



Conservation and human rights: the important nexus in South Africa

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ABSTRACT

The nexus or intersection of human rights and conservation presents a avenue for the critical addressing of the issue of human-wildlife conflict. Across the world, the regular occurrences of conflict between animals and humans are growing, resulting in a surge of injuries, death, property destruction and social disruption.

In South African, the issue of human-wildlife conflict is growing exponentially, leading to several attempts to try and stem the issue, most of which have been unsuccessful. However, for far too long, the impact of this conflict on human rights had been ignored.

In the realm of environmental legislation, which is an ever-developing field, there exists potential for leveraging the synergy between human rights and conservation. By integrating this nexus into legal frameworks, the nexus might prove to be the key in addressing the conflict between humans and the natural occupants of the environment.

Keywords: Conservation; Human rights; Nexus; South Africa; Human-wildlife conflict

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List of Abbreviations

African Charter	African Charter on Human and People’s Rights
African Commission	African Commission on Human and People’s Rights
CBC	Community-based Conservation
CBD	UN Convention on Biological Diversity
CBNRM	Community-based Natural Resource Management
CI	Conservation International
CIHR	Conservation Initiative on Human Rights
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
DCA	Damage-causing Animal
DEAT	Department of Environmental Affairs and Tourism
FFI	Fauna & Flora International
GTZ	Deutsche Gesellschaft für Technische Zusammenarbeit
HWC	Human-wildlife Conflict
IUCN	International Union for Conservation
KNP	Kruger National Park
NEMA	National Environmental Management Act 107 of 1998
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004
NEMPAA	National Environmental Management: Protected Areas Act 57 of 2003

Norms and standards	Norms and Standards for the Management of Damage-causing Animals in South Africa 2016
PA	Protected Areas
PHASA	Professional Hunters Association of South Africa
SADC	Southern African Development Community
SANParks	South African National Parks
SERAC	Social and Economic Rights Action Centre v Nigeria
TNC	The Nature Conservancy
Transform	Training and Support for Resource Management
TOPS	Threatened or Protected Species Regulations 2015
UNEP	United Nations Environment Programme
WCS	Wildlife Conservation Society
WRSA	Wildlife Ranching South Africa
WWF	World Wildlife Fund

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Chapter 1 Introduction

1.1 Background and Problem Statement

In South Africa, the growing number of human-wildlife conflicts (HWCs) and the ensuing human retaliation due to these conflicts pose numerous threats to the conservation efforts and subsequent environmental integrity.¹ These retaliatory actions pose a significant threat to the environment and its consequent conservation since these retaliatory attacks reduce motivation to participate in conservation projects.² HWC is a controversial topic, since wildlife has economic value and is protected by legislation, leading to the question: is environmental legislation aimed at only protecting the environment, i.e. fauna and flora, rather than the humans living within the environment?³ The issue of HWC is driven by a number of factors, which will be discussed throughout the following chapters, but most of these factors contribute to an overall antagonism towards conservation, which in turn increases conflict between humans and the environment due to the negative connections with the environment.⁴

¹ HWC will be defined in more detail below in para 2.2 but can simply be defined as conflict between humans and animals due to an actual or perceived threat which negatively impacts the relationship between the two parties. See IUCN Species Survival Commission *Position Statement on the Management of Human-Wildlife Conflict* 1.

² Retaliatory attacks by affected community members are fueled by the negative consequences associated with animals that might be responsible for HWC in local areas. The consequences of these retaliations however reach much farther than just the intended targets. For example, wildlife poisoning as an attempted HWC prevention in Kenya is the leading cause of vulture deaths, with critically endangered species such as the Hooded (*Necrosyrtes monachus*), Rüppell's (*Gyps rueppellii*) and White-backed vultures (*Gyps africanus*) number declining by 88%, 20% and 75% respectively due to these attacks by humans. This is but one instance of retaliatory attacks having more adverse effects than intended and not alleviating the threat of HWC whatsoever. See Mukeka *et al Global Ecology and Conservation* 15; Barlow and Brooks *World Wildlife Conflict – Response Team: Global Lessons in design, operation, monitoring and sustainability* 4; and Birdlife 2023 <https://www.birdlife.org/news/2023/11/07/addressing-wildlife-poisoning-in-kenya/>.

³ Anthony, Scott and Antypas 2010 *Conservation and Society* 225.

⁴ For the purpose of this study, it is important to understand the correlation between the antagonism towards conservation and HWC. The antagonism can be seen as a major factor increasing the possibility of HWC and therefore plays an integral role in addressing the issue. If the antagonism can be reduced, a probable reduction in HWC could be experienced as well.

The lack of knowledge regarding the environment itself as well as human rights play a significant role in addressing and preventing the antagonism towards conservation, seeing as these two issues result in the growing of the antagonism. Firstly, the lack of environmental knowledge among rural communities in South Africans who depend on the environment for their livelihood leads to an increase in detrimental environmental actions.⁵ Members of the community lack the knowledge to understand their environmental rights supplied to them as well as the environment's impact on their livelihoods.⁶ Another factor that increases the antagonism towards conservation could be the lack of understanding of human rights and how human rights and conservation interact. Local communities lack knowledge of the rights the *Constitution of the Republic of South Africa, 1996* (Constitution) gives them.⁷ To effectively enjoy or enforce any right, the individual must be aware of the right and how it functions as law.⁸ This concept of enjoyment and enforcement is also applicable with respect to human rights. Individuals can only enjoy or enforce human rights as long as they are aware of them.⁹ The aforementioned lack of knowledge might possibly be alleviated by implementing the nexus between human rights and conservation to ensure that these problems are addressed, which could have a positive impact on the threat of HWC. The aim therefore is to employ human rights alongside existing conservation projects and initiatives to ensure not only the development of the environment and its subsequent conservation, but the development of the communities impacted by the environment as well.

Human rights, in essence, are the most basic of rights that humans cannot live without, and it is therefore inherent to humans.¹⁰ Human rights foster the

⁵ Sjöstedt *et al* 2022 *World Development* 7. See para 2.4 below.

⁶ See para 2.4 below for the discussion on lack of environmental knowledge increasing the antagonism toward conservation and in turn, increasing the likelihood of HWC.

⁷ See para 2.3 for the discussion regarding a lack of knowledge regarding human rights.

⁸ Mubangizi and Mubangizi 2005 *Development Southern Africa* 286.

⁹ Mubangizi and Mubangizi 2005 *Development Southern Africa* 286.

¹⁰ Donnelly *The Concept of Human Rights* 10; and United Nations date unknown <https://www.un.org/en/global-issues/human-rights>.

development of human qualities, talents, awareness, and intelligence.¹¹ Consequently, human rights are urgent interests that must be protected at all costs.¹² Human rights are generally divided into three categories that interact with each other.¹³ First-generation rights refer to the political or civil rights of individuals, while second-generation rights refer to the social, cultural, and economic rights of all people.¹⁴ The final category is third-generation rights, which are seen as group rights. It includes environmental rights since environmental problems usually affect the interests of a group rather than individual rights.¹⁵ The day-to-day impact of human rights is evident wherever people are, despite a large populous of humans being unaware of the rights' existence.

Weeramantry J states that the environment is a vital part of human rights, since any damage to the environment will undermine human rights as formulated in the Universal Declaration.¹⁶ The nexus between human rights and environmental law is found throughout different legislation and case law in the international, regional, and national spheres. In order to understand the impact and importance of this nexus, its influence on the different jurisdictions must be discussed. At international level, many countries provide the right to the environment, ranging from developed to developing countries. A hundred and forty four (144) constitutions refer to a government's duty to protect the environment, while 98 of these constitutions provide citizens with the substantive right to a safe and healthy environment.¹⁷ Another 31 constitutions mention procedural rights related to the protection of the environment, such as the right to participate in decisions or the right to access information.¹⁸ Section 45 of the *Constitution of Spain*, 1978 refers to an environment that allows the development of the citizens, while establishing a

¹¹ Mubangizi and Mubangizi 2005 *Development Southern Africa* 282.

¹² Nussbaum 1997 *Fordham Law Reviews* 273.

¹³ Glazewski 1991 *South African Journal on Human Rights* 171.

¹⁴ Glazewski 1991 *South African Journal on Human Rights* 171.

¹⁵ Glazewski 1991 *South African Journal on Human Rights* 172.

¹⁶ Shelton 2006 *Denver Journal of International Law and Policy* 131.

¹⁷ Boyd *The Status of Constitutional Protection for the Environment in Other Nations* 3.

¹⁸ Boyd *The Status of Constitutional Protection for the Environment in Other Nations* 3.

duty on the citizens to preserve this environment.¹⁹ Chapter II of the *Peruvian Constitution*, 1993 provides a real right to all citizens regarding the environment, along with placing a duty on the State to promote sustainable use and protection of the environment, specifically referring to the protection of the Amazon rainforest.²⁰ The *Constitution of Poland*, 1997 refers to protecting the environment specifically for future generations, while also stating that all citizens have the right to information regarding the quality of the country's environment.²¹ Section 48A of the *Indian Constitution* makes the state liable for the protection and safeguarding of the environment and its inhabitants, while placing a fundamental duty on the Indian citizens to protect and improve the environment.²²

In terms of regional legislation, the link is also evident throughout Africa. Forty-one African countries make provisions for an environmental right in their constitution, including Algeria, Egypt, Guinea, and Zimbabwe.²³ Environmental rights are also included in treaties and charters to which African countries are signatories. Article 24 of the *African Charter on Human and People's Rights* (African Charter) states that all Africans have the right to a satisfactory environment that is favourable to the development of a person.²⁴ However, the right, as contained in the African Charter, is underdeveloped, which makes it ambiguous and unclear in meaning.²⁵ This right was in the spotlight in the *Social and Economic Rights Action Centre v Nigeria* (known as the SERAC case), in which a clear violation of socioeconomic rights was identified.²⁶ In this case, the Social and Economic Rights Action Centre and Centre for Economic and Social Rights alleged that the Nigerian government had violated articles 2, 4, 14, 16, 18(1), 21,

¹⁹ Section 45 of the *Spanish Constitution*, 1978.

²⁰ Articles 66, 67, 68 and 69 of the *Constitution of Peru*, 1993.

²¹ Article 74(1), (2), (3) and (4) of the *Constitution of the Republic of Poland*, 1997.

²² Section 48A and 51A of the *Constitution of India*.

²³ Cyrus R. Vance Center for International Justice *Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties: Africa Region 4*.

²⁴ Section 24 of the *African Charter on Human and People's Rights* (1982).

²⁵ Van der Linde and Louw 2003 *African Human Rights Law Journal* 174.

²⁶ Van der Linde and Louw 2003 *African Human Rights Law Journal* 169.

and 24 of the African Charter.²⁷ Moreover it was alleged that the Nigerian government violated not only the rights of Nigerians but of all Africans because they failed to prevent pollution and degradation.²⁸ The African Commission on Human and People's Rights (African Commission) identified numerous considerations with respect to article 24 and identified various government responsibilities, such as providing information to affected communities about the environment, promoting sustainable development, preventing pollution and degradation through reasonable measures, and giving affected groups the opportunity to participate in the decision-making process.²⁹ This is an essential case with respect to the establishment of the link between human rights and the environment, as well as health and conservation. Since section 24 of the African Charter makes provision for the sustainable development of the environment, the case touches on the right of every citizen to health, but also on the matter of a satisfactory environment for the people of Africa, thus linking the two concepts.³⁰ In the judgment of the case, the Court appeals to and urges the Nigerian government not only to ensure that the environment is protected, but also to rectify the human rights violations that occurred due to environmental degradation.³¹

²⁷ Article 2 of the African Charter refers to the enjoyment of rights irrespective of race, gender, religion, etc. Article 4 refers to the right of life of every African, while Article 14 refers to property being guaranteed and safe. Article 16 and 18 refers to the health of Africans by stating that you are entitled to the safest attainable mental and physical health, while the State has a duty to protect the physical health and morals of all Africans. Article 21 states that you are free to spend your wealth as you intend to, as long as no one is exploited. Article 24 is the key article in this discussion, since it states that all people are entitled to an environment that is satisfactory to their development. See the *African Charter on Human and People's Rights* of 1982.

²⁸ *Social and Economic Rights Action Centre v Nigeria* 155/96 African Commission on Human and Peoples' Rights 10.

²⁹ Numerous of these responsibilities identified fall within the principle of good governance and further highlights the link between good governance and environmental legislation, which will be further discussed in para 3.6 below. See *Social and Economic Rights Action Centre v Nigeria* 155/96 African Commission on Human and Peoples' Rights 15 - 16.

³⁰ *Social and Economic Rights Action Centre v Nigeria* 155/96 African Commission on Human and Peoples' Rights 10.

³¹ *Social and Economic Rights Action Centre v Nigeria* 155/96 African Commission on Human and Peoples' Rights 15.

South Africa is one of the forty-one African countries that make provisions for environmental rights in its Constitution, national and provincial legislation.³² Section 24 of the Constitution states that every South African has the right to an environment that is not harmful to his/her well-being or health, while also protecting the environment for future and present generations of South Africans.³³ This is done by avoiding degradation and pollution of the environment, while also promoting conservation and sustainable development of the environment alongside the social and economic development of communities.³⁴ Conservation and the protection of the environment are promoted in various pieces of South African legislation. The *National Environmental Management Act* (NEMA)³⁵ is the framework environmental legislation based on the provisions of the Constitution.³⁶ The principles established by NEMA form the basis for the protection and conservation of the environment.³⁷ The preamble to NEMA directly states that the unequal distribution of wealth and resources causes individuals to participate in environmentally harmful practices.³⁸ Despite the preamble stating this, harmful practices such as poaching and illegal harvesting continue to be pertinent and lead to communities suffering more because of the environment suffering. This leads to further distribution of resources to try and prevent the practices of poaching and harvesting, instead of those resources being available to promote the community and their needs.

A possible solution to problems such as HWC and antagonism towards conservation as discussed above could be the possible nexus between human rights and conservation. This nexus implies that if human rights are promoted through conservation and local communities are more aware of their basic rights, conservation will improve in relation to the advancement of human rights

³² Cyrus R. Vance Center for International Justice *Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties: Africa Region 4*.

³³ Section 24 (a) and (b) of the *Constitution of the Republic of South Africa*, 1996.

³⁴ Section 24 (b) of the *Constitution of the Republic of South Africa*, 1996.

³⁵ *National Environmental Management Act* 107 of 1998.

³⁶ *Constitution of the Republic of South Africa*, 1996.

³⁷ Section 2 of the *National Environmental Management Act* 107 of 1998.

³⁸ *National Environmental Management Act* 107 of 1998.

awareness and as communities gain the new knowledge of conservation, which in turn could alleviate the threat of HWC. In South Africa, reliance on this nexus could promote further sustainable development of the environment while also empowering local communities. The successful implementation of the nexus in smaller projects could prove to be a blueprint for the implementation throughout the public and private sector.³⁹

1.2 Research Question

The research question that this mini-dissertation sets out to answer is: To what extent is the link between human rights and conservation as embedded in the environmental law of South Africa relevant to HWC?

1.3 Research Methodology

A literature study will be conducted comparing various journals, books, legislation, case law, and internet sources to determine the existence, implementation, and impact of the nexus between human rights and conservation and how this link is relevant to HWC. The analysis will be based on current legislation governing HWC and explores how human rights affect not only conservation, but also HWC. In order to establish the effectiveness of current legislation, the principle of good governance will be used as a test to measure the legislation governing conservation, human rights and HWC against the elements of the principle. The objective is to determine whether the nexus fulfils all the elements of good governance and could therefore be seen as a possible solution for the issue of HWC.

1.4 Overview of Chapters

In an effort to answer the research question, Chapter 2 discusses the environmental issue of HWC as a global threat, before turning to the issue of HWC

³⁹ See Chapter 4 below.

in South Africa. Furthermore, the human rights affected by HWC in South Africa are discussed with regard to the threats faced.

Chapter 3 discusses the current law in the international, national, and provincial spheres, while referring to the discourse on environmental legislation and identifying key gaps in this legislation and its implementation. Thereafter, the principle of good governance is discussed and applied to determine the validity and success of the current approach to conservation. The results of the test will then be discussed to identify to what extent is the nexus embedded within the legislation as well as what gaps exist.

Chapter 4 discusses the current approach to community-based conservation (CBC). The discussion considers the position of the nexus between human rights and conservation and its future in South Africa. This is followed by recommendations on possible improvements in the use of the nexus and the possible effects of the effective implementation of the nexus.

Lastly, conclusions regarding the relationship between human rights and conservation are made to answer the posed research question. The nexus's position and future will be briefly discussed in order to answer the research question. The conclusions reached in each chapter will be discussed and the research question answered on the basis of the good governance test.

Chapter 2 The Challenges Faced by Conservation in South Africa

2.1 Introduction

South Africa is currently in a peculiar position. The country is attempting to recover from a history of segregation and discrimination to accommodate its citizens, while also navigating the troubling waters of conservation during the Anthropocene.⁴⁰ However, for far too long, these two aforementioned goals were seen and handled as separate, while the solution could possibly be a symbiotic nexus between the two.⁴¹ It is probable that the alleviation of HWC as a problem in South Africa could depend on the mutual development of human rights and conservation.

This chapter examines the current situation of conservation in South Africa, specifically considering the issue of HWC and human rights, and how both contribute to the current antagonism among some South Africans towards conservation. The chapter serves as background to an investigation into why the current approach in South Africa to conservation is not alleviating the problem of HWC, but rather exacerbating it to a certain extent.

2.2 Human-Wildlife Conflict as an Environmental Issue

The world is currently facing the daunting prospect of trying to alleviate various conservation threats caused by the Anthropocene period. These threats include the ever-changing climate situation, pollution, attacks on biodiversity, deforestation, degradation, growing populations, and urbanisation.⁴² These threats

⁴⁰ Crutzen and Stoermer unofficially denote the 'Anthropocene' as the newest epoch in the geological timescale. The article dictates that the Anthropocene is human-induced and expresses the anthropogenic changes caused by humans in the current epoch. It is clear that the Anthropocene holds humans responsible for the current ecological demise. See Crutzen and Stoermer "The 'Anthropocene'" 17.

