

**Hydraulic fracturing and  
procedural environmental rights  
in South Africa**

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## **ABSTRACT**

Hydraulic fracturing, the process which facilitates the extraction of shale gas from rock formation from depths of up to two miles below the earth's surface, has the potential to adversely impact environmental and the other categories of human rights. Though hydraulic fracturing is in a planning stage in South Africa, notices have been issued regarding pending administrative decision concerning applications for exploration rights to explore for natural (shale) gas largely in the Karoo region. Concerns similar to those which have been expressed in other jurisdictions regarding the process are also being raised locally. These concerns are exacerbated considering that a significant part of the population of the Karoo region have limited understanding of the issues associated with hydraulic fracturing. Many of them are also poor, which may hinder their effective access to justice.

The concern that the adverse effects of hydraulic fracturing may compromise some provisions of the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution") extends to how people are expected to deal with the challenges of enforcing their rights, especially those relating to the environment. This is because the enforcement of substantive environmental rights is not easily realisable. It is therefore necessary to examine the regulatory framework for hydraulic fracturing in relation to the protection of procedural environmental rights. The research question in this study is "to what extent does the South African legal framework pertaining to hydraulic fracturing provide for the protection of procedural environmental rights?"

The study found that the enforcement of environmental rights that may potentially be violated by hydraulic fracturing can be made possible by the application of specific procedural rights. Accordingly, the research considered the legal framework of hydraulic fracturing in relation to procedural environmental rights from the

perspectives of the United States of America, the United Kingdom and South African law. Three procedural rights, namely the right of access to information, the right to just administrative action and the right of access to the courts were considered with a view to draw lessons from the foreign jurisdictions for possible improvement of the South African legal framework on the subject. Findings from the study revealed some positive development in the law from the USA and the UK; perspectives that may be considered in South Africa to strengthen the enforcement of procedural environmental rights in relation to hydraulic fracturing.

**Key words:** hydraulic fracturing, human rights, procedural environmental rights, access to courts, access to information, access to justice, administrative justice, Bill of rights, environment, freedom of information, just administrative action, legal aid, standing, trade secrets, South Africa, United Kingdom, Pennsylvania, United States of America.

## **OPSOMMING**

Hidrouliese breking (of vloeistofbreking), die proses waardeur skaliegas ontgin word van klipformasies op dieptes van tot twee myl onder die aardoppervlak, hou die potensiaal in om negatief op omgewingsregte, asook ander kategorieë van menseregte inbreuk te maak. Alhoewel hidrouliese breking tans in 'n beplanningsfase in Suid Afrika is, is kennis gegee dat aansoeke vir ontginningsregte van natuurlike gas (skaliegas), grotendeels in die Karoo area oorweeg word. Die besware wat teen hidrouliese breking geopper word, kom ooreen met dié wat in ander jurisdiksies gelug word. 'n Groot deel van die samelewing in die Karoo het 'n beperkte begrip van die probleme wat met hidrouliese breking geassosieer word. Baie van hierdie mense is ook arm, wat hul toegang tot die regspleging mag verhinder.

Hidrouliese breking kan meebring dat daar 'n inbreuk gemaak word op die regte vervat in die Handves van Regte in die Suid-Afrikaanse Grondwet. Dit kan vir gewone mense moeilik wees om hul regte af te dwing, veral as die omgewingsreg ter sprake is. Dit is verder moeilik om die substantiewe omgewingsreg af te dwing. Daarom moet ondersoek na die regulatoriese raamwerk van hidrouliese breking en noodsaak vir die beskerming van prosedurele omgewingsregte ingestel word. Die navorsingsvraag van hierdie studie is "tot welke mate maak die Suid-Afrikaanse regsraamwerk ten aansien van hidrouliese breking voorsiening vir die beskerming van prosedurele omgewingsregte?"

Die studie het bevind dat die afdwinging van omgewingsregte potensieel deur hidrouliese breking geskend mag word, maar dat die reg wel deur die implementering van spesifieke prosedurele regte verwesenlik kan word. Dienooreenkomstig het die navorsing die hidrouliese regsraamwerk in die lig van prosedurele omgewingsregte vanuit die perspektief van die Verenigde State van Amerika (VSA), die Verenigde Koninkryk (VK) en Suid-Afrikaanse reg oorweeg. Drie prosedurele regte, te wete die reg op toegang tot inligting, die reg op regverdig administratiewe handeling, en die reg op toegang tot die howe, is oorweeg met die doel om lesse vanuit die buitelandse jurisdiksies vir die moontlike verbetering

van die Suid Afrikaanse regsraamwerk op hierdie gebied te leer. Die studie het bevind dat die positiewe ontwikkeling in die VSA en VK vir Suid Afrika oorweeg kan word om die afdwinging van prosedurele regte ten opsigte van hidrouliese breking, te versterk.

**Kernbegrippe:** Hidrouliese breking, menseregte, toegang tot howe, toegang tot inligting, administratiewe geregtigheid, Handves van Regte, omgewing, vryheid van inligting, regverdige administratiewe aksie, regshulp, prosedurele omgewingsregte, *locus standi*, Suid-Afrika, Pennsylvania, VSA en Verenigde Koninkryk

## LIST OF ABBREVIATIONS

AAL	Administrative Agency Law
ACE	Army Corps of Engineers
Act 13	Oil and Gas Act
AHRLJ	African Human Rights Law Journal
Afr J Legal Stud	African Journal of Legal Studies
AIAL Forum	Australian Institute of Administrative Law Forum
AJ	Administrative justice
AJA	Access to Justice Act
ALJ	Administrative law judge
APA	Administrative Procedure Act
ASSAf	Academy of Science South Africa
ATI	Access to information
BC Env'tl Aff L Rev	Boston College Environmental Affairs Law Review
Br J Am Leg Studies	British Journal of American Legal Studies
Can-US LJ	Canada-US Law Journal
CAS	Chemical Abstracts Service
CCMA	Commission for Conciliation, Mediation and Arbitration
CER	Constitutional Environmental Right
Chi-Kent L Rev	Chicago-Kent Law Review
Colo J Int'l Env'tl L & Pol'y	Colombian Journal of International Environmental Law and Policy
Cornell L Rev	Cornell Law Review
DECC	Department of Energy and Climate Change
Denv J Int'l L & Pol'y	Denver Journal of International Law & Policy
DEP	Department of Environmental Protection
DMR	Department of Mineral Resources
DIO	Deputy Information Officer
ECHR	European Court of Human Rights
ed	Edition



eds	Editors
EA	Environment Agency
EAJA	Equal Access to Justice Act
ECA	Electronic Communications Act
EHB	Environmental Hearing Board
EIA	Environmental Impact Assessment
EIR	Environmental Information Regulations
EJIL	European Journal of International Law
Environ Sci Process Impacts	Environmental Science Process and Impacts
EPA	Environmental Protection Agency
EPCRA	Emergency, Planning and Community Right-to-Know Act
ESTA	Extension of Security of Tenure Act
EU	European Union
EWB	European (Withdrawal) Bill
Fla A & M U L Rev	Florida A & M University Law Review
FOI	Freedom of Information
FOIA	Freedom of Information Act
GAL	Global Administrative Law
GA-OAS	General Assembly of the Organisation of American States
Georgetown Int'l Env'tl Rev	Georgetown International Environmental Review
GHG	Greenhouse gas
GMO	Genetically Modified Organisms Act
GRAPP	General Rules of Administrative Practice and Procedure
GWP	Global warming potential
GWPC	Ground Water Protection Council
HF Regulations	Regulations for Petroleum Exploration and Production
HM	Her Majesty
HRA	Human Rights Act

HSE	Health and Safety Executive
HVHF	High-Volume Hydraulic Fracturing
IACtHRs	Inter-American Court of Human Rights
ICLQ	International and Comparative Law Quarterly
IEA	International Energy Agency
IO	Information officer
IOLTA	Interest on Lawyer Trust Account
IOCCC	The Interstate Oil and Gas Commission
JD	Jurisdictional determination
JEMPAS	Journal of European Management and Public Affairs Studies
J Envtl Law & Litigation	Journal of Environmental Law and Litigation
J Hum Rts & Env't	Journal of Human Rights and the Environment
J Land Use & Envt'l Law	Journal of Land Use & Environmental Law
J Legal Educ	Journal of Legal Education
J Nat'l Ass'n Admin L Judges	Journal of the National Association of Administrative Law Judges
La L Rev	Louisiana Law Review
LASA	Legal Aid South Africa
LASPO Act	Legal Aid, Sentencing and Punishment of Offenders Act
LOC	Local Organising Committee
LRA	Labour Relations Act
Max Planck UNYB	Max Planck Year Book of United Nations Law
Melb UL Rev	Melbourne University Law Review
MESICIC	Mechanism for the Implementation of the Inter-American Convention against Corruption
MI-AL	Model Inter-American Law on Access to Public Information
Mich L Rev	Michigan Law Review
Model Law	Model Law on Access to Information for Africa.

MPRDA	Mineral and Petroleum Resources Development Act
MqJICEL	Macquarie Journal of International and Comparative Environmental Law
MSAPA	Model State Administrative Procedure Act
MSDS	Material Safety Data Sheet
NEMA	National Environmental Management Act
NEPA	National Environmental Policy Act
NGO	Non-governmental organisation
Neth Q Hum Rts	Netherlands Quarterly of Human Rights
NYU Env'tl L J	New York University Environmental Law Journal
NYU L Rev	New York University Law Review
Nw J Int'l Hum Rts	Northwestern Journal of International Human Rights
Nw UL Rev	Northwestern University Law Review
NWA	National Water Act
NWRS 2	National Water Resource Strategy II
OAH	Office of Administrative Hearing
OAS	Organisation of American States
OGA	Oil and Gas Authority
OGEL	Oil Gas & Energy Law Intelligence
OPP	Office of the Public Prosecutor
Pace Env'tl Law Rev	Pace Environmental Law Review
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
para	Paragraph
PCO	Protective Costs Order
PER/PELJ	Potchefstroom Electronic Law Journal
PIC	Prior Informed Consent
PLAN	Pennsylvania Legal Aid Network
POPI	Protection of Personal Information Act
POP	Persistent Organic Pollutant

PTD	Public Trust Doctrine
RKTL	Right to Know Law
SAGNC	South African Geographical Names Council Act
SAHRC	South Africa Human Rights Commission
SAJHR	South African Journal of Human Rights
S Afr J Sci	South African Journal of Science
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
SCLR	Supreme Court Law Review
SLO	Social licence to operate
Stell LR	Stellenbosch Law Review
Tex L Rev	Texas Law Review
TRI	Toxics Release Inventory
UDHR	Universal Declaration on Human Rights
UKSC	Supreme Court of the United Kingdom
UN	United Nations
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UK	United Kingdom
UKOOG	United Kingdom Onshore Operators Group
UNSW Law Journal	University of New South Wales Law Journal
U Pa J L & Soc Change	University of Pennsylvania Journal of Law and Social Change
USA	United States of America
Wash U Global Stud L Rev	Washington University Global Studies Law Review
Wm & Mary L Rev	William & Mary Law Review
WM & Mary Env'tl L & Pol'y Rev	William and Mary Environmental Law and Policy Review

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## Chapter 1 Introduction

### 1.1 Background

Due to war and political crisis in the major oil producing regions of the world, coupled with currency devaluation at the back of global economic depression, many countries of the world have either been subject to, or are experiencing, energy shortage in one form or another.<sup>1</sup> South Africa is not exempted from these developments.<sup>2</sup> In late 2007 to early 2008, the country experienced its first major electricity shortage, and though increased investment resulted in some improvements, shortages returned in the form of load shedding in 2015. Confirming the difficult situation faced by the country, the State President indicated that electricity shortage is the biggest problem facing South Africa, being directly responsible for a 1% reduction in the estimated 3% growth of the economy in 2015.<sup>3</sup>

The quest to find alternative sources of energy other than oil has resulted in the possibility of accessing gas trapped in the core of the earth through hydraulic fracturing (or fracking) among others.<sup>4</sup> On 15 October 2013, the South African Minister of Mineral Resources released the *Proposed Technical Regulations for*

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<sup>1</sup> For example, energy production in the UK declined by 6.3% in 2013, while its energy imports had increased significantly such that the country had become a net importer of petroleum products for the first time since 1973. See MacLeay *et al Digest of United Kingdom Energy Statistics* 11. In the United States of America, the government had since 1976 been providing funding for research to find an alternative drilling method for methane gas in underground layers of coal when oil production peaked at 9.6 million barrels a day, in the early 1970s. See Zuckerman *The Frackers: The Outrageous Inside Story of the New Energy Revolution* 56. In Denmark, the recognition that the natural gas supply in the North Sea being exploited since the 1980s was fast declining and could result in the country being a net importer of gas by 2020 unless viable alternatives are discovered forced the government to focus on renewable energy sources. See Becker & Wenner 2014 *Journal of European Management & Public Affairs Studies* 24.

<sup>2</sup> The National Energy Regulator of South Africa (NERSA) reported on 26 August 2013, that the energy shortage in the country is estimated to cost over R50 billion. *Afrol News* 4 November 2013.

<sup>3</sup> Ishmael "Power cuts SA's biggest challenge" available at <http://www.business.africa.com/news/1002164> [date of use 19 August 2015].

<sup>4</sup> The Geological Society of America "Hydraulic fracturing's history and role in energy development" available at [www.geosociety.org/criticalissues/hydraulicfracturing/history.asp](http://www.geosociety.org/criticalissues/hydraulicfracturing/history.asp) [date of use 1 February 2016].

*Petroleum Exploration and Exploitation*.<sup>5</sup> The purpose of the proposed regulations were, *inter alia* “to augment gaps identified in the current regulatory framework governing exploration and exploitation of petroleum resources, particularly in relation to hydraulic fracturing.” The proposed regulations were subsequently updated by the *Regulations for Petroleum Exploration and Production*,<sup>6</sup> to “prescribe standards and practices that must ensure the safe exploration and production of petroleum.”<sup>7</sup>

In July 2012, the Department of Mineral Resources (hereafter the DMR) published a report by an inter-departmental team, titled *Investigation of Hydraulic Fracturing in the Karoo Basin of South Africa*.<sup>8</sup> The Investigative Report highlighted the fact that there is an estimated 485 trillion cubic feet of shale gas in the Karoo basin, which could guarantee energy security for the country. Although the estimated volume of shale gas is subject to verification, its exploitation, if proven to be available in a commercial quantity, may have environmental and socio-economic implications for the country.<sup>9</sup> According to the Investigative Report, the shale gas resource has the potential to generate about R1 trillion in revenue, create over 1,500 direct jobs, and enhance the economy with several other indirect opportunities. However, the exploitation of shale gas by hydraulic fracturing has the potential to adversely impact land and water use, thereby causing atmospheric and water pollution, which might also adversely impact on the environment and people’s health.<sup>10</sup>

As of July 2018, the Minister of Mineral Resources has issued notices of pending administrative decision in terms of sections 3(2)(b) and 4(3) of the *Promotion of Administrative Justice Act* 2000<sup>11</sup> to all persons and members of the public whose rights may be materially and adversely affected regarding applications for

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<sup>5</sup> GN 1032 in GG 36938 of 15 October 2013 in terms of the *Mineral and Petroleum Resources Development Act* 28 of 2002 (hereafter the MPRDA).

<sup>6</sup> GN R466 in GG 38855 of 3 June 2015 (hereafter “the HF Regulation”) in terms of the MPRDA.

<sup>7</sup> HF Regulation 85.

<sup>8</sup> At [www.gov.za/sites/www.gov.za/files/investigation\\_hydraulic\\_fracturing\\_Karoo\\_basin.pdf](http://www.gov.za/sites/www.gov.za/files/investigation_hydraulic_fracturing_Karoo_basin.pdf) (hereafter the Investigative Report) [date of use 23 November 2015].

<sup>9</sup> Investigative Report at para 2.4.

<sup>10</sup> Investigative Report at para 2.4.

<sup>11</sup> 3 of 2000.

exploration rights to explore for natural (shale) gas in the Western, Eastern and Northern Cape Provinces.<sup>12</sup>

### **1.2 What is hydraulic fracturing?**

'Hydraulic fracturing' is defined as the injection of "fracturing fluids into the target formation at a pressure exceeding the parting pressure of the rock to induce fractures through which petroleum can flow to the wellbore."<sup>13</sup> The process is colloquially referred to as 'fracking', and its dictionary definition explains the process in non-technical language. The *Macmillan Dictionary Online*<sup>14</sup> defines fracking as:

... a procedure which enables the extraction of oil and gas from rock formation deep below the earth's surface. The process involves drilling thousands of metres into the ground and blasting water and chemicals sometimes described as fracturing fluids into the rock in order to extract gas, which is embedded in deposits of *shale*, a rock, which is not very permeable and therefore potentially contains gas reservoirs. The resulting fuel is consequently often described as *shale gas*.

The first attempts to release oil trapped underground took place in New York, Kentucky and Virginia in the 1880s through a process which used nitro-glycerine to stimulate shallow hard rock wells thereby breaking up oil-bearing formations and releasing an increased flow of oil for recovery. By the 1930s, non-explosive fluids were being used resulting in a more efficient rock fracture and the succeeding years saw increased attempts using different compounds. In 1949, a patent for the 'hydrafrac' process was issued to Halliburton Oil Well Cementing Company to use a mixture of sand, crude and gasoline blend as highly pressurised liquid to crack open rocks and fill the cracks to prevent it from closing in order to maintain a steady flow of gas.<sup>15</sup>

Today, with the introduction of technology, large-scale industrial operations and an increased number of wells, the gas that is embedded in rock formations can now be easily released. However, the larger size operations required in hydraulic fracturing

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<sup>12</sup> PN 87 in PG 2195 of 11 July 2018, and PN 121 in PG 4080 of 11 July 2018. The applicants are Shell Exploration South Africa BV, Bundu Gas and Oil Exploration (Pty) Ltd, and Falcon Oil and Gas Ltd.

<sup>13</sup> HF Regulation 84.

<sup>14</sup> Available at [www.macmillandictionary.com](http://www.macmillandictionary.com) [date of use 6 September 2017].

<sup>15</sup> Mooney 2011 Scientific American 82.

compared to the typical oil and gas operations created some unforeseen problems. A typical well site in hydraulic fracturing, comprising of a drilling rig and equipment with pits to store drilling fluids and waste, occupy about 10,000 square metres in size. An example was the Barnett shale operations in Johnson County in Texas, which required 37 well sites within a 20-kilometre radius.<sup>16</sup> Such an operation also exacerbates the risk of pollution of water given the fact that well sites are required in multiples for hydraulic fracturing.<sup>17</sup>

Glazewski and Esterhuyse pointed out that although the potential area of hydraulic fracturing operations will be limited to approximately 27% of the Karoo basin, its adverse impact will be felt directly in the whole region and perhaps the whole country.<sup>18</sup> A scientific study on the potential impact of shale gas extraction in the Karoo basin of South Africa concluded that there is a possibility of the pollution of many aquifers in the region.<sup>19</sup> Therefore, the potential possibility of water pollution from hydraulic fracturing could further aggravate the problem of water-borne diseases, which currently present health risks especially to the country's rural population.<sup>20</sup>

Other possible impacts may include atmospheric pollution from methane emissions, dust and noise. Another challenge relates to the effect of hydraulic fracturing on agricultural land use, as the Karoo basin represents about 37% of South Africa's farming and grazing land.<sup>21</sup> This could adversely impact the right of access to sufficient food and water for example, should there be reduced yield in agricultural products caused by pollution of the soil by toxic chemicals. Other rights may be affected such as involuntary eviction of the traditional residents from the area who

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<sup>16</sup> IEA Golden Rules for a Golden Age of Gas - World Energy Outlook Special Report on Unconventional Gas 22.

<sup>17</sup> Conventional gas operations require one drilling well per 10-kilometre radius. See IEA *Golden Rules for a Golden Age of Gas* 22.

<sup>18</sup> Glazewski and Esterhuyse (eds) *Hydraulic Fracturing in the Karoo: Critical Legal and Environmental Perspectives* 4.

<sup>19</sup> Atangana and Tonder "Stochastic risk and uncertainty analysis for shale gas extraction in the Karoo basis of South Africa" <http://dx.doi.org/10.1155/2014/342893> [date of use 14 March 2014].

<sup>20</sup> Stein 2004-2005 *Tex L Rev* 2169.

<sup>21</sup> Wait and Rossouw 2014 *Southern African Business Review* 11.



can no longer carry on their farming or animal husbandry trade, and other occupation or professions.<sup>22</sup>

Apart from the risk of pollution of water, which might affect human health, the attendant nuisance could also have an adverse impact. Up to 200 truck movements are required to transport equipment alone, with continuous movement of supplies during daily 24-hour operations, generating significant noise, dust and diesel fumes.<sup>23</sup> This could cause nuisance to people, and resultant damage to infrastructural development like road and water works. Furthermore, the extensive industrial operations could transform the character and the landscape of communities, even more so, if an increased number of wells push operations closer to residential areas. This could raise the possibility of harm to the health and well-being of residents,<sup>24</sup> which could also force them to relocate from their homes, abandoning their chosen trade, occupation or profession,<sup>25</sup> and possibly infringe on their right to an environment that is not harmful to their health or well-being.<sup>26</sup>

Hydraulic fracturing also poses a risk of micro earthquakes.<sup>27</sup> Induced seismic activity in hydraulic fracturing has been attributed to the injection of significant quantities of toxic liquid waste into the ground, which creates sustained pressure causing shifts in underground rock formations.<sup>28</sup> Furthermore, the process of hydraulic fracturing emits more greenhouse gases, particularly methane, resulting in increased global warming with potential to harm the environment.<sup>29</sup>

Furthermore, hydraulic fracturing could affect access to food and water considering that its demand for water far outweighs other commercial, developmental and

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<sup>22</sup> See section 22; and section 21(3) of the Constitution, which provides for the right of every citizen "to enter, to remain in and to reside anywhere in, the Republic."

<sup>23</sup> Suzuki 2014 *B C Env't Aff L Rev* 281.

<sup>24</sup> Kitze 2012 *Minnesota Law Review* 389.

<sup>25</sup> Section 22 of the Constitution.

<sup>26</sup> Section 24 of the Constitution.

<sup>27</sup> BBC News "Fracking in Lancashire suspended following earthquakes" 26 October 2018 available at <https://www.bbc.com/news/uk-england-lancashire-45976219> [date of use 1 November 2018].

<sup>28</sup> Schumacher and Morrissey 2013 *Texas Review of Law & Politics* 252.

<sup>29</sup> Howarth *et al* 2011 *Climatic Change* 688.

agricultural demand. Each hydraulic fracturing well would require about 15,000 cubic metres or 500 truck-loads of water, on the basis that a typical truck can hold about 30 cubic metres of water.<sup>30</sup> This will be multiplied by the number of wells, and could be a considerable number. This could further complicate South African water resource challenges. Relative to the global average, the country has low levels of rainfall and high levels of evaporation due to its warm climate. Reputed as the 30<sup>th</sup> driest country in the world, South Africa has less water per person than other drier countries like Namibia and Botswana.<sup>31</sup> Hydraulic fracturing is likely to add significant pressure to existing water scarcity, thereby affecting the right of access to sufficient water.<sup>32</sup> Meanwhile, concerns have also been expressed relating to the possible adverse impact of hydraulic fracturing on climate change, challenges to sustainable development<sup>33</sup> and human rights.

There is a general consensus that knowledge of hydraulic fracturing is limited, albeit being constantly fortified. However, technological advancements tend to outpace regulatory regime because companies invest massively in research and development to improve their competitive advantage on a continuous basis, implying that the regulator must be in close contact with the industry. The implication is that there can hardly be a guarantee that all environmental dangers will be alleviated or that negative impact will be avoided in the event of crystallisation of risks.<sup>34</sup>

In summation, the United Nations Environment Programme (UNEP) summarised the environmental and health concerns of hydraulic fracturing as follows:

UG (unconventional gas) exploitation and production may have unavoidable environmental impacts. Some risks result if the technology is not used adequately, but others will occur despite proper use of technology (EU 2011). UG production has the potential to generate considerable GHG emissions, can strain water resources, result in water contamination, may have negative impacts on public health (through air and soil contaminants, noise pollution),

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<sup>30</sup> IEA World Energy Outlook Special Report on Unconventional Gas 31.

<sup>31</sup> 2013 *National Water Resource Strategy II* 8 (hereafter the NWRS2).

<sup>32</sup> See section 27(b) of the Constitution.

<sup>33</sup> See generally on the potential of the effect of hydraulic fracturing on human rights, Grear *et al* 2014 "A Human rights Assessment of Hydraulic Fracturing and other Unconventional Gas Development in the United Kingdom" at [www.sas.ac.uk/sites/default/files/files/UK%20HRIA%20w%20appdx-hi%20res.pdf](http://www.sas.ac.uk/sites/default/files/files/UK%20HRIA%20w%20appdx-hi%20res.pdf) [date of use 30 October 2014]. See also Brewer 2013 *International Centre for Trade and Development* 11.

<sup>34</sup> Cape Breton University 2014 "Hydraulic fracturing - Understanding the General Regulatory Issues: Nova Scotia Hydraulic Fracturing" at [www.cbu.ca/wp-content/uploads/2015/10/Hydraulic-Fracturing-Understanding-the-General-Regulatory-Issues](http://www.cbu.ca/wp-content/uploads/2015/10/Hydraulic-Fracturing-Understanding-the-General-Regulatory-Issues) [date of use 14 June 2016].

food supply (through competition for land and water resources), as on soil (pollution, crusting).<sup>35</sup>

Hydraulic fracturing of shale gas has been the subject of different forms of controversy depending on the perception of pressure groups in different countries, and attitudes to hydraulic fracturing vary from country to country. In countries that have been aggressive in the pursuit of hydraulic fracturing, it has been stated that the fear of losing economic competitiveness has been one of the motivating factors.<sup>36</sup> Countries in this group, which include the United Kingdom, Poland and the United States of America (hereafter the USA) have consistently argued for domestic regulation of hydraulic fracturing, downplaying the risks associated therewith.<sup>37</sup> On the other side of the divide however, are countries in which hydraulic fracturing has been the subject of strict control or outright ban due to public outcry and criticism based on fears relating to its adverse impact on the environment and human health.<sup>38</sup> In Europe, these countries include for example, the Netherlands,<sup>39</sup> France,<sup>40</sup> Denmark and Sweden.<sup>41</sup> The European Union also took some action on the subject.<sup>42</sup>

### *1.2.1 Hydraulic fracturing and its regulation in Europe*

The increased agitation by environmental and human rights activists calling on the European Union (hereafter the EU) to develop Europe-wide binding regulations resulted in the *EU Commission Recommendation on Minimum Principles for the Exploration and Production of Hydrocarbons (such as shale gas) using Hydraulic Fracturing*.<sup>43</sup> While acknowledging that the “hydraulic fracturing technique raises

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<sup>35</sup> UNEP Global Environmental Alert Service 6.

<sup>36</sup> Becker and Werner 2014 *Journal of European Management and Public Affairs Studies* 23.

<sup>37</sup> See Carrington “Buried UK government report finds fracking increases air pollution” at [https://www.theguardian.com/environment/2018/aug/02/buried-uk-government-report-finds-fracking-increases-air-pollution?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/environment/2018/aug/02/buried-uk-government-report-finds-fracking-increases-air-pollution?CMP=Share_iOSApp_Other) [date of use 15 August 2018]. Similarly, it was reported that by the year 2025, the UK would have to import about 70% of its gas needs unless alternative sources are exploited. See Department of Energy and Climate Change 2013 *Onshore Oil and Gas Exploration in the UK: Regulation and Best Practice* 7.

<sup>38</sup> See Weile 2014 *Journal of European Management and Public Affairs Studies* 11.

<sup>39</sup> See “Dutch government bans shale gas drilling for 5 years” at [www.naturalgaseurope.com/dutch-government-bans-shale-gas-drilling-24586](http://www.naturalgaseurope.com/dutch-government-bans-shale-gas-drilling-24586) [date of use 20 August 2015].

<sup>40</sup> Weile 2014 *Journal of European Management & Public Affairs Studies* 14.

<sup>41</sup> Becker and Werner 2014 *Journal of European Management & Public Affairs Studies* 26.

<sup>42</sup> See para 1.2.1.

<sup>43</sup> The EU Recommendation is discussed in para 3.3.3.2.

specific challenges, in particular for health and environment,<sup>44</sup> the EU Recommendation reiterated the right of Member States to “determine the conditions for exploiting their energy resources, as long as they respect the need to preserve, protect and improve the quality of the environment.”<sup>45</sup> Rather than enacting enforceable regulations, the EU Recommendation simply provides for minimum principles and standards to guide member states desirous of engaging in high-volume hydraulic fracturing to ensure “that public health, climate and the environment are safeguarded, resources are used efficiently, and the public is informed.”<sup>46</sup>

Although the EU Recommendation is facultative, the provisions of the *European Convention on Human Rights* 1950<sup>47</sup> (hereafter the ECHR) on the right to life,<sup>48</sup> and the prohibition of abuse of rights<sup>49</sup> among others, have been applied alongside procedural rights to establish breaches of environmental rights. For example, in *Taskin and Ors v Turkey*,<sup>50</sup> the applicants had applied for a judicial review of the issuing of a permit to extract gold, contending that the use of cyanide in mining by the operator would expose the community to the risk of contamination of the groundwater, thereby posing serious risk to human health and safety. The earlier order of the Supreme Administrative Court restraining the operator was side-tracked by the Ministry of the Environment which issued a permit for continued use of cyanide purportedly on expert opinion that there was no considerable harm to human health. The European Court of Human Rights held that there was a violation of article 6 of the ECHR (right to fair trial) on the ground that continued operations during the proceedings “deprived the procedural guarantees available to the applicants of any useful effect,” and that “where administrative authorities refuse

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<sup>44</sup> See Recital 2 of the EU Recommendation.

<sup>45</sup> See Recital 1 of the EU Recommendation.

<sup>46</sup> See Article 1 of the EU Recommendation.

<sup>47</sup> Available at [www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) [date of use 4 April 2016].

<sup>48</sup> Article 2 ECHR.

<sup>49</sup> Article 17 ECHR.

<sup>50</sup> 2004 ECHR 621.

or fail to comply, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceeding are rendered devoid of purpose."<sup>51</sup>

Furthermore, consultation is required by the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the Aarhus Convention).<sup>52</sup> The Aarhus Convention requires the contracting states to *inter alia* "guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of [the] Convention."<sup>53</sup>

In relation to hydraulic fracturing, each country in the EU has however adopted peculiar positions, considering the interests of its citizens, economy and the environment. For example, the United Kingdom and Poland are actively interested in developing hydraulic fracturing and are setting out regulations to control the process.<sup>54</sup> The Polish government considered hydraulic fracturing a saving grace believing it could improve the economy and create an opportunity to achieve energy independence. The government of Poland also appeared to enjoy the support of the people. A survey indicated that 73% of Polish people appeared to support hydraulic fracturing, perhaps based on the desire to wean the country of its reliance on Russia for about two-thirds of its natural gas requirements. Incidentally, Poland has been suggested as the most aggressive in Europe in exploiting shale gas resources.<sup>55</sup>

The position in Denmark, the Netherlands and France are however different. The countries appear to have applied some restraint in permitting hydraulic fracturing. For example, the government of Denmark had granted a licence in 2012 to conduct

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<sup>51</sup> 2004 ECHR 621 at para 124-125.

<sup>52</sup> Available at [www.unece.org/env/documents](http://www.unece.org/env/documents) [date of use 4 April 2016]. Article 1 of the Aarhus Convention states the objective of the treaty as follows- "In order 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, each Party shall guarantee the right of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

<sup>53</sup> Article 1 of the Aarhus Convention Articles 4, 6, and 9 of the Aarhus Convention address the issues of access to environmental information, public participation in decision-making and access to justice respectively.

<sup>54</sup> DECC UK's Approach to Regulation – Onshore Oil and Gas Exploration in the UK: Regulation and Best Practice 7.

<sup>55</sup> Atkins 2013 *Washington University Global Studies Review* 349.

a feasibility study for hydraulic fracturing of shale gas. The licence was granted on the understanding that research must show that environmentally friendly production had to be guaranteed first, with the Danish Energy Minister assuring citizens that:

...if commercially interesting quantities of shale gas are found in Denmark, it will only be produced if it can be done in an environmentally sound way. The fact is that today we don't know whether we can produce natural gas from shale in the Danish subsoil. Exploration is at a very early stage ... Before we approve a drilling programme for an exploration well, all issues in relation to the protection of the environment and safety in general will be dealt with to safeguard such an operation. All precautions will be taken to protect any groundwater resources.<sup>56</sup>

In August 2015, the exploration site was closed because of technical reasons related to the geology of the site. Tests results had shown that the shale layer encountered by the well was too thin for economically feasible gas production. Results of assessments like these are likely to be useful in the consideration of steps to be taken to decide whether hydraulic fracturing is feasible in South Africa, or not.<sup>57</sup>

In the same vein, the Netherlands imposed a five-year ban on hydraulic fracturing, citing uncertainties as to its impact on the environment.<sup>58</sup> Prior to that, the Dutch Safety Board had launched an investigation into the decision-making process on gas extraction in 2013 consequent to a series of earthquakes in the province of Groningen.<sup>59</sup> The investigation revealed that safety was not embedded in the process, which offered little room for opposing viewpoints from other stakeholders, and lacked an adequate level of accountability to, and communication with the Groningen population. The Board thereupon recommended that in future operations, the operator, the Ministry of Economic Affairs and the State Supervision of Mines (SodM) must "communicate openly about the uncertainties inherent in gas extraction to enable citizens to build realistic expectations."<sup>60</sup>

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<sup>56</sup> Becker and Werner 2014 *Journal of European Management & Public Affairs Studies* 26.

<sup>57</sup> See "Total drops shale site in Dybvad, Denmark" available at [www.naturalgaseurope.com/total-closes-shale-site-in-dybvad-denmark](http://www.naturalgaseurope.com/total-closes-shale-site-in-dybvad-denmark) [date of use 19 August 2015].

<sup>58</sup> See "Dutch government bans shale gas drilling for 5 years" available at [www.naturalgaseurope.com/dutch-government-bans-shale-gas-drilling-24586](http://www.naturalgaseurope.com/dutch-government-bans-shale-gas-drilling-24586) [date of use 20 August 2015].

<sup>59</sup> Dutch Safety Board Earthquake Risks in Groningen: An investigation into the role of the safety of citizens during the decision-making process on gas extraction (1959-2014) 7.

<sup>60</sup> Dutch Safety Board Earthquake Risks in Groningen 8.

In France, consultation was considered crucial to decision-making. Consequent to a petition signed by over 100,000 persons from concerned communities and environmentalists in France, the government initially announced a moratorium on hydraulic fracturing in February 2011, pending the outcome of a scientific commission to study the potential ecological impact. The French parliament eventually passed Law No. 2011-835,<sup>61</sup> which prohibited the “exploration and exploitation of liquid or gaseous hydrocarbons through hydraulic fracturing,” effectively making France the first country in Europe to ban hydraulic fracturing.<sup>62</sup>

#### 1.2.1.1 Hydraulic fracturing in the United Kingdom

Hydraulic fracturing is a recent development in the United Kingdom (hereafter “UK”),<sup>63</sup> and its regulation is in early stages compared to that in USA, which has been engaged in the process of fracturing for oil and gas for the last 40 years.<sup>64</sup> The UK is just a step ahead of South Africa in that hydraulic fracturing operations are only just commencing in some counties.<sup>65</sup> There is therefore little practical experience in the effective regulation of hydraulic fracturing in the UK from which

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<sup>61</sup> Law No. 2011-835 is on the Prevention of the Exploration and Exploitation of Liquid or Gas Hydrocarbon Mines by Hydraulic Fracturing and Revoking Exclusive Licences to Prospect in Relation to Projects that Use this Technology. Article 1 of the Law prohibits exploration and exploitation of hydrocarbons using the hydraulic fracturing technique, based on the requirements of the 2004 Environmental Charter (*Charte de l’environnement*), and on the principle of preventive and corrective action in Article L.1101 of the Environment Code. See Adam “France imposes shale gas restrictions” at <http://www.fasken.com/files/Publication/1f1844698597401ebd08fc351cea88c9/PresAttachment/8c77f9c7-1d5a-47ee-a68906db1998e9bf/France%20Imposes%20Shale%20Gas%20Restrictions%20Bulletin.pdf> [date of use 26 October 2016].

<sup>62</sup> Weile 2014 *Journal of European Management and Public Affairs Studies* 11.

<sup>63</sup> Hydraulic fracturing exploration operations by shale gas company Cuadrilla started for the first time at a Lancashire site on Monday, 15 October 2018. In 2011, a moratorium was placed on the process by the UK government. See Perraudin and Pidd “Anger and blockades as fracking starts in UK for the first time since 2011” available at <https://www.theguardian.com/environment/2018/oct/15/fracking-protesters-blockade-cuadrilla-site-where-uk-work-due-to-restart> [date of use 16 October 2018].

<sup>64</sup> Weinstein 2013 *Wisconsin International Law Journal* 896.

<sup>65</sup> A single well hydraulic fracturing exploration in the North Yorkshire county had earlier commenced in 2017, but it was stopped. See <https://www.northyorks.gov.uk/kirby-misperton-fracking-operations> [date of use 8 March 2018]. The first commercial fracturing for shale gas is planned for a site near Blackpool by Cuadrilla Resources Ltd. See <https://www.ft.com/content/8c980c6c-72d9-11e7-93ff-99f383b09ff9> [date of use 8 March 2018].

much learning is possible.<sup>66</sup> Due to government's policy to progressively close coal-fired energy plants in order to reduce the dependence on coal as a source of energy, it became obvious that the UK has to find alternative sources of energy.<sup>67</sup>

Considering the success recorded in USA, particularly regarding the economic boom which accompanied the exploitation of shale gas through hydraulic fracturing, the UK government believes that the exploitation of shale gas could be a major impetus in the country's transition to other sources of energy that is lower than coal in consequential carbon footprint.<sup>68</sup> To achieve that objective, the government is concerned with finding the best way to balance the three core dimensions of energy trilemma comprising energy security, energy equity and universal access thereto at affordable price, as well as environmental sustainability.<sup>69</sup> Meanwhile, the lack of sufficient data in the UK to ground policies usually result in occasional recourse being made to USA sources, though there is some level of uncertainty as to their applicability of USA data to situations in the UK.<sup>70</sup> Consequently, the position of the UK as a beginner in hydraulic fracturing means that regulation is at neophyte stage and legislation are currently being reviewed with a view to enacting or amending subject specific laws as may be necessary.<sup>71</sup> It is in this regard that South Africa can benefit from the experience of the progress in the UK, especially regarding issues arose in the course of developments leading to the commencement of hydraulic fracturing.

In December 2012, the Department of Energy and Climate Change (hereafter "DECC") commissioned a study to collate evidence on potential GHG emissions from

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<sup>66</sup> Environmental Agency An Environmental Risk Assessment for Shale Gas Exploration in England 4.

<sup>67</sup> MacLeay et al Digest of United Kingdom Energy Statistics 12.

<sup>68</sup> Gear A *et al* 2014A "Human Rights Assessment of Hydraulic Fracturing and Other Unconventional Gas Development in the United Kingdom" 4.

<sup>69</sup> Wyman World Energy Trilemma 8.

<sup>70</sup> Environmental Agency Evidence Monitoring and Control of Fugitive Methane from Unconventional Gas Operations 55.

<sup>71</sup> For example, in 2014, the government ran a three-month public consultation campaign on a proposal consider legislation applicable to underground access when seeking to exploit oil, gas and geothermal resources below 300 metres. See DECC *Underground Drilling Access- Government Response to the Consultation on Proposal for Underground Access for the Extraction of Gas, Oil or Geothermal Energy* 6.



shale gas production in the UK and the compatibility of its production and use within acceptable climate change targets.<sup>72</sup> The study concluded that, with adequate regulations and appropriate safeguards in place, the net effect of GHG emissions from shale gas production in the UK would be relatively small.<sup>73</sup>

However, there is a commitment by the UK government that the exploitation of shale gas resources should go to the people first, and that the individuals and communities who host hydraulic fracturing developments will be involved in decision-making concerning how tax revenues from shale are spent.<sup>74</sup> In this regard, the UK government announced the creation of the Shale Wealth Fund which will consist of up to 10% of tax revenue from shale gas development operations to be used for the benefit of the host communities.<sup>75</sup>

Similarly, the United Kingdom Onshore Operators Group (UKOOG) (the representative body for UK onshore oil and gas companies), adopted a Community Engagement Charter on oil and gas unconventional reservoirs in which the UKOOG committed itself to ensure open and transparent communications between industry, stakeholder groups and the communities in which the industry operates.<sup>76</sup> The UKOOG also commits to sharing revenues from shale gas development with the host communities. At the exploration stage, the UKOOG commits to provide benefits of GBP100,000 per well site where hydraulic fracturing takes place, to provide a share of 1% of revenue at production stage to be shared at the ratio of 66.6:33.4 between the host communities and the host counties.<sup>77</sup>

Furthermore, the UKOOG working with the Health and Safety Executive (HSE) and the Environment Agency (EA) published industry guidelines for shale gas well

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<sup>72</sup> MacKay and Stone Potential Greenhouse Gas Emissions Associated with Shale Gas Extraction and Use 3.

<sup>73</sup> MacKay and Stone Potential Greenhouse Gas Emissions Associated with Shale Gas Extraction and Use 37.

<sup>74</sup> HM Treasury Shale Wealth Fund: Consultation 3.

<sup>75</sup> HM Treasury Shale Wealth Fund: Consultation 7.

<sup>76</sup> See UKOOG 2013 "Community Engagement Charter" available at [www.ukoog.org.uk/images/ukoog/pdfs/communityengagementcharterversion6.pdf](http://www.ukoog.org.uk/images/ukoog/pdfs/communityengagementcharterversion6.pdf) [date of use 31 May 2017].

<sup>77</sup> UKOOG 2013 "Community Engagement Charter" available at [www.ukoog.org.uk/images/ukoog/pdfs/communityengagementcharterversion6.pdf](http://www.ukoog.org.uk/images/ukoog/pdfs/communityengagementcharterversion6.pdf) [date of use 31 May 2017].

operations in 2013.<sup>78</sup> These guidelines have been adopted as best practice for the regulation of hydraulic fracturing by the DECC.<sup>79</sup> The regulations require the operator to obtain a planning permission<sup>80</sup> prior to the commencement of an activity on any site, the grant of which is subject to the outcome of public consultation and the assessment of the impact of economic, social and environmental factors including noise, dust, air quality and water usage.<sup>81</sup> However, it has been argued that the appropriateness of the regulations to deal with the potential risks of hydraulic fracturing cannot be guaranteed, especially as there has not been a proper assessment of its human rights implications.<sup>82</sup>

In the UK, full compliance with procedural requirements in comparable operations has been held to be of utmost importance. In the case of *R (Greenpeace) v The Secretary of State for Trade and Industry*,<sup>83</sup> the claimants applied for an order quashing the decision of the defendant in respect of the construction of a nuclear facility on the ground that the consultation process, which preceded the decision, was procedurally flawed. The Court cited with approval the decision in *R (Nadarajah and Abdi) v Secretary of State for Home Department*<sup>84</sup> that “where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so,” and notwithstanding that the project is dealing with a high level strategic issue, the development of policy in the environmental field is not a privilege to be granted or withheld at will by the executive or administrative authority.<sup>85</sup>

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<sup>78</sup> UKOOG 2013 “Guidelines for UK Well Operators on Onshore Shale Gas Wells” available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/185935/UKOO\\_GShaleGasWellGuidelines.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/185935/UKOO_GShaleGasWellGuidelines.pdf) [date of use 26 October 2016].

<sup>79</sup> DECC UK’s Approach to Regulation – Onshore Oil and Gas Exploration in the UK: Regulation and Best Practice 6.

<sup>80</sup> Approval is obtainable from the county council in England, the unitary authority in Scotland and the planning authority in Wales.

<sup>81</sup> DECC Fracking UK Shale: Planning Permission and Communities 4.

<sup>82</sup> *Grearet a/2014* “A Human Rights Assessment of Hydraulic Fracturing and other Unconventional Gas Development in the United Kingdom” 10.

<sup>83</sup> *R (Greenpeace) v The Secretary of State for Trade and Industry* 2007 Env L Rep 29.

<sup>84</sup> 2005 EWCA Civ 1363 at para 68.

<sup>85</sup> *R (Greenpeace) v The Secretary of State for Trade and Industry* 2007 Env L Rep 29 at paras 55-59.

### 1.2.2 Hydraulic fracturing in the USA

Hydraulic fracturing has become an important source of energy for the USA. Improvements in oil and gas drilling technology gives the USA potential access to about 2214 trillion cubic feet of natural gas resources, estimated to last nearly a hundred years in meeting the energy requirements of the country.<sup>86</sup> By the end of 2010, hydraulic fracturing has increased USA's recoverable oil reserves by at least 30%, and its natural gas by 90%.<sup>87</sup> It is projected that by 2035, shale gas will account for 46% of all USA natural gas production,<sup>88</sup> putting the country in a position to satisfy its local gas demand and resulting in a significant cut in imports from traditional suppliers.<sup>89</sup> Overall, the widespread use of multi-stage hydraulic fracturing facilitated massive commercial exploitation of hitherto unrecoverable oil and gas, giving birth to a new industry, which rapidly moved the USA from a net importer of oil and gas to near sufficiency and towards exporter status.<sup>90</sup>

Notwithstanding the benefits, the USA presents a complex study in the regulation of hydraulic fracturing in that the regulation comprises an intricate association of sometimes independent and sometimes shared rules depending on the applicable federal and state laws. The regulation of hydraulic fracturing is at federal and state level. Federal regulations in the USA are applicable only to Federal and Indian lands. The regulations are designed to allow appropriate development of resources pursuant to the *Federal Land Policy and Management Act*.<sup>91</sup> However, on a general basis, federal regulation in the states is limited to the environmental protection aspects of the business, which are subject to regulations made by the Environmental Protection Agency established pursuant to the *National Environmental Policy Act* 1999.<sup>92</sup> The purpose of the Act is *inter alia*, "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment;

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<sup>86</sup> Kitze 2013 *Minnesota Law Review* 385.

<sup>87</sup> Mooney 2011 *Scientific American* 82.

<sup>88</sup> Rahm and Riha 2012 *Environmental Science & Policy* 12.

<sup>89</sup> Rosenberg *Energy Rush: Shale Production and US National Security* 11.

<sup>90</sup> Zillman et al 2015 *Journal of Energy Law and Natural Resources Law* 85.

<sup>91</sup> 1976 43 USC Chapter 35 1701.

<sup>92</sup> 1999 42 US 4321 (hereafter "the NEPA").

to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” Consequently, states are the primary regulators of oil and gas operations.<sup>93</sup>

The position adopted by most states on whether or not to permit hydraulic fracturing appears to be driven by the level of economic benefits derivable therefrom.<sup>94</sup> The National Conference of State Legislatures reported that state legislatures are actively working to address public health and environmental concerns, while also taking advantage of the economic potential offered by shale gas development.<sup>95</sup> In the course of the 2011-2012 legislative year, fourteen states enacted legislation related to natural gas development. These laws span different areas of the subject including severance taxes, impact fees, well spacing, waste treatment and disposal regulations, hydraulic fracturing fluid additives and disclosure rules, amongst others.<sup>96</sup> Furthermore, the courts in some states have had cause to hold that procedural environmental rights could stand alongside substantive property rights.<sup>97</sup>

Notwithstanding state regulation of hydraulic fracturing, the usually weak position of an individual litigant claiming against big oil and gas companies, may result in

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<sup>93</sup> Section 2 NEPA.

<sup>94</sup> For example, in assenting to House Bill 40, Gov. Abbot of Texas observed that the Law will preempt regulation of oil and gas activity at the city level and give the state that duty. Consequently, the state will be in a position to ensure that any local regulation of surface activity is commercially reasonable and does not effectively prohibit an oil and gas operation. See “Governor Abbot signs HB 40 into law” at [www.gov.texas.gov/news/signature/20903](http://www.gov.texas.gov/news/signature/20903) [date of use 26 August 2015]. Furthermore, Gov. Mary Fallin of Oklahoma [on 29 May 2015] signed Senate Bill 809 into law. The legislation affirms the Oklahoma Corporation Commission as the primary regulator of oil and gas operations and prohibits cities from enacting rules banning drillings. Interestingly, the law also allows reasonable restrictions for setbacks, noise, traffic issues and fencing. The governor noted that the Oklahoma Corporation Commission was “aggressively but fairly” regulating the state’s energy industry. According to Gov. Fallin, “the alternative is to pursue a patchwork of regulations that, in some cases, could arbitrarily ban energy exploration and damage the state’s largest industry, largest employers and largest taxpayers.” See “Fallin signs bill preventing cities from enacting drilling bans” at [www.examiner-enterprise.com/news/state/fallin-signs-bill-preventing-cities-enacting-drilling-bans](http://www.examiner-enterprise.com/news/state/fallin-signs-bill-preventing-cities-enacting-drilling-bans) [date of use 26 August 2015].

<sup>95</sup> Ratner and Tiemann 2014 *Congressional Research Service* 7-5700.

<sup>96</sup> Pless 2013 “*Report of the National Conference of State Legislatures*” available at [www.ncsl.org/documents/energy/NaturalGasDevLeg313](http://www.ncsl.org/documents/energy/NaturalGasDevLeg313) [date of use 25 February 2015].

<sup>97</sup> See *State v Louisiana Land & Exploration Co.*, 2013 La. 110 So. 3d 1038. See also Taylor 2014 *La L Rev* 603.

injustice and should give cause for concern. In *Cabot Oil & Gas Corporation v Scroggins*,<sup>98</sup> the plaintiff had instituted a claim in a Pennsylvania court for trespass against the defendant, an environmental activist opposed to hydraulic fracturing. The court made a wide-ranging order restraining the defendant from being present on “any of Cabot’s well pads or access roads, even with the landowner’s invitation.” The implication of the court order was that the defendant was barred from being present in an area spanning about 300 sq. miles, representing about 40% of the rural county where Ms Scroggins lived. It is important to note that the defendant had represented herself (against Cabot’s 4 lawyers), having been given only a 72-hour notice of the hearing.<sup>99</sup> Scenarios like this further underscore the need for the protection of procedural rights, especially when it involves claims by the weak and the vulnerable in the society.

It is also important to note that some states in the USA share similar characteristics with South Africa in relation to water scarcity and related challenges. Examples include California, much of Texas, Colorado, Oklahoma, New Mexico, Kentucky, Arkansas and Louisiana. These states have to regulate water use and pass appropriate regulations to suit local conditions. For example, Kentucky exempts the oil and gas industry from both surface and groundwater reporting, while Texas requires permits for surface water withdrawals but generally not for groundwater.<sup>100</sup> Applicable regulations in those jurisdictions are likely to be relevant in formulating policies to deal with similar issues in South Africa. Furthermore, some states in the USA have commissioned evaluations of hydraulic fracturing to determine its impact on peoples’ health and the environment. South Africa could benefit from the knowledge generated from these evaluations. The result of one such evaluation was

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<sup>98</sup> No. 2013-1303. Full report available at <http://files.arnorldporter.com/Cabot-Oil-Gas-vVera-Scroggins%20Mar202014.pdf> [date of use 1 April 2016].

<sup>99</sup> See “Anti-fracking activist barred from 312.5 sq.miles of Pennsylvania” [www.theguardian.com/environment/2014/jan/29/vera-scroggins-fracking-activist-pennsylvania](http://www.theguardian.com/environment/2014/jan/29/vera-scroggins-fracking-activist-pennsylvania) [date of use 24 August 2015].

<sup>100</sup> Freyman “Hydraulic fracturing and water stress: Water demand by the numbers” at [www.colorado.edu/geography/class\\_homepages/geog\\_4501s14/ceres\\_frackwater](http://www.colorado.edu/geography/class_homepages/geog_4501s14/ceres_frackwater) [date of use 25 February 2015].

a major factor considered in the eventual decision to ban hydraulic fracturing in New York State.<sup>101</sup>

Furthermore, in the USA, the enforcement of procedural rights has been applied to compel operators in the mining and the oil and gas industries to comply with relevant legislation and regulations. For example, in *Sierra Club and Others v Robert Flowers, US Army Corps of Engineers and Others*,<sup>102</sup> the plaintiffs alleged that the Army Corps erred in issuing a Record of Decision (ROD) approving a new limestone mining permit for a period of 10 years without updating the environmental impact assessment issued two years earlier, and without sufficient analysis or opportunity for public participation. The Court observed that “the failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct,”<sup>103</sup> and accordingly held that the Army Corps failed in their duty to protect the federal wetlands and protected species placed in their care by the Congress from private exploitation to the detriment of the public interest.

Similarly, in *San Luis Valley Ecosystem Council v US Fish and Wildlife Service*,<sup>104</sup> the plaintiffs representing San Luis Valley (a predominantly rural area with an economic base driven by agriculture, recreation and tourism) filed an action alleging that the defendant failed to comply with the *National Environmental Protection Act*<sup>105</sup> in

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<sup>101</sup> In 2012, the New York State Department of Environmental Conservation requested the state’s Commissioner of Health to initiate a public health review of the emerging scientific information, and on the basis of available information “to determine the extent of potential public health impacts of High Volume Hydraulic Fracturing (HVHF) activities in New York State and whether existing mitigation measures implemented in other states are effectively reducing the risk for adverse public health impacts. The public health review process involved more than 4500 man-hours, covering evaluation of peer-reviewed scientific studies, interviews, discussions and meetings with public health and environmental authorities in several states, and engagement with researchers from government departments and academic institutions. See “A Public Health Review of High Volume Hydraulic Fracturing for Shale Gas Development” available at [www.health.ny.gov/press/reports/docs/high\\_volume\\_hydraulic\\_fracturing.pdf](http://www.health.ny.gov/press/reports/docs/high_volume_hydraulic_fracturing.pdf) [date of use 26 November 2015]. The final report concluded that the science surrounding HVHF is only beginning to emerge and many of the existing scientific reports are preliminary or exploratory in nature, justifying the fact that further evaluation was required before the moratorium in New York could be lifted.

<sup>102</sup> 2006 423 F.Supp.2d 1273.

<sup>103</sup> *Simmons v Block* 1986 782 F.2d 1545 (11<sup>th</sup> Cir).

<sup>104</sup> 2009 657 F.Supp.2d 1233.

<sup>105</sup> 42 USC 4321.

relation to its regulatory duties over oil and gas companies' activities in the BACA National Wildlife Refuge (the Refuge). The plaintiffs further claimed that drilling in the Refuge will result in soil disturbance, noise and dust, adversely affecting their aesthetic right, which may affect the creeks and other water sources and harm endangered species. The defendants however argued that the concerns were unfounded, and the potential harm referred to was only possible in full scale drilling, but not the drilling of two exploratory wells in this particular case. It was also argued that the plaintiffs lacked standing to institute the action. In rejecting the defendant's argument, the court held that the plaintiffs have presented sufficient evidence showing that the noise and aesthetic injury from the drill rigs and increased traffic will cause a direct injury to the plaintiffs. Furthermore, the affected aquifer apparently provided water for residents in the area including the plaintiffs and any contamination of the aquifer would directly affect the plaintiffs. The court thereupon granted an injunction restraining further drilling.

The foregoing shows that hydraulic fracturing has potential adverse effects on the environment and human rights, necessitating effective regulation, and that the application and enforcement of procedural rights can play an important role in that regulation. The next section considers the nature of procedural rights in environmental law, especially those that could be adversely affected by hydraulic fracturing.

### ***1.3 Procedural environmental rights***

#### *1.3.1 Background to procedural environmental rights and hydraulic fracturing*

Procedural rights are those rights, which facilitate the guarantee of due process in the enforcement of substantive rights, or in obtaining redress for their invasion.<sup>106</sup> For example, environmental rights being rights of reciepience indicate what the rights-holders are entitled to expect or could obtain.<sup>107</sup> Through the application of procedural rights, which sets standards and systems for the process of exercising

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<sup>106</sup> Gamer et al (eds) Black's Law Dictionary 9<sup>th</sup> ed.

<sup>107</sup> Du Plessis 2008 *PER/PELJ* 173.

and enforcing the rights of recipients via effective laws and regulation, an aggrieved party could seek and obtain redress.<sup>108</sup> The application of procedural rights thus assists to clarify the objective of any legislation relating to a specific substantive right and thereafter enumerate the standards required to realise those objectives. Therefore, legislation must be clear, setting out its provisions in broad and clear terms so that everyone knows what is required to prevent arbitrariness, corruption and regulatory failure.<sup>109</sup> This gives an assurance of procedural fairness, which is:

...concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcomes of those decisions. Such participation is a safeguard that not only signals respect for dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.<sup>110</sup>

Procedural rights therefore play a vital role in human rights protection and contribute to human development by guaranteeing an environment in which opportunities for the good life are made available to everyone.<sup>111</sup> Accordingly, the protection of the environment is a *sine qua non* for the realisation of other human rights, including the right to life. This implies that the effort towards the preservation of the basic resources of the environment should be aimed at human survival, underscoring why it has been convenient to apply the rules relating to civil and political rights to further the cause of environmental protection.<sup>112</sup> Where environmental rights are entrenched in the Constitution, they become constitutional environmental rights (CERs) and are therefore elevated to the level of rights that are more enduring than statements of policy or procedural norms, in which case they become instruments to “protect abjured rights of the underrepresented, and grant to the individual a subjective or personal guarantee.”<sup>113</sup> However, whether or not a CER provision is justiciable will determine its effectiveness or enforceability.

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<sup>108</sup> Handl “Human rights and protection of the environment: A mildly ‘revisionist’ view” in Shelton (ed) 2011 *Human Rights and the Environment* 54.

<sup>109</sup> Craig “Three perspectives on the relationship between administrative justice and administrative law” in Creyke and MacMillan (eds) *Administrative Justice: The Core and the Fringe* 33.

<sup>110</sup> Leon Joseph and Others v City of Johannesburg and Others 2009 ZACC 30 at para 42.

<sup>111</sup> Sax 1990 J Land Use & Evtl Law 102.

<sup>112</sup> Pedersen 2008 *The Georgetown Int’l Evtl Review* 77.

<sup>113</sup> More than 130 countries have constitutional provisions expressly addressing environmental norms as at 2006, but only 60 of them have fundamental environmental provisions. See May 2005-2006 *Pace Environmental Law Review* 118.



In some cases, CERs provisions are mere declarations of value,<sup>114</sup> rather than creating binding legal obligations, in which case, interested parties will have to look for ingenious ways of obtaining the benefit of the CERs. That could be achieved through the application of other substantive rights, such as the right to life as having been impacted by environmental abuse.<sup>115</sup>

There is benefit in adopting a rights-based approach in relation to the protection of the environment, because it focuses the attention of policy makers on the benefits derivable from the law in the conservation and protection of resources on which all life depends. That approach facilitates the adoption of uniform standards for regulation, guiding states on the appropriate legal and institutional framework for the protection of the environment, which interferes with the enjoyment of human rights.<sup>116</sup> However, given that environmental claims may relate to values rather than structures, there is generally no accepted standards to measure the effectiveness of statutes and regulations whose objectives are to preserve the environment and protect the rights of people associated therewith. This is reflected in the seemingly ambiguous terms, which sometimes characterise environmental protection statutes, including phrases like 'decent environment', or 'environment adequate for their health and well-being,' which unfortunately hardly impose any enforceable obligation on the state.<sup>117</sup>

CERs can be classified into substantive environmental rights and procedural environmental rights. While substantive environmental rights guarantee specific rights in relation to the environment in terms of the quality, which citizens can

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<sup>114</sup> Nickel 1993 Yale Journal of International Law 284.

<sup>115</sup> In the Indian case of *Subash Kumar v State of Bihar* A.I.R. 1991 SC 420, the Supreme Court held that the right to life is a fundamental right under the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life, such that if anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to the Constitution to remove the pollution of water or air which may be detrimental to the quality of life.

<sup>116</sup> Knox "Human Rights Obligations to Protect the Environment" in 2014 *The Proceedings of UNITAR-Yale Conference on Environmental Governance and Democracy* available at [www.conference.unitar.org/yale2014/sites/conference.unitar.org.yale2014/files\[date of use 28 October 2016\]](http://www.conference.unitar.org/yale2014/sites/conference.unitar.org.yale2014/files[date of use 28 October 2016].).

<sup>117</sup> Sax 1990 *J. Land Use & Envtl Law* 93.

expect to enjoy,<sup>118</sup> procedural environment rights provide the means by which aggrieved persons or institutions could challenge an action having a potential impact on the environment thereby causing harm and curtailing the enjoyment of constitutional rights.<sup>119</sup> For example, the rights to information and participation as well as the right of access to justice are specific civil and political rights applied to environmental rights, and they help to facilitate the endorsement of the environmental rights as human rights, because the normative quality of civil and political rights “is well defined and their claim to potential universal validity is believable.”<sup>120</sup>

Procedural rights that are likely to have a bearing on the hydraulic fracturing process are the right of access to information, the right to just administrative action and the right of access to courts. These are discussed below.

### *1.3.1 Types of procedural rights explained*

#### 1.3.2.1 Access to information

The origin of the right of access to information<sup>121</sup> is said to stem from the Confucian philosophy, which required Chinese emperors to “admit their own imperfection as a proof for their love of the truth and in fear of ignorance and darkness.”<sup>122</sup> It motivated the emergence of the first Western freedom of information law in Sweden in 1776, and has been relevant in rights discourse ever since.<sup>123</sup> The importance of the right to information is perhaps the reason why it featured in the first session of the United Nations General Assembly (hereafter the UNGA) wherein it was unanimously resolved *inter alia* that “freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations

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<sup>118</sup> Or other similar values like ‘adequate’, ‘healthy’, ‘balanced’ or ‘suitable to well-being,’ etc.

<sup>119</sup> Daly 2012 *International Journal of Peace Studies* 72.

<sup>120</sup> Handl “Human rights and protection of the environment: A mildly ‘revisionist’ view” in Shelton (ed.) 2011 *Human Rights and the Environment* (Vol. 1) 54.

<sup>121</sup> Often interchangeably referred to as ‘freedom of information’ (FOI) and ‘the right to information’ (RTI).

<sup>122</sup> Ackerman and Sandoval-Ballesteros 2006 *Admin L Rev* 88.

<sup>123</sup> See *Freedom of Press and the Right of Access to Public Records Act 1776* available at [www.presscouncils.org/library/Swedish\\_Press\\_Law.doc](http://www.presscouncils.org/library/Swedish_Press_Law.doc) [date of use 10 May 2016].

is consecrated."<sup>124</sup> The UNGA further resolved that a conference of all members of the United Nations be held to formulate views "concerning the rights, obligations and practices which should be included in the concept of freedom of information."<sup>125</sup> That importance was further underscored by the inclusion of the right to receive and impart information in article 19 of the *Universal Declaration of Human Rights* 1948.<sup>126</sup>

In relation to the environment, the *Rio Declaration* appropriately highlights the link between human rights and environmental protection in procedural terms, listing access to information as one of the effective tools of enforcement. Principle 10 elucidates the elements of procedural actions required, providing that:

...environmental issues are best handled with the participation of all concerned citizens, at the national 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.

Principle 10 creates a model on the right to information from which many global and domestic instruments have drawn to preserve the right. The essence of the right of access to information is not merely for the protection of a right, rather, it is to ensure that "there is open and accountable administration at all levels of government."<sup>127</sup> The right is not to be confused with the right to or freedom of expression of which it is sometimes constituted as a part. The right of access to information extends to cover "the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."<sup>128</sup> Therefore, in its most effective form, the right to information should consist of three elements, namely the

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<sup>124</sup> UNGA resolution A/RES/59/I of 14 December 1946 at [research.un.org/en/docs/ga/quick/regular/1](http://research.un.org/en/docs/ga/quick/regular/1) [date of use 11 May 2016].

<sup>125</sup> UNGA resolution A/RES/59/I of 14 December 1946.

<sup>126</sup> Available at [www.ohcr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohcr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf) [date of use 10 May 2016].

<sup>127</sup> Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) 83.

<sup>128</sup> Article 13.1 *American Convention on Human Rights* 1969 at [https://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.pdf](https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf).

right to seek and receive information, the right to inform, and the right to be informed, which together are the crystallisation of the political participation rights which cannot be expressed effectively unless there is access to information.<sup>129</sup>

If information on government's action is available to the public, there will hardly be any pressure coming from the people against the government to justify its action because it is already open to scrutiny. Therefore, access to information held by both public and private institutions enhances the citizens' ability to make informed choices.<sup>130</sup> As the scope of state power increases its inroad into different spheres of human activities increases, the need for state agencies to provide information to the population on what is being done and the underlying reasons therefor becomes even more critical. This is necessary in order to allow people a degree of participation in governance, an essential component of democracy. It is a necessary step to protect human rights through a process, which guarantees that those who exercise state power are not left to do so without check. The grant of access to information is the first step in that process. Access to information facilitates transparency in decision-making, thereby ensuring that the reasons for decisions are available to those who are interested in knowing, thereby enhancing the legitimacy of, and trust in the government.<sup>131</sup>

By necessary implication, the exercise of the right of access to information enhances democratic participation of the people by way of oversight on state action through informed and robust public debate, which ultimately promotes participation on the part of the citizens on the one hand, and responsibility and transparency in government on the other.

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<sup>129</sup> Ackerman & Sandoval-Ballesteros 2006 *Admin L Rev* 89.

<sup>130</sup> O'Regan "Democracy and access to information in the South African Constitution: Some reflections" in 2004 *Proceedings of the Conference on The Constitutional Right of Access to Information* 13 available at [www.kas.de/wf/doc/kas-4936-1522-2-30.pdf](http://www.kas.de/wf/doc/kas-4936-1522-2-30.pdf) [date of use 11 May 2016].

<sup>131</sup> Ackerman and Sandoval-Ballesteros 2006 *Admin L Rev* 92.

### 1.3.2.2 Just administrative action

The right to just administrative action requires that action taken by an administrator must be within the powers conferred by law and must be exercised in compliance with certain procedural prerequisites.<sup>132</sup> Subject to constitutional or legislative provisions applicable in different jurisdictions, the courts are empowered to review and set aside administrative decisions. A review is desirable, considering that the nature of the duties of public officers is sometimes characterised by the use of discretion based on knowledge and training, which may be outside the ambit of jurisprudence.<sup>133</sup> However, the essence of review is not to substitute the view of the court for that of the administrative authority. Rather, it "is to ensure that the individual is given fair treatment by the authority to which he has been subjected."<sup>134</sup> The scope of administrative law, however, transcends judicial review, extending to state regulation, the exercise of discretion, the provision of public information and the promotion of accountability and control.<sup>135</sup> The prerequisites are reflected in the grounds for which judicial review of administrative action is undertaken and are generally classified under three principles namely, illegality, irrationality, and procedural impropriety.<sup>136</sup>

In managing environmental affairs, the limits of state power over the citizens must be fixed and determined, and the rights of the citizens against the state and its agencies must be made plain.<sup>137</sup> There is a need for people to know where they stand in relation to the law as it affects their rights and their actions. This is achieved by a system of administrative law, which regulates the activities of persons or agencies exercising public powers or who perform public functions notwithstanding whether or not the persons or agencies are public authorities.<sup>138</sup> Subject to varying

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<sup>132</sup> Hoexter *Administrative Law in South Africa* 167, De Ville *Judicial Review of Administrative Action in South Africa* 297, and Leyland and Anthony *Administrative Law* 186.

<sup>133</sup> Kallis 1939 *Chi-Kent L Rev* 348.

<sup>134</sup> Per Lord Hilsham in *Chief Constable of North Wales Police v Evans* 1982 WLA 1160.

<sup>135</sup> Jones "Administrative justice: Some preliminary thoughts on a (post) modern theoretical perspective" in Creyke and MacMillan (eds) 2000 *Administrative Justice- The Core and the Fringe* 41.

<sup>136</sup> Hoexter *Administrative Law in South Africa* 168.

<sup>137</sup> Boughey 2013 *ICLQ* 58.

<sup>138</sup> Hoexter *Administrative Law in South Africa* 2.

conditions the state may permit an act or project, which facilitates the economic growth and social development but which could adversely impact the environment. However, the state permits an act or project, while entrusting agencies of government with the responsibility to ensure that the act or project is compliant with environmental and planning laws. This probably accounts for why environmental law has been described as “administrative law in action,” frequently addressing questions relating to administrative decision-making powers,<sup>139</sup> making them susceptible to legal challenge to determine whether or not they are lawful, reasonable or procedurally fair.<sup>140</sup>

The essence of administrative justice in the realisation of procedural rights is manifested in three situations. First, citizens can effectively defend their rights because they are put in a position in which they have an understanding of how policy and actions can affect them, and should it be necessary to defend a right they are better positioned to do so. Secondly, the administrative agency is able to perform its function in a rational and structured manner eschewing arbitrary and biased outcomes, which in the long run facilitates accountability and reinforces public confidence in the administration.<sup>141</sup> Thirdly, the reasons provided as the basis for administrative actions can enable the courts or administrative tribunals to assess the validity or legality of the actions in the face of legislative or constitutional provisions.<sup>142</sup>

Flowing from the above, rules should be simple and clear, containing provisions for general guidelines by which future actions could be tested, and should expressly state the rights of citizens in a manner that those rights could be guaranteed. This underscores the whole essence of administrative law, as its ultimate function in the long run is to protect the dignity of man.<sup>143</sup> The value of dignity is applied in the

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<sup>139</sup> Glazewski *Environmental Law in South Africa* 5-27.

<sup>140</sup> See *Del Porto School Governing Body v Premier*, Western Cape 2002 (3) 265 (CC) 84-90.

<sup>141</sup> Brynard 2009 *Journal of Public Administration* 641.

<sup>142</sup> Glinz 2009 *Namibian Law Journal* 4.

<sup>143</sup> Dyzenhaus 2012 *Review of Constitutional Studies* 88.

interpretation of constitutional right to equality,<sup>144</sup> and the right to be treated equally before the law is guaranteed by a demand that government action be undertaken only according to the law, otherwise the resultant arbitrariness of state action is likely to subject people to indignity. Therefore, judges are conferred with authority to pronounce decisions and actions as invalid if an administrator or an agency of government transcends the limits of constitutional or parliamentary authority.<sup>145</sup>

### 1.3.2.3 Access to courts

Access to courts is the pivotal basis for the rule of law, as the value of the rights guaranteed by a constitution become meaningless if access to an adjudicatory tribunal is delayed or denied to an aggrieved person alleging a breach of fundamental rights.<sup>146</sup> If access to the court is denied in the face of potential violation of a right, "the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."<sup>147</sup>

The notion of constitutional democracy presupposes that the elected representatives of the people are not conferred with an absolute authority; rather, a system of checks and balances put in place to control arbitrary exercise of power. Accordingly, civilised societies recognise and protect the right of citizens to seek redress whenever their interests are prejudiced whether by an act of the state or that of other citizens. This is the right of people to have access to justice, which itself encompasses two elements. First is a procedural element, which presumes the existence of formal and informal avenues to prevent conflict and settle disputes, and secondly, a substantive element designed to ensure that the end of the whole process is to reach "a just, fair or equitable outcome."<sup>148</sup> The procedural element is

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<sup>144</sup> De Vos and Freedman (eds) 2014 *South African Constitutional Law in Context* 456. See also *S v Makwanyane* 1995 (3) SA 391 (CC) 144.

<sup>145</sup> *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC).

<sup>146</sup> Buckley 2008 *SCLR* 573.

<sup>147</sup> *BCGEU v British Columbia (Attorney General)* 1988 2 SCR 230 (cited by Buckley 2008 *SCLR* 573).

<sup>148</sup> Buckley 2008 *SCLR* 567.

embedded in the right of access to the courts, and it is rooted<sup>149</sup> in the *Magna Carta*,<sup>150</sup> the foundation of the Anglo-American struggle for liberty and justice.<sup>151</sup> Indeed, the right of access to justice appear to be the pivotal point of the first and the fourteenth amendments of the *United States Constitution*, facilitating appropriate access to the courts by the due process clause guaranteeing every person the right to resort to judicial process to redress alleged grievances.<sup>152</sup>

In regional international law, article 6 of the *European Convention on Human Rights* 1950 (hereafter the European Convention) protects the right of access to courts. A similar provision is contained in article 7 of the *African Charter on Human and Peoples Rights*, which provides *inter alia* that:

- 1) Every individual shall have the right to have his cause heard. This comprises:
  - (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised by conventions, laws, regulations and customs in force.

Therefore, to be effective, the right of access to courts must be practical and effective, implying that the applicant must "have a clear, practical opportunity to challenge an act that is an interference with his rights."<sup>153</sup> Furthermore, the right is not to be impaired by excessive court fees, unreasonable time limits or inordinate procedural requirements limiting the possibility of applying to a court.<sup>154</sup> Thus, in *Kyrtatos v Greece*,<sup>155</sup> the *European Court of Human Rights* (hereafter the European Court) held that article 6(1) of the European Convention imposes a duty on the contracting states to organise their judicial systems such that their courts can hear cases within a reasonable time, pointing out that:

...the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and with the help of the following criteria: the complexity

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<sup>149</sup> The first evidence of access to justice could be traced to the trial of man in Eden, wherein God granted man a right of fair hearing prior to the sentencing of Adam and Eve. See Genesis 1: 9-24.

<sup>150</sup> Available at [www.bl.uk/magna-carta](http://www.bl.uk/magna-carta) [date of use 11 March 2018].

<sup>151</sup> Phillips 2003 *NYU L Rev* 1310.

<sup>152</sup> McLaughlin 1987 *Fordham L Rev* 1110.

<sup>153</sup> *Bellet v France* 23805/94 available at <http://hudoc.echr.coe.int/eng/?i=001-57952> [date of use 13 May 2016].

<sup>154</sup> Council of Europe Practical Guide to Article 6 13.

<sup>155</sup> *Kyrtatos v Greece* 41666/98 para 40-42 available at <http://hudoc.echr.coe.int/app/conversion/pdf/?library=001-61099> [date of use 13 May 2016].



of the case, the conduct of the parties, the conduct of the authorities dealing with the case and what was at stake for the applicant in the dispute.

In the same vein, article 4 of the Aarhus Convention imposes an obligation on the contracting parties, to ensure that “public authorities, in response to a request for environmental information, make such information available to the public.” The importance of the right of access to environmental information is underscored by the fact that the Aarhus Convention contains copious provisions, *inter alia*, extensively defining the nature of environmental information,<sup>156</sup> and the circumstances in which a refusal to grant access is allowable,<sup>157</sup> with a proviso that the grounds for “refusal shall be interpreted in a restrictive way.”<sup>158</sup>

The maxim, *ubi jus ibi remedium*,<sup>159</sup> implies that whenever a right is infringed or compromised, the law must afford the remedy of an action for the enforcement of that right. The possibility of the enforcement of an action is only possible if there is an effective and enforceable right of access to approach the courts.

### *1.3.3 Procedural environmental rights in South Africa*

The requirement to foster development without compromising the environment is in line with the opinion of the Constitutional Court in *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*.<sup>160</sup> The Court held in the case that “...development cannot subsist upon a deteriorating environmental base.” This upholds section 24 of the Constitution protecting, *inter alia*, the substantive right of everyone “to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures...” Though the term “well-being” is rather wide, open-ended and might be incapable of a precise definition, it expresses the objective of the right protected in section 24, namely the protection of people against harm attributable to the abuse

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<sup>156</sup> Article 2(3) of the Aarhus Convention.

<sup>157</sup> Article 4(3) of the Aarhus Convention.

<sup>158</sup> Article 4(4)(h) of the Aarhus Convention.

<sup>159</sup> Per Lord Holt in *Ashby v White* 1703 ER 126.

<sup>160</sup> 2007 (6) SA 4 (CC) 44.

of the environment.<sup>161</sup> While section 24(a) creates a substantive right which could be realised through judicial action on the proof of facts as to ‘harm’, ‘health’ and ‘well-being’, section 24(b) creates a procedural right, in that the realisation of the right protected is on the basis of an administrative action to be carried out by the State or its agencies. An aggrieved person can seek redress with a view to compel the government or its agency to comply with constitutional requirement through the enforcement of procedural rights.<sup>162</sup>

The framework for the realisation of environmental rights is through judicial and administrative mechanisms within the context of ‘environmental governance’ which is ‘the collection of legislative, executive and administrative functions, processes and instruments<sup>163</sup> used by any organ of state to ensure sustainable behaviour by all as far as governance activities, products, services, processes, and tools are concerned.’<sup>164</sup> As Du Plessis points out, the risks associated with hydraulic fracturing necessitates all-round monitoring of its total life cycle spanning exploration, production and closure phases.<sup>165</sup>

In relation to the enforcement of environmental rights, the following procedural rights manifest in the Constitution, namely the right of access to information,<sup>166</sup> the right to just administrative action,<sup>167</sup> and the right of access to courts.<sup>168</sup> The three species of procedural rights are considered below.<sup>169</sup>

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<sup>161</sup> HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2006 ZAGPHC 132 para 18.

<sup>162</sup> Razzaque ‘Human rights to a clean environment: procedural rights’ in Fitzmaurice *et al* *Research Handbook on International Environmental Law* 284.

<sup>163</sup> The key components of the legal framework for environmental law in South Africa comprises the Constitution, the *National Environmental Management Act* 107 of 1998 (hereafter the NEMA) and the regulations made thereunder, with the ancillary statutes on the protection of human rights including the PAIA and the PAJA, which will be discussed in chapters 4 and 5 respectively.

<sup>164</sup> Kotzé 2004 *PER/PELJ* 63.

<sup>165</sup> Du Plessis 2015 *PER/PELJ* 1445.

<sup>166</sup> Section 32.

<sup>167</sup> Section 33.

<sup>168</sup> Section 34.

<sup>169</sup> The right to public participation is alluded to in the discussion of the three procedural rights where it has the potential to facilitate the realisation of any of the three rights discussed. See paragraphs 1.3.3.1, 2.4.8, 5.4.1.1.2, and 5.4.3.

### 1.3.3.1 Access to information in South Africa

Section 32 of the Constitution provides as follows:

- 1) Everyone has the right of access to-
  - (a) Any information held by the state; and
  - (b) Any information that is held by another person and that is required for the exercise or protection of any rights.
- 2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The foregoing is sufficiently comprehensive to ensure that the right of access to information is enforceable. It is said that the provision of section 32 of the Constitution gives greater significance to the right than in any other country in Africa.<sup>170</sup> Section 32(1)(b) allows for its incorporation by reference into the other provisions of the Bill of Rights by granting access to information that is required “for the exercise or protection of any rights” including that on the environment. Furthermore, the provision settles for once, the question as to whether or not the right of access to information could be extended to information in possession of private persons or organisations.<sup>171</sup> Pursuant to the constitutional requirement and to guarantee the ease of enforcement of the right of access to information, the *Promotion of Access to Information Act*<sup>172</sup> (hereafter the PAIA), was enacted to “actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.”<sup>173</sup>

It is difficult, if not impossible to fulfil fundamental rights when people do not have access to relevant information because the authorities refuse to share same with the affected stakeholders.<sup>174</sup> The lack of information may prejudice people’s interests whether in understanding the rationale for a policy, or being in the dark as to what is required in the event of having to establish a claim to enforce the substantive

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<sup>170</sup> Ward and Stone “Twenty years of South African Constitutionalism: A Critical Analysis of the Journey of the Right of Access to Information in South Africa” at [www.nylslawreview.com/uploads/sites/16/2014/11/Ward-and-Stone.pdf](http://www.nylslawreview.com/uploads/sites/16/2014/11/Ward-and-Stone.pdf) [date of use 13 May 2016].

<sup>171</sup> For example, the applicable legislation in the USA, the *Freedom of Information Act* 1966 5 USC 522 does not extend access to information in possession of private entities.

<sup>172</sup> Promotion of Access to Information Act 2 of 2000.

<sup>173</sup> Preamble to the PAIA.

<sup>174</sup> Du Plessis 2008 *PER/PELJ* 182.

right. Section 32 of the Constitution and the PAIA are therefore meant to prevent this scenario. In relation to the environment, section 31 of NEMA subjected environmental information to the treatment of “the statute contemplated under section 32(2) of the Constitution,” being the PAIA. Accordingly, the courts have upheld the position that the enforcement of the right of access to information advances the course of justice. In *Independent Newspapers (Pty) v Minister for Intelligent Services: In re Masetlha v President of the Republic of South Africa*,<sup>175</sup> the Constitutional Court emphasised that:

...ordinarily, courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one’s case is a time-honoured part of a litigating party’s right to a fair trial.

Similarly in *Mittalsteel South Africa Limited v Hlatshwayo*,<sup>176</sup> the Supreme Court of Appeal held that subject to justifiable limitations such as the reasonable protection of privacy and the balancing of that right with other rights,<sup>177</sup> the appellants were legally obliged to provide the records required by the respondent, in this case, to facilitate the conduct of the respondent’s research as a student.

Furthermore, the right of access to information is an integral part of the right to participation. If there is lack of information, participation in decision-making cannot be meaningful and any decision reached could not be said to have been “taken in an open and transparent manner.”<sup>178</sup> A decision reached without prior information to those affected could not have addressed “the interests, needs and values of all interested and affected parties.”<sup>179</sup> The value of public participation is emphasised in *Petro Props (Pty) Limited v Barlow*.<sup>180</sup> In that case, the respondents opposed the construction of a service station, alleging that the site was an ecologically sensitive

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<sup>175</sup> 2008 (5) SA 31 (CC) para 25.

<sup>176</sup> 2007 (1) SA 66 (SCA).

<sup>177</sup> Section 9(b)(i) and (ii) PAIA.

<sup>178</sup> Section 2(4)(k) of NEMA.

<sup>179</sup> Section 2(4)(g) NEMA.

<sup>180</sup> 2006 ZAGPHC 46.

wetland, which would be degraded by the construction contrary to the applicant's contention that the respondents' campaign was unlawful. The applicant sought to end the campaign through an interdict, arguing that it was damaging to their interests. The court refused to grant the interdict, observing that initiatives like that undertaken by the respondents should be commended because it "earns the support of our Constitution" and:

...in this context, it should be borne in mind that the Constitution does not only afford a shield, to be resorted to passively and defensively. It also provides a sword, which groups like the association can and should draw to empower their initiatives and interests.<sup>181</sup>

It is therefore important that a project for the development of natural resources should not just be presented as simply beneficial or sustainable. It should be manifestly perceived as such by the public, especially the communities that are likely to be affected by the development.<sup>182</sup> Moreover, access to information engenders public participation, especially in any new development such as hydraulic fracturing, where the potential risks are yet to be conclusively grasped. Making the necessary relevant information available to stakeholders will ensure participation. The right of access to information in relation to hydraulic fracturing is considered in chapter 4 of the study.

### 1.3.3.2 Just administrative action in South Africa

Section 33 of the Constitution provides in part that:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

Section 33(3) further provides that legislation must be enacted to give effect to the rights enumerated above and pursuant to that, the *Promotion of Administrative Justice Act*<sup>183</sup> (hereafter "the PAJA") was enacted to compel public officers to give reasons for certain administrative actions as a matter of duty, thereby stimulating

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<sup>181</sup> 2006 ZAGPHC 46 at para 65.

<sup>182</sup> Murombo 2008 *PER/PELJ* 3.

<sup>183</sup> 3 of 2000.

“accountability, transparency and accessibility in public administration.”<sup>184</sup> The objective of section 33 of the Constitution is to subject the exercise of power to constitutional control through legislation, such that when administrative acts affect or threaten the rights of individuals, there is recourse to the constitutional standards of administrative justice.<sup>185</sup> Section 3(1) of the PAJA requires that any administrative action “which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.” The circumstances of each case are relevant,<sup>186</sup> and an administrator must ensure that a person who could be affected materially or adversely by an administrative action must be given the following opportunities amongst others:<sup>187</sup>

- i adequate notice of the nature and purpose of the proposed administrative action;
- ii a reasonable opportunity to make representations;
- iii a clear statement of the administrative action;
- iv adequate notice of any right of review and internal appeal, where applicable;  
and
- v adequate notice of the right to request reasons.<sup>188</sup>

Accordingly, the essence of the right to just administrative action is to keep administrators within the ambit of the law in the exercise of powers conferred on them. The South African legal system provides for a process whereby administrative action can be challenged for failure to comply with the law. The right to just administrative action in relation to hydraulic fracturing is discussed extensively in chapter 5 of the study.

### 1.3.3.3 Access to courts in South Africa

Section 34 of the Constitution of South Africa provides that:

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<sup>184</sup> Brynard 2009 Journal of Public Administration 639.

<sup>185</sup> *The President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) 136.

<sup>186</sup> Section 3(2)(a) PAJA.

<sup>187</sup> Section 3(2)(b) PAJA.

<sup>188</sup> *Walele v City of Cape Town and Others* 2008 ZACC 29. The right to just administrative action is discussed in chapter 4.

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

For the right of access to courts to be effective, the focus must not be limited to the mere existence of functioning institutions, but also on the prospective users of the justice system.<sup>189</sup> The case of *Johan de Cock v Minister of Water Affairs and Forestry and Others*,<sup>190</sup> highlights the challenge that without an appropriate procedural framework, the right to an environment that is not harmful to health or well-being cannot be effectively realised. The applicant applied to the Constitutional Court for direct access pursuant to section 167(6)(a) of the Constitution, citing among others, the then Minister of Water Affairs and Forestry, and the Minister of Environmental Affairs for their failure to both implement legislation aimed at containing pollution and to prosecute the alleged offender for causing such pollution. Although the Court refused to grant direct access, it observed that the case raised important issues of public interest, and that there are “difficulties attendant upon bringing appropriate environmental cases before a court.” The Court noted that cases like that may require expert lawyers collaborating with academics skilled in the area of environmental law, which were lacking in the case, and that:

...without legal assistance, this applicant will struggle to bring properly a case in terms of the applicable law. In his papers, Mr. de Kock has brought to the attention of the Court the need for him to be considered for legal assistance. He outlines his desperate and failed attempts to obtain legal assistance from the relevant bodies...He also states that he has been refused legal aid...This seems an appropriate case to direct the Registrar to bring this judgment to the attention of the Law Society of the Northern Provinces, with a request that it considers whether one of its members may provide assistance to Mr. de Kock.<sup>191</sup>

It is therefore unlikely that an ordinary person may be able to unbundle the issues in matters affecting the environment sufficiently to be able to prove an infringement of the environmental right without the assistance of experts. This is likely to involve significant costs. If the prospective claimant cannot afford these costs, his<sup>192</sup> access

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<sup>189</sup> Nyenti 2013 *De Jure* 902.

<sup>190</sup> 2005 ZACC 12.

<sup>191</sup> 2005 ZACC 12 para 5.

<sup>192</sup> Reference to pronouns representing the male sex made in the course of comments throughout this study includes reference to the female sex.

to the court by filing a claim becomes meaningless, because he will not be able to discharge the required burden of proof.

Meanwhile, the question of standing is also relevant to a discussion of the right of access to the courts. Section 38 of the Constitution introduces a much more liberal approach to rules of standing compared to the restrictive common law rules which have been “a formidable obstacle in the way of access to the courts.”<sup>193</sup> In relation to the environment, the NEMA broadens the provisions relating to standing. Section 32(1) NEMA grants standing<sup>194</sup> “to any person or group of persons” to seek relief for “any breach or threatened breach” of any provision of the NEMA “or any statutory provision concerned with the protection of the environment or the use of natural resources,” compared to the liberal provisions of the Constitution, which are limited to an infringement or threat of infringement of a right in the Bill of Rights.<sup>195</sup> The extensive list of potential parties who may approach a court for relief for any breach or threat of breach of NEMA is in accord with the spirit of the Constitution.<sup>196</sup> In *Wildlife Society of Southern Africa and Others v Minister of Environment Affairs and Tourism of the Republic of South Africa and Others*,<sup>197</sup> the court held that when a statute imposed an obligation upon the State to take certain measures in order to protect the environment in the interest of the public, an organisation like the first applicant whose objective is the promotion of environmental conservation should have standing to apply for an order compelling the State to comply with its statutory obligations. On the concern that a generous approach to the question of standing will open the floodgates of frivolous and vexatious litigation, the court observed that “cranks and busybodies” would be met with appropriate order of costs to inhibit their litigious ardour.<sup>198</sup>

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<sup>193</sup> Hoexter *Administrative Law in South Africa* 489.

<sup>194</sup> Feris “Environmental rights and locus standi” in Paterson and Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 148.

<sup>195</sup> Section 38 of the Constitution.

<sup>196</sup> *Ferreira v Levin NO* 1996 (1) SA 984 (CC).

<sup>197</sup> 1996 (3) SA 1095.

<sup>198</sup> 1996 (3) SA 1095 at 1106 D-G.



Furthermore, the recently decided case of *Nkala and Others v Harmony Gold Mining and Others*<sup>199</sup> confirmed that the utility inherent in class actions is an integral part of South African law by virtue of section 38(c) of the Constitution. In this case, the court granted orders certifying a consolidated class action against companies operating in the gold mining industry, authorising the applicants standing to institute action on behalf of current and past underground mineworkers who contracted silicosis and tuberculosis. The court explained the rationale for class action as a process that:

...is utilised to allow parties and the court to manage a litigation that would be unmanageable or uneconomical if each plaintiff was to bring his/her claim individually. It is normally instituted by a representative on behalf of the relevant class of plaintiffs. The class action process is part of the equity developed law and is designed to cover situations where the parties, particularly the plaintiffs, are so numerous that it would be almost impossible to bring them all before the court in one hearing, and where it would not be in the interest of justice for them to come before the court individually.<sup>200</sup>

The right of access to court confirms the view that the court is the refuge of the ordinary person against any perceived injustice. In the absence of an enabling legal provision, which facilitates access to the courts particularly in matters affecting the environment, the right might just be a mirage. The right of access to courts in relation to hydraulic fracturing will be considered in chapter 6 of the study.

#### ***1.4 Procedural rights implications of hydraulic fracturing.***

The relevance of subjecting administrative actions to constitutional scrutiny cannot be overstated in hydraulic fracturing, a process still in its developing stages even in the most advanced jurisdictions, with a range of concerns as to health and environmental risks, which has often been the subject of controversy amongst the most discerning and knowledgeable parties.<sup>201</sup> For example, operators have consistently tried to resist the requirements of disclosure of the chemicals used in hydraulic fracturing operations on the argument that they should be protected as a trade secret.<sup>202</sup> However, leaving the issue of disclosure to the voluntary decision

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<sup>199</sup> 2016 ZAGPJHC 97.

<sup>200</sup> *Nkala and Others v Harmony Gold Mining and Others* 2016 ZAGPJHC 97.

<sup>201</sup> Zillman *et al* 2015 *Journal of Energy Law and Natural Resources Law* 86.

<sup>202</sup> Disclosure statutes on hydraulic fracturing vary in complexity in the USA, such that by mid-2013, there were 17 states requiring full disclosure in addition to others at different stages of

of operators<sup>203</sup> may result in claimants not being able to prove the nature or effect of chemicals and process of which they have little or no information or knowledge.<sup>204</sup> A position like that may infringe the right of access to information.

Agreements between landowners and oil and gas companies are usually complex, and sometimes include clauses restricting the disclosure of information and clauses which may oblige parties to settle disputes out of regular courts. While such contract clauses may constitute a potential obstacle against a potential complainant, it may also be applied to oust the jurisdiction of the court, especially against vulnerable persons who may not have the resources to engage the services of lawyers to argue their cause.<sup>205</sup> Agreements of this nature are likely to infringe the right of access to information, and the right of access to the courts.<sup>206</sup> In the same vein, by the nature of hydraulic fracturing, information that may be required to establish a claim or protect a prospective fundamental right of an aggrieved person may be in possession of the operator or the regulator. Without proper regulation, the right of access to information and other procedural rights cannot be effectively guaranteed.<sup>207</sup>

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adopting some disclosure regulations, each with varying degrees of attendant verification challenges. See Hall 2013 *Idaho L Rev* 408.

<sup>203</sup> In the state of Pennsylvania in the USA, the operator is ordinarily permitted to withhold information on chemical additives used, giving only general chemical description, submitting a written statement that the information is a confidential trade secret. However, in the event of a spill, such trade secret has to be disclosed at the request of regulators, health authorities and any person affected by the spill. See "Occupational Safety and Health Administration Field Safety and Health Manual" available at [www.osha.gov/OshDoc/Directive\\_pdf/ADM\\_04-00-001.pdf](http://www.osha.gov/OshDoc/Directive_pdf/ADM_04-00-001.pdf) [date of use 27 October 2016].

<sup>204</sup> Kearns "A human rights assessment of hydraulic fracturing for natural gas" 2011 *Environmental and Human Rights Advisory* [EHRA] (A report prepared for the Commissioner, Department of Environmental Conservation of New York State in December 2011) available at [www.earthworksaction.org/files/publications/EHRA\\_Human\\_rights\\_fracking-FINAL](http://www.earthworksaction.org/files/publications/EHRA_Human_rights_fracking-FINAL) [date of use 4 July 2015].

<sup>205</sup> See "Children given lifelong ban on talking about fracking (2 Pennsylvanian children will live their lives under a gag order imposed under a \$750,000 settlement)" available at [www.theguardian.com/environment/2013/aug/05/children-ban-talking-about-fracking](http://www.theguardian.com/environment/2013/aug/05/children-ban-talking-about-fracking) [date of use 24 August 2015].

<sup>206</sup> See paras 1.2 and 2.4 for a review of the adverse impacts of hydraulic fracturing.

<sup>207</sup> Pless "States Take the Lead on Regulating Hydraulic Fracturing: Overview of 2012 State Legislation" 2013 *National Conference of State Legislatures Report* (NCSL), available at [www.ncsl.org/documents/energy/NaturalGasDevLeg313](http://www.ncsl.org/documents/energy/NaturalGasDevLeg313) [date of use 25 February 2015].

The extent of the knowledge of people in relation to the potential harm they could suffer may be limited because hydraulic fracturing is highly specialised. Furthermore, the resources available to such people to seek redress in the event of the infringement of their rights are causes for concern, especially if they are poor and vulnerable. Poor and vulnerable persons may not be able to approach the courts for a remedy due to financial challenges or ignorance of their rights, compared to the companies engaged in hydraulic fracturing operations who likely have access to superior legal resources and finance. Situations like these may prejudice the right of access to court. Denial of access to the courts for whatever reason is a denial of justice. Given that poverty and illiteracy still pervade the communities where hydraulic fracturing may take place and the society at large, the applicable law and the regulations should protect those who may be incapable of effectively protecting themselves.<sup>208</sup> Furthermore, a denial of access to environmental information on the basis of lack of *locus standi* may constitute a denial of the right of access to information and possibly a potential denial of the ability to prevent harm.<sup>209</sup>

Furthermore, a cursory review of the legislation applicable to hydraulic fracturing including the MPRDA, the *National Water Act*<sup>210</sup> (hereafter "the NWA"), and the NEMA as well as the regulations made thereunder indicate that administrative actions take place pursuant to them from time to time. It is safe to assume that the same will apply to hydraulic fracturing. In that case, it is necessary to ensure that hydraulic fracturing activities are subject to procedural rights provisions in the Constitution, and the statutes affecting procedural rights like the PAIA and the PAJA.<sup>211</sup>

Some of the applicable legislation is replete with provisions conferring discretionary powers on public officers, which if exercised wrongly could result in a breach of a

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<sup>208</sup> See *Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 at paras 16-17.

<sup>209</sup> Ksentini "Review of Further Developments in Human Rights and the Environment - The Report of Mrs. Fatima Zohra (Special Rapporteur)" paras 210-213 available at <http://center-hre.org/wp-content/uploads/2011/05/REVIEW-OF-FURTHER-DEVELOPMENTS-IN-FIELDS-WITH.pdf> [date of use 18 October 2018].

<sup>210</sup> *National Water Act* 36 of 1998.

<sup>211</sup> See Glazewski "The constitutional and legal framework" in Glazewski and Esterhuyse (eds) 2016 *Hydraulic Fracturing in the Karoo: Critical Legal and Environmental Perspectives* 34.

procedural right. For example, the MPRDA puts the nation's mineral and petroleum resources in the custody of the Minister of Mineral Resources, who "may grant, issue, refuse, control, administer, and manage any reconnaissance permission ... exploration right and production right".<sup>212</sup> Other discretionary powers of the Minister include the following, namely to facilitate assistance to historically disadvantaged persons as he may determine,<sup>213</sup> refuse to disclose to third parties information or data supplied in confidence by operators,<sup>214</sup> and to delegate his powers in relation to petroleum exploration and production.<sup>215</sup> However, unlike mining,<sup>216</sup> the exercise of the Minister's (and the designated agency's) powers in relation to petroleum exploration and production<sup>217</sup> is to a large extent mandatory in respect of the issuance of a reconnaissance permit,<sup>218</sup> a technical co-operation permit,<sup>219</sup> an exploration right,<sup>220</sup> and a production right.<sup>221</sup>

### **1.5 Research question**

The exposition above therefore leads to the research question, namely "to what extent does the South African legal framework pertaining to hydraulic fracturing provide for the protection of procedural environmental rights?"

### **1.6 Objectives of the study**

The aim of the study is to determine to what extent the South African legal framework pertaining to hydraulic fracturing provide for the protection of procedural environmental rights. The aim will be realised through the following sub-objectives:

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<sup>212</sup> Section 3(2)(a) of MPRDA.

<sup>213</sup> Section 12 of MPRDA.

<sup>214</sup> Section 30(2) of MPRDA.

<sup>215</sup> Section 70 of MPRDA.

<sup>216</sup> Section 48(2) of MPRDA gives the Minister the power to issue a reconnaissance permission, prospecting right, mining right or mining permit "if the Minister is satisfied" as to listed conditions in the section.

<sup>217</sup> See chapter 6 of MPRDA.

<sup>218</sup> Sections 74 and 75 of MPRDA.

<sup>219</sup> Sections 76 and 77 of MPRDA.

<sup>220</sup> Sections 79 and 80 of MPRDA.

<sup>221</sup> Sections 83 and 84 of MPRDA.

- (i) To determine the nature of hydraulic fracturing with reference to the possible impacts on human rights, specifically the protection of procedural environmental rights.
- (ii) To critically discuss the key features of the right of access to information from an international, regional and South African legal perspective and to suggest how South African legislation on hydraulic fracturing may strengthen the right based on the experience of the UK and the state of Pennsylvania in the USA.
- (iii) To critically discuss the key features of the right to just administrative action from an international, regional and South African legal perspective and to suggest how South African legislation on hydraulic fracturing may strengthen the right based on the experience of the UK and the state of Pennsylvania in the USA.
- (iv) To critically discuss the key features of the right of access to courts from an international, regional and South African law framework perspective and to suggest how South African legislation on hydraulic fracturing may strengthen the right based on the experience of the UK and the state of Pennsylvania in the USA.
- (v) To synthesise the findings and the conclusions in paragraphs (i) to (iv) above to make recommendations on how the South African law framework on hydraulic fracturing should be strengthened for the protection of procedural environmental rights.

### ***1.7 Research methodology***

The study<sup>222</sup> is an evaluative review of literature on hydraulic fracturing and the international, regional and South African legal frameworks pertaining to procedural environmental rights. Primary sources such as legislation, regulations, and case law supported by a study of secondary sources such as books, chapters in books, law reviews, journal articles on the three aspects of procedural rights, namely the right

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<sup>222</sup> The research for this study was concluded on 31 August 2018.

of access to information, the right to just administrative action and the right of access to the courts, in relation to environmental rights, as well as relevant internet sources are critically considered and analysed.

The research also considers the same aspects in the UK and the USA. The study will focus on one state in the USA, namely the state of Pennsylvania. The choice of the state of Pennsylvania<sup>223</sup> (in the USA) is premised on the fact that the *Constitution of the Commonwealth of Pennsylvania*<sup>224</sup> has a Declaration of Rights in its article I against which the acts of the state and private persons can be tested to determine their constitutionality. Rights protected include the free communication of thoughts and opinions,<sup>225</sup> access to courts,<sup>226</sup> non-denial of right to enjoy civil rights by the state and its agencies,<sup>227</sup> and the right "to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."<sup>228</sup> Secondly, Pennsylvania has a chequered history with oil and gas. The first oil well in the USA was drilled in the state in 1859, prompting the first oil boom in the world.<sup>229</sup> The Marcellus shale formation,<sup>230</sup> the reservoir of one of the largest known shale gas fields in the world,<sup>231</sup> covers an estimated 64% of the land area of Pennsylvania.<sup>232</sup> The invention of unconventional drilling techniques, including hydraulic fracturing, has increased Pennsylvania's natural gas production exponentially, contributing to the improved energy security witnessed in USA since

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<sup>223</sup> The state of Pennsylvania was founded in 1860, when King Charles II of England granted William Penn a charter that included title over a vast tract of woodlands that comprises present day Pennsylvania. See "The Commonwealth of Pennsylvania" available at [www.netstate.com/states/intro/pa\\_intro.htm](http://www.netstate.com/states/intro/pa_intro.htm) [date of use 17 April 2017].

<sup>224</sup> Available at <http://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/00/00.HTM> [date of use 11 February 2018].

<sup>225</sup> Article 1, section 7.

<sup>226</sup> Article 1, section 11.

<sup>227</sup> Article 1, section 26.

<sup>228</sup> Article 1, section 27.

<sup>229</sup> Cruz et al 2014 *Monthly Labour Review* 1.

<sup>230</sup> The Marcellus shale formation occupies an estimated 95,000 sq. miles over the Appalachian basin spanning the states of New York, Pennsylvania, West Virginia, Ohio, Maryland, Virginia and Kentucky.

<sup>231</sup> IEA Golden Rules for a Golden Age of Gas: World Energy Outlook Special Report on Unconventional Gas 102.

<sup>232</sup> Curtis "Where is Marcellus shale located in Pennsylvania?" in The Institute for Energy & Environmental Research 2014 *Marcellus Shale Clearinghouse* available at <https://energy.wilkes.edu/pages/153.asp> [date of use 17 April 2017].

2008.<sup>233</sup> Therefore, the legal framework pertaining to the regulation of oil and gas (including the hydraulic fracturing of shale gas) in Pennsylvania *vis-à-vis* the experience of the stakeholders, and the interpretation of the diverse laws relating to the protection of procedural environmental rights may provide lessons for South Africa.

The choice of the UK is premised on the fact that hydraulic fracturing is in its early stages, with the country devising regulations to guide the process.<sup>234</sup> Just as the UK is learning from the development in the USA<sup>235</sup> to avoid mistakes already made, there is also an opportunity to learn from the experience of the UK, a country ahead of South Africa regarding the introduction of hydraulic fracturing.

Although the UK does not have a written Constitution, it has a reasonably tested human rights statute, and the development of human rights is at an advanced stage, subjecting primary and subordinate legislation to the requirements of international instruments regulating human rights.<sup>236</sup> The decisions of courts on the interpretation of the relevant legislation may therefore be persuasive, and probably provide a learning experience for South Africa.

While the research is not a comparative study in the strict sense of the term, the consideration of scenarios in the UK and the USA provide the prospects for improved knowledge on the subject for South Africa.<sup>237</sup> This is in line with the requirement of section 39 of the Constitution that when interpreting the Bill of Rights, a court or tribunal or forum “must consider international law; and may consider foreign law”

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<sup>233</sup> Pennsylvania Department of Environmental Protection 2013 *Oil and Gas Annual Report* 3.

<sup>234</sup> See para 1.2.1.

<sup>235</sup> Weinstein 2013 *Wisconsin International Law Journal* 896.

<sup>236</sup> See section 3(1) of the *Human Rights Act*. It is important to state that the UK comprises three political divisions, namely Northern Ireland, Scotland, and England and Wales, each with its own courts and legal system. However, the UK Supreme Court is the apex appellate court for the whole of the UK (See Part 3 of the *Constitutional Reform Act* 2005). In relation to human rights, the *Human Rights Act* 1998 is applicable to the whole country, and by virtue of section 1(1), certain provisions of the European Convention have the force of law throughout the UK. It is noted that the UK is in the process of exiting the EU, but at the completion of negotiations currently taking place. See para 4.3.1.

<sup>237</sup> Some foreign countries considered in the course of the study have taken decisions on hydraulic fracturing either to continue or restrict the process in some way or to ban it outright. In some cases, the decisions of the foreign countries are based on the consideration of procedural rights.

based on the understanding that there is value in learning how “courts in other jurisdictions have dealt with issues that confront us.”<sup>238</sup> In *Bernstein v Bester*<sup>239</sup> for example, the Constitutional Court considered the position of the law on the matter before it in other jurisdictions including England,<sup>240</sup> Australia,<sup>241</sup> the USA,<sup>242</sup> Canada,<sup>243</sup> and in Germany<sup>244</sup> before arriving at a reasoned decision.

Though the circumstances surrounding hydraulic fracturing and its effect in South Africa may not exactly be the same as in other jurisdictions,<sup>245</sup> local legislation and its interpretation can benefit from the positive experience of other jurisdictions and avoid their mistakes in dealing with challenges. Consideration of foreign experience may also provide knowledge as to how best the legal framework pertaining to hydraulic fracturing could be developed to strengthen the protection of procedural environmental rights. In doing this however, caution is advocated mindful that foreign jurisprudence may not necessarily provide a safe guide for the interpretation of the South African Constitution in all cases.<sup>246</sup>

Based on the foregoing, developments in the law in the UK and in Pennsylvania in the USA will be considered to determine how the legal framework pertaining to hydraulic fracturing in those jurisdictions have impacted procedural environmental rights, either positively or negatively. Consequently, a critical assessment of the South African legal framework on hydraulic fracturing will be undertaken *vis-à-vis* the experience drawn from the UK and the USA, with a view to making appropriate recommendations as to how the legal framework for hydraulic fracturing could be reinforced if necessary, to protect procedural environmental rights in South Africa.

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<sup>238</sup> See *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 ZACC 32 at para 16.

<sup>239</sup> 1996 (2) SA 751.

<sup>240</sup> 1996 (2) SA 751 at paras 18-27.

<sup>241</sup> 1996 (2) SA 751 at paras 28-34.

<sup>242</sup> 1996 (2) SA 751 at para 75.

<sup>243</sup> 1996 (2) SA 751 at para 76.

<sup>244</sup> 1996 (2) SA 751 at para 77-78.

<sup>245</sup> See Clarke *et al* 2015 *Energy Policy* 132; and Whitmarsh 2015 *Applied Energy* 3.

<sup>246</sup> See *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 ZACC 32 at para 16.



## ***1.8 Structure of the study***

In this study, chapter 2 reviews the theoretical literature on hydraulic fracturing and its impacts on procedural rights, drawing on experiences from other jurisdictions. The chapter also deals in depth with the role of procedural rights in the protection of environmental interests. Chapter 3 conducts an evaluative study of the international and regional legal framework relevant to procedural environmental rights, with particular reference to the right of access to information, the right to just administrative action, and the right of access to courts with a view to determining the extent that they protect against potential harms of hydraulic fracturing, and to highlight international obligations imposed on the jurisdictions considered. Chapter 4 conducts a critical discussion of the legal framework of the right of access to information in relation to hydraulic fracturing from the perspectives of Pennsylvania in the USA, the UK and South African law, drawing lessons from the foreign jurisdictions for possible improvement of the South African legal framework and makes recommendations to reinforce the South African legal framework pertaining to hydraulic fracturing if necessary, in response to the concerns relating to the protection of procedural environmental rights. Chapter 5 conducts a critical discussion of the legal framework of the right to just administrative action in relation to hydraulic fracturing from similar perspectives as in chapter 4; and chapter 6 assesses the right of access to courts. Chapter 7 summarises the conclusions drawn from the study highlighting the findings and makes recommendations for the protection of procedural environmental rights in the South African legal framework in response to the concerns related to hydraulic fracturing.

