*EXPLORING THE RELATIONSHIP BETWEEN THE ENVIRONMENTAL RIGHT IN THE SOUTH AFRICAN CONSTITUTION AND PROTECTION FOR THE INTERESTS OF ANIMALS**

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ABSTRACT

This article considers the relationship between the environmental right in the South African Constitution, 1996 and the protection of the interests of animals. The question is addressed through articulating two interpretive approaches to the terms 'conservation' and 'sustainable use'. The 'aggregative approach' – which has been the dominant policy approach adopted by the legislature and executive – focuses on broad collective environmental goals such as the long-term survival of a species, the health of ecosystems or conserving biodiversity. The 'integrative' approach, on the other hand, – which has recently been referenced with the approval by the Constitutional Court – requires the adoption of an attitude of respect to the individuals that make up a species, an eco-system or the components of biodiversity. The article makes several arguments as to why the integrative approach is preferable and attempts to demonstrate that the aggregative approach is self-defeating in its own terms. The practical implications of the differences between these abstract approaches are illustrated by considering two recent controversies in interpreting environmental legislation. The article thus sets itself the ambitious purpose of connecting two sets of discourses that often talk past one another in developing the interpretation of the environmental right in the South African Constitution.

I INTRODUCTION

In his famous 'I am an African' speech, introducing the final South African Constitution,[1] Deputy President Thabo Mbeki stated that:

> 'At times, and in fear, I have wondered whether I should concede equal citizenship of our country to the leopard and the lion, the elephant and the springbok, the hyena, the black mamba and the pestilential mosquito. A human presence amongst all these, a feature on the face of our native land thus defined, I know that none dare challenge me when I say – I am an African.'[2]

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1 Constitution of the Republic of South Africa, 1996.

2 Thabo Mbeki, 'I am an African' (Speech at the Adoption of the Republic of South Africa Constitution Bill, 8 May 1996) available at http://www.anc.org.za/show.php?id=4322, accessed 17 January 2015.

In this quote, Mbeki suggests that a defining feature of African-ness, is sharing the land with other creatures. He conjures up an ethos not of domination but of mutual respect and co-habitation with other creatures: indeed, it is with foresight that he suggests the conferral of equal citizenship upon non-human animals, a suggestion that has only recently been defended strongly in the academic literature.[3] Yet, these sentiments did not receive concrete expression in the Constitution, with no mention being made of non-human animals except in the schedules dealing with the competences of national government, provincial government and local government.[4]

An important question thus arises as to whether any of the existing provisions of the Constitution offer any substantive protections for animals. In this article, I will focus on the environmental right and its implications for animals. The right reads as follows:

> '**Everyone has the right—**
> (a) to an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that−
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

In the post-apartheid era, South Africa passed a raft of environmental legislation, which is rooted in this constitutional provision.[5] The direct consideration of animal welfare is mentioned no-where in this primary legislation and, in general, even delegated legislation has sought to avoid engaging issues surrounding animal welfare. In fact, the Department of Environmental Affairs (DEA) has expressed the desire to amend[6] one of the most progressive pieces of legislation passed since the new constitutional order began which is termed the 'National Norms and Standards for the Management of Elephants in South Africa'.[7] One of the main grounds for doing so is the claim that the DEA 'does not have the legislative mandate to regulate matters relating to the welfare of elephants',[8] since those concerns are entirely

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3 See for instance Sue Donaldson and Will Kymlicka *Zoopolis: A Political Theory of Animals* (2011).
4 See Schedules 4 and 5 of the Constitution, each of which contains matters impacting upon animals such as 'animal control and diseases', 'abattoirs', and 'veterinary services'.
5 Some of the most significant ones that have a direct impact on wild animals *inter alia* include the National Environmental Management Act 107 of 1998 (NEMA); the National Environmental Management: Biodiversity Act 10 of 2004 (Biodiversity Act); and the National Environmental Management: Protected Areas Act 57 of 2003 (Protected Areas Act).
6 Department of Environmental Affairs 'Norms and Standards for the Management of Elephants in South Africa to be Amended' (24 September 2014) available at https://www.environment.gov.za/mediarelease/normsandstandards_managementofelephant, accessed on 13 November 2016.
7 Department of Environmental Affairs and Tourism, *National Norms and Standards for the Management of Elephants in South Africa*, *GG* 30833 of 29 February 2008.
8 Department of Environmental Affairs op cit note 6.

distinct from environmental matters which are framed in terms of notions such as biodiversity and conservation.

After this initial introduction, the second part of this article shall consider s 24(*b*) of the environmental right. In particular, the focus will be on different approaches to interpreting two key concepts contained therein, namely, 'conservation' and 'sustainable use'. These concepts also suffuse the rest of the environmental legislation passed in terms of these constitutional provisions. They have been regarded as having particular relevance to animals in the wild, which, as a result, is the focus of examples in this article.[9] Two approaches shall be identified to interpreting these ideas. The 'aggregative' approach – which has been the dominant approach adopted by the legislature and executive – focuses on broad collective environmental goals such as the long-term survival of a species, the health of ecosystems or conserving biodiversity. The 'integrative' approach, on the other hand, – which has recently been referenced with approval by the Constitutional Court ('CC')[10] – requires the adoption of an attitude of respect for the individuals that make up a species, an eco-system or the components of biodiversity.

The third part of the article considers several arguments as to why the integrative perspective is preferable. These arguments aim to show that the aggregative approach is in fact self-defeating in its own terms and that only an integrative approach can in fact succeed in achieving the very collective goals the aggregative approach advocates. That means, in turn, that concepts like 'conservation' and 'sustainable use' are not to be understood in a manner that excludes the interests of individual animals but must be interpreted to include respect for individual creatures. Notions at the heart of environmental law thus are not separate from those engaged in ethical theory relating to the interests of animals but integrated with those concerns.

The final part of this article develops these arguments and explores their implications in the context of two particularly important issues that have arisen in the South African political community relating to the protection of wild animals. The first relates to the DEA's attempt to reject its own competence to make regulations that take account of animal interests and welfare when it passes environmental legislation and regulations.[11] I will show that such an attempt is

[9] The reasoning and coverage of these notions may extend to certain features of the human use of domesticated animals but a full consideration of those issues lies beyond the scope of this paper.

[10] It did so in the context of a judgment concerning the powers of private prosecution of the National Society for the Prevention of Cruelty to Animals in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46 ('*NSPCA*') para 58. As far as I am aware, the specific language of an 'integrative' approach concerning the relationship between animal interests and the environmental right was developed first by myself in the conference paper upon which this journal article is based. It naturally connects with other philosophical ideas that are explored and referenced in this paper.

[11] See Department of Environmental Affairs op cit note 6.

unreasonable in as much as it attempts to divorce elements that are deeply integrated. The second relates to the substantive question that was raised in a case dealing with canned lion hunting.[12] The question there concerned is whether or not environmental concepts such as the 'survival of a species' or the conservation of 'biodiversity' can adequately engage the core ethical question raised by canned lion hunting, which involves the reduction of animals to objects simply to be utilised for frivolous human purposes. I argue, in light of the arguments provided for an integrative perspective, that there is a deep connection between the two sets of concepts and that only a respect-based ethic can hope to attain the larger collective goals articulated in the environmental legislation. This article thus ultimately sets itself the ambitious purpose of connecting two sets of discourses that often talk past one another. I contend, ultimately, that the environmental right contained in the Constitution must be integrated with a concern to protect individual animal interests intrinsically if its very purposes are to be attained.[13]

II THE ENVIRONMENTAL RIGHT AND ANIMALS

(i) Why the environmental right?

A constitution is by its nature a document that is framed at a high level of abstraction. It is meant to cover many aspects of life and society but cannot explicitly cover all of them. It is also meant to be a document that covers new situations over time and thus existing notions are often understood differently in different generations. As such, the omission to mention any particular groups cannot necessarily be taken as determinative that a constitution provides no protection to them. The South African Constitution, for instance, contains no explicit provision that protects individuals against discrimination on grounds of their national origin or citizenship. Yet, the CC has found that such protection indeed exists and that foreigners are included within the prohibition against unfair discrimination contained in s 9(4).[14] Similarly, there is no express provision in the Constitution protecting the rights to family life or the right of spouses to live together. Yet, the CC has interpreted the right to dignity to find that such

[12] *SA Predator Breeders Association v Minister of Environmental Affairs* [2010] ZASCA 151.

[13] The approach in broad terms has been approved by the CC in the *NSPCA* judgment supra note 10. This paper can also thus be seen to clarify what such an approach involves in contrast with the alternative 'aggregative approach', to help understand its key doctrinal and practical implications as well as providing key justifications for its adoption.

[14] See for instance *Larbi-odam v Members of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC) paras 19-20.

rights indeed exist in the Constitution.[15] Consequently, the fact that drafters did not expressly indicate that animals are to be afforded the protection of constitutional rights cannot be seen to be determinative. It is thus necessary to engage in an interpretive exercise to determine the extent to which animals fall within the ambit of constitutional protection.

One possibility is that animals are themselves to be regarded as beneficiaries of the rights in the Bill of Rights and thus fall within the domain of its protections. The fact that the South Africa Constitution lacks a clear indication of exactly who is entitled to claim most of the rights could be the basis for such an argument.[16] I have in a past article provided a general case for reading the Bill of Rights in precisely this way so as to apply the full range of its protection to animals as the subjects of protection.[17]

Without any prejudice to this argument, in this article I wish to consider an alternative possibility. For purposes of this argument, I will assume that the Bill of Rights only includes humans as potential subjects or claimants of these rights. The question, however, still arises as to the interpretation of the content of particular rights and, when doing so, whether protection for individual animals and their interests is contemplated thereby. To illustrate the distinction, let us consider the CC's holding that the right to human dignity protects 'the ability of individuals to achieve personal fulfilment in an aspect of life that is of central significance'.[18] The ability to form intimate relationships and marry was considered such a significant feature of individual lives and thus protected by the right to human dignity. It could be strongly argued that the court's reasoning could be extended to include the very significant connections individuals form with domestic animals, for instance, such as dogs and cats. The right to human dignity would then protect those relationships and, in doing so, potentially offer protection for the interests of dogs and cats. Thus, whilst only human individuals could make claims in terms of the right to dignity, the manner in which the right is interpreted could lead to protection for the interests of dogs and cats through their relationships with human individuals.

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[15] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 37.

[16] The South African Constitution uses the vague term 'everyone' to indicate those who can claim the protection of rights in the Constitution. In D Bilchitz 'Does Transformative Constitutionalism Require the Recognition of Animal Rights?' (2010) 25 *SAPL* 267 at 277-281, I argue that the term does not automatically refer only to humans and admits of a purposive interpretation that could include creatures from other species. See also L Kotze 'A Critical Survey of Domestic Constitutional Provisions Relating to Environmental Protection in South Africa' (2007-8) 14 *Tilburg Law Review* 298 at 305 and J Glazewski *Environmental Law in South Africa* (2005) 72-73 for a recognition of a similar interpretive possibility only to reject it.

[17] Bilchitz ibid.

[18] *Dawood* op cit note 15 para 37.

In this article, similarly, I wish to consider the possibilities that exist within the environmental right for affording protection to individual animals.[19] Whilst it is assumed that the right to environmental protection is itself only claimable by humans, [20] I hope to show nevertheless that the right admits of a construction, which can afford protection for animals and their interests.[21] The human relationship to the environment need not be understood in purely self-interested terms. Moreover, even if it is understood in an anthropocentric manner, I argue that attitudes and behaviours which exhibit respect for individual creatures are necessary for the achievement of the very human-centred goals in question. These arguments will be developed in parts III and IV of this article.

