

**Improving Community Involvement in Biodiversity
Conservation in Southern and South Africa:
A Legal Analysis**

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by

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Dank aan my God, my familie, my liefde en my vriende.....

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Abstract

Traditionally the approach to nature conservation in South Africa was a colonialist one, which centred on the notion that the exclusion of rural people from protected areas would result in the best possible protection of fauna and flora and their habitats. This protectionist approach resulted in the creation of *ad hoc* wildlife sanctuaries, mostly national parks and game reserves which excluded local communities. The notion of a more inclusive approach to communities surrounding conservation areas is a hallmark of modern conservationist thinking and has gained much favour in recent times. The involvement of communities in biodiversity conservation initiatives is especially important when considered within the context of effective environmental governance (EG). This coupled with South Africa's anthropocentric approach to environmental governance serves to lay the theoretical foundation for the proper involvement of communities in the conservation of biodiversity. Central to the notion of sustainability, is the preservation of the integrity of ecosystems, while simultaneously acknowledging the integral part that humans play in these ecosystems. This notion of sustainability, coupled with the much-favoured bottom-up approach to conservation, highlights the importance of community involvement in the formation of biodiversity conservation areas.

In order to ensure effective community involvement in biodiversity conservation initiatives, it is imperative that a coherent policy and legal framework exists so as to properly facilitate community involvement in biodiversity conservation initiatives and in so doing to properly implement such projects.

It is against this background that this study seeks to explore and analyse the relevant and applicable regional, sub-regional and national legal frameworks applicable to community involvement with regard to biodiversity conservation.

Keywords: Community involvement, community based conservation, biodiversity conservation, improving community involvement

Opsomming

Die tradisionele benadering tot natuurbewaring in Suid-Afrika was 'n kolonialistiese een. Die benadering het gesteun op die persepsie dat die beste metode om beskermde gebiede te bewaar, is om *afgeleë* gemeenskappe van sodanige gebiede te verwyder. Hierdie benadering het gelei tot die stigting van *ad hoc* wildbewaringsgebiede, meestal nasionale parke en wildreservate wat plaaslike gemeenskappe uitgeskakel het. Die denke dat 'n meer geïntegreerde benadering tot die betrekking van gemeenskappe beter beskerming vir sulke gebiede sal verseker, is 'n moderne neiging. Dit is teen hierdie agtergrond dat die skripsie die internasionale, regionale en nasionale wetsraamwerke wat van toepassing is op gemeenskapsbetrokkenheid ondersoek en analiseer.

Trefwoorde: gemeenskapsbetrokkenheid, gemeenskap gebaseerde bewaring, verbetering van gemeenskapsbetrokkenheid.

Abbreviations

AU	African Union
CBC	Community Based Conservation
CBD	Convention on Biological Diversity
CBNRM	Community Based Natural Resource Management
CILSA	<i>Comparative and International Law Journal of Southern Africa</i>
CITES	Convention
CM	Collaborative Management
CWM	Community Wildlife Management
DEAT	Department of Environmental Affairs and Tourism
EF	Ecological footprint
EG	Environmental Governance
ICD	Integrated Conservation and Development
IUCN	International Union for Conservation of Nature
MqJICEL	<i>Macquarie Journal of International and Comparative Environmental Law</i>
NEMA	<i>National Environmental Management Act 107 of 1998</i>
NEMBA	<i>National Environmental Management Biodiversity Act 10 of 2004</i>
NEMPAA	<i>National Environmental Management Protected Areas Act</i>
NHRA	<i>National Heritage Resources Act 25 of 1999</i>
PER	<i>Potchefstroom Elektroniese Regstrydskrif</i>
QUTLJJ	<i>Queensland University of Technology Law and Justice Journal</i>
SADC	South African Development Community
SAJELP	<i>South African Journal of Environmental Law and Policy</i>
SAPR/PL	<i>SA Publikereg/SA Public Law</i>
TSAR	<i>Tydskrif vir Suid-Afrikaanse Reg</i>

1 Introduction

Traditionally, the approach to nature conservation in South Africa was a colonialist one which centred on the notion that the exclusion of rural people from protected areas would result in the best possible protection of fauna and flora and their habitats.¹ This is generally referred to as the protectionist approach,² and resulted in the creation of *ad hoc* wildlife sanctuaries; mostly national parks and game reserves which excluded local communities.³ The notion of a more inclusive approach to communities surrounding conservation areas is a hallmark of modern conservationist thinking.⁴ However, despite this positive progression, one of the problems nature conservationists face is how to involve local people with the view to providing them with real economic and social benefits resulting from conservation.⁵ The involvement of communities is especially important when considered within the context of effective environmental governance (EG).⁶ This coupled with South Africa's anthropocentric approach to environmental governance serves to lay the theoretical foundation for the proper involvement of communities in the conservation of biodiversity.⁷

1 The approach of excluding rural black Africans from protected areas was fueled by the colonial stigma that black Africans were perceived as being cruel and destructive, and that the only way of effectively protecting wildlife and its natural habitat was to exclude all peoples from such areas. Paterson 2007 *SAPLJ* 1-33 and Glazewski *Environmental Law* 326.

2 Glazewski *Environmental Law* 326. Under this approach governments pursued policies which alienated the wildlife from the people, which resulted in it being turned into a threat or a nuisance rather than a valuable commodity. The establishment of national parks and reserves excluded and often displaced rural communities from land they have traditionally considered to be their own.

3 The protectionist or exclusionary approach has plagued South Africa's protected areas regime, given the fact that protected areas were often established on land formerly owned or occupied by black local communities. These communities were frequently displaced and subsequently denied access to the resources upon which they were dependant, often as a result of apartheid policies. Conservation thus became regarded as an elitist concern. In other words, it was the preserve of the privileged members of society, and protected areas the playgrounds for the privileged elite. Paterson 2007 *SAPLJ* 1-33 and *White Paper on Biodiversity* 33.

4 Couzens 2006 "Is Conservation a Viable Land Usage?" 27-44.

5 Couzens 2006 "Is Conservation a Viable Land Usage?" 27-44.

6 See discussion below.

7 Scholtz 2005 *TSAR* 69-85. The notion that communities lie at the centre of a successful biodiversity conservation effort, would seem to be, by its very nature anthropocentric. Anthropocentrism holds that our moral duties regarding the natural world are determined by the duties we owe one another as humans. Humans are thus considered to be the central component of the planet. Glazewski *Environmental*

Community involvement with regard to nature conservation entails the decentralisation of conservation and natural resource management, and requires that the community be involved in the planning, establishment and management of conservation areas.⁸ Communities should also receive an adequate share of the benefits derived from such conservation areas, which include, *inter alia*, employment and other financial benefits,⁹ to name but a few.¹⁰ Various international environmental law instruments underscore all these entitlements. These include, for example, articles 1, 8(j) and 10 of the *Convention on Biological Diversity* 1992 (CBD),¹¹ the preamble of the

Law 7. The anthropocentric approach has been criticised for ignoring the rights of animals and nature, and scholars have advocated that nature itself must be awarded subjective rights. However this ecocentric approach fails to totally exclude anthropocentric notions as it requires the enforcement of nature's rights through human guardians, thus implicitly implying human values. The theoretical debates surrounding the anthropocentric approach, its positives and negative aspects, fall outside the ambit of this study. For further reading see Scholtz 2005 *TSAR* 69-85. When closely considering international environmental law, it would appear to be anthropocentrically directed Scholtz 2005 *MqJICEL* 9-30. An example of such anthropocentrism is to be found in the Rio Declaration which states that "Human beings are at the centre of concerns". This strictly anthropocentric nature has evolved into what Redgewell calls a "diluted form of anthropocentrism" Scholtz 2005 *MqJICEL* 9-30. This form of diluted anthropocentrism manifests itself in the CBD, which recognises that the value of the biosphere is integrated with the importance of biosphere conservation for human survival. The loss of biodiversity in nature may impact on man, as conversely the actions of man impact on nature. It is in light of this that Scholtz has suggested a qualitative approach in order to avoid the dichotomy of subject (man) and object (nature) surrounding the anthropocentric approach Scholtz 2005 *MqJICEL* 9-30; Scholtz 2005 *TSAR* 69-85. Scholtz contends that a holistic approach is needed whereby the two opposites are united in a single organism, and thus instead of arguing for or against an anthropocentric approach, the quality of the organism must be identified as the main goal. This focus on quality serves to reconcile the interest of both man and nature, as quality encompasses quality of life for man, which requires quality of the ecosystem of which man is part. This thinking serves to support the notion that community involvement is integral in the successful implementation of biodiversity conservation initiatives. This can be deduced from the reasoning that local communities who are dependent on biodiversity in conservation areas for their livelihoods will, by the very nature of the exercise (sustainable conservation of biodiversity), enrich and improve their day to day existence. It stands to reason that the organism as a whole, benefits, as human livelihoods are improved through the conservation of biodiversity.

8 Whande 2007 *PLAAS Research Report* 13.

9 Financial benefits may include *inter alia*, income from tourism, income from work opportunities within biodiversity conservation initiatives as well as income from community based tourism and hunting.

10 Crook and Decker 2006 *Journal of Sustainable Forestry* 111.

11 31 ILM 818 (1992) concluded in Rio de Janeiro, June 1992, and entered into force on 29 December 1993. The objective of the CBD is the conservation of biological resources, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. This includes appropriate access to genetic resources and the appropriate transfer of relevant

Convention on the International Trade of Endangered Species 1972 (CITES),¹² and principles 10 and 22 of the *Rio Declaration on Environment and Development 1992*.¹³ The protection of biodiversity is a critical component of the above mentioned broader conservation effort. The importance of biodiversity conservation is internationally recognised and addressed in international instruments such as the CBD (1992),¹⁴ CITES (1972),¹⁵ and the Rio Declaration (1992). At an African regional level, biodiversity conservation is addressed in the African Convention on the Conservation of Nature and Natural Resources of 1968¹⁶ and 2003.¹⁷ The Southern African Development Community (hereafter SADC)¹⁸ has approached the issue of biodiversity conservation in its Protocol on Wildlife Conservation and Law Enforcement (1999),¹⁹ which applies to the sustainable use and conservation of wildlife. In South Africa, the *National Environmental Management: Biodiversity Act (NEMBA)*,²⁰ the *National Environmental Management Act (NEMA)*²¹ and the *National Environmental Management:*

technologies taking into account all rights over those resources and technologies, and the appropriate funding required.

- 12 12 ILM 1088. Entered into force on 1 July 1975. This document and other relevant information can be obtained from the CITES website www.cites.org. See Rumsey "Terrestrial Wild Animals" 394-424.
- 13 31 ILM 874 (1992). Concluded in Rio de Janeiro in 1992. The declaration comprises of 27 principles based on the foundation of sustainable development, which reaffirm the Stockholm Declaration of 1972, 11 ILM 1416.
- 14 Crook and Decker 2006 *Journal of Sustainable Forestry* 111.
- 15 31 ILM 818 (1992).
- 16 Adopted in Algiers, Algeria, 1968. Full text available at www.au.org see also Van der Linde "Regional Environmental Law under the Auspices of the African Union" 165-192 and Van der Linde 2002 *CILSA* 99-113.
- 17 Adopted in Maputo, Mozambique, 2003. Full text available at www.au.org see also Van der Linde "Regional Environmental Law under the Auspices of the African Union" 165-192 and Van der Linde 2002 *CILSA* 99-113.
- 18 SADC was established under Article 2 of the SADC Treaty, which was signed on 17 August 1992 in Windhoek, Namibia. The objectives of SADC are contained in Article 5 of the SADC treaty. Important objectives relating to this study include: to promote productive employment and utilisation of the resources within the region; to achieve the sustainable utilisation of natural resources and the protection of the environment within the region; and to strengthen and consolidate the long-standing historical, social and cultural affinities and links among the peoples of the region.
- 19 Adopted in Maputo, Mozambique 18 August, 1999. Other SADC protocols dealing with the protection of biodiversity include the Protocol on Forestry, the Protocol on Shared Watercourses, and the Protocol on Fisheries. These protocols are dealt with below.
- 20 Act10 of 2004.
- 21 Act107 of 1998.

Protected Areas Act (NEMPAA)²² all make specific provision for the conservation of biodiversity.

In addition to this comprehensive legal framework, the challenge to achieving both sustainability and conservation goals in biodiversity conservation initiatives in Southern Africa almost certainly requires the support and buy-in of local communities, and such support is usually only forthcoming and secured by addressing the developmental goals of such communities.²³ These goals do not only include financial income and improvement, but also the recognition of local identity, effective participation and securing rights to the land and natural resources.²⁴ Central to the notion of sustainability, is the preservation of the integrity of ecosystems, while simultaneously acknowledging the integral part that humans play in these ecosystems.²⁵ This notion of sustainability, coupled with the much-favoured bottom-up approach to conservation, highlights the importance of community involvement in the formation of biodiversity conservation areas.²⁶

It is against this background that this dissertation seeks to explore and analyse the relevant and applicable regional, sub-regional and national legal frameworks applicable to community involvement with regard to biodiversity conservation. This analysis will attempt to identify gaps/and or weaknesses in this framework, and to make recommendations for the improvement thereof. The research question posed in this dissertation is accordingly: to what extent do the Southern African and South African legal frameworks provide for community involvement in biodiversity conservation, and is this framework sufficient to facilitate community involvement in South Africa?

In an attempt to answer the research question posed above, the discussion is arranged as follows:

22 Act 57 of 2003.

23 Metcalf "Impacts of Transboundary Protected Areas on Local Communities in Three Southern African Initiatives" 1-27.

24 Metcalf "Impacts of Transboundary Protected Areas on Local Communities in Three Southern African Initiatives" 1-27.

25 Bosselmann *The Principle of Sustainability* 79.

26 The bottom up approach to conservation entails the decentralisation of control over natural resources, and hinges on the idea that people, who are dependant on certain natural resources for their survival, are best suited to protect those resources. See further Brosius and Russell 2003 *Journal of Sustainable Forestry* 39-65.

- An investigation of the theoretical concepts pertaining to community involvement in biodiversity conservation; focusing on environmental governance, biodiversity, and community based conservation initiatives;
- A survey of applicable international, regional, sub-regional and national legal regimes relating to the involvement of communities in biodiversity conservation initiatives. At the international level this study will focus on the Rio Declaration, the *Aarhus Convention*, the CBD, CITES and the *Convention Concerning the Protection of the World Cultural and Natural Heritage*. At a regional level, the African Charter, the African Convention and the *Treaty Establishing the African Economic Community* will be surveyed. At a sub regional level, this dissertation will explore the provisions of the *SADC Treaty*, the *Protocol on Wildlife Conservation and Law Enforcement*, the *Protocol on Fisheries* and the *Protocol on Forestry*. Finally the dissertation will turn to the provisions relating to community involvement in biodiversity conservation in the following South African laws, the Constitution, NEMA, NEMBA, NEMPA and the *National Heritage Resource Act 25 of 1999*.
- Recommendations and conclusions.