## Chapter 2 Theoretical Foundations

### 2.1 Introduction

Public interest in hydraulic fracturing appears to be diametrically opposite, seemingly on a parallel course incapable of any midway correlation. Each side of the divide presents arguments supposedly based on facts, the results of scientific studies and human experiences to justify the position taken.<sup>247</sup> For example, the report on a 2012 survey to gauge the public perceptions of shale gas extraction in New York and Pennsylvania acknowledged the fact that “most experts are divided on the risks posed by hydraulic fracturing.”<sup>248</sup> In the same vein, a 2016 report<sup>249</sup> by the Academy of Science of South Africa emphasised the need to retain a balanced perspective in considering the diverse positions expressed on hydraulic fracturing. The report noted that peculiar interest, rather than sound science appears to shape the positions held by different countries on the subject.<sup>250</sup> Furthermore, the results of some studies in this area may not be based on the right methods in that opposing groups typically frame survey questions in a manner that allows information conveying the same message to elicit different responses, thereby presenting an opportunity to influence public opinion to win support for specific viewpoints.<sup>251</sup> This creates a challenge for a legal analyst who has to rely on studies conducted by other scientists to determine the harm that hydraulic fracturing poses to humans and the environment.

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<sup>247</sup> Borick et al 2014 *Energy and Environmental Policy* 3.

<sup>248</sup> A 2012 survey conducted by researchers at the Quinnipiac University further highlights the controversy. The survey report indicated that while 44% of the sample population in New York was in favour of hydraulic fracturing, 43% were against it. 48% of the sample population believed that hydraulic fracturing would adversely impact the environment against 45% holding the view that the economic benefits derivable therefrom far outweigh any perceived environmental concerns. See also Boudet *et al* 2013 *Energy Policy* 3.

<sup>249</sup> ASSAf South Africa’s Readiness to Support the Shale Gas Industry 1.

<sup>250</sup> The nature of mineral rights in each country appears to be a driver for positions held. For example, hydraulic fracturing is popular in many states of the USA where mineral rights are seised in the landowner. However, in most countries in Europe where mineral rights belong to the State, there appears to be less enthusiasm for hydraulic fracturing. See ASSAf *South Africa’s Readiness to Support the Shale Gas Industry* 21.

<sup>251</sup> Clarke *et al* 2015 *Energy Policy* 132. See also Whitmarsh 2015 *Applied Energy* 3.

Notwithstanding the polarity in views on the subject, at least two main concerns are likely to arise in the consideration of hydraulic fracturing of shale gas. First is the concern relating to the socio-economic considerations in exploiting shale gas. In this regard, relevant issues would include its viability, the cost of exploitation and the impact on the economy. The second but probably more important concern is the consideration of the impact of hydraulic fracturing on the well-being and health of people, human rights, the environment and the issue of sustainability.

Though there appears to be some consensus among commentators that available supplies of shale gas could make a positive difference in the quest for additional sources of energy,<sup>252</sup> there is no guarantee that the estimated resource of shale gas could easily be recovered. For example, in South Africa, the Investigative Report indicated that there is an estimated 485 trillion cubic feet of shale gas in the Karoo.<sup>253</sup> The depth beneath the earth's surface where the resource is located is projected to be in excess of four kilometres underground,<sup>254</sup> which could make the cost of exploitation prohibitive relative to the benefit derivable. There is also paucity of scientific knowledge on the nature of the rock formation at such a depth, and on the potential consequences of such exercise on the environment and human health.<sup>255</sup> It is estimated that the cost for drilling a single well in South Africa would be in the region of R100 million.<sup>256</sup> If the golden rule for drilling unconventional gas set by the International Energy Agency which requires full transparency in operations, the measuring and monitoring of environmental and human impacts as well as engagement with local communities is to be complied with, it is estimated that the financial cost of developing a well could increase by as much as 7%.<sup>257</sup> The

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<sup>252</sup> Zillman et al 2015 *Journal of Energy and Natural Resources Law* 85.

<sup>253</sup> See para 2.2 Investigative Report. Subsequent studies have revealed that estimates cited in the Investigative Report may be ambitious, and that results demonstrate a much-reduced potential shale gas resource. See De Cock *et al* 2017 *S Afr J Sci* 1.

<sup>254</sup> Wait and Rossouw 2014 *Southern African Business Review* 10.

<sup>255</sup> For a summary of current knowledge on hydraulic fracturing, see Healy "Hydraulic fracturing or 'fracking': A short summary of current knowledge and potential environmental impacts" at [https://www.epa.ie/pubs/reports/research/sss/UniAberdeen\\_Fracking\\_Report.pdf](https://www.epa.ie/pubs/reports/research/sss/UniAberdeen_Fracking_Report.pdf) [date of use 18 October 2018]. See also Davis 2012 *Review of Policy Research* 177.

<sup>256</sup> De Wit 2011 *S Afr J Sci* 5.

<sup>257</sup> IEA Golden Rules for a Golden Age of Gas: World Energy Outlook Special Report on Unconventional Gas 10.

potential high cost of drilling in hydraulic fracturing compared to drilling for other conventional gas may therefore result in unwarranted cost cutting and abuse of regulations, which could endanger human life and the environment.<sup>258</sup>

To address the foregoing issues, a brief background to hydraulic fracturing and its impacts on human beings and the environment will be discussed in this chapter. The chapter will also review the theoretical literature on the nature of environmental rights, the complexity of its enforcement, and the role of procedural rights in the protection of environmental interests. A discussion of the specific procedural rights relevant to the enforcement of environmental rights in relation to hydraulic fracturing will conclude the chapter. A brief background to hydraulic fracturing and its impacts precedes the discussion of theoretical literature on environmental rights.

## ***2.2 Hydraulic fracturing***

Rock under the surface of the earth core is comprised of layers stacked on top of one another like pancakes, each accumulating in sheets of compacted and solidified layer with shale being one of the deepest layers.<sup>259</sup> The shale formation is typically located 1,500 to 4,000 metres below the surface, and it could spread for several miles across a specific area.<sup>260</sup> There are pores in the layers of shale in which oil or gas is stored, but the rock carrying the pores is compressed tight forestalling interconnection between the pores thereby making it impossible for the trapped oil or gas to flow unhindered into a wellbore, unless rock is fractured.<sup>261</sup> Hydraulic fracturing provides a means of drawing the oil or gas out of the pores of the shale.

Hydraulic fracturing is not totally a new concept. As early as the 1860s, the first attempts to release oil trapped underground were undertaken in New York, Kentucky and Virginia, via a process which used nitro-glycerine to stimulate shallow hard rock wells, thereby breaking up oil-bearing formations and releasing the flow

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<sup>258</sup> Wait and Rossouw 2014 *South African Business Review* 10. See also Muresan and Ivan 2015 *Sustainability* 7.

<sup>259</sup> Zuckerman *The Frackers: The Outrageous Inside Story of the New Energy Revolution* 34.

<sup>260</sup> See para 2.1.2 Investigative Report.

<sup>261</sup> Zuckerman *The Frackers: The Outrageous Inside Story of the New Energy Revolution* 34.

of oil for recovery.<sup>262</sup> The succeeding years saw increased attempts using different compounds; and in 1949, a patent for the 'Hydrafrac' process was issued to Halliburton Oil Well Cementing Company to use a mixture of sand, crude and gasoline blend as a highly pressurised liquid to crack open rocks, while filling any fissures to prevent the crack in the rock from closing in order to maintain a steady flow of gas. Improvement in drilling technology over the years has given the operators in the USA access to significant volume of gas, which was hitherto unreachable, with production increasing by 50% from five million barrels per day in 2008 to 7.5 million barrels per day in 2013, resulting in a significant cut in imports from traditional suppliers.<sup>263</sup>

Hydraulic fracturing of shale gas may have facilitated improved access to energy inputs for the countries engaged in the process, but the industry it creates is not risk free. While significant economic benefits have accrued to countries engaged in hydraulic fracturing, evidence abounds of adverse effects on the health and wellbeing of people, on the environment and on human rights in general.<sup>264</sup> The benefits or adverse effects in one country may not necessarily occur in another, and where they occur the impact may not necessarily be similar. For example, in South Africa, there is no assurance that the geology of the Karoo basin where shale is reportedly present would be susceptible to hydraulic fracturing, and if it is, the cost is presently unknown or at best an estimated guess.<sup>265</sup> Other factors, which facilitated the success recorded in the USA, are not necessarily available in other countries, including South Africa. Indeed, the hydraulic fracturing revolution, requires:

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<sup>262</sup> See Manfreda "The Real History of Fracking" at [www.oilprice.com/Energy/Crude-Oil/The-Real-History-of-Fracking](http://www.oilprice.com/Energy/Crude-Oil/The-Real-History-of-Fracking) [date of use 2 July 2016].

<sup>263</sup> Center for a New American Security Energy Rush: Shale Production and US National Security 11.

<sup>264</sup> Grearet *a*/"A Human Rights Assessment of Hydraulic Fracturing and Other Unconventional Gas Development in the United Kingdom." See also Kearns 2011 "A human rights assessment of hydraulic fracturing for natural gas."

<sup>265</sup> In the Netherlands, the government on 10 July 2015, announced a ban of shale drilling for five years, adding that existing exploration permits would not be renewed because of uncertainties as to the impact of hydraulic fracturing on the environment. See "Dutch government bans shale gas drilling for 5 years" at [www.naturalgaseurope.com/dutch-government-bans-shale-gas-drilling-24586](http://www.naturalgaseurope.com/dutch-government-bans-shale-gas-drilling-24586) [date of use 20 August 2015].

...more than just favourable geology; it also [requires] financiers with a tolerance for risk, a property-rights regime that let landowners claim underground resources, a network of service providers and delivery infrastructure, and an industry structure characterized by thousands of entrepreneurs rather than a single national oil company. Although many countries possess the rock, none, with the exception of Canada, boasts of an industrial environment as favourable as that of the United States.<sup>266</sup>

Incidentally, the experience in Europe further underscores the polarity of views on the subject of hydraulic fracturing. Many of the shale gas formations in Europe are located in densely populated areas, which typically engender a vociferous and emotional local opposition, which had curtailed production.<sup>267</sup> The development in Denmark, for example, buttresses the observation above. In 2010, the government issued a licence to Total E & P Denmark BV to conduct preliminary investigation and feasibility studies on the exploitation of gas by hydraulic fracturing pending policy decision. The ensuing ceaseless public outcry necessitated several assurances from the government that the interest of the public will not be jeopardised in any manner.<sup>268</sup> However, by August 2015, the sites being investigated had to be closed because tests results had shown that the shale layer encountered by the well was too thin for economically feasible gas production.<sup>269</sup> Consequently, compared to the USA, only a small number of exploration wells had been drilled in Europe, and whereas there were an average 167 exploratory wells drilled in the USA per month between 2005 and 2010, only about 50 were drilled in Europe during the same period.<sup>270</sup>

However, while hydraulic fracturing is susceptible to potential harm to humans and the environment, it is also capable of endowing society with certain benefits. The potential harm as well as the benefits are considered hereunder.

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<sup>266</sup> Blackwill and O'sullivan "America's Energy Edge: The Geopolitical Consequences of the Shale Revolution" 2014 *Foreign Affairs* available at [www.foreignaffairs.com/articles/140750/robert-d-blackwill-and-meghan-l-osullivan/americas-energy-d=edge](http://www.foreignaffairs.com/articles/140750/robert-d-blackwill-and-meghan-l-osullivan/americas-energy-d=edge) [date of use 25 February 2015].

<sup>267</sup> Norton Rose Fulbright *Shale Gas Handbook* 100.

<sup>268</sup> Becker and Werner 2014 *Journal of European Management & Public Affairs Studies* 26.

<sup>269</sup> See "Total drops shale site in Dybvad, Denmark" available at [www.naturalgaseurope.com/total-closes-shale-site-in-dybvad-denmark](http://www.naturalgaseurope.com/total-closes-shale-site-in-dybvad-denmark) 18 August 2015 [date of use 19 August 2015].

<sup>270</sup> Spencer *et al* 2014 "Unconventional wisdom: an economic analysis of US shale gas and implications for the EU" Studies No. 02/14, IDDRI, Paris, France 1-36 available at [www.iddri.org/Publications/Collections/Analyses/Study0214\\_TS](http://www.iddri.org/Publications/Collections/Analyses/Study0214_TS) [date of use 19 January 2016].

## ***2.3 Benefits of hydraulic fracturing.***

Perhaps the most important benefit of hydraulic fracturing is the enhancement of access to energy presented by the provision of possible access to oil and gas locked deep in the earth's bowels, which might not have been available as a source of energy to satisfy domestic needs and power industries. The benefits can be categorised under two broad perspectives, namely energy security, and socio-economic benefits. Remarkably, none of the two is mutually exclusive, raising the question of the energy trilemma,<sup>271</sup> which must be addressed if the benefits that flow from the availability of energy are to be fully realised. Balancing the three core dimensions of the energy trilemma requires the State to effectively address three issues, namely energy security, energy equity, and sustainable development.<sup>272</sup> Energy security and socio-economic benefits are discussed in the following section as two of the potential solutions to resolve the challenges of the energy trilemma, while the question of sustainable development in relation to hydraulic fracturing is considered in paragraph 2.4.3.

### ***2.3.1 Energy security***

The importance of energy to virtually every aspect of human endeavour makes it a major tool for development, with states engaged in an intense competition for energy resources, which play an important role in international politics.<sup>273</sup> It is therefore no surprise that the history of international conflicts and tensions between

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<sup>271</sup> Energy trilemma is the challenge associated with how to effectively balance the core dimensions of access to energy presented in issues of energy security, energy equity and environmental sustainability. To do that effectively, the State must develop policies and practices, which guarantee the reasonable availability of energy for both human and industrial use to facilitate the socio-economic development of the people and the economic independence of the country. Furthermore, there must be energy equity, which requires universal access to energy at affordable costs especially to the vulnerable segment of the population, and thirdly is the question of sustainable development of energy resources in relation to the environment. A resolution of this trilemma in relation to energy development underscores the role of the State in balancing seemingly conflicting issues in relation to socio-economic benefits and potential environmental degradation. The State has a duty to develop policies, which will motivate all stakeholders to take care to forestall damage to the environment, thereby protecting the environment for the present and future generations. See Fisher *et al Environmental Law: Text, Cases and Materials* 54.

<sup>272</sup> Wyman World Energy Trilemma 8.

<sup>273</sup> Mohajeri 2013 Oil Gas & Energy Law Intelligence 2.

countries in the post industrial revolution era can hardly be discussed without reference to efforts to control the source of oil and gas or their pricing.<sup>274</sup> The scenarios are many, including:

...oil and gas exports used as political weapons, riots in the streets when energy bills rise, importing countries turning a blind eye to human rights violations by unaccountable political regimes living off oil rents, cash rich petro-states financing terrorists' activities, pipelines projects done or undone in global races for power, money and access to vital resources.<sup>275</sup>

In the domestic arena, there is a correlation between access to energy and the eradication of poverty.<sup>276</sup> Access to energy is necessary for human development, which in the long run reduces poverty. Availability of energy for productive use influences socio-economic development in the way that health, education and structural employment are promoted<sup>277</sup> through agriculture and industry. The importance of energy development in domestic affairs for security and independence in the international environment underscores the non-stop search for additional energy sources, which gave rise to the invention of hydraulic fracturing of shale gas, among others.<sup>278</sup>

Energy security is subject to competing and varying perspectives because of the multiplicity of actors spanning the national-regional-global space and the public-private spectrum. This is coupled with uncertainty for the continuity of supplies and volatility in pricing, as well as its impact on the economy, people and the environment. For example, the importance of energy security to the European Union is appropriately enumerated in the objectives for its strategy on the subject, which requires that:

... energy supply security must be geared to ensuring, the well-being of its citizens and the proper functioning of the economy, the uninterrupted physical availability of energy products on the market, at a price which is affordable for all consumers (private and industrial), while

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<sup>274</sup> Dreyer and Stang Energy Moves and Power Shifts: EU Foreign Policy and Global Energy Security 11.

<sup>275</sup> Leal-Arcas and Schmitz 2014 *Oil Gas & Energy Law Intelligence* 4.

<sup>276</sup> *Report of the World Summit on Sustainable Development 2002* available at [www.unmillenniumproject.org/documents/131302\\_wssd\\_report\\_reissued.pdf](http://www.unmillenniumproject.org/documents/131302_wssd_report_reissued.pdf)[date of use 11 March 2018].

<sup>277</sup> Ismail 2015 *Journal of Economics and Social Development* 184.

<sup>278</sup> Kitzke 2013 *Minnesota Law Review* 385.



respecting environmental concerns and looking towards sustainable development, as enshrined in Articles 2 and 6 of the Treaty on European Union.<sup>279</sup>

Many regional economic blocks and countries pursue similar goals. In the USA for example, increased unconventional oil and gas production in the last five years has resulted in a significant reduction in oil imports and caused price reduction. For the first time in 60 years, the country has become a net exporter of refined petroleum products. The USA importation of crude oil from African countries like Nigeria, Angola, Libya and Algeria declined by 67% from 1.8 million barrels per day in 2008 to 600,000 barrels per day in 2014.<sup>280</sup>

Emphasising the importance of energy security and the necessity for hydraulic fracturing after the Longmont County in the state of Colorado in the USA banned shale fracturing, the Governor explained that state intervention was necessary to prevent other counties in the state from adopting similar regulations.<sup>281</sup> He argued that the question of whether or not hydraulic fracturing development is allowed has implications that extend far beyond city limits and appealed to the people's sense of nationalism and security. He justified his argument by challenging people to see the benefits, asking if the people:

...want to continue building foreign governments with our reliance on their natural resources at the expense of freedom? Especially when we can tap into our own natural resources, reduce the cost of energy, and move our nation toward energy independence.<sup>282</sup>

In the same vein, the UK government presented energy security as a rationale to justify hydraulic fracturing and the regulations made to facilitate the process,<sup>283</sup> contending that removing the barriers to deep underground drilling

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<sup>279</sup> European Commission Towards a European Strategy for the Security of Energy Supply 2.

<sup>280</sup> Rosenberg 2014 "Energy Rush: Shale Production and US National Security" (Report of the unconventional energy and US National Security Task Force) at [www.cnas.org/sites/default/files/CNAS\\_EnergyBoom\\_Rosenberg](http://www.cnas.org/sites/default/files/CNAS_EnergyBoom_Rosenberg) [date of use 25 February 2015].

<sup>281</sup> The Colorado Observer "In local fracking wars, tide turns against green lobby" 19 June 2013 available at <http://thecoloradoobserver.com/2013/06/analysis-green-lobby-meets-local-resistance-in-fracking-fights/> [date of use 18 October 2018].

<sup>282</sup> The Colorado Observer "In local fracking wars, tide turns against green lobby" 19 June 2013 available at <http://thecoloradoobserver.com/2013/06/analysis-green-lobby-meets-local-resistance-in-fracking-fights/> [date of use 18 October 2018].

<sup>283</sup> Grearet *a*/"A Human Rights Assessment of Hydraulic Fracturing and Other Unconventional Gas Development in the United Kingdom."

access will help to speed up oil and gas geothermal energy exploration.<sup>284</sup> However, while it is possible that hydraulic fracturing may facilitate the realisation of the potential to bolster national energy security, it is important to consider its impact on the people closely associated with its operation, and the sustainable development of shale gas.

Given the correlation between energy security and the reduction of poverty, there is a need for South Africa to be in a position to take advantage of its energy resources to guarantee security and independence. Hydraulic fracturing of shale gas may provide an opportunity to do so, especially against the fact that a significant part of the population has no access to electricity with only 88% of urban South Africans and 55% of the rural population having access.<sup>285</sup> Energy security has to be improved if poverty is to be reduced.<sup>286</sup> It is therefore desirable that the sources of energy be diversified sufficiently to reduce dependence on external sources, which leaves the country vulnerable to factors outside its control such as price changes and supply disruptions.<sup>287</sup>

Like many governments of the world, the policy objectives of the government of South Africa are geared towards achieving energy security. These are the promotion of access to affordable energy services for households and small businesses, the improvement of energy governance to stimulate economic development, while enhancing capacity to manage energy-related environmental and health impacts, and to guarantee energy security through a diversification of supply sources.<sup>288</sup> One such means of diversification is the likelihood of the country being able to satisfy its

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<sup>284</sup> See DECC 2014 "Government to remove barriers to onshore oil and gas and deep geothermal exploration" available at <https://www.gov.uk/government/news/government-to-remove-barriers-to-onshore-oil-and-gas-and-deep-geothermal-exploration> [date of use 23 May 2018].

<sup>285</sup> Econometrix (Pty) Ltd 2012 "Karoo Shale Gas Report: Special Report on the Economic Considerations Surrounding Potential Shale Gas Resources in the Southern Karoo of South Africa" available at [www.cer.org.za/wp-content/uploads/2012/06/Econometrix-KSG-Report-February-2012](http://www.cer.org.za/wp-content/uploads/2012/06/Econometrix-KSG-Report-February-2012) [date of use 25 February 2015].

<sup>286</sup> *The Integrated Resource Plan (IRP) 2010-30* released in 2011 enumerated the government's objectives regarding plans to satisfy growth in demand up to year 2030, and this include the provision of affordable electricity to the people among others, and the development of "a proposed path of least regret, incorporating the benefits of flexibility." See Department of Energy *Integrated Resource Plan Update 2016*.

<sup>287</sup> Nkomo 2009 *Journal of Energy in Southern Africa* 20.

<sup>288</sup> White Paper on the Energy Policy of the Republic of South Africa 1998 at para 3.2.2.

energy requirements through domestic sources, which could be made possible by hydraulic fracturing of shale gas.

### 2.3.2 Socio-economic benefits

The positive impact of hydraulic fracturing in the economic environment is evident in the significant decline in global oil price, which has witnessed a significant decline since June 2014 when it was priced at \$115 a barrel.<sup>289</sup> This is largely attributable to the activities of the shale gas industry, which has been a major factor in increased production.<sup>290</sup> Its contribution to output has grown from 0.5% in 2008 to 3.7% of global output in 2014, thereby causing a significant drop in energy cost for non-oil producing countries.<sup>291</sup> This situation may persist for sometime as the USA shale oil industry appears to be resilient to low oil prices having developed strategies to manage production costs more efficiently.<sup>292</sup>

In the USA, the shale gas industry supported 600,000 jobs in 2010, a figure which increased to 2.3 million in 2012,<sup>293</sup> with additional jobs created in the supporting industries. State authorities are enthusiastic about tax revenue and infrastructure

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<sup>289</sup> Though prices have recovered slightly, average price still hovers around the \$50 per barrel mark, and it is still subject to a high degree of volatility. Industry executives project that it is not likely that a return to the \$100 per barrel is foreseeable in the near future. See Krauss "Oil prices: What's behind the volatility? Simple economics" *New York Times* 2 November 2016 at [www.nytimes.com/interactive/2016/business/energy-environment/oil-prices.html](http://www.nytimes.com/interactive/2016/business/energy-environment/oil-prices.html)? [date of use 3 November 2016].

<sup>290</sup> Production of gas in USA attributable to shale gas development has witnessed significant growth from 0.3 trillion cubic feet in 2000 to 9.6 trillion cubic feet in 2012, while wellheads for unconventional gas drilling in the state of Pennsylvania increased from only eight in 2000 to about 2,000 in 2011. See May and Dernbach *Shale Gas and the Future of Energy: Law and Policy for Sustainability* 3. See also Brewer 2014 *The Shale Gas Revolution: Implications for Sustainable Development and International Trade* 15.

<sup>291</sup> *The Economist* 6 December 2014 "In a bind: Will falling oil prices curb America's shale boom?" available at [www.economist.com/news/finance-and-economics/21635505-will-falling-oil-prices-curb-americas-shale-boom](http://www.economist.com/news/finance-and-economics/21635505-will-falling-oil-prices-curb-americas-shale-boom) [date of use 25 February 2015].

<sup>292</sup> Covert "When global oil prices tanked, shale oil production didn't. Here's why" EPIC (Energy Policy Institute at the University of Chicago 2016) available at [www.forbes.com/sites/ucenergy/2016/08/31/when-global-oil-prices-tanked-shale-oil-production-didnt-heres-why/#713c6ab3cae8](http://www.forbes.com/sites/ucenergy/2016/08/31/when-global-oil-prices-tanked-shale-oil-production-didnt-heres-why/#713c6ab3cae8) [date of use 3 November 2016].

<sup>293</sup> Suzuki 2014 *B C Env't. Aff L Rev* 270.

development.<sup>294</sup> Commenting on the benefits of hydraulic fracturing in the USA, President Obama indicated that:

...Federally supported technology has helped our businesses drill more effectively and extract more gas. And now, we'll keep working with the industry to make drilling safer and cleaner, to make sure that we're not seeing methane emissions, and to put people to work modernizing our natural gas infrastructure so that we can power more homes and businesses with cleaner energy.<sup>295</sup>

Indeed, it would appear that some states in the USA permit hydraulic fracturing largely because of the economic advantage it offers. For example, consequent to the ban on hydraulic fracturing in New York, the neighbouring state of Pennsylvania had to find justification for its continuation, clarifying its position that rather than banning, the state will intensify efforts to deal with the risks associated with hydraulic fracturing by strengthening the rules and increasing their enforcement, hiring more inspectors, and creating a health registry to monitor health issues.<sup>296</sup>

The governor noted that hydraulic fracturing was necessary because:

... Pennsylvania's natural resources should help the commonwealth become an energy leader, including renewable energy and energy efficiency, as well as a magnet for investment and job creation. Governor-elect Wolf's priority is to ensure that Pennsylvania is an energy leader with all Pennsylvanians sharing in the prosperity".<sup>297</sup>

Similarly, in Colorado, the President of the South Metro Chamber of Commerce implored the citizens to understand the importance of energy to the economy and enumerated the benefits as including "...direct jobs, supporting jobs, professional services, retail and restaurants, lower housing prices and governmental services [and] wealth creation, high paying jobs, energy independence, and reliable and inexpensive energy translating into a stronger and healthier community."<sup>298</sup>

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<sup>294</sup> Wiseman 2015 *Texas Law Review* 38.

<sup>295</sup> "Remarks by President [Obama] on Climate Change" at Georgetown University Washington DC on June 25 2013 available at [www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change](http://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change) [date of use 25 February 2015].

<sup>296</sup> Field "PA-Gov: Wolf reiterates support for fracking after NY ban" available at [www.politicspa.com/pa-gov-wolf-reiterates-support-for-fracking-after-ny-ban](http://www.politicspa.com/pa-gov-wolf-reiterates-support-for-fracking-after-ny-ban) [date of use 18 February 2015].

<sup>297</sup> Field "PA-Gov: Wolf reiterates support for fracking after NY ban" available at [www.politicspa.com/pa-gov-wolf-reiterates-support-for-fracking-after-ny-ban](http://www.politicspa.com/pa-gov-wolf-reiterates-support-for-fracking-after-ny-ban) [date of use 18 February 2015].

<sup>298</sup> The Colorado Observer "In local fracking wars, tide turns against green lobby" June 19, 2013 available at [www.thecoloradoobserver.com/2013/a](http://www.thecoloradoobserver.com/2013/a) [date of use 25 February 2015].

The socio-economic opportunities which hydraulic fracturing offers are not likely to be different in South Africa if the exploitation of shale gas resource by hydraulic fracturing in the Karoo in commercial quantity is possible. For example, it is estimated that the exploitation of 1trillion cubic feet of shale gas out of the total estimated 485 trillion cubic feet would be sufficient to launch the PetroSA's project of gas to liquids, providing about 1,600 jobs.<sup>299</sup> If the estimated reserve of shale gas in South Africa could be verified and thereafter economically exploited, there is potential for over R960 billion to be added to the country's GDP over the next 20 to 30 years.<sup>300</sup>The exploitation of 10% of the estimated 485 trillion cubic feet of shale resource could add R200 billion to GDP annually, and create 700,000 jobs.<sup>301</sup>

In terms of social benefits, the objective of South Africa's policy on energy is summarised in the following statement by the then Minister of Minerals and Energy that:

... the Government is committed to the promotion of access to affordable and sustainable energy services for disadvantaged households, small farms, schools, clinics, in rural areas, and a wide range of other establishments; [and that] ... the State should establish a clear difference between its primary role as a policy making and regulatory sector, and its secondary role as a facilitator in the supply of energy services.<sup>302</sup>

The objective is premised on awareness of the fact that without access to electricity, a guaranteed enforcement of the right to have human dignity respected and protected can be compromised if access to heat in times of cold and access to light in periods of darkness is restricted.<sup>303</sup> Yet, the reality is that the electricity needs of the various segments of the population across the regions cannot be met, thereby resulting in a widespread inequality among consumers, making the regulation of the distribution sector a formidable task.<sup>304</sup> There is, however, a possible solution in gas-fired plants to produce electricity. In the USA for example, the resultant decline in the price of natural gas due to the significant growth in production through hydraulic

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<sup>299</sup> See Investigative Report 3.

<sup>300</sup> See Investigative Report 6.

<sup>301</sup> Econometrix (Pty) Ltd 2012 "Karoo Shale Gas Report: Special Report on the Economic Considerations surrounding potential shale gas resources in the southern Karoo of South Africa."

<sup>302</sup> The Ministerial Foreword to *The White Paper on the Energy Policy of South Africa 1998* (hereafter referred to as "the Policy").

<sup>303</sup> The Policy para 7.1.4.1.

<sup>304</sup> The Policy para 7.1.3.

fracturing has caused a drop in electricity prices from gas-fired plants.<sup>305</sup> Therefore, the problem of perennial shortage of electricity in South Africa can be resolved by a potentially successful exploitation of shale gas to improve energy supply, thereby improving on the provision of electricity to some of the over 10 million South Africans who have no access to electricity.<sup>306</sup> Many communities would probably benefit from a more energy-secure environment through the development of shale gas.<sup>307</sup>

Notwithstanding the benefits derivable from hydraulic fracturing, there are numerous calls for caution and in some cases outright ban of hydraulic fracturing because of the potential harm it could cause to the environment and human health.<sup>308</sup> The potential harm also has the propensity to impinge the human rights protected by the Constitution. The adverse impacts of hydraulic fracturing are discussed below.

#### ***2.4 Adverse impact of hydraulic fracturing***

Although the arguments above support the socio-economic benefits of hydraulic fracturing, caution must be exercised because there are arguments suggesting that the negative impact could subject the environment and human health to irreparable damage. A rights-based approach to development demands that the focus should

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<sup>305</sup> International Centre for Trade and Sustainable Development/ Brewer The Shale Gas Revolution: Implications for Sustainable Development and International Trade 13.

<sup>306</sup> The Deputy Minister for Energy, Ms Thembisile Majola reportedly informed the 19<sup>th</sup> Africa Energy Forum held in Copenhagen on 7 June 2017 that the exploitation of shale and other unconventional gases could result in "excess power compared to 2008 when we were having load-shed." See "Shale gas will be a game changer for South Africa" available at [www.africanreview.com/energy-a-power/oil-a-gas/shale-gas-will-be-a-game-changer](http://www.africanreview.com/energy-a-power/oil-a-gas/shale-gas-will-be-a-game-changer) [date of use 3 January 2018]. This however has the potential to make investment in energy renewable sources other than fossil fuel-dependent sources less competitive, and possibly roll back the gains of previous years, further harming the sustainable development of energy resources.

<sup>307</sup> Du Plessis "The governance of hydraulic fracturing in the Karoo: A local government perspective" in Glazewski and Esterhuysen (eds) *Hydraulic Fracturing in the Karoo: Critical Legal and Environmental Perspectives* 121.

<sup>308</sup> De Wit 2011 *S Afr J Sci* 1. See also Vechiatto "Chemicals used in fracking 'could cause cancer'" at [www.bdlive.co.za/business/energy/2015/01/22/chemicals-used-in-fracking-could-cause-cancer](http://www.bdlive.co.za/business/energy/2015/01/22/chemicals-used-in-fracking-could-cause-cancer) [date of use 18 February 2015, Magubane "Groups seek new freeze on fracking licences" at [www.bdlive.co.za/national/science/2014/07/23/groups-seek-new-freeze-on-fracking-licences](http://www.bdlive.co.za/national/science/2014/07/23/groups-seek-new-freeze-on-fracking-licences) [date of use 18 February 2015], and Marais "Red tape puts plug in Africa's rich oil bounty" at [www.bdlive.co.za/businesstimes/2014/07/27/red-tape-puts-plug-in-africa-s-rich-oil-bounty](http://www.bdlive.co.za/businesstimes/2014/07/27/red-tape-puts-plug-in-africa-s-rich-oil-bounty) [date of use 18 February 2015]. See also Du Plessis "The governance of hydraulic fracturing in the Karoo: A local government perspective" in Glazewski and Esterhuysen (eds) *Hydraulic Fracturing in the Karoo: Critical Legal and Environmental Perspectives* 121.

be on identifying the obstacles hindering people from taking advantage of opportunities to improve their lives, and on removing the barriers that impede communities from exercising rights and enhancing their capacities.<sup>309</sup> By necessary implication, development must heed human rights among other factors. If the development envisaged from hydraulic fracturing is to be meaningful, it must enhance human rights and be executed in a way that respects and protects fundamental rights.

The negative impact of hydraulic fracturing is articulated visually in *Gasland*,<sup>310</sup> a 2010 documentary film, which examined hydraulic fracturing of oil and gas and the attendant environmental consequences. The film featured interviews with ordinary citizens whose lives and livelihood had been irreparably altered and depicted people who had fallen ill due to ailments which cause and nature could not be explained. The film also depicted household taps being ignited by fire, and drinking water polluted by chemicals that had seeped into household water wells from hydraulic fracturing operations contiguous to residential properties.

The potential of hydraulic fracturing to adversely affect health, cause pollution and damage the environment among other potential harms, increases its potential to infringe on human rights. As many global and regional instruments on fundamental human rights contain provisions that recognise and protect the rights to life and health,<sup>311</sup> and given that a degradation of the environment may cause ill health, and any activity that subjects human beings to ill health could threaten life, it is necessary to control hydraulic fracturing.<sup>312</sup>

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<sup>309</sup> Offenheiser and Holcombe 2003 Nonprofit and Voluntary Sector Quarterly 271.

<sup>310</sup> Available at [www.hbo.com/documentaries/gasland/synopsis.html](http://www.hbo.com/documentaries/gasland/synopsis.html) [date of use 11 April 2016].

<sup>311</sup> See article 3 of the Universal Declaration of Human Rights 1948; article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950; and articles 4 and 16 of the *African Charter on Human and Peoples' Rights* 1981.

<sup>312</sup> Concerning the right to environment, the fact that many human rights treaties were drafted and adopted before environmental protection became a matter of international interest, there are few references to environmental matters in international human rights instruments. However, some formulations of the rights to life and health have been applied to address issues arising on environmental right. See Shelton, "Human Rights, Health & Environmental Protection: Linkages in Law & Practice" in World Health Organisation 2002 *Health and Human Rights Working Paper Series No. 1* 23. See also Kravchenko 2012 7 *Fla A & M U L Rev* 164.

Although the motivation of this study is to determine the extent to which the South African legal framework pertaining to hydraulic fracturing provides for the protection of procedural environmental rights necessary to counter the negative impacts associated with fracking, there is no gainsaying that other categories of rights including civil and political rights, socio-economic rights, as well as property rights could also be adversely impacted.<sup>313</sup> The breach of any of these rights will most likely trigger the application of at least one procedural right to sustain specific substantive rights that may be in contention. It is important to point out that in South Africa, section 7(2) of the Constitution requires the State to “respect, protect, promote and fulfil the rights in the Bill of Rights.” Incidentally, the enforcement of procedural environmental rights<sup>314</sup> helps to unleash the benefits which people have in other substantive rights including environmental rights. While a comprehensive discussion on the nature and benefits of procedural environmental rights will be considered in paragraphs 2.4.7 and 2.4.8 below, the potential adverse impacts of hydraulic fracturing on water, human health, the environment, sustainable development and public trusteeship over natural resources are discussed below.<sup>315</sup>

#### *2.4.1 Impact of hydraulic fracturing on water*

The impact of hydraulic fracturing on water is two-fold. First the massive volume of water required in operations is likely to affect other water needs including domestic, agricultural and other commercial usage.<sup>316</sup> Secondly, there is a likely risk of water

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<sup>313</sup> The civil and political rights, which may be impacted by hydraulic fracturing, are the rights to equality, human dignity, life, the freedom of expression, freedom of trade, occupation and profession. In the socio-economic rights category are the right of access to housing, the right to have access to food and water, and children’s rights. Property rights and environmental right could also be adversely impacted. Specific procedural rights, which may be impacted by hydraulic fracturing are the right of access to information, the right to just administrative action and the right of access to courts.

<sup>314</sup> See paras 2.4.7 and 2.4.8, for a discussion of procedural environmental rights. The nature of environmental right and the challenges of its enforcement are discussed in para 2.4.6.

<sup>315</sup> See paras 2.4.1-2.4.6.

<sup>316</sup> See para 1.2. Furthermore, in a survey conducted in the USA, 75% of respondents were concerned about the water requirements of hydraulic fracturing, and the concern is not limited to respondents in the arid areas across the USA, but largely on the effect of large water withdrawals, and its effect of the availability of water for other uses. Nearly half noted that water quality challenge was a problem, observing that spills, leaks, and wastewater management could adversely impact water quality. See Cooley and Donnelly “Hydraulic fracturing and water resources” in Pacific Institute Oakland 2014 *The World’s Water* 65 at



pollution considering that some of the chemicals used are toxic, while radioactive elements like uranium, thorium and radium present in geological formations are brought to the surface with flowback fluids in hydraulic fracturing operations.<sup>317</sup> The pollution of water creates health concerns when there is exposure at sufficiently high levels, with potential radiation exposure risk to workers who work with contaminated tools and equipment.<sup>318</sup> There is also concern that due to the extremely large volume of water is required for hydraulic fracturing operations.<sup>319</sup> For example in 2013, voters in the state of Texas in the USA approved *Proposition 6*<sup>320</sup> which authorised the state to provide \$2 billion for the State Water Implementation Revenue Fund, because hydraulic fracturing and other unconventional usage of water has caused significant shortage of water.<sup>321</sup>

Unfortunately, there is hardly a firm conclusion as to the existence or the content of a right to water,<sup>322</sup> and the risk that existing international environmental laws and

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[www.worldwater.org/wp-content/uploads/sites/22/2013/07/ww8-ch4-fracking](http://www.worldwater.org/wp-content/uploads/sites/22/2013/07/ww8-ch4-fracking) [date of use 25 February 2015].

<sup>317</sup> New York State Department of Health *A Public Health Review of High-Volume Hydraulic Fracturing for Shale Gas Development* 39.

<sup>318</sup> A study in New York and Pennsylvania found that drinking water wells in areas of about one kilometre to fracturing sites had methane levels at least seventeen times higher than those outside conventional gas production areas. See Cooley and Donnelly 2014 *The World's Water* 69 available at [www.worldwater.org/wp-content/uploads/sites/22/2013/07/ww8-ch4-fracking](http://www.worldwater.org/wp-content/uploads/sites/22/2013/07/ww8-ch4-fracking) [date of use 25 February 2015].

<sup>319</sup> See IEA World Energy Outlook Special Report on Unconventional Gas 31.

<sup>320</sup> The *Texas State Water Fund Amendment, Proposition 6* was approved on November 5, 2013. Its effect was a "constitutional amendment providing for the creation of the *State Water Implementation Fund* for Texas (SWIFT) and the *State Water Implementation Revenue Fund* for Texas to assist in the financing of priority projects in the state water plan to ensure the availability of adequate water resources" available at <http://www.twdb.state.tx.us/waterplanning/rwp/index.asp> [date of use 3 November 2016].

<sup>321</sup> Notwithstanding *Proposition 6* though, environmental activists estimated that the state's strategy for meeting water demand would still have a 2.7 trillion gallons shortfall by 2060, for which an expenditure of \$53 billion in new infrastructure would be required. See Leclere "Water use for hydraulic fracturing: A Texas sized problem?" 2014 *The Takeaway* 1-4 available at [www.bush.tamu.edu/mosbacher/takeaway/V5-7%20Takeaway%20Hydraulic%20Fracturing](http://www.bush.tamu.edu/mosbacher/takeaway/V5-7%20Takeaway%20Hydraulic%20Fracturing) [date of use 28 April 2016].

<sup>322</sup> Though a few instruments like the 1992 *Dublin Statement on Water and Sustainable Development*; the 2000 *Ministerial Declaration of the Second Water Conference*; and the *Plan of Implementation* adopted at the 2002 World Summit on Sustainable Development, Johannesburg, may be relevant, the arguments against the demand for a binding instrument on the right to water are premised on the possible creation of international liability, the prevention of commodification of water, the avoidance of assumption of free access to water, the possible creation of obstacles to free trade, and the potential clamour for the liberalisation or privatisation of water utilities, as well as the potential of legal harassment of water utilities. See Fitzmaurice *Fordham Environmental Law Review* 556.

regulations are likely to be inflexible sufficiently to address the context-specific impacts of hydraulic fracturing<sup>323</sup> continue to fan the embers of anxiety. This is where procedural rights are relevant, in that they may allow the consideration of peculiar circumstances that could assist in the implementation of substantive rules for the protection of the environment and enforcement of human rights.<sup>324</sup> The importance and benefits of procedural environmental rights are discussed in paragraph 2.4.8.

In South Africa, section 27(1)(b) of the Constitution provides that “everyone has the right of access to sufficient food and water.” The Supreme Court of Appeal (SCA) in *The City of Johannesburg v Mazibuko*,<sup>325</sup> re-emphasised the importance of the right of access to sufficient water, holding that a commitment to address a lack of access to clean drinking water, among others, lies at the centre of the constitutional provision on the right of access to the quantity of water that is required for dignified human existence.<sup>326</sup> However, while the Constitutional Court upheld the SCA’s judgment that there is a constitutional right to sufficient water under section 27(1)(b), the Court ruled that the government, and not the courts, is better positioned to determine what constitutes “sufficient water.”<sup>327</sup>

In relation to hydraulic fracturing, there is a possibility that the right of access to sufficient water could be compromised<sup>328</sup> because the impact of the industry is likely to be localised and in that case, adjoining communities to areas of operations may have their water polluted.<sup>329</sup> However, there are significant differences and variations in geological, hydrology and landscape conditions, as well as cultural,

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<sup>323</sup> Kitze 2013 Minnesota Law Review 395.

<sup>324</sup> See Du Plessis 2008 *PER/PELJ* 173.

<sup>325</sup> 2009 (3) SA 592.

<sup>326</sup> Citing General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights on the *International Covenant on Economic, Social and Cultural Rights*, that “the human right to water is indispensable for leading a life in human dignity [and that] it is a prerequisite for the realisation of other human rights. See *City of Johannesburg v Mazibuko* 2009 (3) SA 592 (SCA) at para 17.

<sup>327</sup> *City of Johannesburg v Mazibuko* 2009 ZACC 28 (CC).

<sup>328</sup> See para 1.2.

<sup>329</sup> Typically, between 40,000 and 160,000 gallons of chemical additives can be released into the environment from each fractured well. See Suzuki 2014 *BC Env't/Aff L Rev* 269.

social and economic conditions in different areas where shale gas is found, even within the same country.<sup>330</sup> For example, availability and accessibility of groundwater varies depending on sites and seasonal changes as well as other uses of water. Given that water availability and use may be impacted and production on farms may be affected, there is a need to understand the local water balance and determine whether or not it could support hydraulic fracturing.<sup>331</sup> Efforts to subject hydraulic fracturing to the provisions of *Safe Drinking Water Act*<sup>332</sup> (SDWA) in the USA have failed, and unwittingly thereby largely leaving the regulation of hydraulic fracturing with states authorities.<sup>333</sup>

In South Africa, the *Investigative Report*<sup>334</sup> indicates that current applications to prospect for gas by hydraulic fracturing cover approximately 125,000km<sup>2</sup> of the Karoo basin, and if approved, hydraulic fracturing is likely to further compound the stress on water and the perennial loss of arable land to non-agricultural activities including mining and housing development causing decline in food production.<sup>335</sup> Furthermore, it is estimated that 19% of the rural population lacks access to a reliable water supply.<sup>336</sup> These facts in the context of recent reports on the water crisis in Cape Town<sup>337</sup> further highlight the need for assurance that the legal

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<sup>330</sup> See Wait and Rossouw 2014 *Southern African Business Review* 6.

<sup>331</sup> Canadian Water Network 2015 *Water and Hydraulic Fracturing Report* 26.

<sup>332</sup> 1974 42 USC 300.

<sup>333</sup> See Brady and Crannell 2012 *Vermont Journal of Environmental Law* 45. The US Court of Appeals in *Legal Environmental Assistance Foundation v US Environmental Protection Agency* 1997 118 F.3d 1467 1478 (11<sup>th</sup>Circ) had ruled that hydraulic fracturing activities constitute 'underground injection' under the (SDWA), the Environmental Protection Agency (EPA) initiated a study in 2004, the result of which concluded that hydraulic fracturing poses little or no threat to underground sources of drinking water. However, consequent upon the EPA study the Congress passed the *Energy Policy Act* in 2005, the effect of which amended the SDWA and excluded its application to hydraulic fracturing, by adding two exclusions to the definition of underground injection. The exemptions, generally referred to as "the Halliburton loophole" is named after the company that patented hydraulic fracturing are that the NSWA does not apply first, to underground injection of natural gas for purposes of storage, and secondly, that the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil and gas, or geothermal production activities.

<sup>334</sup> See Investigative Report 35.

<sup>335</sup> 2013 *National Policy on Food and Nutrition Security Annexure A* 12-13 available at [www.nda.agric.za/docs/media/NATIONAL%20POLICYON%20food%20and%20nutrition](http://www.nda.agric.za/docs/media/NATIONAL%20POLICYON%20food%20and%20nutrition) [date of use 20 April 2015].

<sup>336</sup> "Water access in South Africa" at 12.000.scripts.mit.edu [date of use 28 April 2016].

<sup>337</sup> Reports indicate that Cape Town is experiencing the worst drought to hit South Africa in decades, resulting in municipalities raising water restrictions, with plans to fine defaulters and possibly installing water management devices in private properties. See "Water crisis intensifies

framework for the regulation of hydraulic fracturing in South Africa can effectively protect procedural environmental rights.

The realisation of the substantive right to water is dependent to some extent on the performance of some administrative action.<sup>338</sup> For example, the NWA is enacted “to ensure that the nation’s water resources are protected, used, developed, conserved, managed and controlled in ways which take into account” factors including the promotion of equitable access to water and the efficient, sustainable and beneficial use of water in the public interest.<sup>339</sup> The realisation of the objectives of the NWA will be uncertain given the water-intensive nature of hydraulic fracturing. If the right of access to water is further curtailed by hydraulic fracturing, basic access to clean water and sanitation cannot be guaranteed and the right to an environment that is not harmful to health or wellbeing will most likely be compromised.<sup>340</sup>

There may be a need to examine regulations pertaining to water relation to the effect of hydraulic fracturing on other water use. This is necessary to ensure that the right of access to water is not compromised.<sup>341</sup> This requires an engagement with all stakeholders in the planning and the regulation of water use for hydraulic fracturing. Indeed, the *National Water Resource Strategy*<sup>342</sup> (hereafter NWRS 2) indicates that water resource protection should be based on a participatory approach. Principle 2 of the key principles guiding water resource protection in the NWRS 2 states that:

... the participatory approach to water resource protection should involve raising awareness of the importance and value of water among policymakers and the general public. It means that decisions are taken at the lowest appropriate level, with full public consultation and involvement of users in the management of our water resources.

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in Cape Town” available at [www.dw.com/en/water-crisis-in-cape-town/a-42017758](http://www.dw.com/en/water-crisis-in-cape-town/a-42017758) [date of use 15 January 2018].

<sup>338</sup> See chapter 5 for a consideration of the right to just administrative action in relation to hydraulic fracturing.

<sup>339</sup> Section 2(b) and (d) NWA. The administrative regulation of water licensing provisions of the NWA is designed to achieve the realisation of the objectives.

<sup>340</sup> Econometrix (Pty) Ltd “Karoo Shale Gas Report: Special Report on the Economic Considerations surrounding potential shale gas resources in the southern Karoo of South Africa.

<sup>341</sup> The use of water for hydraulic fracturing purposes will be subject to licence regulated by chapter 4 of the NWA.

<sup>342</sup> National Water Resource Strategy: Water for an Equitable and Sustainable Future II.

It is a legitimate expectation for people to envisage that the currently challenged access to water should not be worsened. Meanwhile, if hydraulic fracturing can adversely affect quality of water, the risk of its impact on human health is not far-fetched. The impact on human health is discussed below.

#### *2.4.2 Impact of hydraulic fracturing on human health*

Government reports in the UK observed that there is no significant risk posed to human health by hydraulic fracturing provided that best practice is followed in operations at all times.<sup>343</sup> However, other studies have reported that there are over 600 chemicals in use in typical hydraulic fracturing operations, and that 75% of the chemicals could affect the skin, eyes and other sensory organs as well as the respiratory and gastrointestinal systems.<sup>344</sup> The release of air and dust emissions, as well as engine emissions particularly fugitive discharge of organic compounds and other hazardous substances into the atmosphere may cause people to suffer from nausea, breathing difficulties, bone pain, and other health problems.<sup>345</sup> People may have to live in constant fear that a leak in storage facilities from hydraulic fracturing sites may contaminate their drinking water and also damage fields relied upon by livestock.<sup>346</sup> Some of the chemicals used in hydraulic fracturing are potentially harmful to human health, and studies have shown the possibility that such chemicals could contaminate surface water,<sup>347</sup> and that they may cause harm to human beings and the environment. The drilling of wastewater may contain hydrocarbons, heavy metals, radioactive materials, a range of chemicals and other toxics.<sup>348</sup> The long-term effect of some of these chemicals on human health is not known.

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<sup>343</sup> Fields et al 2014 *Environ Sci Process Impacts* 954.

<sup>344</sup> Hoffmann "Potential health and environmental effects of hydrofracking in the Williston Basin, Montana" available at [www.serc.carleton.edu/NAGTWorkshopp/health/case\\_studies/hydrofracking\\_w.html](http://www.serc.carleton.edu/NAGTWorkshopp/health/case_studies/hydrofracking_w.html) [date of use 3 November 2016].

<sup>345</sup> McDermott-Levy *et al* 2013 *Environment & Health* 45.

<sup>346</sup> Suzuki B.C. *Env'tl Aff L Rev* 266.

<sup>347</sup> De Wit 2011 *S Afr J Sci* 5.

<sup>348</sup> Kearns "A human rights assessment of hydraulic fracturing for natural gas" in 2011 *Environmental and Human Rights Advisory* [EHRA].

A further report on studies undertaken in 2014 involving patients exposed to hydraulic fracturing operations in different states of the USA,<sup>349</sup> highlighted several public health concerns including reduced birth-weight and increased premature deaths in Colorado. In another study commissioned by the New York State Department of Health, it was observed that while a guarantee of absolute safety is not required for hydraulic fracturing to proceed, it is necessary that sufficient information be made available to understand the likely public health risks.<sup>350</sup> Unfortunately, the study report concluded that:

...it is apparent that the science surrounding HVHF is limited, [and] only just beginning to emerge, and largely suggests only hypotheses about potential public health impacts that need further evaluation ... However, the existing studies also raise substantial questions about whether the risks of HVHF activities are sufficiently understood so that they can be adequately managed. Furthermore, the public health impacts from HVHF activities could be significantly broader than just those geographic locations where the activity actually occurs, thus expanding the potential risk to a large population.<sup>351</sup>

Despite the concerns associated with the health implications of hydraulic fracturing, experience in some countries where hydraulic fracturing is in operation appear to suggest that governmental authorities may not be enthusiastic in enforcing any law curtailing drilling activities, perhaps in a bid to protect anticipated revenues from operations.<sup>352</sup> This heightens the apprehension that socio-economic benefits may trump health and environmental concerns unless the adverse impacts can be reasonably controlled to give assurance that human health and the environment will not be worse off.

The unresolved concerns relating to the impact of hydraulic fracturing on the environment and human health among others, is one of the reasons, which eventually prompted the ban of HVHF in the state of New York.<sup>353</sup> The concerns should also provoke a comprehensive evaluation of the legal framework relating to hydraulic fracturing in South Africa to ensure that the right to an environment that

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<sup>349</sup> Concerned Health Professionals of NY 2014 Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking 51.

<sup>350</sup> NYS Department of Health A Public Health Review of High-Volume Hydraulic Fracturing for Shale Gas Development 41.

<sup>351</sup> NYS Department of Health A Public Health Review of High-Volume Hydraulic Fracturing for Shale Gas Development 2.

<sup>352</sup> Davis 2012 Review of Policy Research 184.

<sup>353</sup> See para 1.2.2.

is not harmful to health and wellbeing<sup>354</sup> is not compromised. The realisation of the implementation of the right to an environment not harmful to health or wellbeing is challenging. It is likely to be even more challenging regarding environmental impairment caused by hydraulic fracturing. This is because there is hardly any consensus on the effect of hydraulic fracturing on human health and the environment.<sup>355</sup> A review of opinions, however, indicates three potential concerns in relation to the impact of hydraulic fracturing on the environment, namely the question of sustainable development of shale gas resources, the question of public trusteeship in the management of shale gas resources, and the nature of the environmental right that could be impacted upon, coupled with issues relating to the complexity of the enforcement of that right. These questions are discussed in the following paragraphs.

#### *2.4.3 Impact of hydraulic fracturing on sustainable development*

'Sustainable development' is defined as development "that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>356</sup> It is the third tripod of the three core dimensions of the energy trilemma which seeks to find solutions to the problem of energy security and energy equity on the one hand, and ensuring that energy resource development effectively incorporates a balance of the interests of all stakeholders by integrating socio-economic benefits derivable therefrom with the impact of the development on the environment in policy and regulation.<sup>357</sup> Uncontrolled consumption of a finite natural resource without taking cognisance of sustainable development may result in the diminution of that resource thereby depriving future generations of the benefits accruing therefrom.<sup>358</sup> It is therefore important to ensure that its development is guided by policies and regulations addressing both socio-economic and environmental considerations, mindful of the interest of present and future

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<sup>354</sup> See section 24(a) of the Constitution.

<sup>355</sup> See para 2.4.2.

<sup>356</sup> 1987 World Commission on Environment and Development "Our Common Future" UN Doc A/42/427 (the Brundtland Report) Annex available at <http://www.un-documents.net/our-common-future.pdf> [date of use 19 October 2018].

<sup>357</sup> See para 2.2.

<sup>358</sup> Bice Responsible Mining: Key Principles for Industry Integrity 1.

generations. Sustainable development affects the interrelationship between mankind and the environment to ensure their continued existence. Though earlier models of the principle addressed the subject only from the perspective of economic and industrial growth, the rapid expansion of global economies post Second World War brought with it enormous environmental challenges which necessitated the reconsideration of a sustainable environment from the perspective of the protection of nature and natural resources.<sup>359</sup>

There is also a concern that GHG emissions, in particular methane, are higher in the extraction of shale gas compared to the global warming potential (GWP) from coal.<sup>360</sup> Methane has an increased GWP, raising serious issues of climate change and challenges of sustainable development.<sup>361</sup> Unfortunately, the possibility of remediating any harm after occurrence by way of compensation may not be effective at all times, as in some cases, the *ex post facto* remedy may not ameliorate irreversible damages. Therefore, it is necessary to evaluate prospective development prior to implementation to ensure that it is "transparent and accessible, holistic and comprehensive, scientifically rigorous, adaptive and robust, and inclusive and collaborative."<sup>362</sup> This is likely to balance competing socio-economic interests of stakeholders against the anticipated impact on the environment to ensure that the project meets the needs of the present generation without compromising the interests of future generations.

Sustainable development is a decision-making framework. It is therefore important that the public should be informed and be involved in the decision-making process relating thereto. Unfortunately, discussion relating to 'environmental justice' tends to focus only on the inequitable share of the ills of environmental degradation that the poor communities have to bear, which typically mirrors the inequities in the socio-economic and cultural statuses.<sup>363</sup> However, the discussion ought to include

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<sup>359</sup> Veinla 2005 *Juridica International* 117.

<sup>360</sup> The GWP of methane is said to be 70 times greater than the GWP of CO<sub>2</sub> at 20 years. See Brewer 2014 *International Centre for Trade and Sustainable Development* 11.

<sup>361</sup> Howarth 2014 *Energy Science & Engineering* 11.

<sup>362</sup> Canadian Water Network *Water and Hydraulic Fracturing Report* 40.

<sup>363</sup> Szaz and Meuser 1997 *Current Sociology* 99-120.



recognition, participation and empowerment of all the stakeholders in decision-making on matters affecting the environment.<sup>364</sup> In this regard, procedural rights, namely the rights of access to information, just administrative action and access to justice as the pillars of decision-making, are critical and necessary to appreciate the varying environmental, economic and social perspectives of the various segments of the population.<sup>365</sup>

The challenges posed by sustainable development have been addressed both under international and domestic law. Principle 2 of the *Stockholm Declaration* 1972 recognised the link between the environment and development, asserting the need to protect the environment “for the benefit of present and future generations through careful planning or management.” The objective of the principle gained international prominence in the 1987 *Brundtland Report*,<sup>366</sup> a document that initiated discussion on the need for a strategic framework for sustainable development across nations.<sup>367</sup> That discussion was eventually encapsulated into the principle of sustainable development, which entered contemporary legal discourse since its inclusion in the *Rio Declaration* 1992.<sup>368</sup> The *Rio Declaration* proclaimed that environmental protection constitutes an integral part of the development process,<sup>369</sup> and enjoins States to “reduce and eliminate unsustainable patterns of production and consumption, and promote appropriate demographic policies.”<sup>370</sup> The *Rio Declaration* therefore constitutes a build-up on the earlier foundation, and severally enumerates the key elements essential for sustainable development including the requirement for the dissemination of information to all stakeholders and to facilitate

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<sup>364</sup> Schlosberg “Three dimensions of environmental and ecological justice” Paper presented at the European Consortium for Political Research Annual Joint Sessions at Grenoble, France on 6-11 April 2001 available at <https://ecpr.eu/events/paperdetails.aspx?paperid=5323&eventid=45> [date of use 5 February 2018].

<sup>365</sup> Dernbach and Cheever “Sustainable development and its discontents” available at <http://ssrn.com/abstract=2634664> [date of use 17 June 2016].

<sup>366</sup> 1987 World Commission on Environment and Development “Our Common Future” UN Doc A/42/427 (the Brundtland Report)

<sup>367</sup> Fisher et al *Environmental Law: Text, Cases, and Materials* 407.

<sup>368</sup> Verschuuren 2006 *PER/PELJ* 209.

<sup>369</sup> Principle 4 of *Rio Declaration* 1992.

<sup>370</sup> Principle 8 of *Rio Declaration* 1992.

their participation in decision-making,<sup>371</sup> the precautionary principle,<sup>372</sup> the polluter pays principle,<sup>373</sup> and the requirement of an environmental impact assessment for projects likely to adversely impact the environment.<sup>374</sup>

Furthermore, Principle 10 of the *Rio Declaration* makes copious provisions relating to access to information and participation in decision-making. If information held by public authorities in relation to a development and its impact on socio-economic interests and on the environment is made available to the people, it will give them opportunity to participate in the decision-making process.<sup>375</sup>

In South Africa, section 2 of the NEMA provides for 'National Environmental Management Principles' which incorporates internationally recognised principles of environmental law including sustainable development among others, and enumerated the relevant factors to be considered in the determination of whether or not development is sustainable.<sup>376</sup> Furthermore, the courts have at different times upheld the constitutional and statutory provisions relating to sustainable development. In *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs*,<sup>377</sup> the court held that legislation dealing with matters such as town and country planning, conservation of natural resources, and prevention of pollution, "bear eloquent testimony of the existence of this more civilised and enlightened attitude" that resources are held in trust for future generations. The court further held that the concept of sustainable development is the "fundamental building block around which environmental legal norms have been fashioned, both internationally and in South Africa, and is reflected in section 24(b)(iii) of the Constitution."<sup>378</sup>

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<sup>371</sup> Principle 10 of *Rio Declaration* 1992.

<sup>372</sup> Principle 15 of *Rio Declaration* 1992.

<sup>373</sup> Principle 16 of *Rio Declaration* 1992.

<sup>374</sup> Principle 17 of *Rio Declaration* 1992.

<sup>375</sup> Principle 10 of *Rio Declaration*.

<sup>376</sup> See section 2(4) NEMA.

<sup>377</sup> 2004 ZAGPHC 18.

<sup>378</sup> 2004 ZAGPHC 18, 24.

Similarly, in *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*,<sup>379</sup> the Constitutional Court held that it is apparent from section 24 of the Constitution that there is an explicit recognition of the obligation to promote justifiable 'economic and social development' as it is vital to the well-being of human beings, observing that the "promotion of development requires the protection of the environment."<sup>380</sup> The Court cited with approval, several international reports and instruments dealing with sustainable development including the *Declaration on the Right to Development*,<sup>381</sup> the *Report of the World Commission on Environment and Development*,<sup>382</sup> and the *Rio Declaration*,<sup>383</sup> as well as the opinion of the International Court of Justice in the *Gabcikovo-Nagymaros Project case (Hungary/Slovakia)*,<sup>384</sup> all to the effect that economic development should be engaged in, contemporaneously with sustainable development. These cases underscore the importance of sustainable development from a legal point of view.

While environmental protection and development may appear incompatible, focus on sustainable development is likely to force stakeholders to pay attention to integrated decision-making and policies which incorporate the social, economic and environmental impacts of development, thereby redirecting the motivation for development to benefits that may accrue to mankind, present and future.<sup>385</sup> Unfortunately, local resistance to development, especially in the extractive mineral industry is common in most jurisdictions, perhaps because it is not backed by a social licence. A social licence to operate' (SLO) is an informal negotiated and on-going process involving the operator's relationship with the community with a view to entering into a sort of social contract to approve the project and its continued operations.<sup>386</sup> Obtaining an SLO therefore implies that the operator has largely

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<sup>379</sup> 2007 ZACC 13.

<sup>380</sup> At para 44.

<sup>381</sup> At para 44.

<sup>382</sup> Commonly referred to as the *Brundtland Report*, at para 47.

<sup>383</sup> At para 49.

<sup>384</sup> 1998 ILM 162, at para 54.

<sup>385</sup> Dernbach 2016 *Shale Gas and the Future of Energy: Law and Policy for Sustainability* 24.

<sup>386</sup> Smith and Richards 2015 *Oil & Gas Nat Resources & Energy* J 89.

addressed and reduced its socio-political risks to the satisfaction of the community,<sup>387</sup> and its existence can be a pointer that the promoter of a development project is mindful of the need to seek and obtain the buy-in of the community, agreeing with them on how challenges and impact can be addressed and presenting the potential benefits accruable in the long run, by facilitating effective participation of stakeholders in sustainable development.<sup>388</sup>

Closely associated with the principle of sustainable development in environmental law, is the Public Trust Doctrine (PTD). PTD is based on the principle that resources held by the state are subject to a trusteeship, which requires the state to make those resources available for the benefit of the general public.<sup>389</sup> PTD is considered below.<sup>390</sup>

#### *2.4.4 Impact of hydraulic fracturing on the public trust doctrine*

PTD is founded on three conceptual assumptions.<sup>391</sup> First, certain resources are so intrinsically important to every citizen, necessitating the protection of such resources so that they can be made available to all citizens. Secondly, some resources are considered bounty gifts of nature, which should be preserved for the whole society, and finally, certain uses of resources are peculiarly public such that any adaptation thereof to private use should be considered inappropriate.<sup>392</sup> A diversion of such resources will amount to their appropriation for personal use contrary to the doctrine that the earth's resources must be left for the public's enjoyment under the stewardship of those in authority. The cliché that everyone has the power to choose his or her destiny perhaps best explain the essence of PTD, as its purpose is to enrich choice and opportunity for everyone, present and future.<sup>393</sup> Thus, in the

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<sup>387</sup> Bursey 2015 Environment and Energy Bulletin 6.

<sup>388</sup> Bice Responsible Mining: Key Principles for Industry Integrity 24. See also Du Plessis 2017 PER/PELJ 4.

<sup>389</sup> See Van der Schyff 2010 PER/PELJ 13; Van der Schyff and Viljoen 2008 *The Journal for Transdisciplinary Research in South Africa* 342. See also Kidd *Environmental Law* (2<sup>nd</sup> ed) 11.

<sup>390</sup> See para 2.4.4.

<sup>391</sup> Takacs 2008 *New York University Environmental Law Journal* 713. See also Kameri-Mbote 2007 *Law Environment and Development Journal* 199.

<sup>392</sup> Takacs 2008 *New York University Environmental Law Journal* 713.

<sup>393</sup> Sax 1990 *J Land Use & Envtl Law* 104.

American case of *Illinois Central Railway Company v Illinois*,<sup>394</sup> the USA Supreme Court held that the state cannot abdicate its trust over property in which all the people are interested, because public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage.<sup>395</sup> That right can be surrendered only in rare cases when the abandonment of that right is consistent with the purpose of the trust.<sup>396</sup>

In contemporary jurisprudence, changing public needs have resulted in a modern version of the PTD, attracting attention in constitutional and statutory law.<sup>397</sup> In South Africa for example, section 2(4)(o) of NEMA provides that "the environment is held in public trust for the people, the beneficial use of environmental resources must serve the interest and the environment must be protected as the people's common heritage." This provision is pursuant to the constitutional requirement "to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."<sup>398</sup> Although section 24(b) confers the duty of protecting the environment for the present and future generations on the State, by virtue of section 8(2) of the Constitution, and to the extent that "a provision of the Bill of Rights binds a natural or a juristic person..." environmental rights can be asserted against the State and private entities.<sup>399</sup> Concomitantly, the combined effect of section 24(a) and section 8(2) of the Constitution, is to impose a responsibility on private entities as custodial of natural resources albeit in a moderate capacity, compared to the all-encompassing duty of the state, thus creating a shared responsibility between public and private actors to manage natural resources in the interest of the public and future generations.<sup>400</sup> In any event, a

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<sup>394</sup> 1892 146 US 387.

<sup>395</sup> See *Munn v. Illinois* 1877 94 U.S. 113.

<sup>396</sup> See *Illinois Central Railway Company v Illinois* 1892 146 US 387 at 441.

<sup>397</sup> Van der Schyff 2010 *PER/PELJ* 130.

<sup>398</sup> Section 24(b)(iii) of the Constitution.

<sup>399</sup> Feris 2012 *Law Environment and Development Journal* 16.

<sup>400</sup> Feris 2012 *Law Environment and Development Journal* 17.

private entity that has been granted rights over natural resources that is *res communis* is not permitted to exploit the resources to the detriment of the citizens. This explains why the government has a duty to protect the environment and natural resources for the benefit of all persons. The consequence of not doing so has the potential to adversely impact the continued availability of the natural resources in the long run, necessitating the constitutional right to a healthy environment, which *inter alia* mandates the protection of the environment for the benefit of present and future generations. Consequently, there is a need for an assurance that the legal framework pertaining to hydraulic fracturing in South Africa sufficiently provides for the protection of procedural environmental rights, being the focus of this study.

Incidentally, the adverse impacts of hydraulic fracturing on water, human health, sustainable development, and public trust in the management of resources will coincidentally impact the environment. This impact coupled with the nature of environmental rights and issues surrounding its enforcement are considered in the succeeding paragraph.

#### *2.4.5 Impact of hydraulic fracturing on the environment*

The potential impact of hydraulic fracturing on the environment is wide and diverse. The use of toxic chemical additives could affect land, aquifers and the underground water table, causing pollution.<sup>401</sup> The USA EPA observed that prudent steps are required to reduce known adverse impacts of hydraulic fracturing on the environment, including "air pollution resulting from the release of volatile organic compounds, hazardous air pollutants, and greenhouse gases."<sup>402</sup> The possibility of hydraulic fracturing harming the environment is due to the fact that shale gas resources are less concentrated than conventional gas deposits having been trapped in very tight or low permeable rock that impedes their flow in the process of extraction.<sup>403</sup> The gas resource has to be released by force to cause a fracture to the earth core. Furthermore, the scale of industrial operation required for a given

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<sup>401</sup> Kitze 2013 *Minnesota Law Review* 409.

<sup>402</sup> US EPA 2012 *Natural Gas Extraction- Hydraulic Fracturing 2* at [www.kdheks.gov/geo/download/Hydraulic-FracturingNaturalGas14.pdf](http://www.kdheks.gov/geo/download/Hydraulic-FracturingNaturalGas14.pdf) [date of use 7 November 2016].

<sup>403</sup> See para 2.2.

volume of unconventional gas output is much larger than for conventional production, implying that drilling and production activities can be considerably more invasive, involving a generally larger environmental footprint.<sup>404</sup> Drilling in hydraulic fracturing is generally a 24-hour-per-day operation; hence light is required throughout the night, with a regular stream of truck movements during mobilisation and demobilisation periods, constituting unceasing nuisance. Drilling operations can take anything from just a few days to several months, depending on the depth of the well and the type of rock encountered,<sup>405</sup> resulting in a disruption of the quality of life of community inhabitants. The process involves potential removal of billions of gallons of fresh water from the hydrologic cycle thereby depriving or stressing other uses for domestic, commercial and agricultural purposes.<sup>406</sup> People may have to live in apprehension that a leak in storage facilities from hydraulic fracturing sites may contaminate their drinking water and also damage fields relied upon for livestock care.

The risk of possible earthquakes and seismic movements near operational sites creates a source of potential danger to lives and property,<sup>407</sup> as well as soil, landscape and ecosystems damage.<sup>408</sup> Furthermore, hydraulic fracturing can substantially change the topographic and demographic character of a community by resulting in increased population, causing infrastructural degradation, and making a society less pastoral and more industrial. For example, the potential “boom and bust” cycle<sup>409</sup> typifying communities that had been sites for the extractive resource industry is real with hydraulic fracturing. Many of such communities become ghost towns populated by largely poor people when the resources have been completely depleted. The possibility of any of these risks occurring makes it important that the legal framework to regulate hydraulic fracturing sufficiently

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<sup>404</sup> IEA *Golden Rules for a Golden Age of Gas: World Energy Outlook Special Report on Unconventional Gas* 19.

<sup>405</sup> IEA *Golden Rules for a Golden Age of Gas: World Energy Outlook Special Report on Unconventional Gas* 23.

<sup>406</sup> Rahm and Riha 2012 *Environmental Science & Policy* 13.

<sup>407</sup> Nikiforuk “Did Alberta just break a fracking earthquake record? Regulator says drilling likely triggered 4.4 tremor” at [www.thetyee.ca/News/2015/01/29/Alberta-Fracking-Earthquake/](http://www.thetyee.ca/News/2015/01/29/Alberta-Fracking-Earthquake/) [date of use- 18 February 2015].

<sup>408</sup> Suzuki 2014 *BC Env'tl Aff L Rev* 266.

<sup>409</sup> Dernbach and May 2015 *Environment* 10.

protects procedural environmental rights, thereby putting potential victims in a position where they could enforce their rights and seek redress under the law.

Furthermore, the impact of hydraulic fracturing on climate change, especially fugitive emissions of methane from operations also gives cause for concern.<sup>410</sup> When methane, a GHG is released into the atmosphere it acts like a ceiling in a greenhouse, in the form of an ozone layer trapping solar energy and restricting the escape of the resultant heat from the atmosphere, with the effect of causing harm to human health, agriculture and eco-systems.<sup>411</sup> These concerns justify a review of the legal framework for regulation to ensure that environmental rights are adequately protected.

While it is recognised that development will necessarily result in some disturbance of nature, there is still a need for caution.<sup>412</sup> Resources will be utilised and the utilisation of resources by industries for the growth of the economy and benefit to people will be accompanied by some disruption of the environment, pollution and the consumption of resources that may deny others the use of same in the future.<sup>413</sup> Depending on varying circumstances as in hydraulic fracturing, the state may permit an act or project, which facilitates the economic growth and social development of the people but which could adversely impact the environment. While the state may permit development, the agencies of government must bear the responsibility and be accorded appropriate authority to ensure that a developmental project is compliant with environmental and planning laws.<sup>414</sup> In all these, the role of the state may appear contradictory. While balancing the benefits of development against its potential impact on the environment, the state may be perceived as both the possible cause of, and the solution to environmental problems. However, it is

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<sup>410</sup> Howarth "Methane emissions and climatic warming risk from hydraulic fracturing and shale gas development: Implications for policy" 2015 *Energy and Emission Control Technologies* 46 available at [https://www.eeb.cornell.edu/howarth/publications/f\\_EECT-61539-perspectives-on-air-emissions-of-methane-and-climatic-warmin\\_100815\\_27470.pdf](https://www.eeb.cornell.edu/howarth/publications/f_EECT-61539-perspectives-on-air-emissions-of-methane-and-climatic-warmin_100815_27470.pdf) [date of use 2 February 2018].

<sup>411</sup> See Smith *et al* 2012 *Nature Climate Change* 535-538.

<sup>412</sup> Adams *et al* Effects of Development of a Natural Gas Well and Associated Pipeline on the Natural and Scientific Resources of the Fernow Experimental Forest 10.

<sup>413</sup> Sax 1990 *J Land Use & Env'tl Law* 94.

<sup>414</sup> Fisher *et al* 2013 *Environmental Law: Text, Cases, and Materials* 57.



clear that development programmes can only be safe if appropriate steps are taken to prevent danger.<sup>415</sup> As the European Court of Human Rights pointed out in the case of *Budayeva and Others v Russia*,<sup>416</sup> there is:

...a positive duty on the government to take appropriate measures to safeguard the lives of individuals, particularly in relation to dangerous activities, which includes the duty to notify the public about life-threatening emergencies and to establish procedures to fix any shortcomings in protecting the right to life.

In many cases however, it is the person aggrieved or injured as a result of environmental degradation that is left to seek redress. The situation is further compounded when the victim is poor and lacks the political and economic resources to change his or her situation.<sup>417</sup>

The realisation that the impact of technological advancement and population growth may constitute a threat to the environment, and may concomitantly be a threat to human health<sup>418</sup> requires that best practice in environmental policy-making should integrate human rights into environmental standards.<sup>419</sup> According to Glazewski, the global trend, especially in developing countries is the recognition of the link between human rights and environmental rights.<sup>420</sup> The application of human rights norms to environmental decision-making will ensure that the standards for the assessment of environmental policies comply with human rights.<sup>421</sup> However, the question may be asked whether or not it is possible to infuse the character of a right into the

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<sup>415</sup> Nyamu-Musembi and Cornwall 2004 *Third World Quarterly* 1421.

<sup>416</sup> 2011 *ECHR Environmental Case Law Toolkit* 5. See also *Öneryıldız v Turkey* Application No. 48939/99 2004 ECHR 657, in which the applicant filed a claim alleging the failure of government officials to prevent a methane explosion, which killed nine of his relatives in violation of Article 2 (right to life) of the *European Convention on Human Rights* among others. The applicant alleged that the authorities failed to act on an earlier report, which concluded that the slums in which they lived did not conform to regulations and posed a serious health risk because of the potential for a methane explosion. The Court unanimously ruled that notwithstanding that the applicant and his deceased relatives lived in the slums illegally there was a violation of article 2 because the Turkish authorities failed to take appropriate steps to prevent the explosion.

<sup>417</sup> Hart "Socio-Political Factors" in Rabie and Fuggle (eds) *Environmental Management in South Africa* 54.

<sup>418</sup> Nickel 1993 *Yale Journal of International Law* 290.

<sup>419</sup> Knox "Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment" to the 28<sup>th</sup> Session of the Human Rights Council, 3 February 2015. A/HRC/28/61 at [www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A\\_HRC](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC) [date of use 31 May 2016].

<sup>420</sup> Glazewski *Environmental Law in South Africa* 1-22.

<sup>421</sup> Boyle 2012 *EJIL* 613.

environment. The succeeding paragraph tries to answer the question via a discussion of the nature of environmental rights.

#### *2.4.6 The nature of environmental rights.*

Notwithstanding that the right to a safe or healthy environment is consistently appearing either by way of a declaration or binding obligation in global and regional instruments, as well as in several state constitutions worldwide,<sup>422</sup> there appears to be an unending debate as to whether a freestanding environmental right binding on all nations as with the first generation rights is fully developed or still in an emergent state.<sup>423</sup> Indeed, it has been argued that if the right to a clean and healthy environment exists at all, it is in moral terms, lacking the authority and control to make it a subject of law.<sup>424</sup> The basis for this position probably depends on the general understanding that it is rather difficult to implement enforcement mechanisms in the event of non-compliance with environmental law.<sup>425</sup> The development of international environmental law has therefore to a large extent been dependent on the willingness of states to resolve environmental problems because they are appropriately endowed to exercise authority, ranging from command to control, designed to stimulate private actors to take care to forestall environmental degradation.<sup>426</sup> To realise that objective, a substantive environmental right is coupled with proclamations of values and classified as a 'solidarity' right pertaining to groups, rather than individuals.<sup>427</sup> Such classification is designed to provide state actors an opportunity to exercise value judgements in balancing the demands of development against human rights.<sup>428</sup> However, treating an environmental right as

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<sup>422</sup> Examples include articles 2 and 3 of the United Nations Framework Convention on Climate Change 1992, article 6 of the United Nations Convention on Biological Diversity 1992, article 24 of the African Charter, and article 11 of the Protocol of San Salvador of the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights.

<sup>423</sup> Vlavianos *The Intersection of Human Rights Law and Environmental Law* 4.

<sup>424</sup> Weston and Bollier *Regenerating the Human Right to a Clean and Healthy Environment in the Common Renaissance* 1.

<sup>425</sup> Watson 2005 *Environmental Law and Management* 4. See also Canfa 2007 *Vermont Journal of Environmental Law* 164.

<sup>426</sup> Fisher et al 2013 *Environmental Law: Text, Cases, and Materials* 54.

<sup>427</sup> Devenish 2003 *PERJ/PELJ* 45.

<sup>428</sup> See *Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) 77.

a solidarity right and third generation rights in which the right is domiciled in a community rather than individuals<sup>429</sup> devalues its character by diverting attention from its implementation, presenting it as different from civil and political rights.

Conversely, it is argued that there is no basis for a right to the environment being considered as a fundamental right in that its content is not easily determinable because there is no fundamental obligation to preserve nature when its resources are there for human beings to use.<sup>430</sup> Furthermore, while there appears to be a preponderance of opinion that every person has some sort of interest in the environment, there is no common ground as to how the interest should be legally protected.<sup>431</sup> Therefore, compared to other basic human rights and freedoms like the right to life, freedom of expression and association and the like, any loose use of the term 'right' in relation to environmental rights discourse, may result in rigid prescriptions that will not allow the trade-offs which are necessary if the statements of values associated with environmental interests are to be given effect.<sup>432</sup>

Furthermore, some global human rights instruments predate the global attention to environmental interests; hence they lack specific reference to environmental rights.<sup>433</sup> Similarly in the early days of its development, global recognition of the right to environment has been the subject of an array of resolutions, declarations, charters and other instruments, but they lack authority in that they do not create enforceable rights.<sup>434</sup> However, even where they do not create a binding obligation, their relevance in international law cannot be underestimated.<sup>435</sup> Some of them played a significant role in the development of environmental rights in international

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<sup>429</sup> Kidd *Environmental Law* (2<sup>nd</sup> ed) 19.

<sup>430</sup> Sax 1990 *J Land Use & Env'tl Law* 94.

<sup>431</sup> Relve 2016 *Juridica International* 32.

<sup>432</sup> Nickel 1993 *Yale Journal of International Law* 282.

<sup>433</sup> Shelton (ed) *Human Rights and the Environment* 10.

<sup>434</sup> Weston and Bollier *Regenerating the Human Right to a Clean and Healthy Environment in the Common Renaissance* 14. See the discussion on the relevance of non-binding international instruments on the protection of procedural environmental rights in paras 3.2.1.5, 3.2.2.1.2, 3.2.2.2.6, and 3.2.2.3.6.

<sup>435</sup> Orellana 2014 *Mich J Int'l L* 420.

and domestic instruments and policies,<sup>436</sup> consequent to which some major international conventions have taken a cue to include an infusion of environmental protection as one of their objectives.<sup>437</sup>

For example, the *Rio Declaration* articulates the need for development to be mindful of the interests of all stakeholders while protecting the “integrity of the global environmental system.” This is done through the proclamation of twenty-seven principles, some of which have shaped the development of global environmental law.<sup>438</sup> In the same vein, while the *Universal Declaration on Human Rights* 1948 (UDHR) does not expressly refer to the environment, article 3 recognises the right of every person to life, and article 25 provides *inter alia* that “everyone has the right to a standard of living adequate for the health and well-being of himself and his family...,” which can be extended to a healthy and conducive environment.<sup>439</sup> Interestingly, while the UDHR is a declaration of the General Assembly of the United Nations lacking the formal binding authority of a treaty, it is ‘broadly known and frequently invoked’ and it remains the fulcrum around which the discourse on human rights generally revolve.<sup>440</sup>

Furthermore, the underlying objective of Agenda 21, 1992<sup>441</sup> (hereafter Agenda 21) as declared in its preamble include addressing the problems of humanity today to

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<sup>436</sup> A growing number of states protect the right to a healthy environment in their constitution in some ways, while several others have statutory provisions imposing obligation on the government and its agencies to protect the environment. See Lewis 2012 *MqJICEL* 36.

<sup>437</sup> Article 24 of the *African Charter on Human and Peoples Rights* 1981 created for the first time, a regional legally binding right to a satisfactory environment, while the Aarhus Convention contained binding provisions on procedural environmental rights.

<sup>438</sup> Environmental norms are classified using three categories namely concepts, principles and rules, each according to its degree of generality or particularity. A rule creates a binding obligation in relation to an action (e.g. prohibition of dumping waste into the sea) and requires a more specific conduct than a norm prescribing the duty of a state to ensure that activities under its control do not cause environmental damage (see Beyerlin “Different types of norms in international environmental law” in Bodansky *et al* (eds) *The Oxford Handbook of International Environmental Law* 18.

<sup>439</sup> The courts in jurisdictions that do not have substantive CERs have sometimes had recourse to other substantive rights in the civil political rights category as having been undermined by a degradation of the environment thereby upholding an infringement. In *Kumar v State of Bihar* A.I.R. 1991 SC 420, the Indian Supreme Court held that polluted water could undermine the constitutional right to the quality of life envisaged by section 32 of the *Indian Constitution*.

<sup>440</sup> Alston and Goodman 2013 *International Human Rights* 142.

<sup>441</sup> Available at <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> [date of use 29 January 2018].

prepare for the challenges of the future,<sup>442</sup> by undertaking to deal with global environmental problems and to accelerate sustainable development,<sup>443</sup> and for all nations to work together to create a global partnership for sustainable development.<sup>444</sup> The programme areas that constitute Agenda 21 are described in terms of the basis for action, activities and means of implementation.<sup>445</sup> The programme areas are enumerated in forty chapters, focusing on various action plans. While a balanced and integrated approach to environment and development matters is important,<sup>446</sup> the programme areas particularly relevant and which should be included in the consideration of the development of a legal framework pertaining to hydraulic fracturing for the protection of procedural environmental rights including the protection of the atmosphere,<sup>447</sup> application of integrated approaches to the development, as well as the management and use of water resources,<sup>448</sup> environmentally sound management of toxic chemicals,<sup>449</sup> promoting education, public awareness and training<sup>450</sup> and information for decision-making.<sup>451</sup>

From the foregoing, the evolution of norms and principles creating a foundation for the recognition of an environmental right cannot be denied<sup>452</sup> especially in view of the inclusion of the right in the provisions of various constitutions of countries, even if such provisions vary in form and substance.<sup>453</sup> As noted by Kravchenko, the academic and judicial world has moved from the non-recognition of the right to a healthy environment to an era of recognition, even if that objective is gradually being realised through creative interpretations of other rights by the courts, which

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<sup>442</sup> Preamble 1.3 of Agenda 21.

<sup>443</sup> Preamble 1.4 of Agenda 21.

<sup>444</sup> Preamble 1.1 of Agenda 21.

<sup>445</sup> Preamble 1.6 of Agenda 21.

<sup>446</sup> Preamble 1.2 of Agenda 21.

<sup>447</sup> Chapter 9 of Agenda 21.

<sup>448</sup> Chapter 18 of Agenda 21.

<sup>449</sup> Chapter 19 of Agenda 21.

<sup>450</sup> Chapter 36 of Agenda 21.

<sup>451</sup> Chapter 40 of Agenda 21.

<sup>452</sup> 'Soft law' refers to rules of conduct, which may not create binding legal obligations, but generally complied with, and may result in opprobrium to states deliberately flouting those rules. Soft-law takes the form of declarations and resolutions of international organisations. They are statements of intent not designed to be legally binding but which may evolve to the status of customary international law over time. See Viljoen *International Human Rights Law in Africa* (2<sup>nd</sup> ed) 30.

<sup>453</sup> See May 2005-2006 Pace Environmental Law Review 129.

is bringing the environment and human rights close together.<sup>454</sup> In Europe for example, there is no convention recognising a substantive right to the environment, though the Aarhus Convention imposes an obligation on the state parties to “guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters.”<sup>455</sup> In the same vein, though the American Convention on Human Rights lacks a provision for the protection of the environment or a substantive right thereto, the IACtHRs has not been shy to apply section 13 of the American Convention, which entitles the applicants to information, to sustain claims for the violation of substantive right arising from degradation of the environment.<sup>456</sup>

In the African sub-region, the *African Charter on Human and Peoples’ Rights*, 1981<sup>457</sup> took the bold step by creating a substantive right “to a general satisfactory environment favourable to their development.”<sup>458</sup> Indeed, the Banjul Charter is the first legally binding regional instrument to make a clear provision for the right to a clean environment and a right to development.<sup>459</sup> Article 21 of the Banjul Charter affirms the right of the states to freely dispose of their wealth and natural resources in the exclusive interest of the people, while article 24 creates a substantive “right to a general satisfactory environment” suitable to people’s development. However, notwithstanding article 24 of the Banjul Charter, the possibility of deriving a right to environment from the custom and principles of international law is doubtful even in

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<sup>454</sup> Kravchenko 2012 7 *Fla. A&M U L Rev* 165.

<sup>455</sup> Article 1 Aarhus Convention. Certain EU Directives in the form of secondary law address procedural environmental rights, with the Directives setting out the requirements for the State parties to protect the environment. The EU Directive is one of the tools for implementing the European Union policies. It forms part of the EU’s *secondary law* (including instruments listed in Article 288 of the TFEU) adopted by EU institutions in accordance with the founding treaties. Article 288 of the *Treaty on the Functioning of European Union* (TFEU) provides that a directive is binding on the Member States (unilateral or multilateral) to whom it is addressed as to the result to be achieved, while leaving the national authorities the competence as to form and means. Thus, it must first be transposed into national law before the citizens of the affected state can have recourse to it. See *Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information* at [www.eur-lex.europa.eu/LexUriServe.do?uri=OJ:L:2003:041:0026:0032:EN:PD](http://www.eur-lex.europa.eu/LexUriServe.do?uri=OJ:L:2003:041:0026:0032:EN:PD) [date of use 21 January 2018].

<sup>456</sup> See *Claude-Reyes and Others v Chile* Case No. 12.108 2006 (IACtHRs).

<sup>457</sup> Hereafter “the Banjul Charter.”

<sup>458</sup> See article 24 of the Banjul Charter.

<sup>459</sup> Atapattu 2002 *Tulane Environmental Law Journal* 79. See also articles 21 and 24 of Banjul Charter.

the African region because the provisions in the various constitutions of African countries in relation to environmental right vary in form and substance, and many can be classified as mere declarations of value, rather than creating binding legal obligations.<sup>460</sup> In *Social and Economic Rights Action Centre v Nigeria*,<sup>461</sup> the applicants alleged the violations of several provisions of the Banjul Charter including article 24 by the Government of Nigeria. The ACHPR based its decision on the interpretation of article 24 on the obligation of Nigeria to carry out environmental impact assessments and to facilitate participation of all the stakeholders. The ACHPR held that Nigeria violated the Banjul Charter, and appealed to Nigeria to ensure the protection of the environment, health and livelihood of the people of Ogoniland, and *inter alia* to provide "information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations."<sup>462</sup>

In domestic law, a rigid classification of environmental rights in the nature of absoluteness that characterises civil and political rights may exacerbate the challenge of the resolution of modern-day conflict between development and human rights. An appropriate tool to resolve the question relating to criteria like 'decent environment', 'environment adequate for their health and well-being' is dependent on some affirmative action of the state, unlike civil and political rights which do not directly impose any obligation on the state, other than clarifying the normative character of the law.<sup>463</sup> In any event, to be effective, environmental laws require effective implementation because they are not self-executing. It is therefore necessary to create the required administrative capacities, appropriate regulations, and commitment on the part of the government, with an active participation of the civil society in the decision-making process.<sup>464</sup>

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<sup>460</sup> Pedersen 2008 *Georgetown Int'l Envtl Review* 82.

<sup>461</sup> Communication No. 155/96 of 2001 available at [www.achpr.org/files/sessions/30th/communications/155.96/achpr30\\_155\\_96\\_eng.pdf](http://www.achpr.org/files/sessions/30th/communications/155.96/achpr30_155_96_eng.pdf) [date of use 8 June 2016].

<sup>462</sup> *The impact of various global and regional international instruments on the enforcement of environmental rights is discussed in chapter 3.*

<sup>463</sup> 1990 J Land Use & Envtl Law 95.

<sup>464</sup> Razzaque "Implementing international procedural rights and obligations: serving the environment and poor communities" in International Institute for Environment and

It may be argued that the duty of the state is not that of protecting the environment, but rather, the protection of human beings from harmful environmental impacts.<sup>465</sup> Jurists and the courts have, however, creatively interpreted and broadened the scope of other rights to protect the interests and rights of those who could have been affected, or are in fact injured by harm done to the environment, where there is a lack of substantive provision on the right to environment.<sup>466</sup> Remarkably, lack of provisions is no longer prevalent. At least 130 countries of the world have constitutional provisions expressly addressing environmental norms in one way or another with not less than 60 of them having an enforceable substantive fundamental environmental right.<sup>467</sup> Even in countries in which environmental right is not justiciable,<sup>468</sup> the courts have successfully interpreted the right to life with the impact of environmental abuse, using human rights law to address a question relating to the environment.<sup>469</sup>

When environmental rights are given constitutional guarantees, the rights are conferred with supremacy over any conflicting action, policy or rule of the State or its agency.<sup>470</sup> The inclusion of an environmental right in the Constitution elevates it to the level of a fundamental right, making it indestructible especially when compared to statements of policy or procedural norms. It becomes an instrument to “protect abjured rights of the underrepresented and grant to the individual a subjective or personal guarantee.”<sup>471</sup> Thus, the substantive environmental right

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Development 2005 *How to Make Poverty History – The Central Role of Local Organisations in Meeting the MDGs* 175-184 London available at [www.pubs.iied.org/pdfs/G00466.pdf](http://www.pubs.iied.org/pdfs/G00466.pdf) [date of use 28 July 2016].

<sup>465</sup> Boyle 2007 *Fordham Environmental Law Review* 489.

<sup>466</sup> Kravchenko 2012 *Fla A & M U L Rev* 163. See also *Taskin and Ors v Turkey* 46117/99 [2004] ECHR 621; *Lopez Ostra v Spain* 1995 Eur Ct H R 303.

<sup>467</sup> May 2005-2006 *Pace Environmental Law Review* 129.

<sup>468</sup> For example, in Nigeria, environmental right is not justiciable. Though section 20 of the *Constitution of the Federal Republic of Nigeria* 1999, imposes an obligation on the State to “protect and improve the environment and safeguard the water, air, land, forest and wildlife in Nigeria,” that obligation is not enforceable in court by virtue of section 6(6)(c) of that constitution which excludes all provisions of chapter II [including the provision relating to the protection of the environment] from the jurisdiction of the courts.

<sup>469</sup> See for example *Social and Economic Rights Action Ctr v Nigeria* 2001 AHRLR 60, *Taskin and Ors v Turkey* 2004 ECHR 621, *Lopez Ostra v Spain* 1995 ECHR 303.

<sup>470</sup> Shelton (ed) 2011 *Human Rights and the Environment* (Vol.1) xi.

<sup>471</sup> May 2005-2006 *Pace Environmental Law Review* 118.



guarantees specific rights in relation to the environment in terms of the quality that people can expect to enjoy.

Today, environmental rights are recognised and applied in three different ways.<sup>472</sup> First, as a right derived from an enforcement of other substantive rights, like the rights to life, to health, and to respect for private and family life.<sup>473</sup> Secondly, the right to environment is seen as a right autonomous unto itself, having been recognised and enforceable as such as evident in national constitutions, legislation and regional treaty provisions. Thirdly, the right to environment is considered in the form of a “cluster of entitlements,” derived from other rights arising from the procedural requirements of other substantive rights applied to the environment, hence, the label ‘procedural environmental rights.’<sup>474</sup> Indeed, the wider acceptance of these divergent sources further underscores the linkage between the environment and human rights as:

...reflected in developments relating to procedural and substantive rights, in the activities of international organizations, and in the drafting and application of national constitutions... In the last decade a substantial body of case law and decisions has recognized the violation of a fundamental human right as the cause, or result, of environmental degradation. A significant number of decisions at the national and international levels have identified environmental harm to individuals or communities, especially indigenous peoples, arising as a result of violations of the rights to health, to life, to self-determination, to food and water, and to housing.<sup>475</sup>

Environmental factors may affect rights protected by human rights instruments in three ways. First, the effect may be direct as in when toxic discharges or pollution adversely affect the health of people. Secondly, adverse environmental factors may necessitate the enforcement of certain procedural rights like the right to be informed and the right to remedy infractions relating to other substantive human rights caused by environmental degradation. Finally, the need to protect the environment

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<sup>472</sup> Pedersen 2008 *The Georgetown Int'l Env'tl Review* 74.

<sup>473</sup> Weston and Bollier *Regenerating the Human Right to a Clean and Healthy Environment in the Common Renaissance* 12.

<sup>474</sup> Weston and Bollier *Regenerating the Human Right to a Clean and Healthy Environment in the Common Renaissance* 13.

<sup>475</sup> “Expert seminar on Human Rights and the Environment, Meeting of Experts’ Conclusions” 2002 available at <http://www.unchr> [date of use 11 November 2016]. See Kravchenko 2008 *Vermont Journal of Environmental Law* 5.

may justify some interference with specific human rights, as may be reasonable and justifiable for the benefit or the protection of the larger society.<sup>476</sup>

While there is some sort of understanding regarding the existence of a substantive right to environmental right, there is no generally accepted standard to measure success or efficacy of the attendant values of terms like 'decent environment', 'environment adequate for their health and well-being' accompanying the right in international law, thereby cloaking environmental rights with the toga of ambiguity and lack of credibility.<sup>477</sup> A countermeasure by activists and scholars is to work towards finding an alternative but effective means of environmental protection,<sup>478</sup> resulting in the emergence of the application of procedural rights like the rights to information, just administrative action, and access to courts as veritable tools to be applied to forestall environmental harm.<sup>479</sup> The nature and function of procedural environmental rights are discussed below.

#### *2.4.7 The nature of procedural environmental rights*

The application of human rights to the development of environmental law has resulted in the evolution of procedural rights for the benefit of people to be applied to enforce other rights when conditions of life may be threatened, including by an abuse of the environment. For the purpose of environmental law, procedural rights are conceived as a democratisation of environmental decision-making involving individuals and communities who are the potential victims of environmental degradation.<sup>480</sup> For example, Principle 10 of *Rio Declaration* characterises the elements of the right of participation of all persons in environmental matters, creating the access rights, namely access to information, access to the right to participate in decision-making and access to judicial and administrative proceedings. These access rights are essential to the realisation of the other principles in *Rio Declaration*, and indeed in the realisation of other substantive rights relating to the

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<sup>476</sup> Council of Europe Manual on Human Rights and the Environment 2<sup>nd</sup> ed 8.

<sup>477</sup> Sax 1990 J Land Use & Env'tl Law 96.

<sup>478</sup> Shelton 2006 *Denv J Int'l L & Pol'y* 132.

<sup>479</sup> Kravchenko 2012 *Fla A&M U L Rev* 164.

<sup>480</sup> Cullet 1995 *Neth Q Hum Rts* 36.24.

environment and affecting human rights.<sup>481</sup> Consequently, provisions protecting procedural environmental rights fashioned after the substance of article 10 of the *Rio Declaration* were eventually adopted and made justiciable in other environmental protection instruments like the Aarhus Convention and in EU Directives,<sup>482</sup> in the form of secondary law to protect the environment and environmental rights.<sup>483</sup> By so doing, procedural rights are applied “emphatically to human rights law” to mark out clear entitlements thereby making it possible to successfully exercise substantive environmental rights.<sup>484</sup> Consequent on the foregoing, it will appear that there is value to be derived in a legal framework designed to regulate hydraulic fracturing incorporating the substance of article 10 of the *Rio Convention* for the protection of procedural environmental rights to ensure that the access rights can be freely used to realise other substantive rights which may potentially be compromised.

In the same vein, the realisation of the objectives of Agenda 21 and its programmes also depends on pertinent information and its dissemination. In this regard, its chapter 40.1 expounds the motivation for information for decision-making, providing that:

...everyone is a user and provider of information considered in the broad sense. That includes data, information, appropriately packaged experience and knowledge. The need for information arises at all levels, from that of senior decision makers at the national and international levels to the grass-roots and individual levels.

From the foregoing, it can be said that procedural rights become instrumental in giving a structural framework for the realisation of the substantive rights,<sup>485</sup> considering that substantive and procedural rights are not always mutually exclusive in the enforcement of rights, because a claim on a substantive right may require a procedural right to be considered in reaching a decision. Procedure is simply the

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<sup>481</sup> Orellana 2016 *RECIEL* 52.

<sup>482</sup> See for example, *Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information* available at [www.eur-lex.europa.eu/LexUriServe.do?uri=OJ:L:2003:041:0026:0032:EN:PD](http://www.eur-lex.europa.eu/LexUriServe.do?uri=OJ:L:2003:041:0026:0032:EN:PD) [date of use 29 March 2017]. The Aarhus Convention and the EU Directives are discussed in section 3.2.2.2.

<sup>483</sup> Relve 2016 *Juridica International* 33.

<sup>484</sup> Mason 2010 *Global Environment Politics* 16.

<sup>485</sup> Cullet 1995 *Neth Q Hum Rts* 36.

process through which decisions, whether administrative or judicial is reached.<sup>486</sup>

Environmental administration is not any different. It is a process that requires:

...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.<sup>487</sup>

In the absence of a universally accepted mechanism for the enforcement of environmental rights, regional human rights conventions seek to protect humans against the vagaries of environmental degradation in the form of secondary law setting out the procedural requirements for the state parties.<sup>488</sup> For example, while the *American Convention on Human Rights* 1969<sup>489</sup> does not provide for a right in respect of the environment, article 31 thereof makes provision for the means by which other rights and freedoms other than those expressly mentioned in the American Convention may be recognised. Such rights and freedoms are to be included by way of Protocols to the Convention.<sup>490</sup> In respect of environmental right therefore, the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* 1988<sup>491</sup> (though yet to become operative), provides, *inter alia*, in article 11 that “everyone shall have the right to live in a healthy environment” and member States are required to “promote the protection, preservation, and improvement of the environment.”

Likewise in Europe, the *Aarhus Convention* made binding provisions and established an enforceable mechanism to protect the right of people to live in an environment

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<sup>486</sup> Razzaque “Human rights to a clean environment: procedural rights” in Fitzmaurice *et al* *Research Handbook on International Environmental Law* 284.

<sup>487</sup> Kotzé “Environmental Governance” in Paterson and Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 108. See also Glazewski *Environmental Law in South Africa* 6-1.

<sup>488</sup> Relve 2016 *Juridica International* 33. Procedural rights, especially the rights of access to information, participation in decision-making and access to justice concisely articulated in Principle 10 of the *Rio Declaration* 1992 are now increasingly featured in international soft law and included in many Multilateral Environmental Agreements (MEAs) as well as in certain key provisions of treaties and conventions. See Kravchenko 2012 *Fla A&M U L Rev* 175.

<sup>489</sup> Hereafter the American Convention, available at [www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.pdf](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf) [date of use 10 June 2016].

<sup>490</sup> Article 77 of the American Convention on Human Rights 1969.

<sup>491</sup> Available at [www.oas.org/juridico/english/treaties/a-52.html](http://www.oas.org/juridico/english/treaties/a-52.html) [date of use 10 June 2016].

adequate to their health and well-being through the application of legislative, regulatory and other measures to facilitate the provision of information, public participation and access to justice in order to implement the provisions of the Convention.<sup>492</sup> Judicial authorities have also lent listening ears.<sup>493</sup> The courts and tribunals across the region have often resorted to the application of procedural rights. While the European Court of Human Rights has generally given the national authorities the latitude to decide on environmental issues, which have technical and social aspects, they have in recent times confirmed that human rights law and environmental law are mutually reinforcing.<sup>494</sup>

It can therefore be argued that in Europe, there is a general recognition that environmental factors affect some of the rights protected by the European Convention like the right to life,<sup>495</sup> which may require a proof of some procedural right to establish a breach. Accordingly, the European Court has established that public authorities are duty bound to protect procedural rights in order to give effect to certain rights, including environmental rights.<sup>496</sup> This is evident in *Steel Morris v the United Kingdom*<sup>497</sup> where the European Court held that the failure of the UK government to grant legal aid to the applicants (an NGO environmental activist organisation) meant they were treated unfairly in the proceedings, and their freedom of expression were violated. Similarly, in *Vides Aizsardzibas Klubs v Latvia*,<sup>498</sup> the applicant, an environmental NGO challenged the Mayor for failing to stop a construction causing damage to the coastline to which the administrative authority objected, contending that the challenge was erroneous and should be

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<sup>492</sup> Articles 1 and 3 of Aarhus Convention.

<sup>493</sup> Kravchenko 2012 Global Business & Development Law Journal 247.

<sup>494</sup> Council of Europe *Manual on Human Rights and the Environment* 2<sup>nd</sup> ed 30 available at [www.echr.coe/LibraryDocs/DH\\_ENV\\_Manual\\_Environment\\_Eng.pdf](http://www.echr.coe/LibraryDocs/DH_ENV_Manual_Environment_Eng.pdf) [date of use 8 June 2016].

<sup>495</sup> See Article 2 of the European Convention.

<sup>496</sup> See *Oneryildiz v Turkey* at [www.hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-67614&filename=0](http://www.hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-67614&filename=0) [date of use 8 June 2016], *Budayewa and Others v Russia* available at [www.hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-85436&filename=0](http://www.hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-85436&filename=0) [date of use 8 June 2016]. See also Council of Europe *Manual on Human Rights and the Environment* (2<sup>nd</sup>ed) 8.

<sup>497</sup> No. 68416/01 2005 available at [www.justiceandenvironment.org/\\_files/file/2011%20ECHR.pdf](http://www.justiceandenvironment.org/_files/file/2011%20ECHR.pdf) [date of use 8 June 2016].

<sup>498</sup> Available at [www.hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-4400&filename=00](http://www.hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-4400&filename=00) [date of use 8 June 2016].

retracted. The European Court held that the applicant's 'watchdog' role was an essential participatory role in a democratic society, and that it was free to report facts that were likely to interest the public and thereby contribute to transparency in the public authorities' action. All that the applicant needed to do was to express a view amounting to a value judgment; it could not be required to prove the accuracy of the assessment. The European Court further held that there was a breach of the right to freedom of expression because of the inappropriate restrictions placed on the activities of the applicant.

Though Africa has the benefit of a regional instrument providing for a substantive right via section 24 of the Banjul Charter resort to procedural rights have helped to clarify the scope of that right. In *Social and Economic Rights Action Centre (SERAC) v Nigeria*,<sup>499</sup> the African Commission observed that state parties to the Banjul Charter have obligations to make sure that individuals are able to exercise their rights and freedoms by creating and maintaining appropriate administrative and regulatory framework, and foster public awareness of the structure.<sup>500</sup> the obligations include "undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development of decisions affecting their communities."<sup>501</sup>

Constitutionalism requires that the powers of the government must be limited.<sup>502</sup> This is achieved by guaranteeing adherence to the rule of law and ensuring that fundamental rights are protected.<sup>503</sup> Accordingly, the legal framework pertaining to hydraulic fracturing should facilitate the protection of procedural environmental rights. Such a framework should ensure that stakeholders have the relevant information as to how hydraulic fracturing could affect them. In the same vein, the regulation of the environment should enhance environmental justice, which

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<sup>499</sup> 2001 AHRLR 60

<sup>500</sup> See *SERAC v Nigeria* at para 46

<sup>501</sup> See *SERAC v Nigeria* at para 53.

<sup>502</sup> Dicey An Introduction to the Study of the Law of the Constitution 5.

<sup>503</sup> Rosenfeld 2001 Southern California Law Review 1307.

demands the fair treatment and meaningful involvement of all people in the development, implementation and enforcement of environmental policies.<sup>504</sup>

The application of human rights to the development of environmental law has resulted in the evolution of procedural rights as a body of rights that could be used to realise the conservation of a wholesome environment for the benefit of people whose conditions of life are threatened. In this regard, the courts appear to have created a refuge to those affected by environmental harm that could have gone without any remedy. Procedural rights have therefore essentially become an ingredient for securing substantive rights, though in their own right, they also assist in raising public awareness, fostering public participation and facilitating an environment conducive to responsible governance.<sup>505</sup> The role and function of procedural environmental rights in the protection of human rights are discussed below.

#### *2.4.8 The role and function of procedural environmental rights*

The foregoing has shown that procedural rights are relevant in the enforcement of environmental rights where available, or where the right to environment is included in the law but not justiciable, or when the substantive right is so much coloured by value perception making the discharge of the burden of proof difficult in litigation. In these situations, procedural rights may achieve a balancing of the competing rights,<sup>506</sup> making it possible to employ other substantive rights impacted by environmental degradation as the basis of claim for remedies. For example, where the effect of environmental damage is direct as in when toxic discharges or pollution adversely affect the health of people, it may be necessary to demand the enforcement of certain procedural rights like the right to be informed, and the right to remedy for infractions on other human rights caused by the environmental degradation. The fact that damage to the environment can impair and undermine

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<sup>504</sup> Gouldson 2006 *Area* 403.

<sup>505</sup> May 2013 *J Envtl Law and Litigation* 30.

<sup>506</sup> Vlavianos "The intersection of human rights law and environmental law" in Canada Institute of Resources Law *A symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage* 6.

other human rights, for example, the right to life underscores the fact that though there is no substantive right to a healthy environment, recourse may be made to procedural rights like the right to just administrative action to prove that action taken was administratively unfair and/or that there is need for appropriate reasons to be provided for the administrative action.

Furthermore, procedural rights facilitate democratic decision-making in the regulation of the environment. People must have access to the centres of power to give them opportunity to express competing views on the exercise of power in a fair and equitable manner.<sup>507</sup> Moral duty on the part of the administrative authority demands that it engages the people through public participation, given that the authority works for the public.<sup>508</sup> Furthermore, the fact that the existence of divergent values influence the development of environmental law underscores the role of the state in resolving environmental problems, and to address the issues emanating from politics in the discourse on the environment.<sup>509</sup> It is therefore reasonable that those who are affected or may be affected by a decision should have a right in the process of arriving at that decision.<sup>510</sup> A participatory process gives opportunity to all stakeholders in policy formulation and operational framework, thereby creating a consensus on the part of those whose rights may be violated and those who have a duty to act.<sup>511</sup>

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<sup>507</sup> Ramaphosa "The main elements of democracy: A South African Experience" in Inter-Parliamentary Union 1998 *Democracy: Its Principles and Achievement* 73.

