

The role of South Africa's environmental rights in transformative constitutionalism

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DEDICATION

For Izwi, Tine, Zuva, Waishe, Kunaishe and Inyasha to whom the future belongs.

ABSTRACT

This study discusses the role of and extent to which South Africa's environmental right contributes to transformative constitutionalism. Prior to the enactment of the *Constitution of the Republic of South Africa, 1996* socio-economic entitlements and environmental concerns were not constitutionally protected. This contributed to maldistribution of environmental resources and socio-economic entitlements, the effects of which are still prevalent to date. South Africa's unjust and discriminatory past called for (and continues to do so) the need to transform people's lives for the better *inter alia* through the redistribution of socio-economic entitlements. The Constitution seeks to redress past injustices through the provision of access to socio-economic entitlements and environmental protection so as to improve people's quality of life. This constitutional transformative vision is mostly assessed in the light of the realisation of the socio-economic rights of access to water, food, healthcare, housing and healthcare. The main reasoning behind advancing transformation through the provision of socio-economic rights is that they seek to promote the redistribution of material resources so that people's quality of life can be improved. Despite the emphasis placed on redistribution, there is little mention by the judiciary or in the literature of the function of the environmental right in this context, although this is the right which seeks to protect and promote the sustainable use of environmental resources so that they can be continuously available to the present and future generations for the purpose of fulfilling the socio-economic transformation agenda. This study seeks to extend the discussion of transformative constitutionalism by addressing the transformative nature of the environmental right and the extent to which it may contribute to transformation in South Africa.

Keywords: transformative constitutionalism, socio-economic rights, environmental rights, sustainable development.

OPSOMMING

Hierdie skripsie ondersoek die rol en die mate waartoe Suid-Afrika se fundamentele omgewingsreg vervat in artikel 24 van die Grondwet van die Republiek van Suid-Afrika, 1996, bydra tot transformerende konstitusionalisme in die land. In die pre-1996 bestel was sosio-ekonomiese en grondwetlike belange van die meerderheid van Suid-Afrika se bevolking nie beskerm nie. Dit het aanleiding gegee tot 'n behoefte aan sosio-ekonomiese herverdeling van hulpbronne. Laasgenoemde word veral bereik deur middel van grondwetlik verskansde sosio-ekonomiese regte soos die regte op toegang tot water, behuising en gesondheidsorg. Tydens hierdie sosio-ekonomiese herverdeling, word daar egter weining aandag geskenk aan omgewingsbelange wat op hul beurt volledig vervat word in die grondwetlike omgewingsreg in artikel 24 van die Grondwet. Deurdat die howe en partye tot 'n hofgeding nie die fundamentele omgewingsreg in ag neem tydens sosio-ekonomiese aangeleenthede nie, mag lei tot 'n onvolhoubare stand van sake, veral tot die mate wat volgehoue sosio-ekonomiese vooruitgang en transformasie onderhewig is aan ekologiese beperkings en belange wat beskerm moet word deur die artikel 24 van die Grondwet. Hierdie studie poog om die gesprek rondom sosio-ekonomiese grondwetlike transformasie in Suid-Afrika uit te brei deur te argumeneer dat die omgewingsreg vervat in artikel 24 'n sentrale element moet wees waneer aangeleenthede rakende sosio-ekonomiese transformasie deur die howe oorweeg word. Hierdie visie kan veral bereik word indien die howe gebruik maak van die konsep van volhoubare ontwikkeling soos vervat in artikel 24 van die Grondwet.

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ACHPR	African Commission on Human and People's Rights
AHRLR	African Human Rights Law Report
CC	Constitutional Court
ICESCR	International Convention on Economic, Social and Cultural Rights
JHRE	Journal of Human Rights and the Environment
NWA	National Water Act 36 of 1998
NEMA	National Environmental Management Act 107 of 1998
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
PELJ	Potchefstroom Electronic Law Journal
RECIEL	Review of European Community and International Environmental Law
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
SERAC	Social and Economic Rights Action Centre
SPLUMA	Spatial Planning and Land Use Management Act
STELL LR	Stellenbosch Law Review
WCED	World Commission on Environment and Development
WHO	World Health Organisation

1 Introduction

The *Constitution of the Republic of South Africa, 1996* (Constitution) seeks to mend past injustices and, *inter alia*, improve people's quality of life for the better.¹ Prior to the enactment of the Constitution, socio-economic and environmental issues were not constitutionally protected.² Considering the discriminatory governing system at the time, socio-economic entitlements as well as environmental benefits and impacts were unequally distributed among the population.³ The governing system of parliamentary sovereignty abused its powers by being more concerned with exploitation and the (discriminatory) allocation of resources than it was concerned about environmental protection.⁴ The effects of such injustices resulted in the marginalised groups of society being poverty-stricken, without access to basic socio-economic entitlements, while they bore the negative impacts of environmental degradation. To date, the maldistribution of resources and poverty are still prevalent in South African society and the Constitution seeks to redress these injustices through the notion of transformative constitutionalism.

Klare⁵ defines transformative constitutionalism as:

The long-term constitutional enactment, interpretation and enforcement committed to transforming political and social institutions and power relationships in a democratic and participatory and egalitarian direction.

There are different viewpoints regarding how transformative constitutionalism can be advanced in South Africa. In most instances, it is discussed in terms of the socio-economic rights of access to housing, food, water, sanitation and healthcare.⁶ This is based on the fact that socio-economic rights create entitlements to conditions of human welfare; hence they have the ability to redress issues of the maldistribution of resources and poverty, thereby advancing transformative constitutionalism.⁷ The general consensus among scholars and the courts is that there is a need to improve

¹ Preamble of the Constitution.

² Kotze 2007 *Direitos Fundamentais and Justica* 36.

³ Dugard and Alcaro 2013 *SAJHR* 15, Kotze 2007 *Direitos Fundamentais and Justica* 38.

⁴ Kotze 2007 *Direitos Fundamentais and Justica* 36.

⁵ Klare 1998 *SAJHR* 150.

⁶ Sections 26, 27 and 29 of the Constitution.

⁷ Brand and Heyns 2005 *Socio-Economic Rights in South Africa* 9.

people's lives for the better, and the realisation of the socio-economic rights has the potential to advance this goal. Pursuant to this goal is the idea of redressing past injustices through advancing socio-economic development.

The Constitution also makes provision for the right to an environment that is not harmful to people's health and well-being, in terms of section 24.⁸ Inherent in the environmental right is the notion of sustainable development, which relates to the idea of meeting basic socio-economic human needs for the benefit of the present and future generations in a way that is not detrimental to the environment.⁹ The environmental right requires the state to secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.¹⁰ Accordingly, the idea of socio-economic sustainable development, as portrayed in the environmental right, could be said to focus on the imperative of environmental care. In contrast to typical socio-economic rights, the environmental right arguably takes a slightly different approach to development, which takes into account the environment and the sustainable use of resources where the predominant focus is not only on socio-economic development but also on environmental concerns.¹¹

One of the challenges being faced in South Africa is the failure to integrate environmental concerns with socio-economic concerns in the planning, implementation and decision-making of development projects.¹² Socio-economic development is usually advanced without incorporating environmental factors in the development project life cycle.¹³ As a result, the environment is continuously degraded, and this compromises the continuous availability of resources to meet people's basic needs. In addition, the marginalised social groups, while not sufficiently benefiting from socio-economic development, also suffer adverse environmental impacts. This idea is

⁸ Section 24 of the Constitution.

⁹ Section 24(b)(i)-(iii) of the Constitution.

¹⁰ Section 24(b)(iii) of the Constitution.

¹¹ See para 4.2 below in this regard.

¹² Faure and Du Plessis 2011 *Balancing the Interests in Environmental Law in Africa* 417 see para 4.2 below in this regard.

¹³ Faure and Du Plessis 2011 *Balancing the Interests in Environmental Law in Africa* 417 see para 4.4 below in this regard.

usefully encapsulated by the notion of environmental justice.¹⁴ Instead of experiencing improvement in the quality of their lives, the marginalised find their socio-economic conditions continuously deteriorating alongside a deteriorating environment. The courts have, in most instances, missed the opportunity to incorporate the environmental right in socio-economic rights cases, despite its being relevant.¹⁵ In other words, they have not afforded the environmental right and its concept of sustainable development any prominent role in socio-economic rights adjudication, thus possibly ignoring the potential role that sustainable development, as one of the objectives of the environmental right, could play in transformative constitutionalism. Development in South Africa still mirrors the injustices of the past in that it fails to improve poor people's quality of life by neglecting environmental factors in socio-economic development endeavours.¹⁶ Accordingly, the question that stands to be addressed in this regard is, what is the role of and to what extent does South Africa's environmental right contribute to transformative constitutionalism?

1.1 Objectives

Murcott¹⁷ is one of the few scholars who have addressed the transformative potential of the environmental right, and she does so by focusing on environmental justice. Fuo¹⁸ has also addressed the transformative potential of the environmental right in the light of the socio-economic right of access to housing. This study seeks to extend the discussion on the transformative nature of the environmental right by reflecting on the notion of sustainable development as a principle included in the environmental right and its implicit role in contributing to transformative constitutionalism. The hypothesis is that the balancing of socio-economic rights and the environmental right is needed for the advancement of transformative constitutionalism in South Africa. To this end,

¹⁴ Du Plessis 2011 *SAJHR* 279-307.

¹⁵ *Government of South Africa v Grootboom* 2001 1 SA (CC) 46, *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) 1, *Federation for Sustainable Development and Others v Minister of Water Affairs* 2012 ZAGPPHC 128.

¹⁶ Faure and Du Plessis 2011 *Balancing the Interests in Environmental Law in Africa* 417, Feris 2008 *SAJHR* 43. Poverty is still rife in South Africa and the marginalised groups in society are benefiting very little from the economic activities carried out by the mining companies, for instance.

¹⁷ Murcott 2013 *The Role of Environmental Justice in Socio-economic Rights Litigation*.

¹⁸ Fuo 2013 *Obiter* 77-95.

this study also seeks to ascertain the impact of the environmental right on the realisation of other socio-economic rights, and how such an impact can advance transformative constitutionalism.

1.2 Structure

The research question will be answered by the stated objectives in terms of the following structure.

Chapter 2 discusses transformative constitutionalism. This chapter defines transformative constitutionalism by firstly discussing South Africa's unjust past as a way of showing why there was, and still is, a need for socio-economic transformation in South Africa. The aim is to formulate a definition for transformative constitutionalism that could encompass the environmental right so as to outline its significance in pursuing the Constitution's transformation vision. In the light of the definition of transformative constitutionalism formulated in Chapter 2, Chapter 3 discusses transformative constitutionalism from the perspective of socio-economic rights. This chapter will discuss the meaning of socio-economic rights and it seeks to argue that these rights advance transformative constitutionalism through socio-economic development. The aim is to eventually determine in Chapter 4 the importance of environmental protection when advancing socio-economic development. In order to illustrate this, reference will be made to how environmental concerns could be incorporated in issues of socio-economic transformation.

Chapter 4 discusses transformative constitutionalism from an environmental rights perspective. It will be established that one of the main issues embedded in the environmental right is the notion of sustainable development. Considering the reliance on natural resources for socio-economic development in South Africa, it will be argued in this part that environmental, social and economic concerns need to be balanced through the notion of sustainable development so as to sustainably advance transformative constitutionalism. Sustainable development, as it is provided for in the environmental right, has the potential to invite environmental considerations into the socio-economically biased understanding of transformative constitutionalism in South Africa. This chapter is therefore significant to the main focus of the study in that it

shows the role and extent to which the environmental right advances transformative constitutionalism through sustainable development. Chapter 5 concludes the discussion by outlining the findings of the research and recommendations.

1.3 Research methodology

This research project will be performed by way of a literature review in which reference will be made to textbooks, case law, statutes, internet sources, scholarly articles and journals which are relevant in assessing the topic.

2 Transformative Constitutionalism

2.1 Introduction

The *South African Constitution, 1996* (Constitution) has been referred to as being *transformative* by various scholars.¹⁹ The transformative nature of the Constitution is evident from its emphasis on addressing injustices that prevailed in the past by improving the quality of life of its citizens and ensuring equality, dignity and democracy.²⁰ Transformative constitutionalism, a term that has emerged in this respect, relates to the idea of achieving change in society through interpreting the Constitution in a way that upholds the rule of law and promotes equality, human rights and democracy by taking into account other constitutional values and principles that influence these aspects.²¹ To this end, transformative constitutionalism changes the design, purpose, scope and nature of the laws that must realise transformation. This part of the dissertation will discuss the notion of transformative constitutionalism by providing an account of South Africa's history, including its transition to democracy and constitutionalism. The aim is to formulate a definition for transformative constitutionalism that encompasses the significance of environmental rights in pursuing the transformation vision. This will be achieved by looking at how the lack of

¹⁹ Pieterse 2005 *SAPL* 155, Langa 2006 *STELL LR* 351, Liebenberg and Goldblatt 2007 *SAJHR* 335, Albertyn and Goldblatt 1998 *SAJHR* 248.

²⁰ The emphasis on improving the quality of life of all citizens is reflected in the Preamble of the Constitution.

²¹ This is the definition that will be used in this context with reference to transformative constitutionalism.

environmental protection negatively affected (and continues to affect) other socio-economic entitlements and so resulted in an unjust past which now calls for transformation.

2.2 South Africa's unjust past and its legacy

This section discusses how South Africa's environmental management practices created the socio-economic and political discrepancies that prevailed in the past. It particularly discusses the effects on the environment of the displacement of people during the colonial and apartheid eras. The displacement of non-white people disempowered them, leaving the majority of the population in poverty and without access to basic services such as water, sanitation, waste-collection and healthcare services.²²

South Africa's unconstitutional racist past left a "wounded" society which still experiences poverty and resource maldistribution, all of which are the effects of the discrimination, injustice and inequality that prevailed during the colonial and apartheid eras.²³ This past is significant because it reflects on the need, as well the progress made so far, to redress those injustices so as to promote equality, dignity and democracy, as outlined in the Constitution, thus advancing the transformative vision of the Constitution.²⁴

2.2.1 Displacement of people

Land, an integral part of the environment, is very valuable and significant in the socio-economic and political development of any society.²⁵ In the past, non-white people were disempowered by the legislation and policies which restricted their ownership and occupation of land.²⁶ The restriction by white people of land ownership and occupation by non-white people inevitably resulted in their being displaced from certain

²² Liebenberg 2000 *Human Development Report* 1.

