



**BOOKLET OF ABSTRACTS
OF THE PRESENTERS AT THE
2021 STUDENT AND ANNUAL CONFERENCES
ON CELEBRATING 25 YEARS OF THE 1996
SOUTH AFRICAN ENVIRONMENTAL RIGHT
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ABSTRACTS OF THE



STUDENT CONFERENCE,
HOSTED BY THE NORTH-WEST UNIVERSITY
CELEBRATING 25 YEARS OF THE 1996
SOUTH AFRICAN ENVIRONMENTAL RIGHT

13-14 September 2021

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13 September, Session 1: Water, sanitation, and health rights

Melandri Steenkamp (LLD candidate, South African Research Chair: Cities, Law and Environmental Sustainability (CLEs) North-West University) – **A legal analysis of water management approaches for achieving urban water security in South Africa**

Water plays a central role in connecting various critical and interrelated global issues ranging from land, energy, economic growth, climate, environment and food. In an increasingly urbanised world, cities and their surrounding areas are becoming more interconnected, affecting the water cycle and overall human security. However, cities have also become integral in addressing environmental and security issues. For this reason, the concept of water security has gained prominence as a framework, and conceptual tool for addressing the wide scope of water-related concerns. The definition of water security addresses both the social and environmental dimensions of water security, and views water security holistically, including both anthropocentric and eco-centric understandings of water. With a wide range of threats to water resources and stemming from water risks, it is unsurprising that water governance and management too, can be contentious. Hence, the new conditions of the Anthropocene and their impacts on water require a shifting of paradigms and approaches towards more integrated, adaptive, coordinated and participatory solutions for the complex issues facing water security. Notably, the traditional, technical, linear management approach that has been successfully applied in many urban water systems worldwide, is now typically found to be insufficient and ineffective to respond to the increasing complexity, uncertainty and conflict that arises in water systems. Water security can be addressed through various governance and management approaches. These include approaches such as IWRM, water-sensitive urban design (WSUD), integrated urban water management (IUWM), adaptive water governance, water conservation and water demand management (WC/WDM) and more recent move towards creating water resilient cities. The choice of management approach will depend on the institutional context in the specific urban area or municipal boundary. Against a general discussion of the conceptual understandings of water security and the water security challenges of the Anthropocene, this presentation aims to provide a legislative analysis of water management approaches for achieving urban water security in South Africa. The discussion concludes with an analysis of two metropolitan areas in South Africa which were selected to highlight the water security challenges faced in these areas and to provide an indication of the degree of implementation and integration of IWRM and WSUD practices in the municipalities.

Keywords: water security; integrated water resources management, water sensitive urban design; local government; water law

Adelaide R Chagopa (LLM candidate University of Pretoria) – *Let's talk about toilets: (re)conceptualising the right to sanitation in South Africa*

'It should never be forgotten that "Sanitation is Dignity" and dignity is a basic human right.'

Currently, up to 35% of South Africans suffer the indignity borne from a lack of adequate sanitation. In this paper, an attempt is made to (re)conceptualise the right to sanitation in South Africa using the concept of minimum core obligations to cement a substantive, free-standing right to sanitation. Although the concept of the minimum core content of socio-economic rights has previously been rejected in South African courts, I assert that the acceptance of a clearly defined minimum core content of the right sanitation is the first step in ensuring an adequate and acceptable level of access for all – where adequate and acceptable levels of access is understood to mean 'sufficient quality and assurance of supply.' The minimum adequate and acceptable level of access to sanitation should consist of, at the very least, improved sanitation options like Ventilated Improved Pit Latrines (VIPs) with proper faecal sludge management plans or other appropriate sanitation facilities after full and proper consultation with communities. Moreover, waterborne sanitation should not necessarily constitute the full realisation of the right to sanitation, rather, context-based, sustainable solutions should be investigated and implemented. Finally, I argue that the above should be utilised as the universal minimum standard below which sanitation programmes in South Africa cannot fall. Consequently, the progressive realisation of the right to water and sanitation will be concerned with the continuous improvement of the nature and quality of access thus moving beyond the minimum levels and pursuing the *full* realisation of the right to sanitation.

Keywords: minimum core, sanitation, progressive realisation, adequate standard of living, dignity, toilets

Meeschka Diedericks (Masters student, CLES, NWU) – *Disaster risk management law as a measure to reduce the risks of communicable and vector-borne diseases in South African cities*

Communicable and vector-borne diseases pose a significant public health risk to populations around the world. South Africa, specifically, is not exempted from this threat as the country faces a quadruple burden of disease in which infectious diseases such as HIV and AIDS, TB, lower respiratory tract infections and diarrhoeal diseases are considered the country's leading cause of disease and morbidity. These diseases are concentrated in South African cities, as cities often create environments conducive to the spread of communicable and vector-borne diseases. Additionally, the recent COVID-19 outbreak has proven how quickly an infectious disease could spread in cities and create a health threat of international concern.

The paper is a desktop-based study that draws on literature in the field of environmental health and disaster risk management. The proposed paper investigates some of the health risks in cities that relates to communicable and vector-borne

diseases. Given the variety of risks and the challenges that local government faces in mitigating or reducing these risks, this paper will also explore the legal framework for disaster risk management as a possible measure to reduce or mitigate the risks of communicable and vector-borne diseases. The proposed paper will analyse the Disaster Management Act and the eight metropolitan municipalities local disaster management plans.

Nonhlanhla Ngcobo (PhD candidate, CLES, NWU) – The constitutional environmental right of street traders in the Anthropocene

Shame and humiliation are inescapable in situations where street traders, regardless of their nationality, operate from places that are unfit for trading purposes. Trading sites that are typically not included in the spatial plans of municipalities often lack adequate infrastructure and amenities. These include safe, well-equipped trading stalls, storage facilities, clean drinking water, toilets, and solid waste removal. The absence of the above typically infringes on a person's right to an environment that is not harmful to their health or wellbeing as enshrined in the Constitution of the Republic of South Africa, 1996 (the Constitution). Section 24 of the Constitution afford everyone the right to an environment that is not harmful to their health or wellbeing.

Arguably, this right is anthropocentric in so far as it seeks to protect humans by providing a healthy and safe environment. Section 24 of the Constitution further obligates that the environment must be protected for current and future generations. This perspective is biocentric because it advocates for the protection of the environment for the environment's sake.

The fact remains that humans are the cause of environmental harm and degradation. The mediating role played by the anthropocentric approach allows for the environment to be taken care of not just for the sake of the environment but for the sake of human beings. Therefore, allowing for the anthropocentric approach to focus on three critical aspects of human existence: health, wellbeing, and the need for the sustainable development of the environment for current and future generations. For street traders, these aspects represent their right to operate their businesses in places that will not subject them to pollution and environmental harm. This is important because street traders are exposed to extreme levels of air pollution and inclement weather daily. Traders operate from places such as stalls that are not well-equipped and exposed to harsh weather conditions, including rain, hail, and storms. Others trade from dilapidated buildings that lack facilities such as portable clean water, toilets, and fire safety equipment. Against this background, this study advances the argument that adopting an anthropocentric approach to the constitutional environmental right of street traders can optimally change municipal reactions to the street trading sector.