⁴¹ The first time that the nexus between the environment and human rights was identified and incorporated was during the *Stockholm Declaration* in 1972 and the *Rio Declaration* in 1992. Only since then has the nexus been studied and implemented more across the world to ensure both the environment and human rights are protected and developed. See Martin-Ortega *et al Sustainability* 14.

⁴² Darkoh 2009 *African Journal of Ecology* 93–97.

increase the issue of HWC, which is now seen as a major threat to conservation, not just in South Africa, but worldwide.⁴³ The threat of HWC has grown to such a level that it has been included as one of the independent 2030 Action Targets in the Zero Draft of the Post-2020 Global Biodiversity Framework.⁴⁴ Although a reduction target was never identified, the importance of reducing HWC was identified.⁴⁵

Since HWC occurs anywhere where humans and wildlife come into contact, any factor influencing this proximity has to be seen as a threat along with the conflict arising from the threat itself.⁴⁶ Thus, it is clear that HWC cannot simply be handled as a development or humanitarian issue, but as a serious conservation concern that affects humans, the natural area, and all species in the affected environment.⁴⁷

In 2004, the World Wildlife Fund (WWF) published the Human-Wildlife Conflict Manual, which defines the term 'Human-Wildlife Conflict' as:

(A)ny interaction between humans and wildlife that results in negative impacts on human social, economic, or cultural life, on the conservation of wildlife populations, or on the environment.⁴⁸

Furthermore, the *IUCN World Parks Congress*, held in Durban, South Africa, between 8 and 17 September 2004, further defined the term as:

(W)hen the needs and behaviour of wildlife impact negatively on the goals of humans or when the goals of humans negatively impact the needs of wildlife. These conflicts can occur when wildlife damage crops, injure or kill domestic animals, threaten or kill people.⁴⁹

Both definitions refer to the consequences of the conflict for both sides by referring to the negative effects on humans, animals, and the environment.

⁴³ IUCN 2022 <https://www.iucn.org/resources/issues-brief/human-wildlife-conflict>.

⁴⁴ Anthony 2021 *Sustainability* 7407.

⁴⁵ Anthony 2021 *Sustainability* 7407.

⁴⁶ IUCN 2022 <https://www.iucn.org/resources/issues-brief/human-wildlife-conflict>.

⁴⁷ WWF Date unknown <https://www.worldwildlife.org/stories/what-is-human-wildlife-conflict-and-why-is-it-more-than-just-a-conservation-concern>.

⁴⁸ World Wide Fund for Nature *Human Wildlife Conflict Manual* 6.

⁴⁹ Dickman and Hazzah "Money, Myths and Man-Eaters: Complexities of Human-Wildlife Conflict" 339.

However, these definitions were broadened in 2020 when the IUCN SSC Human-Wildlife Conflict Task Force proceeded to define HWC as:

(S)truggles emerge when the presence or behaviour of wildlife poses an actual or perceived, direct, and recurring threat to human interests or needs, leading to disagreements between groups of people and negative impacts on people and/or wildlife.⁵⁰

This definition incorporates the antagonism that grows among certain groups towards conservation by referring to the disagreements between groups, i.e. those who choose to conserve and protect animals, irrespective of whether they might be damage-causing, and those who suffer due to these animals. HWC is driven by many factors, most of which are purely conservation issues that combine to create a new issue. Some of the biggest elements of HWC is the growing human population and urbanisation, which in turn causes the expansion of settlements around and, more dangerously, into protected areas (PA) throughout the world, thus bringing humans into more regular contact with animals.⁵¹

The pertinent effects of HWC have been well documented over time. Of these effects, the most documented are the loss of crops and livestock, injuries, and loss of life due to damage-causing animals (DCA) around the world. Six continents have tracked and documented the loss of life due to HWC, ranging from Indian elephants (*Elephas maximus indicus*) in Asia,⁵² Grey wolves (*Canis lupus*) in North America and Europe,⁵³ Nile (*Crocodylus niloticus*) and Saltwater crocodiles

⁵⁰ IUCN Species Survival Commission *Position Statement on the Management of Human-Wildlife Conflict 1*.

⁵¹ Nicole "An Assessment of the Human-Wildlife Conflict across Africa" 172.

⁵² India estimates that an average of 400 people die annually due to elephant attacks, while in Sri Lanka an average of 93 people were killed yearly between 2012 and 2021 by elephants. Nepal reported that elephants are responsible for 40% of HWC in the country. See Rangarajan *et al Securing the Future for Elephants in India* 12; Gunawansa *et al 2022 Biodiversity and Conservation* 3035; and Adhikary, Wolde and Lal *Human-Wildlife Conflict and the Likelihood of Reporting Losses in Nepal* 3.

⁵³ Across Europe and North America, a total of 489 victims of wolf attacks were identified between 2002 and 2020. Although these attacks aren't as fatal as some of the other attacks, injuries are still a common occurrence. See Linnell, Kovtun and Rouart *Wolf attacks on humans: an update for 2002-2020* 14–18.

(*Crocodylus porosus*) in Africa and Australia,⁵⁴ as well as jaguars (*Panthera onca*) and pumas (*Puma concolor*) in South America.⁵⁵ Africa is home to a large portion of the injury and death statistics due to HWC.⁵⁶ Botswana reported a total of 80 people killed and another 57 injured between 2009 and 2019 by African lions (*Panthera leo*), while Zimbabwe reported an average of 65 people killed between 2020 and 2022.⁵⁷ Zambia has reported a total of 4 490 HWC incidents between 2018 and 2022, citing an average of 40 deaths per year, while the Tsavo region of Kenya has reported more than 39 000 cases of conflict.⁵⁸ These numbers represent the small group of communities that has reported HWC. The trend appears to be that these conflicts go unreported because communities feel that their calls for help go unanswered.

Another significant effect of HWC is the loss of crops and livestock. Throughout Africa and Asia, damage to crops and livestock has been identified as the greatest danger of HWC, with animals such as elephants and lions being the most significant threat.⁵⁹ In India, elephants contribute to a loss of more than 3 million US dollars per year, and most, if not all, of these costs are not compensated.⁶⁰ In Africa, communities suffer up to 10% loss of their total agricultural yield yearly, and these losses expose even greater dangers and impacts on these

⁵⁴ Due to the remoteness of attacks, it is hard to specify the number of people killed and injured by crocodilians over the world, with estimates of up to a 1 000 people dying annually due to these attacks. See A-Z Animals 2022 <https://a-z-animals.com/blog/crocodile-attacks-how-common-are-they/>.

⁵⁵ Although these attacks are extremely rare, they still pose a significant risk to local communities living in close vicinity to these large cats. This is another case where remoteness of attacks could heavily influence the data, but several cases have been noted in Brazil, Argentina and Patagonia. See Chinchilla *et al* 2020 *Animals* 491.

⁵⁶ Most of the HWC in Africa is attributed to a number of herbivores and carnivores found throughout the continent. These include primates (such as Vervet Monkeys (*Chlorocebus pygerytrus*) and Baboons (*Papio ursinus*)), mega herbivores (such as Elephants (*Loxodonta africana*) and Buffalos (*Syncerus caffer*)), herbivores (such as Warthogs (*Phacochoerus africanus*) and Bush Pigs (*Potamochoerus larvatus*)) and Carnivores (such as lions, leopards, cheetahs and hyenas).

⁵⁷ Zenda 2022 <https://www.fairplanet.org/story/as-human-wildlife-conflicts-soar-so-do-calls-for-compensation/>.

⁵⁸ Zenda 2022 <https://www.fairplanet.org/story/as-human-wildlife-conflicts-soar-so-do-calls-for-compensation/>.

⁵⁹ Barua, Bhagwat and Jadhav 2013 *Biological Conservation* 310.

⁶⁰ Barua, Bhagwat and Jadhav 2013 *Biological Conservation* 310.

communities.⁶¹ A single cow produces between 227 and 1230 kilocalories per animal, which is equivalent to between half and one-and-a-half years of calory requirements for a human in a developing country, depending on the age of the human.⁶² Therefore, loss of livestock can have a direct impact on the life expectancy of the farmer, his family, and the surrounding community. This loss is also accompanied by significant economic losses, ranging from opportunity costs to a loss of future income.⁶³

In recent times, previously unidentified or 'hidden' consequences of HWC have been brought to the forefront, as they have just as significant, if not more, of an impact on the daily lives of affected communities.⁶⁴ These effects include disruption of families and their livelihoods,⁶⁵ economic impacts,⁶⁶ diminishing of psychosocial well-being,⁶⁷ loss of food security, mental health consequences,⁶⁸ as well as the hidden impacts on the human rights of those involved, which is discussed later in this chapter.⁶⁹ These hidden consequences have been mostly ignored or have been addressed in a hand full of cases, since most of the affected

⁶¹ Barua, Bhagwat and Jadhav 2013 *Biological Conservation* 310.

⁶² Braczkowski *et al* *The unequal burden of human-wildlife conflict* 4.

⁶³ Barua, Bhagwat and Jadhav 2013 *Biological Conservation* 311.

⁶⁴ The hidden impacts of HWC can be defined as the uncompensated and delayed costs associated with HWC. The reason why these costs are seen as hidden is that most of these effects are not seen as critical when determining the impact of conflict. See Ogra 2008 *ScienceDirect* 1409.

⁶⁵ The loss of crops and livestock results in significant loss of wealth and lifestyle, seeing as these represent the proportional majority of socio-economic capital for developing communities. See Barua, Bhagwat and Jadhav 2013 *Biological Conservation* 311.

⁶⁶ The threat of HWC leads to a significant economic impact on farmers and their communities, not only by means of losing income. These costs include the opportunity costs of installing measures to attempt to prevent HWC as well as transaction costs when pursuing compensation for HWC. See Barua, Bhagwat and Jadhav 2013 *Biological Conservation* 311-312.

⁶⁷ These consequences can be highlighted by looking at the impact of losing the primary breadwinner in a low-income household. This shifts the responsibility to the partner and/or children of the deceased. This shift results in increasing debt, which increases the pre-existing poverty to a point of no recovery. Should the responsibilities shift to the children, this results in loss of school attendance, poor development and loss of relationships. Barua, Bhagwat and Jadhav 2013 *Biological Conservation* 311.

⁶⁸ Inability to recover bodies of lost loved ones have had a significant impact on the partners of the deceased, with many of these partners suffering from different forms of post-traumatic stress disorder, depression, suicidal tendencies as well as childhood emotional disorder in these families. See Barua, Bhagwat and Jadhav 2013 *Biological Conservation* 312.

⁶⁹ Barua, Bhagwat and Jadhav 2013 *Biological Conservation* 311.

parties of HWC are unaware of the effects until long after the onset of the conflict.⁷⁰

The impact of HWC often leads to retaliatory killing of animals, most of the time not the animal that was responsible for the HWC.⁷¹ These killings result in even more conflict, creating a chain reaction of conflict on both sides. The conservation community have made many attempts to prevent HWC, with various levels of success and failure. These attempts range from displacement of affected communities to compensating for loss of livestock and crops, to numerous new attempts at security, such as alternate fences and ways of preventing contact between animals and humans. Each of these attempts has its advantages and disadvantages, but has a shared goal of creating an environment that promotes co-existence between humans and animals.

2.3 Human-Wildlife Conflict in South Africa

HWC is becoming a significant environmental challenge in South Africa due to the abundant and diverse wildlife of the country that meets the ever-expanding human settlements throughout the country.⁷² Such meetings create various problems that contribute to the growing conflict, such as significant habitat loss surrounding natural areas; humans and animals competing for resources; as well as the dangers of living near some of the world's most dangerous animals.⁷³ Although HWC seems like a straightforward problem based on the definitions provided earlier in the chapter, it is driven by much more than the simple conflict between humans and animals.⁷⁴ The conflict intensifies when local populations are under the impression that they are less valued or prioritised when compared to the environments and residing animals, which results in the conflict switching from human-animal interactions to conflict about the animals.⁷⁵ The antagonism

⁷⁰ Barua, Bhagwat and Jadhav 2013 *Biological Conservation* 310. See para 2.4 below.

⁷¹ See para 1.1 above for the impact of retaliatory killings.

⁷² Department of Forestry and Fisheries *Chapter 5 Human settlements* 64

⁷³ Nicole "An Assessment of the Human-Wildlife Conflict across Africa" 172–173.

⁷⁴ See para 2.2 for the definitions of HWC above.

⁷⁵ Madden 2004 *Human Dimensions of Wildlife* 249.

towards these animals and the environment in which they live is also the result of historical conservation approaches in South Africa, which now affect the future of conservation as a whole.

The current antagonism towards conservation, which leads to increased HWC, can be attributed to three factors that intensify the community's attitudes: first, the history of conservation in South Africa. The concept of conservation-induced displacement was historically an international problem, since it was reported in North America, Asia, and Africa, and found its way to South Africa.⁷⁶ Africa has a history of embarking on what is known as 'fortress conservation',⁷⁷ where communities, normally marginalised, are forcibly relocated to ensure spaces where nature can 'thrive' untouched by modern civilisation.⁷⁸ In South Africa specifically, this form of conservation has a history of being racially driven, especially during colonial and Apartheid times, so that black communities were displaced to allow the creation of reserves and PA, many of which are still in existence today.⁷⁹ These forced displacements result in many cumulative losses for these communities, ranging from the right of residence, the right to access areas of value such as cultural or religious spaces, and directly affecting their livelihoods in the form of loss of land.⁸⁰ Over time, this approach to conservation has caused internal hatred towards these PAs, further growing the antagonism, and thus resulting in significantly more HWC. The antagonism toward conservation and animals within PAs is largely based on the extent of the impact of the species on humans, but the antagonism is also driven by the human prejudices built up throughout history.⁸¹ An example of this prejudice that Lindsey identifies is the misconception many

⁷⁶ Brockington and Igoe 2006 *Conservation and Society* 433.

⁷⁷ Fortress conservation is a model based on the approach that protection of the environment is best achieved by creating areas where human disturbances are isolated from the area. Fortress conservation took hold due to parties believing local communities abuse natural resources and results in environmental degradation. The goal therefore is to separate humans and the environment to ensure the protection of the environment and its inhabitants. See Robbins 2007 <https://sesmad.dartmouth.edu/theories/85>.

⁷⁸ Massé 2016 *Conservation and Society* 101.

⁷⁹ Sinthumule 2018 *Development and Society* 263.

⁸⁰ Sinthumule 2018 *Development and Society* 264.

⁸¹ Lindsey, Du Toit and Mills 2005 *Biological Conservation* 113.

communities and farmers specifically have about wild dogs (*Lycaon pictus*).⁸² They see these animals as 'cruel' and 'terrorising', which results in the animals being seen and hunted as vermin, resulting in the species being endangered with little or no populations outside Kruger National Park (KNP).⁸³ Further examples include ranchers killing leopards (*Panthera pardus*) in the Soutpansberge of Limpopo while under the impression that these big cats were killing cattle and other livestock before studies showed that this was not the case at all.⁸⁴

Secondly, the lack of knowledge about the impact of the environment on their daily life, as well as their human rights, increases antagonism towards conservation and increases HWC. As stated above, in order to effectively enjoy or enforce any rights, the individual must be aware of these rights and how they function as law.⁸⁵ This refers to knowing what human rights are, how they affect one as a South African, as well as having the necessary knowledge about the environment, the impact of the environment, and what rights you are entitled to regarding the environment. The 2018 Human Rights Watch World Report stated that the South African government had a poor record with respect to human rights and the rule of law within the country.⁸⁶ It is evident in the South African context that individuals lack basic knowledge of human rights and their enforcement, with many lacking knowledge of the Bill of Rights, while others lack knowledge about the institutions that are established by the Constitution to protect human rights with South Africa.⁸⁷ The reality is that South Africans lack the knowledge necessary to enjoy both human rights and the environment. During 2018, the Foundation for Human Rights conducted almost 25 000 interviews in South Africa to determine various attitudes of South Africans. They importantly aimed several of their questions at human rights in South Africa. During these interviews, the foundation highlighted an increase from 47% to 51% of those who have heard of

⁸² Lindsey, Du Toit and Mills 2005 *Biological Conservation* 113.

⁸³ Lindsey, Du Toit and Mills 2005 *Biological Conservation* 114.

⁸⁴ Gross *et al* *A Future for All: The Need for Human-Wildlife Coexistence* 33.

⁸⁵ Mubangizi and Mubangizi 2005 *Development Southern Africa* 286. See para 1.1 above.

⁸⁶ Human Rights Watch *World Report 2018* 489.

⁸⁷ Mubangizi and Mubangizi 2005 *Development Southern Africa* 286.

the Constitution and/or the Bill of Rights, but also expressed the biggest issue with this statistic: 71% of the group had low to medium knowledge of what the Constitution and human rights are.⁸⁸ Furthermore, 57% of the group felt unhappy with how human rights were being upheld, while another 57% felt their human rights were not respected at all.⁸⁹ Lack of knowledge creates a bleak picture of whether South Africans are enjoying the human rights afforded to them by the Constitution and the Bill of Rights.

The lack of knowledge also translates into a lack of environmental knowledge and of the impact of the environment, its issues and causes. South Africans are expected to have a high level of awareness of environmental issues based on the landscape in South Africa, but most are unaware of these issues or do not indicate them as a high priority.⁹⁰ An alarming 0.09% of South African respondents indicated that environmental issues should be deemed the highest priority issues in the country, which leads to these issues being ranked 17th on the list of priorities.⁹¹ Furthermore, 77,62% of the respondents had an overall negative attitude towards the environment and its issues.⁹² To provide an example, only 39% of South Africans feel that the changing climate is an issue, while Simpson stated that awareness of climate change and its causes in Africa (including South Africa) scored an alarmingly low average.⁹³ However, the same view is not shared by the role players in the educational system. They are under the impression that environmental issues are resolved by environmental education, but despite a history of educating young South Africans about land degradation, pollution, and deforestation, these issues are still experienced daily by most South Africans, but

⁸⁸ Foundation for Human Rights *Democracy Challenged: South Africa's largest attitudinal survey on the Constitution* 16.

