Constitutional Court Review 2023
Volume 13, 125–145
https://doi.org/10.2989/CCR.2023.0006

Addressing the Climate Emergency: The Untapped Potential of South African Constitutional Law

CÉSAR RODRÍGUEZ-GARAVITO & JACQUELINE GALLANT

ABSTRACT: Since the early to mid-2010s, rights-based climate litigation has emerged as a prominent tool for those seeking to secure more ambitious climate action and hold governments and corporations accountable for climate harms. South Africa has been the site of a number of rights-based climate cases since the mid-2010s. This article examines the current state of rights-based climate-litigation in South Africa while contextualising it within the larger global body of rights-based climate cases. In doing so, this article aims to identify gaps and opportunities for rights-based climate litigation and articulate how this litigation in South Africa can help secure more ambitious climate action domestically and contribute to the progressive development of human rights and climate change case law globally.

KEYWORDS: climate change, human rights, litigation

AUTHORS: César Rodríguez-Garavito – Professor of Clinical Law, New York University School of Law, USA; Founding Director, New York University Earth Rights Advocacy, USA.
Jacqueline Gallant* – Lawyer, New York University Earth Rights Advocacy, USA.
*Corresponding author, email: jbg445@nyu.edu

ACKNOWLEDGEMENTS: We thank the editors and anonymous reviewers for their helpful comments on this piece.

I INTRODUCTION

We are already bearing witness to a world 1.1 degrees Celsius warmer, on average, than pre-industrial times.[1] Impacts once thought to be exceedingly rare – from severe droughts and wildfires to epoch-defining flooding – are becoming, increasingly, commonplace. The culprit? Human activities cumulatively out of sync with planetary boundaries, including the burning of fossil fuels, rapid deforestation, and land use change – all of which are feeding the ongoing climate emergency.[2]

People around the world have mobilised in response, challenging the fossil-fueled status quo and working to secure the urgent and ambitious climate action needed to avert the most catastrophic scenarios of global warming.

Human rights-based climate litigation is one such response.[3] Though its origins lie in a 2005 petition submitted by the Arctic Inuit to the Inter-American Commission against the United States,[4] rights-based climate litigation did not become a recurring and widespread phenomenon until after the Paris Agreement was negotiated in 2015.[5] Since then, a handful of pioneering cases have paved the way for the exponential increase in rights-based climate lawsuits visible today.[6]

In important ways, the rise of rights-based climate litigation has been an exercise in transnational exchange, as litigators, judges, and advocates have looked to doctrines, norms, and strategies devised in other jurisdictions to apply to their own. Even so, rights-based lawsuits retain features specific to their domestic legal context, making it imperative to understand how they are situated both domestically and internationally in order to shed light on the evolution of this dynamic legal trend.

Using South African climate litigation as its example, this article seeks to do just that. By updating original data presented in previously published research,[7] it sketches out the international context, namely, how rights-based climate litigation is rooted in the interplay between the international climate and human rights regimes as well as key trends and the overall state of the field. This overview provides a frame in which to understand South African rights-based climate litigation. Given the richness of constitutional jurisprudence in South Africa, the original contribution of this article consists in assessing how courts and litigators

1 NASA Earth Observatory 'World of Change' (13 January 2022), available at https://earthobservatory.nasa.gov/world-of-change/global-temperatures.

2 V Masson-Delmotte 'Summary for Policymakers' *IPCC Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2021), available at https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf.

3 We take an inclusive approach to defining rights-based climate litigation, including any climate case – meaning any case where climate change is a central or ancillary concern but explicitly mentioned – that references rights arguments or language in its petition or rulings. We use the terms 'human rights and climate change (HRCC) litigation' and 'rights-based climate litigation' interchangeably.

4 S Watt-Cloutier et al 'Petition No. P-1413-05' (2006), available at https://climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/.

5 C Rodríguez-Garavito (ed) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (2022) 1.

6 Ibid at 9.

7 C Rodríguez-Garavito 'Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action' in C Rodríguez-Garavito (ed) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (2022) 9–83.

have (or have not) made use of constitutional law and rights to advance action on climate change in South Africa.

Ultimately, this analysis suggests that while South African litigation has made important contributions to the transnational climate litigation field – especially in relation to challenging fossil fuel projects – there is substantial opportunity for innovation and growth, particularly with respect to applying and progressively developing constitutional jurisprudence in the context of climate change.

II ROOTING HUMAN RIGHTS AND CLIMATE CHANGE LITIGATION IN GLOBAL CLIMATE GOVERNANCE

Climate change has aptly been characterised as a super wicked problem[8] for the multifarious implications it has for society. Indeed, though describing a particular phenomenon associated with anthropogenic interference in climate systems, climate change can also be thought of as a 'bundle' of interconnected challenges – from greenhouse gas mitigation to adaptation to climate finance and reparations for loss and damage.

In response, global governance around climate change has evolved dramatically in an attempt to tackle the complex regulatory challenges posed by the climate emergency.

Beginning in the early 1990s, the international climate regime, as established by the United Nations Framework Convention on Climate Change (UNFCCC)[9] and further refined by the Paris Agreement,[10] has been at the forefront of efforts to secure global action on climate change. In more recent years, the international human rights regime has played an increasingly critical role in attempts to hold state and non-state actors alike accountable for their actions and inactions on climate change.[11]

Understood together, these two mutually reinforcing regulatory regimes clarify the scope of state and, albeit to a lesser degree, nonstate obligations on climate change. It is within the context of this interplay between the two regimes that human rights and climate change (HRCC) litigation has become a global phenomenon.

A Urgency and ambition: The interplay between the climate and human rights regimes and how it bounds state and nonstate action

Together, the international climate change and human rights regimes clarify the *ambition* and *urgency* with which states and, to a lesser degree, corporations must act. This puts guardrails around what can be considered appropriate state and nonstate behaviour and offers metrics against which courts can assess – and have assessed – the adequacy of state and nonstate action and inaction.

[8] Eg, RJ Lazarus 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future' (2009) 94 *Cornell Law Review* 1153, 1159–1160.

[9] United Nations Framework Convention on Climate Change (1992).

[10] Paris Agreement to the United Nations Framework Convention on Climate Change (2015).

[11] Eg, JH Knox 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477; Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change 'Promotion and Protection of Human Rights in the Context of Climate Change Mitigation, Loss and Damage and Participation', UN Doc. A/77/226 (26 July 2022).

1 *Ambition*

In this context, ambition refers to the depth and scale of action a state or corporation takes to address the drivers of the climate emergency. And this ambition can be measured in reference to a particular outcome: preservation of a stable climate system.

To preserve a stable climate system, according to the international consensus embodied in the temperature target set by the Paris Agreement, global warming must be limited to 'well below 2°C above pre-industrial levels' with all efforts geared towards limiting 'the temperature increase to 1.5°C above pre-industrial levels'.[12] Warming beyond this poses a substantial risk of triggering tipping points in the global climate system that would compromise its stability.

When states act in a manner that would, in the aggregate, fail to respect this hard temperature limit, it cuts against the imperative to preserve a stable climate system and therefore constitutes low ambition. This, in turn, exceeds another boundary imposed by the Paris Agreement: states must act with their 'highest possible ambition', with emission reductions that 'represent a progression' over time.[13]

In other words, states must, under the international climate regime, take actions consistent with *actually* limiting warming to the Paris temperature target. Otherwise, they fall below the level of ambition required of them.

Nevertheless, though the international climate regime imposes these boundaries on state action, there is an accountability gap stemming from the fact that the substance of states' individual commitments – made through their nationally determined contributions (NDCs)[14] – are voluntary. This is where the human rights system comes into play.

Climate change, given the harms it has and will generate, triggers states' duties to safeguard human rights and prevent foreseeable rights violations.[15] Courts and human rights bodies have imported the Paris temperature target as a benchmark to assess compliance with states' duties to protect human rights, as it represents the international consensus as to when the risk to the global climate system – and the human rights dependent upon it – becomes too substantial.[16]

---

[12] Paris Agreement (note 10 above) at Art 1(a).

[13] Ibid at Art 4(3).

[14] Nationally Determined Contributions (NDCs) are the primary mechanism envisaged by the Paris Agreement to achieve the collective temperature target. In these NDCs, states must detail how they intend to contribute to the global response to climate change, including the targets they have and will set for greenhouse gas emission reductions as well as the measures through which they will reach those targets.

[15] For example, JH Knox 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', UN Doc. A/HRC/31/52 (1 February 2016), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/015/72/PDF/G1601572.pdf?OpenElement; Special Rapporteur on Human Rights and the Environment 'Safe Climate', UN Doc. A/74/161 (15 July 2019), available at https://www.unep.org/resources/report/safe-climate-report-special-rapporteur-human-rights-and-environment.

[16] For example, Rechtbank den haag (Tribunal de district de la Haye), équipe commerce, Associations Vereniging Milieudefensie, Greenpeace Pays-Bas, Actionaid c. Royal Dutch Shell, C/09/571932 / HA ZA 19-379, 26/05/2021, para 4.4. ('The goals of the Paris Agreement are derived from the IPCC reports. The IPCC reports on the relevant scientific insights about the consequences of a temperature increase, the concentrations of greenhouse gases that give rise to that increase, and the reduction pathways that lead to a limitation of global warming to a particular temperature. Therefore, the goals of the Paris Agreement represent the best available scientific findings in climate science, which is supported by widespread international consensus. The non-binding goals of the Paris Agreement represent a universally endorsed and accepted standard that protects the common interest of preventing dangerous climate change.')

State action consistent with the Paris temperature target comports with 'the obligations of States, acting together in accordance with the duty of international cooperation, to protect human rights from the dangerous effects of climate change'.[17] Failing to act, on the other hand, in a manner consistent with achieving this temperature target, which includes failing to fulfil international climate commitments, has been considered 'a prima facie violation of the State's obligations to protect the human rights of its citizens'.[18] The two governance regimes are, as a result, mutually reinforcing.

The key to the human rights system's particular contribution to climate governance is its enforceability. States are *individually* responsible for meeting their human rights obligations. Human rights law, moreover, protects *substantive outcomes* in the context of climate change – in particular, limiting global warming to approximately 1.5 degrees Celsius. Warming past this would trigger impacts so disastrous as to be substantively unacceptable from a human rights perspective.[19] As a result, mere promises do not pass muster: states are individually and legally obligated to implement measures that are consistent, in terms of both ambition and timing, with limiting global warming to the Paris temperature target. In contrast to much of the international climate regime, state obligations to act on climate change under human rights law are binding. In this way, the human rights system adds 'teeth' to the boundaries around state action and ambition level laid down by the climate regime.

Note that though corporations are not explicitly included within the ambit of the Paris Agreement, the standards set by the Paris Agreement as well as human rights law have been used to inform the duties that corporations are legally obliged to fulfil.[20] One such example is *Milieudefensie v Shell*, where the Hague District Court used the goals and benchmarks of the Paris Agreement as well as human rights norms to inform the obligations that Shell, a fossil fuel company, has under an unwritten duty of care, including an obligation to reduce greenhouse gas emissions.[21]

2 *Urgency*

Urgency constitutes the other axis defining the boundaries of acceptable action and, in the context of addressing the climate emergency, refers to the time frame in which states and non-state actors must act.

Under both the international climate regime and the human rights system, state action on climate change must be progressive. With respect to the former, this flows from the requirement that NDCs reflect a 'progression over time'.[22] With respect to the latter, this derives from the principle of non-retrogression, which is a hallmark of human rights law, in particular socioeconomic rights law. The principles of non-retrogression and progression provide that states, in developing and implementing measures to advance the enjoyment of human rights, must work to progressively fulfil rights that are not immediately achievable. States may not, in accordance with these principles, alter these measures such that they represent

[17] See Knox (note 15 above) at para 73.

[18] Special Rapporteur on Human Rights and the Environment 'Safe Climate' (note 15 above) at para 74.

[19] Ibid at 26–32.

[20] Ibid at 32.

[21] *Milieudefensie v Royal Dutch Shell* (note 16 above); see also '*Milieudefensie v Royal Dutch Shell' Climate Litigation Accelerator Toolkit*, available at https://clxtoolkit.com/casebook/milieudefensie-v-royal-dutch-shell/.

[22] Paris Agreement (note 10 above) at Art 3.

a decline in ambition or level of protection.[23] In short, in this emphasis on progression and non-retrogression, the two regulatory regimes are again mutually reinforcing and provide constraints on how states can act over time.

The goals of the Paris Agreement, especially its temperature target, also shape the time frame within which states must act. Because climate change is nonlinear – as its impacts compound and the risk of passing tipping points in the climate system increases exponentially over time – there is a substantial benefit to acting now, when action is less costly and more effective relative to the future.[24]

Beyond this, the international climate regime does not detail how state action must be distributed over time. This is significant because a state could, under the regime's stated terms, offload emission reduction burdens to the future to spare present generations from their associated restrictions, risking a scenario where young and future generations would be required to shoulder severe limitations on their activities – indeed, on their freedoms – in order to limit global warming to 1.5 degrees Celsius. In other words, the road to 1.5 degrees Celsius, without the additional norms and obligations of the human rights regime, could be filled with serious infringements on rights. This was the key insight of the pivotal *Neubauer v Germany* case. In *Neubauer*, the German Constitutional Court found that the government's failure to provide post-2030 targets that would specify how the country would achieve climate neutrality in 2050 risked imposing the bulk of emission reductions on young and future generations close to 2050. The risk that rights and freedoms would be severely and disproportionately encumbered in the future was, according to the Constitutional Court, inconsistent with constitutional rights protections. The Court explained further:

> Even provisions that only begin posing significant risks to fundamental rights over the course of their subsequent implementation can fall into conflict with the Basic Law … This is certainly the case where a course of events, once embarked upon, can no longer be corrected.[25]

As ever more of the CO_2 budget is consumed, the requirements arising from constitutional law to take climate action become ever more urgent and the potential impairments of fundamental rights that would be permissible under constitutional law become ever more extreme … The restrictions on freedom that will be necessary in the future are thus already built into the generosity of the current climate change legislation. Climate action measures that are presently being avoided out of respect for current freedom will have to be taken in future – under possibly even more unfavourable conditions – and would then curtail the exact same needs and freedoms but with far greater severity … The amount of time remaining is a key factor in determining how far freedom protected by fundamental rights will have to be restricted – or

[23] For example, A Nolan et al 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights Law' in A Nolan (ed) *Economic and Social Rights after the Global Financial Crisis* (2014), 121, 122–125 & 133–139; BTC Warwick 'Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights' (2019) 19 *Human Rights Law Review* 467, 468–475.

[24] For example, DI Armstrong et al 'Exceeding 1.5°C Could Trigger Multiple Climate Tipping Points' (2022) 377 *Science* 1.

[25] 'Constitutional Complaints against the Federal Climate Change Act Partially Successful [press release]' *Bundesverfassungsgericht* (29 April 2021) 33, available at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html ('*Neubauer v Germany*').

how far fundamental rights may be respected – when making the transition to a climate-neutral society and economy.[26]

Accordingly, human rights law clarifies how states must implement emission reductions over time so as not to disproportionately burden young and future generations and exacerbate intergenerational inequities, serving to safeguard rights-consistent outcomes for young and future generations.

Applying an integrated reading of these two regulatory regimes is crucial because it clarifies the temporal and substantive boundaries that the regimes together lay around state and nonstate action beyond what would be clear from an isolated reading of each regime individually. From this integrated reading, new possibilities and opportunities emerge, which is precisely the context in which HRCC litigation became a global trend. It is to this point we turn next.

III GLOBAL HRCC LITIGATION: IMPLEMENTING THE TWO REGIMES FROM THE BOTTOM UP

Global rights-based climate litigation has blossomed in the context of this interplay between the international human rights and climate change regimes. Indeed, it has served as a bottom-up tool to turn nonbinding individual climate commitments at the international level into binding and enforceable domestic commitments while embedding them within rights norms and principles. In this way, it has attempted to hold both states and corporations to the ambition and urgency with which they must act under the two governance regimes.[27]

In this section, we provide a brief overview of the status of global rights-based climate litigation. Then, we discuss how global HRCC litigation reflects the interplay between the two regimes, honing in on how this litigation has sought to enforce the boundaries around ambition and urgency.