13 September, Session 2: Environmental right interpreted

Tafumanei Chikanya (Masters student, Luiss University, Italy) – Gadamer's Philosophical Hermeneutics and The Politics of Environmental Governance

This paper develops an argument for the significance of dialogue or discursion in the politics of environmental governance. The principle of subsidiarity in development matters, requires inclusivity and extending deliberative privileges to the whole population. On the contrary when submissions are made on issues to do with global environmental policy, the voice of the marginalized is left in the cold. Thus, this paper assumes that dialogue provides a platform for intersubjectivity, particularly in matters of development that affects the lives of the people. Environmental governance, with its technical language and complicated international protocols have never been easy for the general population to understand. The concept of intersubjectivity refers to a symposium of mutual understanding that arose when the parts involved in a dialogue are able to come out of their epistemic shells and embrace the otherness in searching for meaning. Environmental degradation, and climate change being a human issue, it serves therefore to assume that Gadamer's hermeneutics provide significant precepts that can bridge the gaps in the understanding of environmental issues and ensure that policies towards sustainability are better intertwined with general subjective opinions of the masses. Environmental policymaking or governance is a multi-layered process that not only identify issues and decisions, but it also creates layers of decision makers, ideologies and a language that sometimes create cohesion or divisions between the decision makers and those living in the margins of the society whose lives are severely affected by environmental degradation. Since the politics of environmental policymaking is multi-layered, and include personal, institutional, and ideological politics. Gadamer's hermeneutics provides for the rules of dialogue, interpretation and understanding that can overcome the shortcomings of the disparaging state of environment policy and governance that has slowed down the effective implementation of various international protocols and promulgations.

Key words: Hermeneutics, Intersubjectivity, Environmental Governance, Epistemic shells, sustainability, principle of subsidiarity and dialogue.

Maricéle Botes (PhD candidate, CLES, NWU) – The constitutional environmental right and its application to ecological governance for urban ecosystem services protection

Urbanisation, population growth, and unabated urban development are critically affecting cities and city environments, worldwide. Urban areas are faced with severe and persistent challenges such as environmental degradation, over-exploitation of natural resources, pollution, and changes in city climates linked to the global climate crisis. These challenges inhibit the capability of ecosystems to provide crucial services upon which all humanity depend for their health and well-being. Ecosystem services

play an important part in ecological sustainability, and it is important that they are adequately protected. Environmental law and section 24 of the Constitution of the Republic of South Africa, 1996, specifically, creates a pathway through which such protection may be achieved as it is the basis for the implementation of ecological governance instruments to be used by governments in their environmental protection mandates.

Based on the above context, this paper will pertain to legal instruments aimed at ecological governance in urban areas for the protection of ecosystem services as derived from the constitutional environmental right. The question arises whether the environmental right includes provision for adequate ecological governance measures for the protection of ecosystem services in cities, or whether it is too ambitious in its aim. The paper analyses the different responses to ecosystem service protection, focusing specifically on the South African environmental law perspective. As this paper focuses on ecosystem services in urban areas, it will consider local environmental governance (LEG) instruments, specifically, and focus on the viability of such instruments at the local government level as co-regulators of the environment and the increasingly important role of cities in environmental protection. While the environmental right may provide for the protection of the environment and the reasonable and other measures may include ecological governance measures, it might be too ambitious to assume protection for urban ecosystem services, particularly, and might fall short of its aim as urban environments and ecosystem services are severely under protected in South Africa.

Rufaro Chikuruwo (LLD, NWU) – ESD under section 24(b) (iii) of the Constitution: A response to Kidd

South Africa's environmental right is encapsulated in section 24 of the *Constitution of the Republic of South Africa*, 1996 (hereinafter the *Constitution*). Section 24(b) (iii), in particular, directs the state to protect the environment "through reasonable legislative and other measures" that secure "ecologically" sustainable development (hereinafter ESD) and use of "natural resources while promoting justifiable economic and social development". Michael Kidd offers a fair account of the environmental right in South Africa. Kidd notes that section 24's reference to securing ESD, while promoting justifiable social and economic development is redundant and constitutes "clumsy drafting". This is because the inclusion of the phrase justifiable social and economic development in section 24(b) (iii) constitutes slipshod drafting since ESD requires the integration of economic, social and environmental considerations (that is sustainable development). In this paper's view, however, if ESD means something different, other than the integration of economic, social and environmental considerations, then its inclusion as part of section 24(b) (iii) is justified. This paper proceeds from this point of departure, attempting to demonstrate that there is in fact, a nuance between section 24's referral to ESD and the generally oft cited concept sustainable development. The paper will further explain that this nuance implies that the proper interpretation of section 24's reference to ESD as opposed to sustainable development, has the potential to alter the judicial interpretive role/process. Considered from a retrospective

analysis, the argument is that if courts had given ESD its *actual* meaning, then decisions like *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) and *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) could have been different in outcome or approach. Therefore, section 24(b)(iii)'s inclusion of justifiable economic and social development is not redundant, since ESD does not refer to integration, but instead refers to development that seeks to conserve earth's ecological systems.

Ruth Kruger (LLB Wits, Law Clerk Constitutional Court) – The Environment is Ours - the socio-economic promise of section 24 of the Constitution

The production and provision of energy in South Africa is a fraught space. Much of Mpumalanga province is devoted to coal mining and coal-fired power production, but many people in this poor province lack access to energy. They face the double burden of ambient air pollution from the coal, and indoor air pollution as they must light fires for cooking. The situation is a violation of environmental rights, but its resolution is complex. This is particularly the case because a right to energy – or sustainable electricity – is not explicitly provided for in the South African Constitution, and rarely recognised as connected to environmental rights. This paper considers the fit of a right to sustainable electricity as part of the entitlements flowing from environmental right. Data was collected from relevant case law, and also from people living in Kriel, Mpumalanga, and working on energy challenges in the area. Following a qualitative analysis, it is argued that the right would fit well within both jurisprudence and local realities. Further, it is argued that the better inclusion of the voices of beneficiaries would improve the practical realisation of environmental rights.

14 September, Session 3: Traditional knowledge systems, protected areas, public participation, and marine living resources

Isabella Potenza (BA Law student, University of the Witwatersrand) – Traditional and indigenous knowledge and environmental law

This paper will explore the efficacy and the limitations of patents as a legal mechanism in the conservation of medicinal plant species in South Africa. Specifically, whether patents act beyond their commercial advantage to indigenous communities (benefit-sharing) by playing a role in the environmental conservation of the medicinal plants themselves. Over and above the practical environmental conservation that may arise from the patenting process, this research will explore whether patents create public

awareness of endangered medicinal plant species, the ecosystems that support them and contribute to forms of environmental advocacy on the subject. Lastly, the patent will be analysed as to whether it is an appropriate legal mechanism with regard to some traditional cultural approaches to the ownership and management of natural resources.

Keywords: medicinal plants, environmental law, indigenous knowledge, conservation, patents, intellectual property, ownership.