The research methodology is based on a literature study of primary and secondary legal materials relating to the theme.

2 Theoretical analysis of central concepts

In order to fully understand the relevant legal frameworks, a discussion of the theoretical concepts underlying the topic must be undertaken. This discussion also draws from several non-legal fields and will briefly focus on the protection of biodiversity through conservation initiatives, as well as community involvement in such initiatives.²⁷

27 It must be noted that the focus of this study is of a legal nature, but that it is necessary to include and to reflect on non-legal sources and concepts as they are important in efforts to provide a lucid analysis of this theme.

2.1 The role of biodiversity conservation in environmental governance

2.1.1 Environmental governance

A brief discussion on EG will serve to set the background for an in-depth analysis of community involvement in biodiversity conservation initiatives. Although the main focus of EG is not biodiversity protection *per se* but rather the environment, biodiversity forms an integral part of the environment²⁸ and therefore falls within the scope of EG.

For purposes of this study, it is proposed that EG be given a wider and all encompassing definition. This is due to the fact that the ultimate goal of EG is to ensure an economically, socially and environmentally sustainable future. Such a wide definition is proposed by Kotzé, who defines EG as being:²⁹

A management process executed by institutions and individuals in the public and private sector to holistically regulate human activities and the effects of human activities on the total environment (including all environmental media, and biological, chemical, aesthetic and socio-economic processes and conditions) at international, regional, national and local levels, by means of formal and informal institutions, processes and mechanisms embedded in and mandated by law, so as to promote the common present and future interests human-beings hold in the environment.

It is clear from the above definition that EG requires the input of private parties and individuals at local level. For EG to be sustainable government cannot

28 An in depth discussion of the term environment falls outside the ambit of this study. Nel and Kotzé contend that the environment may be defined from either an exclusively green perspective, or a perspective which integrates green issues with social, cultural and economic issues (brown issues). They propose further that for the purpose of environmental governance, the environment should be considered from both a legal and scientific point of view. For further reading refer to Nel and Kotzé "Environmental Management: An Introduction" 1-33. This study employs the definition of environment in s 1 of NEMA as being:

... the surroundings within which humans exist and which are made up of -

- (i) the land, water and atmosphere of the earth;
- (ii) micro-organisms, plant and animal life
- (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influences human health and wellbeing.

29 Kotzé "Environmental Governance" 103-125 and Kotzé "Balancing Sustainability Considerations through Public Participation in South Africa" 133-140. An in-depth discussion on EG falls outside the scope and ambit of this study.

govern alone, as sustainable governance must involve the public. EG consists of two main actors. These are namely, the public sector and the private sector. This is particularly important when considered within the context of this study, as the conservation of biodiversity forms an integral part of the greater EG effort. An argument for the involvement of communities with regard to biodiversity conservation thus begins to manifest itself against the background of achieving sustainable EG. This is deduced from the fact that it can be argued that the input of private parties at local level is critical to the conservation of biodiversity, so as to bolster the greater EG effort. Such inputs also serve to support the argument proposed by Feris, who contends that EG should adhere to the values set out in section 195 of the Constitution, which include *inter alia* accountability, transparency, efficiency, public participation as well as the rights contained in the Bill of Rights.³⁰ Taking this into account, it becomes apparent that the input of private parties and individuals is important with regard to EG and that citizens must be aware and are involved in the decision-making process encapsulated in EG. Such involvement will give them the ability to effectively exercise their environmental right as contained in section 24 of the Constitution.³¹

Although academic, the link can be drawn between sustainable EG, which requires the input of private parties and individuals so as to exercise their right contained in section 24 of the Constitution, and the role played by community involvement in biodiversity conservation in supporting sustainable EG. The environmental right mandates civil involvement. It is anthropocentric, and as the constitutional foundation of EG it clearly envisages the very direct involvement of communities and civil society in the EG effort.

2.1.2 Biodiversity

In order to understand the importance of biodiversity and the role it plays within EG, a brief discussion on biodiversity is given hereafter.

Biodiversity is defined in the CBD as:

30 Feris 2010 *PER* 73-99.

31 Feris 2010 *PER* 73-99. See 5.1 below.

The variability among living organisms from all sources including, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and also includes diversity within species, between species, and ecosystems.³²

A similar definition is used in NEMBA.³³ It is this variability among living organisms from all sources, ecological complexities and diversity within species, between species and ecosystems that often plays a crucial role in the livelihoods of rural communities, through, *inter alia*, providing food and shelter and other ecosystem services, as well as being a crucial element to cultural and spiritual needs.³⁴ It is widely agreed that biodiversity resources are non-renewable, and generally speaking, consist of three elements existing in a hierarchical relationship.³⁵ These elements include genetic diversity, species diversity and ecosystem diversity. The threat of biodiversity loss is well known, and the dangers it poses are widely recognised and have been discussed in depth by numerous authors.³⁶ Trotman argues that properly involving communities in biodiversity conservation, could help fight the loss of biodiversity for numerous reasons.³⁷ These include, *inter alia*, that community involvement may provide locally appropriate responses and application of local knowledge to biodiversity loss, rather than a one sized approach. Proper community involvement may also foster a culture of prevention and preservation of biodiversity, rather than end of pipe or after the fact fixes.

32 The aim of this study is not to give a scientific discussion on biodiversity, thus a brief discussion will only be given on the definition of biodiversity, the recognition of its importance and why it should be protected. This discussion is given in order to place the concept of biodiversity in the context of the aim of the study as discussed above.

33 NEMBA defines biodiversity as being the "variability among living organisms from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and also includes diversity within species, between species and of ecosystems".

34 Alcottson "Biological Diversity" 97-125.

35 Perrings *ed Biodiversity Conservation* 3. See also Birnie and Boyle *International Law* 545 and Glazewski *Environmental Law* 257.

36 The implications of biodiversity loss are widely known and a detailed discussion of this topic falls outside the ambit of this research. However, it must be noted that four main reasons for biodiversity loss in Sub-Saharan Africa have been cited. These are the destruction and fragmentation of habitats associated with the expansion of mining, forestry and agriculture. The persistent tendency towards the degradation of arable and grazing lands that is closely related with changes in biodiversity, the controlled and uncontrolled introduction of alien species and finally, the harvesting and hunting of individual wild species, and particularly of individual wild fauna. See in this regard Perrings (ed) *Biodiversity Conservation* 11. See also Sands *International Environmental Law* 499-501.

37 Trotman *Benefits of Community Conservation* 3.

At a national level, South Africa's State of Environment Report (SoER) paints a bleak picture for the country's biological resources.³⁸ It shows that nearly 18% of the country's terrestrial environment has been transformed, resulting in vast losses of biodiversity.³⁹ The report also shows that invasive alien plants have covered more than 10 million hectares, and that 55% of the countries Red Data listed plants are threatened.⁴⁰ The report continues to list several factors threatening South Africa's biodiversity, *inter alia*, over-exploitation and climate change.⁴¹ It would seem that despite concerted efforts to conserve biodiversity, conventional methods are failing. The SoER recognises that responses to counter the loss of biodiversity may include measures that aim to conserve biodiversity whilst ensuring the sustainable use and equitable sharing of resources.⁴² This serves to support the case for community involvement in ensuring effective biodiversity conservation. The importance of biodiversity conservation on people is echoed by Wynberg,⁴³ who states:

... no longer is biodiversity an issue confined to a handful of die-hard conversationalists and wildlife enthusiasts. It's critical importance to farming methods and communities, to indigenous peoples and their livelihoods, and to human rights, political dispensations and global trade issues, are now well recognised. Biodiversity has moved from the realms of 'saving the rhino' to affect us all by encompassing politics, culture and economy.

When considering the above, it becomes clear that biological diversity is important to communities especially since it plays a vital role in the provision of food and shelter and other eco-system services,⁴⁴ as well as being a crucial element of cultural and spiritual needs as stated above.⁴⁵

38 It is not the intention of this study to delve into the findings of the report, but rather to make the reader aware of the report and the importance of its findings for purposes of biodiversity conservation. For further reading refer to DEAT *South African Environmental Outlook* Chapter 5.

39 DEAT *South African Environmental Outlook* 110.

40 DEAT *South African Environmental Outlook* 110.

41 DEAT *South African Environmental Outlook* 112.

42 DEAT *South African Environmental Outlook* 129.

43 Wynberg 2002 *South African Journal of Science* 233-243.

44 Humanity depends on healthy ecosystems, as they support or improve quality of life, and without them the earth would not be habitable. Ecosystem services comprise of four categories. The most fundamental being supporting services such as nutrient cycling, soil formation and primary production. The provision of services such as the production of food, freshwater, materials and fuel. Regulating services including climate and food regulation, water purification, pollination and pest control, as well as

2.1.3 Community based conservation initiatives

Traditionally, efforts aimed at the conservation of biodiversity were centred on the establishment of protected areas, which were commonly considered one of the most widely accepted means of achieving effective biodiversity conservation by national and international conservation agencies.⁴⁶ Although the importance of protected areas is recognised with regard to biodiversity conservation, it is not yet clear to what extent community involvement is considered to play a role in such biodiversity conservation initiatives. This confusion stems from the fact that no concrete approach with regard to the harmonisation of legislative and policy measures, especially in relation to local people, has been adopted by the main biodiversity conservation actors in Southern Africa.⁴⁷

The problem with regards to community involvement in biodiversity conservation initiatives may best be explained by means of an example: Community A lives within a very biologically diverse area. The area has been identified as a viable conservation area in order to protect various components of biodiversity not found anywhere else. The government, with the help of several non-governmental organisations (NGO's), wishes to establish a national park in the area. Several problems and challenges arise from even such a simple scenario. Must the community be moved, or should they be allowed to stay within the confines of the park? If they are allowed to stay, to what extent must they be involved in the planning and decision making processes with regard to the park? Are they allowed to continue their subsistence farming methods within the park boundaries which may include the harvesting of several biological resources and occasional hunting? Will they share in the financial benefits of the park? Will allowing them to stay

the cultural (including aesthetic, spiritual, educational and recreational) services. *Living Planet Report 4*.

45 Algottson "Biological Diversity" 97-125. DEAT *South African Environmental Outlook* 108.

46 Mbaiwa 2005 *Journal of Environmental Management* 144. Conservation through means of protected areas is also referred to as "fortress conservation". Such protected areas take the form of, *inter alia*, specifically established nature reserves, protected areas, wildlife management areas and wildlife reserves. These reserves are often established in order to protect a specific plant, animal or ecosystem. Southern Africa has close to 5000 of these protected areas.

47 Whande 2007 *PLAAS Research Report* 14.

negatively impact on biodiversity in the area? It is apparent from the example above that the issues surrounding community involvement in biodiversity conservation initiatives are vast and complex.

The recent trend in Southern Africa in trying to resolve these issues is for biodiversity conservation initiatives to harness the benefits of biodiversity conservation locally by bridging the gap between conservation and development. This is achieved through the use of "Community Based Natural Resource Management" (CBNRM).⁴⁸ This shows a movement towards the realisation of the importance of community involvement in biodiversity conservation initiatives. This is in stark contrast to past conservation practices which managed protected areas in isolation from adjacent areas, with very little provision made for sharing management responsibilities with surrounding land owners and communities.⁴⁹ CBNRM manifests itself in many guises, including *inter alia* integrated conservation and development (ICD), community-based conservation (CBC), community wildlife management (CWM), collaborative (or Co-) management (CM) and protected area outreach projects.⁵⁰

The CBD signalled a move towards a more proactive approach to conservation.⁵¹ This approach seeks to continue the use of biological resources by people whilst simultaneously ensuring the long-term sustainability of the earth's biological capital.⁵² The CBD also realises that an equitable sharing of income and assets derived from biological resources is a fundamental and crucial component in any strategy for the conservation of biodiversity.⁵³ This approach is quite novel in conservation circles, which have relied on what are considered more traditional approaches to nature conservation since colonial times. Such traditional approaches were often

48 Dressler and Büscher 2008 *Geoforum* 452-465.

49 Paterson 2007 *SAPLJ* 1-33.

50 DeGeorges and Reilley 2009 *Sustainability* 734-789.

51 Sibanda and Omwega 1996 *Southern African Journal of Wildlife Resources* 175-181.

52 Preamble of the CBD 1992. The CBD and its application with regards to community involvement in TBBC is discussed below in Chapter 3.