A The distribution, status, and key features of global rights-based climate litigation: an overview

Of the 279 HRCC cases worldwide, 253 have been filed since 2015.[28] Given that the vast majority of these lawsuits were filed in the last six years or so, it is no surprise that most of these cases are currently pending before courts or quasi-judicial bodies or are on appeal. Of those cases that have been definitively decided, defendants/respondents[29] have a slight edge: 54 have been resolved in favour of the plaintiffs/applicants and another 76 concluded with findings for the defendants/respondents.[30]

[26] Ibid at 37.

[27] Rodríguez-Garavito (note 7 above) 15.

[28] Until June 2023. Data is from the HRCC Case Database maintained by the Climate Litigation Accelerator at New York University School of Law. See 'CLX Rights-Based Climate Cases Database' *Climate Law Accelerator*, available at https://clxtoolkit.com/casebook/.

[29] We are using the terminology 'defendants/respondents' and 'plaintiffs/applicants' to reflect the diversity of proceedings in global HRCC litigation.

[30] Ibid.

There have been rights-based climate cases filed on every continent, with the exception of Antarctica. More specifically, litigators have filed cases in 44 national courts[31] as well as 14 regional and international judicial and quasi-judicial bodies.[32]

Geographically, Europe takes the lead as the region with the greatest number of HRCC lawsuits. Thereafter, Latin America[33] follows in terms of the numerical penetration of HRCC litigation. Crucially, East Asia has not been the site of much HRCC litigation, with the exception of a handful of cases in Japan and South Korea. This is significant, given the major role that China plays in global greenhouse gas emissions. Relatedly, the United States has also not seen an abundance of rights-based climate litigation, though the United States is a leading jurisdiction for non-rights-based climate lawsuits.[34] The legal traditions of both these major emitters have thus far posed substantial obstacles to those interested in pursuing this type of climate litigation in these jurisdictions.[35]

Though the specific claims, arguments and norms advanced in HRCC litigation vary from case to case, certain broad trends characterise this body of case law.[36] To start, most cases challenge the *mitigation* of greenhouse gas emissions versus *adaptation* to climate impacts. Though mitigation is crucial to averting dangerous scenarios of global warming, this relative dearth of attention paid to adaptation is significant since most countries in the Global South are not, relatively speaking, major emitters. Instead, they face the brunt of climate impacts, making adaptation a high-level concern. And, as a result, HRCC litigation, as a field of legal practice, has missed half the problem.

Despite its relative invisibility from the perspective of HRCC litigation, adaptation is nonetheless emerging as a more visible and contentious issue within international climate negotiations and law and has been the subject of specialised reports from institutional actors like the UN Environment Programme and the Intergovernmental Panel on Climate Change (IPCC).[37] This may serve as an impetus for litigators to more systematically take up the issue of adaptation in HRCC litigation.

---

[31] HRCC cases have been filed in the following countries: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Czech Republic, Ecuador, France, Finland, Germany, Guyana, India, Indonesia, Ireland, Italy, Japan, Kenya, Luxembourg, Mexico, Nepal, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Peru, Philippines, Poland, Romania, Russia, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, Uganda, United Kingdom, United States. Ibid.

[32] HRCC cases have been filed in the following regional and international judicial and quasi-judicial bodies: Court of Justice of the European Union; East African Court of Justice; Economic Community of West African States (ECOWAS) Court of Justice; European Committee of Social Rights; European Court of Human Rights; European Ombudsman; Inter-American Commission on Human Rights; Inter-American Court of Human Rights; International Court of Justice; International Criminal Court; Organization for Economic Co-operation and Development (OECD); UN Committee on the Rights of the Child; UN Human Rights Committee; and UN Special Rapporteurs.

[33] For the purpose of mapping out trends in HRCC litigation, we include Mexico and the Caribbean within the Latin America categorisation.

[34] Non-rights-based climate lawsuits are all those that cannot be classified as rights-based. For the definition of rights-based climate litigation that we deploy, see note 3 above.

[35] Rodríguez-Garavito (note 7 above) at 34.

[36] Ibid at 15–24.

[37] UN Environment Programme *Too Little, Too Slow – Adaptation Gap Report* (2022), available at https://www.unep.org/resources/adaptation-gap-report-2022; HO Pörtner et al 'Summary for Policymakers' in HO Pörtner et al (eds) *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022), available at https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf.

Most HRCC cases, moreover, target *governments* as opposed to *corporations*. More specifically, of the 279 of HRCC lawsuits that have been filed globally, only 45 target corporations.[38] There has, however, been some traction in closing this gap, as an increasing number of cases expressly challenge corporate contributions to climate change, especially after the initial victory against Shell in the Dutch *Milieudefensie v Shell* case.[39] As examined in more detail elsewhere in this article, South African courts may be especially well-positioned to fill this gap, given the extensive body of constitutional law that courts have already developed to define and implement the constitutional duties of private actors, including corporations, in South Africa.

Rights-based climate cases, in general, fall into one of two camps in terms of the substantive targets they pursue.[40] In the first camp, litigators challenge *government or corporate climate policies* for, among other things, their inadequate speed, ambition or level of implementation. The majority of rights-based climate cases fit into this category. The landmark *Urgenda v Netherlands* case, in which plaintiffs challenged the Dutch government's emission reduction targets as inadequate and thus a violation of their legal obligations, is a prime example.[41] Similar lawsuits have been filed in Brazil, France, Switzerland, the United Kingdom, Ireland and South Korea, among other jurisdictions.[42]

In the second camp, litigators challenge specific *projects*, including fossil fuel infrastructure, that they view as inconsistent with efforts to keep global warming well below 2 degrees Celsius. This includes cases seeking to prevent the construction of new oil or gas infrastructure in Tanzania, Uganda and Kenya;[43] the expansion of coal mines in Australia;[44] and the addition of new runways in airports in Austria and the United Kingdom.[45]

The throughline of this section is that HRCC litigation has tried to, often successfully, articulate obligations on climate change, informed by the goals of the international climate regime as well as human rights law, that are domestically binding on states and corporations and therefore enforceable. Elsewhere, we discuss in detail numerous examples of courts holding

[38] See 'CLX Rights-Based Climate Cases Database' (note 28 above).

[39] Rechtbank Den Haag (2021) *Milieudefensie et al v Royal Dutch Shell PLC*, Judgment of 16 May, C/09/571932/HA ZA 19-379.

[40] Rodríguez-Garavito (note 7 above) 18–19.

[41] HR 20 December 2019, 41 NJ 2020, m.nt. J.S. (Urgenda/Netherlands) (Neth.).

[42] *Laboratório do Observatório do Clima v Minister of Environment and Brazil*, Sabin Center for Climate Change Law, available at http://climatecasechart.com/non-us-case/laboratorio-do-observatorio-do-clima-v-environmental-ministry-and-brazil/; *Notre Affaire à Tous v France* N°s 1904967, 1904968, 1904972, 1904976/4-1 (Paris Administrative Tribunal 2021) (Fr.); *Verein KlimaSeniorinnen Schweiz v DE* 1C_37/2019 (Federal Supreme Court 2020) (Switzerland)*; Plan B Earth v Secretary of State for Business, Energy and Industrial Strategy*, see *Plan B Earth v. Sec'y of State for Bus., Energy & Indus. Strategy* [2018] EWHC 1892 CO/16/2018 (appeal taken from Eng.) (UK)*; Friends of the Irish Environment* v. *Ireland* [2019] IEHC 747, 748 (H. Ct.) (Ir.); *Kim Yujin et al. v South Korea*, Sabin Center for Climate Change Law, available at http://climatecasechart.com/non-us-case/kim-yujin-et-al-v-south-korea/.

[43] *Center for Food and Adequate Living Rights et al v Tanzania and Uganda*, Sabin Center for Climate Change Law, available at http://climatecasechart.com/non-us-case/center-for-food-and-adequate-living-rights-et-al-v-tanzania-and-uganda/; *Save Lamu v National Environmental Management Authority* [2019] eKLR, available at http://kenyalaw.org/caselaw/cases/view/176697/.

[44] *Minister for the Environment v Sharma* [2022] FCAFC 35.

[45] *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214; *In re Vienna-Schwechat Airport Expansion,* Sabin Center for Climate Change Law, available at http://climatecasechart.com/non-us-case/in-re-vienna-schwachat-airport-expansion/.

states and corporations accountable using a combination of standards set by the international climate regime and obligations stemming from human and constitutional rights law.[46]

Instead of dwelling on global trends and comparative law, the goal of this article is to examine how South African rights-based climate litigation emerged within the context of these larger developments within the international climate and human rights regimes and has features that both reflect larger trends within the global body of HRCC litigation and are distinctive. In the remainder of the article, we turn to South African rights-based climate litigation, including an analysis of its essential features, gaps and opportunities.

IV SOUTH AFRICA'S HRCC LITIGATION WITHIN THE GLOBAL CONTEXT

A Climate change in South Africa

Before launching into the analysis of South African climate litigation, we take a brief look at how climate change has and will likely unfold in South Africa. Climate impacts are already being felt throughout the country – from extreme flooding[47] to drought[48] and wildfires.[49] These impacts are predicted to worsen as the average global temperature rises, especially since much of South Africa has and will continue to warm at a faster rate – as much as twice as fast – than the average global temperature.[50] This means that, depending on the trajectory that global greenhouse gas emissions take, South Africa may experience up to 6 degrees Celsius of warming within several decades, with catastrophic consequences for marine and terrestrial ecosystems and the communities that rely upon them.[51]

South Africa is, importantly, a major emitter globally. Though the emissions of countries like China and the United States dwarf those of South Africa, the latter nonetheless is the fourteenth largest emitter of greenhouse gases in the world.[52] This is primarily the result of the country's coal-intensive electricity generation, among other factors. Unlike some other larger emitters that will not, from a comparative perspective, face the brunt of climate impacts, South Africa is, as mentioned earlier, especially vulnerable to the impacts of climate change. This creates a palpable tension, whereby South African communities will be especially vulnerable to the impacts of global greenhouse gas emissions, to which the country as a whole has made a meaningful contribution.

In understanding the domestic context, it is also important to note that, given the pervasive socioeconomic inequality that characterises the country, greenhouse gas emissions

[46] Rodríguez-Garavito (note 5 above).

[47] A Tandon 'Climate change made extreme rains in 2022 South Africa "twice as likely"' *Carbon Brief* (13 May 2023), available at https://www.carbonbrief.org/climate-change-made-extreme-rains-in-2022-south-africa-floods-twice-as-likely/.

[48] World Bank Group 'South Africa' *Climate Change Knowledge Portal*, available at https://climateknowledgeportal.worldbank.org/country/south-africa/vulnerability.

[49] Ibid.

[50] Department of Environmental Affairs: Republic of South Africa *South Africa's 3rd Climate Change Report: 2017* (November 2018), available at https://www.dffe.gov.za/research-documents

[51] Ibid at chapter 2.

[52] R McSweeney & J Timperley 'The Carbon Brief Profile: South Africa' *Carbon Brief* (15 October 2018), available at https://www.carbonbrief.org/the-carbon-brief-profile-south-africa/.

are not spread equally across society – those with greater concentrations of wealth drive a disproportionate percentage of the country's greenhouse gas emissions.[53]

B Climate litigation in South Africa

Climate litigation is not an entirely new phenomenon in South Africa. Since at least the mid-2010s, civil society organisations and local communities have challenged actions that contribute to global warming. Indeed, there are at least eight cases[54] that at least in part tackle climate change and its associated harms and incorporate rights language or arguments: *Philippi Horticultural Area Food & Farming Campaign v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape*; *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs*; *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs*; *South Durban Community Environmental Alliance v Minister of Forestry, Fisheries and the Environment*; *Earthlife Johannesburg v Minister of Environmental Affairs*; *Sustaining the Wild Coast v Minister of Mineral Resources and Energy*; *African Climate Alliance v Minister of Mineral Resources and Energy*; and *Herd Nature Reserve v Limpopo Economic Development Agency*.[55]

These HRCC cases have largely focused on the coal-fired generation of electricity, in particular targeting specific coal-fired power plants. This, significantly, differentiates South African HRCC litigation from the global trend insofar as it typically targets *projects* instead of *policies* (whereas, from a global perspective, the opposite is true). Nevertheless, as with HRCC litigation more generally, South African HRCC litigation also seeks to enforce the urgency and ambition with which the government and corporations must act on climate change by challenging projects inconsistent with limiting warming to 1.5 degrees Celsius and whose time horizon would compromise the transition from fossil fuels.

To map out the state of South African rights-based climate litigation, we characterise cases according to a typology based on the primary target of the litigation. According to this three-pronged typology, HRCC cases in South Africa fall into one of three camps, challenges

[53] T Gore & L McDaid 'You Can't Eat Electricity' (May 2013) *Oxfam Discussion Papers*, available at https://oxfamilibrary.openrepository.com/bitstream/handle/10546/292662/dp-south-africa-low-carbon-development-inequality-hunger-280513-en.pdf.

[54] This list is taken both from the Sabin Center Climate Change Litigation Database and from the research conducted by the authors.

[55] *Philippi Horticultural Area Food & Farming Campaign v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape* [2020] ZAWCHC 8, 2020 (3) SA 486 (WCC) ('*Philippi Horticultural Area Food & Farming Campaign*'); *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 61561/17 (1 June 2021) ('Khanyisa Thermal Power Plant case'); *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs* unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 54087/17 (4 May 2022) ('KiPower Thermal Power Plant case'); *South Durban Community Environmental Alliance v Minister of Forestry, Fisheries and the Environment* [2022] ZAGPPHC 741 ('*South Durban Community Environmental Alliance*'); *Earthlife Africa Johannesburg v Minister of Environmental Affairs* [2017] ZAGPPHC 58, [2017] 2 All SA 519 (GP) ('*Earthlife Johannesburg*'); *Sustaining the Wild Coast v Minister of Mineral Resources and Energy* [2022] ZAECMKHC 55, 2022 (6) SA 589 (ECMk) ('*Sustaining the Wild Coast*'); *African Climate Alliance v Minister of Mineral Resources and Energy* pending application before the High Court of South Africa, Gauteng Division, Pretoria, Case No 56907/21; T Carnie 'Limpopo Bushveld "Monster Steel" Project Challenged in Court' *Daily Maverick* (17 January 2023), available at https://www.dailymaverick.co.za/article/2023-01-17-limpopo-bushveld-monster-steel-project-challenged-in-court/.

to: (i) fossil fuel power plants, (ii) fossil fuel exploration and development, and (iii) the systematic use of coal.

1 *Fossil fuel power plants*

Challenges to fossil fuel-based power plants represent one of the more developed strategies in South African HRCC litigation. One of the earliest successes in rights-based climate litigation in South Africa – and, indeed, the world – came from a case filed by two South African environmental organisations challenging plans to construct a new coal-fired power plant station near Lephalale in the Limpopo Province. In *Earthlife Johannesburg*, the applicant environmental organisations (Earthlife Africa and groundWork) challenged the government's issuance of an environmental authorisation under the National Environment Management Act 107 of 1998 (NEMA) to build the Thabametsi Power Plant.[56] They argued that NEMA requires the government to consider all relevant factors when weighing whether to authorise a new coal-fired power plant – and that climate change impacts were relevant factors that the government failed to consider.

The High Court of South Africa sided with Earthlife and groundWork, finding that the government was required to consider the potential climate change impacts generated by the new power plant when deciding whether to issue an environmental authorisation under NEMA.

In its ruling, the High Court explained that courts, with respect to legislation like NEMA, are 'duty bound' to 'promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question'.[57] In that spirit, the Court cited Section 24 of the Constitution – which protects South Africans' right to an environment that is not harmful to their health or well-being – as the relevant constitutional right to consider when interpreting the content of NEMA. More specifically, the Court noted:

> Section 24 recognises the interrelationship between the environment and development. Environmental considerations are balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Climate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures [to] protect the environment 'for the benefit of present and future generations' and hence adequate consideration of climate change. Short-term needs must be evaluated and weighed against long-term consequences.[58]

The Court also provided that it was mandated, per Section 233 of the Constitution, to interpret NEMA in a manner consistent with international law. The UNFCC, for example, incorporates the precautionary principle, which is thus relevant to understanding the scope and content of NEMA.

