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LLM Environmental Law

THE SOUTH AFRICAN ENVIRONMENTAL RIGHT TO WELL BEING AND THE RIGHT TO A SATISFYING, AESTHETICALLY PLEASING, RECREATIONAL, NUISANCE-FREE, CULTURALLY SUPPORTIVE AND ECOLOGICALLY BALANCED ENVIRONMENT.

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I hereby declare that I have read and understood the regulations governing the submission of LLM Environmental Law dissertations, including those relating to length and plagiarism as contained in the rules of this University and that this dissertation paper conforms to those regulations.

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1. INTRODUCTION

One of the more interesting developments within the social, health and economic sciences over the last few decades has been the growing recognition of the complex and diverse ways in which humans beings relate to, and in turn are affected by, their environments. Although much of the debate concerning this relationship has been preoccupied with the question of environmentally related illness and disease, it has also extended to impacts of the environment on other aspects of human life, on not just in health, but also "wellness".

The concept of well-being, and the appreciation of the manner, definition and measurement of the ways in which humans relate to their environment has been the subject of debate amongst philosophers for many centuries. But it has only within the last few decades that the multifaceted and holistic notion of well-being came into vogue as both a legal and political endeavour.[1] As a legal concept, it made its debut when it was it was first articulated in the 1973 Stockholm Declaration, [2] where it was declared that "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being."[3] Since this grand statement, the right to an environment not detrimental to well-being, has gained increasing popularity in various shapes and guises across national constitutions. It has been affirmed as a right to a "sound", "decent", "favourable", "ecologically balanced" and even "wholesome" environment. In South Africa, it is expressed as a fundamental constitutional right of everyone to an "environment not detrimental to their health or well-being".[4]

But what exactly is environmental well-being? One might expect the concept to be well-defined, given its supposed centrality to individual and group autonomy, psychological development and identity. This is even more the case considering that harm to the environment and its effect

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[1] See Panelli and Tipa "Placing Well-Being: A Maori Case Study of Cultural and Environmental Specificity" (2007) 4 *EcoHealth* 445 at 445.

[2] Stockholm Declaration of the United Nations Conference on the Human Environment, U.N. ESCOR, 21th Session, U.N. Doc. A/CONF.48/14/rev. 1 (1973).

[3] Article 1 at 1. See further the Preamble which provides: "[b]oth aspects of a man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights and the right to life itself."

[4] Hereinafter referred to as a right to "environmental well-being". Section 24 of the Constitution of the Republic of South Africa Act 108 of 1996 provides that:

""Everyone has the right

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

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

upon human well-being, is one of the most pervasive concepts in environmental law. Yet, despite its popularity amongst various disciplines and endorsement in numerous national constitutions, as a legal concept it has received relatively little judicial or academic attention.

That the meaning of environmental well-being is still far from settled, may in part be explained by the fact that its measurement is not on the basis of the degree of environmental degradation itself, but rather its effect upon those who use or inhabit it. It goes without saying that what may be an ugly, noxious, sterile or otherwise harmful environment to one person will not necessarily be so to the next. The concept of well-being thus bears a large potential for subjectivity and the import of entrenched values and preferences. Accordingly, any attempt to arrive at a definition will be met with challenging ethical questions which entail different conceptions of the good life and moral choices of a profound nature.[5]

The potential for subjectivity and relativity may also explain why, 17 years since the advent of democracy in South Africa and almost just as long since the fundamental human right to an environment not detrimental to health or well-being was entrenched in both the 1994 Interim Constitution,[6] and the 1996 Final Constitution, there still exists very little case-law or consensus as to what the right actually entails. To be fair, a few judgments have touched on the substantive aspect of the right, but in comparison to other rights in the Constitution it has received relatively scarce attention.

The right is evidently an ambitious one and carries great potential to bring about sweeping and meaningful changes to the environmental legal landscape. Yet, instead of embracing this potential, courts have generally shied away from applying it substantively. The majority of cases concerning the environmental right have instead focused on the nature of the state's duties under section 24(b) to protect the environment for the "benefit" of present and future generations. The underlying question of why and to what extent protection is "beneficial" or important in the first place has been largely ignored. It is this question, and the related question of the extent to which the man's relationship to the environment should be constitutionally protected, which this dissertation seeks to address.

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[5] Du Bois "Social Justice and the Judicial Enforcement of Environmental Rights and Duties" (Chapter 6) in Anderson and Boyle (eds) *Human Rights Approaches to Environmental Protection* (1996) Oxford: Claredon Press at 153.

[6] Section 29 of the Interim Constitution of South Africa Act 200 of 1993, which provides "Every person shall have the right to an environment which is not detrimental to his or her health or well-being." See above (note 4) for the text of section 24 of the final Constitution.

In order to address these questions, the dissertation first addresses the broader issue question of what "environmental well-being" is in the first place. Accepting that there is no immediate or concise answer to this question, the analysis instead addresses the various approaches which have been adopted in defining well-being. The debate on this point has been on the degree to which subjective preference should play a role when defining well-being. With the same goal in mind, the discussion also provides an overview of the manner it has been interpreted more recently within the health, social, economic and environmental sciences. The aim of this section is to illustrate the multifaceted ways that humans relate to and in turn are affected by their environments. This effect is not only felt physically, but also psychologically, culturally and socially, in a manner that can be said to incorporate both subjective and objective aspects of well-being.

Within this context, the dissertation then turns to the manner in which environmental well-being has taken on the shape of a legal right and how it has evolved within international and domestic settings. This aspect of the discussion focuses on the somewhat murky historical emergence of the right and its adoption within national constitutions, international conventions and other instruments. Whilst these documents demonstrate an acknowledgement of the importance of the right, they unfortunately provide little explanation of its ambit. The failure to do so may in part be explained by the definitional challenges to the concept of well-being in the shape of a legal right, and the challenges this presents to its justiciability. This question forms the subject of the following section which seeks to demonstrate that this challenge is neither unique or insurmountable, and that the South African environmental right provides a unique opportunity to demonstrate just that.

Whilst the constitutional right to environmental well-being has in part been inspired by other disciplines and international developments, it is also one which must be interpreted in line with the particular circumstances of South African and the Constitution's object, purpose and vision. Accordingly the analysis, having discussed its broader contextual setting, also attempts to place the meaning of the right within the South African context. More relevantly it also seeks to highlight the legal principles and approaches which guide its interpretation so as to argue for a generous, purposive and contextual interpretation of the right. This is relevant not only to the interpretation of well-being, but also influences the interpretation of the meaning of "environment" in the environmental right.

In order to justify why decision makers should pay greater attention to this right, the discussion also focuses on the multitude of ways in which a broad and purposive interpretation of the right holds the potential to significantly affect almost every aspect of the environmental legal framework, notably with regards to administrative decisions, the constitutional review of legislation and the interpretation of statutory definitions. The discussion, however, mostly dwells on its potential effect upon locus standi and the common law remedies. In this respect, the analysis illustrates what have at times been narrow and arguably unconstitutional approaches to the determination of "harm" and "sufficient interest". This creates a significant stumbling block for applicants who seek to protect the environment and their well-being. A generous and purposive application of the right to well-being bears the potential to remedy these undesirable approaches in a manner consistent with the object and purport of the Constitution.

In building upon the argument for a broad and purposive approach to the right's interpretation, the remainder of the analysis addresses what are arguably the more contentious aspects of well-being, namely its aesthetic and cultural aspects. These are aspects of the right which bear the greatest potential for subjectivity and indeterminacy. The purpose of this section is not only to demonstrate that aesthetic and cultural aspects of the environment are important to human well-being, but that they also have the capacity to be adjudicated upon and substantively determined. This is illustrated by the large amount of academic writings and foreign case law on these aspects of well-being, as well as the fact they are already to some degree recognised in South Africa's environmental legislation.

The dissertation ultimately concludes that despite their challenges, the right to well-being is a justiciable concept which warrants a purposive and generous approach. To be defeated by the challenges of subjectivity and relativity and to thereby ignore or deny the application of the right entirely, is inimical to its constitutional object and the vision it seeks to achieve. Whilst decision makers and courts will have to face hard choices in delimiting the scope of this right, this paper seeks to suggest that this is not only possible but that it is constitutionally mandated if the object of the environmental right is to ever be seriously achieved. The dissertation concludes that the concept of environmental well-being is neither an unworkable nor futile one, but in fact has the potential to play a constructive, far reaching and important role in the development of South African environmental law.

2. WHAT IS WELL-BEING?

Over the centuries, particularly in the last few decades, theories and studies of human well-being in the psychological, philosophical, economic and social fields have grown both in number and complexity. Because of their sheer volume and detail, a full scale analysis of these theories is well beyond the ambit of this analysis, however any attempt to speculate what well-being may mean within the South African Constitution needs to be placed in the greater context it finds itself in. This section thus provides a brief overview of how well-being has been defined and focuses on the different approaches to its definition, notably on the manner in which subjective preference should play a role.

2.1. The Definition of Well-being

There is no simple definition to the concept of "well-being." In fact this is a question which has preoccupied many centuries of philosophic thought and, more recently, has been joined by academic debate in the health, social and economic sciences. Together, both philosophers and scientists have painted a vast and complex picture of what it means to live a life of "well-ness", but in themselves do not provide any agreement or concise answers as to what the term actually means.

The philosophic approaches, often nuanced, conflicting and at times even cynical, all at least appear to have a common understanding of well-being as the attainment of a particular quality of life, or degree of welfare, usually measured by levels of satisfaction, happiness or autonomy, however defined. This can be seen through some of the definitions put forward as to the meaning of well-being. For example Raz, defines well-being and its attainment as the "whole-hearted and successful pursuit of valuable activities" objectively defined.[7] Whilst for Sen, well-being's primary feature is "how a person can function taking that term in a very broad sense… these could be activities (like eating or reading or seeing), or states of existence or beings, e.g. being well nourished, being free from malaria, not being ashamed by the poverty of one's clothing or shoes."[8] For Gerwith, well-being is conceived of as a necessary condition to "enable the individual to make autonomous choices and to achieve one's own conception of the good."[9]

[7] Raz *Ethics in the Public Domain* (1994) Oxford: Oxford University Press at 3.
[8] Sen "Well-being, Agency and Freedom: The Dewey Lectures 1984"(1985) 82(4) *The Journal of Philosophy* 169 at 197-8.
[9] See Feinberg *Harm to Others* (1984) New York Oxford University Press at 37.

Broadly speaking the attainment of well-being can be understood to be the achievement of what is valuable or important. But it is the question of defining quality, value and whether this is even ontologically possible, which has been more challenging. The issue has thus not only been what things create or elicit a state of well-being but more fundamentally, how do they do so. This brings about awkward and difficult questions of what is value and how can it be ascribed to things or experiences.

In light of the multiple determinants and influences of well-being as well as the potentially warring conceptions of what qualifies as a sufficient or adequate quality of life, it comes as no surprise that this still no agreement on the meaning of what qualifies as a life of "well-ness". On this issue, the most pressing question still concerns the degree to which subjective preferences should play a role in determining well-being.[10]

2.2. Approaches to Defining Well-Being

At one extreme, subjective approaches advocate that well-being is entirely determined by individuals' experiences, consciousness, or feelings.[11] Under this interpretation, well-being is informed by personal preference,[12] a famous example being Bentham's quantitative hedonism where welfare is determined by the degree of pleasure or absence of pain.[13] Alternatively there are more refined versions, as supported by Sen and Mill, which advocate other feelings outside of happiness, as also determinative of well-being.[14] The relative advantage of this approach is that it lacks the paternalistic flavour of determining one individual's well-being from another's perspective, or the so-called "objective" determination of well-being.

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[10] See generally Lewinsohn-Zamir "The Objectivity of Well-being and the objectives of Property Law" (2003) 78 *New York University Law Review* 1669

[11] Ibid at 1676.

[12] An approach also known as the "mental state theory". In support of this approach see Bronsteen, Buccafusco and Masur "Welfare as Happiness" (2010) 98 *The Georgetown Law Journal* 1583 at 1592.

[13] Bentham "An Introduction to the Principles of Morals and Legislation" in Burns and Hart (eds) *The Collected Works of Jeremy Bentham* 1979 London: Athlone Press at 11-12. The experience of pleasure, according to Bentham, was held to be the ultimate positive experience and was calculable by subtracting the total quantity of pain from the total quantity of pleasure. The well-being of an individual was thus determinable on the surplus of pleasure over pain. This fairly simplistic views premises pleasure and pain as the primary source of motivation, the sole arbiter of how to act and accordingly, the determinants of a person's well-being.

[14] Mill "Utilitarianism, in On Liberty and Other Essays" (1980) Gray (ed) *Oxford World's Classics* (1998) 136 at 137-43. Mill placed a greater weight on quality as opposed to mere quantity of pleasures and rejected the view that all pleasures have equal worth. He accordingly made the distinction between "higher" pleasures such as spiritual pleasures of understanding and accomplishment as compared to "lower" pleasures for instance physical or bodily pleasures. See also Griffin *Well-Being: Its Meaning, Measurement, and Moral Importance* (1986) Oxford: Oxford University Press at 8; Kagan *Normative Ethics* (1998) US: Westview Press 48-49 at 34.

On the other hand, the problems of this type of approach to a determination of a legally enforceable right are, of course, self-evident. A fully subjectivist approach would render any legal interpretation of the right, in all likelihood insufficient and at best so entirely subjective and relative as to render the concept meaningless. On a normative level, it also presents certain difficulties and has itself been subject to much criticism and a volley of hypothetical scenarios.[15] For example, it suffers the problem of false assumptions and delusions of happiness, the fact that people may desire that which may not be good for them, or may sanction preferences which are prejudicial or racist.[16]

Diametrically opposed to these subjective approaches stands the objective theory of well-being, an approach far more conducive to legal adjudication. This approach holds that certain things have objective value, are good for people and that when possessed or experienced human well-being is advanced. The value of these things is intrinsic, i.e. it exists independently from individual preference, taste or mental states.[17] The converse is that things which decrease well-being are also objectively determinable, and decrease well-being even if the person does not realise it at the time.[18]

Somewhere in the middle of these two positions, a compromise has been reached, where some writers have acknowledged the inherent difficulties and benefits of each method and instead adopted a mixed theory. Under this approach well-being is established where people both subjectively desire and in fact possess what is seen as objectively determinative of well-being.[19] This allows for objectively determined aspects of well-being, such as access to water or food, but also includes within this list certain values with a high degree for subjective preference such as the attainment of autonomy or liberty.[20]

A somewhat different, although arguably more compelling and influential work on well-being which adopts a compromise of being both a subjective and objective approach, is Amartya Sen's work on welfare and well-being. For Sen, well-being consists of the subjective desires of a

[15] See Lewinsohn-Zamir (above note 10) at 1676-80; Griffin (supra) at 10; Kagan (supra) at 26-30.
[16] See Lewinsohn-Zamir (above note 10) at 1676-80. See further Griffin (above note 14) at 10; Kagan (above note 14) at 36 on the actual preference theory and the correction of false assumptions and further at 26-30. On the question of the relationship between desire and value and the problems inherent in this approach (on the question of whether desire predates value or vice versa) see Sen (above note 8) at 190-91 and Kagan (above note 14) at 39 and 48-49.
[17] Lewinsohn-Zamir (above note 10) at 1686.
[18] Ibid and Kagan (above note 14) at 39.
[19] Lewinsohn-Zamir (above note 10) at 1711-12.
[20] Ibid at 1711.

person and their objective capabilities or so called "well-being freedom" to achieve these desires.[21]

That there is no definitive agreement on how well-being should be approached comes as no surprise. The compromise of both objective and subjective elements is attractive but of course remains subject to the same criticisms outlined above. They are also the same criticisms which have been levelled at other attempts to define well-being in the social, health and economic sciences. It is to these disciplines and their endeavours to ascribe meaning to human well-being that the analysis now turns.

[21] For Sen, well-being consists of a combination of various achievements and abilities, namely: (1) well-being achievement, (2) agency achievement, (3) well-being freedom, and (4) agency freedom. The first of these categories refers to a person's subjective well-being; the second is the extent to which they are able to obtain what they desire; the third refers to a person's freedom to attain well-being if they so choose and the fourth relates to the freedom to obtain what they want if they so choose, see Sen "Capability and Well-Being" in Nussbaum and Sen (eds) *The Quality of Life* (2009) Oxford: Claredon Press at 30-53, especially pages 34-5. See further, Sen (above note 8) at 186; 188-9 and 194-95.

3. INFLUENCE OF SOCIAL, HEALTH, ECONOMIC AND ENVIRONMENTAL DISCOURSES ON THE NOTION OF "WELL-BEING"

3.1. Health, Social and Economic Sciences

Although the question of well-being has preoccupied philosophers for many centuries, it was only really in the 1980's that interest in the concept of human well-being, from a subjective point of view, re-emerged within the health and social sciences. This has mostly taken place within the sub-disciplines of psychology, social epidemiology, public health, and other variants of medicine.[22]

The notion of well-being has received a large degree of attention within the fields of psychology and psychotherapy where it has, for the most, been assessed under the rubric of subjective well-being broadly describable as a wide category of phenomena that includes people's emotional responses, domain satisfactions, and global judgments of life satisfaction.[23] Over the years this field of study has grown substantially, argued to be a consequence of larger societal trends concerning the value of the individual, the importance of subjective views in evaluating life and the recognition that well-being of necessity includes positive elements that transcend economic prosperity.[24]

The approach adopted within the mental health or psychological sciences, for the most, appears to equate well-being with happiness or life satisfaction or what is thought to bring "meaning to life" as assessed through a variety of factors such as individual quality of life; satisfaction or contentment; personal agency or efficacy as well as social support and interaction.[25] Various psychological conditions arising from a lack of well-being are well documented and may take on many shapes. One example is the condition of *noogenic neurosis*, a disorder characterized by Victor Frankl as being an absence of well-being demonstrated through feelings of apathy, boredom, and a lack of fulfillment.[26] Studies of well-being in this fashion have, however, also attracted the

[22] Panelli and Tipa (above note 1) at 446. See Bronsteen (above note 12) at 1956 who describes the rise of subjective assessments of well-being in the 1980'and the measurement of "experience utility."
[23] Diener, Suh, Lucas and Smith "Subjective Well-being: Three Decades of Progress" (1999) 125(2) *Psychological Bulletin* 276 at 276 at 277.
[24] Ibid at 276
[25] See Larson "The Measurement of Social Well-Being" (1993) 28(3) *Social Indicators Research* 285 and Panelli and Tipa (above note 1) at 446. This is demonstrated through the indicators which are typically assessed, for example in Ryff's model there are six elements to well-being, namely autonomy, environmental mastery, personal growth, positive relations with others, purpose in life and self-acceptance. Ryff "Happiness is everything, or is it? Explorations on the meaning of psychological well-being" (1989) 57 *Journal of Personality and Social Psychology* 1069.
[26] Frankl *Man's search for meaning* (1963) London: Rider Books.

same criticisms that beset those of the philosophical approaches, namely the question of whether it should be assessed subjectively or objectively.[27]

Within the health sciences well-being is, of course, mainly assessed in relation to, or as a constituent of health. The question of whether health includes not only disease and illness but also broader social factors or subjective mental states is, however, unsettled. For example, the World Health Organisation (WHO) defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".[28] Thus under this definition, both health and well-being are understood to be one and the same. The definition has been criticised for a number of reasons, one concern being the permeable boundaries as to what defines mental illness as opposed to psychological distress, and the definition of disease and illness itself.[29]

Debate has also raged on the question of whether social health should even be included within the definition of health, and the relative importance of the physical, mental and social aspects as weighed against each other.[30] A particularly challenging problem has been the operation of these aspects of health especially within cross-cultural contexts.[31]

In some ways these criticisms reflect an alternative and more defendable view that subjective assessments of the "well-ness" of human relationships to the external environment, be they defined as mental well-being or social-being, are best to be treated as one, under the rubric of psycho-social well-being or "mental well-being". [32] Under this approach, these aspects of the human condition are treated as entirely separate to so called "physical" well-being as defined by the presence of illness or disease. That these two concepts are treated separately is indicative of the relative unease with the quantification of mental well-being and may be the cause for the dual

[27] See in this regard the analysis of objective and subjective well-being in Varelius "Autonomy, subject-relativity, and subjective and objective theories of well-being in bioethics" (2003) 24 *Theoretical Medicine* 363 and reviews cited therein.

[28] Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948. An equally broad definition is one also made by the WHO in the Ottawa Charter for Health Promotion, WHO, Geneva 1986,which characterises health as a "a resource for everyday life, not the objective of living. Health is a positive concept emphasizing social and personal resources, as well as physical capacities."

[29] See generally Larson "The World Health Organization's Definition of Health: Social versus Spiritual Health" (1997) 38 (2) *Social Indicators Research* 181.

[30] See Larson (supra) and Larson (above note 25). For example regarding social well-being it is unclear whether this relates to the environment of society or the functional status of individuals?

[31] Larson (above note 29) at 183.

[32] Ibid at 186-7.

use of the term "health *and* well-being" within the parlance of legal rights. Accepting that there may be no clear line between each category, this approach is more defendable in a legal context since it allows for the protection of other aspects of the human condition which may be subject to challenge if included under health.