<sup>508</sup> Department of the Environment, Transport and the Regions (UK) 2000 *Public Participation in Making Local Environmental Decisions* 11 available at [www.unep.org/env/pp](http://www.unep.org/env/pp) [date of use 27 May 2016].

<sup>509</sup> Fisher *et al* 2013 *Environmental Law: Text, Cases and Materials* 54.

<sup>510</sup> Dellinger 2012 *Colo J Int'l Env'tl L & Pol'y* 313.

<sup>511</sup> For the advantages and disadvantages of participation in environmental decision-making, see - Shelton "Rights-based approach to public participation and local management of natural resources" available at [www.pub.iges.or.jp/modules/envirolib/upload/1503/attach/3ws-26-dinah.pdf](http://www.pub.iges.or.jp/modules/envirolib/upload/1503/attach/3ws-26-dinah.pdf) [date of use 26 May 2016] and Popovic 1993 *Pace Env'tl L Rev* 683; Mason 2010 *Global Environment Politics* 10; and Ministry of Environment Poland 2002 *Handbook on Public Participation in Environmental Impact Assessment Procedures in Poland* available at <http://www.mos.gov.pl/aarhus> [date of use 26 May 2016].



The promotion of coordinated participation of individuals including children,<sup>512</sup> non-governmental organisations and other sectors of the society in the effort to improve the environment generally enhances quality of life in the long run.<sup>513</sup> If there is congruence in the interests of the government and the community regarding environmental decision-making facilitated through public participation, it is possible to expect individuals and the community to monitor compliance and identify violations which could be missed by an understaffed public agency, thereby filling gaps in government enforcement caused by resource constraints.<sup>514</sup>

Regardless of the foregoing, an engagement with the public may not necessarily be beneficial. Consequent upon participation, expectation may be excessive. This is because if the expectations of the public are not met, there may be general dissent regarding the decision. This may also result in a lack of trust of the administrative authority by the public. The expectations of the public could, however, be properly managed in the procedure adopted for public participation, even if it is to resolve conflict in the needs and concerns of the people early in the planning process. A proper public participation procedure must be mindful of possible challenges, which may include but are not limited to governance issues, developmental issues, cultural issues, communication issues and available finance. In this regard, a six-step process recommended in the *Guide to Public Participation in Environmental Assessment Process* developed by the SADC's Calabash Project is worthy of note.<sup>515</sup>

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<sup>512</sup> The interest of every segment of the population is relevant in matters of public participation. Article 12 of the *UN Convention on the Rights of the Child* 1989 provides for the right of a child to be listened to and taken seriously, and "be heard in any judicial and administrative proceedings affecting the child." This is a substantive right, which is coupled with a procedural right enabling the child to seek redress, and it should of necessity be extended to environmental matters.

<sup>513</sup> See The Organisation of American States *1991 Inter-American Program of Action for Environmental Protection* (AG/RES 1114 (XXI-0/91 of June 8 1991).

<sup>514</sup> Casey-Lefkowitz *et al* 1996 *Proceedings of the 4<sup>th</sup> International Conference on Environmental Compliance and Enforcement* (at Chiang Mai, Thailand) available at [www.inece.org/4thvol1/futrell.pdf](http://www.inece.org/4thvol1/futrell.pdf) [date of use 27 May 2016].

<sup>515</sup> Available at [www.saiea.com/calabash/handbook/introduction.pdf](http://www.saiea.com/calabash/handbook/introduction.pdf) [date of use 27 May 2016]. The six-step process guide to public participation covers screening, scoping, impact assessment, decision-making, appeals, and implementation. See also Motherway "Public Involvement in Environmental Decision-Making in Ireland" available at [https://www.tcd.ie/policy-constitute/assets/pdf/PIWP03\\_Motherway.pdf](https://www.tcd.ie/policy-constitute/assets/pdf/PIWP03_Motherway.pdf) [date of use 27 May 2016]; "Public Participation and Communication Plan of the State of California Groundwater Monitoring in Areas Subject to Well

On the whole, while there may be some concerns, it appears that the balance of the scale tilts more on the side of the benefits of using procedural process to facilitate compliance and enforcement of environmental regulations.<sup>516</sup> When administrative authorities work together with the public, it engenders trust on the part of the public and facilitates participation in the course of governance. That is 'trust-based' environmental regulation, which fosters "openness and cooperation in interaction between the regulated, regulators and third-party stakeholders in order to achieve environmental protection objectives."<sup>517</sup> Therefore, involving the public in environmental decision-making especially in the light of contemporary awareness of the general public in matters affecting or likely to affect them will open up the decision-making process to the public domain. Persons who may be affected by a potential decision, but whose interest may not be directly represented are given opportunity to present their views.<sup>518</sup> Conversely, the implementation of policies or decisions to regulate the environment without the participation of the stakeholders is likely to be ineffective and perhaps harmful to the very community that is intended to benefit therefrom.<sup>519</sup>

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Stimulation Treatments 2015" at [www.waterboards.ca.gov/water\\_issues/programs/groundwater/sb4/docs/model](http://www.waterboards.ca.gov/water_issues/programs/groundwater/sb4/docs/model) [date of use 27 May 2016]; and Casey-Lefkowitz *et al* 1996 *Proceedings of the 4<sup>th</sup> International Conference on Environmental Compliance and Enforcement* (at Chiang Mai, Thailand).

<sup>516</sup> Across jurisdictions, there are statutes on environmental regulation that require public participation as part of decision-making or enforcement mechanism. For example in the USA, section 4345 of the *National Environmental Policy Act* 2006 42 USC (hereafter the NEPA) requires the President's Council on Environmental Quality to consult with representatives of science, industry, agriculture, labour, conservation organisations, state and local governments among others, and to "utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals" to forestall duplication of efforts, and waste of resources, as well as overlapping of functions being performed by different government agencies. Similarly, in Europe, Directive 2003/35/EC of the European Parliament and of The Council makes provisions for public participation in respect of plans and programmes relating to the environment (2003 *Official Journal of the European Union* L/156/17). The Directive requires member States to ensure that the public is given an effective and early opportunity to participate in the preparation and the review of plans. Furthermore, the public is entitled to express comments and opinions, and in making decisions "due action shall be taken of the results of the public participation." See article 2 of Directive 2003/35/EC.

<sup>517</sup> Lange and Gouldson 2010 *Science of the Total Environment* 5235.

<sup>518</sup> Lucas 1976 *Natural Resources Journal* 74.

<sup>519</sup> Razzaque "Implementing international procedural rights and obligations: Serving the environment and poor communities" in IIED 2005 *How to Make Poverty History* 183.

Another role of procedural rights is that it facilitates accountability and responsibility in environmental decision-making. Accountability involves two distinct stages. First it refers to answerability, which is the obligation of the authority to provide information regarding decisions and actions in order to justify them to the public. Secondly, it refers to enforcement, which implies that an appropriate institution is empowered to sanction an offending party or remediate a contravening behaviour.<sup>520</sup> Accordingly, obligations imposed upon authorities exercising environmental governance powers either by statute or the common law as the case may be, demand that they act fair and reasonable, and comply with the law.<sup>521</sup> The requirement for accountability therefore facilitates the process by which duty-bearers are liable for their acts or omissions in relation to their duties,<sup>522</sup> as transparency must be manifest in the decision-making process. This is necessary to gain the confidence of the stakeholders that those deserving blame will be held accountable when necessary, and that those adversely affected will be able to seek effective remedies when rights are violated.<sup>523</sup> The approach adopted for guaranteeing accountability whether judicial or administrative should be manifestly "accessible, transparent and effective."<sup>524</sup>

Administrative action, including those relating to the environment, must be governed by democratic values and principles embracing the promotion of ethics, efficient use of resources, impartiality, fairness and equity in the provision of services, and accountability.<sup>525</sup> Persons aggrieved by the exercise of administrative actions or decisions have the right to seek redress before a competent court or tribunal. Judicial review of administrative action is a pre-requisite for legal accountability of public officers, and in a way, the reinforcement of democratic control of official behaviour.<sup>526</sup> Furthermore, the right to just administrative action

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<sup>520</sup> Sano 2014 *Nordic Journal of Human Rights* 385.

<sup>521</sup> Glinz 2009 *Namibian Law Journal* 5.

<sup>522</sup> Peters "Governance as political theory" in Levi-Faur (ed) *Handbook of Governance* 20.

<sup>523</sup> See Mashaw 2005 *Issues in Legal Scholarship* 16.

<sup>524</sup> Office of the UN Commissioner for Human Rights 2012 *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* at para 74.

<sup>525</sup> See section 195 of the Constitution.

<sup>526</sup> Mashaw "Administrative Law and Agency Accountability" in Clark (ed) *Encyclopaedia of Law and Society: American and Global Perspectives* 32

creates an opportunity to subject administrative action to a test as to whether or not it has complied with the law and procedural requirements. Other means of control include recourse to an impartial arbiter like the ombudsman.<sup>527</sup> The legal control of the exercise of environmental administration by the right to just administrative action is discussed further in paragraph 2.5.2; and in relation to hydraulic fracturing, in chapter 5.

Finally, free access to the courts, tribunals or other dispute resolution mechanisms, provides an opportunity to hold public officers and government authority accountable, and to secure redress for environmental violations. The fact that every civilised legal system provides for the right of access to the courts one way or the other to obtain redress for abuse of rights reinforces the opportunity to apply to enforce fundamental rights, one of the effects of which is to obtain redress for an environmental degradation causing harm or injury. The potential enforcement of procedural rights when necessary gives a measure of comfort that public officials and governmental authorities will be compliant in protecting the environment, and that in the event of failure, there is recourse to an impartial and independent arbiter to guarantee justice.

The foregoing confirms that there is no gainsaying that the exploitation of natural resources should not result in an infringement of human rights, but the reality as highlighted in paragraph 2.4 above is that hydraulic fracturing has the potential to adversely impact some fundamental human rights including environmental rights. It is therefore important that if that happens, an aggrieved person should have the opportunity of seeking redress through channels provided by the law to ensure compliance with the law. Procedural environmental rights afford that opportunity,

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<sup>527</sup> Hoexter Administrative Law in South Africa 57.

and those relevant in relation to the enforcement of rights in the event of potential harm caused by hydraulic fracturing are discussed in the next paragraph.

### ***2.5 Specific procedural rights relevant to the enforcement of environmental rights in relation to hydraulic fracturing***

In relation to environmental rights, it is possible to address infringement from three overlapping perspectives, namely the institution of a claim for the enforcement of a substantive fundamental right encroached by an environmental infraction, a claim to enforce procedural rights to correct the action resulting in the infraction, and a claim for remedial action based on the intrinsic value of nature which necessitates its protection.<sup>528</sup> These options reinforce the thinking that the application of procedural rights to the enforcement of environmental rights could facilitate environmental justice and redress harm done to human and the environment.<sup>529</sup> In relation to hydraulic fracturing, specific procedural rights that could be applied to realise substantive rights such as environmental right, are the right of access to information, the right to just administrative action, and the right of access to the courts. The basis for the application of these rights to the regulation of hydraulic fracturing is considered below.

#### ***2.5.1 Access to information***

The right of access to information or freedom of information is a manifestation of the right to know, or be informed of government actions and decisions, thereby creating an opportunity to citizens and residents of a country to present ideas and comments on those actions and decisions, as well as the opportunity to present complaints or grievances to administrative authorities or the courts as may be necessary.<sup>530</sup> Access to information is therefore, the culmination of the values underlying the right to know encapsulated in the principle of maximum disclosure, which require that state-held information should be subject to disclosure unless

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<sup>528</sup> Pedersen 2008 *The Georgetown Int'l Env'tl Review* 74.

<sup>529</sup> Shelton 2006 *Denv J Int'l L & Pol'y* 132.

<sup>530</sup> McDonagh 2013 *Human Rights Law Review* 29.

there is compelling reason to do otherwise.<sup>531</sup> The relative worth of the right of access to information therefore lies in the fact that it is not attached to anything specific, but as a general right operating in the form of an enabling tool which can be used to obtain information relating to environmental, social, political and economic matters.<sup>532</sup>

Though access to information has been espoused in one form or the other in the last two hundred years,<sup>533</sup> there is no universally accepted definition of, or consensus as to its scope.<sup>534</sup> It is however possible to extract its core principles from the provisions of various domestic<sup>535</sup> and international instruments<sup>536</sup> on the subject, coupled with different regional instruments<sup>537</sup> and guidelines<sup>538</sup> emanating from different geographical regions of the world on the implementation of effective legislation on access to information, and the ideas of some non-governmental organisations (NGOs)<sup>539</sup> as to the fundamental principles which domestic rules have

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<sup>531</sup> Mendel Freedom of Information: A Comparative Legal Survey 2<sup>nd</sup> ed 1.

<sup>532</sup> Adeleke "Constitutional domestication of the right of access to information in Africa: Retrospect and prospects" in *African Commission on Human and Peoples' Rights Model Law on Access to Information for Africa* 84.

<sup>533</sup> The first access to information law was enacted in Sweden in 1776. See the "*Swedish Freedom of Press and the Right of Access to Public Records Act 1776*" available at [www.presscouncils.org/library/Swedish\\_Press\\_Law.doc](http://www.presscouncils.org/library/Swedish_Press_Law.doc) [date of use 20 March 2017].

<sup>534</sup> Open Society Justice Initiative 2004 *Justice Initiative Access to Information Monitoring Tool: Report from a Five-Country Pilot Study* 3.

<sup>535</sup> The constitutions and legislation of various countries on access to information, for example, section 32 of the *Constitution of South Africa*, and the PAIA.

<sup>536</sup> Key global instruments [including declaration and reports] having a bearing on access to information include the UNGA Resolution 59/I which called for an International Conference on the Freedom of Information, article 19 of the *Universal Declaration of Human Rights* 1948, article 19 of the *International Covenant on Civil and Political Rights* 1996, the reports of UN Special Rapporteur on Freedom of Opinion and Expression, and Principle 10 of the *Rio Declaration on Environment and Development* 1992.

<sup>537</sup> Key regional instruments having a bearing on access to information include article 13 of the *American Convention on Human Rights* 1969, article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950, article 4 of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* 1998, article 9 of the *African Charter on Human and Peoples Rights* 1981, and article IV of the *Declaration of Principles on Freedom of Expression in Africa* 2002.

<sup>538</sup> Model Inter-American Law on Access to Information, Access to Official Documents Guide of the Council of Europe, Manual on Human Rights and the Environment of the Council of Europe, and the Model Law on Access to Information for Africa.

<sup>539</sup> Examples include the work and publication of Open Society Initiative available at <https://www.osisa.org> [date of use 25 January 2018], and the Campaign for an African Platform on Access to Information available at <https://africafoicentre.org> [date of use 25 January 2018].

to comply with, if they are to achieve the objectives underlying the right of access to information. The key fundamental principles are:<sup>540</sup>

- 1) Information held by public authorities should be freely available to the public subject to legitimate exemption determined to be necessary for a democracy and to protect public interest, which must be clearly defined in a written law.
- 2) All authorities and institutions performing public functions should be obliged by law to respond to public request for information. That obligation should be extended to private bodies, which receive public funds and whose activities affect the public.
- 3) Any person, being a citizen of or resident in a country may request information without having to specify grounds. Categories of requestors should be extended to include journalists, representatives of NGOs, disabled persons and minorities.
- 4) Information request is to be treated equally without subjecting the requestor to any discrimination.
- 5) Information is to be provided in a relevant, comprehensible and in a timely manner. While there is no universally accepted timeframe for obliging requests for information, each country is to determine an average period and encourage authorities holding public information to oblige requests within that timeframe.
- 6) Applicable procedures should allow for requests to be made in writing or orally. The need to allow oral request is particularly important in jurisdictions where illiteracy is prevalent.
- 7) Access should be to information defined in the widest terms possible, and not be restricted to only documents. Therefore, the meaning ascribed to information should cover its form, including written, visual, aural, and electronic or any material form.
- 8) Limitation to the right of access to information should only be in exceptional cases, solely justified by public interest. Such exceptions should however be defined by law.

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<sup>540</sup> The Pan African Conference on Access to Information held in Cape Town on September 17-21, 2011, listed fourteen key principles the adherence to which will facilitate effective access to information. Those principles are an amplification of the eight principles summarised in para 2.5.1.

- 9) A denial of the right of access to information could also be tantamount to a denial of the right of access to the courts, because if a prospective victim does not have access to information necessary to establish his claim, his or her chance of success in the court may be compromised and might as well not bother to incur the expense and time required of approaching the court.

The core principles of access to information highlighted above, though by no means exhaustive, represent key principles reflecting the characteristics of access to information and are intended to serve as guides against which applicable domestic rules can be tested to determine their effectiveness.<sup>541</sup>

The rationale for the importance of the protection of access to information is not far-fetched.<sup>542</sup> It is premised on the notion that the subjects of a state should be privy to information that affect them, because not only does awareness to such information enhance the quality of participation in decision-making in a democratic society, it also enables civil society to protect private interests and control the actions of the government and private bodies holding such information.<sup>543</sup> The motivation for the protection of access to information is succinctly reiterated by the Inter-American Court of Human Rights in its consideration of article 13 of the

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<sup>541</sup> Open Society Justice Initiative Access to Information Monitoring Tool: Report from a Five-Country Pilot Study 4.

<sup>542</sup> The significance of access to information in the development of human rights law is underscored by the fact that the subject is included in the matters considered by the United Nations General Assembly (UNGA) at its first session in 1946, at which Resolution 59(I) was passed among others. See A/RES/59/I available at [www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/59/I](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59/I) [date of use 23 March 2017]. Subsequently, the momentum for the development of the law and practice on the subject has not abated, as evidenced by the volume of accession to conventions addressing access to information, and the number of countries that have either adopted a constitutional access to information provision or enacted a legislation to give it effect. Presently, 168 countries have ratified the International Covenant on Civil and Political Rights 1966. See also "How many states have ratified human rights treaties" available at [www.istitut-fuer-menschenrechte.de/en/topic/developmet/frequently-asked-quesstions](http://www.istitut-fuer-menschenrechte.de/en/topic/developmet/frequently-asked-quesstions) [date of use 22 March 2017]. Over 150 countries attended and approved the *Rio Declaration on Environment and Development* 1992- see Report of the United Nations Conference on Environment and Development – A/CONF.151/26 (Vol. IV) available at [www.postsustainabilityinstitute.org/uploads/4/4/6/6/4466371/agenda.21.attendees](http://www.postsustainabilityinstitute.org/uploads/4/4/6/6/4466371/agenda.21.attendees) [date of use 22 March 2017]. As at 2011, ninety-nine countries have enacted legislation giving effect to the application of freedom of information. See also Michener 2011 *Journal of Democracy* 145.

<sup>543</sup> See Shelton "Rights-based approach to public participation and local management of natural resources" available at [www.pub.iges.or.jp/modules/envirolib/upload/1503/attach/3ws-26-dinah.pdf](http://www.pub.iges.or.jp/modules/envirolib/upload/1503/attach/3ws-26-dinah.pdf)[date of use 22 March 2017].



*American Convention on Human Rights*, (hereafter “the American Convention”) which affirms the right of everyone to freedom of thought and expression including the “freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers.” That court held that the essence of article 13 of the American Convention is to protect the right of the individual to receive information on matters affecting public interest and it is the positive obligation of the state to provide such information to the public or any individual that requests it:

... without the need to prove direct or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.<sup>544</sup>

Therefore, regulated disclosure of information, whether held by the state or private bodies, creates a mutually beneficial arrangement for both the holder of information and citizens, whereby information is put within the reach of affected stakeholders. This engenders the participation of the public in important decision-making processes in relation to public matters. The resultant openness creates transparency, which increases trust in public administration,<sup>545</sup> because the public is put in a position of knowledge regarding government’s plans and investments, thereby becoming acquainted with justification for the plans, and creating an opportunity to assess the competence of the authority on environmental matters, and to consider whether or not the proposed plans are beneficial. Regarding information held by private bodies, the public is reassured that private interests are not given undue advantage above the public, and that whenever necessary, the private bodies may be compelled to disclose information required to facilitate the enforcement of individual’s rights or the protection of public interest.<sup>546</sup>

In relation to environmental rights, access to information facilitates a clear understanding of issues by members of the public and enables them to participate

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<sup>544</sup> See *Claude Reyes and Others v Chile* 2006 IACTHR Series C51 at para 77.

<sup>545</sup> Dellinger 2012 *Colo J Int’l Env’tl L & Pol’y* 313.

<sup>546</sup> See section 32 of the Constitution.

in an informed manner.<sup>547</sup> International instruments on the protection of the environment encourage the participation of citizens, enjoining state parties to adopt effective laws on access to environmental information among other things.<sup>548</sup> When it comes to implementation, individual states still bear ultimate responsibility. Though cooperation at regional level allows for a convergence of, and the development of shared values in which parties "are more likely attuned to each other than those separated by vast geographical and psychological divides,"<sup>549</sup> implementation and enforcement of human rights agreements and understanding take place at the domestic level. This is achieved by provisions on the right of access to information in CERs to provide broad and powerful tools. When CERs are so included, they create the prospect for protection against the violation of environmental rights in a defensive manner, the application of which is to affirmatively compel governments and their agencies to ensure that environmental rights are protected.<sup>550</sup> However, implementation of access to information regime in the domestic forum depends largely on the judicial traditions and constitutional principles, which vary from one jurisdiction to the other. Some jurisdictions may apply and invoke the provisions of legally binding instruments while in other jurisdictions, domestic courts are reluctant or even prevented from doing so, and in other jurisdictions still, a level of discretion applies.

The right of access to information in relation to hydraulic fracturing is considered in chapter 4.

### *2.5.2 Just administrative action*

The understanding that the legislature has entrusted administrative authorities with tasks necessitating them taking actions and making decisions touching on private interests give rise to an expectation that people are entitled to seek justice and

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<sup>547</sup> May 2013 J Envtl Law and Litigation 36.

<sup>548</sup> See Oliver 2013 *Fordham International Law Journal* 1425, Luttenberger *et al* 2004 *Energy and the Environment* 257, and Banisar 2006 *Freedom of Information Around the World* available at [www.freedominfo.org/documents/global\\_survey2006.pdf](http://www.freedominfo.org/documents/global_survey2006.pdf) [date of use 20 March 2017].

<sup>549</sup> Viljoen *International Human Rights Law in Africa* 2<sup>nd</sup> ed 10.

<sup>550</sup> Bruch and King "Constitutional procedural rights: Enhancing civil society's role in good governance" in Bruch (ed) *The New 'Public' – The Globalization of Public Participation* 22.

request independent and impartial review of the decisions which may affect their particular interests.<sup>551</sup> Administrative law therefore prescribes behaviour within the administration and delineates its relationship with those outside it.<sup>552</sup> Hoexter observes that the exercise of public power or the performance of a public function lies at the very centre of administrative law, and it comes up in different contexts, ranging from privatisation, to the nature of an action, or the extent or reach of administrative fairness.<sup>553</sup> While acknowledging the difficulty associated with defining administrative law,<sup>554</sup> the learned author sees the necessity for conceptualisation to give it focus. Referring to Baxter,<sup>555</sup> she defines administrative law as the branch of the law concerned with the regulation of “the organisation of the administrative institutions and the fairness and the efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action and inaction.”<sup>556</sup>

It is, however, argued that an attempt to extend the rule of law to every facet of administrative action is a “hopeless fantasy,” because the legislature lacks the institutional resolve to compel the executive to uphold the rule of law, and in any event, an attempt to close the ostensible ‘loopholes’ of administrative procedures may result in intolerance of the flexible standards required in the exercise of discretion.<sup>557</sup> Reality however disproves that assumption. Discretion is not an absolute exercise of administrative action without check.<sup>558</sup> While the courts allow discretionary powers and defer to the administrative bodies’ exercise thereof when necessary, that deference is subject to the application of substantive standards as ‘reasonableness’ and ‘good cause’ to subject action.<sup>559</sup>

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<sup>551</sup> See the discussion in para 1.3.2.2.

<sup>552</sup> Shapiro 2001 *Indiana Journal of Global Legal Studies* 369.

<sup>553</sup> Hoexter *Administrative Law in South Africa* 3.

<sup>554</sup> Hoexter *Administrative Law in South Africa* 5.

<sup>555</sup> Baxter *Administrative Law* 2. Baxter’s definition is also cited by Currie and Klaaren “Introduction to the Promotion of Administrative Justice Act” in Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 2.

<sup>556</sup> Hoexter *Administrative Law in South Africa* 2.

<sup>557</sup> Vermeulen 2009 *Harv L Rev* 1097.

<sup>558</sup> *Arizona et al v United States* 2012 567 US.

<sup>559</sup> Criddle 2010 *Northwestern University Law Review* 312.

If the essence of the right to just administrative action is to ensure that administrative action is lawful, reasonable and procedurally fair, that essence can only be realised if there is an unfettered right to challenge action undertaken by the administrator when necessary. Control of the exercise of administrative power should therefore not be susceptible to any form of apprehension, but that is not necessarily so. If access to justice is typically understood in terms of access to courts, the same cannot be conclusively asserted when administrative tribunals or decision-makers are considered as the means to guarantee justice to vulnerable persons coming before them to challenge administrative action. By design, administrative tribunals serve as an important public tool to facilitate the peoples' participation in public policy decision-making and to provide for an independent overview of the broader system of public administration, though they are also meant to safeguard justice for the individual in the face of an unjust or questionable decision.<sup>560</sup> The evidence of such participation on the part of the people is an indication that public authorities are inclined to pursue the ideals of social justice.<sup>561</sup>

From the perspective of bureaucrats, however, an evaluation of administrative decision-making is seen as a threat on the belief that the government knows best in conferring authority on administrators,<sup>562</sup> hence, they have no need to justify their action or for their action to be reviewed.<sup>563</sup> As for vulnerable persons on the other hand, when a right or interest is at stake in an administrative proceeding compared to a judicial one,<sup>564</sup> the question is whether or not administrative justice could

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<sup>560</sup> Barker "The emergence of the generalist administrative tribunal in Australia and New Zealand" presented at the 8<sup>th</sup> Annual Conference of The Australian Institute of Judicial Administration Incorporated, 9-10 June 2005, at page 4 available at [http://www.sat.justice.wa.gov.au/\\_files/JBspeechGeneralistAdministrativeTribunal.pdf](http://www.sat.justice.wa.gov.au/_files/JBspeechGeneralistAdministrativeTribunal.pdf) [date of use 31 August 2017].

<sup>561</sup> Fuo 2015 Afr hum rights law journal 167.

<sup>562</sup> Historical antecedents of the doctrine of parliamentary supremacy in the UK prevents judges from declaring legislation as ineffective, as laws made by Parliament are not subject to review expect by itself. See Leyland and Anthony *Textbook on Administrative Law* 8<sup>th</sup> ed 1. However, contemporary understanding that the supremacy of the Parliament does not imply that it is morally entitled to do what it likes, as any legislation that does not enjoy popular support is lacking in moral authority See Bogdanor 2008 *Public Law* 19.

<sup>563</sup> Mason 2010 *AIAL Forum* 5.

<sup>564</sup> Sossin "Access to administrative justice and other worries" in Flood and Sossin *Administrative Law in Context* 2<sup>nd</sup> ed 502.

effectively protect that right or interest. Addressing these challenges is the central purpose of administrative justice which is to ensure that the individual affected by government decision-making process or the decision itself, gets justice.<sup>565</sup> To achieve that objective effectively requires the promotion of three different ideologies underlying the success of administrative justice.<sup>566</sup> These are the protection of private interests, which is the traditional common law approach to the role of law, the advancement of public interests, which is the orthodox public administration approach to the role of law, and thirdly, to aid the cause of public participation in decision-making.<sup>567</sup>

In the administrative process, efforts to implement specific legislative goals sometimes generate friction of political and social resistance at the point of contact between the state and society, resulting in litigation that challenges the legality of administrative action by persons who have suffered hardship.<sup>568</sup> Even more so, the complexity and number of variety of matters handled by administrative bodies are not that straight forward, and sometimes decisions affecting individuals are wrong.<sup>569</sup> Aggrieved persons or institutions can look to a process of administrative justice to give them and the public some assurance that redress can be achieved if administrative decisions are incorrectly made. In this regard, when the courts are called upon to interpret the law, there is an understanding that while judges may lack the jurisdiction to ordinarily determine the course of administrative decisions or actions, their capacity to pronounce decisions and actions invalid on the basis that they transcend the limits of parliamentary authority granted by the law, reaffirms the view that the exercise of public power must not violate the dignity of human being.<sup>570</sup> This is possible considering the wide scope of administrative justice, which

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<sup>565</sup> Creyke 2007 Melbourne University Law Review 705.

<sup>566</sup> Craig "Three perspectives on the relationship between administrative justice and administrative law" in Creyke and MacMillan (eds) *Administrative Justice - The Core and the Fringe* 31.

<sup>567</sup> Craig "Three perspectives on the relationship between administrative justice and administrative law" in Creyke and MacMillan (eds) *Administrative Justice - The Core and the Fringe* 31.

<sup>568</sup> Lindseth "Always embedded' administration: The historical evolution of administrative justice as an aspect of modern governance" 2004 *University of Connecticut School of Law Articles and Working Papers* available at [http://lsr.nellco.org/unconn\\_wps/19](http://lsr.nellco.org/unconn_wps/19) [date of use 2 September 2017].

<sup>569</sup> UK Ministry of Justice *Administrative Justice and Tribunals: A Strategic Work Programme* 5.

<sup>570</sup> Dyzenhaus 2012 *Review of Constitutional Studies* 91.

facilitates the combination and comparisons of administrative law in practice with other areas of the law,<sup>571</sup> with a view to finding solutions to resolve problems that may have been overlooked if the focus had been on administration alone.

Given that a challenge of administrative action is a call for restraint of the exercise of unjust public power, administrative justice may be conceived as restraint. This is far from the truth. The function of administrative justice is to clarify the objectives of a legislation and establish the norms required to realise those objectives by first, empowering the administrator to be effective and secondly, to establish controls on the acts of the administrative agency.<sup>572</sup> Even in the absence of a statute or a constitutional Bill of Rights, the function of administrative justice is to demand that governmental action is carried out in good faith with a rational appreciation of a purpose which is not meant to be "arbitrarily and illegally attempting to divest a citizen of an incident of his civil status" especially considering that "no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose."<sup>573</sup> The courts therefore have a duty to interpret delegated legislation and consider administrative action in the reflective light of administrative justice. There is a need to instil a 'culture of justification' within government and public administration,<sup>574</sup> so that if the government believes a decision that many consider unreasonable is beneficial, it might well be useful for the government to justify its decision.<sup>575</sup> Justification of an administrative decision can be achieved by its exposition to scrutiny and if "the government could adduce economic evidence and argument to make a plausible case, the court would have to uphold the argument."<sup>576</sup>

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<sup>571</sup> Strauss 1996 *J Legal Educ* 478. See also Boughey 2013 *ICLQ* 55.

<sup>572</sup> Craig "Three perspectives on the relationship between administrative justice and administrative law" in Creyke and MacMillan (eds) *Administrative Justice- The Core and the Fringe* 32.

<sup>573</sup> The Canadian Supreme Court in *Roncarelli v. Duplessis* [1959] SCR 121 at 141.

<sup>574</sup> Poole "The reformation of administrative law" 2007 *LSE Law, Society and Economy Working Papers* available at <https://www.lse.ac.uk/collections/law/wps/WPS12-2007PooleN2.pdf> [date of use 2 September 2017].

<sup>575</sup> Dyzenhaus 2012 *Review of Constitutional Studies* 87.

<sup>576</sup> Mureinik 1994 *S Afr J on Hum Rts* 31.

Administrative justice provides a mechanism to ensure that the exercise of public power complies with standards of rationality.<sup>577</sup> The demand for rationality in the exercise of governmental power via administrative justice stimulates the values of openness, fairness and accountability in governance in the public sphere.<sup>578</sup> However, the reach of administrative law into the private sphere may be resisted on the argument that such an extension is likely to interfere in the working mechanism of a free market.<sup>579</sup> Indeed, earlier decisions of the courts tend to suggest that the limitation on the exercise of public power by the courts to control arbitrariness does not extend to the private sphere.<sup>580</sup> There is, however, a need to challenge that assumption because the drive for efficiency and competitive practices have blurred the divide between private and public enterprises.

Increasingly, the distinction between governmental and non-governmental decision-making is blurred as that function now involves and combines public and private actors.<sup>581</sup> A functional theory of justice should dispel the myth of the private sphere, which characterises the acceptance of insubordination on the part of powerful private organisations to administrative authorities as acceptable because it is assumed that the private sphere is sacrosanct and cannot be deconstructed.<sup>582</sup> Theory should be in support of those who would normally have been excluded to find their voice. This is necessary because it is the poor and vulnerable persons that are usually subject to the adverse effect of resource depletion and environmental degradation more acutely than others, but they have no political and economic

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<sup>577</sup> Longley and James 1999 *Administrative Justice: Central Issues in UK and European Administrative Law* 167.

<sup>578</sup> Thomas and Tomlinson 2017 *Journal of Social Welfare and Family Law* 381.

<sup>579</sup> Jones "Administrative justice: Some preliminary thoughts on a (post) modern theoretical perspective" in Creyke and MacMillan (eds) *Administrative Justice - The Core and the Fringe* 47.

<sup>580</sup> An analysis of earlier decisions is available in Cartier 2010 55 *McGill LJ* 392.

<sup>581</sup> Shapiro 2001 *Indiana Journal of Global Legal Studies* 369.

<sup>582</sup> Jones "Administrative justice: Some preliminary thoughts on a (post) modern theoretical perspective" in Creyke and MacMillan (eds) *Administrative Justice - The Core and the Fringe* 47.

power to change this situation.<sup>583</sup> This underscores the requirement of reasons to establish the rationality of administrative action.<sup>584</sup>

The rationality of an administrative action can be tested by the underlying reasons if any is given. An Australian court provided a compendium of why reasons ought to accompany administrative action, being that:

...they amount to a salutary discipline for those who have to decide anything that adversely affects others. They encourage a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making. They provide guidance for future like decisions. In many cases they promote the acceptance of decisions once made. They facilitate the work of the courts in performing their supervisory functions where they have jurisdiction to do so. They encourage good administration generally by ensuring that a decision is properly considered by the repository of the power. They promote real consideration of the issues and discourage the decision-maker from merely going through the motions. Where the decision effects the redefinition of the status of a person by the agencies of the state, they guard against the arbitrariness that would be involved in such a redefinition without proper reasons. By giving reasons, the repository of public power increases 'public confidence in, and the legitimacy of, the administrative process.'<sup>585</sup>

The essence of the right to give reasons for administrative action can therefore manifest in three circumstances, namely the citizens can effectively defend their rights because they are put in a position in which they have understanding of how policy and actions affect them, and should it be necessary to defend a right they are better positioned to do so. Secondly, the administrative agency is able to perform its function in a rational and structured manner eschewing arbitrary and biased outcomes, which in the long run facilitates accountability. Thirdly, the reasons proffered for administrative actions puts the courts or administrative tribunals in a better position to assess the validity or legality of the actions in the face of legislative or constitutional provisions.<sup>586</sup> Impliedly, when provided, reasons could assist a reviewing court or tribunal as to the reasonability of the action, for if reasonable minds could differ as to whether or not there is a relationship between agency action and public health, safety, morals, or general welfare, the agency

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<sup>583</sup> Hart "Socio-Political Factors" in Rabie and Fuggle (eds) *Environmental Management in South Africa* 53.

<sup>584</sup> Brynard 2009 *Journal of Public Administration* 640.

<sup>585</sup> *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* 2003 216 CLR 212 at 242.

<sup>586</sup> Glinz 2009 *Namibian Law Journal* 4.



action may be a valid exercise of power.<sup>587</sup> Though reasons are required to justify outcomes, that requirement on its own does not necessarily imply that the decision-maker will reason correctly or reach a preferable decision for the person affected by the decision.<sup>588</sup>

However, the reasons provided could provide an insight in determining the rationality or otherwise of the action taken, as rationality controls the exercise of discretion, demanding that that exercise of power must be based on reasoning. Irrational exercise of discretion implies that a "decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at that decision."<sup>589</sup> The exercise of discretion is not necessarily a bad thing. It tends to produce creative justice, demanding that each case be treated based on the circumstances surrounding it, which in due course produces elements of flexibility. However, extreme or uncontrolled exercise of discretion is likely to result in inconsistency and uncertainty. Conversely, the exclusion of discretion can result in the extreme application of rules which can in turn result in rigidity.<sup>590</sup> It is reasoning that confers the chosen course of action with legitimacy and helps in determining rationality. These requirements of administrative justice therefore facilitate effective administration of laws affecting diverse matters, including the environment, and other issues that are usually of importance to the welfare, livelihoods and liberty of the people affected or likely to be affected by administrative action. To do that effectively, the values associated with legality, fairness and rationality are added to values associated with governance like transparency, accountability, consultation, public participation and efficiency, are incorporated into administrative justice.<sup>591</sup>

The foregoing challenges are even more pronounced in the administration of environmental regulations.<sup>592</sup> For example, two overlapping areas of environmental

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<sup>587</sup> See *Weatherford v City of San Marcos* 2004 157 SW 3d 473.

<sup>588</sup> McDonald 2015 *Sydney Law Review* 467.

<sup>589</sup> *Council of Civil Service Unions v Minister for the Civil Service* 1984 3 All ER 935.

<sup>590</sup> Longley and James *Administrative Justice: Central Issues in UK and European Administrative Law* 166.

<sup>591</sup> Anthony 2015 *Italian Journal of Public Law* 3.

<sup>592</sup> Rechtschaffen 2003-2004 *UC Davis L Rev* 104.

justice, which may perplex the expectation of policy makers and the public are procedural justice and distributive justice. While procedural justice refers to the fairness of decision-making in which the stakeholders have been adequately informed and allowed to express their opinions in order to influence the ultimate decisions, distributive justice refers to the cost-benefit analysis required to assess the impact of the implementation of regulations on the public or community.<sup>593</sup> However, environmental regulatory practice until recently has been largely concerned with achieving the best cost-benefit approaches<sup>594</sup> which unfortunately tend to impose greater environmental burdens on the poor and their communities than their wealthier counterparts.<sup>595</sup> Furthermore, applying the general principles of administration of justice to environmental regulation has the undesirable effect of making regulators become rigid and mechanical in their application as to engender occasional distrust of the regulatory authorities by the public. Unfortunately, controversies are never alike and the degree with which controversies could be approximated to the recognised types can hardly be calculated with precision.<sup>596</sup>

It follows therefore that development projects should comply with the demands of environmental justice, and regulation should require that efforts should be channelled towards the reform of incongruous distribution of environmental harms and benefits in environmental decision-making to ensure that benefits and burdens are spread equitably across the society.<sup>597</sup> This is necessary given that the whole of humanity is considered as belonging to only one class, and the core of the right to dignity lies in the right to be treated equally before the law, guaranteed by a demand that government action be undertaken according to the law.<sup>598</sup> Persons who are affected by the decisions of administrative bodies should be given opportunity to request a review of the decisions or to take any dispute arising therefrom to the

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<sup>593</sup> Martinez "Environmental justice and the clean power plan: The case of energy efficiency" in Creyke and MacMillan (eds) *Administrative Justice- The Core and the Fringe*.

<sup>594</sup> An example of such approach is the popularity of market-based incentives like tradeable emission credits.

<sup>595</sup> Hart, "Socio-Political Factors" in Rabie and Fuggle (eds) *Environmental Management in South Africa* 53.

<sup>596</sup> See Pound 1906 *ABA Rep* 395.

<sup>597</sup> Rechtschaffen 2003-2004 *UC Davis L Rev* 95.

<sup>598</sup> Dyzenhaus 2012 *Review of Constitutional Studies* 88.

courts for resolution, or to make effort to persuade the legislature to alter the law. That will provide an assurance of procedural fairness, which gives meaning to the concept of liberty, and facilitates the possible endurance of seemingly severe substantive laws on the condition that they are fairly and impartially applied.<sup>599</sup>

Given that environmental governance and administration could impact development and *vice versa*, the beneficial aspect of development in terms of the socio-economic benefits depend on administrative decision-making just as the impact of the development on the environment is subject to the decision-making function of the environmental regulatory authorities.<sup>600</sup> In this regard, Kotzé argued that administrative justice has a role to play in balancing the rights of the public against that of the developer on the one hand, and between the developer seeking to realise the objectives underlying the project, including economic benefits in many cases against the goal of the environmental regulatory authorities, thereby giving effect to the requirements of constitutional provisions and procedural rights legislation.<sup>601</sup>

To effectively address the foregoing challenges, the scope of administrative justice has to transcend judicial review and extend to state regulation, the exercise of discretion, the provision of public information and the promotion of accountability and control.<sup>602</sup> These must however be in addition to the development of a framework for administration and exercise of power by creating essential tools for effective policy-making, governance and compliance, which is assured when citizens have a right of access to seek repose in the courts of law.<sup>603</sup> While the right to just administrative action in relation to hydraulic fracturing is considered in chapter 5, the next paragraph is a discussion of theoretical underpinning of the right of access to courts.

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<sup>599</sup> Shaughnessy v United States 1953 345 US 206 at 224.

<sup>600</sup> Kotzé 2004 *PER/PELJ* 2.

<sup>601</sup> Kotzé 2004 *PER/PELJ* 2.

<sup>602</sup> Jones "Administrative justice: Some preliminary thoughts on a (post) modern theoretical perspective" in Creyke and MacMillan (eds) *Administrative Justice - The Core and the Fringe* 41.

<sup>603</sup> Harlow 2006 *EJIL* 193.

### 2.5.3 Access to courts

'Access to courts'<sup>604</sup> refers to the means for securing vested rights. Construed broadly, it refers to the procedure for legal access to justice on the one hand, while on the other hand it is concerned with the outcome of the procedure, which is the realisation of justice, and as to whether the outcome is just and equitable.<sup>605</sup> Therefore, access to courts has both procedural and substantive elements. The procedural component addresses access to, and the processes in judicial and administrative proceedings to decide claims of violation of rights, while the substantive element addresses the result of the proceedings via redress of the violation or relief to the successful claimant.<sup>606</sup>

From the standpoint of procedure, access to justice comprises that cluster of practical steps, the objective of which is to "secure the respect, protection, and enforcement of the underlying substantive rights."<sup>607</sup> Accordingly, the core elements of the right will include effective access to a dispute resolution body, the right to fair proceedings and the timely resolution of disputes, the right to adequate redress, as well as the general application of the principles of efficiency and effectiveness to the delivery of justice.<sup>608</sup> Access to justice is fundamental to the maintenance of the rule of law, giving voices to people and facilitating the enforcement of their rights.

Effective access to courts therefore encompasses the existence of appropriate laws creating rights, systems facilitating awareness and understanding of the rights, dispute resolution processes that are both formal and informal, availability of, and access to counsel and representation, and a fair, impartial enforcement mechanisms.<sup>609</sup> Access to justice "is the very essence of liberty" and an essential right for victims of human rights violations, which should be seen as such by all

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<sup>604</sup> Sometimes interchangeably referred to as 'access to justice'. See paras 1.3.2.3 and 1.3.3.3.

<sup>605</sup> Janneke, Gerards and Glas 2017 *Netherlands Quarterly of Human Rights* 13.

<sup>606</sup> Antkowiak 2008 *Columbia Journal of Transnational Law* 356.

<sup>607</sup> See Banda "Improving access to justice: Recent trends and developments in procedural environmental rights." Presentation at the UNITAR-Yale Conference on Environmental Governance and Democracy, 5-7 September 2014, New Haven, Connecticut, USA.

<sup>608</sup> EU Agency for Fundamental Rights 2016 *Handbook on European Law Relating to Access to Justice* 17.

<sup>609</sup> Beqiraj and McNamara *International Access to Justice: Barriers and Solutions* 8.

people.<sup>610</sup> Unfortunately however, there is a general tendency for people living in poverty to think that justice is only available to people who can afford it.<sup>611</sup> Poverty disproportionately impacts the poor in that due to their lack of economic resources they are unable to access justice implying that their ability to enforce their rights will be continually subjected to exploitation, thereby making access to justice an issue of equity.<sup>612</sup>

In any political system, the challenges faced by a potential litigant in establishing his claim and enforcing his right are important indicators in determining the attitude of the authorities towards the realisation of justice. Therefore, when the doors of the courts are shut against the poor, the rich and a few corporations, comprising a minority of the population are inadvertently empowered to act without regard to the consequences of their actions.<sup>613</sup> An effective legal system can however play a role in poverty reduction if it provides access to the appropriate mix of rights and remedies, making legal entitlements practical, enforceable and meaningful.<sup>614</sup>

Meanwhile, notwithstanding that a constitution contains an express provision for the resolution of dispute through a fair public hearing held in a court or any other independent and impartial forum, it is important to consider whether or not the pervading circumstances in the society can in reality permit every person to take advantage of the right of access to court. If ordinary people are unable to afford to take the benefit provided by the courts in civil cases due to a low ratio of the number of lawyers to the population,<sup>615</sup> or high cost of litigation or possible ignorance of

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<sup>610</sup> See *Marbury v Madison* 1803 5 US 137.

<sup>611</sup> Carmona and Donald 2014 "Access to Justice for Persons Living in Poverty: A Human Rights Approach" available at <https://ssrn.com/abstract=2437808> [date of use 23 February 2018].

<sup>612</sup> Recent estimates (2013) put the number of persons affected by poverty (living on less than \$1.90 a day) at 10.7% of the world's population. These people may be excluded from the rule of law with limited chance of getting out of that status because the system excludes them from the process and benefits of the rule of law. See The World Bank "Understanding Poverty" available at <http://www.worldbank.org/en/topic/poverty/overview> [date of use 3 February 2018]. See also UNDP 2008 *Making the Law Work for Everyone 2*.

<sup>613</sup> Mattei 2007 *Electronic Journal of Comparative Law* available at <https://www.ejcl.org/113/article113-14.pdf> [date of use 12 December 2017].

<sup>614</sup> Report of the UN Secretary General on Legal Empowerment of the Poor and Eradication of Poverty No A/64/50 of 13 July 2009 available at <https://www.un.org/ruleoflaw/files/N0940207.pdf> [date of use 13 December 2017].

<sup>615</sup> McQuoid-Mason 2013 *Onati Socio-legal Series* 565 available at <http://ssrn.com/abstract=2272640> [date of use 16 May 2016].

their rights,<sup>616</sup> the right of access to the courts cannot be said to be available to such people. To be effective, access to court should be more than:

...the legal right to bring a case before a court. It includes the ability to achieve this. In order to be able to bring his or her case before a court, a prospective litigant must have knowledge of the applicable law; must be able to identify that she may be able to obtain a remedy from a court; must have some knowledge about what to do in order to achieve success; and must have the necessary skills to be about to initiate the case and present it to the court. In South Africa the prevailing levels of poverty and illiteracy have the result that many people are simply unable to place their problems effectively before the courts.<sup>617</sup>

Therefore, strategies aimed at enhancing access to justice on their own are not likely to achieve any meaningful result except if they are combined with programmes designed to significantly improve other procedural rights, especially those affecting peoples' participation in governance and decision-making.<sup>618</sup> In the interest of people who are less well off, access to justice has to be low-cost and with minimal or no delay, mindful of the benefits of informal and alternative dispute resolution mechanisms. If a fundamental element of the rule of law is that all people are equal, the court should be a stronghold for the protection of citizens' rights, to which access must not be hindered. The expectation of civilised people is that the courts should be able to perform that role effectively, balancing the exercise of power against the interests and rights of the people while ensuring that the rights and interests of the people are not compromised.<sup>619</sup>

As the watchdog for justice, the courts should be able to apply the rules of administrative justice to ensure that people are protected from potential abuse from the organs of the state, and as may be necessary, to apply constitutional provisions to uphold the rights of persons who may be adversely affected by acts of others.<sup>620</sup> The courts are better positioned to do so given that in many jurisdictions, judges have life tenures and assured remunerations to ensure that their independence is reasonably guaranteed, thereby enabling them to exercise individual freedom to

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<sup>616</sup> McQuoid-Mason 1999 *Windsor Y. B. Access Just* 232.

<sup>617</sup> Dugard 2008 *SAJHR* 221.

<sup>618</sup> Sheldrick 2013 *Canadian Journal of Poverty Law* 11.

<sup>619</sup> Spahiu 2015 *Utrecht Journal of International and European Law* 20.

<sup>620</sup> Bray "Administrative Justice" in Paterson and Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 155.

deal with matters before them including those that are politically contentious.<sup>621</sup> However, notwithstanding the preparedness of the courts to administer justice, the cost of enforcing rights in the courts could be prohibitive for those who are financially incapacitated. In this regard, legal aid should be available to assist people with genuine cases where rights are infringed as a result of environmental abuse.

Legal aid is a fundamental element in access to justice, comprising two aspects. First, it connotes support for obtaining access to legal information and advice as well as guidance towards taking advantage of available alternative dispute resolution mechanisms, and secondly, it relates to the provision of assistance to assert a right or interest in the context of an action as an applicant or a defendant in judicial proceedings.<sup>622</sup> The provision of legal aid to those in need facilitates the effective administration of justice in that the involvement of attorneys in cases tend to reduce the strain on judges workload by a faster resolution of the cases.<sup>623</sup> The possibility of extending legal aid to persons whose rights are infringed by hydraulic fracturing but who may not have the financial capacity to fund the cost of legal proceedings in court should therefore be included in the applicable regulations. However, it is not at all times that specific and direct harm can be established in the case of proceedings relating to the protection of the environment. A litigant may be in a position to finance or may be aided to prosecute court proceedings to enforce rights, but rules regulating processes may forestall access to the court. The doctrine of standing may constitute a hindrance to the enforcement of environmental rights. The doctrine is discussed in the next section.

#### 2.5.3.1 *Locus standi*

The doctrine of *locus standi* (or standing) ordinarily limits the access of potential litigant to the courts by permitting only a person who is competent as determined

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<sup>621</sup> Kumar "2006 *Chicago Journal of International Law* 351.

<sup>622</sup> European Commission for the Efficiency of Justice (CEPEJ) 2014 *Study on the Functioning of Judicial Systems in the EU Member States: Facts and Figures From the CEPEJ 2012-2014 Evaluation Exercise* available at [http://ec.europa.eu/justice/effective-justice/files/cepj\\_study\\_scoreboard\\_2014\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/cepj_study_scoreboard_2014_en.pdf) [date of use 14 December 2017].

<sup>623</sup> Igly and Shafer 2015 *University of Pennsylvania Law Review* 5. 1-91.

by law to assert the existence of a right or interest in a case in the court.<sup>624</sup> It “concerns the sufficiency and directness of interest in litigation and that that sufficiency of interest depends on the particular facts of each individual case.”<sup>625</sup> ‘Public interest’ is essentially an interest of legal concern to the general public but may not necessarily be of concern to every individual.<sup>626</sup> However, a rider to the public interest rule is the requirement of a special interest that will justify an exception to permit a person who has suffered exceptionally or has a “special interest” to institute an action forcing the court to shift focus from the consideration of the larger public interest to the interest of the claimant.<sup>627</sup> Accordingly, in matters affecting the public generally, the potential litigant can only be accorded standing if he has a direct interest over and above that of the public.

Incidentally, protection of the environment unfortunately routinely falls outside the realm of public interest and consequently non-actionable,<sup>628</sup> based on the “floodgates argument” that if one person is allowed to sue without having a special interest in a matter, then everyone else should be allowed, and in the process the defendant will be punished several times over.<sup>629</sup> The special interest requirement may however constitute a challenge to the substance of the rule of law in that the courts may be powerless in the face of abuse of powers unless invited by a competent person who has an interest in the matter.<sup>630</sup> The implication of that is that in the absence of a competent plaintiff, state authorities may violate the limits of their powers and the courts may be powerless to act.

While the underlying basis for the doctrine of standing is appreciated,<sup>631</sup> there are concerns that litigation relating to environmental protection may be excluded because the inclination may be to take a restrictive view on standing where there is

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<sup>624</sup> Pearson 1980 *UNSW Law Journal* 307.

<sup>625</sup> See *Tergniet and Toekoms Action Group v Outeniqua Kreosootpale (Pty) Ltd* 2009 ZAWCHC 6 at para 21.

<sup>626</sup> See Haskett 1981 *Can-US LJ* 40.

<sup>627</sup> Mohan 1984 *Cochin University Law Review* 526. See also Legere 2005 *Judicial Review* 125.

<sup>628</sup> Longwill 1987 *Queensland Inst Tech L J* 77.

<sup>629</sup> Longwill 1987 *Queensland Inst Tech L J* 81.

<sup>630</sup> Hough 1997 *Cambrian L Rev* 83.

<sup>631</sup> See Stein “The theoretical basis of locus standi” in Stein (ed) 1979 *Locus Standi*.



no evidence of harm done directly to the claimant.<sup>632</sup> The implication of a restrictive view is that the doctrine of standing may be interpreted too strictly, which could result in a denial of access to claimants with legitimate grievances, including public interest NGOs, indigenous communities and the poor whose interest in a matter relating to the environment may be considered as indirect, hypothetical or remote.<sup>633</sup>

There is a need to appreciate the fact that damage to the environment is potentially harmful to all persons in the long-run. Consideration of standing in hydraulic fracturing should be liberal and taken from the perspective of public interest where there is potential harm to the environment.<sup>634</sup> In South Africa, the Constitution has relaxed the strict requirements of *locus standi*, which would have constituted obstacles regarding non-governmental or private citizens action for the protection of the environment.<sup>635</sup> Potential litigants have recourse to section 38 of the Constitution and may institute public interest action<sup>636</sup> on the basis that a right in the Bill of Rights has been infringed or is threatened.<sup>637</sup>

The right of access to court presupposes that a person should be in a position to access appropriate proceedings and participate in them in a meaningful way. Indeed:

... the right to sue and defend in the courts is the alternative of force. In an organised society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.<sup>638</sup>

This is especially true in respect of environmental rights in which every person is considered to have some interest "on the basis that the quality of the natural environment is of legitimate concern to everyone ... [and] if its interests are to be

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<sup>632</sup> Kidd 2010 *PER/PELJ* 27. See also Klaaren "Administrative Justice" in 2009 *Revision Service* at para 25.3.

<sup>633</sup> Banda "Improving access to justice: Recent trends and developments in procedural environmental rights." At the UNITAR-Yale Conference on Environmental Governance and Democracy, 5-7 September 2014, New Haven, Connecticut, USA.

<sup>634</sup> See Murombo 2010 *Law Environment and Development Journal* 178. See also *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) at para 16.

<sup>635</sup> *Locus standi* in South Africa is discussed in paras 1.3.3.3 and 6.4.2.3.

<sup>636</sup> Section 38(d) allows "anyone acting in the public interest" to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened.

<sup>637</sup> See Glazewski *Environmental Law in South Africa* 7-32.

<sup>638</sup> *Chambers v Baltimore and Ohio Railroad Co* 1907 US 142 at 148.

protected someone has to be allowed to speak on its behalf.”<sup>639</sup> Indeed, experience in the USA indicates that citizen suits now account for a vast majority of the lawsuits for environmental enforcement.<sup>640</sup> By that act, citizen suits complement environmental enforcement balancing the developmental goals of industry against the governmental objective of environmental protection.<sup>641</sup> Suits of that nature may be relevant in hydraulic fracturing where claims of trade secrets are potential weapons that operators often apply to gag litigants including NGOs.<sup>642</sup> If that happens, the courts have to be vigilant to ensure that trade secrets claims are not used unreasonably to forestall the enforcement of human rights. Environmental activists may not be personally affected by environmental abuse, but they take up cases to defend general interests. They ought not to be blocked from gaining access to the courts. In *Petro Props (Pty) Limited v Barlow*,<sup>643</sup> the court observed that initiatives undertaken by NGOs to protect the environment should be commended, because “they bear a standard that any vibrant democratic society would be glad to have raised in its midst.”<sup>644</sup>

The courts have an important role to play in the enforcement of environmental rights. As one of the most respected institutions in the society, the judiciary can influence societal attitudes, and through its decisions influence the society’s perception of the environmental danger and of the resources available to society with which to contain it.<sup>645</sup> The courts play an important role in the enforcement of environmental rights, especially in the exercise of its judicial review powers to determine the constitutionality of legislative and executive action.<sup>646</sup> In the *Fuel Retailers* case, the Constitutional Court emphasised the duty of a court reviewing a decision of an environmental authority, holding that “...the court must apply the

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<sup>639</sup> See *Walton v Scottish Ministers* 2012 Pace Env LR 44 at 152.

<sup>640</sup> Yost and Fanning 2015 *Energy & Min L Inst* 103.

<sup>641</sup> Lee 2009 *Pace Envtl L Rev* 499.

<sup>642</sup> Trade secrets and its impact on the right of access to information in Pennsylvania, the UK and South Africa is considered in paras 4.2.2, 4.3.3, and 4.4.4 respectively.

<sup>643</sup> 2006 ZAGPHC 46.

<sup>644</sup> See para 1.3.3.1.

<sup>645</sup> Carnwath 2014 *Journal of Environmental Law* 177.

<sup>646</sup> Feris “Environmental rights and locus standi” in Paterson and Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 134.

applicable legal principles [and] if upon a proper application of the legal principles, the objections are valid, the court has no option but to uphold the objections."<sup>647</sup>

The reasonable expectation of an ordinary person is that if his right is infringed he is entitled to a redress and remedy. This should be guaranteed in relation to the impact of hydraulic fracturing. The legal framework pertaining to hydraulic fracturing must provide the assurance that the right of access to courts is adequately protected. The right of access to the courts in relation to hydraulic fracturing is considered in chapter 6.

## ***2.6 Conclusion***

Though there was initial controversy as to whether or not environmental rights could be characterised as a fundamental right particularly because the content of the right may not be susceptible to easy determination. However, with international interest in environmental protection, non-binding obligations were created which laid the foundation for the recognition of environmental rights in international and domestic instruments and policies. Now, environmental rights may be contemplated in one of three ways. First, as an autonomous right in itself, secondly as a right derivable from the enforcement of other substantive rights like right to life, and thirdly in the form of a group of procedural rights facilitating the enforcement of substantive environmental and other rights.<sup>648</sup>

The manifestation of procedural environmental rights succeeded in giving a structural framework for the realisation of environmental rights. For example, the right of access to information requires that information held by the state (or by private bodies affecting public and individual interests) must be made available to people to enable them take effective decisions and to facilitate the enforcement of their rights when necessary. As a consequence, the right of access to information makes the right to participate feasible, and when it is applied to the protection of the environment and environmental rights, obligations are imposed on states'

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<sup>647</sup> 2007 ZACC 13 at para 101.

<sup>648</sup> See para 2.4.6.

authorities to engage people in decision-making which could affect the environment and adversely affect them. Furthermore, procedural environmental rights facilitate the means for making duty-bearers liable for their actions or omissions, guaranteeing accountability and making administrative action relating to the environment more accessible and effective. In the same vein, procedural environmental rights make it possible for people to have recourse to the courts for redress regarding environmental degradation causing harm.

There is no doubt that benefits are derivable from the exploitation of shale gas by hydraulic fracturing. The challenges of energy security could be reasonably addressed thereby, such that the uncertainty that characterises energy supplies and volatility in price may be reasonably reduced, as is the case in the USA. It is likely to appeal to people's sense of security, nationalism and independence. Furthermore, the potential positive impact of hydraulic fracturing in the economic environment cannot be denied. In jurisdictions that have implemented the process, there are reports of increase in the number of jobs created, increase in tax revenue, and overall economic growth.<sup>649</sup> However, the potential benefits notwithstanding, there is concern that the adverse impact of hydraulic fracturing may be outweighed by its adverse impact on human health and the environment.

The potential adverse impacts are highlighted in the chapter, including potential water pollution and adverse impacts on water use in the face of the enormous volume of water required for operations, which could be worsened in a country that has water scarcity. There is also the potential that human health could be adversely impacted upon, with the potential that protection of trade secret common with operators in the industry could infringe the procedural right of access to information. In relation to the environment, there is a potential that the ecosystem may be degraded coupled with the potential violation of sustainable development principles except if there is strict control and regulation of the process.

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<sup>649</sup> See para 1.2.2.

Furthermore, the adverse impacts of hydraulic fracturing could result in adverse social and economic impacts on people, especially the vulnerable segment of the population. The affected people could suffer irreparable pecuniary losses, their health could be endangered, and they could even untimely die. If that happens, the development of shale gas resources cannot be said to have served the interests of the people affected, or the interest of the environment. These concerns could be minimised or even avoided in hydraulic fracturing if the legal regime for the protection of the environment reinforces the relevant constitutional and statutory provisions on substantive rights and creates effective means by which the rights could be realised. With hydraulic fracturing, there is a general consensus that knowledge is limited, albeit being constantly fortified. However, technological advancements tend to outpace the regulatory regime because companies invest massively in research and development to improve their competitive advantage on a continuous basis, implying that the regulator must be in close contact with the industry, and develop skills that will ensure that regulations do not lag developments in the hydraulic fracturing industry.

The foregoing underscores the idea that development will disturb nature and resources will be utilised in the process. However, it must be appreciated that the environment has to be protected to safeguard humans from the consequences of any abuse. Procedural environmental rights will assist in the protection of environmental interests by democratising environmental decision-making and by providing a mechanism for the recognition and enforcement of substantive rights. Furthermore, accountability in the administration of environmental affairs and the implementation of sustainable development will be facilitated. All these would make it possible to challenge the activities of people, organisations, and regulators involved in hydraulic fracturing that may have a bearing on the environment, with a view to securing the enforcement of substantive rights and the rectification of identified errors.

To date, different sources of international law have played a considerable role in the regulation of development to protect human rights in general and environmental

rights in particular.<sup>650</sup> In this regard, some global and regional instruments have a bearing on the protection of procedural environmental rights. In addition, customary international law, being evidence of general practices accepted as law<sup>651</sup> is also relevant in that discussion. However, to the extent that customary international law largely depends upon the consent of states,<sup>652</sup> the potential that particular states may object to being bound thereby is a possibility.<sup>653</sup> The next chapter will consider binding and non-binding international and regional instruments that may have a bearing on hydraulic fracturing from an international law perspective, to determine the extent that resort could be made to that framework to protect procedural environmental rights.

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<sup>650</sup> See Kravchenko 2015 *Fla A&M U L Rev* 165; Vlavianos 2012 *The Intersection of Human Rights Law and Environmental Law* 3; Boyle 2012 *EJIL* 613; and Viljoen 2011 *De Jure* 208.

<sup>651</sup> See article 38(1)(c) of the Statute of the International Court of Justice.

<sup>652</sup> Helfer and Wuerth 2016 *Mich J Int'l Law* 569, and Baker 2010 *EJIL* 176.

<sup>653</sup> See *The Fisheries Case (UK v Norway)* 1951 ICJ Report 116.

## Chapter 3 International and Regional Law Perspective

### 3.1 Introduction

For nearly half a century, global international institutions have reiterated the fact that development can only be meaningful if it enhances human rights and peoples' freedom.<sup>654</sup> Though not binding,<sup>655</sup> article 1.1 of the *Declaration on the Right to Development*<sup>656</sup> passed by the United Nations General Assembly (UNGA) in 1986 provides that:

... the right to development is an alienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

The UNGA Resolution opened a serious discussion focused on establishing the principle that law is central to development, and that a working legal regime is required to realise all human rights and fundamental freedoms, including procedural rights and the right to a healthy environment.<sup>657</sup> The lack of a legal regime regulating development will most likely result in damage to the environment and ultimately compromise human rights.<sup>658</sup> Therefore, international law has over time imposed a responsibility on states to protect environmental rights, resulting in the emergence of several international instruments seeking to achieve that objective in different contexts.<sup>659</sup> In customary international law, while there is a recognition of sovereign rights over resources within their territory, states are under obligation to ensure that the development and utilisation of the resources do not cause damage beyond

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<sup>654</sup> See Declaration of the United Nations Conference on the Human Environment (Stockholm Convention) 1972.

<sup>655</sup> The majority by which a resolution of the General Assembly is approved is relevant in determining whether or not such resolution acquires a law-making character. In any event, even if the resolutions do not form a new source of international law, they clearly can serve as evidence of customary behaviour of nations, which indeed may constitute them into general principles of law accepted by nations in due course. See Joyner "UN General Assembly resolutions and international law: Rethinking the contemporary dynamics of norm creation" 1981 *California Western International Law Journal* 449.

<sup>656</sup> A/RES/41/128 of 4 December 1986. The resolution is reproduced at [www.un.org/documents/ga/res/41/a41r128.htm](http://www.un.org/documents/ga/res/41/a41r128.htm) [date of use 26 January 2018].

<sup>657</sup> Kennedy "Laws and developments" in Hatchard and Perry-Kessaris (eds) *Law and Development: Facing Complexity in the 21<sup>st</sup> Century* 20.

<sup>658</sup> Vlavianos *The Intersection of Human Rights Law and Environmental Law* 6.

<sup>659</sup> See paras 2.4.6 and 2.4.7 for a discussion of the nature of environmental rights and procedural environmental rights respectively.

the limit of their jurisdictions.<sup>660</sup> In this regard, emerging global concerns gave rise to three guiding principles in the relationship of human with the environment, namely, the polluter pays principle, the preventive principle and the precautionary principle.<sup>661</sup> The relevance of the precautionary principle to hydraulic fracturing is underscored by the fact that the process and its likely consequences are still emerging. The precautionary principle of environmental law requires that measures be taken to prevent potential harm to humans and the environment from policies and actions that are still subject to scientific uncertainty.<sup>662</sup> Some of the obligations created in international law in relation to procedural environmental rights are binding, while some do not create binding obligations.<sup>663</sup>

Discussion in chapter 2 demonstrated that procedural environmental rights play an important role in the enforcement of environmental rights.<sup>664</sup> The objective of this chapter is to review the international and regional instruments relevant to the three procedural rights focused on in this study, namely the right of access to information, the right to just administrative action and the right of access to courts. Each of the three procedural rights is considered from their international and regional perspectives against the background of the development of shale gas resources by hydraulic fracturing. This is done to emphasise the obligations for the protection of procedural environmental rights imposed on the three jurisdictions considered in the study.

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<sup>660</sup> See *The Trail Smelter Arbitration (USA v Canada)* 1941 UN Rep Int'l Arb Awards 1905, and *Corfu Channel Case (UK v Albania)* 1949 ICJ Rep 4.

<sup>661</sup> Pyhala *et al* "The precautionary principle" in Fitzmaurice *et al* 2010 *Research Handbook on International Environmental Law* 203, and De Sadeleer "The principles of prevention and precaution in international law: two heads of the same coin" in Fitzmaurice *et al* 2010 *Research Handbook on International Environmental Law* 182.

<sup>662</sup> See Principle 15 of the Rio Declaration.

<sup>663</sup> See McDonagh 2013 *Human Rights Law Review* 29.

<sup>664</sup> See para 2.4.8 for the discussion on the role and function of procedural environmental rights.



## **3.2 Right of access to information**

### *3.2.1 International perspective*

It is generally accepted that all programmes of development should further the realisation of human rights including the right to access to information as laid down in the UDHR and other international human rights instruments.<sup>665</sup> Consequently, international law relating to access to information or freedom of information rights has over time created obligations on states to protect that right during the implementation of development programmes, resulting in the emergence of various international instruments seeking to protect the right in different contexts.<sup>666</sup> Some of the obligations created in international law in relation to access to information are binding, while some do not create binding obligations. The important global instruments on the right of access to information that may have a bearing on the protection of environmental rights *vis-à-vis* the development of shale gas by hydraulic fracturing include legally binding and non-binding instruments, which are discussed below. The legally binding global instruments are considered first.

#### 3.2.1.1 International Covenant on Civil and Political Rights 1966

In relation to the protection of freedom of information, the ICCPR is probably the first binding global instrument on the civil and political rights, enumerating the content of the right<sup>667</sup> and providing for processes for remediating violations.<sup>668</sup>

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<sup>665</sup> See article 19 of the Universal Declaration of Human Rights 1948, and Principle 10 of the Rio Declaration on Environment and Development 1992.

<sup>666</sup> See McDonagh 2013 *Human Rights Law Review* 29.

<sup>667</sup> See article 19 of the ICCPR.

<sup>668</sup> Article 2 of the ICCPR requires each contracting state to respect the rights of all individuals without distinction, and where there is no legislation to give effect to that obligation, "to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant (Article 2.2 of the ICCPR), to adopt such legislative and other measures as may be necessary to give effect to the rights recognised in the present Covenant" including the right to information protected by article 19 of the Covenant. Article 2 further provides that violations of the rights and freedoms protected should entitle the victims to remedies notwithstanding that the violation was committed by persons acting in an official capacity (article 2.3(a) of the ICCPR), and that remedies are to be "determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system..." (article 2.3 of the ICCPR). Meanwhile, in relation to development, the ICCPR recognises the right of all peoples to "freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation..." See Article 1.2 of the ICCPR.

Article 19 of the ICCPR protects the right to hold opinions and of freedom of expression creating a basis for the recognition of the right of access to information on the basis that opinion cannot be formed without access to information, and that if public opinion is suppressed, an important requirement of democracy is compromised.<sup>669</sup> If a right for access to information or freedom of information is absent the freedom of expression is interpreted to include the “right to seek, receive and impart information and ideas of all kinds regardless of frontiers.”<sup>670</sup> The wide ambit of the nature of information covered by article 19(2) of the ICCPR is an acknowledgement that freedom of expression requires unimpeded access to information and ideas of all kinds. If states desire to restrict the right, the restriction has to be justified.<sup>671</sup> The development of natural resources, including those relating to hydraulic fracturing is not one of the restrictions to the right of access to information in the ICCPR, and therefore cannot be a basis for the justification of restrictions to access to information. Furthermore, some states may argue that information relating to hydraulic fracturing may impact national security.<sup>672</sup> However, the development of natural resources requires not only scientific knowledge but an effective dissemination of the information relating to that knowledge. Hence, the protection of access to information in some way in a binding instrument like the ICCPR underscores the benefit of access to information to

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<sup>669</sup> Kumar 2013 American International Journal of Research in Humanities Arts and Social Sciences 239.

<sup>670</sup> Article 19(2) of ICCPR incorporates the various components of the right of access to information including “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” See “General Comment No 34 of the 102<sup>nd</sup> session of the Human Rights Committee of 11-29 July 2011 on Article 19 of ICCPR” (CCPR/C/CG/24) available at [http://www.un-ilibrary.org/human-rights-and-refugees/report-of-the-human-rights-committee-volume-i-100th-session-101st-session-102nd-session\\_2074e751-en](http://www.un-ilibrary.org/human-rights-and-refugees/report-of-the-human-rights-committee-volume-i-100th-session-101st-session-102nd-session_2074e751-en) [date of use 30 January 2018]. The access to information component of freedom of expression is maintained in many instruments, including article 19 of UDHR, article 19 of ICCPR, article 13.1 of the American Convention on Human Rights, and article 10 of the *European Convention on Human Rights*.

<sup>671</sup> Kaye “Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression” to the 70<sup>th</sup> session of the Human Rights Committee on 8 September 2015 at para 8 available at [www.palermo.edu/cele/pdf/2015-Asambrea-ONU-eng.pdf](http://www.palermo.edu/cele/pdf/2015-Asambrea-ONU-eng.pdf) [date of use 25 March 2017].

<sup>672</sup> A discussion of the exigency of national security as a limitation to access to information is discussed in para 4.4.1.4.1.

development,<sup>673</sup> as well as the protection of procedural rights as having the potential to facilitate the enforcement of substantive rights.

### 3.2.1.2 United Nations Framework Convention on Climate Change 1992

Reduction of the potential risks of climate change<sup>674</sup> requires reduction in the emission of greenhouse gases (hereafter "GHG"), which cannot be done without a cohesive action on the part of the international community.<sup>675</sup> Consequently, the parties to the *United Nations Framework Convention on Climate Change*<sup>676</sup> (hereafter "the UNFCCC") "acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response... to protect the climate system for present and future generations."<sup>677</sup> Accordingly, there is international agreement to stabilise "GHG concentrations in the atmosphere at a level that would prevent anthropogenic interference with the climate system."<sup>678</sup> The recognition of the relevance of information to the attainment of the objectives of the UNFCCC is evident in its article 6(a)(i) which requires state parties to the convention, in carrying

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<sup>673</sup> See article 6 of the ICCPR.

<sup>674</sup> Article 1.3 of the UNFCCC defines 'climate change' as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods." Human activities like deforestation and atmospheric emissions from industry and transport among others lead to increased gases like carbon dioxide and methane being stored in the atmosphere. These types of gases are known as 'greenhouse gases' because they are trapped close to the ground and their effect is to raise air temperatures on the face of the planet causing global warming which in the long run affect the sea level, snow cover, ice sheets and rain cover. See Blobel and Meyer-Ohlendorf *Handbook on United Nations Framework Convention on Climate Change* 16. The UNFCCC makes copious provisions for the regulation of development requiring *inter alia* that parties to the convention "should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects" (see article 3(3) of the UNFCCC). Article 4(1) urges the state parties to the convention to promote and cooperate in education, training and to stimulate awareness of climate change, and encourage the participation of the population including non-governmental organisations.

<sup>675</sup> Williams *Climate Change Negotiations: The United Nations Framework Convention on Climate Change* 1.

<sup>676</sup> Available at <https://unfccc.int/resource/docs/convkp/coneng.pdf> [date of use 27 March 2017].

<sup>677</sup> Part of the preamble of the UNFCCC.

<sup>678</sup> Article 2 of the UNFCCC.

out their commitments thereunder, to promote and facilitate “public access to information on climate change and its effects.”<sup>679</sup>

The relevance of the UNFCCC to the regulation of hydraulic fracturing cannot be overstated. Hydraulic fracturing reportedly generates higher levels of GHG emission particularly methane. When compared to conventional methods of drilling for gas, hydraulic fracturing may have an increased impact on global warming with a potential to harm the environment.<sup>680</sup> Accordingly, there is a need to test domestic legal frameworks and implementation pertaining to hydraulic fracturing in countries engaged in the process against their obligations under the UNFCCC. This is necessary to determine whether or not they comply with their reporting obligations thereunder. Effort to control the emission of GHGs in South Africa is being intensified. By the *Declaration of Greenhouse Gases as Priority Air Pollutants*<sup>681</sup> in terms of sections 29(1) and 29(4) of NEMA,<sup>682</sup> methane, produced in the course of production and/or processing of natural gas has been declared a priority air pollutant; thereby requiring the operator of the production process to submit pollution prevention plans,<sup>683</sup> which shall be subject to evaluation, monitoring, and reporting requirements.<sup>684</sup>

### 3.2.1.3 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998

Hydraulic fracturing operations involve the use of different types of chemicals in different volumes,<sup>685</sup> and due to the adverse impact of some of the chemicals on

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<sup>679</sup> It is noteworthy that there are skeptics who reject and dispute the orthodox view on climate change, contending that “there is no evidence that man’s production of carbon dioxide is causing extreme weather events. To them, any change to the climate attributable to humans will be gradual and there will be plenty of time to adapt, as humans have always done.” See Van Rensburg 2015 *Sage Open* 3.

<sup>680</sup> See paras 1.2 and 2.4.5. See also Howarth *et al* 2011 *Climatic Change* 688.

<sup>681</sup> GN 710 in GG 40996 of 21 July 2017.

<sup>682</sup> 39 of 2004.

<sup>683</sup> See section 3 of the Declaration of Greenhouse Gases as Priority Air Pollutants.

<sup>684</sup> See section 5 of the Declaration of Greenhouse Gases as Priority Air Pollutants.

<sup>685</sup> In a report on the investigation of fourteen oil and gas service companies in USA by the House of Representatives Committee on Energy and Commerce as to the type and volume of chemicals present in fluids used for hydraulic fracturing between 2005 and 2009, it was found that the companies used more than 2,500 products containing 750 chemicals and other components. Excluding water, the companies used 780 million gallons of hydraulic fracturing fluids. Some of

humans and the environment, which is sometimes unknown; the need for regulation is critical. The *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* 1998<sup>686</sup> (hereafter "Rotterdam Convention") is conceptualised to facilitate informed decision-making by countries with regard to trade in hazardous chemicals, especially those that have been banned or severely restricted in contracting state parties.<sup>687</sup> The importance of information and its dissemination in the realisation of the goals of the Rotterdam Convention is shown in its objective, which is to:

... promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to the Parties.<sup>688</sup>

The importance of detailed information and the protection of the environment in dealing with the type of chemicals involved cannot be underestimated.<sup>689</sup> Accordingly, appropriate information and labelling requirements are to be complied with if banned or restricted chemicals are being exported. This is to "ensure adequate availability of information with regard to risks and/or hazards to human

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the companies manufacture their own products, while others purchase them from chemical vendors, with many indicating that they had no proprietary information on the chemicals as they were purchased off the shelf. Appendix A of the report lists each of the 750 chemicals and components. See "Report on Chemicals Used in Hydraulic Fracturing for the US House of Representatives Committee on Energy and Commerce, April 2011" available at [www.conservation.ca.gov/dog/general\\_information/Documents/Hydraulic%20Fracturing%20Report%204%/2018%2011.pdf](http://www.conservation.ca.gov/dog/general_information/Documents/Hydraulic%20Fracturing%20Report%204%/2018%2011.pdf) [date of use 28 March 2017].

<sup>686</sup> Available at [https://www.unido.org/fileadmin/user\\_media/Services/Environmental\\_Management/GUDDIS/Legal\\_Frameworks/rotterdam\\_convention.pdf](https://www.unido.org/fileadmin/user_media/Services/Environmental_Management/GUDDIS/Legal_Frameworks/rotterdam_convention.pdf) [date of use 28 March 2017].

<sup>687</sup> The Rotterdam Convention therefore establishes a procedure to guide the realisation of prior informed consent ("PIC") to ensure that banned or severely restricted chemicals are not exported to countries that do not wish to receive them (see article 4 of the Rotterdam Convention), and contains a list of chemicals subject to PIC in its Annex III, which has been meticulously prepared to ensure that a chemical is not carelessly included (see article 7 of the Rotterdam Convention). For each chemical listed in Annex III, the Chemical Review Committee established pursuant to article 18(6) shall prepare a decision guidance document to be sent to the Conference to consider and decide whether or not the chemical is to be listed in Annex III (see article 7(3) of the Rotterdam Convention).

<sup>688</sup> Article 1 of the Rotterdam Convention.

<sup>689</sup> Kravchenko 2012 *Fla A&M U L Rev* 175.

health or the environment taking into account relevant international standards."<sup>690</sup>

Furthermore, each contracting state is required to facilitate:

- 1) The exchange of scientific, technical, economic and legal information concerning the chemicals within the scope of this Convention, including toxicological, ecotoxicological and safety information;
- 2) The provision of publicly available information on domestic regulatory actions relevant to the objectives of this Convention; and
- 3) The provision of information to other Parties, directly or through the Secretariat, on domestic regulatory actions that substantially restrict one or more uses of the chemical, as appropriate.<sup>691</sup>

Further still, where the chemical being exported is to be used for occupational purposes, a safety data sheet setting out the most up-to-date information available is required to accompany the consignment.<sup>692</sup> In addition, each contracting state is to ensure "that the public has appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III."<sup>693</sup>

Though claims of privilege for non-disclosure of trade secrets as confidential information is prevalent in hydraulic fracturing,<sup>694</sup> the Rotterdam Convention forbids the classification of the following type of information as confidential:<sup>695</sup>

- 1) Information referred to in Annexes I and IV, submitted pursuant to Articles 5 and 6 respectively (namely the properties, identification and uses of the listed chemicals, information on regulatory action pertaining to the chemicals, and information of regulatory action taken on the category or categories of the chemicals including prohibition or restriction where applicable);
- 2) Information contained in the safety data sheet (which is to accompany consignment of chemical in export);
- 3) The expiry date of the chemical;
- 4) Information on precautionary measures, including hazard classification, the nature of the risk and the relevant safety advice;
- 5) The summary results of the toxicological and ecotoxicological tests; and
- 6) The production date of the chemical.

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<sup>690</sup> Article 13(2) of the Rotterdam Convention.

<sup>691</sup> Article 14(1) of the Rotterdam Convention.

<sup>692</sup> Article 13(4) of the Rotterdam Convention.

<sup>693</sup> Article 15(2) of the Rotterdam Convention. In addition, each contracting state is required to take appropriate measures to strengthen its national infrastructure and institutions, including the adoption or amendment of legislative or administrative measures for the effective implementation of the Convention (see article 15(1)).

<sup>694</sup> Trade secrets and its regulation in hydraulic fracturing in the USA, the UK, and South Africa are discussed in chapter 4.

<sup>695</sup> Article 14(3)-(4) of the Rotterdam Convention.

The provisions of the Rotterdam Convention, especially the restriction on the potential claim of confidentiality on the classes of information listed above, are relevant to the domestic regulation of hydraulic fracturing. The restriction has the potential to prevent harm and is likely to boost the endeavour to protect environmental rights.<sup>696</sup>

#### 3.2.1.4 Stockholm Convention on Persistent Organic Pollutants 2001

Hydraulic fracturing operations include activities like soil removal and storage to establish well pads, major transportation of water and equipment which necessitates crossing of property boundaries, and well-drilling to extract gas underground with the use of numerous chemicals,<sup>697</sup> which intersect aquifers and other water resources.<sup>698</sup> The effect of these activities is probably harmful to humans and potential environmental degradation due to atmospheric and water pollution.<sup>699</sup> The concern that persistent organic pollutants (hereafter "POPs")<sup>700</sup> possess toxic properties which can harm human health and the environment<sup>701</sup> spurred global action to address concerns relating to POPs,<sup>702</sup> which resulted in the adoption of the *Stockholm Convention on Persistent Organic Pollutants*.<sup>703</sup>

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<sup>696</sup> South Africa acceded to the Rotterdam Convention on 4<sup>th</sup> September 2002, and it came into force on 24 February 2004 (see status of ratifications of the Rotterdam Convention at <http://www.pic.int/Countries/Statusofratifications/tabid/1072/language/en-US/Default.aspx> [date of use 28 March 2017]).

<sup>697</sup> FracFocus highlights the generic hydraulic fracturing chemical usage including the types of chemicals, their uses in the process and the result of their use. The chemical additives are classified as acid, biocide, base carrier fluid (water), breaker, clay and shale stabilisation control, crosslinker, friction reducer, gel, iron control, non-emulsifier, pH adjusting agent, propping agent, scale inhibitor and surfactant. See FracFocus "Why chemicals are used" available at <https://fracfocus.org/chemical-use/why-chemicals-are-used> [date of use 29 March 2017].

<sup>698</sup> Rahm and Riha 2012 *Environmental Science & Policy* 13.

<sup>699</sup> See Investigative Report at para 2.4.

<sup>700</sup> POPs are group of chemicals including some pesticides, certain industrial chemicals and by-products which remain in the environment for considerable period after use due to a resistance of degradation, becoming widely distributed geographically and accumulated in the tissue of living organisms and the environment as toxins. Due to their long-range mobility, POPs have been detected in remote areas of the globe including the arctic region. See Hagen and Walls 2005 *Natural Resources & Environment* 49.

<sup>701</sup> Marine mammals have been reported to have high levels of POPs in their tissues having a variety of adverse effects on their immune systems and their reproductive physiology. See Karlaganis *et al* 2001 *Environ Sci & Pollu Res* 217.

<sup>702</sup> See the preamble to the *Stockholm Convention on Persistent Organic Pollutants*.

<sup>703</sup> Hereafter "Stockholm Convention." The Stockholm Convention provides for measures to reduce or eliminate releases from intentional production and use of certain chemicals, the regulation of the import and export of such chemicals and the obligations of state parties to realise those

Information and education of the public to create awareness is considered essential to the realisation of the objectives of the Stockholm Convention. Accordingly, state parties are required to promote and facilitate the dissemination of information regarding POPs to the public.<sup>704</sup> They are also required to develop and implement public awareness programmes for vulnerable people on the effects of POPs on their health,<sup>705</sup> and to facilitate public participation in developing responses to the challenges of POPs as well as the implementation of the Convention.<sup>706</sup> Article 10(4) presents examples of the means to achieve effective dissemination of relevant information to stakeholders including the use of “safety data sheets, reports, mass media and other means of communication” as well as the establishment of “information centres at national and regional levels.” To avoid a possible abuse of the claim of confidentiality, article 9(5) provides *inter alia* that “information on health and safety of humans and the environment shall not be regarded as confidential.” The inclusion of a similar provision in local regulations may diminish the potential abuse of claims of trade secret by hydraulic fracturing operators.<sup>707</sup> Schedule 1 to the *Regulations for Petroleum Exploration and Production*<sup>708</sup> lists chemical components of concerns, some of which are toxic and have POPs characteristics.<sup>709</sup> In South Africa, new regulations to phase out the use of certain POPs<sup>710</sup> were

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objectives (see article 3). Article 5 provides for measures to reduce or eliminate releases from unintentional production and enumerates general guidance on best available techniques and best environmental practices for the prevention of unintentional production of POPs. The full text of the Stockholm Convention is available at [www.wipo.int/docs/lexdocs/treaties/en/unep-pop/trt\\_unep\\_pop.pdf](http://www.wipo.int/docs/lexdocs/treaties/en/unep-pop/trt_unep_pop.pdf) [date of use 29 March 2017].

<sup>704</sup> Article 10(1)(b) of Stockholm Convention.

<sup>705</sup> Article 10(1)(c) of Stockholm Convention.

<sup>706</sup> Article 10(1)(d) of Stockholm Convention.

<sup>707</sup> South Africa signed the Stockholm Convention on 23<sup>rd</sup> May 2001, ratified it on 4<sup>th</sup> September 2002, and it came into force on 17 May 2004 (see status of ratifications of the Rotterdam Convention at <http://chm.pops.int/Countries/StatusofRatifications/PartiesandSignatoires/tabid/4500/Default.aspx> [date of use 29 March 2017].

<sup>708</sup> GN 38855 of 3 June 2015, hereafter ‘HF Regulations.’

<sup>709</sup> Chemicals listed in Schedule 1 of HF Regulations include Naphthalene, Acetaldehyde, Formaldehyde, as carcinogens, capable of being accumulated in the tissue of living organisms.

<sup>710</sup> Including Hexabromobiphenyl, Pentachlorobenzene, and Hexabromophenyl Ether. Chemicals used in hydraulic fracturing include species of phenyl and benzene. See <https://www.osha.gov/chemicaldata> [date of use 29 January 2018].



published by the Minister of Environmental Affairs in June 2017, for public comment.<sup>711</sup>

### 3.2.1.5 Non-legally binding global instruments

There exist some non-legally binding global instruments relevant to the protection of access to information, which sometimes facilitate the clarification and scope of the law and are generally invoked in the discourse on human rights.<sup>712</sup> Some of the instruments constitute 'soft' codes, either emerging from the processes of global political institutions, or which have already been elaborated in the context of existing norms. When they are contained in non-binding instruments, they may provide a basis for the negotiation of future international legal instruments.<sup>713</sup> For example, the proclamation of the UDHR by the UNGA on 10 December 1948 gave the UN an opportunity to clarify the content of human rights, which were only vaguely referred to in the UN Charter.<sup>714</sup> Though the UDHR does not create generally binding obligations, it is generally accepted as having become part of customary international law and attained the status of *jus cogens*, a principle of international law, from which no derogation is permitted even in domestic law.<sup>715</sup>

Perhaps in recognition that certain rights and interests like environmental rights are difficult to conceptualise as substantive rights,<sup>716</sup> the UDHR contains procedural rights, including the right of access to national tribunals for remedy against violation of rights,<sup>717</sup> the right to freedom of opinion and expression including the right to

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<sup>711</sup> See Vermaak "Time for industry to comment and prepare for pending regulations to phase out the use of Persistent Organic Pollutants" available at <https://www.bowmanslaw.com/wp-content/uploads/2017/08/Persistent-Organic-Pollutants-by-Michael-Vermaak-.pdf> [date of use 29 January 2018].

<sup>712</sup> Alston and Goodman 2013 *International Human Rights* 142.

<sup>713</sup> Lang 1999 *Max Planck UNYB* 162.

<sup>714</sup> Its preamble declares that among other things, "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" is the foundation for global peace. See Eide "Making Human Rights Universal: Achievements and Prospects" available at [https://www.uio.no/studier/emner/jus/humanrights/HUMR4110/h04/undervisningsmateriale/Lecture1\\_Eide\\_Paper.pdf](https://www.uio.no/studier/emner/jus/humanrights/HUMR4110/h04/undervisningsmateriale/Lecture1_Eide_Paper.pdf) [date of use 29 March 2017].

<sup>715</sup> Linderfalk 2008 *EJIL* 856.

<sup>716</sup> Relve 2016 *Juridica International* 32.

<sup>717</sup> Article 8 of the UNDH.

seek, receive and impart information and ideas,<sup>718</sup> and the right to public participation in the affairs of the state.<sup>719</sup> The UDHR therefore creates a foundation on which other international instruments on access to information are grounded to challenge public authorities not to inhibit the flow of information that could be of interest to the public including those on functions, powers, structures, officials, decisions, budgets, expenditures and other information.<sup>720</sup> While individuals and corporations may not be regarded as subjects of international law, their potential recourse to the provision of article 19 of the UDHR for the protection of access to information regarding information in the custody of private bodies may not be far-fetched given that article 19 of the UDHR applies without boundaries or “regardless of frontiers.”

Other relevant non-legally binding global instruments, which have contributed to the development of international law on the protection of access to information, include the Rio Declaration and Agenda 21.<sup>721</sup>

### 3.2.1.6 International law perspectives: assessment

A familiar principle of international law is that development must be centred on a legal regime that facilitates the realisation of human rights and fundamental freedoms including procedural rights.<sup>722</sup> Accordingly, international law imposes obligations on states to protect environmental rights, resulting in the advent of international instruments, some of which are binding while others are not. The non-

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<sup>718</sup> Article 19 of the UNDH.

<sup>719</sup> Article 21 of the UNDH.

<sup>720</sup> See *African Platform on Access to Information Declaration* adopted at the Pan African Conference on Access to Information held in Cape Town, South Africa on 17-19 September 2011, comprising 14 principles. Principle 2 of the Declaration provides *inter alia* that “the presumption is that all information held by public bodies is public and as such should be subject to disclosure.”

<sup>721</sup> Both the *Rio Declaration* and *Agenda 21* are discussed in paras 2.4.5-2.4.6. Agenda 21 requires an integrated approach towards the realisation of social, economic, and environmental objectives of sustainable development. Information is a fundamental constituent of that approach because it facilitates the formulation and selection of suitable environment and development policies in the decision-making process. See Ngah *et al* 2011 *Journal of Management and Sustainability* 83.

<sup>722</sup> Nyamu-Musembi and Cornwall 2004 *Third World Quarterly* 1416.

legally binding global instruments like the UDHR and the Rio Declaration clarify the meaning and scope of the law and are therefore relevant for consideration in developing a framework for the protection of procedural environmental rights in relation to hydraulic fracturing regulation. The legally binding instruments considered above are relevant in the regulation of hydraulic fracturing. Compliance with their requirements at domestic level are likely to facilitate the enforcement of procedural rights. For example, there is need to regulate the potential GHGs emission attributable to hydraulic fracturing at levels not inferior to the standards required under the UNFCCC framework. Regulations should promote and facilitate public access to information on climate change and its effects as required by article 6(a)(i) of the UNFCCC.

Furthermore, the Rotterdam Convention requires that regulations should facilitate access of the public to information on chemical handling and accident management, as well as alternatives that are safer for human health or the environment in the trade of hazardous chemicals. Article 14(3) -(4) forbids the classification of information relating the properties, identification and uses of hazardous chemicals as confidential, and to make available, information on the risks and/or hazards to human health or the environment related to such chemicals. This has the potential to forestall refusal of information based on trade secrets such as that used by the hydraulic fracturing industry.

Domestic legal frameworks must guarantee unimpeded access to information in line with the wide ambit of article 19(2) of the ICCPR, with recognition that no aspect of the development of shale gas resources by hydraulic fracturing fits into any of the limitation of access to information right. Accordingly, law and regulations must facilitate every aspect of the access to information right required to enforce environmental and other rights breached by operators or regulators of hydraulic fracturing.

South Africa is a party to international instruments discussed in this section.<sup>723</sup> Section 231 of the Constitution provides for the process by which an international agreement becomes a binding law. Section 232 also accords international customary law a binding status in the country “unless it is inconsistent with the Constitution or an Act of Parliament.” Consequently, being a party to the global instruments discussed in this chapter, the legal framework and performance of the regulation of hydraulic fracturing in South Africa should comply with the requirements of international law. Meanwhile, regional perspectives regarding each of the three procedural rights focused on in this study is considered in the next paragraph.

### *3.2.2 Regional law perspectives on access to information*

Law is not just a set of rules, but is encapsulated in a cultural phenomenon, which incorporates a range of considerations, presumptions, and expectations that can “help reveal the historical and societal context that shapes the interpretation and development of law.”<sup>724</sup> Furthermore, evidence abounds that states act in concert in different ways to promote common objectives, and regional cooperation provides a platform for that purpose.<sup>725</sup> It is therefore no surprise that there is a proliferation of regional organisations sometimes vested with normative powers to pursue the common goals of its members.<sup>726</sup> These regional institutions have extended the

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<sup>723</sup> South Africa ratified the ICCPR on 10 December 1998, see [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en); the UNFCCC entered into force on 27 November 1997, see [http://unfccc.int/essential\\_background/convention/status\\_of\\_ratification/items/2631.php](http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php) [date of use 25 February 2018]; the Rotterdam Convention entered into force on 2 February 2004, see <http://www.pic.int/Countries/Statusofratifications/tabid/1072/>; the Stockholm Convention entered into force on 17 May 2004, see <http://chm.pops.int/Countries/StatusofRatifications/PartiesandSignatoires/tabid/4500/Default.aspx>; [date of use 25 February 2018].

<sup>724</sup> Webber 2004 *Australian Journal of Legal Philosophy* 27. For example, many Asian countries including Singapore, Indonesia and China formulated policies affecting regional development on the basis of what the state authority considers to be in the interest of the society renouncing anti-trust rules to facilitate cartelisation, while formal import rules were manipulated to maintain informal barriers required in international trade, and emphasis is given to an administrative law regime to foster bureaucratic flexibility. Those societies consequently thrived economically to the benefit of their people, corroborating that commonality in regional legal systems energises states that appear to share common cultural and ethical roots. See Ginsburg 2000 *Law & Society Review* 836, and McCrudden “Judicial Comparativism and Human Rights” in Orucu and Nelken (eds) *Comparative Law: A Handbook* 373.

<sup>725</sup> Scholtz and Verschuuren (eds) *Regional Environmental Law* 3.

<sup>726</sup> Examples include the European Union, the African Union, and the Organisation of American States. Sub-regional groups also exist to take care of interests common to the members, e.g.

reach of their legal framework to address questions of access to information, the environment and development through the adoption of legally binding and non-binding instruments. The key regional law instruments applicable to access to information in relation to the environment and development, which may have a bearing on the regulation of hydraulic fracturing in the Americas, Europe and Africa are discussed below.

### 3.2.2.1 Regional law perspective: America

Towards the end of the Second World War, the USA began to drive initiatives for global protection of the freedom of expression.<sup>727</sup> In that regard, the Inter-American Conference on Problems of War and Peace, convened in Mexico in February 1945, observed that tyranny cannot exist where truth prevails and that one of the fundamental lessons of the war is “that there can be no freedom, peace or security where men are not assured of free access to the truth through the media of public information.”<sup>728</sup> The Conference thereupon resolved *inter alia* that the American Republics had an obligation to guarantee to their people a free and impartial access to sources of information, and that “the American Republics having accepted the principle of free access to information to all, make every effort to establish a principle of free transmission and reception of information, oral or written, published in books or by the press, broadcast by radio or disseminated by any other means, under proper responsibility and without need of previous censorship, as is the case with private correspondence by letter, telegram, or any other means in time of peace.”<sup>729</sup> Meanwhile, by 1966, the ICCPR had incorporated a binding provision for

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Southern African Development Community (SADC) and Economic Community of West African States (ECOWAS).

<sup>727</sup> The USA Congress passed a resolution on 21 September 1944 asserting “its belief in the world-wide right of interchange of news by news-gathering and distributing agencies, whether individual or associate, by any means, without discrimination as to sources, distribution, rates or charges; and that this right should be protected by international compact.” Resolution cited by Wilson 1945 *AJIL* 791.

<sup>728</sup> Preamble to the *Final Act of the Inter-American Conference on Problems of War and Peace* 1945 available at [https://babel.hathitrust.org/cgi/pt?id=uc1.\\$b728713;view=1up;seq=7](https://babel.hathitrust.org/cgi/pt?id=uc1.$b728713;view=1up;seq=7) [date of use 1 April 2017].

<sup>729</sup> Resolution XXVI.4 *Final Act of the Inter-American Conference on Problems of War and Peace* 1945 available at [https://babel.hathitrust.org/cgi/pt?id=uc1.\\$b728713;view=1up;seq=7](https://babel.hathitrust.org/cgi/pt?id=uc1.$b728713;view=1up;seq=7) [date of use 1 April 2017]. However, the lofty ideal to establish a legal regime for the freedom of expression and the right to information was however not incorporated into the *American*

the protection of the right to hold opinion and freedom of expression (ratified in due course by American States), but it was not until the adoption of the *American Convention on Human Rights* 1969<sup>730</sup> (hereafter the American Convention) that a legally binding provision to protect access to information was adopted in the Americas.

### 3.2.2.1.1 American Convention on Human Rights 1969

The American Convention conceived the rights and freedom protected therein as being available to every human being,<sup>731</sup> and mandated contracting states yet to provide for the protection of any freedom or right contained in the convention to take necessary steps to do so.<sup>732</sup> The American Convention lacks a provision protecting the environment. For a violation causing degradation of the environment, the only recourse is restricted to domestic law.<sup>733</sup> However, the lacuna is not necessarily fatal, because while the American Convention does not provide for a right relating to the environment directly, the IACTHRs has had cause to apply article 13 on freedom of thought and expression which also protects access to information to give effect to the protection of the environment. Article 13.1 of the American Convention provides:

Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.<sup>734</sup>

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*Declaration of the Rights and Duties of Man* adopted in Bogota, Columbia in April 1948 despite their inclusion in a global instrument like the UDHR.

<sup>730</sup> Available at [www.oas.org/dil/treaties\\_b-32\\_american\\_convention\\_on\\_human\\_rights.pdf](http://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf) [date of use 1 April 2017].

<sup>731</sup> Article 1.2 of the American Convention.

<sup>732</sup> Article 2 of the American Convention. The enforcement institutions are important to the realisation of rights stated in the American Convention because without enforcement mechanism and procedure in place to facilitate peoples' access to prevent the violation or abuse of the rights and freedoms, any recognition of substantive rights and freedoms is meaningless. In that regard, article 44 gives permission to "any person or group of persons, or any non-governmental entity legally recognised in one or more-member states of the organization, [to] lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." The jurisdictional competence and procedure of the American Commission and the IACTHRs are contained in articles 44-51 and articles 61-69 respectively.

<sup>733</sup> The domestic legal framework for the protection of access to information in the state of Pennsylvania in USA in relation to the environment in general and hydraulic fracturing in particular is examined in section 4.2.1.

<sup>734</sup> The remaining part of article 13 deals with the limitations to the exercise of the right.

The IACtHRs considered the provision in the case of *Claude-Reyes and Others v Chile*.<sup>735</sup> The case arose on the application of Claude Reyes and others who contended that the refusal of Chilean's Foreign Investment Committee to provide information, which they required on a deforestation project of the government "could be prejudicial to the environment and to the sustainable development of Chile." The American Commission had earlier observed that "there is a growing consensus that States have the positive obligation to provide the information they hold to their citizens,"<sup>736</sup> and consequently referred the case to the IACtHRs. The IACtHRs observed that the refusal was not based on any justification under the Chilean law, amounting to the applicants not being granted an effective judicial remedy to contest a violation of the right of access to information because "there were no mechanisms guaranteeing the right of access to information."<sup>737</sup> The IACtHRs nevertheless found that the state of Chile violated the American Convention to the detriment of the applicants, "in relation to the general obligations to respect and guarantee the rights and freedoms and to adopt provisions of domestic law in terms of article 13 with regard to the administrative authority's decision not to provide information."<sup>738</sup> It follows that the lack of domestic provision or lack of enthusiasm on the part of the local institutions to facilitate redress for violation may not necessarily be a hindrance to the extent that a victim of violation may trigger the process for remediation under the system of the American Convention.

#### 3.2.2.1.2 Non-binding instruments

There are other regional American instruments having a bearing on the environment and human rights. Though not binding, certain resolutions of the General Assembly of the Organisation of American States (hereafter "GA-OAS") from time to time draw the attention of the contracting states to the relevant issues in human rights and the environment. For example, in AG/RES 1819 (XXXI-O/1) of 5 June 2001,<sup>739</sup> the

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<sup>735</sup> *Claude-Reyes and Others v Chile* Case No. 12.108 2006 available at [www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf) [date of use 3 April 2017].

<sup>736</sup> At para 58.

<sup>737</sup> At para 3

<sup>738</sup> At para 173.

<sup>739</sup> Available at <http://wp.cedha.net/wp-content/uploads/2011/05/Resolution-1819-OEA.pdf> [date of use 3 April 2017].

GA-OAS resolved to implement a resolution requesting the Secretary General in collaboration with other organs of the OAS to conduct “a study of the possible interrelationship of environmental protection and the effective enjoyment of human rights.”<sup>740</sup>

In the same vein, the *Model Inter-American Law on Access to Public Information*<sup>741</sup>(hereafter “MI-AL”) adopted pursuant to a resolution of the GA-OAS called for the drafting of a model law on access to information,<sup>742</sup> together with a guide for its implementation to “serve as a model for reform in the hemisphere.”<sup>743</sup> The MI-AL contains provisions on specific aspects of access to information, some of which are either contentious or have assisted to resolve lingering doubts.<sup>744</sup>

The foregoing shows that regional cooperation to protect access to information and the environment compels countries within a group to make effort to achieve a minimum standard imposed by the collective. This is evident in the intervention of international judicial institutions that have developed the law in this area pursuant

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<sup>740</sup> See AG/RES 1819 (XXXI-O/1). See also AG/RES 1896 (XXXII-O/02) of 4 June 2002 and AG/RES 1926 (XXXIII-O/03) of 10 June 2003.

<sup>741</sup> AG/RES 2607 (XL-X/10) available at [https://www.oas.org/dil/AG\\_RES\\_2607\\_2010\\_eng.pdf](https://www.oas.org/dil/AG_RES_2607_2010_eng.pdf) [date of use 8 April 2017].

<sup>742</sup> AG/RES 2514 (XXXIX-O/09) of 4 June 2009 on ‘Access to Public Information: Strengthening Democracy’.

<sup>743</sup> Preamble to the MI-AL.

<sup>744</sup> For example, ‘information’ as defined in MI-AL “refers to any type of data in custody or control of a public authority.” Information is knowledge communicated or received concerning a particular fact or circumstance. ‘Data’ seems to suggest records, and ‘record’ as defined in MI-AL “refers to any recorded information...” which is likely to exclude information in oral, thought, idea, or an opinion form, inadvertently providing an opportunity to public officials intending to avoid disclosure who may ensure that there are no written or permanent records. See Arko-Cobbah 2008 *IFLA Journal* 188. Furthermore, the scope of MI-AL is restricted to public authorities, impliedly excluding its application to private bodies, which may depending on circumstances, be in custody of information whose disclosure or otherwise may adversely impact a person’s interests. Though ‘public authorities’ as contemplated in section 3 includes “non-state bodies which are owned or controlled by government, and private organizations which operate with substantial public funds benefits (directly or indirectly) or which performs public functions and services in so far as it applies to those funds or to the public services or functions they undertake,” it is possible that private bodies not covered by section may hold information which could prejudice people’s interest or rights. See Bertoni and Sánchez “Draft Model Law for African Union States on Access to Information- Comments and Recommendations” Centre for Studies on Freedom of Expression and Access to Information available at the University of Palermo School of Law at [www.palermo.edu/cele/pdf/investigaciones/AU-Draft-Model\\_Law-CELE.pdf](http://www.palermo.edu/cele/pdf/investigaciones/AU-Draft-Model_Law-CELE.pdf) [date of use 8 April 2017].



to the provisions of the various instruments which are either binding or have strong persuasive effect on domestic tribunals.

Developments in other geographical regions are also relevant for a better understanding of the subject. Regional perspectives in Europe and Africa are discussed in the following sections.

### 3.2.2.2 Regional law perspective: Europe

The decline in natural gas production in Europe, coupled with the desire to implement the EU energy policy based on sustainability, security and competitiveness, has sparked increased interest in unconventional gas, including hydraulic fracturing.<sup>745</sup> Over the years, the EU has developed a formidable body of environmental policy and instruments cutting across a myriad of issues, with member states including the UK sharing a common understanding on matters including air and water pollution, waste management and recycling, climate mitigation and the regulation of chemicals.<sup>746</sup>

Notwithstanding, concerns have been expressed as to whether or not state obligations relating to human rights can be fulfilled with regards to the impact of hydraulic fracturing.<sup>747</sup> Incidentally, there is no legally binding European treaty directly regulating hydraulic fracturing.<sup>748</sup> However, the *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereafter "European Convention") contain provisions on an access to information right, which can serve as means to protect environmental rights. The instruments are considered in the following sections.

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<sup>745</sup> Leal-Arcas and Schmitz 2014 *Oil Gas & Energy Law Intelligence* 3.

<sup>746</sup> Baldock *et al* *Brexit- The Implications for UK Environmental Policy and Regulation Institute for European Environmental Policy* 5.

<sup>747</sup> Gear A *et al* 2014 "A Human Rights Assessment of Hydraulic Fracturing and Other Unconventional Gas Development in the United Kingdom" 7.

<sup>748</sup> The EU Commission *Recommendation on Minimum Principles for the Exploration and Production of Hydrocarbons (such as shale gas) Using Hydraulic Fracturing* Commission Recommendation 2014/70/EU of 22 January 2014 however provides guidelines.

### 3.2.2.2.1 Convention for the Protection of Human Rights and Fundamental Freedoms 1950

Though article 1 of the European Convention imposes an obligation on state parties to secure the rights and freedoms therein to everyone within their jurisdictions, the role of individuals in the actual development of the remedial mechanism to deal with the violation of human rights far surpasses the states' role. The ECHR through its consideration of petitions filed by individuals and organisations has been instrumental in applying the provisions of the European Convention to develop the jurisprudence of human rights and environmental law despite a lack of specific provision on environmental right.

While there is no stand-alone right of access to information in the European Convention,<sup>749</sup> the freedom of expression provision which incorporates the freedom to receive and impart information in article 10 has been applied to secure other rights like the right to respect for private and family life<sup>750</sup> on the basis that the violation occurred because the victims were not given essential information that could have enabled them to assess the risk of pollution in the activity complained against.<sup>751</sup> The importance of information to the protection of human rights against the potential abuse of the environment was underscored by the ECHR when the court held that a person does not have to litigate to obtain disclosure of information to enable him to assess the potential risk of environmental harm to which he may be exposed.<sup>752</sup> In *Lingens v Austria*,<sup>753</sup> the ECHR held that the-

...freedom of expression as secured in paragraph 1 of article 10 constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.