These two points regarding constitutional interpretation – reading domestic statute consistently with both Section 24 of the Constitution and relevant international law, like

[56] *Earthlife Johannesburg* (note 55 above).
[57] Ibid at para 81.
[58] Ibid at para 82.

the UNFCCC – comprise a common thread that weaves through much of South Africa's climate litigation as well as its constitutional environmental litigation more broadly. The explicit permeability of South African constitutional law to international law also positions South African HRCC litigation to plug directly into the global jurisprudence developing on climate change. Intergenerational equity, for example, has emerged as a strong feature of the global body of climate change and human rights jurisprudence and can be deployed to bolster HRCC cases in South Africa that incorporate claims on the basis of this principle to secure *urgency* of action.

Building off the success of *Earthlife Johannesburg*, other South African NGOs filed cases targeting coal and gas-fired power plants, arguing that the precedent established by *Earthlife Johannesburg* should apply in those instances too. Namely, the Khanyisa Thermal Power Plant[59] and KiPower Thermal Power Plant[60] cases sought to challenge environmental authorisations granted for coal-fired power plants on the basis of the precedent established by *Earthlife Johannesburg* – that the government authorised these plants without an adequate climate change impact assessment, as is now required by law.

In *South Durban Community Environmental Alliance v Minister of Forestry, Fisheries and the Environment*, the applicant environmental organisations (South Durban Community Environmental Alliance and the Trustees of the Groundwork Trust) challenged the government's decision to authorise the gas-powered Richards Bay Power Plant on several bases, including that the decision was grounded on an inadequate assessment of the potential climate impacts of the plant.[61] In making this argument, the applicants pointed to Section 24 of the Constitution as providing the environmental principles that shape the scope and content of the framework established by NEMA, including environmental authorisations.

This camp of cases is numerically significant – about half of all rights-based climate cases in South Africa follow this mould, challenging the construction and operation of coal and gas-fired power plants. Given that most HRCC litigation globally focuses on challenging policy, litigators in other jurisdictions looking to also target projects may find this body of case law instructive. In particular, this camp of South African litigation demonstrates that success need not rest in arguments that are especially new – instead, litigators can take well-developed components of environmental or administrative law, like the environmental impact assessment, and expand their application in the context of the climate emergency. And even so, these cases have still successfully held the government and others to account for projects inconsistent with the type of *ambition* needed on climate change to avoid dangerous scenarios of global warming, including surpassing the temperature target – thus also illustrating how South African HRCC litigation can hold state and nonstate actors accountable for the urgency and ambition requirements articulated under the international climate and human rights regimes, among other sources.

2 *Fossil fuel exploration and development*

Second in this case typology are challenges to fossil fuel exploration and development, which include several recent rights-based climate cases that challenge corporate plans to explore for

[59] Note 55 above.

[60] Ibid.

[61] *South Durban Community Environmental Alliance* (note 55 above) at para 9.1.

and exploit new fossil fuel reserves in South Africa. A small fraction of HRCC cases globally target this early stage of fossil fuel development, including, for example, *Greenpeace Nordic v Minister of Petroleum and Energy*.[62] This strand of South African HRCC litigation can, therefore, be situated within a relatively small cohort of global HRCC cases, making these South African cases relatively rare for HRCC litigation from a global perspective.

In *Sustaining the Wild Coast,* applicant NGOs and communities sought to check the exploitation of new fossil fuel reserves before it even started – by challenging seismic surveying.[63] In particular, the applicants sought a ruling affirming that an environmental authorisation under NEMA was required before Shell could proceed with its plans to conduct seismic surveys for fossil fuel reserves off the eastern coast of South Africa, in an area known as the Wild Coast. While the High Court considered the matter, the applicants pushed for an interim interdict to restrain Shell from proceeding.

The applicants were successful in their pursuit for an interim interdict. The High Court found, in short, that there was a *prima facie* showing of a right – in this case, community consultation rights – that was at risk of imminent and irreparable harm – here, the damage to marine ecosystems on which the communities rely, generated by seismic surveying. Though the court focused, for the purpose of the interim decision, on community consultation rights, the applicants had also cited constitutional rights, including constitutional environmental rights as well as constitutional cultural and communal rights, as the basis for an interim interdict.

The High Court subsequently ruled again for the applicants in its final ruling. In that decision, the High Court found that the decisions to grant Shell exploration rights failed to comply with a number of rights-based obligations, including Shell's community consultation obligations, thus rendering them invalid.[64]

In *South Durban Community Environmental Alliance v Minister of Environment, Forestry and Fisheries*, the applicant environmental organisation (South Durban Community Environmental Alliance) similarly challenged the government's decision to authorise exploratory drilling off the coast of South Africa.[65] The decision to authorise the drilling, according to the applicant, included a number of procedural and administrative law defects, including the government's failure to give adequate consideration to international law (eg, the Convention on Biological Diversity[66] and the World Heritage Convention[67]) and failure to conduct a climate change impact assessment. As such, the authorisation decision should not stand. Like in other South African HRCC cases, reference to Section 24 of the Constitution as providing an overarching framework for the government's obligations under domestic statutes was interwoven into much of the petition. As of time of writing, this case is still pending before the court.

Strategically, litigators in these cases demonstrate a hallmark of HRCC litigation globally: sensitivity to time. Given that climate change unfolds non-linearly, acting earlier is imperative. And litigators in this camp of cases are seeking to facilitate that type of early action by keeping additional fossil fuels in the ground. In other words, to achieve the temperature target set by the Paris Agreement, it is imperative that additional greenhouse gases (emitted through expanded

[62] *Greenpeace Nordic v Minister of Petroleum and Energy* (2020) HR-2020-2472-P (Norway).
[63] *Sustaining the Wild Coast* (note 55 above).
[64] Ibid.
[65] *South Durban Community Environmental Alliance* (note 55 above).
[66] Convention on Biological Diversity (1993).
[67] World Heritage Convention (1972).

fossil fuel production) do not compound extant emissions to accelerate the time horizon of global warming. These cases reflect that insight and thus seek to enforce the urgency with which states and corporations must respond to the climate emergency.

3 *Systematic reliance on coal*

And third in this typology of South African HRCC cases are challenges to the systematic reliance on coal in the country. Notably, most rights-based climate cases in South Africa target *fossil fuel projects*, meaning specific initiatives to continue and expand the extraction and use of fossil fuels, which, again, differentiates them from the global trend in HRCC litigation. A recently filed case, however, bucks the trend insofar as it challenges a policy-level decision to expand coal-fired electricity generation as part of South Africa's electricity source portfolio. In *African Climate Alliance v Minister of Mineral Resources and Energy*[68] – known more widely as the #CancelCoal case – the three applicant environmental NGOs target the revised Integrated Resource Plan (IRP), which, among other things, details how the country will meet its electricity needs over a certain period of time.[69] It specifically provides how much electrical capacity will come from each of a number of possible sources, including renewable sources like solar and wind, gas and, importantly for this case, coal. In particular, the revised IRP plans for 1500 megawatts (MW) of electricity to be generated through *new* coal-fired power capacity – thereby expanding the use of one of the dirtiest, most polluting forms of energy in spite of the ongoing climate emergency.

In 2020, the Minister of Mineral Resources and Energy along with the National Energy Regulator of South Africa (NERSA) confirmed this expansion of coal-fired power under the national regulatory framework governing the electricity supply industry (the Electricity Regulation Act 4 of 2006), paving the way for the construction and operation of new coal-fired power plants.

Following this, the applicants filed suit in 2021, arguing that the challenged decisions – the IRP provision expanding coal-fired electrical generation and the implementing decisions of the Minister and NERSA – violate constitutional rights as well as fail to provide sufficient reason and justification. Crucially for the development of South African constitutional jurisprudence on climate change, the petition is expressly concerned with articulating the boundaries of acceptable government action in light of the impacts of climate change on constitutional rights:

> [T]he procurement of 1500 MW of new coal-fired power represents a severe threat to the constitutional rights of the people of South Africa, including the section 24 environmental rights, the best interests of the child, the rights to life, dignity and equality, among other implicated rights. These constitutional violations will disproportionately impact the poor and vulnerable, including women, children and young people. Children are physically and psychologically more vulnerable to the shocks and disruptions caused by a polluted environment and climate change. They will also have to live with the consequences of the government's decision for decades to come … Already in 2016, electricity produced by new solar and wind was almost half the price of electricity from new coal … In these circumstances, there is no reasonable and justifiable basis for the limitation of constitutional rights resulting from the government's plans for new coal.[70]

[68] *African Climate Alliance v Minister of Mineral Resources and Energy* (note 55 above).

[69] Integrated Resource Plan, GN1360/2019 *Government Gazette No. 42784* (18 October 2019).

[70] Founding affidavit for applicant in *African Climate Alliance v Minister of Mineral Resources and Energy* (note 55 above) (10 November 2021), available at https://climatecasechart.com/wp-content/uploads/

This plan for new coal impermissibly infringes on constitutional rights – and lacks reason and justification, as required under applicable administrative law – because it would, among other reasons, intensify climate impacts by generating additional greenhouse gas emissions and 'make it more difficult and costly for South Africa to achieve ambitious emission-reductions, consistent with its "fair share" contribution to achieving the Paris Agreement goals'.[71] In other words, the South African government is responsible for achieving a certain level of ambition in climate action and its systematic reliance on coal is preventing that ambition. Note how the petitioners imported a doctrine that has emerged in the global body of rights-based climate jurisprudence – the fair share obligation – to link new coal-fired power to constitutional rights violations.

Moreover, by focusing on the disproportionate impacts of climate change – made worse by the additional greenhouse gas emissions envisaged by the expanded coal-fired electrical generation – on children, young people and future generations, the petition makes intergenerational equity a core concern. In particular, the petition underscores how children – who will bear the brunt of intensified climate impacts – 'largely depend on – and are left to trust – those presently in power to conserve the environment, protect society's common heritage, and ensure a safe climate now and during the decades to come'.[72] In fact, the petitioners argue that the government's decision, in violation of the protections against unfair discrimination baked into the substance of the Section 24 rights, 'unfairly discriminates on the basis of age, as it [is] the young who will disproportionately shoulder the burden of climate change, as the harms intensify in the coming years'.[73]

This provides an opportunity for the High Court to comment on the intergenerational protections offered by the Constitution in the context of the ongoing climate emergency – especially, with regards to Section 24, which explicitly includes future generations within the ambit of its protections.[74]

This case also heavily reflects developments in the global body of HRCC litigation insofar as the latter, like this case, is often centrally concerned with the disproportionate impacts of climate change on children, young people, and future generations. What makes this case, however, relatively distinct from the typical youth-led or youth-oriented HRCC case globally is that South African constitutional environmental protections explicitly include protections for present *and* future generations. As a result, this case has the opportunity to clarify the nexus between the right to a healthy environment, climate change, and intergenerational duties and responsibilities, including the *time frame* in which climate action must be achieved.

The applicants have asked the High Court for a declaration invalidating the portion of the IRP providing for the procurement of new coal-fired power as well as the Minister's decision, along with NERSA, to formally authorise the use of new coal-fired electrical power. Whether the requested relief will be granted remains to be seen, as the case is still pending before the court. How the court rules in this case may have meaningful implications for the body of South African constitutional law on climate change, as the explicit linkage between inadequate climate policy and constitutional rights violations proffered in the case makes it likely that the court

non-us-case-documents/2021/20211110_Case-No.-5690721_petition.pdf at paras 15, 16, 17.1, 21.

71 Ibid at para 258.

72 Ibid at para 217.

73 Ibid at para at 360.

74 Constitution S 24.

will comment on the relationship between government action, constitutional protections and climate change, should it reach the merits of the case.

In other words, the #CancelCoal case has the potential to clarify the government's constitutional obligations on climate change as well as the protections offered by constitutional rights, especially under Section 24, in the context of climate change.

Nevertheless, this case is pending before the High Court of South Africa – not the Constitutional Court. Since it is not the highest court on constitutional matters, the persuasive authority of the decision that is ultimately handed down by the High Court will be somewhat constrained.

C Trends and gaps in South African rights-based climate litigation

Litigators in South Africa have secured meaningful wins thus far in using climate litigation as a tool to challenge corporate and government behaviour that contributes to climate change and is inconsistent with the global effort to limit global warming. These cases – including *Earthlife Africa Johannesburg* and *Sustaining the Wild Coast* – have temporarily or permanently blocked fossil fuel projects that would increase greenhouse gas emissions.

Thus far, rights-based climate litigation in South Africa has been primarily reactive – focused on combatting greenhouse gas emissions project by project. This is not necessarily a shortcoming – systematically subverting or delaying plans for high-emitting activities can help meaningfully constrain greenhouse gas emissions. In practice, though, this approach has an opportunity cost: the lack of proactive cases intended to secure more ambitious society-wide emission reductions.

In other words, with the exception of the #CancelCoal case, litigators have yet to take full advantage of rights-based climate litigation to address inadequacies in governmental policies and regulations on climate.

The #CancelCoal case, however, is the first major step towards filling this gap. How the court ultimately resolves this case will likely shape the future development of South African rights-based climate litigation, especially as it relates to constitutional rights arguments, given the central role they play in the #CancelCoal case.

In the South African context, rights-based climate litigation that is fundamentally concerned with adapting to the already occurring and inevitable impacts of climate change is largely missing, as is also the case with rights-based climate litigation globally. This gap in the South African context, though, is especially stark, given the heightened vulnerability of much of its population to climate impacts as well as the accelerated rate, noted above, at which climate change is occurring in South Africa relative to much of the world.

D Relationship to global rights-based climate litigation

South African rights-based climate litigation has not evolved in a vacuum; rather, it has unfolded as strides have been made in other jurisdictions around the world to use the courts to secure urgent and ambitious climate action.

There is some evidence that South African climate litigation has been shaped by developments abroad. The invocation of South Africa's 'fair share' obligation in the #CancelCoal case, for example, reflects the development of this concept in other cases, including, for example,

the *Sacchi v Argentina* case before the UN Committee on the Rights of the Child,[75] *Duarte Agostinho v Portugal*,[76] and *Milieudefensie v Royal Dutch Shell*.[77]

Moreover, developments in the international climate regime that have influenced rights-based climate litigation in other jurisdictions has also played a role in rights-based climate litigation in South Africa. As has been the case with HRCC litigation more generally, South African litigators and courts typically reference both the reports of the IPCC as well as the Paris Agreement and commitments made thereunder. They have used, as is again the case more generally, IPCC reports as evidence of the severity of climate impacts and urgency of the situation while citing the Paris temperature goal as a benchmark to assess the appropriateness of government and corporate action.

E The role of constitutional law in South African climate litigation

Constitutional law – including constitutional principles, norms and rights – has been a common thread throughout the body of South African HRCC cases. Its inclusion, however, has ranged from peripheral – referenced as part of the relevant legal background for the case – to central – comprising the key basis on which the case has been brought.

Even when constitutional law plays an ostensibly peripheral role, its influence may in fact be deeper. A number of cases, for example, are grounded on claims under the National Environment Management Act (NEMA). NEMA, however, was enacted 'as the primary legislative instrument which gives effect to the environmental rights contained in Section 24 of the Constitution', as the High Court made clear in *Philippi Horticultural Area Food & Farming Campaign*.[78] In other words, even HRCC cases based on statutory claims have been informed by constitutional principles and the governance structure facilitated by Section 24 of the Constitution. NEMA, for example, 'is to be interpreted purposively in a manner that is consistent with the Constitution'.[79] This, in turn, is a function of the principle of subsidiarity, a constitutional principle that provides that direct reliance on a constitutional provision – for example, Section 24 of the Constitution – is not possible in instances where legislation giving effect to an aspect of that provision has been codified.[80] In other words, in issue areas where NEMA applies, applicants must rely on this legislation – though informed by the Constitution – instead of Section 24 directly.

In terms of the development of South African constitutional law on climate, the outcome of the #CancelCoal case will likely play a role in defining future trajectories for constitutional rights-based climate cases, assuming the High Court reaches a verdict on the merits.

Moreover, the articulation of South African constitutional jurisprudence on climate has been and will continue to be influenced by developments in the country's constitutional

[75] *Sacchi v Argentina*, 'Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019' UN Committee on the Rights of the Child, CRC/C/88/D/104/2019, 22 September 2021.

[76] *Duarte Agostinho v Portugal*, Case No. 39371/20 (European Court of Human Rights).

[77] *Milieudefensie v Royal Dutch Shell*, C/09/571932 / HA ZA 19-379 (RDH 2021).

[78] *Philippi Horticultural Area Food & Farming Campaign* (note 55 above) at para 71.

[79] Ibid.