²³ Piertese 2005 *SAPL* 158, Langa 2006 *STELL LR* 351.

²⁴ Liebenberg 2010 *Socio-Economic Rights* 25.

²⁵ Dugard and Alcaro 2013 *SAHJR* 13.

²⁶ Liebenberg 2000 *Human Development Report* 1.

areas.²⁷ For instance, the *Natives Land Acts* of 1913 and 1938 (*Natives Land Act*) limited land ownership by black people through allocating about 13% of the land to black people while the rest was allocated to the white minority.²⁸ Much of the land was left to the white minority to share amongst themselves and they used it for different purposes, such as establishing game parks and carrying out mining activities.²⁹

Considerable funds were spent on the establishment of game parks and wildlife preservation, while non-white areas were neglected and were without access to basic socio-economic services such as healthcare facilities, water, sanitation, schools and houses.³⁰ Despite the displacement of the non-whites for the purpose of establishing game parks, access to these parks was mostly restricted to white people.³¹ Consequently, non-white people did not benefit from the proceeds received by the national parks, nor did they have an opportunity to share in the rich natural bounty of South Africa.³² The displacement of non-white people therefore prevented them from equally enjoying benefits afforded by environmental conservation.³³

Non-whites were also displaced from areas which were rich with minerals so as to make way for mining activities which boosted the economy of the nation.³⁴ Mining activities during this time were not regulated in a manner that promoted environmental protection; instead considerable emphasis was placed on allocating and exploring resources.³⁵ Humby³⁶ describes the mining industry at the time as:

Uncaring towards the safety, health and dignity of workers or needs of the local communities around mines; negligent with respect to the environment and opposed to transformation and beneficiation.

²⁷ Kloppers and Pienaar 2014 *PELJ* 681, Liebenberg 2000 *Human Development Report* 6.

²⁸ Kloppers and Pienaar 2014 *PELJ* 681, Liebenberg 2000 *Human Development Report* 6, Anonymous History of Labour Movements in South Africa www.sahistory.org.

²⁹ McDonald 2003 *South African Geographical Journal* 1.

³⁰ McDonald 2003 *South African Geographical Journal* 1.

³¹ McDonald 2003 *South African Geographical Journal* 1

³² Dugard and Alcaro 2013 *SAHJR* 14.

³³ McDonald 2003 *South African Geographical Journal* 1.

³⁴ Anonymous "Imperialism and the Union in South Africa" www.sahistory.gov.

³⁵ Kotze 2007 *Doutrina Estrangeria* 38.

³⁶ Humby 2014 *Springer* 5.

This illustrates the environmental effects of mining activities on the environment. The health and safety of workers and third parties were overlooked while exploration activities continued. The environment was polluted by mining activities, and non-whites mostly suffered the effects of such environmental degradation³⁷ due to the lack of resources and basic services and as a result of water, air and land pollution.³⁸ There was no equal share of either the benefits that accrued from the mining activities or of the impacts of the resultant environmental degradation. Non-white people did not have access to basic socio-economic services such as water, sanitation or healthcare, as well as housing, and this made it more difficult for them to live a healthy life.³⁹

2.2.2 Lack of socio-economic entitlements

At that time, socio-economic benefits were regulated by racially discriminatory laws which saw the non-white majority receiving the least of services while the white minority had access to the best services such as schools, houses and hospitals.⁴⁰ Liebenberg⁴¹ states that non-white people were:

... subjected to underdeveloped (land) in economically marginal reserves and homelands, and systemically discriminated against in their access to a range of social services and resources.

In other words, the land allocated to non-white people was underdeveloped in the sense that there was inadequate infrastructure to provide basic social services such as water, electricity, healthcare and education.⁴² The lack of basic socio-economic services in the non-white areas resulted in widespread poverty, disease and malnutrition, because people lived in an environment that was continuously polluted, where no measures were being taken to prevent, limit or remediate such degradation.⁴³ Basic services such as water sanitation, waste collection and hospitals

³⁷ Humby 2014 *Springer* 5.

³⁸ Dugard and Alcaro 2013 *SAJHR* 15 note inclusion of the prevention of pollution as an issue in section 24 of the Constitution, and how pollution played and still plays a significant role in environmental degradation.

³⁹ Liebenberg 2000 *Human Development Report* 1.

⁴⁰ Liebenberg 2000 *Human Development Report* 6.

⁴¹ Liebenberg 2010 *Socio-Economic Rights* 2.

⁴² Liebenberg 2010 *Socio-Economic Rights* 2626, Liebenberg 2000 *Human Development Report* 6.

⁴³ Liebenberg 2000 *Human Development Report* 6.

were not easily available, therefore non-whites had to bear the cost of using polluted water and living on polluted land.⁴⁴ A polluted environment affected people's health, the water they used, and the shelters and houses they lived in.⁴⁵ This is a clear instance where environmental degradation affected people's socio-economic interests.

The underlying problem was the general lack of the rule of law as well as a failure to enact a constitution that enforced and recognised justice, environmental protection and socio-economic rights.⁴⁶ The socio-economic, political and environmental injustices that prevailed in the past suggest the inextricable relationship between social, environmental and economic factors in determining the quality of people's lives.⁴⁷ As a result, transformation in South Africa today should be based on the simultaneous realisation of socio-economic rights *and* the environmental right.

2.3 South Africa's transition to constitutional democracy and its purpose

One of the first major steps towards the transition to democracy was the enactment of the *Interim Constitution Act 200 of 1993*, (*Interim Constitution*), which advocated equality and shunned the injustices that had prevailed in the past. The *Interim Constitution* facilitated South Africa's transition to democracy by incorporating, among others, socio-economic and political rights, because these were not recognised during the apartheid era when parliamentary sovereignty reigned supreme.⁴⁸ In addition to the socio-economic rights section 29 of the *Interim Constitution* also included the environmental right. The *Interim Constitution* paved the way for the final Constitution of 1996, which incorporated these socio-economic and political rights. Most notably, the 1996 Constitution includes a comprehensive environmental right in section 24. Environmental protection, and access to services such as water, healthcare, housing and education were consequently recognised at a constitutional level, and this significantly changed the impact of these rights on people's lives in that their inclusion in the Constitution created entitlements to the material conditions of their welfare⁴⁹

⁴⁴ Liebenberg 2000 *Human Development Report* 6.

⁴⁵ Liebenberg 2000 *Human Development Report* 6.

⁴⁶ Kotze 2007 *Direitos Fundamentais and Justica* 38.

⁴⁷ The notion of sustainable development is to be discussed in Part 4 2 below.

⁴⁸ Chapter 3 of the *Interim Constitution*, 1993.

⁴⁹ Sections 24, 26 and 27 of the Constitution, Brand and Heyns 2005 *Socio-Economic Rights* 9.

The property clause in section 25 of the Constitution now regulates land tenure, reform and restitution. This may result in proper land distribution and redistribution, which is intended to reverse the displacements that took place in the past.

South Africa's transformation to constitutional democracy addressed (and continues to address) important rights that did not exist during the colonial and apartheid eras.⁵⁰ The Preamble of the Constitution states that it aims to recognise past injustices and heal past divisions, as well as to create a society that is "based on democratic values, social justice and fundamental human rights."⁵¹ The transition to democracy was and still is meant to "improve the quality of life of all citizens and to free the potential of each person."⁵² The Constitution as the supreme law of the land aims to improve people's quality of life for the better. It aims to achieve this vision through transformative constitutionalism.

2.4 Constitutionalism

Constitutions have become central precepts of modern society, with many states having a written or non-written set of constitutional rules and principles governing them.⁵³ Constitutionalism generally relates to compliance, by a governing system, to the principles laid down in that system's constitution.⁵⁴ Due to the different definitions applied to constitutionalism, this section provides a very brief explanation of the concept, which will lay a foundation for the main focus of the research, which is transformative constitutionalism.⁵⁵

Constitutionalism is usually defined within the context in which it is being applied. In the present context, constitutionalism relates to adherence by the government (and

⁵⁰ Rights such as that of life, equality and dignity are now entrenched in the Constitution.

⁵¹ Preamble of the South African Constitution.

⁵² Preamble of the South African Constitution.

⁵³ Kotze *Transnational Environmental Law* 206, Rapatsa 2014 *Mediterranean Journal of Social Sciences* 890.

⁵⁴ Currie and De Waal 2005 *The Bill of Rights Handbook* 8, Loughlin 2012 "What is Constitutionalism?" 55-56.

⁵⁵ An-Naim 2006 *African Constitutionalism* 3. Constitutionalism is indeed broad and variously defined but the explanation of this concept provided is not conclusive. It does appreciate that constitutionalism is a broad concept, but the explanation in this section is meant to give a contextual meaning that will make it easier to grasp the full significance of the term.

society at large) to constitutional principles such as upholding the rule of law, the separation of powers, the protection of human rights, transparency, promoting social justice and other such principles.⁵⁶ Adherence to constitutional principles helps to redress past and present injustices while at the same time promoting equality, democracy, fairness and legitimacy.⁵⁷ The rights contained in the Constitution address injustices by providing, for instance, socio-economic rights which are justiciable, thereby enabling people to enforce and claim fulfilment of their constitutional rights.⁵⁸ Constitutionalism also changes the order of resource allocation and power relations by subjecting everyone to the Constitution despite their race, ethnicity or gender.⁵⁹

Kotze⁶⁰ states that:

Constitutionalism holds the state to account in terms of a higher standard, specifically with respect to its performance, conduct and the degree to which it observes basic human rights and other (constitutional) values and norms universally endorsed by society.

Constitutionalism is therefore important in this context because it regulates the relationship between the state and citizens as well as that between citizens.⁶¹ While regulating the relationship between the state and its citizens, it also promotes public participation and engagement in governance issues that affect them, directly or indirectly.⁶² This is particularly important because constitutionalism is different from South Africa's former parliamentary sovereignty system, in that it promotes equality and accountability where government is subject to the Constitution.

In South Africa, constitutionalism became the tool to be used to reverse the previous unjust system of governance that had abused power and violated human rights through its discriminatory policies. It introduced the idea of limiting government's

⁵⁶ Kotze 2012 *Transnational Environmental Law* 206, Rapatsa 2014 *Mediterranean Journal of Social Sciences* 890, Grim 2012 "Achievement of Constitutionalism" 10.

⁵⁷ Kotze 2012 *Transnational Environmental Law* 206, May and Daly 2015 *Global Environmental Constitutionalism* 45.

⁵⁸ Brand and Heyns 2005 *Socio-Economic Rights in South Africa* 3.

⁵⁹ May and Daly 2015 *Global Environmental Constitutionalism* 45, Currie and De Waal 2005 *The Bill of Rights Handbook* 10.

⁶⁰ Kotze 2012 *Transnational Environmental Law* 206.

⁶¹ Preamble of the Constitution.

⁶² Rapatsa 2014 *Mediterranean Journal of Social Sciences* 890.

liberal exercise of power by making the Constitution the supreme law.⁶³ Apart from limiting the exercise of power, constitutionalism is designed to put the law above everyone regardless of their position in society and in government, through the constitutional principle of the rule of law.⁶⁴ This is important, because all socio-economic and environmental issues are now subject to the Constitution and not to a parliament or a specific governing body.⁶⁵ Constitutionalism is designed to empower people, mostly through promoting human rights and encouraging them to participate in matters that affect them despite their race, gender or ethnicity.⁶⁶ Constitutionalism, as a normative programme has the purpose of transforming the South African state by ensuring that people are treated equally, and also ensures that they have access to basic services so that they live in an environment that is not harmful to their health and well-being.⁶⁷ Constitutionalism, in this context, is therefore important because it stands as the foundation for transformation in South Africa.

While constitutionalism appears to be the blueprint of a cure for all past injustices, it has been criticised as having little practical value.⁶⁸ Particularly, constitutionalism from an environmental perspective has been criticised as being "normatively ineffective and economically inefficient."⁶⁹ This means that constitutionalism arguably sets goals that are too high to achieve let alone to maintain, due to their economic implications. Yet May and Daly⁷⁰ suggest that environmental constitutionalism proposes:

A new way of thinking about the relationship among individuals, sovereign governments and the environment with the overall goal of prompting government to more aggressively protect environmental resources for the benefit both of present and future generations, and of the environment in itself.

Accordingly, while the practicability of constitutionalism is disputed, at least it seeks to balance government's exercise of power with the public's interests so as to ensure that people's lives are continuously improved for the better. Such a balance is of

⁶³ Currie and De Waal 2005 *The Bill of Rights Handbook* 8-10.

⁶⁴ Section 1 of the Constitution.

⁶⁵ Mzikamanda "Constitutionalism and the Judiciary" www.justice.gov.za.

⁶⁶ Currie and De Waal 2005 *The Bill of Rights Handbook* 8-10.

⁶⁷ Section 24 of the Constitution.

⁶⁸ Kotze 2012 *Transnational Environmental Law* 210.

⁶⁹ May and Daly 2015 *Global Environmental Constitutionalism* 39.

⁷⁰ May and Daly 2015 *Global Environmental Constitutionalism* 39.

significance, especially in a legal order such as South Africa's, which is aimed at advancing transformation.

2.5 Transformative constitutionalism

South Africa's past illustrates the adverse impacts of restricted access to basic services and resources for and lack of participation by the majority of the citizens in South Africa. This section discusses constitutionalism in the light of the transformative vision of the Constitution. The purpose of this discussion is to formulate a definition of transformative constitutionalism in South Africa.