Why then focus on the environmental right to make these arguments? The reason for doing so is that the right itself clearly must, in some way, include animals within its domain of application. There is no uniform definition of what constitutes the environment at present in South Africa and the notion itself admits of wider and narrower definitions. The narrower definition includes only nature and natural resources; the wider approach includes a wider range of physical, cultural and social dimensions. [22] The wider approach was adopted in the case of *BP Southern Africa* where the environment was defined as 'all conditions and influences affecting the life and habits of man'.[23] Whichever construction is adopted, however, it would include at least those elements making up the natural world. Animals – particularly wild animals – would clearly thus fall within the extension of the term 'environment'. Indeed, the key piece of legislation that gives effect to the environmental right, the National Environmental Management Act 73 of 1998 ('NEMA') defines the environment as follows:

'The surroundings within which humans exist and that are made up of:

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19 This question has largely not been addressed in the literature on the environmental right in the Constitution. For a number of treatments of the environmental right, more generally, see M Kidd *Environmental Law* (2008); Kotze op cit note 16; Glazewski op cit note 16; M van der Linde and E Basson, 'Environment' in S Woolman et al *Constitutional Law of South Africa* (2008) ; LJ Kotze and A Du Plessis 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa' (2010) 3 *Journal of Court Innovation* 157; and L Feris 'Constitutional Environmental Rights: an Under-utilised Resource' (2008) 24 *SAJHR* 29; E De Wet and A Du Plessis 'The Meaning of Certain Substantive Obligations Distilled from International Human Rights Instruments for Constitutional Environmental Rights in South Africa' (2010) 10 *African Human Rights Law Journal* 345; and M Murcott 'The role of environmental justice in socio-economic rights litigation' (2015) 132 *SALJ* 875.

20 See Kotze op cit note 16 at 305 and Glazewski op cit note 16 at 73 who argue that this is the best reading of the Constitution and L Feris ibid at 49 who claims that this feature of the right is indicative of an anthropocentric choice for environmental protection. My argument below challenges this view through arguing that achieving general anthropocentric goals in fact requires moving beyond anthropocentrism.

21 Glazewski op cit note 16 at 73 does suggest that there may be a possibility to find indirect protection for animals in the environmental right. However his argument is not entirely clear, as it rests upon a human duty towards non-human animals whose source in the Constitution is unclear.

22 See Van der Linde and Basson op cit note 19 at 50-12.

23 *BP Southern Africa v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 145.

(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;
(iv) The physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

Clearly, environmental legislation recognises that animal life forms part of the environment. It therefore follows that they must be included within the scope of the protection afforded to the environment by s 24.[24]

Of course, different facets of the environment would need different interventions. It is difficult, for instance, to see how all the features mentioned above in NEMA require the same measures to protect them. Thus, whilst NEMA lays out principles that are of use in protecting the environment more generally, the legislature has passed several subsequent pieces of legislation to address specific questions such as air pollution, biodiversity and protected areas.[25] The broad concept of the environment will thus require two prongs when fleshing out its interpretation and implications for the specific features included therein. On the one hand, there is a need for some disaggregation in order to address specific issues which fall within the broad domain of the environment. On the other hand, the notion itself provides the basis for forging a holistic approach which requires a consideration of the relationship between the various parts of what falls within the 'environmental' domain.

In what follows below, I shall consider, in particular, the implications of the environmental right for animals and what it requires in relation to our treatment of them. This involves both disaggregation and a holistic concern for the interactions between different facets of the environment. Moreover, it is necessary when interpreting this right to have reference to the general approach adopted by the CC to the interpretation of constitutional rights, which is only briefly outlined here. The main characteristic is that it is 'purposive' in nature. This means that the court will consider the purpose of constitutional provisions (and, in relation to fundamental rights, the underlying interests) and provide the interpretation that best connects with that purpose.[26] The court has also emphasised that the text of the Constitution remains important but, usually, is not determinative;[27] and that provisions need to be interpreted in their

[24] As Kotze op cit note 16 points out, these protections will arise as a result of the relationship between animal interests and human interests.
[25] Air quality is protected in terms of the National Environmental Management: Air Quality Act 39 of 2004; Biodiversity is protected in terms of the Biodiversity Act supra note 5; and Protected Areas are protected in terms of the Protected Areas Act supra note 5.
[26] *S v Makwanyane* 1995 (3) SA 391 (CC) para 9. On the interpretation of constitutional rights in the South African Constitution, more generally, see L Du Plessis 'Interpretation' S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2008) .32-1.
[27] *S v Zuma* 1995 (2) SA 642 (CC) para 17.

textual and social/historical context.[28] This broad method will be utilised throughout this article to canvass the interpretive possibilities that exist for understanding the related notions of 'conservation' and 'sustainable use' in the environmental right and to determine which of these can best realise the purposes underlying the right.

(ii) Two approaches to interpreting 'conservation'

The environmental right in the Constitution consists of various parts. Each may have some implications for animals: this article, given the limitations of space, does not seek to offer a detailed analysis of each facet of the right. Instead, I shall concentrate on the second part of the right (s 24(*b*)), which expressly recognises an entitlement to have the environment protected.[29] That protection is expressly meant to include both present and future generations: this has been understood to include a requirement of inter-generational equity based on the idea that the earth must be understood to be held in trust for future generations.[30]

Giving effect to this right must take place through 'reasonable legislative and other measures'. This language is reminiscent of that used in relation to other socio-economic rights included in the Constitution which the court has interpreted most extensively in the *Grootboom* case in relation to the right to have access to adequate housing.[31] The court there indicated that legislative measures were not themselves sufficient and that the state has an obligation to devise a programme to address the right in question that was 'reasonable both in conception and…implementation'.[32] That programme must be a comprehensive one that co-ordinates efforts amongst all three branches of government and must be balanced and flexible. Consistently with the above requirement to consider inter-generational equity, a reasonable programme must balance short, medium and long-term needs.[33]

The reasonable measures identified above are required to achieve certain particular ends, which are identified in the Constitution. I shall focus on s 24(*b*)(ii) and (iii).[34] Section

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[28] *Makwanyane* supra note 26 para 10.

[29] In line with the approach discussed above, it is assumed that human individuals have an entitlement that the environment be protected. I focus on s 24(*b*) but s 24(*a*) may offer part of the reason for such protection: namely, that human health and well-being are deeply interconnected with the environment. The relationship between non-human animals and human well-being in s 24(*a*) merits more detailed consideration but, generally, lies beyond the scope of this paper.

[30] See Kidd op cit note 19 at 22 and Glazewski op cit note 16 at 78-9.

[31] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

[32] Ibid para 42.

[33] Ibid para 43.

[34] This should not be taken to mean that s 24(*b*)(i) is irrelevant to the protection of animal interests. The ecological degradation often caused by exploitative practices of animals is worthy of further research but lies beyond the scope of this paper.

24(*b*)(ii) requires reasonable legislative and other measures to 'promote conservation'. Strangely, there has been very limited judicial consideration of what is meant by promoting conservation in the case law and a very cursory engagement with the constitutional meaning of this term in academic literature too.[35] The Merriam Webster dictionary defines conservation as a 'careful preservation or protection of something'.[36] The Oxford English Dictionary defines it as follows: 'it involves the "preservation, protection or restoration of the natural environment and of wildlife"'.[37] One of the difficulties with the formulation in the South African Constitution is the lack of an object for this phrase.[38] It is thus unclear exactly what must be conserved: the term is usually used in the context of wildlife and pristine natural areas. In relation to animals, however, the question arises as to whether conservation should be focused on preserving a species or protecting individual animals.

We can identify, at this point, two approaches to interpreting the notion of conservation: the choice between them has far-reaching implications for the protection the environmental right will offer to individual animals. The 'aggregative' approach focuses on achieving broad collective environmental goals such as the long-term survival of a species, the health of ecosystems or maintaining biodiversity. One of the key questions for such a view concerns the reasons we have to value these collective goals. Two main justifications exist in this regard that affect the manner in which this approach is conceived and applied. The first seeks to conserve on the basis of an anthropocentric utilitarian ethic that seeks to achieve the greatest benefits for the greatest number of human beings.[39] Conservation, on this view, might be good because many humans enjoy seeing a wide range of animals in existence (we might terms this an 'aesthetic' purpose);[40] or perhaps – in a related manner – it might be good for the tourist

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35 See, for instance, the very short treatment given to this idea by Glazewski op cit note 16 at 80 and Kidd op cit note 19 at 22. In *NSPCA* supra note 10 para 58, the CC briefly addressed the relationship between animal welfare and the environmental right, which will be considered further below.

36 Miriam Webster Dictionary available at http://www.merriam-webster.com/dictionary/conservation, accessed on 21 January 2016.

37 Oxford Dictionary available at http://www.oxforddictionaries.com/definition/english/conservation, accessed on 21 January 2016.

38 Kidd op cit note 19 at 22-23.

39 To illustrate the contrast, I reference a rather simple version of utilitarianism in describing the aggregative view: if the wider argument of this paper is correct, then a form of indirect or rule utilitarianism would also endorse the integrative view.

40 The aggregative view cannot see conservation as preserving animals who are valuable in themselves and so the reasons to conserve must relate to some kind of 'aesthetic' value of having different species if they are not particularly valuable for their concrete uses to human beings. For such a justification, see LM Russow 'Why do species matter?' in LP Pojman and P Pojman *Environmental Ethics* 5 ed (2008) 269-276. Attempts to defend the value of collectivities such as species and other aspects of nature independent of the human mind have generally not been regarded as plausible. See D Jamieson, 'Animal liberation is an environmental ethic' in D Jamieson (ed) *Morality's Progress: Essays on Humans, Other Animals, and the Rest of Nature* (2002) 202.

industry and bring economic benefits to humans (we might term this an 'economic' purpose).[41] The second version seeks to conserve in order to achieve the greatest benefit for the environmental system as a whole. [42] This justification is not concerned so much about human welfare alone but with ensuring the overall continuity and integrity of wider eco-systems. Both versions allow for sacrifices of individuals for their wider collective goals and focus on broad notions such as the biodiversity and the continuity of a species rather than the lives of any particular individuals.[43]

The 'integrative' approach, on the other hand, requires the adoption of an attitude of respect for the individual animals that make up a species, an eco-system or the components of biodiversity. In so doing, it also recognises the importance of relationships between individual animals and the environment in which they live, including their connection with human beings.[44] It insists that respect for individuals and their value is an essential component in ensuring the survival of the species as well as the protection of the environment more generally.[45]

Thus, a practical illustration of the difference between these two approaches concerns their attitude to the trophy hunting of large mammals. Those who advocate for the aggregative view often argue that trophy hunting has benefits for humans as well as the environment as a whole: by bringing in large amounts of revenue to the country, it is argued that this practice can help fund conservation efforts in relation to a range of species.[46] Moreover, it is argued that such practices create an incentive for people to protect the species in question as they benefit financially from the wildlife in the country.[47] An integrative view would reject the idea that the

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[41] See L Feris op cit note 19 at 32-33 where she explores such an anthropocentric approach more generally.

[42] Such an 'ecocentric' view goes back to Aldo Leopold's land ethic articulated in *Sand County Almanac* (1949) at 224-225, a central statement of which is that '[a] thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise.' See also, J Baird Callicott 'Animal liberation: A triangular affair' (1980) *Environmental Ethics* 311.

