

Transformative Environmental Constitutionalism

Transformative Environmental Constitutionalism

By

Melanie Murcott



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For Jean and Charles Murcott



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Preface

Developing Law for the Anthropocene in the Global South

This book is about advancing justice in a time of planetary emergency, including as a result of the global climate crisis. It exposes the value of a legal theory of transformative environmental constitutionalism in a Global South context, including by applying the theory in the context of litigation concerning climate change adaptation and mitigation challenges and other environmental problems. It is written primarily for an audience of academics, and secondarily for an audience of practising lawyers, judges, and activists, with a focus on the South African experience, whilst being transplantable to other jurisdictions, particularly in the Global South. The book's emphasis is on the need for the judiciary to recognise, in the adjudication of environmental law disputes, that social injustices are connected to harmful socio-ecological realities and thus to environmental and climate injustices for disadvantaged, marginalised, and vulnerable people (collectively referred to as "vulnerable people"). The book charts a way forward for the judiciary and other role players in litigation.

The book is inspired by my upbringing in a family deeply committed to combatting social injustice.¹ I have a vivid recollection of how, at the end of apartheid, both my parents, Jean and Charles, were active participants in South Africa's transition to democracy, and how they endeavoured to advance social justice in various ways throughout their lives. Because of their influence, and in the hopes of learning to use the law as a tool to advance social justice, I obtained a law degree at the University of Cape Town. Later, after several years in legal practise, as I began my journey into academia, I vowed to generate knowledge and advance scholarship that could contribute towards the attainment of social justice following my parents' hopeful, forward-looking example.

The more I immersed myself in environmental law research, the more I began to appreciate that social justice is not possible without a properly functioning environment.² It is this insight that drove me to develop transformative

1 Demonstrated by, among others, the work of my maternal aunt, Vivienne Taylor (see for instance Taylor "Social Reconstruction"), and the contribution of my maternal uncle, Jaya Josie, in the liberation struggle (see for instance Padayachee and Van Niekerk *The Shadow of Liberation* 236). My late mother, Jean Murcott, was an activist for justice throughout her life, including in her roles as a Minister of the Methodist Church, a leader in the ANC Women's League, and a representative of the South African Council of Churches.

2 Schlosberg 2013 *Environmental Politics* 38; Bosselmann "The ever-increasing importance of ecological integrity" 225.

environmental constitutionalism as a means to contribute (in conjunction with other contemporary responses)³ to discourse responsive to converging socio-ecological crises about which incredible musicians like Jamiroquai⁴ have been singing for years:

If anybody's listening, oh
 Emergency on planet Earth!
 Is that life that I am witnessing?
 Or just another wasted birth?
 Now we got emergency
 Oh, we got emergency on planet Earth
 Now we got emergency
 Oh, we got emergency on planet Earth
 Yes we have
 Think we're standing for injustice
 White gets two and black gets five years
 Well it took me quite a while to suss this
 Now I know my head is cleared
 And a little boy in hungry land
 Is just a picture in the news
 I won't see him in the TV advertising
 Cause it might put you off your food

These powerful lyrics evoke what many scholars refer to as the imagery of the Anthropocene, in recognition that “humans have morphed into ‘geologic agents’ who meddle with the interconnected planetary processes that make up the Earth System”.⁵ The converging socio-ecological crises of the Anthropocene include an increase in human-animal disease transfer linked to biodiversity loss and habitat destruction, and the significant health and other impacts arising from such diseases,⁶ as well as mitigation and adaptation challenges arising from climate change, and related grave injustices and human rights violations

3 For instance, veterinary science has developed the notion of “one health” discussed in Gibbs 2014 *Veterinary Record* and natural scientists have developed a “planetary boundaries framework” discussed in Steffen *et al* 2015 *Science*.

4 Jamiroquai 1993 “Emergency on Planet Earth”.

5 Webster and Mai 2020 *Transnational Legal Theory* 2.

6 O'Callaghan-Gordo and Antó 2020 *Environmental Research* 1–2; Bengis *et al Revue scientifique et technique (International Office of Epizootics)* 498–499.

among and within countries.⁷ Indeed, in 2021, the High Commissioner of the United Nations (UN) Human Rights Council “described the triple threats of climate change, pollution and nature loss as the single greatest human rights challenge of our era”.⁸ Moments later (and almost 30 years after Jamiroquai sang of a planetary emergency) the UN Human Rights Council adopted a resolution recognising that a healthy environment is a human right.⁹

The legal theory of transformative environmental constitutionalism that this book discusses is one among many efforts among legal scholars to offer a critical perspective on much needed law reform given the Anthropocene imagery.¹⁰ In discussing transformative environmental constitutionalism, the book adopts a progressive stance in that I recognise the struggles of, and provide legal means to support, social movements grappling with contemporary justice issues.¹¹ For instance, in 2020 the Climate Justice Charter Movement¹² called for systemic alternatives for transformative change in pursuit of interconnected social and climate justice, as follows:

Through addressing the climate crisis, which affects everything, we can also advance solutions to all socio-ecological crises and more generally end the war with nature. Systemic alternatives are necessary to address the causes of climate change, its risks and pressures for systems collapse.