Klare⁷¹ famously defined transformative constitutionalism as:

The long-term constitutional enactment, interpretation and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction.

In other words, transformative constitutionalism relates to the idea of constitutional enactment, interpretation and compliance which regulates horizontal and vertical relationships in a state so as to ensure social, economic and political justice especially in instances where social, economic and political injustice prevailed in that society's past.⁷² Transformative constitutionalism therefore steers transformation in all systemic structures of a state by using the constitutional values and principles of that state to uphold and promote fundamental aspirations such as equality, dignity and democracy.⁷³

According to Rapatsa:⁷⁴

Transformative constitutionalism entails that the state should be better positioned to fulfil and strengthen the constitutional ambition of bettering social, economic and justice services *indiscriminatively* [Sic].

This means that transformative constitutionalism relates to improving social, economic, political and legal structures through constitutional and other legislative provisions so

⁷¹ Klare 1998 *SAHJR* 150.

⁷² Currie and De Waal 2005 *The Bill of Rights Handbook* 10.

⁷³ Kotze 2012 *Transnational Environmental Law* 206.

⁷⁴ Rapatsa 2014 *Mediterranean Journal of Social Sciences* 890.

as to ensure equality and a society that is substantially better placed compared to its past. This concept of transformative constitutionalism is reflected in Fuo's⁷⁵ definition, which views transformative constitutionalism as:

... the socio-economic and political vision of post-apartheid South Africa to eradicate extreme poverty and inequalities in access to basic services as well as to establish a democratic system of government that is inclusive, participatory and accountable.

In other words, transformative constitutionalism refers to the re-establishing of political, social, economic and legal structures through interpreting and applying the Constitution, while acknowledging the values and ideas that influence these structures. Consequently, transformative constitutionalism is an all-encompassing purposive legal framework which aims to better people's lives.

Transformative constitutionalism relates not only to socio-economic, legal and political transformation but also to environmental transformation. The inextricability of socio-economic entitlements and environmental conditions has been outlined in the light of South Africa's unjust past.⁷⁶ Likewise, transformative constitutionalism relates to the interpretation and implementation of social, economic and environmental factors in a way that improves people's lives for the better.⁷⁷ It entails the redistribution not only of power but also of environmental resources such as water.

Albertyn and Goldblatt⁷⁸ perceive transformative constitutionalism as "a complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines." In other words, one of the ways of transforming South African society from being discriminatory to being an egalitarian one is through the redistribution of power *and* resources so as to sustain and improve people's livelihoods and also to ensure that everyone is on an equal footing in terms of resource accessibility.⁷⁹

⁷⁵ Fuo 2013 *Obiter* 82.

⁷⁶ See para 2.2 above in this regard.

⁷⁷ Kotze 2012 *Transnational Environmental Law* 207.

⁷⁸ Albertyn and Goldblatt 1998 *SAHJR* 249.

⁷⁹ Albertyn and Goldblatt 1998 *SAHJR* 249.

The redistribution of resources and related goods such as land, houses, sanitation and water also influences the redistribution of power because it is through these resources that systemic domination has been evident in South Africa's past. Land, for example, is a resource the distribution of which makes a huge impact on the development of a country. In particular, it has an economic impact which affects the environment and society at large.⁸⁰ Section 25 of the Constitution can now be used to redistribute land through processes such as land reform and land restitution. Such processes, unlike the displacement processes of the past, should take into account a number of factors, including the environmental impacts of redistributing or restituting land.⁸¹ This is what transformative constitutionalism seeks to achieve, using constitutional values and provisions such as those embedded in rights to redistribute resources and power in a fair, equitable and sustainable manner. Therefore, transformative constitutionalism *inter alia* entails the constitutional redistribution of resources and power in a manner that transforms socio-economic, political and environmental development in society.⁸²

2.5.1 Contextual definition for transformative constitutionalism

In this context, transformative constitutionalism relates to the idea of improving the socio-economic, political and environmental conditions of all who live in South African through interpreting and implementing the Constitution in a way that promotes equality, human rights and democracy. It takes into account other constitutional values and principles such as upholding the rule of law, dignity and public participation in order to realise and improve the prevailing socio-economic, political and environmental conditions.⁸³ The impact that the environment has on the improvement of people's socio-economic conditions makes the environmental right relevant in the interpretation, enactment and implementation of socio-economic rights.⁸⁴ Accordingly, South Africa's environmental right is relevant to transformative constitutionalism to the extent that it influences people's socio-economic conditions and the potential of

⁸⁰ Kloppers and Pienaar 2014 *PELJ* 681.

⁸¹ *In Re Kraanspoort Community* 1999 48 LS 67 (ZALCC), section 25 of the Constitution takes into account different issues that need to be considered before land may be expropriated or redistributed.

⁸² McDonald 2003 *South African Geographical Journal* 1.

⁸³ Langa 2006 *STELL LR* 353, Albertyn and Goldblatt 1998 *SAJHR* 249.

⁸⁴ See para 3.5 below in this regard.

transformative constitutionalism to improve access to the material conditions of welfare such as water, sanitation and housing.

2.5.2 Goals of transformative constitutionalism

According to Pieterse⁸⁵ transformative constitutionalism aims to achieve social justice and substantive equality, and to foster "the culture of justification in every exercise of public power." Three issues are raised in this regard, which are social justice, substantive equality, and the justification of every exercise of public power.⁸⁶ Therefore transformative constitutionalism aims to use constitutional values and principles to redress past and present injustices and to ensure that justice prevails in all structures of society.

There are two forms of equality which are connected with the notion of transformative constitutionalism, namely formal equality and substantive equality. According to Currie and De Waal,⁸⁷ formal equality means treating individuals the same before the law without taking into account "the actual social and economic disparities between groups and individuals." Substantive equality, on the other hand,

Requires an examination of the actual social and economic disparities between groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld ... It requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.⁸⁸

Substantive equality therefore takes into account the unequal life chances resulting from South Africa's unjust past.⁸⁹ It furthers the transformative vision by taking into account the different values and principles advanced by the Constitution, which relate to achieving social justice through the recognition of past injustices.⁹⁰ Formal equality limits the scope of advancing the transformative goal of the Constitution in that it does

⁸⁵ Pieterse 2005 *SAPL* 164.

⁸⁶ Currie and De Waal 2005 *The Bill of Rights Handbook* 10.

⁸⁷ Currie and De Waal 2013 *The Bill of Rights Handbook* 213.

⁸⁸ Currie and De Waal 2013 *The Bill of Rights Handbook* 213.

⁸⁹ Alibertyn and Goldblatt 1998 *SAJHR* 251, Liebenberg 2006 *STELL LR* 338.

⁹⁰ Pieterse 2005 *SAPL* 164.

not take into account the effects of South Africa's past such as those outlined in section 2 above. Instead, it realises the right only at face value.⁹¹

This research argues that formal equality on its own is insufficient to bring about equality and social, economic, environmental and political justice where they do not already exist, but that transformative constitutionalism can effectively advance the realisation of these ideals.⁹² In this context, whenever emphasis is placed on substantive equality this is not meant to disregard or devalue formal equality but to complement it. Transformative constitutionalism aims to promote both formal and substantive equality. While promoting equality in a formal and substantive sense, transformative constitutionalism must strive to achieve social, economic, political and environmental justice.⁹³

2.5.3 Transformative constitutionalism as seen through a post-liberal lens

The distinction made between formal and substantive equality closely shadows the distinction between a classical, liberal reading or interpretation of the Constitution and a post-liberal one. Although he does not provide a definition for both the classical liberal and post-liberal readings of the Constitution, Klare⁹⁴ describes a post-liberal interpretation of the Constitution as one which is:

...social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission.

A post-liberal interpretation of the Constitution aims to transform society from its existing condition, which in this context is a product of a repressive history, into a state that takes into account the ideals celebrated in the Constitution. A post-liberal interpretation of the Constitution is not merely formal but also substantive in the sense that it takes into account the different values and principles that influence any given

⁹¹ Currie and De Waal 2013 *The Bill of Rights Hand Book* 213, Liebenberg 2010 *Socio-Economic Rights* 44.

⁹² Alibertyn and Goldblatt 1998 *SAJHR* 251, Liebenberg 2006 *STELL LR* 338.

⁹³ Murcott 2013 *The Role of Environmental Justice in Socio-economic Rights Litigation* 2.

⁹⁴ Klare 1998 *SAJHR* 153.

case.⁹⁵ As against this, a classical liberal interpretation of the Constitution, as Pieterse⁹⁶ describes it, depicts society as being "fixed in time." This approach to constitutional interpretation stresses the need for formal equality without taking into account the different values and principles that further the transformative goal of the Constitution.

A post-liberal interpretation of the Constitution therefore furthers transformative constitutionalism, in that it promotes the goals of substantive equality, which are fundamental to the transformative vision of the Constitution.⁹⁷ While also promoting substantive equality, a post-liberal interpretation will not do so at the expense of formal equality or the classical, liberal interpretation of the Constitution. A post-liberal interpretation of the Constitution and the desire to bring about substantive equality are at the heart of this dissertation, because they permit us to examine issues, values and principles that could influence the realisation of socio-economic rights which are integral to transformative constitutionalism such as those encapsulated in the environmental right.

2.6 Summary

This part of the research has highlighted some of the injustices that prevailed in the past and how environmental injustices negatively affected people's lives. It is against this background that South Africa transitioned from a discriminatory and unjust apartheid past to one in the Constitution is the supreme law of the land.⁹⁸ The transition to constitutional democracy saw fundamental rights, such as the environmental right and the rights to access to water, housing, education and healthcare being enunciated in the Constitution.⁹⁹ Considering the environmental impact on socio-economic and political structures, this chapter has defined transformative constitutionalism as the idea of improving socio-economic, political and environmental conditions by interpreting and implementing the Constitution in a way that promotes equality (both formal and substantive), human rights and democracy.¹⁰⁰

⁹⁵ Langa 2006 *STELL LR* 354.

⁹⁶ Pieterse 2005 *SAPL* 157.

⁹⁷ Klare 1998 *SAJHR* 151-156.

⁹⁸ The Preamble of the Constitution refers to it as the supreme law of the land.

⁹⁹ Sections 24, 26 and 27 of the Constitution.

¹⁰⁰ As reflected in the Preamble of the Constitution.

From this and other definitions of transformative constitutionalism, it is apparent that the aims of this notion are to achieve social justice, equality and democracy.¹⁰¹

Two forms of equality were discussed, namely substantive and formal. This chapter has argued that formal equality is inadequate without substantive equality, because a substantive approach to interpreting equality takes into account other values that influence any given case.¹⁰² The achievement of substantive equality is capable of being advanced by using a post-liberal approach when interpreting the Constitution.¹⁰³ Particular emphasis has been placed on equality so as to lay a foundation for Chapter 3, which will look at transformative constitutionalism from the perspective of socio-economic rights.

3 Transformative constitutionalism from a socio-economic rights perspective

3.1 Introduction

The previous chapter outlined the constitutional transformative goal of redressing past injustices through promoting equal access to socio-economic entitlements in the South African society.¹⁰⁴ In this chapter, the conceptual content of socio-economic rights is investigated. The study analyses socio-economic rights in the context of transformative constitutionalism to determine how socio-economic rights could be used to transform the unequal social landscape in South Africa. Furthermore, the significance of environmental concerns measured against the availability of socio-economic entitlements will be discussed so as to determine the role of the environmental right in the realisation of socio-economic rights.¹⁰⁵ The impact of environmental concerns in the realisation of socio-economic rights will be determined in the light of Constitutional Court cases on some socio-economic rights. It will be argued that while transformative

¹⁰¹ Pieterse 2005 *SAPL* 155, Langa 2006 *STELL LR* 351, Liebenberg and Goldblatt 2007 *SAJHR* 335, Albertyn and Goldblatt 1998 *SAJHR* 248.

¹⁰² Currie and De Waal 2013 *The Bill of Rights Handbook* 213.

¹⁰³ Currie and De Waal 2013 *The Bill of Rights Handbook* 213.

¹⁰⁴ Langa 2006 *STELL LR* 354, Pieterse 2005 *SAPL* 156.

¹⁰⁵ The environmental right in terms of section 24 and socio-economic rights in terms of section 26 and 27 of the Constitution. In this context, particular emphasis is placed on only the socio-economic rights of access to water and housing due to space limitations.

constitutionalism from a socio-economic rights perspective is based *inter alia* on the redistribution of resources, environmental concerns are equally significant, because resources are derived from and dependent on the environment. First, however, in order to illustrate the transformative nature of socio-economic rights there is a need to outline what the realisation of socio-economic rights entails.

3.2 Socio-economic rights

The South African Constitution has been referred to as being transformative due to its entrenchment of socio-economic rights which were not provided for in the past.¹⁰⁶ The Constitution redresses the past discriminatory allocation of socio-economic entitlements through realising socio-economic rights.¹⁰⁷ In this chapter an analysis will be made of the implications of such a constitutional entrenchment of socio-economic rights, and the different duties they place on the state. The aim is to reflect on how socio-economic rights advance transformative constitutionalism. This section further seeks to outline the emphasis placed on improving people's lives through socio-economic development as a tool to advancing transformation in South Africa.

Brand and Heyns¹⁰⁸ define socio-economic rights as "rights which create entitlements to material conditions for human welfare." Accordingly, socio-economic rights give people the right of access to certain benefits such as housing, water, food, healthcare, education and a healthy environment.¹⁰⁹ These socio-economic entitlements help people to improve their lives for the better; an opportunity that was not equally enjoyed by everyone in the past.¹¹⁰ Deriving its powers and mandate from the Constitution, the state has to ensure that everyone has access to water, housing, waste collection services, education, food and sanitation.¹¹¹

¹⁰⁶ Liebenberg 2006 *STELL LR* 6.

¹⁰⁷ See para 2.2 above on the unequal distribution and accessibility of socio-economic resources, also see Pieterse 2005 *SAPL* 155-166.

