Towards a social justice-oriented environmental law jurisprudence in South Africa

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For Jean and Charles Murcott

ABSTRACT

The problem that this thesis seeks to address is the South African judiciary's failure, in general, to recognise in the adjudication of environmental law disputes that social injustices are connected to harmful environmental conditions and thus to environmental and climate injustices for South Africa's poor. This thesis proposes a legal theory of transformative environmental constitutionalism as a means, in the adjudication of environmental law disputes, to foster an appreciation from a socio-ecological systems perspective, of the interconnected nature of social, environmental and climate injustices, particularly in the socio-ecological crisis of the Anthropocene. This thesis argues that the implementation of a legal theory of transformative environmental constitutionalism by the judiciary could facilitate the emergence of a social justice-oriented environmental law jurisprudence more responsive to the plight of South Africa's poor and the deterioration of the environment, as interconnected concerns.

Key words:
Transformative constitutionalism, environmental constitutionalism, transformative environmental constitutionalism, social justice, environmental justice, climate justice, Anthropocene, socio-ecological systems

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Murcott raised me to be passionate about social justice and to believe in the possibility of societal transformation. I love them dearly, and will always be grateful for the wonderful example they have set. Thanks go to some of my oldest friends for seeing me through what has been one of the toughest times in my life so far: Heather Till, Danica Marlin, Gabriel and Tassin Meyer, Rufaro Dhlembeu, Itai Chitapi, Brian Biebuyck and Veronica Vurgarellis. I treasure and appreciate all of you. Special mention must also go to the friends and family who checked in and supplied much-needed care packages that kept me going in the final stages, including Margie and Premilla Murcott, Helena Graham, Luis Ferreira, Georgie George, Maseehah Rashid and Marco Maghoma. I also need to give special thanks to Tim Fish Hodgson, who painstakingly and enthusiastically read my final draft thesis, and offered kind and helpful suggestions to improve it. I feel blessed to have such a remarkable and caring friend-group.

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I wish to end my acknowledgements on a less serious note by offering a "shout-out" to the typos and errors that have survived the many rounds of editing of this thesis – I admire your perseverance, whilst taking full responsibility for your existence!

Melanie Murcott

Johannesburg, November 2019

LIST OF ABBREVIATIONS

AMD	Acid mine drainage
CARA	Conservation of Agricultural Resources Act 43 of 1983
CCR	Constitutional Court Review
IPCC	Intergovernmental Panel on Climate Change
IUCN	International Union for the Conservation of Nature
KOSH	Klerksdorp, Orkney, Stilfontein, Hartebeesfontein (areas falling in a basin of the North-West Province)
MLRA	Marine Living Resources Act 18 of 1998
MOA	Mountainlands Owners Association
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
MTPA	Mpumalanga Tourism and Parks Association
NEMA	National Environmental Management Act 107 of 1998
NEMAQA	National Environmental Management: Air Quality Act 39 of 2004
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004
NEMPAA	National Environmental Management: Protected Areas Act 57 of 2003
NEMWA	National Environmental Management: Waste Act 59 of 2008
NWA	National Water Act 36 of 1998
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PASA	Promotion of Petroleum and Exploitation SOC Ltd
PER	Potchefstroom Elektroniese Regsblad
SAJELP	South African Journal on Environmental Law and Policy
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	SA Public Law
SEMAs	Specific environmental management acts
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman-Dutch Law)
UISP	Upgrading of Informal Settlement Programme
UN	United Nations
UNESCO	UN Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
WIREs Clim Change	Wiley Interdisciplinary Reviews Climate Change

Chapter 1 Introduction

The problem that this thesis seeks to address is the South African judiciary's failure, in general, to recognise in the adjudication of environmental law disputes that social injustices are connected to harmful environmental conditions and thus to environmental and climate injustices for South Africa's poor. This thesis proposes a legal theory of transformative environmental constitutionalism as a means to foster an appreciation of the interconnected nature of social, environmental and climate injustices in the adjudication of environmental law disputes. This thesis argues that the implementation of transformative environmental constitutionalism by the judiciary could facilitate the emergence of a social justice-oriented environmental law jurisprudence more responsive to the plight of South Africa's poor and the deterioration of the environment, as interconnected concerns.

This thesis adopts a socio-ecological systems perspective that acknowledges that humans and the environment are "strongly coupled to the point that they should be conceived as one social-ecological system".[1] In other words, this thesis recognises that:

> Because what we still tend to call 'the natural world' is a joint production of human activity and nonhuman forces, the boundaries of what is 'environmental' are not straightforward.[2]

Accepting the strong links between humans and the environment, a socio-ecological systems perspective rejects the idea that when solving complex problems, social

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1 Stockholm Resilience Centre 2015 https://www.stockholmresilience.org/research/research-news/2015-02-19-what-is-resilience.html. The terms "socio-ecological system" and "social-ecological" are used interchangeably. See also Fischer *et al* 2015 *Current Opinion in Environmental Sustainability* 144-148 who describe socio-ecological systems as complex, adaptive systems comprising various diverse human and non-human entities that interact. In South Africa's framework environmental legislation, the *National Environmental Management Act* 107 of 1998 (*NEMA*) "the environment" is defined broadly to include "the surroundings in which humans exist" (s 1). This definition is consonant with a social-ecological systems understanding of the relationship between humans and the environment and the inclusive understanding of the term "environment" articulated by imminent environmental justice scholar, Novotny, as the places where people "live, work and play" (Novotny *Where We Live, Work and Play* 2-3).

2 Purdy 2018 *Ecology Law Quarterly* 811-812.

systems and ecological systems should be viewed in a compartmentalised manner.[3] Rather, it appreciates that complex problems implicating both of these systems should be approached in an integrative and inter-disciplinary manner that considers the interactions amongst systems.[4] I embrace the view of Bosselmann[5] that the ecological system is "the most encompassing system" known to humans, in that it is the foundation for the existence of all other systems (including socio-economic systems).[6] Should humans (and the law) fail to protect the ecological system, no human development will be possible.[7]

From this socio-ecological systems perspective I focus on the judiciary's role in protecting the environment. The judiciary plays an important role in addressing the plight of poverty-stricken South Africans who lack access to food, water, sanitation, housing and health-care, and thus necessarily live in environments that are harmful to their health and well being: environments that are inherently unjust and unequal, and that violate their rights, including the rights to life and dignity, to an environment not harmful to health or well being, to culture, and to access to housing, food and water.[8] This thesis acknowledges that within a socio-ecological

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3 Binder *et al* 2013 *Ecology and Society* (Introduction).

4 Binder *et al* 2013 *Ecology and Society* (Introduction).

5 Bosselmann "The ever-increasing importance of ecological integrity" 225.

6 Although I recognise the utility of the Earth's ecological system to the functioning of social and economic systems and human survival (an approach that leans towards anthropocentric thinking), I do not discount that the Earth has intrinsic value, independent of its utility to humans (an approach that represents ecocentric thinking). Importantly, I do not view concerns for social justice for humans as superior to the protection of the Earth. Rather I see human and non-human life as intertwined and interdependent. I am not convinced that binary thinking (that pursues either an anthropocentric or an ecocentric approach) when adopting a socio-ecological systems perspective towards environmental law disputes is helpful or necessary, though this a matter that could form the subject of a future research agenda. I agree with Adelman "Sustainable Development Goals" 31 that in the context of the Earth's ecological collapse, where humans are a driving force of that collapse:

> anthropocentrism that correctly identifies the interests of current and future generations must paradoxically be premised upon a radical ecocentrism because human well-being is contingent upon the health of the Earth system. In this perspective, ecocentrism becomes a form of anthropocentrism.

On the distinction between anthropocentrism and ecocentrism, see generally Washington *et al* 2017 *Ecological Citizen*. On the significance of ecocentric thinking in the context of environmental governance see Kotzé and Calzadilla 2017 *Transnational Environmental Law* 2-5.

7 Bosselmann "The ever-increasing importance of ecological integrity" 225-229.

8 *Constitution of the Republic of South Africa*, 1996, ss 10, 24, 26, 27. Framing environmental issues in this manner debunks a widely held view that struggles for social justice are unrelated to the protection of the environment (see Novotny *Where We Live Work and Play* 2-3 and Murcott 2015 *SALJ* 875-876).

system "the state of the poor's environment can shape poverty and…poverty has the potential to shape the state of the environment".[9] This thesis proceeds from two premises: first, that well-functioning socio-ecological systems create the necessary conditions for the achievement of social justice,[10] and second, that the judiciary has a constitutional duty to contribute towards the pursuit of social justice in the enforcement of relevant rights.[11] From these points of departure the thesis argues that in environmental law disputes the judiciary is empowered, and ought explicitly to address and engage with, from a socio-ecological systems perspective, questions about the injustices experienced by South Africa's poor arising from environmental conditions.[12]

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9 Du Plessis 2011 *SAJHR* 288.

10 The deteriorating state of the biosphere and impacts thereof are symptoms of existing injustice, in that those responsible for environmental deterioration, and who benefit from it do not experience the impact of that deterioration, whereas poor communities experience least responsible for deterioration experience the impact thereof disproportionately (see for example Schlosberg and Collins 2014 *WIREs Clim Change*). Moreover, as Schlosberg and Collins 2014 *WIREs Clim Change* point out that a deteriorating environment will serve to drive injustice. The biosphere refers to "that sphere that embraces all air, water and land on the planet in which all life is found" (Stockholm Resilience Centre 2015 https://www.stockholmresilience.org/research/research-news/2015-02-19-what-is-resilience.html).

11 The preamble of the *Constitution* must be understood to require that the judiciary must interpret and enforce constitutional rights and the legislation giving effect thereto so as to "establish a society based on democratic values, *social justice* and fundamental rights" and to "improve the quality of life of all citizens and free the potential of each person". Moreover, s 39(2) of the *Constitution* enjoins the courts, in the interpretation of legislation and development of common and customary law to "promote the spirit, purport and objects of the Bill of Rights". It is well established that in the context of South Africa's constitutional democracy the judiciary has an important role to play in responding to the plight of the poor in adjudication concerning violations of rights enshrined in the *Constitution* (see Cockrell 1996 *SAJHR* 2, referring to *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* 1995 (4) SA 631 para 46). As will be discussed in chapter 2 at 2.4 below, the judiciary must do so through value-laden interpretations and applications of relevant laws and policies towards an open and democratic society based on freedom and equality. Of course, the judiciary is one of many potential role players. The focus of this thesis is on the judiciary's role in pursuing social justice within the South African legal and socio-political context. Relevant rights entrenched in the *Constitution* include the right to an environment not harmful to health or well being (s 24), the rights to dignity (s 10) and life (s 11), and the rights to access to housing (s 26), and to access to water and food (s 27).

12 This thesis elaborates in chapter 2 upon the judiciary's role in responding to the plight of the poor in the context of environmental law disputes. Chapter 3 exposes problematic trends in the manner in which the courts currently adjudicate environmental law disputes. Chapters 4 and 5 illustrate that the judiciary could, in fulfilling its constitutional mandate, more effectively expose and engage with the links between environmental degradation and the plight of the poor.

Although the legislature and executive have a crucial role to play in responding to the plight of the poor,[13] the thesis focuses on the judiciary's constitutionally mandated role in South Africa as important agents of social transformation.[14] Among other things the judiciary can, in the adjudication of disputes through the application and interpretation of laws, respond to institutional failures, and hold to account the other branches of the state, as well as non-state actors such as multi-national corporations, in accordance with South Africa's model of the separation of powers.[15] Before introducing the judiciary's role in responding to poverty and inequality in South Africa in the context of prevailing and worsening environmental problems, I give a brief account of the lived realities of South Africa's poor and the social, environmental and climate justices occasioned thereby.

1.1 Injustice and the lived realities of South Africa's poor

1.1.1 Poverty and inequality in South Africa

This thesis is motivated not least by apartheid's devastating and lasting impact on South African society,[16] including on the environment.[17] Apartheid has entrenched

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13 The legislature and the executive are required by the *Constitution* to perform legislative, administrative and executive acts to procure (i.e. to respect, promote, protect and fulfil rights) the realisation of a range of rights in fulfilment of the values and objects of the *Constitution*. Pieterse 2005 *SAPL* 159 highlights that all three branches of the state are constitutionally obliged to play an important role in social change in South Africa "through the empowerment of poor and otherwise historically marginalised sectors of society through proactive and context-sensitive measures that affirm human dignity". See also Brand "Introduction" 9-18, 37-38.