Chiedza LA Machaka (LLD, North-West University) – Legal governance of the commons in promoting social-ecological resilience: The South African side of the Kgalagadi Transfrontier Conservation Area

Transfrontier conservation areas (hereafter TFCAs) are defined as areas or components of large ecological regions that straddle the boundaries of two or more countries, encompassing one or more protected areas, as well as multiple resource use areas. This paper discusses the South African side of the Kgalagadi TFCA (hereafter KTFCA). Within the South African side of this TFCA, there is a Contract Park, which is a parcel of land that is owned by the local community groups. The Contract Park is as a result of a contractual agreement to jointly manage the land between the government through its representative South African National Parks and the landowners. The communities in the Contract Park are reportedly experiencing various challenges. The Contract Park within the KTFCA can be regarded as commons as it consists of a broad set of resources: natural and cultural, that many people share. The term commons usually refers to a common-pool resource that is managed by a defined community, based on rules devised from their customs. The communities within the commons are facing challenges in relation to the limited recognition of local community members of the possible contribution they can make in governing the commons, human-wildlife conflict, and climate change impacts in the form floods and droughts which have an impact on natural resources within these areas. The KTFCA in terms of which the commons is located, as a social-ecological system consists of areas in which human beings and nature interact. The actions of the community, as resource users may therefore have an impact on whether or not social-ecological resilience within the TFCA is enabled. Social-ecological resilience refers to the capacity of a linked social-ecological system to adapt, absorb and transform in the face of disturbance and still maintain functions through the cooperation of all resource stakeholders including local communities. The link between a TFCA as commons and as a social-ecological system may necessitate a different form of governance that was initially anticipated when the KTFCA were established. This paper will determine how adaptive governance links to social-ecological resilience. This is done by analysing the legal system governing the in the KTFCA which includes management documents for the commons, the park management plan, AU and SADC law and South African law and policies.

Ursula Pape (LLM, University of Pretoria) – A critical analysis of the evolution of public participation in environmental decision-making in the South African mining sector

In this paper I explore how the international law principle of free, prior and informed consent (FPIC) can enhance public participation, to promote environmental justice for communities affected by environmental decision-making in the mining sector in South Africa. Public participation required in terms of the mining sector environmental regulatory framework in South Africa is largely underscored by a requirement to 'consult', notwithstanding recent amendments. I describe how the requirement to consult differs from a requirement to secure consent in terms of FPIC. I describe public participation (i.e. consultation) requirements related to applications for rights, permits, licences and authorisations that must be in place prior to commencement of mining operations. I argue that where the level of public participation requires mere consultation, it can easily amount to a regulatory tick-box exercise given that the views of mining-affected communities can be manipulated or overlooked, with mining developments proceeding despite devastating effects on communities. I describe how FPIC has become part of the regulatory framework governing mining activities through the court's purposive interpretation of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) in *Baleni and Others v Minister of Mineral Resources and Others* and *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*. I engage with scholarly literature on FPIC to analyse why and how environmental justice should and can be enhanced by embedding FPIC into legislative public participation requirements. I argue that FPIC, which now forms part of South Africa's law through the IPILRA, should be a prominent feature in public participation processes for mining-affected communities generally, and not only for informal land right holders.

Keywords: Public participation; free, prior, informed consent, FPIC, environmental justice, consultation

Jamie Flemmer (LLB student, University of Pretoria) – The need for a renewed focus on ecological sustainability and inclusion in the governance of marine living resources in South Africa

In this paper I use the critically endangered West Coast rock lobster to illustrate the importance of asserting constitutionally mandated environmental rights. Ecological sustainable development (ESD) along with transformative constitutionalism is applied to attain the legal theory of transformative environmental constitutionalism, developed by Dr M Murcott. Transformative environmental constitutionalism seeks to fully use the environmental rights contained in S24 of the Constitution as well as other constitutional rights like the right to life, dignity, equality, and freedom. The paper measures the way in which quotas are set with S24 of the Constitution, NEMA and the MLRA. In 2018 the World Wildlife Fund South Africa took the Minister of Agriculture, Forestry and Fisheries and Others to court over unsustainable quotas set for the West Coast rock lobster. The judgment is examined to highlight the courts interpretation of S24 of the

Constitution. The principles discussed by the Judge in the *WWF* case is further testament that the South African courts have a duty to engage in transformative adjudication to attain substantive equality and social justice in all spheres including the environment. Marine living resources were not accessible for people of colour during the Apartheid-era. Even after the constitutional dispensation, there was a group called small-scale fishers who were excluded until 2012. It is important to secure the future of small-scale fishing communities as the generations to come depend on the resources for an income and a source of food. The paper concludes by providing examples of how quotas can be set to conform with the mandatory provisions set out in the Constitution, NEMA and the MLRA. Marine living resources is a commodity on which many South Africans depend. It is paramount that we use these resources in a way which promotes sustainability. Section 24 of the Constitution has the potential to enforce sustainability if applied and interpreted correctly.

Key words: Transformative environmental constitutionalism; Ecological sustainable development; Marine living resources; Small-scale fishers; Sustainable development; Future generations; Constitutional right; Equality; Human dignity; Sustainable quota's for marine living resources

September 14, Session 4: Climate change and nature-based solutions

Frances Nwadike (PhD student, Newcastle, UK) – An Appraisal of South Africa's Carbon Tax Act 2019

The Paris Climate agreement requires signatory members to adopt measures aimed at mitigating or adapting to climate change impacts. Mitigation measures are aimed at reducing the emission of greenhouse gases, such as carbon dioxide, and methane, which are the main contributors to global warming and climate change impacts. Examples of mitigation measures include, Carbon Capture, Green subsidies and Carbon Tax.

Unlike other measures, Carbon tax is based on the Polluter pays principle as it requires polluters of greenhouse gas emissions to pay a certain price for the emissions released into the Earth's atmosphere. Examples of countries with carbon tax include Sweden, United Kingdom and Canada. In 2019, South Africa became the first African country to adopt this measure after the Carbon Tax Act 2019 was signed into law by the South African President. This Act seeks to reduce the amount of greenhouse gas emission by imposing a tax on the carbon dioxide (CO₂) equivalent of greenhouse gas emissions on certain activities. These activities are listed in Schedule 2 of the Act.

The Carbon Tax Act is part of the South Africa's National Climate Change Response Policy (NCCRP) of 2011, and National Development Plan (NDP), which provide for South Africa's vision for effective climate change response and transition and lower-

carbon economy and society. A question worth asking is whether the Act enables the South African government to achieve the objectives set out in the NCCRP and NDP.

This paper examines the legal framework and the extent to which the framework enables South Africa to achieve the objectives set out in the NCCRP and NDP documents. It also discusses some challenges to achieving the objectives and makes recommendations on how the challenges could be addressed.

Keywords: Carbon Tax Act, climate change mitigation, polluter pays principle and greenhouse gases.

Onkarabile Osiele (LLM student, CLES, NWU) – Municipal planning law for climate change mitigation in South African cities

Climate change threatens human life due to ecosystems and environmental degradation, floods, droughts, food security, and water scarcity. As a result, the Intergovernmental Panel on Climate Change (IPCC) has made a global call for action against climate change, including climate change mitigation, which is aimed towards international, regional, national, and sub-national levels government. Mitigation of climate change generally involves taking steps to reduce greenhouse gases (GHGs) that are emitted into the atmosphere. The United Nations Human Settlements Programme (UN-Habitat) provides that cities are responsible for approximately 75% of the GHGs emissions released into the atmosphere, causing climate change. However, cities are regarded by the United Nations (UN) as part of the solution to climate change. Cities could mitigate climate change by limiting the use of fossil fuels from different regions. Furthermore, cities have numerous avenues to effect climate change mitigation through planning and land use control.