[43] There is a real question as to why 'wholes' are valuable and, whichever reasons we give, the problem mentioned in the text will arise. See JR DesJardins *Environmental Ethics* 4 ed (2006) 189-194: see the suggested solution to this problem in the argument in 3(c) below.

[44] The relational aspect of the integrative approach connects well with and can be rooted in approaches to animals and the environment drawn from African ethics. See, for instance, B Bujo 'Ecology and ethical responsibility from an African perspective' in MF Murove (ed) *African Ethics: An Anthology of Comparative and Applied Ethics* (2009) 281, 296 and MF Murove 'An African environmental ethic based on the concepts of *Ukama* and *Ubuntu*' in MF Murove (ed) *African Ethics: An Anthology of Comparative and Applied Ethics* (2009) 315, 329.

[45] The focus of this paper is on the protection for the interests of animals and the respect owing to them. The integrative view thus, as expressed herein, is compatible both with biocentric approaches to the environment as well as those that emanate from recent work in animal welfare/rights theory. The biocentric approach would extend the domain of ethical concern more widely than animal rights theory does. For a description of the two approaches and their differences, see DesJardins op cit note 43 ch 5 and 6.

[46] Alistair S Gunn 'Environmental ethics and trophy hunting' (2001) 6 *Ethics and the Environment* 87.

[47] Ibid.

treatment of individual animals with utter disrespect – as is evidenced by trophy hunting for pleasure – can advance the goal of species conservation. It would involve the key idea that enhancing respect for individuals is essential to preserving the species as a whole.

In a recent judgment, the CC expressly indicated its approval for an integrative approach to conservation, which it states 'correctly links the suffering of individual animals to conservation and illustrates the extent to which showing respect and concern for individual animals reinforces broader environmental protection efforts. Animal welfare and animal conservation together reflect two intertwined values'.[48] As such, the integrative approach is no longer simply a possible theoretical construction but one that reflects the legal doctrine to be adopted towards interpreting the environmental right and consequently, environmental legislation.

(iii) Two approaches to interpreting sustainable use

Before providing arguments for why the integrative approach is indeed apposite for South Africa, it is important to recognise that a choice between two such similar approaches is required in interpreting s 24(*b*)(iii) as well. This provision requires reasonable legislative and other measures to 'secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. The provision is awkwardly worded (and the second part of the provision appears to be repetitive): the key elements are clearly the notion of 'ecologically sustainable development and use of natural resources'.

The idea of sustainable development is drawn from international environmental law. It was initially utilised in the Brundtland Report of 1987 which defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[49] This definition recognises the potential for development to harm the environment which will impact on the future of humans (and other life) on the planet. It outlined a 'type of development that integrates production with resource conservation and enhancement, and that links both to the provision for all of an adequate livelihood base and equitable access to natural resources'.[50] Sustainable development thus involves an integrated type of thinking that links economic development (particularly focused on those who are poor) with environmental considerations. In 1992, states joined together in issuing the Rio

[48] *NSPCA* supra note 10 at para 58.
[49] See Chapter 2, para 1 of the United Nations World Commission on Environment and Development, 'Our Common Future' UN Doc A/42/427 available at: http://www.un-documents.net/ocf-02.htm, accessed on 21 January 2016
[50] Ibid ch 1 para 47.

Declaration on Environment and Development, which represented a large international consensus on these broad ideas. Principles 3 and 4, for instance, include the notions of intra- and inter-generational equity and recognise the twin importance of environmental protection and socio-economic development. One key facet of sustainable development is the acceptance of limits, on environmental protection grounds, on the use of and exploitation of natural resources.[51] This idea has been framed as a 'principle of sustainable use' – the aim of exploiting natural resources in a 'sustainable', 'prudent', 'rational', 'wise' or 'appropriate manner'.[52]

In *Fuel Retailers*, the CC accepted the principles of sustainable development identified in international law as helping to provide a gloss on the South African environmental right.[53] It stated that the '[C]onstitution…recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development…. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment'.[54] Of key importance here is a recognition that developmental and environmental considerations must somehow be harmonised. Natural resources can be used but this must be done in a manner that is 'sustainable'.[55]

Unfortunately, there has been very little direct case law indicating the manner in which these principles apply in relation to animals.[56] The key principle to consider is the notion of sustainable use (and how it connects with development more generally).[57] Once again, there are, at least, two alternative possibilities to interpreting this notion (which, as mentioned, earlier, map onto the alternative notions of conservation identified above). The first 'aggregative' view is focused, as its name suggests, on the 'aggregates' or 'collective goals' and ensuring that any uses of animals do not imperil the long-term survival of the species or the biodiversity of the environment. Since the focus in this context is on the 'use' of natural

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51 Phillip Sands *Principles of International law* (2003) 266.
52 Ibid at 253.
53 *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* 2007 (6) SA 4 (CC) paras 46-56.
54 Ibid para 45.
55 For a discussion of the *Fuel Retailers Association* case supra note 53 and its implications, see, for instance, L Feris 'Sustainable development in practice' (2008) 1 *CCR* 235; D Tladi 'Fuel retailers, sustainable development and integration: A response to Feris' (2008) 1 *CCR* 255 and T Murombo ' From crude environmentalism to sustainable development: Fuel retailers' (2008) 3 *SALJ* 486.
56 *NSPCA* supra note 10 para 58 is the only case with some bearing on the topic, though it does not directly engage the issue of sustainability.
57 The focus of writing generally has been on the notion of sustainable development rather than on what constitutes a 'sustainable use'. See, for instance, Glazewski op cit note 16 at 80-81 and Van Der Linde and Basson op cit note 19 at 50-19 to 50-26. One could well argue that the notion should not apply to animals as they are not 'things' or natural resources and deserve respect in their own right. Since environmental legislation and policy in South Africa has assumed the notion applies to animals, in this article, I attempt to understand the interpretive possibilities in that regard.

resources and enhancing human development, the more likely justification for a concern with collective goals in this context is the more anthropocentric one. Thus the deep justification for a concern with sustainable use would ultimately lie in the goal of achieving the greatest overall benefit to the greatest number of human beings overall.[58] Accordingly, such an approach would practically support trophy hunting of large mammals on the grounds that the killing of some lions, leopards and buffalo can provide incentives for people to conserve the rest of these creatures, as they become a source of livelihood and wealth. The approach would support the idea that there have to be limits on the number of animals killed; otherwise, in the longer-run, these economic benefits for humans would not be achieved due to depletion or extinction of these animals. A further argument contends that profits from these activities can also be ploughed back into conservation activities that can aid long-term sustainability.[59] This approach essentially rejects the notion that individual animals have worth and interests in their own right that are deserving of respect. Alternatively, it regards their lives and welfare as having very minimal value compared to the importance of the overall their use may have for human purposes. The interests of animals are thus subordinate to the economic benefits humans may achieve from their existence.

The major question facing such an approach is whether it in fact provides a viable interpretation of the notion of 'sustainable use'. Indeed, the aggregative view seems to place most of the weight on the notion of 'use'. Ultimately, for instance, animals are to be understood entirely instrumentally: they matter in so far as they help advance the uses humans may have for them now or in the future. The notion of 'sustainability' here is a simple qualification on the notion of use such that present 'uses' do not prevent or impair future 'uses'.

An alternative integrative approach to understanding 'sustainable use', on the other hand, gives equal weight to the composite term, 'sustainable' and 'use'. Sustainability here qualifies and colours the notion of use itself such that certain uses become impermissible. The Oxford English Dictionary defines sustainable primarily as involving being 'able to be maintained at a certain rate or level'.[60] In this context, this definition illustrates the relationship between sustainability and the notion of conservation, and suggests the importance of maintaining animals of a particular species in existence. The integrative approach recognises that the ability to guarantee the survival and continuation of animals from different species

[58] Indeed, see the discussion above of the anthropocentric nature of the right above in, for instance, Feris op cit note 19 at 32-34.
[59] For all these arguments, see Gunn op cit note 46 above.
[60] Oxford Dictionary available at https://en.oxforddictionaries.com/definition/sustainable, accessed on 1 December 2016

depends upon cultivating attitudes in human beings towards them which are respectful of their interests. This approach recognises the deep inter-relationship between individuals and the rest of the ecological system. In so doing, it maintains that there is a necessary connection between the adoption by humans of attitudes and behaviours of respect for individual animals – in the manner they are interacted with and treated – and the very long-term sustainability with which they will be used.[61]

The integrative understanding recognises that there is a legitimate sense in which we may use all those things that are in the 'environment'. Indeed, the idea of 'use' alone is not necessarily objectionable in that, even in the human context, there are uses we make of other people that are legitimate. We can utilise the services of an electrician, for example, provided we pay for them and we may depend on a shopping teller at a supermarket to acquire our groceries. These forms of use are morally and legally acceptable as they do not undermine the respect we owe to other human beings and are consistent with it. They accord, for instance, with the famous second formulation of the categorical imperative provided by Immanuel Kant: 'so act that you use humanity, whether in your own person or the person of any other, always at the same time as an end, never merely as a means'.[62] This principle does not preclude using others for achieving one's ends but forbids reducing them merely to instruments for our own ends.[63]

The integrative approach understands the notion of 'sustainable use' in relation to animals in a similar manner. Usage of animals is legitimate provided it meets certain conditions. It is to be understood along the lines of the Kantian qualification above: that, as we saw, individual animals may be used as a means, but never treated, *merely* as a means. Sustainable use enshrines, on this approach, a conception whereby any use is legitimate only if it is done in a manner compatible with respect for the entity in question that is being used. It

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61 The reasons for the connection between respect and sustainability is developed in the next section of the article. Whilst *NSPCA* supra note 10 does not directly engage with the interpretation of the notion of sustainable use, it does broadly indicate the CC's view that animal welfare is strongly connected to the constitutional environmental right as a whole. It also expressly approves of a statement in the Supreme Court of Appeal ('SCA') case of *S v Lemthongthai* [2014] ZASCA 131 para 57 that 'constitutional values dictate a more caring attitude towards fellow humans, animals and the environment'. As such, it seems likely that the court would approve of an integrative approach towards interpreting the notion of sustainable use as it has done in relation to the notion of conservation.

62 Mary J Gregor (ed) Immanuel Kant *Practical Philosophy* (1999) 80. Kant, of course, only recognised indirect moral duties towards animals. The reasoning I have utilised in the text draws on features of his ethical system to articulate an understanding of sustainable use, which is Kantian in inspiration. Some of the arguments below engage with the indirect duty view in a novel manner and also demonstrate the importance of 'respect' for a viable consequentialist ethic that is not self-defeating.

63 For this understanding of Kant's principle in the South African context, see S Woolman 'Dignity' in S Woolman et al *Constitutional Law of South Africa* (2008) 36-9.

would thus reject the idea that the killing of animals such as lions for mere pleasure or entertainment constitutes a form of 'sustainable use'. Similarly, removing baby elephants from their mothers and subjecting them to cruel forms of training to force them to allow people on their backs would not qualify as being a 'sustainable use'.[64]

I have identified two different approaches to interpreting the notions of conservation and sustainable use. The question that arises is which should be the preferred approach to interpreting the environmental right (and, consequently, the rest of the environmental law framework) in South Africa. Deciding upon this question, as we saw, must have regard to the purposes of the particular provisions in question. In the next part of this article, I provide several arguments as to why the integrative approach is preferable. The arguments, ultimately, seek to show that the aggregative approach is self-defeating on its own terms: to achieve the very purposes and goals it sets itself, it is necessary to develop an attitude of respect and concern for the lives and welfare of individual animals. As we have seen, the CC also has recently expressed approval for an integrative approach to understanding at least the notion of 'conservation': its statements surrounding the topic though are brief and the justification for the adoption of an integrative approach and its implications are unclear. The arguments made in Parts III can thus be seen to provide a clear understanding of the justification and contours of such a doctrinal approach with some practical implications being developed in Part IV.