14 On the competence of South African courts to interpret and apply legislation in a value-laden manner see Currie and De Waal "Application" 56-60. See also Gargarella *et al* "Courts and Social Transformation" 273 elaborated upon in chapter 2 at 2.4 below and Hoexter 2008 *SAJHR* 283 who refers to judges as "social engineers, whether they know it or not".

15 The unique model of separation of powers in South Africa is discussed in chapter 2 at 2.4.3 below. See also Currie and De Waal "Introduction to the Constitution and the Bill of Rights" 18-22. On the judiciary's capacity to respond to institutional failures see Fisher 2013 *Law and Policy* 240-241.

16 Pieterse 2005 *SAPL* 157 points out:

> Apartheid, through its intentional and persistent marginalisation, exploitation and oppression of black people, has combined with the remnants of colonialism and the pervasiveness of patriarchy to concretely shape severe patterns of social, economic and political vulnerability and deprivation in South Africa, and its aftereffects continue to do so.

See also Fish Hodgson 2015 *Acta Juridica* 194 and Bilchitz 2010 *SAPL* 282-283.

17 Steyn 2005 *Globalizations* 392-397. Leonard 2018 *Journal of Contemporary African Studies*.

"severe patterns of social, economic and political vulnerability and deprivation".[18] Statistical studies in 2015 revealed that more than 30 million (55,5 percent) of South Africans were living in conditions of poverty.[19] More than 13 million South Africans were found to be living in conditions of *extreme* poverty, an increase of more than 2 million since 2011.[20] One in seven South Africans was found to be living in an informal settlement in a makeshift structure such as a shack or shanty.[21] South Africa's poor were found to have limited access to food[22] and to enjoy limited public service provision such as flush toilets, piped water, electricity, and refuse removal.[23] South Africa's poor were further found to suffer a disproportionate share of environmental impacts such as water pollution, indoor and outdoor air pollution, land degradation and excessive noise or noise pollution.[24] These hardships are experienced, in the main, by black Africans,[25] who are caught in a structural post-apartheid "poverty trap".[26] In 2017 the World Bank reported that South Africa is one of the most unequal societies in the world.[27] These national and global studies expose poverty and inequality as on-going and wicked problems in post-apartheid South Africa: they are not discrete problems, but rather structural and systemic

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18 Pieterse 2005 *SAPL* 157.
See also Fish Hodgson 2015 *Acta Juridica* 194 and Bilchitz 2010 *SAPL* 282-283.

19 Statistics South Africa 2017 http://www.statssa.gov.za/?p=10341.

20 Statistics South Africa 2017 http://www.statssa.gov.za/?p=10341.

21 Statistics South Africa 2015 https://www.statssa.gov.za/publications/P0318/P03182015.pdf (see 35-49, as well as 73 for the definition of informal dwelling, and 126-127, which reveals that a disproportionate percentage of black people live in informal dwellings).

22 Statistics South Africa 2015 https://www.statssa.gov.za/publications/P0318/P03182015.pdf.

23 Statistics South Africa 2015 "General Household Survey" 35-49. See also Cooper 2017 *SAJELP* 36-38 on the scarce nature of water in South Africa, and the "significant proportion of South Africans [who] still do not have access to sufficient water, 24 years after the formal end of apartheid".

24 Statistics South Africa 2015 "General Household Survey" 166: almost 13 million black, in contrast with 1,6 million white South Africans, reported that they experienced environmental problems of this nature.

25 Statistics South Africa 2017 http://www.statssa.gov.za/?p=10341. The term "black" is used in an inclusive manner to refer to all people of colour (whether so-called "Indian", "Coloured", "African", etc.) who were discriminated against pursuant to the racist laws and policies of the apartheid era. However, this thesis recognises the statistical reality that black Africans suffered most severely.

26 Carter and May 2001 *World Development* 1988. See also Adato *et al* 2006 *Journal of Development Studies* 228-229; Modiri 2015 *PER* 229-230 and generally Brand *et al* 2013 *Law Democracy and Development* where the structural and political nature of poverty is discussed.

27 Barr 2017 https://www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worlds-most-unequal-countries, reporting on the 2017 World Bank's Gini Index. See also World Bank 2017 http://www.worldbank.org/en/country/southafrica/overview: "The poorest 20% of the South African population consume less than 3% of total expenditure, while the wealthiest 20% consume 65%".

problems "beyond the reach of mere technical knowledge and traditional forms of governance".[28]

Poverty is to be understood in this thesis as Brand *et al*[29] propose "dialectically", as "an evil" and "an injustice" with political dimensions. An aspect of the wicked problems of poverty and inequality in South Africa is the immense impact that apartheid had on the environment (broadly understood as including its human and non-human entities).[30] The apartheid government imposed limited regulation of industrial activity and other forms of development, focused on conservation only for the benefit of the white minority, and failed to establish an environmental agenda that was responsive to pollution or the unhealthy state of overcrowded areas that poor South Africans were compelled to occupy as a result of apartheid's spatial planning laws.[31] Post-apartheid failures in the implementation of progressive laws and policies, including as a result of widespread corruption and maladministration in the executive branch of government, have undoubtedly exacerbated the destructive

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28 Hulme *Why We Disagree about Climate Change* 334. See also Fisher, Scotford and Barritt 2017 *Modern Law Review* 177.

29 Brand *et al* 2013 *Law, Democracy and Development* 275.

30 See note 1 in chapter 1 above on "the environment". On the impact of apartheid on the environment and the poor in South Africa see generally Steyn 2005 *Globalizations*. The wicked and complex nature of poverty and inequality entail that responsibility cannot be attributed to apartheid alone, but also to a variety of other actors, including within the global order as discussed in Haydar 2005 *Metaphilosophy* 251-252.

31 Steyn 2005 *Globalizations* 393-397. As Steyn 2005 *Globalizations* 395 explains, conditions in South Africa's former so-called homelands established by the apartheid government constitute a stark illustration of apartheid's severe impact on the environment and on poor black South Africans in rural areas:

> By 1980 an estimated 10.5 million black people lived in the homelands that comprised less that 13 per cent of South Africa's total land surface. This in turn meant that the average population density in the homelands was 66 people per km2. The overcrowding of the homelands had a marked influence on the natural environment and directly led to widespread soil erosion…With an average of two hectares of land per family, and a general lack of capital for essential farming inputs and conservation measures, land in the homelands deteriorated to the point where it could no longer sustain the people who lived on it. Overpopulation coupled with a general lack of electricity and widespread poverty led to the overexploitation of wood fuel resources within the homelands.

For further discussion on the phenomenon of the homelands see Butler *et al The Black Homelands of South Africa* 1-6, who explain that the homelands comprised 10 rural areas (including the Transkei, Ciskei and Bophuthatswana) unilaterally established by the apartheid government as part of its programme of separate development for people of different races, in which black South Africans were typically forcibly and arbitrarily required by law to reside.

impacts of apartheid's legacy on people and the environment.[32] Multi-national corporations are also a key contributor to the wicked problems of poverty and inequality in South Africa, in that they took part in and profited from gross abuses of human rights in South Africa, and continue to do so.[33]

1.1.2 Interconnected social, environmental and climate injustices arising from poverty and inequality in South Africa

In this thesis the lived realities of South Africa's poor, the state of the environment and the wicked nature of deepening inequality and poverty[34] are viewed as *issues of justice*[35] to which the South African judiciary is required to be responsive in the interpretation and application of environmental laws by virtue of the transformative nature of the *Constitution of the Republic of South Africa*, 1996.[36] While justice in the environmental context has several meanings,[37] this thesis construes justice first, as intended to address concerns within changing socio-ecological systems for

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32 See for example, Butler *Contemporary South Africa* 4, 29, 100, 107. See also generally Beresford 2015 *African Affairs*.

33 Van Vuuren *Apartheid, Guns and Money* 1-11, 70-77.

34 In the sense that these problems are not discrete or easily solvable, are structural and systemic problems, and are beyond the reach of mere technical knowledge and traditional forms of governance.

35 Justice is conceptualised in this thesis in the sense argued for by Sen *The Idea of Justice* 21 as "preventing manifestly severe injustice" rather than pursuing "some perfectly just society". Ebbesson "Dimensions of Justice in Environmental Law" (Outline) (e-Book) explains that:

> [a]lthough well-established concepts in environmental law…appear neutral on their face, a closer study, or simply placing them in context, may reveal disproportionate burdening or restricting effects for certain groups or categories when these concepts are applied. It may also show how certain interests or subjects are ignored or demeaned.

This thesis aims to place environmental laws in their context and to bring to the fore the plight of the poor whose interests are often ignored or demeaned in the context of the adjudication of environmental law disputes.

36 See note 11 in chapter 1 above.

37 See for example, Ebbesson "Dimensions of Justice in Environmental Law" (Outline) (e-Book) where the author discusses:

> concerns for the distributive and corrective effects of [environmental] laws and decisions pertaining to health, the environment and natural resources, as well as concerns for the opportunities of those potentially affected to participate in such law-making and decision-making in the first place.

The author further acknowledges that while there are many approaches to justice in environmental matters, they typically address procedural, distributive and corrective elements of justice, and the links between these elements. On justice in the environmental context from a global North-South perspective see generally Gonzalez 2015 *Santa Clara Journal of International Law.*

equitable distribution among humans and between humans and the environment, and secondly, as demanding *participation* and *recognition* (discussed further below) with reference to the concepts of social, environmental and climate (in)justice.[38] This thesis is further motivated by the idea that the injustices experienced by South Africa's poor are set to intensify in the Anthropocene,[39] a proposed new geological epoch in which "planetary systems are on the brink of human-induced ecological disaster that could change life on Earth as we know it".[40]

The Anthropocene epoch "is characterised by human domination and disruption of Earth system processes essential to the planet's self-regulating capacity".[41] Climate change is one of the scientific realities of the Anthropocene and one of its distinct markers.[42] In 2015 the *Paris Agreement* was adopted by 195 countries at a summit organised under the *United Nations Framework Convention on Climate Change*, 1992 (*UNFCCC*) in recognition, amongst other things, that it was necessary to hold the increase in global average temperature rise to well below 2 degrees Celsius:

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38 Pilcher "What's democracy got to do with it?" 33-51.

39 Biermann *et al* 2012 *Science* 1306-1307. Although as Zalasiewicz *et al* 2011 *Philosophical Transactions of the Royal Society A* 837-838 point out, there is some scientific debate about whether we have indeed entered this new geological epoch, it is argued by Braje 2016 *Antiquity* 509 that its value is to "move debates towards developing interdisciplinary socio-ecological solutions that address our world's environmental challenges". Kotzé "Six Constitutional Elements" 16 explains that regardless of whether or not the Earth is formally determined to have entered into the Anthropocene, the concept of the Anthropocene is of "heuristic value", as humans endeavour to understand our impact on the Earth, and "contemplate ways to confront Anthropocene exigencies, and our own destructive behaviour".

40 Kotzé 2017 "Discomforting Conversations" vii. On the concept of planetary boundaries see generally Steffen *et al* 2015 *Science*.

41 Gonzalez "Global Justice" 219. As I will discuss below with reference to Grear 2015 *Law Critique* 236, the Anthropocene implicates some humans (epitomised by a vision of a dominant, white male property owner) as the primary drivers of the crisis.

42 Steffen *et al* 2015 *Science* 1259855-1-10. See also Craig and Benson *Akron Law Review* 843-844. For a discussion on the science of climate change see Lazarus 2009 *Cornell Law Review*. As Lazarus 2009 *Cornell Law Review* 1160-1161 explains, climate change is a "super wicked problem". Whilst a wicked problem arguably "defies resolution because of the enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution", a super wicked problem has "further exacerbating features". In the case of climate change the exacerbating features of the problem include that "time is not costless, so the longer it takes to address the problem, the harder it will be to do so", that wealthy nations and corporations who caused the problem "are in the best position to address the problem…but have the least immediate incentive to act within [the] necessary shorter timeframe", and that there does not exist a global law making institutions to respond to the global nature of the problem.

on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.[43]

Suggesting that the socio-ecological impacts of climate change have been hugely underestimated, in October 2018 the Intergovernmental Panel on Climate Change (IPCC) sought to urge law and policy-makers, with reference to the need to achieve sustainable development and poverty eradication, to introduce measures that will prevent human-induced global temperature rises of more than 1.5 degrees Celsius than at present.[44] The IPCC's 2018 report reiterates that human-induced climate change is already causing extreme weather events (including droughts and flooding), sea-level rise, loss of species and ecosystems, and ocean acidification.[45] Further, it highlights that climate change will adversely impact human health, and that poor and vulnerable populations such as those in South Africa, are exposed to a disproportionately higher risk of adverse consequences should global warming exceed 1.5 degrees Celsius.[46] On 25 June 2019 the UN Special Rapporteur on Extreme Poverty and Human Rights issued a report warning of the dangers of an emerging "climate apartheid" as poverty is set to deepen in poor countries and regions as a result of climate change, whilst the wealthy will be in a position to pay to escape its impacts.[47] The report highlights that absent far-reaching societal shifts, climate change will severely undermine the fulfillment of human rights and democracy.[48] It calls for a shift from complacency to radical interventions.[49]

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43 *Paris Agreement*, article 4.1 read with article 2.1.a.

