

ANALYSIS OF THE FRAGMENTED LEGAL REGIME PERTAINING TO REHABILITATION MEASURES FOR WETLANDS: A SOUTH AFRICAN PERSPECTIVE – PART 1*

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ABSTRACT

Wetlands are disappearing and it is an international dilemma. Many efforts have been made to ensure its protection and conservation, including rehabilitation. Rehabilitation measures have been adopted in policies of various jurisdictions. In South Africa, the wetlands legislative framework is fragmented. It was submitted that a wetlands policy is in the pipeline for South Africa. As opposed to the research on the general protection of this resources, Part 1 of this research aimed, by way of a documentary analysis of the legislative wetland framework, journal articles, books and case law, to provide what the extent of the fragmentation, specifically, rehabilitation measures were, as well as the effect thereof. Part 2 of this research explicitly focused on rehabilitation measures taken by three other jurisdictions, as well as a design for such in South Africa's envisaged policy. The results for Part 1 demonstrated the need to clarify and consolidate terms for achieving the specific goals. The failure to may cause uncertainty for regulators and implementors, as well as unnecessary interpretations by courts, if the literal approach was adequate. Further, it demonstrated the extension of fragmentation from legislation to institutions.

Keywords: fragmentation, institutional, legislative, management, policies, protection, rehabilitation, restoration, repair, wetlands.

1 INTRODUCTION

The loss and degradation of wetlands, considering the benefits that they offer to humans and the environment, is a concern. Prevention is better than cure. However, where rehabilitation is required, the presumption is that we are past prevention, but rehabilitation implies improvement, which entails making better. Many scholars have submitted that, generally, legislation aiming to protect and conserve wetlands in South Africa is fragmented (Glazewski [1], Kidd [2], Booys [3], Lemine [32]). To promote protection and conservation through laws, the recommendations by these scholars include passing wetland-specific legislation, policies, and advising that the initial failure by the legislature to single out wetlands was a missed opportunity. Pursuant to this concern, the Department Forestry, Fisheries and the Environment's *5-Year Strategic Plan (2019/20–2023/24)* has made provision for the development and implementation of a National Joint Wetland Management Policy (NJWMP), to be adopted by 2024. However, if the legislation aiming to protect and conserve wetlands is fragmented and therefore causes legal uncertainty; working with the notion that this body of legislation cater for rehabilitation too, the efforts may be chaotic, and streamlining is needed for coherency and consequently better wetlands management. This legislative framework is what guides wetlands management, generally. Thus, this research zooms in to focus specifically on consolidating certain aspects in the legislative framework pertaining to rehabilitation of wetlands for the anticipated NJWMP.

In South Africa, the Working for Wetlands (WfW) Team, a joint initiative by the Departments Agriculture, Land Reform and Rural Development, Water and Sanitation

* In memory of a water warrior, Mr Lewis Jonker.



(DWS), and Department of Forestry, Fisheries and the Environment, plays a vital role in the rehabilitation of wetlands [5]. The primary focus of this initiative includes projects focusing on rehabilitation, wise use and protection of wetlands which also supports the creation of employment and transferring of marketable skills [5]. This is an important initiative considering the DWS Revised Strategic Plan 2015/2016 to 2019/2020 advises that 65% of South Africa's wetlands are threatened. Thus, to prevent further loss or degradation by implementing rehabilitation measures, it is crucial to have an integrated legislative landscape to provide for the effective and nuanced implementation of wetland rehabilitation.

The importance of singling out rehabilitation is vital because “many remaining wetlands exist in degraded conditions” (Gardner [9]). It has been submitted that policy considerations and measures should cater for protection as well as restoration (read here to mean rehabilitation too) (Hamman et al. [10]). Thus, failing to singling-out rehabilitation and incorporating it into policy consideration could mean the total loss of the resource and its benefits. Furthermore, in appreciating the value of healthy wetlands, some governments have drafted “no net loss” policies which call for the reversal of the trend of wetlands losses – by way of making wetland restoration (read to include rehabilitation) an “instrumental component of these policies” (Gardner [9]). This idea is captured in the following, that: “[w]etlands contribute to all 17 SDGs...their conservation, wise use, and restoration represents a cost-effective investment” [11].