[80] M Murcott & W van der Westhuizen 'The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on Motau and My Vote Counts' (2015) 7 *Constitutional Court Review* 43, 43–53.

jurisprudence on the environment. Though *Fuel Retailers Association*[81] – adjudicated by the Constitutional Court in 2007 – continues to be one of the most, if not the most, authoritative cases on constitutional environmental law, another case bears mentioning: *Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* – or, as it is better known, the 'Deadly Air' case.[82]

In the 'Deadly Air' case, two environmental organisations sued various South African agencies for their failure to reduce decades-long air pollution in a portion of the Highveld region to non-hazardous levels. They argued that this situation, among other things, constitutes a breach of Section 24(a) of the Constitution, which provides that South Africans have a right to an environment that is not harmful to their health or well-being.

The High Court handed down its ruling in March 2022, finding for the applicants and providing insight into the scope and content of the protections afforded by Section 24(a) of the South African Constitution. In short, the High Court found that the levels of air pollution far exceeded the level deemed safe by applicable statutes governing air quality, meaning that the environment was harmful to health and well-being and had been for the years that the government failed to make progress on it. The court, moreover, rejected the government's argument that it could not be held responsible for a 'state of affairs', arguing that the unacceptable levels of pollution were the direct result of the government's failure to promulgate regulations that its own Department of Environmental Affairs deemed necessary. This years-long failure to regulate contradicts the government's duty to ensure the 'expeditious and effective' realisation of the right to an environment that is not harmful to health and well-being. Ultimately, the government was deemed to have breached the environmental right provided for under Section 24(a) of the Constitution.[83]

While analysing the claims of the case, the High Court also affirmed that the environment cannot be wholly sacrificed at the altar of economic gain – government-sanctioned economic development does not comply with the terms of Section 24 if it fails to safeguard environmental health and wellbeing. Put differently:

> The principle of sustainable development further requires that measures put in place to achieve economic development should not sacrifice the environment and human life and wellbeing and it must be that a balance should be struck. Where one trumps the other, it cannot be said the right of section 24(a) has been achieved.[84]

Though the 'Deadly Air' case is not an HRCC case – and nor was it a precedent set by the Constitutional Court – its delineation of the content of Section s24(a) may nevertheless be applied in HRCC cases seeking to use Section 24(a) as the basis for their claims. In particular, it provides that the government will likely prove unsuccessful in arguing that climate impacts or high greenhouse gas emissions represent a 'state of affairs' for which they are not responsible. Instead, this case suggests that a court would find them liable if they have failed to regulate – or, perhaps, failed to regulate *adequately*. The latter point may be especially relevant for HRCC litigation in South Africa, as it may provide a basis for litigators to attack inadequate ambition

[81] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* [2007] ZACC 13, 2007 (6) SA 4 (CC) (*Fuel Retailers Association*).

[82] *Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* [2022] ZAGPPHC 208.

[83] Ibid at paras 178–183.

[84] Ibid at para 175.

for emissions reductions or slow or ineffectual implementation of commitments to reduce greenhouse gases.

Moreover, the 'Deadly Air' case also suggests that economic development cannot be used as a carte blanche to justify environmentally degrading activities – the sustainable development principle embedded in Section 24 requires that a balance is struck between economic development and environmental protection. Applied in the context of HRCC litigation, this suggests that activities contributing to the country's greenhouse gas emissions cannot be justified on the basis of economics alone. Indeed, as the High Court in *Earthlife Johannesburg* noted, 'climate change poses a substantial risk to sustainable development in South Africa … Short-term needs must be evaluated and weighed against long-term consequences'.[85]

V OPPORTUNITIES GOING FORWARD: WHY SOUTH AFRICAN CONSTITUTIONAL LAW ON CLIMATE MATTERS

Though South Africa was home to some of the earliest HRCC cases, the relatively small number of such cases overall means that this line of litigation is still in its infancy. And, as such, there are opportunities for growth and impact.

Indeed, the opportunities for South African constitutional law on climate change are twofold. The first stems from the fact that South African constitutional law is permeable to developments in international law. Indeed, consideration of international law is mandated by the Constitution – Section 39(1)(b) explicitly provides that 'when interpreting the Bill of Rights, a court, tribunal or forum must consider international law'.[86] This means that South African courts may be particularly amenable to incorporating developments in constitutional law in other jurisdictions into their analysis of climate claims under the South African Constitution. The precedent established by the German Constitutional Court in *Neubauer v Germany*, for example, may provide persuasive insight into how South African courts can safeguard intergenerational equity on climate through constitutional protections.

Second, given how, from a comparative perspective, South African constitutional jurisprudence has served as a model for other jurisdictions around the world, progressive development of the constitutional jurisprudence on climate change has the potential to influence how courts weigh constitutional climate claims in other countries. It may, for example, be able to influence courts in other Global South countries that are also heavily reliant on coal, like India.

More concretely, both with respect to the application of socioeconomic rights jurisprudence to climate cases and in terms of holding private actors accountable for climate harms, South African courts are especially well-positioned to extend and apply existing jurisprudence, establishing important precedent for global HRCC litigation writ large.

South African jurisprudence on socioeconomic rights is rich and may provide doctrines, concepts and norms that can advance rights-based climate claims, especially in the Global South context. It may, moreover, help accelerate HRCC litigation within the country, since it may provide a framework to expand HRCC litigation, especially where there are gaps. For example, with the exception of the #CancelCoal case, HRCC litigation in South Africa has not taken on policies that contribute to climate change or undermine needed climate action.

[85] *Earthlife Johannesburg* (note 55 above) at para 82.

[86] Constitution S 39(1)(b).

With respect to socioeconomic rights, however, courts have been more than willing to strike down policies that violate socioeconomic rights, like to the right to housing. These precedents can inform and be applied within the context of rights-based climate litigation to challenge inadequate policies and secure better ones.

With respect to private actors, South African jurisprudence on the constitutional duties of private actors is well-developed. This provides litigators and courts the opportunity to use this extant body of case law in the context of climate change to hold private actors, especially corporations like fossil fuel companies, responsible for their contributions to the ongoing climate emergency. Indeed, this existing jurisprudence could be leveraged to create room for innovative and strategic litigation against private actors, targeting the human rights harms associated with dirty energy and other forms of climate pollution and serving as guideposts for courts in other jurisdictions to do the same.

Rights-based climate litigation has become an important tool in the effort to accelerate global climate action. It took years for this field of practice to launch in earnest and was only made possible by the broader coherence of the human rights and climate change field. Though litigators in South Africa have secured several important successes in HRCC cases, this field of practice is still in its early stages in South Africa. Time, however, is limited – greenhouse gas emissions must be dramatically slashed by the end of this decade to avoid dangerous scenarios of climate change. In this context, South African HRCC practitioners and scholars can draw on the growing number of international and comparative lawsuits and rulings – as well as the relevant South African precedents and the rich domestic tradition of constitutional, environmental and human rights jurisprudence – to help address the climate emergency with the urgency and ambition that it requires.

Constitutional Court Review 2023
Volume 13, 147–170
https://doi.org/10.2989/CCR.2023.0007

Minding the Gap: the Constitutional Court's Jurisprudence Concerning the Environmental Right

MELANIE MURCOTT

ABSTRACT: The central premise of this article is that the Constitutional Court's jurisprudence has not adequately interpreted and applied the environmental right enshrined in Section 24 of the Constitution of the Republic of South Africa. In a time of socio-ecological crises, including due to climate change, and given the crucial role that environmental constitutionalism (the treatment of the environment as a proper subject of protection in constitutional texts, to be enforced by courts) can play in responding to the justice implications of such crises, the article argues that the Court should take up the mantle. To lay the foundation for the argument, the article briefly sketches the recent history of South Africa's environmental rights jurisprudence by contrasting the limited 'environmental rights moments' in the Constitutional Court's jurisprudence with several promising developments in the High Courts and the Supreme Court of Appeal. Thereafter, the article engages with transformative environmental constitutionalism as a nascent theoretical approach that could stimulate the emergence of justice-oriented environmental rights jurisprudence from the Constitutional Court in future.

KEYWORDS: climate change, climate litigation, socio-ecological crises, transformative environmental constitutionalism

AUTHOR: Department of Public Law, Institute of Marine and Environmental Law, University of Cape Town, South Africa
Email: melmurcott@icloud.com ORCiD: 0000-0001-8311-2195

ACKNOWLEDGEMENTS: I would like to thank the editors of *CCR* and peer reviewers for their helpful comments.

I INTRODUCTION

This article reflects on a gap in the Constitutional Court's jurisprudence concerning the environmental right enshrined in Section 24 of the Constitution of the Republic of South Africa, 1996, illustrative of the ongoing 'silence'[1] or 'under-utilisation' of the right.[2] Section 24 confers on everyone 'the right to an environment that is not harmful to their health or wellbeing', and 'to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. Within the global discourse on the growing phenomenon of rights-based protection of the environment in constitutional texts, given effect to by courts and legislatures (known as environmental constitutionalism),[3] South Africa's substantive environmental right is viewed as one of the most 'expansive' and 'sophisticated' in the world.[4] Yet, when it comes to judicial enforcement and interpretation of the right, particularly by the Constitutional Court, a gap remains.

The gap in the Constitutional Court's jurisprudence concerning the environmental right is problematic for at least two connected reasons. First, environmental protection is undoubtedly more pressing than ever before.[5] Humanity is facing several converging socio-ecological crises that negatively impact on Earth systems functioning, with grave justice and human rights implications.[6] Second, courts have a crucial role to play in addressing issues where environmental protection, the fulfilment of human rights, and the pursuit of social justice intersect.[7] As Kotzé and Du Plessis argue, environmental constitutionalism cannot evolve in South Africa absent the judicial interpretation and application of all rights that have a bearing on the environment, most notably the environmental right.[8]

By way of elaboration on the pressing need for environmental protection, there is a growing appreciation that humanity is crossing planetary boundaries within which it is crucial to remain

1 R Krüger 'The Silent Right: Environmental Rights in the Constitutional Court of South Africa' (2019) 9 *Constitutional Court Review* 473.

2 Various accounts of the ongoing phenomenon of 'under-utilisation' include L Kotzé & A du Plessis 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa' (2010) 3(1) *Journal of Court Innovation* 157, 169–174 and M Murcott *Transformative Environmental Constitutionalism* (2022) 89–92, 113–126.

3 On environmental constitutionalism see L Kotzé 'Six Constitutional Elements for Implementing Environmental Constitutionalism in the Anthropocene' in E Daly & J May (eds) *Implementing Environmental Constitutionalism: Current Global Challenges* (2018) 34.

4 J May & E Daly *Global Environmental Constitutionalism* (2015) 43–54, 69; L Kotzé 'The Conceptual Contours of Environmental Constitutionalism' (2015) 21 *Widener Law Review* 187, 196–198.

5 United Nations General Assembly Report of the Special Rapporteur on Extreme Poverty and Human Rights, Climate Change and Poverty, A/HRC/41/39 (July 2019); S Atapattu & A Schapper *Human Rights and the Environment: Key Issues* (2019) 208–221.

6 L Kotzé 'The Anthropocene, Earth System Vulnerability and Socio-Ecological Injustice in an Age of Human Rights' (2019) 10 *Journal of Human Rights and the Environment* 62, 64–70; Murcott (note 2 above) at xii–xiii, 8–13; F Sultana 'Critical Climate Justice' (2022) 188 *The Geographical Journal* 118, 119–120.

7 Murcott (note 2 above) at 5, 28, 41.

8 Kotzé & Du Plessis (note 2 above) at 158. For other motivations for adjudication on the environmental right see Murcott (note 2 above) at 5.

if Earth is to be a safe operating space for humanity.[9] For instance, current rates of biodiversity extinction caused by human activities such as habitat destruction and pollution have led scientists to argue that humanity is facing a sixth mass extinction.[10] The impacts of biodiversity loss include limited access to medicine, nutrition deficiencies, and an increase in animal to human disease transfer (zoonosis).[11] Related to, and compounding biodiversity loss as a result of human activities, are the myriad human and planetary health impacts of anthropogenic climate change.[12] In response, concerned trade unions have coalesced around the slogan: 'there are no jobs on a dead planet'.[13] A disturbing 2023 report of the Intergovernmental Panel on Climate Change (IPCC), the United Nations (UN) body that assesses the science of climate change, lends support to these concerns.[14] The report indicates with 'high confidence' that more than three billion of the world's population are 'highly vulnerable' to climate change.[15] Highlighting the interdependence of human and ecosystem vulnerability, as well as unevenly distributed vulnerability, the report reveals further that

> [i]ncreasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security, with the largest adverse impacts observed in many locations and/or communities in Africa, Asia, Central and South America, [Least Developed Countries], Small Islands and the Arctic, and globally for Indigenous Peoples, small scale food producers and low-income households. Between 2010 and 2020, human mortality from floods, droughts and storms was 15 times higher in highly vulnerable regions, compared to regions with very low vulnerability.[16]

What is perhaps obscured by this revelation – particularly the seemingly neutral description of geographical locations and the use of terms like 'low-income households' and 'vulnerable regions' – is that the impacts of the Earth's socio-ecological crises are unevenly distributed as a result of intersecting systems of oppression, marginalisation and discrimination.[17] Social, environmental and climate justice scholars highlight that those who live in poverty as a result of these systems will be the first and hardest hit.[18] The drivers of these systems, which in turn contribute to socio-ecological crises, include 'colonial conquest, imperial dispossession and the imposition of a global capitalist order that systemically abuses nature and exploits large segments of the world's population'.[19] These systems serve to oppress, marginalise and

9 S Tong et al 'Current and Future Threats to Human Health in the Anthropocene' (2022) 158 *Environment International* 106892.

10 R Cowie, P Bouchet & B Fontaine 'The Sixth Mass Extinction: Fact, Fiction or Speculation' (2022) 97 *Biological Reviews* 640, 641–657.

11 Tong et al (note 9 above) at 3.

12 Ibid.

13 International Trade Union Confederation 'There are no jobs on a dead planet' *The Green Economy Coalition* (2 July 2012), available at https://www.greeneconomycoalition.org/news-and-resources/there-are-no-jobs-dead-planet.

14 Synthesis Report of the Intergovernmental Panel on Climate Change Sixth Assessment Report, Summary for Policymakers, IPPC AR6 SYR (March 2023) at A.2.2.

15 Ibid.

16 Ibid.

17 C Gonzalez 'Racial Capitalism, Climate Justice, and Climate Displacement' (2021) 11(1) *Oñati Socio-Legal Series* 108, 114. See also Kotzé (note 6 above) at 64–69; Murcott (note 2 above) at 12.

18 R Bratspies 'Do We Need a Human Right to a Healthy Environment' (2015) 13(1) *Santa Clara Journal of International Law* 31, 34; Murcott (note 2 above) at 16–17.

19 Gonzalez (note 17 above) at 114. On intersectionality, which will be elaborated upon in part II, see S Cho, K Crenshaw & L McCall 'Towards a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38(4) *Signs: Journal of Women in Culture and Society* 785, 787.

discriminate by privileging 'core (North) over periphery (South), men over women, Christians over non-Christians, Europeans over non-Europeans, heterosexuals over homosexuals, and Western knowledge over non-Western knowledge'.[20] It is further significant that 'the global North is responsible for the vast majority of historic greenhouse gas emissions and has reaped the corresponding economic benefits, while those who are disproportionately harmed by climate change are the states and peoples [largely in the global South] who have contributed least to the problem.'[21]

In South Africa, the rights implicated by these intersecting realities include the right to an environment not harmful to health or wellbeing protected in Section 24 of the Constitution, as well as mutually reinforcing and interrelated rights to life, dignity, equality, culture, access to water, food and housing, education, as well as, arguably most acutely, the rights of the child.[22] The rights implications of converging socio-ecological crises raise issues of intersecting forms of injustice, to which courts ought to be responsive.[23] After all, a functioning and flourishing ecological system creates the conditions in which social justice can occur and the fulfilment of human rights becomes possible.[24] On the other hand, socio-ecological crises represent an obstacle to social justice. As guardians of the rights in the Bill of Rights, and given the overarching social justice imperative of South Africa's constitutional order, courts can contribute to responses to the rights and social justice implications posed by contemporary socio-ecological crises.[25] Indeed, in 2007, the Court emphasised, when interpreting the environmental right, the 'crucial role in the protection of the environment' that the judiciary 'should not hesitate' to fulfil.[26]

This article argues that when confronted with the human rights and justice implications of climate change and related socio-ecological crises in future cases, the Court ought to 'mind the gap' in its jurisprudence concerning the environmental right and adopt a rights-based approach that enhances the protection of the environment in pursuit of social justice. It could do so by embracing transformative environmental constitutionalism. Importantly, judgments of the

[20] Gonzalez ibid.