44 IPCC 2018 http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf.

45 IPCC 2018 http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf. These concerns were articulated in earlier reports, including IPCC 2014 http://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf.

46 IPCC 2018 http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf.

47 UN Special Rapporteur on Extreme Poverty and Human Rights 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E.

48 UN Special Rapporteur on Extreme Poverty and Human Rights 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E.

49 UN Special Rapporteur on Extreme Poverty and Human Rights 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E.

In engaging with the links among the impacts of environmental destruction, inequality and poverty,[50] this thesis seeks to be responsive to the view that the Anthropocene and its climate crisis represent crises of human hierarchy, of human mastery, of grave injustices and of profound patterns of differentially distributed vulnerability.[51] Grear's[52] examination of these crises implicates some privileged humans that approximate, more or less, the socially-constructed image of the dominant "white", "European", "male", property-owning subject, and the corporations in which they are represented, as the principal drivers of environmental destruction in the Anthropocene. Moreover, Grear[53] observes that the law as it stands facilitates these crises (human and environmental) by establishing and preserving (legal, social, political and economic) structures and systems that serve the powerful and wealthy. Given the law's role in facilitating the crises of the Anthropocene, in order to be more responsive to the crises, the content of the law and the manner in which it is interpreted and applied must transform, including through the adjudication of environmental law disputes, in pursuit of justice for the poor as this thesis argues.[54]

This thesis frames the justice issues that arise from the plight of South Africa's poor who experience harmful environmental conditions, including as a result of climate change, with reference to social, environmental and climate (in)justice as interconnected concerns, discussed further below. The pursuit of social justice (i.e. overcoming social injustice) is one of South Africa's constitutional imperatives.[55] The

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50 See Fisher 2013 *Law and Policy* 239-240 on the value of the study of the judicial adjudication of disputes in the context of climate change.

51 Grear 2015 *Law Critique* 227.

52 Grear 2015 *Law Critique* 236.

53 Grear 2015 *Law Critique* 241.

54 In chapter 2 at 2.4 below I will argue for a substantive, as opposed to formal vision of, and approach to the adjudication of environmental law disputes drawing on Cockrell 1996 *SAJHR* 8. As Cockrell has pointed out, a formal vision has arguably "fuelled many of the unspoken premises of lawyers, law students, law professors and judges" that serve the wealthy and powerful.

55 As required by the transformative project of the Constitution discussed below. Pieterse 2005 *SAPL* 160 explains:

> the socio-economic upliftment of the majority of South Africans and the concomitant achievement of social justice may be classified as integral components of the constitutional transformation project.

Recognising Modiri's critique of rights discourse (Modiri 2015 *PER* 253), this thesis motivates for the transformation thereof. I also recognise the inherent limits of the law as but one means to

concepts of environmental and climate (in)justice are invoked first because they are interconnected with social justice, as discussed below, and secondly because of their traction in discourse concerning the protection of the environment,[56] including in the context of the adjudication of environmental law disputes elsewhere in the world.[57] Drawing inspiration from radical judicial responses to environmental problems elsewhere in the world,[58] this thesis argues that South Africa's constitutional setting affords judges the opportunity to play an important role in the pursuit of environmental protection *and* social, environmental and climate justice as interrelated and mutually reinforcing concerns.[59] The judiciary's role will be

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pursue justice: one that is fraught with inadequacies and complexities. However, I disagree with Modiri 2015 *PER* 258 that "rights-based mobilisation strategies…can only ever be 'effective' or 'successful' as a strategic move…[or] emergency course of action… - but never as the expression of a radical, democratic, emancipatory politics". Were the judiciary to adopt a more substantive vision of the law in pursuit of social, environmental and climate justice, environmental rights discourse could potentially, in judgments, give rise to an expression of a radical, democratic and emancipatory politics.

56 I engage with scholarship that expounds upon the terms of social, environmental and climate (in)justice throughout my thesis. Although the term "socio-ecological (in)justice" founded on concrete socio-ecological conflict is potentially a more encompassing term, there is little scholarship concerning its content and import (Pilcher "What's democracy got to do with it?" 33-51 and Kotzé 2019 *Journal of Human Rights and the Environment* 62-85 are isolated examples). Further, the term socio-ecological (in)justice has not gained traction in scholarship concerning environmental law disputes. In contrast, the ideas of social justice, environmental justice and climate justice have gained a great deal of traction in this context. See generally, for example, Kennedy *et al* 2017 *Local Environment*, David and Tuerkeimer 2017 *Northwestern University Law Review Online*, Abate 2010 *Washington Law Review*. I hope to contribute towards the emergence of the notion of socio-ecological justice as part of a further research agenda, to be discussed in chapter 6 at 6.5.

57 Globally there has been a rise in environmental law disputes, particularly significant climate change litigation in pursuit (sometimes explicitly) of social, climate and/or environmental justice. Examples elsewhere in the world emerging from litigation in which social, climate and/or environmental justice was pursued (either implicitly or explicitly) include *Leghari v Federation of Pakistan* (2015) W.P. No. 25501/201 (*Leghari*), *Future Generations v Ministry of the Environment* (2018) Columbian Supreme Court (*Future Generations*), *Urgenda v Netherlands* (The Hague District Court, 24 June 2015) (*Urgenda*), and *Gbemre v Shell Petroleum Development Company of Nigeria* (2005) Federal High Court of Nigeria (*Gbemre*). A discussion of these cases falls outside of the scope of this thesis, but could form the basis of further research engaging with the potential and value of transformative environmental constitutionalism elsewhere in the world. I do not engage in a comparative analysis. However, I draw on scholarship concerning this litigation that frames or engages with environmental law disputes with reference to social, environmental and climate (in)justices. I use "radical" in the same sense as Fish Hodgson 2018 *SAJHR* 61 to connote "a politics that requires more urgent, more far-reaching, more fundamental, more systemic change than a 'liberal' or 'transformative' approach".

58 For instance, in *Leghari*, *Future Generations*, *Urgenda*, and *Gbemre*. See also generally Rajamani 2007 *Review of European, Comparative and International Environmental Law* 277-285 on the environmental jurisprudence of the Indian courts.

59 I will draw on the work of Collins "Judging the Anthropocene" in developing this argument in chapter 4 at 4.1 below.

elaborated upon in chapters 2 and 4. Next, the terms social, environmental and climate (in)justice, and their relationships with one another are introduced.

Social injustice is construed broadly in this thesis to include the unjust distribution of goods and bads amongst people (i.e. equity concerns), connected to the unjust causes of such mal-distribution.[60] I align myself with the view that "we should not be dogmatic about delineating the subject-matter of social justice".[61] Rather, the subject-matter of social justice should include what is "justice-relevant" in the sense of ensuring a fair share of those resources necessary to enable people to flourish, and of those things which inhibit flourishing.[62] Further "distribution" ought not to be construed literally, but rather as "the ways in which a range of social institutions and practices together influence the shares of resources available to different people".[63] Causes of mal-distribution include a failure to recognise or inadequate recognition of the equal moral worth and dignity of human beings.[64] Further, social injustice is caused by the exclusion of people from participation in decision-making that impacts the quality of their living conditions.[65] The lived realities of South Africa's poor outlined above, a failure to recognise their moral worth, and their exclusion from decision-making about their living conditions, represent social injustice.

Justice has both substantive and procedural dimensions, which are viewed in this thesis as interrelated.[66] The substantive dimensions are concerned with equitable

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60 Schlosberg *Defining Environmental Justice* (e-Book).

61 Miller *Principles of Social Justice* 11.

62 Miller *Principles of Social Justice* 11.

63 Miller *Principles of Social Justice* 11.

64 The equal moral worth of humans is discussed in Bilchitz 2010 *SAPL* 283. See also Modiri 2015 *PER* on the exclusion, injury and powerlessness of South Africa's poor black majority emerging from the lack of recognition of their moral worth. Schlosberg *Defining Environmental Justice* (e-Book) explains that:

> a lack of recognition in the social and political realms, demonstrated by various forms of insults, degradation and devaluation at both the individual and cultural level, inflicts damage on oppressed individuals and communities in the political and cultural realm. This is an injustice not only because it constrains people and does them harm, but also because it is the foundation for distributive injustice".

65 Schlosberg *Defining Environmental Justice* (e-Book).

66 Agyeman *Just Sustainabilities* (e-Book) aligns himself with the view of Schlosberg *Defining Environmental Justice* (e-Book) that "distribution, recognition, capabilities, and participation are interrelated and interdependent". Schlosberg *Defining Environmental Justice* (e-Book) explains:

distribution of benefits in a material sense, and facilitating people's functioning and flourishing in society.[67] Justice is thus pursued in a substantive sense when the distribution of goods and bads occurs equitably: in a way that recognises the equal moral worth and dignity of human beings. The procedural dimensions of justice entail showing due recognition of all "people's membership of the moral and political community…and ensuring their inclusion in political decision-making".[68] Justice is pursued in a procedural sense when all people are included in decision-making. Procedural justice is regarded in this thesis as a means to, rather than a substitute of, substantive justice.[69]

In a substantive sense environmental injustice connotes, first, the unjust distribution of environmental benefits (including food, clean water and air, habitable land, etc.).[70] Secondly, it connotes the unjust distribution of environmental risk or burdens (including pollution, waste, vulnerability to climate change) amongst people.[71] Thirdly, environmental injustice relates to the structural and systemic *causes* of mal-distribution.[72] Mal-distribution of environmental benefits and harms is caused, among other things, by a failure to recognise people's equal moral worth, and by procedural injustice arising from the exclusion of people from participation in decision-making about their living conditions.[73] In contrast, environmental justice is the just distribution of environmental benefits and burdens, and recognition and inclusion of all people, particularly the poor and vulnerable, in relation to environmental decision making.[74] Further, environmental justice (from a substantive and procedural perspective) entails "institutions, resources, social and physical

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> one must have recognition in order to have real participation, one must have participation in order to get equity, further equity would make more participation possible, which would strengthen community functioning.

I agree with this view.

67 Agyeman *Just Sustainabilities* (e-Book).
68 Agyeman *Just Sustainabilities* (e-Book).
69 On the role of substantive and procedural environmental rights see Daly 2012 *International Journal of Peace Studies* 73.
70 Schlosberg *Defining Environmental Justice* (e-Book).
71 Schlosberg *Defining Environmental Justice* (e-Book).
72 Schlosberg *Defining Environmental Justice* (e-Book).
73 Schlosberg *Defining Environmental Justice* (e-Book).
74 Schlosberg 2013 *Environmental Politics* 39-40.

environments, and behaviours that permit individuals to flourish".[75] There is also a growing recognition that environmental justice and environmental sustainability are potentially related concepts, since:

> A truly sustainable society is one where wider questions of social needs and welfare, and economic opportunity are integrally related to environmental limits imposed by supporting ecosystems.[76]

A number of substantive and procedural environmental injustices contribute towards social injustice for South Africa's poor in urban, rural and wilderness areas. Environmental injustice is experienced in a substantive sense in that the poor have historically received, and continue to receive an unjust share of adequate access to components of the environment such as land and water, or the benefits accruing therefrom such as food, adequate housing, secure land tenure, and services such as water, waste removal or access to electricity and sanitation.[77] Poor South Africans in urban and rural areas are exposed, disproportionately, to environmental burdens such as pollution and undesirable land uses, which have severe health impacts on them.[78] In wilderness areas, consistent with the legacy of so-called "fortress conservation",[79] poor communities are often deprived of opportunities to engage in

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75 Agyeman *Just Sustainabilities* (e-Book) argues for a "capabilities approach to environmental justice" with reference to Sen *The Idea of Justice* 244, who explains that a capabilities approach to justice is concerned with "people's ability to live the kinds of lives they have reason to value".

76 Agyeman *et al* "Joined-up Thinking" 2.

77 Steyn 2005 *Globalizations* 392-397; Cock *Nature, Power and Justice* 107-115; Cock 2011 *Focus* 45-51; Thondhlana and Cundill 2017 *International Journal of Biodiversity Science* 208-211.