⁸⁹ Foundation for Human Rights *Democracy Challenged: South Africa's largest attitudinal survey on the Constitution* 9.

⁹⁰ Anderson *et al* "Exploring Environmental Consciousness in South Africa" 15.

⁹¹ De Wet-Billings 2022 <https://www.wits.ac.za/news/latest-news/opinion/2022/2022-12/climate-change-is-not-what-south-africans-see-as-their-main-problem.html>.

⁹² De Wet-Billings 2022 <https://www.wits.ac.za/news/latest-news/opinion/2022/2022-12/climate-change-is-not-what-south-africans-see-as-their-main-problem.html>.

⁹³ Human Sciences Research Council 2022 <https://hsrc.ac.za/news/capable-and-ethical-state/climate-change-knowledge-in-south-africa-on-the-rise/>.

specifically in poor communities.⁹⁴ Therefore, the combination of a lack of knowledge on human rights and on the environment has led to various marginalised communities showing an increase in antagonism towards conservation and the environment as a whole, which in turn creates additional conflict between these communities and the environment.⁹⁵

As mentioned, local communities living adjacent to PA have a certain level of antagonism towards conservation and the environment itself.⁹⁶ The negative attitude towards conservation is not only pertinent in South Africa, with Kenya reporting that communities living near PA, specifically areas with elephants, are predominantly negative towards the environment.⁹⁷ The attitude of local communities towards conservation is heavily influenced by the possibility of real damage caused by DCA.⁹⁸ Given the very real threat of DCA and HWC, the attitude towards conservation continues to be negative. Many members of communities do not report DCA due to a lack of reaction from the parties involved, since only 54% of cases are pursued after the first report.⁹⁹ Furthermore, the ineffective handling of HWC has also led communities to fail to report DCA, such as cases where communities report lions preying on livestock and KNP rangers make promises to handle the situation and fail to fulfil the promise.¹⁰⁰ The antagonism is further aggravated by various other factors, such as lack of communication between parties involved in handling DCA, DCA reports not being attended to, different procedures in different provinces, a problematic compensation system, etc.¹⁰¹

⁹⁴ Tshautshau 2013 <https://www.news24.com/news24/environmental-education-in-sa-are-we-doing-enough-20130916>.

⁹⁵ Barua, Bhagwat and Jadhav 2013 *Biological Conservation* 311.

⁹⁶ Although certain contrary views have been expressed, the overall consensus remains that these local communities continue to have a negative attitude towards the environment and conservation due to past and continuing indiscretions. See Chibvongodze *Journal of Human Ecology* for his views on the link between Ubuntu and the environment.

⁹⁷ Ochleng, Elizabeth and Nigel 2021 *PLoS ONE* 14.

⁹⁸ Anthony, Scott and Antypas 2010 *Conservation and Society* 225.

⁹⁹ Anthony, Scott and Antypas 2010 *Conservation and Society* 230.

¹⁰⁰ Anthony, Scott and Antypas 2010 *Conservation and Society* 231.

¹⁰¹ Anthony, Scott and Antypas 2010 *Conservation and Society* 228 – 231.

Although not frequent, South African courts have had to deal with claims for damages caused by wild animals. In the case of *Sambo v Union Government*,¹⁰² it was held that the person who introduces a wild animal into the area should prevent the animal from leaving the area and causing damage. After two lions escaped from the KNP and killed a woman working in the field owned by her family, the applicant approached the magistrate's court to claim damages. Although the precedent at the time was that owners could not be held liable for damages arising from 'normal' activities, the court upheld the decision made by the magistrate's court to make an exception to the precedent.¹⁰³ However, the contrary approach was taken during *Mbhele v Natal Parks, Game and Fish Preservation Board* which held that landowners could not be held responsible if wild animals cause damage or harm while occurring naturally on the property where introduced.¹⁰⁴ The court held that it was unrealistic and unreasonable to erect fences over the entirety of the 220 km perimeter to ensure that hippos (*Hippopotamus amphibius*) would not exit the property, since fences would have to cross various waterways and attacks had been infrequent.¹⁰⁵ Based on this precedent, if predators occur naturally and the owner allows nature to take its course regarding population control, the owner cannot be held responsible for the predator escaping and causing damage.¹⁰⁶ However, if predators are introduced by the owner, the owner has the responsibility and duty to ensure that the animals cause no damage and will be held liable should the DCA cause damage to neighbouring properties.¹⁰⁷

¹⁰² 1936 TPD 182.

¹⁰³ *Sambo v Union Government* 1936 TPD 182.

¹⁰⁴ 1980 (4) SA 303 (D).

¹⁰⁵ *Mbhele v Natal Parks, Game and Fish Preservation Board* 1980 (4) SA 303 (D) 474 and Diemont and Glazewski "Legal Consideration in the Management of Predation on Livestock" 111..

¹⁰⁶ Diemont and Glazewski "Legal Consideration in the Management of Predation on Livestock" 111.

¹⁰⁷ Diemont and Glazewski "Legal Consideration in the Management of Predation on Livestock" 111.

In South Africa, 35% to 55% of the local communities have reported a HWC if they neighbour a protected area.¹⁰⁸ Although there are numerous PAs and parks throughout South Africa, the current hotspot of HWC is the KNP, more specifically, the conflict between animals and those living adjacent the KNP. More than two million South Africans call areas along this border their home, many of whom have lived there for many generations. Many, if not all, of these South Africans are subsistence farmers living in some of the poorest conditions in South Africa.¹⁰⁹ Based on this alone, the effect of HWC on these communities is much more severe than anywhere else in South Africa. These communities are acutely aware of the danger in which they live and about 90% of these people perceive HWC as a possible danger and disadvantage to themselves and their livelihood.¹¹⁰ To further the danger, between 10% and 12% of these communities have already reported livestock damage, but many of these damages and conflicts go unreported due to negative perceptions of how HWC is handled.¹¹¹

In an attempt to alleviate the impact of HWC, the South African National Parks (SANParks) launched what is known as the KNP Livestock Compensation Programme in 2014.¹¹² Consultation between community representatives, farmers, traditional authorities, Limpopo and Mpumalanga provincial authorities, and SANParks led to the creation of a set of criteria to compensate the victims of livestock losses to DCA.¹¹³ The aim of this programme, as described by SANParks, was to reimburse livestock owners for damages suffered due to predators escaping the park, but also to rebuild the struggling relationship between the KNP and the communities living along its borders.¹¹⁴ However, the objectives were

¹⁰⁸ Seoraj-Pillai and Pillay 2016 *Sustainability* 11.

¹⁰⁹ Anthony, Scott and Antypas 2010 *Conservation and Society* 225.

¹¹⁰ Swemmer 2021 <https://www.sanparks.org/scientific-services/our-stories/its-not-about-the-cow-compensation-for-livestock-losses-adjacent-to-the-kruger-national-park>.

¹¹¹ Swemmer 2021 <https://www.sanparks.org/scientific-services/our-stories/its-not-about-the-cow-compensation-for-livestock-losses-adjacent-to-the-kruger-national-park>.

¹¹² Swemmer 2021 <https://www.sanparks.org/scientific-services/our-stories/its-not-about-the-cow-compensation-for-livestock-losses-adjacent-to-the-kruger-national-park>.

¹¹³ Swemmer 2021 <https://www.sanparks.org/scientific-services/our-stories/its-not-about-the-cow-compensation-for-livestock-losses-adjacent-to-the-kruger-national-park>.

¹¹⁴ Swemmer 2021 <https://www.sanparks.org/scientific-services/our-stories/its-not-about-the-cow-compensation-for-livestock-losses-adjacent-to-the-kruger-national-park>.

impeded early on due to the criteria set out during the negotiations. Firstly, SANParks only compensates those who have suffered livestock losses and not crop damage, due to the difficulties in determining the value of damages, as well as verifying the DCA.¹¹⁵ Second, SANParks indicated that they will only compensate damages caused by wild dogs, lions, cheetahs (*Acinonyx jubatus*) and spotted hyenas (*Crocuta crocuta*), since these predators are not found to be free-roaming outside the KNP, thus excluding leopards, which are responsible for livestock kills throughout South Africa.¹¹⁶ Third, a compensation rate was established for each species of livestock, but the rate is not influenced by the gender, size, and breed of the animal, thus resulting in a flat rate per animal. SANParks took this approach to ensure that the compensation is considered a simple compensation and not a replacement fee.¹¹⁷ It is less than the market value to discourage livestock farmers from abusing the compensation fees.¹¹⁸ Between 2014 and 2021, the programme reimbursed more than R3 million to 350 families living within these communities for livestock damage.¹¹⁹ It is a welcome interaction between environmental authorities and local communities, but it still does not alleviate the problem of HWC surrounding the KNP.

2.4 The Link between Human Rights and HWC in South Africa

As stated earlier, human rights are the most basic rights without which humans cannot live.¹²⁰ HWC affects all three categories of human rights and has adverse effects on all these impacted rights. Based on the link between the environment and human rights, the impact of HWC will be adverse on all these rights.

¹¹⁵ Swemmer 2021 <https://www.sanparks.org/scientific-services/our-stories/its-not-about-the-cow-compensation-for-livestock-losses-adjacent-to-the-kruger-national-park>.

¹¹⁶ Swemmer 2021 <https://www.sanparks.org/scientific-services/our-stories/its-not-about-the-cow-compensation-for-livestock-losses-adjacent-to-the-kruger-national-park>.

¹¹⁷ Swemmer 2021 <https://www.sanparks.org/scientific-services/our-stories/its-not-about-the-cow-compensation-for-livestock-losses-adjacent-to-the-kruger-national-park>.

¹¹⁸ Swemmer 2021 <https://www.sanparks.org/scientific-services/our-stories/its-not-about-the-cow-compensation-for-livestock-losses-adjacent-to-the-kruger-national-park>.

¹¹⁹ Swemmer 2021 <https://www.sanparks.org/scientific-services/our-stories/its-not-about-the-cow-compensation-for-livestock-losses-adjacent-to-the-kruger-national-park>.

¹²⁰ United Nations date unknown <https://www.un.org/en/global-issues/human-rights>. See para 1.1 above.

Section 24 of the Constitution can be divided into two parts, firstly paragraph (a) contains the fundamental human right that every South African possesses, while paragraph (b) substantiates the positive steps the state must take to ensure the right is enjoyed and protected.¹²¹ The section therefore provides not only that the environment must not be detrimental to people's health, it should not adversely affect their well-being.¹²² Once section 24 is read in conjunction with section 7(2) of the Constitution,¹²³ it becomes apparent that South Africans not only have the right to the environment, but are tasked with taking steps to ensure the fulfilment of the right and its duties are enjoyed by all.¹²⁴ It is clear that HWC does affect the environmental right supplied, since the conflict is detrimental to both the health and well-being of those involved, as will be discussed further. Further, the antagonism towards conservation also means that South Africans are not fulfilling their duty of protection in terms of section 24, since the retaliatory actions are detrimental to the environment in most cases.

HWC affects various basic human rights included in the Bill of Rights either directly or indirectly. For example, every South African has the right to life and the right to health, but a possible effect of the conflict might be serious physical and mental injuries, which could result in death.¹²⁵ In these instances, the right to health and life has been adversely affected by HWC.¹²⁶ As mentioned earlier in this chapter, those living close to PAs are exposed to health threats daily, as well as risks to their livelihood.¹²⁷ Compromised security with regard to living close to PAs directly and indirectly influences the right to security.¹²⁸ This happens when the person has had their property infringed upon by a DCA that is not aware of its actions, but it

¹²¹ Kidd *Environmental Law* 22.

¹²² Kidd *Environmental Law* 22.

¹²³ Section 7(2) of the *Constitution of the Republic of South Africa*, 1996 stipulates that "The state must respect, protect, promote and fulfil the rights in the Bill of Rights.", thus clearly placing a duty on all South Africans to take the actions needed to enjoy the rights they are given.

¹²⁴ Kotze and Du Plessis 2010 *Journal of Court Innovation* 158.

¹²⁵ Section 11, 24 and 27 of the *Constitution of the Republic of South Africa*, 1996.

¹²⁶ Section 11, 24 and 27 of the *Constitution of the Republic of South Africa*, 1996.

¹²⁷ See para 2.3 above.

¹²⁸ Section 11 and 25 of the *Constitution of the Republic of South Africa*, 1996.

is also indirectly affected by the constant fear of the attack occurring again. Damage to property also violates the right to adequate housing,¹²⁹ as homes, fields, and people's animal pens are destroyed, directly influencing their livelihoods. The destruction of fields and livestock then has a direct influence on the person's right to food and water,¹³⁰ which indirectly influences the community, since food security is jeopardised by these losses. Certain basic rights are indirectly influenced by the HWC surrounding PAs, such as the right to education for both adults and children, which is disrupted by safety concerns, displacement due to attacks, and disruption of daily routines.¹³¹ The right to cultural practices is indirectly influenced by fear of or prevention from entering PAs, which affects the cultural rights of enjoyment.¹³² Lastly, every South African has the right to information, as well as participation in decisions that affect them directly or indirectly.¹³³ Those affected by HWC might not be in a position to obtain information regarding the process, nor are they involved in the decision-making process regarding how HWC must be handled, despite being directly affected by the conflict.

2.5 Summary

The country's peculiar position on conservation will not be rectified if the threat of HWC is continually ignored. It is evident that HWC is a serious threat to the environment around the world, but South Africa is feeling its effects. The nexus between human rights and HWC is evident and is under threat from continued pressure if the issue of HWC is not addressed.¹³⁴ The lack of knowledge with regard to human rights, conservation and environmental impact is placing further

¹²⁹ Section 26 of the *Constitution of the Republic of South Africa*, 1996.

¹³⁰ Section 27 of the *Constitution of the Republic of South Africa*, 1996.

¹³¹ Section 28 and 29 of the *Constitution of the Republic of South Africa*, 1996.

¹³² Such as seen in the case of *Gongqose v Minister of Agriculture, Forestry & Fisheries*, where the court deemed that customary rights trump environmental legislation, the Marine Living Resource Act in this instance. See *Gongqose & others v Minister of Agriculture, Forestry & Fisheries and others; Gongqose & others v State & others* (1340/16 & 287/17) [2018] ZASCA 87 (01 June 2018).

¹³³ Section 16, 32 and 195 of the *Constitution of the Republic of South Africa*, 1996.

¹³⁴ See para 2.4 above.

pressure on an already volatile situation regarding environmental conservation in South Africa, and the continued disregard of the threat will have adverse effects for the environment, its inhabitants, and the dependent humans.¹³⁵ The clear link between human rights and HWC as discussed will have adverse effects on the nexus between human rights and conservation, which entails that the aforementioned nexus might also be employed as a solution to the negative impact of the link between HWC and affected human rights.¹³⁶ In order to determine whether current legislation has embedded the nexus between human rights and conservation, the test of good governance will be applied to legislation to determine to what extent the nexus is embedded.¹³⁷

¹³⁵ See para 2.4 above.

¹³⁶ See para 2.4 above.

¹³⁷ See Chapter 3 below.

Chapter 3 The Legal Framework Governing the Nexus between Human Rights and HWC

3.1 Introduction

The governing and regulating of the environment, animals and inherently HWC is done by way of international agreements and treaties, as well as national and provincial legislation. Although some legislation addresses the issue of HWC and DCA, the legislation that is in place is conflicting, outdated, and does not necessarily hold the values of both the Constitution and the cornerstone environmental legislation like NEMA. NEMA led to the enactment of further environmental legislation such as the *National Environmental Management: Biodiversity Act* 10 of 2004 (NEMBA) and *National Environmental Management: Protected Areas Act* 57 of 2003 (NEMPAA), both of which could be used to manage HWC within South Africa. However, in an attempt to govern the issue of HWC, the *Norms and Standards for the Management of Damage-causing Animals in South Africa* 2016 (further referred to as the Norms and standards) was drafted and published in terms of section 9(1)(a) and read with section 100 under NEMBA, but the Norms and Standards had various administrative and procedural issues.¹³⁸ This chapter aims to discuss the various pieces of legislation on international, national, and provincial spheres that mention or affect HWC, while also identifying any shortfalls or gaps in the legislation. This chapter questions whether the legislation in place effectively addresses the issue of HWC and whether the legislation should be rectified to address the growing problem. This question will be answered by measuring the subsequent legislation against the elements of good governance to determine whether or not the legislation upholds the elements to such an extent that it would constitute the nexus being embedded within the legislation.

¹³⁸ Diemont and Glazewski "Legal Consideration in the Management of Predation on Livestock" 106. See para 3.4.5 for an explanation of some of the procedural and administrative issues with the Norms and Standards.

3.2 International Sphere

South Africa forms part of several wildlife conventions that are governed by the United Nations Environment Programme (UNEP), which is identified as the main intergovernmental agency that regulates international aspects with regard to wildlife.¹³⁹ In terms of nongovernmental organisations, the International Union for Conservation (IUCN) plays an instrumental role in establishing treaties that protect and conserve the environment and the wildlife within it.¹⁴⁰ The IUCN, UNEP, and WWF combined to hold the 1980 *World Conservation Strategy*, as well as the 2003 *World Parks Congress*, both of which were instrumental in ensuring the conservation of the environment by identifying environmental issues.¹⁴¹ Some of the important conventions that South Africa has ratified, specifically with regard to protecting all animals (including those responsible for damage and HWC), include the 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), the *UN Convention on Biological Diversity* (CBD), and the *Convention on the Conservation of Migratory Species of Wild Animals* (the Bonn Convention).¹⁴² These conventions place a duty on South Africa to protect, conserve, and ensure the sustainable development of all animals identified, including those seen as problem or damage-causing.