[21] Ibid at 112.

[22] The Constitution Ss 11 (life), 10 (dignity), 9 (equality), 30 and 31 (culture), 27 (access to water and food), 26 (access to housing), 29 (education), and 28 (children's rights). On children as a group that are particularly vulnerable to contemporary socio-ecological challenges, as they inherit the Earth, see R Fambasayi & M Addaney 'Cascading Impacts of Climate Change and the Rights of Children in Africa: A Reflection on the Principle of Intergenerational Equity' (2021) 21 *African Human Rights Law Journal* 29, 31, 33–39. On women as a group that are particularly vulnerable to contemporary socio-ecological challenges, see L Chamberlain 'The Value of Litigation to Women Environmental Human Rights Defenders in South Africa' in C Albertyn et al (eds) *Feminist Frontiers in Climate Justice* (2023) 213.

[23] Murcott (note 2 above) at 5, 17–27; M Pieterse 'The Right to the City and the Urban Environment: Re-imagining Section 24 of the 1996 Constitution' (2014) 29 *South African Public Law* 175, 180–187.

[24] Murcott (note 2 above) at xi, 5–6, 77–78. See also D Schlosberg 'Theorising Environmental Justice: The Expanding Sphere of Discourse' (2013) 22(1) *Environmental Politics* 37, 38.

[25] On the social justice imperative of the Constitution, see P Langa 'Transformative Constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 351. My remarks should not be construed as discounting the many limitations and criticisms of litigation or human rights-based approaches. For discussion on these, see Murcott (note 2 above) at 46–51 and 172–173.

[26] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* [2007] ZACC 13, 2007 6 SA 4 (CC)('*Fuel Retailers*') at paras 102–104.

Court create precedent in South Africa, with binding force on all other courts.[27] The latter are increasingly seized with litigation about intersecting environmental and social justice issues.[28] Meaningful engagement with the environmental right by our highest court could bolster their efforts (as well as efforts by the legislative and executive branches) to respond to climate change and other contemporary socio-ecological issues. It is not only important for the Court to interpret, apply and enforce the environmental right so as to establish precedent. According to May and Daly, collectively, judiciaries around the world have played a 'necessary, if not sufficient role in the vindication of fundamental environmental rights worldwide'.[29] When they have vindicated environmental rights, courts have contributed towards 'good environmental outcomes', including by improving participation in environmental decision-making and the practices of government relative to the environment.[30] The Court ought to play its part in contributing to good environmental outcomes by vindicating South Africa's environmental right. Doing so would render the Court a participant in the global phenomenon of human rights-based litigation responsive to the climate crisis and its justice implications.[31]

In this article I briefly trace the Court's jurisprudence where the environmental right was (or could have been) interpreted and contrast that jurisprudence with significant jurisprudential developments in the High Courts and the Supreme Court of Appeal. I reveal that overall, in contrast with promising developments in the High Courts and the Supreme Court of Appeal, the Constitutional Court has not contributed as much as it could have to jurisprudence concerning the environmental right. Then, I reflect on some of the ways in which the Court could strengthen its jurisprudence concerning the environmental right, including to bolster important jurisprudential developments emerging from the High Courts and the Supreme

[27] G Devenish 'The Doctrine of Precedent in South Africa' 2007 *Obiter* 1, 3. See also Kotzé & Du Plessis (note 2 above) at 160–165 on the structure of the South African judiciary and access to courts related to environmental disputes.

[28] Examples include *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* [2021] ZAECGHC 118, 2022 (2) SA 585 (ECG)('*Sustaining the Wild Coast I*')(the High Court granted an interim interdict halting a seismic survey from being conducted along South Africa's Wild Coast pending a review of the granting of an exploration right that contemplated said survey); *Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others* [2022] ZAECMKHC 55, 2022 (6) SA 589 (ECMk) ('*Sustaining the Wild Coast II*')(the High Court set aside the granting of a permit authorising exploration for oil and gas along South Africa's Wild Coast); *Mining and Environmental Justice Community Network of South Africa & Others v Minister of Environmental Affairs & Others* [2018] ZAGPPHC 875, 2019 (5) SA 231 (GP) ('*MEJCON*')(the High Court set aside permission to conduct mining activities in a protected environment); and *WWF South Africa v Minister of Agriculture, Forestry and Fisheries & Others* [2018] ZAWCHC 127, 2019 (2) SA 403 (WCC)(the High Court declared the total allowable catch for West Coast Rock Lobster inconsistent with the environmental right).

[29] J May & E Daly 'Vindicating Fundamental Environmental Rights Worldwide' (2009) 11 *Oregon Review of International Law* 365, 437. For subsequent support for this claim see J May 'The Case for Environmental Human Rights: Recognition, Implementation and Outcomes' (2021) 42(3) *Cardozo Law Review* 983, 1013.

[30] May (note 29 above) at 1017–1019. The author acknowledges that more analytical work is needed to determine the positive impact of judicial enforcement of environmental rights, but points to some positive signs.

[31] C Rodríguez-Garavito 'Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action' in C Rodríguez-Garavito (ed) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (2022) 9. For discussion on the limitations of the courts and rights-based strategies as drivers of social change see generally J Dugard, T Madlingozi & K Tissington 'Rights-compromised or Rights-savvy? The Use of Rights-based Strategies to Advance Socio-economic Struggles by Abahlali baseMjondolo, the South African Shack-dwellers' Movement' in H Alviar Garcia, K Klare & L Williams (eds) *Social and Economic Rights in Theory and Practice* (2015) 23.

Court of Appeal. In particular, I encourage the Court to embrace transformative environmental constitutionalism when next it has the opportunity to adjudicate a dispute that implicates (explicitly or not) the environmental right. I argue that the key features of transformative environmental constitutionalism could be valuable in shaping robust jurisprudential responses by the Court to converging socio-ecological crises in future cases.

II AN OVERVIEW OF ENVIRONMENTAL RIGHTS JURISPRUDUENCE OF THE SOUTH AFRICAN COURTS

A The limited environmental rights jurisprudence of the Constitutional Court

In contrast with lively jurisprudence in relation to other substantive rights enshrined in the Constitution,[32] there have essentially been only two definitive moments in the Constitutional Court's jurisprudence concerning the environmental right.[33] The first was in 2007, when *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* was decided.[34] At the time, *Fuel Retailers* was notable for at least three reasons. First, the Court emphasised the crucial role that courts must play in protecting the environment.[35] Secondly, the Court adopted an intersectional approach to rights protection by acknowledging that the protection of the environment is vital to the enjoyment of other rights in the Bill of Rights, including the right to life.[36] Thirdly, the Court spoke to notions of intra- and intergenerational equity by remarking, in the context of interpreting the concept of 'sustainable development', that the environment must be protected for the benefit of present and future generations, and that the present generation holds the earth in trust for the next generation.[37] In setting aside a decision to authorise a new petrol station the court engaged with the concept from the following perspective:

> [D]evelopment cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment.[38]

---

[32] On the socio-economic rights and equality jurisprudence of the Court, see for example: S Liebenberg 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?' (2002) 6(2) *Law, Democracy and Development* 159; A Govindjee 'Adjudication of Socio-Economic Rights by the Constitutional Court of South Africa: Walking the Tightrope between Activism and Deference' (2013) 25(1) *National Law School of India Review* 62; M Couzens 'The Best Interests of the Child and the Constitutional Court' (2019) 9 *Constitutional Court Review* 263; E Christiansen 'Substantive Equality and Sexual Orientation: Twenty Years of Gay and Lesbian Rights Adjudication Under the South African Constitution' (2016) 49 *Cornell International Law Journal* 565.

[33] Krüger (note 1 above) at 485–488 usefully offers some possible reasons for the Constitutional Court's 'silence' such as the novelty and complexity of environmental issues, perceived competing priorities, and standing. I differ with Krüger's view that *Fuel Retailers* is the *only* significant case concerning the environmental right decided by the Constitutional Court, as appears from the discussion below. However, I agree that in several Constitutional Court cases that concerned issues of 'environmental relevance', such as those discussed in Krüger at 480–485, the Court did not engage with the environmental right where there was scope to do so.

[34] *Fuel Retailers* (note 26 above).

[35] Ibid at paras 102–104.

[36] Ibid at para 102.

[37] Ibid at paras 46–62.

[38] Ibid at para 44.

In sum, the Court found that Section 24 of the Constitution requires that environmental considerations must be balanced and integrated with socio-economic considerations 'through the ideal of sustainable development', a concept to be understood with reference to relevant international environmental law.[39] As significant as these pronouncements were,[40] they are now somewhat dated, as sustainable development has become an increasingly controversial concept, far from ideal.[41] The idea of integrating or balancing environmental, social and economic factors in development decision-making embraces a 'disingenuous' and 'complacent promise of sufficient resources in a time of global ecological crisis and resource scarcity'.[42] Development decision-making that follows the logic of sustainable development necessarily proceeds from the flawed assumptions that Earth systems function in a static, stable and predictable manner.[43] Yet contemporary science exposes these assumptions as false: Earth systems functioning is increasingly uncertain and erratic.[44] The huge upheaval suffered by South African society as a result of an increase in extreme weather events (such as the flooding in Durban) is illustrative.[45]

Fuel Retailers was also heavily criticised at the time, including because the Court did not interpret the words 'health' or 'wellbeing' as components of the environmental right.[46] In addition, the Court's interpretation of the concept of sustainable development was economic-centred.[47] Further, the Court did not adequately engage with the environmental right's requirement that legislative and other measures aimed at environmental protection must secure *ecologically* sustainable development that promotes *justifiable* social and economic development.[48]

When it comes to interpreting and applying the environmental right, many subsequent judgments of the Court have done little more than echo key pronouncements made in *Fuel Retailers* about sustainable development.[49] Thus, until 2016, when *National Society for the*

[39] Ibid at paras 45 and 46–56.

[40] For commentary on *Fuel Retailers* see Krüger (note 1 above) at 478–480; Murcott (note 2 above) at 90–92.

[41] S Adelman 'The Sustainable Development Goals, Anthropocentrism and Neoliberalism' in D French & L Kotzé (eds) *Sustainable Development Goals: Law, Theory and Implementation* (2018) 15, 18–19; L Kotzé 'Rethinking Global Environmental Law and Governance in the Anthropocene' (2014) 32(2) *Journal of Energy and Natural Resources Law* 121, 136–138.

[42] Kotzé (note 41 above) at 136–137.

[43] Ibid.

[44] Ibid.

[45] S Nyoka 'Durban Floods: South Africa Floods Kill More than 300' *BBC News* (14 April 2022) available at https://www.bbc.com/news/world-africa-61092334.

[46] A du Plessis 'Adding Flames to the Fuel: Why Further Constitutional Adjudication is Required for South Africa's Constitutional Right to Catch Alight' (2008) 15 *Southern African Journal of Environmental Law and Policy* 57, 60–81. See also E Couzens 'Filling Station Jurisprudence: Environmental Law in South African Courts and the Judgement in *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*' (2008) 15 *Southern African Journal of Environmental Law and Policy* 23, 31–55; M Kidd 'Removing the Green Tinted Spectacles: The Three Pillars of Sustainable Development in South African Environmental Law' (2008) 15 *Southern African Journal of Environmental Law and Policy* 85; T Murombo 'From Crude Environmentalism to Sustainable Development: Fuel Retailers' (2008) 125(3) *South African Law Journal* 488, 489.

[47] Murcott (note 2 above) at 152–153.

[48] Ibid at 76 and 155–158.

[49] Examples include: *MEC: Department of Agriculture, Conservation and Environment & Another v HTF Developers (Pty) Ltd* [2007] ZACC 25, 2008 (2) SA 319 (CC)(challenge to the issue of a directive preventing the clearing of an ecologically sensitive area for a housing development) at paras 60–62; *Long Beach Homeowners Association*

Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another ('*NSPCA CC*') was decided,[50] the jurisprudence of the Constitutional Court concerning the environmental right essentially lay dormant. *NSPCA CC* represents the second definitive moment in the Court's jurisprudence concerning the environmental right. The Court meaningfully seized upon an opportunity to interpret, apply and develop the normative content of the environmental right for the first time since *Fuel Retailers* in 2007. In *NSPCA CC*, in the context of interpreting the powers of the National Society for the Prevention of Cruelty to Animals to institute a private prosecution in the exercise of its statutory duties to protect animal welfare, the Court made the following groundbreaking *obiter* remark:

> Animal welfare is connected with the constitutional right to have the 'environment protected … through legislative and other means'. This integrative approach correctly links the suffering of individual animals to conservation, and illustrates the extent to which showing respect and concern for individual animals reinforces broader environmental protection efforts. Animal welfare and animal conservation together reflect two intertwined values.[51]

Much has been written about the significance of *NSPCA CC* from an animal rights and welfare perspective.[52] From an environmental rights perspective, the *obiter* remark has had the effect of rendering animal welfare a relevant consideration for the lawful exercise of certain environmental decision-making powers.[53] For example, when a High Court interpreted the power to set quotas for the export of lion bone to give effect to the spirit, purport and objects of the environmental right enshrined in the Constitution, it found the decision-maker must appreciate the intertwined nature of environmental protection and concern for the welfare of individual animals.[54] Regarding the plight of lions arising from the export of their bones and other body parts, drawing on the Court's interpretation of Section 24 of the Constitution in *NSPCA CC*, the High Court remarked: 'Even if they are ultimately bred for trophy hunting and for commercial purposes, their suffering, the conditions under which they are kept and the like remain a matter of public concern and are inextricably linked to how we instil respect for animals and the environment of which lions in captivity are an integral part of.'[55]

v Great Kei Municipality, Amatole District, Eastern Cape & Others [2016] ZAGPPHC 610 at para 2; *Company Secretary of Arcelormittal South Africa & Another v Vaal Environmental Justice Alliance* [2014] ZASCA 184, 2015 (1) SA 515 (SCA)('*VEJA*') at paras 3–4; *Sustaining the Wild Coast II* (note 28 above) at para 4.

50 *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another* [2016] ZACC 46, 2017 (1) SACR 284 (CC)('*NSPCA CC*')(declaratory relief sought concerning the powers of the NSPCA to privately prosecute crimes concerning animal cruelty).

51 *NSPCA CC* (note 50 above) at para 58. Crucially, the judgment applies the theory articulated in D Bilchitz 'Exploring the Relationship between the Environmental Right in the South African Constitution and the Protection for the Interests of Animals' 2017 *South African Law Journal* 740.

52 A Wilson 'Animal Law in South Africa: "Until the Lions have their Own Lawyers, the Law will Continue to Protect the Hunter"' (2019) 10(1) *Forum of Animal Law Studies* 35, 41; J de Villiers 'Law and the Question of the Animal: A Critical Discussion of *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*' (2019) 136(2) *South African Law Journal* 207; A Bellengère & E Couzens 'The Camel at the Cutting Edge: Animal Welfare, Environmental Law, Private Prosecutions and the Three Judgments in *NSPCA v Minister of Justice*' (2018) 24 *Southern African Journal of Environmental Law and Policy* 44.

53 *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs & Others* [2019] ZAGPPHC 367, [2019] 4 All SA 193 (GP)('*NSPCA HC*') at paras 64–75.