¹⁰⁸ Brand and Heyns 2005 *Socio-Economic Rights in South Africa* 3.

¹⁰⁹ These are listed as socio-economic rights in terms of sections 26, 27, 29 and 24 of the Constitution.

¹¹⁰ *Ex Parte Chairman of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 10 BCLR 1253 (CC) 23, Currie and De Waal 2013 *The Bill of Rights Handbook* 564, Brand and Heyns 2005 *Socio-Economic Rights in South Africa* 3, Albertyn and Goldblatt 1998 *SAJHR* 249.

¹¹¹ Socio-economic rights as envisaged in sections 26, 27 and 29 of the Constitution.

Socio-economic rights are a significant transformative tool because they:

Allow people disadvantaged by their social and economic circumstances to become more capable of enjoying a life of dignity, freedom and equality. The socio-economic rights evince a deep concern for the material inequality closely associated with past exclusion and poverty.¹¹²

In other words, the inclusion of socio-economic rights in the Constitution advances the transformative goal of "healing the divisions of the past and establishing a democratic society based on social justice and improving the quality of life of all citizens."¹¹³ It does so, among other ways, by ensuring the redistribution of material resources in a manner that promotes equal access to basic socio-economic entitlements. Realising socio-economic rights helps in achieving both formal and substantive equality as well as in alleviating poverty, which is still prevalent in the majority of the South African population.¹¹⁴

The realisation of socio-economic rights reinforces the significance of the foundational values outlined in section 1 of the Constitution, namely human dignity, equality, and the advancement of human rights and freedoms.¹¹⁵ In order to achieve these foundational democratic and transformative values, the state has to promote equal access to resources. But the state can promote equal access to resources only if these resources are available for (re)distribution in the first place.

According to Liebenberg,¹¹⁶ "the state is both constrained and mandated by a combination of negative and positive duties to secure the rights of the Bill of Rights." In other words, the state is burdened with an obligation to do as much as it can, according to the duties, resources and powers it has at its disposal, to secure for all members of society a basic set of socio-economic entitlements.¹¹⁷ Further, the state is

¹¹² Currie and De Waal 2013 *The Bill of Rights Handbook* 564.

¹¹³ Preamble of the Constitution.

¹¹⁴ Kende 2009 *Constitutional Rights in Two Worlds* 246, Mubangizi 2013 *The Protection of Human Rights* 129, Albertyn and Goldblatt 1998 *SAJHR* 249.

¹¹⁵ *Ex Parte Chairman of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 10 *BCLR* 1253 (CC) 23.

¹¹⁶ Liebenberg 2010 *Socio-Economic Rights* 57.

¹¹⁷ Brand 2006 *Socio-Economic Rights and Courts* 208.

not supposed to interfere with people's enjoyment of the socio-economic and other rights envisaged in the Constitution.¹¹⁸

3.3 Transformative constitutionalism from a socio-economic rights perspective

Transformative constitutionalism, as discussed in the previous chapter, has been variously defined, but and it is most usually defined in the context of socio-economic rights.¹¹⁹ This chapter of this piece reflects on the constitutional transformative goals of achieving equality and social justice through redistribution of resources. The aim is to reflect on the emphasis placed on the redistribution of resources as an effective way to achieving social justice, equality and, consequently, transformative constitutionalism.¹²⁰ This discussion is important to the main focus of this dissertation because it outlines the significance of environmental concerns in advancing transformative constitutionalism through advancing the realisation of socio-economic rights.

Socio-economic rights are used as tools to advance transformation through social justice and equality because they afford people equal access to socio-economic entitlements.¹²¹ Although there is no single definition for social justice, there is at least a general consensus about the essence of the term. As Fuo¹²² explains:

Social justice is an unending process which requires the implementation of (re)distributive measures (including legislative and policy measures) that will minimise poverty and extreme inequalities in access to material resources and its consequences on vulnerable groups and individuals ... The pre-condition (for achieving social justice) requires that all forms and levels of material inequality and economic dependence that impede parity participation should be eradicated...any social arrangements that institutionalise deprivation, exploitation and gross disparities in wealth and income should be eliminated because they deny some people the means and opportunities to interact with others as peers.

¹¹⁸ Section 7 (2) of the Constitution.

¹¹⁹ Albertyn and Goldblatt 1998 *SAJHR* 249.

¹²⁰ Albertyn and Goldblatt 1998 *SAJHR* 249, Pieterse 2005 *SAPL* 158, Liebenberg 2006 *STELL LR* 1-35, Langa 2006 *STELL LR* 352-353.

¹²¹ Pieterse 2005 *SAPL* 158.

¹²² Fuo 2014 *Local Government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 40.

In other words, social justice in the present context relates to the idea of the redistribution of material resources in order to improve people's quality of life by ensuring that everyone has equal access to their basic socio-economic entitlements.¹²³

Social justice is clearly premised on the idea of redistributing material resources so as to advance transformative constitutionalism. Material resources, which are the focus of socio-economic entitlements, derive from and are thus predominantly dependent on natural resources.¹²⁴ It is therefore possible to include environmental resources and concerns under the umbrella of material conditions and resources for welfare because of their influence in the redistribution of material resources. It can be inferred that in order to achieve social justice, the deprivation of access to environmental resources on the marginalised groups of society should be eliminated, and environmental resources should be equally distributed. More so, the exploitation of natural resources, as it was practised in the past, should be fresh managed in a way that equally benefits everyone.¹²⁵ In other words, in order for socio-economic entitlements to advance transformative constitutionalism through social justice, environmental resources need to be protected and equally distributed. There cannot be redistribution of socio-economic resources without the protection of the environment and the fair redistribution of environmental resources.

Accordingly, Albertyn and Goldblatt¹²⁶ refer to transformative constitutionalism as "the complete redistribution of power and resources along egalitarian lines (and) the development of opportunities which allow people to realise their full potential." This entails that there should be a redistribution of socio-economic entitlements such as food, land, houses, water and sanitation.¹²⁷ The redistribution of resources along egalitarian lines requires that everyone must have equal access to economic, social and environmental resources. In order to advance transformative constitutionalism environmental resources and impacts should be equally distributed together with

¹²³ As referred to by Fuo 2014 *Local Government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 36-56.

¹²⁴ Dugard and Alcaro 2013 *SAJHR* 339.

¹²⁵ See Part 2 para 2 above on past environmental practices in South Africa.

¹²⁶ Albertyn and Goldblatt 1998 *SAJHR* 249.

¹²⁷ This can be inferred from sections 24, 25, 26, and 27 of the Constitution.

socio-economic entitlements.¹²⁸ In their definition of transformative constitutionalism, Albertyn and Goldblatt¹²⁹ argue that there must be "complete redistribution of resources along egalitarian lines." Environmental resources and impacts are still unequally distributed and they need to be recognised as socio-economic entitlements in order for the transformative vision to be advanced in a sustainable way.¹³⁰ Transformative constitutionalism therefore entails the complete redistribution of (power and) socio-economic and environmental resources.

Langa's¹³¹ view of transformative constitutionalism from a socio-economic rights perspective is that there should be a socio-economic revolution. He expresses this vision of a socio-economic revolution by stating that there must be a "provision of services to all and the levelling of economic playing fields that were so drastically skewed by the apartheid system."¹³² In other words, socio-economic development should be equally enjoyed by everyone so as to effectively improve people's lives for the better. Accordingly, Langa¹³³ argues that the economic playing field needs to be levelled for South African society to be able to effectively transform. It can be inferred in this regard that past practices of natural resource exploitation that benefited the economy and only a minority of the population have to be transformed by ensuring that all people in the country have equal access to the country's economic resources.¹³⁴ Considering that socio-economic development is dependent on environmental resources, there is a need to protect and manage these resources in a way that promotes and improves people's lives, both now and in the future. Accordingly, transformative constitutionalism demands that there must be an equal provision of services, enhanced by economic and social development that takes into account environmental protection and management in a sustainable way.

Based on the foregoing, transformative constitutionalism seen through a socio-economic lens relates to the redistribution of resources so as to sustainably achieve,

¹²⁸ See para 2.2 above in this regard.

¹²⁹ Albertyn and Goldblatt 1998 *SAJHR* 249.

¹³⁰ Du Plessis 2011 *SAJHR* 281, Glazewski and Bradfield 1999 *Environmental Justice* 60-70.

¹³¹ Langa 2006 *STELL LR* 352.

¹³² Langa 2006 *STELL LR* 352-353.

¹³³ Langa 2006 *STELL LR* 352-353.

¹³⁴ See para 2.2 above in this regard.

inter alia, social justice and equality within the limits of the available environmental resources.¹³⁵ This means that the availability of resources is crucial to the advancement of transformative constitutionalism. Accordingly, material resources must be managed and protected in a manner that ensures their (the resources') continuous availability so as to advance socio-economic development. Despite there being no mention of environmental concerns in the aforementioned definitions of transformative constitutionalism, the emphasis placed on the redistribution of resources calls for the need to protect and manage the environment from which these resources are derived. A discussion on advancing transformative constitutionalism through social justice and equality thus should take into account the interrelationship of constitutional rights to the extent that these rights provide for and protect a whole range of different but interrelated entitlements. In order to advance transformative constitutionalism through the realisation of socio-economic rights, the state has to fulfil negative and positive duties, which duties will be discussed below.

3.3.1 Obligations of the state in realising socio-economic rights

South Africa has ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which requires states to take steps within their available resources to progressively realise socio-economic (and cultural) rights.¹³⁶ Implicit in this obligation are the duties to respect, protect, promote and fulfil these socio-economic rights.¹³⁷ Furthermore, the *African Charter on Human and People's Rights* (ACHPR) imposes the same duties on member states.¹³⁸ In terms of section 7(2) of the Constitution, the state has an obligation to respect, protect, promote and fulfil the rights enshrined in the Bill of Rights. This means that South Africa has human rights obligations not only in terms of international law but also in terms of the domestic Constitution.

¹³⁵ Albertyn and Goldblatt 1998 *SAJHR* 249, Pieterse 2005 *SAPL* 158, Langa 2006 *STELL LR* 352.

¹³⁶ A 2.1 of the ICESCR 1966.

¹³⁷ General Comment 3: The Nature of the State Parties' Obligations (CESCR) 1990.

¹³⁸ States are required to respect, protect and promote, *inter alia*, socio-economic rights so as to ensure their progressive realisation in terms of the ACHPR.

The duty to respect socio-economic rights entails that the state must not interfere with people's enjoyment of their socio-economic rights.¹³⁹ In the case of *Social and Economic Rights Action Centre and Another v Nigeria (SERAC)*, the African Commission stated that:

The obligation to respect entails that the state should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action ... And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.¹⁴⁰

This duty seeks to ensure that people enjoy their socio-economic (and other) rights without any unjustifiable interference by the state. The state is in breach of its duties if it impairs people's access to basic resources such as water and housing.¹⁴¹ From a transformative constitutionalism perspective, this duty seeks to govern the state's exercise of power with regards to people's enjoyment of constitutionally entrenched rights.¹⁴² The state may not, for instance, approve activities that disturb people's right of access to basic socio-economic entitlements such as housing, water and food.¹⁴³ In this regard Fuo,¹⁴⁴ states that:

By refraining from interfering with the enjoyment of socio-economic rights, and by implementing measures that enhance their enjoyment, it becomes possible for right-holders to gain and maintain access to basic services such as food, healthcare services, electricity and potable water.

The duty to respect socio-economic rights therefore enables people to maintain access to socio-economic entitlements without unjustifiable interference with their enjoyment of the entitlements. In other words, the full performance of this duty enables people to have continuous access to resources, thereby ensuring that people's quality of life is continuously improved for the better.

¹³⁹ Principle 4 of Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights.

¹⁴⁰ 2001 AHRLR 60 (ACHPR 2001) par 45.

¹⁴¹ Brand 2006 "Socio-Economic Rights in South Africa" 215.

¹⁴² Brand and Heyns 2005 *Socio-Economic Rights in South Africa* 10, *SERAC v Nigeria* 2001 AHRLR 60 (ACHPR 2001) par 45 and 63.

¹⁴³ Brand and Heyns 2005 *Socio-Economic Rights in South Africa* 10, *SERAC v Nigeria* 2001 AHRLR 60 (ACHPR 2001) par 45 and 63.

¹⁴⁴ Fuo 2014 *Local Government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* 2014.

The state is also under a duty to protect and promote socio-economic rights, and this requires the protection of people's rights from infringement and unjustified limitation.¹⁴⁵ The duties to protect and to promote rights carry more or less similar meanings.¹⁴⁶ Protection relates to creating and maintaining an environment that enables people to fully realise and enjoy their freedoms and entitlements.¹⁴⁷ Promoting rights is often equated to doing as much as possible to bring about the gradual realisation of socio-economic and other rights.¹⁴⁸ Socio-economic rights can be protected through setting a standard in respect of the quality of socio-economic entitlements that are provided to society.¹⁴⁹ The quality depends on the quality of the environment from which they are derived and on which they are dependent. This means that the state's duties extend to the quality of the goods, such as water, houses and food, that it provides to society. The state's duty to fulfil socio-economic rights requires that it "moves its machinery towards the actual realisation of rights."¹⁵⁰ The state therefore has to adopt and implement measures to create, extend and enhance access to basic socio-economic entitlements so as to advance transformation.¹⁵¹

Assessed through a transformative constitutionalism lens, these duties collectively seek to ensure that people's access to basic socio-economic entitlements is not unjustifiably hindered and that the rights are positively realised.¹⁵² In other words, for example, the state has an obligation to ensure that the right of access to housing is not interrupted in any unjustifiable manner.¹⁵³ One of the ways the right of access to housing could

¹⁴⁵ Brand and Heyns 2005 *Socio-Economic Rights in South Africa* 10.

¹⁴⁶ According to the African Commission, "The obligation to protect requires the state to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms. This corresponds to a large degree with the third obligation of the state to promote the enjoyment of all human rights," *SERAC v Nigeria* 2001 AHRLR 60 (ACHPR 2001) 46.