Legally, South African cities are bound by various legislation to mitigate climate change, such as the *Constitution of the Republic of South Africa, 1996 (Constitution)*, in terms of section 24, also read with section 152 (1) (d). Other legislation includes *National Environmental Management Act 107 of 1998 (NEMA)* and *National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA)*, which provide that municipalities have a significant role in addressing GHG emissions that cause climate change. This legislation is arguably a means to protect the environment and the most vulnerable urban dwellers. Both the *Constitution* and NEMA obliges municipalities to provide a safe and healthy environment for all. On the other side, the National Climate Change Response Plan White Paper (NCCRP) of 2011 is an essential, authoritative policy that embodies climate mitigation as one of its central objectives.

Against the background of the above, the proposed presentation explores a) A brief background of climate change as a threat to the environment and those in urban areas, b) the notion of climate change mitigation in the city context, c) the perusal of municipal obligations to provide climate change mitigation under South African law and policy, d) to explore the South African planning law and policy on climate change mitigation.

Muhammed Lokhat (Masters student, Stellenbosch University) – Locating safe mobility for pedestrians and cyclists in section 24 of the Constitution

The primacy of private vehicles, particularly cars, over non-motorised forms of transport such as walking and cycling in South Africa is entrenched in law and policy and as a result, is built into the urban fabric of South African cities. This has its roots in Apartheid planning and has been worsened by the post-Apartheid government in all three of its spheres. Road based movement via private vehicle is said to be the worst possible form in three main ways: greenhouse gas emissions, increasing unsustainable and inequitable mobilities, and contributing to the most mortalities. The reality of the South African commuter does not reflect this private vehicle first mindset of decision-makers. Only 27% of South Africans drive cars to work, which pales in comparison to the percentage that utilise public transport, and is relatively similar to the portion of workers who walk to work and cycle at just more than 20% and 1% respectively. These pedestrians and cyclists are the most vulnerable road users in South Africa, pedestrian fatalities account for almost 40% of all fatalities. In KwaZulu-Natal, Gauteng and the Western Cape, the most urbanised provinces, more than 50% of road crashes involve one or more pedestrian deaths.

In light of the above, and following the example of Mexico City, this paper will set out a rights-based framework for safe mobility for pedestrians and cyclists in South African urban settings. It will locate the rights based framework to safe mobility within the environmental right enshrined in the Constitution, arguing that mobility that is safe falls within the protection of a right to an environment that is not harmful to a person's health or wellbeing. This is done following the extensive literatures of Pieterse and Coggin and subscribing to Du Plessis' conception of the "brown environmental agenda". Without a rights based approach, the design of public policies is not done properly – the paper argues that the State, particularly but not exclusively local government due to it exerting the most tangible competence of "municipal planning" of land use, should have a positive obligation to ensure that public spaces and roadways are designed to be accessible to all persons, regardless of the socioeconomic conditions that private vehicle ownership requires. Locating safe mobility within the environmental right will assist in providing the political impetus to shift to more sustainable, safe, and equitable forms of urban structures and transport.

Keywords: Right to a safe environment, mobility, safe mobility, pedestrians, transport, urban law

Heloïze Hattingh (LLB student, CLES, NWU) – The Legal Relevance of Nature-based Solutions for Sustainable Urban Development in South African Secondary Cities

South Africa, like many other countries worldwide, strives for sustainable development. Increasing urbanisation and climate change are two of the main drivers of the global strive towards sustainable development. Nature-based solutions have been receiving increasing attention as a possible way to, not only move cities towards environmental resilience, but also aid cities in their strive for sustainability. Nature-

based solutions uses natural structures and ecosystems to address certain challenges experienced in and around cities and share a clear link with sustainable urban development. Nature-based solutions aim to address social issues such as human well-being, environmental issues such as loss of biodiversity and economic issues such as food security, while sustainable urban development requires integration of social, ecological and economic factors. Furthermore, secondary cities in South Africa have been found to be located advantageously to aid development in both metropolitan and rural areas. Sustainable urban development in secondary cities, and possibly nationally, could be promoted by the use of nature-based solutions in these cities, but South African law needs to be susceptible therefor. This presentation aims to highlight briefly how South African environmental law is possibly attuned to nature-based solutions for sustainable urban development in secondary cities.

Keywords: sustainable development, nature-based solutions, environmental law, secondary cities



**ABSTRACTS OF THE
ANNUAL ELA CONFERENCE
ON**

**CELEBRATING 25 YEARS OF THE 1996
SOUTH AFRICAN ENVIRONMENTAL RIGHT**



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16 September, Session 2: Local government and the environmental right

Johandri Wright, Felix Dube and Anél du Plessis (South African Research Chair in Cities, Law and Environmental Sustainability (CLES, NWU) – In search of solutions for urban sustainability: judicial enforcement of provincial interventions in local government

This paper evaluates the judicial enforcement of provincial interventions in municipalities as a viable response to the collapse of local government and the threats to urban sustainability in South Africa. We argue that when relations between municipalities and their communities have deteriorated to a level of deep mistrust and collapse, and when there is dismal service delivery, there is a case for the courts to order unresponsive provincial authorities to intervene in municipalities as provided for in law. Such interventions are necessary in the name of intergovernmental support and co-responsibility. They protect the rights (including the substantive and procedural environmental rights) of communities. However, reality shows that judicially ordered interventions are simplistic solutions that do not do justice to the legal and political complexities around such interventions. Party politics and the need for sustained good local governance often clash when the judiciary orders provincial executives to intervene in failing municipalities. Consideration of the aftermath of judicially ordered interventions in the Makana Local Municipality and the eMalahleni Local Municipality confirms that whereas litigation may enforce the law around provincial interventions and municipal duties, it is a short-term fix that does not bring sustainable solutions to the collapse of local government. Instead, it often exacerbates the situation.

Anél du Plessis (CLES Research Chair, NWU) – When the legal objectives of sound financial management, environmental justice and spatial transformation collide: the case of South African cities

South Africa's environmental justice and spatial transformation project is ongoing. It finds itself challenged in manifold ways, one of which is the regulatory environment within which environmental justice objectives and spatial transformation should be executed. The latter are understandably necessary for the safety, inclusivity, resilience and sustainability of every city and town in South Africa. It follows that the combination of applicable regulatory instruments should be complementary and enabling and such that it can yield tangible transformative outcomes.

The research underpinning the paper forms part of a continuous process of questioning the slow progress of environmental justice and spatial transformation in South African cities. There are many factors at play, ranging from institutional barriers and the depth of the historically created spatial divide to inadequate political commitment, competing development priorities and insufficient resources. Part of the

frustration of planning officials is the excessive focus on strict legal compliance (mostly with financial management legislation) at the expense of transformation. This paper concerns the tricky interplay between three key pieces of legislation that inform and steer environmental justice and spatial transformation initiatives in every municipality, namely the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA), the National Environmental Management Act 107 of 1998 (NEMA) and the Spatial Land-Use Management Act 26 of 2013 (SPLUMA).