Within the health and social sciences, as well as in the field of economics, there has also been increased attention upon the relationship between well-being and poverty. Under this understanding, well-being and poverty are posited as two extremes of a multidimensional continuum. Evidence of this can be found in the 2000/01 World Development Report which defines poverty as the "the pronounced deprivation of well-being."[33] Those who have researched this relationship, however, also point to its relative nature and note that it is situation dependent reflecting local social and personal factors such as age, gender, geography, ecology, and culture.[34]

Notwithstanding the numerous challenges in defining well-being, academics across the disciplines have nevertheless attempted to compile lists of the various factors regarded as essential to its achievement. These typically include both objective and subjective characteristics reflecting social, economic as well as environmental aspects of well-being. A good example can be seen in the large qualitative analysis undertaken by the World Bank in 1999. This survey, which interviewed over 20 000 people in 23 different countries on the question of what was considered to be a life of well-being, concluded that well-being consists of:

> "1. The availability of material deemed necessary for a good life, including secure and adequate livelihoods; income and assets; sufficient food; shelter; clothing; furniture and access to goods;
> 2. Health;
> 3. Good Social relations;
> 4. Security including access to natural and other resources, personal safety and safety of possessions; and living in a predictable and controllable environment secure from natural disasters;
> 5. Freedom of choice such as control over future events and the ability to achieve what a person values doing or being. "[35]

[33] World Bank *World Development Report 2000/2001: Attacking Poverty* (2001) at 15. It is described as being "not only material deprivation (measured by an appropriate concept of income or consumption) but also low achievements in education and health" (at 15).
[34] Prescott-Allen *The Wellbeing of Nations: A Country-by-Country Index of Quality of Life and the Environment* (2001) at 342
[35] Narayan, Chambers, Shah, and Petesch "Crying Out for Change" in *Voices of the Poor: Volume 2* (2000) World Bank New York: Oxford University Press at 314. This study was undertaken in 1999 in over 23 different countries as a so called "Participatory Poverty Assessment".

3.2. The Environmental Sciences

As the above suggests, part of the general determinants of well-being often concerns the relationship between man and the environment. This relationship in and of itself has generated several fields of study and theories about how well-being is affect or influenced specifically by the natural environment. For example within the field of mental health, there are several studies which assess the beneficial psychological rewards of encounters with the natural environment and its effect upon well-being.[36] Like epidemiological studies on well-being in general, research and theory within this field supports the conclusion that experiences in nature, both active and passive bring personal meaning to people's lives.[37]

The factors used to measure this relationship with the environment and its positive effect are varied, but by way of example Hinds and Spark used indicators such as feelings of relaxation, freedom, refreshment, connectedness, a sense of feeling "alive", serenity, contemplation, awe and empathy.[38] More controversially, the relationship between humans and the environment in the field of psychology has also led towards the development of the biophilia hypothesis, a theory which reasons that humans as a species have an innate need to affiliate with nature due to our evolutionary development within it.[39]

Outside of the cognitive psychological benefits of the environment, scientists have also focused on the roles that natural environments have in contributing towards well-being in a broader sense, a term coined "ecosystem services". This concept which first came upon the scene in the late 1990's,[40] focuses on the manner in which ecosystems provide various uses and benefits to humans which impact upon their well-being. It is an essentially utilitarian construct which synthesises the substantial body of work in the various health, economic and social sciences. The concept highlights how there exists certain services provided by the environment which influence the human needs for example security, the basic materials necessary for a good life, health, good social and cultural relations. These constituents of well-being are, in turn,

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[36] See Hinds and Sparks "Investigating Environmental Identity, Well-being and Meaning" (2009) 1(4) *Ecopsychology* 181 at 181 and studies cited therein.
[37] Ibid at 182.
[38] Ibid at 183.
[39] Wilson "Biophilia and the conservation ethic" in Kellert and Wilson (eds) *The Biophilia Hypothesis* (1993) Washington DC: Island Press at 31–41.
[40] See generally Blanco and Razzaque "Ecosystem Services and Human Well-Being in a Globalized World" (2009) 31 *Human Rights Quarterly* 692 at 693 and the Millennium Ecosystem Report *Ecosystems and Human Well-Being: A Framework for Assessment* (2005) at 3 available at <http://www.maweb.org/en/Framework.aspx> (last accessed 10 January 2011).

influenced by and have an influence on the freedoms and choices available to people and ultimately freedom of choice and action.[41] These needs and their satisfaction within this framework are then ultimately equated with well-being.

The concept of ecosystem services came to the fore during the Millennium Ecosystem Assessment (MEA), a four-year international work programme designed to meet the needs of decision-makers for scientific information on the links between ecosystem change and human well-being. It is a project of massive proportions,[42] and was initiated in 2001 by then UN Secretary General Kofi Annan and sought, amongst other things, to provide an integrated assessment of the interrelationship between human well-being and the environment, with a specific focus as to how the environment contributes to human needs.[43]

A report titled Ecosystems and Human Well-Being,[44] was the first product of the assessment and gives a detailed account of how humans interact with and benefit from their environments which in turn contributes to their well-being. It defines ecosystems as a "dynamic complex of plant, animal, and microorganism communities and the non-living environment interacting as a functional unit."[45] In turn, well-being is defined as having multiple constituents including the "basic material needs for a good life, the experience of freedom, health, personal security, and good social relations."[46] Like the Word Development Report,[47] it defines well-being as existing at the opposite end of a continuum from poverty.[48] It notes that its constituents are subjectively approached and are situation dependent "reflecting local geography, culture, and ecological circumstances. Together, these provide the conditions for physical, social, psychological, and spiritual fulfillment."[49]

[41] Blanco and Razzaque (supra) at 693.
[42] It has been likened to the Intergovernmental Panel on Climate Change (IPCC), because it also assesses current knowledge, scientific literature, and data on a vast scale, with some 1,360 experts from over 100 nations involved.
[43] More information on this project can be accessed at <www.maweb.org>.
[44] See *Ecosystems and Human Well-being* (above note 40). The report has since been endorsed at the UNEP and OHRCR High Level Expert Meeting on the Environment in 2010, see <http://www.unep.org/environmentalgovernance/LinkClick.aspx?fileticket=4IjJ_KKQ9fQ%3d&tabid=504&language=en-US> (last accessed 10 January 2011). It was also endorsed by the parties to the Convention of Biological Diversity 1993 (1760 UNTS 79; 31 ILM 818), and was and incorporated into the SBSTTA work-plan . The MEA also informed several decisions at the COP-6 (see further <http://www.maweb.org/en/Conventions.aspx> which lists these decisions (last accessed 7 February 2011))
[45] At 49.
[46] At 3.
[47] Above note 33.
[48] Ibid.
[49] Ibid

In elaborating on the various ways in which ecosystem services affect and determine well-being, the Ecosystem and Human Well-being Report outlines four types of services, namely: provisioning; regulating; supporting; and cultural services.[50] Provisioning services are defined as products obtained from ecosystems including food and fibre; fuel resources; genetic resources; fresh water; biochemical resources, natural medicines and pharmaceuticals; and lastly ornamental resources such as skins, shells and flowers.[51]

Regulating functions of ecosystems are also found to impact well-being, absent which "the varied populations of human and animal life are inconceivable."[52] These include the purification of air; water purification and waste treatment; the reduction of flooding or drought; the stabilization of local and regional climates, [53] the provision of checks and balances that control the range and transmission of certain diseases; the provision of biological controls that affect the prevalence of crop and livestock pests and diseases; the provision of storm control and protection and lastly pollination.

Thirdly, ecosystems influence well-being through so-called cultural services. Examples include the provision of totemic species, sacred groves, trees, scenic landscapes, geological formations, or rivers and lakes. The report notes that these non-material benefits influence aspects of well-being through providing spiritual enrichment, the creation of knowledge systems, cognitive development, reflection, recreation, ecotourism and aesthetic experiences.[54] It also has an impact upon social relations and the creation of "cultural landscapes."[55]

Lastly ecosystem services affect human well-being though supportive services. These are services which are necessary for the production of all other ecosystem services and are different in that they impact people indirectly or over a very long term. One example would be soil formation services which in turn impacts upon other provisioning services such as food production.[56]

[50] Ibid at 3.
[51] At 56-7.
[52] At 57.
[53] At 57. For example changes in land cover can affect both temperature and precipitation. At a global scale, they are important for sequestering or emitting greenhouse gases.
[54] At 58-9.
[55] Ibid.
[56] At 59.

The Ecosystems and Human Well-being Report is replete with multiple linkages between the human condition and the manner in which it may be influenced.[57] Some obvious examples include how the impairment of the water-cleansing capacity of wetlands creates an adverse effect upon those who drink that water. Less direct effects on well-being can occur through more complex webs of causation, including through social, economic, and political routes.[58] Some also have a long latency period such as irrigated farmlands which become saline, which in turns reduces crop yields and may affect human nutritional security, child development and growth as well as susceptibility to infectious diseases.[59] Harm to ecosystems was also found to be felt inequitably, with poor and rural populations who rely disproportionally on the integrity and functions of ecosystems found to be the worst affected.[60]

The report's interpretation of well-being thus has the potential to call upon a vast multitude of circumstances wherein human well-being is detrimentally affected by environment conditions. This immense scope for application creates significant challenges if the concept is translated into a legal right where it entails legal obligations and duties. It also brings about questions concerning the extent to which the right requires a fixed content and substance if it is to be meaningfully applied. The following chapter seeks to address these issues by first outlining the manner in which environmental well-being came to the fore in the human rights context and how the challenges to its application should be approached.

[57] See generally 59 and 72-3.
[58] Ibid.
[59] Ibid.
[60] Ibid.

4. THE HISTORICAL EMERGENCE OF THE RIGHT TO ENVIRONMENTAL WELL-BEING

Since 1968, a growing number of international declarations and statements have, with increasing specificity, acknowledged the connection between environmental protection and respect for human rights. Although beginning with the 1968 U.N. General Assembly resolution which identified the relationship between the quality of the human environment and the enjoyment of basic rights,[61] the notion of environmental well-being only really came to the international fore with its recognition in the 1972 Stockholm Declaration.[62] The Declaration proclaims that "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself"[63] and provides that "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being."[64]

This grand statement might have provided the basis for a subsequent elaboration of a human right to environmental quality, but its real-world impact has been noticeably modest.[65] In terms of international instruments it only really features somewhat unassertively in the non-binding 1992 Rio Declaration.[66] Here, well-being is touched upon through the term "productive" in terms of which man is entitled to a "healthy and productive life in harmony with nature."[67] The Rio Declaration has been criticised for failing to give greater emphasis to human rights, possibly symptomatic of the uncertainty and debate on the proper role of human rights within the development of international environmental law at the time.[68]

Since then, little binding international law has emerged which gives effect to this right, with only two instruments worthy of mention. The first is the 1981 African Charter on Human and Peoples' Rights,[69] which provides for environmental rights in broadly qualitative terms. It

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[61] *Problems of the Human Environment*, G.A. Res. 2398, U.N. GAOR, 23d Sess., Supp. No. 18, at 2, U.N. Doc. A/7218 (1968).
[62] Above note 2.
[63] Stockholm Declaration on the Human Environmental Principles (above note 2) Introduction.
[64] Ibid, principle 1.
[65] Boyle "Human Rights and the Environment: A Reassessment" Paper presented at the UNEP and OHCHR High Level Expert Meeting on the New Future of Human Rights and Environment 2010 available at <http://www.unep.org/environmentalgovernance/Events/HumanRightsandEnvironment/tabid/2046/language/en-US/Default.aspx> at 3. (updated version of original article published as Boyle "Human Rights and the Environment: A Reassessment" (2008) 18 *Fordham Environmental Law Review* 471).
[66] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).
[67] Stockholm declaration (above note 2) at Principle 1.
[68] Shelton "What Happened in Rio to Human Rights?" (1992) 3 *Year Book of International Environmental Law* 75 at 82.
[69] African Charter on Human and Peoples' Rights, art. 21, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (June 27, 1981).

protects both the right of peoples to the "best attainable standard of health"[70] and their right to "a general satisfactory environment favourable to their development."[71] Outside of this Charter, the Aarhus Convention,[72] is the only remaining international convention which recognises the right to environmental well-being.[73] Notably, however, its focus is strictly procedural in content and its object is rather the promotion of public participation, access to justice and information. Equally, whilst recognising well-being, it stops short of providing a means for citizens to directly invoke the right.[74]

Some non-binding action has, however, been taken towards recognising a more broadly framed right to include environmental well-being. This is evident in the 1990 UN G.A. Resolution that "all individuals are entitled to live in an environment adequate for their health and well-being."[75] Partly as a result of statement, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities developed and published a Declaration of Principles on Human Rights and the Environment.[76] This draft put forward an understanding of environmental human rights which was very much in line with the Stockholm Declaration. It holds that everyone has a right to a "secure, healthy and ecologically sound environment" and to an environment "adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs."[77] It is this document that put forward the comprehensive although not closed list of interrelationships between the environment and human rights.[78]

This sophisticated and far reaching re-statement of environmental rights was important for re-emphasising the indivisibility and interdependence of all human rights and in many respects reflects the integrated and nuanced approach to ecosystem services put forward by the

[70] At Article 16.
[71] At Article 24.
[72] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention).
[73] Article 1 recognises "the right of every person of present and future generations to live in an environment adequate to his or her health and well-being".
[74] Hayward *Constitutional Environmental* Rights (2005) USA: Oxford University Press at 180.
[75] *Need to Ensure a Healthy Environment for the Well-Being of Individuals*, G.A. Res. 45/94, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/45/94 (1990).
[76] U.N. Econ. & Soc. Council [ECOSOC], Sub-Commission on Prevention of Discrimination & Prot. Of Minorities, Human Rights and the Environment, Final Report of the Special Rapporteur, 59, U.N. Doc. E/CN.4/Sub.2/1994/9, (July 6, 1994).
[77] Ibid at I(4)
[78] The document provides for the conservation of air, soil, biological diversity, ecosystems and water; ecologically sound access to nature; the conservation and sustainable use of nature and natural resources; the preservation of unique sites and lastly the enjoyment of traditional life and subsistence for indigenous peoples at I(4). See further Boyle (above note 65) at 11 who summarises the broad reach of the right into these various categories.

Millennium Ecosystem Assessment outlined in Chapter 2.[79] That notwithstanding, the draft Declaration on Human Rights and the Environment, also demonstrates the difficulty in defining an environmental right to well-being through its inconsistent use of terminology when referring to the right. The draft, for example, initially refers to a right to a "healthy and flourishing"[80] environment, or more modestly as a "satisfactory" environment in its report,[81] and finally to a "secure, healthy and ecologically sound environment" in the draft principles.[82]

Although there is a paucity of binding international instruments relating to the right to well-being, there has been a growth in national constitutions which have entrenched various permutations of the right.[83] From a brief survey it appears that, apart from South Africa, only the Democratic Republic of Sao Tome and Principe have a constitution which expressly refers to the right to environmental "well-being".[84] Nonetheless, although the express use of the term "well-being" has not been favoured, comparable concepts which import elements of subjectivity such a "decent" or "ecologically balanced" environment are popular across other constitutions and regional Charters. These include a right to a "decent' environment",[85] a "sound environment",[86] an "unpolluted environment",[87] an environment that is "ecologically balanced"[88], "wholesome",[89] "satisfying and lasting",[90] "favourable"[91] and even "pleasant".[92]

[79] Its relevance to the human rights context is that it also points towards a possible crystallisation of an international environmental right to a "decent" environment through the special rapporteur's conclusion that "International environmental regulations, which emerged from a worldwide movement and a collective realization of the dangers threatening our planet… have finally attained a global dimension, which has made possible the shift from environmental law to the right to a healthy and decent environment."Ibid at I(22). It is questionable however whether this right has in fact crystallised into an internationally enforceable right, see Boyle (above note 65).

[80] Introduction at para 4.

[81] Title of Chapter 3 and para 248-258.

[82] See Annex I, Preamble and part 1(2).

[83] See Boyle (above note 65) at 7 and Taylor "From Environmental to Ecological Human Rights: A New Dynamic in International Law?" (1998) 10 *Georgetown International Environmental Law Review* 309 at 360.

[84] Part II, Title III, Article 49(2): "It is incumbent upon the State to promote the public health which has as objectives the physical and mental well-being of the populations and their balanced fitting into the socio-ecological environment in which they live."

[85] See the African Charter on Human and People's Rights (above note 69). See also the Constitutions of Chechnya Section 1, Chapter 2, Article 39.

[86] See the Afghanistan Constitution preamble para 10.

[87] See the Constitutions of: Angola, Part II, Article 24(1); Ethiopia, Chapter III, Part II, Article 44(1); Chile Chapter III, Article 19(8).

[88] See the Constitutions of: Argentina, First Part, Chapter II, Article 41; Brazil Title VII, Chapter VI, Article 225; Cape Verde, Part II, Title III, Article 70(1); Costa Rica, Title V, Article 50; East Timor, Part II, Title III, Article 61(1); Ecuador Title III, Chapter 5, Section 2, Article 86; France (Charter of the Environment of 2004) Article 1; Mongolia, Chapter II, Article Sixteen (1): Republic of Mozambique, Part II, Chapter I, Article 72; Republic of Paraguay, Part I, Title II, Chapter I, Section II, Article 7; Republic of Seychelles, Chapter III, Part I, Article 38; Turkey, Part II, Chapter Three, Section VIII, Part A, Article 56; Venezuela, Title III, Chapter IX, Article 127.

[89] See the Constitution of Belarus Section II, Article 46.

[90] See the Constitutions of the Republic of Benin, Title II, Article 27 and the Republic of the Congo Title II, Article 35.

Other non-binding references to the right to an environment not detrimental to well-being can be found in the IUCN Draft International Covenant on Environment and Development,[93] the rights outlined in the World Charter for Nature,[94] and the World Commission on Environment and Development (also known as the Brundtland Commission).[95] The Organization for Economic Cooperation and Development (OECD) has also stated that there should be a right to a "decent" environment,[96] whilst the Charter on Environmental Rights and Obligations drafted by the United Nations Economic Commission for Europe (UNECE) has affirmed the universal right to an environment adequate for general health and well-being.[97]

Despite these few documents, most of which are not binding, it appears that generally the broadly formulated right to well-being, or other comparative rights such as a right to a "decent" environment, has not enjoyed much support in other legal texts. As Sunkin et al observe, it is significant that aside from the few instruments mentioned above, there is no other treaty which refers explicitly to the right to an environment supportive of well-being in these terms.[98] Instead it appears that generally where environmental rights are mentioned most instruments just refer to the right to a healthy environment, such as in art 12 of the UN Covenant on Economic and Social Rights.[99] Equally, whilst these documents are useful in re-affirming the importance of the right, they do not provide any clarity on its actual content.

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[91] See the Constitutions of: Bulgaria Chapter Two, Article 55; the Kyrgyz Republic Section I, Second Chapter, Third Section, Article 35(1); the Russian Federation Chapter II, Article 42 and the Slovak Republic Part Two, Chapter Six, Article 44(1).

[92] See the Constitution of the Republic of South Korea Chapter II, Article 35(1).

[93] The IUCN Draft Covenant on Environment and Development (Environmental Policy and Law Paper No.31 Rev 3 IUCN 4th ed (2010) IUCN: Switzerland) refers to the responsibility of the parties to progress towards the realisation of 'an environment and a level of development adequate for [human]health, well-being and dignity' (Article 14(1)).

[94] See GA resolution GA/RES/37/7 48th plenary meeting, 28 October 1982 which proclaims in article 9e) that "Areas degraded by human activities shall be rehabilitated for purposes in accord with their natural potential and compatible with the well-being of affected populations."

[95] World Commission for Environment and Development *Our Common Future* (1987) Oxford: Oxford University Press, Annex I, at 348. It proposed that "all human beings have the fundamental right to an environment adequate for their health and well-being."

[96] Organization for Economic Cooperation and Development "Responsibility and Liability of States in Relation to Transfrontier Pollution" (1984) 13 *Environmental Policy and Law* 122.

[97] Taylor (above note 83) at 348 who cites the draft UNECE Charter on Environmental Rights and Obligations, adopted Oct. 29-31, 1990.

[98] Sunkin, Ong and Wight *Sourcebook on Environmental Law* (1998) London: Cavendish Publishing Limited at 747.

[99] GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966);. See also Sunkin (supra) at 747.

5. THEORETICAL CHALLENGES TO THE REALISATION OF THE RIGHT TO ENVIRONMENTAL WELL-BEING.

The seeming lack of an internationally enforceable right to an environment not detrimental to well-being,[100] is in part a consequence of the indeterminate nature of this right, an issue which has been the subject of vigorous debate for many decades. Whilst this debate touches on many issues,[101] relevant to this discussion has been the challenge in defining man's relationship to the environment and the degree to which it warrants legal protection. As outlined above, this question relates to the obstacle of defining a particular quality of life and the role of subjective choice.

The appropriateness and enforceability of widely framed environmental rights and challenge of ascribing content to them, has led academic scholars to question their very existence with some suggesting that environmental rights generally are too uncertain a concept to be of normative value.[102] The meaning and content of the right to environmental well-being is one of the best examples of this challenge.