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<sup>749</sup> The Aarhus Convention and relevant EU Directives are discussed in para 3.2.2.2.

<sup>750</sup> Article 8 of the European Convention.

<sup>751</sup> *Guerra and others v Italy* 1998 ECHR 19.

<sup>752</sup> *Roche v United Kingdom* 2006 EHRR 30.

<sup>753</sup> 1986 ECHR 7 para 41.

Furthermore, though article 10 of the European Convention provides that the right “carries with it duties and responsibilities” and that it may be subject to conditions which may limit its application,<sup>754</sup> the ECHR has held that the limitations are to be applied stringently on the basis that there is a *prima facie* ground for disclosure of information except on rigorous proof that a specific limitation is applicable.<sup>755</sup>

### 3.2.2.2.2 Charter of Fundamental Rights of the European Union 2000

The *Charter of Fundamental Rights of the European Union*<sup>756</sup> (hereafter “EU Charter”) was adopted to clarify the status of human rights in the EU and to codify the rights in a single document, which has been updated in the light of changes in society, social progress, and scientific and technological developments.<sup>757</sup> Regarding the right of access to information, article 42 of the EU Charter gives natural and legal persons within the Union a right to documents of the EU institutions and agencies in hard copies, electronic or in any other form. By virtue of article 6 of the Treaty of Lisbon,<sup>758</sup> the EU Charter is a legally binding instrument,<sup>759</sup> that provides a possible resolution to the challenges associated with the protection of fundamental rights hitherto considered as *ad hoc*, confusing, and without any clear or conceptual underpinning to the rights being protected.<sup>760</sup>

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<sup>754</sup> The limitations to the exercise of the article 10 right is similar to limitations in legislation on freedom of information in some domestic jurisdictions, including restrictions or penalties prescribed by law and which are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder and crime, for the protection of morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>755</sup> Vides *Aizsardzibas Klubs v Latvia* 2004 ECHR 234.

<sup>756</sup> Available at [www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) [date of use 10 April 2017].

<sup>757</sup> “Why the EU Charter of Fundamental Rights Exists” at [https://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](https://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm) [date of use 10 April 2017].

<sup>758</sup> Article 6 [as amended] of the Treaty of the European Union, *inter alia* by providing that the rights, freedoms and principles set out in the EU Charter is recognised by the EU and “shall have the same legal values as the Treaties,” therefore affirming the binding character of the provisions of the EU Charter.

<sup>759</sup> Groussnot and Pech 2010 *European Issue* 2.

<sup>760</sup> Douglas-Scot 2011 *HRLR* 646.

### 3.2.2.2.3 Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998

The Aarhus Convention marked a major epoch in the quest to elevate procedural environmental rights to the level of customary norm in Europe,<sup>761</sup> consolidating discussion on the subject around ‘three pillars’, with each pillar addressing access to information,<sup>762</sup> participation of the public in decision-making process,<sup>763</sup> and access to justice<sup>764</sup> respectively. The Aarhus Convention formally created a platform to bring the discussion relating to the environment to the public forum considering that the environment has no voice, and future generations cannot participate in that discussion, on the basis that rules and political decisions relating to the environment should be subject to public discourse because no one, including government authority has a monopoly over the truth.<sup>765</sup> It therefore establishes an enforceable mechanism to protect the right of people to live in an environment adequate to their health and well-being through the application of legislative, regulatory and other measures to facilitate the provision of information, public participation and access to justice in order to implement the provisions of the Convention.<sup>766</sup>

The wide acclamation and acceptance accorded to the Aarhus Convention is evident in the number and spread of the countries that have acceded to it.<sup>767</sup> The UK signed the treaty in 1998 and ratified it in 2005. Furthermore, the Compliance Committee, established pursuant to article 15, has delivered rulings interpreting and clarifying the provisions of Aarhus Convention, giving rise to a body of case law relevant to the development of the law.<sup>768</sup>

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<sup>761</sup> Pedersen 2008 *The Georgetown Int’l Env’tl Review* 92.

<sup>762</sup> Articles 4-5 of Aarhus Convention.

<sup>763</sup> Articles 6-8 of Aarhus Convention.

<sup>764</sup> Article 9 of Aarhus Convention.

<sup>765</sup> Kramer 2013 *Environmental Law Network International* 39.

<sup>766</sup> Articles 1 and 3 Aarhus Convention.

<sup>767</sup> 47 countries have acceded to the Aarhus Convention as at the end of 2017, including twenty countries from outside the EU. See UNECE *Status of Ratification* at <https://www.unece.org/env/pp/ratification.html> [date of use 30 January 2018].

<sup>768</sup> Boyle 2012 *EJIL* 623.

In relation to access to information, article 2(3) defines the constitutive features of 'environmental information' and links those features to the state of elements of the environment, the factors affecting or likely to affect the environment and the state of human health and safety.<sup>769</sup> The effect of this is that information is linked to a wide variety of possible consequences of any abuse of the environment that may have adverse effect on the environment itself or on human beings. The potential consequences of an abuse of the environment highlighted in that definition are all possible in hydraulic fracturing as discussed in paragraph 2.4. Therefore, incorporating the substance of the definition of 'environmental information' similar to that in article 2(3) of the Aarhus Convention in local regulation of hydraulic fracturing may assist in resolving what information is relevant in protecting substantive environmental rights.

Meanwhile, articles 4 to 6 of the Aarhus Convention contains comprehensive provisions, which *inter alia* recognise the right of a requestor to information without having to state an interest underlying the request,<sup>770</sup> the procedure regulating the process of request for information<sup>771</sup> and grounds for refusal.<sup>772</sup>

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<sup>769</sup> Article 2(3) of the Aarhus Convention defines environmental information as "any information in written, visual, aural, electronic or any other material on:

- a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
- c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.

<sup>770</sup> Article 4(1)(a) Aarhus Convention.

<sup>771</sup> Article 5 Aarhus Convention.

<sup>772</sup> Article 4(4) Aarhus Convention.

#### 3.2.2.2.4 Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information

The purpose of Directive 2003/4/EC<sup>773</sup> is to align EU legislation with the provisions of the Aarhus Convention. To remove dissimilarity within the EU, it is necessary to eliminate the disparities existing in the laws of different member states regarding access to environmental information held by public authorities. Member states were required to bring into force, laws, regulations and administrative provisions necessary to comply with the Directive no later than 14 February 2005.<sup>774</sup> Directive 2003/4/EC sets out the basic terms, conditions and practical arrangements that a member of the public must comply with when granted access to requested environmental information.<sup>775</sup>

Article 3 requires member states to ensure that public authorities make available environmental information held by or for them to any applicant at his request and without having to state an interest. Request for information is to be fulfilled “as soon as practicable or, at the latest, within one month” after the receipt of the request, except in a case where the volume and complexity of the information required makes compliance within one month difficult. In that case, time is extended to two months, though the applicant should be informed of the extension before the end of the initial one-month period. Furthermore, public authorities are to assist applicants who make requests in a “too general a manner” to specify the request in a more appropriate manner, and article 3(5) provides for a process to guide public officials to support the public in seeking access to information.

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<sup>773</sup> Available at [www.eur-lex.europa.eu/LexUriServe.do?uri=OJ:L:2003:041:0026:0032:EN:PD](http://www.eur-lex.europa.eu/LexUriServe.do?uri=OJ:L:2003:041:0026:0032:EN:PD) [Date of use 15 April 2017].

<sup>774</sup> Article 10 of Directive 2003/4/EC. The UK complied with the requirement to bring into force, laws, regulations and administrative provisions necessary to comply with the Directive, by passing the Environmental Information Regulations No 3391 of 2004, which came into force on 1 January 2005. See para 3.6.3.

<sup>775</sup> See Berthier and Krämer *The Aarhus Convention: Implementation and Compliance in EU Law* 60; Janjatovic and Pokimika (eds) *Strategy for Implementing the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* 14; and Oliver 2013 *Fordham International Law Journal* 1435.

### 3.2.2.2.5 Directive 2016/943/EC of the European Parliament and of the Council on trade secrets

Claims pertaining to trade secrets are common in hydraulic fracturing.<sup>776</sup> Directive 2016/943/EC<sup>777</sup> on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure is designed to ensure that there is a consistent rule in the EU to guarantee redress in the event of unlawful acquisition, use or disclosure of a trade secret, albeit from the perspective of business enterprises.<sup>778</sup> Though the Directive does not affect EU rules or national laws that “require the disclosure of information, including trade secrets, to the public or to public authorities,”<sup>779</sup> trade secret holders are empowered to apply for measures, procedures and remedies to prevent or obtain redress for any unlawful acquisition, use or disclosure of their trade secrets.<sup>780</sup> Furthermore, competent judicial authorities may take specific measures to preserve the confidentiality of trade secrets in the course of legal proceedings,<sup>781</sup> including the prohibition of the continued use or disclosure of the trade secret, the prohibition of the production, storage, marketing and the export of the infringing goods, and the seizure of suspected infringing goods.<sup>782</sup>

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<sup>776</sup> See Norton Rose Fulbright *Trade Secrets and the Regulation of Hydraulic Fracturing- Towards a Global Perspective* 8. The impact of claim of trade secrets in hydraulic fracturing on the right of access to information is discussed in chapter 4.

<sup>777</sup> Directive 2016/943/EC is available at <http://eur-lex.eu/legal-content/EN/TXT/?uri=celex:32016L0943> [date of use 28 April 2017].

<sup>778</sup> Recital 10 of Directive 2016/943/EC. The Directive highlights the reasons and the objectives thereof, recognising that “businesses and non-commercial research institutions invest in acquiring, developing and applying know-how and information which is the currency of the knowledge economy and provides a competitive advantages, and that business enterprises value trade secrets as much as they do patents and other forms of intellectual property right, which necessitates that they use confidentiality as a business competitiveness and research innovation tool.” See recital 2 of Directive 2016/943/EC.

<sup>779</sup> Recital 11 Directive 2016/943/EC.

<sup>780</sup> Article 4(1) Directive 2016/943/EC.

<sup>781</sup> Article 9(2) of Directive 2016/943/EC.

<sup>782</sup> Article 10 of Directive 2016/943/EC. Judicial authorities are required to take into account the specific circumstances of each case prior to granting or rejecting any application, and to consider the following as may be appropriate-

- a) The value and other specific features of the trade secret;
- b) The measures taken to protect the trade secret;
- c) The conduct of the respondent in acquiring, using or disclosing the trade secret;
- c) The impact of the unlawful use or disclosure of the trade secret;
- d) The legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties;

While the objective of this Directive is to protect commercial information, its article 5 contains provisions to preserve the exercise of human rights. Member states are required to ensure that claims pursuant to said Directive are not used to forestall the exercise of the right to freedom of expression and information, the disclosure of misconduct, wrongdoing or illegal activity provided the disclosure is in the public interest, and whistle blowers' activities.<sup>783</sup> This provision is of benefit to potential victims of adverse consequences of hydraulic fracturing, who can seek disclosure of information in the custody of operators to enforce their substantive rights.

#### 3.2.2.2.6 Non-binding instrument

The EU Commission *Recommendation on Minimum Principles for the Exploration and Production of Hydrocarbons (such as shale gas) Using Hydraulic Fracturing* Commission<sup>784</sup> "lays down the minimum principles needed to support Member States who wish to carry out exploration and production of hydrocarbons using high-volume hydraulic fracturing, while ensuring that the public health, climate and environment are safeguarded, resources are used efficiently, and the public is informed."<sup>785</sup> The EU Recommendation is however not binding, perhaps in acknowledging the right of member states "to determine the conditions for exploiting their energy resources, as long as they respect the need to preserve, protect and improve the quality of the environment."<sup>786</sup>

In relation to access to information in hydraulic fracturing regulations 8 and 9 of the EU Recommendation encourages member states to require hydraulic fracturing operators to publicly disseminate information on the chemical substances and volumes of water to be used, and what is actually used. The information provided should list the names and Chemical Abstracts Service (CAS) numbers of all

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- e) The legitimate interests of third parties;
  - f) The public interest; and
  - g) The safeguard of fundamental rights.

<sup>783</sup> Article 5 Directive 2016/943/EC.

<sup>784</sup> Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014H0070#text> [date of use 15 April 2017] (hereafter "EU Recommendation")

<sup>785</sup> Article 1.1 of the EU Recommendation.

<sup>786</sup> See article 292 of the Treaty of the European Union and recital 1 of the EU Recommendation.



substances and include a safety data sheet, and the substance's maximum concentration in the fracturing fluid. Each member state is required to apply the EU Recommendation within 6 months, from December 2014 and inform the Commission annually, of the measures put in place.<sup>787</sup>

### 3.2.2.3 Regional law perspective: Africa

The importance of the protection of access to information in Africa is underscored by the fact that through the initiative of the Africa Group, three African countries co-sponsored a resolution passed by the Executive Board of UNESCO proclaiming 28 September of each year as the *International Access to Information Day*.<sup>788</sup> This is remarkable considering the complexity of the geo-political environment of the region, which is multi-cultural, multi-racial, and with diverse ethnicity and religions.<sup>789</sup> However, development concerning the protection of access to information in Africa has not been too impressive perhaps because the debate thereon has largely been focused on advances in legislation despite the fact that only a few African countries have succeeded in enacting legislation imposing obligations on public bodies to facilitate access to public information.<sup>790</sup>

The constitutions of some countries in Africa expressly provide for the right of access to information, while others incorporate the right by reference to one international human right instrument or a combination thereof.<sup>791</sup> Even in countries with access

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<sup>787</sup> The 2016 Report from the Commission to the European Parliament and the Council on the effectiveness of the EU Recommendation indicated that eleven of the member states have granted or plan to grant authorisations for the development of hydrocarbons that may require the use of hydraulic fracturing. About eighty wells have been drilled of which at least sixteen were fractured with high volumes of fluids. Regarding the recommendation to publish relevant information, a survey of stakeholders revealed that available information "did not help alleviate public concerns. See European Commission "Report from the Commission to the European Parliament and Council on the Effectiveness of Recommendation 2014/70/EU" 15.12.2016/COM(2016) 794 available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52016DC0794> [date of use 20 October 2018].

<sup>788</sup> See "Nigeria, Angola and Morocco call for an international access to information day" available at [https://www.ifex.org/africa/2015/10/21/resolution\\_sponsor/](https://www.ifex.org/africa/2015/10/21/resolution_sponsor/) [date of use 12 April 2017].

<sup>789</sup> Mubangizi 2012 *Journal of International Women's Studies* 34.

<sup>790</sup> As at end of 2017, only 22 of the 54-member states of the AU have adopted legislation addressing the subject of access to information. '22 African countries have passed access to information laws' available at <http://www.africafex.org/access-to-information/22-african-countries-that-have-passed-access-to-information-laws> [date of use 17 May 2019].

<sup>791</sup> See for example, section 32 of the *Constitution of the Republic of South Africa* 1996, article 27 of the *Constitution of the Democratic Republic of the Congo* 2005, section 39 of the *Constitution of the*

to information legislation, pervading dictatorships and corruption of regimes in the region create a propensity for government to administer the state in secrecy by blocking public access to information.<sup>792</sup> Unfortunately, the fact that a significant percentage of the population is largely illiterate has not necessitated the clamour of the people for information on government policies.<sup>793</sup>

Considering the above, protection of access to information will most likely benefit Africa as a region where development is currently in progress, because access to information can be utilised as a tool for the realisation of substantive rights when it is deployed as a community or collective right.<sup>794</sup> A 'one size fits all' access to information approach imported from the west is not likely to be effective in Africa. What is required is a process developed consequent upon negotiation and implementation based on recognition of the particular challenges common to many African countries, with a view to developing an autochthonous and workable access to information framework.<sup>795</sup>

As with other regions of the world, African countries have subscribed to major global instruments on human rights, including environmental rights and the right to information. Several legally binding and non-binding instruments affecting access to information have been adopted under the auspices of the AU and other sub-regional organisations.<sup>796</sup> The relevant regional African instruments on procedural environmental rights, which may have a bearing on hydraulic fracturing, are discussed in the following sections.

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*Federal Republic of Nigeria* 1999, and article 41 of the *Constitution of the Republic of Uganda* 1995.

<sup>792</sup> Diallo and Calland (eds) *Access to Information in Africa- Law, Culture and Practice* 1.

<sup>793</sup> Carter Center 2010 "African Regional Findings and Plan of Action for the Advancement of the Right of Access to Information" at [www.cartercenter.org/resources/pdfs/peace/americas/conference2010/african-reg-findings-plan-of-action.pdf](http://www.cartercenter.org/resources/pdfs/peace/americas/conference2010/african-reg-findings-plan-of-action.pdf) [date of use 13 April 2017].

<sup>794</sup> Calland 2013 *Model Law on Access to Information for Africa* 18.

<sup>795</sup> Mubanzigi 2004 *African Human Rights LJ* 101.

<sup>796</sup> Other relevant regional instruments having provisions on access to information include article 19 of the *African Charter on Democracy, Election and Good Governance* 2007; articles 9 and 12(4) of the *African Convention on Preventing and Combating Corruption* 2003, articles 10(3)(d) and 11(2)(i) of the *African Union Youth Charter* 2006; article 6 of the *African Charter on Values and Principles of Public Service and Administration* 2011; and article 3 of the *African Statistics Charter* 2009.

### 3.2.2.3.1 African Charter on Human and Peoples' Rights 1981

In agreeing to a charter to promote and protect human rights, the state parties took into consideration "... the virtues of their historical tradition and the values of African civilization, which should inspire and characterise their reflection on the concept of human and peoples' rights."<sup>797</sup> In that regard, the *African Charter on Human and Peoples' Rights*<sup>798</sup> ("the Banjul Charter") is a compendium spanning the typical categorisation of rights, namely civil and political rights, procedural rights, cultural rights and socio-economic rights.<sup>799</sup>

On the right to information, article 9 of the Banjul Charter provides that:

- 1) "Every individual shall have the right to receive information.
- 2) Every individual shall have the right to express and disseminate his opinions within the law."

Based on article 9, and the decisions of the African Commission, the right to access to information is a right to all people, applicable to citizens and non-citizens of a country.<sup>800</sup> However, the nature of limitations that may constitute a restriction on the exercise of the right is not detailed in article 9, other than the requirement that the right shall be exercised "within the law." The potential fallout of this is that though article 9 of the Banjul Charter provides that "every individual shall have the right to receive information," the requirement in article 1 which empowers member states to adopt legislative or other measures to give effect to the rights potentially leaves room for despotic governments to enact legislation and regulations which

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<sup>797</sup> Preamble to the Banjul Charter.

<sup>798</sup> 1982 ILM 58.

<sup>799</sup> Though the borderline between the various rights is fluid, scholars often adopt a categorisation in human rights law for convenience of discussion or analysis. See Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* 35. Kidd *Environmental Law* (2<sup>nd</sup>ed) 21 categorised three groups of rights, namely the 'blue' rights or the civil and political rights, the 'red' rights or social, economic and cultural rights, and the 'green' rights or peoples or solidarity rights. It is worthy of note though that the classical categorisation of rights has been criticised on the ground that they do not address the typical African challenges relating to rights, and that it will be more beneficial that typology reflects the African context, taking into account all the rights protected in the African Charter. See Mubanzigi 2004 *African Human Rights LJ* 101.

<sup>800</sup> In any enquiry in terms of administrative justice, the fact that a person is not given a reason for the action against him or her violate the right to receive information contrary to article 9(1) of the Banjul Charter. See *Amnesty International v Zambia* 2000 AHRLR 325.

devise ways to restrict rather than promote the rights. For example in the case of *Zimbabwe Lawyers for Human Rights and The Legal Resources Foundation v The President of the Republic of Zimbabwe and the Attorney General*,<sup>801</sup> the Zimbabwean Supreme Court denied access to the Dumbutshena Commission Report on the Matebeleland massacres, based on the contention of the government that by section 31(k) of the Zimbabwean Constitution, the President is “permitted by this Constitution or any other law to act on his own deliberate judgment, [and] a court shall not, in any case, inquire into ... the manner in which the President exercised his discretion.”<sup>802</sup> The court upheld the submission, holding that the rights created by the Constitution of Zimbabwe are not absolute, to the extent that they are “designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the public interest or the rights and freedoms of other persons.”<sup>803</sup>

The foregoing perhaps illustrates the difficulty involved in the prospect of African regional instruments to affirm a right to information to strengthen their environmental rights especially in view of the fact that the provisions in the various domestic legislation enacted to give it effect vary in form and substance, coupled with the fact that the process for enforcing international obligations is at best spurious.<sup>804</sup>

### 3.2.2.3.2 Non-binding instruments

Two important non-binding instruments relevant to access to information in Africa are the *Declaration of Principles on Freedom of Expression in Africa*<sup>805</sup> and the *Model Law on Access to Information for Africa*.<sup>806</sup> They are discussed below.

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<sup>801</sup> 2003 ZWSC 12.

<sup>802</sup> Section 31(k)(1)(d) of the *Constitution of Zimbabwe*.

<sup>803</sup> Preamble to the Constitution of Zimbabwe.

<sup>804</sup> Pedersen 2008 *The Georgetown Int'l Env'tl Review* 82.

<sup>805</sup> Adopted by the African Commission on Human and Peoples' Rights, at its 32<sup>nd</sup> Ordinary Session, 17-23 October 2002, Banjul, The Gambia. Available at <http://www.africafoicentre.org/index.php/instruments-of-foi/87-declaration-of-principles-on-freedom-of-expression-in-africa/file> [date of use 14 April 2017].

<sup>806</sup> Available at [www.achpr.org/files/news/2013/04/d84/model\\_law.pdf](http://www.achpr.org/files/news/2013/04/d84/model_law.pdf) [date of use 14 April 2017]. The Model Law is a product of two and a half years of a coordinated drafting process guided by the Centre for Human Rights, University of Pretoria and the Special Rapporteur, working with

The preamble to the *Declaration of Principles on Freedom of Expression in Africa* affirmed article 9 of the Banjul Charter, mindful of the evolving human rights and human development environment in Africa, especially of the adoption of the Protocol establishing the African Court of Human and People Rights. To that end, the Declaration formulated principles breaking down the elements of the right to access to information and freedom of expression. The essence of freedom of expression and information is amplified to include “the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form or communication, including across frontiers, [as] a fundamental and inalienable human right and an indispensable component of democracy.”<sup>807</sup>

Furthermore, the constitutive elements of freedom of information are provided in article IV as follows:

- 1) Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
- 2) The right to information shall be guaranteed by law in accordance with the following principles:
  - a. Everyone has the right to access information held by public bodies;
  - b. Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
  - c. Any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
  - d. Public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
  - e. No one shall be subject to any sanction for releasing in good faith information or wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
  - f. Secrecy laws shall be amended as necessary to comply with freedom of information principles.
- 3) Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or private bodies.

Unfortunately, the value that could have been derived in the expanded content of article 9 of Banjul Charter presented by the Declaration is lost, because it is a non-

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several experts in the field of human rights across Africa. See African Commission *Model Law on Access to Information for Africa* 8.

<sup>807</sup> Article I.

binding soft law, which “has greatly watered down its full potential to supplement article 9 of the African [Banjul] Charter.”<sup>808</sup>

Meanwhile, the *Model Law on Access to Information for Africa* (hereafter “Model Law”) was developed by the African Commission pursuant to article 1 of the Banjul Charter which obliges state parties to “adopt legislative, or other measures to give effect” to the rights and freedoms therein. The Model Law serves as a tool to aid African states’ legislative draftsmen and policy-makers in the process of adoption or review of access to information legislation.<sup>809</sup> However, the likelihood of a model access to information law in Africa being fit for purpose is doubtful because there are diverse systemic challenges militating against enforcement of such a right in different countries. The diversity in socio-economic parameters and the state of government and politics create conditions such as unequal access to justice and varying levels of awareness of the benefits of access to information which may impede or enhance implementation.<sup>810</sup> Therefore, the success of any access to information legislation in Africa will depend largely on the level of development of the necessary political, legal and social structures, and the commitment of the government in each country. That being so, the Model Law addresses some cogent aspects of access to information that may be relevant to the guaranteed protection of procedural environmental rights in any legal framework designed to regulate hydraulic fracturing. The relevant provisions are considered below.

Article 1 of the Model Law defines ‘information’ widely to include physical and digital material, audio and video, as well as tangible and intangible material “regardless of the form or medium in which it is held.”<sup>811</sup> The Model Law acknowledges that the

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<sup>808</sup> Tlakula “Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa” available at <http://www.achpr.org/sessions/52nd/intersession-activity-reports/freedom-of-expression/> [date of use 14 April 2017].

<sup>809</sup> Many legislation on access to information in Africa fail to cognisance of the level of development, poor record keeping, the penchant for secrecy regarding official matters, high levels of illiteracy and poverty coupled with challenges associated with access to justice. See African Commission *Model Law on Access to Information for Africa* 10-11.

<sup>810</sup> Hartshorn 2014 ECPR *Conference on Regulatory Governance Barcelona* 5.

<sup>811</sup> Defining information in terms of its “form” or “medium” as done here could assist to avoid the dilemma faced when information is defined in terms of ‘record.’ See Van Heerden *et al* 2014 *Speculum Juris* 34.

right of access should go beyond merely providing for access to information in possession of public bodies. Accordingly, article 7 of the Model Law places an obligation on each public body and relevant private bodies<sup>812</sup> to publish extensive categories of information including reports on different aspects of their undertakings and status. The advantage of this requirement is that the relevant information holder does not have to wait for requesters, who would have had the opportunity to access most information about the entity in public domain. Furthermore, in terms of article 9 of the Banjul Charter to which the Model Law serves as a guide on implementation, the right to receive information is available to “every individual.” To the extent that the Banjul Charter does not distinguish as to who has custody of information, whether public or private body, a requester should be able to make a claim for disclosure.

The Model Law also avoids a common problem in access to information regulation relating to the inability of potential requesters to comply with procedural requirements due to financial or other reasons. Article 14 imposes an obligation on the information officer<sup>813</sup> to assist a potential requester (including persons with disability) at no cost, to “make the request in a manner that complies with this Act.”<sup>814</sup> If a request for information is refused, a ‘deemed refusal’ is not allowed under the Model Law. A notice of refusal is required to be given to the requester, stating the reason(s) for refusal, with reference to the provision of the law on which refusal is based, and information advising the requester of the process for a review of the decision.<sup>815</sup> If a request for information is considered vexatious and is to be denied on that ground, the requestee cannot simply deny the request without giving reasons. Therefore, the notice of refusal must include an affidavit stating why the request is denied.<sup>816</sup> Furthermore, the Model Law is mindful of the relevance of local culture and language in access to information matters, and in that regard, article 22

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<sup>812</sup> The definition of ‘private body’ in article 1 of the Model Law is simple enough to apply to most commercial enterprises.

<sup>813</sup> The person designated as such by a public body and relevant private bodies. See article 14 of the Model Law.

<sup>814</sup> Article 14 of the Model Law.

<sup>815</sup> Article 15 of the Model Law.

<sup>816</sup> Article 37 of the Model Law.

requires the translation of the required information into a preferred language of the requester at a reasonable cost.<sup>817</sup>

Commercial and confidential information of an information holder or a third party is protected in circumstances detailed in article 28. Rather than provide for access, article 28 allows information officers to use their discretion to refuse commercial and confidential information including on trade secrets if it would substantially prejudice a legitimate commercial or financial interest of the information holder. Caution is however, advised regarding the application of this article to hydraulic fracturing, as indeed the question of trade secrets has been a cause for concern.<sup>818</sup> It is feared that the interest of counterparties dealing with hydraulic fracturing operators could be prejudiced. Without caution, claims of confidentiality may be unreasonably raised to forestall disclosure of information.<sup>819</sup> Regulation of trade secrets in Pennsylvania, the UK and South Africa is discussed in paragraphs 4.2.2, 4.3.3, and 4.4.2 respectively.

### *3.2.3 Regional law perspectives on access to information: assessment*

Regional political structures provide a platform to countries to address common challenges by applying shared values to develop solutions for the specific challenges. The process has been applied to address human rights challenges, including procedural environmental rights. In the Americas, the regional courts gave judicial imprimatur to the view that the lack of express provision permitting access to information in the custody of public authorities is not necessarily fatal. A development that is prejudicial to the environment will in the long run affect the interests of people. Therefore, states have an obligation to provide information to effectively facilitate the application of legal remedies.<sup>820</sup>

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<sup>817</sup> Article 22 of the Model Law.

<sup>818</sup> See para 2.2.

<sup>819</sup> See *Robinson Township v Commonwealth of Pennsylvania* 2016 A.3d J-34A-B discussed in para 4.2.3.1.

<sup>820</sup> See *Claude-Reyes and Others v Chile* Case No. 12.108 2006 available at [www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf) [date of use 5 March 2018].



The MI-AL adopted by the GA-OAS meant to serve as a model for reform and to guide states in the implementation of American Convention unfortunately limits its application to information in the custody or control of a public authority. The concern that private bodies involved in hydraulic fracturing may hold information that may prejudice peoples' environmental and other rights necessitate the need to find a position that subjects all information to disclosure, whether it is in the custody of public or private bodies. In the same vein, article 28 of the Model Law applicable in Africa leans towards the protection of commercial and confidential information that could prejudice commercial or financial interests rather than human rights, leaves much to be desired.

On the contrary, the position stipulated by article 5 of Directive 2016/943/EC that claims of trade secrets should not forestall the enforcement of an access to information right, or conceal wrongdoing or illegality if disclosure is in the public interest is that which could enhance the protection of a procedural environmental right. Domestic legal frameworks that do not include the substance of such a provision already, may benefit from its inclusion.

Though the provisions of the Directive 2003/4/EC pertain to public access to environmental information, its requirement in article 3 that an applicant could make a request for information without having to state interest is likely to enhance the position of public interest organisations whose mandate include environmental protection. The requirement of standing in civil procedure is typically a hindrance to public interest litigation. *Locus standi* should not be an obstacle if a person requests information to seek redress for environmental harm.

While the substantive protection of the access to information right in article 9 of the Banjul Charter is laudable, leadership attitude and temperament constitute a stumbling block to the realisation of the objective underlying the provision. The provision of article 1 of the Banjul Charter which subjects the process of giving effect to the Charter provisions to each state adopting "legislative or other measures,"

perhaps provide a chance to some African states to use legislation to suppress access to information.<sup>821</sup>

### ***3.3 Right to just administrative action***

#### *3.3.1 International law perspective*

Administrative law principles are largely procedural in character, and procedure is largely subject to domestic law.<sup>822</sup> However, notwithstanding the source of regulation, there must be an assurance of fairness and impartiality in procedure.<sup>823</sup> However, the concept of global administrative justice is not only difficult, it is also controversial. There is a lack of consensus regarding the primary actors, the extent of its domain, whether or not its principles would invade national legal and constitutional space, and which extra-territorial authority will keep that power subjected within legal bounds to protect the citizens against abuse.<sup>824</sup> The fact that development has a bearing on various actors, ranging from the state to the investor and individuals in the community makes it necessary to delineate the powers and obligations of each stakeholder based on the conceivable relationships, and to set procedural rules and substantive standards to regulate the development.<sup>825</sup> Rules and standards should demand the inclusion of the concept of good governance, stressing that transparency, accountability, and rule-bound systems are important to development, which are made possible in the development of global administrative law (GAL).

The idea of GAL was conceived on the recognition that the applicable rules for extra-territorial administrative justice cannot toe the line of classical international law, which is premised on the rules designed to address inter-governmental relationship.<sup>826</sup> Consequently, GAL operate against the background of the theory of

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<sup>821</sup> Section 31(k) of the Zimbabwean Constitution provides for an ouster clause regarding judicial intervention in the consideration of the exercise of the President's discretion.

<sup>822</sup> Harlow 2006 *EJIL* 192.

<sup>823</sup> *Shaughnessy v United States* 1953 345 US 206 at 224.

<sup>824</sup> Harlow 2006 *EJIL* 187.

<sup>825</sup> Dann "The Global Administrative Law of development cooperation" in Cassesse 2016 *Research Handbook on Global Administrative Law* 418.

<sup>826</sup> Harlow 2006 *EJIL* 190.

the rule of law, enunciating a set of due process principles including the right to make representations and to be heard by the adjudicator, as well as to reasoned decisions.<sup>827</sup> Therefore, the efficacy of GAL depends on the incorporation of domestic procedural norms for the regulation of the conduct of public entities including the process for review of decisions, and the necessity for accountability and legality.<sup>828</sup>

The implication of the foregoing is that the inter-relationship between the domestic and international procedures in GAL breaks down the classical sovereignty theory such that states hardly have a choice but to submit to substantive and procedural rules in international instruments relating to administrative law.<sup>829</sup> In any event, “many international law rules are largely the creation of a community of human rights enthusiasts,” imposing obligations on nations in relation to their subjects consequent upon international conventions and transnational court decisions, whittling down the authority of both supra and sub-national governments.<sup>830</sup>

Incidentally however, the success of GAL is significantly impeded by some principles, which has advanced its course in other areas. For example, the inclusion of due process clauses common in international instruments resulted in the development of a universal rule of procedure in international law that a claimant of right in an international tribunal must first exhaust any local remedy available to him.<sup>831</sup> The rule has found its way into domestic law relating to the control of exercise of public power that when an administrative decision or action is challenged, internal review must take place as precursor to an independent and impartial external review.<sup>832</sup> Unfortunately, the adoption and application of these principles in GAL appear to give fortuitous opportunity to recalcitrant states unwilling to submit to the jurisdiction of

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<sup>827</sup> Stack 1986 *Columbia Law Review* 1994.

<sup>828</sup> Kingsbury 2009 *EJIL* 41.

<sup>829</sup> Krisch and Kingsbury 2006 *EJIL* 4.

<sup>830</sup> Shapiro 2001 *Indiana Journal of Global Legal Studies* 374-375.

<sup>831</sup> Harlow 2006 *EJIL* 188.

<sup>832</sup> Creyke 2007 *Melbourne University Law Review* 707.

tribunals with extra-territorial jurisdiction.<sup>833</sup> A good example of that challenge is presented in the principle, which requires the exhaustion of local remedies in GAL.

### 3.3.1.1 Impact of the requirement of exhaustion of local remedies in regional and GAL

The principle that a claimant for the enforcement of human rights in an international court or tribunal must first exhaust local remedies applicable to the claim in the jurisdiction where the claim arose, is for the benefit of the states, and it is therefore no surprise that states take advantage of the principle from time to time.<sup>834</sup> The principle is a corollary to the doctrine of sovereignty in international law, providing a sort of defence to the state, which the state however has the option to waive at its discretion. For example, concerns were expressed by some parties in the process of drafting article 26 of *European Convention on Human Rights* in relation to the requirement for the exhaustion of local remedies.<sup>835</sup> In the *Note to the European Commission of Human Rights by the Human Rights Department Concerning Article 26 of the Convention*<sup>836</sup> (hereafter “the Note”), apprehension was expressed on the jurisprudence surrounding the phrase “according to the generally recognised rules of international law,” as there was no helpful interpretation of the phrase, and neither was the practice of states on the principle clear as presumed by article 26.

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<sup>833</sup> See for example, *Cudjoe v Ghana* 2000 AHRLR 127.

<sup>834</sup> In *the Matter of Viviana Gallardo et al* 1984 Inter-Am Ct HR (ser A) [Advisory Opinion No. G101/81] at para 26, the American Court of Human Rights observed that the rule is a tool to be applied by a state seeking to be excused from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means.

<sup>835</sup> Article 26 (now article 35(1) as amended by Protocols Nos 11 and 14 of the European Convention on Human Rights (available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) [date of use 6 September 2017]) provides that...the Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

<sup>836</sup> Dated 5 September 1955 available at [http://www.echr.coe.int/Documents/Library\\_TP\\_Art\\_26\\_DH\(55\)11\\_ENG.PDF](http://www.echr.coe.int/Documents/Library_TP_Art_26_DH(55)11_ENG.PDF) [date of use 4 September 2017]. The Note highlights the preparatory work for the draft of article 26 of the Convention by the Committee on Legal and Administrative Questions, the Assembly, the Committee of Experts and the Conference of Senior Officials. There was consensus regarding the general conviction that a precise line of demarcation between the national courts and the supra-national court according to rules of international law should be pre-determined, to enable states assert a positive right to permit recourse to a supra-national court only when recourse to national courts has been exhausted.

There was hardly any certainty as to what meaning each state would accord “final decision” in article 26, in terms of whether it will be a decision of a judicial or administrative tribunal or of both.

The foregoing represents genuine concerns especially against the background of cases where national courts improperly delay decisions in order to frustrate the exhaustion of legal remedies. To address this and other concerns, the European Court of Human Rights had to provide a manual to aid interpretation. The European Court of Human Rights’ *Practical Guide on Admissibility Criteria*<sup>837</sup> indicates that in coming to a decision on the requirement of exhaustion of local remedies the following considerations are relevant, namely that a local remedy was in fact applied and exhausted,<sup>838</sup> that the remedy was inadequate or ineffective in the particular circumstances of the case<sup>839</sup> such as when there was excessive delay in the conduct of an enquiry,<sup>840</sup> or that a remedy which would ordinarily be available was ineffective in the circumstances of the case under consideration.<sup>841</sup> Other relevant factors include the fact that the local remedy not applied in a particular case may be dispensed with because that remedy had been resorted to by others but proved ineffective in earlier cases,<sup>842</sup> or that there existed special circumstances absolving the applicant from the requirement.<sup>843</sup>

In the Americas, article 46(2) of the American Convention provides for three circumstances in which the rule on exhaustion of domestic remedies shall not apply. First, where domestic law does not afford due process of law for the protection of the right allegedly violated. Secondly, where the petitioner has been denied access to remedies under domestic law or prevented from exhausting them, and finally where there has been unwarranted delay in rendering a final judgment under the

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<sup>837</sup> Council of Europe/ European Court of Human Rights *Practical Guide on Admissibility Criteria* 26.

<sup>838</sup> *Grasser v Germany* 2006 ECtHR 5<sup>th</sup> Section No 66491/01.

<sup>839</sup> *Selmouni v France* 2000 29 EHRR 403.

<sup>840</sup> *Radio France and Others v France* 2005 40 EHRR 706.

<sup>841</sup> *Scordino v Italy* 2006 ECHR 276. See also *Pressos Compania Naviera SA and Others v Belgium* 1996 21 EHRR 301.

<sup>842</sup> *Vasilkoski and Others v the former Yugoslav Republic of Macedonia* App No 28169/08 decided in 2010. See also *Laska and Lika v Albania* App Nos 12315/04 and 17605/04 decided in 2010.

<sup>843</sup> *Akdivar and Others v Turkey* 1997 23 EHRR 143. See also *Sejdovic v Italy* 2006 42 EHRR 17.

aforementioned remedies. On that basis, the Inter-American Commission in *Oficina de Derechos Humanos del Arzobispado de Guatemala v Guatemala and the United States of America*<sup>844</sup> held that though Guatemalan domestic law may in theory have protection for the rights violated in the statute book, the provisions did not protect the victims in reality, as the victims were denied access to their application making it impossible for them to exhaust the remedies.

The situation in Africa is rather precarious because a significant percentage of the population of Africa is poor, and in many cases, vulnerable persons are unable to institute legal action for breaches of rights due to financial incapacity and lack of knowledge, let alone being able to exhaust remedies. Impliedly, the challenges working against their capacity to exhaust local remedies for breaches of rights would mean that the facilities of the African Commission are not open to them to seek redress for the violation of their rights.<sup>845</sup> Many vulnerable persons in Africa are likely to find themselves in this treacherous position. For example, out of nine cases involving The Gambia, seven were ruled inadmissible for failure of the applicants to exhaust local remedies.<sup>846</sup> In many of the cases, the applicants were not privy to any form of assistance to take advantage of local remedies. In *Purohit and Moore v The Gambia*,<sup>847</sup> the respondent admitted that no legal assistance or aid is available to vulnerable persons to pursue litigation in their country.<sup>848</sup> In this case, the African Commission held that the domestic remedies available in the respondent state were not realistic, at least for the category of the complainant in the case. In other cases,

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<sup>844</sup> Available at <https://pdfs.semanticscholar.org/85c1/95d46c799d53763e328ec8d223f87d1d6c58.pdf> [date of use 15 December 2017].

<sup>845</sup> Article 50 of the African Charter on Human and Peoples' Rights provides-

- i. The Commission [on Human and Peoples' Rights] can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.
- ii. Article 56(5) of the African Charter also provides that Communications relating to human and peoples' rights other than those emanating from state parties shall only be considered by the Commission if they "are sent after exhausting local remedies, if any, unless it is obvious that this is unduly prolonged."

<sup>846</sup> *African Human Rights Case Law Database* available at <http://www.chr.up.ac.za/index.php/browse-by-country/the-gambia.html> [date of use 4 September 2017].

<sup>847</sup> 2003 AHRLR 96.

<sup>848</sup> 2003 AHRLR 96 at para 34.

the recalcitrant state may just refuse to accept the relevance of institutions set up by the laws of the country.<sup>849</sup>

Though the African Commission explained that the rule requiring complainants to exhaust local remedies is premised on the principle that a government should have notice of the human rights violation in order to have the opportunity to remedy such violations before being called before an international body,<sup>850</sup> it appeared to overlook arguments that it may not be possible in practice in some countries to pursue local remedies due to fear on the part of victims and compromise on the part of the judiciary.<sup>851</sup> Evidently, recalcitrant states may seek to take advantage of the principle, which requires the exhaustion of local remedies before seeking the intervention of international tribunals.<sup>852</sup> But this ought not to be so. The principle evolved in classical international law to protect and preserve state sovereignty, but its application in international human rights law should reflect the focus of human rights law, which is the protection of victims of alleged human rights violation.<sup>853</sup> The application of the principle is not absolute as in many of the international instruments, the principle is applied "according to the generally recognised rules of international law."<sup>854</sup> In any event, an insistence on the exhaustion of remedies can be a "senseless formality" if the remedies "are denied for trivial reasons or without

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<sup>849</sup> In *Cudjoe v Ghana* 2000 AHRLR 127, for example, notwithstanding that the communication filed by the complainant pleaded that the Commission on Human Rights and Administrative Justice of Ghana had earlier decided that the purported termination of his employment from an agency of the government was null and void, thereby infringing his rights in terms of articles 7, 14 and 15 of the *African Charter*, the African Commission declared the communication inadmissible due to non-exhaustion of internal remedies.

<sup>850</sup> See *Free Legal Assistance Group and Others v Zaire* available at <https://www.escri-net.org/caselaw/2008/free-legal-assistance-group-and-others-v-zaire-comm-no-2589-4790-5691-10093> [date of use 11 August 2018], and *Recontre Africaine pour la Defense des Drois de l'Homme v Zambia* 2000 AHRLR 321.

<sup>851</sup> 37<sup>th</sup> Activity Report of the African Commission on Human and Peoples Rights Available at [www.achpr.org/files/activity-reports/37/actrep37\\_2015\\_eng.pdf](http://www.achpr.org/files/activity-reports/37/actrep37_2015_eng.pdf) [date of use 31 October 2017].

<sup>852</sup> It was reported that up to 92% of the cases before the European Court of Human Rights were rejected by the Court on one of the grounds of inadmissibility. See Council of Europe/ European Court of Human Rights 2014 *Practical Guide on Admissibility Criteria* 7.

<sup>853</sup> Brauch Exhaustion of Local Remedies in International Investment Law 5.

<sup>854</sup> See article 35(1) of ECHR. Article 46(1)(a) of the *American Convention on Human Rights* requires that the that the remedies under domestic law must "have been pursued and exhausted in accordance with generally recognized principles of international law."

an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government.”<sup>855</sup>

Furthermore, the growing support for the recognition of individuals as rights-bearing subjects of international law in the protection of human rights is beginning to provide a basis for a varied application of the principle compared to that in general international law. The argument here is that concern is related to interests arising from alleged violation of rights of individuals, which should necessitate greater recognition being given to human rights, different from those of international law.<sup>856</sup> It would appear that the requirement to exhaust local remedies was not originally intended to apply to breaches of human rights, hence, the limitation to the application of the principle in some instruments to ensure that victims of human right abuse get access to justice.<sup>857</sup> Moreover, international courts tend to apply the rule “with some degree of flexibility and without excessive formalism, given the context of protecting human rights.”<sup>858</sup>

In relation to the development of shale gas by hydraulic fracturing from GAL perspective, the requirement for the exhaustion of local remedies may be beneficial if appropriate clauses are inserted in development agreements indicating that the foreign investor may not initiate international proceedings (including arbitration proceedings) against the host state until local remedies have been exhausted.<sup>859</sup>

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<sup>855</sup> See *Velazquez Rodriguez v Honduras* Inter-Am Ct H R (Ser C) No 9 1990 IACHR.

<sup>856</sup> D’ascoli 2007 *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection* European University Institute Italy Working Paper Law No 2007/02 available at [http://cadmus.eui.eu/bitstream/handle/1814/6701/LAW\\_2007\\_02.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/6701/LAW_2007_02.pdf?sequence=1) [date of use 20 September 2017].

<sup>857</sup> For example, article 46(2) of the *American Convention on Human Rights* provides that requirement for the exhaustion of local remedies shall not be applicable when-

1. The domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
2. The party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
3. There has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Similarly, article 50 of the *African Charter on Human and Peoples’ Rights* provides that the requirement for the exhaustion of local remedies shall not apply if it is obvious to the African Commission that “the procedure of achieving these remedies would be unduly prolonged.”

<sup>858</sup> Council of Europe/ European Court of Human Rights *Practical Guide on Admissibility Criteria* 23.

<sup>859</sup> For example, the *SADC Model Bilateral Investment Treaty (BIT) Template* adopted in 2012 (available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template->



Such requirement may protect the interests of the host state in relation to investment especially in the protection of its sovereignty. The downside however is that when states improperly take advantage of the rule requiring the exhaustion of local remedies, concerns are raised as to whether or not the objective of human rights to ensure that an individual gets justice in the event of a breach of right can be guaranteed. It is doubtful that the requirement of exhaustion of local remedies could be of any assistance to an individual victim of a violation of human rights by a hydraulic fracturing operator as the individual is hardly ever privy to the contract between the host state and such operator. That is why it is desirable that the law relating to administrative justice is robust enough to protect individuals' rights against private bodies as may be necessary to enforce rights and protect personal interests.

### *3.3.2 Regional law perspective*

A few regional instruments protecting administrative justice rights have evolved over the years to which a victim of violation could resort in the event of the abuse of rights, traceable to the exercise of powers by state authorities, and in some cases by private individuals and organisation exercising public powers. The relevant regional instruments are discussed in the succeeding paragraphs. The American perspective is discussed first.

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final.pdf [date of use 7 September 2017]). Its article 28(4)(a) provides that "a State Party may not submit a claim to arbitration seeking damages for an alleged breach of this Agreement on behalf of an investor or investment-Unless the investor or investment, as appropriate, has first submitted a claim before the domestic administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the host state...

Another example is in article 45 of the International Institute for Sustainable Development (IISD) *Model International Agreement on Investment for Sustainable Development*, which provides for the inclusion of exhaustion of local remedies rule in the mechanism for settling investor/investment-state disputes, though the investor could plead exceptions to the rule based on unavailability of remedies or a lack of independence of the tribunal. See also Brauch *Exhaustion of Local Remedies in International Investment Law* 9.

### 3.3.2.1 Regional law perspective: America

While the USA has witnessed significant advancement in the development of administrative justice,<sup>860</sup> the same cannot be said of its Latin American states co-members of the Organisation of American States (OAS) who are rather late starters in the development of administrative justice. Democracy was not restored in most of the Latin American states until the late twentieth century, when their judiciary began to create adjudicating bodies specialising in the field of administrative law, and the intense supervision of administrative action and the use of discretionary powers.<sup>861</sup> However, regardless of the delayed development of administrative justice in some countries, the OAS in furtherance of its human rights objectives has been in the forefront in the Americas region over the years to ensure that the governments of member states take responsibility for their actions. Indeed, abuses by authoritarian dictatorships in some member states prompted the creation of the Inter-American Court of Human Rights in 1979, focusing on the protection of human rights among four broad based objectives of the OAS.<sup>862</sup>

The *American Convention on Human Rights* 1969 was adopted by the parties to commit to the rights and freedoms therein "and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms..."<sup>863</sup> Although there is no provision in the American Convention creating the right to administrative justice directly, other provisions have been resorted to at different times to address the violation of human rights attributable to wrongful exercise of public power. For example, in interpreting article 8.1 of the American Convention,<sup>864</sup>

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<sup>860</sup> See the discussion of administrative justice in Pennsylvania in para 5.2.

<sup>861</sup> Perlingeiro 2016 *Br J Am Leg Studies* 286.

<sup>862</sup> The other objectives are the promotion of democracy, economic and social development, and regional security cooperation. See article 2 of the *Charter of the Organization of American States* available at [www.oas.org/en/sla/dil/docs/inter\\_american\\_treaties\\_A41\\_charter\\_OAS.pdf](http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A41_charter_OAS.pdf) [date of use 1 February 2018]. See also Meyer *Organization of American States: Background and Issues for Congress* 2.

<sup>863</sup> See article 1.1 of the American Convention.

<sup>864</sup> Article 8 of the American Convention provides that "every person has a right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any nature."

which extends the right to fair trial to civil cases, the Inter-American Court in the case of *VélezLoo v Panama*,<sup>865</sup> observed that the provision of article 8.1 is applicable to administrative decisions, emphasising that the necessity for ensuring due process are also applicable to non-judicial sphere when matters relating to personal rights are in issue. The Court observed that:

... concerning AJ, the American Convention seeks to control the exercise of administrative powers having the potential to result in the restriction of citizens' rights, applying the principle of international law, that acts or omissions of the agent of a state acting in official capacity is imputed to the state notwithstanding that the acts or omissions occur outside the limit of the agent's sphere of competence.<sup>866</sup> Correspondingly, article 25(1) of the American Convention, provides that "everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or this Convention, even though such violation may have been committed by persons acting in the course of their official duties".

Furthermore, article 23(1) of the American Convention provides for the right of every citizen to participate in government. This right is not limited to political participation alone, as the Inter-American Court pointed out in *Yatama v Nicaragua*<sup>867</sup> that the state has counterpart obligation to the citizens' rights under article 23. The obligation of state is to ensure "... transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of the press." The right to participate in government is therefore an effective tool for monitoring the activities of public authorities.<sup>868</sup> It enables citizens to question, investigate and consider whether public functions are being considered adequately, thereby fostering accountability on the part of state officials.<sup>869</sup>

Public authorities and private bodies engaged in public functions have a duty to assure citizens that if they conform to standards of fair dealing secured through the establishment and enforcement of definite rules of action, caprice will be substituted by self-restraint, favouritism by equality, and authority of the individual by that of a

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<sup>865</sup> 2010 Inter-Am Ct HR (ser. C) No 218.

<sup>866</sup> See *Massacre of Pueblo Bello v Colombia* 2006 Series C No 140 at para 111.

<sup>867</sup> 2005 Series C No. 127 at para 17.

<sup>868</sup> Organisation American States *Report of the Inter-American Commission on Citizen Security and Human Rights* 210.

<sup>869</sup> See *Claude Reyes et al v Chile* 2006 Series C No 51 at para 86.

“fundamental social conscience and common standard.”<sup>870</sup> In *Velásquez Rodríguez v Honduras*,<sup>871</sup> the Inter-American Court pointed out that protection under the law connotes the availability of legal remedies to guarantee the rights provided under the American Convention, which imposes an obligation on member states to “organize the government apparatus and in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”

Although there is no inter-American treaty addressing hydraulic fracturing, the American Convention contains provisions, which can be applied to control potential abuse of human rights including procedural rights arising therefrom.<sup>872</sup>

### 3.3.2.2 Regional law perspective: Europe

Inter-governmental organisations and agencies in Europe have developed key instruments for the adoption of member countries to regulate the exercise of powers,<sup>873</sup> and the courts have not been timid in applying the provisions of the instruments, thereby developing the law.<sup>874</sup> For example, general principles of administrative law based on the requirements of natural justice are incorporated into article 6(1) of the European Convention on Human Rights; while article 41 of the *Charter of Fundamental Rights of the European Union* provides for right to good administration, making copious provisions as follows:

- 1) Every person has the right to have his or her affairs handled impartially, fairly, and within a reasonable time by the institutions and bodies of the Union.
- 2) This right includes:
  - a. The right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
  - b. The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality of professional and business secrecy;
  - c. The obligation of the administration to give reasons for its decisions.

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<sup>870</sup> William 1917 *Cornell L Rev* 190.

<sup>871</sup> 1988 Series C No 4 at para 166.

<sup>872</sup> American perspective on the right of access to courts is discussed in para 3.4.2.1.

<sup>873</sup> Chiti 2004 *Law and Contemporary Problems* 42.

<sup>874</sup> Article 267 of TFEU confers authority of the ECJ to pronounce on national administrative procedures. See Harlow and Rawlins 2010 *Italian Journal of Public Law* 220.

- 3) Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
- 4) Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Other European instruments reinforce the principles enumerated in article 4 in one-way or the other.<sup>875</sup>

Flowing from the instruments, judicial control of administrative action has two objectives from EU perspective.<sup>876</sup> First is the subjective perspective in which courts are responsible for establishing the subjective rights of the individuals who have been wronged by the administration. Secondly, there is the objective perspective in which the courts control the administration's respect for objective legality, whereby the administration's obligations are defined in order to deduce the rights of individuals. For example, in *Union Nationale Des Entraîneurs Professionnels du Football (UNECTEF) v Heylens and Others*,<sup>877</sup> the ECHR held that articles 6 and 13 of the European Convention conferred the right to employment as a fundamental right on individuals in the Community. Consequently, national authorities must provide a remedy of a judicial nature and must inform the complainant of the reason on which denial is based, either in the decision itself or in a subsequent communication made at the individual's request.<sup>878</sup>

In the same vein, the ECHR extended its jurisdiction to the realm of administrative procedure in *Bentham v Netherlands*,<sup>879</sup> where the ECHR expressed the opinion that there was a genuine dispute as to the existence of the right to a licence in a claim

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<sup>875</sup> Non-legislative acts of the European Commission covered by article 290 of *Treaty of the Functioning of the European Union* (TFEU) including decisions permitting or prohibiting an act or event, or normative acts of the Commission, can be reviewed by the ECJ pursuant to article 263(4) of the TFEU. Article III-398 provides the legal basis for a European administrative law that will apply uniformly to all the institutions and bodies, Council of Europe Resolution 77 (31) on the Protection of the Individual in Relation to the Acts of Administrative Authorities 1977, and the European Code of Good Administrative Behaviour 2005 available at <https://osha.europa.eu/en/about/good-administrative-behaviour/annex1-european-ombudsman-code-of-good-administrative-behaviour.pdf> [date of use 31 October 2017].

<sup>876</sup> Woehring 2006 *Croat Pub Admin* 36.

<sup>877</sup> 1987 ECHR 4097 at paras 14-16.

<sup>878</sup> *Johnston v Chief Constable of the Royal Ulster Constabulary* 1986 ECR 1651.

<sup>879</sup> 1985 EHRR 1.

by the applicant after an appeal against the decision of a municipal authority. The court observed that a claim for a civil right within the meaning of article 6(1) is at stake,<sup>880</sup> for which the Court held that there had been a violation.

In relation to the regulation of hydraulic fracturing, the attitude of the EU is reflected in the administrative justice systems of the various countries based on the distinctive features of the unique cultural and political backgrounds regarded as being closely related to the sovereignty of states.<sup>881</sup> Therefore, despite the growing concerns regarding the adverse consequence of hydraulic fracturing,<sup>882</sup> general understanding of the EU countries engaged in the process is that it is better suited for domestic regulation.<sup>883</sup> In justification of this approach, Kitze argued that uniform environmental laws and regulations are often inflexible and cannot address the context-specific impacts of activities like hydraulic fracturing because when the impact of an industry is localised, decision-making that is decentralised and participatory is often preferable to centralised decision making.<sup>884</sup> The practice in Europe appears to support that contention.

The *EU Commission Recommendation on Minimum Principles for the Exploration and Production of Hydrocarbons (such as shale gas) using Hydraulic Fracturing*<sup>885</sup> noted that article 292 of the EU Treaty, gives member states the right to determine the conditions for exploiting their energy resources, as long as they respect the need to preserve, protect and improve the quality of the environment.

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<sup>880</sup> The grant of the licence to which the applicant claimed to be entitled was one of the conditions for the exercise of part of his activities as a businessman and was closely associated with the right to use one's possessions in conformity with the law's requirements. See para 36.

<sup>881</sup> Begucam 2012 *Law & Justice Review* 57.

<sup>882</sup> *Pless.States Take the Lead on Regulating Hydraulic Fracturing: Overview of 2012 State Legislation* March 2013 by the National Conference of State Legislatures (NCSL), at [www.ncsl.org/documents/energy/NaturalGasDevLeg313](http://www.ncsl.org/documents/energy/NaturalGasDevLeg313) [date of use 3 September 2017].

<sup>883</sup> Ratner and Tiemann *Congressional Research Service* [7-5700] 10.

<sup>884</sup> Kitze 2013 *Minnesota Law Review* 394.

<sup>885</sup> In Europe, the EU Commission Recommendation on Minimum Principles for the Exploration and Production of Hydrocarbons (such as shale gas) Using Hydraulic Fracturing 2014 (hereafter "EU Recommendation") available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014H0070#text> [date of use 3 September 2017].

Accordingly, rather than providing for binding regulations to address specific challenges of hydraulic fracturing,<sup>886</sup> the EU Recommendation simply:

...lay[s] down the minimum principles needed to support Member States who wish to carry out exploration and production of hydrocarbons using high-volume hydraulic fracturing, while ensuring that the public health, climate and environment are safeguarded, resources are used efficiently, and the public is informed.<sup>887</sup>

However, while states may have relative freedom to regulate hydraulic fracturing as local conditions permit, article 253 of the Treaty establishing the European Community<sup>888</sup> demands *inter alia* that “regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based...” Pursuant to that provision, the requirement for providing underlying reasons for actions taken in relation to hydraulic fracturing can be read into the EU Recommendation to which affected states are subject.

Furthermore, the provision of reasons for administrative action cannot be treated as unimportant.<sup>889</sup> The ECJ reiterated that the transparency inducing power of reasons should underlie the exercise of power, holding that when required, reasons should not be cryptic, but that:

...the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and enable the competent Community Court to exercise its power of review.<sup>890</sup>

The decentralised system of enforcement of EC law implies that Community law is applied by national authorities and adjudicated by the courts based on national procedural rules. An insistence on uniform rules could create challenges of possible incongruity in fitting extraneous body of rules of with the legal traditions of member

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<sup>886</sup> See Recitals 2 and 3 of the EU Recommendation.

<sup>887</sup> Article 1.1 of the EU Recommendations.

<sup>888</sup> See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997E253> [date of use 2 November 2017].

<sup>889</sup> Perju 2009 *Virginia Journal of International Law* 310.

<sup>890</sup> See *Jose Maria Sison v Council of the European Union* 2007 ECR I-01233 at para 80.

states. Opposing views, however, emphasise support for harmonisation based on the need for greater transparency and legal certainty.<sup>891</sup>

### 3.3.2.3 Regional perspective: Africa

African countries have had a long attachment to a policy of international relations based on non-interference in the domestic affairs of each other, such that the Organisation of African Unity<sup>892</sup> “became an ineffective collection of states, mostly led by autocrats who refuse to take any action if it involved the domestic affairs of other members.”<sup>893</sup> Unsurprisingly therefore, any policy or rule that appears to challenge or control the domestic exercise of power were either not supported in the planning stage, or if eventually passed, its implementation was met with apathy. This is also apparent in the lack of enthusiasm of member states to the requirement of article 1 of the Banjul Charter, which requires member states to “adopt legislative, or other measures to give effect” to the “rights, duties and freedoms enshrined.”

Furthermore, notwithstanding the provision of article 2 of the Banjul Charter that “every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind ...” some states have been able to avoid the responsibility imposed upon them in relation to the enforcement of human rights by an unbridled recourse to article 50.<sup>894</sup> It is important though, to take notice of the fact that one of the major factors hampering the effective realisation of the rights enshrined in the Banjul Charter is the widespread poverty pervading most of Africa.<sup>895</sup> This is in addition to a lack of enthusiasm on the part of some states to guarantee adequate remedy or its

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<sup>891</sup> Eliantonio 2009 *Electronic Journal of Comparative Law* 1-11 available at <http://www.ejcl.org/133/art133-4.pdf> [date of use 31 October 2017].

<sup>892</sup> The forerunner of the present AU.

<sup>893</sup> Taylor “African unity at 50: From non-interference to non-indifference” available at <http://www.e-ir.info/2013/06/25/african-unity-at-50-from-non-interference-to-non-indifference/> [date of use 31 October 2017].

<sup>894</sup> Article 50 of the Banjul Charter provides that recourse to the mechanism for the enforcement of the rights enshrined in the Charter is subject to the exhaustion of all local remedies. See paras 3.3.1.1 for the discussion of the impact of the requirement of exhaustion of local remedies on administrative justice.

<sup>895</sup> 37<sup>th</sup> Activity Report of the African Commission on Human and Peoples Rights Available at [www.achpr.org/files/activity-reports/37/actrep37\\_2015\\_eng.pdf](http://www.achpr.org/files/activity-reports/37/actrep37_2015_eng.pdf) [date of use 31 October 2017].



enforcement through their courts<sup>896</sup> as "...the judiciary had been tainted and ... bears the distrust that comes from the prevailing conditions",<sup>897</sup> and the fact that the conditions of service of judges do not generally protect them from political pressure.<sup>898</sup>

### *3.3.3 Regional perspectives on just administrative action: assessment*

Regional efforts have resulted in the evolution of instruments protecting aspects of administrative justice, to which victims of arbitrary exercise of powers by public authorities could resort for remedies. For example, some provisions of both the American Convention and the European Convention have been interpreted to impose the requirement to give reasons for administrative action on public authorities.<sup>899</sup> Giving reasons to people who may be affected by administrative action has the potential to facilitate the assessment of decisions, and the participation of the public in governance.

However, the position advanced by the EU that regulation of the condition for exploitation of resources should be left to the determination of member states, though subject to the need to protect the environment<sup>900</sup> may in fact exacerbate harm being done to the environment when applied to hydraulic fracturing. The argument that because the activities of the hydraulic fracturing industry is localised, its regulation should be decentralised cannot be supported when the potential harm that it inflicts is widespread and extraterritorial. The emission of methane from the industry's operations has the potential to worsen the effect of climate change. In that case, obligatory minimum standards to control the emission of GHG will not be out of place for international regulation.

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<sup>896</sup> The African perspective on the right of access to courts is discussed in section 3.

<sup>897</sup> Literature however suggests that there are a few exceptions. See Madhuku 2002 *Journal of African Law* 232-235.

<sup>898</sup> See *Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*. Available at [www.achpr.org/files/sessions/11th-ecommunications/340.07/achpr11eo\\_340.07\\_eng.pdf](http://www.achpr.org/files/sessions/11th-ecommunications/340.07/achpr11eo_340.07_eng.pdf) [date of use 1 November 2017].

<sup>899</sup> See *Union Nationale Des Entraîneurs Professionnels du Football (UNECTEF) v Heylens and Others* 1987 ECHR 4097, and *Claude Reyes et al v Chile*.

<sup>900</sup> See EU Commission Recommendation on Minimum Principles for the Exploration and Production of Hydrocarbons (such as shale gas) using Hydraulic Fracturing.

### ***3.4 Right of access to courts***

To forestall a recurrence of the atrocious conduct that characterised the era of the second World War, the international community came together to address the issue of human rights, resulting in the adoption of the UDHR in 1948, followed by several other global and regional instruments in the succeeding years. Unfortunately, the level of enforcement of the human rights obligations imposed by the instruments leaves much to be desired, as studies have shown that the ratification of a human rights convention either has no effect on a country's human rights practices or indeed "is correlated with a higher level of violations than non-ratifying states."<sup>901</sup> In the succeeding paragraphs of this chapter, the relevant global and regional instruments having a bearing on the right of access to courts and their impact on the protection of procedural environmental rights will be discussed in relation to potential harms attributable to hydraulic fracturing. The global perspective is considered first.

#### ***3.4.1 International law perspective***

Although not legally binding, many of the provisions of the UDHR are accorded the status of peremptory norms from which no derogation is permitted...,<sup>902</sup> and most of them have received international recognition in addition to being included in the constitutions of many countries.<sup>903</sup> Incidentally, the UDHR for the first time provided an instrument for the realisation of the goal of the UN which empowered the General Assembly to make recommendations for the "realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>904</sup> The UNGA did that through the inclusion of the right of access to courts in article 8 of UDHR indicating that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." To the extent that the inclusion of a right in an

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<sup>901</sup> Baumgartner 2011 Cornell International Law Journal 444.

<sup>902</sup> See article 53 of the *United Nations Convention on the Law of Treaties* 1969 available at [www.jus.uio.no/im/un.law.of..treaties.convention.1969/53.html](http://www.jus.uio.no/im/un.law.of..treaties.convention.1969/53.html) [date of use 8 February 2018].

<sup>903</sup> Glendon 2004 *NW J Int'l Hum Rts* 5.

<sup>904</sup> See article 13 of the UN Charter. That objective was realised in article 2 of UNDH providing *inter alia* that "everyone is entitled to all the rights and freedoms set forth in this Declaration..."

international instrument does not necessarily guarantee compliance, there is a need for a guaranteed process to compel compliance in the event of a breach. That process should facilitate remediation of abuse and allow compensation in the event of the violation causing harm.

Other international human instruments followed the course charted by UNDH regarding the right of access to courts especially in relation to the protection of the environment and the rights incidental thereto. For example, Principle 10 of Rio Declaration provides that “environmental issues are best handled with the participation of all concerned citizens, at the relevant level [and] at the national level ... effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” This right of access to justice facilitates the realisation of the three pillars of access rights namely the right to participate, to be informed, and to hold polluters accountable for environmental harm.

Furthermore, the UNEP’s *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*<sup>905</sup> is published to provide a voluntary guide to countries to assist in the effective implementation of their commitment to Principle 10 of the Rio Declaration, and to fill possible gaps in their respective legal norms and regulations. On access to justice, Guidelines 15, 16 and 17 highlight the importance of access to courts in relation to disputes arising from requests for environmental information, the challenge of substantive or procedural legality relating to public participation in decision-making in environmental matters, and for any violation of substantive or procedural legal norms of the State related to the environment by public authorities or private actors respectively. Guideline 19 enjoins States to:

... provide effective procedures for timely review by courts of law or other independent and impartial bodies, or administrative procedures, of issues relating to the implementation and enforcement of laws and decisions pertaining to the environment. States should ensure that proceedings are fair, open, transparent and equitable.

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<sup>905</sup> UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters.

UNEP also established the Commission on the Legal Empowerment of the Poor in 2005, with a view to developing 'rule of law' initiatives advanced as development strategies. One such initiative is the development of access to justice strategy, which is considered as a critical pillar of legal empowerment of the poor.<sup>906</sup>

It is important to note that the relevance of providing for a mechanism for the enforcement of rights is not lost on contracting parties to global human rights instruments. As of December 2013, no less than 167 countries have ratified the ICCPR, underscoring the importance of the human rights protected in the Convention, including access to courts.<sup>907</sup> Article 2(3) of the ICCPR requires states "to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." Furthermore, article 14(1) of the ICCPR provides *inter alia* that "in the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law," thereby providing a procedural means for individuals to enforce their rights and obtain redress for violations. Access to legal aid, particularly in civil litigation enhances the realisation of that right. The benefit of the possibility of extending the availability of legal aid to civil cases has the potential to protect the rights of vulnerable people who may be adversely affected by hydraulic fracturing but lacking in means to institute court action for redress.

In relation to legal aid, article 14(3)(d) of the ICCPR provides that everyone shall be entitled to a right "to have legal assistance assigned to him in any case where the interest of justice so requires, and without payment by him in any such case if he does not have sufficient means to pay for it." Although the opening paragraph

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<sup>906</sup> See Schlosberg "Three dimensions of environmental and ecological justice" available at <https://ecpr.eu/events/paperdetails.aspx?paperid=5323&eventid=45> [date of use 12 November 2018].

<sup>907</sup> See Ebbesson "Participatory and Procedural Rights in Environmental Matters: State of Play" available at <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> [date of use 5 February 2018].

of article 14(3) of the ICCPR makes provision for guarantees of rights in relation to persons charged with criminal offences, sub-paragraph (d) extends the right to legal aid to “any case where the interest of justice so require.” Furthermore, the Human Rights Committee encourages states to extend the right to other cases including civil claims for rights, for individuals who lack the means.<sup>908</sup> Efforts to develop practical mechanisms for the enforcement of human rights are not limited to global arrangements. Regional international organisations also address concerns relating to access to justice.

### *3.4.2 Regional perspective*

Citizens of different countries tend to consider the regional human rights institutions as autonomous from the domestic authorities thereby engendering the trust that they will be impartial in administering justice.<sup>909</sup> This underscores the potential that victims of abuse of environmental rights attributable to hydraulic fracturing may have recourse to the regional judicial or arbitral institutions in the event that domestic courts fall short of expectation in the enforcement of their procedural environmental rights. The regional perspectives to the right of access to courts are discussed in the succeeding paragraphs. The American perspective is discussed first.

#### 3.4.2.1 Regional perspective: America

The protection of the right of access to justice under the American Convention envisages alternative safeguards by either the domestic legal framework or the provisions of the Convention in the event of violation of rights. Accordingly, article 25 of the American Convention gives everyone:

... the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by person acting in the course of their official duties.

The access right is coupled with the right to a fair trial in civil proceedings “with due guarantees and within a reasonable time, by a competent, independent and

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<sup>908</sup> See General Comment 32 of the 90<sup>th</sup> Session of the Human Rights Committee (CCPR/ C/GC/32) available at [www.refworld.org/pdfid/478b2b2f2.pdf](http://www.refworld.org/pdfid/478b2b2f2.pdf) [date of use 15 December 2017].

<sup>909</sup> Bedek et al 2010 *The Role of Regional Human Rights Mechanisms* 25.

impartial tribunal ... for the determination of [a person's] rights and obligations of a civil ... or any other nature."<sup>910</sup> Furthermore, article 44 of the American Convention gives a right to "any person or group of persons or any nongovernmental entity ... [to] lodge petitions with the Commission containing denunciations or complaints of violation of this Convention..." Following appropriate process, the Inter-American Commission on Human Rights may refer a case to the Court<sup>911</sup> and if the Court finds that there has been a violation of the Convention right or freedom:

... the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

For example, in *Mercedes Julia HuenteaoBeroiza et al v Chile*,<sup>912</sup> the petitioners had alleged that the implementation of a hydro-electric plant project by the national utility company (ENDESA) violated their rights under articles 4,<sup>913</sup> 5,<sup>914</sup> and 8<sup>915</sup> of the American Convention among others. In a settlement approved by the Inter-American Commission, the government of Chile undertook to make information and participation process more transparent, ensure that necessary compensation is paid to affected parties and to monitor compliance with the full conditions of the environmental rating report on the project. On the right to fair trial, Chile shall ensure strict compliance with the terms of article 8 and "invoke the benefits guaranteed to all persons deprived of liberty by decision of the courts, and furthermore, to examine the adoption of the appropriate measures applicable to his case."<sup>916</sup>

The Inter-American Commission and the Inter-American Court have set an example through their efforts to protect the environmental rights of the people even when

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<sup>910</sup> Article 8 of the American Convention.

<sup>911</sup> Article 51 of the American Convention.

<sup>912</sup> Report No 30/04 of March 11 2004 (Petition 4617/02) available at [www.cidh.oas.org/annualrep/2004eng/Chile.4617.02eng.htm](http://www.cidh.oas.org/annualrep/2004eng/Chile.4617.02eng.htm) [date of use 11 February 2018].

<sup>913</sup> The right to life.

<sup>914</sup> The right to humane treatment.

<sup>915</sup> The right to fair trial.

<sup>916</sup> At page 15.

those rights are not directly guaranteed at the domestic level.<sup>917</sup> The objective of the Inter-American Court is not to punish individuals guilty of violations, which is why states do not appear before the Court as defendants in criminal proceedings, but rather, the objective is to “protect victims and to provide for the reparation of damages resulting from the acts of states responsible.”<sup>918</sup> However, there is a strong commitment to enforcement because access to the courts is meaningless if court decisions are not effectively enforced to produce the expected results. The Inter-American Court indicated in several cases that compliance with measures ordered by the court is necessary to guarantee the effectiveness of its decisions.<sup>919</sup> There is therefore potential for persons whose rights may be adversely impacted by hydraulic fracturing to resort to the framework of the human rights enforcement mechanisms under the American Convention to seek remediation for damage and for the protection of procedural environmental rights. That is in line with the preamble to the American Convention which reaffirms the intention (of the American States) “to consolidate ... within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.”<sup>920</sup>

#### 3.4.2.2 Regional perspective: Europe

Even though the European Convention does not have a direct provision on the right of access to courts, the European Court has made recourse to articles 6 and 13 protecting the rights to a fair trial and to an effective remedy respectively.<sup>921</sup> In addition, several provisions of other instruments protect the right of access to courts in one form or another.<sup>922</sup> The attitude of the European Court is that the obligation

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<sup>917</sup> Dulitzky 2011 *Quebec Journal of International Law* 129.

<sup>918</sup> See *Velásquez-Rodríguez v Honduras* 1998 Series C (No4) at 134.

<sup>919</sup> See *Chunimá v Guatemala* 1996, *Loayza v Peru* 1999, *James et al v Trinidad & Tobago* 2000.

<sup>920</sup> See Office of the High Commissioner for Human Rights *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* 816.

<sup>921</sup> See *Artico v Italy* 1980 ECHR 4.

<sup>922</sup> See for example, article 47 of the Charter of Fundamental Rights (right to effective remedy), article 51 of the Charter of Fundamental Rights (on possible field of application of the right), article 52(3) of the Charter of Fundamental Rights) scope of interpretation of rights and principles), article 6 of the European Convention (right to a fair trial), article 13 of the European Convention (right to an effective remedy), article 35 of the European Convention (admissibility criteria), and article 46 of the European Convention (binding force and execution of judgments). See EU Agency for Fundamental Rights 2016 *Handbook on European Law Relating to Access to Justice* 15.

of states regarding access to courts includes the guarantee of “an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.”<sup>923</sup>

In its supervisory role, the European Court ensures that state parties fulfil their obligations under the European Convention by addressing complaints of individuals regarding violation of their rights.<sup>924</sup> Accordingly in *Golder v UK*,<sup>925</sup> the European Court observed that hindrance to access to remedy in any form is an impediment to the realisation of the rights in the Convention because it is difficult to conceive the rule of law without providing access to the courts.<sup>926</sup> The Court thereupon held in the case that the right of access to courts is implied in the right to a fair trial under article 6(1) of the European Convention.

An effective application of the right of access to courts under the European Convention requires states to provide legal aid to litigants who may need it,<sup>927</sup> including translation service and other practical support to facilitate access to court proceedings, failing which the right will remain “theoretical and illusory.”<sup>928</sup> In the same vein, domestic law cannot be applied to thwart the rights protected under European law.<sup>929</sup> Therefore in *Boxus v Région Wallone*,<sup>930</sup> the Court of Justice of the European Union held that notwithstanding the authorisation of a development project by a legislative act, it was necessary that actions taken in respect of the

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<sup>923</sup> Savoia and Inikov “Access to justice in cases involving access to environmental information” in *Stec Handbook on Access to Justice under the Aarhus Convention* 23.

<sup>924</sup> See article 35 of the European Convention.

<sup>925</sup> 1975 ECHR 1.

<sup>926</sup> 1975 ECHR 1 at para 34.

<sup>927</sup> Article 6(1) of the European Convention and article 47 of the *EU Charter of Fundamental Rights* provide for access to legal aid in civil proceedings.

<sup>928</sup> See *Artico v Italy* 1980 No 6694/74 at para 33.

<sup>929</sup> See *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* 2010 at para 59. See Council of Europe Handbook on European Law Relating to Access to Justice 29.

<sup>930</sup> 2010 I-ECR 5611at para 49-57.



project be subject review to ensure the effective protection of individual procedural rights.

The right of access to justice is one of the three pillars of environmental rights protected by article 1 of the Aarhus Convention, "in order 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 well-being." Accordingly, the public is entitled to "a review procedure before a court of law or another independent and impartial body established by law" as required by article 9 of the Aarhus Convention and in the event of a breach of the right of access to environmental information under article 4. The access to review by courts envisaged in article 9 shall be expeditious, free of charge and inexpensive. Furthermore, perhaps in recognition of the fact that awareness of redress mechanism is low particularly among vulnerable groups, article 9(5) of the Aarhus Convention imposes obligation on the contracting state parties to:

... ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial or other barriers to access to justice.

The access to justice pillar therefore constitutes an important mechanism for the guarantee of the rights protected by the Aarhus Convention, which requires the establishment of proper institutions, guarantee of clear and transparent frameworks for action by the state and the judicious exercise of power by the state and its agencies.<sup>931</sup>

#### 3.4.2.3 Regional perspective: Africa

Article 7 of the Banjul Charter protects the right of every individual to have his cause heard including "the right to appeal to competent national organs against acts of violating his fundamental rights as recognised by conventions, laws, regulations and customs in force."<sup>932</sup> Regardless of the Banjul Charter's protection of access to justice, reports on human rights emanating from Africa are sometimes disquieting

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<sup>931</sup> Stec "Rights and Duties towards a healthy environment" in Stec *Handbook on Access to Justice under the Aarhus Convention* 75.

<sup>932</sup> Article 7(a) of the Banjul Charter.

as they typically include narratives of authoritarian regimes, failing states, civil and ethnic violence, poverty and abuse of the rights of vulnerable persons.<sup>933</sup> This however does not mean that there are no positive developments with regard to the right of access to justice. For example, South Africa has a constitutional Bill of Rights protecting all categories of human rights including the right of access to courts.<sup>934</sup> Indeed, some judgments of the country's Constitutional Court on the subject have been the thrust of many scholarly propositions on what the law ought to be.<sup>935</sup>

To guarantee the enforcement of the rights protected by the Banjul Charter, the African Commission was established by the Charter as the organ for the protection and promotion of human rights in Africa.<sup>936</sup> The African Commission may receive communications from state parties on violations of the Charter provisions,<sup>937</sup> and from other parties including individuals and non-governmental organizations.<sup>938</sup> The access given to specialist NGOs seems to have precipitated success in promoting some accountability on the part of the states, working with local or national partners yielding positive and beneficial results.<sup>939</sup> It would however appear that greater accomplishment by the African Commission is hampered by the nature of its procedure that is unduly long,<sup>940</sup> and perhaps because its decisions are mere

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<sup>933</sup> Sceats 2009 *Africa's New Human Rights Court: Whistling in the Wind?* 2.

<sup>934</sup> Section 34 of the Constitution.

<sup>935</sup> See for example Sloth-Nielsen 2001 *SAHR* 224; Liebenberg 2001 *South African Law Journal* 212; and Wesson 2004 *S Afr J Hum Rts* 291.

<sup>936</sup> Article 30 of Banjul Charter. Article 1 of the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court* (available at [http://www.achpr.org/files/instruments/court-establishment/achpr\\_instr\\_proto\\_court\\_eng.pdf](http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf) [date of use 11 February 2018]) established the African Court on Human and Peoples' Rights. Article 3 of the Protocol on the Establishment of the African Court extends the jurisdiction of the Court to all cases and disputes submitted to the court concerning the interpretation and application of the Charter. The Court may also render advisory opinion on any legal matter relating to the Charter or any other relevant human rights instruments provided the subject matter is not the same as that being examined by the African Commission.

<sup>937</sup> Article 47 of the Banjul Charter.

<sup>938</sup> Articles 55 and 56 of Banjul Charter.

<sup>939</sup> Adeleke "Constitutional domestication of the right of access to information in Africa: Retrospect and prospects" in African Commission on Human and Peoples' Rights *Model Law on Access to Information for Africa* 87.

<sup>940</sup> Though the matter in *Diakite v Gabon* 2000 AHRLR 98 was brought before the African Commission in 1992, there was no decision on the case until 2000, and unfortunately despite the long wait, the communication filed by the complainant was declared as inadmissible for non-exhaustion of local remedies.

recommendations which are not legally binding.<sup>941</sup> There is therefore a tendency for erring states to disregard its decisions.<sup>942</sup>

The decision of the African Commission in *Social and Economic Rights Action Centre (SERAC) v Nigeria*,<sup>943</sup> is enlightening. The African Commission found that Nigeria was in violation of articles 21 and 24 of the Banjul Charter among others and appealed to the country to ensure the protection of the environment, health, and livelihood of the peoples of Ogoniland by “providing information on health and environmental risks, and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations,” among other obligations.<sup>944</sup> Regrettably, the case appeared to confirm that the enforcement of the African Commission’s recommendation could not be guaranteed as there was no evidence of compliance on the part of the Nigerian government, and the environmental degradation continued unabated. It took the institution of a series of civil cases<sup>945</sup> in the UK courts that ended in a settlement, for the Ogoni people to get some compensation.<sup>946</sup>

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<sup>941</sup> Under article 29 of the *Protocol on the Establishment of the African Court*, state parties “undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.” Furthermore, the Court may order provisional measures to prevent the occurrence of irreparable harm to individuals during and enquiry, and in the event of a finding that there has been a violation of rights compensation or reparation may be ordered. See article 2 of the Protocol on the Establishment of the African Court.

<sup>942</sup> See FIDH 2010 *Practical Guide- The African Court on Human and Peoples’ Rights* 26. The acknowledgement of the ineffectiveness of the African Commission motivated the Assembly of Heads of State and Government to convene a panel of experts to work on the establishment of an African Court of Human Rights, which culminated in the adoption of the *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights* 1998 (available [www.achpr.org/files/instruments/court-establishment/achpr\\_instr\\_proto\\_court\\_eng](http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng) [date of use April 14 2017]).

<sup>943</sup> 2001 AHRLR 60.

<sup>944</sup> 2001 AHRLR 60 at para 71.

<sup>945</sup> *Wiwa v Royal Dutch Petroleum*, *Wiwa v Anderson*, and *Wiwa v Shell Petroleum Development Company*. See details of the cases and the settlement at <https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al> [date of use 14 April 2017].

<sup>946</sup> See “Shell announces £55m payout for Nigeria oil spills” in the Guardian (UK) of 7 January 2015 available at <https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills> [date of use 14 April 2017]. Though it is doubtful that if the matter had proceeded to trial in the UK, an extraterritorial order to stop the environmental abuse could have been made by a British court.

Though many governments in Africa may not be responsive to apply the provisions of the Banjul Charter in relation to environmental and other rights for the benefit of their citizens, the availability of mechanisms permitting individuals and activist organisations to submit applications to the African Court,<sup>947</sup> may in the long run cause sufficient embarrassment to erring governments to force a rethink.<sup>948</sup>

### *3.4.3 Regional perspective on access to courts: assessment*

The enforcement of the right of access to courts facilitates the realisation of other rights. Since the inclusion of the right in the UDHR in 1948, other global, regional and domestic instruments have provided for the protection of the right in varying forms. The importance of the right of access to courts in the protection of human rights is such that even without provision protecting it expressly or directly, the European courts have ingeniously applied other provisions of the Convention to give effect to it.<sup>949</sup> Domestic courts can therefore learn from the attitude of the European courts by adopting a generous interpretation of relevant provisions of the law relating to access to justice.

The authorisation of development project (including hydraulic fracturing) by legislation does not exclude actions taken concerning the project from being subject to judicial review. In this regard, domestic courts can learn from the opinion of the Court of Justice of the European Union in *Boxus v Région Wallone*,<sup>950</sup> that the essence of judicial review is the protection of human rights. Considering that it is often the poor that suffer more from environmental degradation, legislation

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<sup>947</sup> See article 5(3) of the Protocol on the Establishment of the African Court.

<sup>948</sup> The opprobrium which characterised the government of Zimbabwe for many years in the international community is evident in international discourse. See Baek "Economic sanctions against human rights violations" 2008 *Cornel Law School Inter-University Graduate Student Conference Papers* 68 available at [http://scholarship.law.cornell.edu/lps\\_clacp/11](http://scholarship.law.cornell.edu/lps_clacp/11) [date of use 11 February 2018], and Van Wyk 2002 *Turkish Journal of International Relations* 10. For example, the SADC Tribunal in *Flick v Zimbabwe*, 2010 SADCT 01/2010 and *William Campbell and Another v The Republic of Zimbabwe* Case No. SADC (T) 03/2009 observed that Zimbabwean government's persistent refusal to enforce the rulings of the Tribunal ruled endangered the "lives, liberty and property of all those whom the decision meant to protect..." the country should be reported to the Summit of Heads of State or Government to take necessary action pursuant to Article 32(5) of the Protocol.

<sup>949</sup> See *Lingens v Austria* 1986 ECHR 7.

<sup>950</sup> 2010 I-ECR 5611.

providing for the right of access to courts should contain provisions designed to make access inexpensive and expeditious. The courts should also be mindful of those objectives in the interpretation of statutes, particularly those having a bearing on environmental rights.

Though stories emanating from Africa in relation to the enforcement of human rights are harrowing rather than calming, there is a silver lining in that developments relating to the enforcement of human rights in some African countries represent beacons of hope to the world and provide learning experiences for other countries even outside of Africa. Furthermore, the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court* has provided access to courts to specialist NGOs including those with focus on environmental protection to seek redress and compensation for environmental harm.

Hydraulic fracturing is a relatively new phenomenon, direct international regulation is wanting, and domestic regulation where available continues to evolve. Where domestic regulation falls short of protecting procedural environmental rights, recourse could be made to the mechanisms for protection and enforcement under regional international law. The provisions of regional instruments and tribunals established thereunder grant direct access to individuals and civil organisations to seek redress for violation of human rights. The instruments will avail opportunity to redress to those whose rights may be infringed by hydraulic fracturing.

Furthermore, the discussion of the international perspectives of procedural rights of access to information, just administrative action and access to courts has been undertaken to facilitate an improved discernment of the scope, meaning and relevance of the rights. This highlights the obligations imposed on states involved in the development of shale gas by hydraulic fracturing in relation to the protection of procedural environmental rights.

### ***3.5 Conclusion***

A familiar principle of international law is that development must be centred on a legal regime that facilitates the realisation of human rights and fundamental

freedoms including procedural rights. Accordingly, international law imposes obligations on states to protect environmental rights.<sup>951</sup> The non-legally binding global instruments like the UDHR and the Rio Declaration assist in clarification of the meaning and scope of the law, while some of them have attained the status of *jus cogens*. Several international instruments address issues pertaining to procedural environmental rights directly or indirectly. Some have legally binding effect, while some do not.<sup>952</sup>

South Africa is a party to the important instruments seeking to achieve that objective in different contexts.<sup>953</sup> Being a party to the international and regional instruments discussed in this chapter, the South African legal framework affecting the subject of those instruments, and perforce the framework as it applies to hydraulic fracturing must comply with the requirements of international law. In relation to the environment, the evolution of principles of sustainable development provides appropriate standards to measure development, emphasising that human beings are important actors in the development process, and are indeed, “the ultimate end of the process.”<sup>954</sup> Furthermore, it is a norm of international law that development must be subject to the rule of law on which fundamental human rights are based. *A fortiori*, it is generally accepted that all programmes of development, including hydraulic fracturing should further the realisation of human rights as laid down in the UDHR and other international human rights instruments.

The discussion of procedural rights of access to information,<sup>955</sup> just administrative action,<sup>956</sup> and access to courts<sup>957</sup> were examined from the perspective of international law shows that international law protects rights that may be violated by harms associated with hydraulic fracturing. Though some of the instruments of international law considered are binding while others are not, they impose obligations on states to protect environmental rights, or to serve as a guide as to

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<sup>951</sup> See para 3.1.

<sup>952</sup> See para 3.2.1.6.

<sup>953</sup> See para 3.2.16.

<sup>954</sup> See para 3.3.1.

<sup>955</sup> See para 3.2.

<sup>956</sup> See para 3.3.

<sup>957</sup> See para 3.4.

best practices on human rights protection when states engage in development programmes.<sup>958</sup> The lessons drawn from the discussion are more specifically highlighted in paragraph 7.2.7.

It is therefore important to examine critically, the domestic legal framework pertaining to hydraulic fracturing to determine the extent that it affords protection of procedural environmental rights. Although the focus of this study is South Africa, the domestic legal framework pertaining to hydraulic fracturing in relation to the protection of procedural environmental rights in the state of Pennsylvania in USA, and the UK, alongside South Africa will be examined. As indicated in chapter 1, the objective is to see how the experience of the two foreign jurisdictions presently undertaking hydraulic fracturing could be applied to strengthen the legal framework for the protection of procedural environmental rights in relation to hydraulic fracturing in South Africa.<sup>959</sup> The objective cannot be undertaken without addressing the impact of relevant international and regional law on the protection of procedural environmental rights.

In South Africa, great care was taken to ensure that the Bill of Rights conform to international norms. It is therefore important to “respect the careful way in which the Constitution itself creates concordance and unity between the Republic’s external obligations under international law, and their domestic legal impact.”<sup>960</sup> International law should therefore have an important role to play in the development of any framework pertaining to hydraulic fracturing and the protection of procedural environmental rights.<sup>961</sup> In this regard, international law should serve as an indubitable tool of interpretation of relevant provisions of the Constitution.<sup>962</sup> As the Constitutional Court pointed out in *State v Makwanyane*,<sup>963</sup>

...public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International

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<sup>958</sup> See para 3.2.1.6.

<sup>959</sup> See para 1.7.

<sup>960</sup> *Glenister v President of the Republic of South Africa* 2011 ZACC 6

<sup>961</sup> Moseneke 2010 *Advocate* 63.

<sup>962</sup> Olivier 2003 *PER/PELJ* 27.

<sup>963</sup> 1995 (3) SA 391 (CC) at para 413-414.

agreements and customary international law accordingly provide a framework within which the Bill of Rights can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the European Commission of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of the Bill of Rights.

Furthermore, it is unlikely that the courts can be presumed to give effect to any law pertaining to hydraulic fracturing which might be in breach of the state's obligations in international law regarding the procedural rights considered in this chapter.<sup>964</sup> Consequently, an examination of the domestic legal frameworks pertaining to hydraulic fracturing in the jurisdictions chosen for this study will be conducted to determine whether or not they can sustain adequate protection of the rights of access to information, just administrative action and access to courts. The right of access to information will be considered in the next chapter, while the rights to just administrative action, and access to courts will be considered in chapters 5 and 6 respectively.

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<sup>964</sup> Azanian People's Organisation v The President of South Africa 1996 (8) BCLR 1015 (CC) at para 26.



## **Chapter 4 Access to Information**

### ***4.1 Introduction***

Considering the potential impact that the hydraulic fracturing process can have on access to information, discussed in chapter 2,<sup>965</sup> the implementation of an access to information regime to regulate the development of hydraulic fracturing ought to address concerns which may forestall an effective enforcement of the right of access to information. Accordingly, this chapter will engage in a critical discussion of the legal frameworks of the right of access to information in the UK, the state of Pennsylvania in USA, and in South Africa, in terms of the protection of procedural environmental rights *vis-à-vis* hydraulic fracturing.

### ***4.2 Domestic perspective: Pennsylvania***

#### *4.2.1 Legal framework*

Access to information in Pennsylvania is largely regulated by the *Right to Know Law*<sup>966</sup> (hereafter "RKTL"). The provisions of RKTL affect access to records of the state and its agencies, though its provisions also apply to conditions in which a private record held by a public agency "constitutes or reveals a trade secret or confidential proprietary information."<sup>967</sup> The RKTL imposes obligations on all agencies of the state to grant access to public records subject to the provisions of the law,<sup>968</sup> and in this regard, there is a general rule of presumption that "a record in the possession of a Commonwealth agency shall be presumed to be a public record."<sup>969</sup>

A request for access to a public record<sup>970</sup> is to be made to an official of the agency designated as the open-records officer, who is under an obligation to "make a good

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<sup>965</sup> See paragraph 2.4.

<sup>966</sup> 2008 PL 6 No 3.

<sup>967</sup> Section 708(3)(b) (11) RKTL.

<sup>968</sup> Section 301(a) RKTL.

<sup>969</sup> Section 305(a) RKTL.

<sup>970</sup> 'Record' as defined in section 101 RKTL is wide and encompassing "information, regardless of physical form or characteristics that document a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or

faith effort” to determine the nature of the record requested, if it is in the custody of the agency, and to respond as promptly as possible but in any event, not later than five business days of the receipt of written request.<sup>971</sup> Failure of the agency to send a response within the five-business day limit implies that the request is deemed as denied.

Even though agencies are given a discretion to “fulfil verbal, written or anonymous verbal or written requests for access,” if the requester wishes to pursue reliefs under the RKTL, the request has to be in writing.<sup>972</sup> Where the agency elects to formally deny access, the denial shall be in writing and shall include *inter alia* the specific reasons for denial, including a citation of supporting legal authority” and information on the procedure to appeal the denial of access.<sup>973</sup>

The RKTL requires the open-records officer to “make a good faith effort” in responding to the request for information. Accordingly, the agency is required to show that it made a “good faith effort to conduct a search for the requested records using methods reasonably expected to produce the requested information” and that any withholding of materials was authorised within a statutory exemption.<sup>974</sup> The burden of proving that a public record is exempt from public access is “on the Commonwealth agency or local agency receiving a request...” to be determined by a “preponderance of evidence.”<sup>975</sup> The government’s duty is to provide evidence that enables the court to make a reasoned, independent assessment of the claim of exemption:

...to assure that a party’s right to information is not submerged beneath government’s obfuscation and mischaracterization and permit the court system effectively and efficiently to evaluate the factual nature of disputed information.<sup>976</sup>

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activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically, and a data processed or image-processed document.” The definition however, does not cover information not captured permanently in the form of a record.

<sup>971</sup> Section 901 RKTL.

<sup>972</sup> Section 702 RKTL.

<sup>973</sup> Section 903 RKTL.

<sup>974</sup> *Care To Live v Food and Drug Administration* 2011 631 F.3d 336, 340.

<sup>975</sup> Section 708(1) RKTL.

<sup>976</sup> *Vaughn v Rosen* 1973 484 F. 2d 820, 826.

In treating objections to disclosure of information on the basis of the allowed exceptions in the RKTL, the courts have always been meticulous to ensure that the presumption of disclosure is not jeopardised. In *John Joseph Contracting v Commonwealth of Pennsylvania Department of Environmental Protection*,<sup>977</sup> the DEP filed a motion to compel disclosure of among other things, waste materials brought onto the petitioner's site, when and by whom, and what documents exist showing what waste materials were brought onto the site. The petitioner pleaded that the information could not be disclosed being confidential commercial information, the disclosure of which would have a significant impact on its business, and communications between the company and its counsel, which were subject to privilege. The Environmental Hearing Board observed that there was a difference between communications between counsel and a client, and the facts contained within those communications, stating that:

...the protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'what did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.<sup>978</sup>

The Board thereupon held that the information and documents required were ordinarily in the company's possession, being factual information within the framework of the law, which must ordinarily be provided to the DEP, and as such must be produced.<sup>979</sup>

The courts have a duty to fulfil the purpose of RKTL, which is "to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions."<sup>980</sup> Therefore the fact that a request is burdensome will not throw it overboard, because:

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<sup>977</sup> 2015 Pennsylvania Environmental Hearing Board Reporter 841.

<sup>978</sup> *Upjohn Co. v United States* 1981 101 S. Ct 667, 685-686.

<sup>979</sup> 2015 Pennsylvania Environmental Hearing Board Reporter 848.

<sup>980</sup> *Bowling v Office of Open Records* 2010 990 A.2d 813 at 824 (Pa. Cmwlth).

...the RTKL permits a requestor to request and obtain public records, subject to claims of exemption. A requestor cannot control how an agency catalogues or organizes such files. As such, an agency's failure to maintain the files in a way necessary to meet its obligations under the RTKL should not be held against the requestor. To so hold would permit an agency to avoid its obligations under the RTKL simply by failing to maintain its records.<sup>981</sup>

In relation to hydraulic fracturing, a likely contentious exemption relates to a record "that constitutes or reveals a trade secret or confidential proprietary information."<sup>982</sup>

Pennsylvania's RTKL defines 'trade secret' as "information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

- 1) Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use;
- 2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>983</sup>

The possibility of operators attempting to use a claim of 'trade secret' to create loopholes or to avoid disclosure is not far-fetched as seen in some of the cases. The regulation of trade secrets is discussed in the next paragraph.

#### *4.2.2 Regulation of trade secrets*

Innovation requires both financial and intellectual investment. Investment can only be encouraged if the benefit of the attendant reward is guaranteed. If the innovator is required to disclose the secret behind its invention, competition could easily copy it, thereby robbing the innovator of the competitive advantage of its invention. That underscores the need to protect inventions from public disclosure.<sup>984</sup> In *Ruckelshaus v Monsanto Co*,<sup>985</sup> the USA Supreme Court observed that the "perception of trade

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<sup>981</sup> Commonwealth of Pennsylvania Department of Environmental Protection v Laura Legere 2012 50 A.3d 260 (Pa. Comwlth).

<sup>982</sup> Section 708(11) of the RTKL.

<sup>983</sup> Section 102 of the RTKL.

<sup>984</sup> Governor Hickenlooper of the state of Colorado justifies the claim for trade secrets on the argument that "respect for trade secrets is a part of what our economy is built on. There's a balance between the public's right to know and the industry's need for proprietary information." See COGA "Colorado's new hydraulic fracturing disclosure rule" available at [www.coga.org/wp-content/uploads/2015/09/HFFracFocusDisclosure.pdf](http://www.coga.org/wp-content/uploads/2015/09/HFFracFocusDisclosure.pdf) [date of use 21 April 2017].

<sup>985</sup> 1984 467 US 986, 1002-1003.

secrets is consonant with a notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's labour and invention," and that "trade secrets have many of the characteristics of more tangible forms of property." In the USA, a trade secret is a matter of substantive law,<sup>986</sup> both federal and states' rules of procedure give discretion to the courts to protect trade secrets during a formal discovery process.<sup>987</sup>

Given the risk associated with an unregulated claim of trade secrets in the oil and gas industry, a need to balance the competing need for disclosure and confidentiality in the resolution of the claim for trade secret is imperative.<sup>988</sup> In that regard, Congress enacted the *Emergency, Planning and Community Right-to-Know Act* (EPCRA)<sup>989</sup> in 1986. The objective of the Act is to help communities plan for chemical emergencies, by mandating industry to report on the storage, use and release of hazardous substances to federal, state, and local government authorities.<sup>990</sup> The authorities are in turn required to use the information to prepare their communities to deal with potential risks. The provisions are community right-

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<sup>986</sup> In West Virginia, the *Uniform Trade Secrets Act* (W.Va. Code ss 47-22-1), allows a claim of misappropriation to be instituted to forestall a disclosure of trade secret by any person who is aware or has reason to be aware that (a) the information was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (b) derived from or through a person who owed a duty to maintain its secrecy or limit its use.

<sup>987</sup> The *Freedom of Information Act* 2010 5 USC 552 available at <http://www.justice.gov/oip/amended-foia-redlined-2010.pdf> [date of use 14 August 2018] permits the public to request for information from the agencies of the federal government for any reason. A request for information from an agency of the government of Pennsylvania will be made under the RCTL. See also Hall 2013 *Idaho Law Review* 421.

<sup>988</sup> The Interstate Oil and Gas Commission (IOGCC) comprising states' oil and gas regulatory agencies, and the Ground Water Protection Council (GWPC) comprising states' groundwater protection agencies launched the FracFocus Chemical Disclosure Registry on April 11, 2011. FracFocus created a website on which oil and gas operators can voluntarily post information on the fracturing fluid and additives used at each well drilled, using the unique identifying number of the chemical compound of the additives as listed on the Chemical Abstract Society Registry (see Norton Rose Fulbright *Trade Secrets and the Regulation of Hydraulic Fracturing- Towards a Global Perspective* 9). As of 1 December 2012, FracFocus contained disclosures relating to over 32,700 wells at hydraulic fracturing operations sites. See Leggette *et al*/2013 *International Energy Review* 157. Information from the FracFocus website is available for access by the public, compared to disclosure on similar websites managed by state agencies, as the latter does not post relevant information publicly, and in some cases, the bureaucracy of the disclosure procedure can be complex. Notwithstanding, information provided on FracFocus is far from ideal because operators' claim of trade secrets may affect the level of disclosure and its content. See in this regard Wang "Voluntary environmental information disclosure and firm size – evidence from the hydraulic fracturing chemical registry FracFocus" 2014 *RFF DP* 14.

<sup>989</sup> 1986 42 USC Chapter 116 available at <https://www.epa.gov/epcra> [date of use 21 April 2017].

<sup>990</sup> See *Johnson v American Standard Inc.* 2008 179 P.3d 905, 908 (Cal).

to-know provisions, relevant in shale gas development. Section 301 of EPCRA requires any facility manufacturing, processing, or storing of hazardous chemicals to prepare Material Safety Data Sheets (MSDS), describing therein the properties and health effects of the chemicals, and to submit copies of MSDS to state and local authorities, fire departments with the inventories of all on-site chemicals for which MSDS exist. Similar information must be made available to the public on request. Section 304 of the EPCRA requires the reporting of releases of certain products used in oil and gas production into the atmosphere, surface water or groundwater in excess of specified thresholds even if there is no requirement to make a Toxics Release Inventory (TRI) reporting.<sup>991</sup> Any claim of trade secrets in respect of chemicals reported under EPCRA is to be accompanied by a substantiation form to justify the claim.<sup>992</sup>

There is justification for the adoption of common rules and their application for comprehensive disclosure to hydraulic fracturing operators. Unfortunately, three attempts to introduce regulations mandating the disclosure of chemical composition of fracturing fluids specifically at federal level failed to record any success.<sup>993</sup> Notwithstanding, McFeely justifies the need for the disclosure of the chemicals as follows:<sup>994</sup>

1) Comprehensive pre-fracturing disclosure will allow property owners and occupiers contiguous to a potential operating site to conduct baseline testing on water sources to establish the quality of water prior to hydraulic fracturing. This is likely to facilitate the confirmation as to whether or not identified fracturing fluids is

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<sup>991</sup> Section 313 of the EPCRA requires the Environmental Protection Agency (EPA) to compile a Toxics Release Inventory (TRI), a publicly available database containing information on toxic chemical releases and waste management activities reported annually by certain industries and federal facilities. The EPA issues a list of industries that must report releases for the TRI. It is noteworthy that as of 2016, the EPA has not included the oil and gas extraction industry in the list for TRI reporting. See <https://fracfocus.org/chemical-use/chemicals-public-disclosure> [date of use 21 April 2017].

<sup>992</sup> Sections 303(d)(2), 311, 312 and 313 EPCRA.

<sup>993</sup> Maule *et al* 2013 *New Solutions* 173.

<sup>994</sup> The rationale underlying disclosure as given by McFeely are summarised here. See McFeely Natural Resources Defense Council *State Hydraulic Fracturing Disclosure Rules and Enforcement- A Comparison* 4.

polluting water source during and after operations. Chemical disclosure will assist in determining the source of any subsequent groundwater contamination.

2) Availability of information regarding chemicals used and their composition will assist first responders to respond appropriately in the event of accidents and other emergencies. Medical professionals will be better prepared if they have access to what potential patients have been exposed to, and in what concentration, in planning diagnosis and treatment.

3) Disclosure will enable the state authorities and the public to assess the risks that chemicals usage, storage, constant heavy equipment movement and attendant noise will constitute to the community. In this regard, necessary conversation between the public, the regulators and operators can take place, facilitating effective regulation and safer practices.

4) An effective disclosure regime will assist state authorities and the public to identify how responsible operators have been, and if necessary, to sanction irresponsible operators or seal their operations as may be necessary.

5) Disclosure of information regarding water use prior to, during and after operations will facilitate the determination of the impact of hydraulic fracturing on water use and assist in the regulation and management of fresh water.

6) A comprehensive disclosure regime is necessary for continuous scientific research for a better understanding of the environmental and health impacts of hydraulic fracturing. This will assist in the development of well-informed policies to protect the public.

7) Regulated disclosure will result in the avoidance of imposing excessive costs on the industry and will not face undue burden on the scarce resources of the regulatory agencies.<sup>995</sup>

Considering the foregoing, even if validly made, a claim of confidentiality of trade secrets should not preclude an examination of the information sought to be restricted; otherwise spurious claims will gain the advantage of restriction. There is therefore a need to carefully evaluate each claim, and as may be necessary to provide opportunity to the public to challenge exemptions.

In relation to trade secrets in hydraulic fracturing in Pennsylvania, an operator may designate a specific part of the stimulation record<sup>996</sup> as containing a trade secret or confidential proprietary information. The DEP shall prevent the disclosure of such information to the extent permitted by the state's RCTL or other applicable law.<sup>997</sup> If a vendor, service provider or operator claims that the properties of a chemical or the concentration thereof are trade secrets or confidential proprietary information, the claim must be indicated on the chemical disclosure registry form, and the claimant must submit a signed written statement that the record contains a trade secret or confidential proprietary information. However, the claim on its own does not exclude disclosure except if the information qualifies under the law as a trade secret or confidential proprietary information.<sup>998</sup>

Notwithstanding the foregoing, the specific identity and volume of any chemical claimed to be a trade secret or confidential proprietary information is to be provided to any health professional who requests the information, upon signing a confidentiality agreement and providing a written statement of the need for the information.<sup>999</sup> However, the need for a written statement may be dispensed with in case of a medical emergency, in which case, a verbal acknowledgement of the health professional that the information may not be used for purposes other than

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<sup>995</sup> Hall 2013 *Idaho Law Review* 409.

<sup>996</sup> Record of chemicals applied to provoke the well to yield gas trapped in the depth of the ground.

<sup>997</sup> Section 3222(b.2) of Act 13.

<sup>998</sup> Section 3222.1(5) of Act 13.

<sup>999</sup> Section 3222.1(10) of Act 13.



health needs shall suffice. The written statement may then be requested as soon as circumstances permit.<sup>1000</sup> Furthermore, in response to a spill or release, nothing is to restrict disclosure to the DEP, a public health official, an emergency manager, and a responder to a spill, release or a complaint from a person who may have been directly and adversely affected or aggrieved by the spill or release.<sup>1001</sup>

The effect of claims of trade secrets in hydraulic fracturing may result in serious harm to human health and even death because many of the chemicals in use are toxic, including diesel fuel (sometimes replacing water), methanol, formaldehyde, ethylene glycol, sodium hydroxide and polycyclic aromatic hydrocarbons.<sup>1002</sup>

The foregoing justifies a careful regulation of trade secrets in hydraulic fracturing. To protect trade secrets, regulation may require that detail of the secret is disclosed to the regulator who will hold such information as confidential. However, there is a need to place the regulator under obligation to release the information to persons who require it to prove a claim that their rights have been prejudiced in one way or the other. For example, medical practitioners should have access to information if it is required to enable them diagnose or treat patients. The Pennsylvania Supreme Court was probably mindful of these concerns in its recent reconsideration of *Robinson Township v Commonwealth of Pennsylvania*.<sup>1003</sup> The court ruled that the provisions of section 3222.1(b)(10) and (11) of the *Oil and Gas Act*<sup>1004</sup> (hereafter "Act 13") which limits the disclosure of chemicals in hydraulic fracturing on the basis of trade secrets and confidential proprietary information is unconstitutional.<sup>1005</sup> The

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<sup>1000</sup> Section 3222.1(11) of Act 13.