Another important agreement to which South Africa is party is the Southern African Development Community (SADC). It incorporated the *Protocol on Wildlife Conservation and Law Enforcement of the Southern African Development Community* to ensure a legal framework that can operate within the different legislations of the parties, with a joint approach to the sustainable use and conservation of environmental resources.¹⁴³ The Protocol governs the use and

¹³⁹ Diemont and Glazewski "Legal Consideration in the Management of Predation on Livestock" 108.

¹⁴⁰ United Nations Environmental Program Date unknown <https://www.unep.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/partners/international-union>.

¹⁴¹ IUCN Benefits *Beyond Boundaries: Proceedings of the Vth IUCN World Parks Congress* 1 – 4.

¹⁴² Diemont and Glazewski "Legal Consideration in the Management of Predation on Livestock" 108.

¹⁴³ Article 3(1) of the *Southern African Development Community Protocol on Wildlife Conservation and Law Enforcement* (1999).

conservation of wildlife and states that all State Parties must act within their own jurisdiction while ensuring that no damage is done to the environment of the other parties.¹⁴⁴

3.3 National Sphere

3.3.1 NEMA

Although NEMA does not explicitly make provision for DCA and HWC, the act is still seen as the framework legislation for South African environmental governance. The principles contained in Chapter 2 of NEMA play an important role in protecting and developing the environment as a whole by ensuring the sustainable development of all species in that environment.¹⁴⁵ NEMA makes provisions for public participation to be promoted as far as possible,¹⁴⁶ while also ensuring environmental education and awareness in the country.¹⁴⁷ It provides the framework within which other forms of legislation such as NEMBA and NEMPAA must be read and enacted. Furthermore, NEMBA and NEMPAA's application must be guided by the principles set by section 2 of NEMBA.¹⁴⁸ In terms of Chapter 5 of NEMA, further management acts such as NEMA and NEMPAA were enacted to allow effective governing of the environment, although this contributes to the further fragmentation of environmental legislation.¹⁴⁹

3.3.2 NEMBA

NEMBA was established with the goal of ensuring the conservation and management of biological diversity and its components,¹⁵⁰ the sustainable use of

¹⁴⁴ Article 3(1) of the *Southern African Development Community Protocol on Wildlife Conservation and Law Enforcement* (1999).

¹⁴⁵ Section 2(4)(a) of the *National Environmental Management Act* 107 of 1998.

¹⁴⁶ Section 2(4)(f) of the *National Environmental Management Act* 107 of 1998.

¹⁴⁷ Section 2(4)(h) of the *National Environmental Management Act* 107 of 1998.

¹⁴⁸ Section 7 of the *National Environmental Management: Biodiversity Act* 10 of 2004 and section 5 of the *National Environmental Management: Protected Areas Act* 57 of 2003.

¹⁴⁹ Chapter 5 of the *National Environmental Management Act* 107 of 1998.

¹⁵⁰ Section 2(a)(i) of the *National Environmental Management: Biodiversity Act* 10 of 2004.

biological resources,¹⁵¹ and the fair and equitable sharing of resources among those affected by the environment.¹⁵² Furthermore, the act gave effect to international treaties ratified by the country affecting biodiversity,¹⁵³ providing cooperative governance with regard to conservation and biodiversity management,¹⁵⁴ while also establishing the South African National Biodiversity Institute to ensure that the objectives of NEMBA are achieved.¹⁵⁵ NEMBA establishes the threshold for species deemed to be in need of high conservation efforts or national importance and lists these species as "threatened or protected species". This is important since some of the species listed are those responsible for HWC throughout South Africa.¹⁵⁶ Restricted activities in terms of NEMBA involving listed species are strictly prohibited without the necessary permits, while any activities that could negatively affect these species are also prohibited.¹⁵⁷ Although NEMBA does allow the issuing of permits, some of which are used to destroy DCA, the procedure to obtain these permits is arduous, expensive and time-consuming, since the applicant is responsible for the costs of the application, as well as the necessary proof such as risk assessments and expert evidence.¹⁵⁸ The framework for the procedure in NEMBA means that the issuing authority can manipulate the process into a burdensome one, which leads many victims to avoid the process altogether.¹⁵⁹

3.3.3 NEMPAA

To ensure the protection of all animals, whether damage-causing or not, it is of utmost importance that the environment within which they find themselves is protected at all costs. NEMPAA was adopted to ensure the declaration and

¹⁵¹ Section 2(a)(ii) of the *National Environmental Management: Biodiversity Act 10 of 2004*.

¹⁵² Section 2(a)(iii) of the *National Environmental Management: Biodiversity Act 10 of 2004*.

¹⁵³ Section 2(b) of the *National Environmental Management: Biodiversity Act 10 of 2004*.

¹⁵⁴ Section 2(c) of the *National Environmental Management: Biodiversity Act 10 of 2004*.

¹⁵⁵ Section 2(d) of the *National Environmental Management: Biodiversity Act 10 of 2004*.

¹⁵⁶ Chapter 4 of the *National Environmental Management: Biodiversity Act 10 of 2004*.

¹⁵⁷ Section 57 of the *National Environmental Management: Biodiversity Act 10 of 2004*.

¹⁵⁸ Section 88 of the *National Environmental Management: Biodiversity Act 10 of 2004*.

¹⁵⁹ Diemont and Glazewski "Legal Consideration in the Management of Predation on Livestock" 119.

management of PAs.¹⁶⁰ NEMPAA establishes the difference between national parks, which are managed by SANParks,¹⁶¹ and provincial PA's, which are managed by the subsequent provincial department in which the park is situated.¹⁶² NEMPAA clearly stipulates that the State must act as a trustee for all PAs of South Africa and must therefore act in the best interest of the PAs and the surrounding environment.¹⁶³ In terms of NEMPAA, the act provides a certain measure of protection, such as the necessary written authority of the area's management authority with respect to specified activities within section 45 of the Act.¹⁶⁴ The act also sets out the maximum penalties applicable to transgressions of the act, stating that a maximum penalty may not exceed five years. No specified amount for fines is included in the act since it will depend on the nature of the transgression and the jurisdiction of the court.¹⁶⁵

3.3.4 Threatened or Protected Species Regulations (TOPS)¹⁶⁶

Before the TOPS Regulations were enacted, the hunting of DCA was regulated by provincial authorities, which culminated in numerous species (threatened or not) being killed using inhumane methods. In order to alleviate the above-mentioned tedious process with regard to applying for permits and to conserve the hunted species, TOPS regulations were introduced with the main goal of establishing a national permit system aimed at species listed as protected or threatened, while also regulating game farms and breeding operations, regulating hunting activities of listed species, prohibiting restricted activities, and providing overall protection of all threatened and protected species.¹⁶⁷ The permit system in terms of TOPS applies to all restricted activities, and in order for such a permit to be granted, the

¹⁶⁰ Section 2 of the *National Environmental Management: Protected Areas Act 57 of 2003*.

¹⁶¹ Section 20 of the *National Environmental Management: Protected Areas Act 57 of 2003*.

¹⁶² Section 12 of the *National Environmental Management: Protected Areas Act 57 of 2003*.

¹⁶³ Section 3 of the *National Environmental Management: Protected Areas Act 57 of 2003*.

¹⁶⁴ Section 45 of the *National Environmental Management: Protected Areas Act 57 of 2003*.

¹⁶⁵ Section 89 of the *National Environmental Management: Protected Areas Act 57 of 2003*.

¹⁶⁶ As of the time of publication, the *Threatened and Protected Species Regulations* of 2007 was still enacted, despite Drafts being presented in 2015 and 2023, both of which were repealed. In light of this, the sections presented in the 2015 Draft will be used for context, despite the sections not being enacted and enforceable.

¹⁶⁷ Section 2 of *Threatened and Protected Species Regulations 2007*.

issuing authority must take into account different factors such as whether biodiversity management plans are in place, whether the species forms part of a wild population, the species' position on the IUCN Red Data List, and whether or not the applicant had previous unsuccessful applications for permits.¹⁶⁸ TOPS aims primarily at regulating the hunting industry and, therefore, is heavily based on these hunting activities as aforementioned, but it does include procedures for the handling and destroying of DCA in Chapter 9.¹⁶⁹ For example, the use of vehicles and/or the baiting of species that are listed as threatened or protected is prohibited, until the animal is deemed to be damage-causing, which then allows the relevant applicant to use these methods.

The TOPS regulations establish several requirements for an animal to be deemed damage-causing. An animal can only be seen as damage-causing if there was substantial proof that its actions resulted in losses to livestock or animals kept, damage to property or crops/vegetation, or the possible threat to human life.¹⁷⁰ If any of these are proven by the applicant, the animal can be seen as damage-causing and could be dealt with accordingly as stipulated by the regulations. The regulations provide several options to destroy DCA inside PA such as capturing and relocating, culling by the provincial authority, or the authorising of another party by the authority to capture and relocate the animal.¹⁷¹ The provincial authority may choose any of the options but must always use the killing of the animal as a last resort.¹⁷² The regulations place the owners of livestock in a difficult position, since the landowner is allowed to kill a DCA in self-defence if human life is threatened, but this does not extend to domestic or livestock animals being in danger.¹⁷³ If a DCA is killed in an emergency situation, the landowner is expected to notify the issuing authority within 24 hours of the incident, after

¹⁶⁸ Part 3 of the *Threatened and Protected Species Regulations 2015*.

¹⁶⁹ Chapter 9 of the *Threatened and Protected Species Regulations 2015* presented an opportunity to deal with the issue of DCA, but the 2015 Draft of the TOPS Regulations were never enacted.

¹⁷⁰ Section 85(5) of the *Threatened and Protected Species Regulations 2015*.

¹⁷¹ Section 86(1)(a) of the *Threatened and Protected Species Regulations 2015*.

¹⁷² Section 86(1)(b) of the *Threatened and Protected Species Regulations 2015*.

¹⁷³ Section 86(5) of the *Threatened and Protected Species Regulations 2015*.

which the authority must determine whether or not the killing was justified.¹⁷⁴ Once the investigation is complete, the authority must provide the landowner with a written report of their findings. This can be accompanied with criminal procedures if the killing was not justified.¹⁷⁵

3.3.5 Norms and Standards for damage-causing animals

Since no clear or definitive legislation had been established to manage and govern DCA and HWC in South Africa, the Minister may, in accordance with NEMBA, issue norms and standards that would conserve the biodiversity within South Africa. Since HWC has become an environmental issue, the Department of Environmental Affairs published the Norms and Standards on 10 November 2016. The purpose of the Norms and Standards was to provide:

- (a) For a uniform approach to the application of management interventions relating to damage-causing animals, in order to prevent or minimise damage to livestock or wild animals; cultivated trees, crops or other property; or to prevent imminent threat to human life, with the minimum adverse effect to the damage-causing animal;
- (b) Appropriate and effective management interventions or equipment which should be implemented by an adequately trained person or group of persons, organisation, registered business, practitioner, conservation authority, or issuing authority; and
- (c) Minimum standards-
 - (i) To assist the issuing authority in the development of legislation and/or policies to regulate the management of damage-causing animals; and
 - (ii) For the lawful use of methods, techniques or equipment to manage damage-causing.¹⁷⁶

However, several procedural and administrative complexities are identifiable within the Norms and Standards. Firstly, the draft only applies to wild animals that are regulated by TOPS or provincial legislation, therefore excluding animals such as

¹⁷⁴ Section 86(6) of the *Threatened and Protected Species Regulations* 2015.

¹⁷⁵ Section 86(7)(b) of the *Threatened and Protected Species Regulations* 2015.

¹⁷⁶ Section 2 of the *Norms and Standards for the Management of Damage-Causing Animals in South Africa* 2016.

bush pigs and baboons, who are frequent DCAs but excluded from TOPS.¹⁷⁷ Secondly, the draft only applies to animals that cause substantial loss to livestock or to wild animals owned by the landowner.¹⁷⁸ Once the report is finalised and issued, the issuing authority is tasked with allocating the appropriate intervention to minimise damages, which could involve capturing or killing the DCA.¹⁷⁹ However, the methods for killing DCAs as identified within the draft Norms and Standards contravene the *Animals Protection Act 71* of 1962, since the use of traps, poison, dogs, or lures are seen as unlawful in terms of one, but not the other.¹⁸⁰ Thirdly, the administrative problems of the Norms and Standards are due to the impracticability of the contents of the draft. The impracticability withholds the Norms and Standards from being effectively implemented. This includes stipulations such as that the damages caused by the DCA must first be assessed and compiled into a report before any measure to deal with the animal can be authorised.¹⁸¹ Along with the impracticability, the conditions stipulated within the act for authorisation impede the efficiency of the draft. Take for example the conditions to establish a trap for a DCA. The draft stipulates that the trap must be erected by a person with the lawful authorisation and training, but the draft fails to provide guidance as to what training is necessary or how the training will be assessed.¹⁸² Lastly, in order to implement the draft, provincial authorities will have to ensure that they have the necessary trained officials to assess, compile, process and monitor compliance of the Norms and Standards.¹⁸³ Although there are clear and evident deficiencies within the Norms and Standards, it is a positive step

¹⁷⁷ Section 3(b) and (c) of the *Norms and Standards for the Management of Damage-Causing Animals in South Africa* 2016.

¹⁷⁸ Section 5(1) of the *Norms and Standards for the Management of Damage-Causing Animals in South Africa* 2016.

¹⁷⁹ Section 5(4) of the *Norms and Standards for the Management of Damage-Causing Animals in South Africa* 2016.

¹⁸⁰ Section 2 of the *Animal Protection Act 71* of 1962.

¹⁸¹ Diemont and Glazewski "Legal Consideration in the Management of Predation on Livestock" 121.

¹⁸² Diemont and Glazewski "Legal Consideration in the Management of Predation on Livestock" 121.

¹⁸³ Diemont and Glazewski "Legal Consideration in the Management of Predation on Livestock" 121.

towards alleviating and managing not only DCA, but HWC as a whole in the event that the gaps are filled by legislation.

3.4 Provincial Sphere

All South African provinces have declared their own provincial nature reserves, which include both local and private reserves. They subsequently have their own legislation to govern the environment within their provinces. Each province sets out to protect species of wild animals in different ways, which also means that these provinces have their own individual processes and legislation to deal with DCA and HWC. The major advantage of this system is the fact that it allows for region-specific governing, meaning that certain species require more protection in certain provinces without causing administrative or procedural problems in other provinces. However, all TOPS regulations are intended to still be applicable in every province with respect to listed species, but species that are deemed not to be threatened or protected, are governed by the province's legislation.

All three Cape provinces implemented the *Nature Conservation and Environmental Conservation Act 19 of 1974* (Cape) at some point as provincial environmental legislation. The act provides that animals causing damage to crops or property, or that are dangerous to human life, may be hunted or capture if the Board deems it necessary.¹⁸⁴ The Western Cape continues to implement the aforementioned act, while also enacting the *Western Cape Nature Conservation Board Act 15 of 1998* to establish a statutory board for the province. However, the Board does not have any functions with regard to environmental management, which remains with the Western Cape Department of Environmental Affairs and Development Planning, who are also responsible for NEMA-regulated environmental impact assessments.¹⁸⁵ The Eastern Cape also continues to implement the *Nature Conservation and Environmental Conservation* but has begun the process of establishing its own conservation board within the province. The province

¹⁸⁴ Section 18(b) and (d) of the *Nature Conservation Ordinance 19 of 1974*.

¹⁸⁵ Section 9 of the *Western Cape Nature Conservation Board Act 15 of 1998*.

continues to use the *Ciskei Nature Conservation Act* 10 of 1987 as well as the *Transkei Environmental Conservation Decree* 9 of 1992 since both regulated the former self-governing states that fall within the province. Along with the aforementioned, the province also adheres to the *Eastern Cape Parks and Tourism Agency Act 2 of 2010*, which established the Eastern Cape Parks and Tourism Agency tasked with managing the province's PAs.¹⁸⁶ The act identifies the Eastern Cape Parks and Tourism Agency as being responsible for the management of DCA within the PAs of the province, but does not mention specifics regarding these animals.¹⁸⁷ The Northern Cape implemented the *Northern Cape Nature Conservation Act* 9 of 2009 to repeal the *Nature Conservation and Environmental Conservation Act* with the goal of ensuring the sustainable development and use of wild animals, as well as allowing the implementation of CITES at the provincial level.¹⁸⁸ Chapter 4 of the act stipulates that DCA may be hunted or captured if the animal is deemed to be detrimental to the environment or humans living close to the environment.¹⁸⁹

The Free State ratified and continues to implement the *Nature Conservation Ordinance Act* 8 of 1969 but has also started the process to repeal the ordinance and replace it with new provincial legislation. The province has yet to do so at present.¹⁹⁰ Chapter 6 of the act provides that a permit may be issued for the hunting of DCA, while also listing the penalties for contravening the act in any of the listed ways.¹⁹¹ The *Eastern Transvaal Park Board Act* 6 of 1995 was passed in Mpumalanga to establish the province's environmental board. The act is not limited to the PAs of the province, since it refers to the effective conservation of the natural resources,¹⁹² as well as stipulating that the board established by the act is responsible for assessing and monitoring the entire province's natural

¹⁸⁶ Chapter 3 of the *Eastern Cape Parks and Tourism Agency Act* 2 of 2010.

¹⁸⁷ Section 12(2)(h) of the *Eastern Cape Parks and Tourism Agency Act* 2 of 2010.

¹⁸⁸ Chapter 2 of the *Northern Cape Nature Conservation Act* 9 of 2009.

¹⁸⁹ Section 28 of the *Northern Cape Nature Conservation Act* 9 of 2009.

¹⁹⁰ Diemont and Glazewski "Legal Consideration in the Management of Predation on Livestock" 116.