Günther Handl, for example, notes the difficulty in defining such a right and the inefficiency of developing environmental standards as a response to individual complaints.[103] Handl's objection stems in two parts. The first is such a right's "normative indeterminacy" *per se.*[104] The second is a broader challenge regarding its appropriateness in an international setting for sovereignty reasons. On this latter point he states that "any generic environmental human right 'suffers' from the fact that it signals a very broad entitlement, one that might turn into an extremely effective legal platform for internationalising national decision making in areas that represent the core of traditional state sovereignty".[105] On the question of indeterminacy he notes that the right's "inherent relativism" renders it potentially meaningless as an international normative

[100] There is still debate as to whether there is a customary law environmental right. Generally speaking this does not appear to be the case- see Taylor (above note 83) at 351; Boyle (above note 65) and discussion at note 70.
[101] See generally Boyle (above note 65) at 12.
[102] Boyle "Role of International Human Rights Law in the Protection of the Environment" (chapter 3) in Boyle & Anderson (eds) *Human Rights Approaches to Environmental Protection* (1996) Oxford: Claredon Press at 44.
[103] Handl "Human Rights and Protection of the Environment: A Mildly 'Revisionist' View" in Cançado Trindade et al (eds) *Human Rights, Sustainable Development and the Environment* (1992) San Jose: Instituto Americano de Derechos Humanos at 117 (also available at <http://www.bibliojuridica.org/libros/4/1985/14.pdf > last accessed 10 January 2011)
[104] Ibid at 130.
[105] Ibid.

standard.[106] He argues that it "devalues the symbolic value of the traditional human rights label that implies a core notion of a universally valid legitimate claim".[107]

But is the right inherently relative? Is it entirely devoid of any content and instead subject only to the whim of the rights holder to determine their well-being and accordingly the ambit of their rights? Not necessarily. That the enforcement of a right to environmental well-being will by its nature be both heavily context laden and relative is nothing novel to the enforcement of human rights, indeed these challenges are the hallmark of all human rights jurisprudence. Rights in the South African constitution such as dignity and freedom suffer from the same challenges, yet courts have still managed to both interpret and adeptly apply these rights in specific contexts.[108]

As Kiss and Shelton have also observed, such definitional problems are not exclusive to environmental law but are generally pervasive in the legal field, in particular human rights.[109] According to their view, these abstract rights have been given sufficient precision through the public conscience of a given society to enable them to be applied within a court of law. They point to national courts which have already embarked on such an exercise, and have proven very able to interpret abstract rights and attribute meaning within a "concrete social and historical context."[110] In support of their justiciability they argue that "there presently exists in the public conscience a clear image of an environment which should be preserved and from which each person should benefit."[111]

This is undoubtedly correct. Any court seeking to determine the meaning of well-being faces inherent but unavoidable challenges of paternalism and the potential for speculation. This is not a separation of powers matter as it equally applies to law makers who engage in the same exercise, but rather the potential for subjectivity and relativity within the meaning of this term itself. It lacks the relatively more determinable contours of an objectively definable good such as

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[106] Ibid.
[107] Ibid at 132. More dramatically some have even suggested that the (perceived) failure of broadly framed rights such as the right to development have ultimately led them to undermine the very notion of human rights itself (Boyle above note 102) but his approach has since been revised (see Boyle above note 65).
[108] See, for example, in relation to the right to dignity, *Dawood an Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (right to dignity and the rights of spouses to African citizens who are not citizens or permanent residents) and *Carmichele v Minister of Safety and Security and Another* 2001 (40 SA 938 (CC) (right to dignity and the right to freedom and security of the person in relation to the duties of the state to protect women from physical violence).
[109] Kiss and Shelton *International Environmental Law* (1991) New York: Transnational Publishers.
[110] Ibid at 24, although they do not answer the question of whether the right is commonly universal to have a core meaning to be applied in an international context.
[111] Ibid.

water or education and even health, and is thus more susceptible to criticism and debate. This may explain in part why, to date, the judiciary has not been ambitious to attempt to define the meaning of the right.

But this is not an excuse to deny or ignore the application of the right entirely. That decision-makers are called to make determinations of this nature, is their constitutional mandate. Not only is it a legal duty but it is also an ethical one which accords with the frequently enshrined constitutional vision, purport and object to protect worthwhile aspects of the human relationship with the environment in a meaningful way. This is what makes the South African Constitution special and unique. Unlike the international arena, the South African Constitution is clear about the existence of the right, and very specific regarding the state's obligations to achieve environmental conservation and the realisation of other rights which impact upon well-being. For this reason, it is an excellent example to other jurisdictions of how the environmental right may be used constructively by decision makers to promote and protect important aspects of the relationship between mankind and the environment.

The remainder of this analysis seeks to encourage decision-makers to do just that. Accordingly the discussion turns to the specific South African context in which the right applies and the manner in which the object and purpose of the Constitution can be best achieved. This is reflected in the interpretative approaches to the right which best allows for the effective protection of environmental rights in line with the norms and values of the Constitution.

6. ENVIRONMENTAL RIGHT TO WELL-BEING AND APPROACHES TO CONSITUTIONAL INTERPRETATION

The South African Constitution is one of the more progressively framed constitutions when it comes to the environmental right. Not only is it a right enforceable against the state and horizontally against private actors, to the extent applicable, but it also imposes positive obligations upon the state to take reasonable legislative measures to protect the environment.[112]

The right also finds itself within a broad array of other constitutional rights which support its protection and enforcement.[113] Whilst much judicial attention has been paid to the interpretation of section 24(b) and the nature of the state's positive obligations;[114] little attention has been devoted to interpreting section 24(a). The purpose of this chapter is to provide a brief overview of various suggestions put forward by academics as to what well-being may entail, as well as the manner in which courts have interpreted Constitutional rights generally and the meaning of the term "environment" with a view to interpreting section 24(a). The aim of the discussion is to demonstrate that the right should be generously and purposively interpreted, particularly with regards to who may raise the right as well as the environmental contexts in which they may do so.

6.1. South Africa's Constitutional Right to Environmental Well-Being: Academic Views

While the right to environmental well-being has not received much judicial attention, it has at least received attention from academics, albeit only in a few textbook writings.[115] Although most acknowledge that it will not be easy to impart a precise legal definition to the meaning of well-

[112] Commentators agree that the Bill of Rights applies horizontally by virtue of section 8 of the Constitution, although the extent to which it does so is debated (Glazewski *Environmental Law in South Africa 2nd ed* (2005) Durban: LexisNexis at 74-5). Section 8 provides that the Constitution applies to all law and that "[a] provision in the Bill of Rights binds natural and juristic persons to the extent that it is applicable taking into account the nature of the right and the nature of any duty imposed by the right. See further section 7 below which outlines the few High Court decisions where the right has been applied horizontally.

[113] Most notably the rights to equality (section 9), dignity (section 10), life (section 11) the socio-economic rights (sections 26-7), rights of cultural communities (section 31) as well as the right to property (section 25).

[114] See for example *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W); *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) and *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited* 2008 (2) SA 319 (CC); 2008 (4) BCLR 417 (CC).

[115] See Du Bois and Glazewski "The Environment and the Bill of Rights" in *Butterworths: The Bill of Rights Compendium* (2004) para 2B4.1; Van der Linde and Basson "Environment" in Woolman, Roux and Bishop (eds) *Constitutional law of South Africa 2nd ed* (2004) vol 3 at 50: 15-16; Feris "Environment" in Currie and de Waal (eds) "The Bill of Rights Handbook" (2005) Cape Town: Juta at 525-6 and Glazewski (above note 112) at 77.

being, several have nevertheless put forward some creative and unusual suggestions as to what it may entail. Most academics generally accept that the right has the potential to protect broad interests in the environment such as social, economic and aesthetic considerations.[116] Several writers, point to its potential to protect a particular state of the environment necessary to provide for the basic conditions of life such as clean water and food. [117] The right thereby may have its greatest impact upon those who are socio-economically disadvantaged and who rely directly on the environment in this way.[118]

There is, however, relatively less agreement as to the extent to which emotional and aesthetic aspects are protected by the right. Some, such as Liebenberg, caution that something more is required than just a sense of emotional insecurity or aesthetic discomfort before the section becomes applicable.[119] Others, such as Van der Linde and Basson, have been more ambitious and suggested that emotional considerations should be taken into account.[120] They propose that the right extend to include the protection of aesthetic interests such as the protection of views from private properties.[121]

Glazewski also adopts a broad approach by, for example, pointing to the ability of the right to protect the environment for its "inherent worth" or "intrinsic value",[122] suggesting that well-being could possibly afford legal protection to particular areas simply because of their "sense of place".[123] Similarly Feris has advocated that the right be widely interpreted to "include[e] spiritual or psychological aspects such as the individual's need to be able to commune with nature" which would have the effect of incorporating conservation issues such as biodiversity protection within the ambit of the right.[124]

In the light of these suggestions, the dissertation now turns to the constitutional context within which the right is found, and the manner in which these suggestions may be supported by a purposive, generous and contextual interpretation of the right.

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[116] Du Bois and Glazewski (supra) at para 2B4.1; Van der Linde and Basson (supra) at 50-15; Feris (supra) at 526 and Glazewski (above note 112) at 77.
[117] Feris (above note 115) at 526 and Du Bois and Glazewski (above note 115) at 2B4.1(b).
[118] Ibid.
[119] Liebenberg "Environment" in Davis, Cheadle and Haysom (eds) *Fundamental Rights in the Constitution: Commentary and Cases* (1997) Cape Town: Juta 256 at 259.
[120] See Van der Linde and Basson (above note 115) at 15.
[121] Ibid at 15-16.
[122] Glazewski (above note 112) at 77.
[123] Ibid.
[124] Feris (above note 115) at 526.

6.2. Approaches to Constitutional Interpretation

It goes without saying that the Constitution is not a mechanical text where mathematical formulas of interpretation can be applied and expected to yield precise and accurate answers, nor is it a fixed and rigid text where rights have defined and inflexible boundaries. Rather, it is an organic and transformative text whose interpretation and application will be influenced by the object and purpose of the Constitution and the facts and circumstances of each case.[125]

The only stricture binding courts in their interpretation of the Constitution is that it must be guided by section 39, which requires an interpretation which will "promote the values that underlie an open and democratic society based on human dignity, equality and freedom". In seeking to elaborate upon the manner in which section 39 can best be applied, the courts have developed various methods to aid an interpretation that promotes these values, although these are merely guides and in themselves do not amount to a strict rule of interpretation.

In the context of constitutional interpretation courts have observed that rights must not only be interpreted purposively, but they should be interpreted generously and contextually.[126] As the Court held in *S v Mhlungu:*

> "[a] constitution is an organic instrument. Although it is enacted in the form of a statute it is sui generis. It must be broadly, liberally and purposively interpreted so as to avoid... the austerity of tabulated legalism and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government."[127]

A purposive interpretation is thus geared towards teasing out the core values that underpin the fundamental rights in the Constitution, and prefers an interpretation that best supports and protects the values underlying a democratic society based on human dignity, equality and

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[125] See generally *S v Mhlungu* 1995 (3) SA 391 (CC) at para 8 regarding the organic nature of the Constitution. The issue of context and the facts and circumstances of each matter is well illustrated in the case of determining a content of socio-economic rights, where it is accepted that these rights have no minimum core but instead the interpretation of their content will be highly context dependant. See for example *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at 32-33 in relation to the right to housing. See further *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at para 60, in relation to the right to water and the finding that what it requires will vary over time and context.

[126] *S v Makwanyane* 1995 (3) SA 391 (CC) para 9. See also *S v Zuma* 1995 (2) SA 642 (CC) at para 14. See further *Minister of Defence v Potsane; Legal Soldier (Pty)* Ltd 2002 (1) SA 1(CC) where the judgment of Kriegler J points to the need to address the contextual, teleological and historical aspects of a constitutional provision when interpreting its meaning.

[127] *S v Mhlungu* (above note 115) at para 8. See further *S v Makwanyane* (supra) at para 9, where it was held that "whilst paying due regard to the language that has been used [an interpretation of the Bill of Rights should be] 'generous' and 'purposive' and 'give… expression to the underlying values of the Constitution".

freedom.[128] An aspect of purposive interpretation also requires a court to do so in a holistic and historically sensitive fashion. A historically sensitive and contextual approach recognises the unity of the Constitution and requires courts to harmonise provisions in order to give effect to them.[129] In *Matatilele Municipality and Others v President of the Republic of South Africa and Others*,[130] it was held that:

> "Our Constitution …has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate. Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole. The process of constitutional interpretation must therefore be context-sensitive."[131]

Similarly, a generous interpretation is one which aims to give individuals "the full measure of rights" which may be applicable,[132] and is geared towards interpreting in favour of a right instead of its restriction.

Although these are only interpretive tools and the meaning of environmental well-being will of course very much depend on the context in which the right is applied, interpreting the right to wellbeing in a purposive and generous fashion has a significant effect on the potential role that it may play within the South African legal landscape. Whilst the many aspects of interpreting the right in this way could in themselves justify an entire chapter, there are a few salient points worth mentioning.

The first is that a purposive approach should recognise the particular socio-historical context from which the right evolved. As the White Paper,[133] preceding the National Environmental Management Act (NEMA),[134] points out, the history of the environmental right is one which resonates with many African nations who have been burdened by a history of competition for scarce resources leading to many tensions and conflicts, and which continue to do so in the present day.[135] Particularly within South Africa, past development has emphasised exploitation

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[128] On approaches to Constitutional Interpretation see Woolman and Roux "Chapter 32: Interpretation" in Woolman, Roux and Bishop (eds) *Constitutional law of South Africa 2nd ed* (2004) vol 3; and "Interpretation of the Bill of Rights" Currie and de Waal (eds) "The Bill of Rights Handbook" (2005) Cape Town: Juta at 145.
[129] See for example *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC) at para 83 and *S v Makwanyane* (above note 126) at para 11.
[130] 2007 (1) BCLR 47.
[131] At para 36-7.
[132] *S v Zuma* (above note 126) at para 14.
[133] See Department of Environmental Affairs and Tourism: *White Paper on Environmental Management Policy* GN 749 in Government Gazette 18894 of 15 May 1998.
[134] Act 107 of 1998.
[135] At 81.

and optimisation of natural resources, most notably with regards to water and minerals. It has also ignored the constraints arising from the finite character of these non-renewable natural resources and the ecological cycles that sustain them.[136] Access to these resources was also skewed particularly in favour of a privileged white minority, not only in cases of access to natural resources necessary to sustain life and health such as water, but also to recreational natural areas such as parks and beaches.

Of equal relevance is the fact that the right finds itself balanced against but also supportive of other fundamental rights, most notably the rights to equality, dignity, the socio-economic rights, rights to culture as well as the right to property.[137] In the context of the environmental right, this interdependence is manifold, indeed it is one which stems to the very right to life itself.[138]

As the earlier chapter on ecosystem services suggests, the environmental right, especially the right to well-being, may serve as a gateway to the realisation of other socio-economic rights such as the right of access to water, shelter and food. It is also a right which induces tension with other rights contained in the Bill of Rights, most notably property rights and the right to freedom of trade and occupation. [139] Whilst it has the potential to be supportive of them, the environmental right also bears the potential to come in tension with socio-economic rights, for example where natural areas are sacrificed in order to provide housing to communities.[140]

The import of this interplay and tension is that, to the extent possible in the circumstances, the right to well-being should be broadly interpreted to include both an extensive array of states or conditions of environmental well-being as balanced against other rights in the Constitution. Doing so would give due recognition to the wide and varied manners that environments affect human well-being. It would also engender support for and provide access to other rights and correct the inequitable, and at times unsustainable, utilisation of natural resources in the past. An interpretation of well-being in this way may assume many shapes, but could in principle include not only a right to an environment which is conducive to the equitable access of natural

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[136] At appendix 1 and para 2. See further *Mazibuko* (above note 125) at para 2 where it was held that "In 1994, it was estimated that 12 million people (approximately a quarter of the population), did not have adequate access to water. Yet, despite the significant improvement in the first fifteen years of democratic government, deep inequality remains and for many the task of obtaining sufficient water for their families remains a tiring daily burden".

[137] See sections 9; 10; 26-27; 31 and 25 of the Constitution respectively.

[138] As it was held in the case of *Fuel Retailers* (above note 114), "[t]he importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself."(at para 102).

[139] In the matter of *HTF Developers* (above note 114) the Court pointed out that "Environmental management…is a process that induces tension with other rights contained in the Bill of Rights, most notably property rights and the right to freedom of trade and occupation. While the environmental right is a collective right, it does not supersede or eclipse other rights" at para 26.

[140] See for instance *Minister of Public Works and Others v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC).

resources in order to satisfy other fundamental rights such as water or food, but also more elusive and subjective benefits derived from the environment such as aesthetic benefits. This could take the form of a right of access to wilderness areas or a right to enjoy and make use of recreational areas. Such a right not only implies the right to enter these areas where they exist but also motivates for their protection and preservation.

It could equally take the shape of a right to an environment which is supportive or instrumental to the practices of a particular culture. Not only would doing so be in line with a purposive and contextual approach to constitutional interpretation, particularly in light of the constitutional right to culture, but would also be historically appropriate in light of previous marginalisation of the diverse host of South African cultures in favour of a privileged minority.[141]

With the need to adopt a broad and purposive approach to the right in mind, the remainder of this chapter addresses another aspect of the Constitution which will be influential in determining the meaning of environmental well-being, namely the definition of the environment itself. The scope of what falls within and outside of the constitutionally protected environment will of course interplay with, and in part determine, the ambit of the right to environmental well-being. Accordingly the manner in which "environment" is defined in both section 24(a) and 24(b) of the Constitution is discussed in some detail.

6.3. The Meaning of Environment

A broad approach to the interpretation of well-being also motivates for an equally wide interpretation of the meaning of "environment" within section 24(a). Although a seemingly obvious term, the meaning of environment itself is not entirely settled,[142] and its definition will to a large degree impact upon the meaning of environmental well-being.

Traditionally, individual components of the environment were identified and treated separately,[143] however the often artificial distinctions between these components and their inter-relationship has highlighted the need for, and to some extent resulted in, a more holistic approach to environmental management. This brings about the question of what aspects of the

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[141] See for example *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 53 and 65.
[142] See broadly Rabie "Nature and Scope of Environmental Law" in Fuggle and Rabie (eds) *Environmental Management in South Africa* 1st ed (1992) Cape Town: Juta at 83.
[143] Ibid.

environment should be considered to be the subject of environmental law, and more relevantly, which aspects fall within that part of the environment which is determinative of well-being.

On a narrow approach the term "environment" as envisaged within section 24, could be interpreted to include that part of the natural environment devoid of human interference, or the non-anthropogenic environment. On a broader approach, however, it could include all living and therefore renewable resources. Or even more broadly, it could include non-renewable natural resources such as landscapes, natural phenomena like habitats and biological resources and communities. Even more broadly it could also include works of man that have a cultural value. At its most extreme it could include all aspects of the surroundings of man to include natural and socio-cultural conditions with the potential to include for example work or political environments. The extent to which it is broadly interpreted thus will of course have a significant impact upon the reach of the constitutional protection of the right to environmental well-being.

In the context of the constitutional environmental right, the term "environment" is used twice. The first in section 24(a) with regards to well-being and the second in section 24(b) which provides for the protection of "the environment" for the benefit of present and future generations. If the term environment were too broadly construed to include all of the built or anthropogenic environment, section 24(b) would be somewhat nonsensical since every aspect of man's surroundings would need to be protected, not only the natural but *every* aspect of the man-made environment as well, regardless of its human value or otherwise. Equally, if a purely semantic approach were adopted to include every aspect of what is commonly referred to as the environment, such as the work or political environment,[144] it would require its protection as well and could also render the right so broad as to be meaningless.

On the other hand there are cogent reasons for adopting a wide approach to the definition of environment in section 24(a). The first is that there are certain aspects of man-made or anthropogenic environments which contribute to well-being in a meaningful and important way, most contentiously the aesthetic and cultural aspects, and which are worthy of constitutional protection.

[144] See Rabie (above note 127) at 84.

This importance is also reflected in the wide definition of the environment in NEMA[145] which provides that:

> " 'environment' means the surroundings within which humans exist and that are made up of-
> (i) the land, water and atmosphere of the earth;
> (ii) micro-organisms, plant and animal life;
> (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
> (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being"[146]

Secondly there are more pragmatic and conceptual challenges which arise if the meaning of environment were so narrowly construed so as to only include the natural environment. This is so because the conceptual line between what is "natural" and what is not is far from clear. As the High Court in *BP Southern Africa* observed:

> "it would be unrealistic to restrict environment to the purely natural environment because most of the erstwhile natural environment is no longer in that state but has to a greater or lesser degree been modified by humans save in protected wilderness areas"[147]

To make sense of these opposing consideration, a line needs to be drawn somewhere. To do so I would suggest either one of two approaches. The first requires some nimble conceptual footwork so as to interpret the term "environment" within section 24(a) and (b) as including the traditionally understood natural environment such as fresh natural water resources, forests, clean air etcetera, and select aspects of the manmade environment which are valuable for their aesthetic or cultural attributes. To the extent that these are harmed, and thus in turn cause harm to human well-being, they should be included within the definition of "environment" within the Constitution and are deserving of protection under section 24(b). It is harm to these aspects of

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[145] Above note 134.