53 Dressler and Büscher 2008 *Geoforum* 452-465.

encapsulated in the fortress approach.⁵⁴ This approach was the most dominant conservation philosophy of the twentieth century, and it had as its main precept command and control laws which boiled down to "keep out or you will suffer".⁵⁵ The protectionist approach, and the laws which govern it, serve to punish rural communities for using the natural resources within protected areas,⁵⁶ and in so doing serves to strain the relationship between local communities and conservation authorities.⁵⁷ As Watts and Faasen put it: "... this conservation policy often resulted in inadequate conservation of biodiversity".⁵⁸ Fortunately, this approach is now recognised as being dated, and Southern Africa has embarked on a new approach to establish community based natural resource utilization programmes with communities adjacent to protected areas, as well as those in rural areas.⁵⁹ This approach recognises the modern concept of conservation, which stresses a human centred management approach.⁶⁰ Paterson states that there is a growing acceptance of the view that effective conservation must be socially and economically relevant, and requires the acceptance, active participation,

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- 54 The fortress approach, or fines and fences approach is a natural resource management practice which aims to preserve natural resources through the forcible exclusion of rural communities that traditionally rely on these resources for their livelihoods. See in this regard Watts and Faasen *South African Geographical Journal* 25-37. See also Michaelidou *et al Society and Natural Resources* 599-616.
- 55 It must be noted that this approach is largely biocentric, as it aims to preserve nature for nature's sake. The protectionist approach relies on measures such as fines and imprisonment to keep people out of protected areas, and in so doing attempts to conserve biodiversity. Watts and Faasen 2009 *South African Geographical Journal* 25-37.
- 56 Watts and Faasen 2009 *South African Geographical Journal* 25-37.
- 57 Feris highlights this sentiment precisely by quoting "If conservation means losing water rights, losing grazing and arable land and being dumped in a resettlement area without even the most rudimentary infrastructures and services, as was the case when the Tembe Elephant Park (near Kosi Bay) was declared in 1983, this can only promote a vigorous anti-conservation ideology among the rural communities of South Africa." Feris "Environmental Rights and *Locus Standi*" 129-151.
- 58 Watts and Faasen 2009 *South African Geographical Journal* 25-37.
- 59 Crook and Decker 2006 *Journal of Sustainable Forestry* 111. It is interesting to note that as early as 1975, the IUCN passed a resolution at its 12th General Assembly in Kinshasa, Zaire, recognising the value and importance of 'traditional ways of life and the skills of the people which enable them to live in harmony with their environment'. This resolution recommends that governments 'maintain and encourage traditional methods of living' and 'devise means by which indigenous people may bring their lands into conservation areas without relinquishing their ownership, use or tenure rights. 'The same resolution recommended against displacement and stated 'nor should such reserves anywhere be proclaimed without adequate consultation'.
- 60 Paterson 2007 *SAPLJ* 1-33.

involvement and co-operation of local communities.⁶¹ The rationale behind these approaches is that if rural people derive tangible benefits from natural resources, there will be a greater drive on their part to protect such natural resources.⁶² Tangible benefits include, *inter alia*, shared decision making authority, employment, revenue sharing, limited harvesting of plant and animal species, provision of community facilities such as schools, bore holes and roads, as well as secure land tenure in exchange for the community's support for conservation. This approach is recognised by the IUCN as having conservation merit. This is evident from the fact that the IUCN recognises category IV protected areas as part of its protected area categorisation. These areas allow for "a sustainable flow of natural products and services to meet community needs".⁶³

61 Paterson 2007 *SAPLJ* 1-33.

62 Nelson and Agrawal 2008 *Development and Change* 557-585; Newmark and Hough 2000 *Bioscience* 585-592.

63 *IUCN Guidelines for Protected Areas Management Categories*. The IUCN further recognises the importance of community involvement in biodiversity conservation initiatives in its *IUCN Management Guidelines*. Paterson 2010 *South African Law Journal* 490-514. These guidelines were published to assist the international community, as well as domestic-policy makers to understand, plan for and accurately record protected areas governance. The guideline recognizes four governance types, namely governance by government, shared governance, private governance and governance by indigenous peoples and local communities. All four governance types incorporate community involvement in the governance of protected areas. Governance by government is the traditional form of protected area governance, and entails government holding the authority, responsibility, and accountability for managing a protected area. There is usually no consultation with relevant stakeholders regarding the establishment and management of protected areas. Public participation and accountability are however becoming increasingly common and is generally regarded as being desirable. This form of governance thus provides for the delegation of planning or management functions to parastatals, NGO's, local communities, and or indigenous communities. Shared Governance entails the governance of a protected area by two or more parties. The *IUCN* Guideline recognizes two main sub-categories of shared governance, namely collaborative management or co-management, and joint management. Collaborative management results in authority vesting with one body, who is required by law or policy to inform and consult with other stakeholders. These stakeholders may include *inter alia* local communities, indigenous peoples or NGOs. Joint management results in the decision making authority vesting in a range of bodies such as the ones identified above. The decision making process is varied and may or may not require consensus, and once such a decision is made, its implementation is assigned or delegated to various agreed bodies or individuals. Private Governance recognizes the growing number of protected areas which have largely been established voluntarily by private parties. This form of governance entails protected areas owned by, or controlled by private entities, including, *inter alia*, private entities, individuals, NGOs, indigenous peoples and local communities. Lastly governance by indigenous peoples and local communities is recognised by the guideline. Paterson contends that this form of governance has resulted in an increased focus on protected areas governance in recent times. This form of governance results in the management authority and

It is thus imperative that a policy framework should exist which could guide the drafting and implementation of programmes which advocate the involvement of communities in biodiversity conservation. The lack of downwardly accountable decentralisation or devolution is recognised as being the principal barrier to community involvement in biodiversity conservation initiatives.⁶⁴ Nelson and Agrawal point out in a similar vein that the prevalent failure to transfer sufficient decision making powers to the local level turns most decentralised reforms with regard to biodiversity conservation into charades.⁶⁵ This coupled with the fact that if no coherent policy or legal framework exists with regard to the facilitation of community involvement in conservation initiatives,⁶⁶ such projects could be improperly implemented and may subsequently fail.⁶⁷ The importance of an effective legal framework is evident when the following is considered:⁶⁸

Legislation and policy regarding natural resource management are crucially important in directing who will manage biodiversity, as well as who will benefit from that management and how. Thus, they provide the foundation for long-term equitable and sustainable relations between government and communities in protected areas.

responsibility for a protected area falling within the control of indigenous peoples or local communities through various forms of customary or legal, formal or informal, institution and rules. Paterson identifies three traits which are central to this form of governance. The relevant indigenous peoples or local communities are closely concerned with the preservation of the area they hold the main authority to make and implement decisions in respect of the area, and the exercise of such authority leads to or contributes to the sustainability of the area, notwithstanding the fact that this need not necessarily have been the rationale for the action. Paterson 2010 *South African Law Journal* 490-514.

64 Nelson and Agrawal 2008 *Development and Change* 557-585.

65 Nelson and Agrawal 2008 *Development and Change* 557-585.

66 Dressler and Büscher 2008 *Geoforum* 452-465.

67 Already there is a drive in conservation circles to dismiss community based natural resource management as being flawed, and that a return to the protectionist approach is the best way of securing proper biodiversity conservation. These sentiments are fuelled by the failure of certain CBNRM projects. These failures often result because of a lack of willingness on behalf of governments and officials to decentralise control over natural resources, improper implementation and control over CBNRM initiatives and a host of other factors. For further reading see Dressler and Büscher 2008 *Geoforum*, Watts and Faasen 2009 *South African Geographical Journal* and Nelson and Agrawal 2008 *Development and Change* 557-585.

68 Lubbe "Transfrontier Conservation and Poverty Alleviation: A Case Study of the MDTP" 1-19.

Brosius and Russell⁶⁹ also state the importance of a clear legal framework with regard to community involvement in biodiversity conservation initiatives by saying:⁷⁰

... we believe that no species, no habitat, no place or piece of land can be 'saved' without a community. How that community is constructed and *empowered* to conserve is the question.⁷¹

There have accordingly been calls for local community participation in biodiversity conservation initiatives to be prescribed as a matter of law, rather than retained as a discretionary administrative policy as is currently the case.⁷² Such participation by communities can accrue at different levels. Communities need not only be involved in the actual management and implementation of biodiversity conservation projects or initiatives, but may also become involved in policy and law making with regard to biodiversity conservation as well as the enforcement of such laws.

The discussion will now turn to the relevant legal framework at international, regional, sub-regional and national levels, in order to distil whether legal provisions exist in order to facilitate the involvement of communities in biodiversity conservation initiatives.

3 International law

This section aims to identify the international law instruments and provisions applicable to the involvement of communities in biodiversity conservation initiatives in Southern and South Africa.⁷³

69 Brosius and Russell 2003 *Journal of Sustainable Forestry* 39-65.

70 Brosius and Russell 2003 *Journal of Sustainable Forestry* 39-65.

71 Own emphasis.

72 Paterson 2007 *SAPLJ* 1-33.

73 A description on the nature and differing types of treaties and conventions is given in Dugard *International Law* 28. The conventions which are to be discussed are the CBD, the *Convention Concerning the Protection of the World and Cultural Heritage*, and the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*.

3.1 The Rio Declaration

The Rio Declaration⁷⁴ comprises 27 principles which are based on the corner stone of sustainable development. These principles reaffirm the provisions of the Stockholm Declaration.⁷⁵ Of significance for this study is Principle 1, which states that "human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature". This principle reaffirms the recognition that people are considered to be an integral part of the environment, and also recognises the right that people have to live in harmony with nature. This is of importance when considering the traditional approach to conservation, which advocated that the removal and exclusion of communities from conservation areas, would result in the best possible protection being afforded to such conservation areas.⁷⁶ Principle 10 is also of importance when considered within the context of this study. It states that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The above principle holds several important considerations for the involvement of communities in biodiversity conservation. This is evident from the fact that it recognises that environmental issues are best confronted with the participation of all concerned parties at the relevant level. Involving communities, who are affected by biodiversity conservation initiatives through public participation, and through the design, operation and management of such initiatives will serve to give effect to the above principle. The principle also reaffirms the importance of access to information, and the importance thereof for the facilitation of meaningful participation in the decision making

74 31 ILM 874 (1992). Concluded in Rio de Janeiro in 1992.

75 Principle 2 of the Rio Declaration.

76 See n 58.

process. This highlights the importance of providing communities who may be affected by biodiversity conservation initiatives with adequate access to information, so as to ensure that their participation in the process of establishment and management of the initiative is meaningful and takes into account their needs and situation. It also stresses the importance of ensuring just administrative proceedings, implying that decisions made regarding biodiversity conservation initiatives must be made in a fair manner taking into account communities who may be affected.

The Rio Declaration goes on to state in Principle 22 that:

Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Once again the importance of community involvement in the conservation of biodiversity is given recognition. It is clear from the above that the Rio Declaration recognises the important role which community involvement can play in conservation initiatives. Whilst the Declaration is at best a soft law instrument and not legally enforceable and necessarily binding, it goes a long way in reaffirming a strengthening of the theoretical foundation laid at international level advocating community involvement in such initiatives.

3.2 Conventions

3.2.1 The CBD

Whilst the Rio Declaration is not necessarily binding because it is a soft law instrument, the CBD is an enforceable and legally binding international law instrument. It is also considered to be the primary international instrument for the conservation of biodiversity.⁷⁷ The importance of a holistic approach to

77 31 ILM 818 (1992) concluded in Rio de Janeiro, June 1992, and which entered into force on 29 December 1993. To date there are 190 contracting parties to the CBD. South Africa became party to the convention by ratification on 2 November 1995. The negotiations during the CBD resulted in what is commonly referred to as the "North-South Debate" in which Southern Hemisphere countries were concerned that biodiversity as common heritage would lead to a plundering of the South's abundant biodiversity, whilst the Northern countries feared that the notion of common heritage would in turn lead to excessive benefit sharing and transfer of technology. It is as a

conservation, rather than a single species approach, is encapsulated in the CBD.⁷⁸ The CBD also contains several relevant provisions relating to the involvement of communities in biodiversity conservation initiatives. The first of these is to be found in the preamble, which states that contracting States recognise the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources. It continues to state that it also recognises the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.

Article 1 of the CBD sets out the main objectives of the Convention, with specific emphasis placed on the conservation and sustainable use of biological resources. Importantly, for the purposes of this study, article 1 also places emphasis on the sharing of benefits derived from biodiversity. This is of particular importance when one considers that many rural communities are excluded from conservation areas, thus depriving them of access to natural resources on which their livelihoods depend.⁷⁹

Article 8(j) of the CBD is of specific importance to community involvement in conservation initiatives. It states that a contracting party must:⁸⁰

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.

This read in conjunction with article 8(e) of the CBD, which states that contracting parties should promote environmentally sound and sustainable development in areas adjacent to protected areas with the view to expanding

result of this debate, that it was elected to refer to biodiversity as a "common concern" thus serving to protect the notion of state sovereignty to a greater extent with regard to aspects relating to biodiversity. See Bosselmann, Engel and Taylor *Governance for Sustainability* 21; see also Kiss and Shelton *International Environmental Law* 44.

78 Glazewski *Environmental Law* 259; see also Strydom "Protected Areas" 951-957.

79 See discussion above.

80 Article 8(j) of the CBD.

conservation into those areas, serves to provide a legal justification, motivation and foundation for community involvement. This can be deduced from the discussion above which advocates that involving communities in the conservation of biological resources is recognised as being an environmentally and scientifically sound method of achieving effective biodiversity conservation, and is a step in the direction of ensuring sustainable conservation practices.⁸¹ The traditional approach to conservation which excluded communities from conservation areas often resulted in expelled communities settling on the peripheries of conservation areas.⁸² The expansion of conservation into areas surrounding protected areas as envisaged by article 8(e) serves to provide the perfect setting for the practical application of article 8(j), and thus necessitates the involvement of communities in the newly formed conservation area.

It would appear from the above that the CBD includes the objectives of equity and benefit-sharing by local communities, enhancement of the involvement of indigenous and local communities in the establishment and management of protected areas, and maximising commercial opportunities that arise from protected areas to local communities.⁸³ De Villiers⁸⁴ argues that the CBD seeks to promote the sustainable use and benefit sharing that arise from the protection of biodiversity through the realisation that, unless local communities receive some form of benefit from protected areas, it is unlikely that such areas will be sustainable in the long run.

3.2.2 CITES

The principal aim of CITES is the conservation of endangered species through the regulation of the international trade of these species. It states that people and States are and should be the best protectors of their own wild fauna and flora.⁸⁵ This is relevant for the purposes of this study as fauna and flora form an integral part of biodiversity. As discussed above, it is widely

81 See 2.1.3 above.

82 See discussion above.

83 De Villiers *People and Parks* 15.

84 De Villiers *People and Parks* 15.

85 Preamble of CITES.

believed that involving local communities in biodiversity conservation efforts may be an effective way of curbing biodiversity loss, thus ultimately protecting fauna and flora. Although no specific mention is made in CITES of community involvement in conservation initiatives, it can be argued that these initiatives will be considered to be of importance in the protection of species as envisaged by CITES. This is evident when considering the notion contained in CITES that people are the best protectors of their own wild fauna and flora. This serves to make a strong case for the involvement of communities in biodiversity conservation programmes.

3.2.3 *Convention Concerning the Protection of the World Cultural and Natural Heritage*

The *Convention Concerning the Protection of the World Cultural and Natural Heritage*⁸⁶ is a response to the loss of natural and cultural world heritage. The convention deals with cultural heritage, as well as natural heritage.⁸⁷ For the purpose of this study it is important to focus on the definition given for natural heritage, which the Convention defines as being:

... natural; features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiological formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

The above definition embraces several components of biodiversity. This is evident through the inclusion of delineated areas, which constitute the habitat of threatened species of animals and plants of outstanding universal value,

86 Adopted in Paris, France, at the UN Educational General Conference during its seventeenth session on November 16th 1972.

87 Article 1 of the Convention. Cultural heritage is defined as being: "monuments"- architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; "groups of buildings" - groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; "sites" - works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

from the point of view of science or conservation. The inclusion of natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty also serves to incorporate a component of biodiversity within the definition of natural heritage. Although not expressly referring to biodiversity, the above definition encompasses certain aspect of the definition of biological diversity. This can be deduced from the inclusion of species and ecosystems, albeit only those warranting outstanding universal value from the point of view of science, conservation or natural beauty within the definition of natural or cultural heritage.

In terms of the above, conservation areas may be considered to be areas of natural heritage. This read in context with article 5 of the Convention, serves to lay a foundation for the involvement of communities in biodiversity conservation initiatives. Article 5 states:

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:

- (a) To adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes.