This paper aims to demonstrate the extent of the fragmentation of rehabilitation laws in South Africa's existing legislative framework and the effect thereof. Table 1 demonstrates the rehabilitation measures within the Constitution of the Republic of South Africa of 1996 (Constitution) and pieces of legislation.

2 THE EXTENT OF THE FRAGMENTATION AND THE CONSEQUENCES THEROF

2.1 The extent of the fragmentation

The weakness in this section of the work is that it focuses predominantly on the terminology and definitions that speak to rehabilitation, within the existing framework as demonstrated in Table 1. However, the strength lies in the argument that terminology and definitions as illustrated in Table 1, if carried through, convey great meaning for regulators, the executive and the judiciary, as will be espoused below. In support of wetlands rehabilitation measures, the binding sustainable development principles in the national environmental framework provide

- Section 2(4)(p): the costs of...environmental degradation and consequent adverse effect and ... environmental damage and adverse health effects must be paid for by those responsible...
- Section 2(4)(r): sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure.

With reference to section 2(4)(r), Lemine [23] submits that “specific attention” is a requirement of refinement in policymaking. The expectation is therefore that this refinement includes rehabilitation measures. Over and above this, on a global level of sustainable principles it was submitted that “Wetlands contribute to all 17 SDGs” [11].



Table 1: Rehabilitation laws within existing legislation [46].

Item	Provision	Page
1. Constitution of the Republic of South Africa of 1996 [12]	Section 24(a) “...environment that is not harmful to their health and well-being”	7
	Sections 24(b) “...measures that prevent pollution and ecological degradation; promote conservation; and secure ecological sustainable development and use of natural resources...”	
2. National Environmental Management Act 107 of 1998 (NEMA) [13]	Section 24N(2)(a)(iv) “The environmental management programme must contain the rehabilitation of the environment”	21–22
	Section 28(1) “Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimize and rectify such pollution or degradation of the environment”	25
3. National Water Act 36 of 1998 (NWA) [14]	Section 1 (definitions list) “‘protection’ in relation to a water resource, means the rehabilitation of the water resource”	12
	Section 137(2)(d) “The systems must provide for the collection of appropriate data and information necessary to access, among other matters the rehabilitation of water resources”	121
4. World Heritage Convention Act 49 of 1999 (WHCA) [15]	Article 5(d) “...appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage...”	20
	Article 22(a) “Assistance... by the World Heritage Fund may take the following forms studies concerning... problems raised by the protection, conservation, presentation and rehabilitation of the... natural heritage”	25
5. National Environmental Management: Integrated Coastal Management Act 24 of 2008 (NEMICMA) [16]	Article 22® “training of staff and specialists... identification, protection, conservation, presentation and rehabilitation of... natural heritage”	25
	Section 1(a) “coastal management includes the regulation, management, protection, conservation and rehabilitation of the coastal environment”	10



Table 1: Continued.