78 Statistics South Africa 2015 https://www.statssa.gov.za/publications/P0318/P03182015.pdf 166. See also Matooane *et al* "Vulnerability" 19. On the impacts of coal fired power stations on South Africa's poor see Holland 2017 https://cer.org.za/wp-content/uploads/2017/04/Annexure-Health-impacts-of-coal-fired-generation-in-South-Africa-310317.pdf. On the impacts of unsustainable mining practices on South Africa's poor leaving a legacy of un-rehabilitated abandoned and ownerless mines and tailings dams, and the problem of acid mine drainage (AMD) see Harvard Law School International Human Rights Clinic 2016 http://hrp.law.harvard.edu/wp-content/uploads/2016/11/The-Cost-of-Gold-Full-Report-Final.pdf 31 which explains that "AMD forms when water and oxygen combine with sulfide minerals, exposed in open mines and tailings dams, to produce highly acidic water" 31. The report explains further (for instance at 13-15 and 59-73) that the harmful impacts of mining during apartheid were borne disproportionately by the poor, and that this continues to be the case.

79 "Fortress conservation" is defined by Castree *et al A Dictionary of Human Geography* as "[t]he creation of protected areas for terrestrial or marine wildlife by the coerced displacement or exclusion of the existing inhabitants". See further Thondhlana and Cundill 2017 *International Journal of Biodiversity Science* 204.

subsistence farming and fishing[80] so as to meet their most basic needs.[81] Further, South Africa's poor have been and continue to be afforded limited opportunities to participate in decision-making about the unjust distribution of environmental benefits and burdens,[82] and thus experience environmental injustice in a procedural sense.[83] The exclusion of the poor from participation in decision-making and the mal-distribution of environmental benefits and burdens (i.e. the procedural and substantive dimensions of environmental injustice) are illustrative of a failure to recognise their moral worth, and further inhibit their health and well being.

Emerging from and related to the concept of environmental (in)justice is the concept of climate (in)justice.[84] Climate injustice connotes the unjust distribution of climate change vulnerabilities and impacts,[85] and the underlying causes thereof, including a lack of recognition and the exclusion of people from participation in decision-making about these impacts and vulnerabilities.[86] The concept reminds us that the climate crisis of the Anthropocene raises not only technical and scientific issues, but also ethical and political issues related to the distribution of its impacts and the causes thereof.[87] The UN Educational, Scientific and Cultural Organization (UNESCO) tells us

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80 An illustration of environmental injustices experienced as a result of this kind of fortress conservation is provided in chapter 5 at 5.5.

81 See for example Watts and Faasen 2009 *South African Geographical Journal* 27 and Hulme and Murphree 1999 *Journal of International Development* 279.

82 See for example the discussion on the exclusion of the poor from decision-making in Humby 2013 *Revue générale de droit* 92-111 in the context of the unjust distribution of mining impacts in urban areas, and on the exclusion of the poor from access to and decision-making about conservation of protected areas see Thondhlana and Cundill 2017 *International Journal of Biodiversity Science* 210-211.

83 See Schlosberg 2013 *Environmental Politics* 39-40, who explains: "Participatory justice – speaking for ourselves, or a seat at the table – has also always been part of environmental justice discourse". An absence of participatory justice gives rise to environmental injustice.

84 Schlosberg and Collins 2014 *WIREs Clim Change*. For some, climate (in)justice is an aspect of environmental (in)justice, and there is no need to distinguish between the two terms (see generally for instance, Gonzalez 2015 *Santa Clara Journal of International Law*). This thesis distinguishes between the terms to draw attention to climate change related vulnerabilities and impacts on the poor, in contrast with other environmental harms, as there is a growing discourse concerning climate change related vulnerabilities and impacts, and call to action in response, particularly in the context of litigation (see generally Fisher 2013 *Law and Policy*).

85 Shue *Climate Justice* 272-274.

86 Schlosberg and Collins 2014 *WIREs Clim Change*.

87 Schlosberg and Collins 2014 *WIREs Clim Change*. Watkins *Human Development Report 2007/2008* 3 explains that "[w]hile the world's poor walk the Earth with a light carbon footprint they are bearing the brunt of unsustainable management of our ecological interdependence".

that climate change represents at least a triple injustice.[88] First, most climate change casualties, and consequently those most at risk, are poor people.[89] Secondly, poor people are suffering the consequences of climate change, but are essentially powerless to stop it, as industrialised nations largely responsible for the problem continue to burn fossil fuels, which exacerbates the impacts of climate change.[90] Thirdly, developed nations are refusing to incur the costs of addressing the impacts of climate change.[91] The global justice implications of climate change[92] are viewed as an interpretive lens and context within which South African courts ought to adjudicate environmental law disputes.[93]

Climate change also has justice implications within countries, and at a grassroots level. Reflecting on the impacts of a failure to address climate change, Watkins[94] notes that the poorest 40 percent of the world's population (around 2.6 billion people) will be consigned to a future involving "diminished opportunity" as deep inequalities within countries are exacerbated. In other words, the poor, who are already socially, economically and/or environmentally vulnerable, are likely to feel the impacts of climate change most severely.[95] The environmental impacts of the global climate crisis will thus hamper efforts to attain social justice for the poor, particularly in countries in the global South such as South Africa. These impacts call for local responses at the level of environmental law and governance that take cognisance thereof, including in the adjudication of environmental disputes.

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88 UNESCO 2010 http://www.unesco.org/education/tlsf/mods/theme_c/popups/mod19t04s01.html.

89 UNESCO 2010 http://www.unesco.org/education/tlsf/mods/theme_c/popups/mod19t04s01.html.

90 UNESCO 2010 http://www.unesco.org/education/tlsf/mods/theme_c/popups/mod19t04s01.html.

91 UNESCO 2010 http://www.unesco.org/education/tlsf/mods/theme_c/popups/mod19t04s01.html.

92 At a global scale climate injustice acknowledges that those principally responsible for climate change, the global North, shoulder neither the burden of nor the responsibility for it (see Shue *Climate Justice* 183-186. Gonzalez "Global Justice" 228). In contrast, the world's poor, principally in the global South, are disproportionately impacted by climate change, and unable to cope with its impacts (see Schlosberg and Collins 2014 *WIREs Clim Change*).

93 For instance, in *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) (*VEJA*) the Supreme Court of Appeal invoked climate change impacts as a basis to impose rigorous disclosure obligations on Arcelormittal in relation to its polluting activities.

94 Watkins *Human Development Report 2007/2008* 2.

95 Aylett 2010 *International Journal of Urban and Regional Research* 479. See also Parks and Timmons Roberts 2006 *Society and Natural Resources*. Bratspies 2015 *Santa Clara Journal of International Law* 34.

A number of climate change impacts are set to intensify threats to food and water security at a grass roots level in South Africa, and thus deepen social and environmental injustice for the poor.[96] These impacts represent adaptation challenges that will invariably yield a range of human rights violations for the poor, and heighten existing social and environmental injustices, as "[t]he poorest and most vulnerable will suffer first, and perhaps most".[97] They include a rapid depletion of the quantity and quality of freshwater resources,[98] an increase in droughts which are likely to become more extreme;[99] and a devastating loss of marine and terrestrial biodiversity.[100] These impacts will likely prompt environmental law disputes in South Africa going forward as they result in a deepening of patterns of mal-distribution of energy, food and water, and thus social, environmental and climate injustice in a substantive sense.

The negative environmental and social impacts of mining, a continued reliance on fossil fuels, and a failure to reduce greenhouse gas emissions represent mitigation challenges that are disproportionately experienced by the poor.[101] They thus give rise to social, environmental and climate injustice in a substantive, distributional sense. In addition, the state and corporations' failure to recognise the moral worth of, and ensure meaningful participation by poor communities in decision making about mining, greenhouse gas emissions and the reliance on fossil fuels represent social, environmental and climate injustice in a procedural sense. This thesis considers the ways in which South African courts are able to respond to social, climate and environmental injustices within South Africa, and at a grass roots level, including by holding polluters to account, fostering participation, and addressing the vulnerabilities of South Africa's poor in environmental law disputes. Drivers of climate change giving rise to social, environmental and climate injustice in South

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96 See Du Plessis and Kotzé 2014 *Journal of African Law* 150-154. On the impact of water scarcity on food security see Hanjra and Qureshi 2010 *Food Policy* 367-368. On water security see generally Vörösmarty *et al* 2010 *Nature.*

97 Bratspies 2015 *Santa Clara Journal of International Law* 34.

98 Dallas and Rivers-Moore 2014 *South African Journal of Science* 1.

99 See for example Hoffman *et al* 2009 *South African Journal of Science* 58-59.

100 See for example James 2015 https://theconversation.com/climate-change-is-hitting-south-africas-coastal-fish-44802 and Midgley *et al* 2002 *Global Ecology and Biogeography* 447-450.

101 See for example Holland 2017 https://cer.org.za/wp-content/uploads/2017/04/Annexure-Health-impacts-of-coal-fired-generation-in-South-Africa-310317.pdf.

Africa have already resulted in several environmental law disputes, including in relation to the government's continued reliance on fossil fuel in energy production, and its failure to reduce greenhouse gas emissions.[102]

Having introduced the interconnected nature of the social, environmental and climate injustice experienced by South Africa's poor, I now turn to introduce the judiciary's role in responding thereto, and its capacity to develop a social justice-oriented environmental law jurisprudence.

1.2 Conceptualising the South African judiciary's transformative mandate and defining environmental law disputes

1.2.1 The South African judiciary's transformative mandate

This thesis argues that the South African judiciary ought, in the adjudication of environmental law disputes, to adopt a socio-ecological systems perspective that recognises and addresses that social injustices are connected to harmful environmental conditions and thus to environmental and climate injustices. It is argued in chapter 2 that the source of the judiciary's power and duty is the transformative mandate of the *Constitution*, which necessitates a project of transformative constitutionalism.[103] This transformative mandate is articulated in the *Constitution*'s preamble, which states that the *Constitution* is adopted as South Africa's supreme law to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights". The Constitutional Court has asserted that fulfilling the *Constitution*'s transformative mandate will require "a decisive break from, and a ringing rejection of, that part of

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[102] For instance, *Stern v Minister of Mineral Resources* unreported case number [2017] ZAECGHC 109 of 17 October 2017 (*Stern HC*) and *Minister of Mineral Resources v Stern; Treasure the Karoo Action Group v Department of Mineral Resources* [2019] 3 All SA 684 (SCA) (*Stern SCA*) were motivated by the South African government's support of hydraulic fracturing, a process to extract natural gas (a fossil fuel) for energy generation. *Earthlife Africa Johannesburg v Minister of Environmental Affairs* [2017] 2 All SA 519 (GP) (*Earthlife)* was motivated by the government's approval of the development of a coal fired power station, and the government's failure to consider the climate change impacts of the development. As I will discuss in my analysis of *Earthlife* in chapter 5 at 5.3 below, the court did not sufficiently engage with the climate injustices arising from the government's conduct.

[103] Klare 1998 *SAJHR* 150. See also generally Langa 2006 *Stellenbosch Law Review*.

the past which is disgracefully racist, authoritarian, insular, and repressive".[104] The seminal work of Klare[105] on the topic argues that the *Constitution*'s transformative mandate and the project of transformative constitutionalism necessitated thereby entails:

> constitutional enactment, interpretation and enforcement committed...to transforming [our] country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction inducing large-scale social change through processes grounded in law.

Klare's[106] work further explains that South African legal culture will have to undergo a shift away from formalism and conservativism in order to pursue transformative constitutionalism. Although the meaning of the term transformative constitutionalism is contested, I align myself with those who argue that the term requires that the *Constitution* be invoked with a focus on its social justice imperative, so as to improve the living conditions of the poor.[107] The specific role of the judiciary in South Africa's project of transformative constitutionalism is introduced next.