¹⁴⁷ *SERAC v Nigeria* 2001 AHRLR 60 (ACHPR 2001) par 46.

¹⁴⁸ *SERAC v Nigeria* AHRLR 60 (ACHPR 2001) par 46, Brand and Heyns 2005 *Socio-Economic Rights in South Africa* 10.

¹⁴⁹ Brand 2006 "Socio-Economic Rights in South Africa" 216.

¹⁵⁰ *SERAC v Nigeria* 2001 AHRLR 60 (ACHPR 2001) par 47.

¹⁵¹ Brand 2006 "Socio-Economic Rights in South Africa" 219.

¹⁵² In *SERAC v Nigeria*, the African Commission confirmed that States should not interfere with people's enjoyment of socio-economic rights through, for instance, unreasonable evictions par 45 and 63. The same position is outlined in the *Government of South Africa v Grootboom* case. Brand and Heyns 2005 *Socio-Economic Rights in South Africa* 10.

¹⁵³ Brand and Heyns 2005 *Socio-Economic Rights in South Africa* 9.

be hindered is through land, water and air pollution that could harm people's health and well-being where houses are situated on contaminated land and where they are not given the opportunity to reside in homes that are safe and that protect them.¹⁵⁴ The negative and positive duties placed on the state are important for advancing transformative constitutionalism, because they demand that the state respect, promote, protect and fulfil people's entitlements to the material conditions of human welfare, which in turn are necessary for social justice.¹⁵⁵

3.3.2 Socio-economic rights as interpreted by the Constitutional Court

Transformative constitutionalism, as an on-going process, requires that rights be constantly interpreted in a way that improves people's quality of life.¹⁵⁶ The three spheres of government are all placed under the duty to promote transformation in South Africa.¹⁵⁷ The socio-economic rights are referred to as being "justiciable" which means they can be enforced, interpreted and applied by a court of law.¹⁵⁸ The Constitutional Court has had the opportunity to interpret a number of socio-economic rights such as access to housing and water in terms of both sections 26 and 27.¹⁵⁹ The next section discusses instances of such interpretation by the Constitutional Court.¹⁶⁰ Due to space limitations, two court cases dealing with the rights of access to housing and water will be assessed in this regard. The aim is to reflect on the Constitutional Court's recognition of the impact of socio-economic rights in advancing transformative constitutionalism, as well as on the degree to which the courts recognised environmental considerations in their reasoning.

3.3.2.1 The right of access to housing

Section 26 of the Constitution provides everyone with the right of access to adequate housing. The housing right aims to reverse the discriminatory and unequal apartheid

¹⁵⁴ Fuo 2013 *Obiter* 94.

¹⁵⁵ Brand and Heyns 2005 *Socio-Economic Rights in South Africa* 10.

¹⁵⁶ Langa 2006 *STELL LR* 354, Pieterse 2005 *SAPL* 156.

¹⁵⁷ Pieterse 2005 *SAPL* 156.

¹⁵⁸ Currie and De Waal 2013 *The Bill of Rights Handbook* 565.

¹⁵⁹ *Government of South Africa v Grootboom* 2001 1 SA 46 (CC).

¹⁶⁰ Section 26 and 27 of the Constitution.

human settlement system.¹⁶¹ In order to achieve this goal, the state has a duty to respect, protect, promote and fulfil the right of access to adequate housing.¹⁶² The state is under a duty to take reasonable legislative and other measures within its available resources in order to progressively realise this right.¹⁶³ Reasonable measures to fulfil these duties could take the form of laws, policy enactments, or low-cost housing projects. For example, reasonable legislative measures include the *Housing Act* 107 of 1997, *Extension of Security of Tenure Act* 62 of 1997, the *Prevention of Illegal Eviction and Unlawful Occupation of Land Act* 19 of 1998 (PIE) and the *Spatial Planning Land Use Management Act* 16 of 2013 (SPLUMA).

Transformative constitutionalism from a housing right perspective entails that people should have access to housing in areas that are habitable and that do not cause harm to their health or well-being, thus linking up with section 24.¹⁶⁴ There are a number of reasons why people need houses, one of which is to protect themselves from harsh weather conditions which can be harmful to their health and well-being.¹⁶⁵ Environmental concerns such as climate change have an impact on the weather, including rainfall, cold winters or very hot summers.¹⁶⁶ This implies that need for people to have shelter so that they can protect themselves from harsh weather conditions.¹⁶⁷ This also means that the land on which houses are to be built must be habitable, where habitability could be determined by a number of factors such as the availability of water and sanitation services, and whether or not the soil is polluted.¹⁶⁸ One of the factors that determine the habitability of houses is the land and areas they are situated on.¹⁶⁹ Fuo¹⁷⁰ gives an example of an area that used to be a mine, and proper rehabilitation was not done on the area. Building houses in such an area is not

¹⁶¹ See para 2 above in this regard.

¹⁶² Section 26 read together with section 7 (2) of the Constitution.

¹⁶³ Section 26 (2) of the Constitution.

¹⁶⁴ *Housing Act* 107 of 1997, White Paper on *Housing Act* 107 of 1997, Fuo 2013 *Obiter* 94.

¹⁶⁵ Fuo 2013 *Obiter* 94, Kotze 2010 *JHRE* explains how poor people are at risk of suffering many of the effects of climate change.

¹⁶⁶ Kotze 2010 *JHRE* 140.

¹⁶⁷ Fuo 2013 *Obiter* 94.

¹⁶⁸ *Housing Act* 107 of 1997, SAHRC 1998 "Economic and Social Rights Report" 4-70, Fuo 2013 *Obiter* 94.

¹⁶⁹ Fuo 2013 *Obiter* 94.

¹⁷⁰ Fuo 2013 *Obiter* 94.

safe for the people, because the soil will not be strong enough to support the structures and will probably be polluted as well.¹⁷¹

The significance of all this is that the realisation of the housing right is dependent on environmental considerations such as land and water, which are crucial natural resources and which are protected by the environmental right. Therefore, the realisation of the right of access to adequate housing is dependent on the environmental right because of its inseparability from environmental resources such as land and water. The fact that housing must also be conducive to the health and well-being of people reflects on the significance of the environmental right as enshrined in section 24 of the Constitution.¹⁷²

The Constitution specifies that its aim is to improve the quality of lives of people, implying that not just any form of shelter may be sufficient to meet this goal.¹⁷³ In other words, when the right of access to housing is being interpreted by courts there is a need to ensure that people's health and well-being is not threatened by their living conditions. This entails that the quality of the environment and the houses in which people live is important to realising the right of access to adequate housing. In order for the right of access to adequate housing to advance the transformative constitutionalism goal, the housing settlements must have sufficient supporting infrastructure such as sanitation, waste and water services.¹⁷⁴

3.3.2.2 *Grootboom* case

The Constitutional Court had an opportunity to interpret the right of access to housing in terms of section 26 of the Constitution in *Government of South Africa v Grootboom (Grootboom)*.¹⁷⁵ The applicants in this case were a group of marginalised people who had no houses to live in.¹⁷⁶ They had been on the waiting list for the housing

¹⁷¹ Fuo 2013 *Obiter* 94.

¹⁷² Sections 25 and 27 (1) (b) of the Constitution.

¹⁷³ Preamble of the Constitution.

¹⁷⁴ *Housing Act* 107 of 1997, SAHRC 1998 "Economic and Social Rights Report" 4-70, Fuo 2013 *Obiter* 94; this is also alluded in the *Government of South Africa v Grootboom* 2001 1 SA 46 (CC) 49.

¹⁷⁵ 2001 1 SA 46 (CC) 4.

¹⁷⁶ 2001 1 SA 46 (CC) 4.

programme for a long time but still did not have houses allocated to them.¹⁷⁷ The applicants then illegally moved to an unoccupied farm and pitched their shacks there while waiting to be allocated houses.¹⁷⁸ The owner of the land which they had occupied applied for a court order to have them evicted from his property, and the order was granted.¹⁷⁹ The applicants' shacks were demolished together with their belongings.¹⁸⁰ These poor applicants were left homeless in the cold, as it was winter.¹⁸¹ No policy made provision for emergency situations such as those the applicants were left in, and the Constitutional Court had to interpret the realisation of the housing right in the light of the reasonableness tests.¹⁸² The Constitutional Court found that the housing policies enacted to realise the housing right were not reasonable because they did not make provision for emergency situations that arise as a result for instance of natural disasters.¹⁸³

In reaching its decision on reasonableness the Constitutional Court considered the conditions under which the applicants lived and stated:

The conditions under which most of the residents of Wallacedene lived were lamentable. A quarter of the households of Wallacedene had no income at all, and more than two thirds earned less than R500 per month. About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare. Mrs Grootboom lived with her family and her sister's family in a shack about twenty metres square.¹⁸⁴

It is clear that the applicants in *Grootboom* were poverty-stricken; their monthly income could not sustain them.¹⁸⁵ They lacked water and sanitation services, meaning that they could not enjoy their right of access to water in terms of section 27(1)(b) of the Constitution. The area was prone to pollution from sewage, lack of refuse removal services, and noise from the highway.¹⁸⁶ This implies that not only were the applicants'

¹⁷⁷ 2001 1 SA 46 (CC) 8.

¹⁷⁸ 2001 1 SA 46 (CC) 8.

¹⁷⁹ 2001 1 SA 46 (CC) 8.

¹⁸⁰ 2001 1 SA 46 (CC) 8.

¹⁸¹ 2001 1 SA 46 (CC) 9.

¹⁸² 2001 1 SA 46 (CC) 9.

¹⁸³ 2001 1 SA 46 (CC) 9.

¹⁸⁴ 2001 1 SA 46 (CC) 7.

¹⁸⁵ 2001 1 SA 46 (CC) 8.

¹⁸⁶ Fuo 2013 *Obiter* 90.

right of access to adequate housing infringed upon, but also that of access to water and the environmental right.¹⁸⁷

None of the parties in this case raised environmental concerns, despite their being relevant, as an issue to be considered by the Constitutional Court. However, the court had a duty to give content and meaning to the right of access to housing so as to ensure that the right was not infringed. According to section 39(1)(b) of the Constitution, the court is supposed to consider international law. In terms of *General Comment No. 4: Right to Housing (Art. 11 (1) of the ICESCR*:

An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services ... Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors.¹⁸⁸

Clearly, it can be seen from the above that the right to housing is interlinked with other rights such as water and sanitation, food and a safe and healthy environment. The Constitutional Court, however, did not take into account the environmental concerns that should have been raised as a result of the residents' deplorable living conditions; nor did it invoke the environmental right. The lack of sufficient water and levels of pollution posed a risk to people's health and well-being. In order to advance transformative constitutionalism through the right of access to housing, the Court could have taken into account environmental concerns, because they influence people's realisation of the right of access to housing. The idea is to ensure that people's lives are improved for the better and are not just provided with mere shelter.

In its assessment of the "reasonableness" of the state's actions in fulfilling the right of access to housing, the Court had an opportunity to consider environmental concerns, which it did not do. Arguably the environmental right should have been taken into

¹⁸⁷ The right of access to housing in terms of section 27(1)(b) of the Constitution as well as the environmental right in terms of section 24 of the Constitution.

¹⁸⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23.

account, and the courts should have raised the relevance of section 24 in such circumstances. Therefore, despite the court not being asked to consider environmental concerns in the *Grootboom* case, it would have been plausible had it given content to the housing right by taking these concerns (environmental concerns) into account.¹⁸⁹ Had it done so, the right of access to housing would, in future, include ensuring that people's living conditions are improved so as to improve their quality of life.

3.3.2.3 Right of access to water

The UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water* (General Comment 15), read in the light of section 39 (b) of the Constitution, outlines what honouring the right to water entails.¹⁹⁰

In this regard the CESCR states:

An amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements ... Water is required for a range of different purposes, besides personal and domestic uses, to realize many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life).

Accordingly, the right to water is linked to housing, food, health and the environment.¹⁹¹ In other words, a contextual interpretation of this right requires that these interlinked rights be taken into account so as to effectively advance transformation.

The *African Commission on Human and People's Rights* (ACHPR) states that:

¹⁸⁹ 2001 1 SA 46 (CC), Liebenberg 2007 "Beyond Civil and Political Rights" suggests that the courts should require more of government in assessing the provision of the socio-economic rights than reasonableness. Her argument is premised on the fact that the reasonableness approach taken by the courts does not give substantial meaning to socio-economic rights; hence, advancing transformation in this regard becomes a challenge. In other words, transformative constitutionalism requires more than just the formal interpretation of rights. It should take into account other factors such as the historical context and the purpose which the Constitution seeks to serve by making provision for such rights. Only then will the existence of socio-economic rights effectively advance transformative constitutionalism.

¹⁹⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant).

¹⁹¹ Sections 26, 27 and 24 of the Constitution.

Sufficient water means an adequate and continuous water supply for each person's personal and domestic use. Normally this includes drinking, personal sanitation, washing clothes, food preparation and personal hygiene. A sufficient amount of water is necessary to prevent death from dehydration...Safe water is water that, in particular is free from hazardous substances that could endanger human health and whose colour, odour and taste are acceptable to users.¹⁹²

The ACHPR, therefore, also acknowledges the interrelationship between the right to water and other rights such as dignity, health, socio-economic and cultural development, as well as that to a satisfactory environment.¹⁹³

The Constitution guarantees the right of access to water.¹⁹⁴ This does not mean that the government necessarily has to immediately provide water to people, but it has to progressively take reasonable measures which ensure that people have access to water.¹⁹⁵ The Regulations to the *Water Services Act*, giving content to the right of access to water, determine that:

Basic sanitation means the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of ... domestic waste-water and sewage from households, including informal households ... Basic water supply means the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.¹⁹⁶

The policy implicitly takes into account the interrelationship between the right to access to water and the environmental right.¹⁹⁷ The references made to providing necessary services that are safe and hygienic as well as waste collection and treatment services arguably relate to concerns encapsulated under the environmental right. The relationship between the environmental right and that of access to water has the transformative potential to improve people's quality of life by ensuring that they have access to clean and safe water that is not harmful to their health and well-being. Water

¹⁹² ACHPR Principles and Guidelines on the Implementation of Economic, Social and Cultural in the African Charter on Human and People's Rights 2010 par 87. The other rights mentioned in this regard are in terms of articles 4, 5, 16, 22 and 24 of the African Charter.