III EVALUATING THE AGGREGATIVE AND INTEGRATIVE APPROACHES

(i) The indirect duty view and the relationship between human and animal well-being

The aggregative view, as we saw, suggests that what ultimately matters is overarching collective goals; individuals are understood in a manner that is purely instrumental to the achievement of these goals. If the goals in the aggregative approach, however, can only be achieved through adopting a view whereby individuals are respected in their own right, then it would essentially collapse into the integrative view.

An important line of argumentation, in this regard, which needs to be considered is a school of thought that supports what is termed an 'indirect duty view' of obligations towards animals. The view usually starts from an understanding that direct moral obligations are owed to humans alone. Kant's ethical system, for instance, only considers rational agents to be the

[64] International Fund for Animal Welfare 'Baby Elephants Snatched from Wild Herds – who is Issuing the Permits?' available at http://www.ifaw.org/united-states/news/baby-elephants-snatched-wild-herds-who%E2%80%99s-issuing-permits, accessed on 1 December 2016.

subject of direct obligations and his understanding of what constitutes a rational agent would appear to include only human beings. At the same time, Kant is of the view that human beings do have certain 'indirect' obligations towards animals: treating animals cruelly, it is argued, develops dispositions in individuals that lead them to treat humans badly.[65] Animals must thus be treated decently in order to avoid harming humans.[66]

Robert Nozick famously challenged this line of reasoning by wondering why it is inevitable that cruel treatment of animals leads to cruel treatment of human beings. He writes:

> 'If I enjoy hitting a baseball squarely with a bat, does this significantly increase the danger of my doing the same to someone's head? Am I not capable of understanding that people differ from baseballs, and doesn't this understanding stop the spillover? Why should things be different in the case of animals?'[67]

The response to this argument is of course to recognise that animals are not baseballs.[68] The fact that animals are not inanimate objects but sentient creatures means that harming them requires a particularly hard-hearted and deadened character that is consistent with similar treatment to humans.[69] There is thus a sufficient similarity between humans and animals such that a failure to respect the interests of animals often leads to a failure to respect the interests of humans. This argument is not just fancy a priori ethical reasoning: empirical research has recently found a clear correlation between circumstances in which there is animal abuse and those in which there is domestic violence towards women and children.[70] There are also a number of empirical studies showing that violent activities of serial killers began with cruel behaviour towards animals and that cruelty to animals is associated with a higher risk of committing criminal offences.[71] Post-traumatic stress disorder and violent and aggressive behaviours have also been shown in those working in abattoirs.[72]

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65 I Kant *Lectures on Ethics* (trans L Infeld 1963) 239.

66 Kant ibid 240 states: '[H]e who is cruel to animals becomes hard also in his dealing with men…. Tender feelings towards dumb animals develop humane feelings towards mankind.'

67 Robert Nozick *Anarchy State Utopia* (1974) 36.

68 I have addressed this argument previously in D. Bilchitz 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' (2009) 25 *SAJHR* 38, 46-48.

69 The sentience of animals refers to the fact that they have subjective conscious experiences of the world. See, for instance, M Dawkins 'The scientific basis for assessing suffering in animals' in P Singer (ed) *In Defense of Animals* (2000)26.

70 R Lockwood 'Animal cruelty and violence against humans: Making the connection' (1999) 5 *Animal Law* 85; CA Lacroix, 'Another weapon for combatting family violence: Prevention of animal abuse' (1998) 4 *Animal Law* 7; AJ Dryden, 'Overcoming the inadequacies of animal cruelty statutes and the property-based view of animals' (2001) 38 *Idaho L Rev* 185.

71 Lockwood ibid at 82-83. See also A Peters 'Liberte, egalite, animalite: Human-animal comparisons in law' (2016) *Transnational Environmental Law* 16.

72 See, for instance, J Dillard 'A slaughterhouse nightmare: Psychological harm suffered by slaughterhouse employees and the possibility of redress through legal reform' (2007) 15 *Georgetown Journal on Poverty Law and Society* 391. In the South African context, see K Victor and A Barnard 'Post-traumatic stress of employees working as slaughterers' available at

These studies show that behaving in a way that demonstrates utter disrespect towards animal life is not neatly compartmentalised; it translates and connects with a whole set of other behaviours in relation to human society as well. Recent research demonstrates, for instance, how the hunting industry maintains highly racialised and discriminatory practices and has perpetuated apartheid-era property and land relations in South Africa.[73] Indeed, the research also shows the exploitation of poor black workers who are often required to deal with wild animals with minimal safety measures and extremely limited pay. [74] These recent findings in an industry which shows utter disrespect to non-human animals – by killing them for entertainment – bears out the key underlying assumptions of the indirect duty perspective: there is an intimate relationship between the disrespectful treatment of other creatures and similar behavior towards humans. As such, on purely anthropocentric grounds, there are reasons to question whether the aggregative approach can achieve its own goals of advancing collective human well-being through an instrumentalisation of animal life that has a negative impact on human behaviour towards other humans.

Moreover, the violence involved in killing for entertainment in trophy-hunting essentially accepts and normalises violence towards animals for no particular reason. South Africa, unfortunately, has some of the highest rates of domestic violence against women and children in the world; it also has an exceptionally high rate of violent crime more generally.[75] Whilst one must be cautious in drawing simplistic direct causal relations between trophy hunting of animals, for instance, and the high rate of violence against humans, at the same time, the promotion and sanctioning of violence against highly sentient creatures for entertainment, at a minimum, does nothing to counter the general violent ethos in the society. The aggregative approach may thus in fact contribute to undermining overall human welfare through failing to recognise the interconnections between cruel and exploitative attitudes and behaviours towards animals and similar approaches towards humans. The integrative approach, on the other hand, recognises the value and respect owing to individual animals and is not committed to a strict

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http://uir.unisa.ac.za/bitstream/handle/10500/18454/PTSD%20Slaughtering%20Poster%20A%20Barnard%202003.pdf?sequence=1, accessed on 14 November 2016.

[73] Nomalanga Mkhize 'Game farm conversions and the land question: Unpacking present contradictions and historical continuities in farm dwellers' tenure insecurity in Cradock' (2014) 32 *Journal of Contemporary African Society* 207-219; Femke Brandt and Marja Spierenburg 'Game fences in the Karoo: Reconfiguring spatial and social relations' (2014) *Journal of Contemporary African Society* 1-18.

[74] Femke Brandt 'Trophy hunting in South Africa: Risky business for whom' *Daily Maverick* (17 Nov 2015) available at http://www.dailymaverick.co.za/opinionista/2015-11-17-trophy-hunting-in-south-africa-risky-business-for-whom/?utm_source=Daily+Maverick+Mailer#.VqCRDLZ97IV, accessed on 14 July 2016.

[75] See 2015 Crime Stats for South Africa: Everything You Need to Know *Business Tech* (Sept 29 2015) available at: http://businesstech.co.za/news/government/99648/2015-crime-stats-for-south-africa-everything-you-need-to-know/, accessed on 14 July 2016.

separation between the human and the animal. As such, it is able to recognise better the interconnections between the attitudes and behaviour towards animals and the impact of these on humans.

(ii) The aggregative approach, self-interest and the longer term

The indirect duty view, however, also suggests a further problem for the aggregative approach in its disregard of individuals for the achievement of collective goals. As we saw, the indirect duty view is based upon the idea (borne out by empirical evidence) that there is a connection between our cruel and disrespectful actions to animals and those towards humans. However, if this is true, we could argue a fortiori that there must be a connection between disrespectful actions towards some individual animals of a particular species and similar actions towards other individual animals of the same species. Now, the aggregative view, of course seeks to preserve a range of species and biodiversity so long as it advances general human well-being or the good of the environment as a whole. If some individuals can be treated without regard for their welfare or interests simply for these collective goals, then that view translates into a more general approach towards individuals of that species (and other species). In other words, the aggregative view develops a series of dispositions and attitudes to see not just some individual animals but all of them as purely instrumental to the achievement of greater collective goods. I now provide reasons why developing such attitudes towards animals is likely to threaten these very goals – such as long-term species survival – sought to be achieved by the aggregative approach.

As we saw, the anthropocentric justification for the aggregative view focuses on ensuring that the self-interest human beings have in the use of other creatures is maintained over the longer term. It thus legitimates self-interest as the ground upon which we interact with other creatures (and the environment more generally). At the same time, it essentially requires individual human beings to adopt a long-term view that is happy to forego some profit and self-interest in the present for benefits that will accrue to them in the future. Thus, to ensure that humans can profit from hunting in future, it is necessary to limit the number of animals that are killed in the present so that there is a supply of animals for continued use.

There are several problems with this approach, the first of which involves the creation of a serious collective action problem. For every individual, according to this ethic, self-interest is the lens through which the animal world is viewed and there is very limited reason not to use an animal in a way that advances their self-interest. At the same time, collectively, if everyone adopts this approach, the number of animals available for everyone to use will decrease, the

eco-system will be affected and the future availability/survival of animals be affected. This problem is perhaps the key reason an aggregative view would seek to use the law to circumscribe the over-utilisation by some people of animals to advance their economic goals. Yet, the problem inherent in this approach is its elevation of self-interest as the key driving feature in our interaction with other creatures. As such, every individual has a strong incentive to try and free-ride. If one can gain benefits from animals whilst others comply with the law, one will be able to advance oneself without affecting the aggregate availability of animals for future use. If many people adopt this free-riding approach, the survival and availability of the species as a whole will be affected. In countries with a relatively poor and developing ability to enforce laws, encouraging a self-interested ethic towards animal life is likely to impinge upon a serious resolution of this collective action problem.[76]

Consider the following real-life situation. Environmental legislation and regulations in South Africa allow for trophy hunting but often require permits for hunting and place quotas on the number of animals that can be hunted.[77] These laws give expression to an 'aggregative' approach to conservation and sustainable use. Very little importance is placed on individual animals and the entire system of quotas and permits, for instance, is designed to ensure the species as a whole will not be destroyed and that there will be sufficient animals available in the future for humans to utilise. For example, the Biodiversity Act expressly states that its goal is to 'provide for the protection of species that are threatened or in need of protection in the wild' and that it seeks to ensure that 'the utilisation of biodiversity is managed in an ecologically sustainable way'.[78] The Act does not ban restricted activities such as hunting but seeks to regulate them in order to achieve these goals. The crisis in South Africa relating to rhino poaching illustrates the problem of instrumentalising animals and then seeking to keep their use within manageable constraints.

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[76] South Africa has only relatively recently created teams of environmental management inspectors and now creates annual reports on their work which clearly highlight the developing ability to enforce such laws. See Department of Environmental Affairs National Environmental Compliance and Enforcement Report (2014-15) ('NECER Report') available at https://www.environment.gov.za/sites/default/files/reports/201415_necer_report.pdf, accessed on 17 November 2016.

[77] Chapter 4 of the Biodiversity Act addresses species that are regarded as threatened or protected and provides for a permitting system to be introduced to perform any restricted activity (which includes hunting). Regulations have been issued at the national level which provide further regulation around threatened and protected species. See the Threatened or Protected Species Regulations *GG* 38600 of 15 March 2015. Hunting is also regulated more generally by a number of provincial statutes which require permits and create time periods in which hunting can take place. See, for instance, ss 31 and 32 of the Limpopo Environmental Management Act 7 of 2003.