It has been argued (though not with reference to environmental law specifically) that in order meaningfully to participate in South Africa's project of transformative constitutionalism, judges must, through their statutory interpretation and legal reasoning, pursue "the attainment of substantive equality, the realisation of social justice, the infusion of the private sphere with human rights standards and the promotion of a 'culture of justification' in public-law interactions".[108] Hoexter[109] asserts that when judges reason in this manner, they engage in "transformative adjudication". As elaborated upon in chapter 2, transformative adjudication demands substantive legal reasoning, as opposed to formalistic legal reasoning.[110] Substantive

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104 *S v Makwanyane* 1995 (3) SA 391 (CC) (*Makwanyane*) para 262. See also Bilchitz 2010 *SAPL* 269-273.
105 Klare 1998 *SAJHR* 150.
106 Klare 1998 *SAJHR* 166-172. See also Cockrell 1996 *SAJHR* 37.
107 See generally, for example: Sibanda 2011 *Stellenbosch Law Review*; Fish Hodgson 2015 *Acta Juridica*; Brickhill and Van Leeve 2015 *Acta Juridica*.
108 Pieterse 2005 *SAPL* 161. Hoexter 2008 *SAJHR* 286-287. Du Plessis "Interpretation" 32/120-32/125, 32/128-32/131.
109 Hoexter 2008 *SAJHR* 287.
110 Hoexter 2008 *SAJHR* 287.

legal reasoning requires of judges that they "consciously and openly" articulate the "extra-legal values and sensibilities that inform their choices" in their interpretations and applications of relevant laws.[111] In contrast, formalistic reasoning purports to entail "an essentially apolitical process of logical deduction from readily identifable legal rules".[112] Transformative adjudication, adopting a substantive approach, best fulfils the injunction in section 39(2) of the *Constitution* that courts must interpret statutes in a manner that gives effect to the spirit, purport and object of the *Bill of Rights*.[113] Transformative adjudication further entails "judicial activism" in the sense of a substantive, rights-based approach to judicial review from a social justice-oriented perspective that aligns with the *Constitution*'s transformative mandate.[114] Judges ought to engage in transformative adjudication whether they are concerned with enforcing procedural rights (such as the rights to access to information and administrative justice)[115] or substantive rights (such as the environmental right or the rights to access to water or access to housing),[116] or a combination thereof.

This thesis illustrates in chapter 2 that transformative constitutionalism operates to justify judicial activism through transformative adjudication, particularly when adjudicating disputes concerning poor people in "desperate need".[117] I further argue that South Africa's model of separation of powers permits such activism, but that

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111 Hoexter 2008 *SAJHR* 283-284. As Penfold 2019 *SALJ* 85 puts it, a substantive approach to legal reasoning "involves deciding matters according to their substance and the principles or values underpinning them, rather than on the basis of their superficial form". As will be discussed in chapter 5 at 5.4 below, substantive legal reasoning was, for instance, pursued to some extent in *VEJA*. The Supreme Court of Appeal interpreted and applied Arcelormittal's statutory obligation to afford access to information to environmental activists with reference to South Africa's "culture of openness", the need for "ecological sensitivity" and the important role of the public in holding polluters accountable for the environmentally destructive behaviour. See also Quinot 2010 *CCR* for discussion on substantive reasoning in constitutional adjudication in *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) (*Joseph*). See also Quinot 2010 *CCR* 113.

112 Roux 2016 *Journal of Southern African Studies* 12. As I argue in chapter 2 at 2.4.2 below, the idea that formalistic reasoning is apolitical, is arguably a fiction.

113 Penfold 2019 *SALJ* 91-92.

114 For a discussion on various ways in which to understand the concept of judicial activism see Lentz 2004 *SAJHR*. Pieterse 2005 *SAPL* 164-165 supports the kind of judicial activism proposed in this thesis. He argues that it will challenge the traditional liberal legal culture that is deeply entrenched in South Africa. See also Dlamini 1992 *THRHR* 411.

115 Ss 32 and 33 of the *Constitution*.

116 Ss 24, 27 and 26 of the *Constitution*.

117 Du Plessis "Interpretation" 32/49.

South Africa's formalistic legal culture continues to constrain that activism to a degree.[118]

This thesis focuses on the implementation of environmental constitutionalism in South Africa by engaging with judicial efforts in environmental law disputes to give effect to the constitutional recognition of environmental protection through the interpretation and application of the laws discussed in chapter 2.[119] Environmental constitutionalism is a relatively recent global phenomenon involving the protection of the environment in constitutional texts and vindication of environmental rights by courts, worldwide.[120] South Africa has constitutionalised environmental protection as is discussed in detail in chapter 2.[121] For instance, the Constitutional Court has pointed out that the courts play a "crucial role in the protection of the environment" and "should not hesitate to do so", since:

> The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out. Indeed, the Johannesburg Principles adopted at the Global Judges Symposium underscore the role of the judiciary in the protection of the environment.[122]

In fulfilling this increasingly crucial role in a time of environmental crisis, transformative environmental constitutionalism conceptually offers the legal means to the courts, grounded in the *Constitution* as these are, to pursue social, environmental and climate justice for South Africa's poor. It does so by proposing

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118 Roux 2016 *Journal of South African Studies* 12-13 and 17. Roux's analysis of the Constitutional Court's jurisprudence after 20 years of the introduction of the *Constitution* illustrates that South African courts have not yet shifted away from formalist reasoning.

119 The judiciary's engagement with the laws described in chapter 2 is discussed with reference to problematic trends identified in chapter 3, and the potential emergence of a legal theory of transformative environmental constitutionalism in chapter 5.

120 May and Daly *Global Environmental Constitutionalism* 1. See also Kotzé 2015 *Widener Law Review* 196-198.

121 Kotzé 2015 *Widener Law Review* 196-198.

122 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) (*Fuel Retailers*) paras 102-104.

the implementation of environmental constitutionalism from a social-ecological, justice-oriented perspective. Before elaborating on the concept of transformative environmental constitutionalism and its potential relevance in the implementation of environmental constitutionalism towards a social justice-oriented environmental law jurisprudence, I address next the manner in which an environmental law dispute is to be understood in this thesis.

1.2.2 Environmental law disputes

In this thesis an environmental law dispute is one concerned with conflict related to the functioning of a particular socio-ecological system, including, within such system the distribution of environmental benefits and burdens, and/or climate change vulnerabilities and impacts, and/or concerns about participation in environmental decision-making, and/or a lack of recognition of the equal moral worth of everyone in South Africa in environmental decision-making. This characterisation of an environmental law dispute recognises that when the environment suffers, people suffer, as people and the environment are strongly coupled to the point that they exist in a single system.[123]

This thesis acknowledges that the environmental movement in South Africa and elsewhere in the world is heterogeneous.[124] Participants in this movement are often described as pursuing either a "green agenda" (or mainstream environmentalism) on the one hand, which traditionally focuses on the protection of "nature",[125] or a "brown agenda" on the other hand, which seeks to address environmental concerns in urban areas, such as human health issues arising from pollution and poor waste

123 See note 1 in chapter 1 above. Further, a justice orientated understanding of an environmental law dispute recognises that the poor are typically first and hardest hit in the context of socio-ecological conflict.

124 Cock "Connecting" 20; Jamieson "Justice: The Heart of Environmentalism" 85-87.

125 This thesis recognises that in the Anthropocene the ideas of "nature" and a "natural world" are increasingly fictious, since every part of the Earth's system has been influenced by human existence (see Steffen *et al* 2007 *A Journal of the Human Environment* 616-620). Moreover, I recognise that human existence is fundamentally dependent upon the proper functioning of the Earth's system. Those who adopt binary thinking towards environmental protection, however, tend to view the "green agenda" as pursuing conservation and ecologically sustainable development of "nature" as if it is disconnected from human existence.

management.[126] These agendas are often viewed as being fragmented and at odds with one another.[127] The justice-oriented, socio-ecological systems understanding of an environmental dispute proffered by this thesis hopes to offer an approach that brings these agendas together by recognising the complex relationships between ecological and social systems, and the need for justice within these systems.[128]

For reasons of relevance, scope and length, the environmental law disputes discussed in this thesis involve the interpretation and application of laws in judicial review proceedings as opposed to criminal proceedings.[129] They nonetheless implicate a wide range of laws in the adjudication of issues about the protection of the environment and communities dependent thereon.[130] Moreover, in South Africa environmental law disputes can involve disputes amongst natural and/or juristic persons (pursuant to the horizontal application of the relevant environmental laws),[131] as well as disputes between natural and/or juristic persons and the state (pursuant to the vertical application of the relevant laws).[132]

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126 Du Plessis 2015 *PER* 1847-1852; Jamieson "Justice: The Heart of Environmentalism" 85-87. See also Cock "Connecting" 2-4.

127 Cock "Connecting" 2-4.

128 I agree with Wenz "Does Environmentalism Promote Injustice for the Poor?" 64-78, who argues that environmental protection can be mutually reinforcing of the pursuit of justice. See also Cock "Connecting" 20.

129 "Judicial review" is defined in Quinot (ed) *Administrative Justice in South Africa* 316 as: "The process through which judges review the constitutionality of actions taken by the legislature, executive or private parties and declare such actions invalid if they are in conflict with the Constitution." The judgments discussed in this thesis involve this kind of judicial scrutiny.

130 Judgments emerging from environmental law disputes in which polluters challenge decisions of the state about the implementation of environmental laws such as *Fuel Retailers* and *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* 2014 (3) SA 149 (SCA) (*Harmony Gold 2014*) (fall within this definition, since in these cases engage questions about the just distribution of the environment, participation and recognition).

131 Pursuant to s 8 of the *Constitution*, constitutional rights are capable of imposing obligations not only on the state, but also on natural and juristic persons. On the horizontal application of the *Bill of Rights* see further Bhana 2013 *SAJHR*; Currie and De Waal "Application" 41 who point out that the *Bill of Rights* "recognizes that private abuse of human rights may be as pernicious as violations perpetrated by the state" and that the *Constitution* seeks to address this through the direct and indirect horizontal application of rights. See also Kidd *Environmental Law* 30 on the horizontal application of the environmental right and Glazewski 1999 *Acta Juridica* 10.

132 See Boezaart *Law of Persons* 3-5: South African law defines as legal subjects, every human (a natural person) and social entities or associations of people who according to the law have an independent right of existence (juristic persons).

Environmental constitutionalism is implemented in environmental law disputes by virtue of the notion of constitutional supremacy.[133] This notion entails that the laws discussed in this thesis be understood as operating within a hierarchy, with constitutionally enshrined values and rights at the top of the hierarchy. One of the implications of this hierarchy is that environmental law disputes must be adjudicated with reference to the constitutive and substantively higher order norms and values regulating environmental governance in the *Constitution*.[134] This thesis argues that these norms demand the pursuit of social, and thus environmental and climate justice in the interpretation and application of environmental laws, particularly with reference to the right to an environment not harmful to health or well being.

The laws that potentially operate to implement environmental constitutionalism in South Africa in what Kotzé[135] refers to as a substantively "thick" sense, from a rights-based perspective, will be discussed in chapter 2. In this thesis the laws are discussed as representing three broad categories. Each category includes higher order norms and values emerging from the *Constitution*, and laws that are intended to give effect thereto. The first category comprises laws that are *explicitly* aimed at the protection of the environment or components thereof. The second category of laws are those that can facilitate environmental protection through procedural mechanisms requiring transparent, lawful, fair and reasonable environmental decision-making, and so operate to implement environmental constitutionalism in South Africa. The third category of laws that potentially operate to implement environmental constitutionalism includes substantive rights and the laws giving effect thereto that are aimed at ensuring that all people in South Africa live, in a substantive sense, in a dignified manner, such as laws ensuring the protection of culture and access to socio-economic entitlements. These laws are interconnected with laws explicitly aimed at the protection of the environment, in the sense that a healthy environment is often a prerequisite for the fulfilment thereof.

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133 S 2 of the *Constitution* provides: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

134 Kotzé 2015 *Widener Law Review* 196-198.

135 Kotzé 2015 *Widener Law Review* 197.

Having introduced the manner in which an environmental law dispute is to be understood in this thesis, I now introduce some of the problematic trends emerging from the manner in which environmental constitutionalism is, in general, currently implemented in the adjudication of environmental law disputes. These trends will be elaborated upon in chapter 3.

1.3 Problematising trends in the adjudication of environmental law disputes

This thesis identifies four problematic trends in the adjudication of environmental law disputes that represent a failure on the part of the judiciary to implement environmental constitutionalism in a manner that pursues South Africa's project of transformative constitutionalism.[136] First, the courts have a tendency to overlook the social, environmental and climate justice issues emerging from environmental law disputes, and by doing so arguably demean the plight of the poor.[137] As an aspect of this problem, courts tend not to adopt a socio-ecological systems perspective to the issues before them.[138] *Adendorffs Boerderye v Shabalala*,[139] *Kenton on Sea Ratepayers Association v Ndlambe Local Municipality*,[140] are illustrative of this first trend (trend 1). Secondly, in the adjudication of environmental law disputes framed as procedural rights violations,[141] the courts tend to engage in "over-

136 As appears from chapter 3, I have engaged in an extensive study of case law and literature in order to identify these trends.