<sup>1001</sup> Section 3222.1(11) (d) of Act 13.

<sup>1002</sup> FracFocus highlights the generic hydraulic fracturing chemical usage including the types of chemicals, their uses in the process and the result of their use. The chemical additives are classified as acid, biocide, base carrier fluid (water), breaker, clay and shale stabilisation control, crosslinker, friction reducer, gel, iron control, non-emulsifier, pH adjusting agent, propping agent, scale inhibitor and surfactant. See FracFocus "Why Chemicals are Used" available at <https://fracfocus.org/chemical-use/why-chemicals-are-used> [date of use 15 February 2017].

<sup>1003</sup> 2016 A.3d J-34A-B.

<sup>1004</sup> Act 13 of 2012.

<sup>1005</sup> Section 3222.1(b) (10) and (11) of Act 13 imposes an obligation on a health professional to provide a written statement [or verbal undertaking in emergency situations] or execute a confidentiality agreement prior to obtaining information classified as trade secret by a hydraulic fracturing operator.

unconstitutionality of such claims of trade secrets implies that related information cannot be withheld from individuals who require such information to enforce rights or protect interests. The court held that the provisions as is, afforded “the oil and gas industry as a class, special treatment not afforded to any other class of industry,” and there was no justification to allow that, given that there are many other industries with similar concerns but who were not granted similar treatment.<sup>1006</sup>

Furthermore, the nature of hydraulic fracturing and its potential harmful impacts on human health and the environment makes it necessary to keep as much information on pre- and post-drilling activities of operators to ensure that there is accurate data.<sup>1007</sup> Availability of information is likely to put regulators and victims in a better position to respond to dangers associated with hydraulic fracturing. It is equally important that access to information is guaranteed, especially to the public to enable people to assess potential risks, plan how to react to unexpected incidents, and use information to establish any harm they may have suffered with a view to claiming appropriate remedies. Act 13 contains provisions dealing with these issues, as highlighted below.

An obligation is imposed on hydraulic fracturing operators in Pennsylvania to report developments on the wells being drilled. Each well operator is required to file an annual report indicating the volume of gas production for each well with DEP. The reason for disclosure rule on individual well basis is that composition of fracturing fluid depending on methods being used by different operators may vary depending on geology presented by each well.<sup>1008</sup>

Other records to be maintained by well operators include the record of each well drilled or altered. Within 30 days and 90 days of completion, a completion

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<sup>1006</sup> 2016 A.3d J-34A-B at 64.

<sup>1007</sup> See para 2.4.2 for a discussion of the adverse impacts of hydraulic fracturing on human health.

<sup>1008</sup> Hall 2013 *Idaho Law Review* 407.

report,<sup>1009</sup> are to be delivered to DEP, serving as the registry.<sup>1010</sup> Furthermore, within 60 days of conclusion of the hydraulic fracturing of unconventional wells, the well operator is required to complete the chemical disclosure registry form and post the form on the registry.<sup>1011</sup>

#### *4.2.4 Assessment of the right to access to information: Pennsylvania*

Pennsylvania's RCTL regulates the disclosure of information held by the state and its agencies. The RCTL establishes a presumption that records in custody of the state and its agencies are public records which must be disclosed upon request, subject to the rules governing circumstances when exemption from the presumption applies.

The rule is that the agency claiming the exemption has the onus of proving that the exemption applies,<sup>1012</sup> rather than classifying certain records as mandatorily protected from disclosure.<sup>1013</sup> A presumption that all information is subject to disclosure is likely to prevent unnecessary claims of privilege or protection. While it is recognised that certain records require protection, the agency seeking that

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<sup>1009</sup> The completion report shall contain the operator's stimulation record, containing the following information required in section 3222(b.1) of Act 13:

- i. A descriptive list of the chemical additives in the stimulation fluids, including any acid, biocide, breaker, brine, corrosion, inhibitor, crosslinker, demulsifier, friction reducer, gel, iron control, oxygen scavenger, Ph adjusting agent, proppant, scale inhibitor and surfactant.
- ii. The trade name, vendor and a brief description of the intended use or function of each chemical additive in the stimulation fluid.
- iii. A list of the chemicals intentionally added to the stimulation fluid, by name and chemical abstract service number.
- iv. The maximum concentration, in percent by mass, of each chemical intentionally added to the stimulation fluid.
- v. The total volume of the base fluid.
- vi. A list of water sources used under the approved water management plan and the volume of water used.
- vii. The pump rates and pressure used in the well.
- viii. The total volume of recycled water used.
- ix. The well record shall identify whether methane was encountered in other than a target formation; and the country of origin and manufacture of tubular steel products used in the construction of the well.

<sup>1010</sup> Section 3222(a) of Act 13.

<sup>1011</sup> Section 3222(1)(b) of Act 13 provides for hydraulic fracturing chemical disclosure requirements.

<sup>1012</sup> Section 708(1) of RCTL.

<sup>1013</sup> As is the case under PAIA in South Africa (see section 4.4.4.1 on the affected classes of information subject to mandatory protection) and the case of absolute exemption in the UK under section 2 of the FOIA.

protection ought to be able to justify the requirement, and if the court, the custodian of justice sees the need, that protection will be ordered.

The standard of proof required for the protection of information from disclosure ought not to be light so that the presumption of disclosure is not jeopardised, especially where protection of information may have the effect of violating the rights of the requester. The denial of a request on the basis that it may be burdensome to an agency, or that the request is vexatious should not be a ground for its refusal.<sup>1014</sup> While waste of scarce resources or profligacy is not being canvassed, the opinion of the Pennsylvania Commonwealth Court that each agency should organise its affairs and put itself in a position to fulfil its obligations under the law is apposite and worthy of consideration.<sup>1015</sup> A requirement in that line will prevent agencies from keeping sloppy a record maintenance system that will put them in a position to avoid statutory obligations.

The requirement that operators should file reports providing information on individual wells being operated has the potential to facilitate availability of information which may be lost had a general report on all wells been required.<sup>1016</sup> As topography and geological conditions may differ, individual wells may require different treatment in terms of the nature of drilling and the chemicals used.

As indicated above, claims of trade secrets are commonplace in hydraulic fracturing and the potential to abuse such claims to the detriment of the enforcement of access to information right cannot be ruled out.<sup>1017</sup> Though the content of a stimulation record may be designated a trade secret it is subject to the requirements of RCTL, and information in the custody of DEP can be released to health professionals as may be necessary. However, the requirements of federal law as provided in the EPCRA goes beyond the requirements of the RCTL by recognising the need to protect trade secrets but equally appreciating that such need must be balanced

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<sup>1014</sup> Section 45 of PAIA allows a discretionary refusal if the request for access is manifestly frivolous; or vexatious; or the work involved in processing the request would substantially and unreasonably divert the resources of the Republic.

<sup>1015</sup> See section 3222(b.1) of Act 13.

<sup>1016</sup> See para 4.2.2.

<sup>1017</sup> See para 4.2.2.

against a compelling demand to disclose information in certain cases, which in any event, is real in hydraulic fracturing. Therefore, the requirement of the EPCRA imposing an obligation to report on storage, use and releases of hazardous substances to federal, state and local authorities. Chemicals used in the hydraulic fracturing industry necessitate its operators having to mandatorily disclose properties and health effects of chemicals and justify claims of trade secrets. All claims of trade secrets also fail in the case of a spill, in which case disclosure of information should be granted. These aspects of the law in Pennsylvania have the potential to inform development of regulations in the South Africa.

The failure of Pennsylvania's RKTL to grant direct access to individuals to seek disclosure of information protected as trade secret is unpropitious. Furthermore, the imposition of obligations on health practitioners by the RKTL before information relating to chemicals used in hydraulic fracturing can be disclosed to them has the potential to imperil health and life.<sup>1018</sup> These are examples of regulations not likely to enhance the protection of procedural environmental rights and should not to be copied in South Africa. Fortunately, they have largely been ruled as unconstitutional in the case of *Robinson Township v Commonwealth of Pennsylvania*.<sup>1019</sup>

### ***4.3 Domestic perspective: United Kingdom***

#### ***4.3.1 Background***

The planned exit of the UK from the EU is expected to have some impact on the status of EU law in the UK in due course.<sup>1020</sup> Though the UK maintains that despite Brexit, it "will continue to honour international commitments and follow international law,"<sup>1021</sup> the ideological inclination of the UK may not be known until an appreciable period after its separation from the EU. However, a significant change in

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<sup>1018</sup> The lacuna was however corrected by the Pennsylvania Supreme Court in *Robinson Township v Commonwealth of Pennsylvania* 2016 A.3d J-34A-B discussed in para 4.2.3.1.

<sup>1019</sup> 2016 A.3d J-34A-B.

<sup>1020</sup> UK Environmental Law Association *Brexit and Environmental Law: The UK and International Environmental Law after Brexit* 5.

<sup>1021</sup> See Department for Exiting the European Union 2017 "The United Kingdom's Exit From and New Partnership with the European Union White Paper" at para 2.13 available at <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper> [date of use 15 February 2018].

environmental policy is not envisaged for two reasons.<sup>1022</sup> First, an inclination for maintaining the *status quo* is expected based on the path dependence of the relationship with the EU built over many years. Secondly, the anticipated overwhelming pressure on the government in dealing with many of the procedural mechanics of Brexit is unlikely to permit an overhaul of environmental policy in the short to medium term. The UK government's official position is to be found in the *European (Withdrawal) Bill 2017-19*,<sup>1023</sup> (hereafter the "EWB") being to "repeal the *European Community Act 1972*, and to retain, as far as practicable, existing EU law and EU derived domestic law within the domestic legal system, until there is opportunity to review and revise these laws." To achieve that purpose, section 3(1) of the EWB incorporates direct EU legislation "so far as operative immediately before exit day [as] part of domestic law on and after exit day." While this may appear clear on the surface, it is not likely to be a simple task for the UK to preserve the implementation of the commitments after its separation from the EU.<sup>1024</sup> However, regarding EU case law, "a court or tribunal is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and cannot refer any matter to the European Court after exit day."<sup>1025</sup> What is clear is that until its disengagement is complete the UK will continue to be subject to EU law including those having a bearing on the protection of procedural environmental rights.

Pending the EWB becoming law, EU law, particularly those relating to the environment like Directive 2003/4/EC,<sup>1026</sup> Directive 2016/943/EC<sup>1027</sup> and the EU Recommendation<sup>1028</sup> will remain valid. Regarding the regulation of hydraulic fracturing at domestic level, the regulatory control of the shale gas industry is

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<sup>1022</sup> Hilson "The impact of Brexit on the environment: exploring the dynamics of a complex relationship" available at <http://centaur.reading.ac.uk/72360/> [date of use 15 February 2018].

<sup>1023</sup> Available at <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf> [date of use 15 February 2018].

<sup>1024</sup> UK Environmental Law Association *Brexit and Environmental Law: The UK and International Environmental Law after Brexit* 6.

<sup>1025</sup> Section 6(1) of the EWB.

<sup>1026</sup> Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information is discussed in para 3.2.2.2.4.

<sup>1027</sup> Directive 2016/943/EC of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure discussed in para 3.2.2.2.5.

<sup>1028</sup> Discussed in para 3.2.2.2.6.

carried out under the authority of OGA and Environment Agency within the framework of local legislation. The applicable local legislation affecting access to information relevant to the industry are the *Freedom of Information Act 2000*,<sup>1029</sup> and the *Environmental Information Regulations 2004*.<sup>1030</sup> The key provisions of the statute and the regulations as they affect the protection of access to information are discussed below.

#### 4.3.2 Legal framework

The applicable statute regulating access to information in the UK is the *Freedom of Information Act 2000* (hereafter “the FOIA”). The FOIA gives a right to any person to request information from a public authority. The person is obliged to be informed in writing whether or not the authority holds the information, and if it holds it, to communicate the information.<sup>1031</sup> The public authority’s duty in this regard is referred to as “the duty to confirm or deny.”<sup>1032</sup> The right of access is however subject to two classes of exemption,<sup>1033</sup> namely ‘absolute exemption’ and ‘public interest exemption.’<sup>1034</sup> The public interest exemption is a qualified exemption,<sup>1035</sup> which ordinarily requires a disclosure unless the public authority concludes “in all circumstances of the case [that] the public interest in withholding outweighs the public interest in the disclosure.”<sup>1036</sup> In *The Rugby Football Union v Consolidated Information Services Limited*,<sup>1037</sup> the court held that notwithstanding contractual terms excluding disclosure or liability for disclosure, a court may order disclosure of information in order to protect other interests that may be at stake.

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<sup>1029</sup> Chapter 36 of 2000.

<sup>1030</sup> 3391 of 2004.

<sup>1031</sup> Section 1 of the FOIA.

<sup>1032</sup> Section 1(6) of the FOIA.

<sup>1033</sup> Exemptions are listed in Part II of the Act, classified into ‘absolute’ or ‘qualified’ exemption. See section 2 of the FOIA.

<sup>1034</sup> A qualified exemption is that in which “the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.”

<sup>1035</sup> Holsen and Amos *A Practical Guide to the UK Freedom of Information Act 2000* 17.

<sup>1036</sup> Matters to be concluded in arriving at a decision include for example the necessity to allow “individuals to understand the decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging the decisions.” See Holsen and Amos *A Practical Guide to the UK Freedom of Information Act 2000* 19.

<sup>1037</sup> 2012 UKSC 55.

The public authority has duty to comply with a request for information promptly and in any event not later than 20 days following the date of the request,<sup>1038</sup> though the obligation to comply is excluded where the request is vexatious.<sup>1039</sup> Unfortunately, there is no provision to guide the determination of when a request could be vexatious, and how to control a potential abuse of that determination. A proviso similar to that in section 17 relating to the refusal of a request would be beneficial to the provision on vexatious request. Under section 17, if a request for information is being refused on the basis of any of the permitted exemptions, the requestee is obliged to give the requester a notice which:

- a) states the fact of the exemption,
- b) specifies the exemption in question, and
- c) states (if that would not otherwise be apparent) why the exemption applies.

Such a notice is likely to prevent an abuse of discretion and is likely to put the requester in a position to better assess his response to the decision refusing the disclosure of information requested.

Any person (“complainant”) may apply to the Information Commissioner if not satisfied with how the request has been dealt with by the public authority.<sup>1040</sup> If the Information Commissioner finds that the public authority has failed to comply as required by section 1, he must give a ‘decision notice’ specifying the steps to be taken to comply and the period to do so, with information on the right of appeal.<sup>1041</sup> Further failure to comply will attract an ‘enforcement notice’ from the Information Commissioner specifying the necessary steps to be taken. The complainant or the public authority may appeal to the Tribunal against the decision of the Information Commissioner,<sup>1042</sup> with further right to appeal a decision of the Tribunal to the High Court.<sup>1043</sup> In *R and Another v Attorney General*,<sup>1044</sup> a journalist had requested the disclosure of communications passing between various governments departments

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<sup>1038</sup> Section 10 of the FOIA.

<sup>1039</sup> Section 14 of the FOIA.

<sup>1040</sup> Section 50(1) of the FOIA.

<sup>1041</sup> Section 50(4) and (5) of the FOIA.

<sup>1042</sup> Section 57 of the FOIA.

<sup>1043</sup> Section 59 of the FOIA.

<sup>1044</sup> 2015 UKSC 21.



and HRH the Prince of Wales (“the letters”) under the FOIA and the *Environmental Information Regulations 2004*<sup>1045</sup> (hereafter “the EIR”). The request was refused on the basis that the letters were exempt. The Information Commissioner agreed the letters were exempt, but the Tribunal held that a substantial part of the letters be disclosed. However, the Attorney General issued a certificate under section 53(1) of the FOIA and regulation 18(6) of the EIR stating that the departments had reasonable grounds to refuse to disclose the letters. The effect of the validity of the Attorney General’s certificate would be to override the decision of the Tribunal. The Supreme Court (UKSC) held that the Attorney General had no power to issue the certificate, which was declared invalid, holding that it would be impermissible for the executive to override a decision of the Upper Tribunal, a body with a coordinate status as the High Court.

#### 4.3.2.1 Environmental Information Regulations 2004

The EIR was passed pursuant to the FOIA, and the requirement of EU Directive 2003/4/EC on public access to environmental information.<sup>1046</sup> The EIR adopts the definition of “environmental information” in article 2(1) of Directive 2003/4/EC.<sup>1047</sup>

Public bodies are required to progressively make information available by electronic means, which are easily accessible and to take steps to organise the information relevant to their functions to ensure systematic dissemination to the public. Accordingly, there is a presumption in favour of disclosure of information regarding request made pursuant to the EIR.<sup>1048</sup> Such information is to include in the minimum, the information required under article 7(2) of Directive 2003/4/EC,<sup>1049</sup> and “facts and

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<sup>1045</sup> No 3391 of 2004.

<sup>1046</sup> See Recital 7. Directive 2003/4/EC at [www.eur-lex.europa.eu/LexUriServe.do?uri=OJ:L:2003:041:0026:0032:EN:PD](http://www.eur-lex.europa.eu/LexUriServe.do?uri=OJ:L:2003:041:0026:0032:EN:PD) [Date of use 15 April 2017]. See comments on the Directive in para 3.2.2.2.4.

<sup>1047</sup> The definition of ‘environmental information’ covers inter alia “written, visual, aural, electronic or any material form” on “factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment...” article 1(b) of EU Directive 2003/04/EC. Many other provisions of Directive 2003/4/EC are incorporated into the EIR by reference.

<sup>1048</sup> Regulation 12(2) EIR.

<sup>1049</sup> Article 7(2) of Directive 2003/4/EC imposes an obligation on member states to provide to the public [and update it as appropriate] in easily accessible electronic databases information on

analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals.”<sup>1050</sup> Regulation 5(2) of the EIR imposes an obligation on a public authority to oblige to a request within 20 days of the receipt of the request, though if “the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to do so,” the period may be extended to 40 days.<sup>1051</sup>

The importance of providing environmental information is accentuated by the requirement that no enactment or rule of law will be allowed to forestall the disclosure of a request for information made under the EIR,<sup>1052</sup> and where a requester needs assistance to complete the request procedure, the relevant public authority is required to provide advice and assistance as may be necessary.<sup>1053</sup> To ensure that public authorities are able to carry out their obligations effectively, the Secretary of State is required to issue a code of practice to guide them in the discharge of their functions.<sup>1054</sup>

The right to request and obtain environmental information is however not without qualification. Regulation 12 of the EIR provides for circumstances in which a public authority may refuse to disclose information. Those circumstances are in line with the usual exceptions to the presumption to disclose.<sup>1055</sup> Of particular interest to the regulation of hydraulic fracturing is the exception created in regulation 12(5(e) allowing a public authority to refuse the disclosure of information to the extent that

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relevant international and local instruments relating to the environment, government plans and policies on the environment, progress reports on those plans and policies, reports on state of the environment, data derived from monitoring activities affecting or likely to affect the environment, authorizations with significant impact on the environment, environmental impact studies and risk assessments concerning environmental elements.

<sup>1050</sup> Regulation 4(4) EIR.

<sup>1051</sup> Regulation 7(1) EIR.

<sup>1052</sup> Regulation 5(6) EIR.

<sup>1053</sup> Regulation 9(1) EIR.

<sup>1054</sup> Regulation 16 EIR.

<sup>1055</sup> Regulation 12(4) and (5) allows the public authority to refuse to disclose, including where the authority does not hold the information, where the request is unreasonable, where the request is not properly made and the authority has complied with the regulation obliging the authority to render advice and assistance, and where the disclosure of information will adversely affect international relations, defence, national security or public safety.

disclosure would adversely affect “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.” A question to be answered is the effect of this provision when put against regulation 5(6) of the EIR that no enactment or rule of law will be allowed to forestall the disclosure of a request for information made under the EIR.

Meanwhile, legislation requires the regulation of activities causing pollution.<sup>1056</sup> Accordingly, the *Environmental Protection (England and Wales) Regulations 2016* were passed to regulate the operations of facilities carrying on “a waste operation, radioactive substance activity, water discharge activity, small waste incineration plant operation, solvent emission activity or flood risk activity.”<sup>1057</sup> The aspect of the regulations relevant to access to information are discussed in the next paragraph.

#### 4.3.2.2 Environmental Protection (England and Wales) Regulations 2016

Section 12 of the *Environmental Protection (England and Wales) Regulations 2016* requires operators engaged in a regulated activity, or whose activity causes a water discharge or groundwater activity to obtain an environmental permit. For such activity, the regulator is required to maintain a public register,<sup>1058</sup> which must be made available for public inspection at all times and free of charge.<sup>1059</sup> Regulation 50 gives the regulating authority to determine the inclusion on or exclusion of information from the public register on the basis that the information is confidential. Information relating to emissions cannot be excluded from the public register<sup>1060</sup> and guidance is provided for the regulator in the exercise of the function of compiling the register.<sup>1061</sup>

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<sup>1056</sup> See section 62 Regulatory Enforcement and Sanctions Act 2008, sections 2 and 7 Pollution Prevention and Control Act 1999, and sections 61 and 90 Water Act 2014.

<sup>1057</sup> Regulation 7(b) *Environmental Protection (England and Wales) Regulations 2016*.

<sup>1058</sup> Regulation 46 *Environmental Protection (England and Wales) Regulations 2016*.

<sup>1059</sup> Regulation 46(6) *Environmental Protection (England and Wales) Regulations 2016*.

<sup>1060</sup> Regulation 51(3) *Environmental Protection (England and Wales) Regulations 2016*.

<sup>1061</sup> The exercise of the regulator’s function regarding the inclusion or exclusion of information must

a) Take any reasons given in an objection to account,

b) Apply a presumption in favour of including the information in the public register, and determine to exclude the information from the public register if it considers that-

i. The information is commercial or industrial information,

ii. Its confidentiality is provided by law to protect a legitimate economic interest, and

Meanwhile, the importance of information to stakeholders who may be affected by proposed abstraction of water for hydraulic fracturing is underscored by the requirement for a notice in terms of the *Water Resources Act 1991* giving opportunity for objections, indicating:

- a) Name of place within the relevant locality where a copy of the application, and of any map, plan or other document submitted with it, will be open to inspection by the public, free of charge, at all reasonable hours during [the] period<sup>1062</sup> specified in the notice, and
- b) That any person may make representations in writing to the NRA with respect to the application at any time before the end of that period.<sup>1063</sup>

The representations made in response to the notice supporting the application are to be considered<sup>1064</sup> in addition to information on whether or not the abstraction or impounding works obstructs or impedes the flow of any inland waters.<sup>1065</sup>

#### *4.3.3 Regulation of trade secrets*

In relation to trade secrets, while there is no definition in the FOIA, section 43 makes provision for the treatment of commercial interests, providing that:

- 1) Information is exempt if it constitutes a trade secret.
- 2) Information is exempt information if its disclosure under this Act would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
- 3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

Section 43 of the FOIA therefore does not change the common law position on the treatment of trade secrets which has been developed through the cases.<sup>1066</sup>

The courts in the UK have often based the need for the protection of trade secrets on the need to protect property interests, treating the relevant information as

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iii. In all the circumstances, the public interest in maintaining the confidentiality of the information outweighs the public interest in including it on the register.

<sup>1062</sup> The notice is to remain open for public reaction for a period not less than 25 days.

<sup>1063</sup> Section 37(4) of *Water Resources Act 1991*.

<sup>1064</sup> Section 38(3) of *Water Resources Act 1991*.

<sup>1065</sup> Section 40(1) of *Water Resources Act 1991*.

<sup>1066</sup> *Evans et al 2015 Corporate and Commercial Disputes Review 8*.

“know-how” property, which is very valuable as an asset.<sup>1067</sup> The origin of that protection is traceable to the case of *Prince Albert v Strange*,<sup>1068</sup> but its definitive principles were developed<sup>1069</sup> in the case of *Coco v AN Clark (Engineers) Ltd*.<sup>1070</sup> The court held that for a case of breach of confidence to succeed, three things must be proven, namely that the information must “have the necessary quality of confidence about it,” that information must have been imparted in circumstances importing an obligation of confidence, and there must be an unauthorised use of that information to the detriment of the party communicating it.<sup>1071</sup> If an applicant can show that the subject information confers on it some commercial or technical advantage and that it had taken some steps to protect the information, the court will recognise it as confidential and eligible to protection.<sup>1072</sup> Furthermore, while the remedy for the misuse of trade secrets lies in contract or for the protection of property interests, it has been argued that liability in damages may not guarantee sufficient deterrent to a potential wrongdoer, especially one who does not have assets to satisfy a judgment.<sup>1073</sup>

It is important to point out that all information is subject to the terms of disclosure in the EIR, whether owned by the authority or held on behalf of third parties, all the exemptions are subject to the public interest test, and requests relating to information on emissions into the environment cannot be refused. The exception allowed by regulation 12(5)(e) of the EIR on claim of confidentiality of commercial or industrial information is of importance in hydraulic fracturing regulation because

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<sup>1067</sup> See *Boardman v Phipps* 1967 2 AC 46, *Exchange Telegraph Co Ltd v Howard* 1906 22 TLR 375.

<sup>1068</sup> *Prince Albert v Strange* 1849 Eng R 255, where the Chancery court held that jurisdiction on such matters is premised not only so much on property or on contract, but a duty of good faith, and the disclosure of the subject matter being restrained on the basis that it was “an intrusion- an unbecoming and unseemly intrusion... [and] that the catalogue and the descriptive and other remarks therein contained could not have been compiled or made, except by means of the possession of the several impressions of the said etchings surreptitiously and improperly obtained... [and] originated in a breach of trust, confidence, or contract.”

<sup>1069</sup> *Anderson et al* 2010 *Protection of Trade Secrets through IPR and Unfair Competition Law* 1 available at [https://aippi.org/wp-content/uploads/committees/215/GR215united\\_kingdom.pdf](https://aippi.org/wp-content/uploads/committees/215/GR215united_kingdom.pdf) [date of use 30 April 2017].

<sup>1070</sup> 1968 FSR 415.

<sup>1071</sup> At page 419.

<sup>1072</sup> *Evans et al* 2015 *Corporate and Commercial Disputes Review* 8.

<sup>1073</sup> The Law Commission 1997 “Legislating the Criminal Code: Misuse of Trade Secrets- A Consultation Paper” available at <https://searchworks.stanford.edu/view/3817364> [date of use 30 April 2017].

it is the typical basis for the claim for trade secret in the industry. Though regulation 12(9) provides that a claim of confidentiality of commercial or industrial information shall not be allowed to forestall the disclosure of information relating to emissions, it does not extend that rule to the protection where such claim will adversely affect the right of a person.

Furthermore, while the EU Directive 2016/943/EC<sup>1074</sup> permits competent judicial authorities locally to take specific measures to preserve the confidentiality of trade secrets in the course of legal proceedings,<sup>1075</sup> its article 5 contains provisions to preserve the exercise of human rights, in that claims pursuant to the Directive cannot be used to forestall the exercise of the right to freedom of expression and information, the disclosure of misconduct, wrongdoing or illegal activity provided the disclosure is in the public interest, and whistle blowers' activities.<sup>1076</sup>

#### *4.3.5 Assessment of the right to access to information: the UK*

A review of relevant legislation affecting access to information rights in relation to the regulation of hydraulic fracturing and environmental protection reflect a collection of the usual provisions seeking to encourage disclosure of information held by public authorities. Although there are statutory provisions protecting commercial confidential information of business enterprises, an express mandate to disclose information required by individuals to enforce rights is lacking.

While the EIR provides for a presumption that all information is subject to disclosure and that any exemption will be subject to the public interest test, regulation 12 of the EIR provides for circumstances in which public authorities may refuse disclosure. Therefore, the EIR thereby more or less sustains the FOIA position subjecting disclosure to absolute exemption or public interest exemption and permitting refusal

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<sup>1074</sup> EU Directive 2016/943/EC pertains to the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. EU Directive 2016/943/EC is discussed in para 3.2.2.2.5.

<sup>1075</sup> Article 9(2) of Directive 2016/943/EC.

<sup>1076</sup> Article 5 Directive 2016/943/EC.

on the basis of claims of trade secrets. The EIR however provides that no exemption shall be allowed to forestall disclosure of information relating to emissions.

The statutes considered make provisions for the process of securing disclosure in the custody of public authorities, but they fail to provide for the means of securing disclosure in the custody of private bodies, except when the latter are engaged in actions that could be regarded as public. Therefore, position of the individual seeking disclosure of information to enforce environmental rights may not necessarily be enhanced by the provisions of the statutes. It is however important to note that the public interest exemption in EU Directive 2016/943/EC is available to any person who may be claiming that a refusal to oblige his request for information is in the public interest notwithstanding that it relates to business information.<sup>1077</sup>

#### ***4.4 Domestic perspective: South Africa***

##### *4.4.1 Legal framework*

With the provision in section 32 of the Constitution,<sup>1078</sup> South Africa charted a new path in human rights discourse by linking an autonomous access to information right to the exercise or protection of other rights, compared to the recognition of access to information merely as a qualification of the right to freedom of expression or an adjunct thereto.<sup>1079</sup> The details of the procedure for the enforcement of access to information rights are hardly found in constitutions, hence an appropriate legislation for that purpose had to be enacted. This is in line with the requirement in section 32(2) of the Constitution imposing an obligation on the legislature to enact an appropriate law.<sup>1080</sup> That legislation is the *Promotion of Access to Information Act*<sup>1081</sup>

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<sup>1077</sup> See article 5 Directive 2016/943/EC.

<sup>1078</sup> The full provision of section 32 of the Constitution is cited in para 1.3.3.1.

<sup>1079</sup> See for example article 19 of the ICCPR, article 19 of the UDHR, and article 13 of the American Convention. See also chapter 3 for a discussion of the international perspectives.

<sup>1080</sup> Certification of the Constitution of the Republic of South Africa 1996-1997 (2) SA 97 (CC) at para 86.

<sup>1081</sup> Act 2 of 2000.

(hereafter "PAIA") which became effective on 9 March 2001. PAIA is discussed in the following paragraph.

#### 4.4.1.1 Promotion of Access to Information Act

In creating the right of access to information, section 32 of the Constitution distinguishes between two classes of bodies that may hold information, namely information held by the state, and information held by another person, though in respect of the latter, the right of access is qualified by the proviso that the access sought must be for the exercise or protection of any rights. It is therefore not a surprise that PAIA also adopts this classification, providing for access to records of public bodies in part 2, and access to records of private bodies in part 3. Accordingly, if the request of the applicants is to be resolved by invoking PAIA, there is a necessity to establish whether the requestees are private bodies or public bodies in terms of the Act.<sup>1082</sup> Meanwhile, the general provisions of PAIA are discussed in the following paragraphs.

##### 4.4.1.1.1 Public bodies to compile and publish manuals

Section 14 of PAIA requires the information officer (IO) to compile and make available a manual in at least three official languages containing detailed information about the public body, including the street and electronic mail addresses of the IO and the deputy information officer (DIO). Other information to be included in the manual include a description of the body's structure and functions, description of the subjects on which the body holds information, the process for requesting information, available records for which the public do not have to request access, and a description of all remedies available in respect of an act or failure to act by the body. The public body is required to update and publish the manual at least on a yearly basis.<sup>1083</sup>

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<sup>1082</sup> See *The Institute of Democracy in South Africa and Others v The African National Congress and Others* Case 2005 (5) SA 39 (C).

<sup>1083</sup> The *Protection of Personal Information Act* 4 of 2013 (hereafter "POPI") which, is to become operative by proclamation, amends subsection (3) of section 14, regarding the publication of a



#### 4.4.1.1.2 Public bodies to make voluntary disclosure of certain records

Section 15 of PAIA requires public bodies to submit to the Minister<sup>1084</sup> at least once a year, description categories of records that are available to the public without their having to make a request.<sup>1085</sup> The Minister is required to publish the information by notice in the *Gazette*. If any fee is payable to access this information, it is to be limited to the cost of reproduction.

#### 4.4.1.1.3 Manner of access

The process for requesting and granting access to information from public bodies is contained in sections 17 to 32 of PAIA. A request for information is to be made in the prescribed form addressed to the IO of the public body.<sup>1086</sup> The form must be designed to ensure that the requester provide sufficient particulars to enable an official of the public body to identify the records requested, the requester, and whether the record is preferred in a particular language. If the requester is illiterate or disabled, the request may be made orally.<sup>1087</sup> However, while PAIA allows the submission of oral requests, experience does not appear to show that this has been of help to vulnerable requesters. The report of a survey showed that the process was difficult to implement and that 70% of the oral requests fell in the “unable to

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manual. It provides that “the manual referred to subsection (1), or the update version thereof as referred to in subsection (2) must be made available-

- i. On the web site, if any, of the public body;
- ii. At the head office of the public body for public inspection during normal business hours;
- iii. To any person upon request and upon the payment of a reasonable amount; and
- vi. To the information regulator upon request.”

<sup>1084</sup> ‘Minister’ is defined in section 1 of PAIA as “the Cabinet member responsible for the administration of justice.”

<sup>1085</sup> The Centre for Environmental Rights reported that there appears to be a secrecy surrounding some activities of the government and some of its agencies in relation to hydraulic fracturing. Examples cited includes the secrecy surrounding the identity of members of the expert task team, and the inaction of the Petroleum Agency of South Africa regarding the need for urgent consultation with disadvantaged and vulnerable communities in the Karoo, consequent upon findings that consultation had not taken place. See Centre for Environmental Rights “Position statement of environmental rights in decisions around fracking for shale gas” available at <https://cer.org.za/news/position-statement-on-protection-of-environmental-rights-in-decisions-around-fracking-for-shale-gas> [date of use 15 August 2018].

<sup>1086</sup> Section 18(1) of PAIA.

<sup>1087</sup> Section 18(2) and (3) of PAIA.

submit” outcome.<sup>1088</sup> Section 19 imposes an obligation on the IO to assist requesters at no cost to the requester to complete the PAIA form, and to provide relevant information where possible or to transfer the request to a more appropriate body within 14 days.

Section 22 of PAIA provides that the IO of a public body to whom a request for information is made may require the requester by notice to pay the prescribed request fee, stating the amount of deposit payable, and advising the requester of the right to appeal the payment of a request fee. It is noteworthy that certain categories of persons are exempted from the payment of the fee required under section 22.<sup>1089</sup> For records that cannot be found or that do not exist, the IO must submit a detailed affidavit to the requester giving a full account of the efforts made to find the record, in which case the failure to find the record will be regarded as a decision to refuse access to the record.<sup>1090</sup>

#### 4.4.1.1.4 Decision on request

Section 25 of PAIA requires that the IO to whom a request for information is made or transferred shall as soon as reasonably possible, but not later than thirty days<sup>1091</sup> after receiving the request, decide whether to grant the request, and notify the requester of the decision. If the request is granted the IO shall give notice of that decision to the requester with information on the access fee payable (if any) and advising the requester of the options of appeal open to him.

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<sup>1088</sup> See Centre for Environmental Rights 2012 “Position Statement on Protection of Environmental Rights Around Fracking for Shale Gas” available at <https://cer.org.za/news/position-statement-on-protection-of-environmental-rights-in-decisions-around-fracking-for-shale-gas> [date of use 16 February 2018]. See also Open Society Justice Initiative *Justice Initiative Access to Information Monitoring Tool: Report from a Five-Country Pilot Study* 16.

<sup>1089</sup> A single person whose annual income does not exceed R14,712.00 and married persons whose annual income does not exceed R27,192.00 are exempted from the section 22 PAIA fee. See *Promotion of Access to Information Act, 2000 Exemptions and Determinations for Purposes of Section 22(6) of the Act* GN R991 2005. See also Cronje and Laubscher 2016 *PAIA: What You Need to Know* 51.

<sup>1090</sup> Section 23 of PAIA.

<sup>1091</sup> Section 26 permits the IO to extend the period within which to revert to the requester by not more than thirty additional days, informing him of the decision to extend, giving adequate reasons for the extension and advising the requester of the options of appeal open to him.

If the IO fails to provide the information within the prescribed time, it will be regarded that the IO refused the request.<sup>1092</sup> However, a provision that deems the silence of the IO as a refusal may encourage an apathetic IO not to act, waiting for the expiration of the time allowed. It is probably more desirable to require that a notice of refusal be given to the requester, stating the reason(s) for refusal, based on the content and substance of the request, with reference to the provision of the law on which refusal is based, and information advising the requester of the process for a review of the decision.<sup>1093</sup>

#### 4.4.1.2 PAIA in relation to the Constitution and other legislation

There is no controversy that section 32(1) of the Constitution creates the right of access to information, and indeed to the extent of the application of that right as a constitutional ground for securing access to information that is held by any person or entity for the exercise or protection of any rights. This makes it a potential tool for the realisation of environmental rights because it is not attached to any specific thing or circumstance.<sup>1094</sup> The right of access to information is therefore a general right operating in the form of an enabling tool for the pursuit of social, political and economic privileges from the state.<sup>1095</sup> PAIA was enacted to elaborate the characteristics of the right of access to information, making it effective in a practical manner.<sup>1096</sup>

The Constitution creates the access to information right, while PAIA as legislation prescribes the process to guide its enforcement. Section 32 of the Constitution potentially performs a dual role, first to inform the interpretation of PAIA, and secondly to "serve as a basis for a possible challenge to the constitutionality of PAIA

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<sup>1092</sup> Section 27 of PAIA.

<sup>1093</sup> This is the model recommended in Article 15 of the Model Law. See para 3.2.2.3.2.

<sup>1094</sup> Calland "The right of access to information: The state of the art and the emerging theory of change" in Diallo and Calland *Access to Information in Africa: Law, Culture and Practice* 18.

<sup>1095</sup> Adeleke "Constitutional domestication of the right of access to information in Africa: Retrospect and prospects" in Diallo and Calland *Access to Information in Africa: Law, Culture and Practice* 84.

<sup>1096</sup> De Vos and Freedman (eds) *South African Constitutional Law in Context* 622.

for being either under-inclusive or over-restrictive.”<sup>1097</sup> Accordingly, any approach permitting a direct enforcement of the right of access to information via section 32(1) is likely to result in the development of “two parallel systems”<sup>1098</sup> that may likely create uncertainty. The legislature is by far better positioned to lay down the practical requirements and procedure for the enforcement of the right of access to information, and to set the criteria for its limits.<sup>1099</sup> The absence of PAIA would have meant that the courts have to provide details for an enforcement procedure, which the courts are not best positioned to do.<sup>1100</sup> Therefore, in the interpretation of PAIA, the courts must consider its provisions broadly and purposively promoting “the values that underlie an open and democratic society ...”<sup>1101</sup> while also promoting “the spirit, purport and objects of the Bill of Rights.”<sup>1102</sup> In *The Institute of Democracy in South Africa and Others v The African National Congress and Others*,<sup>1103</sup> the Court pointed out that PAIA is the “principal legal instrument defining and delineating the scope and content of the right of access to information, establishing the mechanisms and procedures for its enforcement.”<sup>1104</sup>

On the relationship between the PAIA and other legislation on access to information, PAIA provides for its supremacy over other legislation regarding the prohibition or restriction of the disclosure of a record of private or public body, and over any legislation that is materially inconsistent with an object or provision of PAIA.<sup>1105</sup> This makes sense, as it would have been difficult if people who require information had to examine different statutes to find different requirements applicable in each situation. In *Clutchco (Pty) Ltd v Andrew Christopher Davis*,<sup>1106</sup> the SCA refused to

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<sup>1097</sup> See *The Institute of Democracy in South Africa and Others v The African National Congress and Others* Case 2005 (5) SA 39 at para 32.

<sup>1098</sup> See *Naptosa and Others v Minister of Education, Western Cape and Others* 2001 (2) SA 112 (C) at 122C-123J.

<sup>1099</sup> See *Certification of the Constitution of the Republic of South Africa 1996-1997* (2) SA 97 (CC) at para 86.

<sup>1100</sup> The values required to guide the interpretation of constitutional provisions in terms of access to information are reflected in the objects of PAIA as stated in its section 9. See also *My Vote Counts v Speaker of the National Assembly and Others* 2015 ZACC 31 at para 179.

<sup>1101</sup> Section 39(1)(a) of the Constitution.

<sup>1102</sup> Section 39(2) of the Constitution.

<sup>1103</sup> 2005 (5) SA 39 (C).

<sup>1104</sup> 2005 (5) SA 39 (C) at para 31.

<sup>1105</sup> Section 5, PAIA.

<sup>1106</sup> 2005 (3) SA 486 (SCA) at para 11.

allow the provisions of the *Companies Act 1973*<sup>1107</sup> to forestall the disclosure of information, holding that PAIA was supreme to other legislation in terms of disclosure of information, and that in accordance with the Constitution.<sup>1108</sup>

#### 4.4.1.3 The scope of PAIA

The objects of PAIA are clear, as stated in its section 9, including:

- a) To give effect to the constitutional right of access to-
  - i. Any information held by the State; and
  - ii. Any information that is held by another person and that is required for the exercise or protection of any rights.

Section 9(a) of PAIA therefore raises two potential issues. First, what constitutes 'information' as referenced in the subsection, and secondly, should there be a limitation applicable to access, considering that the subsection refers to access to "any information"?

##### 4.4.1.3.1 What constitutes 'information'?

Neither the Constitution nor PAIA defines information, but curiously, sections 3 and 12 of PAIA provide that the Act applies to 'records' of both public and private bodies regardless of when the record came into existence; and provides that its provisions will not apply to certain public bodies or officials thereof, respectively.<sup>1109</sup> The

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<sup>1107</sup> Act No 61 of 1973.

<sup>1108</sup> The inability of the applicant in *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T) to "lay a proper foundation for why that document is reasonably "required" for the exercise of his or her rights" forestalled the order to grant access to information. Unlike in the *Clutchco case*, the court refused to allow the provisions of PAIA to facilitate the disclosure of information sought by the respondent on the argument that the provisions of the *Companies Act* and the common law for the protection of shareholders are not to be lightly regarded. Hence, PAIA could not have intended that the books of a company be thrown open on the allegation of minor errors or irregularity. The court held that a "far more substantial foundation would be required" to justify a claim that the record was required for the exercise or protection of the right asserted by the respondent (paras 17-19).

<sup>1109</sup> By virtue of section 12 of PAIA, the Act does not apply to a record of-

- (a) of the Cabinet and its committees;
- (b) relating to the judicial functions-
  - (i) a court referred to in section 166 of the Constitution;
  - (ii) a Special Tribunal established in terms of section 2 of the *Special Investigating Units and Special Tribunals Act 1996* (Act 74 of 1996); or
- (c) of an individual member of Parliament or of a provincial legislature in that capacity; or
- (d) relating to decision referred to in paragraph (gg) of the definition of 'administrative action' in section 1 of the *Promotion of Administrative Justice Act 2000* (Act 3 of 2000), regarding the

variation introduced in section 3 of PAIA raises a fundamental question as to why PAIA focuses on records instead of information *per se* considering that section 32 of the Constitution and indeed, the title of the legislation addresses access to information. If, as section 3 of PAIA indicates, the Act is concerned only with records, then the focus of PAIA may appear to be narrower than that envisaged in the scope of section 32 of the Constitution, which creates “the right of access to any information.”

PAIA defines ‘record’ in relation to a public or private body as any recorded information:

- a) “Regardless of form or medium;
- b) In the possession or under the control of that public or private body; respectively;
- c) Whether or not it was created by that public or private body, respectively.”<sup>1110</sup>

If ‘record’ is contemplated as “any recorded information - regardless of form or medium...” it may not be possible to gain access to any information, which is not in the form of a record, or in the alternative, there may be no basis to compel a public officer to put information in a recorded form to bring that information within the purview of PAIA.<sup>1111</sup> This may create problems for access to environmental information, which may not necessarily be available in recorded form. In *Mogane v Konrad Rosen NO and Another*,<sup>1112</sup> the court suggested that the limit of the scope of access in PAIA to ‘records’ instead of ‘information’ may be due to the fact that information that is not recorded would probably require some form of explanation in some cases, and its inclusion in PAIA would have made its operation unworkable.<sup>1113</sup> Fortunately, the definition of “record” in section 1 of PAIA which is

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nomination, selection or appointment of a judicial officer or any other person by the Judicial Service Commission in terms of any law.

<sup>1110</sup> Section 1 of PAIA.

<sup>1111</sup> Van Heerden *et al* 2014 *Speculum Juris* 34.

<sup>1112</sup> 2015 ZAGPJHC 38.

<sup>1113</sup> 2015 ZAGPJHC 38 at para 17. Environmental information will ordinarily include materials on the state of elements of the environment, such as air and atmosphere, water, soil, and land; factors such as substances, energy, noise and radiation; as well as state of human health and safety to mention a few, which will typically be included in EIAs and reports. (see Article 2(3) of the Aarhus Convention). Advancement in technology also makes it necessary that definition of information should cover the existence of other means in which information may be present.

extended to cover any “recorded information- regardless of form or medium” should effectively address any new form of record that may come into existence.<sup>1114</sup>

#### 4.4.1.3.2 Limitation to access to information

Should there be a limitation applicable to access to information under PAIA considering that section 9(a) makes provision for the objects of the Act, which includes giving effect to the constitutional right of access to ‘any information?’ ‘Any information’ may imply ‘whatever’ or ‘whichever’ information.<sup>1115</sup> Indeed, section 9(a)(i) refers to giving effect to the constitutional right of access to “any information held by the State,” and the provision is without qualification, compared to section 9(a)(ii) which qualifies the access to information in private custody by the requirement that such information must be “required for the exercise or protection of any rights.” Section 11(1) of PAIA also imposes a mandatory obligation on public bodies to give access to its records if the requester has complied with all the procedural requirements in PAIA.

Correspondingly, it could be argued that there is a presumption that any information in possession of the state is subject to access. In *Centre for Social Accountability v The Secretary of Parliament and Others*,<sup>1116</sup> the court held that grant of access to state information is the rule, and the refusal is the exception. Where an IO is inclined to refuse to grant access, he or she has to justify the refusal, “adequate reasons for

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<sup>1114</sup> The *Protection of Personal Information Act* No 4 of 2013 (hereafter “POPI”), which is to become operative upon its proclamation extends the scope of “record” to any recorded information regardless of form or medium including-

- i. Writing on any material;
- ii. Information produced, recorded or stored by means of any tape-recorder, computer equipment, whether hardware or software or both, or other device, and any material subsequently derived from information so produced, recorded or stored;
- iii. Label, marking or other writing that identifies or describes anything of which it forms part, or to which it is attached by any means; and
- iv. Book, map, plan, graph or drawing;
- v. Photograph, film, negative, tape or other device in which one or more visual images are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced.

<sup>1115</sup> The meaning of ‘any’ in a given statute depends upon the context and the subject matter of the statute, but generally, it is often synonymous with ‘either,’ or ‘every,’ or ‘all.’ See Garner (ed) *Black’s Law Dictionary* 9<sup>th</sup>ed 94. See also Hornby (ed) *Oxford Advanced Learner’s Dictionary of Current English* 55.

<sup>1116</sup> 2011 (5) SA 279 (ECG).

the refusal must be stated with a reference to the provisions of the Act that are relied upon to refuse the request."<sup>1117</sup>

Section 9(b) of PAIA provides for acceptable limitations to the right of access to information, indicating that effect is to be given to the right-

- 1) Subject to justifiable limitations, including but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and
- 2) In a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution.

The right of access to information is a constitutional right in the Bill of Rights hence its interpretation is subject to the requirement of section 39(2) of the Constitution, which requires that a court, tribunal or forum engaged in the interpretation "must promote the spirit, purport and objects of the Bill of Rights." The "spirit, purport and object" includes the requirement that "the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36,<sup>1118</sup> or elsewhere in the Bill of Rights,"<sup>1119</sup> and that "no law may limit any right entrenched in the Bill of Rights."<sup>1120</sup> Accordingly, the provisions of PAIA, which limits the right of access to information, can only be valid to the extent that they passed the test laid down in section 36 or any other provision elsewhere in the Bill of Rights.<sup>1121</sup>

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<sup>1117</sup> 2011 (5) SA 279 (ECG) at para 59.

<sup>1118</sup> Section 36 of the Constitution applies to the right of access to information to the extent that the limitation in question is "in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- a) The nature of the right;
- b) The importance of the purpose of the limitation;
- c) The nature and extent of the limitation;
- d) The relation between the limitation and its purpose; and
- e) Less restrictive means to achieve the purpose."

<sup>1119</sup> Section 7(3) of the Constitution.

<sup>1120</sup> Section 36(2) of the Constitution.

<sup>1121</sup> See *Van Huysteen and Others v Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 283 (C)- The right of access to the information of which section 23 (IC) is plainly not absolute and unqualified. Apart from potential limitations of the right which might be permissible in terms of section 33(1) (IC), s 23 contains its own qualification in that the information requested must "required for the exercise or protection of any of the rights of the person concerned; ... "required" must be understood as meaning "reasonably required."



In relation to hydraulic fracturing, presumption that access to information held by the state will be granted subject to section 36 of the Constitution is beneficial to potential persons who may be seeking information in the custody of a public body. The basic rationale for regulating access is simply to ensure compliance with the law though ideally, a public body should provide access to information. However, where access is denied, it can only be on the grounds for refusal stated in chapter 4 of each of parts 2 and 3 of PAIA, which in any event, is subject to consideration by the courts if the requester is not satisfied with a refusal.<sup>1122</sup>

#### 4.4.1.4 Access to information held by public bodies

PAIA is reflective of the UNDP's recommendation that the 'principle of maximum disclosure,' which expounds that all documents held by a public body should be open to the public should characterise legislation addressing the right to access to information.<sup>1123</sup> Section 11 of PAIA provides that access "must" be granted irrespective of "any reasons the requester gives for requesting access; or the IO's belief as to what the requester's reasons are for requesting."<sup>1124</sup> In *Centre for Social Accountability v The Secretary of Parliament and Others*,<sup>1125</sup> the court held that the right of access to information held by the state and its agencies is unqualified, while the right to information held by private bodies is qualified by the condition that the information must be required for the exercise or the protection of a right. Therefore, granting of access to state information is the rule, and the refusal is the exception.<sup>1126</sup> Furthermore, though compliance with the required procedure is important, it would appear that the courts are disposed to rule that the exercise of the discretionary power to refuse access should be carried out in a manner that

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<sup>1122</sup> Grounds for the refusal of access to information are discussed in paras 4.4.1.4.1 and 4.4.1.5.1.

<sup>1123</sup> United Nations Development Programme *Right to Information: Practical Guidance Note 5*.

<sup>1124</sup> Section 11(3) of PAIA.

<sup>1125</sup> 2011 (5) SA 279 (ECG).

<sup>1126</sup> It would however appear that there are challenges facing public bodies in complying with the requirements relating to disclosure of information. See for example, Centre for Environmental Rights "Shadow Report 2016: Access to Information Network" available at <https://cer.org.za/wp-content/uploads/2017/02/CER-Shadow-Report-Final.pdf> [date of use 5 November 2018]. See also Centre for Environmental Rights "Full Disclosure – The Truth about Mining Rehabilitation in South Africa" available at <https://fulldisclosure.cer.org.za> [date of use 5 November 2018].

favours disclosure, which is the underlying substance of PAIA.<sup>1127</sup> Thus, the fact that the requisite forms were not filled out correctly should not prejudice applicants and deprive them of standing<sup>1128</sup> to request for information, as the defect is purely a technical one.<sup>1129</sup>

There is however no single test of universal application in the determination of whether or not a function is of a public nature "given the diverse nature of governmental functions and the variety of means by which these functions are discharged today."<sup>1130</sup> Powers or functions that are 'public' in nature, in the ordinary meaning of the word, "contemplates that they pertain 'to the people as a whole' or that they are exercised or performed 'on behalf of the community as a whole' (or at least a group or class of the public as a whole), which is pre-eminently the terrain of government."<sup>1131</sup> Sometimes the determination of a public body may not be that straightforward. Section 8 of PAIA envisages situations in which a body "may in one instance be a public body and in another instance be a private body, depending on whether that record relates to the exercise of a power or performance of a function as a public body or as a private body." In that case, it is important to establish whether the access sought is in relation to the records of a private or public body, as the process in either case differs.

In *M & G Media and Others v 2010 FIFA World Cup Committee South Africa Ltd and Another*,<sup>1132</sup> the court pointed out that the critical enquiry under PAIA is an enquiry into the nature of an 'activity',<sup>1133</sup> rather than into the nature of a 'decision' as

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<sup>1127</sup> See *M & G Media and Others v 2010 FIFA World Cup Committee South Africa Ltd v Another* 2011 (5) SA 163 (GSJ) at para 397.

<sup>1128</sup> Section 18(1) of PAIA requires that "a request for access must be made in the prescribed form to the information officer of the public body concerned at his or her address or fax number or electronic mail address".

<sup>1129</sup> *M & G Media and Others v 2010 FIFA World Cup Committee South Africa Ltd v Another* 2011 (5) SA 163 (GSJ) at para 30.

<sup>1130</sup> *Calibre Clinical Consultants (Pty) Ltd and Another v The National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA) at para 30.

<sup>1131</sup> *Calibre Clinical Consultants (Pty) Ltd and Another v The National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA) at para 39.

<sup>1132</sup> 2011 (5) SA 163 (GSJ) at para 190.

<sup>1133</sup> The exercise of a public power or the performance of a public function.

required in PAJA cases.<sup>1134</sup> In that case, request for access to information was refused on the basis *inter alia*, that PAIA does not apply to the Local Organising Committee for the FIFA World Cup (LOC), and that disclosure would cause likely harm to the commercial interests of the LOC. The court found it necessary to interpret the phrases 'performing a public function' and 'the exercise of a public power' in sub-paragraph (b)(iii) in the definition of public body in section 1 of PAIA. The court referred to the minority opinion of Langa CJ in *Chirwa v Transnet Ltd and Others*,<sup>1135</sup> and expressed the opinion that:

The exercise of a 'public power' would ... mean: the exercise of a power that concerns all members of the community; the exercise of a power that relates to or involves government and governmental agencies; and, the exercise of a power belonging to the community as a whole and administered through its representatives in government.<sup>1136</sup> ... The performance of a 'public function' would on the same method, mean: the performance of a function that concerns all members of the community; the performance of a function that relates to or involves government or governmental agencies; and, the performance of a function belonging to the community as a whole and administered through its representatives in government.<sup>1137</sup>

The court thereupon held that the LOC's disbursement of public funds constituted the performance of a public function or the exercise of a public power; and given that the fund being disbursed is from the public purse, the LOC is a public body for that purpose.<sup>1138</sup>

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<sup>1134</sup> In *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting and Others* 1996 (3) SA 800 (T), the court restricted the application of the term 'organ of state' to "... institutions which are an intrinsic part of government... and those institutions outside the public service which are controlled by the State; i.e. where the majority of the members of the controlling body are appointed by the State or where the functions of that body and their exercise is prescribed by the State to such an extent that it is effectively in control. In short, the test is whether or not the State is in control."

<sup>1135</sup> 2008 (4) SA 367 (CC) at para 186, where Langa CJ pointed out that "... determining whether a power or function is 'public' is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors, including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context."

<sup>1136</sup> *M & G Media and Others v 2010 FIFA World Cup Committee South Africa Ltd v Another* 2011 (5) SA 163 (GSJ) at para 221.

<sup>1137</sup> *M & G Media and Others v 2010 FIFA World Cup Committee South Africa Ltd v Another* 2011 (5) SA 163 (GSJ) at para 222.

<sup>1138</sup> The South African government has bound the country in obligations to FIFA. The use of LOC as a separate company is an organisational convenience to discharge the obligations of SAFA, and perform, the Republic. Total government budget was R33.9 billion, though about R2.961 billion

Some private institutions or companies have major impact on socio-economic development. The companies engaged in discussions with the government of South Africa on hydraulic fracturing in South Africa are in that category,<sup>1139</sup> and they may impact socio-economic development of the country. The government plans to take some interest in the companies granted the right to exploit shale gas.<sup>1140</sup> Furthermore, production of energy [the business of hydraulic fracturing operators] is a major utility that would impact the people and the economy of the country significantly.<sup>1141</sup> PAIA should therefore apply to activities beyond those undertaken by purely state bodies to those functions performed on behalf of the state by private or voluntary sector bodies, acting either under statute or contract.<sup>1142</sup>

The position is in line with the observation of the Supreme Court of Appeal in *Calibre Clinical Consultants (Pty) Ltd and Another v The National Bargaining Council for the Road Freight Industry and Another*,<sup>1143</sup> that where an enterprise constitutes “a privatisation of the business of government itself,” or it is publicly funded, or there is “potentially a governmental interest in the decision-making power in question,” or the body concerned is “taking the place of central government or local authorities,” and so on, there is justification for regarding the exercise of powers as public in nature. Activities carried out under circumstances as enumerated in the case should bring entities involved under the purview of disclosure and access requirements provided for public bodies.<sup>1144</sup> Such is the nature of business enterprises engaged in hydraulic fracturing, and there is no reason to think it would

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of that budget will be funded through private source. Various government guarantees to FIFA underscore its commitment to the success of the 2010 World Cup.

<sup>1139</sup> See PN 87 in PG 2195 of 11 July 2018, and PN 121 in PG 4080 of 11 July 2018.

<sup>1140</sup> See section 59 of *Mineral and Petroleum Resources Development Amendment Bill 2013* GN 36523 of 31 May 2013, amending section 84 of MPRDA to give the state “a right to a free carried interest in all new production rights” over petroleum resources.

<sup>1141</sup> See para 2.3.1 on the benefits of hydraulic fracturing.

<sup>1142</sup> See the recommendation in the Seventh Report from the Joint Committee on Human Rights HL/HC 382 of 2003-2004, at para 4.

<sup>1143</sup> 2010 5 SA 457 (SCA) at para 38.

<sup>1144</sup> Memza “An analysis of weaknesses in access to information laws in SADC and in developing countries” – A report prepared for the Freedom of Expression Institute, available at [www.fx.org.za/PDFs/ATIP/ATI%20weaknesses%20analysis%20sadc1.pdf](http://www.fx.org.za/PDFs/ATIP/ATI%20weaknesses%20analysis%20sadc1.pdf) [date of use 18 May 2017]. See also Russel 2011 *Int J of Law in Development in Context* 23.

be any different in South Africa.<sup>1145</sup> Incidentally, the private sector exists among other things to protect private commercial interests and its affairs are expectedly treated with secrecy as its direct concern is not for the public but the parochial benefits of its stakeholders. This necessitates that access to information held by such private entities should not be ring-fenced against disclosure. The next paragraph will discuss grounds for refusal of access to information held by public bodies.

#### 4.4.1.4.1 Grounds for refusal of access to public records

Grounds for refusal of access to public records are classified into two categories by section 33(1) of PAIA. The first category is mandatory refusal under section 33(1)(a) of PAIA, in which a public body “must refuse a request for access” to any record contemplated by PAIA.<sup>1146</sup> The second category refers to records in terms of section 33(1)(b) of PAIA in which the public body may refuse access to a record, unless the provisions of section 46 apply.<sup>1147</sup>

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<sup>1145</sup> The Minister of Mineral Resources has issued notices of pending administrative decision in terms of sections 3(2)(b) and 4(3) of the *Promotion of Administrative Justice Act 2000* regarding applications for exploration rights to explore for natural (shale) gas in the Western, Eastern and Northern Cape Provinces. The applicants are Shell Exploration South Africa BV, Bundu Gas and Oil Exploration (Pty) Ltd, and Falcon Oil and Gas Ltd. See PN 87 in PG 2195 of 11 July 2018, and PN 121 in PG 4080 of 11 July 2018.

<sup>1146</sup>

<b>Sections-PAIA</b>	<b>PAIA grounds for mandatory refusal</b>
34(1)	Mandatory protection of privacy of third party who is a natural person.
35(1)	Mandatory protection of certain records of South African Revenue Services.
36(1)	Mandatory protection of commercial information of third-party including trade secret, financial, commercial, scientific or technical information, which may put that third party at a disadvantage in contractual or other negotiations; or to prejudice that other party in commercial competition.
37(1)(a)	Mandatory protection of certain confidential information in which disclosure would constitute a breach of a duty of confidence to a third party in terms of an agreement.
38(a)	Mandatory protection of safety of individuals, and protection of property.
39(1)(a)	Mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings.
40	Mandatory protection of records privileged from production in legal proceedings.
43(1)	Mandatory protection of research information of third party, if that record contains information, which if disclosed is likely to expose the third party to serious disadvantage.

<sup>1147</sup>

With respect to the mandatory refusal of request for access to records under section 33(1)(a) of PAIA, the operative phrase is “must refuse a request for access.” Therefore, in any of the cited situations the IO must refuse to grant access. The refusal to grant access in such cases has a justification in that it is necessary to balance the interests and the right of a requester to information against governmental and private concerns for maintaining confidentiality of some information in some cases as stipulated in PAIA.<sup>1148</sup> However, some of the records to which access must be denied include those likely to arise in hydraulic fracturing, especially in relation to mandatory protection of commercial information of third parties including trade secrets, financial, commercial, scientific or technical

<b>Sections-PAIA</b>	<b>PAIA grounds for discretionary refusal in relation to information of third parties, state security, economic and commercial interests of the state and public bodies, and of foreign governments</b>
37(1)(b)	Discretionary protection of confidential information supplied by a third party the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and if it is in the public interest that similar information, or information from the same source, should continue to be supplied.
41(1)(a) or (b)	Discretionary refusal of information if disclosure could reasonably be expected to cause prejudice to the defence, security, or international relations of the Republic; or would reveal information supplied in confidence on behalf of another state or international organisation, or supplied by or on behalf of the Republic to another state or international organization in terms of an agreement contemplated by section 231 of the Constitution, or required to be held in confidence in terms of section 231 or 232 of the Constitution.
42(1) or (3)	Discretionary refusal of information if disclosure is likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively on the interests of the Republic; or if the information contains trade secrets of the state or a public body; or contains financial commercial, scientific or technical information, other than trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of the state or a public body.
43(2)	Discretionary refusal of information if the record contains information about research being or to be carried out by or on behalf of a public body if disclosure is likely to expose the public body or the person carrying on the research or the subject matter of the research to serious disadvantage.
44(1) or (2)	Discretionary refusal of information if the record requested contains information relating to the operations of public bodies.
45	Discretionary refusal if the request for access is manifestly frivolous; or vexatious; or the work involved in processing the request would substantially and unreasonably divert the resources of the Republic.

<sup>1148</sup> See *The Trustees for the Time Being of the Biowatch Trust v The Registrar: Genetic Resources* 2005 (4) SA 111 at para 39.

information,<sup>1149</sup> and mandatory protection of research information of third party.<sup>1150</sup> Consequently, in respect of this category of records and any other cited in subsection 33(1)(a) of PAIA, which adversely impacts the interest or right of any person as a result of the operations of hydraulic fracturing, a request for access may not be granted by the state. Nothing however forestalls a request being made to a company direct.

It would appear that the legislature is mindful of the spirit underlying the constitutional provision on access to information, especially if the request for access to a record containing information is required in terms of section 32(2) of the Constitution to exercise or protect a right. Notwithstanding that section 33(1)(a) of PAIA creates mandatory grounds for refusing access to records of public bodies, section 46 of PAIA more or less overrides that mandatory obligation to refuse access. Section 46 of PAIA imposes a mandatory obligation based on public interest, requiring that the IO of a public body must grant a request for access to a record of the body contemplated in certain circumstances,<sup>1151</sup> if:

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<sup>1149</sup> Section 36(1) of PAIA.

<sup>1150</sup> Section 43(1) of PAIA.

<sup>1151</sup>

<b>Sections-PAIA</b>	<b>PAIA grounds for mandatory refusal in relation to information of individuals, third parties, state security, economic and commercial interests of the state and public bodies.</b>
34(1)	Section 34(1) protects the right to privacy under section 14 of the Constitution, and to some extent, the right to dignity under section 10. Section 34(1) of PAIA must therefore be interpreted in the light of those constitutional provisions bearing in mind the operation of limitation of rights clause in section 36 of the Constitution. Request for access contemplated under the section must ordinarily be refused, unless the provision of section 46 applies. Section 34(1) of PAIA must be interpreted taking into account, the provision of section 1 PAIA on the definition of "personal information." See Cronje and Laubscher 2016 <i>PAIA: What You Need to Know</i> 64. See also <i>Centre for Social Accountability v Secretary of Parliament and Others</i> 2011 (5) SA 279 (ECG) at para 61, where the court gave an opinion on the process for considering section 34(1) of PAIA.
36(1)	Mandatory protection of commercial information of third party.
37(1)(a) or (b)	Mandatory protection of certain confidential information, and protection of certain other confidential information of third party.
38(a) or (b)	Mandatory protection of safety of individuals, and protection of property.
40	Mandatory protection of records privileged from production in legal proceedings.

- a) "the disclosure of the record would reveal evidence of-
  - i. a substantial contravention of, or failure to comply with the law; or
  - ii. an imminent and serious public safety or environmental risk; and
- b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."

The requirement for mandatory disclosure in the public interest applies to the commercial information of third a party<sup>1152</sup> and to certain other confidential information of a third party.<sup>1153</sup> It is not denied that a company has a right to confidentiality in respect of sensitive and commercial information,<sup>1154</sup> but when the private interest of the owner of the information has the potential to prejudice public interest or violate human right,<sup>1155</sup> recourse could be made to the court to balance the conflicting interests.<sup>1156</sup> In any event, the court is an independent arbiter in the dispute between the parties, and should, in the interest of justice be in a position to test the argument for non-disclosure and to lay a proper basis to refuse or grant access to the record under consideration.<sup>1157</sup> Where a litigant claims that disclosure of certain information is essential for the exercise or protection of a right and another party claims that the disclosure of the same information will prejudice his right or his obligations to another person or the society in general, the court has a duty to balance the conflicting interests in a manner which enhances the interest of

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41(1)(a) or b	Defence, security and international relations of the Republic.
42(1) or (3)	Economic interests or financial welfare of the Republic and commercial activities of public bodies.
43(1) or (2)	Mandatory protection of research information of third party, and protection of research information of public body.
44(1) or (2)	Operations of public bodies.
45	Manifestly frivolous or vexatious requests, or substantial and unreasonable diversion of resources.

<sup>1152</sup> Section 36(1) of PAIA.

<sup>1153</sup> Section 37(1)(a) or (b) of PAIA.

<sup>1154</sup> *Financial Mail (Pty) Ltd v Sage Holdings* 1993 (2) SA 451 (A).

<sup>1155</sup> See *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ).

<sup>1156</sup> In the event of conflict involving the right to privacy and public interest, "privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly. See *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC) at para 67.

<sup>1157</sup> See *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 ZACC 32 at para 14.



justice, ensuring both parties are treated fairly as the circumstances of the case would permit.<sup>1158</sup>

In *M Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Limited*,<sup>1159</sup> the respondents had earlier sought access to a report further to an investigation of maladministration concerns on the affairs of Nelson Mandela Bay Metropolitan Municipality, but the request was refused. The High Court granted access in the public interest pursuant to section 46 of PAIA, hence, this appeal.<sup>1160</sup> The SCA held that the effect of section 46 is to mandate disclosure upon the satisfaction of the two conditions stated therein, notwithstanding that a record may be legitimately withheld in terms of all the PAIA subsections stated in section 46. In that situation, disclosure is not optional or discretionary. There is an obligation to permit access to the record.<sup>1161</sup>

While PAIA does not define 'commercially confidential information,' the definition in section 1 of NEMA<sup>1162</sup> may provide a guide. Section 30(2) of MPRDA gives protection to third party information supplied in confidence by the owner in that information supplied under the cover of confidentiality may not be disclosed,<sup>1163</sup> section 30(4)(a) of MPRDA excludes liability on the part of the state or any of its agencies in the event of inadvertent or *bona fide* release of information submitted in confidence. It

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<sup>1158</sup> See *Crown Cork & Seal Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093 (W).

<sup>1159</sup> 2013 (3) SA 315 (SCA).

<sup>1160</sup> The appellant's contention was that the report in question was still subject to further consideration that may or may not result in the exercise of his powers to intervene in the affairs of the municipality in terms of section 139(1)(a) of the Constitution, which entitled him to withhold disclosure in terms of section 44(1)(a) and (b) of PAIA. The trial judge granted leave to appeal despite his ruling on the basis that there were no decided cases on the application of section 46 of PAIA, observing that the concept of disclosure in the public interest was very important, and that application of section 46 is likely to arise in other cases in future. The SCA decided to take the appeal despite its mootness (the requested documents have already been disclosed), because the case raises fundamental issues under the Constitution (see para 6). Furthermore, the court observed that it could hear the appeal on the ground in the interests of justice, citing several the Constitutional Court's decisions including *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 995 (CC) para 11; *MEC for Education, KwaZulu Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 32 and *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) para 32.

<sup>1161</sup> See *M Qoboshiyane and Others v Avusa Publishing Eastern Cape (Pty) Limited* 2012 ZASCA 166.

<sup>1162</sup> See para 4.4.2 for the definition of "commercially confidential information" in section 1 of NEMA.

<sup>1163</sup> Section 30 (3) of MPRDA.

can be argued that release of third-party confidential information requested in terms of PAIA to protect a constitutional right will be considered *bona fide*,<sup>1164</sup> and therefore constitute a basis for disclosure if necessary.<sup>1165</sup>

Regarding the discretionary refusal of a request for access to records under section 33(1)(b) of PAIA, the IO may or may not refuse the granting of access in the circumstances cited in the subsection. For example, a body invoking discretion on the ground that disclosure is “likely to cause harm” in terms of sections 42 and 68 of PAIA ought to show “based on real and substantial grounds, that there is a strong probability that a harmful consequence will occur.”<sup>1166</sup> The exercise of the discretion contemplated in section 33(1)(b) of PAIA is not without check. It is subject to the requirements of mandatory disclosure in the public interest in terms of section 46 of PAIA.

#### 4.4.1.5 Access to information held by private bodies<sup>1167</sup>

A person seeking to benefit from the right of access to records in the custody of a private body<sup>1168</sup> must show that the record is required for the purpose stated, which purpose must include the exercise or protection of a right.<sup>1169</sup> The onus will be

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<sup>1164</sup> Section 50 of PAIA.

<sup>1165</sup> The SCA held in *Clutchco (Pty) Ltd v Andrew Christopher Davis* 2005 (3) SA 486 (SCA) at para 11 that a critical issue relevant in compelling disclosure of information is the requirement of that information to enforce a right.

<sup>1166</sup> Currie and Klaaren *The Commentary on the Promotion of Access to Information Act* 103.

<sup>1167</sup> There are provisions in PAIA to generally facilitate access to information held by private bodies similar in substance to those discussed in para 4.4.1.1. Those general provisions make it easy for persons seeking information to follow the process provided in the Act, and for the body affected to comply with the requirements of the law. They include the requirement for the publication of a manual to guide the public in relation to the process of getting access to documents (section 51), form of request (section 53), fees payable (section 54), records that cannot be found or do not exist (section 55), decision on request and notice thereof (section 56) and deemed refusal of request (section 58).

<sup>1168</sup> The definition of “private body” in section 1 of PAIA appears to be focused on persons or entities that are engaged or formerly engaged in business enterprise, which presupposes that there is some relationship with third parties, which may give rise to some contention if not protected. There is therefore some justification for placing some restriction on access to records in possession of private bodies engaged in a business enterprise, subject to a requirement that the requester establish that the record is required to exercise or protect rights (see section 50 of PAIA). In that situation, there is a need for intervention to resolve the potential clash of interests that is likely to arise. In either case, the protection and exercise of the right of each party is no longer exclusive of the other.

<sup>1169</sup> Section 50(1)(a) of PAIA.

discharged upon proof that the required record “will be of assistance in the exercise or protection of the right.”<sup>1170</sup> In *Clutchco (Pty) Ltd v Andrew Christopher Davis*,<sup>1171</sup> the SCA held that the word “required” is capable of a number of meanings ranging from “desired” through “necessary” to “indispensable,” ... the word “conveys an element of need: the information does not have to be essential, but it certainly has to be more than “useful” or “relevant” or simply “desired.”<sup>1172</sup> To put it simply:

... the applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.<sup>1173</sup>

Therefore, a requester for information has to lay a proper foundation for why that document is reasonably required for the exercise of his or her rights. ‘Required’ in the context of section 50(1)(a) of PAIA implies that the basis of requirement of the record for the exercise and protection of a right cannot be inferred; it must be shown.<sup>1174</sup> Hence, in *Le Roux v Direkteur-Generaal van Handel en Nywerheid*,<sup>1175</sup> the court refused to allow the provisions of PAIA to facilitate the disclosure of information sought by the respondent on the argument that the provisions of the *Companies Act* 1973 and the common law for the protection of shareholders are not to be lightly regarded. The court pointed out that PAIA could not have intended that the books of a company be thrown open on the allegation of minor errors or irregularity. “A far more substantial foundation would be required” to justify a claim that the record was required for the exercise or protection of the right asserted by the respondent.<sup>1176</sup>

The inclusion of the word ‘any’ before the word ‘right’ in section 50(1)(a) when articulating the right of access to information held by private bodies points to the legislature’s intention “to ensure that the broadest possible interpretation be given

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<sup>1170</sup> Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others 2001 (3) SA 1013 SCA at para 28.

<sup>1171</sup> 2005 (3) SA 486 (SCA).

<sup>1172</sup> 2005 (3) SA 486 (SCA) at para 12.

<sup>1173</sup> Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others 2001 (3) SA 1013 SCA at para 28.

<sup>1174</sup> *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at para 23.

<sup>1175</sup> 1997 (4) SA 174 (T).

<sup>1176</sup> 1997 (4) SA 174 (T) at paras 17-19.

to what qualifies as a right for the purposes of these sections.”<sup>1177</sup> Therefore, ‘rights’ could mean rights in the Bill of Rights, or private law rights arising from contractual or delictual obligations, and could also mean all legislative and private law rights, including rights held against private citizens.<sup>1178</sup> Construed rights will also fall in this category. These are rights, which though not mentioned expressly in a Bill of Rights, form the guarantees that help give life and substance to those mentioned.<sup>1179</sup>

Meanwhile, it is important to note that pursuant to section 8 of PAIA, a private body may for the purpose of access to a record be treated as public body if the record “relates to the exercise of a power or performance or a function as a public body.” It would appear that the same consequence may apply if a private body carries out a function of an organ of state as defined by section 239 of the Constitution.<sup>1180</sup> In relation to certain private bodies, it would appear that the right of access to information granted in section 32(1)(a) applies if read in conjunction with the provision of section 239 of the Constitution which defines an ‘organ of state’ *inter alia* as “any other functionary or institution... exercising a public power or performing a public function in terms” of the Constitution, provincial constitution or any legislation. Therefore, a functionary or institution acting in that capacity, irrespective of its status as being private will be subject to the greater burden imposed by section 11 of PAIA demanding that access to a record must be given to a requester upon compliance with procedural requirements. In that case the obligation on the requester required by section 50(1)(a) of PAIA to show that the record is required for the exercise or protection of any rights will no longer apply.<sup>1181</sup>

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<sup>1177</sup> *M & G Media and Others v 2010 FIFA World Cup Committee South Africa Ltd and Another* 2011 (5) SA 163 (GSJ) at para 336.

<sup>1178</sup> Currie and De Waal *The Bill of Rights Handbook* (6<sup>th</sup> ed) 704. See also *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 C; *Makhanya v Vodacom Service Provider (Pty) Ltd* ZAGPPHC 156.

<sup>1179</sup> See Meagher 2011 *Melbourne University Law Review* 449. See also Amendment IX of the *Constitution of the USA*.

<sup>1180</sup> Van Heerden *et al* 2014 *Speculum Juris* 30.

<sup>1181</sup> See *Mittalsteel South Africa Ltd v Hlatshwayo* 2007 (1) SA 66 (SCA) and *Institute for Democracy in South Africa v African National Congress* 2005 5 SA 39 (C).

Meanwhile, the HF Regulations makes no provision for the process to secure the disclosure of information relating to chemicals used in hydraulic fracturing fluid.<sup>1182</sup> HF Regulation 113 requires hydraulic fracturing operators to deliver MSDS<sup>1183</sup> to the competent authority, but the regulation is silent on whether or not the content of MSDS can be disclosed to third parties and in what circumstances. Therefore, the recourse open to potential requesters is to seek the enforcement of the constitutional right to information as espoused by PAIA. That may result in litigation if a hydraulic fracturing operator insists on confidentiality of information on the basis of trade secret.<sup>1184</sup> Litigation unfortunately costs money and time, which may not be available in certain circumstances, especially to poor and vulnerable persons. Furthermore, in the event of an emergency, it may be difficult if not impossible to curtail irreparable harm to human beings or the environment, before access to the information is granted.

There is a benefit in compelling appropriate public and private bodies to keep records and to report thereon to specific environmental authorities at prescribed intervals, as this is likely to facilitate public access to environmental information.<sup>1185</sup> When the right is extended beyond the traditional access to information in possession of public bodies, the essence of the access to information right is

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<sup>1182</sup> HF Regulation 84 provides that 'hydraulic fracturing fluid' means the mixture of the base fluid and the hydraulic fracturing additives used to perform hydraulic fracturing; and that 'hydraulic fracturing additive' means a chemical substance or combination of substances, including, but not limited to a chemical or proppant that is added to a base fluid for the purpose of preparing hydraulic fracturing fluid.

<sup>1183</sup> A typical MSDS is a document prepared by the manufacturer or importer of hazardous chemical describing the physical and chemical properties of the product, also providing information relating to flash point, toxicity, the procedures to manage spills and leaks, as well as storage guidelines. The value of MSDS lies in the fact that in the event of a spill or leak of fluids containing the chemical responders will know how to deal with its impact on human and the environment, thereby underlying the necessity for immediate access to the MSDS See "MSDS: Where are Material Safety Data Sheets?" available at [www.ehso.com/cssmsds/msdsoverview.htm](http://www.ehso.com/cssmsds/msdsoverview.htm) [date of use 10 May 2017].

<sup>1184</sup> See para 2.5.1.

<sup>1185</sup> Du Plessis "Access to Information" in Paterson and Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 203. Examples in South Africa include the imposition of public duty on approved professionals to compile and keep records in respect of tasks carried out on a dam (section 119 of *National Water Act* 36 of 1998) as well as the obligations to keep proper records, to submit progress and records, and not to destroy records except in accordance with the written directions of the relevant Regional Manager (see sections 21 and 28 of MPRDA).

guaranteed in that any contravention of the right of a person traceable to non-disclosure by any person or entity can be redressed. Applied to hydraulic fracturing, the conceptualisation of access to information as a leverage right which makes the realisation of other rights possible, means it could be applied by people whose rights may be infringed in one way or the other by operators.<sup>1186</sup> The right of access to information should therefore play an important role in the resolution of claims for the protection of a trade secret, which is common in hydraulic fracturing.<sup>1187</sup> If access to any information that could prejudice a victim's interest or right in a claim affecting substantive rights is denied, a claim to enforce a procedural right under PAIA will be in order.

#### 4.4.1.5.1 Grounds for refusal of access to private records

The provisions of PAIA dealing with the ground for refusal of access to records in custody of private bodies are mentioned in sections 62 to 70 of PAIA. However, rather than a focus on disclosure regarding records with public bodies, PAIA here focuses on the protection of records with private bodies. A private body is mandatorily required to refuse access to records regarding the named circumstances. These include the mandatory protection of third party who is a natural person,<sup>1188</sup> the mandatory protection of commercial information of a third party,<sup>1189</sup> mandatory protection of safety of individuals, and protection of

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<sup>1186</sup> Potential rights that could be infringed are discussed in paras 1.5 and 2.4 respectively. The civil and political rights that could be adversely impacted by hydraulic fracturing in South Africa include the rights to equality (section 9), human dignity (section 10), life (section 11), the freedom of expression (section 16), and the right to freedom of trade, occupation and profession (section 22). In the socio-economic rights category are the right of access to housing (section 26), the right to have access to food and water (section 27) and children's rights (section 27). Others are property rights (section 25) and environmental right (section 24). Specific procedural rights that may be impacted by hydraulic fracturing are the right of access to information (section 32), the right to just administrative action (section 33) and the right of access to courts (section 34).

<sup>1187</sup> Regulation of trade secrets is discussed in para 4.4.2.

<sup>1188</sup> Section 63 of PAIA.

<sup>1189</sup> Section 64 of PAIA relating to records containing trade secrets of a third party, financial, commercial, scientific or technical information other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party or information supplied in confidence by a third party, the disclosure of which could reasonably be expected to put that third party at a disadvantage in contractual or other negotiations; or to prejudice that third party in commercial competition.

property,<sup>1190</sup> discretionary protection of commercial information of private body including trade secrets, financial, commercial, scientific or technical information,<sup>1191</sup> and mandatory protection of research information of a third party, and protection of research information of private body.<sup>1192</sup>

However, notwithstanding whether or not the protection against disclosure given to the record is mandatory, a private body may be compelled to grant access to certain records of the body or of third parties in the public interest.<sup>1193</sup> Private bodies are mandated to disclose information on grounds of public interest in the circumstances highlighted in the table below:

<b>Sections-PAIA</b>	<b>PAIA mandatory disclosure on grounds of public interest</b>
63(1)	Personal information about a third party, including a deceased individual.
64(1)	Commercial information of a third party.
65	Confidential information of a third party.
66(a) or (b)	Record which may endanger the life or physical safety of an individual; or which may prejudice or impair the security of physical infrastructure or the safety of individual, security of property or safety of the public.
67	Record of private body which is privileged from production in legal proceedings.
68(1)	Commercial information of a private body, including trade secrets, and financial, commercial, scientific or technical information.
69(1) or (2)	Research information of a third party and of the private body.

Information regarding the listed circumstances must be disclosed if:

- a) the disclosure of the record would reveal evidence of-
  - i. a substantial contravention of, or failure to comply with the law; or
  - ii. imminent and serious public safety or environmental risk; and

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<sup>1190</sup> Section 66 of PAIA mandates a private body to refuse a request for access to a record if its disclosure could reasonably be expected to endanger the life or physical safety of an individual, or likely to prejudice or impair the security of property among other interests.

<sup>1191</sup> Section 68 of PAIA.

<sup>1192</sup> Section 69 of PAIA.

<sup>1193</sup> Section 70 of PAIA.

b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.<sup>1194</sup>

Consequently, records of hydraulic fracturing operators are not ring-fenced, and may be requested on grounds of public interest stated in section 70 of PAIA, as well as in terms of section 9 of PAIA read with 32(1)(b) of the Constitution.

#### 4.4.1.6 Appeals against decisions

Section 78 of PAIA provides that a requester or third party not satisfied with the internal appeal decision regarding refusal of a request for disclosure may apply to a court for relief in terms of section 82 of PAIA if that requester or third party "has exhausted the internal appeal procedure against a decision of the IO of a public body provided for in section 74;<sup>1195</sup> or aggrieved by a decision of the head of a private body to refuse a request a request for access, or a decision taken in terms of sections 54, 57(1) or 60.<sup>1196</sup>

A section 78 application regarding a decision of an IO of public bodies and relevant authorities of private bodies is not a limited review; rather, it is a civil proceeding in which parties are at liberty to present evidence to support their respective cases for access or refusal. A court hearing a section 78 application cannot come to a decision regarding a wrongful refusal of access to information without evaluating full evidence from both sides.<sup>1197</sup> Therefore, an IO cannot merely quote the provisions of PAIA on which the ground for refusal is based. It makes sense that the exercise of power should be subject to explanation if necessary. As Mureinik argued, there is a need to work towards building and sustaining a culture of justification:

...in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.<sup>1198</sup>

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<sup>1194</sup> Section 70 of PAIA.

<sup>1195</sup> Section 78(1) of PAIA.

<sup>1196</sup> Section 78(2)(d) of PAIA.

<sup>1197</sup> *Transnet Limited and Another v SA Metal Machinery Company (Pty) Ltd* 2006 All SA 352 (SCA) at paras 24-25.

<sup>1198</sup> Mureinik 1994 *SAJHR* 32.



Therefore, in determining whether or not the refusal to grant access by the authority that conducted the internal appeal was proper, the court is not restricted to only a review of that authority's decision.<sup>1199</sup> The matter is considered *de novo*, on the merits, with the evidentiary burden being discharged by the body opposing the granting of access, and the court is empowered to call for additional evidence, including on the contested record to test the validity of the exemption claimed.<sup>1200</sup> The claim that access should be restricted based on the classification of a record as likely to prejudice national security by the state or any of its agencies does not necessarily oust the jurisdiction of the court to decide whether or not the record should be protected from disclosure to the media and the public. Any document before the court is subject to scrutiny, and the court has the authority to determine whether or not the document should be kept secret from other parties to the proceedings or the media and the public. In deciding this matter, the court will always consider the interests of justice.<sup>1201</sup> Relevant considerations in the matter, though not exhaustive include:

... the extent and character of the matter sought to be kept confidential; the connection of the information to national security; the grounds advanced for claiming disclosure or for refusing it; whether the information is already in the public domain and if so, in what circumstances it reached the public domain; for how long and to what extent it has been in the public domain; and, finally, the impact of the public disclosure or non-disclosure on the ultimate fairness of the proceedings before a court.<sup>1202</sup>

Furthermore, the provision of section 78 of PAIA is clear to the effect that where a requester is dissatisfied with the decision of the IO in respect of a public body or aggrieved by the decision of the head of a private body, application to a court for appropriate relief should follow after exhausting all the internal appeal procedure provided in sections 74 and 82 of PAIA respectively. That procedure is mandatory.<sup>1203</sup>

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<sup>1199</sup> *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 ZACC 32 at para 14.

<sup>1200</sup> Section 80(1) of PAIA provides that "despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds."

<sup>1201</sup> *Independent Newspapers (Pty) Ltd v Minister of Intelligence Services and Others* 2008 ZACC 6.

<sup>1202</sup> *Independent Newspapers (Pty) Ltd v Minister of Intelligence Services and Others* 2008 ZACC 6 at para 55.

<sup>1203</sup> *Sumbana and Others v Head of Department: Public Works, Limpopo Province and Others* 2008 ZALMPHC 1.

The procedure is likely to give any potential requester of information relating to hydraulic fracturing recourse to the court to examine whether or not a ground of refusal is valid in law.

#### 4.4.2 Regulation of trade secrets

In South Africa, trade secrets and confidential commercial information in business are considered proprietary interests, which should be protected.<sup>1204</sup> Though there is no benefit of a statutory definition of trade secret to clarify the concept,<sup>1205</sup> in *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another*,<sup>1206</sup> the court observed that 'protectable proprietary interest' could manifest in two different ways.

...The first consisted of the relationship with customers, potential customers, suppliers and others go to make up what is compendiously referred to as 'trade connection' of the business and being an important aspect of its incorporeal property known as goodwill. The second consisted of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential matter is sometimes compendiously referred to as 'trade secret.'

The basis of the claim for the protection of commercial information in the energy industry is similar to the second type, referred to as trade secret by the court in *Sibex*, often on the basis that significant investment has been made to innovate and develop an intellectual property for which there is an expectation of a competitive advantage over other competitors.<sup>1207</sup> While the underlying rationale to safeguard

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<sup>1204</sup> South African legislation typically refer to this category of information as commercially confidential information. See for example, section 30 of MPRDA, and section 1 of NEMA. See also *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A), and *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209.

<sup>1205</sup> Section 1 of NEMA defines "commercially confidential information" as "commercial information, the disclosure of which would prejudice to an unreasonable degree the commercial interests of the holder: Provided that details of emission levels and waste products must not be considered to be commercially confidential notwithstanding any provision of this Act or any other law."

<sup>1206</sup> 1991 (2) SA 482 (T).

<sup>1207</sup> *Leggette et al* 2013 *International Energy Review* 154. In *Bambelela Bolts (Pty) Ltd v Ball and Another*, 2012 ZALCJHB 148, it was held that for a restraint of trade agreement on the basis of protection of confidential commercial information to be enforceable, it must not only protect against competition in the industry in which the claimant operates, it must satisfy the tests established in *Advtech Resourcing (Pty) Ltd (t/a Communicate Personnel Group) v Kuhn and Another* 2008 (1) SA 375 (C), namely that the-

- (i) Information must not only relate to, but must also be capable of application in the trade or industry,
- (ii) Information must be confidential. The information must accordingly be objectively determined to be available and thus known to a restricted number of people or to a close circle, or as is

commercial transactions by the protection of trade secrets cannot be faulted, there is a need for caution as unfortunately, other interests may be prejudiced if the right to engage in economic activity, characterised by trade secret is absolute.<sup>1208</sup> Parties to commercial agreements entered into freely are entitled to assume that their agreements will be enforced and that they can operate freely in the business environment. However, if the enforcement of their agreements will prejudice public interest, or harm human beings or the environment, there is a need to have a second look at such agreement.<sup>1209</sup> As the court pointed out in *Bernstein and Others v Bester NO and Others*,<sup>1210</sup>

...the truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every right accruing to another citizen... This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, ...[and] as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.

Tension is created when one party insists on the protection of information on the basis of an economic right and another, claims that a disclosure of the information being protected is essential for the exercise or protection of a right.<sup>1211</sup> In that regard, a court considering the enforcement of an agreement incorporating the protection of information must make a value judgment with two principal considerations in mind in determining the reasonableness of a restraint:<sup>1212</sup>

...the first is that public interest requires that the parties should comply with their contractual obligations... the second is that all persons should in the interest of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common law but also constitutional values.

In relation to hydraulic fracturing, an operator will have a right to protect information relating to intellectual property, and there is a restriction on the disclosure of that information on the basis of confidentiality in terms of section 30(2) MPRDA. This may affect the ability of a person whose right is infringed upon to

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usually expressed, the information must be something which is not public property or in the public knowledge, and

(iii) The information objectively viewed must be of economic or business value to the plaintiff.

<sup>1208</sup> See *Document Warehouse (Pty) Ltd v Truebody and Another* [2010] ZAGPJHC 92 at para 54.

<sup>1209</sup> See *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ).

<sup>1210</sup> 1996 (4) BCLR 449 (CC) at para 67.

<sup>1211</sup> See *Crown Cork & Seal Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093 (W).

<sup>1212</sup> *Burmbuild (Pty) Ltd v Sibabini Ndzama* 2013 (2) All SA 399 (ECG).

effectively seek and obtain redress, contrary to the right of access to information protected by section 32 of the Constitution. Though section 88(1) of MPRDA imposes an obligation on a permit or right holder for petroleum exploration and production to submit such information, data, reports and interpretations to the designated agency as may be prescribed, the designated agency is required to keep the information, data, reports and interpretations confidential.<sup>1213</sup> No express authority is granted to the agency to disclose the subject information when necessary.

The fact that the regulations applicable to hydraulic fracturing do not give opportunity to potential complainants for securing the disclosure of information relating to chemicals used in hydraulic fracturing operations may not necessarily be fatal. In that case, PAIA can effectively address the disclosure of information where necessary. Even though a private body is permitted to refuse a request for access to its record containing trade secrets and other commercial information,<sup>1214</sup> the authority is not absolute. By virtue of section 70 of PAIA, the private body must grant disclosure in certain circumstances on the ground of public interest.<sup>1215</sup>

However, while concerns may be eliminated regarding the capability of PAIA to compel disclosure of information where necessary, it is doubtful that the socio-economic circumstances of the potential persons that may be adversely affected by hydraulic fracturing puts them in the most convenient situation to benefit from PAIA's provisions.<sup>1216</sup> The high cost of litigation coupled with the possible ignorance of the processes for the enforcement of their rights,<sup>1217</sup> may constitute a hindrance to recourse to PAIA. If the regulations applicable to hydraulic fracturing are made simple and sufficiently comprehensive to address issues of disclosure *ab initio*, the potential for recourse to PAIA will be reduced significantly, if not totally eliminated.

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<sup>1213</sup> Section 88(2) MPRDA requires that the information, data, reports and interpretations be kept for four years or until the expiration of that period or when the right or permit to which they relate have been abandoned or relinquished.

<sup>1214</sup> Section 68 of PAIA.

<sup>1215</sup> See para 4.4.1.5.1 above.

<sup>1216</sup> Agreements between landowners and oil and gas companies are usually complex, sometimes including clauses restricting the disclosure of information and clauses compelling parties to settle disputes out of regular courts.

<sup>1217</sup> McQuoid-Mason 1999 *Windsor Y. B. Access Just* 232.

#### 4.4.3 Assessment of the right to access to information: South Africa

PAIA was enacted to give effect to the access to information right<sup>1218</sup> and to promote the value of “transparency, accountability and effective governance of all public and private bodies.”<sup>1219</sup> It is a general statute regulating access to information held by different kinds of institutions and persons, necessitating the enactment of “general rules to balance the competing interests at stake by means of threshold requirements, grounds of refusal and public interest overrides.”<sup>1220</sup> The provisions of PAIA gives an assurance that access to information will not be compromised; and given its connection to other human rights, it should help to facilitate the process of holding the government, businesses, private organisations and individuals to account. This is necessary in a country like South Africa where there are high levels of poverty and injustices. The dissenting opinion of Cameron JA in *Unitas Hospital v Van Wyk and Another*<sup>1221</sup> underscores the plight of the weak and vulnerable. He explained *inter alia* that the novel dimension of the PAIA “lies in the fact that it creates pre-commencement access” which should not be stifled, as it:<sup>1222</sup>

... affords an opportunity to broaden the approach to pre-action access. It does so on a basis that is flexible and accommodating without threatening the boundless exposure against which my colleague warns. The key lies in a case-by-case application of whether a litigant ‘requires’ a record... Institution of proceedings is an immense step. It involves a massive commitment in costs, time, personnel and effort. And it is fraught with risks. Where access to a document can assist in avoiding the initiation of litigation, or curtailing opposition to it, the objects of the statute suggest that access should be granted.

Section 50 of PAIA affirms the right of access to information regarding the records of private bodies if “that record is required for the exercise or protection of any rights.” Though there is hardly a consensus on the extent of the potential harm hydraulic fracturing poses, some comfort lies in the belief that PAIA will succeed in protecting access to information and guarantee its application to facilitate the enforcement of environmental and other fundamental rights that may be adversely impacted by hydraulic fracturing.

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<sup>1218</sup> Section 32 of the Constitution.

<sup>1219</sup> Section 9(e) of PAIA.

<sup>1220</sup> See *Nova Property Group Holdings Ltd v Julius Cobbett and Others* 2016 ZASCA 63 at para 21.

<sup>1221</sup> 2006 (4) All SA 231 (SCA).

<sup>1222</sup> 2006 (4) All SA 231 (SCA) 32.

By virtue of section 83(3)(b) of PAIA, the South Africa Human Rights Commission (hereafter "SAHRC") is saddled with the responsibility of monitoring the implementation of PAIA<sup>1223</sup> among other functions.<sup>1224</sup> Curiously however, the wording of section 83 of PAIA gives the SAHRC a wide ambit of discretion in the performance of its duties. Most of its other functions are on a best endeavour basis if "financial and other resources are available."<sup>1225</sup> The reports of audits conducted by SAHRC with a view to supporting public institutions to identify and address challenges relating to the implementation of PAIA<sup>1226</sup> appear to confirm that the monitoring role of the SAHRC would probably be more effective if its obligations in relation to PAIA are obligatory.<sup>1227</sup>

In a country like South Africa where there are high levels of poverty and inequality, access to information cannot be compromised given its connection to other human rights, and its ability to facilitate the process of holding the government, businesses, private organisations and individuals to account.<sup>1228</sup> In this regard access to information was one of the core issues that dominated the South African political transition process, being one of the thirty-four constitutional principles comprised in a list of fundamental rights and interests to be included in the framework for

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<sup>1223</sup> By virtue of section 39 of the *Protection of Personal Information Act*, No. 4 of 2013, (POPI), (which will become operative by proclamation), the Information Regulator is created in terms of the POPI and will assume the role of the SAHRC in relation to the PAIA. Section 40 of POPI details the powers, duties and functions of the Information Regulator, in addition to the functions listed in section 83 of PAIA. Section 39 of the POPI, provides that the Information Regulator is established as a juristic body, which:

- i) Has jurisdiction throughout the Republic;
- ii) Is independent and is subject only to the Constitution and to the law and must be impartial and perform its functions and exercise its powers without fear, favour or prejudice;
- iii) Must exercise its powers and perform its functions in accordance with this Act and the Promotion of Access to Information Act; and
- iv) Is accountable to the National Assembly.

<sup>1224</sup> Section 83 lists the functions of the SAHRC in relation to PAIA.

<sup>1225</sup> Sections 83(2) and 83(5) of PAIA.

<sup>1226</sup> *South African Human Rights Commission 2012 The Promotion of Access to Information (PAIA) and Records Management – Consolidated Audit Report: 2008-2012* (hereafter "the Report").

<sup>1227</sup> The audit function could not be said to have yielded much in terms of success as the SAHRC audited only 43 public bodies comprising national government departments to provincial government departments and local governments over a period of four years. The SAHRC has no power to sanction non-complying agencies. See page 13 of the Report.

<sup>1228</sup> *South African Human Rights Commission 2012 The Promotion of Access to Information (PAIA) and Records Management – Consolidated Audit Report: 2008-2012* 4.

deliberations on issues to be included in the ensuing constitution.<sup>1229</sup> Constitutional Principle IX is related to freedom of information, emphasising the provision of section 1(d) of the Constitution, which lists accountability, responsiveness and openness among other values upon which the democratic state of South Africa is founded.<sup>1230</sup> In the same regard, section 195 of the Constitution makes provision for the basic values and principles to govern public administration. It demands that the public administration must be governed by democratic values and principles enshrined in the Constitution, including the requirement for accountability,<sup>1231</sup> and that “transparency must be fostered by providing the public with timely, accessible and accurate information.”<sup>1232</sup> These requirements apply to administration in every sphere of government, and to organs of state and public enterprises.<sup>1233</sup>

In relation to hydraulic fracturing and the right of access to information, the Constitution and PAIA appear to have sufficiently set out in broad and clear terms provisions that could largely forestall arbitrariness. Though the grounds for refusal of request for information are detailed in PAIA, the legislation creates exceptions which may justify disclosure on grounds of public interest. The implication of the foregoing is that PAIA provides the means by which the tendency of the hydraulic fracturing industry to hide information could be dealt with. The HF Regulations should be reinforced to give effect to the provisions of PAIA. Finally, the implementation of HF Regulations has to “foster a culture of transparency and accountability in public and private bodies involved with hydraulic fracturing by giving effect to the right of access to information.”<sup>1234</sup> If the HF Regulations are sufficiently clear and address the concerns relating to access to information, the need to approach the courts for enforcement will be eliminated or reduced, and when necessary, cases of breaches can easily be determinable. The benefit of that

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<sup>1229</sup> Ward and Stone “Twenty years of South African Constitutionalism: A critical analysis of the journey of the right of access to information in South Africa” at [www.nyslawreview.com/wp-content/uploads/sites/16/2014/11/Ward-and-Stone.pdf](http://www.nyslawreview.com/wp-content/uploads/sites/16/2014/11/Ward-and-Stone.pdf) [date of use 12 May 2017].

<sup>1230</sup> See De Vos and Freedman (eds) *South African Constitutional Law in Context* 621.

<sup>1231</sup> Section 195(1)(f) of the Constitution.

<sup>1232</sup> Section 195(1)(g) of the Constitution.

<sup>1233</sup> Section 195(2) of the Constitution.

<sup>1234</sup> Preamble to PAIA.

will go to the ordinary person who might have been constrained by lack of knowledge or poverty in seeking redress if a contrary situation was the case.

#### **4.4 Conclusion**

This chapter conducted a critical discussion of the legal framework for the access to information right as a tool for the realisation of the environmental right from the perspective of international (global), regional and South African law *vis-à-vis* the regulation of hydraulic fracturing. The ultimate objective of the exercise was to draw lessons from the UK and the state of Pennsylvania in the USA for South Africa, in terms of the protection of procedural environmental rights against the potential harms of hydraulic fracturing. The discussion shows that an effective implementation of the legal framework on the right of access to information is likely to limit the harm that hydraulic fracturing can cause to humans and the environment.

Regarding hydraulic fracturing, available information about its impact on humans and the environment is sketchy and controversial, and the industry itself has a penchant to cleave to information on the basis of confidentiality for commercial advantage. It is therefore necessary for the law to guarantee that the people are privy to information submitted to the state and its agencies, especially those that affect or have the potential to affect people adversely. Awareness of such information will enable the civil society to assess the potential risks that they face and possibly plan how to react in the event of emergencies. People will be in a better position to assess government's capacity to act and to protect public interests. Furthermore, if the legal framework facilitates the disclosure of state-held information to the public directly or upon requests by citizens, a mutually beneficial arrangement for both the state and citizens may be created whereby the participation of the public is engendered and information is put within the reach of affected stakeholders. In the same vein, where information held by operators of hydraulic fracturing could compromise the rights of any person, the law should come to the aid of the potential victim. In that case, any claim of confidentiality should not be allowed to stand against the rights of potential victims.



To a large extent, PAIA can effectively address the disclosure of information where necessary. There are however concerns as to its implementation by public officers and private bodies responsible to decide on request for information by the public. These concerns may be eliminated or at least reduced if it is possible to compel action on the part of authorities responsible for the disclosure of information, rather than ignoring requests in the guise of deemed refusal. In the same vein, where it is not possible to oblige requests for information, the relevant authority should be compelled to give reasons in writing so that the requester is put in a better position to challenge the action. As the court held in *Centre for Social Accountability v The Secretary of Parliament and Others*<sup>1235</sup> the granting of access to information is the rule, while refusal is the exception. Discretionary power to refuse access should therefore be exercised in a manner that favours disclosure.<sup>1236</sup>

The involvement of government as the holder of rights in companies likely to operate hydraulic fracturing, and the utility value of energy should necessitate potential hydraulic fracturing operators in South Africa as entities performing public functions. This will make it possible to subject the regulation of disclosure of records in their custody to that applicable to public authorities. If the acts of hydraulic fracturing operators affect people or a community (or a group or class of the public as a whole), it is pre-eminently the terrain of government,<sup>1237</sup> and the operators should be treated as exercising public powers and functions, thereby subjecting them to relevant provisions of PAIA.

Notwithstanding, the legal regime in South Africa relating to access to information and environmental rights is comprehensive and has a far-reaching potential to address concerns about violation of the relevant rights. Indeed, the provisions of the Constitution and the relevant legislation have been commended by commentators. There is however still some room for improvement regarding the application of the law to hydraulic fracturing and all its incidents. The potency of

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<sup>1235</sup> 2011 (5) SA 279 (ECG).

<sup>1236</sup> *M & G Media and Others v 2010 FIFA World Cup Committee South Africa Ltd and Another* 2011 (5) SA 163 (GSJ).

<sup>1237</sup> *Calibre Clinical Consultants (Pty) Ltd and Anor v The National Bargaining Council for the Road Freight Industry and Anor* 2010 (5) SA 457 (SCA) at para 39.

the South African Constitution to address matters affecting socio-economic interests has been described as "the most admirable constitution in the history of the world."<sup>1238</sup> Credit is also extended to implementation, as its courts are considered torch bearers in the enforcement of legal rights,<sup>1239</sup> a pointer to the fact that if there is an effective legal framework to regulate hydraulic fracturing the protection of procedural environmental rights is not likely to constitute a major challenge in South Africa.

The provisions of the Pennsylvaniaian RKTL which imposes of obligations on health practitioners prior to accessing information relating to chemicals used in hydraulic fracturing is unpropitious, and may have the potential to endanger human life and imperil the environment. Such provisions are not likely to enhance the protection of procedural environmental rights and should therefore not to be copied in South Africa. However, the decision of the Pennsylvania Supreme Court in *Robinson Township v Commonwealth of Pennsylvania*<sup>1240</sup> is fundamental to the development of the law relating to access to information in relation to hydraulic fracturing. The court ruled that the provisions of Act 13 which limits the disclosure of chemicals in hydraulic fracturing on the basis of trade secrets and confidential proprietary information, is unconstitutional.<sup>1241</sup> That decision may be of persuasive authority in interpreting statutory and constitutional provisions to determine claims based on trade secrets in hydraulic fracturing in South Africa.

In the same vein, there is value in the mandatory requirement of article 5 of Directive 2016/943/EC applicable in the UK regarding the potential effect of trade secrets,<sup>1242</sup> which requires that claims of trade secrets should not forestall the enforcement of an access to information right, or conceal wrongdoing or illegality if

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<sup>1238</sup> Kende 2003 *Chapman Law Review* 138.

<sup>1239</sup> Mubanzigi 2006 *Afr J Legal Stud* 6. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), *Minister of Health v Treatment Action Campaign (No. 2)* (TAC) 2002 (5) SA 721 (CC), and *Government of Republic of South Africa v Irene Grootboom and Others* 2001 (1) SA 46 (CC).

<sup>1240</sup> 2016 A.3d J-34A-B.

<sup>1241</sup> See para 4.2.2.

<sup>1242</sup> See par 3.2.2.2.5.

disclosure is in the public interest. A provision such as this in the HF Regulations could enhance the protection of procedural environmental rights.<sup>1243</sup>

Specific learning points from Pennsylvania and the UK, as well as recommendations to strengthen the law regarding the right of access to information in South Africa are presented in paragraph 7.3.2.

Meanwhile, the development of hydraulic fracturing will involve many stakeholders. It is therefore necessary to delineate the powers of each and set procedural rules and substantive standards to regulate the process.<sup>1244</sup> The procedural right to just administrative action gives a guarantee to persons whose rights may be infringed by hydraulic fracturing to challenge an exercise of power resulting in the violation of their rights. The next chapter considers the extent to which the legal framework pertaining to hydraulic fracturing provide for the protection of the right to just administrative action.

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<sup>1243</sup> See para 3.2.2.2.5.

<sup>1244</sup> Dann "The Global Administrative Law of development cooperation" in Cassese *Research Handbook on Global Administrative Law* 418.

## Chapter 5 Just Administrative Action

### 5.1 Introduction

Public officers and regulatory authorities will carry out administrative actions in the course of the regulation of hydraulic fracturing. Such actions should be lawful and in compliance with the process required by the applicable law and regulations.<sup>1245</sup> The right to just administrative action or the right to administrative justice is the basis of an assurance to the public that administrative power will be exercised in a manner that is fair in all the circumstances.<sup>1246</sup> The complexity of hydraulic fracturing demands that efforts must be made to ensure that regulations sufficiently address the concerns of the public and provide opportunity to challenge the actions of administrative authorities where necessary.

A developer of any infrastructure including the exploitation of shale gas by hydraulic fracturing is subject to administrative decision-making procedures notwithstanding the prospective beneficial outcome of the undertaking.<sup>1247</sup> For example in *Earthlife Africa Johannesburg v The Minister of Environmental Affairs and Others*,<sup>1248</sup> the court held that the lack of express statutory or regulatory provisions requiring a climate change assessment prior to building a 1200MW coal-fired station does not imply that there is no legal duty to conduct one. The court referred to international obligations imposed by global instruments, holding that:

... the legislative and policy scheme and framework overwhelming support the conclusion that an assessment of climate change impacts and mitigating measures will be relevant factors in the environmental authorisation process, and that consideration of such will best be accomplished by means of a professionally researched climate change impact report. For all these reasons, I find that the text, purpose, ethos and intra and extra-statutory context of ... [legislation] support the conclusion that climate change impacts of coal-fired power stations are relevant factors that must be considered before granting environmental authorisation.<sup>1249</sup>

There is therefore justification in calling for the subjection of the exercise of powers or the performance of functions that “pertain to the people as a whole, or that they

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<sup>1245</sup> Glinz 2009 *Namibian Law Journal* 21.

<sup>1246</sup> *Chairman, Board on Tariffs and Trade and Others v Brenco Inc and Others* 2001 (4) SA 511 (SCA).

<sup>1247</sup> Kotzé 2004 *PER/PELJ* 10.