The Convention calls for the adoption of comprehensive planning programmes, to give effect to article 5, and thus, for purposes of this study, community involvement in biodiversity conservation initiatives which are declared to be natural heritage sites. It is apparent that this Convention also provides a solid foundation for the involvement of communities in biodiversity conservation initiatives.

3.2.4 Aarhus Convention

The *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*⁸⁸ (Aarhus Convention) sets out the responsibilities of contracting States regarding access to information, public participation and access to justice in all matters environmental. It reaffirms that the above provisions are necessary to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.⁸⁹ While the Convention is only aimed at European countries, the importance and the impact on public participation in environmental matters of the Aarhus convention is widely recognized.⁹⁰ It is currently the only international instrument to comprehensively provide for solid and wide representation of the private sector in environmental governance, specifically by means of community involvement. Moreover, although it is not obligatory, South Africa may sign the Convention and thus adopt its principles, which may positively influence the involvement of communities in biodiversity conservation, especially in the areas of access to information, public participation and access to justice.⁹¹

Article 3 of the Convention sets out the general provisions and states, *inter alia*, that each Party to the Convention shall take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention.⁹² This requires contracting States to, *inter alia*, have clear legislation dealing with the access to information, justice and public participation, and to have

88 Concluded in Aarhus Denmark, 25 June 1998, and entered into force on 30 October 2000.

89 Article 1 of the *Aarhus Convention*.

90 Kofi Annan, former Secretary General of the United Nations is quoted as saying "Although regional in scope, the significance of the *Aarhus Convention* is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizen's participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations." <http://www.unece.org/env/pp/>. For further reading on the *Aarhus Convention* see Kremlis "The Aarhus Convention and its Implementation in the European Community" 141-143.

91 See 5.1 below

92 Article 3(1) of the *Aarhus Convention*.

such legislation regulated in a clear, transparent and consistent manner. Such measures may serve to facilitate the involvement of communities in biodiversity conservation initiatives in so far as it may provide legal certainty regarding the information which may be accessed by a community which is affected by a biodiversity conservation initiative. It will also provide clarity on when and how such a community may participate in decisions affecting them with regard to the biodiversity conservation initiative, and in which instances they may seek access to justice if their rights are infringed.

Each party to the Convention shall also promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision making and how to obtain access to justice in environmental decision making matters.⁹³ It can subsequently be argued that the Convention recognizes that such rights are not only important, but that within the context of this study, communities must be made aware of these rights and educated so as to understand their rights and how they may be applied in order to ensure effective involvement in biodiversity conservation initiatives.

4 Regional and Sub-Regional Law

4.1 Regional Instruments

Several regional and sub-regional instruments exist from which obligations necessitating community involvement in biodiversity conservation initiatives may be derived. This section seeks to identify the regional and sub-regional legal provisions relevant to community involvement in biodiversity conservation initiatives, specifically in the African and Southern African Regions.

93 Article 3(3) of the *Aarhus Convention*.

4.1.1 *The African Charter*

The *African Charter on Human and People's Rights*⁹⁴ (African Charter) contains in section 24 a pioneering environmental provision which states that: "All people shall have the right to a general satisfactory environment favourable to their development." The inclusion of section 24 in the African Charter is of specific significance as it was the first international recognition of an environmental right.⁹⁵ The importance of this provision is illustrated through the adoption of such a right into several African national constitutions and laws.⁹⁶ Considered within the context of community involvement in biodiversity conservation initiatives, this right can be seen as a duty which is placed on all member states of the AU to strive towards a satisfactory state of the environment in Africa as a whole, in which communities can reach a desirable level of development. Some authors⁹⁷ believe that adequate community involvement in conservation initiatives offers the best form of environmental protection, which in turn relates to better circumstances for communities dependant on such natural resources, and arguably, better circumstances for such communities to develop. Adequate community involvement in conservation initiatives could thus provide the best approach to try and fulfil this duty and to increase the level of environmental satisfaction on the African continent. Section 24 may give effect to the involvement of communities in biodiversity conservation initiatives, and such involvement may help to create an environment which is generally satisfactory and favourable to development through improved protection of biodiversity and, ultimately, improved livelihoods.⁹⁸

94 Adopted in 1981 at the 18th Ordinary Assembly of the OAU held in Nairobi, Kenya. The African Charter entered into force on 21 October 1986. The African Charter has been ratified by all 53 African states.

95 See Van der Linde "Regional Environmental Law under the Auspices of the African Union" 165-192.

96 South Africa has for example included an environmental right in its Constitution. See discussion below.

97 Paterson *SAPLJ* 1-33; Nelson and Agrawal 2008 *Development and Change* 557-585; Newmark and Hough 2000 *Bioscience* 585-592.

98 See discussion 2.1.4 above.

4.1.2 *The African Convention*

The *Convention on the Conservation of Nature and Natural Resources*⁹⁹ (*African Convention*) states in its preamble that natural resources must be utilised to satisfy the needs of man according to the carrying capacity of nature. Article II of the *African Convention* requires states to adopt principles to conserve water, soil, fauna and flora in accordance with scientific principles and in the best interest of the people.

The *African Convention* provides specifically for protected species, traffic in specimens and conservation areas. A duty is placed on States to recognise endangered species and their habitats.¹⁰⁰ Article VII is particularly noteworthy for the purposes of this study, as it places a duty on contracting states to ensure conservation, and the wise use and development of faunal and floral resources and their environment within the framework of land use planning and of economic and social development. If one is to accept the arguments above that the inclusion of local communities in biodiversity conservation is beneficial to the sustainable use of resources and to the development of such communities both socially and economically, then this provision could be interpreted to facilitate the involvement of communities in such conservation initiatives.¹⁰¹ Conservation areas are also covered by the Convention, which places a duty on states to protect existing conservation areas, as well as to establish new ones, whilst taking into account land-use planning programmes.¹⁰² The *African Convention* as a whole serves as a guiding instrument that determines which type of laws should be adopted by contracting states. The result of this is that contracting states should draft and adopt laws which give effect to the provisions of the *African Convention*.

Recognising that the 1968 *African Convention* is out of date, a more comprehensive and revised version of the Convention has been tabled in an

99 Adopted in Algiers, Algeria 1968.

100 Article VIII of the *African Convention*.

101 See 2.1.3 above.

102 Article X of the *African Convention*.

attempt to address some of the shortcomings of the original version.¹⁰³ The Convention deals with several aspects relevant to biodiversity conservation. The Convention also incorporates several important provisions relating to community involvement. These provisions are set out below. Article VI of the revised Convention deals with the conservation of land and soil, and states that parties shall take effective measures to prevent land degradation and that they shall adopt measures to conserve and to improve the soil.¹⁰⁴ To this end, they shall establish land-use plans based on, *inter alia*, local knowledge and experience. Article XII deals with conservation areas and states in subsection 3 that parties shall promote the establishment by local communities of areas managed by them primarily for the conservation and sustainable use of natural resources.¹⁰⁵ Article XVII sets out the traditional rights of local communities. It states that parties shall take legislative and other measures to ensure that traditional rights and intellectual property rights of local communities, including farmers' rights, are respected in accordance with the provisions of this Convention.¹⁰⁶ Parties to the convention must also take the measures necessary to enable active participation by local communities in the process of planning and management of natural resources upon which such communities depend, with a view to creating local incentives for the conservation and sustainable use of such resources.¹⁰⁷

103 A draft revised *African Convention of Nature and Natural Resources* was presented at the 5th Inter-Agency meeting in 2002. On the 11th of July, another version of the revision was adopted in Maputo, Mozambique. 15 states are required to ratify the revised convention before it may enter into force. To date, 34 countries have signed the convention, but to date only 4 have ratified the revised Convention. Important revisions for purposes of this study include Article VI, which deals with Land and Soil, and includes provisions for the use of local knowledge and the taking into account of the rights of local communities. Article XII, which deals with conservation areas states that parties to the convention must promote the establishment, by local communities, areas managed by such communities, for the conservation and sustainable use of natural resources. Article XVII deals with the traditional rights of local communities as well as indigenous knowledge. For more information and to obtain the revised convention see the AU website www.africa-union.org 9 September 2009.

104 Article VI (1) and (2).

105 The ideal of conservation areas managed by local communities is also encapsulated in South African legislation through NEMPA, discussed at 5.5 below

106 Article XVII (1).

107 Article XVII (3).

4.1.3 Treaty Establishing the African Economic Community

The *Treaty Establishing the African Economic Community*¹⁰⁸ has as one of its objectives the promotion of economic, social and cultural development and the integration of African economies in order to increase economic self reliance.¹⁰⁹ The Treaty states that in order to achieve this objective it will endeavour to harmonise national policies in order to promote community activities in certain fields, particularly agriculture, natural resources and culture.¹¹⁰ This is of particular importance to the theme of this study as conservation initiatives, as income generating entities, serve to go a long way in bolstering economic development within the region.¹¹¹ It can thus be argued that the Treaty envisages the involvement of communities in biodiversity conservation initiatives through the workings of Article 4(2)(e), which requires the promotion of community activities in certain fields, including, *inter alia*, natural resources. Article 58 of the Treaty further assists to lay the foundation for the involvement of communities in such initiatives. Article 58 briefly states that member states undertake to promote a healthy environment. To this end they shall adopt national, regional and continental policies, strategies and programmes to establish appropriate institutions for the protection and enhancement of the environment. Although the Treaty does not specifically provide for the involvement of communities in biodiversity conservation initiatives, it can be argued that the Treaty does make indirect provision for such involvement.

108 Signed at Abuja, Nigeria on June 3rd 1991.

109 Article 4(1)(a).

110 Article 4(2)(e).

111 Conservation initiatives generate income through activities such as tourism, ecotourism and hunting. Tourism in itself is the biggest sector of business in the world economy, responsible for over 230 million jobs and 10% of the gross domestic product (GDP) worldwide. For 83% of developing countries, many of which are African countries, tourism is the principal foreign exchange earner, and it is the top earner for a third of the world's poorest nations. Conservation areas in Africa are world renowned tourist destinations, often generating large sums of income. A case in point is South Africa's Kruger National Park, which is estimated to have direct and indirect economic impacts to the amount of R496.5 million annually. For further reading refer to <http://www.safariguideafrica.com/ecotourism-in-africa.php> 16 August 2010 and Saayman and Saayman 2006 *Journal of Sustainable Tourism* 67-81.

4.2 Sub-regional instruments

4.2.1 The SADC Treaty

One of the most relevant instruments regulating community involvement in conservation initiatives at sub-regional level is the SADC Treaty.¹¹² The SADC Treaty is a codification of SADC's objectives, which are contained in article 5 of the Treaty. It is article 5(1)(g) and 5(2)(b), which create the mandate to encourage community involvement in biodiversity conservation initiatives. It is an objective of SADC to achieve the sustainable utilisation of natural resources and effective protection of the environment¹¹³ which, in addition to other means, shall be achieved by encouraging the people of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of the programmes and projects of SADC which include biodiversity programmes and projects.¹¹⁴

In addition to the Treaty, SADC's objectives are further expressed through the adoption and implementation of various protocols which are signed and ratified by member states. These protocols reflect general concerns which are shared by the member states, and offer more specific directions and guidelines for co-operation than those presented in the Treaty.¹¹⁵ The protocols relevant to the scope of this study are discussed below.

4.2.2 Protocol on Wildlife Conservation and Law Enforcement

The *Protocol on Wildlife Conservation and Law Enforcement*¹¹⁶ (Wildlife Protocol) has as its main objective the conservation and sustainable use of wildlife. Wildlife is a core component of biodiversity, and thus is an important consideration in the establishment of biodiversity conservation initiatives. A

112 Signed on August 17th 1992 in Windhoek Namibia. The signing of the treaty brought about the formation of the SADC. The fourteen countries comprising SADC are: Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

113 Article 5(1)(g) of the SADC Treaty.

114 Article 5(2)(b) of the SADC Treaty.

115 Article 22 of the Treaty deals with Protocols.

116 Adopted in Maputo, Mozambique, August 18th 1999.

specific objective of the Wildlife Protocol is to promote the conservation of shared wildlife resources through the establishment of transfrontier conservation areas.¹¹⁷ Member states are encouraged to harmonise legal instruments and to exchange information in order to achieve the objectives of the Wildlife Protocol. The involvement of communities in conservation initiatives is not specifically mandated, but member states are mandated to encourage the people of the region and their institutions to participate fully in the implementation of SADC programmes and projects which include biodiversity conservation initiatives where they are present.¹¹⁸

4.2.3 Protocol on Fisheries

The *Fisheries Protocol* was adopted to promote the sustainable use of aquatic ecosystems,¹¹⁹ which form an important part of biodiversity. Article 7 is of particular importance, as it sets out measures for management and cooperation in matters relating to shared fish resources.¹²⁰ Of particular importance is article 7(7), which states that member states shall endeavour to ensure that all stakeholders participate at the appropriate level in decision making processes that affect the management of shared resources.¹²¹ Communities adjacent to and living within aquatic conservation initiatives that are dependent on fishing can be considered as stakeholders, and are duly afforded the right to participation in the management and decision making processes of such conservation initiatives as contemplated in the protocol.

117 Article 4(f) of the Protocol on Wildlife.

118 See 4.2.1 above. Article 5(2) of the SADC Treaty.

119 Adopted in Blantyre, Malawi, August 14th 2001. The Protocol on Fisheries is important for the purposes of this study, as conservation initiatives are not solely confined to terrestrial areas, and may be comprised of and include aquatic ecosystems. An example is the proposed Lubumbo Transfrontier Park, of which South Africa's Isimangaliso wetland park is a vital component. The proposed park will be a venture between South Africa, Mozambique and Swaziland, and will be Africa's first marine and coastal Transfrontier Park, including five Ramsar wetlands. It is considered to be the most complex of the six Transboundary Biodiversity Conservation initiatives of which South Africa is a partner. The establishment of the park is regarded as being a major step towards poverty alleviation in the area through the creation of jobs and the introduction of infrastructure such as bridges and roads. For further reading see <http://www.southafrica.net/sat/content/en/us/full-article?oid=9525&n=detail&pid=7014> (Date of use 30 September 2009).

120 These measures include *inter alia*, information exchange, instruments for coordination, management plans and participation of all stakeholders.

121 The Protocol on fisheries defines stakeholders as being "all persons whose interests are materially affected, either directly or indirectly, by fishing and fishing related activities under this Protocol".

Although community involvement in biodiversity conservation initiatives is not expressly provided for in the protocol, provision is made for stakeholder involvement. This, coupled with the provisions in section 5 of the SADC Treaty,¹²² provide a solid normative foundation to implement community participation in biodiversity conservation initiatives.