[146] Section 1. In interpreting a similar definition of the environment in the Environmental Conservation Act, the High Court in *BP Southern Africa* (above note 114) at 219-220, held that:

> "…On the one hand a more limited approach has defined "environment" as relating only to the natural environment or simply, God's created physical environment. In this sense it would exclude social, cultural, economic and spatial environment, in short, the entire anthropogenic environment. At the other end of the spectrum, it was appreciated that it would be unrealistic to restrict environment to the purely natural environment because most of the erstwhile natural environment is no longer in that state but has to a greater or lesser degree been modified by humans save in protected wilderness areas. In promulgating the ECA, South Africa chose to embark upon the extensive approach to environment by giving it a comprehensive definition, which is as all embracing as may be imagined"

This broad conception of the environment is also in line with the definition of environment in the White Paper on Environmental Management and Policy (above note 133) in section 1.

[147] *BP Southern Africa* (above note 114) at 220.

the environment which cause harm to well-being under section 24(a), for example clean water which is polluted in an industrial environment.

There are, however, conceptual difficulties to this approach where harms to well-being occur in the form of noise or light pollution which in themselves arguably do not do physical harm to any natural resource but instead are a form of "pollution" which usually are disruptive only to human existence, this particularly so in urban settings.[148] To exclude, for example, noise pollution from the ambit of the protection of the right would be an unduly narrow approach recognising the fact that noise pollution emanates from the man's surrounding environment and has the potential to be not only psychologically harmful but also physiologically harmful.[149] Similarly, artificial and random boundaries would have to be drawn where the pristine natural resource which is harmed is deeply anchored in, integrated or intermingled with the anthropogenic environment.

Perhaps a better approach would be to construe the meaning of environment in terms of section 24(a) in a slightly broader fashion than the meaning of environment in section 24(b). Under this approach, I would suggest "environment" be interpreted for the purposes of section 24(a), to include all spaces or areas regardless of their degree of development whose "conditions and influences affecting the life and habits of man"[150] but in a way which is meaningful and not merely trivial.

The focus is thus not on what aspects of these spaces are worthy of protection but rather whether there are aspects of these spaces which, through human interference or by way of natural disaster, are detrimental to human well-being. This is most likely to take the shape of harm to natural resources within these spaces but will not always necessarily be so, for example where the environment itself is not damaged in cases of urban noise or light pollution. In this way the focus is on the right to exist in an area or space where the normal use and enjoyment of it is not unreasonably interfered with, regardless of whether natural (or cultural)environmental resources are in some way harmed or not.[151] The broad reading of environment in section 24(a)

[148] Arguably there may be instances where noise or light pollution may disrupt wildlife or domestic animals in but this is more likely to take place in an agricultural or wilderness context. The point is rather that in instances where only humans (and not the environment) are harmed by noise and or light they would be precluded from raising the right to well-being if environment was construed too narrowly.

[149] See Glazewski (above note 112) at 607-10 and cases cited therein. The effects include loss of hearing; stress as well as hypertension, all of which are well documented (at 607).

[150] *BP Southern Africa* (above note 114) at 220.

[151] This is in line with the vast array of case-law addressing aspects of nuisance, particularly in the context of a built environment. See further nuisance law below.

would not be so broad as to include, for example, the political and work environment, as these are arguably provided for elsewhere in the Constitution.

The corollary of this is that the interpretation of environment in section 24(b) would in my view be slightly narrower to focus on those aspects worthy of "protection for the benefit of present and future generations". This would ordinarily include all aspects of the natural environment as well as a select few aspects of the man-made environment which are aesthetically or culturally valuable.[152]

Interpreting the environment in section 24(a) in this broad fashion thus allows for a wide array of harms which may arise from the environment, but which themselves may not necessarily be linked to harm to natural resources or aspects of the built environment, worthy of protection for aesthetic or cultural reasons. It is also in line with a broad approach to the interpretation of the right without rendering it meaningless so as to require protection of *all* aspects of the environment, which would include the built environment, under section 24(b).

[152] This approach is also in-line with the concept of environment as depicted in *Fuel Retailers* (above note 114) which describes the meaning of sustainable development under section 24(b). In this case the environment was conceived of as something worth protecting, and whose protection will invariably come in conflict with social or economic development. It was held that:

> "[sustainable development] offers an important principle for the resolution of tensions between the need to protect the environment on the one hand, and the need for socio-economic development on the other hand. In this sense, the concept of sustainable development provides a framework for reconciling socio-economic development and environmental protection… socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources."

At para 27-8. The tension arises from the fact that certain aspects of the environment are worthy of protection, as singled out from the "environment" more broadly conceived such as the social and economic environment which in my view also implicitly include aspects of the built or developed world.

7. THE RELEVANCE OF THE RIGHT TO ENVIRONMENTAL WELL-BEING TO SOUTH AFRICAN LAW

It could be said that with the host of environmental statutes, regulations and policies in operation, that the meaning of well-being is already clearly spelt out and effectively provided for within South African law. For example, there presently exists a lengthy suite of statutes which address water, biodiversity, protected areas, coastal areas, forests, living marine resources, minerals and air quality. These statutes, for the most, provide a detailed and comprehensive form of environmental management over these resources and present a wide armoury of criminal, administrative and other measures in order to achieve their objectives, one of which is to achieve or maintain an environment conducive to well-being.[153]

Over and above this, there are principles for environmental management within NEMA, the overarching framework statute for environmental laws. These principles provide for a wide host of considerations which apply to all actions by the state which may affect the environment, [154] and whose broad array of considerations in turn foster an environment not detrimental to well-being. The NEMA principles recognise the varied manners in which the environment influences human well-being by providing that:

> "Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably… Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued"[155]

Outside of these detailed and comprehensive principles and laws, is there still any use to having a Constitutional right to well-being? The aim of this chapter is to suggest that not only is it relevant, but that its meaning is fundamental to the proper interpretation, application and assessment of these regulatory instruments and conduct in the first place.

The following chapter accordingly seeks to demonstrate these multiple effects through assessing the manner in which the right to environmental well-being may impact upon three areas of

[153] This objective is not however provided for in all statutes but is arguably implicit. Only the NEMA and the National Environmental Management: Air Quality Act 39 of 2004, and the National Environmental Management: Waste Act 59 of 2008, specifically make reference to the right to well-being within their preambles.
[154] See section 2(1) of NEMA.
[155] Sections 2(2) and 2(4)(d) respectively. See further the extensive list of environmental considerations relevant to sustainable development in section 2(4), such as the need to avoid the disturbance of landscapes and sites with cultural heritage, minimisation of waste, avoidance of environmental degradation and pollution, avoidance of the disturbance of ecosystems and loss of biological diversity; responsible and equitable exploitation of sustainable resources; that a risk averse and cautious approach be adopted and that negative impacts on the environment and people's environmental rights be prevented or minimised.

environmental law. The first concerns its role in the interpretation of statutory definitions; the second is the manner in which it may inform administration action and the third relates to the role it may play in the development of the common law remedies. These potential effects are addressed in turn.

7.1. Interpreting Statutory Definitions and Concepts

The import of well-being and its constitutional definition will have a significant effect on the interpretation of statutory provisions. Having the status of a constitutional right, significantly alters the manner in which these broadly phrased statutory rights and duties should be interpreted. It affects not only broad principles such as the open-ended NEMA principal of environmental management which must serve "physical, psychological, developmental, cultural and social interests",[156] but it also serves to assist in interpreting other broadly phrased statutory offences and duties, most especially through definitions within environmental statutes.

Interpretations of the right to well-being in the manner argued for earlier,[157] will impact upon judicial interpretations of important statutory definitions in several environmental laws. It could, for example, inform the definition of what amounts to "acceptable exposure" and "minimal negative affect on health or the environment"[158] in the National Environmental Management: Waste Act (Waste Act).[159] It could also have an effect upon the interpretation of "adverse effect" in the National Environmental Management: Integrated Coastal Management Act (ICMA), [160] and the meaning of "pollution" in NEMA, which is defined in part as "… any change in the environment… where that change has an adverse effect on human health or well-being".[161] It may also determine the thresholds of "significant pollution" or "significant adverse effect" upon man and/or the environment in various environmental laws.[162]

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156 NEMA section 2(2).
157 See section 6.2.3-4. above .
158 See the definition of "acceptable exposure" in the Waste Act (above note 153).
159 Above note 153.
160 Act 28 of 2008. See the definition of "adverse effect" which means"any actual or potential impact on the environment that impairs, or may impair, the environment or any aspect of it to an extent that is more than trivial or insignificant " which includes impacts on the environment which results in "a detrimental effect on the health or well-being of a person"
161 See the definition of pollution in NEMA section 1.
162 By way of example, see sections 28(1) and (2) of NEMA ("significant adverse effect" and the duty of care on polluters); and the responsibilities and duties of the state in relation to decisions which "significantly" affect on the environment in NEMA (sections 13(1)(a); 16(1)(a); 17(1)(a) 23(2)(a) and (e); 24(4)(a)). See further section 56(1) of the Waste Act (above note 153- revocation of license for harms having a significant effect on health and the environment) and section 21(1) of the Air Quality Act (above note 153, which relates to the listing of activities which significantly affect the environment) and section 50(2) (control of significant trans-boundary air pollution).

The right to environmental well-being equally has a role to play in the interpretation of statutory offences of nuisance which impair the well-being of other members of the public as provided for in the National Environmental Management: Air Quality Act,[163] the Waste Act[164] and the ICMA.[165]

A good demonstration of how the right to well-being impacts upon the interpretation of statutory definitions can be seen in the case of *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products, and Others*,[166] one of only a handful of High Court cases to address the meaning of well-being. In this matter the court addressed the question of what constituted "significant pollution or degradation of the environment" under section 28(1) of NEMA.[167]

The applicants in the matter had sought to interdict the activities of a neighbouring semi-processing tannery which was emitting odious and corrosive gasses. In upholding their claim that the activities did amount to "significant pollution", Leach J observed that in the case of well-being, there is a substantial amount of relativity and subjectivity involved which will be highly contingent upon the facts of the particular case at hand. Accordingly he held that "the assessment of what is significant involves, in my view, a considerable measure of subjective import".[168] That notwithstanding he held that in his view, "the threshold level of significance will not be particularly high" and that "no one should be obliged to work in an environment of stench and … to be in an environment contaminated by H2S is adverse to one's "well-being."[169]

Building on this interpretation the courts again had opportunity to consider the meaning of well-being in the case of *HTF Developers v Minister of Environmental Affairs and Tourism.*[170] In this case the High Court was asked to consider the legality of a directive issued under the Environmental

[163] See with respect to the Air Quality Act (above note 153) section 35(2) which provides for a duty take reasonable steps to prevent the emission of offensive odours, defined as odours which cause a "nuisance".
[164] See section 16(d) of the Waste Act (above note 153) which provides for a general duty to "manage…waste in such a manner that it does not endanger health or the environment or cause a nuisance through noise, odour or visual impacts" and a duty on owners of private land to which the general public has access in section 27 to ensure that "*(b)* that the litter is disposed of before it becomes a nuisance" and section 21(d) provides that those who store waste must do so in a manner to ensure that "*(d)* nuisances such as odour, visual impacts and breeding of vectors do not arise".
[165] See the definition of adverse effect within the ICMA (above note 160), which is defined to include the impairment of a person's well-being, and which creates a statutory duty on the public not to cause an adverse effect upon coastal public property or the coastal environment (sections 13(1)(b)(i) and 58(1)(a) respectively).
[166] 2004 2 SA 393 at 415.
[167] Above note 134. Section 28(1) applies to a person who "causes, has caused or may cause significant pollution or degradation of the environment" and imposes a duty of care upon such persons to remediate it. In this matter the court was required to address whether section 28(1) had been breached. If it had, the court would then be able to determine whether the state then bore a duty to take certain steps under section 28(4).
[168] at 414I
[169] See 415E.
[170] *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism,* 2006 (5) SA 512 (T).

Conservation Act[171] and whether the authorities had acted within their legal mandate.[172] One of the questions at issue concerned the definition of "virgin ground" and whether it included an environmentally sensitive ridge within a proclaimed township.[173] When interpreting the ambit and meaning of the term "virgin ground" the court noted that it should be placed in context of both the environmental right and NEMA.

Of relevance to the court's interpretation was the meaning of the right to well-being. Murphy J observed that its meaning is "open-ended and manifestly is incapable of precise definition".[174] Nonetheless, citing Glazewski,[175] he continued to find that "[t] he words nevertheless encompass the essence of environmental concern, namely a sense of environmental integrity; a sense that we ought to utilize 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."[176] The attainment of this objective or imperative is to impose a duty of stewardship of the environment upon the authorities for the benefit of future generations.[177] On this same basis, it was also held that to a degree land owners also hold their land in trust for future generations.[178]

Construing well-being in this fashion created a platform upon which the court found that virgin ground should be construed "purposively and generously" to mean land which has not been developed within the last ten years.[179] Although this matter was ultimately appealed to the Supreme Court and thereafter the Constitutional Court,[180] neither Court addressed the issue of the meaning of virgin ground and well-being.[181] The High Court judgment thus serves as a good demonstration of how the right to well-being can be influential in determining the meaning of statutory definitions.

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171 Act 73 of 1989.
172 One of the questions at issue was whether the meaning of 'virgin ground' included erf within a proclaimed township.
173 The "cultivation or any other use of virgin ground" is an activity identified in item 10 of Schedule 1 of Regulation 1882 (as amended) of 5 September 1997 in terms of section 21(1) of the ECA.
174 At para 18
175 Glazewski (above note 112) at 86.
176 At para 18.
177 At para 19.
178 Ibid.
179 At para 28
180 See above note 114, in particular para 13.
181 The applicable regulations were repealed by the time the matter was appealed to the SCA.

7.2. Informing Administrative Action and Reviews of Constitutional Invalidity

A comprehensive interpretation of a right to environmental well-being will also have the potential to impact administrative decision making with regard to activities that have an impact upon the environment and in turn upon well-being. Whilst decision makers are already guided by the principles in NEMA which include almost every aspect of well-being highlighted in this analysis, a developed jurisprudence on the right may nonetheless add weight and a constitutional dimension to submissions which previously may have been perceived as either frivolous, less important or too remote, for example aesthetic considerations.

Equally so, the understanding of the right has relevance in judicial review of these decisions in that they may inform a judicial interpretation of the decision's reasonableness and/or rationality. Failure to adequately take into account or misconstrue environmental considerations which affect human well-being will of course determine whether the decision is capable of being set aside by a court. The relative importance of the considerations are influenced by the extent to which courts recognise the right to environmental well-being and what is and what is not constitutionally protected.

More broadly, the right to well-being may serve as a basis upon which to assess the constitutional validity of legislation or policy. To the extent that either of these fail to adequately protect the right to well-being, they may be declared unconstitutional and therefore invalid.

But the scope for a broad and inclusive right to environmental well-being will most probably be felt more directly by affected parties when having to prove locus standi or when seeking to invoke the common law remedies. It is this last issue which is the focus of the remainder of this chapter.

7.3. Informing the Application of the Common Law Remedies and Locus Standi

The common law remedy of the interdict still retains a special place within environmental law for its effectiveness in preventing environmental harm from continuing or from commencing in the first place. It is particularly important in instances where administrative decisions in favour of the activity which will cause the harm, are being appealed. In such cases the current regulatory framework generally does not provide for the suspension of the right granted and, absent an

interdict, the commencement of the activity whilst the appeal or review is being finalised may render any decision moot, especially in cases of irreparable environmental damage. In these circumstances, proving that the existence of a right (or prima facie right in the case of interim interdicts) as well as demonstrating that the activity is indeed "harmful", is pivotal and is where the right to well-being has the potential to have a substantial impact.

Equally so, the interpretation of "sufficient interest" as a requirement to satisfy locus standi presents an opportunity for a broad and inclusive interpretation of well-being to have a role. This area of the law has demonstrated to have been particularly challenging for litigants who have been hindered by narrow and arguably unconstitutional interpretations of the requirements of locus standi. These approaches present an unfortunate obstacle to applicants wishing to have their matter even heard in the first place. Owing to the fact that the issues of "sufficient interest" under locus standi and the demonstration of "harm" within the context of interdicts are inter-related these matters are dealt with jointly in the following section.

7.3.1. Locus Standi

The phrase "*locus standi*", also known as "standing", speaks to whether an applicant is entitled to bring the matter to court. The first aspect of it relates to a litigant's capacity and whether he, she or the entity has sufficient capacity to litigate or personal capacity to sue without assistance. The second is that the applicant must have a sufficient interest in the matter to bring it to court.[182]

Before the Constitution, this latter issue was a long standing hurdle for individuals and NGOs seeking to litigate environmental issues since they needed to prove a special interest in the matter. This requirement arose from a series of cases decided in the early twentieth century, namely *Patz v Green and Co* ,[183] as read with *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd*[184]. In these matters it was held that an individual required a special interest peculiar to himself before being given a hearing. This rule became known as the *Patz v Green* rule, a rule which was at times strictly applied in issues relating to the environment, [185] although not consistently so with some courts relaxing the rule for groups acting in the public interest.[186]

The challenges presented by the special interest requirement were, however, substantially done away with through the advent of the Constitution, most notably the right in section 38 relating to locus standi. The section lists the persons who may approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened.[187] Included in this list of persons are:

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[182] See generally Baxter *Administrative Law* (1984) Juta: Cape Town at 650.
[183] 1907 TS 427 at 432.
[184] 1933 AD 87 at 95. See further *Bagnall v Colonial Government* 1907 24 SC 470 and *Dalrymple v Colonial Treasurer* 1910 TS 372 at 386.
[185] *Von Moltke v Costa Aerosa* 1975 (1) SA 255 (C). at 258
[186] See *Society for Prevention of Cruelty to Animals, Standerton v Nel* 1988 (4) SA 42 (W) at 47D-E.
[187] S 38.

"…(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interests of its members."[188]

In interpreting the meaning of this right, the courts have held that a broad approach should be adopted.[189] Equally so, it has been held that standing under section 38 will be satisfied if an applicant alleges that a right in the Bill of Rights has been infringed or threatened and that he or she (or it) can demonstrate with reference to the categories listed in section 38(a) to (e) that there is a sufficient interest (not necessarily their own interest) in obtaining the remedy they seek.[190] Courts have to some extent outlined various factors which may assist in determining whether there is a sufficient interest, but generally much will depend on the nature and facts of each case.[191]

In addition to the constitutional right, NEMA has further broadened the requirements of standing by conferring locus standi to applicants in instances not only when a right under the Bill of Rights has been threatened but now extends standing to applicants to enforce "any breach or threatened breach of any provision of [NEMA], including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources . . ."[192] It also extends the types of circumstances under which standing may be conferred, include instances where the relief sought is purely in the interest of protecting the environment. [193]

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[188] S 38(c), (d) and (e).

[189] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1.

[190] *Ferreira* (supra) at para 26. See further *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) SA 409 (CC) at para 7.

[191] In *Ferreira* (above note 189) O'Regan J identified factors relevant to determine whether a person is genuinely acting in the public interest, these included: "whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court. These factors will need to be considered in the light of the facts and circumstances of each case." At para 234. This aspect of the minority judgment was endorsed by the same Court in *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) at para 17. This is not however a closed list and in addition Courts have added that the degree and vulnerability of the people affects, the nature of the right alleged to be infringed and the consequences of the infringement of the right are also relevant.

[192] S 32(1).

[193] S 32(1). This section provides locus standi to persons acting

"(a) in that person's or group of person's own interest;
(b) in the interest of, or on behalf of, a person who is for practical reasons, unable to institute such proceedings;
(c) in the interest of or on behalf of a group or class of persons whose interests are affected;
(d) in the public interest; and
(e) in the interest of protecting the environment."

Despite the wide and embracing locus standi right, the courts have been somewhat inconsistent in their application in environmental matters. Initially there were a few judgments which were generous in interpreting the right to standing, even without reference to the Constitution. For example in W*ildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa*,[194] although the Wildlife Society's locus standi was recognised under the interim Constitution,[195] Judge Pickering nonetheless held that even in instances where the interim Constitution may not be applicable, and where a statute imposes state obligations to protect the environment in the interests of the public, a body like the Society which sought to protect the environment ought to have standing in order to compel the state to carry out these obligations.[196]

Another broad approach to the question of standing was demonstrated in a more recent matter in the case of *Landev (Pty) Ltd v Black Eagle Project and Another.*[197] In this matter the High Court was willing to grant standing to Black Eagle, a registered s21 public interest organisation, with the main object of educating and informing the public about black eagles residing in the Witwatersrand National Botanical Gardens and about raptors in general. The applicant had applied to court for the review of a decision to grant certain development rights over a property which it alleged would be detrimental to the Black Eagle species. In a counter application, the respondent argued that the organization lacked *locus standi* because the power to litigate fell outside of its main constitutional object.

Declining to uphold this contention, Judge Splig held that if Black Eagles or raptors generally were to become extinct the organization would be unable to fulfil its main objective and would put the fulfillment of its main objective at risk, a risk it was entitled to protect itself against.[198] Moreover, it was held that in the light of the locus standi provisions under NEMA and s38 of the Constitution, a broad approach should be adopted to the interpretation of ancillary objects of public interest organisations in order that they may enjoy the power to litigate against a threatened invasion of the very right which they seek to protect or advance or for which they

[194] 1996 (3) SA 1095 (Tk). See further *Minister of Health and Welfare v Woodcarb (Pty) Ltd*1996 (3) SA 155 (N); and *Highveldridge Residents Concerned Party v Highveldridge TLC* 2002 6 SA 66 (T).
[195] At 1104I–J.
[196] At 1105 A–B.
[197] *Landev (Pty) Ltd v Black Eagle Project Roodekrans In re: Black Eagle Project Roodekrans v MEC Department Agriculture Conservation and Environment Gauteng Provincial Government and Others* (6085/07) [2010] ZAGPJHC 18 (29 March 2010) (as yet unreported).
[198] At 39.

stand.[199] Of interest in the matter is that at no point did the court question whether the organization, which had no proprietary interest in the area, had a sufficient interest in the decision of the authorities to appeal it. Instead the Court held that the decision had the potential to put the associations "*substratum* at risk of failure, a risk it is entitled to protect itself against."[200] Implicit in this reasoning is that the object of the organisation, namely the protection of raptors without more, clothed it with a sufficient interest to bring the matter before court.