[78] Section 51.

The story of the current crisis in fact commences with the legal hunting of rhino, which, as has been described, is provided for within South African legislation. Vietnam is one of the main markets for rhino horn (which is believed to have medicinal qualities). From 2003 to 2010, there was a clear increase in the number of rhino trophies exported from South Africa to Vietnam.[79] The number of applications to hunt rhino from Vietnam increased substantially in 2009-2010 with virtually all export permits going to Vietnamese nationals.[80] This practice has been referred to as 'pseudo-hunting' as it does not appear to have been individuals coming as tourists to the country who wished to hunt for entertainment. Rather, it seems that the horns were being utilised to feed a growing commercial market in Vietnam and China.[81] However, the demand for rhino horn outstripped the supply that was based on the limited quotas the South African government allowed in relation to legal hunting. Illegal poaching of rhinos, therefore, increased in order to meet the demand of the markets in Asia. This trend can be traced in the reports of the South African government, which show that prior to 2007, the average number of rhinos poached were nine per year.[82] From 2008, the numbers began to rise to 83, with an exponential increase thereafter: 448 rhinos being poached in 2011 to the point where record levels of over 1215 rhinos were killed in 2014 in South Africa.[83] The very future existence and survival of rhinos has now been placed in peril and strong limits recently have been placed on the legal hunting of rhino.[84] Moreover, the role of rhinos in the wider eco-system is essentially threatened. What seemed like a 'sustainable use' on the aggregative view essentially sanctioned self-interested behaviour, which could not be contained. In fact, the killing of rhinos multiplied eventually to threaten the very future of the species. Despite strong law enforcement measures, the South African government has not been able to stem the tide of poaching.[85] Indeed, the recent case of *S v Lemthongthai*, which relates to this pseudo-hunting, provides evidence that law enforcement officials should have known that the permitting system was being misused.[86]

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[79] Department of Environmental Affairs 'The viability of legalising trade in rhino horn in South Africa' 46 available at https://www.environment.gov.za/sites/default/files/docs/rhinohorntrade_southafrica_legalisingreport.pdf, accessed on 27 November 2016.

[80] Ibid at 46-47.

[81] Ibid at 20.

[82] Ibid at 18. Most rhino experts do not believe that tightened regulations by the government increased poaching: see ibid at 43.

[83] See NECER report op cit note 76 at 56.

[84] Tony Carnie 'Changes to law will limit rhino hunts' (06 August 2013) available at: http://www.iol.co.za/scitech/science/environment/changes-to-law-will-limit-rhino-hunts-1.1558174, accessed on 18 January 2016.

[85] In 2015, 1175 rhinos were poached. This was a slight decrease on 2014 but still very high. See Save the Rhino 'Poaching Statistics' available at https://www.savetherhino.org/rhino_info/poaching_statistics, accessed on 27 November 2016.

[86] Supra note 62 para 18.

The instrumental approach towards rhinos promoted by the aggregative approach can also impact upon the attitudes of law enforcement officials and the manner in which they approach their duties with animals simply regarded as dispensable resources. Very strong evidence has recently emerged of a similar pattern in relation to elephants: the once-off legal sale of ivory in 2008 saw a massive increase in the illegal killing of elephants as the stigma of ivory was lifted. Elephants became conceptualised simply as a 'resource' for acquiring ivory.[87]

Those committed to the aggregative view would claim that there is a strong difference between legally hunting a rhino, which takes place within strictly controlled quotas and poaching rhino, which imperils the species. Yet, both views rest on an understanding of conservation and sustainable use that essentially renders individual rhinos pure instruments for other ends (particularly human self-interest). Since there is economic profit to be gained and these animals are simply instrumental to human purposes, it is hard to see, from an individual point of view that is focused on present self-interested gain, why such an individual should desist from poaching where trophy hunting is allowed. Particularly, in the socio-economic context of Africa, the incentives to poach for people who lack the very basic necessities of life – which, in the case of rhino horn are extremely high – become significant.[88] Where animal life is regarded as dispensable and instrumental to profit in the context of legal hunting, why should those who are economically deprived take a different approach? Wide-spread economic disparities exist around hunting and it appears difficult to provide a convincing answer – where self-interest is the predominant motive with which the animal world is approached – why wealthy Americans should be entitled to kill animals at will and wealthy South African game farm owners reap these benefits whilst poor individuals who are trying to provide a basic living for their families are prohibited from benefiting economically from animals who are simply regarded as 'resources' to be exploited. An ethic that simply reduces animals to instruments is essentially contingent upon that ethic providing people with a self-interested reason for preserving some animals in the longer-term for future uses. Where humans do not widely share views about the importance of long-term species survival or find greater use in the destruction of these creatures (or their habitat), it is unclear what justification there is to limit current uses as the greatest benefit for humans can, in their view, be achieved through unconstrained use.

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87 See the recent study by S Hsiang and N Sekar 'Does Legalization Reduce Black-market activity? Evidence from a Global Ivory Experiment and Elephant Poaching Data' (NBER Working Paper no 22314, June 2016) available at: http://www.nber.org/papers/w22314, accessed on 10 July 2016.

88 This is not to suggest that people who are not well off act only from motives of self-interest. Indeed, arguably, there are strong reasons flowing from certain concepts in African ethics why an approach that is respectful of other creatures and concerned with our developing a harmonious relationship with them should be adopted. See, for instance, Bujo op cit note 44 at 296 and Murove op cit note 44 at 329.

Apart from indulging self-interest and struggling to deal with the collective action problem, the above example highlights the related problem that the aggregative view – when justified in anthropocentric terms – also cannot address the fact that human beings have limited life-spans and tend to be more interested in their proximal futures than distant outcomes. As such, an ethic that focuses on 'use' will always tend to imperil the sustainability thereof given the demands of the present being more pressing than those of the future.[89] This point is of importance to a range of environmental issues from the tendency of people to overuse marine resources to emissions of greenhouse gases.[90] Moreover, some of the initial successes claimed in terms of the aggregative approach by pro-hunting lobbyists have had disastrous effects when situations change and people land up in situations of crisis where conserving animals becomes less important.

Consider, for example, Zimbabwe's attempt to implement an aggregative view of sustainable use through its CAMPFIRE policy ('Communal Areas Management Programme For Indigenous Resources'). In a 2001 article, Gunn wrote that the programme seemed to be successful on its own terms: it generated USD 2.5 million, 90 percent of which came from big game hunting licenses. Some of this money was ploughed back into conservation activities and community development.[91] At the same time, Zimbabwe was hailed as a conservation success. Whilst one percent of elephants were killed per year in hunting operations, the total number of elephants increased substantially over time in Zimbabwe from 32,000 in 1960 to 70, 000 in 1993.[92] However, during the late 1990s, President Robert Mugabe undertook a disastrous series of reforms around land, which plunged the country into economic crisis. Conditions in Zimbabwe deteriorated with fewer hunters and tourists coming to the country. By 2003, over 80 percent of the animals in Zimbabwe safari camps had died.[93] With animals no longer so valuable in monetary terms, people began to kill them indiscriminately for poaching and subsistence purposes with one report speaking about the wildlife being 'decimated' by the

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89 See Robert Heilbroner 'What has posterity ever done for me?' in Pojman and Pojman op cit note 40 at 347-8 who sees this attitude as rational, though wrong.

90 See, for instance, J Brett 'Why Climate Change Defeats our Short-term Thinking' (2014) *The Monthly* available at https://www.themonthly.com.au/issue/2014/february/1391173200/judith-brett/why-climate-change-defeats-our-short-term-thinking, accessed on 27 November 2016.

91 Gunn op cit note 46 at 87.

92 Ibid at 88.

93 Nash Jenkins 'Who is Really Responsible for the Killing of Zimbabwe's Lions and Other Wildlife?' *Time* (July 29, 2015) <available at http://time.com/3976344/cecil-lion-zimbabwe-walter-palmer/>, accessed on 21 January 2016.

economic crisis.[94] This example suggests that an ethic of pure self-interest around the use of animals is ultimately not sustainable and fails to conserve them for future generations. It renders their survival contingent upon particular conditions existing that render them more useful to human beings alive than dead, and in circumstances in which people value their uses in the longer-term. When people land up worse off due to economic conditions, the self-interested ethic fails to offer any protection with short-term thinking and rampant destruction becomes the name of the game.

I have argued thus far that the aggregative approach to sustainable use and conservation undermines its own collective goal of achieving the long-term survival of a species and maintaining biodiversity. Even if there is no absolute certainty that some of these effects will eventuate, there are clear risks created through this approach. In terms of the general principles of environmental law, a precautionary approach, which tries to mitigate these risks, should therefore be adopted. [95]

To achieve the very goals of the aggregative approach (and to mitigate its risks), it is necessary to adopt an alternative view which refuses to reduce animals to mere resources to be used at will and recognises that individual animals are deserving of respect for their interests in their own right.[96] If such an ethic is promoted in society and enshrined in the manner in which the law approaches animals, it will not be permissible to kill animals for any trivial reason such as entertainment (hunting). In turn, the law would send a clear message that the pure instrumentalisation of animals is unacceptable and a consistent message would be conveyed that no form of killing for pure profit is sanctioned. Whilst there are good reasons to think that the aggregative approach imperils long-term species survival or at least places this at risk, a respect-based ethic of conservation and sustainable use would not in itself contain the tension that legitimates self-interest and then attempt to place it within constraints. Instead, this ethic would recognise the inherent value and respect to be accorded to the life of individual

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[94] Nick Wadhams 'Zimbabwe Wildlife Decimated by Economic Crisis' *National Geographic News* (1 August 2007) available at: http://news.nationalgeographic.com/news/2007/08/070801-zimbabwe-animals.html, accessed on 21 January 2016.

[95] The precautionary principle deals with decision-making in circumstances without full scientific certainty. It was included in Principle 15 of the Rio Declaration on Environment and Development available at http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163 , accessed on 01 December 2016. NEMA too recognises it in s 2(4)(*a*)(vii) as a key principle mandating a 'risk-averse and cautious approach'.

[96] This could be supported by a more complex version of utilitarianism in relation to the environment. Instead of adopting a view that allows the benefits of humans (or the environment as a whole) to run roughshod over individual interests, it would require a rule to be adopted that individuals are deserving of respect in their own right and their interests must be protected. That rule would in the longer run achieve better the utilitarian purposes and is an expression of the general argument that is often made for rule utilitarianism over act utilitarianism. See, for instance, R Brandt *Morality, Utilitarianism and Rights* (1992).

animals. As such, just as in the case of our relations with other humans, self-interest would not be accepted as an ethic that can guide our relationships with them. Since individuals cannot just be disposed of at whim, inherently, this approach would lead to the survival of a range of species. Since their lives matter intrinsically, human beings may only use them under limited conditions, an idea that is built into this ethic itself. Moreover, an ethic that promotes respect for animals must also respect their fundamental interests and the conditions required for their flourishing. Accordingly, an integrative approach is concerned both with animals as well as their relationship with humans and the environment in which they live. Conservation and the long-term survival of the species – which includes permissible uses thereof in the future – will follow as a consequence of the respect individual animals are afforded.

This section of the argument focused on the anthropocentric justification for the aggregative view and the benefits humans gain through their relation with animals. However, one of the underlying issues that surfaces concerns the relationship between the attitudes and behaviours adopted towards particular animals and those towards the species, a matter that is considered in the next section.