Item	Provision	Page
6. National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) [17]	Section 11(1)(m)(i) "The Institute may coordinate and implement programmes for the rehabilitation of ecosystems"	22
	Section 11(1)(m)(n) "The Institute may coordinate programmes to involve civil society in the rehabilitation of ecosystems"	22
7. Conservation of Agricultural Resources Act 43 of 1983 (CARA) [18]	Section 14(1) "... necessary for the restoration or reclamation of the natural agricultural resources..."	19
	Section 17(1) "The purpose of the declaration of areas as protected areas as protected areas are to rehabilitate and restore degraded ecosystems..."	18
8. National Environmental Management: Protected Areas Act 57 of 2003 (NEMPA) [19]	Section 1 "management" in relation to a protected area, includes control, protection, conservation, maintenance and rehabilitation of the protected area..."	9
	Long title "to provide for the conservation, use, management and control of land situated in mountain catchment areas..."	1
9. Mountain Catchment Areas Act 63 of 1970 (MCAA) [20]	Section 17(2)(b) "... Minister is of the opinion that urgent steps are required to rehabilitate a natural forest or a woodland..."	26
	Section 17(4)(c) "prohibit activity which may cause deforestation or prevent rehabilitation..."	27
10. National Forest Act 84 of 1998 (NFA) [21]	Section 17(4)(e) "prevent deforestation or rehabilitate the natural forest or woodland..."	27
	Section 17(9)(a) "... Minister may enter into an agreement with the owner of the land... (or) any other interested persons... steps to be taken... to rehabilitate the natural forest or woodland..."	27
	Section 17(10) "in the absence of an agreement... authorize officials of the Department or any other person to take steps to ...rehabilitate the forest or woodland..."	28
11. National Heritage Resources Act 25 of 1999 (NHRA) [22]	Section 1 (xix) "improvement in relation to heritage resources, includes the repair, restoration and rehabilitation of a place protected in terms of this Act"	5
	Section 42(2)(a) "SAHRA... may negotiate and agree... for the execution of a heritage agreement to provide for the conservation, improvement or presentation of... a heritage resource"	68



Figure 1: Illustrates the Zoar wetland before and after rehabilitation.

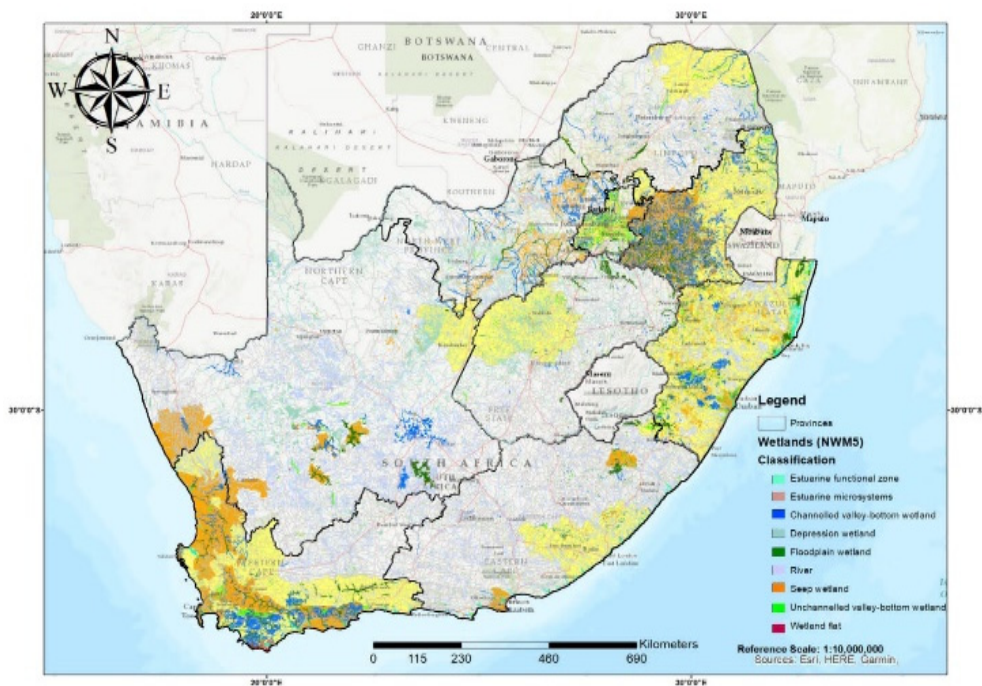


Figure 2: Illustration of inland wetlands and estuarine ecosystems in South Africa [47].