¹⁹¹ Section 36A – E of the *Nature Conservation Ordinance* 8 of 1969.

¹⁹² Diemont and Glazewski "Legal Consideration in the Management of Predation on Livestock" 116.

resources.¹⁹³ The *Mpumalanga Nature Conservation Act* 10 of 1998 was later ratified to repeal all the provincial legislation used prior to 1994. Chapter 4 of the act deals with problem animals, mentioning the clubs used to hunt problem animals. It stipulates prohibited acts, and offers financial assistance as well as research procedures.¹⁹⁴ The province of KwaZulu-Natal enacted the *KwaZulu-Natal Nature Conservation Management Act* 9 of 1997 to establish a new body to replace the former Natal Parks Board and combine it with the KwaZulu Bureau of Natural Resources to establish the KwaZulu-Natal Nature Conservation Service.¹⁹⁵ Limpopo used the *Limpopo Environmental Management Act* 7 of 2003 to consolidate the legislation and institutions of the former homelands to ensure coherent legislation with regard to environmental management. Section 44 of the act establishes the power of the MEC, who may instruct the hunting or capturing of an animal causing damage to property by means of an Environmental Officer.¹⁹⁶ Gauteng continues to implement the *Transvaal Nature Conservation Ordinance* 12 of 1983, which regulates the establishment of provincial PAs, hunting within the province, the management of wild animals and specifically problem animals within the province.¹⁹⁷ Chapter 5 deals with problem animals as well as the clubs responsible for dealing with these animals, while also listing offences related to the acts used to hunt or capture these animals.¹⁹⁸ In May 2015, North West ratified the *North West Parks Board Act* 3 of 2015 which repealed the *North West Parks and Tourism Board Act* 3 of 1997. The new act allowed the establishment of the North West Parks Board, which is responsible for managing and controlling PAs and subsequently the wildlife within the province.¹⁹⁹

The implementation of provincial legislation has led to some concern about contradictions in the legislation. Although TOPS regulations prohibit certain forms

¹⁹³ Diemont and Glazewski "Legal Consideration in the Management of Predation on Livestock" 116.

¹⁹⁴ Section 44 – 50 of the *Mpumalanga Nature Conservation Act* 10 of 1998.

¹⁹⁵ Chapter 4 of the *KwaZulu-Natal Nature Conservation Management Act* 9 of 1997.

¹⁹⁶ Section 44 of the *Limpopo Environmental Management Act* 7 of 2003.

¹⁹⁷ Chapters 3, 4 & 5 of the *Transvaal Nature Conservation Ordinance* 12 of 1983.

¹⁹⁸ Section 55 – 66 of the *Transvaal Nature Conservation Ordinance* 12 of 1983.

¹⁹⁹ Chapter 2 of the *North West Parks Board Act* 3 of 2015.

of hunting or trapping of protected species, species not listed by TOPS can be captured or killed using the methods supplied in the local legislation. Further problems arise when one realises that numerous of the provincial legislation fail to enact the TOPS Regulations in any way or form, which creates further stress on the enforcement of regulations if the legislation does not make provision for these regulations.²⁰⁰ The already complex interprovincial legislation is further complicated by provinces implementing hunting-specific legislation.

3.5 Issues with Current Legislation

Environmental governance, and more specifically governance regarding DCA, faces several issues and challenges preventing the effective implementation of all the different pieces of legislation. Two key issues that will be briefly discussed include the fragmentation of environmental governance and the enforceability of environmental legislation, which are both issues that are contradictory to the principle of good governance.

3.5.1 Fragmentation

In layman's terms, fragmentation refers to legislation that is not streamlined, coordinated, or integrated.²⁰¹ Although fragmentation has advantages due to each legislation governing specific instances, the disadvantages far outweigh these possible advantages.²⁰² Fragmentation is a threat in environmental governance since it leads to inconsistency of rules, confrontation between parties due to administrative issues, and duplication of work.²⁰³ Fragmentation thus leads to ineffectiveness due to administrative resources being wasted or misused,

²⁰⁰ The issue of enforcement of legislation will be further discussed in para 3.5.2.

²⁰¹ Kotze "Environmental Governance" 110.

²⁰² For example, a positive of fragmentation is the tailored approach that each province can take to conserving its specific environment, due to each having unique needs that must be fulfilled. A different approach is taken to protect the Fynbos of the Western Cape and the grass field of KwaZulu-Natal. These differences have certain positives, but the lack of streamlined enforcement and decision-making processes cause these positives to lack behind.

²⁰³ Godt "The need for and the unavailability of international 'positive integration' in chemicals control" 247.

overlapping of legislation, and duplication of work.²⁰⁴ Kotzé identifies three different instances of fragmentation within environmental governance, namely the institutional, legislative and intersectoral levels.²⁰⁵ Institutional fragmentation can be divided into vertical and horizontal institutional fragmentation.²⁰⁶ The environmental departments regulating the different sectors of the environment, such as air, water, land use and planning, heritage, biodiversity, etc., are divided across all the different sectors of the government, while no central agent is identified to coordinate the approach to environmental conservation.²⁰⁷

Fragmentation in the legislative sphere also occurs vertically and horizontally sphere.²⁰⁸ As mentioned earlier in this chapter, South African environmental governance is divided into several pieces of national, provincial, and local legislation.²⁰⁹ Horizontally, the fragmentation refers to several acts or pieces of legislation being applicable to a single issue or activity. For instance, DCA activities are spread across different acts that contradict one another.²¹⁰ Intersectoral fragmentation refers to an issue being approached and governed in an integrated manner to allow a blanket approach to the issue.²¹¹

3.5.2 Enforceability of governance

The implementation, compliance, and enforcement of environmental legislation has proven to be a threat within the environmental sector.²¹² Enforcement deals with "compelling, convincing and motivating" of citizens and entities to act within

²⁰⁴ Kotze 2014 *South African Law Journal* 557.

²⁰⁵ Kotze "Environmental Governance" 110.

²⁰⁶ Vertical fragmentation refers to the different spheres of government being in place to deal with issues arising. Horizontal fragmentation in the institutional sphere refers to the different departments and functionaries present in the environmental governance. An example of institutional fragmentation relevant to DCA would be the handling of DCA after escaping the KNP. The departments will differ depending on the province affected, since the Limpopo Parks Board deals with DCA in Limpopo and the Mpumalanga Parks Board deals with DCA in Mpumalanga. See Kotze "Environmental Governance" 111.

²⁰⁷ Kotze "Environmental Governance" 111.

²⁰⁸ Kotze "Environmental Governance" 111.

²⁰⁹ Kotze "Environmental Governance" 111. See para 3.3 and 3.4 above.

²¹⁰ Kotze "Environmental Governance" 111.

²¹¹ Kotze "Environmental Governance" 111.

²¹² Mngoma, Pillay and Reddy 2011 *African Journal of Public Affairs* 115.

the laws of the land, in this case environmental laws, while monitoring the compliance of these role players and dealing with those acting contradictory.²¹³ A key aspect with regard to this problem is the lack of coordination of enforcement to ensure sustainable development and effective management of the environment.²¹⁴ Enforcement of environmental governance proves to be an issue in the government sphere, as well as the local sphere. For example, if municipalities do not comply with environmental governance, their actions may result in them failing their duties in terms of section 24 of the Constitution, while community members will directly counter the attempts of municipalities to fulfil their duties.²¹⁵ Enforcement is a key aspect of successful implementation and good governance, but it is evident that the current lack of enforcement is creating gaps in environmental governance, more specifically in governance addressing DCA. For example, laws that prohibit the killing of DCA are not enforced effectively and present a major threat to conservation as community members resolve issues in illegal ways, while many legal, but unenforced methods already exist.²¹⁶ The 2023 TOPS Regulations that were set to be enacted on 1 April 2023 had been repealed after concerns had been raised by the Wildlife Ranching South Africa (WRSA) and the Professional Hunters Association of South Africa (PHASA) with regards to the implementation of the regulations, as well as a governmental lack of capacity to enforce the regulations.²¹⁷ During the announcement of the revised TOPS Regulations, the Minister of the Department of Forestry, Fisheries, and Environment Barbra Creecy admitted that a lack of resources had resulted in

²¹³ Du Plessis 2010 *Stellenbosch Law Review* 286.

²¹⁴ Mngoma, Pillay and Reddy 2011 *African Journal of Public Affairs* 116.

²¹⁵ Du Plessis 2010 *Stellenbosch Law Review* 286.

²¹⁶ Woolaston et al 2021 *Conservation & Society* 179.

²¹⁷ The revised TOPS Regulations had made numerous gross errors within the amendments, such as listing ranges within which certain animals would be found, but not providing maps to enforce the sections on, removing key sections and definitions that allow the regulations to be adopted successfully and basing key decisions on a lack-luster public participation process. See WRSA 2023 <https://www.wrsa.co.za/2023/03/10/revised-tops-regulations-2023-wrsa-and-phasa-launch-legal-action/>.

various restricted activities listed within NEMBA not being regulated by the government.²¹⁸

3.6 Good Governance as a Principle to Determine the Effectiveness of Incorporating the nexus between Human Rights and Conservation

Environmental governance and the principle of good governance are closely linked to one another, seeing as environmental governance must adhere to the elements of good governance.²¹⁹ Good governance can be defined as a decision-making process during which members of local communities or minorities participate, prevent corruption, and make decisions that are aimed at the current and future needs of the community or society.²²⁰ Good governance can be seen as essential when dealing with natural resources to ensure the management and conservation of such resources for society as a whole.²²¹ The principle of good governance is increasingly used within the context of environmental governance as it relates to the determining of the efficiency and effectiveness of governance.²²² For governance to be effective, all the principles of good governance must be present. These principles include participation, consistency with the rule of law, transparency, responsiveness, consensus-orientated, equitability and inclusivity, effectivity and efficiency, as well as accountability.²²³ To test the effectiveness of the current approach to HWC, the principle of good governance must be applied to current legislation governing human rights, conservation and HWC, as well as the nexus between the conservation and human rights. The goal is to determine whether or not the current legislation governing conservation, HWC and human rights fulfil all the elements of good governance. A distinction has to be made between simply identifying the principles of good governance and the effective implementation of these principles, since the latter is much harder to achieve,

²¹⁸ WRSA 2023 <https://www.wrsa.co.za/2023/03/10/revised-tops-regulations-2023-wrsa-and-phasala-launch-legal-action/>.

²¹⁹ See Feris 2010 *PER* 75; Kotzé "Environmental Governance" 120.

²²⁰ Pomernaz and Stedman 2020 *Journal of Environmental Policy & Planning* 428.

²²¹ Pomernaz and Stedman 2020 *Journal of Environmental Policy & Planning* 429.

²²² Kotzé "Environmental Governance" 119.

²²³ Kotzé "Environmental Governance" 119.

especially in a South African context.²²⁴ However, for the purpose of this study, the test is applied to determine whether the elements are embedded within the legislation and not necessarily how the elements are implemented. This would provide a possible understanding as to whether the nexus between human rights and conservation might be able to alleviate the issue of HWC.

3.6.1 Participation

Participation in terms of good governance refers to direct or indirect participation in decision-making processes, especially with regard to decisions that directly affect the individual or community.²²⁵ Although South Africa follows a system of representative democracy, it often fails to ensure that the opinions of those most vulnerable are heard. In terms of HWC and conservation in South Africa, the concept of participation has only recently been implemented, such as with the negotiations to create the criteria for the compensation scheme implemented by SANParks and the KNP.²²⁶ However, there is still a lot of room for improvement to effectively allow participation in the conservation process, especially with the environmental knowledge available within most communities that live adjacent to PAs. Section 195 of the Constitution requires that public participation must be present within the public administration of South Africa to ensure the upholding of democratic values.²²⁷ Therefore, this section ensures that public participation is sought in all areas of administration, including the environmental sphere and its consequent decisions.

3.6.2 Consistency with rule of law

Secondly, governance must be in line with the rule of law. This entails a legal framework that is fair and impartially enforced to protect human rights, and based

²²⁴ Kotzé "Environmental Governance" 119.

²²⁵ United Nations Economic and Social Commission for Asia and the Pacific *What is Good Governance?* 2.

²²⁶ Swemmer 2021 <https://www.sanparks.org/scientific-services/our-stories/its-not-about-the-cow-compensation-for-livestock-losses-adjacent-to-the-kruger-national-park>. Also see para 2.3 above.

²²⁷ Section 195 of the *Constitution of the Republic of South Africa*, 1996.

on previous discussions, it includes the protection of the environmental rights of all parties.²²⁸ Environmental governance in South Africa is an ever-developing field with many judicial areas that must still be addressed, specifically with respect to HWC. The fragmentation of South African environmental governance at an institutional, legislative, and intersectoral level is well documented, which reveals that governance is not cooperative or streamlined.²²⁹

3.6.3 Transparency

The third principle refers to transparency, ensuring that all decisions made are done within the rules and regulations supplied.²³⁰ This means that information on decisions made must be available, which is a problem in South Africa, as those living adjacent to PA are some of the poorest communities in South Africa with no possibility of obtaining the information needed to make informed decisions on conservation and PA. Section 195(g) places the duty on the state to ensure that transparency is fostered and that the public has access to accurate, timely, and accessible information.²³¹

3.6.4 Responsiveness

Responsiveness refers to institutions processing and serving stakeholders within reasonable timeframes, and as explained earlier in the chapter, most institutions fail to process DCA claims or reports within reasonable timeframes, if at all.²³²

3.6.5 Consensus-oriented

The principle of consensus-orientated mediation requires that the society's broad views be incorporated to ensure the best interest of the community is achieved.²³³

²²⁸ United Nations Economic and Social Commission for Asia and the Pacific *What is Good Governance?* 2. See para 2.4 above.

²²⁹ Kotzé "Environmental Governance" 110. See para 3.5.1 above.

²³⁰ United Nations Economic and Social Commission for Asia and the Pacific *What is Good Governance?* 2.

²³¹ Section 195(g) of the *Constitution of the Republic of South Africa*, 1996.

²³² United Nations Economic and Social Commission for Asia and the Pacific *What is Good Governance?* 2. See para 2.2 and 2.3.

In South Africa, this means that cultural, social, environmental, and economic consequences be taken into account to ensure a decision is made that is in the best interest of all those affected.

3.6.6 Equitability and inclusiveness

The next principle that should be followed is equity and inclusion, and based on South Africa's history, this principle could prove to be a difficult aspect to achieve. This principle would require that all members of communities are included in the decision-making processes that affect them, but based on the antagonism already present toward conservation due to South Africa's history, it might prove hard to implement successfully.²³⁴

3.6.7 Effectiveness and efficiency

The next principle is effectiveness and efficiency, which means using natural resources and the environment in a sustainable, yet effective manner.²³⁵ It is clear that current legislation and their subsequent procedures are extremely inefficient in terms of enforcement, but this matter has been discussed under the problems of current legislation.²³⁶

3.6.8 Accountability

Lastly, accountability in the public and private sectors plays an important role in ensuring good governance.²³⁷ Governments, their representatives, and the community must be held responsible and accountable for their actions that affect the environment and its conservation. However, this is not possible without transparency and adherence to the rule of law in such a manner that it ensures

²³³ United Nations Economic and Social Commission for Asia and the Pacific *What is Good Governance?* 3.

²³⁴ United Nations Economic and Social Commission for Asia and the Pacific *What is Good Governance?* 3. See para 2.3 above.

²³⁵ United Nations Economic and Social Commission for Asia and the Pacific *What is Good Governance?* 3.

²³⁶ See para 3.5.2 above.

²³⁷ United Nations Economic and Social Commission for Asia and the Pacific *What is Good Governance?* 3.

that all parties are held accountable.²³⁸ Public participation ensures that decision makers are held accountable throughout the process to ensure processes are dealt with in a holistic manner.²³⁹

Although good governance proves difficult to achieve in its entirety, positive strides to ensure the principles are followed would result in sustainable development and protection of the environment, thus promoting human rights in South Africa and alleviating HWC in the country. Thus, to ensure that the nexus between human rights and conservation is used successfully, the principles of good governance must be met, which could result in positive steps towards the alleviation of HWC.

3.7 Determining The Adherence to the Principle of Good Governance in South African Environmental Governance of HWC And DCA

The mechanism of good governance can be used to gauge the effectiveness of the current legislation in place to govern HWC and DCA. This section evaluates each piece of legislation and awards it a mark according to a scale to determine to what extent it addresses each element of good governance, thus using the principle as a test for effectiveness and efficiency. A mark of 0 (zero) is awarded if the legislation makes no effort to incorporate the specific element, while a mark of 1 (one) is awarded for little to no effort. A mark of 2 is awarded for sufficient incorporation, while a mark of 3 (three) is awarded for excellent or complete incorporation of the specific component of good governance. A total mark is then calculated to determine the legislation's current position in terms of good governance.

Scale	Explanation
0	The legislation makes no reference to the element of good governance.

²³⁸ United Nations Economic and Social Commission for Asia and the Pacific *What is Good Governance?* 3.

²³⁹ Du Plessis 2008 *PER* 12.

	A clear gap exists in the legislation.
1	The legislation makes little mention of the element of good governance. The element is not identified, explained or implemented in an efficient manner. A clear gap exists in the legislation.
2	The legislation refers to certain aspects of the element of good governance, but areas of improvement are evident. The element is identified, explained, or implemented to a reasonable degree, but may be improved further. No gap, but there is room for improvement.
3	The legislation refers to the element of good governance in an acceptable and effective manner. The element is identified, explained, and implemented in an effective manner. No gaps identifiable.

Table 1 – Scale used to determine adherence to the principle of good governance.