4.2.4 Protocol on Forestry

A key objective of the *Forestry Protocol*¹²³ is to ensure the safe guarding of both present and future generations interests through effective environmental protection.¹²⁴ In achieving this objective, member states must co-operate by, *inter alia*, promoting respect for the rights of communities, and facilitating their participation in forest policy development, planning, and management. Particular attention must be given to protect traditional forest-related knowledge and to develop adequate mechanisms to ensure the equitable sharing of benefits derived from forest resources and traditional forest-related knowledge without prejudice to property rights.¹²⁵ State parties must also establish equitable and efficient ways to ensure public access to forests, especially by neighbouring communities.¹²⁶ The Protocol's guiding principles outline that member states shall recognise that communities are entitled to effective involvement in the sustainable management of forests and forest resources upon which they depend, and to share equitably in the benefits arising from their use.¹²⁷

122 See discussion 4.2.1 above.

123 Adopted in Luanda, Angola, October 3rd, 2002. Forests form an integral part of biodiversity as they encompass several habitats and are home to numerous species of flora and fauna. On a community level forests play an important role with regard to the provision of eco-system services. An example of forests being a rich centre of biological diversity is the Sand Forest, a distinctive habitat type in Southern Africa. Sand Forest is characterised by a unique assemblage and combinations of animal and plant species and has the highest diversity of woody plant species in the region. Van Eeden *et al South African Journal of Wildlife Research* 153-157.

124 Article 3(1)(c) of the Protocol on Forestry.

125 Article 3(2)(g) of the Protocol on Forestry.

126 Article 3(2)(h) of the Protocol on Forestry.

127 Article 4(10) of the Protocol on Forestry.

5 South African Law

5.1 Constitutional provisions

Domestic EG, which is based on the anthropocentric approach,¹²⁸ draws its mandate from section 24 of the Constitution.¹²⁹

Section 24 of the Constitution reads as follows:

Everyone has the right to:

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

Section 24 has a twofold aim. Section 24(a) guarantees a healthy environment to everyone in general, whilst section 24(b) mandates the state and other parties, arguably including private parties, to take certain measures in order to realise the guarantee stated in section 24(a).¹³⁰ Section 24(b) also provides protection against any infringement by the state that negates environmental protection or that in anyway harms the environment.¹³¹

The people-centred nature of section 24 is revealed when considering that the right is conferred to everyone, and that the environment must not be harmful to health or well-being. Glazewski¹³² argues that the word "everyone" should be interpreted to mean people only, despite calls to confer the right upon nature and animals.

The wording of section 24(a) suggests a traditional, positively formulated, fundamental right to which every person is entitled.¹³³ Section 24(b), however, takes the form of a socio-economic right, as it contains direct principles that

128 Du Plessis 2006 *PER* 2-46.

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

130 Feris "Environmental Rights and *Locus Standi*" 129-151.

131 Feris "Environmental Rights and *Locus Standi*" 129-151 and Feris 2008 *SAPR/PL* 198.

132 Glazewski *Environmental Law* 72.

133 Kotzé 2003 *PER* 81-95 and Kotzé 2004 *PER* 1-42.

impose duties on the state to protect the environment for present and future generations through reasonable legislative and other measures.¹³⁴ The right contained in section 24 is binding on the state.¹³⁵ Section 8(2) of the Constitution however also results in the above right being binding on natural and juristic persons, in so far as it is applicable taking into account the nature of the right, and any duty imposed by the right.¹³⁶ This right may be enforced by either individuals or groups acting as a collective.¹³⁷

In the context of biodiversity conservation, section 24(b)(iii) finds specific application. It can be argued that the main aim of any conservation initiative is not only the promotion of conservation but the promotion of ecologically sustainable development and use of natural resources as well, whilst promoting justifiable economic and social development.¹³⁸ Lubbe thus contends that the goals of biodiversity conservation initiatives are supported in the highest form of law in South Africa.¹³⁹ It may be argued that to give effect to the right contained in section 24(b)(iii), community involvement may be construed as being part of "other measures". An argument can thus be made that the involvement of communities in biodiversity conservation initiatives may give effect to section 24(b)(iii) of the Constitution. Moreover, this provision constitutionally mandates community involvement in EG efforts.¹⁴⁰ Communities may thus rely on this provision to ensure proper involvement in biodiversity conservation initiatives. Such involvement may thus be effected in not only biodiversity conservation initiatives instituted by the state, but by other parties as well. Lubbe further states that although this is a good foundation laid down by the Constitution, the provision in section 24(b)(iii) is vague and meaningless unless substantive form and meaning are given to it

134 Kotzé 2003 *PER* 81-95 and Kotzé 2004 *PER* 1-42.

135 S 8(1) of the Constitution makes the Constitution applicable to the legislature, the judiciary, the executive and all other organs of state. Feris and Tladi "Environmental Rights" 250-264.

136 Feris and Tladi "Environmental Rights" 250-264.

137 Feris and Tladi "Environmental Rights" 250-264.

138 Lubbe "Transfrontier Conservation and Poverty Alleviation: A Case Study of the MDTP" 1-19; see also Tanner *et al* 2004 *SAJELP* 167-182.

139 Lubbe "Transfrontier Conservation and Poverty Alleviation: A Case Study of the MDTP" 1-19.

140 See 2.1.1 above.

by "reasonable and other legislative measures".¹⁴¹ Such substantive form could be provided through, *inter alia*, specific laws or a policy mandating community involvement in biodiversity conservation initiatives.

Other sections of the Constitution also provide a platform for the involvement of communities in biodiversity conservation initiatives. Section 32 provides for a right of access to information against public and private bodies.¹⁴² Section 32 states that everyone has the right of access to any information held by the state,¹⁴³ as well as to any information held by another person and that is required for the exercise or protection of any rights.¹⁴⁴ In the context of this study, this right is of particular importance, as it allows communities who may be affected by proposed biodiversity conservation initiatives to gain access to information regarding such initiatives. Biodiversity conservation initiatives may be implemented by either public bodies, such as conservation areas established in terms of NEMPAA,¹⁴⁵ or by private bodies, such as the acquisition of land by private individuals in order to establish conservation areas. Allowing communities' access to information will foster worthwhile involvement as it theoretically facilitates improved environmental decision making, monitoring, compliance and enforcement, as evidence and information pertaining to the conservation initiative may be gathered and

141 S 24(b) of the Constitution.

142 Public and private bodies are defined in s 1 of the Promotion of Access to Information Act 2 of 2002 (PAJA). A public body is defined as being:

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when-
 - (i) exercising a power or performing a duty in terms of the Constitution or provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation;

A private body is defined as being:

- (a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;
- (b) a partnership which carries or has carried on any trade, business or profession; or
- (c) any former or existing juristic person, but excludes a public body.

143 S 32 (1)(a) of the Constitution.

144 S 32 (1)(b) of the Constitution. See Hoexter *Administrative Law in South Africa* 91 and Currie and de Waal *The Bill of Rights Handbook* 683.

145 Discussed below.

studied.¹⁴⁶ It will also allow them the proper opportunity to protect their rights and interests in an informed manner.

Section 33 of the Constitution affords everybody the right to administrative action which is lawful, reasonable and procedurally fair,¹⁴⁷ as well as including the right to be given written reasons where rights have been adversely affected by an administrative action.¹⁴⁸ Section 33 essentially embraces the concept of administrative justice, which aims to, *inter alia*, ensure good governance and administration, ensure fair dealing in administrative context, enhance protection of the individual against abuse of state power and to promote public participation in decision-making.¹⁴⁹ This provision may facilitate the involvement of communities in biodiversity conservation initiatives as it affords them the right to have decisions made with regards to such conservation initiatives, in so far as their rights are affected, in a procedurally fair, lawful and reasonable manner. It would thus entail that they be heard and that the principle that no one can be a judge in his own case applies. Section 33 also entails that should a community be disadvantaged by an administrative action with regard to a biodiversity conservation initiative, the court may investigate the justification of such action.¹⁵⁰

Section 38 of the Constitution deals with *locus standi* and states that anyone listed in terms of section 38 has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and

146 Du Plessis "Access to Information" 197-221.

147 S 33(1) of the Constitution. Administrative action is defined in s 1 of the *Promotion to Administrative Justice Act* 3 of 2002 (PAJA) as being:
any decision taken, or any failure to take a decision, by-
(a) an organ of state, when-
(i) exercising a power in terms of the Constitution or a provincial constitution;
or
(ii) exercising a public power or performing a public function in terms of any legislation; or
(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

148 S 33(2) of the Constitution.

149 Kotzé 2004 *PER* 1-42.

150 Kotzé 2004 *PER* 1-42. See also Hoexter *Administrative Law in South Africa* 167 and Currie and De Waal *The Bill of Rights Handbook* 650.

that the court may grant appropriate relief, including a declaration of rights.¹⁵¹ The list of persons who may approach the court include, anyone acting in their own interest, anyone acting on behalf of another person who cannot act in their own name, anyone acting as a member of, or in the interest of, a group or class of persons, anyone acting in the public interest or an association acting in the interest of its members. Section 38 effectively provides communities the right to be involved in the conservation of biodiversity by providing them with a means to enforce their rights as contained in the Constitution, and more specifically section 24 through the granting of access to courts. Not only can specific community members or the community as one be granted such *locus standi*, but section 38 has widened the scope of *locus standi* so as to allow third parties access to courts should they be acting in the interests of a community whose rights have been infringed.¹⁵² However, it must be noted that such *locus standi* only finds application in matters where a community might contend that a right, as contained in section 2 of the Constitution, is infringed.

5.2 Specific biodiversity related policies

5.2.1 Draft Policy on Buffer Zones for National Parks 2010

The Policy on Buffer Zones¹⁵³ was published for comment on 5 March 2010.¹⁵⁴ The purpose of this policy is to set out the South African government's national policy on the establishment of buffer zones around national parks in order for the parks to better meet their management objectives. The purpose of the policy is twofold: a) to convey government's

151 S 38 of the Constitution.

152 Feris "Environmental Rights and *Locus Standi*" 129-151.

153 A buffer zone is an area surrounding a national park which has complementary legal and management restrictions placed on its use and development aimed at providing an extra layer of protection to the integrity of the national park. The overall goal of the buffer zone's function is to reduce or mitigate the negative influences of activities taking place outside the parks on the ecological integrity of the national parks and to better integrate parks into their surrounding landscapes. Objectives of buffer zones are to *inter alia* encourage sustainable development that promotes and enhances the conservation values of the surrounding national park and to assist adjacent and affected communities. It is important to consider buffer zones around protected areas within the context of this study, as almost all biodiversity conservation initiatives incorporate some form of protected area. See discussion above. *Draft Policy on Buffer Zones for National Parks* 48.

154 *Draft Policy on Buffer Zones for National Parks*.

objectives for buffer zones of national parks to the public, and how it intends to achieve these objectives; and b) to provide guidance to government agencies and state organs on developing strategies to achieve these objectives.

The purpose of buffer zones are to, *inter alia*, encourage sustainable development that promotes and enhances the conservation values of the surrounding national park, and to assist adjacent and affected communities to secure appropriate and sustainable benefits. This can be achieved by promoting a conservation economy, ecotourism and its supporting infrastructure and services and sustainability through properly planned harvesting of biological resources.¹⁵⁵

In chapter 2 which sets out the policy's vision and principles, it is recognised that "the viability of protected areas is thus dependent upon the extent to which such areas are socially, economically, and ecologically integrated into the surrounding area".¹⁵⁶

It is against this background that the vision for the policy on buffer zones is as follows:

The integration of national parks into local landscapes for the benefit of those living adjacent to the parks and the improved conservation/protection of the attributes and functions of the national parks.

The policy sets out several guiding principles, several of which are relevant to the involvement of communities in biodiversity conservation. The principles with specific relevance to this study are as follows:

The fair and equitable distribution of benefits: The policy states that benefits arising from the use and development of South Africa's biological resources will be fairly and equitably shared. The rights to use biological resources will be equitably allocated, and will recognise.¹⁵⁷

155 *Draft Policy on Buffer Zones for National Parks* 48.

156 *Draft Policy on Buffer Zones for National Parks* 51.

157 *Draft Policy on Buffer Zones for National Parks* 52.

- (a) that it may be necessary to limit access in order to ensure conservation and sustainable use
- (b) that within the constraints of sustainable use, the socio-economic upliftment of disadvantaged communities is an important criterion upon which decisions will be based
- (c) that where people's historical rights of access to natural resources have been removed or constrained this should be reviewed and redressed in line with the other guiding principles
- (d) the constitutional rights of owners of biological resources.

Participation: Interested and affected individuals and groups will have an opportunity to participate in decisions about the ways in which biological resources are conserved and used.¹⁵⁸

Recognition and protection of traditional knowledge, practices and cultures: Traditional knowledge, practices and cultures supporting the conservation and sustainable use of biodiversity will, where possible, be recognised, protected, maintained, promoted, and used with the approval and involvement of those who possess this knowledge. Benefits arising from the innovative use of traditional knowledge of biological diversity will be equitably shared with those from whom the knowledge has been gleaned.¹⁵⁹

Chapter 3 of the policy sets out the goals which are to be achieved through the implementation of the policy. Several of these goals have direct implication with regard to the involvement of communities and subsequently will be discussed below.

Goal 5 supports the development of community-based biodiversity management initiatives as part of a broader set of approaches to land-use planning and developing local sustainable development strategies.¹⁶⁰

158 *Draft Policy on Buffer Zones for National Parks* 52.

159 *Draft Policy on Buffer Zones for National Parks* 52.

160 The strategy for achieving the above goal, as set out in the policy states that recognition is given to the vital role which the use of biological resources plays in the household economics of many rural communities. In order to ensure the conservation and sustainable use of biodiversity in park buffer zones, and to minimise the adverse impacts on biodiversity of such buffer zones, several common approaches will need to be adopted. The policy contends that in order to meet this

Goal 6 promotes the development of partnerships between the management authority, other conservation authorities, community organisations, NGOs, and private entrepreneurs for purposes of planning and managing the use of resources within the park buffer zone and optimising benefits for local people.¹⁶¹

Goal 7 enhances the capacity of communities residing in or adjacent to protected areas to participate in protected area management through the provision of appropriate training and education and through recognising local expertise and traditional institutions.¹⁶²

Goal 9 improves benefit flows to people in and around protected areas.¹⁶³

goal partnerships need to be developed to enhance and ensure the sustainability of the biological resources. An active partnership between the park management authority, the community and the municipality is encouraged. It is suggested that Community Based Natural Resource Management plans be incorporated into local authority Integrated Development Plans, and thus benefit from the support that local, provincial and national government can provide. The policy states that the main thrust of this partnership is the promotion of the establishment, development and management of community conservation areas in which the aim is to: Promote sustainable harvesting of natural resources, provide benefits and commercial opportunities to local communities, support traditional use of natural resources, supplement traditional use with beneficiation and to control excess use of resources where the resource is not being renewed. It is envisaged by the policy that in the development of such community conservation areas in the buffer zone, the park management authority will provide assistance with the development of management programmes. *Draft Policy on Buffer Zones for National Parks* 60.