The objective of this paper is to provide an alignment and enablement analysis of the three Acts and to establish whether or not the demands arising from the co-existence and joint implementation of diverse pieces of law could be one of the causes of the slow environmental and spatial transformation in South African cities. The preliminary combination of desktop research and inputs of local government officials and practitioners show that the content, objectives and provisions of the different pieces of law are aligned with developmental local government objectives. The challenge arguably lies not in the letter of the law but elsewhere. This paper critically responds to this dilemma whilst also drawing on lessons from other developing and developed country jurisdictions.

16 September, Session 3: Recent Case Law

Angela van der Berg (University of the Western Cape) – [Khanyisa Community Development Organisation and Others v Director: Development Management: Region 2, Western Cape Department of Local Government, Environmental Affairs and Development and Another \(10032/17\) \[2020\] ZAWCHC 16 \(5 March 2020\)](#)

John Rantlo (North-West University) – [Global Environmental Trust and Others v Tendele Coal Mining \(Pty\) Ltd and Others \(1105/2019\) \[2021\] ZASCA 13; \[2021\] 2 All SA 1 \(SCA\) \(9 February 2021\)](#)

Catherine Warburton (Warburton Attorneys Inc) – [Milieudefensie v Royal Dutch Shell PLC C/09/571932 / HA ZA 19-379](#)

Peter Kantor (Advocate and Chair ELA) – [Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment \[2021\] FCA 56](#)

16 September, Session 4: Environmental constitutionalism

James R. May (Esq., Visiting Professor of Law, S.J. Quinney College of Law, University of Utah) – ***The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes***

The idea that every human being has a right to a clean and healthy environment has caught the imagination of people across religious, cultural, constitutional, national, and continental divides. What, though, is the case for environmental human rights? This question incorporates many others, including whether there is or ought to be a human right to a healthy environment; where and how it should be recognized; how to implement it; and the extent to which it causes or correlates to improvements in outcomes. Simply, the case for environmental human rights is complicated and complex. There are normative, ethical, and moral justifications that both the planet and people living on it are better off in a world that recognizes a right to a healthy environment. Reflecting this, a majority of nations already do so, and the effort for international recognition is gaining momentum. Ultimately, however, while it is compelling, the case for environmental human rights has shortcomings that warrant consideration and further analytical interrogation.

Recognition of a right to a healthy environment is now the subject of considerable effort and within humanity's reach, if only we can grasp it. But what is less clear is whether and the extent to which all of this is worth the coin, yet, and if so, why it is a better use of time and energy than by, say, protecting *other* established rights, working to enact and enforce environmental laws, or by implementing other regimes, such as the United Nations' Sustainable Development Goals, discussed below. It is complicated and hard to know. Ultimately, however, while the case is solid, it has shortcomings that warrant consideration and further analytical interrogation. In the end, the outcome and objective converge: the world is better off for recognizing everyone's right to a healthy environment.

Thus, this presentation examines three aspects of the case for environmental human rights. Part I considers the extent to which environmental human rights have been recognized in law, such as by international instrument, constitution, or court decision. Part II then examines the extent to which courts are reaching results because of an environmental right. Part III then contemplates the extent to which recognizing environmental human rights in law improves environmental outcomes. The presentation concludes that although environmental human rights have found footholds about half the world over, judicial recognition has been slow in coming and mixed in results. There remain few cases issued from apex courts (that is, courts that issue controlling opinions) engaging environmental rights, leaving much opportunity for the development of legal principles. There is also sparse demonstrable evidence that legal recognition of a right to a healthy environment improves environmental outcomes, suggesting a need for further interrogation.

Key Words: Environmental Human Rights, Human Rights, Environment, Constitutionalism

Pasquale Viola (Charles University, Prague) – Constitutionalism(s) and the environment from different viewpoints: “the good, the bad and the ugly”

The meaning of the term ‘constitution’ has changed over time, from a simple implementation or body of rules into a legal structure enacted by a constituent power, offering functional instruments to limit the political power. Whether pristine or secondary, internally legitimate or imposed, autochthonous or borrowed, constitutions reflect to a certain extent both an endogenous claim and a global trend. Considering constitutionalism as a political theory tight with the legal technique, constitutional experiences inspired autonomous or context-related forms of constitutionalism. An example of such attitude could be traced back in several theories, and scholars seem to find common features usually summarised in an adjective to be prepended to the noun ‘constitutionalism’ (e.g., authoritarian, post-authoritarian, global, neo-, etc). Through amendments or the entry into force of entirely new texts, constitutions seem to follow up-to-date concerns, both transnational and domestic, and environmental degradation is one of these pervasive topics within the current constitutional debate, thus nurturing a key-question: is environmental constitutionalism a ‘different species’ or a genetic and physiological variant of other theories?

The wave of new or amended constitutions dealing with the concept of environment adopts different legal forms, i.e. state positive obligation, individual right and duty, procedural right and several other peculiar provisions. The majority of these constitutional ‘tools’ are enforceable, and the environment is usually mentioned in the construction of fundamental and/or human rights theories, while only in few cases, along with social, economic, and cultural rights, it assumes less predominance than civil and political rights. In contrast, only few constitutional texts expressly qualify environmental provisions as unenforceable. The main effect of this new approach provides a holistic attitude that impacts on legal systems. The critical rethinking of ‘old-fashioned’ legal schemes could appear a phenomenon on which everybody agrees. However, theoretical positions differ, especially considering that thousands of legal scholars are quite ‘fond’ of classical theoretical frameworks. In other words, it is quite easy to find scholars ready to just consider the environment as another topic law has to deal with, such as, for instance, artificial intelligence or digital security. Consequently, environmental constitutionalism is seen through different lenses: ‘the good’, ‘the bad’ and ‘the ugly’ (of course, these perspectives contain value judgments, yet they offer a brief and direct insight on how legal scholars actually perceive environmental constitutionalism).

Dealing with the already mentioned scholarly approaches towards environmental constitutionalism, this presentation focuses on three relevant theories regarding contemporary facets of constitutionalism(s)—namely transformative, global and *nuevo constitucionalismo latinoamericano*—, with the aim of assessing “how much environment is embedded in them” and questioning the epistemological autonomy of environmental constitutionalism.

Keywords: constitutionalism; environmental law; comparative law.

Amy P Wilson (*Animal Law Reform South Africa and Brooks Institute Animal Law and Policy Fellow, UCLA School of Law*) – ***The Right to Environment: Exploring Interactions and Opportunities for Human and Nonhuman Animals***

This paper will discuss the interaction between section 24 of the Constitution of the Republic of South Africa, 1996 and non-human animals with reference to the 2016 NSPCA Constitutional Court case and related cases. The paper will illustrate the implications of the right and the case law for specific uses and impacts relating to wildlife and animals in agriculture.