The elements of good governance that will be measured will be participation and consensus-oriented; consistency will rule of law; transparency, responsiveness and accountability; and equitability and inclusivity. These elements have already been discussed and adherence will be measured according to these explanations.²⁴⁰ In order to obtain the necessary data to determine whether or not the nexus is embedded within legislation, a mixture of national, provincial and other legislation will be measured against all the elements of good governance. The national legislation that would be measured includes NEMA, NEMBA and NEMPAA due to their direct influence on HWC and DCA, as well as the Norms and Standards and TOPS Regulations that stem from the framework legislation. To ensure fairness, at least one piece of environmental legislation from each province will be measured alongside the framework legislations.²⁴¹

²⁴⁰ See para 3.6 above for the explanation of each element.

²⁴¹ These provincial legislations will include the following for each province: Western Cape – Nature Conservation Ordinance 8 of 1969; Eastern Cape – *Eastern Cape Parks and Tourism Agency Act 2 of 2010*; Northern Cape – *Northern Cape Nature Conservation Act 9 of 2009*;

3.7.1 Participation and consensus-oriented²⁴²

3.7.1.1 NEMA

Although NEMA refers to the importance of promoting and facilitating public participation in its preamble and objectives, the act fails to provide a streamlined process and minimum standards for such participation.²⁴³ The act refers to allowing adequate participation but does not provide the measurement for such participation.²⁴⁴ Participation in terms of NEMA was highlighted in the *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* where the needs of society were placed alongside the needs of the developer.²⁴⁵

3.7.1.2 NEMBA and NEMPAA

NEMBA and NEMPAA much more adequately refer to the public participation process, with sections 100 and 33 subsequently providing the requirements for the process of participation, and NEMPAA also including the role players that must be involved in participation process.²⁴⁶

Mpumalanga – Mpumalanga Nature Conservation Act 10 of 1998; KwaZulu-Natal – *KwaZulu-Natal Nature Conservation Management Act* 9 of 1997; Free State - *Nature Conservation Ordinance* 19 of 1974; Limpopo – *Limpopo Environmental Management Act* 7 of 2003; Gauteng – *Transvaal Nature Conservation Ordinance* 12 of 1983; and North West – *North West Parks Board Act* 3 of 2015. For further data, the *Ciskei Nature Conservation Act* of 1987 and *Transkei Environmental Conservation Act* 9 of 1992 were included to measure their effectiveness in terms of the test.

²⁴² See para 3.6.1 and 3.6.5 above for the discussion on participation and consensus-oriented elements.

²⁴³ Preamble and section 2(4)(f), 23(2)(d) and 23(3)(f) of the *National Environmental Management Act* 107 of 1998.

²⁴⁴ Section 2(4)(f) of the *National Environmental Management Act* 107 of 1998.

²⁴⁵ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC).

²⁴⁶ Section 100 of the *National Environmental Management: Biodiversity Act* 10 of 2004 and section 2(f) and 33 of the *National Environmental Management: Protected Areas Act* 57 of 2003.

3.7.1.3 Other national legislation pieces

The Norms and Standards make no reference to public participation when dealing with DCA other than the consultation with relevant parties concerning the compensation scheme.²⁴⁷ The TOPS regulations do not make any reference to public participation whatsoever.

3.7.1.4 Provincial legislation

The *Eastern Cape Parks and Tourism Agency Act* allows the participation in relevant participation programmes to expand to PAs within the province.²⁴⁸ The *Limpopo Environmental Management Act* mentions that the act must take the principles of NEMA into account and therefore considers public participation as one of the key principles.²⁴⁹ None of the other provincial legislation pieces discussed above addresses the issue of public participation whatsoever.²⁵⁰

3.7.2 Consistency with rule of law²⁵¹

3.7.2.1 NEMA

NEMA serves as the framework for environmental legislation but refers to its duty to apply other relevant considerations, such as the State's duty in terms of the Constitution, while also promoting the development of other pieces of legislation and management plans to expand the effectiveness of NEMA.²⁵² All management plans, environmental assessments and norms and standards must be in line with the content of NEMA and therefore the Constitution.²⁵³

²⁴⁷ Section 19(2)(h) of the *Norms and Standards for the Management of Damage-Causing Animals in South Africa* 2016.

²⁴⁸ Section 3(1)(a) of *Eastern Cape Parks and Tourism Agency Act* 2 of 2010.

²⁴⁹ Section 2(2) of the *Limpopo Environmental Management Act* 7 of 2003.

²⁵⁰ See footnote 238 for the provincial legislation measured.

²⁵¹ See para 3.6.2 above for the discussion on consistency with rule of law as an element.

²⁵² Section 2(1)(a) and (l) of the *National Environmental Management Act* 107 of 1998.

²⁵³ Section 13(1)(b) of the *National Environmental Management Act* 107 of 1998.

3.7.2.2 NEMBA and NEMPAA

NEMBA clearly states that the act must fall within the framework as supplied by NEMA, while also ratifying international agreements affecting biodiversity.²⁵⁴ Further, the Act clearly states that it must be read in conjunction with NEMA and that the principles applied in NEMA are carried over and act as guide for NEMBA.²⁵⁵ NEMPAA shares a similar approach, also stating that the act must be read in conjunction with NEMA and its principles, while also stating that NEMBA must be interpreted and applied in conjunction with the act.²⁵⁶

3.7.2.3 Other national legislation and provincial legislation

The Norms and Standards states that NEMBA, TOPS Regulations as well as provincial legislation must be taken into account when applying the Norms and standards, while also carrying over the principles of NEMA, such as duty of care.²⁵⁷ The TOPS Regulations must applied alongside the CITES regulations, provincial legislation as well as Alien and Invasive Species Regulations and other legislation applicable to threatened and protected species.²⁵⁸ The *Limpopo Environmental Management Act* states that the act must uphold the fundamental rights as contained in section 24 of the Constitution, and interpret and apply NEMA's principles as set out in Section 2.²⁵⁹ Although the provincial legislation does not make explicit mention of adherence to the rule of law, these pieces must not contradict the Constitution and through NEMA's workings proceed to fall within some ambit of the rule of law.

²⁵⁴ Section 2 of the *National Environmental Management: Biodiversity Act* 10 of 2004.

²⁵⁵ Section 6 and 7 of the *National Environmental Management: Biodiversity Act* 10 of 2004.

²⁵⁶ Section 5 and 6 of the *National Environmental Management: Protected Areas Act* 31 of 2003.

²⁵⁷ Section 4 of the *Norms and Standards for the Management of Damage-Causing Animals in South Africa* 2016.

²⁵⁸ Section 3 of the *Norms and Standards for the Management of Damage-Causing Animals in South Africa* 2016.

²⁵⁹ Section 2(2) of the *Limpopo Environmental Management Act* 7 of 2003.

3.7.3 Transparency, responsiveness, and accountability²⁶⁰

3.7.3.1 NEMA

NEMA clearly states that all decisions made must be open and transparent, with all information being shared with those affected in accordance with the law.²⁶¹ Further, section 31 protects the whistle-blowers and provides for the sharing of environmental information.²⁶² It stipulates that all information should be disclosed due to the importance of accountable and participatory administration.²⁶³

3.7.3.2 NEMBA and NEMPAA

Once again, NEMBA and NEMPAA share the principles of NEMA, and therefore shares the principle of being transparent and sharing information with all stakeholders affected.²⁶⁴ Furthermore, public participation processes contained within NEMBA and NEMPAA make provision for feedback to those affected and therefore ensure the responsiveness needed to ensure good governance.²⁶⁵

3.7.3.3 Other national legislation

Neither TOPS nor the Norms and Standards make any mention of being transparent, responsive and accountable with regard to HWC and DCA.

3.7.3.4 Provincial legislation

The *Limpopo Environmental Management Act* shares the principles of NEMA, and therefore shares the principle of being transparent and sharing information with all

²⁶⁰ See para 3.6.3, 3.6.4 and 3.6.8 above for the discussion on transparency, responsiveness and accountability as elements.

²⁶¹ Section 2(4)(k) of the *National Environmental Management Act* 107 of 1998.

²⁶² Section 31 of the *National Environmental Management Act* 107 of 1998.

²⁶³ Section 31(5)(b)(ii) of the *National Environmental Management Act* 107 of 1998.

²⁶⁴ Section 7 of the *National Environmental Management: Biodiversity Act* 10 of 2004 and section 5 of the *National Environmental Management: Protected Areas Act* 31 of 2003.

²⁶⁵ Section 100 of the *National Environmental Management: Biodiversity Act* 10 of 2004 and section 2(f) and 33 of the *National Environmental Management: Protected Areas Act* 31 of 2003.

stakeholders affected.²⁶⁶ Although some of the provincial legislation makes mention of DCA and HWC, they fail mention transparency, responsiveness and accountability towards those affected. The legislation states that the MEC will be responsible for instructing environmental officers/clubs to handle the issue, but does not provide a procedure, nor the implications of failure to deal with the issue.²⁶⁷

*3.7.4 Equitability and inclusivity*²⁶⁸

3.7.4.1 NEMA

Inclusivity and equitability play an important role in all legislation of South Africa, as within environmental legislation. The preamble of NEMA highlights the fact that the legislation sets out to "respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities", while also combatting the inequality of the distribution of resources and wealth among South Africans.²⁶⁹ The importance is further highlighted by section 2(2), according to which people and their needs are placed at the forefront by environmental management to ensure all their interests are met equitably.²⁷⁰ Various further subsections of NEMA deal with the issue of inclusiveness and equitable elements, such as equitable access to environmental resources, benefits and services; that all parties must enjoy fair and equitable participation, but especially those who are disadvantaged or vulnerable; and any decisions made by policy makers must take into account the needs, values and interests of all affected and interested parties.²⁷¹

²⁶⁶ Section 2(2) of the *National Environmental Management Act 107 of 1998*.

²⁶⁷ See footnote 234 for the provincial legislation measured.

²⁶⁸ See para 3.6.6 above for the discussion on equitability and inclusivity as elements.

²⁶⁹ Preamble of the *National Environmental Management Act 107 of 1998*.

²⁷⁰ Section 2(2) of the *National Environmental Management Act 107 of 1998*.

²⁷¹ Section 2(4)(a)(v), (4)(d) and (4)(f) of the *National Environmental Management Act 107 of 1998*.

3.7.4.2 NEMBA and NEMPAA

The preamble of NEMBA once again mentions the equitable sharing of resources between all South Africans, while highlighting equitable sharing as an objective of the act.²⁷² Further, NEMBA and NEMPAA share the principles of equitability and inclusiveness as highlighted by NEMA through its shared principles.²⁷³

3.7.4.3 Other national legislation pieces

The Norms and Standards and TOPS regulations do not address the elements of inclusivity and equitability whatsoever.

3.7.4.4 Provincial legislation

The *Limpopo Environmental Management Act* share the principles of equitability and inclusiveness as highlighted by NEMA through its shared principles.²⁷⁴ The provincial piece goes further by placing the duty on the MEC to establish regulations ensuring the appropriate methods for equitable distribution of the assets and benefits obtained from the use of animals within the province.²⁷⁵ The other provincial legislation discussed does not refer to equitable sharing nor inclusiveness in terms of environmental resources or DCA and HWC.²⁷⁶

²⁷² Preamble of the *National Environmental Management: Biodiversity Act* 10 of 2004.

²⁷³ Section 7 of the *National Environmental Management: Biodiversity Act* 10 of 2004, section 5 of the *National Environmental Management: Protected Areas Act* 31 of 2003 and section 2(2) of the *Limpopo Environmental Management Act* 7 of 2003.

²⁷⁴ Section 7 of the *National Environmental Management: Biodiversity Act* 10 of 2004, section 5 of the *National Environmental Management: Protected Areas Act* 31 of 2003 and section 2(2) of the *Limpopo Environmental Management Act* 7 of 2003.

²⁷⁵ Section 48(n)(iii) of the *Limpopo Environmental Management Act* 7 of 2003.

²⁷⁶ See footnote 234 for the provincial legislation measured.

	Participation & consensus- oriented	Rule of law	Transparency , responsiveness & accountability	Equitable & inclusiveness	Total good governance score
<i>National Environmental Management Act 107 of 1998</i>	2	3	3	3	11
<i>National Environmental Management: Biodiversity Act 10 of 2004</i>	3	3	2	2	10
<i>National Environmental Management: Protected Areas Act 31 of 2004</i>	3	3	2	2	10
<i>Norms and Standards for the Management of Damage-causing Animals in South Africa 2016</i>	1	3	0	0	4
<i>Regulations Pertaining to Threatened or Protected Terrestrial Species and Freshwater Species (TOPS)</i>	0	3	0	0	3
<i>Nature Conservation Ordinance 8 of 1969</i>	0	2	0	0	2
<i>Ciskei Nature Conservation Act of 1987</i>	0	2	0	0	2
<i>Transkei Environmental Conservation 9 of 1992</i>	0	2	0	0	2
<i>Eastern Cape Parks and Tourism Agency Act 2 of 2010</i>	0	2	0	0	2
<i>Northern Cape Nature Conservation Act 9 of 2009</i>	0	2	0	0	2
<i>Mpumalanga Nature Conservation Act 10 of 1998</i>	0	2	0	0	2
<i>KwaZulu-Natal Nature Conservation Management Act 9 of 1997</i>	0	2	0	0	2
<i>Limpopo Environmental Management Act 7 of 2003</i>	2	2	2	2	8
<i>Transvaal Nature Conservation Ordinance 12 of 1983</i>	0	2	0	0	2
<i>North West Parks Board Act 3 of 2015</i>	0	2	0	0	2
<i>Nature Conservation Ordinance 19 of 1974</i>	0	2	0	0	2

Table 2 - Good governance test applied to select national and provincial legislation regarding HWC and DCA

3.8 Results and discussion

It is evident from the above-mentioned application of good governance that NEMA serves as the clear flagship legislation for good governance towards HWC. This highlights the importance of establishing and enforcing the principles highlighted

by good governance. The national legislation such as NEMA, NEMBA and NEMPAA are more evolved regarding HWC and good governance concerning the issue, while the provincial pieces lack the necessary elements of good governance to successfully handle the issue of HWC and DCA. Although the fragmentation of national and provincial legislation has its advantages, the clear degree of severance between them are evident once the test of good governance is applied. "Newer" legislation such as the *Limpopo Environmental Management Act* do carry over the principles of NEMA and therefore measure up better, but "older" provincial legislation lacks the key elements to alleviate the issue of HWC in South Africa by means of the nexus. Provincial legislation lacks the necessary elements of good governance to govern HWC and DCA in an effective and efficient manner and leaves room for improvement.

Thus, the following can be determine: the nexus is embedded to some degree within framework legislation and newer environmental legislation, which could be employed to alleviate the issue of HWC. Older provincial legislation, the Norms and Standards and TOPS Regulations do not have the nexus embedded within and could prove ineffective in addressing HWC by means of the nexus. Based on the findings, it is evident that a top-down holistic approach would be more successful when dealing with the issue of HWC, but to do so, the provincial governance must be adapted to ensure that the same principles and elements that are governed by national legislation are incorporated. To allow for a successful top-down approach, the concept of a human-rights based approach is discussed in the next chapter, while the Constitution is measured against the test of good governance to determine its appropriateness to govern HWC and DCA.²⁷⁷

3.9 Conclusion

It is evident that international agreements and treaties, as well as national and provincial legislation on environmental governance mention or allude to dealing with HWC and DCA. The use of framework legislation such as NEMA, along with

²⁷⁷ See para 4.3.2 below.

other pieces of legislation such as NEMPAA and NEMBA, highlights the issue of DCA and HWC more, but not enough to effectively tackle the issue.²⁷⁸ Gaps in the legislation in terms of fragmentation and enforcement are preventing the effective implementation of the above-mentioned and will continue to do so until the issue is resolved. This chapter concludes that legislation is in place to address the issue, but key aspects need to be improved to alleviate HWC. Based on the applied test of good governance, the difference between national and provincial legislation with regard to the elements of good governance are clear. Provincial legislation lacks the necessary development to ensure that HWC and DCA are alleviated in South Africa.²⁷⁹ However, the legislation in place allows for the current approach to conservation, but could also allow for an alternative in a human-rights integrated approach, as is discussed in the following chapter.²⁸⁰

²⁷⁸ See para 3.8 above.

²⁷⁹ See para 3.8 above.

²⁸⁰ See Chapter 4 below.

Chapter 4 The Current Position of the Nexus in South Africa

4.1 Introduction

In 1980, the IUCN published the *World Conservation Strategy* in which it stressed the importance of linking the management of PAs with the development of local communities.²⁸¹ In 1985, the *Wildlife and Human Needs Programme* was created with the goal of combining development and conservation in twenty developing countries.²⁸² However, the importance of the link was highlighted in 2003 at the 5th World Parks Congress, where the *Durban Accord* linked protecting the environment with ways in which the protection must benefit the local community economically.²⁸³ Furthermore, the involvement of local communities in conservation was established as an international goal by the CBC, which was established by the 1992 *United Nations Conference on Environment and Development* held in Rio de Janeiro.²⁸⁴ The convention established three key objectives that must be implemented, namely (1) fair and equitable sharing of benefits for local communities; (2) sustainable use and development of natural resources; and (3) enhancing biodiversity conservation.²⁸⁵ Thus, internationally the link is being promoted to ensure that conservation and communities thrive together.

Locally, SANParks have adjusted and developed their policies since 1994 to be more inclusive with regard to communities and their impact, but the link could be strengthened throughout the public and private sectors of conservation in South Africa. If the local communities are involved more with regard to the conservation in such a way that it develops their own socio-economic rights, the environment will benefit from this link. If communities are informed about human rights, it will

²⁸¹ *World Conservation Strategy* (1982).

²⁸² *Wildlife and Human Needs Programme* (1985).

²⁸³ *Durban Accord* (2003).

²⁸⁴ *Rio Conference on Environment and Development* (1992).

²⁸⁵ *Convention on Biological Diversity* (1992).

have an effect on conservation and the overall protection of the environment, which in turn will lead to the realisation of their basic human rights.²⁸⁶

This chapter explains South Africa's current CBC while also explaining the advantages and disadvantages of this approach. Further, this chapter explains the influence of human rights on CBC, while also explaining how the Constitution can act as legislation to alleviate HWC and its impact. Lastly, the Constitution and its sections are measured against the elements of the good governance principle to determine its eligibility and effectiveness as HWC legislation.