54 Ibid.

55 Ibid at para 71.

For the reasons outlined in part I, it is problematic that *NSPCA CC* is the only notable development in the Constitutional Court's environmental rights jurisprudence since *Fuel Retailers*. Indeed, there have been other opportunities for the Court to interpret and apply the environmental right. The earliest was perhaps the 2005 decision of *De Kock v Minister of Water Affairs and Forestry & Others* ('*De Kock*'), in which an unrepresented litigant sought direct access to the Court to challenge a failure on the part of authorities to implement legislation aimed at containing pollution and to prosecute a major polluter.[56] In an extremely brief judgment, the Court non-suited the litigant for failure to satisfy the requirements for direct access.[57] The Court acknowledged the importance of the environmental rights issues at stake, but was unwilling to comment on the content of Section 24 in the abstract.[58] The Court's reluctance to pronounce on the environmental right in *De Kock* is understandable. However, subsequent cases represent wasted opportunities to do so.[59] In 2009 the Court, in *Biowatch Trust v Registrar Genetic Resources & Others* ('*Biowatch*'), was concerned with a challenge to an adverse costs orders granted against a public interest litigant seeking access to information to protect the environmental right.[60] Although the Court found in favour of the public interest litigant on the issue of costs, it said nothing about the importance or the content of the environmental right.[61] Whilst the focus of *Biowatch* was justifiably the issue of costs, the Court could have commented on the importance of litigating in the public interest to uphold the environmental right, an issue that was squarely before it.[62]

In 2018 and 2020 two cases were brought before the Court by communities resisting extractivism.[63] The bread and butter of powerful multinational fossil fuel companies, extractivism entails the large-scale removal of predominantly unprocessed resources from the Earth, often for export.[64] Extractivism has been and continues to be a major contributor to climate change,[65] and a driver of contemporary socio-ecological crises.[66] In both cases, *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Limited & Another* ('*Maledu*') and

[56] *De Kock v Minister of Water Affairs and Forestry & Others* [2005] ZACC 12, 2005 (12) BCLR 1183 (CC)('*De Kock*').

[57] Ibid at paras 3–4.

[58] Ibid at paras 5–6.

[59] Examples include the cases discussed in Krüger (note 1 above) at 480–485.

[60] *Biowatch Trust v Registrar Genetic Resources & Others* [2009] ZACC 14, 2009 (6) SA 232 (CC)('*Biowatch*'). The same criticism applies to *Limpopo Legal Solutions & Others v Vhembe District Municipality & Others* [2017] ZACC 14, 2017 (9) BCLR 1216 (CC)(*Biowatch* principle applied to overturn a punitive costs order granted in the context of public interest litigation seeking action in response to a burst sewer pipe).

[61] Ibid at para 60.

[62] Ibid at paras 5, 9, 19, 40 and 45.

[63] *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Limited & Another* [2018] ZACC 41, 2019 (1) BCLR 53 (CC)('*Maledu*')(community resisting eviction by mining companies on the basis that they did not give their free, prior, informed consent prior to the grant of mining authorisations); *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited & Others* [2020] ZACC 5, 2020 (4) SA 409 (CC)('*Normandien*')(farmers resisting the acceptance of an application to explore for shale gas in the Karoo on the basis of a failure to first afford them the right to be heard).

[64] C Pereira & D Tsikata 'Contextualising Extractivism in Africa' (2021) 2(1) *Feminist Africa* 14, 14–16, 30; A Acosta 'Extractivism and Neoextractivism: Two Sides of the Same Curse' in M Lang & D Mokrani (eds) *Beyond Development: Alternative Visions from Latin America* (2013) 61, 62–74.

[65] H Bambrick 'Resource Extractivism, Health and Climate Change in Small Islands' (2018) 10(2) *International Journal of Climate Change Strategies and Management* 272, 276.

[66] Kotzé (note 6 above) at 66–68.

Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited & Others ('*Normandien*'), communities set to be adversely impacted by extractivism argued that they had not been afforded adequate opportunities to participate in environmental decision-making in terms of relevant legislation.[67] The legislation at issue (implemented to authorise extractivism) included the National Environmental Management Act 107 of 1998 (NEMA) and the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA), which must be interpreted to give effect to the environmental right. Had the environmental right been interpreted and applied in *Maledu* and *Normandien*, it could have played a valuable role in giving content to the procedural duties owed to communities adversely affected by extractivism. The Court could have explicitly engaged with well-established links between procedural environmental injustice (in the form of a lack of recognition of legitimate community concerns and inadequate opportunities for participation in environmental decision-making) and substantive environmental injustice (in the form of the uneven distribution of environmental harms caused by extractivism, to which poor and vulnerable people are disproportionately exposed).[68] To some extent the Court in *Maledu* recognised these links. The Court protected the Xolobeni community from eviction at the hands of mining companies because the community had not given their free, prior and informed consent to mining.[69] The Court contextualised its judgment with reference to Franz Fanon's 1963 work, *The Wretched of the Earth*, on the significance for colonised people of protecting land as a fundamental component of their dignity.[70] Despite these links, the potential significance of the environmental right was overlooked. The fact that land is part of the environment and unjust dispossession of land amounts to environmental injustice was ignored. A focus on property rights detracted from the significance of the environmental right. Even if the environmental right was not raised by the parties, the Court could have engaged with the right of its own accord, as it has done previously in relation to other rights.[71] Nevertheless, *Maledu*, within the broader struggle of the Xolobeni community, 'is the articulation of the possibility that destructive, extractivist patriarchal capitalism may be halted and that rights struggles may contribute'.[72]

The Constitutional Court has also missed opportunities to engage with the environmental right by refusing leave to appeal against judgments of the High Court or the Supreme Court of Appeal concerning environmental issues without hearing argument or giving full reasons,

[67] *Maledu* (note 63 above) at paras 64–67; *Normandien* (note 63 above) at paras 17–18. For discussion on *Maledu* see D Huizenga 'Governing Territory in Conditions of Legal Pluralism: Living Law and Free, Prior, and Informed Consent (FPIC) in Xolobeni, South Africa' (2019) 6 *The Extractive Industries and Society* 711. For discussion on *Normandien* see M Murcott & E Webster 'Litigation and Regulatory Governance in the Age of the Anthropocene: The Case of Fracking in the Karoo' (2020) 11(1–2) *Transnational Legal Theory* 144, 157–159.

[68] These links are recognised in the principles for good environmental governance provided for in s 2 of the National Environmental Management Act 107 of 1998 ('NEMA'), specifically s 2(4)(c), (d) and (f), which speak to environmental justice in a substantive and procedural sense, discussed in Murcott (note 2 above) at 144–146 and M Murcott 'The Role of Environmental Justice in Socio-Economic Rights Litigation' (2015) 132 *South African Law Journal* 875, 904–905. See also Gonzalez (note 17 above) at 112–113.

[69] *Maledu* (note 63 above) at paras 95–108.

[70] Ibid at paras 1–5.

[71] *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd & Others* [2015] ZACC 29, 2015 (6) SA 440 (CC)('*Link Africa*') paras 33–36 and 114–119, discussed in Murcott (note 2 above) at 60–61.

[72] B Goldblatt & S Hassim '"Grass in the Cracks": Gender, Social Reproduction and Climate Justice in the Xolobeni Struggle' in C Albertyn et al (eds) *Feminist Frontiers in Climate Justice* (2023) 246, 248.

instead dismissing applications for leave to appeal on the basis that they had 'no prospects of success'.[73] Examples of relevant judgments of the Supreme Court of Appeal in 2017 and the High Court in 2018, respectively, prevented extractivism in ecologically sensitive areas, including by interpreting relevant legislation with reference to Section 24 of the Constitution.[74] The judgments represent favourable environmental outcomes. While the Court's orders left the judgments intact, the Court could have strengthened and confirmed their reasoning by meaningfully engaging with the environmental right, creating valuable precedent.

In 2022, another opportunity to engage with the content of the environmental right arose in *Mineral Sands Resources (Pty) Ltd & Others v Reddell & Others* ('*Reddell*').[75] The case concerned a defamation suit brought by a multinational corporation in the mining sector, Mineral Sands Resources, against environmental lawyers and activists who were part of broader social mobilisation against extractivism in South Africa. The environmental lawyers and activists who were being sued argued that Mineral Sands Resources' defamation suit was an instance of strategic litigation against public participation (a SLAPP suit).[76] The alleged SLAPP suit represents part of a growing global trend aimed at stifling environmental activism through abuse of the court process.[77] The Court commented briefly on the importance of environmental interest lobbies and their quest 'to make section 24 environmental rights a reality for all who live in South Africa'.[78] The Court went on to find that a SLAPP suit defence forms part of South African law.[79] Unfortunately, beyond its brief comments about the importance of making the environmental right a reality, the Court did not engage meaningfully with the content of the right. Its focus was on the question of abuses of process in defamation suits, rather than on how such abuses can hinder the fulfilment of the environmental right, or why that matters with reference to socio-ecological crises driven by the extractivism of multinational corporations. *Reddell* thus represents yet another missed opportunity to develop the content of Section 24 of the Constitution.

It is impossible to determine conclusively why the Court has not seized upon the various opportunities discussed to fill the gap in its jurisprudence relating to the environmental right. May and Daly have suggested that the judiciary may be reluctant to develop the necessary new vocabulary.[80] It is, for instance, a daunting task to answer the threshold question of what

[73] For instance, in *Barberton Mines (Pty) Ltd & Others v Mpumalanga Tourism and Parks Agency & Another* unreported order number CCT 84/17 of 3 August 2017, refusing leave to appeal against *Mpumalanga Tourism and Parks Agency & Another v Barberton Mines (Pty) Ltd & Others* [2017] ZASCA 9, 2017 (5) SA 62 (SCA) ('*Barberton Mines SCA*'), discussed in Murcott (note 2 above) at 109–113, and *Atha-Africa Ventures (Pty) Ltd v Mining and Environmental Justice Community Network of South Africa & Others* unreported order number CCT 203/19 of 6 November 2019, refusing leave to appeal against *MEJCON* (note 28 above), discussed in C Vinti 'The Right to Mine in a Protected Area in South Africa: *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs*' (2019) 35(3) *South African Journal on Human Rights* 1.

[74] *Barberton Mines SCA* (note 73 above) at para 11; *MEJCON* (note 28 above) at paras 4.7, 10.6–10.7.

[75] *Mineral Sands Resources (Pty) Ltd & Others v Reddell & Others* [2022] ZACC 37, 2023 (2) SA 68 (CC)('*Reddell*').

[76] Ibid at para 7.

[77] L Chamberlain 'Growing Threats to Environmental Human Rights Defenders: The Latest SLAPP Suit Developments in South Africa' (2020) 26(1) *Southern African Journal of Environmental Law and Policy* 5; L Chamberlain 'SLAPPing Back: A New Legal Remedy for Targets of Corporate Bullying' (2021) 37(3) *South African Journal on Human Rights* 410.

[78] *Reddell* (note 75 above) at para 4.

[79] Ibid at paras 94–98.

[80] May & Daly (note 29 above) at 370.

constitutes 'an environment not harmful to health or wellbeing'. This is especially so when the environment is understood broadly, as is the case in South Africa. As Daly points out, 'environmental degradation is broad and its contours are vague, creeping into many different areas of life: a single leak may pollute the water and the air, prevent farming, poison the water, cause disease and premature death, and produce social insecurity.'[81]

If these are the reasons for the Court's reluctance to develop the content of Section 24, one may be sympathetic. The legal questions raised by environmental harms are indeed complex and novel. Nevertheless, given the human rights and justice issues confronting humanity amidst the prevailing climate crisis, these complex and novel questions must be tackled.

B Promising environmental rights jurisprudential developments in South Africa

The picture that appears is that the Constitutional Court has not contributed as much as it could have to jurisprudence concerning the environmental right. In contrast, there have been some promising developments in other courts, particularly in the High Courts. By way of illustration, next I discuss the High Court's judgment in *Sustaining the Wild Coast I*, which usefully recognised the mutually reinforcing nature of the environmental right and the rights to culture.[82] The judgment is part of a nascent trend toward recognising synergies between the environmental right and other substantive rights.[83] Although the judgment did not engage extensively with the content of the environmental right, the High Court's recognition of the need to respond to intersecting environmental right and cultural rights violations is valuable. It contributes to an approach to rights protection that is potentially more responsive to the interlocking justice issues arising from converging socio-ecological crises. I then turn to discuss the High Court's judgment in *Trustees for the time being of Groundwork Trust & Another v Minister of Environmental Affairs* ('*Deadly Air*'),[84] perhaps the most valiant attempt by any court to give content to the environmental right since *Fuel Retailers*.

I do not suggest that *Deadly Air* is the *only* High Court judgment that has given content to the environmental right. Prior judgments have made significant headway. For instance, in 2017, in *Earthlife Africa Johannesburg v Minister of Environmental Affairs & Others* ('*Earthlife*'), when pronouncing upon the obligations of the state to consider climate impacts

[81] E Daly 'Constitutional Protection for Environmental Rights: The Benefits of Process' (2012) 17(2) *International Journal of Peace Studies* 71, 75.

[82] *Sustaining the Wild Coast I* (note 28 above). Of course, the environmental right could be pitted against the right to culture, housing or other rights through the adoption of a narrow understanding of 'the environment' that fails to appreciate that the environment constitutes the places where people live, work and play, and the (often racist) desire to protect pristine environments and land ownership for an elite minority. Such an approach to environmental protection is misaligned with the Constitution's social justice imperative. See Murcott (note 2 above) at 5; Pieterse (note 23 above) 188.

[83] As discussed above, *Fuel Retailers* (note 26 above) at para 102 created the impetus for this approach. Subsequently, see *VEJA* (note 49 above) where the Supreme Court of Appeal enforced the procedural right of access to information protected in S 32 of the Constitution by placing environmental harms at the centre of the dispute, and recognising the intersection between the right to access to information and the environmental right. For discussion on *VEJA* see M Murcott 'The Procedural Right of Access to Information as a Means of Implementing Environmental Constitutionalism in South Africa' in E Daly & J May (eds) *Implementing Environmental Constitutionalism: Current Global Challenges* (2018) 193, 197–206. See also *Trustees for the time being of Groundwork Trust & Another v Minister of Environmental Affairs & Others* [2022] ZAGPPHC 208 ('*Deadly Air*') at para 76.

[84] *Deadly Air* (note 83 above).

in an environmental impact assessment procedure,[85] the High Court found with reference to Section 24 of the Constitution that:

> [s]ustainable development is … integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures protect the environment 'for the benefit of present and future generations' and hence adequate consideration of climate change. Short-term needs must be evaluated and weighed against long-term consequences.[86]

In this way, *Earthlife* interpreted the environmental right to require consideration of climate change in environmental impact assessment procedures.[87] In the same year, the High Court found in *Propshaft Master (Pty) Ltd & Others v Ekurhuleni Metropolitan Municipality & Others* that 'a person's sense of environmental security in relation to the potential risks and dangers of environmental disaster fall within the scope of protection provided by Section 24 of the Constitution'.[88] In 2018, in *WWF*, a case concerning the lawfulness of the determination of the total allowable catch for Western Cape Rock Lobster, the High Court gave content to the ideas of conservation and sustainable development as articulated in Section 24 of the Constitution in the following manner:

> Conservation and sustainable development … are not only, or even primarily, important because of the pleasure humans derive from healthy and biodiverse ecologies. Many people in the past, the present and the future have depended, do depend or will depend for their economic wellbeing on exploiting renewable resources. To enable them to do so, and thus to preserve food security and avoid poverty, one cannot allow the resource of the many to be exhausted for the benefit of the few (I speak relatively of the 'few' current participants in the lobster sector as against all of those who will come after them).[89]

Each of these pronouncements has resulted in an evolution of the protection of the environment based on the environmental right. However, *Deadly Air* has subsequently gone further.

The discussion of the judgments that follows should not be viewed as discounting the many criticisms that can be levelled at the reasoning of the courts in environmental law disputes.[90] The purpose of the discussion is to reveal instances of meaningful judicial engagement with the environmental right. The judgments discussed are illustrative, and not exhaustive. The thrust of my argument is that the promising developments and, in turn, the potential of the environmental right to respond to converging socio-ecological crises, could be bolstered by

[85] Prescribed by NEMA s 24O.

[86] *Earthlife Africa Johannesburg v Minister of Environmental Affairs & Others* [2017] ZAGPPHC 58, [2017] 2 All SA 519 (GP)('*Earthlife*') at para 82.

[87] T Humby 'The Thabametsi Case: Case No 65662/16 *Earthlife Africa Johannesburg v Minister of Environmental Affairs*' (2018) 30 *Journal of Environmental Law* 145, 149–150.

[88] *Propshaft Master (Pty) Ltd & Others v Ekurhuleni Metropolitan Municipality & Others* [2017] ZAGPHC 270, 2018 (2) SA 555 (GJ) at para 8.4.

[89] *WWF* (note 28 above) at para 91.