Table 1 sets out the provisions in the Constitution and the environmental legislation that provides a framework for the rehabilitation of the wetlands. The WET-Legal, under the auspices of the Water Research Commission makes provision for a “Roadmap to Wetlands and Wetland Rehabilitation Law” [24]. With reference to rehabilitation laws, the same legislation has been quoted as in Table 1, to the exclusion of the NEMICMA which has the potential of disregarding wetlands situated within the coastal environment. Furthermore, the

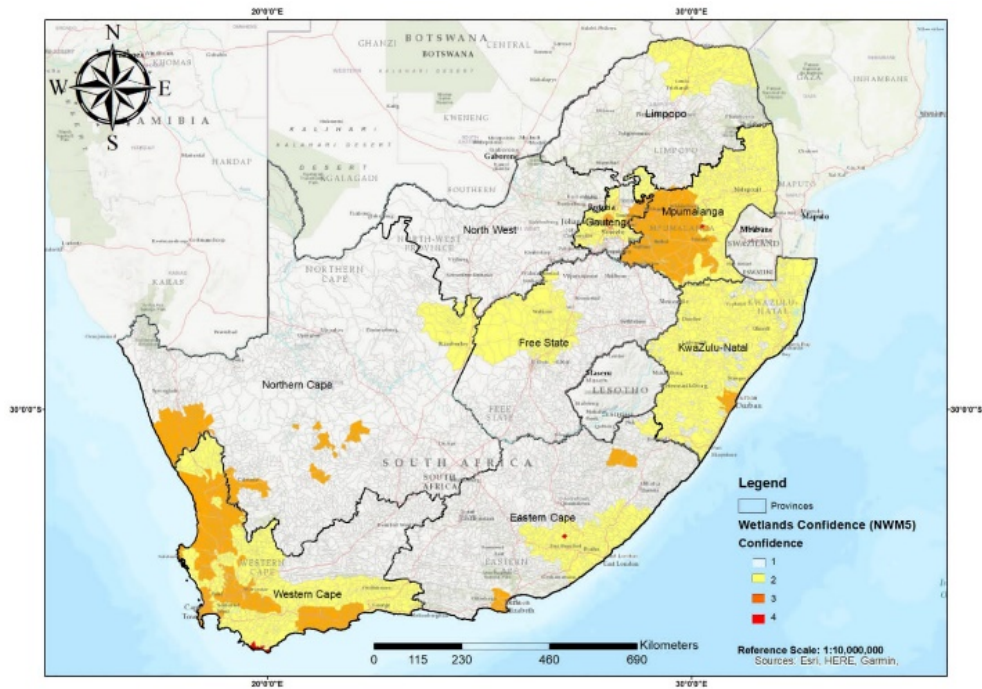


Figure 3: Illustration of confidence range in mapping the extent of wetlands in South Africa [47].

argument of fragmentation is not highlighted in the Wet-Legal publication, nor the consequences of, for instance, legal uncertainty as will be demonstrated later. And at the time this document was drafted, the notification for the NJWMP had not been published.

The aim of the legislation in Table 1 is to promote the protection, conservation and rehabilitation of wetlands, but the different meaning or definitions as it relates to rehabilitation may hamper the overall achievement or implementation of rehabilitation. The comparisons and analogies that follow are based on the information in Table 1. The NWA reads as follows: “‘protection’ in relation to a water resource, means the rehabilitation of the water resource”. The NEMICMA espouses rehabilitation under its then newly found tool of coastal management, which includes “the regulation, management, protection, conservation and rehabilitation of the coastal environment”. Wetlands may fall within the purview of “coastal environment”, thus making the NEMICMA applicable as a legislative tool for consideration. Thus, for purposes of the rehabilitation of wetlands, does “protection” under NWA equate to “management” under the NEMICMA, one would wonder. One would assume that management is required for purposes of protecting, therefore not equating to each other. Working with the meaning of “management” provided by Nel and Alberts [25] within an environmental management context, it requires that “management is... an iterative and ongoing process that functions at strategic, tactical and operational levels... to achieve the predetermined management goals”. They continue further by stating that “managers often select, adopt and use instruments or tools to assist them to achieve the defined... goals” [25]. Section 2(4)I of NEMA further requires that “sensitive, vulnerable or stressed ecosystems, such... wetlands... require specific attention in management ...” The conclusion is therefore

that “protection” under the NWA cannot be read to mean “management” in the NEMICMA, but rather that protection is a product of (better) management.