4.2 South Africa's Current Approach to Community-based Conservation

4.2.1 Community-based conservation in South Africa

After the 1980s, the conservation policy in South Africa moved away from the fortress conservation model towards the CBC still implemented today.²⁸⁷ The concept of CBC can be defined as a conservation approach centred on the participation of community members to provide both environmental and socio-economic benefits to all parties involved.²⁸⁸ The CBC is based on the premise that communities should be involved with the protection and management of PA while deriving benefits from their actions.²⁸⁹ To ensure the success of CBC, the link between local communities and the environment should be determined and understood to ensure that the values of the environment and the community are protected.²⁹⁰ At the heart of CBC is the Constitution, which provides the framework within which CBC can be contextualised and realised.²⁹¹ When implementing CBC in South Africa, SANParks implemented social ecology as the central idea for its new vision and identified five key functions to ensure that social ecology thrives in the country, namely environmental education, research and monitoring, economic

²⁸⁶ Campese et al (eds) *Rights-based approaches: Exploring issues and opportunities for conservation* 1.

²⁸⁷ Nkambule, Buthelezi and Munien 2016 *Bothalia* 2.

²⁸⁸ Nkambule, Buthelezi and Munien 2016 *Bothalia* 2.

²⁸⁹ Nkambule, Buthelezi and Munien 2016 *Bothalia* 2.

²⁹⁰ Nkambule, Buthelezi and Munien 2016 *Bothalia* 2.

²⁹¹ Wilson, Tapela and Queiros 2002 *Town and Regional Planning* 13.

empowerment, community facilitation and cultural resource heritage management.²⁹²

CBC is closely linked with Community-Based Natural Resource Management (CBNRM), which aims to assist communities to make use of resources in a sustainable manner that allows for economic, cultural and spiritual benefits to the community itself.²⁹³ In order to achieve this, the Department of Environmental Affairs and Tourism (DEAT), in partnership with the *Deutsche Gesellschaft für Technische Zusammenarbeit* (GTZ) established the Training and Support for Resource Management (Transform), a programme aimed at assisting the South African communities to improve their daily lives through responsible and careful management and use of natural resources.²⁹⁴ Some of the successful projects undertaken by Transform include the development and conservation programmes in the Makuleke Region of the KNP, the Bourke's Luck Centre for Local Economic Development and the Richtersveld. Their successes included job creation and economic growth.²⁹⁵ The projects' success was attributed to a strong human rights approach by giving communities their right to own land while also making use of the natural resources available.²⁹⁶

4.2.2 Advantages of community-based conservation

Many economic or socio-economic advantages are associated with CBC. However, CBC also holds numerous advantages for the environment through the workings of

²⁹² SANParks describes social ecology as their strategy to convey their philosophy and approach to communities neighbouring parks and establishing mutual benefits for both parties through the establishment of partnerships. SANParks' process ensures the community's views are taken into account. Thus, SANParks wishes to ensure that communities obtain direct benefits from the different parks and in turn the communities welcome and participate in the conservation efforts of SANParks. See the 1998 Corporate Plan. See Anthony 2007 *Environmental Conservation* 237.

²⁹³ Department of Environmental Affairs and Tourism *Success stories in South Africa Community Based Natural Resource Management (CBNRM)* 1.

²⁹⁴ Department of Environmental Affairs and Tourism *Success stories in South Africa Community Based Natural Resource Management (CBNRM)* 1.

²⁹⁵ Department of Environmental Affairs and Tourism *Success stories in South Africa Community Based Natural Resource Management (CBNRM)* 2.

²⁹⁶ Department of Environmental Affairs and Tourism *Success stories in South Africa Community Based Natural Resource Management (CBNRM)* 11.

the local members and the knowledge they have acquired in times past. Some of the key advantages that also play a role in the principle of good governance include the local knowledge acquired, advancements in terms of job creation and poverty alleviation, and the inclusiveness of these projects.

One of the advantages of CBC is the local knowledge community members have acquired. Due to the community's dependence on the environment's natural resources, they have built up knowledge about the surrounding environment, which in turn allows them to manage resources successfully and effectively to sustain their livelihoods and ensure that the environment is developed.²⁹⁷ Countries like Australia, Canada and New Zealand have recently started incorporating indigenous knowledge into conservation.²⁹⁸ This has proven to be successful due to the local communities understanding of the environment.²⁹⁹ It has influenced the way these countries manage fire, biodiversity conservation, restoration of wetlands, and important for this discussion, feral- and dangerous animals.³⁰⁰ These projects centred around respecting the cultural knowledge and priorities of the local community, respecting the members themselves, and fostering respectful long-term relationships between conservation parties and the local community, which resulted in positive outcomes for the environment, but also better education and communication for the local communities.³⁰¹

Another advantage of CBC is the possible job creation and poverty reduction that coincides with this form of conservation. Conservation projects can partner with private entities to ensure local communities are assisted by means of job creation such as employing locals as game and field rangers, or allowing the sales of

²⁹⁷ Büscher and Dressler 2007 *Conservation and Society* 589.

²⁹⁸ World Economic Forum *Embedding Indigenous Knowledge in the Conservation and Restoration of Landscapes* 16 & 18.

²⁹⁹ World Economic Forum *Embedding Indigenous Knowledge in the Conservation and Restoration of Landscapes* 16 & 18.

³⁰⁰ World Economic Forum *Embedding Indigenous Knowledge in the Conservation and Restoration of Landscapes* 16 & 18.

³⁰¹ World Economic Forum *Embedding Indigenous Knowledge in the Conservation and Restoration of Landscapes* 17.

handicrafts or employment within private lodges.³⁰² In South Africa, this has proven to be successful, with a high number of quality jobs being created for local villages surrounding the Bourke's Luck Potholes, a hotel in the Makuleke project run by local employees only, as well as various small businesses around the project aimed at providing tourists with souvenirs and local products.³⁰³ Another successful implementation of CBC that led to job creation is the Nambiti Private Game Reserve located in the Tugela basin of KwaZulu-Natal, where a successful land claim resulted in the reserve's creation.³⁰⁴ This led to various economic benefits for the local community, ranging from employment in one of the many luxury lodges to the cheaper sale of products collected from the reserve, such as firewood and thatch from invasive species of plants.³⁰⁵

One of the goals of CBC is the inclusion of all members of the local community. The advantage of this is the empowerment of previously disadvantaged members and their voices being heard. Many of the CBC projects are aimed at supporting women and youth from previously disadvantaged backgrounds to gain experience in conservation to improve their income and to provide future opportunities for these community members.³⁰⁶ Within local communities, women are known to be the users and managers of rangelands and their resources.³⁰⁷ They therefore play a key role in the conservation of these rangelands because of their accumulated knowledge.³⁰⁸ Conservation projects that aim to include women by means of education, resources and decision-making roles have proven to be more likely to achieve sustainable development and ensure the success of the project.³⁰⁹

³⁰² Young African Leaders Initiative 2015 <https://yali.state.gov/the-many-benefits-of-community-based-conservation/>.

³⁰³ Department of Environmental Affairs and Tourism *Success stories in South Africa Community Based Natural Resource Management (CBNRM)* 4–7.

³⁰⁴ Chevallier *Elevating the Role of Communities in Conservation Management Areas* 242.

³⁰⁵ Chevallier *Elevating the Role of Communities in Conservation Management Areas* 242.

³⁰⁶ Conservation South Africa *Impact Report 2020–2022* 35.

³⁰⁷ Conservation South Africa *Impact Report 2020–2022* 38.

³⁰⁸ Conservation South Africa *Impact Report 2020–2022* 38.

³⁰⁹ Conservation South Africa *Impact Report 2020–2022* 38.

4.2.3 Disadvantages of community-based conservation

Although CBC has several advantages, the conservation initiatives associated with CBC has its disadvantages as well. Many of these disadvantages are linked to good governance. They include the benefits to community members not reaching them, lack of knowledge regarding CBC, and weakened community institutions, resulting in CBC not being as effective as possible.

One of the greatest difficulties with CBC is the attempt to balance benefits for the local community and the environment and its conservatists. The goal of CBC is to achieve both the socio-economic and environmental development goals, which is not always possible.³¹⁰ There are many discrepancies between what conservationists deem to be benefits and what the local community members deem to be benefits, and this mismatch creates further problems.³¹¹ Throughout literature, many conservationists regard the economic benefits of CBC to be enough for local communities, which in reality creates a complex situation.³¹² The economic benefits are always distributed in a fair and just way between all the community members, which creates more antagonism.³¹³ On the other hand, various other benefits arising from the environment might be of more importance to the community rather than monetary benefits, such as the cultural use of these areas. Allowing members to enter ancestral grounds and cultural areas are worth far more to local communities than the monetary benefits they obtain from the fenced tourism reserves.

As discussed earlier, a lack of knowledge is detrimental to any conservation attempt and CBC is hampered by this lack of knowledge.³¹⁴ Local communities' lack of knowledge with regard to environmental issues, conservation attempts, and human rights will continue to hamper any and all conservation efforts until the

³¹⁰ Nkambule, Buthelezi and Munien 2016 *Bothalia* 1.

³¹¹ Berkes 2004 *Conservation Biology* 627.

³¹² Berkes 2004 *Conservation Biology* 627.

³¹³ Berkes 2004 *Conservation Biology* 627.

³¹⁴ See para 2.3 above.

issue is resolved.³¹⁵ The Sandstone Sourveld grasslands of KwaZulu-Natal is an example where a lack of knowledge is hindering the conservation projects. In the local community living adjacent to the grasslands, 87% of respondents were not aware of any existing conservation initiatives in the area.³¹⁶ This number is worrying, since a large number of the same respondents had the necessary awareness of what conservation entails (80%) and the necessary environmental knowledge to make a difference.³¹⁷ Ninety-two percent of the respondents indicated that the grasslands had to be protected, but knowledge and awareness does not translate into action.³¹⁸ This lack of knowledge regarding ongoing conservation initiatives could prove detrimental to future conservation in areas where such projects are already ongoing.

For CBC to be effective and successful, the community itself has to have strong community institutions to achieve all its goals.³¹⁹ This means that the community must be stringent when making rules regarding the use, management and conservation of the natural resources in the environment.³²⁰ However, communities were not able to participate in decision-making processes prior to 1980, and the privatisation of land throughout South Africa, demographic pressure due to South Africa's past, as well as the commercial value of land and its uses all hinder CBC.³²¹ These factors have resulted in weak community institutions with regard to biodiversity management and decision making capabilities. Along with the aforementioned, the lack of environmental governance strengthening the position of local communities also weakens the community's position. As discussed earlier, provincial governance lacks the provisions for public participation, inclusiveness and transparency that would allow these communities to develop in such a way that they could become successful conservation parties.

³¹⁵ See para 2.3 above.

³¹⁶ Nkambule, Buthelezi and Munien 2016 *Bothalia* 6.

³¹⁷ Nkambule, Buthelezi and Munien 2016 *Bothalia* 6.

³¹⁸ Nkambule, Buthelezi and Munien 2016 *Bothalia* 6.

³¹⁹ Zyambo 2018 *Journal of Ecology & Natural Resources* 3.

³²⁰ Zyambo 2018 *Journal of Ecology & Natural Resources* 4.

³²¹ Zyambo 2018 *Journal of Ecology & Natural Resources* 4.

4.3 Integrating Human Rights into Community-based Conservation in South Africa

4.3.1 Understanding the link between human rights and conservation

As mentioned previously, various human rights are directly and indirectly affected by HWC in South Africa.³²² In the same light, various human rights are also directly and indirectly affected by conservation, with many of these rights affected by both. Conservation efforts directly influence communities in a positive or negative way. Restricted access to PAs that are critical to these members directly affect their right to life, health, adequate living standards, water and how they practice their cultures within these areas.³²³ Substantive rights such as life, health, practising one's culture, property and development, and procedural rights such as access to justice and information are influenced by conservation daily.³²⁴ The Constitution affords all citizens the right to life, which in conservation terms refers to an environment that is healthy and sustainable for all, while ensuring that conservation efforts do not prevent communities from enjoying critical resources that ensure their right to life.³²⁵ This right coincides with the right to health, which is also ensured through a healthy and unpolluted environment that allows communities to make sustainable use of natural resources.³²⁶ The right to food and water is of utmost importance to local communities, since they are dependent on the environment to access safe food and water by sustainable means.³²⁷ The restriction of such a right could be extremely detrimental to the community, but unsustainable practices on the community's part could also be detrimental to the environment. For example, access to unpolluted water for consumption shows the interconnectedness between sections 24 and 27 of the Constitution, where conservation efforts ensure clean accessible water for communities, but also

³²² See Chapter 2.4 for the human rights affected by DCA and HWC in South Africa.

³²³ Springer and Campese *Conservation and Human Rights: Key issues and Contexts* 16.

³²⁴ Springer and Campese *Conservation and Human Rights: Key issues and Contexts* 16.

³²⁵ Section 11 of the *Constitution of the Republic of South Africa*, 1996.

³²⁶ Section 27 of the *Constitution of the Republic of South Africa*, 1996.

³²⁷ Section 27 of the *Constitution of the Republic of South Africa*, 1996.

ensure the sustainable use of this resource.³²⁸ The cultural rights included in the Constitution play an important part in conservation, since communities' rights to use the environment must be protected alongside the environment itself. The right to property refers to communities being able to use and enjoy their property, but could also refer to the right to be protected against forced eviction, which used to be a common occurrence in conservation practices but is no longer.³²⁹ In terms of section 24 itself, the term "well-being" means that various other rights included in the Bill of Rights should be addressed, such as education, children's rights, slavery, security, forced labour, health care, housing and food and water.³³⁰ Although most of these links are straightforward, others, such as the right to security, are more obscure, although the government has the duty to provide security for local communities against environmental threats such as HWC.³³¹ Another important right contained in the Constitution and similarly carried over into NEMA is section 38, referred to as the "locus standi" clause. This section provides locus standi to any citizen seeking justice should they feel that provision concerning environmental protection has been breached.³³²

Further, in terms of procedural rights, the Constitution provides for numerous rights that are directly affected by conservation efforts. Local and broader communities have the right to information that affects their knowledge of environmental threats, planned conservation activities, sustainable development efforts and possible conservation impacts on the community.³³³ They also have the right to participate in the decision-making processes regarding the above-mentioned as they are directly affected by these processes.³³⁴ Both these rights are incredibly important in terms of good governance and could therefore play a key role in addressing HWC in South Africa. All people's rights are affected, since local communities feel the direct influence and broader communities feel the

³²⁸ Section 24 and 27 of the *Constitution of the Republic of South Africa*. 1996.

³²⁹ Springer and Campese *Conservation and Human Rights: Key issues and Contexts* 18.

³³⁰ Kidd "Environment" 525.

³³¹ Kidd "Environment" 526.

³³² Kidd "Environment" 527.

³³³ Kidd "Environment" 527.

³³⁴ Kidd "Environment" 527.

indirect influence of conservation.³³⁵ Likewise, local and broader communities affected by conservation efforts have the right to information about upcoming developments, while also having the opportunity to participate in decisions that would affect them.³³⁶ The difference, however, is the fact that HWC simply has a negative effect on the realisation of human rights and the protection thereof.

It is evident that one of the major drivers of CBC is the aim of addressing socio-economic issues. This can be addressed through the successful implementation of human rights, as well as improving the knowledge of human rights within these affected communities. The successful implementation of human rights alongside CBC could result in the alleviation of HWC and the adverse effects of DCA in South Africa. To strengthen the connection between human rights and conservation, the Conservation Initiative on Human Rights (CIHR) was established by eight of the largest conservation organisations to promote and establish best practices for conservation.³³⁷ The CIHR established four common principles to guide each of the organisations' practices and policies. Firstly, all internationally proclaimed human rights must be respected; secondly, human rights must be supported and promoted within conservation programmes; thirdly, the vulnerable members of communities must be protected within the scope of the conservation programmes; and lastly, the principle of good governance must be encouraged and supported by all members.³³⁸ If these principles can be followed in South African legislation and conservation, the long-term alleviation of HWC can be attempted.

³³⁵ Springer and Campese *Conservation and Human Rights: Key issues and Contexts* 16.

³³⁶ Springer and Campese *Conservation and Human Rights: Key issues and Contexts* 18.

³³⁷ The establishing members of CIHR are BirdLife, Conservation International (CI), Fauna & Flora International (FFI), International Union for the Conservation of Nature (IUCN), the Nature Conservancy (TNC), Wildlife Conservation Society (WCS) and the World Wide Fund for Nature (WWF).

³³⁸ Conservation Initiative on Human Rights *Human Rights in Conservation: Progress Since Durban 4*.

4.3.2 *The Constitution as an answer to the HWC issue*

In determining the effectiveness of human rights and the Constitution as a possible means to alleviate HWC and its impact, the same test of good governance must be applied to determine the effectiveness as HWC legislation.

4.3.2.1 Participation and consensus-orientated³³⁹

The National Assembly and the National Council of Provinces adhere to an element of public participation as the Constitution states that public involvement must be facilitated in legislative and other processes.³⁴⁰ Section 152 of the Constitution explains the objects of the local government of South Africa and included in these objects is the duty to encourage local communities and their organisations to be involved and participate in the matters of local government.³⁴¹ Public administration has the duty to ensure that members of the local community participate in decisions that affect them.³⁴² Although it is not specifically aimed at HWC and DCA, the Constitution clearly makes provision for local communities and their members to be involved in any matters that influence them, including HWC and DCA. The Constitution does not prescribe what process must be followed or adhered to as NEMBA or NEMPAA do.