[90] Murcott (note 2 above) at 89–130, 171–203 offers extensive commentary on problematic trends in the adjudication of environmental law disputes. See also M Murcott 'Emerging Climate Law and Governance Measures in South Africa: A Clash between Policy and Practice' (2022) 12 *IUCN AEL Journal of Environmental Law* 76, 83–89; Vinti (note 73 above); Kotzé & Du Plessis (note 2 above) at 169–174; O Fuo 'The Role of the Courts in Interpreting Local Government's Environmental Powers in South Africa' (2015) 18 *Commonwealth Journal of Local Governance* 17, 26–33; T Humby 'The Spectre of Perpetuity Liability for Treating Acid Water on South Africa's Goldfields: Decision in Harmony II' (2013) 31(4) *Journal of Energy and Natural Resources Law* 453.

jurisprudence from the Constitutional Court, especially if the Court embraces transformative environmental constitutionalism, discussed in part III.

1 *Intersectionality in* Sustaining the Wild Coast I

I use the term 'intersectionality' to connote an acknowledgement that people suffer differentiated, intersecting experiences of marginalisation, oppression and discrimination.[91] It encourages consideration of all potentially intersecting axes of systems of oppression and marginalisation, including race, class, sexual orientation, physical ability, age, gender, locality, etc in the pursuit of social justice.[92] The discussion of socio-ecological crises at the outset of this article illustrated that multiple human rights are implicated by climate change harms, pollution and biodiversity loss. Further, whilst all people are vulnerable to these crises, vulnerability is not evenly distributed.[93] Rather, vulnerability is informed by converging axes of marginalisation, oppression and discrimination and the underlying systemic causes thereof.[94] In the face of these issues, the United Nations General Assembly Report of the Special Rapporteur on Extreme Poverty and Human Rights, Climate Change and Poverty affirms the need for an intersectional approach to the protection of human rights, noting that:

> [c]oping with the unavoidably dramatic impacts of climate change will be much harder if people's economic and social rights are not protected. That applies doubly in the case of those living in poverty, whose plight is almost certain to be greatly exacerbated.[95]

Addressing intersecting experiences of marginalisation, oppression and discrimination such as those highlighted by the Special Rapporteur, in *Sustaining the Wild Coast I* the High Court recognised the relationship between the protection of the environment, participatory rights protected by the right to administrative justice, and the rights to culture.[96] In this sense, the court's approach aligned with one of the core features of transformative environmental constitutionalism, discussed in part III: the idea that viewing rights as mutually reinforcing of one another can be responsive to intersecting drivers of vulnerability. The applicants in *Sustaining the Wild Coast I* were local communities and non-profit organisations who sought an interdict preventing a seismic survey from being conducted along South Africa's Wild Coast, pending judicial review proceedings challenging the legality of a decision by the Minister of Mineral Resources and Energy to grant an exploration right.[97] The exploration right, in turn, permitted a seismic survey, a central part of exploration for oil and gas reserves beneath the seabed. A seismic survey involves blasting airguns along the seabed to map out oil and gas reserves.[98] The seismic survey was to be undertaken at the behest of Shell Exploration and Production South Africa BV, a South African subsidiary of the infamous multinational fossil fuel corporation,[99] as well as Impact Africa Limited.

---

91 Cho et al (note 19 above) at 787.

92 Gonzalez (note 17 above) at 114.

93 Kotzé (note 6 above) at 64–70.

94 Ibid. For examples, see Gonzalez (note 17 above) at 114–115.

95 United Nations General Assembly Report of the Special Rapporteur on Extreme Poverty and Human Rights, Climate Change and Poverty (note 5 above) at 15.

96 *Sustaining the Wild Coast I* (note 28 above) at paras 8–36.

97 The subsequent judicial review proceedings were successful. See *Sustaining the Wild Coast II* (note 28 above).

98 *Sustaining the Wild Coast I* (note 28 above) at para 6.

99 New Frame 'Go to Hell, Shell' (26 November 2021) available at https://www.newframe.com/go-to-hell-shell/.

In granting the interdict, the High Court found that the applicants had established that they had *prima facie* rights requiring protection.[100] These included, first, the right to be meaningfully consulted about the seismic survey,[101] a feature of the right to just administrative action enshrined in Section 33 of the Constitution. Relatedly, the communities' constitutional right to have the environment protected in terms of Section 24 of the Constitution, and cultural rights provided for in Sections 30 and 31 of the Constitution were recognised, including because of the seismic survey's potential impacts on the climate system, which in turn would impact on livelihoods, community wellbeing, cultural practices and spiritual beliefs.[102] The High Court found that a flawed consultation process had been followed by Shell or Impact Africa prior to the granting of the exploration right.[103] Therefore, the Minister's decision to grant the exploration right was deemed to be *prima facie* unlawful: the communities had the right to seek an interim interdict to protect their constitutional rights from such unlawfulness.[104] A lawful consultation process would afford communities the opportunity to be heard in relation to threats to the environment and their cultural rights.

In reaching these conclusions, the court's engagement with the evidence before it reveals an understanding of intersectionality. Implicitly, the court recognised that a well-functioning environment creates the conditions in which the communities experience social justice, a feature of transformative environmental constitutionalism, discussed in part III. The court acknowledged that the communities are concerned about the impact that a seismic survey could have on the climate, since '[a]s indigenous peoples, they feel responsible for conserving the planet for themselves and humanity'.[105] The court took into account that the communities had observed unpredictable weather patterns with more extreme weather events, and that their livestock become sick more often.[106] The court took seriously that these environmental issues are bound up with the livelihoods and cultural practices of the communities, since they rely on the sea for sustenance.[107] The court acknowledged that the communities are further deeply connected to the land and the sea, including because their ancestors reside in the sea; 'the sea is integral to [their] cultural identity and customary system'; and because they 'know the sea and the land to have healing properties'.[108] At the same time, the court highlighted how the process adopted by Shell and Impact Africa giving rise to the grant of the exploration right had served to exclude the communities. For instance, the notices were not published in languages spoken by the communities and were not accessible to people without access to technology.[109] Public meetings were held in cities, rather than rural areas easily accessible to the communities.[110] The court also highlighted that it was inadequate and invalid for Shell to engage with the 'kings' of communities rather than the communities themselves.[111] In doing so, the court considered

[100] *Sustaining the Wild Coast I* (note 28 above) at paras 8–36.
[101] Ibid at paras 10 and 20–33.
[102] Ibid at paras 9, 12–19 and 68.
[103] Ibid at paras 32–34.
[104] Ibid at para 35.
[105] Ibid at para 15.
[106] Ibid.
[107] Ibid at paras 12–19.
[108] Ibid.
[109] Ibid at para 23.
[110] Ibid at para 24.
[111] Ibid at para 25.

the communities' claim that 'Shell's way of engagement … derives from the colonial and apartheid eras' and departs from their custom of consensus building.[112] By engaging with these intersecting issues and invoking mutually reinforcing rights in response, the court demonstrated an understanding that interlocking systems of marginalisation, oppression and discrimination were at play in the Minister's decision to authorise the exploration right.

The court's intersectional, symbiotic approach to environmental and cultural rights protection and participation advanced complementary norms of inclusion and equitable decision-making about the environment. This is important given that climate change represents an existential threat to indigenous peoples. Fossil fuel development disproportionately impacts upon indigenous communities and is a major contributor to the Earth's socio-ecological crises. It would have been helpful had the court, in discussing the evidence outlined above, engaged explicitly with the content of the environmental right and its relationship with cultural rights. Nevertheless, what is important is the court's departure from a compartmentalising approach to these rights issues.[113] The court's approach in *Sustaining the Wild Coast I* is consistent with the Constitutional Court's recognition that all constitutional rights should be viewed as interrelated and mutually reinforcing of one another.[114] By implicitly embracing this logic, the court illustrated how rights can work together to strengthen claims concerned with human flourishing and environmental protection. Further, the court's approach aligns with transformative environmental constitutionalism, discussed in part III.[115]

2 *Developing the normative content of the environmental right in* Deadly Air

Deadly Air is the focus of this part because the High Court made valiant strides in interpreting the environmental right in response to the socio-ecological crisis of air pollution caused by the burning of fossil fuels.[116] The High Court addressed air pollution from a social justice orientation that aligns with transformative environmental constitutionalism. I elaborate on the notion of transformative environmental constitutionalism in part III. Since being decided in 2022, *Deadly Air* has been appealed,[117] so the Court may have the opportunity to engage with the High Court's approach to the environmental right in future.

Deadly Air arose from a failure by the Minister of Forestry, Fisheries and Environment (formerly the Minister of Environmental Affairs) to put in place adequate measures to address the socio-ecological crisis brought on by harmful emissions causing tens of thousands of deaths in a particularly polluted part of South Africa around Emalahleni. The area is designated in

[112] Ibid.

[113] On compartmentalisation of the environmental right and other substantive rights, see Murcott (note 2 above) at 126–129.

[114] *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 (1) SA 46 (CC) ('*Grootboom*')(engagement with reasonable measures aimed at the realisation of the right to housing enshrined in S 27 of the Constitution) at paras 23–24.

[115] Murcott (note 2 above) at 162–163.

[116] The crisis is a global one since, according to the World Health Organisation 'Household Air Pollution: Key Facts' (28 November 2022), available at https://www.who.int/news-room/fact-sheets/detail/household-air-pollution-and-health, air pollution killed about 3,2 million people in 2020 worldwide. Of these deaths, over 237 000 were children under the age of five.

[117] Centre for Environmental Rights 'Deadly Air Pollution Case Back in Court' (10 March 2023), available at https://cer.org.za/news/deadly-air-pollution-case-back-in-court.

terms of relevant legislation as 'the Highveld Priority Area'.[118] Evidence on record illustrated that the emissions are causing air pollution in the area 'responsible for premature deaths, decreased lung function, deterioration of lungs and heart, and the development of diseases such as asthma, emphysema, bronchitis, tuberculosis and cancer'.[119] Children and the elderly are especially vulnerable.[120] The Minister and other officials conceded that poor air quality in hotspots in the area has adverse impacts on human health and wellbeing.[121] It appeared from the government's evidence that air pollution was responsible for a staggering 10 000 premature deaths each year in the Highveld Priority Area.[122] Despite this evidence and these concessions, the Minister disputed (i) that there was a breach of Section 24(a) of the environmental right, and (ii) that she had a duty to make regulations to address the air pollution in the area.[123]

The High Court made several significant findings about the environmental right. The court then declared that the deadly air in the area violated affected communities' right to an environment not harmful to health or wellbeing in terms of Section 24(a).[124] Further, the Minister was found to owe a legal duty to put in place regulations to address the deadly air.[125] The court ordered the Minister to fulfil this obligation and directed her to publish regulations within six months of its order.[126] As the Minister has applied for leave to appeal against the judgment and the order, the effect of the order is suspended pending the finalisation of the appeal.[127]

The High Court's reasoning in *Deadly Air* illustrates a departure from the Constitutional Court's judicial unwillingness to interpret and apply the environmental right. Of course, there may be valid criticisms of the court's reasoning in *Deadly Air*, and some findings may be overturned on appeal. The purpose of this article is modestly aimed at contrasting the *Deadly Air* court's willingness to interpret and apply the environmental right with the Constitutional Court's apparent reluctance to do so.

In *Deadly Air*, the court began by framing the issues in a justice-oriented manner aligned with transformative environmental constitutionalism, discussed in part III. The court recognised at the outset that 'poor air quality falls disproportionately on the shoulders of marginalised and vulnerable communities who bear the burden of disease caused by air pollution'.[128] This observation represents an acknowledgment of distributive (substantive) environmental injustice, experienced around the world by marginalised and vulnerable people, who suffer an unjust (uneven) share of environmental harms, despite contributing the least to

[118] National Environmental Management Air Quality Act 39 of 2004 ss 18 and 19.
[119] *Deadly Air* (note 83 above) at para 70.
[120] Ibid.
[121] Ibid at paras 12, 66 and 153–155.
[122] Ibid at para 155.
[123] Ibid at para 11.
[124] Ibid at paras 183 and 232–241.
[125] Ibid.
[126] Ibid.
[127] Superior Courts Act 10 of 2013 s 18(1).
[128] *Deadly Air* (note 83 above) at para 9.

these harms.[129] As it traversed some of the harrowing evidence of human suffering as a result of air pollution,[130] the court adopted an intersectional approach by noting that

> the enduring and unsafe levels of air pollution in the Highveld Priority Area are an ongoing violation of the section 24(a) constitutional rights of residents. This violation necessarily violates other constitutional rights, including the rights to dignity, life, bodily integrity and the right to have children's interests considered paramount in every matter concerning the child.[131]

In finding that the air pollution experienced in the Highveld Priority Area violated the environmental right, the court adopted the arguments of the affected communities.[132] One of the most significant and influential of these was the argument that part (a) of the environmental right is 'unqualified' and 'immediately realisable', as discussed further below.[133] Further, the communities argued that the text of Section 24 created 'a meaningful nexus between the environment, "human health" and "well-being"'.[134] The court also mentioned the communities' reliance on Du Plessis's scholarship concerning the need for the judiciary to give content to the environmental right, particularly the terms 'health' and 'wellbeing'.[135] Du Plessis compellingly argues that the right was intended to protect people beyond health issues and is not only concerned with disease outcomes.[136] The communities had asked the court to consider that even where pollution does not have a direct effect on health, it 'could nevertheless be seen as harmful to an individual's wellbeing and therefore in violation of the environmental right'.[137] The court explained the relationship between the right to access to health care in Section 27 of the Constitution and the environmental right:

> A particular environment may be damaging to a person's health yet avoid falling foul of the right to health in section 27, as it does not infringe on that person's right of access to health care services. Health is unarguably a component of environmental concern and falls within the ambit of section 24.[138]

Unfortunately, the court did not draw explicitly on each of these arguments in its analysis and findings. Nevertheless, the court's willingness to traverse the arguments and its findings in favour of the affected communities lends legitimacy to the arguments and brought them prominently into the public domain for further debate. By doing so, the court has traversed arguments in a manner that could inspire the Constitutional Court to begin to fill the gap in its jurisprudence concerning the environmental right in future.

In its analysis, and concluding that the affected communities in *Deadly Air* could rely directly on Section 24(a) of the environmental right to challenge the Minister's failure to put measures in place to address air pollution in the Highveld Priority Area, the court found that

[129] Murcott (note 68 above) at 880–889. See also R Bratspies 'Renewable Rikers: A Plan for Restorative Environmental Justice' (2020) 66(2) *Loyola Law Review* 371; C Soyapi & L Kotzé 'Environmental Justice and Slow Violence: Marikana and the Post-Apartheid South African Mining Industry Context' (2016) 49 *World Comparative Law* 393.

[130] *Deadly Air* (note 83 above) at para 75.

[131] Ibid at para 76.

[132] Ibid at para 149.

[133] Ibid at paras 30–46.

[134] Ibid at para 82.

[135] Ibid, referring to A du Plessis 'South Africa's Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty?' (2011) 27(2) *South African Journal on Human Rights* 279, 293–297.

[136] Du Plessis ibid at 279–297.

[137] *Deadly Air* (note 83 above) at para 82.

[138] Ibid.

'the inescapable conclusion that must be reached on the evidence presented, is that the levels of air pollution [are] not consistent with the s 24(a) right to an environment that is not harmful to health or wellbeing'.[139] The court agreed with the communities' argument that the right enshrined in Section 24 is made up of two parts. Subsection (a), the 'right to an environment not harmful to health or wellbeing', was viewed as an immediately realisable right, distinct from subsection (b), which imposes a duty on the state to take reasonable legislative and other measures to prevent pollution, promote conservation and secure ecologically sustainable development.[140] Thus the court implicitly endorsed the argument that environmental protection is both about addressing environmental harms in the here and now pursuant to part (a), and about 'exercising long-term custodianship and care for the environment' pursuant to part (b) of the environmental right.[141] The court reasoned that Section 24(a) was textually distinct from other 'qualified' and 'progressively realisable' rights,[142] and 'phrased in an entirely unqualified' manner that is comparable to the phrasing of the right to access to basic education.[143] In these ways the court developed the normative content of the environmental right in *Deadly Air*.

There is ongoing debate about the 'immediately realisable' finding.[144] A full evaluation of the finding falls outside of the scope of this article. My position is that even if the environmental right does not comprise two distinct parts, with the first being 'immediately realisable', there can be no doubt that the air quality measures currently in place are not reasonable, applying the *Grootboom* test.[145] Tens of thousands of people are dying and countless others are suffering as a result of deadly air – they are 'most in peril' and thus, according to *Grootboom*, 'must not be ignored by the measures aimed at achieving the right'.[146] The evidence in *Deadly Air* reveals that the Minister can and should reasonably do more in the short and long term. For her response to be reasonable, the Minister must treat the vulnerable people affected by air pollution 'with care and concern'.[147] Following *Fuel Retailers*,[148] the courts should not hesitate to engage with the environmental right in a manner that advances adequate responses to the socio-ecological crisis of air pollution. The approach in *Deadly Air* represents an attempt to do so.

