 1997 (CCT 6/97)

Certification of the Amended Text of the Constitution of the Western Cape, 1997 (CCT 29/97)

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others CCT 89/09 [2010] ZACC 11

Corrans v MEC for the Department of Sport, Legislation Recreation, Arts and Culture, Eastern Cape Government and Others, 2009 (5) SA 512 (ECG), [2009] ZAECGHC 17

Doctors for Life International v The Speaker of the National Assembly and Others (CCT 12/05)

Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11

Ex Parte President of the RSA: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC)

Ex Parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill no 83 of 1995 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC).

Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another [2016] ZACC 14

Fedsure v Greater Johannesburg Metropolitan Counsel 1999 (1) SA 347 (CC), 1998 (12) BCLR 1458 (CC)

Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others CCT 67/06 [2007] ZACC 13

Glenister v President of the Republic of South Africa and Others [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*)

Government of the Republic of South Africa and Others v Grootboom and Others (CCT 11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

HTF Developers v Minister of Environmental Affairs and Tourism 2006 (5) SA 512 (T)

HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism [2007] SCA 37 RSA

Johannesburg Municipality v Gauteng Development Tribunal & Others 2010 (2) SA 554 (SCA)

Khohliso v The State [2014] ZACC 33

Kruger Johan and Another v Minister of Water and Environmental Affairs and two Others Gauteng division, Case No. 57221/12

MACCSAND (Pty) (Ltd) v City of Cape Town and Others CCT 103/11 [2012] ZACC 7

Mario Gaspare Oriani-Ambrosini, MP v Maxwell Vuyisile Sisulu, MP Speaker of the National Assembly (CCT 16/12 [2012] ZACC 27

Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) (2009) ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC)

MEC: Department of Agriculture Conservation and Environment and Another v HTF Developers (Pty) Ltd [2007] ZACC 25

Member of the Executive Council for Education in Gauteng Province and Others v Governing Body of the Rivonia Primary School and Others CCT 135/12 [2013] ZACC 34

Minister of Defence and Military Veterans v Motau and Others [2014] ZACC 18

Minister of Education v Doreen Harris, CCT 13/01

Minister for Environmental Affairs and Another v Aquarius Platinum (SA) (Pty) Ltd and Others [2016] ZACC 4

Minister of Water and Environmental Affairs v Kloof Conservancy (106/2015) [2015] ZASCA 177

National Gambling Board v Premier, KwaZulu-Natal and Others [2002] (2) SA 715 (CC), 2002 (2) BCLR 156 (CC)

National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others (CCT 120/12) [2013] ZACC 26

New National Party of SA v Government of the RSA & Others, 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)

Nokhanyo Khohliso v The State & Another ECHC (Mthatha) (Case No: 86/2011)

Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLC 865 (CC)

Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others [2014] ZACC 9

Premier Limpopo Province vs Speaker of the Limpopo Provincial Legislature and Others CCT 94/10 [2011] ZACC 25 (*Limpopo I*)

Premier: Limpopo Province vs Speaker of the Limpopo Provincial Legislature and Others CCT 94/10 [2012] ZACC 3 (*Limpopo II*)

Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others [2015] ZACC 24

Ramakatsa and Others v Magashule and Others [2012] ZACC 31, 2013 (2) BCLR 202 (CC)

Sokhela and Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and Others KwaZulu-Natal High Court, Case No. 12266/08

South African Shore Angling Association & Another v The Minister of Environmental Affairs and Tourism (63/02) [2002] ZAECHC 12

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