161 The policy states that partnerships between the management authority of the national park and the provincial authority(s) responsible for conservation is essential as these organisations are all working towards the same goal. Written agreements between organisations are to be encouraged to ensure collaboration and cooperation in the conservation of biodiversity, especially in the buffer zone. Partnerships between the management authority of the park and its neighbouring communities should be encouraged through the development of partnership agreements between the park and neighbouring communities. This is encouraged, especially where joint ventures for the benefit of the community and the natural resources is promoted, and for the supply of goods and services required for the management of the park. *Draft Policy on Buffer Zones for National Parks* 61.

162 The policy recognises that capacity development of local communities surrounding national parks is critical to the existence of such protected areas. Development of the capacity of the communities of the buffer zone for the conservation of biodiversity both in the parks and its buffer zone will enhance the long term viability of the parks. *Draft Policy on Buffer Zones for National Parks* 62.

163 The policy contends that national parks must be seen and must operate as local economic drivers which contribute substantially to the long term sustainability of the region. People living in the buffer zone, in providing both protection for a park and support for a park, should see direct benefits accruing to them from the park. The policy states that the management authority of the park will promote local and social development in the region by (a) where possible securing goods and services from communities in the buffer zones (b) employing personnel from the buffer zone as far as possible (c) facilitating joint venture schemes with enterprises in the buffer zone,

5.2.2 Draft Biodiversity Stewardship Policy Document

The *Draft Policy Document on Biodiversity Stewardship* was published in March 2010, and holds several important considerations with regard to the involvement of communities in biodiversity conservation initiatives.¹⁶⁴ The policy recognises that much of the country's biodiversity is situated on private or communally owned land, which is often under pressure from competitive land and resource uses, and that it is not always favourable for the expansion of the country's protected areas to occur through the acquisition of land by government.¹⁶⁵

The goal of the stewardship programme is to contribute to securing the biodiversity features and ecosystem services in identified areas of biodiversity importance through formal and informal conservation agreements, whilst also addressing socio-economic and rural development imperatives.¹⁶⁶

The stewardship programme thus allows for the involvement of local communities in biodiversity conservation through the provision of a mechanism by which such communities can get involved. This is achieved through the implementation of partnerships and co-operative governance between communities, land owners, government as well as other key role players. The instruments which can be used to implement such stewardship programmes include the following:¹⁶⁷

especially by the development of infrastructure which will serve both the park and the community (d) providing community services (e) providing environmental education and opportunities within protected areas (f) promoting community management of protected areas in the buffer zone (g) where relevant promoting co-management agreements for the management of the park (h) where appropriate, designating areas for sustainable resource use in the park; and (i) facilitating where appropriate the development of compensation agreements with those who have lost access to resources or who have suffered damage caused by wildlife. *Draft Policy on Buffer Zones for National Parks* 64.

164 *Draft Biodiversity Stewardship Policy*. Stewardship is defined as being "the wise use, management and protection of that which is entrusted to you" whilst biodiversity stewardship is defined as: "Landowners/users voluntarily participating in biodiversity conservation by formally agreeing to conserve their land to (i) protect important ecosystems (ii) enable sustainable use of natural resources and (iii) effectively manage threats to natural systems and biodiversity." Government would provide an enabling environment to landowners/users who enter into these agreements.

165 *Draft Biodiversity Stewardship Policy Document* 4.

166 *Draft Biodiversity Stewardship Policy Document* 5.

167 KZN Wildlife www.kznwildlife.co.za.

Nature reserves and protected environments declared in terms of NEMPAA sections 23 and 28.¹⁶⁸

168 S 23 of NEMPA reads:

- (1) The Minister or the MEC may by notice in the *Gazette*
 - (a) declare an area specified in the notice
 - (i) as a nature reserve; or
 - (ii) as part of an existing nature reserve; and
 - (b) assign a name to the nature reserve.
- (2) A declaration under subsection (1)(a) may only be issued
 - (b) to protect the area if the area
 - (i) has significant natural features or biodiversity;
 - (ii) is of scientific, cultural, historical or archaeological interest; or
 - (iii) is in need of long-term protection for the maintenance of its biodiversity or for the provision of environmental goods and services;
 - (c) to provide for a sustainable flow of natural products and services to meet the needs of a local community;
 - (d) to enable the continuation of such traditional consumptive uses as are sustainable; or
 - (e) to provide for nature-based recreation and tourism opportunities.
- (3) A notice under subsection (1)(a) may be issued in respect of private land if the owner has consented to the declaration by way of a written agreement with the Minister or the MEC.
- (4) No area which is or forms part of a special nature reserve may be declared as a nature reserve or as part of an existing nature reserve.
- (5) An area which was a nature reserve immediately before this section took effect must for purposes of this section be regarded as having been declared as such in terms of this section.

S 28 of NEMPA reads:

- (1) The Minister or the MEC may by notice in the *Gazette*
 - (a) declare any area specified in the notice
 - (i) as a protected environment; or
 - (ii) as part of an existing protected environment; and
 - (b) assign a name to the protected environment.
- (2) A declaration under subsection (1)(a) may only be issued
 - (a) to regulate the area as a buffer zone for the protection of a special nature reserve, world heritage site or nature reserve;
 - (b) to enable owners of land to take collective action to conserve biodiversity on their land and to seek legal recognition therefore;
 - (c) to protect the area if the area is sensitive to development due to its -
 - (i) biological diversity;
 - (ii) natural characteristics;
 - (iii) scientific, cultural, historical, archeological or geological value;
 - (iv) scenic and landscape value; or
 - (v) provision of environmental goods and services;
 - (d) to protect a specific ecosystem outside of a special nature reserve, world heritage site or nature reserve;
 - (e) to ensure that the use of natural resources in the area is sustainable; or
 - (f) to control change in land use in the area if the area is earmarked for declaration as, or inclusion in, a nature reserve.
- (3) A notice under subsection (1)(a) may be issued in respect of private land if the owner has requested or consented to a declaration contemplated in subsection (1)(a) and the Minister or the MEC has given the owner notice in writing in terms of section 33.
- (4) No area which is or forms part of a special nature reserve or nature reserve may be declared as a protected environment or as part of an existing protected environment.

Biodiversity Management Agreements in terms of NEMBA section 44, which gives rise to statutory conservation of biodiversity, in terms of NEMBA.

Parties may enter into a biodiversity agreement by means of contract, where it is agreed to conserve biodiversity. Such an agreement is contractual in nature. A community may also decide to conserve an area on its own accord. No-contractual agreement exists, nor are there any statutory provisions.

The above provisions exist in a hierarchal relationship, with nature reserves and protected environments usually being used as mechanisms where the value of the biodiversity resource being conserved is high. The conservation value of the biodiversity being conserved by the contractual agreements is usually less. As one moves up the hierarchy, land owners are more restricted with regard to the use of their land. Nature reserves declared in terms of NEMPA will thus not allow for any form of land use other than that which is intended as being a for a nature reserve. In this instance, parties who enter into a biodiversity agreement may be permitted to still practice limited amounts of grazing on the land in terms of the biodiversity agreement, so long as such grazing does not negatively impact on the biodiversity which is to be conserved.

Stewardship provides a mechanism for communities who are landowners or users to protect and restore biodiversity by entering into agreements with conservation agencies whilst receiving support from government. It thus creates a vehicle to facilitate the involvement of communities in biodiversity conservation initiatives.¹⁶⁹

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- (5) The declaration of an area as a protected environment for purposes of subsection -
(2)(f) lapses at the expiry of three years from the date of publication of the notice contemplated in subsection (1), but the Minister or the MEC may by notice in the *Gazette* extend that period for not more than one year.
 - (6) An area ceases to be a protected environment if that area is declared as, or included into, a nature reserve or part thereof.
 - (7) An area which was a protected environment immediately before this section took effect must for purposes of this section be regarded as having been declared as such in terms of this section.

169 *Draft Biodiversity Stewardship Policy Document 4.*

5.3 The National Environmental Management Act

The *National Environmental Management Act* 107 of 1998 (NEMA), was promulgated to, *inter alia*, give effect to the environmental right in section 24 of the Constitution. The aim of NEMA is the creation of a legal framework in terms of which the right contained in section 24 can be given effect.¹⁷⁰

Section 2 of NEMA contains a set of environmental management principles, which apply to all actions which may have an effect on the environment. These principles are anthropocentric in nature as they require that people and their needs be placed at the forefront of concern in environmental management. It is also required that their physical, psychological, developmental, cultural and social interests must be served equitably.¹⁷¹ These principles are deemed to be important because they serve as a contextual backdrop against which all environmental legislation must be interpreted, administered and implemented, including legislation related to biodiversity conservation and community involvement.¹⁷² The principles contained in sections 2(4)(f)-(i) are important. Section 2(4)(f) states that the participation of all interested and affected parties in EG must be promoted. All people must be afforded the opportunity to develop the understanding, skills and capacity necessary in order to achieve equitable and effective participation. Participation by vulnerable and disadvantaged people must be ensured. Thus sections 2(4)(f) not only serves to promote community involvement through the participation of interested and affected parties in EG, of which biodiversity conservation plays an important role it also purports that the necessary skills and understanding must be nurtured so as to ensure that such participation is effective and not merely symbolic.

NEMA expects that all decisions taken must take into account the interest, needs and values of all interested and affected parties. Recognition must also be given to all forms of knowledge, including traditional and ordinary

170 Nel and Du Plessis *SAJELP* 1-37.

171 S 2(2) of NEMA; Couzens and Dent 2006 *PER* 1-50.

172 S 2(1)(e) of NEMA; Van der Linde "National Environmental Management Act 107 of 1998 (NEMA)" 193-221; Couzens and Dent 2006 *PER* 1-50; De Villiers 2007 *PER* 28-68.

knowledge.¹⁷³ Thus, when investigating or establishing a biodiversity conservation initiative, consideration must be given to the above as contained in section 2(4)(g) as it pertains to communities who may be affected by the biodiversity conservation initiative.

The involvement of communities in biodiversity conservation initiatives may find further favour through the interpretation of section 2(4)(h) which requires that community well-being and empowerment be promoted by means of environmental education, the raising of environmental awareness and the sharing of knowledge and experience. Involving communities in biodiversity conservation initiatives may serve as a vehicle to facilitate the provisions of section 2(4)(h) through educating communities and making them aware of the advantages of biodiversity conservation, as well as the dangers of biodiversity loss.

Section 2(4)(i) is also relevant in that it states that the social, economic and environmental impacts of activities, including both benefits and disadvantages, must be considered, assessed and evaluated, and decisions must be made accordingly. The practical implication of this section would be that the benefits and disadvantages of a proposed biodiversity conservation initiative must be evaluated and assessed in light of its social, economic and environmental impacts. It may be argued that communities are indirectly involved through the application of this section, due to the fact that should a proposed biodiversity conservation initiative affect them, for example through the loss of land and tenure, then these impacts must be taken cognisance of when deciding the viability of the proposed initiative. Community rights in terms of social, economic and environmental considerations are thus protected.

The above principles serve to highlight the importance of community involvement, thus placing community participation at the centre of EG.

173 S 2(4)(g) of NEMA.

Section 32 of NEMA serves to widen the narrow *locus standi* provisions of the common law.¹⁷⁴ It states that any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of NEMA, including any principle contained in Chapter 1 or any other statutory provision concerned with the protection of the environment or the use of natural resources.¹⁷⁵ Such a person or group of persons may act in their own interest,¹⁷⁶ in the interest of, or on behalf of, a person who is unable to institute such proceedings,¹⁷⁷ in the interest of or on behalf of a group or class of persons whose interest are affected,¹⁷⁸ in the public interest¹⁷⁹ and in the interest of protecting the environment.¹⁸⁰

Section 32 of NEMA will afford a community *locus standi* in instances where *locus standi* as afforded by the Constitution is not applicable. An example of this may include instances where non-constitutional matters are contested. Importantly, section 32 applies not only to all legislation concerned with the protection of the environment but also to the NEMA principles discussed above. This will entail that should a community be affected by any biodiversity conservation initiative, without due diligence being given to the principles contained in section 2 of NEMA, such a community will have *locus standi* to bring the matter to court. This does not pertain only to the community, but also to any person acting on behalf of the community.¹⁸¹ This provision in NEMA thus allows for the community to get involved in biodiversity conservation initiatives by affording them *locus standi* to bring any matter before court should such a conservation initiative affect the community and be inconsistent with any principles of NEMA section 2 or any other environmental law.¹⁸²

174 In terms of the common law, only a person who could prove an interest in the matter could have standing to bring legal proceedings. Feris "Environmental Rights and *Locus Standi*" 129-151. See also Muroombo *Law Environment and Development Journal* 165-178.

175 S 32 (1) of NEMA.

176 S 32 (1)(a) of NEMA.

177 S 32(1)(b) of NEMA.

178 S 32(1)(c) of NEMA.

179 S 32(1)(d) of NEMA.

180 S 32(1)(e) of NEMA.

181 Kidd *PER* 1-15 and Kotzé 2004 *PER* 1-42.

182 Feris "Environmental Rights and *Locus Standi*" 129-151.

Section 32(2) also serves to facilitate community involvement in biodiversity conservation initiatives, in that it allows for courts not to award costs against a person or group of persons who fail to secure the relief sought in respect of any breach or threatened breach of any provision of NEMA, including a principle contained in section 2, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources. The court may make such an order if it is of the opinion that the person or group of persons acted reasonably out of concern for the public interest or in the interest of protecting the environment, and had made due efforts to use other means reasonably available to obtain the relief sought. This provision is of particular importance to this study, as it affords communities the opportunity to involve themselves in biodiversity conservation initiatives by allowing them access to seek relief should such initiatives be in contrast to NEMA, its principles and any other environmental legislation. This can be achieved without burdening often impoverished communities with the worries of having to pay litigation costs should they not be successful.¹⁸³

Section 32 further facilitates the involvement of communities through the provisions of section 32(3), which states that should a community bring a matter to court as contemplated above, the court may award costs on an appropriate scale to any person or persons entitled to practise as advocate or attorney and who provided free legal assistance or representation to such a person or group.¹⁸⁴ This provision further eases access to courts and legal counsel of communities who may otherwise not have been able to afford such proceedings. Section 32(3) then continues to state that the court may order the party against whom the relief is granted to pay the person or group concerned any reasonable costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings.