Unfortunately this broad approach to standing has not filtered into every court room. For instance in *Tergniet and Toekoms Action Group*[201] the High Court appeared to be cautious to move away from the *Patz v Green* rule.[202] In this matter the applicants, a voluntary association protecting the interests of the residents of Tergniet and Toekoms as well as the as local residents themselves, had sought relief against the first respondent because of its emissions leading to atmospheric pollution from the manufacture of creosote treated wooden poles. The applicants had argued that the respondent's operations were unlawful since they conflicted with the relevant provisions of the Atmospheric Pollution Prevention Act[203] (APPA) and the Land Use and Planning Ordinance[204] (LUPO). They thus sought an interdict restraining it from operating until the requisite authorisations had been granted.

In reply, the respondents argued that the group lacked the capacity to litigate because it was not formally constituted and that it did not have a substantial and sufficient interest in the subject matter of the litigation. In arguing that there was insufficient interest in the litigation, they submitted that in terms of the *Patz v Green* rule, the applicants needed to demonstrate having sustained or apprehending sustaining actual harm or special damages, which it had failed to do.[205]

Although the Court ultimately arrived at the correct outcome by holding that the group had standing, the manner in which it did so is unfortunate since it follows the same strictures of the *Patz v Green* rule by continuing to uphold the need to demonstrate special damages in instances of legislation enacted in the public interest. It was held, on the basis of the *Patz v Green* rule, that the APPA had not been enacted in the public interest but rather in the interest of a specific

[199] At para 49.
[200] At para 39.
[201] *Tergniet and Toekoms Action Group and Another v Outeniqua Kreosootpale (Pty) Ltd and Others* (10083/2008) [2009] ZAWCHC 6 (23 January 2009) (as yet unreported).
[202] The reasoning of this judgment is akin to that in the pre-constitutional case of *Verstappen v Port Edward Town Board and Others* 1994 (3) SA 569 (D), on the application of the *Patz v Green* rule and locus standi.
[203] Act 45 of 1965.
[204] Act 15 of 1985.
[205] At para 20.

group, namely those persons and communities living in close proximity to premises undertaking scheduled processes that emitted noxious or offensive gasses.[206] On this basis the court held that the voluntary association representing the residents as well as the residents themselves had a sufficient and direct interest to grant them standing. It is unclear on what basis the voluntary organization was deemed to have standing although in the context it appears only on the grounds that its members were residents of the affected area. Equally it was found that under LUPO, the common law already recognized that residents in the area enjoyed standing to sue, and thus the residents (but not the voluntary organization) had sufficient interest in terms of LUPO as well.[207] Although noting that the applicant relied on s32 of NEMA and s38 of the Constitution, the court itself unfortunately did not do so when determining whether the applicants enjoyed standing.

The resurrection of the *Patz v Green* rule is unfortunate. Its effect is that persons or groups who fall out of this specific group, namely resident communities in the case of APPA, will need to prove a special interest in order to demonstrate locus standi based on the assumption that ordinarily their interest is neither sufficient nor direct. In doing so, the court overlooked the wide and embracing standing provisions in both the Constitution and NEMA which provide that "everyone" has a right to an environment not detrimental to their health or well-being. By assessing standing on what is effectively a degree of remoteness as determined by residency undermines the broad ambit of this right. The wide ambit of the environmental and locus standi rights is reflective of the fact that environmental harms by their nature are often diffuse in effect and may be significant in degree across a broad spectrum of groups and individuals. There is no better example of this diffuse effect than in the case in point, namely air pollution. As Kidd has suggested, the nature of air pollution is such that it is not something that affects just people living in proximity to polluters but people generally.[208]

Applying a rule which approaches environmental statutes on the basis that they may be enacted only in the interest of a specific group not only creates both substantive and procedural barriers to litigants who fall outside of this class of specific persons, but does so in a manner which denies these broad and diffuse effects which impact upon well-being. As suggested earlier, well-being does not place boundaries based on vicinity or only on a "special" degree of harm but

[206] At para 20.
[207] At para 22.
[208] Kidd "Obstacles to public interest environmental litigation" Unpublished paper delivered at the Environmental Law Association Conference, Muldersdrift, 29 May 2009 at 8.

instead operates to provide rights of judicial redress to everyone whose well-being is harmed by the environment specifically providing constitutional protection to environmental harms which may only be felt indirectly or more remotely than those who experience them first-hand. Although some courts have already treaded lightly around this rule and have created special instances of departure, the conceptual challenges in doing so are too insurmountable.[209] Instead I would suggest that a broad and encompassing interpretation of the right to well-being should operate to do away with the rule entirely.

7.3.2. Interdicts

The interpretation of well-being also potentially dramatically affects traditional approaches to the common law remedies, namely applications for an interdict or damages. As already mentioned, an interdict may be necessary pending further administrative action or judicial proceedings where the environmental harm is likely to affect the public at large. Litigants may therefore resort to interdict proceedings pending administrative review or appeal proceedings concerning environmental authorisations or proceedings in terms of section 28(9) of NEMA.[210] Equally so, a mandatory interdict is useful in instances where affected parties may seek to order the authorities to undertake their statutory obligations[211]

In this context, the meaning of well-being may play a substantial role in satisfying the requirements for an interim, a final or a mandatory interdict. In the case of a final interdict, the court must be satisfied that the applicant has a clear right; that there was an injury actually committed or reasonably apprehended; and that there is an absence of similar protection by means of any other ordinary remedy.[212] Interim interdicts only require proof of a *prima facie* right;

[209] In the case of *Bamford v Minister of Community Development and Another* 1981 (3) SA p1060 Watermayer JP held that the *Patz v Green* rule does not apply in instances where the applicant has a positive right and seeks to restrain an unlawful interference of that right (at p1060). It was held that it should only operate in the context of statutory prohibitions . In the constitutional context, the environmental right provides for both positive and negative rights and duties, making the application of this exception problematic.

[210] Section 28(12) provides an avenue for parties affected by environmental harm to apply to court to compel a Director General or provincial head of department to take certain against the person or entity causing harm. The type of action a Court may compel is limited to that provided for in section 28(4). This relief does not empower the court itself to suspend an environmental authorisation (although there may be an exception in circumstances where there exists "persistent, serious and on-going pollution" see *Hichange* above note 147).

[211] An example would be seeking a local authority to enforce compliance with its zoning scheme regulations against an unlawful land user. See further Summers "Common Law Remedies for Environmental Protection" in Paterson and Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2010) Juta: Cape Town at 356.

[212] See *Setlogelo v Setlogelo* 1914 AD 221 at 227. See further Summers (above note 211) at 346-7.

a well-grounded apprehension of irreparable harm; the balance of convenience favours granting the interdict and there is no alternative remedy.[213]

Before turning to the question of the manner in which well-being may affect the satisfaction of the requirements of "harm" or "injury", it is also worth mentioning the parallels between the right to well-being and the large pre and post constitutional body of nuisance and neighbour law. This area of law regulates the conduct of neighbouring landowners by providing remedies to them, or persons with a right in land, to hold accountable persons who cause harm to neighbouring land-owners (also known as private nuisances).[214]

The concept of a nuisance is a fairly broad one and, in the context of private nuisances, can include health as well as interferences with "the ordinary comfort of human existence."[215] This may take place for example by way of interferences caused by offensive odours, smoke, noise, water and light pollution as well as land contamination.[216] The application of nuisance law in this context has generally been with a view to protecting proprietary rights as opposed to environmental rights per se.[217]

Nuisance law extends, however, beyond just neighbour law or private nuisances and includes so called public nuisances. This normally takes the shape of an administrative nuisance which are provided for in statute and are generally regulated through abatement notices and local authority action.[218] As highlighted earlier, several statutes specifically regulate nuisances, for example the Air Quality Act provides for the Minister to make regulations to address "nuisances" caused by dust or offensive odours.[219] Although the concept of public nuisance is relatively unclear, it has been held that such actions should only to be brought by authorities since it would be against public policy to allow each affected individual to do so.[220] There may, however, be an argument that section 28(12) of NEMA, [221] together with the environmental right, to some extent ameliorates this rule. Outside of statute, there also exists a possible common law crime of a public nuisance. Its status, however, is uncertain with only a few very dated cases where persons

[213] *Webster v Mitchell* 1948 (1) SA 1186 (W). See further Summers (above note 211) at 346-7.
[214] Summers (above note 191) at 342-3.
[215] *Holland v Scott* (1882) (2 EDC 307 at 314.
[216] See Summers (above note 211) at 344.
[217] Ibid at 345.
[218] Joubert "Protection and Control of Nuisances" 21 *Law of South Africa* 2nd Ed (2010) LexisNexis Butterworths at para 560.
[219] Above note 153 at sections 32 and 34 as read with the definitions in section 1. See further the Health Act 63 of 1977 and the definition of nuisance in section (1).
[220] See *Diepsloot Residents & Landowners Association v Administrator Transvaal* 1993 1 SA 577 (T); 1993 3 SA 49 (T);; 1994 3 SA 336 (A) and Joubert "Public Nuisance" 21 *Law of South Africa* 2nd Ed (2010) LexisNexis Butterworths at para 211.
[221] See above note 210 regarding the role of section 28(12) of NEMA.

were convicted of this crime.[222] Commentators have suggested that this crime appears to have been replaced by the enactment of statutory offences relating to public nuisances.[223]

Although harm to well-being may not always best be described as a nuisance, in my view it will often be the case that the type of harms an applicant seeks to address overlap significantly, namely the ordinary comfort of human existence and the relationship of man to his/her environment in a manner conducive to well-being. They both address environmental harms to persons in a manner which, although not affecting health, may be sufficiently detrimental to the ordinary use and enjoyment of their environment. At times nuisances will have property rights as their main concern, with their focus being economic as opposed to personal harm. At these junctures it may not be appropriate to apply the right to well-being, something discussed in further detail below under the discussion of aesthetics.[224] That notwithstanding, the focus of this analysis is more concerned with the manner in which the right to well-being will be relevant in the application of nuisance law and the interdict, most particularly with regards to public nuisances and the challenge of proving "harm".

The potential to bring an interdict in order to protect environmental well-being in the context of harm to the public broadly (i.e. a public nuisance interdict) also appears to have fallen victim to the *Patz v Green* rule. The obstacles presented by the rule in this context were demonstrated in the case of *Laskey and Another v Showzone CC and Others*.[225] In this matter the applicants had applied for a final interdict against a private party, Showzone, from continuing to make a disturbing noise arising from their operation of a restaurant theatre business. Like *Tergniet*, the court held, on the basis of *Patz v Greene* rule that the relevant noise regulations had been enacted in the interest of the public generally and thus the applicants who owned neighbouring properties needed to show special harm.[226] It held that:

> "It follows that the fact that the respondent has been shown to be in apparent breach of … the noise control regulations does not, without more, entitle the applicants to interdictory relief. In order for the applicants to obtain such relief it is necessary for them to show that the breach has occasioned them harm, or is likely to do so. I am of the view that in the circumstances of this case the requirement of harm would be established if the conduct of the respondent about which applicants complain gave rise to a private nuisance actionable at their instance."[227]

[222] Joubert (above note 218).See *R v Paulse* (1892) 9 SC 422; *R v CP Reynolds* (1901) 22 NLR 89; *R v Cohen* (1902) 19 SC 155; *R v Ninya* 1954 2 SA 644 (C).
[223] See Joubert (above note 218) at 560.
[224] See below at section 8.2.4.
[225] 2007 (2) SA 48 (C).
[226] At para 13-16.
[227] Ibid para 18.

The case thus proceeded on the basis of the applicant's alternative claim based on the harm amounted to a private nuisance. As commentators have pointed out, this requires applicants need to show harm to themselves personally, effectively allowing the common law to render the noise control regulations redundant insofar as the applicants were concerned.[228] Again, like *Tergniet*, the application of the rule in this context is problematic in instances where public interest groups seek to interdict environmentally harmful conduct and will be unable to show private harm. The effect of requiring harm in a proprietary sense thus precludes any future opportunity to bring a nuisance interdict on the basis of harm to the public generally where no proprietary interests are affected.

For the same reasons put forward in the discussion on standing, approaching nuisance law in this way is inimical to the rights of everyone to an environment not detrimental to well-being, and conceives of actionable harms in an overly narrow and arguably unconstitutional fashion. As argued earlier, well-being recognises a broad and diffuse array of harms to the human relationship with the environment, even if relatively more remote than, for example, that experienced by communities resident in the area where it primarily takes effect. Constitutionalising this relationship provides special recognition of the importance of protecting this broad and diffuse effect.

Interpreting the right to well-being broadly may thus go a long way towards mediating, if not entirely doing away with, this rule so that interdicts may be used on the basis that all environmental statutes are enacted in the public interest. As a result it would not be necessary to demonstrate a private interest or proprietary interest in the harm, and would open up the law to allow for interdicts where the public at large is affected.

7.3.3. Damages

Lastly, a broad and inclusive interpretation of well-being may also have a substantial effect upon delictual actions for damages under the Aquilian action. This remedy provides that a person is liable for damage wrongfully caused by the negligent conduct to the person or property of another. Liability is imposed so as to compensate the plaintiff by restoring them to the status quo ante as far as possible.[229] Similarly, an applicant may seek damages under the *actio iniuriarum*,

[228] Kidd (above note 208) at 9 who in turn cites Freedman "Hear No Evil: Noise pollution, the law of nuisance and the noise control regulations – *Laskey v Showzone CC* 2007 (2) SA 48 (C)" (2009) *SAJELP* 79.

which is an action for intentionally caused harm to the personality interests of a plaintiff, such harm to their physical-mental integrity.[230]

In order to claim damages under the Aquilian Action and the *actio iniuriarum*, the applicant must demonstrate that the conduct which caused the harm was wrongful.[231] Wrongfulness is an objective enquiry which determines the reasonableness of imposing liability according to public or legal policy, as determined by the *boni mores* of society. The legal policy considerations must of necessity be informed by the prevailing norms and values of society as articulated in the Constitution,[232] which of course includes the right to well-being. The right to well-being may thus be influential in determining whether conduct is sufficiently harmful to warrant imposing liability.[233]

Whilst the reasonabless of imposing liability will depend on the facts and circumstances of each case, a wide and inclusive interpretation of environmental well-being opens up the opportunity for applicants to seek damages under the Aquilian action which are patrimonial in nature, for example in compensating a group dependant on an ecosystem service such as a natural food-source which is damaged by negligent conduct, which forces the group to incur financial costs by having to buy food elsewhere.

More radically it could also be used as a basis upon which to motivate for the common law development of the *actio iniuriarum* in cases where there is psychological harm in the shape of harm to environmental well-being, but is one with no attendant financial consequences and the conduct itself is not intentional. Such a case would not be actionable under the Aquilian action because the harm is not patrimonial, but would also not be actionable under the *actio iniuriarum* because it is not intentional. Adopting a broad approach to the meaning of well-being and attaching weight to what may at times be grave mental harms, may warrant the development of the common law on constitutional grounds, to allow for damages in these kinds of cases.

Foreseeably, damages for harms to well-being may in quantitative terms be less than those of harms to health, however they may also present a more viable alternative since harm to health

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229 Midgley and Van der Walt "Delict" in Joubert (ed) *Law of South Africa* Vol 8(1)(2005) at para 143.
230 See Neethling, Potgieter and Visser *Law of Delict 5th ed* (2006) Durban: LexisNexis Butterworths at 14-5. See further Neethling, Potgieter and Visser *Neethling's Law of Personality* (2nd ed) (2005) Lexis Nexis Butterworths: Durban at 90.
231 Neethling et al (Law of Personality- supra) at 9 and 13.
232 *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 43 (SCA) at 444 E-G.
233 See generally Havenga "Liability for Environmental Damage" (1995) 7 *SA Mercantile Law Journal* 187 at 193.

and its proof of causation suffers from challenges that the illness may only manifest latently, and the fact that human health may be influenced by a wide variety of factors which need to be eliminated such as genetic or dietary causes.

Framing the claim as one for harm to well-being does not, however, solve all the challenges that a litigant may face under a delictual action for damages.[234] Notably, harm to well-being may prove to be difficult to quantify in the form of non-patrimonial loss, perhaps even more so than harm to health.[235] But this is not a challenge unique to well-being, and is one generally felt under the *actio iniuriarum* regardless.[236]

The right to environmental well-being may thus have multiple and far-reaching impacts not only upon statutory law, but also on a broad array of common law remedies. To what extent, though, can it be said that environmental well-being is protected under these laws and their remedies? The following two chapters seek to explore this question of degree, by focusing on what are arguably the more subjective areas of well-being, namely aesthetic and cultural well-being. It is to these two aspects that the analysis now turns.

[234] The extent to which this type of liability is imposed will of course be tempered by reasonableness and remoteness considerations, the floodgates argument and the other policy considerations.
[235] Non-patrimonial loss in delictual actions is quantified by way of an equitable estimate. See Neething et al (above note 230) at 199. The line between damages to health and those to well-being is however somewhat blurred since often future medical expenses, loss of future income as a result of harm to health may also be fairly speculative.
[236] See Neething et al (above note 230) at 198.

8. EXTENDING THE RIGHT TO ENVIRONMENTAL WELL-BEING TO INCLUDE AESTHETIC INTERESTS

There is something fairly radical to the statement that an environment which for no other reason than its beauty or aesthetic qualities is a basic and fundamental human right protectable under the Constitution. In the context of other rights such as equality, freedom, dignity, access to water, food, housing and education, arguing that the environmental right includes a right to beautiful or sublime spaces appears to be pushing the Constitution's envelope a little.

But is it really beyond the Constitution's vision to suggest that its protection includes a right to an environment not detrimental to well-being based on aesthetic harms? How do beautiful or aesthetically pleasing or stimulating environments contribute towards the human psyche? How are these areas or objects to be separated out as worthy of legal protection as against those which are not? Most importantly, is the very concept itself even justiciable? These are the questions raised in this chapter which seeks to assert that not only is aesthetic environmental well-being protected both in statute and by the Constitution, but that despite its shortcomings the concept is justiciable and worthy of greater judicial attention.

8.1. The Relationship Between Aesthetics and Well-being.

The link between aesthetics and human well-being law is by no means a novel one. The aesthetic appreciation of nature is both ancient and vast. It is preceded by a long tradition of thought by great thinkers and philosophers from Nietzsche and Kant, through to the beginnings of western civilisation. One of the more famous quotes from Plotines was the statement that "[w]ithout beauty, what would become of being".[237] The aesthetic values of the natural environment were also made prominent by the Romanticists who linked well-being to the inspiration of the sublime and the transcendent from nature.

Sociological and anthropological investigations on this topic are also plentiful, as are biological speculations.[238] Indeed, experimental aesthetics dates from the beginning of psychology as an independent discipline.[239] Some theories evoke naturalist arguments based on survivalist

[237] Plontinus *Enneads* (1981) London: Penguin at 5.8.9.
[238] See generally Carlson "Critical Notice: Aesthetics and Environment**"** (2006) 46 (4) *British Journal of Aesthetics* 416; Averill, Stanat and More "Aesthetics and the environment" (1998) 2(2) *Review of General Psychology* 1089; Berleant *Aesthetics and Environment: Variations on a Theme* (2005) Aldershot: Ashgate; and Carlson "On Aesthetically Appreciating Human Environments" (2001) 4 *Philosophy and Geography* 9.
[239] Averill et al (supra) at 1089.

principles,[240] whilst others approach it from a social identity perspective with a view that beautiful objects and places are the substitute of, or contribute towards, group or social identity and stability.[241] Under this approach, aesthetics is understood to be a social construct and not an ontological given.[242]

The value of aesthetics to human well-being has in recent decades also attracted increasing legal recognition. This is so not only because visual amenity has been a longstanding foundation of policy with social norms attributing greater value to landscapes for their "natural beauty", but also because it has also often been assumed to suggest a healthy performance of underlying systems.[243] As one commentator has noted:

> "the change over the last fifty to sixty years in the attitude of the law toward aesthetics, toward beauty and ugliness as a source of legal rights can be regarded as archetypical of the process of legal adjustments to a change in societal values. Aesthetics can to some extant be regarded as a proxy for or possibly even as an indicator of environmental quality in general."[244]

These ideals have also made their way into environmental soft law through, for example, the *Statute of the IUCN for the Conservation of Nature and Natural Resources* which states:

> " Natural beauty is one of the sources of inspiration of spiritual life, and the necessary framework for the needs of recreation, intensified now by man's increasingly mechanised existence."[245]

In the same spirit the United Nations Educational, Scientific and Cultural Organisation (UNESCO), has issued a recommendation in favour of protecting the aesthetics aspect of natural environment suggesting that:

> "it is necessary to the life of men for whom it represents a powerful physical, moral and spiritual regenerating influence, while at the same time contributing to the artistic and cultural life of peoples, as innumerable and universally known examples"[246]

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[240] Ibid, The authors allude to various theories of aesthetic determination of the environment based on how ecological systems and their appearance contribute towards informing survivalist instincts such as avoidance of harm, foraging, and the most common and ancient of theories which relate aesthetic natural appreciation to sexual attraction.