<sup>1248</sup> 2017 (2) All SA 519 (GP).

<sup>1249</sup> 2017 (2) All SA 519 (GP) at para 91.

are exercised or performed on behalf of the community (or at least a group or class of the public as a whole)” to judicial review regardless of whether the power is being exercised or the function is being performed by a public or private authority.<sup>1250</sup>

Mindful of the foregoing, this chapter will carry out a critical discussion of the legal framework of the right to just administrative action *vis-à-vis* hydraulic fracturing, with a view to drawing lessons from the UK and the State of Pennsylvania in the USA for South Africa, for the protection of procedural environmental rights with particular reference to the right to just administrative action. First, the domestic perspective on the right to administrative justice in Pennsylvania will be considered.

## **5.2 Domestic perspective: Pennsylvania**

### *5.2.1 Legal framework*

The focus of administrative law in the USA is largely on decision-making processes, rather than on the content of the decisions, underscoring the importance from the onset that if the authority of administrative agencies ultimately stems from the legislature, an examination of that authority is essential in the consideration of how an agency has acted.<sup>1251</sup> When an agency is engaged in rule-making processes, the agency is required to provide notice of the rule in the *Federal Register*,<sup>1252</sup> stating the legal authority under which the rule is proposed.<sup>1253</sup> This is to ensure that the administrative decision or action is traceable to a legal authority, so that if necessary the ‘due process’ clause of the Constitution of USA<sup>1254</sup> can be invoked to challenge

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<sup>1250</sup> See *Calibre Clinical Consultants (Pty) Ltd and Anor v The National Bargaining Council for the Road Freight Industry and Anor* 2010 (5) SA 457 (SCA) at para 39.

<sup>1251</sup> Fox Jr. *Understanding Administrative Law* (4<sup>th</sup> ed) para 1.01.

<sup>1252</sup> The *Federal Register* is a daily publication of the federal government of USA published by the National Archives and Records Administration, containing information on federal agency regulations, proposed rules and public notices, executive orders and other Presidential documents. See “About the Federal Register” available at <https://www.archives.gov/federal-register/the-federal-register/about.html> [date of use 18 September 2017].

<sup>1253</sup> The Attorney General’s Manual on the APA requires that the reference to the legal authority “must be sufficiently precise to apprise interested persons of the agency’s legal authority to issue the proposed rule.” See US Department of Justice *Attorney General’s Manual on the Administrative Procedure Act* 29.

<sup>1254</sup> The procedural due process clause of the 14<sup>th</sup> Amendment of the Constitution of USA demands that any impairment of a person’s right to life, liberty or property must be based on fundamental fairness of procedures applied by the government or its agency. See *Lochner v New York* 1905 198 US 45.

the agency when it is involved in a violation of individual's rights. On that basis, the court has consistently held that some kind of hearing is required before a person is finally deprived of his or her right or interests.<sup>1255</sup>

The *Administrative Procedure Act*<sup>1256</sup> ("the APA") was enacted as a federal statute to control the wide discretionary powers of administrators in the socio-economic environment, in order to address the demands placed on the government consequent upon the great economic depression and the Second World War.<sup>1257</sup> To facilitate the determination of whether or not an agency decision or action has a basis in, or is carried out in accordance with the law, section 557(c)(3) of the APA requires that administrative decisions "shall include a statement of ... findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."<sup>1258</sup> The requirement for reasons underlying administrative action is to ensure that affected persons could determine from the reasons whether or not they have a basis for challenging administrative action. According to Powers, where a decision of a governmental agency is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law..." the procedural basis of the action can be challenged by an action requesting the agency to provide justification for the decision and to explain if there is a "rational connection between the facts found and the decision made."<sup>1259</sup>

At the federal level, the APA has been described as the most important statute in USA administrative law,<sup>1260</sup> governing the process by which agencies develop and

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<sup>1255</sup> Friendly 1975 *University of Pennsylvania Law Review* 1269.

<sup>1256</sup> 1946 5 USC 551. The APA is a federal law applicable to all federal agencies in the USA. A *Revised Model State Administrative Procedure Act* (MSAPA) is available at [http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf) [date of use 10 March 2017] based on the provisions of the APA was adopted by the National Conference of Commissioners on Uniform State Laws in 2010. MSAPA is required because administrative law in the 50 states is not uniform. MASAPA's provisions represent best practices in the states. See the prefatory note to MSAPA 2010.

<sup>1257</sup> See Corder 1998 *Admin Review* 11.

<sup>1258</sup> See also Perju 2009 *Virginia Journal of International Law* 307.

<sup>1259</sup> Powers "Citizen suits in U.S. environmental law: An overview and assessment" 2013 *dpbia* 129 available at [http://cls.kangwon.ac.kr/data/file/sub41/1917250915\\_0ebf2ab0\\_11\\_5\\_Melissa.pdf](http://cls.kangwon.ac.kr/data/file/sub41/1917250915_0ebf2ab0_11_5_Melissa.pdf) [date of use 14 December 2017], citing *Chevron USA v Natural Resources Defense Council* 1984 467 US 837 at 43, and *Burlington Truck Lines v US* 1962 371 US 156, 168.

<sup>1260</sup> Lewis 2012 *Mich J Envtl and Admin L* 293.

issue regulations, covering rule-making procedures, issuance of policy statements, licences and permits.<sup>1261</sup> The APA also provides standards for judicial review, giving opportunity to persons who are affected by the decisions of those bodies to appeal to the agencies for a review of decisions, or to take the dispute to the courts for resolution.<sup>1262</sup> In this regard, the “long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted”<sup>1263</sup> is often invoked.<sup>1264</sup> The basis for the application of the rule was explained by the USA Supreme Court in *McCarthy v Madigan*<sup>1265</sup> that “the exhaustion doctrine recognizes the notion, grounded in deference to Congress’ delegation of authority to coordinate branches of Government that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer.”

Notwithstanding, it is important to note that the APA does not make exhaustion of remedies a pre-requisite for judicial review of administrative action.<sup>1266</sup> Indeed, the rule is that “any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action.”<sup>1267</sup> The USA Supreme Court gave judicial imprimatur to this rule in *Darby et al v Cisneros, Secretary of Housing and Urban Development*,<sup>1268</sup> holding that by virtue of section 10(c) of the APA, where statute or agency rules have not specifically mandated exhaustion as a pre-requisite to judicial review, federal courts do not have the authority to require a plaintiff to exhaust available administrative remedies. The court reiterated that section 10(c) only requires the exhaustion of all intra-agency appeals which are mandated either by statute or agency rule, and that it

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<sup>1261</sup> Section 553 of the APA makes provisions for ‘legislative rule-making’ creating law, rights or duties, exempting “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”

<sup>1262</sup> Sections 701-706 of the APA.

<sup>1263</sup> *Myers v Bethlehem Shipbuilding Corporation* 1938 303 US 41 at 50-51.

<sup>1264</sup> Lubbers “*Fail to Comment at Your Own Risk: Does Issue Exhaustion have a Place in the Judicial Review of Rules?*” available at <https://works.bepress.com/jeffrey-lubbers/2/> [date of use 20 September 2017].

<sup>1265</sup> 1992 503 US 140 at 145.

<sup>1266</sup> Unfortunately, Pennsylvania does not follow the requirement of the federal APA regarding the exhaustion of remedies. The position in Pennsylvania is discussed in para 5.2.2 below.

<sup>1267</sup> See section 10(c) of the APA.

<sup>1268</sup> 1993 509 US 137.

will be inconsistent with the plain reading of the section for any court to require litigants to exhaust optional appeals requirement.

In *the Matters of Mark S. Wallach as Chapter 7 Trustee for Norse Energy Corp. USA v Town of Dryden et al No. 130 and Cooperstown Holstein Corporation v Town of Middlesfield No. 131*<sup>1269</sup> the Town Board of Dryden contended that oil and gas operations fell within the ambit of its zoning regulations subjecting leases on land in Dryden for the purpose of exploring and developing natural gas resources by the Norse Energy Corporation, to its authority. The Town Board had earlier amended its zoning ordinance to specify that all oil and gas exploration, extraction and storage activities were not permitted in Dryden, as it “would endanger the health, safety and general welfare of the community through the deposit of toxins into the air, soil, water, environment, and in the bodies of residents.”<sup>1270</sup> The court held that the state legislature cannot eliminate the home rule capacity of municipalities to pass zoning laws that excluded oil, gas and hydraulic fracturing activities in order to preserve the existing character of their communities. Accordingly, the zoning laws of Dryden were held to be valid.

Flowing from the above, the need to eliminate the structural flaw which existed in trusting an agency employee to render a fair and impartial decision to review its action that is adverse to a citizen resulted in calls for central administrative hearing panels.<sup>1271</sup> It is argued that this would ensure strict compliance with the due process clause of the US Constitution, and with decisions of the US Supreme Court emphasising that “fair trial in a fair tribunal is a requirement of due process,” and that “an impartial decision-maker is [an] essential element of the fairness

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<sup>1269</sup> 2013 NY Slip Op 03148 106 AD3d 1170.

<sup>1270</sup> Article IX S 2(C)(iii) of the *New York State Constitution* (known as the “home rule”) provides that – “every local government shall have the power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law ... except to the extent that the legislature shall restrict the adoption of such a local law.” Furthermore, the state legislature had enacted the Municipal Home Rule Law, which empowers local governments to pass laws both for the “protection and enhancement of (their) physical and visual environment”, and for the “government, Protection, order, comfort, safety, health and well-being of persons or property therein.”

<sup>1271</sup> See *In re Murchinson* 1955 349 US 136.



equation."<sup>1272</sup> Accordingly, the establishment of an Office of Administrative Hearing (OAH) quickly became best practice in many states of USA.<sup>1273</sup> The effect is that many administrative hearings are centralised to take advantage of the experience and training of administrative law judges (ALJs), assurance of effective oversight, and evaluation of effectiveness, thereby eliminating the structural conflict of interest and concerns of bias as the judge or hearing officer is not subject to the control of the agencies whose decisions are being reviewed.<sup>1274</sup>

The establishment of OAHs has over time provided citizens with a mechanism to adjudicate disputes with administrative agencies before judges who are truly independent and impartial.<sup>1275</sup> Agencies fiercely challenged the position on the contention that "their policy-making role would be usurped, their expertise ignored, and their budgets broken,"<sup>1276</sup> with independent hearing officers being free of control but with potential to set agency priorities and policies.<sup>1277</sup> Though it may be argued that there is justification in the protest of the agencies that administrative adjudications are supposed to be expedient alternative to trials, as the subject matter is best suited to executive decision-making, different from adjudication by jury or a trial court judge. All that is required is that the persons affected by administrative action are provided "some kind of hearing."<sup>1278</sup> On the contrary, some kind of hearing where an agency officer or adjudicator is performing an adjudicatory

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<sup>1272</sup> *Goldberg v Kelly* 1970 397 US 271.

<sup>1273</sup> There are more than 27 states of the US with central administrative adjudicatory panels including Alaska, Arizona, California, Colorado, Florida, Georgia, Iowa, Kansas, Louisiana, New Jersey, Texas, Virginia and Washington. See Joint State Government Commission of the General Assembly of the Commonwealth of Pennsylvania "Reforming the Administrative Law of Pennsylvania: Staff Report 2014" 2014 *J Nat'l Ass'n Admin Law Judiciary* 356.

<sup>1274</sup> Office of the District of Columbia Auditor 2016 *Administrative Justice in the District of Columbia: Recommendations to Improve DC's Office of Administrative Hearings* 11.

<sup>1275</sup> Ewing 2003 *J Nat'l Ass'n Admin Law Judiciary* 89.

<sup>1276</sup> Ewing 2003 *J Nat'l Ass'n Admin Law Judiciary* 57.

<sup>1277</sup> Oregon State Bar 1989 *Report of the Commission on Administrative Hearings* 6. The Governor of Oregon had opposed a central OAH, arguing that it would create a "new and powerful bureaucracy within [the] state government, able to direct state policy in significant ways and, ... answerable neither to the Governor, nor to agency heads, nor even to the General Assembly." See Ewing 2003 *J Nat'l Ass'n Admin Law Judiciary* 63.

<sup>1278</sup> Friendly 1975 *University of Pennsylvania Law Review* 1267. See also Mcneil 2008 *Louisiana Law Review* 1121-1144.

function as an internal review process may heighten the risk of potential conflict of interest, with the perception of unfairness possibly undermining public trust.<sup>1279</sup>

In the state of Pennsylvania, the determination of whether or not a state agency action is in compliance with the constitutional provision relating to environmental right protected by section 27 of article 1 of the Constitution of the Commonwealth of Pennsylvania, the courts often apply the *Payne* test.<sup>1280</sup> The Supreme Court of Pennsylvania in *Pennsylvania Environmental Defense Fund v Commonwealth*<sup>1281</sup> observed that the CER in section 27 is fundamental and inviolable, and that as public trustee of the right, “the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary’s conduct.” Accordingly, the court held that each agency of government cannot perform its “duties respecting the environment unreasonably,” and “that prior to making decisions, the trustee should understand the impact of its decisions on public natural resources held in trust.”<sup>1282</sup> The performance of that duty demands the development and incorporation of environmental justice principles into environmental policies and decision-making. The advice is reiterated in an Executive Order on Environmental Justice<sup>1283</sup> by President Clinton that:

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<sup>1279</sup> Office of the District of Columbia Auditor 2016 Administrative Justice in the District of Columbia: Recommendations to Improve DC’s Office of Administrative Hearings 11.

<sup>1280</sup> The *Payne* test is established in the decision of the Commonwealth Court in *Payne v Kassab* 1973 312 A2d 86 (Pa Commw Ct). See also *Snelling v Department of Transportation* 1976 366 A2d 1298 (Pa Commw Ct), *Concerned Residents of Yough v Department of Environmental Resources* 1994 639 A2d 1265 (Pa Commw Ct), *Pennsylvania Environmental Management Services v Commonwealth* 1986 503 A2d 477 (Pa Commw Ct). The Commonwealth Court held in the *Payne*’s case that the court’s role is to test an agency’s decision under review by a threefold standard, namely:

- 1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resources?
- 2) Does the record demonstrate a reasonable effort to reduce environmental incursion to a minimum?
- 3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

<sup>1281</sup> 2017 No 10 MAP 2015.

<sup>1282</sup> 2017 No 10 MAP 2015 at page 31.

<sup>1283</sup> Federal Register 1994 *Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations* (Executive Order 12898 of February 11 1994) available at <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf> [date of use 6 June 2017].

... to the greatest extent practicable and permitted by law, and consistent with the principles ... each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories.

In Pennsylvania, the thrust of the duty imposed on the Commonwealth as public trustee of natural resources in section 27 of article 1, is to “conserve and maintain them for the benefit of all the people.” That duty requires:

...the fair treatment and meaningful involvement of all people with respect to the identification of environmental issues and the development, implementation, and enforcement of environmental policies, regulations, and law ... No group of people – including racial, ethnic, or socio-economic groups – will bear a disproportionate share of the negative environmental impacts resulting from industrial, municipal, and commercial activities or from the execution of federal, state and local programs and policies. The attainment of environmental justice requires proactive and ongoing review of environmental and administrative programs and policies, identification of inequities and work to assure equal consideration and protection.<sup>1284</sup>

Where that is not done, section 9 of article V of the Constitution of the Commonwealth of Pennsylvania creates “a right of appeal from ...an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.”

The Pennsylvania’s *Administrative Agency Law*<sup>1285</sup>(AAL) contains provisions giving effect to the constitutional right to challenge administrative action.<sup>1286</sup> Its scope covers acts of executive and government agencies, which by the definition in section 101 includes the Governor and the departments, boards, commissions, authorities and other officers and agencies of the government, political sub-divisions like municipalities and local authorities, and the officers of the agencies, and political sub-divisions. Accordingly, persons aggrieved by acts of authorities and persons

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<sup>1284</sup> Environmental Justice Work Group 2001 *Report to the Pennsylvania Department of Environmental Protection* 6 available at [http://files.dep.state.pa.us/PublicParticipation/Office%20of%20Environmental%20Advocacy/EnvAdvocacyPortalFiles/2013/Environmental\\_Justice\\_Work\\_Group\\_June\\_2001.pdf](http://files.dep.state.pa.us/PublicParticipation/Office%20of%20Environmental%20Advocacy/EnvAdvocacyPortalFiles/2013/Environmental_Justice_Work_Group_June_2001.pdf) [date of use 22 September 2017].

<sup>1285</sup> 1945 Pa. Laws No 442.

<sup>1286</sup> The 1945 Act remained intact until its amendment 1968 to repeal provisions barring judicial review of agency actions (1968 Pa. Laws 1135 No 354) such that it can be argued that adjudications and judicial review in Pennsylvania remained frozen and have not benefited from developments in administrative law for a considerable period. Consequent upon the amendment of the state’s Constitution, and in 1978, to add new chapters dealing with the use of interpreters and re-codify it into Consolidated Pennsylvania Statutes (1978 Pa. Laws 202 No 53. See section 103). See also Pepe *Legislative Process, Statutory Drafting, Regulator Process and Update* 1.

within the scope of AAL are entitled to seek administrative remedies against them pursuant to the Act.<sup>1287</sup>

Notice of a hearing by a Commonwealth agency is essential in adjudication proceedings, and by section 504 of AAL, an adjudication shall be invalid “as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard.”<sup>1288</sup> Comprehensive provisions<sup>1289</sup> are made for the engagement of an interpreter for persons with limited English language proficiency at the cost of the agency conducting the administrative proceeding.<sup>1290</sup> Similar provisions are made for the engagement of an interpreter for persons who are deaf.<sup>1291</sup> To ensure that proceedings are not bogged down by technicalities, section 505 of AAL provides that “Commonwealth agencies shall not be bound by technical rules if evidence at agency hearings, and all relevant evidence of probative value may be received.”

### *5.2.2 Judicial review of agency action*

As a general rule, the provisions of the AAL relating to judicial review “apply to all Commonwealth agencies regardless of any statutory provision that there shall be no appeal from the adjudication of an agency, or that the adjudication of an agency shall be final or conclusive, or shall not be subject to review.”<sup>1292</sup> Consequently, any person who is aggrieved by a decision of an agency “shall have the right to appeal

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<sup>1287</sup> By virtue of section 501, AAL applies to all Commonwealth agencies except certain proceedings before the Department of Revenue, Auditor General, Board of Finance and Revenue, or the Secretary of the Commonwealth in terms of the Pennsylvania Election Code (1937 PL 1333 No 320), the Department of Transportation and the State System of Higher Education involving student discipline.

<sup>1288</sup> In *R. P. v Department of Public Welfare* 2003 408 A.2d 888, the Commonwealth Court pointed out that there is no need for argument that due process requires an express and unequivocal notice in order for a hearing to be meaningful.

<sup>1289</sup> Provisions cover the certification of interpreters, appointment, their role in proceedings, fee schedule, standards of professional conduct, and what steps to take upon non-availability of qualified interpreter. See sections 561-568 of AAL.

<sup>1290</sup> Section 567 of AAL.

<sup>1291</sup> See sections 581-588 of AAL.

<sup>1292</sup> Section 701(a) of AAL. For an agency action to be final under the APA, two conditions must be satisfied, namely, “...first, the action must mark the consummation of the agency’s decision-making process- it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” See *Bennett v Spear* 1997 520 US 154 at 177-8.

therefrom to the court vested with jurisdiction for such appeals."<sup>1293</sup> The implication of these provisions is that the potential for absolute or arbitrary exercise of power is put under check.

In proceedings for judicial review of agency action, the complaining party has the right to challenge the acts of the agency and may also question the validity of the act under which the action is undertaken. He is however precluded from raising new issues which were not raised in the agency proceeding, except with the approval of the court.<sup>1294</sup> Furthermore, judicial review proceedings do not require a jury, and the remedies available to the petitioner include remedies at law and equitable reliefs.<sup>1295</sup>

A sure ground for the success of a judicial review action is the successful proof of the violation of a constitutional right, or non-compliance with the requirement of a statute. In that situation, the court hearing a review proceeding shall not affirm the agency ruling if it "is in violation of the constitutional rights of the appellant, or is not in accordance with law... or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence."<sup>1296</sup> The case of *Southern Union Co v United States*<sup>1297</sup> reinforced the principle that an administrative action cannot thwart a constitutional right.<sup>1298</sup>

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<sup>1293</sup> Section 702 of AAL.

<sup>1294</sup> Section 703(a) of AAL.

<sup>1295</sup> Section 703(b) of AAL.

<sup>1296</sup> Section 754(b) of AAL.

<sup>1297</sup> 2012 132 S Ct 2344.

<sup>1298</sup> The appellant in the case (a natural gas distributor), had earlier been convicted of knowingly storing liquid mercury without a permit, violating the *Resource Conservation and Recovery Act* 1976 (RCRA). Violation of RCRA was caused by truants who had broken into the storage facility and spread mercury to neighbouring premises, resulting in temporary displacement of residents for the required clean-up. The fine was calculated for the period of storage (762 days) amounting to \$38.1 million, but the appellant contended that the fine should not be for more than 1 day, following the decision in *Apprendi v New Jersey* 2000 530 US 466. The Supreme Court rejected government's argument that applying the decision in *Apprendi* to determine fines due for breach of regulations will prevent the government from enacting statutes making it possible to calibrate fines to a defendant's culpability. The court had held in *Apprendi* that by the sixth amendment, facts which increase the maximum punishment authorised for certain offences must be proved to a jury beyond reasonable doubt. The Court, however, held in the *Southern Union's case* that the long-standing tenet of common law criminal jurisprudence on which *Apprendi* is based, that the truth of every accusation against a defendant should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours cannot be assailed.

Regrettably, failure to seek and exhaust administrative remedies made available by an agency will foreclose judicial review.<sup>1299</sup> Accordingly, in *Citizens Concerned About Taxes v Department of Education*,<sup>1300</sup> the Commonwealth Court declined jurisdiction over the Department of Education's final approval of the school board's plan for bid awards, where the petitioners twice failed to appeal to the Secretary of Education the issues addressed by the division chief and the division chief's failure to grant them a hearing on those issues. Similarly, in *Matesic v Maleski*,<sup>1301</sup> the court held that a petitioner to an agency for the issuance, amendment, waiver or repeal of a regulation must show evidence that he has exhausted all administrative remedies before an action for mandamus can be entertained.

The awareness of possible deficiency in the AAL that it "is not comprehensive and, unfortunately, merely sets out an individual's right to a hearing, the right to an appeal, and the bare bones of adjudicatory procedure,"<sup>1302</sup> resulted in the passing of *General Rules of Administrative Practice and Procedure*<sup>1303</sup> (GRAPP). GRAPP was passed to supplement the provisions of the AAL, with the former simply introducing new set of procedural rules, to implement article V, section 9 of the Constitution of Pennsylvania.<sup>1304</sup> There is no obligation on administrative agencies to adopt the GRAPP. However, where an agency has not adopted its own regulations, its practice and procedures will be subject to the GRAPP.<sup>1305</sup>

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<sup>1299</sup> This is a departure from the requirement of the federal APA that exhaustion of remedies is not a pre-requisite for judicial review of administrative action. See para 5.2.1. Though in *EQT Production Company v Department of Environmental Protection of the Commonwealth of Pennsylvania* 2015 130 A.3d 752, the appellant had earlier notified DEP that a spill at one of its sites had contaminated a river. The appellant challenged the basis of calculation of civil penalties imposed, but the trial court sustained DEP's objection that the appellant had failed to exhaust administrative remedies, which required it to seek relief on assessment of penalty from the Environmental Hearing Board (EHB). The Supreme Court in reversing that ruling held that DEP's threat of multi-million-dollar assessments against the appellant "was sufficiently direct, immediate, and substantial to create a case or controversy justifying pre-enforcement judicial review... and that exhaustion of administrative remedies ...was unnecessary in the case."

<sup>1300</sup> 1999 739 A.2d 1129 (Pa. Cmwlth).

<sup>1301</sup> 1993 624 A.2d 776 (Pa. Cmwlth).

<sup>1302</sup> Ruth 1996 J Nat'l Ass'n Admin Law Judiciary 221.

<sup>1303</sup> Issued under section 506 of the *Administrative Code* 1929 71 PS s 186.

<sup>1304</sup> See Pepe 2011 Legislative Process, Statutory Drafting, Regulator Process and Update 1.

<sup>1305</sup> Section 31.1(a)(c) of GRAPP. See also *Celane v Insurance Commissioner* 1980 415 A.2d 130 (Pa. Cmwlth), and *Pioneer Finance Co. v Securities Commission* 1975 332 A.2d 565 (Pa. Cmwlth). In a proceeding involving two agencies with overlapping jurisdictions and one agency

To ensure that justice is done to the ordinary person who may be aggrieved by the action of an agency, the GRAPP is interpreted as not being subject to strict rules of procedure to which courts of records are. In this regard, section 31.2 of the GRAPP provides that the rules “shall be liberally construed to secure just, speedy and inexpensive determination of the issues presented.” Accordingly, it has been held that in a proceeding before a licensing board, ‘substantial evidence’ is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>1306</sup>

Furthermore, a person need not be aggrieved in the traditional sense or necessarily be a party to challenge actions of an administrative agency,<sup>1307</sup> and accordingly, “standing to appeal administrative decisions extends to persons, including non-parties, who have a direct interest in the subject matter, as distinguished from a direct, immediate, and substantial interest.”<sup>1308</sup> To avoid complications, section 31.3 of the GRAPP clarifies ways by which persons interested in a proceeding may become a party in one of five circumstances, namely as applicant,<sup>1309</sup>

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interprets the other’s act in a manner inconsistent with that other agency, the interpretation will be given effect to the extent that the interpretation is consistent with the legislative intent of the General Assembly. See *Younkin v State Real Estate Commission* 2001 774 A.2d 1281 (Pa. Cmwlth).

<sup>1306</sup> See *Younkin v State Real Estate Commission* 2001 774 A.2d 1281 (Pa. Cmwlth).

<sup>1307</sup> The GRAPP creates an innovative way to permit persons who may otherwise have been prevented from filing an action or joining an existing one to do so. Section 35.28 of GRAPP provides that:

- a) A petition to intervene may be filed by a person claiming a right to intervene or an interest of such nature that an intervention is necessary or appropriate to the administrative of the statute under which the proceeding is brought. The right may be one of the following:
  - 1) A right conferred by statute of the United States or of this Commonwealth.
  - 2) An interest which may be directly affected and which is not adequately represented by existing parties, and as to which petitioners may be bound by the action of the agency in the proceeding. The following may have an interest: consumers, customers or other patrons served by the applicant or respondent; holders of securities of the applicant or respondent; employees of the applicant or respondent; competitors of the applicant or respondent.
  - 3) Other interest of such nature that participation may be in the public interest.
- b) The Commonwealth or an officer or agency thereof may intervene as of right right in a proceeding subject to this part.

<sup>1308</sup> See *Gambling Subsidies v Gaming Control Board* 2007 916 A.2d 628 (Pa. Cmwlth).

<sup>1309</sup> The party on whose behalf an application is made in proceedings involving application for permission or authorisation which the agency may give under statutory or other authority delegated to it.

complainant,<sup>1310</sup> intervener,<sup>1311</sup> protestant,<sup>1312</sup> or respondent.<sup>1313</sup> If the petitioner cannot show the violation of a right, the petition is bound to fail,<sup>1314</sup> but if there is a potential violation of a right it is sufficient to create a right for an intervener to file a petition, either as a person affected or in the public interest. Accordingly, in *Re Petition of Dwyer*,<sup>1315</sup> it was held that alleged abuses by the Industrial Board with regard to the enforcement of the *Fire and Panic Act*<sup>1316</sup> can be and should be challenged by resorting to the AAL.

To facilitate greater opportunity to settle or expedite administrative proceedings without the need for review, the GRAPP introduced prehearing conferences, permitting the "submission of facts, arguments, offers of settlement, or proposals of adjustment, for settlement of a proceeding, or any issue therein, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited..."<sup>1317</sup> A prehearing conference may be initiated by the agency after consideration of beneficial results to be derived therefrom, and the failure of a party to attend after being served with due notice "shall constitute a

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<sup>1310</sup> Person who complains to the agency of an agency regulation or general order or anything done or omitted to be done in violation of the provisions of a statute or other delegated authority administered by the agency, or any orders, rules or regulations issued thereunder, or another alleged wrong over which the agency may have jurisdiction.

<sup>1311</sup> A person intervening or petitioning to intervene as provided by sections 35.27-35.31 of the GRAPP, when admitted as a participant to a proceeding. Admission as an intervener may not be construed as recognition by the agency that the intervener has a direct interest in the proceeding or might be aggrieved by an order of the agency in the proceeding.

<sup>1312</sup> Person objecting on the ground of private or public interest to the approval of an application, petition, motion or other matter which the agency may have under consideration. Protestants desiring to become interveners in a proceeding before the agency shall file a petition for intervention as provided by sections 35.27-35.31 of GRAPP. "A protest is solely intended to alert the agency and the parties to a proceeding of the fact and nature of the objection of the protestant to the proposed agency action, other than a notice of proposed rule-making..." See section 35.24 of GRAPP.

<sup>1313</sup> Person subject to a statute or other delegated authority administered by the agency, to whom an order or notice is issued by the agency instituting a proceeding or investigation on its own initiative or otherwise.

<sup>1314</sup> In *Pennsylvania Dental Association v Insurance Department* 1989 560 A.2d 870 (Pa. Cmwlth), the Commonwealth Court held that a denial of the Pennsylvania Dental Association's petition to intervene in a statutory comment procedure did not violate procedural due process in part because the Association failed to show that the changes in payment rates to its members would adversely affect their ability to remain in business and especially because nearly 40% of its members would not be affected by the rate change.

<sup>1315</sup> 1979 406 A.2d 1335.

<sup>1316</sup> 1927 PL 465 No 299.

<sup>1317</sup> Section 35.111 of GRAPP.



waiver of all objections to the agreements reached, if any, and any order or ruling with respect thereto.”<sup>1318</sup> The advantage of a prehearing conference lies in the fact that issues may be simplified by the exchange and acceptance of potential evidence exhibits, admission of facts or authenticating documents, which taken together may shorten the duration of proceedings or eliminate the need for a review entirely.<sup>1319</sup>

Although the courts have been very active in intervening to protect constitutional rights, including those having a bearing on the environment,<sup>1320</sup> there were concerns that administrative law in Pennsylvania has not witnessed significant developments in terms of legislation,<sup>1321</sup> That is however being addressed. For example, in 2011, the legislature directed the Joint State Government Commission to study and make recommendations on the practice of administrative law,<sup>1322</sup> resulting in a report titled “*Reforming the Administrative Law of Pennsylvania*,”<sup>1323</sup> which proposed the adoption of a comprehensive statute revising and re-codifying the AAL in the light of the MSAPA.<sup>1324</sup> The recommendations are the substance of a pending Bill in the Senate on *Administrative Law Procedure and Office of Administrative Hearing*,<sup>1325</sup> extensively revising provisions on practice and procedure of Commonwealth

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<sup>1318</sup> Section 35.113(b) of GRAPP.

<sup>1319</sup> Section 35.112 of GRAPP.

<sup>1320</sup> See for example, *Pennsylvania Environmental Defense Fund v Commonwealth* No 10 MAP 2015. Decided on 20 June 2017 available at <http://www.pacourts.us/assets/opinions/Supreme/out/J-35-2016mo%20%2010314240919600966.pdf?cb=1> [date of use 22 September 2017] and *Robinson Township and Others v Commonwealth of Australia and Others*, 2013 A.3d WL 6687290 (Pa SC), and Pennsylvania in *Robinson Township v Commonwealth of Pennsylvania* 2016 A.3d J-34A-B.

<sup>1321</sup> See Ruth 1996 J Nat'l Ass'n Admin Law Judiciary 221.

<sup>1322</sup> See House Resolution 247 of 2011 available at <http://jsg.legis.state.pa.us/resources/documents/ftp/documents/HR247.pdf> [date of use 22 September 2017].

<sup>1323</sup> See Joint State Government Commission of the General Assembly of the Commonwealth of Pennsylvania “Reforming the Administrative Law of Pennsylvania: Staff Report 2014” 2014 J Nat'l Ass'n Admin Law Judiciary 317.

<sup>1324</sup> Joint State Government Commission of the General Assembly of the Commonwealth of Pennsylvania “Reforming the Administrative Law of Pennsylvania: Staff Report 2014” 2014 J Nat'l Ass'n Admin Law Judiciary 319.

<sup>1325</sup> Senate Bill 413 on Administrative Law Procedure and Office of Administrative Hearings – Regular Session 2015-2016 available at <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syar=2015&body=S&type=B&bn=0413> [date of use 22 September 2017].

agencies and judicial review of Commonwealth agency action, as well as establishing the OAH.<sup>1326</sup>

### *5.2.3 Assessment of the right to just administrative action: Pennsylvania*

The need to subject the exercise of administrative action to control by rules devised by the legislature had been recognised in the USA for nearly a century, resulting in the enactment of the APA in 1946. However, the fact that the APA is not applicable to the states necessitated the collation and adoption of best practices in the APA and relevant statutes in the various states as the first version of the MSAPA in the same year. The APA, AAL and MSAPA have been developed over the years in the form of amendments and judicial interpretation.

Administrative decisions and actions, particularly those relating to the environment, could be technical for a potential litigant who is seeking to challenge public authorities or private corporations in order to enforce his or her rights. This necessitates the need to have regulations drafted in a language sufficiently clear to understand and for administrative proceedings to be conducted in a simple, easy to follow manner. In an environment where many of the potential victims of hydraulic fracturing are likely to be challenged both financially and in scientific knowledge of relevant issues, there is a potential to learn from section 505 of the AAL which mandates administrative agencies to eschew technical rules of evidence and to receive any relevant evidence having probative value regardless of the manner of presentation. That will enable vulnerable claimants to better present their cases even where they are not represented by counsel.

In the same vein, provisions in the GRAPP are designed to implement section 9 of article V of the Constitution of Pennsylvania which among other things creates a "right of appeal from an administrative agency." The purpose of the GRAPP is to ensure that an ordinary person aggrieved by an administrative action gets justice.

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<sup>1326</sup> The adoption of OAH for Pennsylvania is likely to facilitate the impartiality of ALJs as fact-finders, thereby improving the quality of hearings and decisions. Furthermore, the management and training of all ALJs in the hands of experienced officers whose understanding and appreciation of the duties and responsibilities of the office come from their actual performance of such duties and responsibilities. See Ruth 1996 *J Nat'l Ass'n Admin Law Judiciary* 245.

Accordingly, legislation provides that administrative proceedings are not subjected to strict rules of procedure. The rules “shall be liberally construed to secure the just, speedy and inexpensive determination of issues,” and evidence which a reasonable mind will accept as sufficient to support a conclusion.<sup>1327</sup> Simplification of procedure in this manner will be beneficial to the vulnerable population.

The requirements in sections 561-568 of AAL regarding the comprehensive provisions covering the certification of interpreters, appointment, their role in proceedings, fee schedule, standards of professional conduct, and what steps to take upon non-availability of qualified interpreter, will further assist in the presentation of the cases of vulnerable people. It is worthy of note that the legislation also addresses the challenges facing disabled persons by making similar provisions for the engagement of interpreter for persons who are deaf.<sup>1328</sup>

Though section 38 of the Constitution is generous enough to remove the typical limitation that a litigant may face relating to standing in getting access to courts in South Africa, rules similar to those provided for in section 31.3 of the GRAPP have the potential to further simplify the rules in relation to administrative justice. Classifying and defining the role of potential persons as applicant, complainant, intervener, protestant, and respondent who may challenge administrative action, extending standing to persons including non-parties having no direct interest in the matter, has the potential to avoid unnecessary litigation to resolve questions of capacity involved in seeking redress in the courts.

The GRAPP introduced pre-hearing conferences in administrative proceedings to facilitate opportunities to settle expedited proceedings. These conferences may result in the simplification of issues in contention thereby shortening the duration of proceedings, and possibly eliminating the need for judicial review entirely.

MSAPA’s recommendation for the adoption of an OAH to conduct administrative adjudications has the potential to engender fairness and impartiality on the part of

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<sup>1327</sup> Section 31.2 of GRAPP.

<sup>1328</sup> See sections 581-588 of AAL.

ALJs in the minds of the public, improve the quality of decisions, facilitate training and improve the experience of ALJs, streamline administration structures thereby saving money, and creating an experienced government-wide and politically insulated career service to attract quality individuals. Though concerns that administrative matters are best suited to executive decision-making and not adjudication by a trial judge, the fact that an internal review process fortifies the risk of conflict of interest make the consideration of a central hearing panel worthy of consideration.

### ***5.3 Domestic perspective: UK***

#### *5.3.1 Legal framework*

Administrative law in the UK is largely judge-made. Over the years, the increasing number of administrative tribunals and inquiries resulted in the need for legislation in order to introduce some element of uniformity in process for the appointment of personnel and imposing a general duty to give reasons for decisions. The grounds of review have however not been codified.<sup>1329</sup>

To avoid regulatory failure, administrative justice requires a guarantee of fair procedural principles in the functioning of the administrative agency such that the procedure should facilitate the agency work to realise the objectives for which it is established, rather than an insistence on the rigours of the adversarial or adjudicative model of the judicial procedure.<sup>1330</sup> In the event of failure, however, institutions and processes available for the redress of grievances against public authorities in the UK include internal complaints procedures, internal and external reviews, ombudsman and other independent complaints adjudicator, tribunals, and the courts via judicial review, statutory appeals and private actions. The services

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<sup>1329</sup> Corder 1998 *Admin Review* 10.

<sup>1330</sup> Craig "Three perspectives on the relationship between administrative justice and administrative law" in Creyke and MacMillan (eds) *Administrative Justice- The Core and the Fringe* 35.

and functions which administrative justice and tribunals in the UK<sup>1331</sup> undertake span:

- 1) The overall system by which decisions of an administrative or executive nature are made by central or local public governments and their agencies, and the law under which the decisions are made.
- 2) Publicly-funded regulators of the public and private sectors.
- 3) Planning enquiries taking decisions on behalf of the state.
- 4) The internal review systems for redress against administrative or executive decisions, including dispute resolution, complaint processes, ombudsman schemes, tribunals, courts, and judicial review of decisions.
- 5) Tribunals ruling on party versus party disputes such as employment and property claims.

Though article 8 of the European Convention protects the individual against any arbitrary interference by public authorities<sup>1332</sup> by affording a right to UK citizens to submit petitions to the European Court,<sup>1333</sup> it raises a fundamental constitutional question on how to reconcile positive human rights guarantees in the European Convention with the doctrine of parliamentary sovereignty prevalent in the UK. A dilemma is thus created as to how far the provisions of the European Convention should be allowed to enjoy precedence over domestic principles and practice relating to administrative proceedings. The *Human Rights Act*<sup>1334</sup> (hereafter "the HRA") was enacted to resolve that dilemma.<sup>1335</sup>

### 5.3.1.1 The era of HRA

The enactment of the HRA caused a radical change in the role of domestic courts in the UK,<sup>1336</sup> arising out of recognition by the Parliament that legislation like the HRA was necessary:

... at a time when the map of the public sector had been redrawn, as privatisation and contracting-out had over several decades, increased the role of the private and voluntary sectors in the provision of public services,... [as] it was clearly envisaged that the Act would

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<sup>1331</sup> See UK Ministry of Justice *Administrative Justice and Tribunals: A Strategic Work Programme 2013 -2016* 7.

<sup>1332</sup> *Glaser v United Kingdom* 2003 FCR 193.

<sup>1333</sup> The UK signed the European Convention on 4 November 1950 and ratified it on 8 March 1951. It became effective in the UK on 3/9/53. See 'Chart of signature and ratifications of Treaty 005' at [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p\\_auth=3pfiQNE2](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=3pfiQNE2) [date of use 15 June 2017].

<sup>1334</sup> Chapter 42 of 1998.

<sup>1335</sup> Leyland and Anthony *Textbook on Administrative Law* (8<sup>th</sup> ed) 69.

<sup>1336</sup> Hickman 2008 *Public Law* 84.

apply beyond activities undertaken by purely State bodies, to those functions performed on behalf of the State by private or voluntary sector bodies, acting either under statute or contract. The Act was therefore designed to apply human rights guarantees beyond the obvious governmental bodies.<sup>1337</sup>

To achieve that objective, section 3(1) of the HRA requires that as “far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [European] Convention rights.”<sup>1338</sup>

Regarding acts of public authority, section 6(1) of the HRA provides that “it is unlawful for a public authority to act in a way which is incompatible with a Convention right.” By virtue of this provision, any act of a public authority that is contrary to the European Convention will be *ultra vires*, thereby redefining administrative law in the UK, and give supremacy to Convention rights.<sup>1339</sup>

Accordingly:

- 1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may:
  - a. Bring proceedings against the authority under this Act in the appropriate court or tribunal, or
  - b. Rely on the Convention right or rights concerned in any legal proceedings, but only if he is, (or would be) a victim of the unlawful act.
- 2) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim.<sup>1340</sup>

This provision received judicial imprimatur in the case of *YL v Birmingham City Council*<sup>1341</sup> where the question before the House of Lords was whether a government agency performing “functions of a public nature” for the purpose of section 6 of the HRA was a “public authority” obliged to act compatibly with European Convention rights under section 6(1) of HRA. The court held that public authorities in the UK must not act incompatibly with a Convention right of any person in the country; and that the same provision applied to anybody which is not a public authority, but “whose functions are of a public nature.”<sup>1342</sup>

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<sup>1337</sup> 2003-2004 Seventh Report of the Joint Committee on Human Rights 382 at para 4.

<sup>1338</sup> Section 1 of the HRA provides that the ‘Convention rights’ are the rights and fundamental freedoms set out in articles 2 to 12 and 14 of the European Convention.

<sup>1339</sup> Leyland and Anthony *Textbook on Administrative Law* (8<sup>th</sup> ed) 77.

<sup>1340</sup> Section 7 of the HRA.

<sup>1341</sup> 2007 UKHL 27.

<sup>1342</sup> 2007 UKHL 27 at para 3.

Considering that decision-makers in the private sector take decisions and engage in acts which would qualify as 'public,' how much of such decision or act can be subjected to judicial review, especially in view of the emerging trend of an extensive scope of the nature of 'public power'?<sup>1343</sup> The House of Lords warned that formulating a general test for the determination of whether or not a function is of a public nature might result in dangerous consequences.<sup>1344</sup> Rather, it is better to leave it to the courts to determine it on the facts of each case, mindful of the following considerations:<sup>1345</sup>

- 1) In considering the nature of the function in question, there is need to consider the role and responsibility of the state agency as functionary in relation to that function, and determine whether or not there is any statutory power or duty in relation to the function?
- 2) To what extent does the state or its agency directly or indirectly regulate, supervise and inspect the performance of the function, and possibly impose penalties on defaulters and those who fall short of the publicly promulgated standards for performance?
- 3) The extent of the risk that an improper performance of the function might violate an individual's right under the European Convention is also relevant.

Mindful of the above, it is possible to construe section 7(1) of HRA as introducing the classical doctrine of standing thereby limiting the category of persons who may seek judicial review only to persons who are victims of unlawful act of a public authority. There is, however, no need for such concerns to the extent that section 6(3)(b) of HRA extends the definition of public authority to cover bodies which are not public authorities in character, but whose functions are of a public nature, therefore making it likely to include bodies whose acts are not ordinarily amenable to judicial review. Such extension may also make it possible to apply the HRA horizontally between private persons.<sup>1346</sup> A liberal approach to interpretation expanding the rule relating to standing in judicial review procedure would give

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<sup>1343</sup> Leyland and Anthony *Textbook on Administrative Law* (8<sup>th</sup>ed) 221.

<sup>1344</sup> A summary of the relevant considerations as propounded by the court in *YL v Birmingham City Council* 2007 UKHL 27 at para 5-13.

<sup>1345</sup> See *YL v Birmingham City Council* 2007 UKHL 27 at para 5-13.

<sup>1346</sup> Phillipson 1999 *Modern Law Review* 824-849. It is however argued to the contrary on the argument that there is no reference expressly to private persons or organisations in any other part of the HRA. See Hunt 1998 *Public Law* 423.

increased access to activists and pressure groups to challenge government action.<sup>1347</sup>

Proponents of the horizontal application of the HRA contend that because the definition of 'public authority' in section 6(3)(a) of the HRA include a "court or tribunal," that definition extends the scope of the HRA to cover the jurisdiction of courts and tribunals, which apply "not only [to] cases involving other public authorities but also in developing the common law in deciding cases between individuals."<sup>1348</sup> In any event, some private law rights have their basis in administrative law decisions, which are subject to challenge under the 'public authority' provisions of the HRA.<sup>1349</sup> Furthermore, the courts are obliged to protect Convention rights of an individual in legal proceedings arising from infringement by public authority or by private person.<sup>1350</sup> In any event, section 6(3)(b) of the HRA also creates a right of action against "any person certain of whose functions are functions of a public nature."

What is important is for the applicant to have sufficient interest in relation to the unlawful act such as having been victimised.<sup>1351</sup> Indeed, the courts have recognised the right of others who have been indirectly affected by the action against the victim.<sup>1352</sup> Therefore, the issue for determination does not relate to the process of coming to a decision, but whether or not the right of the claimant had been violated. It is concerned with substance, and not procedure, hence, in *Thompson and Venables v News Group Newspapers Ltd*,<sup>1353</sup> the court granted an injunction to

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<sup>1347</sup> See *R v Secretary of State for Social Security, ex parte The Joint Council for the Welfare of Immigrants* 1997 1 WLR 275.

<sup>1348</sup> *Thompson and Gordon Cases and Materials on Constitutional & Administrative Law* 11<sup>th</sup> ed 435.

<sup>1349</sup> *Mare and Gallafent* 2001 *JR* 29.

<sup>1350</sup> See *Union Nationale Des Entraîneurs Professionnels du Football (UNECTEF) v Heylens and Others* 1987 ECR 4097.

<sup>1351</sup> See section 7(2) of the HRA. See also the case of *R (Begum) v Head Teacher and Governor of Denbigh High School* 2006 UKHL 15. The House of Lords overruled the Court of Appeal's ruling that a pupil's right to religious freedom under article 9 of the ECHR had been contravened when the school forbade her from attending classes wearing the *hijab* on the argument that there had been no interference with the claimant's right given that she chose the school voluntarily, when she could have gone to another school that permitted that mode of dressing.

<sup>1352</sup> See *Re McCaughey's Application* 2011 2 WLR 1279.

<sup>1353</sup> 2001 2 WLR 1038.



protect the identities of the applicants [who had earlier been convicted as minors], because disclosure might result in serious possibility of physical harm or death or some other potential disastrous consequences to them.<sup>1354</sup>

### 5.3.2 Judicial review of administrative action

The exercise of judicial review by the court is a supervisory, and not an appellate jurisdiction. In an appeal, the court has to decide whether the decision of a prior arbiter is right or wrong and if wrong, the court has the power to substitute that decision with its own.<sup>1355</sup> A judicial review proceeding in the UK, is:

...intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and ... administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner... It is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached...<sup>1356</sup>

In the years preceding the HRA, the judicial review of administrative action was premised largely on reasonableness and *ultra vires*.<sup>1357</sup> Recent development however confirms a shift to embrace the principle of legality, interpreted as imposing "both a duty on administrative decision-makers to give reasons for their decisions and a duty on judges to defer to those reasons to the extent that they refrain from reviewing on a correctness standard."<sup>1358</sup> The HRA provides an unassailable protection against abuse of power by the state and its agencies beyond that seen under an unwritten constitution, giving the courts appropriate tools to uphold

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<sup>1354</sup> In *R v Disciplinary Committee of the Jockey Club (CJB), ex parte The Aga Khan*, 1992 App L R 12/04 (Arbitration, Practice and Procedure Law Reports), the court held that the Disciplinary Committee of the Jockey Club "effectively regulates a significant national activity, exercising powers which affect the public and are exercised in the interest of the public... If the Jockey Club did not regulate this activity the government would probably be driven to create a public body to do so... This has the result that while the Jockey Club's powers may be described as, in many ways, public they are in no sense governmental" (see paras 43-44).

<sup>1355</sup> Thompson and Gordon Cases and Materials on Constitutional & Administrative Law 494.

<sup>1356</sup> Chief Constable of the North Wales Police v Evans 1982 1 WLR 1155.

<sup>1357</sup> R v Secretary of State for the Home Department, ex p. Fayed 1997 1 All ER 228.

<sup>1358</sup> Poole "The reformation of administrative law" in LSE 2007 *Law, Society and Economy Working Papers* 2 available at <https://www.lse.ac.uk/collections/law/wps/WPS12-2007PooleN2.pdf> [date of use 27 October 2017].

freedoms, and a right balance in the exercise of powers by each of the legislature and the judiciary.<sup>1359</sup>

The lack of a written constitution in the UK gives effect to the doctrine of parliamentary supremacy, which prevents judges from declaring legislation as ineffective. Indeed, Dicey was reported to have insisted that Britain had no need of administrative law as the Parliament was supreme, and laws made by it are not subject to review except by itself.<sup>1360</sup> But courts are called upon to determine the law in context from time to time. For example, in *Anisminic v Foreign Compensation Commission*,<sup>1361</sup> the court was requested to consider and determine the effect of section 4(4) of the *Foreign Compensation Act* 1950, which provided that any determination by the Commission in respect of an application "shall not be called in question in any court of law." The court refused to accept the argument of the respondent that the words of the statute are plain and capable of having only one meaning. The fact that there is a determination presupposes that the determination shall be valid and not constitute a nullity. Accordingly, it is unlikely that parliamentary supremacy can exhaustively limit the courts' powers regardless of the legislative requirement that acts done pursuant to a statute "shall not be called in question in any court of law." In any event, courts are not precluded from reviewing the manner of the exercise of power conferred on public authorities by legislation.<sup>1362</sup>

### *5.3.3 Assessment of the right to just administrative action: The UK*

Where legislation forbid judges from declaring actions of government officials as unreasonable, the resultant arbitrariness in the long run tend to prove the connection between administrative law and the protection of human rights.<sup>1363</sup> In *R v Secretary of State for the Home Department, ex p. Fayed*,<sup>1364</sup> the Court of Appeal

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<sup>1359</sup> Lord Irvine of Lairg "The development of human rights in Britain under an incorporated Convention on Human Rights" in Lord Irvine of Lairg *Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays* 22.

<sup>1360</sup> Leyland and Anthony *Textbook on Administrative Law* 8<sup>th</sup> ed 1.

<sup>1361</sup> 1969 2 AC 147 [House of Lords].

<sup>1362</sup> Thompson and Gordon 2014 *Cases and Materials on Constitutional & Administrative Law* (11<sup>th</sup> ed) 491.

<sup>1363</sup> Dyzenhaus 2012 *Review of Constitutional Studies* 93.

<sup>1364</sup> 1997 1 All ER 228.

held that but for the inclusion of a provision in the statute that the public officer was not required to give reasons for his decisions, the common law would have imposed a duty to give clear reasons for the refusal of citizenship. In that case, the Secretary of State in refusing the application for citizenship only indicated that “after careful consideration your application has been refused.”

The Report of the Committee on Administrative Tribunals and Enquiries<sup>1365</sup> observed that there was a need to properly characterise administrative tribunals as there was some confusion whether they should be regarded as part of the machinery of justice or as mere administrative expedients. The Committee found that tribunals were “part of the machinery provided by the Parliament for adjudication, responsible along with the courts for the enforcement of the Rule of Law.”<sup>1366</sup> The reforms recommended by the Committee resulted in the enactment of the *Tribunals and Enquiries Act* 1958, which marked a turning point in the recognition of administrative tribunals in England as having an obligation to dispense justice in an independent capacity, and providing extended rights of appeal to the courts, with a requirement that the tribunals provide reasons for their decisions, so as to aid judicial review if necessary in due course.<sup>1367</sup>

Compared to the courts, administrative tribunals have the benefit of specialist expertise and the experience of members coupled with the flexibility to develop and vary its procedures to suit the particular characteristics of its jurisdiction and the needs of its users.<sup>1368</sup> The perception of authority and fairness is important to the users, considering that the administrative tribunals adjudicate on matters affecting individual’s rights. Therefore, administrative tribunals “should properly be regarded

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<sup>1365</sup> HM Stationery Office The Report of the Committee on Administrative Enquiries 218.

<sup>1366</sup> HM Stationery Office The Report of the Committee on Administrative Enquiries 9.

<sup>1367</sup> See Lindseth “Always embedded’ administration: The historical evolution of administrative justice as an aspect of modern governance” 2004 *University of Connecticut School of Law Articles and Working Papers* available at [http://lsr.nellco.org/unconn\\_wps/19](http://lsr.nellco.org/unconn_wps/19) [date of use 27 October 2017].

<sup>1368</sup> The Administrative Court, whose core function is the resolution of disputes between the state and its citizens receives over 500 cases each month, and outstanding cases before the court were 3,500 and 2,825 in 2014 and 2015 respectively. See Judiciary of England and Wales 2016 *The Lord Chief Justice’s Report 2015* presented to the Parliament pursuant to section 5(1) of the *Constitution Reform Act* 2005.

as machinery provided by Parliament for adjudication rather than as part of the machinery of administration.”<sup>1369</sup>

In contemporary jurisprudence, however, the need to apply a stringent procedural requirement to administrative action is creating a blur on the plain sheet of parliamentary sovereignty.<sup>1370</sup> That need is increasingly being extended into decisions by the courts. In *Lloyd v McMahon*,<sup>1371</sup> Lord Bridge pointed out that the “courts will not only require the procedure in the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.”<sup>1372</sup> Accordingly, the courts have at different times intervened to fill the “omission of the legislature” to protect rights such as natural justice,<sup>1373</sup> or refuse to follow the clear implication of a statute that would deny a fundamental right,<sup>1374</sup> or authorise a tort.<sup>1375</sup> It is not unlikely that the courts will intervene to prevent a violation of procedural rights by administrative actions traceable to hydraulic fracturing.

The English courts have since 1987 “developed an additional approach to determine susceptibility [to judicial review] based on the type of function performed by the decision maker.” It is therefore relevant whether or not the decision or lack thereof has features, which are public in nature when determining whether or not that decision is subject to judicial review. Accordingly, in *Regina v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex Parte Wachmann*,<sup>1376</sup> an English court held that:

...to attract the court’s supervisory jurisdiction there must be not merely a public but potentially governmental interest in the decision-making power in question... In other words, where non-governmental bodies have hitherto been held reviewable, they have generally been operating as an integral part of a regulatory system, which although itself is non-statutory, is

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<sup>1369</sup> See paragraph 40 of the Report of the Committee on Administrative Tribunals and Enquiries.

<sup>1370</sup> Loveland *Constitutional Law, Administrative Law, and Human Rights* (4<sup>th</sup> ed) 565.

<sup>1371</sup> 1987 1 All ER 1118.

<sup>1372</sup> 1987 1 All ER 1118 at 1161.

<sup>1373</sup> *Cooper v Wandsworth Board of Works* 1863 14 CB (NS) 180.

<sup>1374</sup> *Adams v Naylor* 1944 KB 750.

<sup>1375</sup> *Morris v Beardmore* [1981] AC 446.

<sup>1376</sup> 1992 1 WLAR 1036 at 1041C-E.

nevertheless supported by statutory powers and penalties clearly indicative of government concern.

The *Tribunals, Courts and Enforcement Act 2007*<sup>1377</sup> established specialist tribunals and conferred with adjudicatory function in areas such as social security, mental health and education. The underlying objective is to give individuals access to a system of justice that is efficient, and which will be prompt and meet the needs of people.<sup>1378</sup>

## **5.4 Domestic perspective: South Africa**

### *5.4.1 Legal framework*

The Constitution contains appropriate mechanisms to ensure that the exercise of governmental power consistently reflects the values on which the democratic state is founded, including the objective of ensuring “accountability, responsiveness and openness.”<sup>1379</sup> The quest to ensure that there is no recurrence of the arbitrariness that characterised the former regime resulted in a clamour for constitutional guarantees in the form of codification of administrative law in South Africa. While other sections of the Constitution and other statutes may be relevant in enforcing the right to just administrative action, section 33 of the Constitution<sup>1380</sup> enumerates four requirements of the right to just administration, namely lawfulness, reasonableness, procedural fairness and the provision of reasons,<sup>1381</sup> while section 33(3) of the Constitution envisages that a legislation to be enacted will facilitate the practical implementation of the right, and provide the procedures and the statutory mechanisms to make the realisation of the right a reality.<sup>1382</sup> PAJA is the legislation envisaged, and as clearly stated in its explanatory note, it is “to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and the right to written reasons for administrative action as contemplated in section 33 of the Constitution ... and to provide for matters incidental thereto.” In relation to the

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<sup>1377</sup> Chapter 15 of 2007.

<sup>1378</sup> Anthony 2015 *Italian Journal of Public Law* 11.

<sup>1379</sup> Section 1(d) of the Constitution.

<sup>1380</sup> The full provision of section 33 of the Constitution is cited in para 1.3.3.2.

<sup>1381</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para 143.

<sup>1382</sup> Corder 1998 *Admin Review* 7.

development of shale gas by hydraulic fracturing, the provision of section 6 of the MPRDA is very clear. The section requires that “any administrative process conducted or decision taken in terms of this Act must be conducted or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness,” and that written decisions must accompany decisions. PAJA is considered in the next section of this chapter.

#### 5.4.1.1 Promotion of Administrative Justice Act

The preamble to PAJA states its objective, which is to comply with the constitutional requirement in section 33(3) by creating the means to give effect to the right to just administrative action. The legislation is usually construed from the perspective of the control of the exercise of public power, and rightfully so because taken from the perspective of section 33(1) and (2) of the Constitution, the exercise of power and decision-making that is fair, rational and lawful highlights the underlying protection of the right to just administrative action.<sup>1383</sup> However, a less commonly acknowledged objective is the obligation to be created by statute to “promote an efficient administration”<sup>1384</sup> expatiated in the preamble to PAJA.<sup>1385</sup> This further underscores the need to subject public administration to one of the overarching values “to ensure accountability, responsiveness and openness” specified in section 1 of the Constitution, and the values and principles governing public administration listed in section 195. The fulfilment of the attributes of the values will significantly eliminate potential abuse of the right protected by section 33 of the Constitution. Another possible effect of compliance is the reinforcement of public confidence in the administration.<sup>1386</sup>

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<sup>1383</sup> Currie and Klaaren “Introduction to the Promotion of Administrative Justice Act” in Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* para 1.2.

<sup>1384</sup> Section 33(3)(c) of the Constitution.

<sup>1385</sup> In order to “promote an efficient administration and good governance; and create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action.”

<sup>1386</sup> Brynard 2009 *Journal of Public Administration* 641.

PAJA is general administrative law in that it prescribes how public powers conferred on administrators by law are to be exercised and controlled. It creates a two-step process to facilitate the realisation of the right to just administrative action, first creating the necessity to determine whether or not the act under consideration falls within the scope of the application of the right created by the Constitution in section 33, that is 'administrative action,' and secondly, to determine the content of the rights as to lawfulness, reasonableness and procedural fairness.<sup>1387</sup> Being the national legislation envisaged by section 33 of the Constitution addressing the four heads of the right to just administrative action as enumerated in section 33(1) and (2), PAJA is intended to be a codification of the rights contained in the Constitution. Administrative action is therefore regulated by only one system of law grounded in the Constitution, and the powers of the court flow from PAJA and the Constitution itself.<sup>1388</sup> Accordingly, a litigant cannot go behind PAJA and seek to rely on the common law or the Constitution except to "inform the meaning of the constitutional rights and of the Act."<sup>1389</sup>

In *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*,<sup>1390</sup> the appellant was dissatisfied with the allocation of fishing quotas by the respondents, and initiated review proceedings to set aside the decision. The trial court held that it was appropriate to permit the applicant to seek review before exhausting available internal remedies, though PAJA was not cited at both the trial court and at the SCA. The Constitutional Court requested that the parties file written arguments to address *inter alia*, whether the applicant's cause of action was founded on the common law, PAJA and/or section 33 of the Constitution, and if the proper cause of action is premised on PAJA what effect does it have on the grounds of appeal? The Court subsequently held that the course of action for judicial review

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<sup>1387</sup> Currie and De Waal *The Bill of Rights Handbook* 6<sup>th</sup> ed 653.

<sup>1388</sup> See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 32.

<sup>1389</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at paras 95-96.

<sup>1390</sup> 2004 (4) SA 490 (CC).

of administrative action arises from PAJA, and that the case cannot be decided without reference to it.<sup>1391</sup>

#### 5.4.1.1.1 Administrative action

The constitutive elements of 'administrative action'<sup>1392</sup> can be broken down for simplicity of discussion<sup>1393</sup> as follows:

- 1) a decision, or a proposed decision
- 2) of an administrative action
- 3) that is made in terms of an empowering provision
- 4) by an organ of state (or a private natural or juristic person exercising public power)
- 5) when exercising a public power or performing a public function
- 6) that adversely affects rights
- 7) that also has direct, external legal effect
- 8) and that is not specifically excluded by the list of exclusions in subparagraphs (aa) to (ii) of the definition of administrative action.

Flowing therefrom, a decision, which is the subject of an enquiry or determination under PAJA must be an administrative action, hence, the first question in an action for judicial review and other heads of claim in PAJA is "what is the administrative act sought to be reviewed and set aside? Absent such an act, the application for review is still-born."<sup>1394</sup> Accordingly, a decision, which constitutes 'administrative

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<sup>1391</sup> PAJA is therefore the national legislation contemplated in section 33(3) of the Constitution, which requires it to "cover the field" regarding the right to just administrative action and it purportedly does so. See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 ZACC 22 at para 30. However, nothing in section 33 of the Constitution precludes a specialised legislative regulation of administrative action as done in section 145 of the *Labour Relations Act* 66 of 1995. Alongside PAJA provided that such specialised legislation gives effect to the requirements of section 33.

<sup>1392</sup> Section 1 of PAJA provides that "... unless the context indicates otherwise, 'administrative action' means 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 affects the rights of any person and which has a direct, external legal effect...

<sup>1393</sup> These constitutive elements are derived from the categorisation suggested by Currie and De Waal (see Currie and De Waal *The Bill of Rights Handbook* (6<sup>th</sup> ed) 656, and Currie and Klaaren "Scope of the Act" in Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* para 2.4.

<sup>1394</sup> *Gamevest (Pty) Ltd v The Regional Land Claims Commissioner for the Northern Province and Mpumalanga* 2002 ZASCA 117 at para 11. In *Mzamba Taxi Owners' Association and Another v Bizana Taxi Association and Others* 2005 ZASCA 74 (SCA), the appellants contended that permit



action' within the contemplation of section 1 of PAJA must relate to the source and nature of the decision.<sup>1395</sup> Regardless of the identity of the maker of the decision, what is required is whether or not he was "exercising a public power or performing a public function?"<sup>1396</sup> Such decision will extend to those taken by bodies<sup>1397</sup> exercising public power,<sup>1398</sup> including the exercise of discretion,<sup>1399</sup> the process of a government tender,<sup>1400</sup> compulsory arbitration proceedings in terms of the *Labour Relations Act* 66 of 1995 (LRA),<sup>1401</sup> and actions taken by public corporations with the status of organs of state.<sup>1402</sup> The focus is not on the arm of government to which the actor belongs. Rather, the focus is on the nature of the power the actor is exercising, thus some acts of the legislature may constitute administrative action and judicial officers may from time to time carry out administrative tasks.<sup>1403</sup>

Therefore, a strict application of sections 3 and 4 of PAJA to the definition of administrative action may have the effect of excluding certain circumstances, especially where the action does not "materially affect the rights or legitimate expectations."<sup>1404</sup> That effect may whittle down the scope of section 33 of the Constitution, which creates a right to just administrative action and sets the overriding conditions, namely "that is lawful, reasonable and procedurally fair."<sup>1405</sup>

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to operate route was issued irregularly, thereby adversely affected the interests of its members financially. The court held that there was no administrative action because the Provincial Taxi Registrar merely endorsed a voluntary agreement between two taxi associations in terms of how a taxi rank is shared.

<sup>1395</sup> Decision by an "organ of state" or a "natural or juristic person, other than an organ of state." See section 239 of the Constitution for definition of 'organ of state.'

<sup>1396</sup> *Calibre Clinical Consultants (Pty) Ltd and Anor v The National Bargaining Council for the Road Freight Industry and Anor* 2010 (5) SA 457 (SCA).

<sup>1397</sup> Klaaren "Administrative Justice" 2009 *Revision Service* 5 at 25.2.

<sup>1398</sup> See *Jeeva v Receiver of Revenue Port Elizabeth* 1995 (2) SA 433 (SE); *Gardener v East London Transitional Local Council and Others* 1996 (3) SA 99 (E); and *Directory Advertising Cost Cutters v Minister of Posts, Telecommunications and Broadcasting and Others* 1996 (3) SA 800 (T).

<sup>1399</sup> *Deacon v Controller of Customs and Excise* 1999 (2) SA 905 (SE).

<sup>1400</sup> *Umfolozi Transport (EDMS) v Minister van Vervoerenandere* 1997 (2) All SA 546 (SCA).

<sup>1401</sup> *Carephone (Pty) Ltd v Marcus and Others* 1999 (3) SA 304 (LAC). See also *Shoprite Checkers (Pty) Ltd v Ramdaw* 2001 (3) SA 68 (LAC).

<sup>1402</sup> See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (2) SA 374 (CC).

<sup>1403</sup> *The President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 at para 141.

<sup>1404</sup> See Currie and de Waal *The Bill of Rights Handbook* 6<sup>th</sup> ed 676.

<sup>1405</sup> *Azeem Hassan Walele v The City of Cape Town* 2008 ZACC 11.

An application of the right limited by the phrase “materially affect the rights or legitimate expectations” may complicate potential application of the right in hydraulic fracturing where the science relating to its adverse impact on human and the environment is still controversial.<sup>1406</sup> In *Leon Joseph and Others v City of Johannesburg and Others*,<sup>1407</sup> the Constitutional Court held that to materially affect the right of a person implies a significant and not trivial, and must have a “direct, external legal effect” on the applicants.<sup>1408</sup> Any limitation of the section 33 right caused by a narrow interpretation of the right by PAJA and resulting in such constraining consequences should not be applied.<sup>1409</sup>

On the whole, it would appear that the SCA recognised that the definition of ‘administrative action’ in section 1 of PAJA is cumbersome and capable of creating a number of terms that are themselves overlapping and which may affect or limit its meaning or scope. In *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*,<sup>1410</sup> the SCA proffered a definition which consolidates the principal elements provided in PAJA to read as follows:

...administrative action means any decision of an administrative nature made ...under an empowering provision [and] taken... by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] 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<sup>1411</sup> the rights of any person and which has a direct, external legal effect.

Notwithstanding the exemption of certain executive powers, and legislative and judicial functions from the scope of administrative action in section 1 of PAJA, the Constitutional Court cautioned that focus should not just be on the arm of government to which the actor belongs, but on the nature of the power the actor is exercising.<sup>1412</sup> Some acts of the legislature may constitute administrative action and

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<sup>1406</sup> See para 1.2 in chapter 1 above.

<sup>1407</sup> 2009 ZACC 30.

<sup>1408</sup> See *Leon Joseph and Others v City of Johannesburg and Others* 2009 ZACC 30 at para 27. See also Govender 2013 *AHRLJ* 82-102.

<sup>1409</sup> See *Hoban v ABSA Bank Ltd t/a United Bank and Others* 1999 (2) SA 1036 (SCA).

<sup>1410</sup> 2005 (6) SA 313 (SCA) at para 21.

<sup>1411</sup> Note that the SCA excludes the requirement of material and adverse effect on rights.

<sup>1412</sup> *The President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 at para 141.

judicial officers may from time to time carry out administrative tasks.<sup>1413</sup> Although section 1(aa)-(ii) of PAJA excludes powers exercised pursuant to executive, legislative and judicial functions from the ambit of administrative action, the exercise of power is nevertheless subject to the requirement of the principle of legality, in that it must be exercised lawfully, rationally and in a manner consistent with the Constitution.<sup>1414</sup> This echoes the opinion of the Constitutional Court in the case of *The President of the Republic of South Africa and Others v South African Rugby Football Union and Others*<sup>1415</sup> that the doctrine of legality is one of the instruments of control through which the exercise of power is regulated by the Constitution, and that doctrine:

...entails that both the Legislature and the Executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law." In this sense, the Constitution entrenches the principle of legality and provides the foundation for the control of public power.<sup>1416</sup>

Given that the focus is on the function rather than the functionary,<sup>1417</sup> the action of a private person or entity exercising public power or performing a public function could be subsumed within the scope of administrative action in terms of PAJA.<sup>1418</sup>

In *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others*<sup>1419</sup> the court held that the Johannesburg Stock Exchange (JSE) was exercising a public power where legislation empowered it to list securities if the securities are in public interest and to make rules to protect the same interest, amongst other things. Accordingly, it was held that the decision of the JSE was subject to judicial

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<sup>1413</sup> See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (2) SA 374 (CC) at para 41. In practice, the question is not whether or not the action is carried out by a governmental authority or official, or indeed that the actor is an organ of state, rather, it is whether or not the task is administrative. Therefore, an institution may exercise public powers for some purposes, and private powers for others. Each decision or action must be considered on a case by case basis. See *Eden Security Services CC and Others v Cape Peninsula University of Technology and Others* 2014 ZAWCHC 148 at para 45.

<sup>1414</sup> *Billy Lesedi Masetlha v The President of the Republic of South Africa* 2007 ZACC 20 at para 78.

<sup>1415</sup> 2000 (1) SA 1 (CC).

<sup>1416</sup> *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 49.

<sup>1417</sup> *Transnet Limited v Goodman Brothers* 2001 (1) SA 853 (SCA) at para 9.

<sup>1418</sup> Currie and De Waal *The Bill of Rights Handbook* 6<sup>th</sup> ed 659.

<sup>1419</sup> 1983 (3) SA 344 (W).

review.<sup>1420</sup>The justification for subjecting the exercise of powers or the performance of functions to PAJA lies in the fact that they are likely “to pertain to the people as a whole, or that they are exercised or performed on behalf of the community as a whole (or at least a group or class of the public as a whole), which is pre-eminently the terrain of government.”<sup>1421</sup>

The action of “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 affects the rights of any person and which has a direct, external legal effect...”<sup>1422</sup> as contemplated by PAJA may be relevant in relation to the development of hydraulic fracturing considering that potential operators are private entities.<sup>1423</sup>The decision in the case of *Mobile Telephones Networks (Pty) Ltd v SMI Trading CC*<sup>1424</sup> is instructive. The appeal was to resolve whether or not section 22 of the *Electronic Communications Act*<sup>1425</sup> (ECA) infringes section 25 of the Constitution. The appellant had unilaterally decided the terms on which it would continue to occupy the respondent’s property pursuant to section 22(1) of the ECA which gives an electronic communications network power *inter alia* to “enter upon any land, including any street, road, footpath, or land reserved for public purposes...” The court held that any decision by the applicant in terms of section 22 of the ECA is ‘administrative action,’ which in any event, must be procedurally fair, the effect of which is to give due regard to “applicable law and the environmental policy of the republic,” as “the Constitution does not countenance arbitrary action.” The exercise of public power by a private entity as a licensee would constitute administrative action under PAJA, which by necessity “attracts the fundamental rights that are

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<sup>1420</sup> See also *AAA Investments (Pty) Ltd v The Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at para 45 where the Constitutional Court held that while the form of the Council is that of a private company, its functions are essentially regulatory.

<sup>1421</sup> *Calibre Clinical Consultants (Pty) Ltd and Anor v The National Bargaining Council for the Road Freight Industry and Anor* 2010 (5) SA 457 (SCA) at para 39.

<sup>1422</sup> Section 1 of PAJA.

<sup>1423</sup> See the argument subjecting hydraulic fracturing enterprises to regulations affecting public bodies because of the nature of their functions in para 4.5.

<sup>1424</sup> 2012 ZASCA 138.

<sup>1425</sup> Act 36 of 2005 (hereafter “the ECA”).

vested in an affected landowner to administrative action that is lawful, reasonable and procedurally fair.”<sup>1426</sup>

For an exercise of power to constitute an administrative action, an organ of state must have acted in terms of the Constitution, a provincial constitution or any legislation, or in the case of a natural or juristic person, the administrative action must have taken place pursuant to an ‘empowering provision,’ defined in section 1 PAJA as “a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.”<sup>1427</sup> Impliedly, regulations like the HF Regulations are subject to review under PAJA, otherwise regulations would have been excluded in the list of exceptions<sup>1428</sup> contained in the definition of ‘administrative action’ in section 1 of PAJA. To the extent that the HF Regulations were made under an empowering provision of legislation, and have the potential to adversely affect the rights of persons and communities in locations where hydraulic fracturing will take place.<sup>1429</sup> In this regard, the Constitutional Court held that whenever administrative action materially and adversely affects the rights of applicants, it would necessarily imply that the decision had a “direct, external legal effect” on the applicants.”<sup>1430</sup>

#### 5.4.1.1.2 Administrative action affecting the public

Where an administrative action “materially and adversely affects the rights of the public section 4 of PAJA provides for mandatory<sup>1431</sup> steps to be taken to give effect to the right to procedurally fair administrative action.”<sup>1432</sup> The obligation imposed on

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<sup>1426</sup> 2012 ZASCA 138 at para 33.

<sup>1427</sup> Currie and De Waal 2013 *The Bill of Rights Handbook* 6<sup>th</sup> ed 660. See also *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC).

<sup>1428</sup> See section 1(aa) to (ii) of PAJA.

<sup>1429</sup> See *Minister of Health v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para 135.

<sup>1430</sup> *Leon Joseph and Others v City of Johannesburg and Others* 2009 ZACC 30 at para 27.

<sup>1431</sup> The operative word in section 4(1) of PAJA in relation to the obligation on the administrator regarding the process to be followed to ensure that administrative action is procedurally fair is ‘must.’

<sup>1432</sup> Section 4 of PAJA provides:

1. In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether:
  - a. to hold a public enquiry in terms of section (2);

an administrator requires him to ensure that proper consultation takes place. This is analogous to an requirement that a public authority has to follow certain procedure, and that obligation implies that adequate consultation with local communities and other stakeholders must take place.<sup>1433</sup> However, Currie and De Waal are of the opinion that the mandatory elements of the obligation are rather deceptive.<sup>1434</sup> That is because notwithstanding the benefits inherent in the processes required in section 4 to facilitate effective participation, discretion is given to an administrator to depart from the requirements of section 4(1)-(3) of PAJA if "it is reasonable and justifiable in the circumstances" to do so, especially where strict compliance with the requirements could impede efficient administration.<sup>1435</sup> Similar discretion given to an administrator to depart from the stipulated processes are contained in sections 3(4) and 5(4) of PAJA.

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- b. to follow a notice and comment procedure in terms of subsection 3;
  - c. to follow the procedures in both subsections (2) and (3);
  - d. where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
  - e. to follow another appropriate procedure which gives effect to section 3.
- 2) If an administrator decides to hold a public enquiry-
- a. the administrator must conduct the public enquiry or appoint a suitably qualified person or panel of persons to do so; and
  - b. the administrator or the person or the panel referred to in paragraph (a) must-determine the procedure for the public enquiry, which must- (aa) include a public hearing;
- (bb) and comply with the procedures to be followed in connection with public enquiries as prescribed;
- i. conduct the enquiry in accordance with that procedure;
  - ii. compile a written report on the enquiry and give reasons for any administration taken or recommended; and
  - iii. as soon as possible thereafter-
- (aa) publish in English and in at least one of the other official languages in the Gazette or relevant provincial Gazette a notice containing a concise summary of any report and the particulars of the places and times at which the report may be inspected and copied; and
- (bb) convey by such other means of communication which the administrators consider effective, the information referred to in item (a) to the public concerned.
- 1) If an administrator decides to follow a notice and comment procedure, the administrator must-
- a. take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
  - b. consider any comments received;
  - c. decide whether or not to take the administrative action, with or without changes; and
  - d. comply with the procedures to be followed in connection with notice and comment procedures as prescribed.

<sup>1433</sup> See *The Chairpersons Association v Minister of Arts and Culture and Others* 2007 SCA 44 at para 46.

<sup>1434</sup> Currie and De Waal *The Bill of Rights Handbook* 6<sup>th</sup> ed 677.

<sup>1435</sup> Section 4(4)(a) of PAJA provides that "if it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1)(a) to (e), (2) and (3)."

That discretion is however not absolute. The discretion to depart from the required processes must be “reasonable and justifiable, [and] an administrator must take into account all relevant factors.”<sup>1436</sup> Impliedly, the discretionary power of a functionary granted by law implies that the necessary evaluation to exercise the discretion is within the functionary’s domain must take place for the departure to be reasonable and justifiable.<sup>1437</sup> In that regard, Chaskalson CJ, reasoned that “what is or is not administrative action for the purposes of PAJA is determined by the definition in section 1,”<sup>1438</sup> and that even if the circumstance envisaged in section 4(4) necessitating a departure is imminent, the administrator remains under obligation to satisfy the requirements of subparagraphs (a) to (d) of section 4(1) of PAJA by following the named procedures to ensure that administrative action is procedurally fair.<sup>1439</sup>

In the documentary film ‘*Unearthed- The Deeper the Dig, the Darker the Secrets,*’ investigators conducted several interviews across South Africa. The preponderance of the views expressed by farmers and community members in the Karoo engaged in the interviews was that there was no meaningful public engagement regarding hydraulic fracturing.<sup>1440</sup> In *The Chairpersons Association v Minister of Arts and Culture and Others*,<sup>1441</sup> the decision to approve the change of the geographical name of the town of Louis Trichardt to Makhado was set aside consequent to judicial

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<sup>1436</sup> Section 4(4)(b) of PAJA provides for examples of relevant factors that may justify a departure from the required processes as reasonable and justifiable, including-

- i. the objects of the empowering provision;
- ii. the nature and purpose of, and the need to take, the administrative action;
- iii. the likely effect of the administrative action;
- iv. the urgency of taking the administrative action or the urgency of the matter; and
- v. the need to promote an efficient administration and good governance.

Similar provisions are contained in sections 3(4) and 5(4) of PAJA.

<sup>1437</sup> *Eden Security Services CC and Others v Cape Peninsula University of Technology and Others* 2014 ZAWCHC 148 at para 63.

<sup>1438</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para 132.

<sup>1439</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para 131.

<sup>1440</sup> ‘*Unearthed- The Deeper the Dig, the Darker the Secrets*’ – A feature documentary film by Jolynn Minaar, covering extensive interviews held across South Africa, USA, UK and Canada, in over 18 months of research and over 300 interviews. See [www.un-earthed.com](http://www.un-earthed.com) [date of use 16 November 2017].

<sup>1441</sup> 2007 SCA 44.

review because the South African Geographical Names Council Act (SAGNC) failed to ensure that proper consultation had taken place. Though meetings were held in some wards they were poorly attended, whilst in other wards meetings were not held at all. The court held that the decision of the first respondent failed to comply with the terms of section 10(1) of the *South African Geographical Names Council Act*.<sup>1442</sup> Therefore, in relation to the adverse impacts of hydraulic fracturing especially, there should be evidence that the procedure required in section 4(1) of PAJA is followed in arriving at a decision.

#### 5.4.1.1.3 Procedurally fair administrative action materially and adversely affecting rights or legitimate expectations

An administrator is required to act within the confines of the law, as he does not have a *carte blanche* to act as he pleases.<sup>1443</sup> He has a duty to act fairly,<sup>1444</sup> and that duty must guide his exercise of public power.<sup>1445</sup> The requirement of procedural administrative fairness puts the administrator in a state where he is able to assess issues with an open mind seeing the whole picture of the facts and circumstances within which administrative action is to be taken.<sup>1446</sup> Sections 3 and 4 of PAJA make provisions for procedurally fair administrative action. While section 3 requires that “administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair,”<sup>1447</sup> section 4 provides for processes to be undertaken “in order to give effect to the right to procedurally fair administrative action.”<sup>1448</sup> The succeeding paragraphs will discuss what is required for administrative action to be procedurally fair, and when administrative action materially and adversely affects the rights or legitimate expectations of a person.

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<sup>1442</sup> 118 of 1998.

<sup>1443</sup> *Jurgens Johannes Steenkamp v The Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC).

<sup>1444</sup> *Administrator of the Transvaal and Others v Beverly Traub and Others* 1989 (4) All SA 924 (AD).

<sup>1445</sup> *Billy Lesedi Masetlha v The President of the Republic of South Africa* 2007 ZACC 20 at para 183.

<sup>1446</sup> *Janse van Rensburg and Another v Minister of Trade and Industry and Another* 2001 (1) SA 29 at para 24.

<sup>1447</sup> Section 3(1) of PAJA.

<sup>1448</sup> Section 4(1) of PAJA.



#### 5.4.1.1.3.1 A Procedurally fair administrative action

Procedural fairness enhances public participation, which in the long run improves the quality and rationality of administrative decision-making and boosts its legitimacy.<sup>1449</sup> It concerns the manner in which decisions are taken, but not with the substance or fairness of the decision itself. Its essence is to ensure that the administrative process is conducted fairly and that decisions are made following legislative requirements, in which case, the court will not interfere with the decision made.<sup>1450</sup>

An administrator may in his or her discretion give to a person whose right or legitimate expectations are materially and adversely affected by an administrative action an opportunity to:

- a) obtain assistance and, in serious or complex cases, legal representation;
- b) present and dispute information and arguments; and
- c) appear in person.<sup>1451</sup>

The importance of the discretion exercised in this manner particularly in the administration of hydraulic fracturing cannot be underestimated especially where the relevant factors are numerous and varied, making it impossible for the legislature to contemplate all possible scenarios in advance.<sup>1452</sup> Resort to discretion, where necessary, could facilitate flexibility and permit abstract and general rules to be applied to specific and particular situations in a fair manner.

Given that fairness is a relative concept,<sup>1453</sup> the meaning to be attached to procedurally fair administrative action has to be determined within the particular framework of the action in question viewed in the light of the relevant circumstances. Administrative action that fails to satisfy the requirements of natural

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<sup>1449</sup> Hoexter *Administrative Law in South Africa* 327.

<sup>1450</sup> *Bel Porto School Governing Body and Others v The Premier of the Province and Another* 2002 (3) SA 265 at para 85.

<sup>1451</sup> See section 3(3) of PAJA.

<sup>1452</sup> *Rahim Dawood and Another v The Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 53.

<sup>1453</sup> *Radovan Krecjir v The Minister of Correctional Services and Others* 2016 (1) SACR 452 (GP).

justice is procedurally unfair and therefore unconstitutional.<sup>1454</sup> The procedure must be fair not only to the holder of the right affected by the administrative act, but also to the executive or administration acting in the public interests.<sup>1455</sup> Though “a fair administrative action depends on the circumstances of each case,”<sup>1456</sup> section 3(2)(b) of PAJA provides what an administrator must do to give effect to the right, namely to give:

- i. adequate notice of the nature and purpose of the proposed administrative action;
- ii. a reasonable opportunity to make representations;
- iii. a clear statement of the administrative action;
- iv. adequate notice of any right of review or internal appeal, where applicable; and
- v. adequate notice of the right to request reasons in terms of section 5.

These requirements are mandatory, barring the circumstances indicated for departure in section 3(4), and in the event of an administrator failing in that responsibility, the Constitutional Court pointed out that section 3(2)(a) is an empowering provision allowing the courts to exercise a discretion to enforce the minimum procedural fairness requirements in section 3(2)(b).<sup>1457</sup> If it is necessary for the court to intervene, the objective of judicial intervention will be to ensure that there is compatibility with fundamental notions of fairness in relation to the exercise of administrative power.

The Constitutional Court in *Billy Lesedi Masetlha v The President of the Republic of South Africa*,<sup>1458</sup> held that acting fairly requires the decision-maker to give an opportunity to the party who may be affected by the decision to be heard, being one of the procedural aspects of the rule of law, expressed in the maxim *audi alteram partem*.<sup>1459</sup> That decision was followed in *Sokhela and Others v The MEC for*

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<sup>1454</sup> *The Commissioner of Customs and Excise v Container Logistics* 1999 ZASCA 35.

<sup>1455</sup> *Gardener v East London Transitional Local Council and Others* 1996 (3) SA (E) at 1160.

<sup>1456</sup> Section 3(2)(a) of PAJA.

<sup>1457</sup> *Leon Joseph and Others v City of Johannesburg and Others* 2009 ZACC 30 at para 59.

<sup>1458</sup> 2007 ZACC 20 at para 183.

<sup>1459</sup> In the words of De Smith *et al*:

...the rule of law ... acts as a constraint upon the exercise of all power. The scope of the rule of law is broad. It has managed to justify - albeit not always explicitly - a great deal of the specific content of judicial review, such as the requirement that laws as enacted by Parliament be faithfully executed by officials; that orders of court should be obeyed; that individuals wishing

*Agriculture and Environmental Affairs and Others*,<sup>1460</sup> where the court observed that the right to procedurally fair administrative action demands that persons affected by the action “must be given adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations and a clear statement of the administrative action.”<sup>1461</sup> In the instant case, the court held that a meeting to consider the portfolio committee’s recommendations did not satisfy the requirements of section 3(2)(b)(ii) of PAJA for a hearing, for failing to allow the applicants to make representations.

However, the requirement that an administrative action must be procedurally fair does not necessarily afford a right to appear in person before the decision-maker.<sup>1462</sup> It is sufficient that the complainant is given opportunity to a hearing and makes representation. In *Minister of Defence and Others v L H Dunn*,<sup>1463</sup> the respondent had submitted his curriculum vitae to the special placement board, which considered same alongside others, and did not meet any of the other candidates in person, including the person eventually appointed. The court held that there was no basis for a review of the decision. In the same vein, the determination of what constitutes procedural fairness should not constrain the ability of the government to effectively make and implement policies.<sup>1464</sup> Therefore, in making an urgent decision regarding government’s obligations to provide homes for people rendered homeless by flooding, the consideration that the decision may cause a decline in the value of adjoining property is relevant, procedural fairness does not require the government to consult with the owners of the affected properties.<sup>1465</sup>

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to enforce the law should have reasonable access to court; that no person should be condemned unheard; and that power should not be arbitrarily exercised.

See De Smit et al *Judicial Review of Administrative Action* 5<sup>th</sup> ed 14-15.

<sup>1460</sup> 2009 ZAKZPHC 30.

<sup>1461</sup> 2009 ZAKZPHC 30 at para 52.

<sup>1462</sup> *Minister of Defence and Others v L H Dunn* 2007 SCA 75 at para 27.

<sup>1463</sup> 2007 SCA 75.

<sup>1464</sup> See *Premier, Mpumalanga and Another v Executive Committee, Association of State-aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at para 41.

<sup>1465</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (3) SA 1151 (CC) at para 109.

#### 5.4.1.1.3.2 Materially and adversely affecting rights or legitimate expectations

Only administrative action, which “materially and adversely affects the rights or legitimate expectations of any person,” is actionable.<sup>1466</sup> Therefore, a party seeking to intervene in proceedings before the court arising out of a complaint relating to an administrative action must show that it has a direct and substantial interest in the case.<sup>1467</sup> For example in *Sokhela and Others v The MEC for Agriculture and Environmental Affairs and Others*<sup>1468</sup> it was held that the MEC’s act of suspending the applicants was an exercise of public power constituting administrative action, which adversely affected the applicants’ rights, as public perception would inevitably be that they have been suspended due to some form of misconduct. The detrimental effect of the action would affect their reputation and dignity contrary to section 10 of the Constitution, which gives them a right to have their dignity respected and protected.

To be entitled to a hearing, the administrative action must materially and adversely affect the rights or legitimate expectations of the aggrieved person. The issues for determination in *Transnet Limited v Goodman Brothers*<sup>1469</sup> included whether or not the applicant had a ‘right’ or an ‘interest,’ and if he had, whether or not that right or interest was ‘affected.’ The SCA held that section 33(1) and (2) of the Constitution gives to every person a right to lawful and procedurally fair administrative action, and if any administrative action of a tender process was not fair it would not only contravene section 33 of the Constitution, but also the right to equal treatment guaranteed in section 9 of the Constitution which pervades the spectrum of administrative law.<sup>1470</sup> However, in *Azeem Hassan Walele v The City of Cape Town*,<sup>1471</sup> the applicant had instituted a review application challenging the validity of the approval of the respondent’s building plans, contending that the decision-maker lacked authority to approve the plans, and for failing to give the applicant a hearing

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<sup>1466</sup> See section 3(1) of PAJA.

<sup>1467</sup> *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 ZACC 18 at para 18.

<sup>1468</sup> 2009 ZAKZPHC 30.

<sup>1469</sup> 2001 (1) SA 853 (SCA).

<sup>1470</sup> 2001 (1) SA 853 (SCA) at para 41.

<sup>1471</sup> 2008 ZACC 11 at para 28.

before the approval. The Constitutional Court disagreed, holding that for the appellant's failure to establish how the approval of the building plans materially and adversely affected his rights or legitimate expectations, the claim must fail.

The doctrine of legitimate expectation is one of the attributes of the duty to act fairly. Its origin and development reflect many of the concerns and difficulties accompanying the broader judicial effort to promote administrative fairness.<sup>1472</sup> A legitimate expectation of fair procedure can be induced by a promise that a substantive benefit will be acquired or retained<sup>1473</sup> and the fact that an administrative action adversely affects a person could be a pointer to a fact of breach of legitimate expectations. The phrase 'legitimate expectation' is not defined in PAJA. It is, however, a question of fact depending on the context of each case to be given "its ordinary meaning as understood over a period of time by the courts of this country."<sup>1474</sup>

In *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*,<sup>1475</sup> the appellants complained that a lease of state land to a third party affected their right to procedurally fair administrative action in that they were not consulted or invited to comment on the lease before it was approved by the Minister. The respondent had hitherto refused the appellants' request for an undertaking that the appellants would be invited to comment before any alteration of the use of the property was approved. The SCA held that the appellants were not in any way adversely affected, nor was it shown that they appellants had a legitimate expectation that the use of the property would not be altered.

In another case, the SCA had advised that the doctrine of legitimate expectation should be applied cautiously, as the law does not protect every expectation but only

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<sup>1472</sup> *Administrator of the Transvaal and Others v Beverly Traub and Others* 1989 (4) All SA 924 (AD)

<sup>1473</sup> *Meyer v ISCOR Pension Fund* 2003 (2) SA 715 (SCA).

<sup>1474</sup> *Azeem Hassan Walele v The City of Cape Town* 2008 ZACC 11 at para 35.

<sup>1475</sup> 2005 (6) SA 313 (SCA).

expectations that are legitimate.<sup>1476</sup> The Court<sup>1477</sup> therefore advised that the following requirements, which are not exhaustive, should be considered if the doctrine of legitimate expectations is to be successfully invoked:<sup>1478</sup>

- 1) The representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification... The requirement is a sensible one. It accords with the principle of fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who chose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.
- 2) The expectation must be reasonable.
- 3) The decision-maker must have induced the expectation.
- 4) The representation must be one, which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.
- 5) The reasonableness of the expectation is a condition for its legitimacy. It involves the application of an objective test to the circumstances from which the expectation of the applicant arose.

The representation made by the functionary that gave rise to the expectation must be "clear, unambiguous and devoid of relevant qualification," eliminating the risk that the ambiguous statements of public functionaries may create a legitimate expectation.<sup>1479</sup>

Considering the concept of 'legitimate expectation' as used in section 24 of the Interim Constitution in the case of *The Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*,<sup>1480</sup> the Constitutional Court pointed out that it has intertwined substantive and procedural aspects."<sup>1481</sup> Expectations can arise in respect of a substantive benefit, or an expectation of a procedural kind, but once legitimate expectation is established, procedural fairness is required in relation to the administrative action that may affect or threaten that expectation. The Constitutional Court held that the

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<sup>1476</sup> *South African Veterinary Council v Greg Szymanski* 2003 ZASCA 11 at para 15.

<sup>1477</sup> Citing Heher J in *National Director of Public Prosecutions v Phillips and Others* 2002 (4) 60 (W) at para 28.

<sup>1478</sup> See *South African Veterinary Council v Greg Szymanski* 2003 ZASCA 11 at paras 19-21.

<sup>1479</sup> *Minister of Defence and Others v L H Dunn* 2007 SCA 75 at para 31.

<sup>1480</sup> 1998 ZACC 20; 1999 (2) SA 91 (CC).

<sup>1481</sup> *The Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1998 ZACC 20; 1999 (2) SA 91 (CC) at para 38.

determination of 'legitimate expectation' in the mind of a litigant is an objective test; that is "whether, viewed objectively, such expectation is, in a legal sense, legitimate."<sup>1482</sup> It is a legitimate expectation for persons living and working in the Karoo where hydraulic fracturing will take place that administrative action relating to it will not affect substantive human rights and will be procedurally fair. A legitimate expectation requires that fair procedure be followed to afford greater procedural protection to individuals affected by administrative actions.<sup>1483</sup>

#### 5.4.1.1.4 Reasons for administrative action

Where rights are affected or threatened by administrative action, it is rational to expect the person affected to ask for reasons for the action. At common law, there is no obligation on the administrator to give reasons, and when provided, it is as a matter of grace and not duty. Whatever reason given as basis for the action will enable persons who may be affected to determine whether or not the decision is reviewable, and to take steps to seek protection of the law if necessary.<sup>1484</sup> PAJA addresses the issues associated with reasons for administrative action in section 5. The requirement for reason under PAJA is likely to facilitate accountability, transparency, and accessibility in public administration, and that is a welcome development.<sup>1485</sup>

Under PAJA, a person whose rights have been materially and adversely affected by administrative action has a right to be given reasons for the action, failing which he can within 90 days of becoming aware of the action or when he might reasonably be expected to have become aware of the action request to be furnished with written reasons.<sup>1486</sup> The administrator must give the requester "adequate reasons in writing for the administrative action" within 90 days of receiving the request,<sup>1487</sup> failing which it can be presumed in subsequent judicial review proceedings that the

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<sup>1482</sup> *The President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 at para 216.

<sup>1483</sup> *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A).

<sup>1484</sup> *Bel Porto School Governing Body and Others v The Premier of the Province and another* 2002 (3) SA 265 at para 35.

<sup>1485</sup> Brynard 2009 *Journal of Public Administration* 638.

<sup>1486</sup> Section 5(1) of PAJA.

<sup>1487</sup> Section 5(2) of PAJA.

administrative action was taken without reason.<sup>1488</sup> Though an administrator may depart from the requirement to provide reasons, any departure must be reasonable and justifiable in the circumstances, and the requester must be informed of the departure.<sup>1489</sup> An indication that a decision or action is at the discretion of the decision-maker is not an acceptable reason.<sup>1490</sup>

In *Logbro Properties CC v SA Bedderson, NO and Others*,<sup>1491</sup> the appellant had signed tender documents which included a clause that a public authority could take action without giving reasons. Upon a subsequent challenge, it was contended that the authority cannot be compelled to give reasons because its decisions constituted a binding contract on those who executed it based on the terms of the tender. The SCA disagreed, holding that notwithstanding the contractual relationship, the principles of administrative justice apply to the public authority's exercise of public power. The court held that the tender process constituted an administrative action, which entitled the complainant to a lawful and procedurally fair process and an outcome. Therefore, the terms of the contract must yield for the authority to comply with its public duties under the Constitution and any applicable legislation.<sup>1492</sup>

#### *5.4.2 Judicial review of administrative action*

In conducting judicial review, the courts in South Africa consider the presence or absence of features that are 'governmental' in the decision being contemplated, hence, it is relevant that the function or decision under consideration is:

... "woven into a system of governmental control," or "integrated into a system of statutory regulation," or the government "regulates, supervises and inspects the performance of the function," or it is "a task for which the public in the shape of the state, have assumed responsibility," or it is "linked to the functions and powers of government," or it constitutes "a privatisation of the business of government itself," or it is publicly funded, or there is

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<sup>1488</sup> Section 5(3) of PAJA.

<sup>1489</sup> Section 5(4) of PAJA. See section 4.5.2.2 above for a discussion of the law relating to the circumstances when departure is permitted and the potential issues in the enforcement of rights.

<sup>1490</sup> See *Pieterse and Another v Lephalele Local Municipality* 2016 ZAGPPHC at para 42.

<sup>1491</sup> 2003 (2) SA 460 (SCA).

<sup>1492</sup> 2003 (2) SA 460 (SCA) at para 5.



“potentially a governmental interest in the decision-making power in question,” or the body concerned is “taking the place of central government or local authorities,” and so on.<sup>1493</sup>

Section 2 of the Constitution lays the foundation for legal control of public power, providing that the Constitution is the supreme law of the Republic, and any law or conduct inconsistent with its provisions is invalid. This view is amplified by the decision of the Constitutional Court in *Fedsure*,<sup>1494</sup> emphasising that the doctrine of legality is an incident of the rule of law, which is:

...central to the conception of our constitutional order that the Legislature and the Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.

By implication, any administrative action which fails to conform to constitutional or legal requirement is invalid and may be set aside. Section 1(c) of the Constitution emphasises that the “supremacy of the Constitution and the rule of law” are some of the values on which South African democracy is based, and therefore courts are under an obligation to “declare any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.”<sup>1495</sup> Therefore, the exercise of power is only legitimate when it is lawful.<sup>1496</sup>

While there are different means to seek redress for wrongs attributable to the adverse effect of administrative action,<sup>1497</sup> PAJA permits any person to “institute proceedings in a court or a tribunal for the judicial review of an administrative action.”<sup>1498</sup> Sometimes the exercise of public power may require justification. The courts provide a veritable site for the justification of public conduct.<sup>1499</sup>

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<sup>1493</sup> *Calibre Clinical Consultants (Pty) Ltd and Anor v The National Bargaining Council for the Road Freight Industry and Anor* 2010 (5) SA 457 (SCA) at para 38.

<sup>1494</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58.

<sup>1495</sup> *The Affordable Medicines Trust and Others v The Minister of Health of the Federal Republic of South Africa and Another* 2006 (3) SA 247 (CC) at para 48.

<sup>1496</sup> See also *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (3) SA 1151 (CC) at para 35.

<sup>1497</sup> For example, section 182(1) of the Constitution gives power to the Public Prosecutor *inter alia* to “investigate any conduct ... in the public administration in any sphere of government, that is alleged or suspected by to be improper or to result in any impropriety or prejudice.”

<sup>1498</sup> Section 6(1) of PAJA.

<sup>1499</sup> Quinot 2010 *Constitutional Law Review* 112. The right of access to courts is discussed in chapter 6.

Section 6 of PAJA provides an underlying basis for the codification of the grounds of judicial review of administrative actions.<sup>1500</sup> A court or tribunal is empowered to review administrative action in a myriad of circumstances provided for in section 6(2) and (3) of PAJA. Section 7 of PAJA contains provisions for the procedure guiding the institution of action for judicial review. From these provisions, all that is required of the court in a judicial review of administrative action is to determine whether or not an irregularity has occurred, as it is only upon the occurrence of illegality that the action must be “legally evaluated to determine whether it amounts to a ground of review under PAJA.”<sup>1501</sup> Simply put, the essence of judicial review is to detect and correct maladministration.<sup>1502</sup>

In *Western Cape Minister of Education and Others v The Governing Body of Mikro Primary School and Another*,<sup>1503</sup> the SCA held that a refusal to change the language policy in a public school is an administrative action which is subject to review; and should the decision be unreasonable in the sense that no reasonable person would in the circumstances have refused to change the language policy it may be reviewed and set aside.<sup>1504</sup> In ruling whether or not an administrative decision is reasonable, guidance is provided in section 6(2)(h) of PAJA, which requires that the decision must not be “so unreasonable that no reasonable person could have so exercised the power.”<sup>1505</sup> In that regard, the Constitutional Court held that a breach of section 6(2)(h) of PAJA can be shown *inter alia* by a proof that:

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<sup>1500</sup> See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 ZACC 22. See also *Rustenburg Platinum Mines Ltd v Commission for Conciliation Mediation and Arbitration* 2007 (1) SA 576 (SCA) at para 26.

<sup>1501</sup> *Eden Security Services CC and Others v Cape Peninsula University of Technology and Others* 2014 ZAWCHC 148 at para 65. In the case, the court had to consider whether or not CPUT’s decision to appoint security service providers is subject to judicial review under section 33 of the Constitution. The national legislation referred to is the *Public Finance Management Act* 1 of 1999, which incidentally does not cite the university. The court therefore held that universities are not included in the ambit of section 217 of the Constitution which makes provision for the procurement of goods and services by organs of state and “any other institution identified in national legislation.”

<sup>1502</sup> Currie and Klaaren “Introduction to the Promotion of Administrative Justice Act” in Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 1.30.

<sup>1503</sup> 2005 3 All SA 436 (SCA) at para 36.

<sup>1504</sup> See section 6(2)(h) of PAJA.

<sup>1505</sup> *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 34.

...the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or an improper purpose; or that [the decision-maker] misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision ...was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.<sup>1506</sup>

In interpreting 'reasonableness' of administrative decision, section 39(2) of the Constitution provides a guide that every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.<sup>1507</sup> Accordingly, section 6(2)(h) of PAJA must be interpreted through the prism of the Bill of Rights.

The Constitutional Court adopted a similar approach in the recent case of *Nomsa Ellen Dladla and Others v City of Johannesburg and Others*.<sup>1508</sup> In that case, the Constitutional Court had to consider a constitutional challenge to the validity of certain rules imposed by the respondents upon the applicants as a condition for living in a temporary shelter. Part of the rules required them to leave the shelter during the day and forbade family members of the opposite sex from living together.<sup>1509</sup> In rejecting the respondents' argument that the shelter did not qualify as a 'home' in everyday sense of the word, the Constitutional Court observed that the argument cannot diminish the applicants' entitlement to the protection of their fundamental constitutional rights. The rights "attach to every person and are enjoyed everywhere in the country, except where they are limited in terms of section 36 of the Constitution,"<sup>1510</sup> and for any limitation of the rights to be justified under section 36 they must be authorised by a "law of general application" rather than some rules. It is therefore not possible to conduct a reasonableness enquiry without first locating a law of general application.<sup>1511</sup>

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<sup>1506</sup> *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 43.

<sup>1507</sup> *Devraj Govender v The Minister of Safety and Security* 2001 ZASCA 80 at para 10.

<sup>1508</sup> 2017 ZACC 42.

<sup>1509</sup> The High Court held that the rules were unjustifiable infringements on the applicants' constitutional rights to dignity, freedom and security of the person, and privacy enshrined in sections 10, 12 and 14 of the Constitution. However, the SCA held that though the rules infringed the applicants' constitutional rights, the infringement was reasonable.

<sup>1510</sup> 2017 ZACC 42 at para 44.

<sup>1511</sup> The opinion of Cameron J is, however, worthy of special interest. While agreeing that the rules were unreasonable, he pointed out that the test for justifiability need not always be against a law of general application. Rather, there is a need first to examine the context and requirement

In the same vein, an administrative action may be set aside where the administrator fails to take a decision which is required, delays in taking the decision, or takes the decision outside the period stipulated therefor.<sup>1512</sup> Therefore, in *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd*,<sup>1513</sup> the court held that discretion vested in a public functionary must be exercised by that functionary in the absence the right to delegate. He must not become a mere 'rubber-stamp' relying only on the advice of others and without knowing the underlying basis for the advice such that it cannot be said that he exercised the power in question.

Furthermore, it does not matter that legislation is devoid of an enumeration of the factors to be considered by the administrator in taking a decision. International law may be relevant in that regard. Section 233 of the Constitution provides that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." Therefore, in *Earthlife Africa Johannesburg v The Minister of Environmental Affairs and Others*,<sup>1514</sup> the court held that the absence of express provision requiring climate change impact assessment does not imply that there is no legal duty to do so.

Similarly, a court or tribunal has the power to judicially review an administrative action if the action was taken based on irrelevant considerations, or relevant considerations were not considered.<sup>1515</sup> In *Bato Star Fishing (Pty) Ltd v The Minister*

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of the specific right underlying the rule under consideration. In the instant case, the question should be 'is the rule justified in terms of section 26(2) of the Bill of Rights which required that the action taken must be reasonable?' That should be the "central enquiry in determining the constitutional soundness of socio-economic rights measures" (at para 63) laid down in *Grootboom* (2001 (1) SA 46 (CC) at para 42), *TAC* (2002 (5) SA 721 (CC) at para 68) and *Mazibuko* (2002 (5) SA 721 (CC) at para 68). It is therefore possible to enquire into the reasonableness of a measure intended to fulfil a constitutional right, "without first hunting down a law of general application enabling that measure."<sup>1511</sup>

<sup>1512</sup> See section 6(3) of PAJA.

<sup>1513</sup> 2005 (6) SA 182 (SCA) at para 120.

<sup>1514</sup> 2017 2 All SA 519 (GP).

<sup>1515</sup> See section 6(2)(e)(iii) of PAJA.

*of Environmental Affairs and Tourism and Others*,<sup>1516</sup> the Constitutional Court held that in reaching a decision, regarding the allocation of fishing quotas the decision-maker is to consider the importance of redressing imbalances in the industry with the goal of transformation. The Court, however, noted that the goal of transformation could be achieved in many ways including a consideration of the requirements of section 24(b) of the Constitution. In refusing to review the administrative decision in the case,<sup>1517</sup> the Court emphasised that section 6(2)(h) of PAJA must be construed strictly with the Constitution, and that what will constitute a reasonable decision depend on the circumstances of each case. However, in reaching a decision, the court is not to usurp the decision of administrative agencies but to ensure that their decisions fall within “the bounds of reasonableness as required by the Constitution.” In the instant case, the Constitutional Court refused to review the decision because available records showed that the Chief Director took the relevant factors necessary for the transformation of the fishing industry into account, engaged in an evaluative process and gave reasons for his decision.

Meanwhile, there are other relevant considerations in the procedure for judicial review. Section 7 of PAJA requires that proceedings for judicial review must be instituted without unreasonable delay,<sup>1518</sup> and they can only commence after the exhaustion of internal remedies in terms of PAJA or any other law.<sup>1519</sup> Another relevant factor is the nature of remedies in proceedings for judicial review.<sup>1520</sup> These are considered below.

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<sup>1516</sup> 2004 (4) SA 490 (CC).

<sup>1517</sup> The court considered a string of English decisions and observed that the opinion of Lord Cooke in *Secretary of State for Education and Science v Tameside Metropolitan Borough* 1976 3 All ER 665 at 697, that “conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt” is subject to review, provided sound guidance. See also *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 1948 1 KB 223 (CA), *R v Chief Constable of Sussex, ex parte International Trader’s Ferry Ltd* 1999 1 All ER 129 (HL) at 157, and *Secretary of State for Education and Science v Tameside Metropolitan Borough* 1976 3 All ER 665.

<sup>1518</sup> Section 7(1) of PAJA.

<sup>1519</sup> Section 7(2) of PAJA.

<sup>1520</sup> Section 8 of PAJA.

#### 5.4.2.1 Remedies in proceedings for judicial review

Caution is the watchword in the consideration of administrative decision in judicial review as there is a need to maintain a reasonable balance between unfair decisions of public authorities and the desire to avoid undue judicial interference in public administration.<sup>1521</sup> Care should be taken not to impose obligations upon the government which may constrain its ability to make and implement effective policy.<sup>1522</sup> In this regard, procedural fairness must be distinguished from substantive fairness. The substantive fairness of a decision in itself is not a ground for judicial review otherwise, the court would be dragged into determining matters which are best dealt with at political or administrative level.<sup>1523</sup> In the same vein, a court should not stop the exercise of executive or legislative power before the exercise is successfully and finally impugned on review. This is in accord with the doctrine of separation of powers, the comity that the courts owe the other organs of government, provided they have acted lawfully.<sup>1524</sup>

Section 8 of PAJA gives a court or tribunal engaged in judicial review of an administrative action in terms of section 6 a discretion to "grant any order that is just and equitable."<sup>1525</sup> In *Makhanya NO and Another v Goede Wellington Boerdery (Pty) Ltd*,<sup>1526</sup> the Water Tribunal had refused an appeal of the applicant against a decision rejecting an application for water licence. The issues for determination by

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<sup>1521</sup> See *The Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1998 ZACC 20; 1999 (2) SA 91 (CC) at para 34.