183 For an interesting discussion on the matter of cost awards and public interest litigation, refer to *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* 2009 CC 14; see also Kotzé and Feris 2009 *Review of European Community and International Environmental Law* 338-346; Humby 2009 *PER* 95-136 and Cullinan 2009 *Without Prejudice* 9-10.

184 S 32(3)(a) of NEMA.

Section 35 of NEMA deals with environmental management co-operation agreements (EMCAs), and states that the minister, every MEC and municipality may enter into such EMCAs with any person or community for purposes of promoting compliance with the principles laid down in NEMA.¹⁸⁵ The underlying aim of EMCAs is to promote a co-operative and participative approach to environmental management, expressing an intent to move away from coercive and regulatory approaches.¹⁸⁶ EMCAs may only be entered into if every organ of state having jurisdiction of the matter concerned, and the minister and MEC concerned, agree.¹⁸⁷ EMCAs must contain an undertaking by the person or community concerned to improve on the standards laid down by law for the protection of the environment which are applicable to the subject matter of the agreement, as well as a set of measurable targets for fulfilling the above undertaking including dates for the achievement of such targets.¹⁸⁸ EMCAs must also provide for periodic monitoring and reporting of performance measured against targets, independent report verification, regular independent monitoring and inspections and verifiable indicators of compliance with any targets, norms and standards laid down in the agreement as well as any obligations laid down by law.¹⁸⁹ Finally, EMCAs set out measures to be taken in the event of non-compliance with commitments in the agreement, including where appropriate penalties for non-compliance as well as the provision of incentives to persons and communities entering into EMCAs. Before an EMCA may be entered into, a public participation process must be followed.¹⁹⁰

EMCAs provide a potentially viable platform for the facilitation of community involvement in the conservation of biodiversity as they create a mechanism whereby communities can be directly involved in biodiversity conservation. EMCAs provide a tool whereby agreements between communities and government with regard to *inter alia* biodiversity conservation may be

185 S 35(1) of NEMA. See also Scholtz "Cooperative Governance through Section 35 of NEMA" 269-276.

186 Glazewski *Environmental Law* 158.

187 S 35(2)(a)(i)-(ii).

188 S 35(3)(a)-(b) of NEMA.

189 S 35(c)(i)-(iv).

190 Du Plessis http://userpage.fu-berlin.de/ffu/akumwelt/bc2004/download/duplessis_f.pdf 1-23.

formalised and given legal standing. Involvement by communities in biodiversity conservation through EMCAs not only furthers the achievement of the principles laid down in NEMA, but also serves to reward communities as envisaged in section 35(3)(d), through incentives. Communities may thus agree to enter into an EMCA for the protection of certain tracts of land in exchange for grazing rights or tenure.¹⁹¹

5.4 The National Environmental Management: Biodiversity Act

The *National Environmental Management: Biodiversity Act*¹⁹² (NEMBA) is the main instrument regulating the conservation of biodiversity in South Africa. NEMBA's overarching aim is the conservation and sustainable use of biodiversity, which are also the primary goals of biodiversity conservation initiatives.¹⁹³ NEMBA must be implemented and interpreted in accordance with the environmental management principles set out in section 2 of NEMA.¹⁹⁴ This entails that community involvement is required in the application of NEMBA against the background of NEMA.¹⁹⁵

Section 38 of NEMBA states that the Minister must prepare and adopt a national biodiversity framework.¹⁹⁶ This framework must provide an integrated, co-ordinated and uniform approach to biodiversity management by organs of state in all spheres of government, non-governmental organisations, the private sector, local communities, other stakeholders and the public.¹⁹⁷

Section 40 facilitates the involvement of communities in biodiversity conservation through the inclusion of section 40(4), which states that any person or organ of state may, on the request of the Minister or MEC, assist in the preparation of a bioregional plan. Bioregional plans are plans published by the Minister, in order to manage the biodiversity and components of

191 See also Nel and Kotzé "Environmental Management: An Introduction" 1-33; Bray 1999 *SAJELP* 1; Glazewski *Environmental Law* 158 and Thornhill *et al* "The Environment as Catalyst: Understanding Environmental Governance for Sustainable Development" http://phelamanga.co.za/images/papers/39_env_catalyst.pdf.

192 Act 10 of 2004.

193 S 2 of NEMBA.

194 S 7 of NEMBA.

195 See 5.3 above.

196 S 38(1)(a) of NEMBA. See also Kotzé and Du Plessis *QUTLJJ* 30-53.

197 S 39 (1)(a) of NEMBA. See 5.4.1 below.

biodiversity within a specific bioregion.¹⁹⁸ Such a bioregional plan must be consistent with, *inter alia*, the principles contained in section 2 of NEMA, thus further implying the involvement of communities in biodiversity conservation initiatives implemented through means of bioregional plans.¹⁹⁹

Section 43 sets out the provisions relating to biodiversity management plans, and states that any person, organisation or organ of state desiring to contribute to biodiversity management may submit to the Minister for approval a plan for an ecosystem listed in terms of section 52 of the Act,²⁰⁰ or an ecosystem which is not listed in section 52 of NEMBA but which does warrant special conservation attention.²⁰¹ Such a plan may also be submitted for an indigenous species listed in terms of section 56 of NEMBA,²⁰² or which is not listed in terms of NEMBA but which does warrant special conservation attention.²⁰³ Before such a plan can be implemented, a suitable person, organisation or organ of state which is willing to be responsible for the implementation of the plan²⁰⁴ and responsibility for implementing the plan must be assigned to the responsible party by the Minister.²⁰⁵ Biodiversity management plans must, *inter alia*, be consistent with the principles contained in section 2 NEMA.

Section 44 of NEMBA states that the Minister may enter into a biodiversity management agreement with the person or organisation identified as being responsible for the implementation of the biodiversity management plan, or any other suitable person or organisation, regarding the implementation of a biodiversity management plan or any aspect of it.

198 A geographic region may be determined by notice in the *Gazette* as being a bioregion if that region contains whole or several nested ecosystems and is characterized by its landforms, vegetation cover, human culture and history. S 40(1) of NEMBA. For further reading on bioregional plans refer to the DEAT *Guideline regarding the Determination of Bioregions and the Preparation and Publication of Bioregional Plans*.

199 S 41(c)(2) of NEMBA.

200 S 43(1)(a)(i) of NEMBA.

201 S 43(1)(a)(ii) of NEMBA.

202 S 43(1)(b)(i) of NEMBA.

203 S 43(1)(b)(ii) of NEMBA.

204 S 43(2) of NEMBA.

205 S 43(3)(c) of NEMBA.

The above provisions relating to biodiversity management plans and agreements serve to facilitate the involvement of communities in biodiversity conservation initiatives by providing a mechanism whereby communities can implement their own initiatives to conserve biodiversity and thus contribute to the greater biodiversity conservation effort.

Section 47 of NEMBA provides further provisions for the involvement of communities in biodiversity conservation initiatives, requiring consultation in terms of sections 99 and 100 of NEMBA before any bioregional plan or biodiversity management plan may be adopted or amended.²⁰⁶ Section 99 of NEMBA requires that the Minister must allow for public participation in accordance with section 100, should the Minister wish to exercise a power in terms of NEMBA which requires consultation in terms of section 99.²⁰⁷ Section 100 lays out the requirements for the public participation. It requires that notice must be given in the Gazette as well as in at least one newspaper distributed nationally, or if the exercise of power for which public participation is required may only affect a specific area, then in at least one distributed within that area.²⁰⁸ The notice must invite members of the public to submit to the Minister written representations on, or objections to, the proposed activity for which the notice was issued within 30 days of publication of the notice.²⁰⁹ The notice must contain sufficient information to enable the members of the public to submit meaningful representations or objections.²¹⁰ The Minister may in appropriate circumstances allow any interested person or community to present oral representations or objections to the Minister or a person designated by the Minister.²¹¹ Due consideration must be given to representations and objections received.²¹²

Chapter 6 concerns itself with access and benefit sharing related to bioprospecting.²¹³ Provision is made for the protection of local communities in

206 S 47(1) and (2) of NEMBA.

207 S 99 (2)(c) of NEMBA.

208 S 100(1)(a)-(b) of NEMBA.

209 S 100(2)(a) of NEMBA.

210 S 100(2)(b) of NEMBA.

211 S 100(3) of NEMBA.

212 S 100(4) of NEMBA.

213 Bioprospecting is defined in s 1 of NEMBA as being:

the form of benefit sharing agreements,²¹⁴ community participation in the issuing of permits,²¹⁵ material transfer agreements²¹⁶ as well as the establishment of a bioprospecting trust fund.

5.4.1 *The National Biodiversity Framework*

The National Biodiversity Framework (NBF)²¹⁷ was published on 3 August 2009 in terms of Section 38 of NEMBA. The purpose of the NBF is to provide a framework to co-ordinate and align the efforts of the many organisations and individuals involved in conserving and managing South Africa's biodiversity.²¹⁸ The aim of the NBF is to focus attention on the most urgent strategies and actions required for conserving and managing South Africa's biodiversity, as well as to highlight the roles and responsibilities of key stakeholders, including key organs of state whose mandates impact directly on biodiversity conservation and management.²¹⁹ The NBF sets out 5 Strategic Objectives (SO), which draw out immediate priorities for the next five years. These SOs can be summarised as follows:²²⁰ SO one: An enabling policy and legislative framework which integrates biodiversity objectives into the economy SO two : Enhanced institutional effectiveness and efficiency which ensures good governance in the biodiversity sector. SO three: Integrated management of terrestrial and aquatic ecosystems minimising the impacts of threatening processes on biodiversity, enhancing ecosystem

... any research on, or development or application of, indigenous biological resources for commercial or industrial exploitation, and includes-

- (a) the systematic search, collection or gathering of such resources or making extractions from such resources for purposes of such research, development or application;
- (b) the utilisation for purposes of such research or development of any information regarding any traditional uses of indigenous biological resources by indigenous communities; or
- (c) research on, or the application, development or modification of, any such traditional uses, for commercial or industrial exploitation;

The focus of this study is biodiversity conservation initiatives, and thus a discussion on the provisions relating to community involvement with regard to bioprospecting falls outside the ambit of this dissertation.

For further reading refer to Wynberg "Benefit Sharing in South Africa: Fact or Fiction?" .

214 S 82 of NEMBA.

215 S 81 of NEMBA.

216 S 84 of NEMBA.

217 GN 32474 in GG 813 of 3 August 2009.

218 *National Biodiversity Framework* 10.

219 *National Biodiversity Framework* 10.

220 *National Biodiversity Framework* 13.

services and improving social and economic security .SO four: Human development and well being enhanced through the sustainable use of biological resources and the equitable sharing of benefits. SO five: A system of protected areas and conservation areas, which conserve a representative sample of biodiversity and maintains key ecological processes across the landscape and seascape.

Within each of these SOs, the NBF identifies a total of 33 priority actions.²²¹ It is within these priority actions that one is to find the relevance of the NBF to the involvement of communities in biodiversity conservation initiatives. Of particular relevance is SO five, which provides for provisions relating to community involvement in biodiversity conservation initiatives. It highlights as priority actions, *inter alia*, the importance of the establishment and strengthening of provincial stewardship programmes as well as the strengthening of programmes that support the informal conservation area system.

As stated above, SO five is entitled "Expanded network of protected areas and conservation areas". SO five is a twenty year objective, which aims to have as its result a network of protected areas and conservation areas which conserve a representative sample of biodiversity and maintain key ecological processes across the landscape and seascape.²²² SO 5 identifies five immediate priority actions to achieve its aims, one of which has direct implications for the involvement of communities in biodiversity conservation.

Priority Action 31 states that provincial stewardship programmes must be strengthened and established.²²³ Priority Action 31 will be given effect by the workings of NEMPA discussed above, which provides for any land, including private or communal land, to be declared a formal protected area. Co-management of such a protected area by the landowners or any suitable

221 The SOs set out by the NBF are the long term strategy for biodiversity in South Africa as identified by the National Biodiversity Strategy and Action Plan (NBSAP). The NBF draws out immediate priorities for the next five years within each of the SOs, and these are set out as the Priority Actions.

222 *National Biodiversity Framework 76.*

223 *National Biodiversity Framework 76.*

person or organisation is provided for.²²⁴ These co-management agreements serve to facilitate the involvement of communities in biodiversity conservation initiatives. Affording communities the opportunity to have their privately owned land declared as a protected area, facilitates the notion of community involvement in biodiversity conservation. The workings of the *Draft Biodiversity Stewardship Programme* discussed above will also facilitate the realisation of Priority Action 31. NEMBA, as discussed above, also serves to realise the aims of Priority Action 31 through the implementation of Biodiversity Management Plans and Biodiversity Management Agreements. These new legal tools contained in NEMBA and NEMPA serve to open the way for a range of innovative biodiversity conservation initiatives involving communities.

The NBF highlights the importance of community involvement through co-management agreements, Biodiversity Management Plans and Agreements as well as the adoption of stewardship programmes that give effect to Priority Action 31, and ultimately, SO 5.

5.5 The National Environmental Management: Protected Areas Act

The *National Environmental Management: Protected Areas Act*²²⁵ (NEMPA) was promulgated to regulate protected areas.²²⁶ Section 9 of NEMPA describes protected areas which are deemed to include, *inter alia*, national parks, nature reserves, world heritage sites and mountain catchment areas. Almost all biodiversity conservation initiatives house some form of formal protected area, which would result in NEMPA being applicable in these areas. It is important to remember that the whole area which is encompassed in a biodiversity conservation initiative is not necessarily deemed to be protected areas *per se*, therefore NEMPA only applies to those areas within the area which are. NEMPA must be read in conjunction with both NEMA and NEMBA.²²⁷ As is the case with NEMBA, NEMPA must be implemented and interpreted in line with the environmental management principles found in

224 S 42 of NEMPA.

225 Act 57 of 2003.

226 S (2)(c) of NEMPA.

227 Ss 5 and 6 of NEMPA.

section 2 of NEMA.²²⁸ The description of the purpose of protected areas, as found in section 17 of NEMPA, reveals the relevance of NEMPA in relation to biodiversity conservation.²²⁹ The main incentives contained in this description would seem to be the conservation and sustainable use of biodiversity, along with managing the interrelationship between natural environmental biodiversity, human settlement and economic development. Involving communities in biodiversity conservation initiatives may give effect to the incentives as contained in NEMPA, as such involvement may help to integrate human settlements, and biodiversity by involving people who are reliant on biodiversity for day to day existence in its conservation and protection. Such involvement may also add to economic development, as community involvement may result in communities realising financial benefits as discussed above.