The WHCA and NFA showcases rehabilitation as a standalone, and the NHRA details restoration, rehabilitation, and repair as separate objectives. In terms of the NEMBA, the Institute is empowered to coordinate and implement programmes pertaining to the rehabilitation of wetlands. This Institute is known as the South African National Biodiversity Institute (statutory body appointed by the Minister of environmental matters) but is not expressly mentioned as a party to the WfW programme. At this point one cannot ascertain the approach taken to rehabilitation in the MCAA, if any at all.

The CARA creates the obligation of “restoration”, which, under Resolution VIII.16 (Ramsar Administration Principles and Guidelines for Wetland Restoration), is read to include rehabilitation. With reference to terminology, Cross et al. [26] submit that:

confusion surrounding the definition and application of terminology in... ecological repair has resulted in uncertainty for industry, the scientific community and regulators. This lack of clarity may underrepresent high aspirations or could be misused to disguise low aspirations and therefore problematic for setting objectives, establishing goals and assessing recovery trajectories.

In their application, they define restoration to mean “the return to the original state of the altered land, the state before degradation”; and rehabilitation “the return to the utility/natural state according to the original land... plan” [26]. Hamman et al. [10] confirms this view in their opinion that “rehabilitation” can aid in repairing the ecosystem, but not restoring it. There is a difference in the description and the intended aspiration, therefore, a clear distinction needs to be made. The aspiration in Davies et al. [43] recommends that “...wetlands should possess legal standing in courts of law”. These aspirations include the following: “...The right to regeneration and restoration”.

To accept only the literal meaning or approach taken by Cross et al. above, would not suffice. The Constitution is the highest law of the land, and any law or action inconsistent with it are invalid. The Constitution requires in section 39(2) that “when interpreting any legislation...every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. In the Constitutional court’s decision of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (7) BCLR 687 (CC)*, it was held that every piece of legislation is construed in a manner congruent with section 39(2) [44]. In the Bill of Rights, section 24(b) of the Constitution as displayed in Table 1 provides that the environment must be protected through legislative and other measures that “prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources...”. The consequence is that legislation in Table 1, that are enabled by the Constitution, though not specifically stating “rehabilitation”, could be interpreted to mean this.

The extent of the scattered nature of the rehabilitation laws goes beyond rehabilitation measures sitting in various pieces of legislation; it is further extended based on inconsistent and confusing terminology, definitions and meaning, that require the use of interpretation tools, and unnecessarily so. It is evident that there is legislative fragmentation, which could at times then create uncertainty, and where the law is uncertain – it is problematic (Lemine [45]). The problem is exacerbated by the fact that uncertainties in wetlands management reflect on the administrative bodies implementing their duties or failure to do so due to the uncertainties created in the law (Lemine [45]). When rehabilitation is required, which legislation will apply? With what definition or term? Enforced by which department? Du



Plessis [36] submits that misinterpretation of legislation and questioning which takes precedence creates turf wars, for example. Kotzé [27] terms this as unsustainable service-delivery. This further leaves a bad taste in the mouth of efforts aiming to promote integrated water resources management and Sustainable Development Goal (target) 6.5, for example.