4.3.2.2 Consistent with rule of law³⁴³

One of the founding values of the Republic of South Africa as a democratic state is the fact that the Constitution is the supreme law, along with the rule of law.³⁴⁴ Further, the Constitution states that any law or conduct that is inconsistent with it will be seen as invalid and the obligations of the Constitution must be imposed.³⁴⁵

³³⁹ See para 3.6.1 and 3.6.5 above for an explanation of participation and consensus-oriented as elements of good governance.

³⁴⁰ Section 59(1)(a) & 72(1)(a) of the *Constitution of the Republic of South Africa, 1996*.

³⁴¹ Section 152(1)(e) of the *Constitution of the Republic of South Africa, 1996*.

³⁴² Section 195(1)(e) of the *Constitution of the Republic of South Africa, 1996*.

³⁴³ See para 3.6.2 above for an explanation of consistency with rule of law as an element of good governance.

³⁴⁴ Section 1 of the *Constitution of the Republic of South Africa, 1996*.

³⁴⁵ Section 2 of the *Constitution of the Republic of South Africa, 1996*.

It is thus evident that the Constitution will be the supreme legislation regarding HWC, along with the national environmental legislation established. This will ensure a top-down approach that is holistic and implementable. As the supreme law, the Constitution will fill the holes left by the national and provincial legislation to ensure HWC and DCA are governed in a successful and effective manner.

4.3.2.3 Transparency, responsiveness, and accountability³⁴⁶

One of the principles identified for cooperative government and intergovernmental relations between South Africans and the organ of state is providing "effective, transparent, accountable and coherent government for the Republic as a whole", which plays a key role in good governance.³⁴⁷ The National Assembly, the National Council of Provinces and provincial legislatures are also bound by the principles of transparency, participatory democracy, representation, and accountability.³⁴⁸ Public administration plays a key role in ensuring that this element of good governance is administered in a successful manner. The democratic values and principles must be ever-present within public administration.³⁴⁹ Included in this is the fact that public administration must be held accountable.³⁵⁰ Public administration must foster transparency by means of accessibility to accurate and timely information.³⁵¹ Those responsible for public administration should respond to the needs of the community and allow the member to participate.³⁵² It is clear that those responsible for governing in South Africa must ensure a transparent, responsive and accountable approach to governance, and this includes the governing of HWC and DCA in South Africa.

³⁴⁶ See para 3.6.3, 3.6.4 and 3.6.8 above for an explanation of transparency, responsiveness and accountability as elements of good governance.

³⁴⁷ Section 41(1)(c) of the *Constitution of the Republic of South Africa*, 1996.

³⁴⁸ Section 57(1)(b), 70(1)(b) & 116(1)(b) of the *Constitution of the Republic of South Africa*, 1996.

³⁴⁹ Section 195(1)(f) of the *Constitution of the Republic of South Africa*, 1996.

³⁵⁰ Section 195(1)(f) of the *Constitution of the Republic of South Africa*, 1996.

³⁵¹ Section 195(1)(g) of the *Constitution of the Republic of South Africa*, 1996.

³⁵² Section 195(1)(e) of the *Constitution of the Republic of South Africa*, 1996.

4.3.2.4 Equitability and inclusivity³⁵³

Due to South Africa's past of segregation and discrimination, inclusivity and equitability will play a key role in ensuring successful governance. The preamble of the Constitution states that one of the goals is to address the injustices of the past, while uniting South Africans in their diversity.³⁵⁴ Included in the South African values of democracy is the achievement of equality, as well as the elimination of racism and sexism.³⁵⁵ Further, the Bill of Right is identified as the cornerstone of democracy and identifies equality as one of its democratic values.³⁵⁶ Section 9 addresses equality in its totality by stating that all South Africans are equal and must enjoy equal protection and benefits.³⁵⁷ It clearly states that no one may be discriminated against based on their race, sex, gender, disability, beliefs, culture, etc.³⁵⁸ The state has a duty to prevent discrimination to ensure that no South Africans are discriminated against, either directly or indirectly.³⁵⁹ Public administration once again plays a key role to ensure that inclusivity and equitability is promoted, seeing as services must be provided in a manner that is impartial, equitable and fair, while also ensuring that South Africa's people are represented fairly.³⁶⁰ It is evident that the Constitution aims to address the past injustices by treating all South Africans equally. The aim is therefore to treat parties living near DCA equally to those who do not feel the effect of HWC.

³⁵³ See para 3.6.6 above for an explanation of equitability and inclusivity as elements of good governance.

³⁵⁴ Preamble of the *Constitution of the Republic of South Africa, 1996*.

³⁵⁵ Section 1(a) and (b) of the *Constitution of the Republic of South Africa, 1996*.

³⁵⁶ Section 7(1) of the *Constitution of the Republic of South Africa, 1996*.

³⁵⁷ Section 9(1) of the *Constitution of the Republic of South Africa, 1996*.

³⁵⁸ Section 9(3) of the *Constitution of the Republic of South Africa, 1996*.

³⁵⁹ Section 9(4) of the *Constitution of the Republic of South Africa, 1996*.

³⁶⁰ Section 195(1)(d) and (i) of the *Constitution of the Republic of South Africa, 1996*.

	Participation & consensus-oriented	Rule of law	Transparency, responsiveness & accountability	Equitability & inclusiveness	Total good governance score
<i>The Constitution of the Republic of South Africa, 1996</i>	2	3	3	3	11

Table 3 - Good governance test applied to the Constitution of the Republic of South Africa, 1996.

4.3.2.5 Results and discussion

Based on the test of good governance, the Constitution does address all the elements of the principle. The Constitution clearly highlights the importance of public participation in all aspects of governance that could be translated into a possible solution for HWC. The Constitution successfully implements the elements of accountability, inclusivity, transparency, responsiveness, and equality for all South Africans. Implementing the Constitution and human rights more actively alongside CBC, could prove to be an effective measure in addressing the threat posed by HWC. While numerous of the provincial pieces of legislation failed to address the elements of good governance, the Constitution addresses all the elements successfully and effectively. As the supreme legislation, the Constitution could be employed as a more active piece of environmental legislation to fill the gaps left by national and provincial legislation. By actively implementing the Constitution and its principles along with NEMA and its principles, the issue of HWC could be alleviated by means of communities working alongside government mechanisms. In order to determine the effectiveness of this approach, the idea of CBC alongside human rights must be tested against issues such as the antagonism towards conservation and the lack of knowledge regarding conservation and human rights.

4.4 Recommendations

4.4.1 Addressing the antagonism towards conservation with human rights

The major reason for the antagonism towards conservation, as discussed earlier, is South Africa's past approach of displacing communities to establish fenced-off PAs.³⁶¹ If the preamble of the Constitution is applied here, the injustices of the past can be addressed by emphasising human rights alongside CBC, and the antagonism towards conservation could be alleviated. A successful example of this would be the Makuleke Region near the Pafuri section of the KNP. In 1969, approximately 3 000 members of the local community were displaced without any opportunity to prevent the situation.³⁶² After the passing of the new restitution laws, the Makuleke people successfully claimed their land back and started one of the first projects of CBC.³⁶³ The local community was given back the original 24 000 hectares, but undertook to use and develop the land in a manner that is compatible with the environment.³⁶⁴ The land was reincorporated back into KNP and gave the community an opportunity to gain commercial value from the land.³⁶⁵ Some of the successful results of the Makuleke project include the establishment of a development forum tasked with representing the views of the community and ensuring that the community is developed in a transparent manner; establishing a joint management board that would take key decisions on environmental issues such as wildlife management, anti-poaching, fence management, etc.; and the creation of job opportunities to the local members in conservation, such as training field rangers to assist in research and anti-poaching.³⁶⁶ This success story could be emulated by public and private individuals and parks to ensure that past

³⁶¹ See para 2.3 above.

³⁶² Department of Environmental Affairs and Tourism *Success stories in South Africa Community Based Natural Resource Management (CBNRM)* 6.

³⁶³ Department of Environmental Affairs and Tourism *Success stories in South Africa Community Based Natural Resource Management (CBNRM)* 6.

³⁶⁴ Department of Environmental Affairs and Tourism *Success stories in South Africa Community Based Natural Resource Management (CBNRM)* 6.

³⁶⁵ Department of Environmental Affairs and Tourism *Success stories in South Africa Community Based Natural Resource Management (CBNRM)* 7.

³⁶⁶ Department of Environmental Affairs and Tourism *Success stories in South Africa Community Based Natural Resource Management (CBNRM)* 7.

injustices are addressed. This would repair some of the damage done by these injustices and ultimately result in the prejudices towards conservation being removed altogether.

4.4.2 Addressing the lack of knowledge regarding conservation and human rights through rights-based conservation

Another issue that the human rights approach to conservation must solve is the lack of knowledge about human rights and conservation. As stated earlier, a right can only be enjoyed or enforced if the person is aware of the right and aware of how it works.³⁶⁷ Although steps have been taken to increase knowledge about human rights by incorporating these rights into the school curriculum after apartheid had ended, the problem stretches to those who do not have access to education or whose education is subpar.³⁶⁸ However, SANParks aims to address this issue by means of its own education and awareness projects in local communities.³⁶⁹ Projects aimed at educating members of the community about human rights, conservation and the nexus between the two, may alleviate the antagonistic approach towards conservation. Successful examples of this approach of environmental education include special training on the environment at the Table Mountain National Park and Garden Route National Park for teachers near the parks.³⁷⁰ The collaboration between the Table Mountain National Park and the Western Cape Department of Education is aimed at developing a training programme and curriculum aimed at environmental education. This can be done at other national, provincial and public parks to educate members of the community, but most importantly the younger generation, about the environment, its impact and human rights and its importance.

³⁶⁷ Mubangizi and Mubangizi 2005 *Development Southern Africa* 286.

³⁶⁸ Russel, Sirota and Ahmed 2018 *Comparative Education Review* 18.

³⁶⁹ SANParks Date unknown
<https://www.sanparks.org/conservation/people/community/default.php>.

³⁷⁰ SANParks Date unknown
<https://www.sanparks.org/conservation/people/education/default.php>.

4.5 Conclusion

The link between human rights and conservation stretches back to the earliest displacement conservation in South Africa, although the link was a negative one at that stage. However, today we have the opportunity to rectify this by using the nexus between human rights and conservation in such a way that it becomes a positive for both the environment and the local communities who depend on this environment. It is evident that South Africa's approach to CBC is starting to prove successful, but it has space to develop.³⁷¹ The link between CBC, CBNRM and human rights has proven to be a blueprint that can be used in public and private sectors to assist in the alleviation of many environmental and socio-economic issues. Using this nexus can not only alleviate the issues of HWC and DCA in South Africa, but numerous other environmental threats.

Although the advantages are accompanied by various disadvantages, it is evident that the link between human rights and CBC could prove to be a long-term solution to many of the problems local communities face. By using the Constitution alongside environmental governance instruments such as NEMA, the link could strengthen various environmental spheres. The Constitution addresses all the elements of good governance and proves to be the key in addressing the holes in national and provincial legislation governing HWC in South Africa.³⁷² By using this link between human rights and CBC, the antagonism towards conservation and the lack of knowledge regarding human rights and the environment could be addressed. The nexus has proven to be a possible answer to many of South Africa's environmental threats and can be a successful initiative in both public and private spheres. By implementing a top-down governance approach with the Constitution and a down-top conservation approach, the nexus could be successfully used to alleviate the issue of HWC in South Africa and address the lack of environmental governance of HWC in the country.

³⁷¹ See para 4.2 and 4.4 above.

³⁷² See para 4.3.2 above.

Chapter 5 Conclusion

5.1 Revisiting the Research Question and Objectives

This discussion set out to evaluate to what extent the nexus between conservation and human rights is embedded within South African environmental law, specifically with reference to HWC. In order to answer this question, various aspects were considered to determine the position and effectiveness of the nexus within the context of South Africa. As a test of effectiveness, the principle of good governance was employed and the Constitution, legislation and the nexus to some extent was measured against the elements to determine to what extent the nexus was embedded in legislation.³⁷³

5.2 Main Findings

HWC was discussed in depth in Chapter 2, where the issue was first identified as an international threat to the environment. HWC was defined, followed by a discussion of its effects at different levels. The threat was then explained as experienced by South Africans and its PAs. The drivers of HWC in South Africa was identified as the antagonistic attitude towards conservation among local communities, lack of knowledge regarding the environment and its impact, and lastly the lack of knowledge regarding human rights and their impact.³⁷⁴ The current compensation approach to HWC was briefly discussed to show that certain attempts are being made to lessen the impact of HWC.³⁷⁵ Furthermore, the nexus between human rights and HWC was discussed and the negative effects highlighted.³⁷⁶ The positive nexus between human rights and conservation is under pressure due to increasing HWC across the globe, and based on the fact that the human population is increasing daily and further encroaching onto more of the protected area, the issue of HWC cannot be alleviated without an intervention.

³⁷³ See para 3.7, 3.8 and 4.3 above.

³⁷⁴ See para 2.3 above.

³⁷⁵ See para 2.3 above.

³⁷⁶ See para 2.4 above.

In Chapter 3, the legislative approach to HWC was measured against the test of good governance. Firstly, the international aspects that influence South Africa was briefly discussed by looking at some of the treaties and agreements to which South Africa are signatories. Subsequently, the national and provincial legislation was considered in more detail to answer the research question and to determine their approach to HWC or lack thereof. The issues of horizontal or vertical fragmentation within environmental legislation, as well as the lack of enforcement of the subsequent legislation were discussed to identify some of the issues faced by current legislation.³⁷⁷ The elements that would be measured were discussed to effectively apply the test. It is clear from this chapter that the real threat of HWC is experienced daily, be it directly or indirectly, but not adequately addressed by legislation.³⁷⁸ The test of good governance was then applied to several national and provincial pieces of legislation to determine the adherence to the principle. The conclusion was that some of the discussed legislation refers to HWC, but the nexus between human rights and conservation was not pertinent at all.³⁷⁹ "Older" provincial legislation was found to be severely lacking on the issues of HWC and DCA, while national legislation adhered more to the principle, with certain areas of improvement apparent.³⁸⁰ Provincial legislation fails to address the elements of participation, transparency, and inclusiveness. This is detrimental to the use of the nexus. Throughout the discussion, it was clear that framework legislation such as NEMA, NEMBA and NEMPAA had made strides to use the nexus between human rights and conservation, but not to the point where it could successfully alleviate the issue.³⁸¹ However, it was determined that if the current framework legislation was employed alongside the Constitution in a human-rights-based approach, the gaps left could be filled.³⁸²

³⁷⁷ See para 3.5.1 and 3.5.2 above.

³⁷⁸ See para 2.3 and 3.8 above.

³⁷⁹ See para 3.8 above.

³⁸⁰ See para 3.8 above.

³⁸¹ See para 3.3, 3.7 and 3.8 above.

³⁸² See para 3.8 and 4.3 above.

Chapter 4 highlighted South Africa's approach to CBC by briefly defining and discussing what CBC entails. The advantages and disadvantages of the approach were briefly identified to discuss possible improvements with the use of human rights.³⁸³ The link between human rights and conservation was discussed in more detail before applying the test of good governance to the Constitution to determine whether it addresses the gaps left by national and provincial legislation. The study recommends the use of the nexus between human rights and conservation to address the issues of antagonism towards conservation and the lack of knowledge about the environment and human rights, which were identified in Chapter 2 as some of the driving factors behind HWC.³⁸⁴ This nexus has been used successfully in the public sector on a small scale.³⁸⁵ These instances could be used as a blueprint for use throughout the public and private sectors of conservation. The successful implementation of CBC and the nexus was highlighted by referring to success stories such as the Makuleke Region, the Table Mountain National Park and Garden Route National Park, to show the impact of the successful implementation. The nexus was identified as a possible solution to not only HWC, but various socioeconomic development issues local communities face daily.³⁸⁶

5.3 Answering the Research Question and Concluding Remarks

The threat of conflict between man and animal is as old as time and not one that could easily be alleviated. The consequences of the conflict are far-reaching, heavy and sometimes not visible.³⁸⁷ However, an approach of using human rights alongside existing conservation initiatives could prove to be a solution to these effects and this threat. The nexus between human rights, conservation and HWC is evident from this discussion, be it a positive or negative nexus.³⁸⁸ However, to answer the question raised at the beginning of this discussion, the nexus between

³⁸³ See para 4.2.2 and 4.2.3 above.

³⁸⁴ See para 2.3 above.

³⁸⁵ See para 4.2, 4.3 and 4.4 above.

³⁸⁶ See para 4.4 and 4.5 above.

³⁸⁷ See para 2.2 above.

³⁸⁸ See para 2.4 and 4.3.2 above.

human rights and conservation can be seen within some aspects of South African environmental law, but it does not successfully address the issue of HWC as it is still developing. The test of good governance reveals that the nexus is becoming embedded in South African legislation, but many issues must be addressed to use it as a possible solution to the issue of HWC in South Africa. Many gaps were identified in the legislation, and a human rights approach could fill these gaps. Successfully using the nexus as a top-down legislation model, while also using it as a bottom-up approach in conservation initiatives, could offer a solution to this environmental threat being experienced worldwide. By further improving the position of the nexus in framework legislation and incorporating it into provincial legislation, it could be employed at all levels of governance and conservation, which could prove to be the start to the end for DCA and HWC in South Africa.

Based on the findings of the discussion, the following can be clearly determine: HWC, conservation and human rights are intertwined. The positive nexus between human rights and conservation is under threat from the nexus between human rights and HWC and both clearly influence one another. It is evident that the positive nexus meets most of, if not all, of the elements of good governance and could therefore be the key in addressing the issue of HWC. In order to address the worldwide issue of HWC, the effective and immediate implementation of the positive nexus must be embraced. Although the nexus is slowly but surely being embedded within South African legislation, an active and holistic intervention is needed to ensure the issue is addressed from both the top-down and the bottom-up. This simultaneous approach between legislation, those who enforce and those who live in affected areas could prove to be the solution to not only the development of these local communities, but could also be the key to peace between the environment and those who depend so heavily on it.

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