¹⁹³ ACHPR Principles and Guidelines on the Implementation of Economic, Social and Cultural in the African Charter on Human and People's Rights 2010 par 87. The other rights mentioned in this regard are in terms of articles 4, 5, 16, 22 and 24 of the African Charter.

¹⁹⁴ Section 27 (1) (b) of the Constitution.

¹⁹⁵ Kotze 2010 *JHRE* 147.

¹⁹⁶ Regulation 3 GN R507 in Government Gazette 22355, dated 8 June 2001.

¹⁹⁷ Sections 27 (1) (b) and 24 of the Constitution.

is important because it is the main source of life; it is used to grow food, to drink, to clean and to sustain the environment.¹⁹⁸ Lack of clean and accessible water poses a risk to people's health and their well-being, which could amount to an infringement of their environmental right in terms of section 24. In order to ensure accessibility of water as a socio-economic entitlement, natural water resources need to be protected and managed by mitigating and/or preventing pollution where possible.¹⁹⁹

3.3.2.4 Mazibuko case

The right to access to water was contested in the Constitutional Court case of *Mazibuko v City of Johannesburg (Mazibuko)*.²⁰⁰ In this case the applicants were poor residents of a community called Phiri.²⁰¹ Pre-paid water meters had been installed at residents' houses and each person was allocated 25 litres of free water per person per day in terms of Regulation 3 of the *Water Services Act*.²⁰² As they were poor, the applicants in *Mazibuko* could not afford to pay for the pre-paid water after their free basic water had been used up.²⁰³ They wanted the free basic water allocation to be increased to at least 50 litres per person per day because they argued the 25 litres was insufficient. In reaching its decision, the Constitutional Court assessed the right of access to water in the light of the duty placed on the State to take reasonable legislative and other measures to progressively realise the right.²⁰⁴ The Constitutional Court held that the government had acted reasonably in, among other things, enacting legislation that realises the right to access to water.²⁰⁵ Government policy and the minimum allocation of free basic water was also said to be reasonable considering the cost the respondents incurred in treating and making water accessible to the public.²⁰⁶

The Constitutional Court has been criticised for its decision in *Mazibuko*, with much of the criticism being based on the fact that the court failed to determine a minimum core

¹⁹⁸ 2010 4 SA 1 (CC) 1.

¹⁹⁹ Kotze 2010 *JHRE* 145.

²⁰⁰ 2010 4 SA 1 (CC).

²⁰¹ 2010 4 SA 1 (CC) 4.

²⁰² 108 of 1997, 2010 4 SA 1 (CC) 4

²⁰³ 2010 4 SA 1 (CC) 4.

²⁰⁴ 2010 4 SA 1 (CC) 50.

²⁰⁵ 2010 4 SA 1 (CC) 50.

²⁰⁶ 2010 4 SA 1 (CC) 49.

in relation to the right of access water so that it could advance the constitutional transformative vision.²⁰⁷ None of the parties in the case raised environmental concerns or the environmental right explicitly. Emphasis was placed on the government's not having a minimum core obligation as well as the costs incurred by the respondents if the applicants were allocated more free water.²⁰⁸ While these are important aspects in the realisation of the right to access to water, the Constitutional Court arguably overlooked the significant weight that the environmental right carries in access to water issues. The challenge with the judgement is that the Constitutional Court should have emphasised the interrelationship between the right to access to water and other rights, especially the environmental right.²⁰⁹ Stewart²¹⁰ argues that:

The environmental right also strengthens the importance of access to clean water to maintain health (and well-being) but further implies that scarce resources such as water should be dealt with carefully and that due regard should be given to the protection thereof for future generations.

Accordingly, considering the interrelationship between the environment and the socio-economic right to water, the interpretation of the right to water should take into account the environmental right so that it can advance transformative constitutionalism. It is only when water resources are protected and managed sustainably that water can be equally and continuously accessible as a socio-economic entitlement.

3.4 Summary

Based on the foregoing, transformative constitutionalism from a socio-economic rights perspective relates to the redistribution of resources so as to advance social justice. There has to be socio-economic development in order to improve people's quality of life. But the redistribution of resources as well as the realisation of the socio-economic rights is dependent on the availability of the environmental resources, therefore environmental concerns should be considered when advancing transformation through

²⁰⁷ Kende 2009 *Constitutional Rights in Two Worlds* 265 gives a detailed discussion on the criticisms that have been given regarding the Constitutional Court's decision in *Mazibuko*.

²⁰⁸ 2010 4 SA 1 (CC) 52-56.

²⁰⁹ Fuo 2010 *Obiter* 77-95.

²¹⁰ Stewart 2010 *Penn State International Law Review* 502-504.

the promotion of socio-economic rights. Litigating parties and the courts alike have not taken into account the role of the environmental right in the realisation of socio-economic rights. If they were to do so that could help advance transformative constitutionalism by ensuring that people's quality of life was improved, while natural resources were protected and managed in a manner that promoted their continuous availability.

4 Transformative constitutionalism from an environmental right perspective

4.1 Introduction

The elevation of the environment to a justiciable human right in the Constitution is significant to the extent that it seeks to protect the environment while promoting socio-economic development.²¹¹ The environmental right is now afforded as much value as other fundamental constitutional rights.²¹² As with other human rights entrenched in the Constitution, the state has a duty to respect, protect, promote and fulfil the environmental right.²¹³ Any interpretation of the environmental right should therefore promote the spirit, purport and objects of the Bill of Rights, which, among others, aims to transform South African society for the better.²¹⁴

The following section outlines the transformative nature of the environmental right by arguing that the environmental right is embedded in the notion of sustainable development.²¹⁵ It will be argued that the principle of sustainable development has the potential to advance the constitutional transformative goals of achieving equality and human dignity, and upholding the rule of law.²¹⁶ In order for this transformative potential of sustainable development to be realised, it has to be interpreted in the light of the constitutional environmental right.²¹⁷ Accordingly, the aim of this discussion is

²¹¹ Kotze 2007 *Direitos Fundamentais and Justica* 36.

²¹² Section 24 of the Constitution, Kotze 2007 *Direitos Fundamentais and Justica* 36.

²¹³ Section 7(2) of the Constitution.

²¹⁴ Sections 7(2) and 39(2) of the Constitution.

²¹⁵ Federico et al 2014 *The Quest for Constitutionalism: South Africa since 1994* 226.

²¹⁶ These are fundamental constitutional transformative goals as envisaged in sections 1, 7 and 8 of the Constitution.

²¹⁷ Section 24 of the Constitution.

to advance the argument that transformative constitutionalism in South Africa does not only relate to the realisation of socio-economic rights, but must also include environmental protection concerns. The hypothesis is that the integration of social, environmental and economic concerns is needed for the advancement of development more generally, and more specifically transformation, in South Africa, which will assist in the transformative goal of improving people's quality of life.

4.2 Transformative potential of sustainable development

One of the main transformative goals of the Constitution is to ensure the improvement of "the quality of life of all citizens and free the potential of each person."²¹⁸ Considering that South Africa is a developing country with an unjust and unequal past, there is a need to improve its social and economic structures.²¹⁹ Such development is highly dependent on the use of natural resources.²²⁰ As a developmental ideal that seeks to improve people's quality of life, transformative constitutionalism seeks to eliminate poverty and inequality in order to ensure the availability of sustainable livelihoods where basic socio-economic entitlements and environmental benefits are equally accessible and available to all.²²¹ Sustainable development seeks to ensure that while society is developing through the exploitation of natural resources, such exploitation is reasonable and managed in a way that protects the environment for the benefit of present and future generations.²²²

Sustainable development is rooted in international law and defined by the World Commission on Environment and Development (WCED) as "development that meets the needs of the present without compromising the ability of future generations to meet their own basic needs".²²³ This requires that socio-economic development should

²¹⁸ Preamble of the Constitution.

²¹⁹ Kotze 2007 *Direitos Fundamentais and Justica* 45.

²²⁰ Kotze "Sustainable Development and Rule of Law for Nature" 131.

²²¹ Liebenberg 2010 *Socio-Economic Rights* 36.

²²² *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 6 SA 4 (CC) 41-50.

²²³ Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report), www.un.org/esa/sustdev/documents/docs_key_conferences.htm, General Assembly 42nd Session: Report of the World Commission on Environment and Development.

be integrated with environmental considerations so as to cater for present and future generations' basic needs. Sustainable development thus aims for the best attainable quality of life in a society which takes into account social, economic and environmental needs.²²⁴

One of the main goals of sustainable development is to meet basic human needs.²²⁵ In order to meet these needs there is a prior need to sustainably use and equally distribute natural resources. To this end, Field²²⁶ argues that the notion of sustainable development has at its heart the idea of equity, where equity embraces intra- and intergenerational equity. Furthermore, the idea of equity in terms of sustainable development includes notions of transformation and redress.²²⁷ Equity therefore relates to the idea of taking cognisance of the distributional demands of social justice and redressing the unequal distribution of resources.²²⁸ This means that in order to redress past injustices and equally meet people's needs, there must also be transformation of the exploitation, distribution and management of resources.²²⁹ Based on the foregoing, if equity and the pursuit of an egalitarian society are ideals/goals of transformative constitutionalism, it follows that sustainable development, through its imperatives of requiring equity between and within generations, could contribute to the transformative constitutionalism agenda.

Sustainable development has the potential to advance transformative constitutionalism through its aim of securing social and economic development that is based on sound environmental governance.²³⁰ In South Africa, the principle of sustainable development was judicially recognised in the case of *BP Southern Africa (Pty) Ltd v MEC for*

²²⁴ Kotze "Sustainable Development and the Rule of Law for Nature' 130.

²²⁵ Federico et al 2014 *The Quest for Constitutionalism: South Africa since 1994* 226, Field 2006 *SALJ* 415.

²²⁶ Field 2006 *SALJ* 415.

²²⁷ Field 2006 *SALJ* 415.

²²⁸ Feris 2008 *SAJHR* 41.

²²⁹ Kidd 2011 *Environmental Law* 303.

²³⁰ NEMA defines sustainable development as the integration of social, economic and environmental factors in any planning, implementation and decision making so as to ensure that development serves present and future generations.

Agriculture, Conservation, Environmental and Land Affairs (BP Southern Africa), where it was stated that:

Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, inter alia, socio-economic concerns and principles.²³¹

The aim is to ensure the continuous availability of resources for both present and future generations and thus to promote equality.²³² Following on from the understanding of the court of sustainable development in *BP*, development in the past was not balanced, as only one of the three pillars of development (social, economic and environmental) would be advanced, without taking into account the effect of such development on the other pillars.²³³ In most instances, economic development was prioritised (most often for a privileged few) and it is for this reason that the court in *BP Southern Africa* clarified that pure economic considerations would no longer suffice in advancing development.²³⁴

The balancing of socio-economic and environmental considerations at once also seeks to promote social (environmental) justice as a constitutional transformative tool.²³⁵ The court in *BP Southern Africa* emphasised the need to balance economic, social and environmental concerns; a notion that could be extended to the idea that marginalised groups in society must be protected and must also benefit from economic and social development that is based on a sustainable environmental situation.²³⁶ This is also

²³¹ 2004 5 SA 124 (W) 144 B-D.

²³² Du Plessis 2011 *SAJHR* 298.

²³³ *Fuel Retailers Association of South Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment*, (Fuel Retailers) 2007 6 SA 4 (CC), the Constitutional Court, reiterated that pure economic development alone will not be considered in future, thus inferring that economic development had previously always been prioritised over social and environmental factors.

²³⁴ 2004 5 SA 124 (W) 144 B-D.

²³⁵ The Preamble to the Constitution points out that achieving social justice as one of the transformative goals.

²³⁶ 2004 5 SA 124 (W) 150D-E.

premised on the fact that some of the negative impacts of pure economic development are still being experienced, where the poor are mostly affected by land, air and water pollution.²³⁷ The marginalised groups of society do not sufficiently benefit from pure economic development as much as they suffer the negative environmental impacts caused as a result of environmental degradation.²³⁸ Sustainable development therefore seeks to restrict development in a manner that promotes socio-economic development through providing equal access to resources and to the distribution of negative environmental impacts. This is significant to transformative constitutionalism because it could advance equality through environmental justice.

In *Fuel Retailers Association of South Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, (Fuel Retailers)* the Constitutional Court reiterated the importance of sustainable development.²³⁹ The Court stated that:

The need to protect the environment cannot be gainsaid. So, too, is the need for social and economic development. How these two compelling needs interact, their impact on decisions affecting the environment and the obligations of environmental authorities in this regard, are important constitutional question.²⁴⁰

This confirms the notion that sustainable development seeks to achieve socio-economic development through the integration of environmental concerns into the planning, implementation and decision-making of development projects.

Further, sustainable development focuses on the imperative of environmental care as a prerequisite for sustainable socio-economic development. This was confirmed by the Constitutional Court in *Fuel Retailers*, when it stated that:

Decision-makers guided by the concept of sustainable development will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support socio-economic developments.²⁴¹

²³⁷ Du Plessis 2011 *SAJHR* 300.

²³⁸ Feris 2008 *SAJHR* 43, Du Plessis 2011 *SAJHR* 300.

²³⁹ *Fuel Retailers Association of South Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment* 2007 6 SA 4 (CC).

²⁴⁰ 2007 6 SA 4 (CC) 41.

²⁴¹ 2007 6 SA 4 (CC) 58.