[241] See the identity theory put forward by Costonis in Costonis *Icons and aliens: Law, aesthetics, and environmental change* (1989)Urbana: University of Illinois Press, and the critique thereof by Smith "Law, Beauty and Human Stability: A Rose is a Rose is a Rose" (1990) 78 *California Law Review* 787. In favour of Costonis's approach, see Coletta "The Case for Aesthetic Nuisance" (1987) 48 *Ohio State Law Journal* 141.

[242] Coletta (supra) at 155.

[243] Selman "What do we Mean by Sustainable Landscape?" (2008) 4 (2) *Sustainability: Science, Practice and Policy* 23 at 26.

[244] Broughton "Aesthetics and Environmental Law: Decisions and Values" (1972) 7 *Land and Water Law* Review 451 at 455.

[245] *Statute of the International Union for the Conservation of nature and Natural Resources* 1948 reprinted in Rusta and Simma (eds) *International Protection of the* Environment (1976) Oceana: New York vol 1.8.

As welcome as these often emotive and aspirational statements may be to environmentalists, the challenge of proving a protectable aesthetic legal interest for lawyers has the potential to be a legal nightmare. Despite recent developments of objective aesthetic determinants such as "visual complexity and fractal dimension" to "ecological functionality" used to measure the correlation between qualities such as line, colour and positive or negative aesthetic responses,[247] it appears that these attempts for the most have still been fraught with subjectivity and subject to criticism.[248]

Moreover it would be misleading to suggest that there is unanimous philosophical support for an objective aesthetic. As Protagoras has suggested: "[b]eauty is relative and subjective", a thought echoed by Hume, Kant, Locke, Santayana alike.[249]

It therefore comes as no surprise that many ordinary and even damaged landscapes give pleasure and security to some people, this particularly so in the urban context.[250] Similarly, when looking at the history of so called "fashionable landscapes", it could even be argued that the Romanticists notion of "wild" nature is also subject to popularity especially where dynamic aesthetic tastes are socially, culturally, spatially and temporally dependent.[251] For example, Selman highlights how various perceptions of what is aesthetically pleasing have changed progressively over the last century with particular reference to the importance and beauty of wetlands.[252] The relative nature of what is aesthetically pleasing in the environmental context is thus perhaps the most controversial aspect of what it environmental well-being may mean.

Despite its relative nature, there is still agreement that aesthetic experiences are nevertheless valuable and important. Their value is described through references to experiences within nature, which are suggested to bring about a sense of peace, satisfaction or inspiration.[253] It may for instance include experiences of quietness, the opportunity to undertake recreational activities or the chance for solitude amongst nature. As the earlier discussion on well-being within the health

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[246] United Nations Educational, Scientific and Cultural Organisation, *Recommendation Concerning the Safeguarding of the Beauty and Character of Landscapes and Sites* available at <http://portal.unesco.org/en/ev.php-URL_ID=13067&URL_DO=DO_TOPIC&URL_SECTION=201.html> (last accessed 10 January 2011).
[247] See Selman (above note 243) at 26.
[248] Gillespie *International Environmental Law, Policy and Ethics* (1997) Oxford University Press at 87.
[249] Ibid at 89.
[250] Ibid.
[251] Strang "Common senses: Water, Sensory Experience and the Generation of Meaning" (2005) 10(1) *Journal of material Culture* 93.
[252] Selman (above note 243) at 26.
[253] See generally Broughton (above note 244).

and social sciences demonstrates, these experiences play an important role in both individual and group identity and in achieving what is perceived of as a valuable or good quality of life.[254]

By focusing on the nature of the experience as opposed to the sense used to achieve it, aesthetic experiences could also be said to be more than just visual. Whilst impossible to define what elements of the experience are necessary to qualify it as an aesthetic one, some obvious suggestions have described it as an experience which evokes pleasure and which are wholly absorbing, and which require an intrinsic motivation.[255] The list of experiences which could be described as aesthetic experiences thus has the potential to be infinite. Acknowledging this, and also accepting that aesthetic experiences may be treated separately from recreational or spiritual experiences within or involving nature, this analysis approaches these varied aspects as one, under the umbrella of aesthetic experiences or value. This is so both for reasons of space and for the fact that the concepts are often interlinked and overlapping since that which is beautiful or sublime may heighten the value of or play a pivotal role within spiritual or recreational activities.

With this interplay in mind, the discussion accordingly addresses the question whether these types of harms or values are legally protectable, as demonstrated in foreign and domestic case law, and to what extent they are or should be afforded Constitutional protection in South Africa.

8.2. The Application of Aesthetic Well-Being within the Courts.

8.2.1. Foreign Case Law

The manner in which courts have approached aesthetic harms have generally been mixed in favour of public interest cases and less so for cases seeking to protect private interests. Particularly in the case of England and the United States (US), it appears that the courts have been more supportive of aesthetic environmental harm where the harm is to the public at large and not solely private property owners.[256] Courts have shown to be uncomfortable administrating subjective standards relating to taste especially if it relates to private property rights. They have also not found a usable negative standard relating to visual incongruity, although they have recognised smell and hearing nuisances.[257] The reasons generally given in this

[254] See section 3.2. above
[255] See generally Averill et al (above note 238).
[256] Smardon "When is the Pig in the Parlour?: The Interface of Legal and Aesthetic Considerations" (1984) 8 *Environmental Review* 146 at 148.
[257] Ibid at 147-8

context are that "aesthetic considerations are fraught with subjectivity. One man's pleasure may be another man's perturbation… Judicial forage into such a nebulous area would be chaotic."[258]

There are, however, a few notable exceptions where courts have been willing to recognise a form of private aesthetic nuisance but these are more the exception than the rule.[259] One such exception can be seen in the Argentinean case of *Sociedad de Fomento Barrio Félix v. Camet y otros.*[260] In this matter it was established that the right to live in a suitable environment and to enjoy an adequate standard of living merits en extensive interpretation, covering as a result the broadest possible number of environmental offences, including, as in this case, the right to enjoy the ocean's view which had been impaired by the construction of a wall.

Outside of private interests related to property, however, courts have shown to be more willing to recognise aesthetic interests that affect the public at large. This has been particularly the case in the US where the debate has been framed in whether a recognisable harm has afforded applicants the requisite standing to sue.

The *locus classicus* regarding standing and which links well-being to environmental aesthetics is the US Supreme Court decision of *Sierra Club v. Morton.* [261] In this matter, the court held the plaintiff's legal interest in recreation, conservation, and aesthetics were sufficient to establish *locus standi.* The case concerned an environmental protection organisation, the Sierra Club, which had sought an interdict against the U.S. Forest Service and the U.S. Department of the Interior to stop their issuance of a development permit to Walt Disney Enterprises, Inc. The permit was to authorise the construction of a $35 million resort in the Mineral King Valley, a national game refuge in the Sierra Nevada Mountains.[262] The Sierra Club had alleged that "the development would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations."[263]

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[258] *Ness v* Albert 665 SW 2d. 1(1983). See also *Metromedia v City of San Diego* 453 US 490 (1980). See further Coletta (above note 241) at 145 and cases sited therein at 145-146.

[259] *Parkersburg Builders Material Co. v. Barrach* 118 W. Va. 608, 191 S.E. 368, 192 S.E. 291 (1937) in which the court felt that an injunction would have been appropriate if the auto wrecking operation in question had been located in a "residential" neighbourhood. It also recognised that "persons may entertain appreciation of the aesthetic and be heard in equity in vindication of their love of the beautiful, without becoming objects of opprobrium. Basically, this is because a thing visually offensive may seriously affect the residents of a community in the reasonable enjoyment of their homes, and may produce a decided reduction in property values" at 612-3. Similarly in *Hay v Stevens* 271 Or. 16, 530 P.2d 37 (1975) the court assumed that an action for nuisance based on visual interference was possible however in that matter it held that the hog-wire mesh fence was not of sufficiently unusual design to amount to a nuisance. See further *Foley v. Harris*, 223 Va. 20, 286 S.E.2d 186 (1982); *Allison v. Smith,* 695 P.2d 791 (Colo. App. 1984).

[260] *Sociedad De Fomento Barrio Félix V. Camet Y Otros. Cámara De Apelaciones Y Garantías En Lo Penal De Mar Del Plata, Sala I.* Ruling of 9.9.1999. LLBA, 2000-991.

[261] *Sierra Club v. Morton*, 405 U.S. 727 (1972).

[262] At 728-9

[263] at 734.

The Supreme Court ruled that the impairment of the natural surroundings and scenery was a sufficient harm to confer standing, and held that this injury was no less significant because of its possible effect on a wide range of people.[264] In its oft quoted dicta, the court held that

> "aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[265]

Although recognising aesthetic harm as a cognisable harm under US law, the court nonetheless ruled that the plaintiffs had failed to prove injury in fact, i.e. they had not shown that their members actually used the area in question and thus did not enjoy standing on this ground.[266]

A short time later, in the matter of *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*),[267] the Supreme Court granted expansive standing to a group of law students who had challenged railroad freight rates arguing that the rates had the ability to undermine the market for recycled materials. The plaintiffs claimed that this rate structure would discourage the use of recyclable materials and thereby cause them recreational, economic and aesthetic injury because of a general harm to the environment, a far less perceptible or direct injury than had been alleged in the *Sierra* case.

On a relatively weak chain of causality, the court found in favour of the applicants and held that their use of "the forests, streams, mountains and other resources ... for camping, hiking, fishing, and sightseeing ... was disturbed by the adverse environmental impact caused by the non-use of recyclable goods brought about by a rate increase on these commodities," which created a causal nexus sufficient to satisfy the requirement of standing.[268] The court also accepted that aesthetic and recreational harms may be widely felt by all persons who "utilized the scenic resources of the country, and indeed all who breathe its air."[269] Despite the challenges that recognising such a wide group of affected parties presented,[270] the court still held that "[t]o deny standing to persons

[264] At 734. However, the Court held that the Sierra Club failed to show any direct injury because it "failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development" (at 735).
[265] Id. at 734.
[266] It held that "The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort. The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development." (footnotes omitted) at 735
[267] *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).
[268] Id. at 685, 688.
[269] Id at 687.
[270] Implicitly the challenge would be the possibility of a flood of litigation brought by the many affected parties.

who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."[271]

Again the aesthetic and recreational injuries resulting from harm to the environment were also sufficient to confer standing on the plaintiff in *Friends of the Earth, Inc. v. Laidlaw Environmental. Services (TOC) Inc.,*[272] where the applicant had lived close to a river allegedly polluted by mercury, and which he used to fish, camp, swim and picnic near. In this matter, the Supreme Court held that the plaintiff he had standing because the "aesthetic and recreational values of the area will be lessened" by the alleged discharges.[273] Although the harms were held to be subjective, they were nonetheless reasonable fears.[274] In a similar vein, the Supreme Court has also held that harm to a public interest group's enjoyment in whale-watching, which was affected by Japanese whaling activities, was sufficient to grant them standing.[275]

While the types of harms recognisable in the US form a good precedent upon which to interpret the right to well-being, the degree of use as determined by the injury in fact rule, is arguably less so. In the US this rule, as demonstrated in *Sierra Club,* suggests that litigants cannot bring actions for relief based on aesthetic harm unless they themselves use that particular environment. Of late, demonstrating actual use of the area has become particularly problematic in challenges to aesthetic harms, either through a lack of specificity as to how, or what exact portion of, the area is used in the pleadings, or a failure to assert that the environment would be utilised in the immediate future.[276] This is not an approach which would accord well to the broad standing requirements in the South African Constitution, which would place obstacles upon litigants who sought to protect environments which they did not use or benefit from often. It would also be unnecessarily restrictive given that access to wilderness areas on a regular basis is not economically or geographically feasible to a majority of South Africans.

Although the lion's share of cases regarding aesthetic environmental harm emanate from the US, there have also been some fairly progressive judgments from developing countries which have recognised this form of harm and its relationship with well-being. The Nigerian case of *SERAC*

[271] Id at 688.
[272] *Friends of the Earth, Inc. v. Laidlaw Environmental. Services (TOC) Inc.*, 528 U.S. 167 (2000) .
[273] Id at 184.
[274] Id at 184.
[275] *Japan Whaling Association v. American Cetacean Society* 478 U.S. 221 (1986).
[276] In *Lujan v National Wildlife Federation* (89-640), 497 U.S. 871 (1990), none of the members of the Federation had pleaded specific use of the portions of the large area they sought to defend Similarly in the second Lujan matter, *Lujan v Defenders of Wildlife,* 504 U.S. 555, 560 (1992) the Court denied standing on the basis that the plaintiffs had no concrete plans to visit the areas abroad where American activities were threatening endangered wildlife species.

v Nigeria,[277] is a noteworthy example and it is one of the few African cases in which environmental aesthetic values were recognised. In this matter, it was alleged that the military government of Nigeria and the state owned oil company, NNPC acting together with Shell, had caused environmental degradation which had affected the health and well-being of the Ogoni people. Holding in favour of the applicants, the African Commission on Human and Peoples' Rights found that the State was in violation of the African Charter's right to a satisfactory environment.[278] In giving meaning to the definition of a "satisfactory environment" the court endorsed the writings of Alexander Kiss stating that he:

> "rightly observes [that] an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health."[279]

Although the many cases cited above will be welcomed for their broad and progressive interpretations of aesthetic well-being, they do not, unfortunately, demonstrate precisely how this aesthetic value is to be proven. Whilst expert opinion may be called for, this in itself is still a highly subjective exercise. This is well illustrated in the case of *Kyrtatos v Greece,* heard in the European Court of Human Rights (ECtHR).[280] In this matter the applicants had owned a house adjacent to a swamp which was later destroyed by urban development. The applicants argued that the failure of the Greek authorities to secure compliance with court rulings which rendered the developments illegal amounted to a breach of Article 8 of the European Convention on Human Rights (the right to private and family life). It was alleged that the developments had resulted in the swamp surrounding their home losing its scenic beauty and no longer being a natural habitat for wildlife.

The ECtHR dismissed the claim holding that Article 8 provides legal redress where there is "a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment." It held that even assuming that it did provide such protection there was no suggestion that the harm to the wildlife in the swamp had affected the applicant's own well-being. Most importantly, the Court continued by stating that "it might have been otherwise if, for instance, the environmental deterioration complained of had consisted *in the destruction of a*

[277] *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria* (2001), Communication No 155/96.
[278] African Charter (above note 69) article 24.
[279] At para 2.
[280] *Kyrtatos v Greece, Application* no. 41666/98, 22 August 2003.

forest area in the vicinity of the applicant's house, a situation which could have affected more directly the applicant's own well-being"[281]

What reasons the court may have had for suggesting that a forest would affect well-being more than a swamp are unclear and arguably a somewhat skewed approach to accepting the relativity of aesthetic value of natural environments. This comes through in the partial dissent where it was observed that there appeared to be "no major difference between the destruction of a forest and the destruction of the extraordinary swampy environment the applicants were able to enjoy near their house."[282]

Although the line drawn by the court in this instance appears to be fairly arbitrary on what constitutes an environment valuable to well-being, it also highlights the difficult choices courts may find themselves forced to make in adjudicating these types of issues. That is not to say that these questions should not be decided upon at all, but rather that in the context of South Africa, courts should be particularly cautious of where this line is drawn. In the case of natural environments courts I would suggests that should accept at face value assertions that these environments are aesthetically valuable, since arguably the line for subjective preference within such environments is lessened. This is so since, even in the rural context, some may find a field of wheat or a vineyard more beautiful than fynbos. In the context of anthropogenic environments, however, the element of subjective preference is arguably greater and in these instances courts may be justified in questioning whether they are worthy of protection on the basis of their contribution to well-being. This difficult issue is addressed in greater detail under the discussion of cultural well-being and heritage resources below.

Building upon this overview, the remainder of the chapter seeks to demonstrate how aesthetic harms have and could still further play a role within the right to environmental well-being specifically within South African law.

8.2.2. Aesthetic Harm in Statute and Administrative Review

The legal protection of aesthetic aspects of the environment is not a novel one to South African statutory law. Indeed within NEMA the very definition of the environment itself includes the

[281] At para 53 (emphasis added).
[282] See the dissent of Judge Zagrebelsky.

"aesthetic and cultural properties and conditions" of the land, water and atmosphere of the earth as well as micro-organisms, plant and animal life which "influence human health and well-being".[283] In addition, various other statutes have placed particular emphasis on aesthetic values, such as the National Forests Act which provides that when making decisions affecting forests under the Act, that forests must be developed and managed so as to "conserve heritage resources and promote aesthetic, cultural and spiritual values".[284]

Even more so, the National Environmental Management: Protected Areas Act,[285] recognises that certain environments are particularly worthy for their aesthetic aspects which are given varying degrees of protection under provisions relating to classes of protected areas.[286] Amongst the different types of protected areas which may be declared, aesthetic aspects play varying roles of relevance and importance, most notably within wilderness areas where they may be declared as such in order to provide "outstanding opportunities for solitude".[287]

Outside of the so called natural environment, the National Heritage Resources Act (the Heritage Act),[288] further provides for places or objects to be considered part of the national estate if it has cultural significance or other special value because of "its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group."[289] It is also trite that the various land use laws pertaining to zoning often use aesthetic criteria or what is referred to as a "sense of place" as one of the grounds upon which to make zoning amendments.

Judicial review in this context has demonstrated courts to be confident in assessing the reasonableness or rationality of an administrative decision based on aesthetic grounds or a sense of place.[290] A notable example is that of *Hentru Developers*[291] where the court held that the

[283] Environment is defined in section 1 to include "the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being".
[284] Section 3(3)(c)(vi).
[285] Act 57 of 2003.
[286] See the provisions relating to the declaration of protected areas, whose purpose *inter alia* is to create an area which contributes to "human, social, cultural and spiritual and economic development" (section 17(k)). Amongst the various types of protected areas which may be declared, aesthetic aspects play varying roles of relevance. For instance, national parks and nature reserves may be declared as such for their spiritual, recreational and tourism value. (Section 20(1)(c) and section 23(2)(e)) Similarly "protected areas" may be declared to protect areas sensitive to development due to their "scenic and landscape value" (section 28(2)(c)(vi)).
[287] Sections 26(2)(c) and 22(2)(b).
[288] Act 25 of 1999.
[289] At section 3(e).
[290] See instance *Corium (Pty) ltd and Others v Myburgh Park Langebaan (Pty) Ltd and Others* [1995] 1 All SA 310 (C) "The evidence deals with the adverse visual effect which the township would have upon the Lagoon and the nature areas around the Lagoon, which conflicts with the purpose of conserving natural beauty specified in the Act… It is our

administrator's decision should be set aside *inter alia* because she had mischaracterised the sense of place of the area and the effect that the proposed development would have on it. In this matter the application for rezoning of land to allow for a security complex had, amongst other things, been denied on the basis that it would affect the sense of place of a predominantly agricultural and rural/rural-residential area.

After a detailed discussion of the arguments and evidence presented on this issue the court disagreed with the administrator's decision on this issue and went so far as to state that:

> "the Department is of the view that the proposed development would significantly negatively impact on the current sense of place of the area, leading to the total transformation of agricultural land/land presently used for grazing into residential area… There is no discussion of the fact that the proposed development would substitute a modern, aesthetically acceptable building for dilapidated buildings on the specific site. Nor is there any appreciation of the fact that the apparently haphazard development of semi-industrial and commercial businesses on the agricultural holdings in the area must have destroyed what rustic atmosphere there might once have existed"[292]

The finding is a fairly bold one and, although the same concerns of relativity and the expertise of courts in this area are still relevant, the matter at least demonstrates a willingness and capability of courts to assess arguments and evidence in adjudicating the question of what is and is not aesthetically satisfactory.

Equally notable in this context is the long disputed matter of *Oudekraal*.[293] In this matter, a developer had sought to develop a farm bordering Table Mountain in Cape Town. The area is valuable, amongst other reasons, for its aesthetic attributes and unique geographic formations[294]. The matter was one concerning administrative review and exceptional delay. An aspect which was influential in the court's decision to condone the delay on the part of the City, was the ecology of the area and its aesthetic attributes. Here the SCA noted that the area offered an "integrity of scenery from mountain crest to sea, not easily found in such lose proximity to major

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conclusion that the exercise by the Administrator of his discretion in issuing this permit is hit by defects reflecting a failure properly to apply his mind to the matter before him."

[291] *Hentru Developers and Contractors CC v Hanekom NO and Another* (35154/2003) [2005] ZAGPHC 322 (21 September 2005) (unreported). The applicant had sought to develop a security village on agricultural land surrounded by rural residential holdings and open spaces and applied for the area to be rezoned from "agricultural" to "residential and general". They were unsuccessful in their attempts to do so and the concomitant approval needed to rezone the property from the Provincial Department was refused.

[292] At 92-3.

[293] See *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2004 (6) SA 222 (SCA) (*Oudekraal 1)* and *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2010 (1) SA 333 (SCA) (*Oudekraal* 2).