(iv) The relationship between individuals and collective concepts

One of the key features of the aggregative view is the notion that what really matters is the big picture: ensuring species survival, and that ecosystems and biodiversity are maintained for future generations. It may of course be questioned why these features of the world should be valued. If the answer is framed in terms of human self-interest, then that view, once again, becomes subject to many of the objections discussed in the last sub-section and, as we saw, the very achievement of that self-interest in such collective notions may require the adoption of attitudes not founded purely on human self-interest. If the justification is not captured in anthropocentric terms, then there is a puzzle as to why these collective goods are valuable at all.[97]

Even if we can provide some justification for ascribing value to such entities as species, a number of further questions arise. First, what is the relationship between a valuing of a species and the value of individuals that make up the species? Secondly, if we have reasons to value

[97] This is one of the difficulties for ecocentric ethical systems that focus on collectivities rather than individuals. See, for instance, DesJardins op cit note 43 at 186-189 and Russow op cit note 40 at 270-276.

collective entities such as species, can this provide a sufficient justification for overriding the interests of individuals if there is a clash? Let us turn to an exploration of these questions.[98]

A key question in this context concerns the nature of the collective goals or concepts and their relationship with the individuals who make them up. I shall focus in this article on the notion of the species. The notion of how to define a species has in fact been controversial and developed across time.[99] There remain several concepts of what constitutes a species but the most commonly utilised one is of a 'biological species', which is defined by the famous evolutionary biologist Mayr as 'a reproductive community of populations (reproductively isolated from others) that occupies a specific niche in nature'.[100] The development and diversity involved in specifying the concept of the species highlights the fact that the notion is itself a human concept developed to describe particular features of the environment.[101] There is something rather strange about placing strong normative value upon a collective notion whose very contours have only relatively recently become clearer.

The notion of a species is designed like many other forms of taxonomy to classify certain features of the world around us. It is a concept that picks out particular characteristics of individuals and groups them in a particular way. Biologically, the feature that is most accepted is of different types of creatures (and plants) that can inter-breed. It is very hard to see from this definition that there is any moral importance to this idea. The key issue from a normative point of view, however, appears to be that those that can inter-breed have particular characteristics that distinguish them from others who can inter-breed. Species survival is thus about ensuring the preservation of individuals with a particular set of characteristics.[102]

When we talk, for instance, of an endangered species, we mean that there are very few individuals with those characteristics that are left. The survival of a species may not be dependent on the survival of any particular individual animal. Yet it is individuals who must survive for the species to continue. This point highlights that a species cannot exist separately to individuals who make it up. It would also be hard to see how one can be interested in preserving the characteristics of individuals without the individuals per se.

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98 The relationship between collective notions such as a species and individuals has been the subject of much discussion and debate within environmental ethics. See, for instance, Callicott op cit note 42 and Jamieson op cit note 40. I engage further below with situations where collective and individual considerations may clash.

99 This interesting area is explored in E Mayr *The Growth of Biological Thought: Diversity, Evolution and Inheritance* (1982) ch 6.

100 Ibid 273.

101 Similar points can also apply to other collective concepts such as ecosystems over which there has been much debate in the field of ecology. For an overview, see DesJardins op cit note 43 at 162-168.

102 See Russow op cit note 40 at 275.

As a result of these points, it is clear that the goal of ensuring the survival of a species must necessarily include the goal that some individuals with those particular characteristics survive. It is hard to see how one can de-emphasise the survival of individuals where they are integral to the survival of the species. It also remains difficult to see how one can promote respect for the broad concept of a species surviving without respecting the individuals that make it up. As such, those concerned with the survival of species must care about the fate of at least some individuals that make up the species. The aggregative view, as we saw, however, places little or no value on individuals and adopts a purely instrumental approach towards individuals. Such an approach is self-defeating for two reasons. First, given the relationship between the species and the individuals that make it up, it remains hard to see conceptually how the aggregative approach can attribute anything other than instrumental value to the species itself. Secondly, the aggregative view seems likely to undermine the protection of a range of species on a practical level. As we have already seen, an attitude of pure instrumentalisation is a general one which is not confined to certain individuals within any species; it applies across the board. The attitudes to and behaviours displaying disregard of individuals promoted by the aggregative view, therefore, is likely to translate into a problem in relation to species survival. Examples where this has arisen around elephants and rhinos have already been provided.

The integrative view, on the other hand, recognises that there is a close relationship between a focus on individuals and a focus on collective notions such as species. The one cannot be divorced from the other. By promoting respect for individuals and recognising our moral and legal obligations towards them, the view automatically forces human beings to have a stake in the survival of individuals with particular characteristics, the species. Moreover, respect involves attention to the interests of animals, the habitat in which they live and the environment more generally. As such, the integrative view in fact adopts a more expansive holistic view than the aggregative approach. It requires understanding the relationships between animals, humans and the rest of the environment and thus requires not only a focus on the individual but the broader features of the environment as a whole.

However, it may be objected that matters are not so simple and that there are often conflicts that may arise between a focus on individuals and collective goals. It seems intuitively plausible that it may be necessary to capture (and perhaps on some occasions even humanely kill) an individual animal which suffers from a serious disease and poses a threat to an entire population or species. The aggregative view essentially seeks to resolve these problems by allowing the collective simply to override any concerns with the individual. However, in doing

so, it does not accord any particular value to the interests of individuals in and of themselves and, as we saw, renders them purely instrumental to wider goals. It is for this reason that one of the strong charges against eco-centric views that focus only on the collective has been one of 'environmental fascism'. Reminiscent of fascism in the human context, it simply allows collective notions – which, as we have seen, have questionable moral relevance – to override claims by individuals.[103]

An integrative approach, on the other hand, has the resources, more successfully, to recognise and address conflicts that may arise between individuals themselves and between individuals and the collective. It is founded on a commitment to respect for individuals and thus requires a consideration of animal interests in their own right. This will mean that their interests are not subordinate immediately to collective goals or the justifications underlying them (whether that be collective human utility or the interests of the environment as a whole). It does not, however, require the interests of individuals to be conceived of as absolute. Instead, what will be required is a method of reasoning that recognises a clash of interests and values and attempts to resolve them in the best way possible.

This is not a situation that is unknown to constitutional law. Indeed, clashes between the interests of humans are central to much of constitutional law. Particular modes of reasoning have been adopted – in particular, the proportionality enquiry – which seek to assist in the adjudication of competing interests without losing a sense of the value of each individual.[104] A proportionality enquiry could thus also be used as means to balance competing interests where these arise between humans, animals and other features of the environment.[105] As a result, a diseased animal that is posing a threat to an entire population remains a valuable being on the integrative view and could not simply be sacrificed for the collective. It would be necessary to evaluate the threat posed to other individuals and determine whether there is any less drastic

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[103] See, for instance, Tom Regan *The Case for Animal Rights* (1983) 362 and, more generally, for a discussion of this charge DesJardins op cit note 43 at 189-194.

[104] For two classic treatments and deeper justifications for the notion of proportionality and its uses in law, see R Alexy *A Theory of Constitutional Rights* (trans J Rivers, 2002) and A Barak *Proportionality: Constitutional Rights and their Limitations* (2011). For a positive application of the principle of proportionality which protected animal interests even in the face of the profitable human industry of foei gras production, see *Noah (Israel Association for the Protection of Animals) v Attorney General* HCJ 9231/01 [2002-3].

[105] In so doing, the proportionality enquiry will ultimately require some kind of focus on achieving the best holistic solution for, at least, humans and other animals. The overarching perspective adopted is distinct from the aggregative approach in its holistic version, in that value is placed on individuals and the overarching enquiry seeks to achieve what is best from a perspective that values the equal importance of inherently valuable creatures. For such a complex consequentialism which tries to take into account distributions of goods and the protection of individual rights in the evaluation of outcomes, see T Scanlon 'Rights, goals and fairness' in J Waldron (ed) *Theories of Rights* (1984) 142 and Amartya Sen 'Rights and agency' in S Scheffler (ed) *Consequentialism and its Critics* (1988).

intervention available (such as separation and quarantine) than the lethal one. Only if that were not possible would it be permissible to kill such an animal in the most humane way possible. Such a result would be seen as a tragic choice on the integrative view rather than something to be celebrated.[106]

Arguably, such form of reasoning, as promoted by the integrative approach, is in fact entirely consistent with the structure of s 24(*b*) of the Constitution. One of its core notions is the obligation upon the state to take 'reasonable' legislative and other measures. The notion of 'reasonableness' could very well be interpreted to require such a balancing approach in relation to the measures that are adopted. Indeed, in the socio-economic rights context, it has been contended that many elements of the proportionality enquiry are contained within this notion.[107] For the satisfaction of the reasonableness enquiry, the CC requires balancing between short, medium and long-term needs, ensuring the inclusion of those with significant interests, and an attention to individuals rather than statistical goals being achieved overall.[108] The approach of the CC to the interpretation of reasonableness in the socio-economic rights context has widely been regarded as applicable to the interpretation of this notion in the environmental law context.[109] Consequently, the above-mentioned features of reasonableness would mesh well with and support the adoption of the normative thrust of the integrative approach. Moreover, s 36(1) of the Constitution itself (the general limitation clause) contains the broad notion of reasonableness and justifiability which includes the sub-elements of a proportionality enquiry. Sub-section 24(*b*)(iii) of the environmental right itself also, in a broader way, inherently requires a form of balancing reasoning which requires there to be sustainability in the use of resources whilst still allowing for economic and social development.[110] Balancing is thus not foreign to the environmental clause. The approach advocated for would cohere well with its language and structure as well as the recent statements of the CC in favour of an integrative approach.[111] Accordingly, a strong argument for the integrative approach is that it can also recognise the value conflicts that exist in giving effect to the environmental right and requires a reasonable balance to be achieved (rather than giving expression to only one set of values).

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106 For the role and importance of recognising tragedy in moral and legal reasoning, see M Nussbaum 'The costs of tragedy: The moral limits of cost-benefit analysis (2000) 29 *The Journal of Legal Studies* 1005.

107 See the argument made in this regard in Sandra Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 226.

108 See *Grootboom* supra note 31 paras 39-44.

109 See, for instance, Glazewski op cit note 16 at note 79 and Van Der Linde and Basson op cit note 19 at 50-26-7.

110 See Glazewski ibid at 81 and Van Der Linde and Basson ibid at 50-25.

111 *NSPCA* supra note 10 para 58.

I have thus far provided three sets of reasons for why the integrative approach to interpreting the notions of conservation and sustainable use should be preferred to the aggregative view. Indeed, in large measure, these arguments seek to show that the aggregative view is self-defeating; to achieve the very goals it sets itself requires and presupposes the adoption of the integrative approach. In the next section, I consider how the differences between these approaches become important in relation to two concrete matters of environmental law and policy in South Africa.