2.2 The effect or consequences of fragmentation on rehabilitation

Overall, fragmentation in the law seems problematic as indicted throughout this section of the paper. Du Plessis [36], quoting Bosman et al., submits that South Africa has inherited a fragmented system that is based on the environmental media. Glazewski [28] makes an interesting observation about spatial planning laws in the light of fragmentation, he submits that “the continued existence and operation of multiple laws at national and provincial spheres of government in addition to the laws applicable in the previous homelands and self-governing territories has created fragmentation, duplication and unfair discrimination”. In this sense, it is as if fragmentation leaves the taste that an arrangement of legislation in this fashion (for example rehabilitation efforts in Table 1) is of an apartheid legacy; one that cannot be entertained under the Constitution of the Republic of South Africa of 1996 as enshrined in its preamble.

With the application of global environmental law and legislative fragmentation, Kotzé submits that fragmentation “could lead to an inconsistency of rules, duplication of work, organizational frictions and confront the parties with an unsatisfactory administrative jungle” [29]. In the *Maccsand (Pty) Ltd v City of Cape Town and Others (Chambers of Mines of South Africa and Another as Amici Curiae) 2012 (7) BCLR 690 (CC)*, Jaftha submits that all role players must be taken on board before concerning matters which affects the environment are made [30]. This obligation delves into the heart of cooperative governance, as set out below.

Furthermore, where fragmentation exists, it should rather be streamlined to iron out possible duplications and other issues associated with fragmentation (Lemine [45]). He specifically referenced that fragmentation of wetland legislation could cause duplication or non-enforcement due to uncertainty (Lemine [45]). Lemine goes further to provide where the legislation was lacking in enforcement and was duplicating in nature [45]. Van Marle [31] delves deeper into fragmentation by splitting it into two: institutional and legislative. Kotzé [27] further divides these two into vertical and horizontal fragmentation of each and submits with eloquent examples how it goes against the section 24 of the Constitution (see Table 1), but also the constitutional obligation of cooperative (environmental) governance (Du Plessis [36]). For the later provision, Chapter 3 of the Constitution states that spheres of government and all organs of state within each sphere must “co-operate with one another in mutual trust and good faith by: (i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest; (iv) coordinating their actions and legislation with one another; and (v) adhering to agreed procedures” (section 41(1)(h) (i–v)).

To give effect to achieving these imperatives, the legislature introduced the Intergovernmental Relations Framework Act 13 of 2005 (IRFA) [37], which establishes a framework for the national, provincial and local governments to promote and facilitate intergovernmental relations. In cooperating, it does not mean that one institution has superior powers which trumps another. This is confirmed in the case of the *Minister of Water and Environmental Affairs v Kloof Conservancy [2016] 1 All SA 676 (SCA)*, in which it was held that:



the requirement that Ministers ensure that all organs of State in every sphere of government, discharge the relevant duties misconceived the powers and responsibilities of a national Minister under our constitutional system of co-operative government [38].

Section 24(b) of the Constitution was given effect to in the NEMA, and the latter's purpose is:

to provide for cooperative environmental governance ... on matters affecting the environment, institutions that will promote cooperative governance and procedures for coordinating environmental functions exercised by organ of state; to provide for certain aspects of the administration and enforcement of other environmental management laws.

This, therefore, intensifies the need to overcome legislative and institutional fragmentation for the achievement of harmony within environmental matters departments. With reference to wetlands and overcoming fragmentation, the ecosystem approach requires the adoption of strategies for integrating land, water and living resources (Paterson [39]). Lemine has linked these environmental media to certain departments to illustrate institutional integration along these media. The thinking is that the ecosystem approach cannot be limited to purely resource protection but must incorporate rehabilitation efforts, hereby creating an ecosystem-based approach to rehabilitation.

For equal treatment on the topic of fragmentation, it is necessary to consider the way research suggest these may be overcome. Having said this, the concept of Integrated Environmental Management (IEM) is described as "a holistic and goal-orientated approach to environmental management that addresses interconnections through a strategic approach" (Margerum [40]). However, it has been argued that an operational model is equally important to give effect to the theory upon which it is based (Margerum and Born [41]). In South Africa the unified operational approach (joint WfW initiative) to rehabilitation appears to be more effective than the disconnected strategy (Table 1) driving it, therefore making reform a requirement in the envisaged NJWMP.