137 I illustrate in chapter 3 at 3.3 below that courts tend to overlook evidence of injustice presented to them, or fail to take judicial notice of such evidence.

138 On the notion of socio-ecological systems see Stockholm Resilience Centre 2015 https://www.stockholmresilience.org/research/research-news/2015-02-19-what-is-resilience.html.

139 *Adendorffs Boerderye v Shabalala* unreported case number [2017] ZASCA 37 of 29 March 2017 (*Adendorffs Boerderye*).

140 *Kenton on Sea Ratepayers Association v Ndlambe Local Municipality* 2017 (2) SA 86 (ECG) (*Kenton on Sea*).

141 Recent examples of environmental law disputes framed as procedural rights violations either in terms of s 33 and *PAJA* and/or the principle of legality include: *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) *(Bengwenyama*); *Shelton v Ndlambe Municipality* unreported case number [2016] ZAECGHC 143 of 1 December 2016 (*Shelton*); *Stern HC* and *Stern SCA*. Environmental law disputes framed as procedural rights violations in terms of *PAIA* and s 32 include: *Trustees for the time being of the Biowatch Trust v Registrar; Genetic Resources* 2009 (6) SA 232 (CC) (*Biowatch*); *VEJA* and *De Lange v Eskom Holdings Ltd* 2012 (1) SA 280 (GSJ) (*De Lange*). This thesis exposes in chapter 3 at 3.3 below how the framing of the

proceduralisation", which entails formalistic or conceptual legal reasoning that views the environmental context of disputes as peripheral, and grapples in a limited fashion, if at all, with relevant substantive provisions in environmental legislation.[142] The trend of over-proceduralisation (trend 2) is illustrated with reference to *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum and Exploitation SOC Ltd* (*Normandien Farms*),[143] *Barberton Mines (Pty) Ltd v Mpumalanga Tourism and Parks Agency* (*Barberton HC*) and *Mpumalanga Tourism and Parks Agency v Barberton Mines (Pty) Ltd* (*Barberton SCA*).[144] Thirdly, the courts tend not to engage with, or develop the content and normative (justice-oriented) potential of, the environmental right.[145] The trend of courts failing to develop the normative content of the environmental right (trend 3) is illustrated by *Propshaft Master (Pty) Ltd v Ekurhuleni Metropolitan Municipality* (*Propshaft*),[146] and *Umfolozi Sugar Planters Limited v iSimangaliso Wetland Park Authority* (*iSimangaliso*), *Harmony Gold Mining Company Ltd v Regional Director Free State Department of Water Affairs and Forestry* (*Harmony Gold 2006*), *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* (*Harmony Gold

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issues in this manner can serve to limit engagement with the underlying environmental context and justice issues arising therefrom.

[142] Kidd 2006 *PER* 72/118-86/118 explained in 2006 that the obfuscation of the environmental context and principles responsive thereto in environmental law disputes adjudicated on the basis of procedural rights violations was indicative of a need to "green the judiciary". This thesis argues in chapter 3 at 3.3, 3.4, 3.5 below that more than 10 years later, little progress has been made towards the kind of greening advocated for by Kidd. Dugard and Alcaro 2013 *SAJHR* 26-31 engage with some of these problems and discuss a number of examples of environmental law disputes adjudicated on narrow, procedural grounds.

[143] *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum and Exploitation SOC Ltd* unreported case number [2017] ZAWCHC 53 of 3 May 2017 (*Normandien Farms*).

[144] *Barberton Mines (Pty) Ltd v Mpumalanga Tourism and Parks Agency* unreported case number 43125/13 ZAGPPHC of 28 October 2015 (*Barberton Mines HC*) and *Mpumalanga Tourism and Parks Agency v Barberton Mines (Pty) Ltd* 2017 (5) SA 62 (*Barberton Mines SCA*) (collectively the *Barberton Mines litigation*).

[145] The discussion on this trend builds on several works of several scholars (for example, Feris 2008 *SAJHR* 38-45; Kotzé and Du Plessis 2010 *Journal of Court Innovation* 169-175; and Du Plessis 2011 *SAJHR* 293-297), and an analysis of judgments decided subsequently. As Murcott and van der Westhuizen 2015 *CCR* discuss, lower order norms (specific environmental laws) ought, pursuant to the principle of subsidiarity, to be read and understood in the context of and with reference to the higher order (more general) norms, so as to give effect thereto. For this reason, arguments that rely on subsidiarity theory to justify the view that the environmental right ought not to be considered when specific legislation is invoked are untenable.

[146] *Propshaft Master (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2018 (2) SA 555 (GJ) para 8.4 (*Propshaft*).

2014).[147] Fourthly, the environmental right[148] tends not to be viewed as interrelated with and mutually reinforcing of other substantive rights, such as the rights to access to housing and water,[149] and cultural rights.[150] The trend of courts failing to recognise the interrelated and mutually reinforcing nature of the environmental right and other substantive rights (trend 4) is illustrated with reference to *Government of the Republic of South Africa v Grootboom* (*Grootboom*),[151] *Melani v City of Johannesburg* (*Melani*),[152] *Mazibuko v City of Johannesburg* (*Mazibuko*),[153] *Federation for a Sustainable Environment v Minister of Water Affairs* (*FSE 1*) and *Federation for a Sustainable Environment v Minister of Water Affairs* (*FSE 2*).[154] The discussion on trend 4 illustrates that although the courts do reason substantively (to varying degrees) in enforcing of socio-economic rights to access to housing and water, they tend not to engage with environmental considerations or the enviromental right in their reasoning.

Trends 1 to 4 are elaborated upon in chapter 3, where I argue that in various respects, the courts have not fully embraced transformative adjudication in the context of environmental law disputes. I argue that the overall problem with the judiciary's prevailing approach to the adjudication of environmental law disputes is that a social justice-oriented environmental law jurisprudence more responsive to the social, environmental and climate injustices experienced by South Africa's poor in the Anthropocene is yet to emerge. Having exposed problematic trends in the adjudication of environmental law disputes, a key aim of this thesis is to illustrate that the courts are empowered to use the juridical tools available to them so as to adjudicate these disputes in a manner that is more responsive to social injustice as

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147 *Harmony Gold Mining Company Ltd v Regional Director Free State Department of Water Affairs and Forestry* [2006] SCA 65 (RSA) (*Harmony Gold 2006*) and *Harmony Gold 2014*.

148 S 24 of the *Constitution*.

149 Ss 26 and 27 of the *Constitution*.

150 Ss 30 and 31 of the *Constitution*.

151 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (*Grootboom*) paras 23 and 24.

152 *Melani v City of Johannesburg* unreported case number [2016] ZAGPJHC 55 22 March 2016 (*Melani*).

153 *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) (*Mazibuko*).

154 *Federation for a Sustainable Environment v Minister of Water Affairs* (ZAGPPHC) unreported case number 35672/12 of 10 July 2012 (*FSE 1*) and *Federation for a Sustainable Environment v Minister of Water Affairs* (ZAGPPHC) unreported case number 35672/12 of 26 July 2012 (*FSE 2*).

connected to environmental and climate injustice, through a legal theory of transformative environmental constitutionalism. These theoretical aspects are elaborated upon in chapter 4. Next I outline some of the key aspects of transformative environmental constitutionalism in theory and how they aim to respond to the problematic trends in the adjudication of environmental law disputes.

1.4 Transformative environmental constitutionalism: towards a social justice-oriented environmental law jurisprudence

A legal theory of transformative environmental constitutionalism demands a social justice-orientation towards, and transformative adjudication of, all environmental law disputes. It suggests first that all environmental law disputes ought to be framed in a manner that adopts a socio-ecological systems perspective and brings to the fore the underlying social, environmental and climate justice issues at stake. A socio-ecological systems perspective (the idea that humans and the environment are strongly coupled to the point that they exist within a single system) highlights that when the environment suffers, people suffer, and a social justice-orientation of this perspective places emphasis on the fact that the poor and vulnerable are first and hardest hit by environmental problems. This perspective facilitates an appreciation that all environmental law disputes (which concern conflicts about the functioning of socio-ecological systems) have justice implications. Thus, I argue that even when courts adjudicate environmental law disputes that are not directly concerned with the plight of the poor, but with the state of the environment more generally, they ought to be cognisant that well-functioning socio-ecological systems create the conditions in which humans can flourish, vulnerabilities can be addressed, and social justice can occur.

Secondly, transformative environmental constitutionalism calls for a substantive, rights-based approach to the adjudication of environmental law disputes. In other words, it demands substantive, purposive legal reasoning and interpretation that is consistent with and gives effect to the rights contained in, and the overarching

substantive vision of the *Constitution*,[155] including the pursuit of social justice, dignity and equality.[156] I argue that substantive reasoning and interpretation as an aspect of transformative environmental constitutionalism requires that courts engage fully with the justice-oriented principles and provisions in environmental legislation in the adjudication of environmental law disputes, through indirect application of relevant rights and values.[157] Further, courts ought to develop the normative content of the environmental right so as to pursue a social, environmental and climate justice-oriented vision thereof, including with reference to the emphasis on "ecological sustainability" provided for in the right.[158] In addition, substantive, rights-based adjudication entails courts engaging with the interrelated and mutually reinforcing nature of the environmental right and other substantive rights in appropriate cases.[159]

In chapter 5 the practical relevance of transformative environmental constitutionalism is introduced with reference to three landmark judgments that arguably serve to advance social justice as connected to environmental and/or climate justice in various respects: *Earthlife Africa Johannesburg v Minister of Environmental Affairs* (*Earthlife*), *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* (*VEJA*), and *Gongqose v Minister of Agriculture, Forestry, Gongqose and S* (*Gongqose SCA*).[160] *Gongqose SCA* will be contrasted with the judgment of the court *a quo* in *Gongqose v S; Gongqose v Minister of*

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155 See Cockrell 1996 *SAJHR* 5-6.

156 This substantive reasoning must unpack and engage with the environmental context of disputes. That context emerges not only from the legacy of South Africa's apartheid past, but also the Anthropocene, a time of socio-ecological crisis, which has disproportionate impacts on the poor.

157 This thesis focuses on the principles of public trusteeship and environmental justice.

158 Murcott "Transformative Environmental Constitutionalism" 291-292. See also Feris 2008 *CCR* 252. The concept of sustainable development has been discussed in several cases, but none have properly considered the significance of the term "ecologically" with reference thereto. See for instance: *MEC: Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC) (*HTF CC*); *Fuel Retailers*; *Sole v Minister of the Department of Agriculture, Forestry and Fisheries* unreported case number [2013] ZAWCHC 94 of 13 June 2013 (*Sole*).

159 These constitutional rights include the rights to life (s 11), dignity (s 10), the rights to culture and customary practices (ss 30 and 31), the rights to access to housing (s 26) and to access to water and food (s 27).

160 *Gongqose v Minister of Agriculture, Forestry, Gongqose and S* [2018] 3 All SA 307 (SCA) (*Gongqose SCA*).

Agriculture, Forestry and Fisheries (*Gongqose HC*).[161] *Gongqose SCA* and *Gongqose HC* are collectively referred to as the *Gongqose* judgments. Only these cases are discussed for reasons of scope and length. They have been chosen to reveal practical significance of a theory of transformative environmental constitutionalism for a number of reasons. First, *Earthlife*, *VEJA* and *Gongqose SCA* represent significant victories as part of broader struggles for social justice of poor and vulnerable communities. As such, they are well-known examples of environmental law disputes and offer a potentially familiar point of reference for exposing the value of the theory in disputes that are explicitly concerned with the plight of poor and vulnerable communities. Secondly, in each of the judgments the courts pursued some aspects of what the theory of transformative environmental constitutionalism proposes, and reveal the potential for the broader application of the theory.[162] Thirdly, the judgments engage with contrasting environmental contexts: a rural environment in a pristine protected area (*Gongqose SCA*), and polluted urban environments (*VEJA* and *Earthlife*), and thus expose the relevance of the theory in varying contexts.

As is discussed in chapter 5, *Earthlife*, *VEJA* and *Gongqose SCA* are illustrative of different ways in which South Africa's poor experience substantive and procedural injustice and rights violations necessitating struggles for social, environmental and/or climate justice. Although not necessarily or explicitly articulated by the courts, each dispute concerned the plight of impoverished communities experiencing several substantive rights violations and injustice: they live in environments harmful to their health and well being that impair their dignity, and they have limited access to water, food, adequate housing and sanitation. As this thesis shows, the communities involved have also been afforded limited access to information and opportunities to participate in decision-making about the substantive injustices to which they are

[161] *Gongqose v S; Gongqose v Minister of Agriculture, Forestry and Fisheries* [2016] 2 All SA 130 (ECM) (*Gongqose HC*).