Melanie Murcott (*Senior Lecturer, University of Pretoria*) – ***The importance of transformative environmental constitutionalism in climate litigation***

“We are the last generation with the power not only to reverse climate change but to advocate for structural change by unconditionally prioritising justice and equity whilst tackling the crisis. May we not forget that it is our responsibility to become more ethical than the society we grew up in.” – *Keila Mcfarland Dias*

South African judges, as important agents of social transformation, are constitutionally mandated to radically transform environmental governance in the public interest to respond not only to the immense socio-ecological impacts of apartheid, but also to the chilling prospect of a "climate apartheid" set to emerge as a result of the current climate crisis. In the context of the enforcement of socio-economic rights, Karl Klare's notion of transformative constitutionalism has offered a useful justification for courts to do so. This is because transformative constitutionalism represents a call for judges, lawyers, and others to respond to the socio-economic hardships arising from the deplorable living conditions of South Africa's poor through legal means, grounded in the Constitution. Emerging from and building on this concept, transformative environmental constitutionalism entails recognizing that the lived realities of South Africa's poor are also environmental issues, to which environmentalism must respond. Transformative environmental constitutionalism requires implementing environmental constitutionalism (understood as the entrenched and enforceable protection of the environment in a constitution) so that it can contribute more meaningfully towards South Africa's project of transformative constitutionalism. This paper describes key legal tools emerging from a legal theory of transformative environmental constitutionalism and explains how and why these tools could be particularly useful in the context of litigation responding to climate change adaptation and mitigation challenges with reference to *Earthlife Africa*, South Africa's first climate change case.

Transformative environmental constitutionalism requires, first, that courts frame climate litigation in a justice-oriented manner that adopts a socio-ecological systems perspective. Courts should do so by carefully considering social, environmental and climate justice issues emerging from the evidence before them, or by taking judicial notice of relevant facts that illustrate social, environmental and climate injustice. Secondly, transformative environmental constitutionalism requires transformative adjudication in climate litigation, from a rights-based perspective. This form of adjudication could be pursued through more meaningful reliance on the principles of environmental justice and public trusteeship as they emerge from *NEMA* and the

environmental right. Thirdly, the normative content of the environmental right ought to be developed with reference to the notions of ecological sustainability and inter- and intra-generational equity. Judicial engagement with these notions could lend normative force to the environmental right in a manner that aligns with South Africa's project of transformative constitutionalism and that is responsive to the current climate crisis. Lastly, the environmental right ought to be relied upon in conjunction with other substantive rights, as it could serve to strengthen claims for such rights, including the rights to life, dignity, socio-economic entitlements, and culture, that pertinently arise in climate litigation. South African constitutional law allows courts to engage in a substantive manner with the law, by engaging with relevant legal principles and rights *mero motu* to the extent that litigants do not refer to them in argument.

Key words: environmental constitutionalism; transformative environmental constitutionalism; climate change; climate litigation

17 September, Session 6, Comparative perspectives

Md. Zakir Hossain (Senior Judicial Magistrate Chief Judicial Magistrate Court, Feni District, Bangladesh) – ***Access to Environmental Justice as a Constitutional Right in Bangladesh & South Africa***

In the absence of any enforceable provision in the Constitution of Bangladesh regarding protection of the environment the Supreme Court of Bangladesh expanded the ambit of Articles 31 and 32 of the Constitution and recognized the unenumerated right to the environment in *Dr. M. Farooque v. Bangladesh* [1997]. However, The Constitution of Bangladesh (Fifteenth Amendment) Act, 2011 inserted a new Article 18A in the Constitution imposing responsibility on the State to protect natural resources, biodiversity, water bodies, forest, and wildlife, and preserve and develop the environment for the present and future generations. Following the precedents from India, the Apex court of Bangladesh has delivered some efficacious and eventual judgments for the protection of the environment and for ensuring the environmental justice. Bangladesh is one of the pioneers in establishing specialized environment court in 2000 by the Environment Courts Act 2000. Unfortunately, the environment courts have not been fully functional even though the previous Act has been replaced by the Environmental Court Act 2010.

South Africa after the successful revolution against apartheid and racism in 1994 adopted a very promising constitution in 1996 granting right to the environment the status of a fundamental right under Article 24. The access to environmental justice is ensured under the constitutional framework and subsequently a series of statutory laws. The National Environmental Management Act (NEMA) of 1998 lays out the governance of environmental justice and access to environmental rights through environment courts and executive approach in a variety of ways. South Africa has also been working for environmental justice from constitutional, social and international aspects.

Considering the facts that the right to environment in South Africa has been recognized by the Constitutional text and in Bangladesh it is the Supreme Court who has recognized the right, this paper does a comparative examination of the situations regarding environment prevailing in Bangladesh and South Africa. There are criticisms against the Apex court of Bangladesh as it has in some of the environmental cases encroached into the domain of the executive and the legislature. This paper will examine whether this could have been avoided by expressly providing the right in the constitution as has been done in South Africa. This paper will propose recommendations from the South African experience to build a robust environmental jurisprudence in Bangladesh which would ensure better access to justice.

Key Words: Right to Environment, Environmental Justice, Public Interest Environmental Litigation (PIEL), Constitutional Rights, Judicial Activism, Access to Justice.

Kesolofetse O Lefenya & Gaopalelwe L Mathiba (NWU) – Enhancing Accountability for Environmental Damage in South Africa, Zimbabwe, Mozambique and Swaziland: Towards Environmental Justice

In recent times, some SADC countries, including South Africa, Mozambique, Zimbabwe and Swaziland, have experienced widespread violent protests. This has resulted in the damage to infrastructure, loss of lives, decline in economic activity, environmental pollution and exacerbated property, among others. These violent protests were fuelled by various reasons, but the common consequence being the severe destruction of properties and environmental degradation and pollution. This has necessitated a need to explore how accountability for environmental degradation and pollution can be determined.

Accountability is the mechanism for ensuring conformity with the set norms and standards of action. In any setting where rules are established to guide human activity, supervision of conformity with those rules is an essential condition for the stability of that environment. Those exercising public power and discretionary authority must be answerable by being subjected to rigorous scrutiny, interrogation and ultimately, commendation or sanction for any degradation. In the absence of accountability, autocracy, despotism and even dictatorship is likely to result. Therefore, accountability is a basic attribute of an open, democratic and transparent society.

On the other hand, environmental justice concept has always existed in other countries outside of South Africa. It has existed in the American system, for many years now, and in other jurisdictions such as Australia and Canada. This goes a long way to demonstrate that environmental justice means different things to different people or scholars or laymen. Even if it has differing meanings across jurisdictions, environmental justice has been practiced in recent years through public interest litigation in many countries, including South Africa.

The South African Environmental Justice Networking Forum understands environmental justice as being about social transformation directed towards meeting

basic human needs and enhancing the quality of human life, economic quality, health care, housing, environmental protection and democracy.

Given the prevalence of violent protests in selected countries within SADC, it is very clear that the notion of environmental justice continues to be a dream that is far from being realized. In order for this dream to come into reality, there is a need for various accountability mechanisms to be put into place and accountability being the order of the day. The questions that remain to be answered, is who must be held accountable, and how can those responsible for such environmental wrongs be held accountable for their actions.

This paper will unpack the principle of accountability and further elaborate on what environmental justice refers to in the South African context. It will briefly highlight a few incidents of environmental wrongs that took place in the recent past in these selected SADC states. The paper will later attempt to answer the questions of who must be held accountable for environmental injustice/ environmental wrongs and lastly deal with the question of how to ensure the aforementioned accountability.

Leila Neimane (Postdoctoral researcher, University of Latvia, Faculty of Law, Institute of Legal Science, Raina) – ***Maritime Spatial Planning “Know-How” of the Baltic Sea Region and the African Atlantic Region: Mutual Learning Possibilities***

Since the beginning of the millennium, maritime spatial planning (MSP) gradually becomes one of the most popular ecosystem-based tools of the integrated ocean management governance worldwide to reconcile the environmental protection and economic development in line with the sustainability paradigm while planning activities at sea. Currently, 78 countries around the world, including African countries, are implementing MSP-related initiatives, and the spread of MSP can be considered a kind of “success story”.