In other words, sustainable development forms the basis for socio-economic development and is also the basis for the socio-economic transformation agenda in South Africa. Environmental, social and economic interests should be afforded the same value within the principle of sustainable development, and this entails that everyone has an equal opportunity to realise these interests.²⁴² To this end, transformative constitutionalism can be better achieved when developmental goals are pursued in an integrated manner, as implied in the concept of sustainable development. In other words, it is only when social, economic and environmental considerations are well balanced that transformative constitutionalism can occur effectively.

4.3 Transformative constitutionalism from an environmental right perspective

The transformative potential of sustainable development is inherent in the environmental right as envisaged in section 24 of the Constitution, because the realisation of the environmental right is based on the acknowledgement of the notion of sustainable development.²⁴³ This section discusses transformative constitutionalism from an environmental right perspective by outlining the transformative potential of sustainable development as a principle embedded in the environmental right.²⁴⁴ The aim is to suggest that the environmental right could be used to advance transformative constitutionalism through the balancing of socio-economic and environmental concerns in the pursuit of protecting people's health and well-being, based as it is on the principle of sustainable development discussed above. Furthermore, the balancing of socio-economic and environmental concerns could ensure that the environment is protected for the benefit of present and future generations.²⁴⁵

4.3.1 An anthropocentric approach to the environmental right

The environmental right as entrenched in section 24 of the Constitution provides that:

²⁴² Kotze 2007 *RECIEL* 311.

²⁴³ Federico et al 2014 *The Quest for Constitutionalism: South Africa since 1994* 226 and 229.

²⁴⁴ Federico et al 2014 *The Quest for Constitutionalism: South Africa since 1994* 226.

²⁴⁵ As envisaged in the notion of sustainable development.

Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable and 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.

Clearly, South Africa's environmental right is anthropocentric in nature.²⁴⁶ Anthropocentrism is a human-centred approach through which the environment is protected and its resources utilised for the benefit of people and not exclusively for the environment itself.²⁴⁷ In other words, anthropocentrism requires that the environment be protected in a manner that enables it to provide resources for people's social and economic development. The anthropocentric nature of the environmental right is also portrayed in the *National Environmental Management Act 107 of 1998* (NEMA), which defines the "environment" as conditions and influences, whether psychological, physical or spiritual, that influence human health and well-being.²⁴⁸ In terms of the NEMA, sustainable development relates to the "integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that development benefits present and future generations."²⁴⁹ In sum, the anthropocentric nature of the environmental right, because of its human focus, which is also balanced by environmental concerns, points to the fact that the right could be useful in advancing the transformative constitutionalism project in South Africa to the extent that human (socio-economic) and environmental interests are advanced.

²⁴⁶ Currie and De Waal 2013 *The Bill of Rights Handbook* 516, Glazewski 2014 *Environmental Law in South Africa* 10 www.mylexisnexis.co.za (last accessed 10 October 2015).

²⁴⁷ Feris 2008 *SAJHR* 30-31.

²⁴⁸ Section 1 of NEMA 107 of 1998.

²⁴⁹ Section 1 of NEMA 107 of 1998.

4.3.2 *The transformative nature of the environmental right*

In the light of the anthropocentric orientation of the right, environmental protection, as envisaged in section 24 of the Constitution, is aimed at improving people's quality of life by protecting their health and well-being.²⁵⁰ "Health" refers to people's "complete physical, mental and social well-being" including the ability to live in an environment where environmental degradation does not pose physical, mental or social threats to livelihoods.²⁵¹ "Well-being" is a much broader concept as it goes beyond "health" and it correlates with the notion of environmental integrity and instances where a person's environmental interests have been or could be affected.²⁵² Health and well-being, when provided as minimum standards or injunctions in a right, collectively promote the constitutional transformative goal of improving people's quality of life.²⁵³ This is a transformative matter in itself, because before the enactment of the Constitution, environmental concerns were not constitutionally recognised; neither was the need to protect, improve and maintain health and well-being. The majority of the population did not benefit from the environment, as resources were unevenly distributed.²⁵⁴ As a result, people's quality of life deteriorated due to their lack of access to basic socio-economic goods.²⁵⁵ The environmental right therefore seeks to redress this by affording everyone the right to an environment that does not harm their health and well-being, thereby improving their quality of life; a noble and important transformative goal in and of itself.²⁵⁶

In order to protect people's health and well-being, development must be sustainable. Accordingly, the Constitutional Court in *Fuel Retailers* stated that:

What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable "economic and social development". *Economic and*

²⁵⁰ Section 24(a) of the Constitution.

²⁵¹ Preamble of the Constitution of the WHO, 1978. It is not possible to have a "pollution-free" environment but the least that can be done is to mitigate or prevent it where possible. Kotze 2007 *Direitos Fundamentais and Justica* 43, Feris 2008 *SAJHR* 35.

²⁵² Du Plessis 2008 *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 245, Kotze 2007 *Direitos Fundamentais and Justica* 43, Du Plessis 2011 *SAJHR* 295.

²⁵³ GN 749 in GG 18894 OF 15 May 1998.

²⁵⁴ See Part 2 above in this regard.

²⁵⁵ See Part 2 above in this regard.

²⁵⁶ Section 24(a) of the Constitution.

*social development is essential to the well-being of human beings ... But development 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. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.*²⁵⁷

In other words, socio-economic development is significant to people's health and well-being. Socio-economic development should also not degrade the environment to the extent that it harms people's health and well-being. There is a need to always balance socio-economic development with environmental protection so as to strike a balance between these competing interests.²⁵⁸ This is relevant in the transformative constitutionalism discourse because the environmental right seeks to improve people's quality of lives by requiring that they live an environment that does not harm their health and well-being while they are empowered at the same time through socio-economic development processes.

While improving people's quality of life, the environmental right further seeks to advance the constitutional transformative goal of achieving equality.²⁵⁹ This is based on the notion of environmental justice, which relates to:

... social transformation directed towards meeting human needs and enhancing the quality of life – economic equality, health care, shelter, human rights, species preservation and democracy – using resources sustainably. A central principle of environmental justice stresses equal access to natural resources and the right to clean air and water, adequate health care, affordable shelter and a safe workplace.²⁶⁰

Realisation of the environmental right in the environmental justice context means that everyone must benefit equally from the sustainable exploitation and distribution of natural resources.²⁶¹ Environmental justice entails that everyone should also equally experience the prevailing negative environmental impacts, such as pollution, caused as a result of socio-economic development through the exploitation of resources.²⁶²

²⁵⁷ 2007 6 SA 4 (CC) 44 (own emphasis added).

²⁵⁸ Feris 2008 *SAJHR* 43, Du Plessis 2011 *SAJHR* 299.

²⁵⁹ The right to equality as entrenched in section 9 of the Constitution and entrenched as a transformative goal in terms of section 7(1) of the Constitution and the Preamble thereof.

²⁶⁰ Glazewski and Bradfield 1999 *Environmental Justice and the Legal Process* 3.

²⁶¹ Section 2(4)(c) of NEMA 107 of 1998.

²⁶² Section 2(4)(c) of NEMA 107 of 1998, Glazewski and Bradfield 1999 *Environmental Justice and the Legal Process* 3.

From this perspective, there should not be discrimination regarding who benefits how from South Africa's socio-economic development through the exploitation of resources.²⁶³

The environmental right further implicitly requires that natural resources be used and distributed in a manner that promotes social and economic development and thus links with transformative constitutionalism that seeks to redress past injustices through addressing issues such as poverty alleviation.²⁶⁴ Liebenberg²⁶⁵ states that the entrenchment of socio-economic rights in the Constitution aims to redress past injustices by addressing issues such as poverty and material disadvantage. Arguably, the environmental right and transformative constitutionalism converge to this end in their pursuit of the improvement of people's socio-economic rights. To be sure, the environmental right, as a type of socio-economic right, has the potential to address issues of impoverishment and material disadvantage; notably all issues which transformative constitutionalism also addresses. For instance, depletion of water resources affects the realisation of the right of access to water in terms of section 27(1)(b) of the Constitution. Water as a natural resource needs to be managed and protected so that it can continuously sustain human lives. Transformative constitutionalism, as an ongoing process, seeks to continuously improve people's lives *inter alia* through the realisation of their socio-economic rights.²⁶⁶ The environmental right, therefore, should undergird and seek to promote the continuous realisation of socio-economic rights by ensuring that resources are sustainably used and accessible to everyone equally in the present generation and between present and future generations. In this respect, the environmental right forms the basis of other socio-economic rights such as the right of access to housing, water, food and sanitation.²⁶⁷ This correlates with the idea that socio-economic entitlements are mainly dependant on the environment and that the realisation of socio-economic rights is subject to the

²⁶³ Section 2(4)(d) of NEMA 107 of 1998, Glazewski and Bradfield 1999 *Environmental Justice and the Legal Process* 3.

²⁶⁴ Liebenberg 2010 *Socio-Economic Rights* 36, Du Plessis 2011 *SAJHR* 280-307.

²⁶⁵ Liebenberg 2010 *Socio-Economic Rights* 36.

²⁶⁶ Langa 2006 *STELL LR* 353.

²⁶⁷ Section 26 and 27 of the Constitution.

availability of resources.²⁶⁸ This is significant in the transformative constitutionalism context because it confirms the idea that socio-economic rights and the environmental right can collectively address issues of poverty and environmental degradation when they are interlinked.

More specifically, the environmental right could serve to ensure the continuous realisation of socio-economic rights through the sustainable use of natural resources so as to promote justifiable economic and social development.²⁶⁹ Environmental protection is usually a challenge because of the socio-economic disparities that still exist in the land and the need to redress them through the exploitation and distribution of natural resources.²⁷⁰ People need access to socio-economic entitlements such as water, food, housing and sanitation, to enable them to actively engage in activities that affect and influence their lives. These entitlements are dependent on and some are derived from the same environment that needs protection for the benefit of present and future generation.²⁷¹ In most instances economic development is prioritised over environmental concerns, thereby making it difficult to ensure the continuous realisation of other socio-economic rights.²⁷² Faure and Du Plessis²⁷³ highlight the challenge currently being faced in South Africa in this respect:

South Africa currently experiences significant challenges in relation to water implementing appropriate and equitable water conservation strategies. The challenges result in part from the unequal distribution of water and the pressures on water resources, the depletion of aquifers and increasing water pollution caused by communities as well as industrial giants. At the same time it is well-known that access to improved water sources and adequate sanitation are key elements in improving the quality of life (of people). At the moment balance seems to be weighted in favour of economic growth and fulfilling or accommodating human needs.

Clearly, from the above, the isolation of environmental matters from the consideration of the realisation of socio-economic rights could compromise such realisation, and this

²⁶⁸ The right to access to housing section 26(2), and the right to access to food, healthcare, water and social security in terms of section 27(2) of the Constitution.

²⁶⁹ Section 24(b)(iii) of the Constitution.

²⁷⁰ Feris 2008 *SAJHR* 43, Du Plessis 2011 *SAJHR* 297-307.

²⁷¹ Section 24(b) of the Constitution.

²⁷² Du Plessis 2011 *SAHJR* 283.

²⁷³ Faure and Du Plessis 2011 *Balancing the Interests in Environmental Law in Africa* 417.

could have a negative effect on the quality of people's lives, fundamentally working to thwart the transformative constitutionalism project.²⁷⁴

In addition, Feris²⁷⁵ argues that:

The South African reality is that the health and well-being of lower-income strata of the population are at a bigger risk than those of middle-income and wealthy sectors ...The environmental concerns of the poor- water pollution, lack of sanitation, overcrowding, distance from places of work and the like- can have a much greater effect and may even threaten their livelihood ... The poor often suffer the double-bind of lack of access to basic services such as clean water, housing and healthcare. There is therefore a nexus between poverty, underdevelopment and the degradation of the environment.

From a practical point of view, while the environmental right is thus designed to be enjoyed by everyone, a failure to uphold this right mostly affects the poor.

4.4 Judicial interpretation of the environmental right

The transformative potential of the environmental right is portrayed as an easily achievable task, at least in theory. However, in practice balancing socio-economic and environmental factors is not an easy task, especially not in a transformative context such as South Africa's. The courts have the duty to interpret and to give meaning and content to the environmental right and specifically in this context to its potential to contribute to transformative constitutionalism alongside the socio-economic rights. Despite the transformative potential of the environmental right, the courts have not yet interpreted the right in such a manner. This section discusses some court cases where the courts missed an opportunity to give content to the transformative potential of the environmental right. There may be several other cases, but as a result of space limitations, the subsequent discussion focuses on only a limited selection of cases.

In *Federation for Sustainable Development and Others v Minister of Water Affairs* (*Carolina* case) the effects of pollution, as a result of mining activities, on the realisation

²⁷⁴ This correlates with the duties discussed earlier, where it was said that they are there to give content to section 24(a), the right to having the environment protected for one's health and well-being. Failure to fulfil such duties on the part of the state may result in people's health and well-being being risked by pollution and ecological degradation.

²⁷⁵ Feris 2008 *SAJHR* 43.

of other socio-economic rights were outlined.²⁷⁶ This case relates to a community in Mpumalanga Province called Carolina, where the community's water resources were contaminated by acid mine drainage.²⁷⁷ It was submitted that there was acid mine drainage from mines close to the community which contaminated the potable water resources and as a result, approximately seventeen thousand community residents were deprived of a regular water supply.²⁷⁸ This resulted in the community's being supplied with water from water tanks, some of which could not be refilled at times. The court regarded this as an urgent matter but did not consider the environmental right or the issue of sustainable development at all (although one must admit these aspects were not argued by any of the parties). The court based its decision mainly on the right of access to water in terms of section 27 of the Constitution.²⁷⁹ In its decision, the court held that the municipality must provide the community with potable water.²⁸⁰

Despite acknowledging the urgency of the need to provide the community with potable water, the court missed an opportunity to take into account environmental concerns triggered by the water pollution. In the light of the foregoing analysis, it is clear that a contextual meaning of the right of access to water in this case required the court to take into account the environmental right. The state has not only a duty to provide access to water, but also a duty to protect water as a natural resource so that it could be accessible to present and future generations, a duty conferred by the environmental right.²⁸¹ The court, however, considered only the right of access to water and failed to acknowledge that water can be accessible only if it is available as a resource.²⁸² The court had an opportunity to incorporate the environmental right by emphasising the duties it places on the state to protect and conserve water in a way that protects people's health and well-being. Such an interpretation could have advanced transformative constitutionalism to the extent that it seeks to sustainably protect

²⁷⁶ 2012 ZAGPPHC 128.