[294] At para 7 of *Oudekraal 2* (supra).

metropolitan areas elsewhere in the world. Its aesthetic value heightens its value for tourism."[295] Amongst other reasons these considerations contributed towards the Court's finding that the city's belated court application to set aside the unlawful decision to approve the development should be upheld.

Outside of land-use decisions and zoning, aesthetic aspects of the built or developed environment have also featured prominently in disputes under the Building Standards Act (BSA).[296] Most cases on this issue have turned on the interpretation of section 7 of and the question of derogation of value of a property where a beautiful view has been obstructed.[297] Of relevance in this debate is whether in determining value under the BSA, aesthetic and other values derived from a view were legally protected. The Courts have consistently found that value in this context concerns only market value,[298] but to a degree market value will take into account the degree of unattractiveness or intrusiveness of the new development.[299]

8.2.3. Aesthetic Nuisance, Well-Being and the Common Law

Whilst these cases concerning new developments and derogation of value are relevant to the extent that they speak to the question of actionable harm and the degree to which aesthetics is relevant in the urban setting, they cast their reasoning strictly within the net of financial value as the form of harm. In doing so, however, some courts have simultaneously addressed the common law remedies, in the form of interim interdicts and whether the harm in casu amounted

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[295] At para 71.

[296] Act 103 of 1977. Section 7(1)(b)(ii)(aa) provides that ""If a local authority…is satisfied that the building to which the application in question relates-

> (aa) is to be erected in such a manner or will be of such a nature or appearance that -
> (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;
> (bbb) it will probably or in fact be unsightly or objectionable;
> (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties…..such local authority shall refuse to grant its approval in respect thereof…"

[297] The question on this issue has mostly concerned whether the Building Control officer enjoyed a discretion to approve a building plan when it was demonstrated that the new development would in fact derogate the value of the adjoining property because of an obstructed view. See generally *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC), and *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) and *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* (CCT 18/10) [2010] ZACC 19 (4 November 2010) (as yet unreported).

[298] See *Paola v Jeeva* 2004 (1) SA 396 (SCA) at para 23 (obiter) and *Camps Bay* (supra) at 38.

[299] See *Camps Bay* (above note 297) at para 40 where it was held that "Derogation from market value … only commences: (a) when the negative influence of the new building on the subject property contravenes the restrictions imposed by law; or (b) because the new building, though in accordance with legally imposed restrictions, is, for example, so unattractive or intrusive that it exceeds the legitimate expectations of the parties to the hypothetical sale."

to an actionable nuisance, in other words, the concept of an aesthetic nuisance. On this question the courts have been less willing to adjudicate aesthetic issues.

The case of *Clark v Faraday*[300] suggests that where the development is lawful under the BSA, even where it obstructs the view of adjoining properties and in instances where a nuisance action is brought on this ground, it would not be actionable since to do so was a normal and natural use of the developer's property.[301] This is in line with the general reluctance of South African courts to recognise visual disturbance as an aspect of personal harm. The traditional textbook writings and English law have served as a basis for this position holding that "[a]s a general rule…that which is merely unsightly or which is visually un-aesthetic will not *per se* provide a cause of action in nuisance. Likewise, that which obstructs a pleasant view…cannot be a nuisance".[302]

This approach has been confirmed in the case of *Dorland v Smits,*[303] where it was held that purely aesthetic considerations are irrelevant to the law of nuisance,[304] despite the court accepting in that matter that there had been a loss in aesthetic quality.[305] The reasoning for this was because the test for an actionable nuisance is objective and, as the court observed: "[t]he trouble with aesthetics, visual or other is that they are notoriously subjective and personal."[306] Echoing an understandable judicial concern with the concept of an aesthetic nuisance, the court held that:

> "[it would be] difficult enough to get any group of persons with similar backgrounds and qualifications to agree on what constitutes a worthwhile work of modern art. Extend this exponentially to the general population, and the ambit of diverse tastes, of likes and dislikes, becomes almost infinite. I consider this to be an area into which as a matter of judicial policy the courts should not venture…Otherwise, one person's tastes could form the basis for depriving another person of the right to use his or her property, and nuisance law would be transformed into a license to the courts to set neighbourhood aesthetic standards. I conclude, therefore, that purely aesthetic considerations are irrelevant in the common law relating to nuisance and neighbours."[307]

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[300] 2004 (4) SA 564.
[301] At p 577.
[302] Milton (revised by Pugsley) "Nuisance" in W A Joubert (ed) *The Law of South Africa* (1997) 144, citing the English cases of *McVittie v Bolton Corporation* [1945] 1 KB 281 and *Dalton v Angus* (1881) 6 AC 740).
[303] 2002 (5) SA 374 (C). See also *Paola v Jeeva* (above note 298), where in deciding whether the value had of the applicant's property had been depreciated becasue of the obstruction of his view, the Court chose to rely on the ordinary interpretation of the word 'value' and held that only econmic and not aesthetic value was protected. Although the case does not strictly rule out the potential for aesthetic value to be recognised outside of the statutory context, it does suggest a preference against doing so.
[304] at 383 F-G. See also Summers (above note 211) at 8.
[305] At page 19 of [2002] JOL 9624 (C) where it was held that "[i]t is so that some of the wiring is or will be masked by foliage. Nonetheless I think it should be accepted that, particularly in the area of the Columbia block wall, having regard to the special architectural design and to the carefully cultivated garden, there has been a marked loss in aesthetic quality. At this personal level the respondent is the loser."
[306] At 383 F-G. See also See *Eagles Landing Body Corporate v Molewa* 2003 1 SA 412 (T) 445 where the court was reluctant to find in favour of a group seeking to protect their view.
[307] At p 16-17.

The case of *Waterhouse Properties (CC) and others v Hyperception Properties 527 CC and Others*,[308] although ultimately deciding the matter based on financial considerations, hints however at a willingness to recognise aesthetic nuisances to property owners as an independent actionable harm. In this case the applicant's view had been impaired by the respondent's erection of a shelter over an existing waterfront jetty on the Vaal River and they sought a final interdict for its removal. Although the applicants had not explicitly contended that their right to a view had been impaired, they did allege that the shelter unreasonably interfered with their ordinary use, comfort, convenience and enjoyment of their own property. Accepting this distinction, Rampai J agreed that when determining whether the applicants' had a "right" which was interfered with, nuisance based on aesthetic grounds can be distinguished from nuisance based on visual grounds which upset the use, enjoyment and purposes for which the property was purchased, developed and improved. The latter was thus sufficient to accrue a right to the applicants.

On this issue, Rampai J noted that it was not a question of whether the offending thatch was just an "eyesore" but whether "the structure erected over the jetty on the neighbouring property has a material and negative influence on the intended use, enjoyment and purpose for which the neighbouring property was purchased, developed and improved."[309] When deciding whether there had been a material and negative influence the court therefore held it was "imperative… to consider not only the nature of the neighbouring property, but also the nature of their geographical setting as well as the particular society which inhabits such a particular locality."[310] In making this assessment he noted that "[t]he area… is a truly rich man's playground. It has to be seen for what it is."[311]

It was held that, although there exists some similarity between a harm which is a mere "eyesore" such as an ugly electric fence, and harm which has a material and negative influence on the intended use, enjoyment and purpose for which the neighbouring property was purchased, developed and improved, the two harms were fundamentally different.[312] They were similar in that "in each case the complaint entails a sense of sight", nonetheless "the mere fact that the sense of sight or vision is also involved… does not without more render it a purely aesthetic

[308] (2004) Case Number: 4245/2004 Orange Free State Provincial Division (unreported).
[309] At para 33.
[310] At para 22.
[311] At para 24.
[312] At para 33.

issue which in our law is not accorded the status of a right."[313] In this matter, the view was an asset with a "unquestionable proprietary significance" which amounted to an actionable nuisance.[314] The distinction is in the degree of harm, small amounts of unsightliness are not nuisances but where a visual eyesore is sufficient to have financial implications, it amounts to a nuisance similar to that of smoke or offensive odours.[315]

Having made much of the psychological well-being of the applicant, in casu, his feelings of living in the area and specific property,[316] that the area was one which was a sanctuary of tranquillity and natural beauty[317]and that the "the visual impact of water be that of a dam, a lake, a river or an ocean, is arguably one of the best known relaxing and enjoyable experiences of human existence"[318] it appears somewhat artificial to then make a distinction on what is an actionable visual harm based on the degree of financial value. Instead the reasoning should be accepted for what it is, a nuisance not only because it may have financial impacts but because the aesthetic effect disrupts the comfort and well-being of the occupants. This is ultimately what nuisance is, harm to psychological well-being which amounts to an "inconvenience materially interfering with the ordinary comfort, physically, of human existence."[319] Although it has a proprietary aspect to it, in that it relates to the ordinary enjoyment of property in a neighbour law context, whether it amounts to a nuisance or not should depend on its impact upon the person, not only on their pocket.

The reasoning also lends to the conclusion that, in cases of neighbour law and interdicts for nuisance, aesthetic harms may only arise where there are substantial financial implications. This is so since the only real difference between an ugly security fence which was a mere "eyesore", as was the case in *Dorland v Smits,* as opposed to a very small thatched roof on a jetty structure in *Waterhouse Properties*, was the degree of financial damage the structures supposedly caused. It thus has the effect of allowing only those who are affluent the right to claim a visual nuisance based on impairment of the ordinary use and enjoyment of their property.

The decision also presents a significant stumbling block in cases of public nuisance, where there may be no financial implications to the nuisance but where the harm impedes the public's enjoyment of the environment by, for example, permanently obscuring or destroying the use of a

[313] At para 33.
[314] At para 34.
[315] At para34.
[316] At para 26.
[317] At para 28.
[318] At para 30
[319] See *Holland v Scott* (1882) EDC 307, 332.

particular area which is enjoyed by the public but where there are no attendant financial implications. Similarly, it is understandable that courts have expressed a concern of relativity and subjectivity in the case of aesthetic nuisances. However, these concerns are undermined where courts prove willing to adjudicate upon derogation of financial value based on aesthetic grounds which in essence involve the same considerations and evidence, but apparently baulk at doing so as a form of harm to aesthetic appreciation within that environment. Accepting that aesthetic aspects of the environment are constitutive of well-being and that they are an integral and important aspect of enjoyment, appreciation or experience of the environment, I would instead suggest that both public and private nuisance actions should recognise this type of harm as an actionable one.

8.2.4. Are All Aesthetic Harms Constitutionally Protected?

The extent to which aesthetic nuisances should be recognised as constitutionally protected actionable harms is one which should, of course, be decided upon based upon a matter of degree, since trivial harms will naturally not be protected by the right. This calls into question the degree of impairment which triggers the protection of the right. On one end there are arguably less substantial infringements where, for example a view from a property is obscured. On the other end of the spectrum exists more extreme impairments such as where an environment itself is degraded or destroyed so that aesthetic appreciation of it may not take place at all.

In the case of the former, Linde and Basson are of the view that the courts should approach obstructions to views from private properties as a form of harm to environmental well-being.[320] In their view, the reduction in the value of the property as a result of the impairment of the property would "fall part of the field of protection of the applicant's right to an environment that is not detrimental to his well-being."[321]

In my view the degree of harm which warrants constitutional protection should rather be one based on the degree of *access* to that environment.[322] On this approach, I would suggest that the obstruction of a view in itself does not substantially impair the aesthetic enjoyment or benefit of that environment since whatever was the subject of that view may still be accessed through other means. In the case of private property, a development which obstructs the view of an adjoining

[320] Linde and Basson (above note 115) at 16.
[321] Ibid.
[322] The use of the term "access" is in part inspired from the phrasing of the socio-economic rights which provide for the right of "access" to water and shelter and the like. The right of "access" is an important internal qualifier in limiting the scope of these rights albeit in a different manner than advanced above.

landowner does not necessarily take away access to that environment entirely but merely hampers its enjoyment in a fashion most convenient to the land-owner, from the comfort of his/her own property. Although arguing for a broad approach to the interpretation of the right to well-being, I would suggest that visual appreciation of an environment merely through the obstruction of a view would go beyond the constitutional objective of the right to environmental well-being, simply because it does not appear to accord with the purpose or object of the environmental right and would be so far reaching that the environmental right would be implicated in every instance where a development affects a view. Although important to interpret the right broadly, this should not be done in a manner which renders the right entirely meaningless.

On the other hand, in instances where the subject of the view is entirely destroyed or significantly damaged, there is a more defensible case to be made that the aesthetic harm occasioned by the destruction or degradation is protected by the right to well-being since access to the aesthetic benefits of the area is entirely denied. This does not leave those whose views have been obstructed without recourse to the Constitution, and it may well be that the Constitutional right to just administrative action and the reasonableness of the decision (regarding derogation of value and the BSA) is more apposite in these circumstances.[323]

The relevance of the preceding cases was thus not to argue in favour of a right to a view affording constitutional protection under the environmental right, but rather to highlight the need for aesthetic public or private nuisances to be accepted as a general concept. Accepting the principle that aesthetic harms are actionable and in certain instances protected by the right to environmental well-being allows for this right to play a more meaningful role within both South African statutory and common law.

8.3. The Future of Aesthetic Well-Being in South African Law

Whilst there are some fairly daunting challenges to adjudicating matters concerning aesthetic harms, these types of harms are undeniably an aspect of the right to well-being and as such the Constitution calls on courts to make hard choices when the issue presents itself. This may be relatively easier in matters of administrative review where courts may have the additional benefit of expert opinion prepared well in advance and the insight of administrators with which to work from. Where courts are the first arbiters of these choices such as matter concerning locus standi

[323] See Section 33 of the Constitution.

and common law remedies, they may stand at a relative disadvantage because these are often brought on an urgent basis and without prior administrative consideration.

This is not however to say that courts are powerless or incapable in such cases. Indeed, as some of the domestic administrative review cases as well as foreign case-law suggest, courts have proven ambitiously willing to not only accept the important link between aesthetics and human well-being, but have demonstrated an aptitude to do so. At times some awkward lines have been drawn as to what is and is not legally protectable on aesthetic grounds. That these lines are contentious and perhaps unsupportable is an inevitable consequence of litigating this type of harm, but the same can equally be said of many other instances of broadly framed rights adjudication.

The emphasis of this chapter is rather that such harms, despite their shortcomings, are in fact already recognised within certain areas of the law and that the constitutional right to environmental well-being requires that they be recognised to a greater degree in areas of law from which they have been precluded, most especially the common law remedies and nuisance law. The manner in which well-being is constitutionally protected may, however, be tempered by the degree of harm inflicted and most importantly, the degree to which the access to the aesthetic benefit of the environment is precluded. With this in mind, the analysis now turns to another equally contentious aspect of environmental well-being, namely its cultural and social aspects.

9. ENVIRONMENTAL WELL-BEING AND CULTURAL AND GROUP WELFARE.

9.1. The Relationship between the Environment and Social and Cultural Groupings

If well-being could be used to describe interests and values as broad as environmental aesthetic values, it could be equally applicable to the value of a cultural affinity to the environment, or for its social value. This place-centred interpretation recognises the relationship between cultures and social groupings and their environments as being a source of well-being. The approach is also one which is in line with the general trend in health sciences to move away from western notions of individual health and psychological development towards cultural sensitivity to social-geographic relationships which affect well-being.[324]

Traditionally, a clear western hegemony has prevailed which views well-being as something measured along the plane of the individual as based on interpretations of personal satisfaction or quality of life, personal efficacy or agency.[325] Essentially these approaches have been premised on the conception of the ideal self as autonomous and independent.[326] Developments in social epidemiological studies, ethnography and health geographic studies, however, have highlighted the need for a cultural and social dimensions when assessing well-being.[327]

This is reflected in the Millennium Ecosystem Assessment which observes that for many people socio-cultural identity is in part constituted from their surrounding environments in which they live and on which they depend.[328] These environments not only help determine how they live, but also who they are,[329] something akin to a form of cultural ecosystem service.[330] These types of services highlight that for many communities, ecosystems are closely associated with deeply held historical, national, ethical, religious and spiritual values imbued for example in a particular forest, mountain or watershed which hosts sites of important past events, shrines or places which facilitate moments of moral transformation or the embodiment of national ideals.[331]

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[324] Panelli and Tipa (above note 1) at 445.
[325] Ibid at 446.
[326] Ibid at 446 who cites Ingersoll-Dayton, Saengtienchai, Kespichayawattana and Aungsuroch "Measuring psychological well-being: insights from Thai elders" (2004) 44 *Gerontologist* 596.
[327] Ibid.
[328] Millennium Ecosystem Assessment (above note 42) chapter 6 at 128.
[329] Ibid.
[330] Ibid.
[331] Ibid at 140.

These relationships or associations have been documented by a multitude of studies of well-being such as those of the Matsigenka in Peru.[332] This study makes specific reference to the qualities of importance necessary for well-being such as "productivity, goodness, and maintaining harmony with [the] social, physical and spiritual environment".[333] Equally, studies on Australian cultures have highlighted the culturally specific notion of well-being and environment expressed through "knowing more about one's heritage, the sacred sites within the tribal area, and where you fit in the world… [which facilitates] a connection with people and environment, strengthens identity and spirituality …[and ultimately] wellbeing."[334]

9.2. Cultural and Social Environmental Well-Being as a Legal Right

The growth in recognition of cultural and social environmental well-being has encouragingly filtered into the court-room decisions as well as the global agenda.[335] This is reflected in the increasing prominence of international statements recognising such rights in the last few decades such as the UN declaration on the Rights of Indigenous Peoples of 2007.[336] The relationship between indigenous cultures and their environments is also well illustrated in the preamble of the draft *Inter American Declaration on Human Rights* which provides that:

> "in many indigenous cultures, traditional collective systems for control and use of land and territory, including bodies of water and coastal areas, are a necessary condition for their survival, social organization, development and their individual and collective well-being, and that the form of such control and ownership is varied and distinctive and does not necessarily coincide with the systems protected by the domestic laws of the States in which they live."[337]

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[332] Izquierdo "When 'Health' is not Enough: Societal, Individual and Biomedical Assessments of Well-Being Among the Matsigenka of the Peruvian Amazon" (2005) 61 *Social Science and Medicine* 767.

[333] Ibid at 776. He also demonstrates that these values could be diminished even in the face of so called "improvements in bio-medical health status"

[334] McLennan "Australian indigenous health: reconnecting spirituality and well-being" (2003) Paper presented at the National Conference of The Australian Society of Rehabilitation Counsellors, Sydney, 16–17 October 2003.

[335] See for example article 8(j) of the Convention on Biological Diversity (above note 44) and the commentary thereon by the Ad Hoc Working Group (available at <http://www.cbd.int/traditional/outcomes.shtml last accessed> 7 February 2011). See also the IUCN Draft Covenant on Environment and Development (above note 93) article 15 and commentary thereon at 65. This work has been furthered by the IUCN through the work of the Theme / Strategic Direction on Governance, Communities, Equity, and Livelihood Rights in Relation to Protected Areas (TILCEPA). This group has played particular attention to the participation, rights, values, livelihoods and contributions of indigenous peoples and local communities living in or affected by Protected Areas (for more information see: <http://www.iucn.org/about/union/commissions/ceesp/wg/tilcepa/> accessed 7 February 2011)

[336] UN Declaration of the Rights of Indigenous Peoples 2007 A/RES/61/295**.** In the preamble it provides that "…control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs… respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment". See also article 29.1

[337] See the Preamble of the Proposed American Declaration of Indigenous Rights Inter-Am. C.H.R., EA/Ser.L/V/II.95 (1997) (IADIR). It also states that "[i]ndigenous peoples have the right to a safe and healthy

Within foreign and international courts, this relationship has also achieved widespread recognition. In the matter of *Yanomami v. Brazil*,[338] one of the most frequently cited precedents regarding cultural environmental rights and well-being, the decision of the Brazilian government to construct a highway through the territory of Yanomani people, as well as other acts such as its authorization to exploit mineral resources of the Indian territories, and the facilitation of their displacement was found to have violated, amongst other rights, their right to health and well-being.[339] In this matter the Inter-American Commission on Human Rights found that the violation was on account of their displacement and harm to their lives, security and cultural integrity.[340]

The European Commission of Human Rights has made an analogous finding in *G and E v Norway*,[341] a case concerning the right to well-being of the Sámi People of Norway. In this matter the Norwegian government was held to have violated Article 8 of the European Convention of Human Rights (ECHR- the right to private and family life),[342] when it had erected a hydro-electric plant and had, as a result, submerged of an area of the valley in which they lived. In upholding the Sami people's claim, the court noted that policies which alter the environment in which a cultural grouping's way of life was integrated, amount to an interference with the private life of that community and accordingly the government was held to have infringed their rights.[343] Although the court did not make reference to the notion of 'well-being' specifically, the case does serve as a useful precedent for judicial recognition of the importance of the relationship between cultural groupings and their environments.

The willingness of courts to recognise cultural aspects to environmental well-being has also been demonstrated in several cases emanating from developing countries. In *Organización Indígena de Antioquia v Codechoco and Madarién*,[344] the Columbian Supreme Court held that logging within the territory of the indigenous population had violated their rights because "the devastation of

environment, which is an essential condition for the enjoyment of the right to life and collective well-being"(Article XIII.1). The draft has yet to be finalised and this provision in particular has proved to be highly controversial- see Shelton "Environmental Rights and Brazil's Obligations" (2009) 40 *The George Washington International Law Review* 733 at 741-2.