Other movements, such as those of Earthlife Africa,¹³ the Vaal Environmental Justice Alliance,¹⁴ the Philippi Horticultural Area Food and Farming Campaign,¹⁵ and the Amadiba Crisis Committee,¹⁶ amongst many others, are

7 UN Special Rapporteur on extreme poverty and human rights 2019 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E>; Gonzalez 2018 *Wisconsin International Law Journal* 367–370; “Gonzalez “Global Justice” 220; Houston 2013 *Globalizations* 444–448.

8 UN News 2021 <https://news.un.org/en/story/2021/10/1102582>.

9 Ibid.

10 Several examples of such scholarship are discussed in Webster and Mai 2020 *Transnational Legal Theory* 7–12. Like the work of Richardson “Doing Time”; Bosselmann “The Imperative of Ecological Integrity”; and Kotzé 2020 *Transnational Legal Theory*, this book is “reformist” as envisaged by Bonilla Maldonado “Environmental Law Scholarship” 46–48.

11 In this sense the book is responsive to the call of Madlingozi “Legal Academics” 6 for progressive legal scholarship.

12 Climate Justice Charter Movement <https://cjcjcm.org.za/the-charter/en>.

13 Earthlife Africa Johannesburg <http://earthlife.org.za/wp-content/uploads/2008/04/website-ELA-Jhb-gen-leaflet.pdf>.

14 Vaal Environmental Justice Alliance <http://www.veja.org.za/campaigns.html>.

15 PHA Food & Farming Campaign <https://www.facebook.com/PHAFoodFarmingCampaign/>.

16 Alternative Information & Development Centre <https://aidc.org.za/partners/amadiba-crisis-comittee/>.

also engaged in crucial ongoing struggles for social, environmental and climate justice as intersecting concerns in South Africa. More than ever before, their struggles cohere and align with concerns about justice and vulnerability expressed by a global scientific community.¹⁷ I hope that this book will strengthen their struggles, including by influencing legal culture and offering novel approaches in litigation that form part of their broader movements.¹⁸

This book was developed from my doctoral thesis titled “Towards a Social Justice Oriented Environmental Law Jurisprudence”. I obtained my doctorate from North-West University under the incredible supervision of Professor Louis Kotzé. The content has since been significantly re-worked and supplemented as a result of additional research carried out following anonymous peer review (which was wonderfully constructive), and with thanks to the examiners of my doctoral thesis and a few truly amazing colleagues and friends who gave input. I am grateful for funding from the National Research Foundation’s Black Academic Advancement Programme, which empowered me to finalise the book.

The purpose of the book is to disseminate original scholarly research on the role of the judiciary in responding to the socio-ecological crises of the Anthropocene. It is an extensive and in-depth scholarly treatment of the novel legal theory of transformative environmental constitutionalism developed during, and subsequent to my doctoral studies. The book is embedded in literature concerning transformative constitutionalism, transformative adjudication, the separation of powers, environmental constitutionalism, and the need for a reimagined, justice-oriented approach to the adjudication of environmental law disputes given the Anthropocene’s socio-ecological crises. Chapter 1 of the book outlines the structure of and methodology adopted in the book in more detail.

The book’s cover contains a photograph taken by my brilliant sister, Premilla Murcott, an avid climate justice activist. The lyrics in the book were selected in collaboration with my love, Ilonda Maghoma, who has supported me in so many ways during the writing of this book. Mpho Mogadime has provided invaluable research assistance.

17 IPCC 2022 https://report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_SummaryForPolicymakers.pdf.

18 I might be accused of romanticising such social movements. However, my focus is on the unjust structures and systems that they seek to dismantle. I should not be seen to be discounting that these social movements are complex, heterogeneous, and operate in contested spaces (see for example Steyn 2016 *South African Journal of Political Studies* 274–277).

My hope is that the lyrics, theory, practice, and thought in this book will lead to many more conversations and critiques about justice, and how the law can be more responsive to the socio-ecological crisis of the Anthropocene.

Melanie J. Murcott

Abbreviations

AMD	Acid mine drainage
CARA	Conservation of Agricultural Resources Act 43 of 1983
CCR	Constitutional Court Review
GG	Government Gazette
GHG	Greenhouse gas
GN	Government Notice
IPCC	Intergovernmental Panel on Climate Change
J Hum Ecol	Journal of Human Ecology
KOSH	Klerksdorp, Orkney, Stilfontein, Hartebesfontein (areas falling in a basin of the North-West Province)
MLRA	Marine Living Resources Act 18 of 1998
MOA	Mountains Owners Association
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
MTPA	Mpumalanga Tourism and Parks Association
NEMA	National Environmental Management Act 107 of 1998
NEMAQA	National Environmental Management: Air Quality Act 39 of 2004
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004
NEMICMA	National Environmental Management: Integrated Coastal Management Act 24 of 2008
NEMPAA	National Environmental Management: Protected Areas Act 57 of 2003
NEMWA	National Environmental Management: Waste Act 59 of 2008
NWA	National Water Act 36 of 1998
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PASA	Promotion of Petroleum and Exploitation SOC Ltd
PER	Potchefstroom Elektroniese Regsblad
RECIEL	Review of European Community and International Environmental Law
SAJELP	South African Journal on Environmental Law and Policy
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	SA Public Law
SEMAS	Specific environmental management acts
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman-Dutch Law)
UISP	Upgrading of Informal Settlement Programme
UN	United Nations

UNFCCC	United Nations Framework Convention on Climate Change
Vulnerable people	disadvantaged, marginalised, and vulnerable people
WIREs Clim Change	Wiley Interdisciplinary Reviews Climate Change