[162] I illustrate in chapter 5 below that the courts in *Earthlife*, *VEJA* and *Gongqose SCA* adopted, to varying degrees and in varying respects, social justice-orientated reasoning that showed an appreciation of the socio-ecological conditions of the Anthropocene. The judgments are thus illustrate the potential for the kind of transformative adjudication in environmental law disputes that the thesis proposes.

exposed. In this sense they have experienced violations of their procedural rights to access to information and administrative justice, and injustice in a procedural sense. A favourable outcome in each dispute potentially served the interests of impoverished communities. Chapter 5 of this thesis recognises these favourable outcomes, but critiques the manner in which environmental constitutionalism was implemented by the courts. It does so with reference to the theory of transformative environmental constitutionalism developed in chapter 4. Although the critique is backward looking, it also usefully illustrates how a legal theory of transformative environmental constitutionalism could be applied by the courts in future environmental law disputes towards the emergence of a social justice-oriented environmental law jurisprudence.

1.5 Main research question and sub-questions

The overall study addresses the following central question: *How can and should South African courts invoke transformative environmental constitutionalism through transformative adjudication in environmental law disputes to respond to social, environmental and climate injustices experienced by South Africa's poor, and in so doing, develop a social justice-oriented environmental law jurisprudence?*

Subsequent research questions that feed back into this main question, and which are the foundation of each of the ensuing chapters, include:

- With a view to unpacking the theoretical foundations of this study, what are transformative constitutionalism, transformative adjudication and environmental constitutionalism, how are they connected, and how do they reveal the judiciary's capacity to engage with and respond to the interconnectedness of social, environmental and climate injustices experienced by South Africa's poor through the adjudication of environmental disputes? (Chapter 2)

- With a view to problematising the manner in which the judiciary tends to adjudicate environmental law disputes, what are the trends in the adjudication of environmental law disputes in South Africa currently, and how do these trends impact upon the emergence of a social justice-oriented environmental law jurisprudence? (Chapter 3)

- With a view to offering a theoretical solution to the problematic trends identified, and exposing the manner in which the judiciary could pursue a social jusitice-oriented environmental law jurisprudence, what is transformative environmental constitutionalism and how can it respond to some of the trends in the adjudication of environmental law disputes and facilitate the emergence of a social justice-oriented environmental law jurisprudence that is more responsive to the transformative mandate of the *Constitution*? (Chapter 4)

- With a view to illustrating the practical application of the theory, how can courts pursue transformative environmental constitutionalism in practice as illustrated through an analysis and critique of *VEJA*, the *Gongqose* judgments, and *Earthlife*? (Chapter 5)

1.6 Objectives

The overall purpose of the thesis is to illustrate how judges can contribute to responses to the wicked problems of poverty and inequality in South Africa through the adjudication of environmental law disputes in pursuit of social, environmental and climate justice as interconnected concerns.[163] The related objective is to facilitate the emergence of a much-needed social justice-oriented environmental law jurisprudence. This thesis offers transformative environmental constitutionalism as a

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[163] Kotzé 2015 *Anthropocene Review* 2014 255. Kotzé argues:

> business-as-usual approaches to human rights and the environment are probably inadequate to accommodate the myriad socio-political and ecological challenges that arise in the Anthropocene.

A legal theory of transformative environmental constitutionalism proceeds from the premises that such approaches are *certainly* inadequate, as this thesis will illustrate.

means to reorient the adjudication of environmental law disputes in a way that is more sensitive towards social, environmental and climate justice concerns, and adopts a socio-ecological systems perspective.

Specific aims of the study are:

1. To situate the debate by providing the study with an ideological and theoretical foundation:
    a. to interrogate the judiciary's capacity to respond to social, environmental and climate injustice as interconnected concerns in environmental law disputes pursuant to transformative constitutionalism, and its calls for social justice (and thus also environmental and climate justice) and transformative adjudication in the implementation of environmental constitutionalism, which are described; and
    b. to elaborate upon how transformative constitutionalism ought, from a social-ecological perspective in the adjudication of environmental law disputes, to pursue social justice as interconnected with environmental and climate justice (Chapter 2).

2. To critically evaluate the manner in which environmental law disputes are adjudicated against the ideological and theoretical orientation of the thesis:
    a. to expose current trends in the implementation of environmental constitutionalism in environmental law disputes as failing to pursue transformative adjudication of environmental law disputes in a number of respects; and
    b. to show the impacts of the current trends in the adjudication of environmental law disputes on the emergence of a social justice-oriented environmental law jurisprudence (Chapter 3).

3. To develop the content of a legal theory of transformative environmental constitutionalism:

   a. departing from the theoretical concepts in chapter 2, to describe what transformative environmental constitutionalism demands of the judiciary and how it could, in theory, facilitate the emergence of social justice-oriented environmental law jurisprudence (Chapter 4).

4. To illustrate the practical relevance and significance of a legal theory of transformative environmental constitutionalism:
   a. to reveal the practical relevance of transformative environmental constitutionalism through an analysis and critique of judgments emerging from three environmental law disputes: *VEJA*, the *Gongqose* judgments, and *Earthlife* (Chapter 5).

5. To conclude the study, to summarise all findings and insights from the preceding chapters and then to formulate a further research agenda arising from those findings and insights (Chapter 6).

1.7 Hypotheses, assumptions and caveats

Proceeding from the point of departure that South Africa's project of transformative constitutionalism has not adequately engaged the implementation of environmental constitutionalism as a concern for the protection of the environment and social, environmental and climate justice for people who live in the environment, this study is premised on the following central hypotheses, which it seeks to prove by answering the foregoing questions and realising the study objectives:

- The judiciary, in pursuing South Africa's project of transformative constitutionalism, has not sufficiently grappled with the potential of environmental constitutionalism to fulfil the constitutional objective of social justice as interconnected with environmental and climate justice.

- South Africa's project of transformative constitutionalism aimed at the pursuit of social justice could be enhanced by more thorough engagement with, and

transformation of, the implementation of environmental constitutionalism in the adjudication of environmental law disputes, through the development of transformative environmental constitutionalism that pursues social, environmental and climate justice as interconnected concerns.

- Transformative environmental constitutionalism could aid in the development of a progressive conception of environmental constitutionalism in the adjudication of environmental law disputes, and the emergence of a social justice-oriented environmental law jurisprudence that is more responsive to social, environmental and climate injustices to which the poor are increasingly exposed in the context of the Anthropocene.

- The judiciary ought to play a central role in advancing social, environmental and climate justice as interconnected concerns through the implementation of transformative environmental constitutionalism, and is equipped with the juridical tools it requires to play this role.

The study is based on the following assumptions:

- South Africa is a constitutional democracy.[164]

- South Africa's constitutional democracy adopts a human rights-based approach, underpinned by the pursuit of dignity, equality and social justice.[165]

- It is a constitutional imperative that South Africa's judiciary pursues a project of transformative constitutionalism.[166]

- Poverty alleviation, equality and social justice are key aspirations of South Africa's project of transformative constitutionalism.[167]

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164 Klug *Constituting Democracy* 18-28.

165 Moseneke 2016 http://hsf.org.za/resource-centre/lectures/helen-suzman-memorial-lecture-2016-1.

166 The preamble of the *Constitution*. Klare 1998 *SAJHR*. Langa 2006 *Stellenbosch Law Review*.

- A well-functioning environment is a necessary condition for the fulfillment of the social justice imperative of the *Constitution*.[168]

- South Africa has constitutionalised environmental protection.[169]

- The judiciary has an important role to play in the enforcement of the constitutional protection afforded to the environment through the adjudication of environmental law disputes.

- Post-apartheid, many South Africans continue to live in poverty and in environments that are harmful to their health and well being.[170]

- The pursuit of social, environmental and climate justice by the judiciary should be a priority in light of the Anthropocene's socio-ecological crisis and its disproprortionate implications for the poor.[171]

- Environmental protection, both globally and in South Africa, has become increasingly significant in the Anthropocene, a time in which the Earth system faces collapse, including as a result of human impacts on the climate system.[172]

- In developing countries such as South Africa, the collapse of the Earth's systems, including as a result of climate change, will have disproportionately harmful impacts on the poor.[173]

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167 Brand *et al* 2013 *Law, Democracy and Development*.

168 Schlosberg *Defining Environmental Justice* (e-Book).

169 Kotzé 2015 *Widener Law Review* 196-198.

170 Statistics South Africa 2017 http://www.statssa.gov.za/?p=10341; Du Plessis 2011 *SAJHR*; Pieterse 2005 *SAPL*; Matooane *et al* "Vulnerability".

171 Schlosberg *Defining Environmental Justice* (e-Book). Agyeman *Just Sustainabilities* (e-Book).

172 Steffen *et al* 2015 *Science*. Kotzé 2017 "Discomforting Conversations" vii. Gonzalez "Global Justice" 219. See also generally, Hanjra and Qureshi 2010 *Food Policy* and Vörösmarty *et al* 2010 *Nature.*

173 Schlosberg and Collins 2014 *WIREs Clim Change*. Watkins *Human Development Report 2007/2008* 2 and 73-107.

This study recognises the following caveats that act to limit the scope of the inquiry:

- This study addresses the significance of transformative environmental constitutionalism for the courts in the adjudication of environmental law disputes. Transformative environmental constitutionalism could play a role in other kinds of disputes and in environmental governance by the executive and legislative branches of government, but this study does not address those specific roles.

- Lawyers play an important role in the manner in which environmental law disputes are adjudicated. A discussion on the role of lawyers falls outside the scope of this study. Instead the focus is on the role of the courts.

- The focus of this study is transformative environmental constitutionalism as a response to social injustice as interconnected with environmental and climate injustice for people. Although transformative environmental constitutionalism could engage questions of interspecies injustice,[174] such questions fall outside the scope of this study, although these could form the basis for further research.

- Courts are, of course, required to pursue transformative constitutionalism in the adjudication of all disputes. The focus of this thesis is on the pursuit of transformative constitutionalism in the context of the adjudication of environmental law disputes as defined above.[175] This study does not address

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[174] See Bosselmann 2006 *SAJELP* 45-48 on inter-species justice.

[175] The term "environmental law dispute" is defined broadly, in chapter 1 at 1.2.2 above. Some of the disputes discussed in this thesis entail the enforcement of socio-economic rights. This is because environmental law disputes include disputes involving the enforcement of substantive rights that ensure that all people in South Africa are able to live in a dignified manner. However, these disputes are only critiqued in this thesis with reference to whether the enforcement of the substantive right at issue was done in a manner that recognised the relationship between the protection of the environment and the fulfilment of other substantive rights, in the sense that the protection of the environment is a prerequisite for the fulfilment of the substantive right.

the extent to which courts pursue transformative constitutionalism in the adjudication of other disputes.

- The environmental right is interrelated with and mutually reinforcing of various socio-economic rights, such that a number of the judgments discussed in this thesis concern the enforcement of socio-economic rights. The critique of these judgments is limited to the interrelationship between the environmental right and the relevant socio-economic right(s). A critique of the manner in which the courts enforce socio-economic rights in other respects falls outside of the scope of this thesis.

1.8 Structure of the discussion

Chapter 1 introduces and motivates the study, including with reference to the lived realities of South Africa's poor, and the concepts of social, environmental and climate injustice, the Anthropocene, an environmental law dispute, transformative constitutionalism, transformative adjudication, environmental constitutionalism, and transformative environmental constitutionalism. It briefly outlines the linkages amongst these concepts. Chapter 1 contends that a greater appreciation of these linkages could pave the way for a much-needed social justice-oriented environmental law jurisprudence, which could emerge through the application by the courts of transformative environmental constitutionalism.

Chapter 2 addresses the capacity of the South African judiciary, with reference to the concept of transformative constitutionalism and its call for transformative adjudication, to respond to social, environmental and climate injustice as interconnected concerns in environmental law disputes through the implementation of environmental constitutionalism.

Next, chapter 3 of the study engages with current trends in the implementation of environmental constitutionalism in environmental law disputes that illustrate a failure by the courts to engage in transformative adjudication that pursues South Africa's

project of transformative constitutionalism. Chapter 3 reveals that the problems emerging from these trends are inhibiting the emergence of a social justice-oriented environmental law jurisprudence.