IV THE PRACTICAL IMPORT OF THE INTEGRATIVE APPROACH

(i) The competences of the department of environmental affairs

The Department of Environmental Affairs (DEA) claims that it lacks the competence to legislate over issues that concern animal welfare.[112] This is due to the failure by the legislature and executive to adopt an integrative approach to constitutional environmental rights[113] and subsequent environmental legislation and the lack of an explicit focus on animals in these instruments. The issue raised its head in a process that was initiated to modify a document titled the National Norms and Standards for the Management of Elephants in South Africa ('Norms and Standards').[114] This document, which is essentially a set of regulations, was issued by the former Minister of Environmental Affairs in 2008 in terms of s 9 of the Biodiversity Act. The Norms and Standards provide a framework for regulating the management of elephants in South Africa. Their purpose is stipulated to involve a number of elements which include managing elephants in such a way as to ensure the following: their long-term survival; the promotion of biodiversity and broad socio-economic goals in a manner that is sustainable; no disruption to the ecological system of which elephants are a part; their treatment in a manner that is ethical and humane; and their treatment in accordance with their sentient nature, highly organised social structure and ability to communicate.[115] The Norms and Standards were issued following an extensive process of public and stakeholder engagement, which drew on expertise from scientists, civil society and academia. This development followed a major debate that took place as to whether the culling of elephants should be allowed as part of the process of managing elephants and their impact on the environment.

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[112] See Department of Environmental Affairs op cit note 6.
[113] *NSPCA* ibid was only decided in December 2016 and, without clear guidance about interpreting the constitutional environmental right, the dominant approach adopted by the DEA has been an 'aggregative' one.
[114] *GG* 30833 of 29 February 2008.
[115] The purposes are laid out in terms of ss 2(2).

The Norms and Standards are perhaps the one example in post-apartheid South Africa of a set of environmental regulations that could be said to incorporate respect-based considerations for animal interests and to adopt a more integrative approach. The Norms and Standards set up a series of guiding principles for the management of elephants by anyone exercising a power relating to them. They include a requirement to recognise that 'elephants are intelligent, have strong family bonds, and operate within highly socialised groups and unnecessary disruption of these groups by human intervention should be minimised'.[116] The principles recognise that management interventions regarding elephants must be based on scientific knowledge and take into account the social structure of elephants. They should also seek to avoid causing stress and disturbance to elephants.[117] The guiding principles require every effort to safeguard elephants from abuse and neglect.[118] At the same time, there is a balance created in the principles, which recognise the impact of elephants on biodiversity and on people who live in close proximity to them.[119] In relation to issues such as culling, 'lethal interventions' are only to be utilised with caution and after all available alternatives are considered. In other words, these are interventions of last resort.[120] The Norms and Standards essentially require anyone who is responsible for elephants to create a management plan for doing so. They limit the ability to keep elephants in captivity and require strong justifications for the translocation of elephants. The Norms and Standards thus recognise the need to protect individual elephants whilst ensuring that people's interests and other environmental concerns are also addressed.

To achieve their goals, the Norms and Standards have restricted the uses that can be made of elephants, thus conforming well with the integrative approach outlined above. This salutary feature however, has generated resistance from those wishing for an approach that allows for greater unconstrained uses of elephants. The Department itself has put forward the argument that it needs to remove all aspects of the document that relate to animal welfare as it lacks the competence to regulate in that regard. In its concept note advocating for amendments to these Norms and Standards, the DEA states that 'a number of the guiding principles relate to the prevention of abuse and the neglect of elephants, which is problematic as the Department of Environmental Affairs [DEA] does not have the mandate to regulate welfare issues'.[121]

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116 Section 3(*a*).
117 Section 3(*h*).
118 Section 3(*l*).
119 Sections 3(*b*) and 3(*f*).
120 Sections 3(*i*) and 19 (*b*)(ii).
121 Department of Environmental Affairs 'Key challenges Relating to the Implementation and Enforcement of the Norms and Standards for the Management of Elephants in South Africa' available at:

Many of the inputs and comments received from other interested parties also articulate this point. This idea – that the DEA is not empowered to regulate welfare issues – seems to underpin one of the key elements of the case that the Norms and Standards should be revisited.

The key argument is based on the fact that the empowering legislation is the Biodiversity Act. The purpose of this Act involves managing and conserving 'biological diversity within the Republic and of the components of such biological diversity' and 'the need to protect the ecosystem as a whole, including species which are not targeted for exploitation'.[122] It also involves a principle concerning the use of 'indigenous biological resources in a sustainable manner'.[123] Key concepts here are biological diversity, conservation, holistic protection and sustainable use. The approach adopted towards the notions of sustainable use and conservation becomes very important in determining the manner in which the Act is interpreted. Clearly, it must be constructed in light of the interpretation given to these terms in the Constitution.[124] Section 9 of the Act provides that the Minister may issue Norms and Standards to achieve any of the objectives of the Act including the 'management and conservation of South Africa's biological diversity and its components'; and 'restriction of activities that impact upon biodiversity and its components'.[125] The DEA has argued that these sections do not contemplate some of the elements in the Norms and Standards that protect animal welfare and as such, have its powers in that regard.[126] It is instead the Department of Agriculture that is tasked with regulating animal welfare and the DEA should focus only on environmental questions.

This argument is deeply flawed and needs to be rejected on terms that are suggested by the integrative approach in this article. As we saw, legislative measures taken to give effect to environmental matters must meet the standard of 'reasonableness'. Reasonableness at least involves the notion that the legislation must be rational and not arbitrary. It is absurd to suggest that norms and standards regulating the management of elephants can exist without considering the nature, welfare, and social character of elephants, which can be simply or neatly unbundled from other matters relating to their management. To attempt to regulate elephants without considering these aspects would be like attempting to regulate tobacco without considering its

http://conservationaction.co.za/wp-content/uploads/2014/09/Concept-Note-Key-challenges-relating-to-the-management-of-elephants-in-South-Africa.pdf, accessed on 21 January 2016

122 Sections 2(*a*)(i) and (IA).

123 Section 2(ii).

124 All legislation is to be interpreted in light of the spirit, purport and objects of the bill of rights in terms of s 39(2) of the Constitution

125 Section 9 of the Biodiversity Act.

126 See Department of Environmental Affairs op cit note 6.

effect on human health. It is well-established in law that if something is incidental to – or necessarily accompanies – the proper performance of an authorised legal power, then it, too, is legally authorised.[127] The Norms and Standards must, therefore, take account of the nature, welfare and social character of elephants as these cannot be separated from the management of these animals. To avoid doing so, would risk a legal challenge to these regulations as being irrational.

Consider, for instance, the fact that the Norms and Standards provide for management plans to be drawn up by those responsible for managing elephant populations in a particular area.[128] These plans must include consideration of the 'availability of adequate food plants; the availability of adequate shelter; the availability of adequate water for drinking and bathing; and the size of land available to the population'.[129] All these provisions can only be explained if one takes account of the welfare needs of elephants.

Another provision severely limits the possibility of capturing elephants from the wild.[130] What lies behind this provision is the prohibition on the traumatic separation of family units and, in particular, female elephants from their young. This practice has often occurred in order for private tourist operations to acquire baby elephants, which are then destined for a life of captivity in zoos or for being used in elephant-backed safaris.[131] It is not clear on what basis the Minister could pass a provision such as this without recognising the deep connections between elephants and their young.

The Norms and Standards also cover subjects such as the need to ensure sedation of elephants is not performed repeatedly;[132] limits the number of times elephants can be translocated, and requires this to occur in family units;[133] addresses the manipulation of ranges of elephants;[134] and places limits on the use of culling, which should only be employed as a

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127 The CC affirmed this principle which it regarded as trite in *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC) para 50. It has also been affirmed by the SCA in *GNH Office Automation CC v Provincial Tender Board, Eastern Cape* 1998 (3) SA 45 (SCA) at 51G-H. In *Moleah v University of Transkei* 1998 (2) SA 522 (Tk), Van Zyl J expressed the principle of implied powers as follows at 536H-I:

> 'Applying the principles applicable to the interpretation of statutes, it is clear that, if certain conduct is required or authorised, the authorising act should be interpreted as impliedly including authorisation to do that which is "reasonably necessary" to achieve the main purpose or to perform the action effectively or that which is "reasonably incidental" or "reasonably ancillary" to those powers expressly conferred.'

128 Section 5(1)(*f*).

129 Section 7(*b*).

130 Section 11.

131 See, for instance, C Russo 'Zimbabwe's Reported Plan to Export Baby Elephants Raises Outcry Against Animal Trade' available at http://news.nationalgeographic.com/news/2014/12/141217-zimbabwe-china-elephants-zoos-tuli-botswana-south-africa/, accessed on 1 December 2016.

132 Section 10.

133 Section 12.

134 Section 18.

last resort.[135] These are all measures, which provide significant protection for elephants – and are founded on a recognition that they are sentient creatures with worth, and that respect must be shown for their strong welfare and social needs.

These arguments are supported by the fact that the empowering legislation in question explicitly recognises the ability to regulate 'components of biodiversity'. This phrase requires an understanding of the nature of each particular component in question which, in the case of sentient creatures, involves their having a welfare with particular characteristics. As such, one simply cannot provide sensible environmental regulations without taking into account the nature of the subject of the regulations.

These arguments give expression to and support the adoption of an integrative understanding of the environmental right articulated above. Indeed, the CC has now clearly stated that animal welfare is related to 'questions of biodiversity'[136] and its approval of the integrative approach must prompt a shift in the DEA's understanding of its own powers. The DEA is one of the principal state organs which gives effect to the environmental rights and is responsible – in the context of this article – for the development of legislation and regulations as well as the enforcement thereof in relation to wild animals. The environmental right imposes obligations upon the state to protect the environment for present and future generations, including the protection of animal life. The preferred integrative view would understand the notions of conservation and sustainable use to require that legislation and regulations give expression to an attitude of respect for the particular creatures that make up collective concepts such as species or biodiversity and to integrate that respect into how the legal rules regulate the interaction between humans, animals and other features of the wider environment. Respect for individual animals would require displaying an understanding of, and concern for their natures which, in the case of sentient creatures, involves their having a welfare.[137] The DEA is mandated to pass reasonable legislative and other measures that protect the environment. No such measures will be reasonable without recognising the nature of the creatures before it and according them the respect that is due to them.[138] Treating individuals with such respect, as has been argued above, is also necessary for achieving the very goals of the aggregative approach,

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[135] Section 19.

[136] *NSPCA* supra note 10 para 58.

[137] It is arguable that animal welfare and a consideration of the nature of a creature would matter – at least to some extent – even on an aggregative view as completely ignoring the welfare of animals and their needs may well lead to a crisis, thus affecting their continued survival which, in turn, would prevent human uses of them in the future.

[138] Reasonableness also means that the DEA cannot attempt to separate parts of the legal system arbitrarily and deny that it has any role to play in giving effect to the key animal protection statute, the Animal Protection Act of 1962. The law needs to be considered in its integrated unity and not as silos.

such as species survival and maintaining biodiversity. I turn now – in the context of a concrete case relating to canned lion hunting – to exploring the interaction between aggregative and integrative approaches.

(ii) Canned lion hunting and environmental law

The case of *Predator Breeders Association v Minister of Environmental Affairs and Tourism*[139] involved a challenge to the validity of regulations that sought severely to restrict the practice of 'canned lion' hunting.[140] I shall outline the background to the case and consider the reasoning in the appeal judgment to the SCA insofar as it is relevant to this article.