The court found that the Minister had not been able to justify the limitation of the communities' environmental right in terms of Section 36 of the Constitution.[149] In doing so, the court found that the relevant air quality legislation that the Minister argued amounted to a law of general application that reasonably and justifiably limited the environmental right could

[139] Ibid at para 153.
[140] Ibid at paras 156–162.
[141] Ibid at para 44.
[142] Ibid at para 155.
[143] Ibid at paras 156–162.
[144] M Kidd *Environmental Law* (2022) at 2.1. Kidd's position was criticised at a 2022 panel of the Environmental Law Association of South Africa Annual Conference (Environmental Law Association of South Africa 'Annual and Student Conferences 2022: Celebrating Desmond Tutu in an Era of Transition' available at https://elasa.co.za/ela-events/2022-annual-and-student-conferences/).
[145] *Grootboom* (note 114 above) at paras 41–44.
[146] Ibid at para 44.
[147] Ibid.
[148] *Fuel Retailers* (note 26 above) at paras 102–104.
[149] *Deadly Air* (note 83 above) at paras 171–176.

not be construed as permitting an increase in levels of air pollution above national standards in a manner that poses a threat to human life and wellbeing.[150] Further, the court found that:

> The principle of sustainable development … requires that measures put in place to achieve economic development should not sacrifice the environment and human life and wellbeing and it must be that a balance should be struck. Where one trumps the other, it cannot be said the right of section 24(a) has been achieved.[151]

This statement develops the normative content to the environmental right by adopting a value-laden approach to sustainable development. The court showed an appreciation that economic development ought to be 'justifiable' in the sense that the environment and human life and wellbeing ought not to be sacrificed.

The brief discussion of *Deadly Air* is illustrative of the value of meaningful engagement with the normative content of the environmental right – the court breathed much-needed life into the environmental right in response to the pressing socio-ecological issue of air pollution, given its justice implications. By framing the dispute in a justice-oriented manner, adopting substantive, rights-based reasoning that gave content to the environmental right, and recognising the intersections between a violation of the environmental right and other substantive rights, the court's approach aligned with transformative environmental constitutionalism, the adjudicative approach that I discuss next. The hope is that transformative environmental constitutionalism could inform the adjudication of disputes concerning converging socio-ecological crises in future, including in the Constitutional Court.

III TRANSFORMATIVE ENVIRONMENTAL CONSTITUTIONALISM

Transformative environmental constitutionalism has been theorised extensively elsewhere.[152] Weaving together a body of well-established literature relating to transformative constitutionalism and environmental constitutionalism,[153] transformative environmental constitutionalism entails a novel approach to the adjudication of disputes that implicate interlocking struggles for social justice and environmental protection in a time of planetary crisis. In developing the theory, Murcott 'invites the judiciary, in fulfilling its constitutional mandate to pursue social justice, to engage with the law in a radical manner that recognises the

[150] Ibid at para 174.

[151] Ibid at para 175.

[152] Murcott (note 2 above) at 132–170. See also M Murcott 'Introducing Transformative Environmental Constitutionalism' in E Daly et al (eds) *New Frontiers in Environmental Constitutionalism* (2017) 280; M Murcott 'Transformative Environmental Constitutionalism's Response to Setting Aside of South Africa's Moratorium on Rhino Horn Trade' (2017) 6(4) *Humanities*. This body of work is not the first to speak about the potential of environmental rights discourse to advance transformation in society, but is the only work that does so thoroughly and from a South African perspective.

[153] The body of scholarship on transformative constitutionalism includes: M Pieterse 'What Do We Mean When We Talk About Transformative Constitutionalism?' (2005) 20(1) *South African Public Law* 155; D Moseneke 'The Fourth Braam Fischer Memorial Lecture – Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 386; S Sibanda 'When Do You Call Time on Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism' (2020) 24 *Law, Democracy & Development* 384. On environmental constitutionalism, the body of scholarship includes: Kotzé (note 3 above); May & Daly (note 3 above); May & Daly (note 4 above); May & Daly (note 29 above); P Viola 'From the Principles of International Environmental Law to Environmental Constitutionalism – Competitive or Cooperative Influences' in D Amirante & S Bagni (eds) *Environmental Constitutionalism in the Anthropocene* 127.

links between environmental degradation in a time of socio-ecological crises, and the plight of vulnerable people'.[154]

The purpose of this part is to summarise the core features of transformative environmental constitutionalism and their potential significance for the adjudication of disputes about converging socio-ecological crises that negatively impact on Earth systems functioning, with grave justice and human rights implications. Acknowledging legitimate criticisms of transformative constitutionalism and rights-based strategies as a response to injustice,[155] transformative environmental constitutionalism is posited as a means to render rights-based litigation more effective when it is pursued.[156]

Albeit an emerging concept, in the early days of its development, transformative environmental constitutionalism has at least two central features. First, it calls upon the courts to frame litigation about converging socio-ecological crises such as climate change in a justice-oriented manner, adopting a socio-ecological systems perspective that allows an appreciation of intersecting forms of injustice.[157] Doing so would help to address the concern raised by scholars that courts have 'environmental blind spots' or treat environmental issues as peripheral.[158] A socio-ecological systems perspective entails recognising first, that humans and the environments in which they exist are strongly coupled to the point that they exist within a complex, single system.[159] This perspective is important since environmental harms impact on human flourishing and the attainment of social justice.[160] Interlocking systems causing marginalisation, oppression and discrimination are heightened by and often coincide with environmental degradation. The communities' argument in *Deadly Air* that 'there is an inextricable relationship between one's health and the environment within which one lives' aligns with this perspective.[161] A justice-oriented framing of litigation about socio-ecological issues allows interlocking patterns of marginalisation, discrimination and oppression to be explicitly linked to the need to protect the environment.[162] The plight of the most vulnerable to environmental degradation is less likely to be overlooked or demeaned. The justice-oriented framing of *Deadly Air* through the lens of the disproportionate exposure of marginalised and vulnerable communities to deadly air pollution is an example of how bringing justice issues to the fore can promote value-laden responses to human suffering connected to environmental degradation.[163] It aligned with transformative environmental constitutionalism. The suffering of the communities was rendered tangible and immediate, justifying a strenuous response to the government's failures to address air pollution. *Deadly Air* alerted the public that socio-ecological impacts of harmful emissions are issues of justice.

[154] Murcott (note 2 above) at 135.

[155] Ibid at 47, 51, 172–173.

[156] Ibid at 50.

[157] Ibid at 168–169.

[158] On courts' environmental blind spots see generally Krüger (note 1 above). On treating the environment as peripheral see J Dugard & A Alcaro 'Let's Work Together: Environmental and Socio-Economic Rights in the Courts' (2013) 29 *South African Journal on Human Rights* 14, 24–26; Pieterse (note 23 above) at 187–188. For a recent and comprehensive discussion of various problematic trends in litigation concerning intersecting social, environmental and climate justice issues see Murcott (note 2 above) at 89–131.

[159] Murcott (note 2 above) at 8–9.

[160] Ibid at 138.

[161] *Deadly Air* (note 83 above) at para 82.

[162] Murcott (note 2 above) at 138–141.

[163] *Deadly Air* (note 83 above) at para 9.

The second core feature of transformative environmental constitutionalism is a demand for substantive, human rights-based adjudication of environmental law disputes as required by Section 39(2) of the Constitution.[164] This kind of adjudication interprets and applies relevant justice-oriented principles in environmental legislation, such as the principles requiring public trusteeship and environmental justice in NEMA.[165] In addition, it develops the normative content of the environmental right provided for in Section 24 of the Constitution.[166] Such development could, in turn, engage with the under-explored notions of ecological sustainability and inter- and intra-generational equity.[167] Judicial engagement with these notions could lend normative force to the environmental right in a manner that aligns with South Africa's broader project of transformative constitutionalism and is responsive to climate change and other pressing socio-ecological crises. This kind of adjudication could help to centre environmental justice concerns in cases implicating socio-ecological systems functioning that tend to focus on administrative justice issues to the exclusion of environmental justice.[168]

Lastly, adjudication aligned with transformative environmental constitutionalism recognises the mutually reinforcing and interrelated nature of the environmental right and other relevant substantive rights concerned with the flourishing of humans and the environment.[169] Acknowledging a judicial tendency to compartmentalise rights issues,[170] transformative environmental constitutionalism looks for synergies between the environmental right and other substantive rights.[171] Reliance on the environmental right alongside other rights (including the rights to life, dignity, socio-economic entitlements and culture) could serve to strengthen litigation in response to interlocking systems of marginalisation, oppression and discrimination arising from the deterioration of the environment, including due to pollution, biodiversity loss and climate change. This was the case in *Sustaining the Wild Coast I* where the court resisted a compartmentalised approach and relied upon interrelated rights to culture, the environment and administrative justice to respond to the intersecting forms of injustice experienced by the applicant communities.

South Africa's constitutional order equips judges with several tools that allow the kind of adjudication called for by transformative environmental constitutionalism. These include the adjudicative style envisaged by the Constitution and South Africa's model of separation of powers.

It is widely recognised that, in terms of Section 39(2) of the Constitution, the courts must engage in substantive, human rights-based adjudication in pursuit of the Constitution's transformative mandate and overarching social justice imperative. This style of legal reasoning is often described as 'transformative adjudication'.[172] Transformative adjudication entails 'openly

[164] Murcott (note 2 above) at 28–29, 58–64.

[165] NEMA ss 2(2), 2(4)(o) and 2(4)(c), (d), (f), (h) and (k), discussed in Murcott (note 2 above) at 143–151.

[166] Murcott (note 2 above) at 151–161.

[167] Ibid.

[168] Dugard & Alcaro (note 157 above) at 24–26; Pieterse (note 23) at 188; Murcott (note 2 above) at 100–113.

[169] Murcott (note 2 above) at 162–168.

[170] Pieterse (note 23 above) at 189–190; O Fuo 'The Transformative Potential of the Constitutional Environmental Right Overlooked in Grootboom' 2013 *Obiter* 77, 93–95; Murcott (note 2 above) at 126–130.

[171] Murcott (note 2 above) at 162–168.

[172] C Hoexter 'Judicial Policy Revisited: Transformative Adjudication in Administrative Law' (2008) 24 *South African Journal on Human Rights* 281, 283–284; G Quinot 'Substantive Reasoning in Administrative-Law Adjudication' (2010) 3 *Constitutional Court Review* 111; Pieterse (note 152 above); Moseneke (note 152 above).

and honestly tell[ing] us what the substantive bases of their decisions are, including what values, policy objectives or political considerations truly motivated a particular outcome'.[173] It further requires a contextual approach to legal interpretation in which

> '[d]ecisions on violation of constitutional rights must be seen in the context of socio-economic conditions of the groups concerned in the light of social patterns, power relations and other systematic forms of deprivation, which may be relevant. Also the historical context of the case must be heard.'[174]

Transformative environmental constitutionalism urges judicial reflection on the purpose of the environmental right and its subsidiary legislation as well as on the current context of converging socio-ecological crises that negatively impact on Earth systems functioning, and the grave justice and human rights implications thereof. Where litigants do not adequately introduce evidence or arguments addressing relevant socio-ecological issues and their justice implications, a remarkable feature of transformative adjudication is that it may, in certain limited circumstances, require that courts take judicial notice of relevant evidence or raise norms of their own accord or volition (ie *mero motu*).[175]

South Africa's distinct conception of separation of powers envisages an activist role for judges and empowers the courts to advance the Constitution's transformative mandate.[176] Through a range of mechanisms, the model of separation of powers incorporates a normative component, as it is not only about dividing and controlling power, but also about ensuring social justice.[177] Transformative environmental constitutionalism brings to the fore the reality that social justice cannot be ensured in the absence of a well-functioning environment. This view of separation of powers was embraced in *Deadly Air*. In granting a just and equitable remedy, the court relied on prior Constitutional Court jurisprudence in which it was remarked that 'the bogeyman of separation of powers should not cause courts to shirk from [their] constitutional responsibility'.[178]

The practical advantages of the Constitutional Court adjudicating future cases that relate to the protection of the environment in a manner consistent with transformative environmental constitutionalism include bringing the links between injustice and environmental degradation to the fore, and developing the normative content of the environmental right as a mechanism responsive to the struggles of those most vulnerable to converging socio-ecological crises. Valuable precedent could be created to bolster findings of other courts that are seeking to

[173] Quinot (note 171 above) at 113.

[174] Moseneke (note 152 above) at 318. See also C Albertyn 'Substantive Equality and Transformation in South Africa' (2008) 23(2) *South African Journal on Human Rights* 253, 273–274.

[175] On judicial notice see Murcott (note 2 above) at 139–141. On the court's power to engage with arguments *mero motu* see *Link Africa* (note 71 above) at paras 33–36; *CUSA v Tao Ying Metal Industries & Others* [2008] ZACC 15, 2009 (2) SA 204 (CC) at para 68, discussed in Murcott (note 2 above) at 60–61.

[176] T Fish Hodgson 'The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Towards a Distinctly South African Doctrine for a More Radically Transformative Constitution' (2018) 34(1) *South African Journal on Human Rights* 57, 63, 66–68, 73–74, 76–77; R Gargarella et al 'Courts, Rights and Social Transformation: Concluding Reflections' in R Gargarella et al (eds) *Courts and Social Transformation in New Democracies – An Institutional Voice for the Poor?* (2006) 255, 260; S Liebenberg *Socio-economic Rights Adjudication Under a Transformative Constitution* (2010) 66–71; D Davis 'Separation of Powers: Juristocracy or Democracy' (2016) 133(2) *South African Law Journal* 258, 267.

[177] Fish Hodgson (note 176 above) at 75.

[178] *Deadly Air* (note 83 above) at para 239, referring to *Mwelase & Others v Director-General, Department of Rural Development and Land Reform & Another* [2019] ZACC 30, 2019 (6) SA 597 (CC) at para 51.

uphold the environmental right. The gap in the Constitutional Court's jurisprudence concerning the environmental right could be filled through imbuing normative force into the environmental right in a manner that aligns with South Africa's project of transformative constitutionalism and is responsive to converging socio-ecological crises.

IV CONCLUSION

This article has reflected on a gap in the Constitutional Court's jurisprudence concerning the environmental right enshrined in Section 24 of the Constitution. Apart from *Fuel Retailers* (in 2007) and to a lesser extent *NSPCA CC* (in 2016) the Court has not contributed a great deal to South Africa's jurisprudence concerning the environmental right. The Court has missed several opportunities to do so. More recently, *Sustaining the Wild Coast I* (in 2021) and *Deadly Air* (in 2022) represent significant endeavours on the part of High Courts to engage with environmental rights issues in a manner that is responsive to converging socio-ecological crises. When the Constitutional Court next has the opportunity to adjudicate a dispute about the protection of the environment, this article has proposed transformative environmental constitutionalism as offering valuable insights for how it could do so. With its emphasis on substantive legal reasoning and framing disputes in a justice-oriented manner that views humans and the environment as inextricably connected, transformative environmental constitutionalism could encourage the Constitutional Court to fill the gap in its jurisprudence concerning the environmental right. What is more, transformative environmental constitutionalism promotes judicial engagement with the environmental right in ways that respond to differentiated, intersecting experiences of marginalisation, oppression and discrimination in a time of converging socio-ecological crises.

V POSTSCRIPT

This article engaged with judgments of the Constitutional Court up to and including early December 2022. In late December 2022, *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44; 2023 (5) BCLR 527 (CC); 2023 (4) SA 325 (CC) was handed down. The facts raised several significant socio-ecological systems issues, including sewage spillages caused by a lack of electricity, harmful to human health and well-being and to the environment. In granting an interim interdict the environmental right was touched on in addition to several other rights. However, the judgment did not fill the gap in the Constitutional Court's jurisprudence concerning the environmental right. It offers ripe territory for further analysis of the utility of transformative environmental constitutionalism and the need to mind the gap in the Constitutional Court's jurisprudence concerning the environmental right.