Baltic Sea Region comprising eight Member States of the European Union (Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden) is one of the pioneers in the field of marine protection and more recently also MSP coordination across coastal and marine areas, providing an excellent platform for reducing the users’ conflicts in the sea and at the same time a fruitful ground for the fostering of the established and emergent sectors of the Blue Economy. The acquired practical and scientific knowledge since 2000s, methods and guidelines in the MSP field in the Baltic Sea Region can serve as a helpful model for other regions of the world.

Useful lessons can be drawn from the MSP practical experiences, gained also through the variety of the implementation of the pilot projects in the Baltic Sea Region, and the underpinning MSP legislative framework of the European Union for the African Nations bordering the Atlantic. At the same time, the knowledge exchange can be mutual due to active regional initiatives taking place in the African Atlantic Region, e.g., the Mama Wati project implemented by the Abidjan Convention Secretariat.

In light of the issues mentioned above, the main aim of the paper is to explore opportunities and challenges of the exchange of the MSP regulatory and practical experience between the Baltic Sea Region and the African Nations bordering the Atlantic. To that end, firstly, the paper provides an overview of the current the MSP institutional and legal framework in the countries of both regions and makes a comparative analysis. Secondly, the paper identifies problematic issues for the effective MSP development and implementation in both regions, taking into account the experience of various pilot projects. Thirdly, the paper identifies the hindering issues of the MSP uptake and, more specifically, analyses flaws of the MSP institutional and legal framework, data availability and stakeholder involvement. Additionally, in conclusion, the paper discusses the problematic areas of the exchange of MSP experience. During the research process, monographic, dogmatic, comparative and special analytical methods were used.

Keywords: maritime/marine spatial planning; integrated ocean management; Blue Economy; Baltic Sea Region; African Atlantic Region

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17 September, Session 7: Environmental rights interpreted

Ashleigh Dore (*Endangered Wildlife Trust*) – ***Ecologically sustainable use versus use that is sustainable – understanding the true ethos of section 24(b)(iii)***

“For use to be considered sustainable, it is not enough for the use or the used resource to be sustained, the use must not involve unsustainable impacts on the broader ecosystem”

Dr Rosie Cooney succinctly captures one of the fundamental failings of one school of thought about the application of sustainable use in South Africa, which focuses on the sustainability of the use as opposed to securing the ecologically sustainable use as a mechanism to achieve wider environmental protection. Section 24(b)(iii) of the Constitution of the Republic of South Africa, 1996 (the Constitution) calls for the environment to be protected through securing ecologically sustainable [development and] use of natural resources, while promoting justifiable economic and social development. This is fundamentally different from providing a right to use natural resources, with the latter increasingly becoming the common but incorrect interpretation prevalent in South Africa.

This presentation will consider the existing legal and policy provisions which provide for sustainability and sustainable use in South Africa; the principles applied internationally to achieve sustainable use; and we will assess the inclusion of wild animals in the Animal Improvement Act 62 of 1998 (AIA) against the existing provisions relating to sustainability and sustainable use. We will show that the current application of sustainable use by some, is not in line with the Constitution and that the listing of wild animals in the AIA is contrary to the fundamentals of sustainability, both nationally and internationally.

We will demonstrate that South Africa needs a progressive, effective and appropriate approach to achieving the constitutional requirement of protecting the environment through ensuring ecologically sustainable use. We will conclude the presentation with an assessment of whether the definition and approach to sustainable use as provided for in the Draft Policy on the Conservation and Ecological Sustainable use of Elephant, Lion, Leopard and Rhinoceros as published in Government Notice number 566 in Government Gazette 44776 meets this mandate.

Keywords: Sustainable use, wildlife

Nsikan-Abasi Odong (University of Ottawa, Canada) – A Critique of the Right of Access to Water in South Africa: General Comment No. 15, 2002 of the Committee on Economic, Social and Cultural Rights as Benchmark

South Africa is the first country in the world to explicitly constitutionalize the right of access to water in section 27 (1) b) of its 1996 Constitution. The increasing focus on the constitutional right to water is understandable because water is not only a finite resource, it has also been identified by experts as a precursor to the enjoyment of and a crucial component of other constitutionally guaranteed rights including the right to life; the right to health; the right to personal liberty; and the right to human dignity.

In view of the strategic role which water plays and of the fact that not everyone is enjoying the right of access to water in South Africa presently, this paper will employ the comparative methodology to evaluate the right to access to water and the challenges to the realization of the right of access to water in South Africa. In evaluating the right of access to water in South Africa, the paper will rely on General Comment No. 15 2002 of the Committee on Economic, Social and Cultural Rights (General Comment No. 15) as the benchmark. Although General Comment No. 15 is not a hard law since it does not have coercive force, it has, however, been accepted by experts as the first international instrument that definitively provides for the contents of the right to water and would therefore serve as a useful benchmark to measure the progress made, towards as well as what needs to be done for, the full realization of the right of access to water in South Africa. The paper will make useful constitutional, legislative and policy recommendations to further the realization of the right of access to water for everyone in South Africa.

Keywords: The right to water; access to water; availability of water; adequacy of water; affirmative action; accessibility of water; quality of water; state duty on the right to water; and progressive realization socio-economic rights.

***Reuben Chifundo Nazombe (MA Phil Student at Arrupe Jesuit University) –
Agricultural Cooperatives and Section 24(b) of the South African Constitution:
A Measure to Secure Ecologically Sustainable Development while Promoting
Justifiable Economic and Social Development among Smallholder Farmers in
South Africa***

Section 24(b) of the South African Constitution arguably spells out in clear language the obligation of the government towards the sustainable development. The obligation calls on the state to adopt reasonable legislative and other measures in implementing the right through sustainable development. This paper focus on one group that is very critical towards sustainable development, that is to say, smallholder farmers. Their strong dependence on agriculture makes them a focal point in achieving sustainable development. Since the paper focuses on smallholders, sustainable development refers to sustainable agriculture and it involves the management and conservation of natural resources catering for the needs of both the present and future generations.

Cooperative societies have been identified as very important vehicles in the advancement of the post 2015 sustainable development goals adopted by the United Nations and by inference sustainable development in Section 24(b) of the South African Constitution. Agricultural cooperatives help in sustainable management and use of natural resources through providing for the local people means to find solutions to changes in the environment, manage natural resources as well as economic diversification of economic activities to embrace environmentally friendly means of production. The South African government has identified agricultural cooperatives as critical in poverty reduction, unemployment, high levels of inequality and as a means of accelerating empowerment of disadvantaged majority. The government has thus seen the need to create a framework for development of small-scale farmers through development of cooperatives.

This paper argues that, though not clearly seen as such, by creating an elaborate framework for developing small-scale farmers through various cooperatives, the government adopted a deliberate measure towards the fulfilment of the obligation to sustainable development created by Section 24(b). This paper shall analyze the obligation on the part of the state created by Section 24(b) of the Constitution in line with other relevant international instruments. It further explores cooperative societies in general and in particular, the development of a framework to develop smallholder farmers through cooperative development by the South African government as a deliberate measure targeted towards the fulfilment of the obligation to sustainable development.