Canned hunting in South Africa generally involves allowing hunters to shoot an animal in a wild setting, which has been reared by humans and thus domesticated. Given that the animal is habituated to humans, it usually does not run away and the kill is virtually guaranteed. Canned hunting facilities thus 'share the same basic concept: hunters pay for a guaranteed kill – they never have to walk away empty-handed'.[141] South Africa had seen the extensive growth of canned lion hunting, which led to the introduction of the regulations in question.[142]

In 2007, the Minister of Environmental Affairs and Tourism passed the Threatened or Protected Species Regulations ('ToPS Regulations') in terms of powers granted to him under the Biodiversity Act. Section 57 of that Act authorises the Minister to 'prohibit the carrying out of any activity – (a) which is of a nature that may negatively impact on the survival of a listed threatened or protected species; and (b) which is specified in the notice…'. The ToPS Regulations prohibited the hunting of a 'put and take animal' which was defined as a 'live specimen of a captive bred listed large predator…that is released on a property irrespective of the size of the property for the purpose of hunting the animal within a period of twenty four months'.[143] The regulations, however, contained an exception: a listed large predator which had been bred in captivity could be hunted provided it had been rehabilitated to live naturally in an environment that was subject to minimal human intervention and had been fending for itself for at least twenty four months.[144] This provision effectively prevented the hunting of

[139] [2010] ZASCA 151.
[140] The description of the case is drawn from D Bilchitz 'Animal interests in South African law: The elephant in the room? in D Cao and S White (eds) *Animal Law and Welfare: International Perspectives* (2016) 143-145.
[141] L Ireland 'Canning canned hunts: Using state and federal legislation to eliminate the unethical practice of canned "hunting"' (2002) 8 *Animal Law* 223, 227.
[142] See P Lindsay et al 'Possible relationships between the South African captive-bred lion hunting industry and the hunting and conservation of lions elsewhere in africa' (2012) 42 *South African Journal on Wildlife Research* 11-22 for a discussion on the increase of canned lion hunting in South Africa.
[143] Section 1.
[144] Regulation 24(2).

animals that had not been living freely for two years and vastly increased the costs of raising animals for hunting purposes. Whilst lions, at the time the case was lodged, had temporarily been removed from the published category of 'listed large predators', the Minister had clearly expressed the intention that they were to be included in the near future, with the consequent implications that these regulations would apply to hunting them.

The Predator Breeders Association (PBA) – a group of breeders of predators and of hunters of those animals that were bred in captivity – challenged the regulations and particularly, the exception on the grounds that they were irrational. In terms of South African law, all exercises of public power must be rational. This requires that there be a rational relationship between the scheme adopted and the achievement of a legitimate government purpose; that a decision is rationally related to the purpose for which the power was given; and that there is a rational connection between the information available to a government functionary and the actions taken by him on the basis thereof.[145] The PBA argued that the period of 24 months bore no rational connection to any legislative purpose of the Act; no rational basis or evidence existed for the underlying assumption that a captive-bred lion could be rehabilitated at all; and the period of 24 months was not justified by information in the possession of the Minister.[146]

The main holding by the SCA concerned the lack of a proper evidentiary basis to justify the assumption in the regulations that captive-bred lions could be rehabilitated over a 24 month period. In the course of the judgment, however, the appellate court considered the legislative basis for the prohibition on canned lion hunting. In terms of the empowering provision in the Biodiversity Act, the focus of any regulations had to be on the purpose of ensuring the survival of a threatened or protected species. This meant that the prohibition on canned lion hunting or any exception thereto had to be justified in terms of its impact on the survival of lions as a species. The court found that some of the motivation for the regulations lay in public opinion which was opposed to captive-bred lions being hunted and certain concepts of ethics surrounding hunting. This included the notion that there should be a 'fair chase' between the hunter and the hunted. In analysing these justifications, Heher J stated that '[i]t is by no means clear to me how either ethical hunting (whatever its limits may be) and fair chase fit into a legislative structure which is designed to promote and conserve biodiversity in the wild and,

[145] *Predator Breeders Association* supra note 140 para 28.
[146] Ibid para 29.

more especially in relation to captive-bred predators that are not bred or intended for release into the wild'.[147]

The judge here struggles to connect the collective environmental notions such as 'biodiversity', 'conservation' and 'survival of a species' with the normative basis for regulating a practice such as canned hunting. Indeed, in terms of the aggregative view of 'conservation' or 'sustainable use', such a practice would seem justified. As long as domestically-reared animals do not mix with wild populations, any genetic abnormalities created by in-breeding would not be transferred. This form of hunting in turn would involve the use of a 'renewable resource' and not deplete the number of animals living in the wild or kill those animals in the wild with the best genetic stock. The survival of the species would thus not clearly be affected and the 'wild' animals be conserved.

Some of these claims can be challenged on their own terms and upon empirical grounds. For instance, canned operations may require new genetic stock and so remove animals from the wild, thus depleting the gene-pool therein. Furthermore, the extent of the contribution of such operations to conservation can be challenged.[148] To understand what is foundationally wrong with this reasoning, however, it is necessary to think normatively and to reject the notion that the treatment of animals in canned hunting operations is unrelated to their treatment in other contexts. Canned hunting by its nature involves the rearing of animals specifically for the purpose of being killed. The ethical objections and revulsion in relation to canned hunting arises from the very idea of raising domesticated wild animals – often in iconic species – and then allowing them to be shot.[149] Underlying this concern appears to be a worry that the lives of magnificent creatures such as lions are treated with utter disrespect and they are simply reduced to objects to be reared and shot for profit. Yet, as was discussed in part III(i) above, lions remain lions whether they are killed in a canned lion hunting operation, hunted in the wild or through poaching. The attitudes and behaviours promoted in one context translate into attitudes and behaviours in other contexts.

As such, an ethic that reduces the value of such creatures to mere instruments for human entertainment without any regard for their lives or welfare, will affect how they are generally conceived of and treated. Individuals will tend to see them simply as tools for personal enrichment towards whom we owe no respect. Such an attitude undermines the very basis for

147 Ibid para 37.
148 A number of these arguments in response to the aggregative view are made in Anne Susskind 'Lions to the slaughter' *Noseweek* (20 – 23 November 2015).
149 On the general ethical questions around hunting, see E Cohen 'Recreational hunting: Ethics, experiences and commoditization' (2014) 39 *Tourism Recreation Research* 3.

conserving such creatures and maintaining their survival. It further places in jeopardy their future, thus undermining any claims to long-term sustainability. To counter such a destructive ethos, we can well defend the Minister's use of the Biodiversity Act to restrict canned hunting and, indeed, to ban it. The unethical nature of the practice itself is in fact related to the environmental concepts of managing and conserving biodiversity as well as the survival of the species which, as the arguments in this article have sought to establish, cannot take place without fostering an attitude of respect for individual creatures. Indeed, the court itself seems to have recognised that it may have been better for the Minister to issue an outright ban on canned hunting rather than creating an ostensible compromise that lacked a proper scientific basis. The court stated that '[n]o doubt the Minister was entitled to take account of the strong opposition and even revulsion expressed by a substantial body of public opinion to the hunting of captive-bred lions'.[150] What the court failed to do adequately was to connect this revulsion to the very environmental purposes of the Act, something this article has sought to do.[151]

The reasoning of the court clearly indicates the potential perils that an environmental law framework focused on collective goals may hold for the protection of animals. The two sets of concerns are divorced from one another and a concern for the interests of animals is not taken into account. However, it also demonstrates the importance of harmonising environmental concerns with those relating to the interests of animals in a way suggested by the integrative approach and as I have argued for in this article. There is now also an express mandate by the CC to connect a protection for animal welfare and interests to the broad concepts contained in the environmental right and legislation, such as biodiversity and conservation. As has been demonstrated in this section, the integrative approach has potentially significant implications for not only government powers but also the substance of what it is required to do in developing the environmental law regulatory framework.

V CONCLUSION: RECONCILING ENVIRONMENTALISM AND ANIMAL INTERESTS

In this article, I have sought to consider two possible approaches to interpreting the notions of 'conservation' and 'sustainable development'. I have argued for an integrative approach, which involves inculcating an attitude of respect towards every individual animal making up the environment or eco-system. Individuals have intrinsic value, which limits the uses that can be

150 *Predator Breeders Association* supra note 146 para 44.

151 That failure has also provided the basis of arguments made by the DEA that it lacks the competence to regulate issues relating to animal welfare. I have already discussed why this is a mistaken claim.

made of them. The reduction of creatures to mere playthings for humans must itself be understood to threaten the survival of those beings and the conservation of biodiversity as a whole. I argue that only such an ethic really provides good reasons for conservation or sustaining the environment at all. The integrative approach, as its name suggests, also offers an opportunity to integrate concerns that are intimately connected – those relating to individuals and the holistic environment in which they exist – rather than attempting an awkward and unnatural separation. In doing so, it also does not deny that conflicting interests may arise. Rather, it recognises that these clashes occur within a constitutional framework that can take account of and seek to balance the interests of particular individual animals with the interests of other animals, humans and the environment as a whole. The implications of this approach were explored in relation to two concrete issues – the scope of the mandate of the DEA and the regulation of canned lion hunting – that have arisen in relation to animals and the environment in South Africa.

The argument in this article may also merit further research into its implications for other features of the environment. Animals, as I employ the term, are a special case as they are beings in the environment who have a conscious experience of the world. Their sentient nature has been recognised widely to place strong ethical obligations upon human beings in their relations with them and, as rendering them, primary bearers of value.[152] A respect-based ethic clearly makes sense in relation to sentient creatures. Yet, it may be argued, that similar reasoning to that employed in this article may be necessary in relation to other components of the environment too. In other words, whilst the floral kingdom, mountains, oceans and rivers lack a consciousness of their own, it could be argued that they will be preserved adequately for future generations only by inculcating an attitude of respect towards them that is not premised on their being purely instrumental to our own self-interested goals. That is a more complicated argument to make and I leave it for further research.[153]

The Constitution of South Africa heralds a new era in which the relations between people are meant to be founded in a respect for one another that is captured by the foundational values of 'dignity, equality and freedom'. The inclusion of an environmental right, I contend,

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[152] For reference to this idea, see D Jamieson op cit note 40 at 204 and D Bilchitz *Poverty and Fundamental Rights* (2007) 10.

[153] The complexity of such a position can be seen by the attempt by Jamieson op cit note 40 at 203-211 to argue that other features of the environment have an 'intrinsic' value even though it is derivative; cf the response by R Crisp 'Animal liberation is not an environmental ethic: a response to Dale Jamieson' (1998) 7 *Environmental Values* 476 at 478 where he contends that Jamieson is 'valuing as ends mere means'. This paper suggests a way out of this conundrum of requiring an attitude of respect to features of the environment, which may, nevertheless, only have derivative or instrumental value. Why we should do so is suggested by some of the lines of argument in this paper but a fuller exploration lies beyond the scope of this paper.

highlights the fact that human beings themselves have an interest in ensuring that this respect is not confined to the human species but radiates outwards and includes, at least, creatures who are sentient and must be conserved and preserved for non-exploitative uses by future generations. Indeed, such an ethic of respecting non-humans may well be necessary to achieve the very society envisaged in relation to humans themselves. The CC has recently expressly approved of such an integrative approach that connects animal welfare to the environmental right. It also has approved of the SCA's statement that 'constitutional values dictate a more caring attitude towards fellow humans, animals and the environment more generally'.[154] Of course, it would be desirable (and perhaps required) in light of these arguments for the legislature and executive – along the lines of the Norms and Standards for elephant management – directly to include the protection of animal interests and welfare within legislation that impacts upon them. The point of this article, however, is to establish that even in the absence of such direct interventions, the environmental right (and its purposes) require the adoption of legally-enshrined attitudes that exhibit respect for the lives and welfare of individual animals. Concepts such as conservation and sustainability recognise the deep interconnection between ourselves and the features of the world around us within a holistic system: one prong in achieving these noble goals is developing a deep respect for the individual animals that form an integral component of the rich tapestry of the environment within which we live.

[154] *Lemthongthai* supra note 61 para 20 quoted in *NSPCA* supra note 10 para 57.