<sup>1522</sup> *The Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1998 ZACC 20; 1999 (2) SA 91 (CC) at para 41.

<sup>1523</sup> See *The Associated Institutions Pensions Fund and Others v Johan van Zyl and Others* 2004 (4) All SA 133 (SCA). The Constitutional Court in *Bel Porto Governing Body and Others v The Premier of the Province and another* 2002 (3) SA 265 at para 88, while considering item 23(2)(b) of Schedule 6 of the Interim Constitution, held that the provision did not introduce the consideration of substantive fairness as a criterion to determine the validity of administrative action, and that any such a position would drag the courts into the consideration of political or administrative matters.

<sup>1524</sup> *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 ZACC 18 at para 26.

<sup>1525</sup> Where the proceedings relate to the judicial review of an administrative action in terms of section 6(1), section 8(1) of PAJA gives examples of orders that is just and equitable which the court or tribunal may give.

<sup>1526</sup> 2012 ZASCA 205.

the SCA were whether or not the decision of the Water Tribunal constituted administrative action reviewable under PAJA, and if so, whether or not the lower court was correct in setting aside the Tribunal's decision and substituting its own decision in place thereof, rather than remitting the matter to the Tribunal for reconsideration. The SCA held that the decision constituted administrative action, reviewable in terms of section 6(2)h) of PAJA, being one which a reasonable decision-maker ought not to reach. The court further held that section 8(1) of PAJA authorises the court to grant any order which is just and equitable, and if necessary "in exceptional cases"<sup>1527</sup> to set aside the administrative decision and substitute or vary it or correct a defect resulting from the action.<sup>1528</sup> However, considering that PAJA does not provide guidelines for the determination of "exceptional cases," any decision reached must satisfy the constitutional imperative that administrative action must be lawful, reasonable and fair.<sup>1529</sup> In the instant case, the urgent need for water on the appellant's farm and the fact that the Water Tribunal has been disbanded justify exceptional circumstances for substitution of the decision of the Tribunal.

Where a violation of the right to procedural fairness is caused by a failure to comply with a peremptory requirement of the law, an administrative authority has no inherent power to condone the failure.<sup>1530</sup> However, a court or tribunal in judicial review may condone the non-compliance where such condonation is not incompatible with public interest. Therefore, in *Millennium Waste Management (Pty) Ltd v The Chairperson of the Tender Board: Limpopo Province and Another*,<sup>1531</sup> the SCA condoned the failure of the tender committee to comply with rules because it would promote the values of fairness, competitiveness and cost-effectiveness required in section 217 of the Constitution, resulting in the award of a tender to the appellant who had quoted the sum of R444 244,43 per month against the successful tenderer's R3 642 257,28 per month for the same service.

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<sup>1527</sup> Section 8(1)(c)(ii) of PAJA.

<sup>1528</sup> Section 8(1) (c)(ii)(aa) of PAJA.

<sup>1529</sup> See *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA).

<sup>1530</sup> *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing* 2009 (1) SA 308 (SCA).

<sup>1531</sup> 2007 SCA 165 (RSA).

In exceptional circumstances, a court or tribunal in granting a just and equitable order is permitted to “direct the administrator or any other party to the proceedings to pay compensation.”<sup>1532</sup> This is in addition to the constitutional right to “appropriate relief” in terms of section 38 of the Constitution.<sup>1533</sup>

#### 5.4.2.2 Effect of delay

It is important that an application for review of an administrative decision should be brought within a reasonable time, as delay may cause prejudice to the other party, and it may adversely affect the public interest element in the finality of administrative action, thereby making the validity of decisions uncertain for the members of the public who may want to rely on those decisions.<sup>1534</sup> Section 7(1) of PAJA requires that proceedings for judicial review must be instituted not later than 180 days of the conclusion of proceedings of internal remedies, or when the aggrieved person “was informed of the administrative action, became aware of the action, and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.” The period of 180 days should ordinarily serve government’s interests well to rethink its action if necessary and should afford an adequate and fair opportunity to an aggrieved person to seek judicial redress.<sup>1535</sup>

Section 9(1), however, provides that the 180-day period “may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal, on application by the person or administrator concerned;” and such application may be granted “where the interests of justice so

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<sup>1532</sup> Section 8(1)(c)(ii) (bb) of PAJA.

<sup>1533</sup> Section 38 of the Constitution guarantees *inter alia*, “the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.”

<sup>1534</sup> See *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality and Anor* 2017 ZASCA 23 at para 18. See also *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 at paras 22-24.

<sup>1535</sup> *Stefaans Conrad Brümmer v Minister of Social Development and Others* 2009 ZACC 21 at para 78.



require.”<sup>1536</sup> However, the court is only empowered to entertain the application for extension of time if the interest of justice requires it, otherwise, the court cannot review the application.<sup>1537</sup>

In *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others*,<sup>1538</sup> the appellants commenced court proceedings four years after the declaration of certain roads in the Gauteng province as toll roads was made by SANRAL through publication in the *Government Gazette*, to review the decision of the Minister. The appellants contended that the respondents failed to comply with the notice and comment procedure requirement of section 4 of PAJA. The respondents however relied on the ‘delay rule’, contending that the action must fail and required that the court dealt with the issue of delay first.<sup>1539</sup> The SCA refused to extend the 180 days required for commencing review under section 9(1) of PAJA, holding that “a court must take a broad view of when the public at large might reasonably be expected to have had knowledge of the action, not dictated by the knowledge, or lack of it, of the particular member or members of the public who have chosen to challenge the act.”<sup>1540</sup> The Court observed that SANRAL could not have borrowed the money without anticipating tolling, and if the government is compelled to pay on the guarantee, the impact would be felt on funding for other services as health care education, pension, and social grants.

It is not impossible that a person affected by an administrative action fails to satisfy the delay rule due to an action of the administrator, for example, having requested for reasons in line with section 5 of PAJA, and none was provided till the expiration of the 180 days allowed for commencing judicial review. Put in another way, could persons whose rights are adversely and materially affected by hydraulic fracturing operations in due course commence judicial review proceedings contending that the

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<sup>1536</sup> See section 9(2) of PAJA.

<sup>1537</sup> *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* 2013 ZASCA 148 at para 26.

<sup>1538</sup> 2013 ZASCA 148.

<sup>1539</sup> A finding of unreasonable delay will forestall the consideration of the lawfulness or otherwise, of the contentious administrative action. The question of delay has to be resolved first. See *South African National Roads Agency Ltd v Cape Town City* 2016 ZASCA 122 at para 13.

<sup>1540</sup> 2013 ZASCA 148 at para 27.

regulator failed to bring to their notice, the potential adverse effects of hydraulic fracturing in terms of the requirements of section 4 of PAJA? The SCA's opinion is that the question of whether or not delay in initiating judicial review proceedings is unreasonable is a question of fact, the determination of which is subject to the inherent jurisdiction of the court. It requires two considerations, namely, "was there an unreasonable delay?" and "if so, should the delay in all the circumstances be condoned?"<sup>1541</sup> While this opinion portends that the courts are available to protect the rights of persons who may be aggrieved by administrative action, the capacity of potential persons who may be affected to take advantage of opportunity offered by the courts is another matter. This is considered in chapter 6.

Furthermore, section 8 of PAJA permits the courts to grant an order "which is just and equitable" in addition to the other specific orders stated in the section,<sup>1542</sup> and "it is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable monitoring tool for avoiding or minimising injustice when legality and certainty collide."<sup>1543</sup> Therefore, the courts will always be open to persons who may suffer harm attributable to hydraulic fracturing. The remedies available in proceedings for judicial review are considered below.

#### 5.4.2.3 Exhaustion of internal remedies

Section 7(2) of PAJA provides that "...no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted." This rule is however subject to the proviso that "a court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."<sup>1544</sup> The essence of the requirement to exhaust internal remedy is to allow the mechanism

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<sup>1541</sup> *The Associated Institutions Pensions Fund and Others v Johan van Zyl and Others* 2004 4 All SA 133 (SCA) at para 47-48.

<sup>1542</sup> See *Eskom Holdings Ltd v The New Reclamation Group (Pty) Ltd* 2009 ZASCA 8 at para 9.

<sup>1543</sup> See *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 36.

<sup>1544</sup> Section 7(3) of PAJA.

of the statute to be applied to rectify any perceived irregularities prior to resort to litigation, thereby providing an immediate and cost-effective relief.<sup>1545</sup>

There is wisdom in allowing the administrator to fully complete his task before opportunity is given to the court to perform its review function.<sup>1546</sup> To have it otherwise may result in premature judicial intervention and probably usurp executive role and function. In *Petronella Nellie Nelisiwe Chirwa v Transnet Limited and Others*,<sup>1547</sup> it was held that the fact that the applicant did not fully take advantage of remedies available to her under the applicable legislation, which required resolution by the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 191(1)(a)(ii) of the LRA prior to approaching the High Court to establish her right under section 33 of the Constitution was fatal to her claim.

Internal remedies are to be taken as a conjunctive whole. Therefore, in the absence of a decision by a particular person or office, or dissatisfaction with a decision if one is made, the affected person must pursue the next line of decision-making, otherwise the whole process is compromised.<sup>1548</sup> Furthermore, in arriving at a decision on exhaustion of internal remedies, rights must be compared and balanced carefully such that if necessary, public policy and public interest may override an applicant's rights to guarantee effective administration of facilities under the supervision of the respondents. In *Radovan Krecjir v The Minister of Correctional Services and Others*,<sup>1549</sup> one of the issues for determination by the court was whether or not the applicant had utilised and/or exhausted the internal remedies available to him in terms of section 21 of the *Correctional Services Act*<sup>1550</sup> to address complaints or issues arising in the course of his incarceration. The court held that

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<sup>1545</sup> The rationale for, and the impact of the requirement of the exhaustion of local or internal remedies is discussed in para 3.4.2.1.

<sup>1546</sup> *Wycliffe Simiyu Koyabe and Others v Minister for Home Affairs and Others* 2009 ZACC 23 at para 35.

<sup>1547</sup> 2007 ZACC 23.

<sup>1548</sup> See *Radovan Krecjir v The Minister of Correctional Services and Others* 2016 (1) SACR 452 (GP) at para 18.

<sup>1549</sup> 2016 (1) SACR 452 (GP).

<sup>1550</sup> No 111 of 1998.

confiscation of the applicant's notebooks and documents in the course of a search of his cell during which several illegal items including firearms were found, was necessary to enforce order in the prison and to protect other inmates.

While there appears to be a credible rationale for insisting on exhaustion of internal remedies, potential abuse cannot be ruled out especially if a potential applicant finds it impossible to exhaust internal remedies due to the uncooperative approach of a government functionary or agency. Simply put, does a wrongful application of section 7(2) of PAJA have an adverse impact on the effect of the enforcement of a right? This was the question before the Constitutional Court in *Wycliffe Simiyu Koyabe and Others v Minister for Home Affairs and Others*.<sup>1551</sup> The court considered analogous situations in international law, observing that the view of the African Commission on Human and Peoples Rights is that to be operative the local remedy must be "available, effective and sufficient" to redress the complaint.<sup>1552</sup> The Court thereupon held that the effect of section 7(2)(c) of PAJA is to provide a relief to an aggrieved applicant in the event of a potential action by administrators to frustrate the necessity of judicial scrutiny of administrative action.<sup>1553</sup> Accordingly, the provision facilitates exceptional circumstances in which a court can condone non-exhaustion of remedies and allow judicial review notwithstanding. As to what constitutes "exceptional circumstances," the Constitutional Court pointed out that it depends on the circumstances of each case,<sup>1554</sup> but on the whole, the "internal remedy must be readily available, and it must be possible to pursue without any obstruction, whether systematic or arising from unwarranted administrative conduct."<sup>1555</sup>

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<sup>1551</sup> 2009 ZACC 23.

<sup>1552</sup> 2009 ZACC 23 at para 42.

<sup>1553</sup> 2009 ZACC 23 at para 73.

<sup>1554</sup> *Nichol and Another v The Registrar of Pension Funds and Others* 2008 (1) SA 383 (SCA) at paras 16-17.

<sup>1555</sup> *Reed and Others v Master of the High Court and Others* 2005 2 All SA 429 at para 20.

### 5.4.3 Assessment of the right to just administrative action: South Africa

People are entitled to information underlying an administrative action, including the regulation of hydraulic fracturing, and the PAJA requires that to give effect to the right to procedurally fair administrative action, adequate notice of the nature and purpose of the proposed action must be given,<sup>1556</sup> among other things. PAJA contains provisions that facilitate the process of participation an integral part of decision-making.<sup>1557</sup> While there may be no generally accepted standard to measure the effectiveness of CERs, an effective solution can be found in the application of baseline democratic values evident in three principles, namely the recognition of the intrinsic value of each individual which demands that the individual or the community must be protected from harm, patrimonial responsibility as a public duty on the understanding that people must have the power to choose their destinies and an open process of decision-making whose objective is to engender public participation.<sup>1558</sup>

Regulations should be seen to protect public interest and the stakeholders, including the ordinary person in the community from the potential adverse impacts of hydraulic fracturing are pervasive on the environment. Participation should extend beyond taking part in the evolution of the regulation and in its monitoring, so that the rights being protected do not lose their meaning and become worthless.<sup>1559</sup> The complexity of hydraulic fracturing requires that participation cannot be a one-off event because the potential dangers are yet to be fully comprehended.<sup>1560</sup> The processes of submitting a draft regulation or proposed administrative action for public comments will serve this purpose. The process affords the interests that may be affected an opportunity to state their objections, the outcome of which may result in necessary changes.

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<sup>1556</sup> Section 3(2)(b)(i) of the PAJA.

<sup>1557</sup> Brynard 2011 *Administratio Publica* 113.

<sup>1558</sup> Sax 1990 J Land Use & Env'tl Law 98.

<sup>1559</sup> Du Plessis 2008 *PER/PELJ* 171.

<sup>1560</sup> Murombo 2008 *PER/PELJ* 11.

Although the HF Regulations were released to the public for comment, the controversy surrounding hydraulic fracturing and its potential impacts on human and the environment should require more. Notice has also been given to all persons and members of the public whose rights may be materially and adversely affected regarding applications for exploration rights to explore for natural (shale) gas in the Western, Eastern and Northern Cape Provinces.<sup>1561</sup> A procedurally fair administrative action in hydraulic fracturing should satisfy the procedure envisaged in terms of section 4(1)(c) of PAJA.<sup>1562</sup> The adoption of the notice and comment procedure alone does not appear to sufficiently address the peculiar needs of the affected community especially on consideration of the relative level of literacy in South Africa which will obviously affect a thorough appreciation of the issues involved in the draft regulations. While it is recognised that administrators face practical difficulties in implementing decisions, they should be held to account in the face of constitutional infringements because remedy is supposed to be adapted to the right and not the right to the remedy.<sup>1563</sup> In *Bel Porto School Governing Body and Others v The Premier of the Province and Another*,<sup>1564</sup> the Constitutional Court observed that the Constitution prohibits administrative action which among other things, adversely affects a disadvantaged sector of the community. In the words of Mokgoro and Sachs J,

... the Constitution prohibits administrative action which, however meritorious in general thrust, is based on exclusionary processes, applies unacceptable criteria and results in sacrifice being borne in a disproportionate and unjustifiable manner, the more so if those who are most adversely affected are themselves from a disadvantaged sector of the community.<sup>1565</sup>

Necessary effort to protect the people and the communities of the Karoo to ensure that their procedural rights are protected demands that every procedure that gives

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<sup>1561</sup> See PN 87 in PG 2195 of 11 July 2018, and PN 121 in PG 4080 of 11 July 2018.

<sup>1562</sup> Though section 4(1) of PAJA gives the choice of which procedure to adopt to give effect to procedurally fair administrative action, 4(1)(c) which requires the administrator to hold a public enquiry and to follow a notice and comment procedure appears most relevant in hydraulic fracturing given the concerns relating to its extensive adverse impacts.

<sup>1563</sup> *Bel Porto School Governing Body and Others v The Premier of the Province and Another* 2002 (3) SA 265 at para 62.

<sup>1564</sup> 2002 (3) SA 265.

<sup>1565</sup> *Bel Porto School Governing Body and Others v The Premier of the Province and Another* 2002 (3) SA 265 at para 31.

effect to a procedurally fair administrative action ought to be considered and implemented.

The obligation on an administrator to provide reasons for decisions upon request provides the first indication in a potential judicial review process as to whether or not administrative action complies with the requirements of administrative justice as expounded in PAJA. Glinz argues that rather than waiting for the aggrieved person to ask for reasons, it is probably better to compel the person acting administratively to give reasons for the action when the act is being carried out.<sup>1566</sup> Glinz's recommendation is further underscored by research commissioned by the Public Service Commission to assess the current status of compliance with PAJA by all spheres of government, and to identify the reasons for non-compliance in government agencies.<sup>1567</sup> Research findings indicated that there was a vague understanding of PAJA and its requirements, and whatever knowledge of the statute the officers had were gleaned from the media or their superior officers who unfortunately, did not discuss it from operational perspectives.<sup>1568</sup> Meanwhile, the Department of Public Service and Administration has been focused on how to improve the perspectives and the values on which the public service operates.<sup>1569</sup>

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<sup>1566</sup> Glinz 2009 *Namibian Law Journal* 21.

<sup>1567</sup> See *The Public Service Commission Compliance with the Promotion of Administrative Justice Act, 2000*.

<sup>1568</sup> See *The Public Service Commission Compliance with the Promotion of Administrative Justice Act, 2000* 13.

<sup>1569</sup> The *White Paper on Transforming Public Service Delivery (Batho Pele)* of 2007 provides a policy framework and implementation strategy for the transformation of public service delivery by prescribing eight principles aimed at improving the efficiency and effectiveness in the form of guide as to how service is provided. *Bathopele* in its literal interpretation means 'people first.' The *Batho Pele* approach is based on the understanding that the public dealing with the public service has no option of taking their business to the competition, as is often possible in dealing with the private sector provider of services. The approach demands that the citizen must be regarded as the 'customer' of the public sector, whose interest is pre-eminent in the transaction in which he is engaged with the public sector. Accordingly, eight key principles of *Bathopele* are devised to assist in the transformation of public service delivery, namely consultation, service standards, access, courtesy, information, openness and transparency, redress, and value for money. See Department of Public Service and Administration 1997 *Batho Pele – "People First": White Paper on Transforming Public Service Delivery*. See also Currie and Klaaren "Introduction to the Promotion of Administrative Justice Act" in Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* at para 1.12.

Necessary training of public officers ought to include the benefits that providing reasons for administrative action can facilitate effective administration.

Compelling administrative authorities to provide reasons for actions and decisions may reduce incidence of judicial review, thereby fostering a culture of administrative justice. This is likely to be beneficial in the administration of hydraulic fracturing considering the complexity of the process and the lack of consensus on the severity of its impact on the environment and on humans. If reasons underlying specific actions or decisions<sup>1570</sup> precede their implementation, persons that may be potentially affected would be in a better position to assess the effectiveness of prospective actions or decisions and may decide to request an internal review, thereby forestalling a costly judicial review.

#### **5.4 Conclusion**

While the Constitution and PAJA constitute the source of the right to just administrative action, it does not imply that the common law ceases to have effect. Rather, as expatiated by the Constitutional Court in *The Pharmaceutical Manufacturers Association of South Africa and Others - In re: the ex parte application of the President of the Republic of South Africa and Others*<sup>1571</sup> the common law is not a separate body of law distinct from the Constitution. There is only one system of law, and that is the Constitution, which is the supreme law from which all law, including the common law derive their authority. Therefore, the well-established principles of common law will continue to inform the content of administrative law and other aspects of public law, and will contribute to its future

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<sup>1570</sup> The scope of 'decision' as envisaged in section 1 of PAJA is rather wide. It is defined as "...any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

- a) making, suspending, revoking or refusing to make an order, award or determination;
- b) suspending, or refusing to issue a licence, authority or other instrument;
- c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- d) imposing a condition or restriction;
- e) making a declaration, demand or requirement;
- f) retaining, or refusing to deliver up, an article; or
- g) doing or refusing to do any other thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly."

<sup>1571</sup> *Pharmaceutical Manufacturers of South Africa: In re Ex Parte Application of the President of the Republic of South Africa* 2000 (3) BCLR 241 (CC) at para 44-46.



development. The Supreme Court is empowered and will continue to develop the common law in relation to the application of the Bill of Rights to natural or juristic persons<sup>1572</sup> where there is no legislation giving effect to the right, and to develop common law rules to limit the right provided such limitation is within the terms of section 36(1) of the Constitution.

To strengthen the constitutional democracy, independent state institutions are created and made subject only to the Constitution and the law, and to be impartial and “exercise their powers and perform their functions without fear, favour or prejudice.”<sup>1573</sup> The Office of the Public Prosecutor (OPP) is one of the institutions established to strengthen constitutional democracy in the Republic.<sup>1574</sup> The power of the OPP in terms of section 182 of the Constitution and the *Public Prosecutor Act*<sup>1575</sup> includes *inter alia* the investigation of conduct in “the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,” and “to take appropriate remedial action.”<sup>1576</sup> While the Constitution does not set up a central administrative review tribunal, specific bodies are set up by legislation to address appeals in respect of the subject matter of the relevant statutes.<sup>1577</sup> Furthermore, section 195 of the Constitution sets out the basic values and principles<sup>1578</sup> that must govern public administration,<sup>1579</sup> and

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<sup>1572</sup> See section 8(3) of the Constitution.

<sup>1573</sup> Section 181(1)(d) of the Constitution.

<sup>1574</sup> Section 181(1) of the Constitution.

<sup>1575</sup> Act 23 of 1994, as amended by the *Public Protector Amendment Act* 113 of 1998.

<sup>1576</sup> Section 182(1) of the Constitution.

<sup>1577</sup> Examples include the Lands Claims Court (see section 22 of the *Restitution of Land Rights Act* 22 of 1994), Competition Appeal Court (see section 37 of the *Competition Act* 89 of 1998), the Commissioner of Patents (see section 75 of the *Patents Act* 57 of 1978), Special Tax Court (see section 83 of the *Income Tax Act* 58 of 1962), the Electoral Court (See sections 18 and 20 of the *Electoral Commission Act* 51 of 1996), the Labour Court and the Labour Appeal Court (See sections 151, 158, 167, and 174 of the LRA). These review courts are recognised as part of the judicial system, while appeals from them go to the Supreme Court of Appeal, in terms of sections 166(e) (see section 166(e) of the Constitution, which classifies “court[s] established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrate’s Courts” as part of the judicial system) and 168(3) of the Constitution. See “Review of administrative decisions of government by administrative courts and tribunals of South Africa” available at [https://www.aihja.org/images/users/1/files/south.africa.national.report\\_south.africa.en.0.pdf](https://www.aihja.org/images/users/1/files/south.africa.national.report_south.africa.en.0.pdf) [date of use 3 November 2017].

<sup>1578</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para 111.

<sup>1579</sup> Section 195(1) of the Constitution.

which must be promoted in national legislation,<sup>1580</sup> including requirements that the public administration must be development-oriented,<sup>1581</sup> accountable,<sup>1582</sup> based on fairness,<sup>1583</sup> and respond to people's needs.<sup>1584</sup>

The effect of these developments collectively represents a sort of 'second wave' of administrative justice in South Africa, encompassing the development of non-judicial institutions to facilitate compliance with administrative law.<sup>1585</sup> Furthermore, the existence of other legislation facilitating the enforcement of the right to just administrative action confirms the robustness of South African law in this regard. For example, section 33 of the Constitution unlike the due process clause of the Constitution of USA cannot be the sole source of administrative justice in South Africa because constitutional provisions on access to information, access to court, the chapter 9 institutions like the Human Rights Commission and the OPP as well as legislation providing for review of decisions on matters arising under the subject matter of the statutes all play important role.<sup>1586</sup>

In relation to the development of shale gas by hydraulic fracturing, section 6 of the MPRDA imposes an obligation on all concerned to ensure that the process is carried out in accordance with the principles of administrative justice.

Administrative action and administrative proceedings have a far greater impact on individual rights than regular judicial proceedings because the former is concerned with everyday practice of administrative justice.<sup>1587</sup> Vulnerable persons and communities face major challenges including access to legal knowledge and/or financial capacity required to enforce rights. Notwithstanding, it will appear that not

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<sup>1580</sup> Section 195(3) of the Constitution.

<sup>1581</sup> Section 195(1)(c) of the Constitution.

<sup>1582</sup> Section 195(1)(f) of the Constitution.

<sup>1583</sup> Section 195(1)(i) of the Constitution.

<sup>1584</sup> Section 195(1)(e) of the Constitution.

<sup>1585</sup> Klaaren "Three waves of administrative justice in South Africa" 2006 *Acta Juridica* 370 at 379 cited by Hoexter *The Transformation of South African Administrative Law Since 1994 With Particular Reference to the Promotion of Administrative Justice Act 3 of 2000*.

<sup>1586</sup> Klaaren "Administrative Justice" in 2009 *Revision Service* 5 at para 25.1.

<sup>1587</sup> Sossin "Access to administrative justice and other worries" in Flood and Sossin 2013 *Administrative Law in Context* available at <http://digitalcommons.osgoode.yorku.ca/scholarlyworks/502> [date of use 7 December 2017].

much could be done to assist an aggrieved person whose right to just administrative action has been infringed if he does not make efforts to demand compliance with the law, or commence proceedings for judicial review on the failure of the administrator to comply.<sup>1588</sup> Even where a judicial review succeeds, a breach of the right to administrative justice gives rise to public law, and not private law remedies, as the essence of public law remedies "is to pre-empt or correct or even reverse an improper administrative function."<sup>1589</sup> By so doing, administrative justice enhances efficient and effective public administration, which is compelled by the Constitution to entrench the rule of law.

Although the provisions of the AAL are not sufficiently comprehensive in addressing the challenges associated with adjudicatory procedure, the procedural rules introduced by the GRAPP to give effect to section 9 of article V of the Constitution of Pennsylvania<sup>1590</sup> are worthy of consideration for South African law. The GRAPP requires that administrative proceedings should not be subjected to strict rules of procedure by allowing evidence which a reasonable mind will accept as sufficient to support the conclusion.<sup>1591</sup> Furthermore, sections 561-568 of the AAL provide for the regulation of processes to assist vulnerable persons in the presentation of the cases to challenge administrative action. These provisions are worthy of consideration for possible application in South Africa.<sup>1592</sup>

In the UK, a strict application of the doctrine of parliamentary supremacy may result in arbitrary action, though the enactment of the HRA caused a radical change in the role of domestic courts.<sup>1593</sup> The combined effect of sections 3(1) and 6(1) of the

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<sup>1588</sup> In *M G Phenithi v MEC for Education in the Provincial Government of the Free State and Others* 2008 (1) SA 420 (SCA), the challenge of the constitutionality of section 14(1)(a) of *Employment of Educators Act 76* of 1998 was dismissed on the ground that section 14(2) of the Act affords an educator an opportunity to be heard if she showed cause why she should be reinstated. While there is no obligation on the employer to offer a hearing, the educator is not precluded from presenting facts to restrict the effect of deemed discharge or why the discharge should be set aside in terms of section 14(2).

<sup>1589</sup> See *Jurgens Johannes Steenkamp NO v The Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC).

<sup>1590</sup> See para 5.2.2.

<sup>1591</sup> See para 5.2.2.

<sup>1592</sup> See para 5.2.3.

<sup>1593</sup> See para 5.3.1.1.

HRA is to make it unlawful for a public authority to act in a way which is incompatible with a Convention right. However, while the HRA can be said to provide protection against abuse of the exercise of public power by giving the courts appropriate tools to uphold freedoms, the legal framework for safeguarding administrative justice in South Africa is not only broader, it also controls the exercise of power by a private body exercising public power, when the exercise of power affects the rights of any person.

The right to just administrative action protected in South Africa by section 33 of the Constitution, and PAJA expressly provides for the control of the exercise of public power.<sup>1594</sup> By virtue of section 6 of the MPRDA administrative action or decision taken in respect of hydraulic fracturing operations should comply with the principles of lawfulness, reasonableness and procedural fairness, and that written reasons must accompany decisions when requested.<sup>1595</sup> The specific learning points from Pennsylvania and the UK, as well as recommendations to strengthen the law regarding the right to just administrative action in South Africa are presented in paragraph 7.4.

Meanwhile, although each of the procedural rights can facilitate the enforcement of other CERs, it is possible that the rights of access to information and just administrative action may be infringed in the process of hydraulic fracturing. If it is not possible to secure remedy through the mechanisms provided for the application of those rights, recourse lies to the application of the constitutional right of access to the courts. Section 34 provides a right to everyone to get access to the courts to have disputes resolved by the application of law in a fair public hearing. The succeeding chapter engages in a comprehensive discussion of that right.

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<sup>1594</sup> See para 5.4.1.1.

<sup>1595</sup> See para 5.4.1.

## **Chapter 6 Right of Access to Courts**

### ***6.1 Introduction***

Access to courts refers to the procedure of securing legal access to justice on the one hand, and the outcome of that procedure, on the other hand. The right should typically guarantee an effective process for the enforcement of substantive rights through a fair and public hearing, with minimal or no delay, at an affordable cost to all. Furthermore, the process must be founded on a system that makes it possible for every person to seek the intervention by the courts for the protection of their rights and if necessary, to provide aid to ensure that their case is effectively presented before the court.<sup>1596</sup>

This chapter will conduct a critical discussion of the right of access to courts pertaining to the matter of hydraulic fracturing in Pennsylvania in the USA, in the UK, and in South Africa. In each of these jurisdictions, the legal framework of the right will be discussed via an explanation of the nature of the right and its implementation. In addition, the systems designed to ensure that effective access is available to all, in each jurisdiction, will be evaluated. The objective is to ascertain if there are lessons to be learned from the experience in Pennsylvania and the UK, relevant to South Africa. First, the domestic perspective in Pennsylvania will be considered.

### ***6.2 Domestic perspective: Pennsylvania***

#### ***6.2.1 Background***

Article III of the Constitution of the USA vests judicial power over “all cases in law and equity” in the courts. The right of access to courts is not expressly provided for in the Constitution,<sup>1597</sup> the underlying rationale for the courts’ existence was aptly

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<sup>1596</sup> See para 2.5.3 for a discussion of the theoretical appraisal of the right of access to justice.

<sup>1597</sup> The Petition Clause of the First Amendment is said to create an indirect source for the right of access to courts in that it provides *inter alia* that “Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances” (see Andrews 1999 *Ohio State Law Journal* 557). *Obiter* regarding judgments relating to the SCOTUS also appears to confirm this position (see *Sure-Tan v NLRB* 1984 467 US 883 at 897, *California Motor Transport Co v Trucking Unlimited* 1972 404 US 508 at 513, and *McDonald v Smith* 1985 472

explained by the Supreme Court of the United States (“the SCOTUS”) in *Chambers v Baltimore and Ohio Railroad Co*,<sup>1598</sup> holding that “the right to sue and defend in the courts is the alternative of force.” Notwithstanding, the importance of the right of access to courts cannot be underestimated, especially its capacity to serve as a tool for securing other rights.<sup>1599</sup> It is therefore not surprising that equal access to justice has been the focus of legislative and judicial attention both at federal and state levels.<sup>1600</sup> The state of Pennsylvania as a unit of the political entity of the USA is subject to both the Constitution of the country, and relevant federal legislation, as well as the Constitution of Pennsylvania and the applicable laws of the state which collectively regulate the judicial system, such as access to courts and proceedings. These are considered in the next paragraphs.

### 6.2.2 Legal framework

The legal framework in Pennsylvania pertaining to the right of access to courts is founded upon article 1, section 11 of the Constitution of Pennsylvania which provides that:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

The constitutional provision is supplemented by the *Access to Justice Act 2002*,<sup>1601</sup> (hereafter “the AJA”) which seeks to enhance the quality of access to justice,

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US 479 at 484. See also Andrews 1999 *Ohio State Law Journal* 557). Conversely, there are other views which appear to support the argument that the Petition clause cannot be a basis for the application of the right of access to the courts, but rather a principle relevant only in antitrust law. See for example *Grip-Pak Inc v Illinois Tool Works Inc* 1982 694 F.2d 466 (7<sup>th</sup> Cir). Bass 2014 *Fla St U L Rev* 871 argued that the draftsmen of the Constitution of the USA perhaps perceived the right of access to courts as an integral part of the common law and so ingrained in the law that there was no need to expressly include a provision. The unintended consequence of the absence of an express provision in the Constitution of USA may have stunted the development of scholarship on the subject, in that research is not comparable in volume to that in other aspects of the Constitution and the law. Tenured professorial positions at accredited law schools on the subject are scarce. See Phillips 2003 *New York University Law Review* 1317.

<sup>1598</sup> 1907 US 142 at 148.

<sup>1599</sup> Angstadt 2016 *Vermont Journal of Environmental Law* 347.

<sup>1600</sup> Sisk 1995 *La L Rev* 190.

<sup>1601</sup> 49 PL 841 No 122.

enumerating components of the right. Section 5101 of the AJA provides that “every person for a legal injury done to him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.” Furthermore, the law guarantees to everyone seeking lawful redress of their grievances an “equal access to [our] system of justice” and that “the availability of civil legal services are essential to providing meaningful access to justice for indigent persons who cannot afford legal representation.”<sup>1602</sup> The *Judiciary and Judicial Procedure Act 1976*<sup>1603</sup> adds that the right of every litigant to present his case either by himself or through counsel is guaranteed in all civil matters.<sup>1604</sup> These provisions, read together, underscore the characteristics of the right of access to courts in Pennsylvania, which are discussed in the following paragraphs of this chapter.

#### 6.2.2.1 Judicial system

The *Judicial Code*<sup>1605</sup> which deals with the judiciary and judicial procedure in Pennsylvania creates the courts system and confers them with specific jurisdiction.<sup>1606</sup> The Supreme Court in which the supreme judicial power is reposed, is the court of last resort in the Commonwealth.<sup>1607</sup> In addition to its statutory jurisdiction classified as mandatory and discretionary depending on the nature of the subject before it,<sup>1608</sup> the court has exclusive jurisdiction over appeals of final orders of the Commonwealth Court.<sup>1609</sup> On the recognition that certain cases may

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<sup>1602</sup> See section 4902 of the AJA.

<sup>1603</sup> 1976 42 PS No 142.

<sup>1604</sup> See section 2501(a) of the *Judiciary and Judicial Procedure Act 1976* PL 586 No 142.

<sup>1605</sup> 42 Pa. CS 1976 PL 586.

<sup>1606</sup> The state court system comprising 1,700 courts is a core function of the government receiving 0.5% of the state’s total budget. The system maintains automated court case and financial management arrangements that provide enhanced court access and accountability to the courts, criminal justice agencies and a host of others including the Commonwealth citizens. See “Courts – Pennsylvania’s Unified Judicial System” available at [www.pacourts.us/courts](http://www.pacourts.us/courts) [date of use 3 October 2018].

<sup>1607</sup> Section 501 of the *Judicial Code*.

<sup>1608</sup> The Supreme Court’s original but not exclusive jurisdiction extends to all cases of *habeas corpus*, *mandamus* or prohibition to courts of inferior jurisdiction, and *quo warrant* as to any officer of state wide jurisdiction (section 721 of the *Judicial Code*). The Court’s discretionary jurisdiction covers civil, noncapital criminal, administrative agency, original proceeding and interlocutory decision cases.

<sup>1609</sup> Section 723(a) of the *Judicial Code*.

require speedy and summary intervention to protect personal liberty or “to minister justice to all persons, in all matters whatsoever,”<sup>1610</sup> the Supreme Court is conferred with extraordinary jurisdiction on any matter involving an issue of immediate public importance, to which the Court may “enter a final order or otherwise cause right and justice to be done.”<sup>1611</sup>

The Commonwealth Court and the Superior Court are courts of coordinate jurisdiction, serving as intermediate appellate courts in Pennsylvania. The Commonwealth Court has original jurisdiction *inter alia* over all civil actions or proceedings against the Commonwealth government and its officers acting in official capacity.<sup>1612</sup> The Court’s appellate jurisdiction is exclusive in relation to appeals of final orders of Courts of Common Pleas only in specified cases including governmental and Commonwealth regulatory criminal cases,<sup>1613</sup> secondary review of certain appeals from Commonwealth agencies,<sup>1614</sup> and local government civil and criminal matters.<sup>1615</sup> The importance of the Commonwealth Court in the protection of the environment and environmental rights is underscored by its jurisdiction in relation to appeals against final orders of the Environmental Hearing Board. The latter is an administrative tribunal conferred with jurisdiction on the resolution of appeals of the decisions of the DEP on environmental matters.<sup>1616</sup>

The Superior Court on the other hand lacks original jurisdiction except in cases of *mandamus* and prohibition to courts of inferior jurisdiction. The court, however, has exclusive appellate jurisdiction on all appeals of final orders of the Courts of common Pleas (excluding appeals reserved for the Commonwealth Court) regardless of the controversy or the amount involved.<sup>1617</sup>

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<sup>1610</sup> See *Commonwealth v Rollins* 2016 159 A.3d 1009 (Pa. Sup Ct) and *Commonwealth v Onda* 1954 103 A.2d 90 at 92.

<sup>1611</sup> Section 726 of the *Judicial Code*.

<sup>1612</sup> Section 761(a) of the *Judicial Code*.

<sup>1613</sup> Section 762(a)(2) of the *Judicial Code*.

<sup>1614</sup> Section 762(a)(3) of the *Judicial Code*.

<sup>1615</sup> Section 762(a)(4) of the *Judicial Code*.

<sup>1616</sup> The jurisdiction and procedure of the Environmental Hearing Board is discussed in para 6.2.1.1.1.

<sup>1617</sup> Sections 741-742 of the *Judicial Code*.



The Courts of Common Pleas are courts of general jurisdiction. They are organised on the basis of judicial districts delimited on the boundary lines of sixty counties.<sup>1618</sup> They have unlimited jurisdiction on cases not exclusively assigned to another court.<sup>1619</sup> Two other categories of courts are classified as minor courts. These are the Community Courts and the Traffic Courts.<sup>1620</sup>

#### 6.2.2.1.1 The Environmental Hearing Board

The Environmental Hearing Board (hereafter “the EHB”) was established as an independent quasi-judicial agency of the Commonwealth of Pennsylvania.<sup>1621</sup> It is conferred with powers<sup>1622</sup> to review a final action of the DEP,<sup>1623</sup> and to hold hearings and issue adjudications on orders, permits, licences or decisions of the DEP, with authority extending to constitutional issues in relation to agency regulation of the environment.<sup>1624</sup>

The *Rules of Practice and Procedure* governs the process of appeals to the EHB.<sup>1625</sup> Individuals are permitted to present their appeals personally, but they are encouraged to appear through counsel.<sup>1626</sup> A lay person presenting his or her appeal without representation by counsel bears the risk that may arise because of his lack of expertise.<sup>1627</sup>

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<sup>1618</sup> Section 901(a) of the *Judicial Code*.

<sup>1619</sup> Section 931 of the *Judicial Code*.

<sup>1620</sup> Sections 1101-1144 of the *Judicial Code*.

<sup>1621</sup> See section 3(a) of the *Environmental Hearing Board Act* 1988 PL 530, PS 7511-7516.

<sup>1622</sup> See section 4 of the *Environmental Hearing Board Act*.

<sup>1623</sup> The powers of DEP are limited to the extent that its action on any matter shall not be final regarding any person unless that person has an opportunity to appeal the action to the EHB. If a person however fails to take advantage of the appeal process, then DEP’s action shall be final against that person. See section 4(c) of the *Environmental Hearing Board Act*.

<sup>1624</sup> See section 4(b) of the *Environmental Hearing Board Act*. The DEP has authority to administer over 50 statutes and regulations pertaining to environmental protection and management including Act 13, *Air Pollution Act* 35 PS 4001, *Hazardous Sites Cleanup Act* 35 PS 6020, *Clean Streams Law*, PL 1987 35 PS 691, and the *Clean Air Act* 1963 42 USC 7401. See *Empire Sanitary Landfill Inc v Department of Environmental Resources* 1996 546 Pa 315.

<sup>1625</sup> See Rules of Practice and Procedure of the EHB issued in terms of the *Environmental Hearing Board Act* 35 PS 7511-7516.

<sup>1626</sup> See section 1021.21(a) of the *Rules of Practice and Procedure* of the EHB.

<sup>1627</sup> See *Barber v Tax Review Board* 2004 850 A 2d 866.

The rules of standing are applied liberally in the proceedings of the EHB. A party is not ordinarily required to establish that he has standing,<sup>1628</sup> though if his standing is challenged, he must provide evidence to uphold his standing. This obligation is fulfilled if the appellant has a substantial, direct, and immediate interest in the outcome of the appeal.<sup>1629</sup> The EHB is not bound by technical rules of evidence, therefore evidence that is considered relevant and material with some probative value is admissible.<sup>1630</sup> However, the standard of proof in the EHB proceedings is the same as in common law, imposing the burden of proof on the party asserting the affirmative of an issue.<sup>1631</sup> This burden is discharged by a preponderance of evidence.<sup>1632</sup> The EHB may however require the other party to assume that burden “if that party is in possession of facts or should have knowledge of facts relevant to the issue.”<sup>1633</sup> The DEP always bears the burden of proof in specific circumstances.<sup>1634</sup> The EHB is empowered to modify or substitute the decision of the DEP or direct on an alternative action as may be necessary.<sup>1635</sup> Appeals are allowed against final orders of the EHB to the Commonwealth Court.<sup>1636</sup>

The advantage of the EHB to environmental protection lies in the fact that it is unique. Its personnel comprises of lawyers from the DEP and private practice, and academics with specialisation in environmental law.<sup>1637</sup> The fact that it sets its own procedural rules and creates precedents confirms its importance in the regulation

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<sup>1628</sup> See *Mathews International Corporation v DEP* 2011 EHB 402, and *Winner v DEP* 2014 EHB 135.

<sup>1629</sup> See *Robinson Township v Commonwealth* 2013 83 A 3d 901.

<sup>1630</sup> Section 1021.123(a) of the *Rules of Practice and Procedure* of the EHB.

<sup>1631</sup> Section 1021.122 of the *Rules of Practice and Procedure* of the EHB.

<sup>1632</sup> In relation to hydraulic fracturing, individuals may have considerable difficulty in discharging that burden. In *Brockway Borough Municipal Authority v Commonwealth of Pennsylvania Department of Environmental Protection* 2015 EHB 221, the EHB observed that parties who do not rely on expert testimony usually have a difficult time discharging the burden of proof because the cases involving hydraulic fracturing usually bring up technical issues. Whereas, the DEP and the operator come forward with expert testimony refuting the claim of the third-party appellant. In such situations, the EHB has no choice but to follow the law and dismiss the appeal. The EHB cannot revoke a permit based on a concern, if that concern is not supported by a preponderance of the evidence.

<sup>1633</sup> Section 1021.122(a) of the *Rules of Practice and Procedure* of the EHB.

<sup>1634</sup> When the DEP assesses or files a complaint for a civil penalty, or for any other purpose, when it revokes or suspends a licence, permit, approval or certification, and when it issues an order. See section 1021.122(b) of the *Rules of Practice and Procedure* of the EHB.

<sup>1635</sup> See *People United to Save Homes v DEP* 1999 EHB 457.

<sup>1636</sup> See section 763(a)(1) of the *Judicial Code*.

<sup>1637</sup> *Hinerman Insider’s Guide to the Pennsylvania Environmental Hearing Board* 2.

of hydraulic fracturing in that many of the potential cases will most likely be heard first by the EHB.<sup>1638</sup> The existence of a specialised environmental court is perhaps justifiable considering the complexity of the scope of matters covered, including the hydraulic fracturing process on which the state of knowledge is still limited.<sup>1639</sup> Furthermore, environmental problems are polycentric and multidisciplinary, with wide trans-boundary impacts.<sup>1640</sup> Aside the need for expertise, specialised courts are likely to guarantee uniformity or consistency in decisions regarding the subject matter of their jurisdiction. In addition, they could probably reduce the workload of regular courts thereby giving both systems of court opportunity to pay sufficient attention to matters within their jurisdiction.<sup>1641</sup> In the case of *Ohio v Wyandotte Chemicals Corporation*<sup>1642</sup> the SCOTUS declined to exercise its original jurisdiction against the appellants to stop activities resulting in the pollution of Lake Erie. The SCOTUS held *inter alia* that it had no expertise to adjudicate the case because it “is an extraordinarily complex one both because of the novel scientific issues of fact inherent in it, and the multiplicity of governmental agencies involved.”<sup>1643</sup> The decision in *Wyandotte Chemicals* gives cause for concern. In the absence of a specialised court conferred with jurisdiction over environmental matters or indeed any subject, the court has a duty to resolve conflicts, otherwise wrongs will continue without the availability of a remedy. As the SCOTUS pointed out in *Marbury v Madison*, “where there is a legal right, there is also a remedy by suit or action at law, whenever that right is invaded.”<sup>1644</sup> To correct the assumption that it is possible for the courts to decline jurisdiction without an alternative to provide justice, the

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<sup>1638</sup> In *Kirskadden v DEP and Range Resources-Appalachia LLC* 2014 EHB 380 for example, the EHB held that there is a rebuttable presumption that contaminants in a water supply may have been caused by a hydraulic fracturing operator being the party in the best position to provide information regarding the chemical make-up of products used at its site having failed to provide the information. Proceedings of the EHB are similar to those of the regular courts. Its decisions are reported in annual volumes of opinion and adjudication from 1972 to date. See Opinions and Adjudication Volumes available at [www.ecourtapps.com/public/opinionAndAdjudicationVolumes.php](http://www.ecourtapps.com/public/opinionAndAdjudicationVolumes.php) [date of use 3 October 2018].

<sup>1639</sup> See paras 2.2 and 2.4 on the complexity of hydraulic fracturing, and the adverse impacts of hydraulic fracturing respectively.

<sup>1640</sup> See Preston 2012 *Pace Envtl Law Rev* 396.

<sup>1641</sup> Whitney 1973 *Wm & Mary L Rev* 473.

<sup>1642</sup> 1971 401 US 493.

<sup>1643</sup> 1971 401 US 493 at 5-4.

<sup>1644</sup> 1803 5 US (1 Cranch) 137 at 163.

SCOTUS in the recent case of *State of Indiana and Others v Commonwealth of Massachusetts*<sup>1645</sup> warned that the position taken in *Wyandotte Chemicals* was actuated by policy, which conflicts with the court's role based on the time-honoured maxim that "a court possessed of jurisdiction generally must exercise it."

#### 6.2.2.2 Equal access to the courts

Section 4902(1) of AJA provides that "it is of paramount importance to the citizens of this Commonwealth that all individuals who seek lawful redress of their grievances have equal access to our system of justice." The open invitation to everyone to seek redress through the courts system will be meaningless if people do not have absolute confidence in the courts to right the wrongs, including those caused by hydraulic fracturing. Lack of confidence may inadvertently force people to become indifferent to seeking redress through the courts in which case rights may be compromised. For judicial proceedings to be fundamentally fair, certain distinct factors must be considered including the nature of "the private interest that will be affected," the comparative risk of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards" and the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirements."<sup>1646</sup>

The case of *Cabot Oil and Gas Corporation v Vera Scroggins*<sup>1647</sup> substantiates the view that courts can effectively protect the ordinary person against the might of the oil and gas industry. In vacating a broad injunction issued in an earlier case in which the respondent was not represented by counsel, the court observed that a wrong message would be sent to "those who oppose fracking and wish to make their voices heard or to document practices that they fear will harm them and their neighbors."<sup>1648</sup> The right of equal access to the courts therefore gives an assurance that the ordinary person can present his case against a large corporation on the

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<sup>1645</sup> 2018 138 S Ct 1585.

<sup>1646</sup> See *Turner v Rogers* 2011 564 US 431.

<sup>1647</sup> Case No 2013-1303 CP available at <https://files.arnoldporter.com/Cabot-Oil-and-Gas-v-Vera-Scroggins%20Mar%202014.pdf> [date of use 17 April 2018].

<sup>1648</sup> Case No 2013-1303 CP at page 16.

understanding that the court will act as an impartial arbiter.<sup>1649</sup> Regrettably, some other cases involving oil and gas companies which may ultimately have a bearing on the protection of human rights are usually resolved by settlements rather than by trial on merits.<sup>1650</sup> Though settlement of disputes out-of-court is legal, it has the potential to impede the development of the law and possibly show the ordinary person that the law is not a respecter of persons. The situation is further complicated by the fact that parties in the oil and gas industry usually insist on confidentiality as key terms of settlement agreements forbidding counterparties from discussing terms of settlement.<sup>1651</sup> Courts are known to readily accept settlements perhaps because they help to reduce workload,<sup>1652</sup> but while settlement of disputes out-of-court may have its benefits the expediency of the moment should not be allowed "to overturn centuries of tradition of open access to court documents and orders."<sup>1653</sup>

### 6.2.2.3 Standing

The general position regarding standing in the USA is that a party in a judicial proceeding must assert his legal rights and interests, rather than justifying his claim to relief on the legal rights or interests of third parties.<sup>1654</sup> A person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved, and cannot stand to obtain a judicial resolution of his claim.<sup>1655</sup> He is required to establish that he has a substantial, direct, and immediate interest in the outcome

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<sup>1649</sup> See *Robinson Township v Commonwealth of Pennsylvania* 2016 A.3d J-34A-B.

<sup>1650</sup> Nicholson *Analysis of Litigation Involving Shale and Hydraulic Fracturing* 2.

<sup>1651</sup> Galanter 2004 *J Empirical Legal Studies* 459.

<sup>1652</sup> Moss 2007 *Mich L Rev* 869. See also See *Zimmermann v Atlas America LLC* No 2009-7564 (Ct Common Pleas Washington Cty, Pa. September 21, 2009; *Hallowich v Range Resources Corporation* 2012 64 A.3d 13. *Hallowich v Range Resources Corporation and Others* was an appeal from an order dated 31 January 2012, denying a motion to intervene and unseal records of a \$750,000 settlement between the Hallowich family and Range Resources Corporation. See "2 Pennsylvanian children will live their lives under a gag order imposed under a \$750,000 settlement)" available at [www.theguardian.com/environment/2013/aug/05/children-ban-talking-about-fracking](http://www.theguardian.com/environment/2013/aug/05/children-ban-talking-about-fracking) [date of use 3 October 2018].

<sup>1653</sup> See *Bank of America National Trust Savings Association v Hotel Rittenhouse Association* 1986 800 F.2d 339 at 345-6.

<sup>1654</sup> *Kowalski v Tesmer* 2004 543 US 125 at 129.

<sup>1655</sup> *Ashley Funk and Others v Tom Wolf (as Governor of Pennsylvania and Others)* 2016 144 A.3d 228 (Pa. Commw Ct).

of the litigation.<sup>1656</sup> It is irrelevant that the claimant is seeking to assert the common interest of the public to ensure compliance with law.<sup>1657</sup> Therefore, proof of injury is a core requirement to sustain standing in each case,<sup>1658</sup> though the harm alleged need not be pecuniary in nature.<sup>1659</sup>

To confirm standing in a case, the claim must not be based upon remote and speculative allegations of harm. However, it may be difficult to prove that hydraulic fracturing caused certain kinds of harm like pollution of the water well on a neighbour's adjoining property, whereas it may be possible to show that procedural rights may have been breached. For example, information which could have put the other party on notice to take certain precaution may not have been provided.<sup>1660</sup> In such situations, the claimants will be considered to have a substantial and direct interest in the outcome of the litigation. Judicial imprimatur for this position is given by the SCOTUS holding that "when a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."<sup>1661</sup>

Where the claim relates to harm or violation of rights caused by environmental abuse, it is required that the claimant establish that his interest surpasses the common interest of all citizens.<sup>1662</sup> Accordingly, in *Tessitor v DEP*,<sup>1663</sup> the court held that the petitioner lacked standing to challenge the regulator's issuance of a water obstruction and encroachment permit because he failed to demonstrate how he would be directly impacted by the activity covered by the permit. Asserting the common interest of all citizens in procuring obedience to the law is not sufficient.

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<sup>1656</sup> *Fumo v City of Philadelphia* 2009 972 A.2d 487 at 496.

<sup>1657</sup> See *William Penn Parking Garage Inc v City of Pittsburgh* 1975 346 A.2d 269 at 281.

<sup>1658</sup> Hessick 2008 *Cornell Law Review* 324.

<sup>1659</sup> See *Fumo v City of Philadelphia* 2009 972 A.2d 487 at 496.

<sup>1660</sup> In *Robinson Township v Commonwealth* 2013 83 A 3d 901, the court held that harm suffered by claimants is not speculative or remote where the claimants are residents and business owners in municipalities hosting hydraulic fracturing operations.

<sup>1661</sup> *Massachusetts v Environmental Protection Agency* 2007 549 US 947.

<sup>1662</sup> *Lucchino v DEP and Another* 1996 EHB 583.

<sup>1663</sup> 1996 682 A.2d 434 (Pa Cmwltth).

The claimant's interest must have substance, being "some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law."<sup>1664</sup> Similarly in *Sierra Club v Morton*,<sup>1665</sup> the petitioner, relying on section 10 of the *Administrative Procedure Act* alleged that the claim for a declaratory judgment and an injunction to restrain federal officers from approving a development was in the public interest. The SCOTUS however rejected the argument and held in a five to four decision that the applicants lacked standing to institute the action because the petitioner failed to assert any harm to itself or its members.

While the reasoning underlying the insistence of the proof of injury on the part of the claimant is appreciated,<sup>1666</sup> its strict application without caution may restrict access to the courts for genuine claimants especially in claims relating to environmental interests, or claims instituted to assist others to enforce their rights. It will be tragic if insurmountable obstacles are placed in the paths of those who most need protection, thereby inadvertently making litigation impossible, and allowing wrongs to continue without redress.<sup>1667</sup> Economic harm is one of the traditional means of showing a plaintiff's injury, but harms traceable to polluted water, threat of extinction of some species, or contaminated air may not easily be assessable in economic terms.<sup>1668</sup> It is therefore important that the voice of the beneficiaries of nature should be heard considering that nature cannot on its own institute cases in the courts. The dissenting opinion of Justice Douglass in *Sierra Club v Morton*<sup>1669</sup> is instructive in this regard. He argued that:

... inanimate objects are sometimes parties in litigation... The ordinary corporation is a 'person' for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes... So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes- fish, aquatic insects, water ouzels, otter, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy

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<sup>1664</sup> *William Penn Parking Garage Inc v City of Pittsburgh* 1975 346 A.2d 269.

<sup>1665</sup> 1972 405 US 727.

<sup>1666</sup> See para 2.5.3.1 for a discussion of *locus standi*.

<sup>1667</sup> Smith *Justice and the Poor* (3<sup>rd</sup> ed) 8, 15. See also Bamberger 2005 *Seattle Journal for Social Justice* 384.

<sup>1668</sup> Martin 2008 *Social Education* 113.

<sup>1669</sup> 1972 405 US 727 at 749.

it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water- whether it be a fisherman, a canoeist, a zoologist, or a logger- must be able to speak for the value which the river represents and which are threatened with destruction.

Interestingly, the majority opinion of the SCOTUS in *Sierra Club v Morton* acknowledged the fact that although particular environmental interests shared by many people are deserving of legal protection, yet the court's holding on standing is that a person seeking review must himself be among the injured.<sup>1670</sup> The majority opinion however provides a window for environment-interests organisations who continue to wield considerable powers with increasing support of the public and a sympathetic judiciary<sup>1671</sup> to pursue their cause. The requirement that the person seeking remedy must himself be among the injured more or less sets the future litigation strategy for environmental NGOs, that once a single member of a group can prove injury, the group's complaint becomes valid and its suit can proceed.<sup>1672</sup> Recent cases appear to support this view. For example, in *Massachusetts v Environmental Protection Agency*,<sup>1673</sup> the SCOTUS found that as an owner of substantial coastal property, the appellant state had standing to sue because the injury suffered by it was 'actual' and 'imminent,' especially as rising sea levels were submerging part of its coastal land, which may be worsened if the levels continued to rise as predicted.<sup>1674</sup>

Courts should be able to apply environmental law to give content to environmental and human rights protection.<sup>1675</sup> However, they are unlikely to be successful in that role if strict rules on standing are imposed on potential litigants, whether they are individuals or interest groups.<sup>1676</sup> While it is recognised that effective regulation

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<sup>1670</sup> 1972 405 US 727 at 735.

<sup>1671</sup> Weinstein 1980 *Env'tl Aff L Rev* 311.

<sup>1672</sup> Manus 2000 *Stanford Environmental Law Journal* 343. See also Lofthouse *et al* 'Equal Access to Justice Act' available at <http://strata.org/pdf/2014/equal-access-justice.pdf> [date of use 4 October 2018].

<sup>1673</sup> 2007 127 S Ct 1438.

<sup>1674</sup> In *Kelsey Juliana and Others v USA* 2016 217 F. Supp. 3d 1224 (D. Or), the US District Court held that environmental activists acting on behalf of minor citizens had a right of action to enforce the public trust doctrine, and that the right to a climate system capable of sustaining human life is a fundamental right protected by substantive due process. See also Powers 2018 *RECIEL* 199.

<sup>1675</sup> Shelton 2010 *J Hum Rts & Env't* 97.

<sup>1676</sup> See Hester 2013 *Journal of the Indian Law Institute* 8.



requires setting standards, enforcement, and training of regulators, the emergent systems for enforcement should require less demanding criteria regarding the standing of those adversely affected by objectionable acts.<sup>1677</sup> Accordingly, there is some justification in reassessing the doctrine of standing in relation to the protection of the environment, and if the courts appear reluctant in addressing the issue, nothing stops the legislature in stepping up to do so.

#### 6.2.2.4 Legal aid

In Pennsylvania, section 4902(2) of the AJA provides that “the availability of civil legal services<sup>1678</sup> is essential to providing meaningful access to justice for indigent persons who cannot afford legal services.” To this end, section 4904 of the AJA established the ‘Access to Justice Account’ in which all funds and investment income are to “be used exclusively to provide civil legal assistance to poor and disadvantaged persons in [the] Commonwealth.”<sup>1679</sup> Funding for the Access to Justice Account is generated from inflows from the Federal Legal Services Corporation, the ‘Interest on Lawyer Trust Account’ (IOLTA), the state government and private donors.<sup>1680</sup> The IOLTA Board contracts with the Pennsylvania Legal Aid Network Incorporated (PLAN) to distribute state and IOLTA funding to local legal aid programmes operating as independent non-profit organisations.<sup>1681</sup> The fund provides legal assistance to clients whose family income does not exceed 125% of poverty level.<sup>1682</sup> However, due to low funding, nearly 80% of about two million Pennsylvanians that qualify for legal aid, cannot be helped.<sup>1683</sup>

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<sup>1677</sup> Nickel 1993 *Yale Journal of International Law* 294.

<sup>1678</sup> From the 1970s, the term ‘civil legal services’ was used to refer to legal aid in civil cases, to avoid confusion with legal aid in criminal cases. However, in recent times both clients and the general public appear comfortable to use ‘legal aid’ to refer to legal assistance for civil or criminal cases. See Milkes 2009 *The Pennsylvania Lawyer* 41.

<sup>1679</sup> Section 4905 *Access to Justice Act* 2002.

<sup>1680</sup> See “*Toward Equal Justice For All: Report of the Civil Legal Justice Coalition to the Pennsylvania State Senate Committee*”<sup>9</sup> available at <https://www.palegalaid.net/sites/default/files/Report%20of%20the%20Civil%20Legal%20Justice%20Coalition.pdf> [date of use 8 June 2018].

<sup>1681</sup> Section 4906 *Access to Justice Act* 2002.

<sup>1682</sup> See Report to the Legislative Budget and Finance Committee of the Pennsylvania Legislature on Performance Audit of Pennsylvania’s Access to Justice Act on 27 February 2017.

<sup>1683</sup> Wilkinson Jr. 2013 *The Pennsylvania Lawyer* 31. The *Eligibility Regulations Applicable to Access to Justice Funding* made in terms of the AJA provides for eligibility criteria to determine qualification for legal assistance for the conduct of civil cases. Section 401.1 of the *Eligibility*

Further to the above, the *Equal Access to Justice Act*<sup>1684</sup> (hereafter “the EAJA”) was enacted as a federal law to provide opportunity to potential litigants to engage government agencies in legal processes when the agencies fail to comply with their rules. The purpose of the EAJA is partly to “provide an incentive for private parties to contest government overreaching, to deter subsequent government wrongdoing, and to provide increased compensation to citizens injured by government action.”<sup>1685</sup> The effect of section 2412(b) of the EAJA is that if a government agency is unsuccessful in litigation against an individual or small business, the latter is reimbursed for attorney’s fees and costs.<sup>1686</sup> The relevance of the EAJA in the enforcement of environmental rights cannot be understated. Several cases relating to the implementation of environmental statutes like NEPA and the CWA have been conducted at near zero cost to non-governmental environmental organisations.<sup>1687</sup>

Notwithstanding the foregoing, the situation in Pennsylvania regarding legal aid is not particularly different from the federal trend. Though the AJA extends legal aid to civil cases,<sup>1688</sup> only about 20% of those qualified can be helped.<sup>1689</sup> Due to the decline in funding for legal aid, it is only possible to provide assistance in cases bordering on matters affecting families.<sup>1690</sup> While legal assistance in cases bothering

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*Regulations Applicable to Access to Justice Funding* defines an “applicant” as the person who voluntarily requests legal assistance, or on whose behalf it was requested. The applicant is the determining factor in defining “individual or family status” for eligibility determination purposes. Furthermore, by virtue of section 401.3, eligibility for civil legal assistance is limited to “applicants whose family monthly gross income does not exceed 125% of the Federal Poverty Guidelines, as published annually in the *Federal Register* by the Department of Health and Human Services, adjusted according to family size. Federal Poverty Level (FPL) is estimated depending on numbers of persons in a household at \$12,140 for individuals, \$16,460 for a family of 2, \$20,780 for a family of 3, and \$25,100 for a family of 4 in 2018. (2018 FPL guidelines are available at <https://www.healthcare.gov/glossary/federal-poverty-level-fpl/> [date of use 4 October 2018]).

<sup>1684</sup> 1985 5 USC 504 (and later as 1988 28 USC 2412).

<sup>1685</sup> Krent 1993 *Yale L & Pol’y Rev* 458.

<sup>1686</sup> The US District Court for the Eastern District of Pennsylvania in *Monagle v Astrue* 2008 WL 1376845 (ED Pa.) granted in part, an order for the award for attorney’s fees to the plaintiff upon a successful appeal against the denial of social security disability benefits to him.

<sup>1687</sup> Lofthouse *et al* “*Equal Access to Justice Act*” available at <http://strata.org/pdf/2014/equal-access-justice.pdf> [date of use 5 April 2018].

<sup>1688</sup> See section 4902 of *Access to Justice Act* 2002 49 PL 841 No 122.

<sup>1689</sup> See Wilkinson 2013 *The Pennsylvania Lawyer* 29-32.

<sup>1690</sup> Civil cases covered by PLAN include foreclosure, eviction, child custody disputes, domestic violence, and consumer fraud claims. See Abel 2009-2010 *Univ of Pennsylvania Journal of Law and Social Change* 295.

on environmental protection and environmental rights are not expressly excluded, persons affected by these challenges have not been reported to benefit from existing civil legal services schemes as far as could be established. The total funding for legal aid in civil cases from all sources declined from \$48.6 million in 2010-11 to \$45.9 in the 2014-15 financial year.<sup>1691</sup> The decline in financial support for legal aid in civil cases continue to widen the chasm faced by the poor in getting access to justice, forcing them to stand alone in their attempt to protect their most important interests.<sup>1692</sup> This should be a cause for concern considering that oil and gas is one of the prevalent industries in Pennsylvania with the potential for environmental violations affecting people.<sup>1693</sup>

Due to financial incapacity, a substantial part of the legal needs of the poor in Pennsylvania reportedly go unaddressed.<sup>1694</sup> This could however be mitigated if available legal aid is channelled to those who may require it to facilitate the protection of their rights in civil proceedings. In this regard, an evaluation of the impact of full legal representation as aid in civil cases indicates that “differences in outcomes can be attributed solely to the presence of legal counsel and are independent of the merits of the case.”<sup>1695</sup> In the USA, four-fifths of the legal needs of people in the low-income segment of the society remain unmet.<sup>1696</sup> Considering the complexity of court processes, there is no doubt that unrepresented litigants will fare poorly in the courts.<sup>1697</sup> Unfortunately, despite the long-standing authority of *Marbury v Madison*,<sup>1698</sup> the SCOTUS has not provided a categorical constitutional

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<sup>1691</sup> See Report to the Legislative Budget and Finance Committee of the Pennsylvania Legislature on Performance Audit of Pennsylvania’s Access to Justice Act on 27 February 2017.

<sup>1692</sup> Ruli 2014 *University of Pennsylvania Journal of Law and Social Change* 347.

<sup>1693</sup> See the discussion in para 1.2.2 in chapter 1 on the importance of the oil and gas industry. See also Miller and Garber 2017 *Fracking Failures in 2017- Oil and Gas Industry Environmental Violations in Pennsylvania* 12.

<sup>1694</sup> See also Haneman 2017 *W New Eng L Rev* 460.

<sup>1695</sup> Abel 2009-2010 *Univ of Pennsylvania Journal of Law and Social Change* 300.

<sup>1696</sup> Angstadt 2016 *Vermont Journal of Environmental Law* 348.

<sup>1697</sup> Engler 2013 *Harvard Law & Policy Review* 35.

<sup>1698</sup> 1803 5 US (1 Cranch) 137 at 163. In *Turner v Rogers* 2011 564 US 431, SCOTUS held that the due process clause of the Constitution did not automatically require the appointment of a counsel on the facts of the case. However, the court observed that the appellant’s incarceration violated due process because he was not given the benefit of a counsel or alternative procedures, and neither was he provided with a form designed to elicit information concerning

guarantee on the right of access to court in civil cases.<sup>1699</sup> There is no federal constitutional right to legal aid counsel in civil cases in the USA.<sup>1700</sup> The Legal Services Corporation established by Congress in 1974 to provide civil legal assistance to low income Americans among other services, has suffered significant shortage of funds due to massive cuts in its congressional appropriations over the years.<sup>1701</sup>

Poor and vulnerable persons including those with disabilities should not be excluded or marginalised by the justice system. Variation in type and degree of physical and mental impairment presents unique challenges which must also be addressed appropriately.<sup>1702</sup> The courts and civil legal aid programmes in Pennsylvania now use various tools to expand access, including simplified court procedures, advice-only hotlines, help desks and self-help manuals, unbundled legal services in which lawyers are able to pick areas in which they are willing to assist, and offer full legal representation. In the same vein, the use of plain language forms has the potential to give litigants who conduct their civil cases without lawyers better access to the courts at the same time reducing costs for both litigants and the courts.<sup>1703</sup> Information technology is also being used to facilitate increased access to sources, both primary and secondary, thereby facilitating efficiency, speed and cost reduction in access to legal information.<sup>1704</sup>

While the foregoing initiatives may alleviate the shortcomings in the process relating to access to courts, it is argued that assistance other than full legal representation

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his financial circumstances. As a result, he had no clear notice that his ability to pay child support would constitute the critical question in his civil contempt proceeding.

<sup>1699</sup> Andrews 1999 *Ohio State Law Journal* 557.

<sup>1700</sup> The SCOTUS created a presumption against the right to legal aid counsel in civil cases except civil liberty is at stake. See *Lassiter v Department of Social Services* 1981 452 US 18.

<sup>1701</sup> Federal funding for the provision of legal services to indigent persons in the USA is administered by the Legal Services Commission. An estimate of not more than 20% of poor persons seeking assistance for legal needs getting the service. See Cabral *et al* 2012 *Harvard Journal of Law & Technology* 243.

<sup>1702</sup> Larson 2014 *Laws* 221.

<sup>1703</sup> It is reported that about 65% of family law litigants in Washington state come to court without lawyers. See Dyer 2013 *Seattle Journal for Social Justice* 1065.

<sup>1704</sup> See "The future of the courts: A white paper" available at <https://legalexecutiveinstitute.com/wp-content/uploads/2017/01/The-Future-of-the-Court> [date of use 12 October 2018].

may just be “a fig leaf over the shame of a fundamentally unfair judicial process.”<sup>1705</sup> The provision of legal services to persons who genuinely require it as aid but cannot afford it will not only boost the confidence of litigants in the quest for the realisation of their rights, it will also provide a guarantee of “equal access to [the] system of justice.”<sup>1706</sup>

### *6.2.3 Assessment of the right of access to courts: Pennsylvania*

Article 1, section 11 of the Constitution of Pennsylvania and the AJA form the bedrock of the legal framework of the right of access to courts protecting the right of every person to have remedy by due course of law, and a right to justice administered without sale, denial or delay. However, a rigid requirement of proof of injury may create challenges for environmental protection thereby causing a possible violation of section of article 1, section 27 of the Constitution of Pennsylvania.<sup>1707</sup> It is important to appreciate that it is humans who have a relationship with nature and who may be threatened by its impairment; therefore, when necessary, humans should be allowed to speak for nature and defend its interest.

The development of natural gas stimulates significant litigation.<sup>1708</sup> Government’s attitude may appear to be sympathetic to the business interests of the oil and gas industry because it is a source of revenue.<sup>1709</sup> However, economic considerations ought not to provide a justification for the violation of rights. The poor and the vulnerable should be able to access the courts for relief when their rights are violated, which unfortunately may not be possible due to financial constraints on the one hand, and the rules of procedure relating to standing, which may close the

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<sup>1705</sup> Abel 2009-2010 *Univ of Pennsylvania Journal of Law and Social Change* 295.

<sup>1706</sup> See section 4902 of the AJA.

<sup>1707</sup> See The Widener School of Law’s Environmental & Natural Resources Law Clinic 2010 “A Citizen’s Guide to Article 1, Section 27 of the *Pennsylvania Constitution*” available at [http://blogs.law.widener.edu/envirolawcenter/files/2010/03/PA\\_Citizens\\_Guide\\_to\\_Art\\_I\\_Sect\\_27.pdf](http://blogs.law.widener.edu/envirolawcenter/files/2010/03/PA_Citizens_Guide_to_Art_I_Sect_27.pdf) [date of use 13 April 2018].

<sup>1708</sup> Pennsylvania Judicial Center 2016 *Triennial Report 2014-2016 of the Commonwealth Court of Pennsylvania* 3.

<sup>1709</sup> Susskind and Weinstein 1980 *Envtl Aff L Rev* 315.

doors of the courts against them on the other hand.<sup>1710</sup> It is therefore necessary to provide means of support to facilitate the enforcement of rights by indigent persons. Legal aid typically provides a source for credible support.

Finally, equality is an essence of the right of access to the courts, protected by article 1, section 11 of the Constitution of Pennsylvania.<sup>1711</sup> Where the rights of the poor are violated by environmental abuse, including those arising from hydraulic fracturing, and they are not able to finance legal costs for the enforcement of their rights, there is a failure of the justice system. Their rights in such situations cannot be said to be protected by the procedural right of access to courts.

### **6.3 Domestic perspective: UK**

#### *6.3.1 Background*

The idea that a class of rights are guaranteed by a constitution is alien to the understanding of an Englishman, as to him the rights of man rests upon the law of the land.<sup>1712</sup> In English law, rights, like principles -

“are like all maxims established by judicial legislation, mere generalisations drawn either from the decisions of or dicta of judges, or from statutes which, being passed to meet special grievances, bear a close resemblance to judicial decisions, and are in effect judgments pronounced by the High Court of Parliament.”<sup>1713</sup>

Regard must be given to the fact that with the enactment of the HRA,<sup>1714</sup> the United Kingdom incorporated certain provisions of the European Convention into domestic law.<sup>1715</sup> However, the role of the courts in the enforcement of rights is not in any way diminished.<sup>1716</sup> In the realm of private law, society has been content to allow

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<sup>1710</sup> The *2016 Justice Index* ranked Pennsylvania 37<sup>th</sup> among the 50 states with a composite score of 31 out of 100 in the process for improving access to justice for self-represented litigants. Philadelphia Bar Association “The 2016 Justice Index: Selected Best Practices for Improving Access to Justice in the Courts for Self-represented Litigants” available at <http://www.philadelphiabar.org/WebObjects/PBA.woa/Contents/WebServerResources/CMSResources/Oct2017JusticeIndexOCT.pdf> [date of use 9 April 2018].

<sup>1711</sup> Maritz “Courts to be open: Suits against the Commonwealth” available at <https://www.pabar.org/public/committees/lspublic/atj/Chapter14-final.pdf> [date of use 15 May 2018].

<sup>1712</sup> Dicey *An Introduction to the Study of the Law of the Constitution* 10<sup>th</sup> ed 201.

<sup>1713</sup> Dicey *An Introduction to the Study of the Law of the Constitution* 10<sup>th</sup> ed 197.

<sup>1714</sup> The *Human Rights Act* 1998 is discussed in para 5.3.1.1 in chapter 5.

<sup>1715</sup> The European Convention is discussed in para 3.2.2.2.

<sup>1716</sup> Thompson and Gordon 2014 *Cases and Materials on Constitutional and Administrative Law* 491.

judges to formulate and develop the law through the common law and equity, subject to the occasional intrusion of statutes, ensuring a degree of certainty through the judicially imposed doctrine of *stare decisis*.<sup>1717</sup>

Flowing from the above, it is deductible that the right of access to courts is long recognised at common law.<sup>1718</sup> Blackstone wrote of the right of every man to apply “to the courts of justice for redress of injuries, on the understanding that the law in England is the supreme arbiter of every man’s life, liberty and property, and courts of justice must at all times be open to the subject and the law be duly administered therein.”<sup>1719</sup> The discussion in the next paragraph will consider the right of access to courts in the UK, covering the judicial system and the jurisdiction of the courts, as well as the features of applicable legislation underlying standing and the provision of legal aid.

### *6.3.2 Legal framework*

Section 3(1) of the HRA requires that as “far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [European] Convention rights.”<sup>1720</sup> Section 1 of the HRA provides that ‘Convention rights’ are the rights and fundamental freedoms set out in articles 2 to 12 and 14 of the European Convention.<sup>1721</sup> The European Convention does not have a direct provision on the right of access to courts, even though the European Court has made recourse to articles 6 and 13 which protect the rights to

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<sup>1717</sup> See *Duport Steels Ltd v Sirs* 1980 1 WLR 142 (HL).

<sup>1718</sup> See *Raymond v Honey* 1983 1 AC 1; *R v Lord Chancellor, ex parte Witham* 1998 QB 575.

<sup>1719</sup> Blackstone *Commentaries* 4<sup>th</sup> ed 111.

<sup>1720</sup> Section 4 of the HRA provides for circumstances in which a local legislation may be determined to be incompatible with a Convention right by a court, in which case a person whose right has been violated shall have the power to take remedial action in terms of section 10 of the HRA.

<sup>1721</sup> The impact on the status of EU law in the UK consequent upon Brexit is discussed in para 4.3.1. Meanwhile, it is worth mentioning that article 13 of the European Convention which protects the right to an effective remedy is not incorporated in the reference to the compatibility requirement. Article 13 provides that “everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

a fair trial and to an effective remedy respectively.<sup>1722</sup> Article 6(1) of the European Convention provides that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private lives of the parties so require, or to the extent strictly necessary in opinion of court in special circumstances where publicity would prejudice the interests of justice.

The effect of the provision as developed in the jurisprudence of European human rights law is the imposition of obligations on member states to guarantee the individual's right to go to court or an alternative dispute resolution body to obtain remedy for any violation of rights.<sup>1723</sup> For the right not to be theoretical and illusory, the Court of Justice of the European Union held that courts should be accessible.<sup>1724</sup> Accessibility demands that courts should be reasonably close to the people, and necessary facilities making participation of litigants in the proceedings possible should be available.<sup>1725</sup> In *Golder v UK*,<sup>1726</sup> the European Court held that in civil matters, the rule of law can hardly be conceived without the possibility of the right of access to courts, which is an element that is inherent in article 6(1) of the European Convention without any extensive interpretation forcing obligations on the Contracting States.

However, the right of access to courts derived from article 6(1) of the European Convention is subject to some limitations, imposed to facilitate an effective administration of justice. Nevertheless, the essence of the right must not be impaired. For example, an order staying proceedings for a significant period of time

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<sup>1722</sup> See *Artico v Italy* 1980 ECHR 4.

<sup>1723</sup> Council of Europe Handbook on European Law Relating to Access to Justice 16.

<sup>1724</sup> See *Artico v Italy* 1980 ECHR 4 at para 4.

<sup>1725</sup> See *Istvan Vizsnyiczai v Raiffeisen Bank Zrt* CJEU C-567/13 decided on 12 February 2015 available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62013CJ0567> [date of use 5 October 2018].

<sup>1726</sup> 1975 ECHR 1.



will constitute an infringement of the right because it may prevent the determination of civil rights of a litigant within a reasonable period.<sup>1727</sup>

Although the HRA makes provisions for proceedings in respect of certain specific rights<sup>1728</sup> it is silent regarding the right of access to courts. This perhaps indicates that the right of access to courts will continue to be subject to common law.<sup>1729</sup> In any event section 11(1) of the HRA also provides that a person's reliance on a Convention right does not restrict any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom.

### 6.3.2.1 Judicial system

The *Constitution Reform Act 2005*<sup>1730</sup> established the Supreme Court of the United Kingdom (hereafter "the UKSC"). It replaced and assumed the jurisdiction of the House of Lords as the final appellate court in the United Kingdom. The UKSC's jurisdiction covers appeals on points of law from either the Criminal or Civil Division of the Court of Appeal, although in rare situations it could hear appeals directly from the High Court.<sup>1731</sup> The UKSC and other local courts are empowered to give effect to the Convention rights incorporated into the HRA, and are enjoined to take into account, relevant decisions of the European Court in deciding cases before them.<sup>1732</sup>

The Court of Appeal is one court divided into Criminal Division<sup>1733</sup> and the Civil Division, both appellate, with jurisdiction to hear appeals against first instance decisions. Appeals against decisions of the High Court go to the Court of Appeal

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<sup>1727</sup> See *Kutik v Croatia* (Application 48778/99) decided on 1 June 2002 available at [https://www.echr.coe.int/Documents/Reports\\_Recueil\\_2002-II.pdf](https://www.echr.coe.int/Documents/Reports_Recueil_2002-II.pdf) [date of use 5 October 2018].

<sup>1728</sup> Proceedings relating to the rights to freedom of expression, and freedom of thought, conscience and religion are addressed in sections 12 and 13 of the HRA respectively. Sections 6 to 9 of the HRA makes provisions for proceedings regarding acts of public authorities incompatible with Convention rights. The right to administrative justice in the UK is discussed in para 5.3.

<sup>1729</sup> See para 6.3.1.

<sup>1730</sup> See section 23 of the *Constitution Reform Act* Chapter 4 of 2005.

<sup>1731</sup> The "leapfrog appeal" refers to situations when the UKSC takes an appeal directly from the High Court which is permissible in terms of the *Administration of Justice Act* Chapter 68 of 1969, in relation to cases of general public importance.

<sup>1732</sup> Section 2(1) of the HRA. See also Amos 2017 *EJIL* 763.

<sup>1733</sup> See *Criminal Appeal Act* Chapter 19 of 1968.

Civil Division, which also hears appeals against certain decisions of tribunals dealing with a wide range of subject matter.<sup>1734</sup> The Court of Appeal Criminal Division has jurisdiction over appeals from the Crown Court.

The High Court is a superior court of record with three divisions, each with jurisdiction over specific matters. The Queen's Bench Division has original jurisdiction over private law matters including contract, tort, commercial matters, admiralty and administrative law. The Family Division exercises jurisdiction over family matters and serves as an appellate court regarding appeals from the magistrates' courts. The Chancery Division has jurisdiction over matters relating to trusts, tax, bankruptcy, companies and patents, and it also serves as an appellate court in respect of appeals from the county courts on bankruptcy and land matters.

In relation to the enforcement of environmental laws and regulations, the *Environment Act 1995*<sup>1735</sup> established the Environment Agency<sup>1736</sup> (hereafter "the EA") to protect or enhance the environment taken as a whole, and to make the contributions towards attaining the objective of achieving sustainable development.<sup>1737</sup> The EA is authorised to make regulations to eliminate or minimise the risks of adverse impact on the environment on people's lives, and by the protection and improvement of air, land and water quality through the application of environmental standards within which industry can operate.<sup>1738</sup> The EA works with the Oil and Gas Authority (hereafter "the OGA") and the Health and Safety Executive ("the HSE") to regulate the activities of the oil and gas industry.<sup>1739</sup>

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<sup>1734</sup> Appeals lie to the Court of Appeal Civil Division from Competition Appeal Tribunal, Employment Appeal Tribunal, Upper Tribunal (Administrative Appeals Chamber), Upper Tribunal (Immigration Asylum Chamber), Upper Tribunal (Lands Chamber), and Upper Tribunal (Tax and Chancery Chamber).

<sup>1735</sup> Chapter 25 of 1995.

<sup>1736</sup> Section 1 of *Environment Act 1995*.

<sup>1737</sup> Section 4(1) of *Environment Act 1995*.

<sup>1738</sup> The scope of EA's regulatory authority covers oil and gas installation, mobile plant, waste operation, mining waste operation, radioactive substances activity, water discharge activity, groundwater activity, waste incineration plant, solvent emission activity, and flood risk activity.

<sup>1739</sup> See Environment Agency An Environmental Risk Assessment for Shale Gas Exploratory Operations in England 2.

The Appeal Procedure Guidelines of the *Environmental Permitting (England and Wales) Regulations 2016* permit operators to appeal against the decisions of the EA.<sup>1740</sup> Appeals are decided by an Inspector (from the Planning Directorate) acting as a delegate of the Secretary of State under section 114(2) of the *Environment Act 1995*.<sup>1741</sup> The Secretary of State for Environment is authorised to take over the adjudication of an appeal if “it is particularly important or controversial.”<sup>1742</sup> Hearings are normally held in public, but an Inspector may decide that a hearing will be in private where issues of commercial confidentiality are raised.<sup>1743</sup> Parties are encouraged to present cases “in a more relaxed and less formal atmosphere than at an inquiry.”<sup>1744</sup> Decisions are to include the underlying points which give effect to the Inspector’s decision, which “may affirm or quash the regulator’s decision or notice and can direct the regulator to grant or vary the conditions in a permit.”<sup>1745</sup> The decision of an Inspector can be challenged in court by way of judicial review.<sup>1746</sup> Application to seek permission for judicial review lies with the Administrative Court of the Queen’s Bench Division of the High Court, within three months after the date of the decision.<sup>1747</sup>

### 6.3.2.2 Equal access to the courts

Article 6 of the European Convention protects the right of everyone to approach a court for the determination of civil rights and obligations in a fair and public hearing.<sup>1748</sup> A hearing is considered fair when there is “equality of arms” between the parties, in which case each party must be given an opportunity to present his

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<sup>1740</sup> Para 1 of the Appeal Procedure Guidelines of the Environmental Permitting (England and Wales) Regulations 2016.

<sup>1741</sup> Para 6 of the Appeal Procedure Guidelines.

<sup>1742</sup> Para 6 of the Appeal Procedure Guidelines.

<sup>1743</sup> Para 30 of the Appeal Procedure Guidelines.

<sup>1744</sup> Para 30 of the Appeal Procedure Guidelines.

<sup>1745</sup> Para 38 of the Appeal Procedure Guidelines.

<sup>1746</sup> The courts tend to show a deferential approach to decisions of EA. See *R (Levy) v Environmental Agency* 2002 EWHC 1663. In *R (Downs) v Secretary of State for Environment Food and Rural Affairs* 2009 EWCA 664, the Court of Appeal reversed the High Court’s decision because it went into a review of the merits. See also Tromans *et al* 2013 *Environmental Judicial Review* 6.

<sup>1747</sup> Para 51 of the Appeal Procedure Guidelines.

<sup>1748</sup> Article 6 of the European Convention is incorporated into UK domestic law by section 1 of the HRA. See para 6.3.2.

case.<sup>1749</sup> Other features of equal access to the courts include the right to have knowledge of and opportunity to comment on all evidence adduced in a case,<sup>1750</sup> and the right of each party to present evidence to prove his claim.<sup>1751</sup> The truism regarding equal access to courts is that it "is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done."<sup>1752</sup> Therefore, transparency, impartiality, fairness and propriety are required on the part of the courts.<sup>1753</sup>

There is also a general understanding in the UK that laws being administered by the government should have a character that is predictable because people ought to know where they stand in relation to the law as it affects their actions and their rights.<sup>1754</sup> In that regard, a measure of certainty is infused into the law by the doctrine of parliamentary sovereignty.<sup>1755</sup> However, the application of a stringent procedural requirement in the enforcement of the law may necessitate the use of discretion as may be demanded by the quest to do justice. As the court observed in *Lloyd v McMahon*,<sup>1756</sup>

... the so-called rules of natural justice are not engraved on tablets of stone ... [W]hat the requirements of fairness demand when anybody ... has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.

For example, in order to speed up oil and gas and deep geothermal exploration, the UK government sought to remove what it considered barriers by announcing its

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<sup>1749</sup> See *Hornsby v Greece* 1997 EHRR 250.

<sup>1750</sup> *Vermeulev v Belgium* 1996 ECHR 7.

<sup>1751</sup> *Clinique de Acacias and Others v France* 2005 ECHR 714.

<sup>1752</sup> See *R v Sussex Justices, Ex parte McCarthy* 1924 1 KB 256 at 259.

<sup>1753</sup> The rationale for these requirements is enunciated in *R v Bow Street Metropolitan Stipendiary Magistrates and Others Ex Parte Pinochet Ugarte (No 2)* 2000 1 AC 61. The court pointed out that flowing from the maxim – *nemo iudex in causa sua* there are two similar but not identical implications. First, it will constitute a bias sufficient to ground disqualification if a judge is indeed a party to the case in any conceivable way or if he has a financial or proprietary interest in its outcome. Secondly, it is also a bias where though a judge has no interest in the case, his conduct or behaviour gives rise to a suspicion that he is not impartial. See also Thomas "Judicial Independence in a Changing Constitutional Landscape" Speech to the Commonwealth Magistrates' and Judges' Association on 15 September 2015 available at <https://www.judiciary.uk/wp-content/uploads/2015/09/speech-lcj-judicial-independence-in-a-changing-constitutional-landscape.pdf> [date of use 4 October 2018].

<sup>1754</sup> Loveland *Constitutional Law, Administrative Law, and Human Rights* 4<sup>th</sup> ed 61.

<sup>1755</sup> See Cormacain *The Theory and Practice of Legislation* 87.

<sup>1756</sup> 1987 1 All ER 1118 at 1161.

intention to introduce legislation permitting operators to drill underground at a depth in excess of three hundred metres without being liable in trespass to the land owner.<sup>1757</sup> Such review will alter the time-honoured principle of English land law based on the maxim *cuius est solum, eius est usque ad coelum et ad inferos*.<sup>1758</sup> The rationale behind such legislation is probably to ensure that the tort of trespass does not constitute a hindrance to hydraulic fracturing.

The courts have held that in the face of the infringement of a right, very good cause must be shown before a litigant is deprived of that right.<sup>1759</sup> Therefore, when rights are infringed by activities traceable to hydraulic fracturing, a recourse open to persons affected is to approach the court for remedial action. However, when standing rules are construed narrowly, obstacles may be put in the way of legitimate claims in the courts.

### 6.3.2.3 Standing

While the concept of standing is a recurring issue in proceedings for judicial review of administrative action, it is rarely referred to in ordinary civil proceedings between private parties.<sup>1760</sup> In civil cases, what must be established is the substantive right underlying the claim on which the action is premised. Although the rules regulating multi-party proceedings permit representative action, the requirement of “same interest” on the part of the claimant group<sup>1761</sup> is subject to a very narrow

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<sup>1757</sup> The operator will still be required to obtain all necessary regulatory permissions relating to planning and the environment. See Department of Energy and Climate Change 2014 “Government to remove barriers to onshore oil and gas and deep geothermal exploration” available at <https://www.gov.uk/government/news/government-to-remove-barriers-to-onshore-oil-and-gas-and-deep-geothermal-exploration> [date of use 23 May 2018].

<sup>1758</sup> The 13<sup>th</sup> century maxim describes the extent of an owner’s right in land extending to the substrata, surface, and the airspace of the land. See Law *Oxford Dictionary of Law* 8<sup>th</sup> ed 165. The maxim was recently approved by UKSC in *Bocardo v Star Energy UK Onshore Ltd* 2010 UKSC 35. It is important to point out that though the UKSC held in *Bocardo* that there was trespass when the defendant extracted petroleum under the plaintiff’s land, the Court awarded only nominal damages on the ground that the landowner was neither disturbed nor displaced, and he had no right to the petroleum, which was vested in the Crown and was exploited under licence. See also Stockley 2014 *Solicitors Journal* 1.

<sup>1759</sup> See *Quashie v Methodist Home Association* Appeal No UKEAT/0422/11/DM.

<sup>1760</sup> European Parliament *Standing up For Your Right(s) in Europe Locus Standi Country Reports* 50.

<sup>1761</sup> Section 31(3) of the *Supreme Courts Act* 1981 Chapter 54 of 1981 provides that:

No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application

interpretation, requiring that the interest of members of that group must be identical, and the remedy sought must be beneficial to all members of the group.<sup>1762</sup>

Section 31(3) of the *Senior Courts Act 1981*<sup>1763</sup> requires that the plaintiff must have “sufficient interest” in the subject of the action.<sup>1764</sup> The requirement of an interest personal to the claimant as basis for standing in judicial review proceedings is also made mandatory by section 7(2) of the HRA, which provides that it is only the person who is a victim of the unlawful act of a public authority that could institute a claim against the authority in an appropriate court or tribunal. The requirement appears to be a restatement of article 34 of the European Convention which provides that only persons or NGOs “claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention” can bring application before the European Court. Determination of the question of standing is consequently left to the decision of the courts based on the facts of each case. Unfortunately, an insistence on the requirement of specific personal interest or the victim test may inadvertently foist some malfeasance on the society.<sup>1765</sup>

Auspiciously, in *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Business Ltd*,<sup>1766</sup> the Court of Appeal held that outdated technical rules of *locus standi* should not be allowed to stand in the way of preventing unlawful acts and the vindication of the rule of law.

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unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

<sup>1762</sup> European Parliament *Standing up For Your Right(s) in Europe: Locus Standi Country Reports* 54.

<sup>1763</sup> Chapter 54 of 1981.

<sup>1764</sup> In *R v Secretary of State for Foreign Affairs ex parte the World Development Movement Ltd* 1995 1 WLR 386, the applicants challenged a government decision to give foreign economic aid on the argument that as a charity distributing aid locally, government action would adversely affect its activities. The court granted the application, holding that the applicants’ interest was sufficient.

<sup>1765</sup> See *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change* 2011 Env LR 11 and *William Ashton v Secretary of State for Communities and Local Government and Another* 2010 EWCA 6000.

<sup>1766</sup> 1982 AC 617.

The Court pointed out that standing –

“is not simply a point of law to be determined in the abstract or upon assumed facts, but upon a due appraisal of many different factors revealed by the evidence presented by the parties, few if any of which will be able to be wholly isolated from the others.”<sup>1767</sup>

The court’s opinion appear to be in favour of an approach to open access to the courts in public interest cases to prevent illegality, regardless of the standing of the applicant.<sup>1768</sup> Accordingly, in some cases, the courts have found reasons to relax the strict application of standing rules. For example, in *R v Somerset County Council and ARC Southern Limited ex parte Dixon*,<sup>1769</sup> the court held that the concern of a citizen who instituted an action for judicial review in respect of an illegality in granting a planning permit that could adversely impact the environment, was legitimate.<sup>1770</sup>

Furthermore, in *AXA General Insurance v Lord Advocate and Others*,<sup>1771</sup> the UKSC observed that the requirement of ‘sufficient interest’ was outdated. The Court held that a preferred test should be based on whether or not the claimant would be “directly affected” as to be regarded as a victim in terms of the requirement of article 34 of the European Convention.<sup>1772</sup> Fortunately however, the need to protect the environment is not lost on the courts, bearing in mind that the activities of NGOs and other pressure groups will go a long way in achieving that objective.<sup>1773</sup> In *R (on the application of Edwards and Another) v Environment Agency and Others (No 2)*,<sup>1774</sup> the UKSC cited with approval, the opinion of the European Court in the case

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<sup>1767</sup> 1982 AC 617 at 644. See also *R v Secretary of State for Employment ex parte Equal Opportunities Commission* 1995 1 AC 1.

<sup>1768</sup> See *Leyland and Anthony Administrative Law* 212.

<sup>1769</sup> 1998 *Env LR* 111.

<sup>1770</sup> Day 2011 *e-law* 8.

<sup>1771</sup> 2011 UKSC 46.

<sup>1772</sup> 2011 UKSC 46 at para 23. See also *Burden v United Kingdom* 2008 47 EHRR 857 at para 34.

<sup>1773</sup> In *R v Inland Revenue Commission ex parte National Federation of Small Businesses*, 1982 AC 617, the House of Lords pointed out that “It would be a great lacuna in our system of public law if a pressure group, like the federation, or even a public spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.”

<sup>1774</sup> 2013 UKSC 78 at para 24.

of *Commission of the European Union v United Kingdom*,<sup>1775</sup> that:

...recognition of the public interest in environmental protection is especially important since there may be many cases where the legally protected interests of particular individuals are not affected or are affected only peripherally. However, the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations.

Therefore, the role of NGOs and activists interested in the protection of the environment and enforcement of environmental law ought to be valued.<sup>1776</sup> In *R v Inspectorate of Pollution and Another ex parte Greenpeace Limited (No 2)*,<sup>1777</sup> the court considered several factors, including the very nature of Greenpeace, as being an organisation accredited with consultative and observer status with the United Nations. Consideration was also extended to the nature of the activity underlying the application, in this case the discharge and disposal of radioactive waste may have affected over 2,500 persons. The court held that it would be ignoring the obvious if it disregarded the danger to health and safety from any additional discharge of radioactive waste.

#### 6.3.2.4 Legal aid

If the system does not avail some assistance to the poor and vulnerable to access the courts for remedies for the violation of their rights, the doors to the court as “temple of justice” may be shut against them. In that case, any claim of English courts to leadership in the provision of legal services and the protection of rights will not amount to much.<sup>1778</sup> One obstacle to access to justice in relation to environmental protection or enforcement of rights for members of the public or NGOs in the UK is the issue of costs of legal services. The litigant has to find funds to pay counsel for the court proceedings to establish his claim in the absence of legal aid. There is also a potential for the payment of a large and uncertain bill for

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<sup>1775</sup> Case C-530/11 at para 42.

<sup>1776</sup> De Sadeleer *et al* “Access to justice in Environmental Matters” available at [http://ec.europa.eu/environment/aarhus/pdf/accesstojustice\\_final.pdf](http://ec.europa.eu/environment/aarhus/pdf/accesstojustice_final.pdf) [date of use 28 September 2018].

<sup>1777</sup> 1994 4 All ER 329 at 351.

<sup>1778</sup> See Lord Neuberger “Access to justice” Welcome Address of the President of the UKSC to the Australian Bar Association Biennial Conference on 3 July 2017 (at para 3) available at <https://www.supremecourt.uk/docs/speech-170703.pdf> [date of use 28 September 2018].



the settlement of costs in the event of losing the case. These challenges may inadvertently deter people to risk bringing legal proceedings to hold a public body to account for breaking the law.

The recognition that the cost of litigation in the UK can be expensive and highly unpredictable, with the potential to dissuade potential claimants from instituting legal proceedings resulted in the courts developing a process to address the issue of costs. That process is the grant of a discretionary 'Protective Costs Order' (hereafter "the PCO"), whereby the amount payable by the losing side as cost to the winning side is limited in the early stages of the litigation by a court order.<sup>1779</sup> Meanwhile, rather than easing the plight of NGOs involved in environmental activism, and individuals seeking to enforce environmental rights, their situation appeared exacerbated by the *Legal Aid, Sentencing and Punishment of Offenders Act* 2012 (hereafter "the LASPO Act").<sup>1780</sup> The LASPO Act was enacted to limit the grant of legal aid with a view to making savings in the cost to public funds, resulting in a significant number of claims being taken out of scope unless the stringent conditions set out in section 10 of the LASPO Act are satisfied. However, these conditions are rather too restrictive, and their application have occasionally resulted in the breach of applicants' rights.<sup>1781</sup>

In relation to legal aid, the LASPO Act gives effect to the recommendations contained in the *Proposals for the Reform of Legal Aid in England and Wales*

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<sup>1779</sup> See *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* 2005 1 WLR 347, for guidelines for the granting of a PCO. However, notwithstanding the benefits of PCOs, over 75% of respondents in a survey to test the effectiveness of PCOs indicated that though they believed they had good and arguable cases, they did not proceed with instituting court action because of concerns regarding exposure to substantial costs (See Day 2011 *e-law* 9). In any event, even the process of applying for a PCO could involve substantial cost depending on the applicant. For example, the claimant in *Eley v Secretary of State* 2009 EWHC 660 (Admin) reportedly withdrew her claims despite a PCO limiting liability for costs at £10,000 on the ground that the limit was rather too high for her financial capability. See Litton QC "Protective costs orders in UK environmental and public law cases" available at <https://www.middletemple.org.uk/download/file/901>[date of use 26 May 2018].

<sup>1780</sup> Chapter 10 of 2012. The explanatory note to LASPO Act indicates *inter alia* that the Act makes "provision about legal aid; to make further provision about funding legal services; to make provision about costs and other amounts awarded in civil and criminal proceedings; to make provision about referral fees in connection with the provision of legal services..."

<sup>1781</sup> See *IS v The Director of Legal Aid Casework and Another* 2015 1 WLR 5283.

2010.<sup>1782</sup> Accordingly, the LASPO Act became the operative statute for the regulation of the provision of legal aid in England and Wales, replacing the *Access to Justice Act* 1999. The provisions in part 1 of the LASPO Act are designed to discourage unnecessary and adversarial litigation at public expense, to target legal aid to those who need it most, to make significant savings to the cost of the scheme, and to deliver better overall value for money.<sup>1783</sup> Section 21 of the LASPO Act provides that a person will not qualify for legal aid except if it is determined that the individual's financial resources are such that it makes him eligible in terms of the requirements of section 10(3), namely:

- a) ... that it is necessary to make the services available to the individual ... because failure to do so would be a breach of
  - i. the individual's Convention rights (within the meaning of the Human Rights Act 1998), or
  - ii. any rights of the individual to the provision of legal services that are enforceable EU rights, or
- b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.

Consequent to the enactment of LASPO Act, the number of cases qualifying for civil legal aid declined by 70% from 573,672 in 2012-13 to 170,617 in 2014-15.<sup>1784</sup> To be eligible for legal aid, an applicant must pass three basic tests. First, the case for which assistance is required must fall within the scope of the legal aid scheme indicated in Schedule 1 to LASPO Act.<sup>1785</sup> Secondly, the applicant must pass a

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<sup>1782</sup> Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228970/7967.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf) [date of use 21 April 2018].

See the "Memorandum to the Justice Select Committee on the Legal Aid, Sentencing and Punishment of Offenders Act 2012" presented to the Parliament on 30 October 2017 available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/655971/LASPO-Act-2012-post-legislative-memorandum.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655971/LASPO-Act-2012-post-legislative-memorandum.pdf) [date of use 21 April 2018].

<sup>1784</sup> Equality and Human Rights Commission 2016 "Legal Aid Reforms and Women's Access to Justice" available at <https://www.equalityhumanrights.com/en/publication-download/cedaw-shadow-report-legal-aid-reforms-and-womens-access-justice> [date of use 21 April 2018].

<sup>1785</sup> Legal aid services are provided *inter alia* for matters involving care, supervision and protection of children, special educational needs, abuse of children or vulnerable adults, community care, facilities for disabled children, appeals relating to welfare benefits, inherent jurisdiction of High Court in relation to children and vulnerable adults, family homes and domestic violence, and protection of children and family matters. See also The Bar Council 2015 *Civil Legal Aid – Practical Guidance for the Bar* 5.

financial means test<sup>1786</sup> involving some complex procedures and calculations,<sup>1787</sup> and thirdly, the applicant must satisfy the requirement of a merits test<sup>1788</sup> to determine the prospect of success of bringing the case and a cost benefit analysis of providing legal aid.<sup>1789</sup> It is therefore not surprising that the preponderance of opinion is that the LASPO Act compounded the problems in the justice system, resulting in the closure of legal advice centres across the country, and increasing fees for courts and tribunal services.<sup>1790</sup>

In relation to environmental protection and enforcement of environmental rights, the stringent 'means test' contained in the LASPO Act has the effect of excluding potentially relevant civil cases. Though exceptional case determination in terms of section 10(3) of the LASPO Act<sup>1791</sup> could be extended to environmental cases, that exception is not likely considering that section 10(3)(a)(i)-(ii) specifically enumerates breaches for which exceptional case determination is applicable, namely breach of the European Convention rights within the meaning of the HRA, and any EU rights for which the provision of legal aid is enforceable.<sup>1792</sup> It is most

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<sup>1786</sup> See Legal Aid Agency "Civil legal aid: Means testing" available at <https://www.gov.uk/guidance/civil-legal-aid-means-testing> [date of use 23 May 2018].

<sup>1787</sup> See House of Commons Library "Provision of legal aid" Debate Pack No CDP-2107-0239 of 28 November 2017 available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CDP-2017-0239#fullreport> [date of use 23 May 2018].

<sup>1788</sup> Section 4(5) and (6) of the LASPO Act authorises the Lord Chancellor to publish directions and guidance for the implementation of legal aid casework.

<sup>1789</sup> See Lord Chancellor's "Guidance under section 4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012" available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/672154/lord-chancellors-guidance-under-section\\_4-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672154/lord-chancellors-guidance-under-section_4-laspo.pdf) [date of use 23 May 2018].

<sup>1790</sup> See for example Byrom 2013 "The State of the Sector: The Impact of Cuts to Civil legal Aid on Practitioners and their Clients" A Report by the Centre for Human Rights in Practice, University of Warwick available at [https://warwick.ac.uk/fac/soc/law/research/centres/chrp/spendingcuts/153064\\_statesector\\_report-final.pdf](https://warwick.ac.uk/fac/soc/law/research/centres/chrp/spendingcuts/153064_statesector_report-final.pdf) [date of use 23 May 2018]; Amnesty International 2016 *Cuts that Hurt: The Impact of Legal Aid Cuts in England on Access to Justice* 17-22 available at [https://www.amnesty.org.uk/files/aiuk\\_legal\\_aid\\_report.pdf](https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf) [date of use May 23 2018]. See also the Interim Report on the Bach Commission on Access to Justice 2016 "*The Crisis in the Justice System in England Wales*" available at [https://www.fabians.org.uk/wp-content/uploads/2016/11/Access-to-Justice\\_final\\_web.pdf](https://www.fabians.org.uk/wp-content/uploads/2016/11/Access-to-Justice_final_web.pdf) [date of use 21 April 2018].

<sup>1791</sup> Qualification for legal aid on the basis "that it is appropriate to do so, in particular circumstances of the case, having regard to any risk that failure to do so would be such a breach."

<sup>1792</sup> Article 6(3(d) of the European Convention provides for legal aid only in criminal cases. In *Coedbach Action Team Ltd v Secretary of State for Energy and Climate Change* 2010 EWHC 3213, the court observed that the proceedings were not expensive, holding that the plaintiffs (a local community group challenging the planning permit for a biomass fuelled power plant) did not qualify for a protective cost order.

unlikely that exceptional case determination will be extended to environmental rights based on Aarhus Convention claims,<sup>1793</sup> except if it could be subsumed under any of the heads listed in Schedule 1 to the LASPO Act.<sup>1794</sup>

Access to the courts should not be determined by the ability to pay. An appreciation and understanding of the challenges faced by the poor and vulnerable should be one of the characteristics of meaningful access. In the absence of an effective system of legal aid, the procedural ideals of equality, fairness and respect for individual rights which characterise justice is bound to be compromised.<sup>1795</sup>

### *6.3.3 Assessment of the right of access to courts: UK*

The right of access to courts or indeed any other right, is not expressly presented in a constitution in the UK because the country does not have a written constitution. Rights are evolved through decisions or *dicta* of judges or created by statutes enacted to address specific challenges. The enactment of the HRA which resulted in the incorporation of specific provisions of the European Convention into domestic law,<sup>1796</sup> does not in any way diminish the role of the courts in the enforcement of rights. While it is possible that the legislature may enact laws, which limit rights and interests in line with the doctrine of parliamentary sovereignty,<sup>1797</sup> the courts can be relied upon to enforce private rights.<sup>1798</sup>

Consequently, it may be assumed that when rights are infringed by activities traceable to hydraulic fracturing, a recourse available to persons affected is to

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<sup>1793</sup> The Aarhus Convention is discussed in para 3.2.2.2.3.

<sup>1794</sup> See Client Earth "*Legal briefing: Access to justice in environmental cases in the UK and the Criminal Justice and Courts Bill*" available at <https://www.clientearth.org/access-to-justice-in-environmental-cases-is-the-government-going-to-do-the-right-thing/> [date of use 21 April 2018].

<sup>1795</sup> Flynn and Hodgson Access to Justice and Legal Aid – Comparative Perspectives on Unmet Legal Need 6.

<sup>1796</sup> See para 6.3.2.

<sup>1797</sup> A manifestation of potential limitation of right in relation to hydraulic fracturing is evident by the plan of the UK government to enact legislation permitting operators to drill underground at a depth in excess of three hundred metres without liability in trespass to the land owner, in order to speed up oil and gas and deep geothermal exploration. See para 6.3.2.2.

<sup>1798</sup> See *Bocardo v Star Energy UK Onshore Ltd* 2010 UKSC 35.

approach the court, except if there is a statute limiting the said recourse. However, this assumption may not do much to help poor or vulnerable victims who lack the means to seek redress in the courts. Unfortunately, neither the PCOs nor the LASPO Act has improved the position of the indigent litigant, as evidence abounds that potential litigants may find it difficult to advance *prima facie* lawful claims.<sup>1799</sup>

Even if the question of standing rarely features in proceedings between private parties, it remains an intractable issue in proceedings for judicial review of administrative action. Limiting access to courts by standing rules which demand that a claimant has to have sufficient interest in or be directly affected by the subject matter of the case seem to focus only on the party seeking to get his complaint to the court rather than the issues on which he seeks the court's intervention.<sup>1800</sup> If the doctrine of public trust is to hold, nature enthusiasts ought to be given a chance to represent injured and incompetent elements of nature.<sup>1801</sup>

## **6.4 Domestic perspective: South Africa**

### *6.4.1 Background*

Access to courts is more than the capacity to approach a court by initiating court processes. It is important that litigants before a court, including those involved in civil proceedings must be effectively heard.<sup>1802</sup> In relation to hydraulic fracturing the question to be answered is - 'to what extent does section 34 of the Constitution provide for the protection of procedural environmental rights?' To answer the question, the succeeding paragraphs will critically examine the legal framework of the right of access to courts in South Africa, the constitutive elements of the right under the Constitution and applicable statutes. The examination is undertaken with

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<sup>1799</sup> See *Eley v Secretary of State* 2009 EWHC 660 (Admin), *IS v The Director of Legal Aid Casework and Another* 2015 1 WLR 5283, and *R (on the application of Edwards and Another) v Environment Agency and Others (No 2)* 2013 UKSC 78. See also Flynn and Hodgson *Access to Justice and Legal Aid – Comparative Perspectives on Unmet Legal Need* 6.