Section 40 of NEMPA stipulates certain management criteria which state that the managing authority of a protected area must manage the area in accordance with a management plan. The effective management of protected areas may directly serve the cause of conserving and protecting biodiversity. Effective management, however, requires an unambiguous and precise legal framework as well as co-operation between all parties.²³⁰ Section 41 lays down the minimum requirements which such a plan must meet. Of particular importance is the fact that the management plan must include a procedure for public participation by any local communities or any other interested

228 S 5(1)(a) of NEMPA.

229 S 17 of NEMPA reads:

The purpose of the declaration of areas as protected areas are- (a) to protect ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes in a system of protected areas; (b) to preserve the ecological integrity of those areas; (c) to conserve biodiversity in those areas (d) to protect areas representative of all ecosystems, habitats and species naturally occurring in South Africa; (e) to protect South Africa's threatened or rare species; (f) to protect an area which is vulnerable or ecologically sensitive; (g) to assist in ensuring the sustained supply of environmental goods and services; (h) to provide for the sustainable use of natural and biological resources; (i) to create or augment destinations for nature-based tourism; (j) to manage the inter-relationship between natural environmental biodiversity, human settlement and economic development; (k) generally, to contribute to human, social, cultural, spiritual and economic development; or (l) to rehabilitate and restore degraded ecosystems and promote the recovery of endangered and vulnerable species.

230 Dressler and Büscher 2008 *Geoforum* 452-465.

parties.²³¹ More importantly, such a plan should provide for community based natural resource management where this appropriate.²³² In accordance with the above provisions, it can be assumed that the management plans of biodiversity conservation initiatives which form part of protected areas will have to involve the local communities in their conservation efforts where appropriate. Furthering this notion of community involvement is section 42 of NEMPA, which provides for the co-management of protected areas. This section authorises the managing authority to enter into agreements with, *inter alia*, local communities in order to co-manage the area and to regulate human activity within the area.²³³ These agreements may regulate, *inter alia*, the apportionment of income generated by the protected area, any other form of benefit sharing, the use of biological resources within the area, access and even occupation of the protected area, development of economic opportunities within and adjacent to the area, financial and other support to ensure effective co-management and the development of local management capacity and knowledge exchange.²³⁴ Co-management agreements could prove to be a viable mechanism to involve local communities in conservation

231 S 41(e) of NEMPA.

232 S 41(f) of NEMPA.

233 Ss 42(1)(a)(i) and 42(1)(a)(ii) of NEMPA.

234 On the 30th of May 1998, 25 000 ha of land in the Pafuri area of the Kruger National Park was awarded to the Makuleke community after a successful land claim application was lodged, following their forceful removal from the area in August 1969. The Pafuri land was returned to the Makuleke Community Property Association (CPA) after 18 months of negotiations and the signing of a 'world class' agreement, which provides for the return of ownership of the land, and the joint management thereof between the CPA and Kruger. The agreement was unique in that the community was willing to let the land remain as part of the national park, subject to the joint management thereof by a Joint Management Board (JMB). The key elements of the agreement are as follows: ownership of the land is returned to the CPA, which holds it on behalf of the community. The land remains part of the Kruger Park on a contractual basis for at least 25 years. A joint management board is established to manage and control the area. All commercial benefits arising from the land will accrue to the community, while SANParks remains responsible for conservation matters subject to the directives of the JMB. At expiry of the lease, the community may dispose of the land provided that SANParks is afforded the right of first refusal. A condition registered on the title of the land stipulates that whoever owns the land may only use it for conservation purposes. For further reading see De Villiers *People and Parks* 73. Although the agreement between the Makuleke CPA and SANParks preceded the enactment of NEMPA, it can be argued that it serves to perfectly illustrate the co-operation envisaged by s 42 of NEMPA, thus serving as a perfect example for fledgling co-management agreements between communities and protected area management authorities.

efforts of protected areas, as well as being a platform to provide socio economic benefits in order to help alleviate poverty.²³⁵

5.6 *Incidental legislation*

The *National Heritage Resource Act*²³⁶ (NHRA) applies to the management and conservation of several biodiversity conservation initiatives which contain within their jurisdiction recognised world heritage sights.²³⁷ Cultural heritage sources form part of the natural environment.²³⁸ The NHRA may thus contribute to the conservation of biodiversity in so far it affects heritage resources within a specific conservation area and also necessitates community involvement. Section 4 of the NHRA sets down management principles for heritage sites, and includes the following provisions relating to community involvement.²³⁹

Section 4(1)(a) requires that cultural and natural heritage management must be sensitive to the people and their needs, and must equitably serve their physical, psychological, developmental, cultural and social interests. This is important when considered within the context of community involvement. As

235 Although co-management agreements have been recognised as being good vehicles for furthering community involvement in biodiversity conservation initiatives, Lubbe contends that although they seem sound in theory, co-management agreements are not yet well established in practice. This is supported by a quote lifted from the People and Parks conference held in 2006, where it was stated that: "Currently the communities are not experiencing the reality of co-management on the ground, if there is any it is not empowering the communities. Many communities have problems gaining access to reserves and are not informed about developments within nature reserves. They still feel alienated and unable to influence park management decisions. This is attributed to lack of management plans and transparency, such as information on concessions within the parks." See Lubbe "Transfrontier Conservation and Poverty Alleviation: A Case Study of the MDTP" 1-19 and Department of Environmental Affairs and Tourism (DEAT) "Conference Report. "The viability of co-management agreements has also been questioned after the consideration of three land reform initiatives in South African Protected areas. It is contended that joint management agreements appear unsuitable and unsustainable given the power imbalances between conservation agencies and local communities when concluding such agreements. For further reading see Paterson 2007 *SAPLJ* 7 and Kepe, Wynberg and Ellis <http://www.sasusg.net> (unpublished paper).

236 Act 25 of 1999.

237 Examples of biodiversity conservation initiatives who contain within their borders world heritage sites include the Maloti Drakensburg Park, which contains the uKhahlamba Drakensburg Park, the Ais-Ais Richtersveld Transfrontier Park, the Greater Mapungubwe Transfrontier Park and the Kgalagadi Transfrontier Park.

238 For a discussion on the importance of cultural heritage and the role it plays in the environment, refer to the judgement of *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2009 SCA 85.

239 Ss 4(1)(a)-(h) of the NHRA.

discussed above, involving communities in biodiversity conservation poses numerous advantages for such communities. It could be argued that such involvement will serve the needs of communities as stipulated in section 4(1)(a), through, *inter alia*, the provision of financial benefits, sense of belonging and security of tenure.

Section 4(1)(b) stipulates that development must be socially, culturally, environmentally and economically sustainable. Proper community involvement can go a long way in meeting the requirements of section 4(1)(b) with regard to new developments in the form of biodiversity conservation initiatives. This can be deduced from the discussions above which purport that involving communities in such conservation initiatives may offer better protection for biodiversity, which is an integral part of the environment, whilst at the same time offering such communities financial and other benefits ultimately aiming to improve community livelihoods.

Section 4(1)(d) requires that the participation of all interested and affected parties in the governance of cultural and natural heritage must be promoted. This section serves as the foundation for the involvement of communities in the governance of cultural and natural heritage sites, which may include biodiversity conservation initiatives. Section 4(1)(e) further bolsters the notion of such participation by stating that all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, thus ensuring that such participation is meaningful. Section 4(1)(f) ensures that not only community involvement is required, but that provision is made to ensure that specifically vulnerable and disadvantaged people be involved and their participation ensured. Section 4(1)(g) requires that all decisions regarding natural and cultural heritage, must take into account the interests, needs and values of all interested and affected parties, thus making provision for community involvement. This requirement ensures that communities must be engaged with in order to distil what those needs, interests and values are in order to ultimately address them in the decision making process. Section 4(1)(h) states that community well-being and empowerment must be promoted through cultural and natural heritage

education, the raising of cultural and natural heritage awareness, the sharing of knowledge and experience and other means. This provision facilitates community involvement in that it requires communities be engaged with and educated, and also encourages community knowledge to be utilised and shared.

It can be deduced from the above management principles that community involvement is an important consideration in the management of cultural and natural heritage. If a specific cultural or natural heritage site incorporates a biodiversity conservation initiative, the above management principles will find application and will thus facilitate the involvement of communities in the conservation of biodiversity

6 Conclusion

The loss of biodiversity is a major concern worldwide, and the implications of its loss are far reaching and complex. Traditional efforts aimed at the conservation of biodiversity have failed to adequately conserve biodiversity. In South Africa, this is evident from the SoER, which shows sharp declines in the country's terrestrial and aquatic biodiversity. New and novel approaches to biodiversity conservation have been suggested in an attempt to try and halt the loss of biodiversity, not only in South Africa, but worldwide. Such methods include, *inter alia*, the involvement of communities in the conservation of biodiversity.

The question which this dissertation intended to answer was whether the international, Southern African and South African legal frameworks provide for community involvement in biodiversity conservation, and whether these provisions are sufficient in the event that they do exist.

The Rio Deceleration, through the inclusion of principles 1, 10 and 22, serves to lay a foundation for the involvement of communities in biodiversity conservation initiatives. The relevant provisions of the CBD, Cites and the *Convention Concerning the Protection of the World Cultural and Natural Heritage* all contain sufficient provision for the involvement of communities in biodiversity conservation initiatives. The importance of public participation

and access to information as well as access to justice is highlighted in the *Aarhus Convention*, and although not binding on South Africa, it serves to highlight the importance of these provisions in environmental matters. The sufficient provisions contained in international environmental law oblige South Africa to make provision for community involvement in biodiversity conservation initiatives, and one would expect such provisions to be included at a national level, this is especially true if one considers chapter 6 of NEMA and sections 39 and 231-234 of the Constitution.

At a regional level the *African Charter*, the *African Convention* and the *Treaty Establishing the African Economic Community* all offer elements relating to the involvement of communities in biodiversity conservation initiatives. However, these provisions are not explicit, and may indirectly contribute to the involvement of communities in biodiversity conservation initiatives when substantive form is given to them at sub-regional and national levels. These provisions set general norms which can be given substantive form when implemented through protocols and policies at a sub-regional and national level. It may be argued that South Africa as a party to the AU, may be obliged to shape its legislation so as to give effect to the provisions pertaining to community involvement in biodiversity conservation initiatives as contained in the *African Charter*, the *African Convention* and the *Treaty Establishing the African Economic Community*.

At a sub-regional level, the SADC Treaty mandates community involvement in biodiversity conservation initiatives by stating that the participation of communities must be encouraged in all SADC programmes and projects which include biodiversity conservation initiatives. As with the regional level provisions, the provisions pertaining to community involvement in biodiversity conservation initiatives at a sub-regional level are not explicit. It is only the *Protocols on Fisheries and Forestry*²⁴⁰ which offer explicit provisions for such involvement, but such involvement is only applicable to biodiversity conservation initiatives falling within the ambit of *the Forestry Protocol* and the

²⁴⁰ See 4.2.3 and 4.2.4 above.

Fisheries Protocol. It is worrying that the *Wildlife Protocol*,²⁴¹ the protocol which expectedly applies to most conservation initiatives within the region including transboundary biodiversity conservation initiatives, is silent with regard to explicit community involvement provisions. Community involvement in terms of the *Wildlife Protocol* can only be deduced through the provisions of the SADC Protocol²⁴² and relevant provisions in the *Wildlife Protocol* which allude to the incorporation of the *SADC Protocol* provisions in the working of the *Wildlife Protocol*. This omission serves to create *lacunae* at a regional level with regard to community involvement in most biodiversity conservation initiatives. It is suggested that a SADC Protocol dealing with community involvement in biodiversity conservation initiatives be drafted and adopted, which sets out the specific provisions relevant to meaningful community involvement in biodiversity conservation initiatives. Such a Protocol may be expected to address all levels of community involvement including, *inter alia*, involvement at all levels of decision making, as well as setting out provisions for involvement during the planning, commissioning and operational phases of biodiversity conservation initiatives. The adoption of such a protocol may serve as a unified and integrated approach throughout the whole SADC region, and may better facilitate the involvement of communities in biodiversity conservation initiatives, especially in the case of transboundary biodiversity conservation areas. It is also suggested that failing the adoption of a protocol dealing with dealing with community involvement in biodiversity conservation initiatives, a protocol dealing with community involvement in EG drafted and adopted. Such a protocol may be drafted along similar lines to that of the *Aarhus Convention* discussed above, thus ensuring proper community involvement through mechanism such as access to information and public participation. Such a protocol may ensure proper community involvement in biodiversity conservation initiatives, as biodiversity forms part of the broader environment, and the provisions applicable in the EG protocol, would find application on biodiversity conservation initiatives. Such a protocol may also serve to provide better guidance for community involvement in biodiversity conservation initiatives at a sub-regional level.

²⁴¹ See 4.2.2 above.

²⁴² See 4.2.1 above.

At a national level, community involvement in biodiversity conservation initiatives is well provided for. The Constitution, NEMA, NEMBA and NEMPA all provide substantive provisions which could be used to facilitate community involvement in biodiversity conservation initiatives. The framework for the involvement of communities at a national level is fragmented to some extent, as provisions facilitating community involvement may be found in numerous acts and policy documents. Many of these provisions do not explicitly deal with community involvement in biodiversity conservation initiatives *per se*, but rather find application to the degree that they facilitate such involvement through, *inter alia*, public participation and access to information. NEMBA sets the benchmark for the protection and conservation of biodiversity in South Africa at national level. However, as our primary source of biodiversity conservation legislation, it fails to sufficiently identify provisions to clarify and explicitly accommodate the position regarding biodiversity conservation and local community involvement. NEMBA does however boast several positive aspects. These would include the fact that it is a good integrated mechanism to conserve biodiversity. NEMBA however fails to include dedicated and substantive provisions relating to community involvement. Failing in this regard, NEMBA offers little contribution to sufficiently address local community involvement apart from matters relevant to bioprospecting. The above concerns may hamper the proper involvement of communities in biodiversity conservation initiatives. In order to address the above, it is purported that Norms and Standards for the involvement of communities in biodiversity conservation initiatives be published in terms of sector specific legislation dealing with biodiversity and protected areas. Such norms and standards may effectively incorporate and outline the necessary provisions relating to community involvement in different biodiversity conservation scenarios, as well as incorporating the different mechanisms which may be used to give effect to the provisions of community involvement in biodiversity conservation initiatives as set out in the different pieces of legislation. Although dedicated community involvement legislation may be considered, as it could provide legal certainty with regard to community involvement in biodiversity conservation initiatives, this option may only add to the fragmentation of an already crowded legal regime. However, such a law

could consolidate all provisions and mechanisms pertaining to community involvement in biodiversity conservation and accordingly provide guidance with regard to the implementation of such provisions and mechanisms in differing conservation scenarios.

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