338 *Yanomami v. Brazil, Case 7615* (Brazil) Inter-Am CHR 1984, 1985 Annual Report 24, OEA/Se.L/V/II/II.66, doc 10, rev1 (1985), 1985 Inter-Am YB on HR 264.

339 See article XI of the American Declaration of the Rights and Duties of Man O.A.S. Res. XXX.

340 At para 8(ix).

341 *G and E v Norway* App Nos 9278/81 and 9415/81 35 DR (1984) 30.

342 Rome, 4.XI.1950. Article 8(1) states: "[e]veryone has the right to respect for his private and family life, his home and his correspondence." European Convention on Human Rights, Rome, 4 November 1950.

343 *G and E v Norway* (above note 341) at 35–36.

344 *Organización Indígena de Antioquia v Codechoco and Madarién* Decision of the Third Agrarian Court of the District of Antioquia, Colombia (24 February 1993).

forests alters their relation with the environment" and endangers their "cultural and ethnic integrity."[345] In a similar fashion, Chilean courts have held in favour of protection of a particular tree species holding that "[the] species is intimately linked to the values and principles which constitute the historical, social and cultural heritage of the Mapuche people".[346]

Building on this broader notion of well-being, it is arguable that in line with the protection of indigenous cultures, the notion of well-being could also be extended to include protection of other social groupings such as the relationship between family life and the surrounding environment. In this respect, a comparison can be made with European cases protecting privacy and family life and the well-being of family groups under article 8 of the ECHR (the right to privacy and family life). The most famous example of such a relationship is the oft cited case of *Lopez Ostra v. Spain*.[347] In this matter, the ECtHR ruled that plant fumes causing a nuisance to Mrs Lopez-Ostra and her daughter which compelled them to vacate their home, amounted to an infringement of their private and family life, and accordingly an infringement of their "well-being". In its ruling the Court held that:

> "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."[348]

If this line of thought were to be stretched even further, it could even be argued that the right to environmental well-being extends to the protection of relationships even outside the family or cultural grouping to man's social relations generally. This is in line with the broad conception of psycho-social well-being discussed earlier in the context of the health and social sciences.[349] Such an interpretation can, for example, be found in the Columbian case of *Fundepúblico v. Mayor of Bugalagrande and Others,* where it was held that "'well-being' not only protects biological and individual survival [but extends towards man's] normal participation and integral development in society."[350] This is an approach which thus extends the notion of well-being to include almost every aspect of the life and habits of man. As a legal right, much thus hangs on the proper

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345 Quotation cited from an extract of the case translated by Fabra and Arnul "Review of jurisprudence on human rights and the environment in Latin America" Background Paper No. 6 presented at the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002, Geneva, available online at <http://www2.ohchr.org/english/issues/environment/environ/bp6.htm> (last accessed 11 January 2011).

346 *Mario Arnaldo García Sabugal v. Ministro de Agricultura*. 30.5.1990, at 2736.

347 *Lopez Ostra v. Spain*, Eur. Ct. Hum. Rts [1994] Ser. A, No. 303C.

348 At para 51

349 See section 3.1 above.

350 *Fundepúblico v. Mayor of Bugalagrande and Others,* Juzgado Primero Superior, Interlocutorio # 032. Tuluá. 19.12.1991. (Columbia Supreme Court).

interpretation of "environment" to ensure that the right is not applied to such a broad degree that it is rendered meaningless.

9.3. Conceptual Challenges to Cultural and Social Environmental Well-being

Over and above the need to ensure the right is not applied in an overly broad fashion, there are several additional potential difficulties to asserting a right to cultural (or social) environmental well-being. The primary difficulty is that in certain instances it could possibly even be detrimental to the environment itself or to the environmental well-being of other parts of the population. On this point, Giseppe has argued that it is entirely conceivable that just as cultural considerations can be used to protect the environment, they can also be used to justify its exploitation.[351] In this respect he lists animals such as the rhinoceros, American black bears and other species which "have been taken to endangered status in the name of culture."[352]

The cultural intersection with an environment conducive to well-being also stands at odds with the elements of an environmental right geared to protect the environment. At this junction, part of the right arguably allows for cultural communities to have a preferent right to be able to exploit aspects of the environment which form part of, or are related to, their cultural practices. On the other hand, it is entirely in keeping with a conservation ethic in that it presupposes protection of those very resources by the state at a sustainable level so that cultures may continue to do so.

Equally the line as to what and what is not culturally significant within an environment and even as to what a defined culture is, is not without controversy. What one person may describe as a cultural attachment necessary for the well-being of their community may not be uniformly recognised by those outside or even within it. Its boarders are notoriously porous and contestable. Challenges in attempts to define cultures in a fixed objective fashion are well illustrated in the dictum of the Constitutional Court in *MEC for Education: Kwazulu-Natal and Others v Pillay*,[353] a case concerning the constitutional rights to culture.[354] In this matter it was observed that:

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[351] Gillespie (above note 248) at 97.
[352] Ibid.
[353] *MEC for Education: Kwazulu-Natal and Others v Pillay* (above note 141).
[354] Section 30 of the Constitution provides that "everyone has the right to use the language and to participate in the cultural life of their choice, but no-one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights." Section 31 provides "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society…"

> "…while cultures are associative, they are not monolithic. The practices and beliefs that make up an individual's cultural identity will differ from person to person within a culture… While people find their cultural identity in different places, the importance of that identity to their being in the world remains the same. There is a danger of falling into an antiquated mode of understanding culture as a single unified entity that can be studied and defined from outside. As Martin Chanock warns us: 'The idea of culture derived from anthropology, a discipline which studied the encapsulated exotic, is no longer appropriate. There are no longer (if there ever were) single cultures in any country, polity or legal system, but many. Cultures are complex conversations within any social formation. These conversations have many voices.' Cultures are living and contested formations. The protection of the Constitution extends to all those for whom culture gives meaning, not only to those who happen to speak with the most powerful voice in the present cultural conversation."[355]

The boundaries of what and what is not an identifiable culture are especially challenged within urban landscapes and communities, most notably in larger urban areas where ways of life are seen to be more porous and subject to social change. How these groupings identify themselves and construe this identity through their environmental surroundings in a manner that influences their well-being is no easily definable task. Accepting that urban environments, like natural environments are equally constitutive of identity[356] and are in some respects reflective of a particular culture, where this conceptual boundary of what a culture is and to what extent it deserves constitutional protection is particularly challenging. This issue takes on a particular relevance within South Africa where there are exists a multitude of cultures, many of which suffered forms of oppression under apartheid.

In the light of these challenges, the analysis accordingly turns to how these forms of group relationships to the environment are recognised within South African law and how the right to environmental well-being may serve in part to transcend the divide between what is and is not culturally protected.

9.4. Cultural and Social Well-Being in South African Law.

That natural or man-made environments are constitutive, symbolic or influential aspects of certain cultures and social groups is already well-recognised within South African law.[357] This relationship has, for example, attained special significance within the matter of *Oudekraal,*

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[355] At para 54 (footnotes omitted). It was further held that "The inclusion of culture in section 30 and section 31 makes it clear that by and large culture as conceived in our Constitution, involves associative practices and not individual beliefs…individuals draw meaning and their sense of cultural identity from a group with whom they share cultural identity and with whom they associate" (at para 44)

[356] Further Coletta (above note 241) and Costonis (above note 241).

[357] See generally the National Heritage Resources Act (above note 288); in particular the preamble. In support of the importance of national heritage sites which are supportive of this cultural or social relationship to the environment, see section 39(3)(b)(iii) of the Mineral and Petroleum Resources Development Act 28 of 2002; section 2(4)(a)(iii) of NEMA; section 40(1)(a) of the National Environmental Management: Biodiversity Act 10 of 2004 and sections 13; 46-7; 50 of the National Environmental Management:: Protected Areas Act (above note 285).

referred to earlier in the chapter on aesthetic well-being.[358] In this matter, the Supreme Court of Appeal recognised that the land in issue was important not only for aesthetic reasons but also because the area in question and the mountainside as a whole was regarded as sacred and a proper place for spiritual reflection and meditation.[359] This was particularly so for the Muslim community of Cape Town, most notably because of the presence of kramats of prominent leaders in the area. It was held that these considerations were important and that:

> "there can be no doubt… that the presence on the land of religious and cultural sites of particular significance to a sector of the Cape Town community was a factor that should properly have been taken into account and evaluated… in coming to the decision whether to permit the establishment of a township [in the area]."[360]

For this reason alone the decision to approve the township was held to be invalid.

The relationship between cultural or social groups and the environment as constitutive of group identity has also attained statutory recognition. The National Heritage Resources Act (Heritage Act),[361] aptly illustrates this by providing for the protection of the nation's heritage resources, through the recognition that:

> "heritage is unique and precious and it cannot be renewed. It helps us to define our cultural identity and therefore lies at the heart of our spiritual well-being and has the power to build our nation. It has the potential to affirm our diverse cultures, and in so doing shape our national character."[362]

The national heritage resources as managed under the Act, are those which have cultural significance or other special value for the present community and for future generations and are managed under a series of protective measures and procedural requirements under the Act.[363] The objects and places protected under the Act may include a site or area, buildings and open spaces such as streets and parks as well as movable objects of cultural significance which cover a vast array of both natural and man-made environments.[364] Cultural significance is defined as including places or objects which have "aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance." [365] This definition is also widely and

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[358] See section 6.2.1. above.
[359] At para 25 of *Oudekraal 2* (above note 293).
[360] At para 24 of *Oudekraal 1* (above note 293)
[361] Above note 288.
[362] Preamble.
[363] See in particular sections 27-47.
[364] See the definition of "place" and "object" and "heritage resource" in section1 and section 3(2) which expands on this definition.
[365] Section 3 (3) provides that:

> "Without limiting the generality of subsections (1) and (2), a place or object is to be considered part of the national estate if it has cultural significance or other special value because of

seemingly limitlessly expanded upon to include objects and places of almost any form of significance to a community, cultural group or South Africa as a whole.[366]

The challenges presented by the somewhat all-embracing ambit of the Act, the definition of culture, and the relationship between communities and man-made environments are well illustrated in case of *Raubenheimer NO v Trustees Johannes Bredenkamp Trust.*[367] In this matter the court was called upon to decide an applicant enjoyed locus standi to bring an urgent interdict to halt the demolition of a property in Bloubergstrand, a suburb in Cape Town.

The applicant had acted in his dual capacity as a resident as well as in his capacity of chairperson of the local residents' association, and had pursued the interdict pending an appeal he'd proposed launching against the Provincial Heritage Resource Authority's decision to issue a permit for the property's demolishment.[368] The house in question required a permit for its demolition under the Heritage Act because it was older than 60 years.[369] The applicant had put forward disputed facts alleging that it dated to before 1863, where it had been built by resident fishermen. It was also believed to have featured in the story of Wolraad Woltemade who had had attained somewhat heroic and legendary status. Most notoriously it had also been the previous residence of Mollie Lochner, a famous children's story writer and it was believed her ashes were scattered on the property.

(a) its importance in the community, or pattern of South Africa's history;
(b) its possession of uncommon, rare or endangered aspects of South Africa's natural or cultural heritage;
(c) its potential to yield information that will contribute to an understanding of South Africa's natural or cultural heritage;
(d) its importance in demonstrating the principal characteristics of a particular class of South Africa's natural or cultural places or objects;
(e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;
(f) its importance in demonstrating a high degree of creative or technical achievement at a particular period;
(g) its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;
(h) its strong or special association with the life or work of a person, group or organisation of importance in the history of South Africa; and
(i) sites of significance relating to the history of slavery in South Africa."

366 See section 1.
367 2006 1 SA 124 CP.
368 The applicant had only become aware of the authorisation to demolish 8 months after it was granted. Pending the lodgement of his appeal, he had sought to interdict the intended demolition having learnt the provincial authority was not prepared to suspend the permit pending the appeal.
369 Section 34 of the Act.

The applicant asserted that the area was a local landmark and tourist attraction and was of great importance to the community. He further argued that he and many other residents in the area had developed an emotional attachment to the house over a long period of time. A petition had also been signed by a number of local residents and visitors, calling upon the authorities to stay the demolition. Over the last few decades, however, the house had undergone substantial renovations and it was disputed whether the "essence" of it still remained.

In opposing the application, the second respondent challenged the applicant's locus standi, alleging that his interest was not bona fide and that he was not affected by the granting of the permit. The applicant, however, had argued that he had a direct interest in the move to prevent the demolition of the structure in that it formed "part of his social and cultural life" and that he received "emotional and psychological satisfaction" from it as protected by the common law.[370] He further argued that section 38 of the Constitution provided him standing in order to do so.[371]

In deciding upon the applicant's locus standi, the court, held that reference to the regulations[372] of the Heritage Act were pertinent, namely parties who were bona fide in their interest and who were affected by the decision could appeal it.[373] The Court held that the applicant did not have a bona fide interest in the matter because his interest was based on a purely sentimental, and emotional attachment to the house and that his attempt to represent it as a historical beacon forming part of the Western Cape's cultural heritage was, for the most part "based on vague, romantic and incorrect or exaggerated statements accepted at their face value without being properly or accurately researched."[374]

The provisions which the applicant had relied upon in the Constitution did not include the environmental right but rather the right to culture and equality. The court held that that these provisions "did not support his submission and were irrelevant in the context.[375] At best he had an indirect interest which would not vest him with the necessary *locus standi*.

Whilst the Court's opinion on the merits of the applicants claim may have some merit, the decision regarding his locus standi is unfortunate. Although the applicant's right to culture in the

[370] At para 28.
[371] At para 29.
[372] Provincial Notice (PN) 336/2002 on 25 October 2002.
[373] At para 45.
[374] At par 46.
[375] At para 47-9

form of membership of suburban community is to some degree debatable,[376] the outcome may have been considerably different had the applicant raised or the Court had regard to the environmental right to well-being. If the right to an environment conducive to well-being is accepted to apply to the environmental surroundings of an urban community, something which the Heritage Act clearly supports, the applicant may have made out a far stronger case for an interim interdict. That suburban communities have a sufficient interest in protecting the sense of place of their shared environment to afford them locus standi is also supported in other case law such as *McCarthy and Others v Constantia Property Owners' Association and Others*.[377] In this matter the High Court granted locus standi to a suburban community to limit the development of a shopping center through the enforcement of a restrictive servitude. Again, although the Court noted that the Constitutional environmental right may have applied in this instance, it is unfortunate that it did not explicitly rely on it when granting the community standing.[378]

To give such a wide approach to standing and the meaning of a "right" in this fashion would also not open the floodgates to spurious or trivial litigation. In fact this matter is the only such matter on the books where a community has sought relief in light of a decision made under the Heritage Act.

9.5. The Future of Cultural Environmental Well-Being and South African Law.

The need to recognise and protect the interrelationship between the environment and the identity of cultures is particularly relevant in a multicultural country such as South-Africa where the well-being of many communities depends on the maintenance of a way of life that is integrated with a certain environmental status quo. Similarly, whilst some social groupings may not qualify as deserving of protection of the right to culture, the right to an environment not detrimental to well-being may still serve as a tool to transcend this divide by allowing social grouping to protect their relationship to the environment irrespective of whether they qualify as a "culture" or not.

It is also possible that the right to well-being may enjoy more success in the shape of group actions seeking to protect environments on the basis of a shared group identity and values than

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[376] To apply the right to culture so broadly so as to include suburban groups would arguably extend the ambit of the right that the "category becomes so broad as to be rather useless for understanding differences among identity groups" (*MEC for Education: Kwazulu-Natal and Others v Pillay* above note 141 at para 49). At minimum, as *Pillay* suggests, there needs to be "more than simple association; it includes participation and expression of the community's practices and traditions" (at para 53). Whilst this may apply to some suburban communities, in all likelihood, this will in most instances it will be more the exception than the rule.

[377] 1999 (4) SA 847.

[378] See further Kidd "Suburban Aesthetics and the Environmental Right" 1999 (6) *South African Journal of Environmental Law and Policy* 257 in particular 261-2.

in cases of individuals who seek to protect the environment for aesthetic reasons. Whilst the former is no more deserving than the latter, decision makers may also be more willing to grant favourable decisions on the basis of cultural or social well-being simply for the reason that these types of group actions bear the hallmark of group buy-in and decision makers are less at risk of being perceived as arbiters of individual taste.

10. CONCLUSION

The right to an environment not detrimental to well-being in the South African Constitution brings about challenging but exciting opportunities for both rights bearers and decision makers alike. As a nation, we enjoy a bold and progressive environmental right which is not only directly enforceable against the state and private parties, but which also places obligations upon the state to protect the environment for the benefit of present and future generations. Much has been done to legislatively implement this right and courts have consistently applied themselves to the difficult question of the nature of the state's constitutional obligations on several occasions. That said, little has been done to elaborate on the underlying motivation of this right, namely the nature of the human relationship to the environment and why environmental protection is even beneficial to people in the first place. This goes to the very heart of the source of the claim for the existence of an environmental human right.

Most people will agree that environments affect well-being and that the protection of this relationship is important and worthy of Constitutional protection. Yet, what environmental well-being is and what criterion of well-being should be constitutionally protected are complex and controversial issues. The question is bound to suffer from criticisms of subjectivity and relativity since by its nature it requires elements of subjective preference to be taken into account. As a legal human right it also creates vexing problems as it lacks the universal value normally thought to be inherent in human rights. Not only is the concept vulnerable to criticism of relativity and subjectivity, but the breadth of the right also poses significant challenges if it is to be applied in law. If interpreted to its semantic extreme, it bears the potential to become so voluminous and overwhelming that it may ultimately be rendered meaningless.

These issues are well reflected in extensive philosophical debate and the vast array of health, economic and social science studies on the subject. Yet the question has been largely ignored by legal literature and the courts with only a few textbook paragraphs and the odd High Court matter devoted to the meaning of the right. This is unfortunate. If environmental rights are to be taken as more than mere aspirational statements they need to be applied and given content and meaning to achieve the constitutional vision which they were intended to achieve. The aim of this analysis has been to do just that. Firstly, it has sought to elaborate upon the intricate and varied manners in which humans relate to the environment and to demonstrate why this relationship is important and deserving of Constitutional protection. A contextual, purposive and generous interpretation of the right in line with its Constitutional vision, is not merely

desirable but bears the potential to affect the environmental legal landscape in a multitude of ways. Not only does it serve as a bench mark against which the constitutionality of enacted legislation may be assessed, but it will serve to elevate aspects of the right in the eyes of decision makers which may have been previously ignored or perceived as relatively less important. It thus may play a decisive role in administrative appeal and judicial review proceedings. Equally it will serve as a guiding light in the interpretation of legislation, notably broadly phrased statutory definitions and the guiding principles of NEMA, and of course will play a significant role in the constitutional review of the adequacy of environmental legislation.

Secondly, the dissertation has focused on the manner in which this constitutional right has the capacity to effect far reaching changes on the existing environmental legal landscape. A broad and purposive interpretation of the right also bears the potential to dramatically affect various challenges posed to litigants under the common law remedies and in the demonstration of locus standi.

Thirdly, the analysis has sought to explore the potentially more subjective aspects of this right, namely aesthetic and cultural well-being and how they are not only important aspects of the right but also capable of judicial analysis. The aesthetic appreciation of nature and its meaningful role in the determination of human well-being is a topic that is both ancient and uncontested. However its precise content, nature and measurement makes it challenging to adjudicate as a fundamental legal right. The same applies to the equally amorphous manner in which cultural and social groupings relate to the environment in a way that is conducive to their well-being. That said, these are important and undeniable aspects of environmental well-being which contribute towards social stability, identity, group cohesion, cognitive development, spiritual enrichment, subsistence, security or are important simply because they offer unique experiences of the transcendental or sublime.

As the preceding debate suggests, these aspects of the human relationship to the environment are meaningful and worthy of Constitutional protection. The extent to which they are deserving of protection will of course depend on the manner and degree of harm, notably the degree to which access to the environment is denied. The right's ambit will thus need to be determined on a case by case basis and in line with the need for it to not be too broadly applied so that it loses all meaning.

More importantly, however, is the need for these aspects of environmental well-being to be accepted in the first place. This requires a measure of judicial activism and awareness amongst those seeking to protect their rights, something which the analysis hopes to encourage. That decision makers may shy from the right to well-being is understandable. However, its potential for indeterminacy and subjectivity is nothing novel to human rights adjudication. As Kiss and Shelton suggest, in these circumstances it is better to accept the impossibility of defining an ideal environment in abstract terms and let human rights supervisory institutions and courts develop their own interpretations, as they have done for many other human rights.[379]

The unique circumstances of South Africa's history, its present social and economic dynamics, remarkable beauty and wealth of natural resources provide an exceptional opportunity for decision makers to give a uniquely South African interpretation of the right. It is also an exciting juncture for decision makers to set a precedent not only nationally, but also internationally. Given the international indeterminacy of the status of an environmental human right, a broad, generous and ambitious interpretation of it, in the context of a developing country, may also be influential by demonstrating that not only is the right justiciable, but that it plays an important role in protecting both the environment and a multitude of human rights. Equally, as pressure on environmental resources and in turn human well-being mounts, a comprehensive, embracing and progressive interpretation of the right, may go a long way in setting the direction in which the future of environmental and human rights protection may develop. The challenge, however, 17 years since the right's inception, is for decision makers to actually do so.

[379] Kiss and Shelton, *International Environmental Law* 2nd ed (2000) New York 174-8.