<sup>1800</sup> See Baude 1973 *Indiana Law Journal* 213.

<sup>1801</sup> Manus 2000 *Stanford Environmental Law Journal* 351.

<sup>1802</sup> Dugard 2008 *SAJHR* 216. Currie and De Waal also contend that constitutional access to courts has four constitutive elements, namely access to everyone, to the courts or other independent and impartial forum, in respect of any dispute capable of resolution by application of law, in a fair public hearing. See Currie and De Waal *The Bill of Rights Handbook* 6<sup>th</sup> ed 711.

a view to determine whether or not the legal framework pertaining to hydraulic fracturing in relation to the right of access to courts can protect procedural environmental rights in South Africa.

#### *6.4.2 Legal framework*

Section 7 of the Constitution makes the Bill of Rights “a cornerstone of democracy in South Africa,” affirming “the democratic values of human dignity, equality and freedom,”<sup>1803</sup> and thereby imposes an obligation on the state to “respect, protect, promote and fulfil the Bill of Rights.”<sup>1804</sup> In the event that the state fails in that obligation, section 34 of the Constitution creates a right of access to courts.<sup>1805</sup>

The right of access to courts protected by section 34 requires that a dispute is to be resolved by the application of law and decided in a fair public hearing. Fairness and lack of impartiality in a judicial hearing refers to the “quality of open-minded readiness to persuasion – without unfitting adherence to either party, or to the judge’s own predilections, preconceptions and personal views – that is the keystone of a civilized system of adjudication.”<sup>1806</sup> The Constitutional Court has held that fairness and impartiality are requirements even for private hearings including in arbitrations, and that the word ‘fair’ in section 34 of the Constitution qualifies any ‘hearing,’ and not only ‘public hearing,’ hence, hearings held in private arbitrations are also subject to the fairness requirements of the section.<sup>1807</sup> The right to fairness incorporated into section 34 also applies to the resolution of disputes in the private sphere. Any forum or body acting judicially cannot turn a blind eye to a lack of fairness.<sup>1808</sup> This admonition by the Constitutional Court will be relevant in the consideration of agreements and interpretation thereof in respect of transactions in hydraulic fracturing.

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<sup>1803</sup> Section 7(1) of the Constitution.

<sup>1804</sup> Section 7(2) of the Constitution.

<sup>1805</sup> The full provision of section 33 of the Constitution is cited in para 1.3.3.3.

<sup>1806</sup> See *South African Commercial Catering and Allied Workers Union and Another v Irvin and Johnson Ltd Seafoods Division Fish Processing* 2000 (3) SA 705 at para 14.

<sup>1807</sup> *Lufuno Mphaluli and Associates (Pty) Ltd v Andrews and Another* 2009 ZACC 6 at para 70.

<sup>1808</sup> *Lufuno Mphaluli and Associates (Pty) Ltd v Andrews and Another* 2009 ZACC 6 at para 74.

The constitutional right of access to courts is sometimes discussed in the context of 'open justice' which entails the cluster of rights included within the ambit of access to justice, including freedom of expression, access to courts, and the right to a fair public trial.<sup>1809</sup> Section 34 therefore protects the right of access to courts, but inherent in that is the requirement that courts must deliberate in public hearing. This is in line with some of the values on which the democratic Republic is based, namely accountability, responsiveness and openness.<sup>1810</sup> In any event, "open courtrooms foster judicial excellence, thus rendering the courts accountable and legitimate."<sup>1811</sup> The constitutional imperative of open justice is evidenced via its presentation in different sections of the Constitution.<sup>1812</sup>

The Constitutional Court had cause to emphasise the importance of open justice in *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions*.<sup>1813</sup> The Constitutional Court pointed out that:

... open justice is observed in the ordinary course in that the public is able to attend all hearings... Courts should in principle welcome public exposure of their work in the courtroom, subject of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (the principle of open courtrooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.

Furthermore, if fairness demands it, the court may admit *amicus curiae* to draw the court's attention to relevant matters of the law and facts of which the court might not have been mindful.<sup>1814</sup> The admission of *amici curiae*<sup>1815</sup> who may introduce new

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<sup>1809</sup> See *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* 2008 ZACC 6 at para 39.

<sup>1810</sup> See section 1(d) of the Constitution.

<sup>1811</sup> See *Shinga v The State and Another* 2007 ZACC 3 at para 26.

<sup>1812</sup> See sections 16(1)(a) and (b), 34, and 35(3)(c) of the Constitution.

<sup>1813</sup> 2007 (1) SA 523 (CC) at paras 31-32.

<sup>1814</sup> *Koyabe and Others v Minister for Home Affairs and Others* 2009 ZACC 23 at para 80.

<sup>1815</sup> The principles governing the admission of *amicus curiae* were set out by the Constitutional Court in the case of *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 9. See also *Stefaans Conrad Brummer v Minister for Social Development and Others* 2009 ZACC 21. The court may refuse to admit an applicant as *amicus* where the underlying principles are not satisfied, and it is irrelevant that the applicant was admitted as *amicus* in the court below. See *Ex parte Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC).

and relevant perspectives into court proceedings may result in invaluable contribution to the development of jurisprudence, especially in constitutional litigation which sometimes require the determination of issues in the public interest.<sup>1816</sup>

Other constitutional provisions complement section 34 in other ways. Section 9(1) of the Constitution provides that “everyone is equal before the law and has the right to equal protection and benefit of the law.” Furthermore, section 39(1)(a) of the Constitution requires that in the interpretation of the Bill of Rights, a court, tribunal or forum must promote the values based on human dignity, equality and freedom. To realise these objectives, the Constitution creates the courts comprising the judicial system and confer them with appropriate jurisdiction. The judicial system is discussed in the next paragraph.

#### 6.4.2.1 Judicial system

The judicial system of South Africa is constituted by the courts created by section 166 of the Constitution, namely:

- a) the Constitutional Court;
- b) the Supreme Court of Appeal;
- c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
- d) the Magistrates’ Courts; and
- e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates’ Courts.

The Constitutional Court is the highest in the hierarchy of courts in the Republic.<sup>1817</sup> It has exclusive jurisdiction in respect of the matters listed in section 167(4) of the Constitution, in respect of which it may act as court of first instance. The court’s jurisdiction reflects the essence of its name in that it “may decide<sup>1818</sup> constitutional

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<sup>1816</sup> See *Minister of Justice and Constitutional Development and Others v The Southern African Litigation Centre* 2016 ZASCA 17.

<sup>1817</sup> Section 167(3)(a) of the Constitution.

<sup>1818</sup> By virtue of section 172(2) of the Constitution, the SCA, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, such order has no force unless it is confirmed by the Constitutional Court. See also sections 167(5) and 169(a) of the Constitution.



matters.”<sup>1819</sup> The Constitutional Court may also decide “any other matter,”<sup>1820</sup> if it grants leave to appeal on the grounds that the matter raises an arguable point of law of general importance which ought to be considered by that Court.”<sup>1821</sup> The Court is empowered to make “the final decision whether a matter is within its jurisdiction.”<sup>1822</sup> Accordingly, the determination of jurisdiction is subject to the pronouncement of the Court on the subject given the wide discretion it has on whether or not it will hear an appeal.

The Supreme Court of Appeal (SCA) is the highest appellate court in South Africa, except in constitutional matters.<sup>1823</sup> The SCA’s jurisdiction extends to “appeals, issues connected with appeals, and any other matter that may be referred to it in circumstances defined by an Act of Parliament.”<sup>1824</sup> The jurisdiction of the High Court covers “any constitutional matter except a matter that only the Constitutional Court may decide; or is assigned by an Act of Parliament to another court of a status similar to the High Court; and any other matter not assigned to another court by an Act of Parliament.”<sup>1825</sup> The jurisdiction of Magistrates’ courts and all other courts covers whatever an Act of Parliament indicates, although an enquiry into any legislation or the conduct of the President are excluded.<sup>1826</sup>

The jurisdiction conferred on the courts by the Constitution positions each of them to protect the rights of the diverse population of South Africa. In this regard, section

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<sup>1819</sup> Section 167(7) of the Constitution provides that “a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.” In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte the President of the Republic of South Africa* 2000 (2) SA 674 at para 44, the Constitutional Court explained that there is only one system of law shaped by the Constitution, as the supreme law from which all law including the common law derives its force.

<sup>1820</sup> In *South African Commercial Catering and Allied Workers Union and Another v Irvin and Johnson Ltd Seafoods Division Fish Processing* 2000 (3) SA 705 at para 4, the Constitutional Court held that notwithstanding the lack of provision in the relevant statute it has jurisdiction to decide any question arising from or connected with the Labour Court’s interpretation of the right to fair labour practices, which, in any event, is a constitutional right.

<sup>1821</sup> Section 167(3)(b) of the Constitution.

<sup>1822</sup> Section 167(3)(c) of the Constitution.

<sup>1823</sup> Section 168(3) of the Constitution.

<sup>1824</sup> Section 168(3)(a), (b) and (c) of the Constitution.

<sup>1825</sup> Section 169 of the Constitution.

<sup>1826</sup> Section 170 of the Constitution.

39 of the Constitution imposes an obligation on the courts when interpreting the Bill of Rights to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom...”<sup>1827</sup> In the same vein, the interpretation of legislation and the development of common law or customary law are to be undertaken to “promote the spirit, purport and objects of the Bill of Rights.”<sup>1828</sup>

#### 6.4.2.2 Equal access to the courts

In terms of section 34 of the Constitution, everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.<sup>1829</sup> Section 9(5) provides partly that “equality includes the full and equal enjoyment of all rights and freedoms.” Therefore, where equal access to the courts cannot be guaranteed, there is a breach of section 9 of the Constitution. The Constitutional Court stressed the need to strive for the ideal of equality, observing that “the achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that this is the goal of the Constitution that should not be forgotten.”<sup>1830</sup>

Equality demands that no party to judicial proceedings should benefit from an enhanced status or be subject to a diminished status compared to another party, or be treated disadvantageously.<sup>1831</sup> However, while equality before the law is a fundamental right under the Constitution, equal access to the courts is often an illusory concept for those living in poverty, and those with little or no education,

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<sup>1827</sup> Section 39(1)(a) of the Constitution.

<sup>1828</sup> Section 39(2) of the Constitution.

<sup>1829</sup> *Carephone (Pty) Ltd v Marcus and Others* 1998 ZALAC 11 (JA 52/98) at para 10. The scope of section 34 does not extend to disputes of a moral or religious nature. In *Prince v The President of the Law Society of the Cape of Good Hope and Others* 2002 (2) SA 794 (CC) at para 42, the Constitutional Court cautioned that courts should avoid entering into debates as to whether or not a particular practice is central to a religion except there is a genuine dispute as to the centrality of the practice. It is therefore important that litigants must show that the contested matter directly affects their rights or interests potentially or actually (see *Registrar of Pensions v C T Howie and Others* 2015 ZASCA 203). See also Currie and De Waal 2013 *The Bill of Rights Handbook* 6<sup>th</sup> ed 712).

<sup>1830</sup> See *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) 32.

<sup>1831</sup> See *Trustees for the Time Being of the Biowatch Trust v Registrar, Genetic Resources and Others* 2009 ZACC 14 at para 9.

thereby justifying the creation of special courts to which South Africans may have access cases.<sup>1832</sup>

While those who can afford the cost of litigation may have only standing requirements to contend with, the same cannot be said for poor and vulnerable people. Poor and vulnerable people are hardly able to afford use of the courts in civil cases due to high cost or ignorance of their rights.<sup>1833</sup> For example, the majority of private summonses for debts are reportedly resulting in default judgments against poor people.<sup>1834</sup> In such cases, summons against the poor are not defended because the counterparty has decided to institute suits in the Provincial Division of the High Court, which suits could equally have been instituted in the Magistrates' courts or the Local Division of the High Court. Such act has potential adverse implications on the right of access to courts.<sup>1835</sup> First, impecunious defendants or respondents who would have had to travel in person from far-away distances may not be able to appear to defend the suits because of prohibitive transport and related costs. Secondly, forum shopping by claimants in jurisdictions convenient for them rather than the jurisdiction most closely connected with the subject matter of the case has the potential to clog the cause list of the preferred courts of the impudent claimants. In either situation, there is a potential denial of access to the courts. First, there is a potential to shut the doors of the courts against the poor, and secondly, there is a potential congestion of the roll of the courts thereby causing delay for other parties who have no choice but to institute action in those courts.

In *Nedbank Limited v Thobejane and Related Matters*,<sup>1836</sup> the court consolidated thirteen cases involving banks against defendants in situations similar to those described above and considered the adoption of an appropriate directive to deal

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<sup>1832</sup> Kaersvang 2008 *The Africa Issue* 1.

<sup>1833</sup> About 40% of the population live in rural areas, usually farms and traditional areas with low levels of economic activity and minimal infrastructure, and 45.5% of the population is poor, with at least 20% living in extreme poverty. See Vedalankar and Hundermark "Country Report on Legal Aid South Africa" presented at the ILAG Conference in Scotland in June 2015 available at <http://www.legal-aid.co.za/wp-content/uploads/2015/05/ILAG-Report-2015-Final.pdf> [date of use 23 April 2018].

<sup>1834</sup> See McQuoid-Mason 1999 *Windsor YB Access Just* 232.

<sup>1835</sup> See *Nedbank Limited v Thobejane and Related Matters* 2018 JOL 40451 (GP).

<sup>1836</sup> 2018 JOL 40451 (GP).

with such cases.<sup>1837</sup> The court held that it is an abuse of process to allow a matter which can be decided in the Magistrates' courts or a Local Division of the High Court to be heard in the Provincial Division of the High Court simply because the latter has jurisdiction.<sup>1838</sup> The court further held that the practice which allows a plaintiff to choose any forum that suits him is outdated because "it loses sight of the deep inequalities in our society and the constitutional imperative of access to justice."<sup>1839</sup>

The fact that indigent persons can hardly afford the prohibitive costs of legal services constitutes an impediment to access to courts especially in civil cases, and the possibility of a denial of section 34 rights in the absence of free legal services.<sup>1840</sup> Regrettably, the lack of express constitutional provision in relation to legal aid for civil cases compared to the express provision in criminal cases in section 35 of the Constitution further compounds the situation.<sup>1841</sup> This puts a question mark on equality as one of the values on which the state is founded,<sup>1842</sup> and the fundamental right of equality before the law, for which the Constitution imposes an obligation on the state to design legislative and other measures "to protect or advance persons, or category of persons, disadvantaged by unfair discrimination."<sup>1843</sup>

The typical practice in hydraulic fracturing of including terms in agreements with counterparties, which among other things subjects resolution of disputes to a settlement process outside the courts' jurisdiction or precludes parties from discussing terms of settlement with third parties,<sup>1844</sup> may violate the section 34 right. An agreement or contract that appears unreasonable as to offend public policy ought not to be allowed to hide behind the principle of sanctity or freedom of

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<sup>1837</sup> The Pretoria Society of Advocates was requested, and it agreed to assist the unrepresented defendants. The South African Human Rights Commission, the Department of Justice and the Minister of Justice were admitted as *amici curiae*. See 2018 JOL 40451 (GP) at para 8.

<sup>1838</sup> 2018 JOL 40451 (GP) at para 76.

<sup>1839</sup> 2018 JOL 40451 (GP) at para 79.

<sup>1840</sup> Holness 2013 *PER/PELJ* 130.

<sup>1841</sup> See McQuoid-Mason 1999 *Windsor YB Access Just* 3. Legal aid in South Africa is discussed in para 6.4.2.3.

<sup>1842</sup> See section 1(a) of the Constitution.

<sup>1843</sup> See section 9(2) of the Constitution.

<sup>1844</sup> See para 4.1 for a discussion of the ways in which hydraulic fracturing process and operations may adversely impact the right of access to information.

contract but should rather bow before public policy which should require that the agreements should not be enforced.<sup>1845</sup> This is because public policy is rooted in the Constitution alongside its underlying values,<sup>1846</sup> and it requires that contractual limitation clauses should be subject to considerations of reasonableness and fairness.<sup>1847</sup> If a contractual term raises an issue of perceived conflict or an envisaged threat to a provision of the Bill of Rights, it will involve a discussion of public policy.<sup>1848</sup> Accordingly, in *Mohlomi v Minister of Defence*,<sup>1849</sup> the court held that the state cannot limit claims against itself by imposing very short notice and prescription periods on litigants seeking to enforce rights, as that is in breach of the constitutional right of access to the court.

Section 34 of the Constitution gives an expression to the foundational value of the democratic order which requires orderly and fair resolution of disputes by courts or other independent and impartial tribunals, thereby guaranteeing to everyone the right to seek the assistance of a court.<sup>1850</sup> The right protected by section 34 however does not include the right of the litigant to choose the method of approaching and placing a dispute before the court. That process can only be determined by the court, in terms "of the inherent power [of the courts] to protect and regulate their own processes."<sup>1851</sup> However, in the exercise of that power the court is enjoined to take "into account the interests of justice."<sup>1852</sup> Accordingly, courts are warned to be

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<sup>1845</sup> See *Barkhuizen v Napier* 2007 ZACC 5, *Mohlomi v Minister of Defence* 1997 (1) SA 124, *Lufuno Mphaluli and Associates (Pty) Ltd v Andrews and Another* 2009 ZACC 6 at para 81, and *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 at 469. See also *Kuschke* 2008 *De Jure* 468.

<sup>1846</sup> See section 1 of the Constitution. See also *Carmichele v Minister of Safety and Another* 2001 (4) SA 938 (CC) at paras 54-56.

<sup>1847</sup> See *Barkhuizen v Napier* 2007 ZACC 5 at para 48. The dissenting opinion of Moseneke DCJ in refusing to accept the constitutionality of the contractual time limitation clause is instructive. He observed that the clause is unreasonably short and inflexible. To require a claimant to find funds, appoint attorney, brief counsel, issue and serve summons all within a period of 90 days of the repudiation of a claim is not only unreasonable, it is unconscionable. Its potential consequence is to release the insurer from liability and give it gain, causing irreparable prejudice to the insured. "One must wonder why this one-sided rush is necessary to protect the insurer," especially when the limitation is not reciprocal. See *Barkhuizen v Napier* 2007 ZACC 5 at para 111-113.

<sup>1848</sup> See *Barkhuizen v Napier* 1997 (1) SA 124.

<sup>1849</sup> 1997 1 SA 124.

<sup>1850</sup> See *Barkhuizen v Napier* 1997 (1) SA 124 at para 31.

<sup>1851</sup> Section 173 of the Constitution.

<sup>1852</sup> Section 173 of the Constitution.

extremely wary of closing their doors to any litigant entitled to approach the courts.<sup>1853</sup> There is therefore a need for caution in applying the rules relating to the principle of standing so that they are not applied in a manner that could deny a potential litigant access to the courts. The application of the rules relating to standing in South Africa is considered below.

#### 6.4.2.3 Standing

In relation to the enforcement of rights, section 38 of the Constitution provides as follows:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are:

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

For section 38 of the Constitution to apply, the enforcement of rights contained in the Bill of Rights must have been infringed or threatened.<sup>1854</sup> Section 38 of the Constitution introduced a radical departure from the common law in relation to standing, allowing access to the court in certain circumstances even in the absence of a live case.<sup>1855</sup> A party seeking to rely on section 38 of the Constitution faces the onus of establishing that it has such a right by making specific averments based on facts that the right has been threatened or infringed and therefore require

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<sup>1853</sup> See *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) at 8201.

<sup>1854</sup> See *Raubenheimer v The Trustees of the Hendrik Johannes Bredenkamp Trust and Others* 2005 ZAWCHC 50 at para 51. In *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others*, 2012 3 All SA 198 (GNP), an application was filed on behalf of torture victims in Zimbabwe premised on section 38(a) of the Constitution, and the obligations of the state to act as a responsible member of the international community, by holding those responsible as liable for crimes against humanity. The court however rejected the application on the ground that the alleged victims' rights infringement could not be redressed under the Bill of Rights, and the applicants cannot rely on the Constitution, which does not oblige the respondents to protect any foreign national not present in South Africa.

<sup>1855</sup> See *The Campus Law Clinic (University of Kwazulu-Natal) v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC) at para 20.

protection.<sup>1856</sup> A person is said to have a direct and substantial interest in the subject matter of litigation when that interest is one which could “be prejudicially affected by the judgment of the court” in the proceedings, and accordingly, an association acting in the interest of its members could approach the court alleging that the right of its members has been or is being threatened to be infringed.<sup>1857</sup>

In relation to the protection of the environment or the use of natural resources, the NEMA makes broad and liberal provisions, opening the doors of the courts to “an almost non-exhaustive list of persons” and creating an opportunity for public interest litigation to protect and enforce of environmental rights.<sup>1858</sup> Section 32(1) of the NEMA provides:

Any group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in chapter 1,<sup>1859</sup> 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:

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

The wide ambit of the NEMA provisions is justified by the understanding that a strict approach to standing could be a serious threat to public interest environmental litigation.<sup>1860</sup> In the same vein, section 38 of the Constitution permits an action to protect any right in the Bill of Rights including the right to an environment not harmful to health and wellbeing.<sup>1861</sup> Therefore, the courts have generally recognised that NGO’s have an interest in ensuring compliance with the Constitution and the

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<sup>1856</sup> *Polokwane Local and Long-Distance Taxi Association v Limpopo Permissions Board and Others* 2016 ZASCA 44.

<sup>1857</sup> Section 38(e) of the Constitution. See also 2016 ZASCA 44 at para 23.

<sup>1858</sup> Kotzé and Du Plessis 2010 *Journal of Court Innovation* 163.

<sup>1859</sup> Chapter 1 of the NEMA contains principles that may significantly affect the environment which apply alongside other considerations, the *Bill of Rights* and “serve as the general framework within which environmental management and implementation plans must be formulated.” See section 2 of the NEMA.

<sup>1860</sup> Murombo 2010 *Law Environment and Development Journal* 175.

<sup>1861</sup> Section 24 of the Constitution.

rule of law, underscoring their objective of litigating in the public interest.<sup>1862</sup> This is because legal activism has its benefits in that “some of the worst failures of the state and private sector have been corrected by the courts through public interest litigation,” thereby making public interest legal services an effective tool for social change.<sup>1863</sup> Furthermore, there cannot be a good reason for adopting a narrow interpretation of standing in constitutional cases.<sup>1864</sup> In *Limpopo Legal Solutions v Vhembe District Municipality and Others*,<sup>1865</sup> the Constitutional Court cited with approval, Justice O’Regan’s opinion in *Feireira*<sup>1866</sup> that:

... factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.

An appreciation that strict standing rules preceding the era of section 38 of the Constitution are no longer available may result in an imprudent exercise of discretion by judges in relation to costs, whereby an exorbitant cost is constituted into a weapon to “inhibit [the] litigious ardour” of potential “cranks and busybodies who would flood the courts with vexatious or frivolous applications against the State.”<sup>1867</sup> There is however no need to suffer any apprehension regarding a flood of litigation inundating the courts. The usual arguments relating to opening the floodgates of litigation appear not to have been borne out by reality,<sup>1868</sup> and in any event potential floodgates “may sometimes be necessary ... in order to irrigate the arid ground below them.”<sup>1869</sup> Moreover, section 32(2) of the NEMA gives the court a discretion

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<sup>1862</sup> *Democratic Alliance and Others v The Acting National Director of Public Prosecutions* 2012 ZASCA 15 at para 42.

<sup>1863</sup> Socio-Economic Rights Institute of South Africa *Public Interest Legal Services in South Africa* 8.

<sup>1864</sup> *Polokwane Local and Long-Distance Taxi Association v Limpopo Permissions Board and Others* 2016 ZASCA 44 at para 25.

<sup>1865</sup> 2017 ZACC 30.

<sup>1866</sup> *Feireira v Levin* NO 1996 (1) SA 984 (CC).

<sup>1867</sup> See Humby 2009 *PER/PELJ* 126. See also *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism* 1996 (3) SA 1095 at 1106 F-G.

<sup>1868</sup> See *Democratic Alliance and Others v The Acting National Director of Public Prosecutions* 2012 ZASCA 15 at para 47.

<sup>1869</sup> See *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism* 1996 3 SA 1095 at 1106. See also Murombo 2010 *Law Environment and Development Journal* 171.



to waive the award of cost against a person or group of persons who unsuccessfully litigated to enforce any provision of the NEMA "if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment."<sup>1870</sup> On the other hand, litigants and their counsels who have successfully secured relief in respect of the enforcement of environmental right or protection may be awarded costs.<sup>1871</sup>

The foregoing show that by virtue of section 38(d) of the Constitution, and section 32 of the NEMA individuals or organisations acting in the public interest are put in positions where they could approach the court to institute court proceedings with the objective of protecting the environment or on behalf of other persons to protect environmental interest.<sup>1872</sup> In *Tergniet and Toekoms Action Group and Another v Outeniqua Kreosootpale (Pty) and Others*,<sup>1873</sup> relying on *Fereira v Levin*,<sup>1874</sup> the court held that the constitutional provision in section 38 should be amplified with a view to grant standing to a loose association of persons seeking to enforce the rights of the group or through legislation whose purpose is to protect constitutionally entrenched fundamental rights.<sup>1875</sup>

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<sup>1870</sup> Section 32(2) of NEMA.

<sup>1871</sup> See *Trustees for the Time Being of the Biowatch Trust v Registrar, Genetic Resources and Others* 2009 ZACC 14.

<sup>1872</sup> See *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) at para 15.

<sup>1873</sup> 2009 ZAWCHC 6.

<sup>1874</sup> 1996 (1) SA 984 CC at para 165.

<sup>1875</sup> In *Louis Khosa and Others v The Minister of Social Development and Others* 2004 (6) SA 505 (CC), the applicants, Mozambican citizens, granted permanent residence status in South Africa, were denied social assistance in the form of financial grants. The respondents raised objection to their action on the ground that the applicants lacked standing, and that the action was abstract and hypothetical. The applicants however claimed standing under section 38(a)-(e) of the Constitution, having brought the application in the public interest "in their private capacities, on behalf of their children and on behalf of permanent residents and children." The Constitutional Court observed that the applicants need not satisfy all the requirements of section 38 for them to have standing to approach the Court. Furthermore, having brought the matter in the interest of permanent residents and their children, "they are indeed members of a group or class who would qualify for assistance under the Act but for the fact that they are not South African citizens." The Court ordered that "the omission of the words "or permanent resident" after the word "citizen" from section 3(c) of the *Social Assistance Act* 59 of 1992, is declared to be inconsistent with the Constitution.

In *Nkala and Others v Harmony Gold Mining Company and Others*,<sup>1876</sup> the application before the court was for the certification of a class action on behalf of current and past underground mine workers, including those deceased, who had contracted silicosis or tuberculosis in the course of their employment in the goldmines.<sup>1877</sup> The court held that it was necessary to develop the common law to allow for claims for general damages to be transmissible to the estate or executor of a deceased mineworker who had succumbed to his illness *prelitis contestatio*.<sup>1878</sup> Accordingly, over seventy applicants were granted leave as class representatives for various heads of claims in the suit. The SCA had in an earlier case observed that the most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it, explaining that<sup>1879</sup>

... because so many in our country are in a poor position to seek redress, and because technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice, that ... the Constitution created the express entitlement that anyone asserting a right in the Bill of Rights could litigate as a member of, or in the interest of, a group or class of persons.

This probably underlies the insertion of section 38 into the Constitution, in extensively broadening the scope of standing for litigants and leading to the development of public interest litigation in terms of section 38(d) as a tool for societal transformation.<sup>1880</sup>

A discussion of the subject of access to the courts in South Africa cannot be restricted to the courts of first instance. In relation to appeals to the Constitutional Court, the application for leave to appeal must raise a constitutional issue or

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<sup>1876</sup> 2016 (3) All SA 233 (GJ).

<sup>1877</sup> The potential number of the class members may range from 17,000 to 500,000 persons.

<sup>1878</sup> 1996 (1) SA 984 CC at para 215.

<sup>1879</sup> *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* 2001 ZASCA 85 at para 7.

<sup>1880</sup> Swanepoel 2016 *Journal for Juridical Science* 29. See also Loots "Access to the courts and justiciability" 1998 *Revision Series* 8 also available at [http://www.chr.up.ac.za/chr\\_old/centre\\_publications/constitlaw/constitlaw\\_contents\\_first.html](http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/constitlaw_contents_first.html) [date of use 14 October 2018].

issues,<sup>1881</sup> and only if it is in the interest of justice that the appeal will be granted.<sup>1882</sup> Section 167(6)(a) of the Constitution makes the Constitutional Court a court of first instance for individuals by direct access “when it is in the interests of justice and with leave of the Constitutional Court.” In *De Cock v Minister of Water Affairs v Forestry and Others*,<sup>1883</sup> the applicant was seeking direct access to the Constitutional Court based on allegation of the infringement of his rights including environmental rights caused by pollution allegedly traceable to activities in a factory belonging to one of the respondents. The Court observed that even though the applicant raised important issues of environmental rights, he was unable to scale the complex hurdles set out in the rules of court, which compelled the Court to refuse direct access. The Court pointed out that without legal assistance, the applicant will struggle to properly institute the action.<sup>1884</sup>

In the recent case of *Grace Maledu and Others v Itereleng Bakgatla Minerals Resources (Pty) Limited and Others*,<sup>1885</sup> the Constitutional Court observed that the cases that would merit its attention must “raise arguable points of law of general public importance.”<sup>1886</sup> The Court thereupon held that in considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the enquiry. There is, however, a need to reconceptualise access to the courts to take cognisance of access to justice not only for the purpose

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<sup>1881</sup> Section 167(7) of the Constitution defines ‘constitutional matter’ as including “any issue involving the interpretation, protection or enforcement of the Constitution.” See also *Pharmaceutical Manufacturers of SA: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

<sup>1882</sup> Application for direct access to the Constitutional Court is governed by rule 18 of the Constitutional Court Rules, section 167(6)(a) of the Constitution, and section 8 of the *Constitutional Court Complementary Act* 13 of 1995, which read together, gives the Court a discretion to grant such application if granting it is in the interest of justice, depending on the facts of each case. See *Xolisile Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC), and *MEC for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC). See also *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2010 ZACC 19 at para 26.

<sup>1883</sup> 2005 ZACC 12.

<sup>1884</sup> 2005 ZACC 12 at para 5.

<sup>1885</sup> 2018 ZACC 41.

<sup>1886</sup> 2018 ZACC 41 at para 31. The Court cited its earlier decision in *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 ZACC 5, that a point of law is arguable when it has some degree of merit, which though may not be convincing at the beginning, it must have a measure of plausibility.

of obtaining a remedy, but also to incorporate constitutionally protected ideals of equality and social justice for the poor and marginalised members of the society.<sup>1887</sup>

To address situations like *De Cock*, Dugard argued that a less complex process of granting direct access to the Constitutional Court for the poor will create an opportunity for meritorious claims to come to the court's attention, especially against the backdrop of the absence of a *de facto* right to legal aid in civil cases.<sup>1888</sup> He suggested that in view of the fact that the South African Constitutional Court has a low caseload compared to some courts of coordinate jurisdiction in other countries, the Court could "explicitly pick cases that would not otherwise be captured by the existing system, on the basis of disadvantage."<sup>1889</sup> Cases involving hydraulic fracturing in which the poor and vulnerable persons are parties should be *bona fide* candidates for a process like that canvassed by Dugard, considering that justice may be guaranteed to parties who may not ordinarily qualify for legal aid. Furthermore, the potential issues to be determined are likely to be novel and their determination would potentially create certainty regarding a complicated subject.

The constitutional and statutory provisions regarding standing are broad. These provisions should for practical purposes, be able to facilitate standing for any potential quest to redress any infringement of right traceable to hydraulic fracturing. The potential victims may lack access to legal services in their individual capacities; their individual claims may be small and unsuitable for enforcement in isolation, justifying the assertion of authority to institute class action proceedings.<sup>1890</sup> In such instances, victims could approach the courts directly, and where they are incapacitated by doing so either due to lack of finance, education or knowledge, other persons, including public interest organisations must be allowed to approach the courts on their behalf.

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<sup>1887</sup> See Holness 2013 *Speculum Juris* 2.

<sup>1888</sup> Dugard 2006 *SAJHR* 277.

<sup>1889</sup> Dugard 2006 *SAJHR* 266.

<sup>1890</sup> See *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuzo and Others* 2001 ZASCA 85.

When public interest organisations take up the case of the poor and vulnerable to obtain remedies for the violation of their rights,<sup>1891</sup> the ideal set for South Africa in section 1(a) of the Constitution as a democratic state founded on the value of human dignity and the achievement of equality and the advancement of human rights and freedoms will be progressively realised. Unfortunately, in some cases that have a bearing on the protection of environmental interests, it may appear that public interest organisations sometimes partner with persons of means to pursue the realisation of rights and interests peculiar to the latter.<sup>1892</sup> Meanwhile, there are many other cases in which the interests of the poor and the vulnerable are violated by environmental abuse, but which unfortunately, did not attract the attention of public interest organisations. While parties' rights in judicial proceedings to pursue legitimate claims of interest to them cannot be faulted, those who wear the badge of public protection would do much better if they also consider the plight of the poor and vulnerable in the society and assist them to enforce their rights.

#### 6.4.2.4 Legal aid

The *Legal Aid South Africa Act 39* of 2014 established the Legal Aid South Africa (hereafter "the LASA") to render or make available legal aid and legal advice and provide legal representation to persons at state expense; and to provide education and information concerning legal rights and obligations to give effect to the protection of the right of access to courts as envisaged by the Constitution.<sup>1893</sup> However, it would appear that the LASA sees its mandate as only derived from the provision of section 35 of the Constitution which imposes an obligation on the state

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<sup>1891</sup> See, for example, the cases of *Louis Khosa and Others v The Minister of Social Development and Others* 2004 (6) SA 505 (CC), *The Campus Law Clinic (University of Kwazulu-Natal) v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC) and *Earthlife Africa (Cape Town) v Director General, Department of Environmental Affairs and Tourism and Another* 2017 (2) All SA 519 (GP).

<sup>1892</sup> See cases like *The Director, Mineral Development Gauteng Region and Another v Save the Vaal Environment and Others* 1999 ZASCA 9, *Camps Bay Ratepayers Association and Another v Harrison and Another* 2010 ZACC 19, and *South Durban Community Environmental Alliance v Head of Department: Department of Agriculture and Environmental Affairs* 2003 (6) SA 631 (D).

<sup>1893</sup> See section 3 of LASA.

to provide legal aid to the accused in criminal trials.<sup>1894</sup> The situation is further compounded by the fact that the LASA is the only statutory body established to provide legal aid services to the poor in South Africa. Other providers are privately funded, including NGO's and law offices with an interest in human rights law.<sup>1895</sup> The ratio of lawyers to people does not make the situation better. As at 2016, there were only 24,330 lawyers for a population of 55.9 million in South Africa,<sup>1896</sup> of which 69% had their practice in Gauteng and Western Cape provinces.<sup>1897</sup> This shows that a significant percentage of lawyers are based in the larger towns and cities because that is where those who can afford to pay for legal services are located, thereby creating a gap between the rich and the middle class who can afford the services of lawyers, and the indigent rural and urban poor who cannot.<sup>1898</sup> By number, lawyers are too few relative to the population for those engaged in *pro bono* service to have a meaningful impact in the quest to deliver access to justice to persons with limited financial means.<sup>1899</sup>

Compounding an already difficult situation, the qualifications for legal aid in South Africa encompass three requirements, namely the matter must be one which is covered by the legal aid scheme, if it is a civil matter there must be merit in pursuing the matter, and the applicant must pass the means test.<sup>1900</sup> It is therefore no surprise that the intervention of the LASA in support of indigent persons involved in civil cases has not been very encouraging. For example, the LASA dealt with 421,365

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<sup>1894</sup> Department of Justice and Constitutional Development *Annual Report 2013-2014* 16. In 2012, LASA dealt with 421,365 cases, with only 7% of them being civil cases. See Legal Aid South Africa 2012 *Impact Litigation- Giving Content to our Rights* 3.

<sup>1895</sup> Prominent NGOs supporting legal aid in South Africa include the Legal Resources Centre, Lawyers for Human Rights, the Centre for Applied Legal Studies, Section 27, and University Legal Aid Clinics established in virtually all law faculties in the country.

<sup>1896</sup> See Statistics South Africa 2016 *Mid-year Population Estimates 2* available at <https://www.statssa.gov.za/publications/P0302/P03022016.pdf> [date of use 5 June 2018].

<sup>1897</sup> See Law Society of South Africa "Attorneys' Profession in South Africa – 2016 Review" available at <http://www.lssa.org.za/upload/LSSA-LexisNexis---Infographic-Report-2016-Survey-of-the-Attorneys-Profession.pdf> [date of use 5 June 2018].

<sup>1898</sup> McQuoid-Mason 2013 *Oñati Socio-legal Series* 564.

<sup>1899</sup> Holness 2013 *PER/PELJ* 131.

<sup>1900</sup> Applicant's income should not exceed R5,500 after tax deductions, with value of movable property and immovable property not exceeding R100,000 and R500,000 respectively. See Vedalankar and Hundermark "Country Report on Legal Aid South Africa" presented at the ILAG Conference in Scotland in June 2015 available at <http://www.legal-aid.co.za/wp-content/uploads/2015/05/ILAG-Report-2015-Final.pdf> [date of use 14 October 2018].

cases in 2012, of which only 7% are civil cases.<sup>1901</sup> The previous year was not any different.<sup>1902</sup> Meanwhile, technology is making an inroad into the provision of legal aid services in South Africa. Educated persons are able to access information and make enquiries through the self-help portals of the world-wide-web services of the LASA.<sup>1903</sup> The advent of cellular phones has made it possible to provide legal advisory services to many people in different languages through the establishment of call centres.<sup>1904</sup> However, many of the poor and vulnerable segment of the population have restricted access to the technology-enabled services due to limitation in finance to acquire devices like smartphones and computers, in addition to infrastructure deficiency.<sup>1905</sup>

Currie and De Waal observe that any interpretation of section 34 of the Constitution to the effect that it imposes an obligation on the state to provide assistance to individuals to have their disputes resolved by a court or other forum may not be possible due to limited state resources.<sup>1906</sup> They, however, cited various efforts by the government to ease access to the courts for different kinds of disputes that could involve persons with limited financial capabilities.<sup>1907</sup> Regardless, challenges which militate against poor and vulnerable persons simply accentuates the prevalent

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<sup>1901</sup> Legal Aid South Africa *Impact Litigation- Giving Content to our Rights* 3.

<sup>1902</sup> In 2011, 93% of the cases handled by LASA in 2011 were criminal cases. See McQuoid-Mason 2013 *Oñati Socio-legal Series* 566.

<sup>1903</sup> Vedalankar and Hundermark "Country Report on Legal Aid South Africa" presented at the ILAG Conference in Scotland in June 2015 available at <http://www.legal-aid.co.za/wp-content/uploads/2015/05/ILAG-Report-2015-Final.pdf> [date of use 23 April 2018].

<sup>1904</sup> See Vedalankar and Hundermark "Country Report on Legal Aid South Africa" at 16.

<sup>1905</sup> See Fin24tech "Data must fall: Poor locked out of the digital economy" available at <https://www.fin24.com/Tech/Opinion/datamustfall-poor-locked-out-of-the-digital-economy-20170811> [date of use 30 October 2018].

<sup>1906</sup> Currie and De Waal *The Bill of Rights Handbook* 6<sup>th</sup> ed 715.

<sup>1907</sup> Government efforts to ease access to courts have resulted in the establishment of special courts and tribunals like the Commission for Conciliation, Mediation and Arbitration (CCMA) established by the *Labour Relations Act* 66 of 1995, the Small Claims Courts established in terms of the *Small Claims Act* 61 of 1984, Maintenance Courts pursuant to the *Maintenance Act* 99 of 1998, the Provincial Rental Housing Tribunals by the *Rental Housing Act* 50 of 1999, the National Credit Regulator and the National Consumer Tribunal, both established in terms of the *National Credit Act* 34 of 2005, the National Consumer Commission by the *Consumer Protection Act* 68 of 2008, and the Companies Tribunal as well as the Takeover Regulation Panel, both established pursuant to the *Companies Act* 71 of 2008. See Currie and De Waal *The Bill of Rights Handbook* 6<sup>th</sup> ed 715.

inequality in the South African society. Lack of a constitutional provision to ameliorate the situation is no reason for a defect to persist.

Flowing from the above, the opinion expressed by the Land Claims Court in *Nkuzi Development Association v The Government of the Republic of South Africa and Another*<sup>1908</sup> should provide a more convincing process towards the quest to attain equality. In this case, the court observed that a large number of persons who should ordinarily benefit from the provisions of the *Extension of Security of Tenure Act* (ESTA)<sup>1909</sup> and the *Land Reform (Labour Tenants) Act*<sup>1910</sup> are unable to do so because they are overwhelmingly poor, vulnerable and have little education which limits them from being able to defend or enforce their rights under the statutes and the Constitution. Consequently, to ensure that their rights under section 34 is guaranteed, there is a need for legal representation in cases involving them, or at the very least an explanation of their rights.<sup>1911</sup> There is no reason why the requirement in criminal proceedings that the judicial officer should inform the accused of his rights<sup>1912</sup> should not be extended to litigants in civil cases, considering that the issues in civil matters are equally complex and the laws and procedures difficult to understand.<sup>1913</sup>

While it is recognised that the implementation of a constitutional right to legal aid in civil cases is likely to be affected by the availability of funding, its inclusion as a constitutional right will impose an obligation on the state to act responsibly. As the Constitutional Court held in *Grootboom*,<sup>1914</sup>

... the question will be whether the legislative and other measures taken by the state are reasonable... A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether

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<sup>1908</sup> 2013 ZALCC 12.

<sup>1909</sup> 62 of 1997.

<sup>1910</sup> 3 of 1996.

<sup>1911</sup> 2013 ZALCC 12 at para 6.

<sup>1912</sup> See *State v Mabaso and Another* 1990 (3) SA 185A at 203G.

<sup>1913</sup> The Land Claims Court thereupon held *inter alia* that the state is under a duty to provide such legal representation or legal aid through mechanism selected by it.

<sup>1914</sup> *The Government of South Africa and Others v Irene Grootboom and Others* 2001 (1) SA 46 (CC).



money could have been better spent. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations.<sup>1915</sup>

A discriminatory approach to the provision of legal aid which provides assistance to parties in criminal cases but not in civil cases despite evidence of unsatisfied need resulting in violation of rights, is an incident of inequality. The Constitutional Court has stressed the need to strive for the ideals of equality, observing that though it may not be easy, this is the goal of the Constitution which should not be forgotten.<sup>1916</sup> The provision of section 24 of the Constitution can be applied to achieve the transformative agenda set by the Constitution.<sup>1917</sup>

#### *6.4.3 Assessment of the right of access to courts: South Africa*

Notwithstanding the enviable status of the constitutional regime existing in South Africa, meaningful access to justice is still determined by access to economic resources in some cases.<sup>1918</sup> The civil justice system is still characterised by cumbersome, complex and time-consuming processes, overloaded court rolls resulting in delays, and prohibitive costs, which sometimes compel litigants to conclude settlements not necessarily beneficial to them.<sup>1919</sup> The courts should not be fastidious in encouraging formalism in the application of the rules of court because the rules are not an end in themselves but to “secure the inexpensive and expeditious completion of litigation before the courts.”<sup>1920</sup>

Furthermore, illiteracy, poverty and differences in culture and languages are factors which may isolate people and leave them uninformed about their legal rights, thereby subjecting them to a handicap from the mainstream of the law where access

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<sup>1915</sup> 2001 (1) SA 46 (CC) at para 41.

<sup>1916</sup> See *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) 32.

<sup>1917</sup> See Fuo 2013 *Obiter* 94.

<sup>1918</sup> Klaaren “The cost of justice” a briefing paper for Public Positions Theme Event of Wisser, History, Workshop & Wits Political Studies Department on 24 March 2014 available at <https://wiser.wits.ac.za/system/files/documents/Klaaren%20-%20Cost%20of%20Justice%20-%20%202014.pdf> [date of use 23 April 2018].

<sup>1919</sup> Ngcobo “Enhancing access to justice: The search for better justice” 2011 available at <https://constitutionallyspeaking.co.za/wp-content/uploads/2011/07/Speech-of-the-Chief-Justice-2011.pdf> [date of use 26 May 2018].

<sup>1920</sup> See *Federated Trust Ltd v Botha* 1978 (3) 645A at 654D.

to professional legal advice and assistance is scarce.<sup>1921</sup> In the face of these challenges, the right of access to courts must facilitate the process by which any prospective litigant brings his case before the court. In the words of Budlender, to effectively bring a case before the court:

... a prospective litigant must have knowledge of the applicable law; must be able to identify that she may be able to obtain a remedy from a court; must have some knowledge about what to do in order to achieve success; and must have the necessary skills to be about to initiate the case and present it to the court.<sup>1922</sup>

Effective access to justice is required if sustainable economic development serving the dual role of protecting the investors and their investment on the one hand and protecting the people whose interests and rights may be affected by development on the other hand is to be attained.<sup>1923</sup> Interestingly, one of the arguments canvassed for a probable recourse to hydraulic fracturing in South Africa is its potential to enhance economic development.<sup>1924</sup> However, if the South African society is to be transformed whether in terms of socio-economic development or human rights, the ability of people to meaningfully assert and claim the rights in the Constitution must be assured. The ability to assert and claim rights can only be assured if the access of people to the courts is guaranteed. The judiciary can engender the trust of the people that the justice system that is:

... just in the results it delivers; that is fair to all litigants regardless of their station in life; that is inexpensive; that delivers results in the shortest possible time; that people who use it understand; that responds to their needs; and that is effective.<sup>1925</sup>

The outcome in the case of *Trustees for the Time Being of the Biowatch Trust v Registrar, Genetic Resources and Others*<sup>1926</sup> brings to mind potential challenges faced by those who are bold to come to court. Six years elapsed before the

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<sup>1921</sup> *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at para 14.

<sup>1922</sup> Budlender 2004 121 *SALJ* 341.

<sup>1923</sup> Southern Africa Litigation Centre *Goal 16 of the Sustainable Development Goals: Perspectives from Judges and Lawyers on Promoting Rule of Law and Equal Access to Justice* 147.

<sup>1924</sup> See para 1.1 in chapter 1.

<sup>1925</sup> Ngcobo "Enhancing access to justice: The search for better justice" 2011 available at <https://constitutionallyspeaking.co.za/wp-content/uploads/2011/07/Speech-of-the-Chief-Justice-2011.pdf> [date of use 26 May 2018].

<sup>1926</sup> 2009 ZACC 14.

information requested in the *Biowatch* case<sup>1927</sup> was received, during which period more than 1 million hectares of land had been planted with GM<sup>1928</sup> crops in South Africa.<sup>1929</sup> There is therefore value in accessing the court promptly and for the courts to decide the dispute as early as possible, otherwise the harm sought to be prevented by legal action may have crystallised as a result of delay attributable to procedural complexities. Prompt access to court is necessary to address any unexpected incident that may arise from hydraulic fracturing operations.<sup>1930</sup> Notwithstanding, the benefit of the case for environmental protection is that for seeking access to the court to right a wrong, the act of the applicant encouraged others to challenge the government and big corporations on the belief that success is not impossible.<sup>1931</sup> Furthermore, it facilitated greater responsiveness from the government in other cases, and it resulted in law reform in relation to environmental impact assessment for GMO's<sup>1932</sup> and ultimately, an amendment of the *Genetically Modified Organisms Act*.<sup>1933</sup>

## **6.5 Conclusion**

The right of access to courts, which is interconnected with all other human rights can be applied through litigation to bring about social change and to protect rights.<sup>1934</sup> It is a tool that can facilitate the realisation of the attainment of the constitutional objective of improving "... the quality of life of all citizens and free the

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<sup>1927</sup> Trustees for the Time Being of the Biowatch Trust v Registrar, Genetic Resources and Others 2009 ZACC 14.

<sup>1928</sup> 'Genetically modified.'

<sup>1929</sup> Wynberg and Fig "Realising Environmental Rights: Civic action, leverage, and litigation" in Malcom Langford *et al* (eds) *Socio-Economic Rights in South Africa – Symbols or Substance?* 325.

<sup>1930</sup> For example, operations were halted by a court injunction within one week of hydraulic fracturing operations in Lancashire, UK in mid-October 2018, consequent upon the application of environmental interests' campaigners. The operator had subsequently stopped operations twice in line with the "traffic light" warning system operated by the OGA to control potential harm to the environment. Gabbatiss "Fracking halted at Lancashire site for third time after biggest earth tremor yet" available at <https://www.independent.co.uk/news/uk/home-news/fracking-lancashire-earth-tremor-preston-new-road-cuadrilla-earthquake-a8606821.html> [date of use 30 October 2018].

<sup>1931</sup> See Wynberg and Fig 2014 *Realising environmental rights: Civic action, leverage, and litigation* 326.

<sup>1932</sup> See National Environmental Management: Biodiversity Act 10 of 2004.

<sup>1933</sup> 15 of 1997, amended by the Genetically Modified Organisms Amendment Act 23 of 2006.

<sup>1934</sup> Holness and Rule 2014 *PER/PELJ* 1907-1909.

potential of each person.”<sup>1935</sup> The foregoing underscores the importance of the right of access to courts. It is a crucial element in the quest for the enforcement of substantive and indeed, procedural constitutional rights. The right of access to courts is an integral part of the values and principles underlying the rule of law, constraining lawyers to ensure that they cannot work round it or in spite of it, in the pursuit of justice.<sup>1936</sup> It is the basis for the assurance that there will always be a remedy for a wrong, hence, a tool to be applied to forestall environmental harm, and to protect procedural environmental rights which may potentially be assailed by the introduction of hydraulic fracturing in South Africa.

Ideally, an effective application of the constitutional right of access to courts will create a smooth path towards “the achievement of equality and the advancement of human rights and freedoms” envisaged by the Constitution.<sup>1937</sup> Poverty and lack of knowledge sometimes limit the ability of some persons to appreciate constitutional rights. Shortage of lawyers relative to the population is also a major hindrance militating against the enforcement of access rights. To ensure that litigants are treated without being subjected to harm by hydraulic fracturing, there is a need to address the problems which reinforce societal inequalities. It is imperative that the process that could facilitate the effective enforcement of the right protected by section 34 be reinforced if the other provisions of the Constitution relating to the right of equality are to be efficacious. The provision of effective legal aid process in civil cases will make that objective possible.

The foregoing point to the fact that there is a need to rethink the structure and the process for legal aid in South Africa. The *status quo* is likely to prejudice the interests and the rights of poor and vulnerable persons who may be prejudiced by hydraulic fracturing otherwise, a realisation of the rights protected by the Constitution may be a mirage. The fundamental principle of the rule of law that all persons are equal before the law can only be meaningful if everyone has the means, or could be

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<sup>1935</sup> See the preamble to the Constitution.

<sup>1936</sup> Waldron 2006 *Harvard Journal of Law and Public Policy* 15.

<sup>1937</sup> See section 1 of the Constitution.

assisted to protect interests and rights under the substantive law.<sup>1938</sup> Equality should entitle all persons, who may demand it, access to legal assistance and the courts, to enforce their legal rights and protect themselves against injustice and exploitation.<sup>1939</sup>

In the UK, the right of access to courts is not expressly presented in a constitution because the country does not have a written constitution. When a right is infringed, recourse is to the courts. Therefore, if rights are infringed by activities traceable to hydraulic fracturing, the complainant or the victim may approach the court. However for the indigent litigants, neither the PCOs nor the LASPO Act has improved their position. Therefore, indigent persons affected by hydraulic fracturing in the UK face daunting challenges in accessing finance redress in the courts.<sup>1940</sup> Furthermore, standing remains an intractable issue in proceedings for judicial review of administrative action,<sup>1941</sup> thereby impeding nature enthusiasts activities in representing injured and incompetent elements of nature.<sup>1942</sup> With these challenges, South Africa does not have much to learn from the UK as to how the application of the right of access to courts could facilitate the protection of environmental rights.

In Pennsylvania, the requirement that technicalities of the rules of procedure should be relaxed and applied flexibly in the adjudication of environmental cases,<sup>1943</sup> may be worthy of consideration by the courts in South Africa in addressing the challenges faced by potential victims in the Karoo when they seek the courts' intervention to redress wrongs potentially traceable to hydraulic fracturing. Furthermore, article 1, section 11 of the Constitution of Pennsylvania protects the right of access to courts in clear terms. The courts have applied this provision to ensure that justice is done where hydraulic fracturing violates the rights of people. The decisions in *Cabot Oil and Gas Corporation v Vera Scroggins*,<sup>1944</sup> and *Robinson Township v Commonwealth*

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<sup>1938</sup> Nyenti 2013 *De Jure* 903.

<sup>1939</sup> Sarkin 2002 *SAJHR* 630.

<sup>1940</sup> See para 6.3.2.4.

<sup>1941</sup> See para 6.3.2.3.

<sup>1942</sup> Manus 2000 *Stanford Environmental Law Journal* 351.

<sup>1943</sup> See para 6.2.2.1.1.

<sup>1944</sup> 2013-1303 CP.

*of Pennsylvania*<sup>1945</sup> show that the courts remain a bastion to prevent violation of rights attributable to hydraulic fracturing. Finally, the extension of legal aid to indigent persons in civil cases by legislation in Pennsylvania<sup>1946</sup> is a step in the right direction, which is worthy of consideration for adoption in South Africa. Meanwhile, specific learning points from Pennsylvania and the UK, as well as recommendations to strengthen the law regarding the right of access to courts in South Africa are presented in paragraph 7.5.

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<sup>1945</sup> 2016 A.3d J-34A-B.

<sup>1946</sup> See para 6.2.2.4.

## Chapter 7 Conclusion and Recommendations

### *7.1 Introduction*

Hydraulic fracturing, the process which facilitates the extraction of shale gas from rock formation from depths of up to two miles below the earth's surface has the potential to adversely impact environmental rights and other categories of human rights.<sup>1947</sup> Though the process is in the planning stage in South Africa, notices have been issued regarding pending administrative decisions concerning the applications for exploration rights to explore for natural (shale) gas largely in the Karoo region.<sup>1948</sup> Concerns similar to those which have been expressed in other jurisdictions regarding the process are also being raised locally.<sup>1949</sup> These concerns are exacerbated considering that a significant part of the population of the Karoo region have limited understanding of the issues associated with hydraulic fracturing. Many of the people are also poor, while others may lack knowledge of the issues associated with hydraulic fracturing which may ultimately hinder their effective access to justice.<sup>1950</sup>

This thesis considered to what extent the legal framework pertaining to hydraulic fracturing protect procedural environmental rights from the perspectives of the state of Pennsylvania in the USA, the UK and South African law. Three procedural rights, namely the right of access to information, the right to just administrative action and the right of access to courts were considered with a view to draw lessons from the foreign jurisdictions for possible improvement of the South African legal framework pertaining to hydraulic fracturing in order to protect procedural environmental rights.<sup>1951</sup> Findings from the study revealed some positive development of the law from the USA and the UK that may be considered in South Africa to strengthen the legal framework for the regulation of hydraulic fracturing.<sup>1952</sup> The study also revealed

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<sup>1947</sup> See para 1.2.

<sup>1948</sup> See para 1.1.

<sup>1949</sup> See para 1.2.

<sup>1950</sup> See para 1.2.

<sup>1951</sup> See chapters 4, 5, and 6 for the consideration of the rights of access to information, just administrative action, and access to courts respectively.

<sup>1952</sup> See chapters 4, 5, and 6 for the consideration of the three rights in relation to the three jurisdictions.

specific areas of concern where development in the foreign jurisdictions do not appear to be of benefit to the South African legal framework on the subject, and indeed where the South African situation appears better, and is more suited to the local context.<sup>1953</sup>

The findings on the general challenges identified in the study are presented in paragraph 7.2, and the findings and recommendations relating to procedural environmental rights of access to information, just administrative action, and access to courts are presented in paragraphs 7.3, 7.4 and 7.5 respectively. The general recommendations, as well as the conclusion and comments on a future research agenda are presented in paragraphs 7.6. The general observations are discussed first.

## ***7.2 General observations***

Chapter 2 discussed the nature of hydraulic fracturing, highlighting the benefits derivable therefrom. The issues relating to its adverse impacts were also examined drawing on experiences from Pennsylvania, a state in the USA that had been engaged in the process for many years, and the UK which is at an advanced stage in commencing the process.<sup>1954</sup> The study showed that the enforcement of the three procedural rights considered, also have the potential to facilitate the enforcement of other substantive rights that may be violated during the hydraulic fracturing processes.<sup>1955</sup>

The findings on the general adverse impacts of hydraulic fracturing which could affect procedural environmental rights are discussed in the following paragraphs.

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<sup>1953</sup> See paras 7.3, 7.4, and 7.5.

<sup>1954</sup> See para 1.2.1.1.

<sup>1955</sup> See para 1.5.



### *7.2.1 Impact on water resources*

The study found that the impact of hydraulic fracturing on water is two-fold.<sup>1956</sup> The massive volume of water required for the process would affect other water needs including domestic, agricultural and other industrial usage.<sup>1957</sup> Secondly, the risk of water pollution caused by some of the chemicals to be used for the process are toxic and bring to the surface radioactive elements present in geological formations thereby polluting water and cause harm to human health and the environment.<sup>1958</sup> The position in the USA which excluded the application of the SDWA (a federal law) to hydraulic fracturing despite the concerns in relation to water pollution cannot augur well for South Africa.<sup>1959</sup>

In South Africa, the acute water resource challenges which the country currently faces, makes comprehensive assessment of the impact of hydraulic fracturing on the right of access to water a necessity.<sup>1960</sup>

### *7.2.2 Impact on health*

Paragraph 2.4.2 of the study discussed investigations on the impact of hydraulic fracturing which revealed serious concerns regarding human health. Studies in other jurisdictions referred to in the paragraph indicated that more scientific information is required to completely understand its likely public health risks, and that there are questions about whether these risks are sufficiently understood to guarantee effective management thereof. Notwithstanding the position adopted in the UK and Pennsylvania that hydraulic fracturing poses no significant risk to human health if best practice is followed during the operational phase,<sup>1961</sup> there is a need for caution. The position in those jurisdictions appears to be based on policies designed to make

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<sup>1956</sup> See para 2.4.1.

<sup>1957</sup> See para 2.2.

<sup>1958</sup> See para 2.4.1.

<sup>1959</sup> See para 2.4.1.

<sup>1960</sup> See para 2.4.1.

<sup>1961</sup> See para 2.4.2.

them energy leaders and to increase investment and job creation, and perhaps to influence decisions by assuaging the concerns of those opposed to the process.<sup>1962</sup>

### *7.2.3 Impact on sustainable development*

The GWP of methane, the GHG from hydraulic fracturing of shale gas, is reportedly higher than that from other fossil fuels like coal.<sup>1963</sup> Certain impacts caused by hydraulic fracturing cannot be remedied, and it may therefore permanently affect the interrelationship between mankind and the environment in terms of their continued mutually beneficial existence.<sup>1964</sup> There is therefore a need to balance the competing socio-economic interests of stakeholders against the anticipated impact of hydraulic fracturing on the environment to ensure that its development meets the needs of the present without compromising the ability of the future generations to safeguard their needs.<sup>1965</sup>

The regulation of hydraulic fracturing in South Africa should comply with section 24(b)(iii) of the Constitution which protects the right to an environment and provides for measures that that secure “ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.” Sustainable development is incorporated as a principle in section 2 of the NEMA. The Constitutional Court also gave judicial imprimatur to the principle in the case of *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*.<sup>1966</sup>

### *7.2.4 Impact on the public trust doctrine*

Section 2(4)(o) of NEMA provides that “the environment is held in public trust for the people, the beneficial use of environmental resources must serve the interest and the environment must be protected as the people’s common heritage.” This is

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<sup>1962</sup> See para 1.2.1.

<sup>1963</sup> See para 2.4.3.

<sup>1964</sup> See para 2.4.3.

<sup>1965</sup> See para 2.4.3.

<sup>1966</sup> 2007 ZACC 13 at para 44.

line with the requirement of section 24(b) of the Constitution.<sup>1967</sup> This principle is binding on the state as well as natural and juristic persons.

### *7.2.5 Impact on the environment and procedural environmental rights.*

The wide and diverse impacts of hydraulic fracturing on the environment were discussed in paragraph 2.4.5. Glazewski points out that developing countries also recognise the link between human rights and environmental rights.<sup>1968</sup> That link ensures that the standards for the assessment of environmental policies are made to comply with human rights norms. Considering that the implementation of the requirements for the realisation of the right to an environment not harmful to health or wellbeing is challenging, the study dealt in depth with the nature of environmental rights<sup>1969</sup> and the role of procedural rights in the protection of environmental interests.<sup>1970</sup> The theoretical foundation for the study was laid by a comprehensive review of literature on the specific procedural rights relevant to the enforcement of environmental rights in relation to hydraulic fracturing.<sup>1971</sup>

The theoretical evaluation of the literature showed that applying procedural rights to remediate environmental harms can facilitate the enforcement of the substantive environmental rights.<sup>1972</sup> By so doing, procedural rights become instrumental in giving a structural framework for the realisation of the right itself.<sup>1973</sup> Environmental rights are seen as a cluster of rights including procedural rights, which may be compromised by an abuse of the environment, hence, the appellation “procedural environmental rights.”<sup>1974</sup>

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<sup>1967</sup> See para 2.4.4.

<sup>1968</sup> See para 2.4.5.

<sup>1969</sup> See para 2.4.6.

<sup>1970</sup> See para 2.4.7.

<sup>1971</sup> Paras 2.5.1, 2.5.2, and 2.5.3 discussed philosophical perspectives of the procedural rights of access to information, just administrative action and access to courts respectively.

<sup>1972</sup> See para 2.4.7.

<sup>1973</sup> See para 2.4.7.

<sup>1974</sup> See para 2.4.7.

### *7.2.6 Regulation of hydraulic fracturing*

The MPRDA was enacted in 2002 when concerns associated with hydraulic fracturing were probably not fully appreciated or adequately articulated. Its subsequent amendments could also not have considered the seriousness of its impact on the environment and human rights. Chapter 6 of the MPRDA, which applies to petroleum exploration and production, and perforce hydraulic fracturing, is subject to the same limitation. Though the HF Regulations may contain provisions dealing with technical problems probably observed in relation to hydraulic fracturing operations in other jurisdictions, it is important to note that the impact may not manifest in the same manner in South Africa, especially in relation to potential human rights implications. This is because the demography and the sociology of the South African population are different. Therefore, regulation should be seen to protect all stakeholders from the potential adverse impacts.

This study shows that the framework for the realisation of environmental rights should be within the context of 'environmental governance' which is the collection of legislative, executive and administrative functions, processes and instruments. Effective regulation cannot be one-stop. The risks associated with hydraulic fracturing therefore necessitates all-round monitoring of its total life cycle spanning exploration, production and closure phases.<sup>1975</sup>

Although it is shown in this study that an effective legal framework for the regulation of hydraulic fracturing is essential to protect environmental rights, an effective implementation of the legal framework is of equal importance. Even if statutory provision imposing obligation on the regulatory authorities or private bodies to take certain actions to protect the environment and peoples' rights are lacking, hydraulic fracturing operators should not take that as licence to act arbitrarily. Regulatory authorities still have a duty to ensure that there is compliance with international

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<sup>1975</sup> See para 2.3.3.

obligations binding on South Africa. That is the view expressed by the court in *Earthlife Africa Johannesburg v The Minister of Environmental Affairs and Others*.<sup>1976</sup>

### *7.2.7 International perspective*

Chapter 3 of the study evaluated the international and regional legal framework relevant to procedural environmental rights. The procedural rights of access to information,<sup>1977</sup> just administrative action,<sup>1978</sup> and access to courts<sup>1979</sup> were examined from the perspective of international law as to their meaning, use and relevance. This was done to determine the extent to which the rights are protected by international law against the potential harms of hydraulic fracturing, and to highlight international obligations imposed on the three jurisdictions considered.<sup>1980</sup>

The study revealed that international law protects the three procedural rights considered and has over time created obligations requiring states to protect them in the course of development programmes.<sup>1981</sup> The instruments of international law, some of which are binding while others are not, either impose obligations on states to protect environmental rights, or to serve as a guide as to best practices on human rights protection when states engage in development programmes.<sup>1982</sup> The legally binding instruments considered in chapter 3 are relevant for the regulation of hydraulic fracturing. Compliance with their requirements at domestic level is likely to facilitate the enforcement of procedural rights.<sup>1983</sup> The non-legally binding instruments, some of which have attained the status of *jus cogens*, can assist in the clarification of the meaning and scope of the law regulating hydraulic fracturing.<sup>1984</sup>

In furtherance of interests to promote common objectives, regional states have established institutional platforms to pursue their common goals.<sup>1985</sup> The regional

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<sup>1976</sup> 2017 2 All SA 519 (GP).

<sup>1977</sup> See para 3.2.

<sup>1978</sup> See para 3.3.

<sup>1979</sup> See para 3.4.

<sup>1980</sup> See para 3.1.

<sup>1981</sup> See para 3.2.1.6.

<sup>1982</sup> See para 3.2.1.6.

<sup>1983</sup> See para 3.2.1.6.

<sup>1984</sup> See para 3.2.1.5.

<sup>1985</sup> See para 3.2.2.

institutions have extended the reach of their authority to issues relating to procedural rights, as well as the environment and development through the adoption of legally binding and non-binding instruments. Key regional instruments relevant in the protection of procedural environmental rights applicable in Europe, the Americas and Africa on those subjects were considered in chapter 3.<sup>1986</sup> In Africa, where extensive development is currently in progress, the study found that a regional approach to the protection of procedural environmental rights may be more effective. For example, a procedural access to information right can be utilised as a tool for the realisation of substantive rights when it is deployed as a community or collective right in that processes can be developed consequent upon negotiation based on the recognition of the particular challenges common to many African communities.<sup>1987</sup>

The relevance of international law to the study is evident in the requirement of section 39(1)(b) of the Constitution which provides *inter alia* that when a court, tribunal or forum is interpreting the Bill of Rights "it must consider international law." Section 232 of the Constitution also accords international customary law binding status in the country "unless it is inconsistent with the Constitution or an Act of Parliament." Therefore, as a party to the instruments considered in this chapter, South Africa has an obligation to comply with above noted requirements to the extent that such instruments have become binding law in terms of section 231 of the Constitution.<sup>1988</sup> The South African Bill of Rights conforms to international norms in many respects, and indeed, some of its provisions are reference points in foreign judgments and academic writings.<sup>1989</sup> Concomitantly, the domestic legal framework and perforce, the regulation of hydraulic fracturing in South Africa should comply with the requirements of international law to protect procedural environmental rights, and take into consideration the lessons learned from Pennsylvania and the UK.<sup>1990</sup>

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<sup>1986</sup> See paras 3.2.2, 3.3.3, and 3.4.2.

<sup>1987</sup> See para 3.2.2.3.

<sup>1988</sup> See para 1.8.

<sup>1989</sup> See para 3.5.

<sup>1990</sup> See para 3.5.

### **7.3 Access to information**

Chapter 4 discussed the legal framework of the right of access to information in relation to hydraulic fracturing from the perspectives of Pennsylvania in USA, the UK and South African law, drawing lessons from the foreign jurisdictions for possible improvement of the South African legal framework in relation to the protection of procedural environmental rights.

#### *7.3.1 Access to information: Lessons learned*

The study found that in Pennsylvania, the RKTL which is the main statute regulating access to information imposes obligations on all agencies of the state to grant access to public records subject to the provisions of the law,<sup>1991</sup> on the basis of a general rule of presumption that “a record in the possession of a Commonwealth agency shall be presumed to be a public record.”<sup>1992</sup> However, the failure of the RKTL to grant direct access to individuals to seek disclosure of information protected as a trade secret, and its imposition of obligations on health practitioners before information relating to chemicals used in hydraulic fracturing can be disclosed to them is unpropitious.<sup>1993</sup> The provisions have the potential to endanger human life and imperil the environment. It is submitted that these aspects of the regulation of access to information in relation to hydraulic fracturing in Pennsylvania are not likely to enhance the protection of procedural environmental rights and should not to be copied in South Africa.<sup>1994</sup>

The study however showed that the decision of the Pennsylvania Supreme Court in *Robinson Township v Commonwealth of Pennsylvania*<sup>1995</sup> is fundamental to the development of the law relating to access to information in relation to hydraulic fracturing. The court ruled that the provisions of section 3222.1(b)(10) and (11) of Act 13, which limits the disclosure of chemicals in hydraulic fracturing on the basis

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<sup>1991</sup> See para 4.2.1.

<sup>1992</sup> See para 4.2.1.

<sup>1993</sup> See para 4.2.2.

<sup>1994</sup> See para 4.2.4.

<sup>1995</sup> 2016 A.3d J-34A-B.

of trade secrets and confidential proprietary information, is unconstitutional.<sup>1996</sup> Therefore, claims based on trade secrets cannot be the basis for withholding information from individuals who may require such information to enforce their rights or protect their interests.<sup>1997</sup>

Regarding the UK, the study found that the country has indicated that until its exit from the EU, it “will continue to honour international commitments and follow international law.”<sup>1998</sup>In that regard, pending the EWB becoming law, EU law, particularly those relating to the environment and rights associated therewith like Directive 2003/4/EC,<sup>1999</sup> Directive 2016/943/EC<sup>2000</sup> and the EU Recommendation<sup>2001</sup> will remain valid.<sup>2002</sup>

In the UK, the study found that the FOIA gives a right of access to information to any person to request information from a public authority.<sup>2003</sup> The right is however subject to two classes of exemption, namely ‘the absolute exemption’ and ‘the public interest exemption.’<sup>2004</sup> Even though there are statutory provisions protecting commercial confidential information of business enterprises, an express mandate to disclose information required by individuals to enforce rights is lacking. In relation to trade secrets, the courts often base the need for the protection of trade secrets on the need to protect property interests, thereby treating the relevant information as “know-how” property, which is very valuable as an asset.<sup>2005</sup>Section 43 of the FOIA does not change the common law position on the treatment of trade secrets which has been developed through the cases. The study found that notwithstanding the common law, the regulation of access to environmental information in the UK is

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<sup>1996</sup> See para 4.2.2.

<sup>1997</sup> See para 4.2.2.

<sup>1998</sup> See para 4.3.1.

<sup>1999</sup> Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information is discussed in para 3.2.2.2.4.

<sup>2000</sup> Directive 2016/943/EC of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure is discussed in para 3.2.2.2.5.

<sup>2001</sup> Discussed in para 3.2.2.2.

<sup>2002</sup> See para 4.3.1.

<sup>2003</sup> See para 4.3.1.

<sup>2004</sup> See para 4.3.1.

<sup>2005</sup> See para 4.3.1.



accentuated by the requirement that no enactment or rule of law will be allowed to forestall the disclosure of information made under the EIR.<sup>2006</sup>

In South Africa, the study noted that the constitutional provision in section 32 charted a new path in human rights discourse by linking an autonomous access to information right to the exercise or protection of other rights.<sup>2007</sup> The PAIA, enacted to give effect to the constitutional access to information right provides for its supremacy over other legislation regarding the prohibition or restriction of the disclosure of a record of private or public body.<sup>2008</sup> The study found that in terms of the law, the granting of access to state information should be the rule, and that refusal is the exception.<sup>2009</sup> Studies however show that there are challenges facing public and private bodies in complying with the requirements relating to disclosure of information.<sup>2010</sup> Notwithstanding, the general trend is that the courts appear disposed to rule that the exercise of the discretionary power to refuse access should be carried out in a manner that favours disclosure as the underlying substance of PAIA.<sup>2011</sup>

The study found that given the probability that hydraulic fracturing will be undertaken by private enterprises, the provisions of PAIA are sufficiently aligned as necessary to suit the requirements for access to documents from private bodies.<sup>2012</sup> Section 50 of PAIA affirms the right of access to information contained in the records of private bodies if “that record is required for the exercise or protection of any rights.” Furthermore, private bodies may be mandated to disclose information on grounds of public interest regardless of whether the information relates to commercial information of a third party, confidential information of a third party, and commercial information of a private body, including trade secrets, financial, commercial, scientific or technical information.<sup>2013</sup>

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<sup>2006</sup> See para 4.3.2.1.

<sup>2007</sup> See para 4.4.1.

<sup>2008</sup> See para 4.4.1.2.

<sup>2009</sup> See para 4.4.1.1.

<sup>2010</sup> See para 4.4.1.4.

<sup>2011</sup> See para 4.4.1.4.1.

<sup>2012</sup> See para 4.4.1.5.

<sup>2013</sup> See para 4.4.1.5.1.

In terms of international law, South Africa is yet to comply with the requirements of the *Stockholm Convention on Persistent Organic Pollutants* in that express statutory provision which forbids the classification of information on health and safety of humans and the environment as confidential is lacking.<sup>2014</sup> Similarly, statutory provisions are required in South Africa to mitigate the effect of climate change as required by the UNFCCC, and to provide mechanisms for access to information on the subject.<sup>2015</sup>

In concluding chapter 4, it was argued that applied to hydraulic fracturing, access to information as a leverage right can make the realisation of other rights possible in that it could be applied by people whose rights may be infringed in one way or the other by operators.<sup>2016</sup>

### *7.3.2 Access to information: Recommendations*

The lessons drawn from the discussion in chapter 4 that may strengthen the South African legal framework pertaining to hydraulic fracturing in terms of protecting the right of access to information and its application to the protection of procedural and substantive environmental rights are presented below.

- 1) As a party to the *Stockholm Convention on Persistent Organic Pollutants* South Africa has to comply with article 9(5) of the Convention, which provides *inter alia* that “information on health and safety of humans and the environment shall not be regarded as confidential.” The inclusion of a similar provision in local regulations may diminish the potential abuse of claims of trade secrets by hydraulic fracturing operators. The state’s obligation under article 10(1) of the Convention should also extend to the provision of information on persistent organic pollutants (POPs) to the public, especially the development and implementation of public awareness programmes for vulnerable people on the effects of POPs on their health.<sup>2017</sup>

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<sup>2014</sup> See para 3.2.1.4.

<sup>2015</sup> See para 3.2.1.2.

<sup>2016</sup> See para 4.4.3.

<sup>2017</sup> See para 3.2.1.4.

- 2) Hydraulic fracturing operations involve the use of different types of chemicals at different volumes. The adverse impact of some of the chemicals on humans and the environment is sometimes unknown.<sup>2018</sup> As a party to the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, South Africa must comply with the procedure established to guide the realisation of PIC set by the Convention to ensure that banned or severely restricted chemicals (contained in the list of chemicals subject to PIC in its Annex III) are not exported to the country.<sup>2019</sup>
- 3) As a party to the UNFCCC, there is a need to put appropriate structures in place to ensure that the country's obligation to provide public access to information on climate change and its effects. The prospective structures should also cover public access to information on the obligations of South Africa under the *Kyoto Protocol to the United Nations Framework on Climate Change* and the various action plans made thereunder.<sup>2020</sup> Operators of hydraulic fracturing should be compelled to provide relevant information to the public on a periodical basis on the level of emissions of GHG in a manner that the potentially affected communities can appreciate and understand. The regulator must also provide periodical reports to the public on action taken to sanction erring operators who exceed the acceptable levels of emission set for the industry.<sup>2021</sup>
- 4) The regulation of hydraulic fracturing in South Africa should incorporate provisions similar in substance to that in section 301 of the EPCRA which require any facility manufacturing, processing, or storing hazardous chemicals to prepare MSDS, describing therein the properties and health effects of the chemicals, and to submit copies of MSDS to state and local authorities, as well as the fire departments, showing the inventories of all on-site chemicals for

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<sup>2018</sup> See para 2.4.2.

<sup>2019</sup> See para 3.2.1.3.

<sup>2020</sup> See para 3.2.1.2.

<sup>2021</sup> See para 3.2.1.2.

which the MSDS exist. The HF Regulations should expressly indicate that chemicals used in the process of hydraulic fracturing shall not be subject to any claim of confidentiality.

- 5) Any claim of trade secrets in respect of chemicals reported under the prospective legislation or regulation should be accompanied by a substantiation form to justify the claim. The absence of provisions in the HF Regulations as to the process for securing the disclosure of information relating to chemicals used in hydraulic fracturing fluid may result in litigation if a hydraulic fracturing operator insists on confidentiality of information on the basis of trade secrets. Litigation unfortunately costs money and time, which may not readily be available in certain circumstances, especially to vulnerable persons.<sup>2022</sup> There is a need for the PAIA to define what constitutes “trade secrets” and “confidential commercial information,” and to subject each of them to the requirement of section 32(1)(b) of the Constitution.
  
- 6) The specific identity of any chemical used in hydraulic fracturing should not be subject to confidentiality based on a trade secret or confidential proprietary information. Health professionals and responders to emergencies arising from spills in hydraulic fracturing should not be left guessing in deciding the best course of action to deal with emergencies. The Pennsylvania Supreme Court in *Robinson Township v Commonwealth of Pennsylvania* decided that the provision of legislation which limits the disclosure of chemicals in hydraulic fracturing on the basis of trade secret and confidential proprietary information is unconstitutional.<sup>2023</sup> Therefore, in response to a spill or release, nothing is to restrict disclosure of information to responders, public health officials, emergency managers, and persons who may have been directly and adversely affected or aggrieved by the spill or release. The decision in *Robinson Township v Commonwealth of Pennsylvania* may be relevant as a persuasive

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<sup>2022</sup> See para 4.2.2.

<sup>2023</sup> See para 4.2.2.

authority in the interpretation of section 32(1)(b) of the Constitution in relation to hydraulic fracturing.<sup>2024</sup>

- 7) It may be dangerous to limit the examination of hydraulic fracturing wells and monitoring of operations to the operators alone. They may cut corners or do a self-serving job. Discretion on the part of the regulator relating to monitoring should be eliminated. The decision of the Supreme Court of Pennsylvania in *Robinson Township and Others v Commonwealth of Pennsylvania and Others* that wrongful exercise of discretion or waivers weakens the regulator's powers to regulate and enforce environmental standards is worthy of consideration by local courts.<sup>2025</sup> In addition, the public should not be excluded in monitoring hydraulic fracturing operators to ensure that relevant information is provided at all times.
  
- 8) Effective information management involving different strategies targeted at different segments of the population is likely to culminate in increased awareness, which in turn creates capacity to participate in pro-environmental behaviour.<sup>2026</sup> The treatment of information relating to every aspect of hydraulic fracturing in line with the objectives stated in chapter 40.5 of Agenda 21 will facilitate the development of useful indicators of sustainable development of shale gas resources in South Africa.<sup>2027</sup>
  
- 9) There is value in the mandatory requirement of article 5 of Directive 2016/943/EC applicable in the UK regarding the potential effect of trade secrets.<sup>2028</sup> The provision demands that claims of trade secrets should not forestall the enforcement of an access to information right, or conceal wrongdoing or illegality if disclosure is in the public interest, a provision such as this in the HF Regulations could enhance the protection of procedural

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<sup>2024</sup> See para 4.2.2.

<sup>2025</sup> See para 4.2.2.

<sup>2026</sup> See para 2.4.6.

<sup>2027</sup> See para 2.4.6.

<sup>2028</sup> See par 3.2.2.2.5.

environmental rights.<sup>2029</sup> It is further recommended that the South African regulation of hydraulic fracturing include an express provision that a claim of trade secrets or confidential commercial information is not enforceable if it will violate the enforcement of the right of access to information, or if it will conceal wrongdoing or illegality.

- 10) The HF Regulations should require that if an operator declines to access to information, a notice of refusal should be given to the requester. The reason(s) for refusal, based on the content and substance of the request, with reference to the provisions of the law on which the refusal is based, and information advising the requester of the process for a review of the decision should be stated in the notice.<sup>2030</sup> Deemed refusal under section 27 of the PAIA may encourage uncooperative or apathetic IOs to disregard requests for information.

#### ***7.4 Just administrative action***

Chapter 5 reviewed the legal framework of the right to just administrative action in relation to hydraulic fracturing from the perspectives of Pennsylvania in USA, the UK and South African law, drawing lessons from the foreign jurisdictions for possible improvement of the South African legal framework in relation to the protection of procedural environmental rights.

##### *7.4.1 Just administrative action: Lessons learned*

The legal framework of administrative justice in Pennsylvania was discussed in paragraph 5.2.1. The provisions of the AAL give effect to the constitutional right to challenge administrative action.<sup>2031</sup> The provisions of the Pennsylvanian AAL relating to judicial review of administrative action are clear to the effect that all exercise of public power is subject to it regardless of any statutory provision indicating that “there shall be no appeal from an adjudication of an agency, or that the adjudication

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<sup>2029</sup> See para 3.2.2.2.5.

<sup>2030</sup> See para 4.4.

<sup>2031</sup> See para 5.2.1.

of an agency shall be final or conclusive, or shall not be subject to review."<sup>2032</sup> However, the recognition that the AAL is not sufficiently comprehensive regarding its provisions on adjudicatory procedure resulted in the passing of the GRAPP that introduced new set of procedural rules, to give effect to section 9 of article V of the Constitution of Pennsylvania.<sup>2033</sup> To ensure that an ordinary person aggrieved by an administrative action gets justice, the GRAPP requires that administrative proceedings should not be subjected to strict rules of procedure by allowing evidence which a reasonable mind will accept as sufficient to support the conclusion.<sup>2034</sup>

The study found that the legislature of Pennsylvania is currently engaged in the review of AAL based on the MSAPA's recommendation for the establishment of the OAH.<sup>2035</sup> The Joint State Government Commission's proposal is that the adoption of OAH will facilitate the impartiality of ALJs as fact-finders, thereby improving the quality of hearings and decisions. Furthermore, the management and training of all ALJs in the hands of experienced officers whose understanding and appreciation of the duties and responsibilities of the office come from their actual performance of such duties and responsibilities.<sup>2036</sup> There is value in the consideration of a similar procedure in South Africa.

Unfortunately, however, the study found that the AAL stops short of the requirement of section 10(c) of the APA, a federal law which does not make the exhaustion of remedies a pre-requisite for judicial review of administrative action.<sup>2037</sup> Consequently, a failure to seek and exhaust administrative remedies made available by an agency in Pennsylvania may foreclose judicial review.<sup>2038</sup> A position like that is not likely to assist victims of regulatory failure in relation to hydraulic fracturing in South Africa.

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<sup>2032</sup> See para 5.2.2.

<sup>2033</sup> See para 5.2.2.

<sup>2034</sup> See para 5.2.2.

<sup>2035</sup> See para 5.2.2.

<sup>2036</sup> See para 5.2.2.

<sup>2037</sup> See para 5.2.1.

<sup>2038</sup> See para 5.2.2.

The legal framework of administrative justice in the UK is discussed in paragraph 5.3.1. Even though administrative justice is largely in the purview of the common law, the increasing number of administrative tribunals and inquiries have resulted in legislation introducing some element of uniformity in processes.<sup>2039</sup> The study found that the grounds for review have however not been codified.<sup>2040</sup>

The study found that a misapplication of the doctrine of parliamentary supremacy may result in situations where legislation gives government officials the authority to act without check, and where judges may be forbidden from declaring such action unreasonable.<sup>2041</sup> This may result in arbitrariness. That recognition justifies an increased application of stringent procedural requirements to administrative action in the UK. In this regard, the study found that the enactment of the HRA caused a radical change in the role of domestic courts in the UK.<sup>2042</sup> Section 3(1) of the HRA provides that “as far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [European] Convention rights.” Accordingly, section 6(1) of the HRA provides that “it is unlawful for a public authority to act in a way which is incompatible with a Convention right.” The HRA therefore can be said to provide sound protection against abuse of power by the state, giving the courts appropriate tools to uphold freedoms, and to ensure a balance in the exercise of powers by each of the legislature and the executive.<sup>2043</sup>

The right to just administrative action in South Africa is discussed in paragraph 5.4. The development of shale gas by hydraulic fracturing is subject to the provisions of the MPRDA, among other statutes. Section 6 of MPRDA is clear on the effect that any administrative action or decision taken should comply with the principles of lawfulness, reasonableness and procedural fairness, and that written reasons must accompany decisions when requested.<sup>2044</sup> These are principles of administrative

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<sup>2039</sup> See para 5.3.1.

<sup>2040</sup> See para 5.3.1.

<sup>2041</sup> See para 5.3.2.

<sup>2042</sup> See para 5.3.1.1.

<sup>2043</sup> See para 5.3.2.

<sup>2044</sup> See para 5.4.1.



justice recognised and protected by section 33 of the Constitution. Furthermore, the PAJA, the legislation envisaged in section 33(3) of the Constitution, addresses the control of the exercise of public power with provisions to ensure that the exercise of power and decision-making that is fair, rational and lawful highlights the underlying protection of the right to just administrative action.<sup>2045</sup> The ambit of the PAJA is extended to cover the exercise of power by a private body (whether a natural or juristic person) exercising public power, when the exercise of power affects the rights of any person and has a direct, external legal effect.<sup>2046</sup>

The study found that it may be difficult to prevent potential abuse associated with regulatory failure in hydraulic fracturing considering the provision of section 7(2) of the PAJA that "... no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."<sup>2047</sup> This is because a potential applicant may find it impossible to exhaust internal remedies due to the uncooperative approach of a government functionary or agency. The study noted that the caution advocated by the Constitutional Court in *Wycliffe Simiyu Koyabe and Others v Minister for Home Affairs and Others*<sup>2048</sup> is apposite in this regard. The court referred to the opinion of the African Commission on Human and Peoples Rights, that for the requirement to be operative the local remedy must be "available, effective and sufficient" to redress the complaint. The court further held that section 8(1) of the PAJA authorises the court to grant any order which is just and equitable, and if necessary "in exceptional cases" to set aside an administrative decision and substitute or vary it or correct a defect resulting from the action.<sup>2049</sup> The application of section 8(1) of the PAJA and the interpretation thereof in *Koyabe* should take precedence over the effect of any application of section 7(2) of the PAJA.<sup>2050</sup>

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<sup>2045</sup> See para 5.4.1.1.

<sup>2046</sup> See para 5.4.1.1.1.

<sup>2047</sup> See para 5.4.2.3.

<sup>2048</sup> 2009 ZACC 23.

<sup>2049</sup> See para 5.4.2.3.

<sup>2050</sup> See para 5.4.2.3.

In relation to hydraulic fracturing, it is important that regulations should be seen to protect the public interest and other stakeholders, including the ordinary person in the community from its potential adverse impacts on the environment and human health. The study found that administrative actions have a far greater impact on individual rights because they are concerned with everyday practice.<sup>2051</sup> If the law and the recommendations presented below regarding the right to just administrative action are effectively implemented, administrative justice as compelled by the Constitution to entrench the rule of law will strengthen the protection of procedural and substantive environmental rights in South Africa.<sup>2052</sup>

#### *7.4.2 Just administrative action: Recommendations*

The following lessons drawn from discussion in chapter 5 could strengthen the South African legal framework pertaining to hydraulic fracturing in terms of protecting the right to just administrative action and its application to the protection of procedural and substantive environmental rights.

- 1) Considering that a significant percentage of the people living in the Karoo where hydraulic fracturing will take place are unlikely to understand the technicalities of hydraulic fracturing and its consequences, it is desirable that regulations and/or communication relating thereto be drafted in language sufficiently clear to understand.<sup>2053</sup> There is no reason why communication and notices relating to hydraulic fracturing should not be translated into the languages predominant in the subject location. In the UK, for example, the relevant government departments have produced many publications designed to inform the general public on different aspects of shale gas development and regulation.<sup>2054</sup>
- 2) Administrative proceedings should be conducted in a manner that the ordinary person can understand. Hydraulic fracturing and environmental

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<sup>2051</sup> See para 5.4.

<sup>2052</sup> See para 5.4.

<sup>2053</sup> See para 5.4.1.1.3.1.

<sup>2054</sup> See para 1.4.1.1.

matters are technical enough. The application of the complex rules of procedure in administrative proceedings will further alienate vulnerable persons who may have been victims of public authorities' maladministration or victims of harm caused by hydraulic fracturing operators. Section 505 of Pennsylvania's AAL mandates administrative agencies to conduct proceedings without technical rules of evidence and to receive any relevant evidence having probative value regardless of the manner of presentation.<sup>2055</sup> Similar provisions exist in section 31.2 of the GRAPP.<sup>2056</sup> The process will enable vulnerable claimants to better present their cases even where they are not represented by counsel. A similar process is worthy of consideration for possible application in South Africa.

- 3) While regular court proceedings may have provisions for interpreters, extending similar gestures to parties of administrative proceedings by legislation is desirable. The practice instituted in sections 561-568 of the AAL regarding the comprehensive provisions covering the certification of interpreters, appointment, their role in proceedings, fee schedule, standards of professional conduct, and what steps to take upon non-availability of a qualified interpreter, will further assist in the presentation of the cases of vulnerable people is worthy of consideration for possible application in South Africa.<sup>2057</sup> Similar provisions for the provision for the engagement of interpreters for persons who are deaf as provided for in sections 581-588 of the AAL, or assistance to persons with other forms of disability is also desirable.<sup>2058</sup>
  
- 4) The use of pre-hearing conferences in administrative proceedings introduced by the GRAPP to facilitate opportunities for settlement is reported to expedite administrative proceedings.<sup>2059</sup> This is worthy of consideration and possible

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<sup>2055</sup> See para 5.2.1.

<sup>2056</sup> See para 5.2.3.

<sup>2057</sup> See para 5.2.3.

<sup>2058</sup> See para 5.2.3.

<sup>2059</sup> See para 5.2.2.

application in South Africa. Pre-hearing conferences may result in the simplification of issues in contention thereby shortening the duration of proceedings, and possibly eliminate or reduce the need for judicial review.<sup>2060</sup>

- 5) MSAPA's recommendation for the adoption of the OAH to conduct administrative adjudications has the potential to engender fairness and impartiality on the part of ALJs in the minds of the public, improve the quality of decisions, facilitate training and improve the experience of ALJs, streamline administration structure thereby saving money, and create an experienced government-wide and politically insulated career service to attract quality individuals.<sup>2061</sup> Consideration and adoption of a similar structure may have similar effects in South Africa.
  
- 6) Judicial deference is recommended to deal with the complexity of the tasks ordinarily undertaken by public authorities, and that in itself is consistent with the concerns for individual rights.<sup>2062</sup> The regulation of hydraulic fracturing should not facilitate exclusionary processes or be applied in a manner that will result in any sacrifice arising therefrom being borne in a disproportionate and unjustifiable manner, the more so, if those who are most adversely affected are themselves from a disadvantaged sector of the community.<sup>2063</sup> If the latter occurs, the courts should be open in every sense of the word, to allow victims to seek remedies. The cliché that the judiciary is the last hope of the common man is not lost on the draftsman of the Constitution. Section 38 of the Constitution provides *inter alia* that a person "has the right to approach a court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief."

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<sup>2060</sup> See para 5.2.2.

<sup>2061</sup> See para 5.2.3.

<sup>2062</sup> See para 5.4.2.

<sup>2063</sup> See para 5.4.3.

## **7.5 Access to courts**

Chapter 6 is a critical discussion of the legal framework of the right of access to courts in relation to hydraulic fracturing from the perspectives of Pennsylvania in the USA, the UK and South African law, with a view to draw lessons from the foreign jurisdictions for possible improvement of the South African legal framework in relation to the protection of procedural environmental rights.

### *7.5.1 Access to courts: Lessons learned*

The study found that when individuals and communities face the types of challenges arising from the adverse impacts of hydraulic fracturing,<sup>2064</sup> one of the most viable solutions is for the victims to approach the court to seek remedies. The courts are duty bound to deliver justice without partiality and ensure that due process is followed.<sup>2065</sup> However, the study found that it is difficult for the poor and vulnerable to access the courts for relief when their rights are violated.<sup>2066</sup> This is due largely to financial constraints, sometimes coupled with lack of knowledge regarding issues surrounding violation and the complex process of judicial proceedings.<sup>2067</sup>

The study found that the state of Pennsylvania presents a good example of the role that the courts can play in ensuring that justice is done when people have absolute confidence in the courts to right the wrongs which may be caused by hydraulic fracturing.<sup>2068</sup> The cases of *Cabot Oil and Gas Corporation v Vera Scroggins*, and *Robinson Township v Commonwealth of Pennsylvania*, point to the fact that notwithstanding the benefits to the economy the risks and uncertainties of hydraulic fracturing cannot and should not be overlooked to ensure that human rights are not compromised.<sup>2069</sup> Similarly, the decision of the SCOTUS in *Massachusetts v Environmental Protection Agency*<sup>2070</sup> that a regulator cannot avoid its statutory obligation to make a reasoned judgment by basing its inaction on the

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<sup>2064</sup> See para 2.4.

<sup>2065</sup> See para 6.4.3.

<sup>2066</sup> See para 6.4.2.2.

<sup>2067</sup> See para 6.4.2.4.

<sup>2068</sup> See para 6.2.2.2.

<sup>2069</sup> See para 6.2.2.2.

<sup>2070</sup> 2007 549 US 947.

scientific uncertainty surrounding a subject creates a basis to debunk the claim of proponents of hydraulic fracturing, who argue that because its harmful impact is not supported by science, it may not be possible to prove that it violates rights.<sup>2071</sup> Furthermore, in *State of Indiana and Others v Commonwealth of Massachusetts*,<sup>2072</sup> the SCOTUS pointed out that notwithstanding that a court lacks the expertise on the subject of litigation, or because of the complexity or novelty of the merits the court has a duty to exercise its jurisdiction to settle disputes and provide remedy.<sup>2073</sup>

The study found that some claims against oil and gas companies are settled out-of-court with agreements forbidding parties from discussing the allegations, evidence and the settlement amounts.<sup>2074</sup> This type of practice impacts on the public's right to have access to information and may constitute an impediment to the development of jurisprudence in this important area of the law. Although section 11 of article 1 of the Constitution of Pennsylvania, and the AJA guarantee to everyone equal access to justice and the availability of civil legal services for indigent persons who cannot afford legal representation, the study found that legal aid for civil cases including claims relating to the violation of an environmental right is not readily available due to funding constraints.<sup>2075</sup>

The legal framework of the right of access to courts in the UK is discussed in paragraph 6.3. In the UK, access to courts has for many years been formulated and developed through the common law subject to the occasional intrusion of statutes.<sup>2076</sup> For example, the HRA incorporated some of the provisions of the European Convention relating to human rights into domestic law, although the role of the courts in the enforcement of rights has not in any way been diminished.<sup>2077</sup>

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<sup>2071</sup> See para 6.2.2.1.

<sup>2072</sup> 2018 138 S Ct 1585.

<sup>2073</sup> See para 6.2.2.1.

<sup>2074</sup> See para 6.2.2.1.

<sup>2075</sup> See para 6.2.2.4.

<sup>2076</sup> See para 6.3.1.

<sup>2077</sup> See para 6.3.2.

The UKSC protects for example, the interests of claimants in torts against the actions of oil and gas entrepreneurs.<sup>2078</sup>

The study found that the poor and the vulnerable face similar challenges in the UK as in the other jurisdictions considered. Unfortunately, the LASPO Act enacted to save public funds by introducing stringent conditions for the qualifications required to be entitled to legal aid only compounded matters for prospective applicants, resulting in a 70% decline in the number of civil cases qualifying for legal aid.<sup>2079</sup> Therefore, the assumption that those affected by hydraulic fracturing in the UK will have recourse to the courts for remedies does not hold much promise to the poor or vulnerable victims who may lack the financial means to seek redress in the courts.<sup>2080</sup>

In paragraph 6.4, the study engaged in a critical discussion of the right of access to courts in South Africa. In South Africa, section 34 of the Constitution protects the right of access to courts. Section 9(1) of the Constitution protects the equality of all persons before the law. Reading the two provisions together, it can be argued that no party to court proceedings should benefit from an enhanced status or be subject to a diminished status compared to another party, and in that regard, the Constitutional Court has held that litigants should not be treated disadvantageously.<sup>2081</sup>

The study found that the provisions of section 38 of the Constitution and section 32 of NEMA are wide enough to permit standing regarding potential actions to protect the right to an environment not harmful to health and wellbeing.<sup>2082</sup> The provisions should also sufficiently give standing to applicants seeking to enforce rights potentially violated by hydraulic fracturing. However, evidence abounds that big corporates take advantage of statutory provisions to advance their position regardless of any hardship their action may cause to counterparties.<sup>2083</sup>

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<sup>2078</sup> See para 6.3.3.2.

<sup>2079</sup> See para 6.3.2.4.

<sup>2080</sup> See para 6.3.2.4.

<sup>2081</sup> See para 6.4.2.2.

<sup>2082</sup> See para 6.4.2.3.

<sup>2083</sup> See para 6.4.2.2.

Furthermore, the study found that an ordinary person seeking to enforce environmental rights without legal representation will face challenges.<sup>2084</sup> The case of *Johan de Cock v Minister of Water Affairs and Forestry and Others*<sup>2085</sup> highlights the plight of an ordinary litigant in environmental cases. Poor and vulnerable persons may have to rely on the assistance of individuals or organisations acting in the public interest in terms of section 38(d) to enforce rights violated by hydraulic fracturing.<sup>2086</sup>

The study found that none of the three jurisdictions considered has an effective solution to the problem besetting the application of legal aid to civil cases which is largely attributable to shortage of funding. As long as the problem remains unsolved, the right of access to courts in civil cases for indigent persons is likely to remain a mirage.<sup>2087</sup>

The study found that lack of a constitutional provision to address the issue of legal aid to indigent persons in civil cases may impede the right of access to courts.<sup>2088</sup> It also accentuates the inequality in the South African society. While it is appreciated that funding may be a constraint to the implementation of a constitutional right to legal aid in civil cases, its inclusion as a constitutional right will impose an obligation on the state to act responsibly. If necessary, the court may determine the reasonability of issues surrounding the implementation.<sup>2089</sup>

The study found that although the courts in Pennsylvania appear to have displayed boldness in ruling against the oil and gas industry and hydraulic fracturing operators when their business violate human rights, there is not much that South Africa can copy from either the UK or the state of Pennsylvania to improve upon the legal framework of access to courts. In the UK and Pennsylvania, the current state of the

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<sup>2084</sup> See para 6.4.2.3.

<sup>2085</sup> 2005 ZACC 12.

<sup>2086</sup> See para 6.4.2.3.

<sup>2087</sup> See paras 6.2.2.4, 6.3.2.4, and 6.4.2.4 for the situation in Pennsylvania, the UK and South Africa respectively.

<sup>2088</sup> See para 6.4.2.4.

<sup>2089</sup> See para 6.4.2.4.



law in relation to ensuring that people have equal access to courts, especially regarding principle of standing appears weaker than the position in South Africa.<sup>2090</sup>

In South Africa, the Bill of Rights is made a cornerstone of democracy affirming the values of human dignity, equality and freedom.<sup>2091</sup> However, in a country where a large percentage of the population has limited education which may prevent them from being aware of their rights constitutional litigation will provide the opportunity to redress imbalances.<sup>2092</sup> The Constitution guarantees access to courts “as a manifestation of a deeper principle ... that any constraint upon a person or property shall be exercised by another only after recourse to a court recognised by the law of the land.” Accordingly, far-reaching constitutional and statutory provisions regarding standing are provided to ensure that the doors of the courts are not shut against any potential quest to redress any infringement of right, including those traceable to hydraulic fracturing.<sup>2093</sup>

#### *7.5.2 Access to courts: Recommendations*

While there may not be many lessons for South Africa to be drawn from the perspectives of the UK and Pennsylvania regarding the right of access to courts, prospects still exist for the reinforcement of the local legal framework on the subject. These are highlighted in the recommendations below.

- 1) Potential cases arising from the operations of hydraulic fracturing are likely to be complex and novel. The courts should not be fastidious in encouraging formalism in the application of the rules of court because the rules are not an end in themselves but to “secure the inexpensive and expeditious completion of litigation before the courts.”<sup>2094</sup> Technicalities of the rules of procedure should be relaxed and applied flexibly. For example, Pennsylvania’s EHB is not bound by technical rules of evidence, hence, the EHB will admit any evidence that is considered

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<sup>2090</sup> See para 6.4.

<sup>2091</sup> See section 7(1) of the Constitution.

<sup>2092</sup> See para 6.4.2.3.

<sup>2093</sup> See para 6.4.2.

<sup>2094</sup> See para 6.4.3.

relevant and material with some probative value.<sup>2095</sup> The courts in South Africa should be considerate of the challenges faced by potential victims in the Karoo when they seek the courts' intervention to redress wrongs potentially traceable to hydraulic fracturing.

- 2) The extension of legal aid to indigent persons in civil cases by legislation in Pennsylvania<sup>2096</sup> is a step in the right direction, which is worthy of consideration for adoption in South Africa. The seeming lack of commitment on the part of the state to fund civil legal aid may be due to a lack of constitutional or statutory provision more than a lack of funding.<sup>2097</sup> It would appear that LASA considers its mandate as one derived from the provision of section 35 of the Constitution regarding legal aid to the accused in criminal trials.<sup>2098</sup> It is recommended that a constitutional obligation be imposed on the state to enforce the right of indigent persons to legal aid in all types of cases. It is recommended that the right to legal aid in civil cases be implemented as an element of the constitutional right of access to courts. Although funding may be a constraint to its implementation, its implementation as a constitutional right will impose an obligation on the state to act responsibly. If necessary, the court may determine the reasonability of issues surrounding the implementation.<sup>2099</sup> By their nature, social and economic rights play a pivotal role in guiding the government and the courts towards the consideration of the values and material realities of the society in the interpretation of those rights.<sup>2100</sup>

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<sup>2095</sup> See para 6.2.2.1.1.

<sup>2096</sup> See para 6.2.2.4.

<sup>2097</sup> See para 6.2.2.4.

<sup>2098</sup> See para 6.4.2.4.

<sup>2099</sup> See para 6.4.2.4.

<sup>2100</sup> See para 6.4.2.3.

- 3) The implementation of the constitutional provisions relating to direct access for individuals to the Constitutional Court needs to be re-examined. By virtue of section 167(6)(a), the Constitutional Court should be a court of first instance for individuals; and should allow direct access “when it is in the interests of justice and with leave of the Constitutional Court.” The Court should assist ordinary persons without legal support to appear before it and convince that his case has merits.<sup>2101</sup> The Court may selectively pick cases involving parties subject to some disadvantages who would not otherwise be served by the existing system.<sup>2102</sup> Cases involving hydraulic fracturing in which the poor and vulnerable persons are parties should be bona fide candidates for a process like this, specifically based on the novelty and complexity of the issues involved, as well as the likely costs.
  
- 4) It is recommended that the superior courts review cause lists of courts periodically to determine whether or not there are cases in which poverty, technicality of procedure or other reasons may justify intervention by the courts.<sup>2103</sup> An action of the court in that regard in *Nedbank Limited v Thobejane and Related Matters*,<sup>2104</sup> resulted in the consolidation and resolution of at least 13 cases, and a recognition that the practice which allows a plaintiff to choose any forum that suits him is outdated because “it loses sight of the deep inequalities in our society and the constitutional imperative of access to justice.”<sup>2105</sup>

## **7.6 General recommendations**

For development to be meaningful and beneficial, the obstacles hindering people from taking advantage of opportunities of the development to improve their lives

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<sup>2101</sup> See para 6.4.2.3.

<sup>2102</sup> See para 6.4.2.3.

<sup>2103</sup> See para 6.4.2.2.

<sup>2104</sup> 2018 JOL 40451 (GP).

<sup>2105</sup> See para 6.4.2.2.

should be removed.<sup>2106</sup> Therefore, developmental goals should include factors that will facilitate the removal of barriers that impede people and communities from exercising their rights and enhance their capacity. To achieve this objective, development must heed human rights, among other factors. If the development envisaged from hydraulic fracturing is to be meaningful, it must enhance human rights and be executed in a way that respects and protects fundamental rights, and specifically, procedural environmental rights.<sup>2107</sup>

Based on the general observations highlighted in paragraph 7.2, the following are identified to address the challenges not related directly to procedural environmental rights, and that may involve further research. The general recommendations also present an agenda for potential future research.

- 1) There is a need to engage with all stakeholders in the planning and the regulation of water use for hydraulic fracturing. This requires the strengthening of the current legal framework on water *vis-à-vis* prospective legislation and regulations in line with the recommendation of NWRS 2 that water resource protection and usage should be based on a participatory approach involving all stakeholders.<sup>2108</sup>
- 2) There is a need for caution in South Africa to ensure that socio-economic benefits are not elevated to trump health concerns. It is recommended that hydraulic fracturing operations should not be flagged off until there is a strong level of assurance that technical and administrative regulations can effectively control its adverse impacts on human health.<sup>2109</sup>
- 3) It is necessary to evaluate prospective development prior to its implementation to ensure that the procedures are “transparent and accessible, holistic and comprehensive, scientifically rigorous, adaptive and

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<sup>2106</sup> See para 2.4.

<sup>2107</sup> See para 2.4.

<sup>2108</sup> See para 2.4.1.

<sup>2109</sup> See para 2.3.

robust, inclusive and collaborative.”<sup>2110</sup> This is likely to balance competing socio-economic interests of stakeholders against the anticipated impact on the environment to ensure that the project meets the needs of the present without compromising the interest of future generations.

- 4) A private entity that is granted rights over shale gas should not be permitted to exploit the resource to the detriment of the environment or the people without ensuring that the benefit thereof will be enjoyed by future generations.<sup>2111</sup> Government should act as a trustee of the environment and ensure that no harm will affect people and environment as a consequence of hydraulic fracturing.<sup>2112</sup>
- 5) HF Regulations should provide for a scheme similar to the Shale Wealth Fund in the UK, or that based on the commitment of the UKOOG to provide financial benefits to the host communities including a share of revenues from shale gas development in the UK.<sup>2113</sup> The scheme should be funded by hydraulic fracturing operators for the benefit of the host communities, so that municipalities where hydraulic fracturing is to take place will enjoy some direct benefit, rather than all revenues first going to the national government with the municipalities hoping for crumbs in due course. Other projects that may be supported by the scheme include environmental programmes, and public awareness programmes regarding hydraulic fracturing and its impact.
- 6) Public interest organisations should engage in partnerships with the poor and the vulnerable to pursue the realisation of environmental rights and interests peculiar to the latter. The poor often bear the brunt of environmental abuse. This should attract a greater interest on the part of public interest organisations.<sup>2114</sup> While parties’ rights in judicial proceedings to pursue

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<sup>2110</sup> See para 2.4.3.

<sup>2111</sup> See paras 1.1 and 4.4.1.5.

<sup>2112</sup> See para 2.4.4.

<sup>2113</sup> See para 1.2.1.1.

<sup>2114</sup> See para 6.4.2.3.

legitimate claims of interest to them cannot be faulted, those who wear the badge of public protection would do much better if they also consider the plight of the poor and vulnerable in the society and assist them to enforce their rights.

- 7) The final decision as to whether South Africa will proceed with hydraulic fracturing lies with the government. If the decision is to proceed, there should be a commitment on the part of the government that the exploitation of shale gas resources should benefit the people of South Africa, and particularly, the communities who will bear the brunt of hydraulic fracturing. If that cannot be done, then, hydraulic fracturing should not take place.

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