18 September, Session 8: Giving effect to section 24

Amanda van Reenen (Director: Legal Support NEMA, Department Forestry, Fisheries and Environment) – **New developments in environmental law - giving effect to section 24**

Willemien du Plessis (North-West University) – **Environmental framework legislation the way forward – benchmarking South Africa against other African countries**

South Africa introduced its first environmental framework law in 1998, namely the National Environmental Management Act 107 of 1998 (NEMA). It was one of the first countries in Africa to do so. The NEMA's predecessor was the Environment Conservation Act 73 of 1989 which introduced some of the environmental management tools on which the concept of an environmental authorisation was built. At the time only a few authors refer to environmental framework laws, a concept introduced by UNEP in a number of countries, amongst others, Kenya (UNEP, 1999). UNEP and a number of authors referred to environmental framework law (Iqbal, 1999, Okidi, 1997 and Nolon, 2000). Nel and Du Plessis later refined the concept in a 2001 article (Du Plessis & Nel, 2001).

A White Paper on Environmental Management was published in 1997, following an extensive public consultation process and setting out the dream of what South Africa's environmental management act should entail. The NEMA promulgated by parliament in 1998 did not live up to expectations as parliament approved a watered down version of the original draft Bill. NEMA was subsequently amended several times and a number of additional and supporting sector-specific environmental laws (SEMAs) were promulgated. An array of environmental management instruments had been added and the then Department of Environmental Affairs tried to introduce a one environmental system (at least for mining) (see Du Plessis, 2015). The theory of environmental framework legislation was not elaborated upon further and no-one determined whether NEMA with its new SEMAs now live up to the ideals of environmental framework legislation. There is therefore a need to firstly review and revise the general theory on framework environmental law and secondly to establish whether NEMA (read with its SEMAs) are indeed akin to modern framework environmental law. At the IUCN conference in Malaysia I addressed the question whether environmental framework legislation in Africa addresses climate change issues as set out in the SDGs. This paper will benchmark the South African environmental framework legislation against those of other African countries, to distil best practices for future implementation.

18 September, Session 9: Chemicals, agriculture, waste and water

Michael Kidd (University of KwaZulu Natal) – The United Phosphorus Limited chemical leak: Non-compliance with legislation or a gap in the law?

The recent disastrous chemical leak following a fire at a warehouse in Cornubia, Umhlanga, led to serious aquatic pollution, killing thousands of marine animals, and had health impacts on humans. Questions have been raised in the media about the possibility of shortcomings in the environmental authorisation process and possible applicability of the major hazard installations regulations under the Occupational Health and Safety Act. My paper will examine the applicability of the relevant laws to ascertain whether there was a problem of non-compliance, or whether the warehouse containing pesticides created a dangerous situation that was not covered by the existing law. If the latter, possibilities for strengthening the law will be considered.

See the [Daily Maverick](#) for context.

Danica Marlin, Toshka Barnardo and Samuel Pillay (Sustainable Seas Trust) – How litter monitoring surveys can guide waste management strategies (and influence policies)

Along with the effects of climate change, plastic litter on land and in the ocean is one of the most pressing issues threatening the health of the environment, with adverse social, economic, and ecological consequences. It is estimated that globally between 0.5 and 12.7 million tonnes of plastic enter the ocean annually and that 80% of this litter comes from land. In Africa, five countries, including South Africa, are among the top 20 in the world in terms of plastic litter production. Africa faces numerous waste management challenges and is expected to become the most plastic-polluted continent within the next few decades. This expectation is perpetuated by Africa's high population growth rates, rapid urbanisation, and a growing middle-class with increasing consumption patterns.

In support of the UN Environmental Assembly's call on all people to work "Towards a Pollution-free Planet", Sustainable Seas Trust (SST) launched the African Marine Waste Network (AMWN), which is committed to working with all 54 African countries to assist them in improving waste management. In 2017, proceedings of the Inaugural International Conference of the AMWN revealed that Africa is data poor and thus has no measurable aspects upon which to build strategies and against which to monitor progress. Furthermore, it does not have adequate education about pollution and therefore has decision-makers who are uninformed about plastic waste issues and does not have capacity to deal with waste management.

To monitor whether litter reduction strategies are effective, it is vital to have baselines against which progress can be measured. Litter baselines can be developed through the collection of quantitative data during regular litter monitoring surveys in different

environments. In 2019, the AMWN and the Western Indian Ocean Marine Science Association (WIOMSA) rolled out the WIOMSA Marine Litter Monitoring Programme in seven WIO countries. This is the first multinational, regional litter monitoring programme taking place in Africa. The participating countries have developed litter baselines in their respective locations, by conducting synchronised beach litter monitoring surveys using the same methods. These data may be used to influence local and regional policies. With 93% of the global population living along the coast, and beaches usually being easily accessible and relatively easy to survey, beaches are ideal habitats in which to monitor litter.

Results from the beach litter surveys have shown that across all seven participating countries, plastic forms the bulk of all litter collected, that urban centres are hotspots of litter, but even beaches far removed from urban centres have large amounts of litter, indicating that ships are an important source of litter found on beaches. Considering these results, litter reduction strategies should therefore focus on plastic litter, near cities, and must not disregard management of litter on ships.

Keywords: plastic debris, waste management, litter surveys, data collection

Carin Bosman (*Carin Bosman Sustainable Solutions*), ***Fanie de Lange*** (*University of the Free State*), ***Germarié Viljoen*** (*NWU*) – ***Assessing South Africa’s groundwater regulatory framework: The case of the unprotected dolomitic aquifer of Delmas***

Fresh water scarcity is widely recognised as one of the greatest global challenges of the 21st century. In South Africa, a semi-arid country that is being plagued by episodes of severe drought, the water crisis continues to grow. In securing water availability, South African cities, communities and farmers increasingly depend on groundwater. With the dependence or pressure on groundwater on the increase, incidences of exploitation and pollution are of particular concern. The Botleng Dolomite Aquifer, which is the primary source of domestic water supply and source of water for large scale agricultural farming in the Delmas area, is but one example. Not only did the Delmas community witness a number of serious typhoid fever outbreaks due to groundwater contamination, but mining and associated activities, located on top of the Delmas dolomitic aquifer, continue to cause irreversible damage to this life-sustaining water resource. The Delmas example, which highlights the vulnerability of groundwater in an already water scarce country, justifies an assessment of groundwater governance.

Governing groundwater in a way that does not deplete the source of water, nor cause any form of degradation is a global challenge. In South Africa, scholarship shows an extensive history of groundwater governance doctrines. Yet, the country’s groundwater remains a poorly governed resource. While the National Water Act 36 of 1998 (NWA) provided an ideal opportunity for the judicious governance of South Africa’s groundwater, groundwater governance remains problematic.

This paper sets out to achieve three objectives: 1) to assess South Africa’s existing regulatory approach to the protection of groundwater; 2) to identify gaps in the

regulatory framework; and 3) to explore regulatory opportunities to strengthen groundwater governance. The discussion follows a focussed approach, and hinges on the case of the dolomitic aquifer of Delmas.

Keywords:

Groundwater, land use planning, agriculture, mining

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