²⁷⁷ 2012 ZAGPPHC 128 4-6.

²⁷⁸ 2012 ZAGPPHC 128 4-6.

²⁷⁹ 2012 ZAGPPHC 128.

²⁸⁰ 2012 ZAGPPHC 24.

²⁸¹ Section 27(2) read together with section 24 of the Constitution.

²⁸² Section 27(2) makes the realisation of socio-economic rights conditional on the availability of resources. If there are no resources, the state cannot be expected to provide access to water; hence the need to protect it as a resource.

natural resources so that they can be continuously accessible (and be able to meet basic human needs) to both present and future generations.

Considering that one of the main transformative goals of the Constitution is to promote social justice through the equitable distribution of resources, there is a need to protect the environment so as to ensure availability of resources. Therefore, whenever courts adjudicate socio-economic rights such as those of access to water, food and housing, they should not neglect the environmental right, because it plays a significant role in the realisation of these rights through its provision of natural resources, and thus advances transformation. Conversely, the case highlights the critical need for parties to such cases to rely on and base their claims on the environmental right as well.

The court also missed an opportunity to exploit the transformative potential of the environmental right in the case of *Minister of Public Works v Kyalami Ridge Environmental Association (Kyalami)*.²⁸³ In this case, there had been heavy rains that led to flooding and subsequently the destruction of about 300 homes in Alexandra Township, near Johannesburg. Tents were erected to temporarily accommodate some of the flood victims. The living conditions were deplorable, as the tents were overcrowded and there was insufficient access to water and sanitation. The municipality decided to establish a transit camp so as to cater for the flood victims. Residents of land adjoining the proposed transit camp (Kyalami residence) contested the establishment of the camp on the site. Their contentions were based on the fact that, *inter alia*, the establishment of the camp on the site had environmental implications such as soil erosion, air pollution caused as a result of coal fires, and water pollution, and might cause possible damage to fauna and flora.²⁸⁴ Kyalami residents also contended that in providing access to housing for the victims, the state had negated its obligations in terms of NEMA section 2 to take integrated environmental management into account.²⁸⁵ Accordingly, Feris²⁸⁶ summarises the Kyalami residents' contentions as resting on the argument that the state negated its obligation to secure

²⁸³ 2001 (3) SA 1151 (CC).

²⁸⁴ 2001 3 SA 1151 (CC) 66.

²⁸⁵ 2001 3 SA 1151 (CC).

²⁸⁶ Feris 2008 *SAJHR* 42.

sustainable development by not providing for integrated environmental management related to the site. Despite this being the basis of the Kyalami residents' claim, they did not raise sustainable development, as envisaged in section 24 of the Constitution, as an argument. The Constitutional Court also did not consider the relevance of sustainable development in this instance, because it can decide only on issues presented to it by litigating parties.²⁸⁷ The court held that the interests of the flood victims had to be upheld over those of Kyalami residents.²⁸⁸

Two potentially conflicting interests that influenced the court's decision were the right to access to housing and the environmental right.²⁸⁹ It is argued that in this regard the court should have taken into account the notion of sustainable development, because then it would have been able to balance the relevant socio-economic and environmental concerns.²⁹⁰ The flood victims' socio-economic interests had to be balanced with the environmental interests of the Kyalami residents. The environmental concerns raised by the Kyalami residents were entirely relevant, and so was the need to provide access to housing to the flood victims. The idea was not only to provide alternative accommodation for the flood victims, but also to provide shelter in an environment that did not pose a threat to victims' health and well-being.²⁹¹ The right to access to housing goes beyond having a mere structure to live in, to the extent that the area must be environmentally safe for habitation.²⁹² Conversely, advancing transformative constitutionalism requires improving the quality of people's lives by ensuring *inter alia* that they live in an environment safe for their health and well-being.²⁹³ The environmental issues raised by the Kyalami residents would affect the flood victims more than the plaintiffs, severely tempering the quality of the provision of the victims' right to access to housing.²⁹⁴ It does not suffice for the court to say it upholds the interests of the victims without considering the impacts of the environment in which the victims are to be accommodated the victims and residents' health and

²⁸⁷ Feris 2008 SAJHR 42.

²⁸⁸ 2001 3 SA 1151 (CC).

²⁸⁹ Sections 24 and 27 of the environmental right.

²⁹⁰ See para 4.2 above in this regard.

²⁹¹ See para 3.4 above in this regard on the right to access to housing.

²⁹² *Government of South Africa v Grootboom* 2001 1 SA 46.

²⁹³ Section 24 of the Constitution.

²⁹⁴ See para 3.4 above on the right of access to housing.

well-being. After all, the environmental right and the socio-economic rights are to be enjoyed equally by all, regardless of their personal circumstances. To this end, it stands to reason that sustainable development seeks to balance socio-economic concerns with environmental concerns so that people can effectively realise their socio-economic rights while living in environmental conditions that are safe for their health and well-being. *In casu*, the court had an opportunity to determine how the environmental right seeks to promote transformation by ensuring that everyone has their socio-economic and environmental interests protected through balancing these interests, instead of preferring the interests of one group over the interests of another. The court in this case, as in *Carolina*, arguably missed an opportunity to realise the transformative potential of sustainable development, a notion embedded in the environmental right.

4.5 Summary

Based on the foregoing discussion, it is evident that the environmental right could potentially contribute to the advancement of the transformative constitutionalism project that is often seen to be spearheaded by socio-economic rights in South Africa. For this reason, a consideration of sustainable development is important when interpreting the meaning of the environmental right through a transformative constitutionalism lens, because sustainable development is an integral part of the environmental right.²⁹⁵ It has been ascertained that sustainable development has transformative potential and it can be used to determine or guide the transformative nature of the environmental right.²⁹⁶ It does so by balancing socio-economic *and* environmental factors together. Furthermore, it could be argued that because environmental resources are the foundation of socio-economic activities, the environmental right forms the basis of other socio-economic rights.²⁹⁷ This means that when issues of socio-economic transformation are heard by the court, they should, based on the principle of sustainable development as encapsulated in the environmental right, balance socio-economic and environmental concerns, thus

²⁹⁵ See para 4.2 above in this regard.

²⁹⁶ See para 4.2 above in this regard.

²⁹⁷ See para 4.3 above in this regard.

enabling sustainable, long-term socio-economic transformation in South Africa's constitutional democracy.

5 Conclusion and recommendations

5.1 Conclusion

This study has attempted to interrogate the role of South Africa's environmental right in achieving transformative constitutionalism. It has been established that considering the need for socio-economic development in South Africa, transformative constitutionalism is often regarded solely from a socio-economic rights perspective. Despite the reliance on natural resources to achieve socio-economic development (and thus transformation), not much regard is given to the environmental right in the transformative constitutionalism discourse or in judicial practice. To this end, the question that had to be addressed was, what is the role of and to what extent does the environmental right contribute to transformative constitutionalism?

In addressing this question, chapter 2 discussed the notion of transformative constitutionalism by firstly determining why there was, and still is, a need for socio-economic constitutionally-embedded transformation in South Africa.²⁹⁸ It was determined that South Africa's unjust and discriminatory past led to the majority of non-whites having insufficient access to basic environment-related socio-economic entitlements such as water; the effects of which are still prevalent to date.²⁹⁹ As a result, there is a continued inextricable link between the environment and people's access to socio-economic entitlements. The aim in this part was to formulate a contextual definition for transformative constitutionalism that encapsulates environmental, social and economic concerns; especially in the light of the interrelationship between these factors. Accordingly, transformative constitutionalism was defined as the idea of improving socio-economic and environmental conditions through interpreting and implementing the Constitution in a way that promotes equality, social justice and human rights.³⁰⁰ It was then established that the

²⁹⁸ See para 2.2 above in this regard.

²⁹⁹ See para 2.2 above in this regard.

³⁰⁰ See para 2.5.1 above in this regard.

environmental right is significant in advancing transformative constitutionalism to the extent that it influences and determines people's access to socio-economic entitlements while balancing these against environmental concerns, and especially the sustainable availability of environmental resources to facilitate socio-economic transformation in South Africa.

Based on the definition for transformative constitutionalism formulated in chapter 2 above, chapter 3 discussed transformative constitutionalism from a socio-economic rights perspective. It was established that socio-economic rights seek to advance transformative constitutionalism by creating entitlements to material conditions for human welfare such as water, sanitation and housing.³⁰¹ The following findings were established regarding the transformative potential of socio-economic rights:

- (a) The realisation of socio-economic rights is based on the availability of resources.
- (b) Emphasis is placed on the redistribution of resources, but there is little mention of protecting the environment from which these resources are derived.³⁰²
- (c) Courts are not taking into account the environmental right in socio-economic rights adjudication, despite its being relevant in the realisation of socio-economic rights.³⁰³

Accordingly, it was determined that in order to effectively advance socio-economic transformation there is a need to protect and manage the environment in order to ensure the availability of resources.³⁰⁴ In other words, transformative constitutionalism requires that the interpretation of socio-economic rights should incorporate the environmental right and its concerns and aspects. In this regard, the environmental right is significant to transformative constitutionalism to the extent that it forms the basis for the realisation of socio-economic rights through its protection of resources.

³⁰¹ See para 3.2 above in this regard.

³⁰² See para 3.4 above in this regard.

³⁰³ See para 3.5 above in this regard.

³⁰⁴ See para 3.4- 3.6 above in this regard.

Following from the need for socio-economic development to advance socio-economic transformation in South Africa, chapter 4 discussed transformative constitutionalism from an environmental rights perspective. While socio-economic development is essential, environmental protection is equally significant because it redresses past environmental degradation practices that subsequently affected people's access to basic socio-economic resources (a notion embedded in the concept of environmental justice). The relevance of the environmental right in this regard is that it seeks to balance social, economic and environmental concerns in any development activities through its central notion of sustainable development. It was determined that:³⁰⁵

- (a) The environmental right takes a different approach to development which takes into account the environment and the sustainable use of resources, where the predominant focus is not only on socio-economic concerns but also on environmental concerns. Accordingly, the environmental right is significant to transformative constitutionalism to the extent that it seeks to promote (sustainable) development through integrating social, economic and environmental concerns in development activities.³⁰⁶
- (b) The environmental right is significant to transformative constitutionalism because it seeks to promote justifiable socio-economic development through the sustainable use and distribution of resources. Transformative constitutionalism in South Africa therefore should not only relate to the realisation of socio-economic rights, but also to environmental protection. To this end, the environmental right is significant to transformative constitutionalism to the extent that it seeks to integrate environmental concerns with socio-economic development so as to ensure that resources are equally accessible to present and future generations.³⁰⁷

³⁰⁵ See para 4.2 above in this regard.

³⁰⁶ See para 4.3 above in this regard.

³⁰⁷ See para 4.3 above in this regard.

- (c) Failure to protect the environment compromises the effective realisation of socio-economic rights because socio-economic entitlements are dependent on the environment.³⁰⁸
- (d) Considering that one of the main transformative goals of the Constitution is to improve people's lives for the better, sustainable development is equally relevant in the discourse because it seeks to meet basic human needs for present and future generations.³⁰⁹
- (e) The integration of economic, social and environmental interests is needed for the advancement of development in order to achieve transformative constitutionalism.
- (f) The courts are still to fully exploit the transformative potential of the environmental right from a transformative constitutionalism perspective. Litigators have also not yet incorporated the environmental right in cases of socio-economic transformation, an opportunity that could see socio-economic rights effectively advancing transformative constitutionalism. Accordingly, it was ascertained that when socio-economic issues of transformation are being dealt with, they should, based on the principle of sustainable development as encapsulated in the environmental right, balance socio-economic and environmental concerns, thus enabling sustainable, long-term socio-economic transformation.³¹⁰

5.2 Recommendations

Following the transformative potential of the environmental right alluded to in this study, the courts have an opportunity to interpret the right in such a way as to advance transformation in South Africa in a sustainable manner that will seek to realise socio-economic entitlements within limited ecological parameters.³¹¹ It is also suggested that litigating parties to socio-economic transformation cases should incorporate the

³⁰⁸ See para 4.3 above in this regard.

³⁰⁹ See para 4.2 above in this regard.

³¹⁰ See para 4.2-4.5 above in this regard.

³¹¹ See para 4.4 above in this regard.

environmental right in their arguments. The fact that environmental concerns and section 24 are not dealt with by the courts is after all a result of parties to disputes not arguing it in their cases and relying on it to prove their cases. Courts must implicitly recognise related rights issues, but they will rarely do so unless the issues are explicitly argued by the parties. So there is also a case to be made that parties litigating should better understand the potential of section 24, which raises the issues of education and awareness raising. When interpreting socio-economic rights specifically and when dealing with issues of environment-related transformation, the courts are encouraged to take into account the notion of sustainable development as envisaged in the environmental right.³¹² The aim is to ensure that socio-economic rights are continuously realised in a way that promotes both formal and substantive equality for the benefit of present and future generations.³¹³ This is because the continuous realisation of socio-economic rights may be hampered by unsustainable development which may lead to the depletion of resources and threaten the continued existence of humankind.³¹⁴ It is further recommended that the interpretation of the state's duties in terms of socio-economic rights should be read together with its duties relative to the environmental right.³¹⁵ When interpreting or implementing socio-economic rights, it is suggested that the courts take into account people's health and well-being, as well as the concept of sustainable development, so as to ensure that people's lives are continuously improved, and thereby advancing transformation in South Africa.

³¹² See para 4.4 above in this regard.

³¹³ See para 3.5 above in this regard.

³¹⁴ See para 4.3 above in this regard.

³¹⁵ See para 3.5 above in this regard.

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