Chapter 5 of the NEMA is dedicated to IEM. It makes provision for the promotion and application of environmental tools to ensure IEM of activities. This section provides a strategic approach to promoting integration, but to say that the NEMA does not provide an operational model, even if tacitly, is fraught by section 11 of NEMA which mandates the national and provincial departments responsible for environmental affairs to prepare an environmental implementation plan and management plan. For example, section 14(c) of NEMA provides that every environmental management plan must contain a description of the policies, plans and programmes of the relevant department that are designed to ensure compliance with its policies by other organs of state and persons. Hereby creating a strategic approach to tacitly control operational measures.

Looking at the (fragmented) legislation represented in Table 1 above as well as the institutional bodies responsible for each, these are therefore, as a result, fragmented too. Kotzé et al. [35] provides the results of fragmentation (legislative), but, importantly, explains the way reformed policies "provide for, among others, important tools, structures and processes to facilitate sustainable environmental governance". With the introduction of the NJWMP, provision may be made for clarifications in terms, ironing out the contradictions and providing a synchronous strategy. Furthermore, the existing and improved institutional arrangement may be designed here.



3 ANALYSIS

Overcoming fragmentation is crucial, not only from a legislative and institutional perspective, but to overcome the legacy of apartheid. This should be the narrative until better integration is achieved. Table 1 in this study demonstrates, on the face of it, a clear exposition of the fragmented nature within the existing wetland legislative framework for purposes of rehabilitating these. The introduction of the NJWMP is the adequate tool that creates an opportunity to ensure that these different terms are pinned together in an integrated manner but given their unique meaning for the achievement of the requisite aspiration. In South Africa, extensive research has indicated the fragmentation of wetland laws, but fragmented rehabilitation efforts have not been singled out to demonstrate this specifically. Although it appears that the consequences may be the same, for unrehabilitated and degraded wetlands, the consequences are far worse. The idea that it should be treated as a section on its own in the NJWMP is illustrated in the legislature's incomprehensible drafting of "protection, management, conservation, rehabilitation..." in the existing legislation (Table 1). The creation of the "no net loss" policy appeared to be helpful to an extent, but section 28 of NEMA (see Table 1) serves an adequate provision for creating enforceable measures to recover and apply the necessary measures coupled with the aim of sustainable development principle of section 2(4)(p). With regards to the only section in the national environmental framework that expressly spells out "wetlands", section 2(4)(r) makes provision for "specific attention" to wetlands which speaks to policy refinement. It is in the opinion of the authors that specificity must be extended into the policy itself by way of creating a rehabilitation-specific objective/s.

Sections 2(4)(p) and 2(4)(r) standing next to each other, obliges the state to incorporate, whilst managing sensitive ecosystems, to recover costs for wetland degradation and environmental damage (whether this is due to the ordinary cause of nature or an Act of God). Legislation is designed to advance its own aim, purpose and objectives as cited, so too the anticipated NJWMP. Within the spirit of section 24(b) of the Constitution (see Table 1), legislation must aim to promote environmental protection, prevent degradation, and securing sustainable development of natural resources. The Constitution does not make provision for curing (rehabilitation, restoration or repair) the environment, but rather "prevention". Perhaps under the umbrella of the purposive approach it may be read to include rehabilitation.

With reference to the different terms pertaining to "rehabilitation" within the legislative framework (see Tables 1 and 2) coupled with the aim of achieving certain aspirations for regulators and implementors, appears – on the face of it – to be problematic. For example, rehabilitation and restoration does not have the same meaning; however, under the purposive approach, this may be read to include rehabilitation. However, one should guard against using an approach that is broad and thwarts the literal, more appropriate, meaning.

Table 2: Consolidated summary of terms and definitions.

Description	Legislation
Rehabilitation as a "standalone"	WHCA/NFA/NHRA
Rehabilitation under "protection"	NWA
Rehabilitation under "management"	NEMICMA/NEMPA
Rehabilitation under "restoration"	CARA
Uncertain	MCAA

The power of terms and definitions cannot be undermined – it is what informs strategic, tactical and operational levels of achieving the envisaged goals or aspirations. Terms and



definitions guide regulators and implementors. In addition to the three spheres of government (national, provincial, and local), are the three branches of government: legislature (regulator), executive (implementor) and judiciary. Terms and definitions that are inadequately drafted by the legislature causes issues of uncertainty for the executive (national environmental matter departments), which the judiciary would, unnecessarily have to interpret and apply. But for the drafting of clear terms, resorting to interpretation tools would be superfluous.

It is evident though that the legislative framework does promote the “rehabilitation” of wetlands, the definitions or terms could retard or fail to meet the envisaged goals, as it is clear that “management”, “rehabilitation”, “restoration”, “repair” and “protection” are distinct terms, each with its own aspirations. Table 2 represents the similarities in terms by way of the terms provided by the framework.

From Table 2, it is evident that the majority makes provision for “rehabilitation” as a standalone provision; two places “rehabilitation” under management; one under restoration; one under protection; and the MCAA does not necessarily provide. “Management” cannot be read to be rehabilitation, as management speaks about the process to achieving, for example, rehabilitation.

The citizen–nature–restoration nexus creates a right upon wetlands to be rehabilitated. However, currently South Africa has an anthropocentric approach to environmental laws, and, arguably, the realisation of conferring rights upon resources would require big-scale law reform.

Rehabilitation measures, although there are legislation and “roadmaps” guiding these, are scattered (see Table 1), thus catapulting into exacerbating implementation efforts. The hypothesis is therefore that scattered legislation aiming to managing one resources, automatically bring discord and institutional fragmentation – especially in this study.

The irony here is that the constitutional provisions expressly create a mandatory framework for cooperation through section 41(1)(h), section 24(b), and by introducing the IRFA. Section 41(1)(h) (i–v) of the Constitution sets out the guidelines for achieving and maintaining the framework of cooperation. The IRFA sets out, generally, the tools, procedures and purpose for promoting and facilitating intergovernmental relations, these do not necessarily pertain to environmental management or governance specifically; however, by honing into environmental management, the NEMA’s purpose writes this for fulfilling the environmental–cooperation nexus, along with tools promoting these. Thus, theoretically, there should not be conflict. Considering Kotze’s idea of reforming policies, the NJWMP must enable a framework for cooperative legislation and institutions for rehabilitation – to avoid conflict and its consequences as spelled out.

The research shows that the extent of fragmentation for rehabilitation laws go beyond it merely sitting in different pieces of legislation, rather if they were coordinated, then the fragmentation would be less so on the legislative side, but this causes institutional fragmentation in this that environmental management departments are working in silos on rehabilitation matters (again, general wetlands management and protection argued elsewhere is not considered here), but more so this may cause the turf wars and inability to give realisation to section 41(1)(h) of the Constitution, the constitutional obligation of cooperative governance.

4 CONCLUSIONS

The requirement of law reform through the envisaged NJWMP is necessary. This would necessitate incorporating legislation stemming from different pre- and post the Constitution era and making it a holistic “new”. It is the view of the author that the NJWMP serves as an opportunity to close the apartheid-esque law legacy by closing fragmentation specifically for



rehabilitation by creating clear definitive (literal) meaning to definitions on “rehabilitation”, “restoration”, “repair” and so on. This is an effort to provide efficient and effective rehabilitation and avoiding unnecessary hick-ups. In Part 2 of this research this is dealt with, along with reference to work by other jurisdictions.

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