In response to the trends exposed in chapter 3, in chapter 4 the study develops the content of transformative environmental constitutionalism in theory as a basis to facilitate the emergence of a social justice-oriented environmental law jurisprudence.[176]

Chapters 5 of the thesis illustrates the potential practical relevance and significance of transformative environmental constitutionalism through a comprehensive analysis and critique of the judgments emerging from three environmental law disputes: *VEJA*, the *Gongqose* judgments and *Earthlife*.[177] The critique of the cases engages with the extent to which the courts pursued transformative adjudication and a social justice-oriented approach to the issues that recognised the environmental and climate justice dimensions thereof. The critique further illustrates how applying transformative environmental constitutionalism could have facilitated, and should in future facilitate, the emergence of a social justice-oriented environmental law jurisprudence.

Chapter 6 concludes the thesis with a summary of the findings and insights that emerge from chapters 1 to 5, and proposes a future research agenda.

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176 Chapter 4 elaborates upon how transformative environmental constitutionalism calls for transformative adjudication requiring: (i) the framing of environmental law disputes in a manner that brings underlying environmental problems and the social, environmental and climate justice implications thereof to the fore; (ii) rights-based, substantive interpretation and reasoning, through engagement with justice-oriented principles in environmental legislation, development of the normative content of the environmental right, and the environmental right operating as mutually reinforcing of other relevant substantive rights.

177 *VEJA* concerned an application for access to information from Arcelormittal in order to facilitate pollution control in the Vaal Triangle; the *Gongqose SCA* concerned a challenge to a state decision that had the effect of depriving an impoverished community from access to marine life in the Dwesa-Cwebe Nature Reserve; and *Earthlife* concerned a challenge against a state decision to approve the construction of a coal-fired power station in spite of a failure to consider the climate change impacts thereof.

1.9 Original contribution

The scientific importance of this thesis lies first in its original contribution to understanding and describing the linkages amongst the concepts of transformative constitutionalism, transformative adjudication and environmental constitutionalism in South Africa, and their potential to address social, environmental and climate injustices as interconnected concerns. The focus of the study is the judiciary's role in addressing injustices through the implementation of environmental constitutionalism in a transformative manner in environmental law disputes that can facilitate the emergence of a social justice-oriented environmental law jurisprudence.

In legal discourse valuable scholarship conceptualising environmental constitutionalism in South Africa has begun to emerge,[178] but there remains ample scope for further scholarship on the role of the law in responding to deteriorating environmental conditions in the Anthropocene, and their impacts upon the poor. Further, environmental constitutionalism is itself an emerging concept.[179] In particular, though it is recognised that more effective implementation of environmental constitutionalism by the courts could enhance environmental protection in South Africa,[180] legal discourse does not generally address the necessity of the courts doing so from a socio-ecological systems perspective in a time of environmental crisis for the attainment of social, environmental and climate justice for the poor. At the same time, there is some literature concerning the courts' role in pursuing transformative constitutionalism and social justice.[181] However, this literature has generally failed to engage with the idea that it is the environment that creates the conditions in which social justice must occur,[182] and that the courts ought to engage with the linkages among environmental, climate and social injustice. Yet the imagery of the Anthropocene and its disproportionate

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178 Kotzé 2015 *Widener Law Review* represents an important contribution on "the conceptual contours of environmental constitutionalism" in South Africa. This thesis builds on that scholarship with a focus on the judiciary's role in responding to poverty and inequality in South Africa.

179 May and Daly *Global Environmental Constitutionalism* 17-18.

180 Kotzé and Du Plessis 2010 *Journal of Court Innovation* 175.

181 Moseneke 2016 http://hsf.org.za/resource-centre/lectures/helen-suzman-memorial-lecture-2016-1. Klare 1998 *SAJHR*. Hoexter 2008 *SAJHR*. Pieterse 2005 *SAPL*. Quinot 2010 *CCR*.

182 Schlosberg 2013 *Environmental Politics* 38.

consequences for South Africa's poor demand a re-evaluation of existing laws aimed at addressing environmental problems and responses to social injustice. This thesis views South Africa's ongoing project of transformative constitutionalism with its focus on the attainment of social justice as offering a useful point of entry for this re-evaluation.

1.10 Methodology

In order to achieve its objectives, the study employs a desk top-based qualitative research methodology that is primarily grounded in juridical science. Where appropriate, the study relies upon non-juridical materials. The research methodology is explained in greater detail below with reference to the research questions to which each chapter intends to respond.

The thesis seeks to be responsive, throughout, to two strands of scholarship that present an opportunity, and serve as a call, for radical transformation of the law. One strand of scholarship engages with the need for environmental law and governance to be "reimagined" so as to respond to injustice arising from the conditions of the Anthropocene.[183] The other strand of scholarship relates to the need for South African law to undergo, as part of an ongoing project of transformative constitutionalism, large-scale transformation as demanded by the *Constitution* so as to respond to the legacy of apartheid in pursuit of social justice, equality and dignity.[184]

Chapter 2 addresses the potential of the South African courts to pursue, as interconnected concerns, social, environmental and climate justice for South Africa's poor in the adjudication of environmental law disputes. The study conducts a literature review of legal and social science literature. It further engages with

183 See for example Philippopoulos-Mihalopoulos "Critical Environmental Law" 131 who points out that "[t]here is no question that the Anthropocene affects the way environmental legal research and thinking in general should take place".

184 See for example, Moseneke 2016 http://hsf.org.za/resource-centre/lectures/helen-suzman-memorial-lecture-2016-1; Klare 1998 *SAJHR*; Hoexter 2008 *SAJHR*; Pieterse 2005 *SAPL*; Quinot 2010 *CCR*.

primary legal sources including the *Constitution*, environmental legislation and policy, as well as legislation giving effect to procedural rights to access to information and administrative justice. The study considers case law that interprets and applies the relevant laws. The study conducts a literature review of scholarship concerning transformative constitutionalism, the separation of powers, and transformative adjudication in South Africa, as well as on environmental constitutionalism in general, and its implementation in South Africa.

Chapter 3 examines, with reference to a number of judgments, the current trends in the adjudication of environmental law disputes, and asks what problems emerge from these trends. It offers a *lex lata* perspective on the adjudication of environmental law disputes with reference to relevant case law and secondary sources with reference to which the cases are analysed. A vast number of judgments were considered so as to identify the various problematic trends in the adjudication of environmental law disputes (in addition to those judgments specifically discussed).[185] These judgments concern conflict within socio-ecological systems that gave rise to questions about justice, including in relation to the distribution of environmental benefits and burdens and/or climate change responsibility, vulnerabilities and impacts, concerns about participation in environmental decision-making, and/or a lack of recognition of the equal moral worth of everyone in South Africa in environmental decision-making.[186] For reasons of scope and length, only some examples of the judgments considered are discussed in chapter 3.[187]

185 See notes 32, 52, 90, 91, 146 and 209 in chapter 3 below.

186 The judgments discussed involve the implementation of environmental laws in all three categories discussed above: (i) the environmental right, laws giving effect thereto, and international environmental law instruments, all of which are *explicitly* aimed at the protection of the environment or components thereof; (ii) procedural rights and the laws giving effect thereto *when* they operate in conjunction with the first category of laws and enable environmental protection through mechanisms requiring transparent, lawful, fair and reasonable environmental decision-making; and (iii) substantive rights and the laws giving effect thereto that are aimed at ensuring that everyone in South Africa lives, in a substantive sense, in a dignified manner, and that are interconnected with the right to a healthy environment, in the sense that a healthy environment is a prerequisite for the fulfilment thereof, *when* they are invoked in that sense.

187 Many of the judgments discussed in chapter 3 represent "ordinary" environmental law disputes, and may not seem particularly noteworthy at first glance. They contrast with the landmark judgments discussed in chapter 5 in this respect.

Having motivated for and set the scene of the study, chapter 4 offers a *de lege ferenda* perspective on the adjudication of environmental law disputes by developing a theory of transformative environmental constitutionalism. The study relies on secondary sources that aid in exposing the potential for the progressive implementation of environmental constitutionalism in South Africa in pursuit of social justice.

Chapter 5 exposes the practical relevance of transformative environmental constitutionalism in the adjudication of environmental law disputes in South Africa. It does so with reference to three landmark judgments: *litigation* and *Earthlife*, *VEJA*, the *Gongqose SCA* and commentaries thereon. These judgments are illustrative of the problematic trends discussed in chapter 3 to varying degrees, but offer glimmers of hope towards a more social justice-oriented environmental law jurisprudence, and are therefore useful illustrations of the practical application of the theory of transformative environmental constitutionalism developed in chapter 4. The chapter applies the ideas developed in chapter 4 to the manner in which environmental constitutionalism was implemented in response to the struggles of the communities involved in each dispute.

The methodology adopted in the final chapter 6 is to summarise the findings in the preceding chapters, to evaluate them, and then to consider how a legal theory of transformative environmental constitutionalism could continue to evolve so as to contribute towards the emergence of a social justice-oriented environmental law jurisprudence.

Overall, the study is an attempt at progressive legal scholarship, as envisaged by Madlingozi.[188] It is progressive in that it seeks to grapple with the role of the law in supporting the struggles of important social movements in the context of the

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[188] Madlingozi "Legal Academics" 6 sounds an emphatic call for progressive legal scholarship when he argues:

> In … South Africa, progressive politics and social transformation have no meaning unless those who claim to be 'progressives' connect with the struggle that is being waged by new social movements. In other words, progressive legal scholars need to take these struggles into account in their research.

Anthropocene, particularly where issues of poverty, race and class inequality, and environmental degradation intersect in South Africa. It is true that environmental activism and social activism are to some extent polarised in South Africa.[189] Simon[190] contends that this polarisation occurs first because social change and environmental change occur in different scales in space and time in that "social reform operates, on average, over much shorter time frames than environmental intervention can". Further, environmental activism is perceived to address the "esoteric" whilst social justice struggles are perceived to address more "tangible" matters.[191] This study endeavours to respond to this polarisation in the context of the implementation of environmental constitutionalism by the courts as part of South Africa's project of transformative constitutionalism and as one way to address the socio-ecological crisis of the Anthropocene and its consequences for South Africa's poor. Transformative environmental constitutionalism could become more deeply rooted in the fabric of South African life if courts begin to recognise the intrinsic links between environmental, climate and social justice struggles.[192] This study is aimed at illustrating these links, and how the courts can more effectively respond to these struggles in environmental law disputes.

1.11 Existing foundational research of the candidate

The present study departs from, and further builds on several years' worth of research conducted since 2013. Earlier research originally sought to illustrate the potential contribution of environmental law towards the enforcement of socio-economic rights in South Africa. It specifically explored how an over-reliance on procedural rights can inhibit the development of substantive rights aimed at meeting

189 See for example Simon 2016 *South African Journal of Science* 1-2.

190 Simon 2016 *South African Journal of Science* 1.

191 Simon 2016 *South African Journal of Science* 1.

192 Transformative environmental constitutionalism could also be useful to those who seek to defend the rights of South Africa's poor. It could enable them to seize upon environmental constitutionalism as a tool to enhance their struggles against social, environmental and climate injustice in environmental law disputes. These struggles will invariably intensify in the face of ecological collapse in the Anthropocene. The theory could also challenge those who pursue improved environmental protection to connect the need to reimagine environmental law and governance in the Anthropocene to the pursuit of social justice required by the transformative mandate of the *Constitution*.

the needs of the poor. Later research explored the linkages between the notion of transformative constitutionalism in South Africa and improved environmental protection. More recent research began to explore the need for South African environmental law to be reimagined given the socio-ecological crisis of the Anthropocene. All of the publications and presentations engaged in various ways with questions about how to improve the lived realities of the poor and/or environmental protection in South Africa to fulfil the *Constitution*'s transformative mandate in the pursuit of social justice. However, none of my earlier publications have dealt in a systematic and comprehensive way with the linkages amongst the concepts of social, environmental and climate (in)justice, environmental constitutionalism, transformative adjudication and transformative constitutionalism, so as to explore the ways in which a legal theory of transformative environmental constitutionalism can facilitate the emergence of a social justice-oriented environmental law jurisprudence in South Africa, as this thesis does. This thesis therefore represents a culmination of a broader research agenda in which I have been intimately involved for a number of years. The research includes:

Book chapters:

- Murcott M 2017 "Introducing Transformative Environmental Constitutionalism in South Africa" in Daly E *et al* (eds). *New Frontiers in Environmental Constitutionalism* (UN Environment Programme) 289-293

- Murcott M 2018 "The Procedural Right of Access to Information as a Means of Implementing Environmental Constitutionalism in South Africa" in Daly E and May JR (eds) *Implementing Environmental Constitutionalism: Current Global Challenges* (Cambridge University Press, United Kingdom) 193-208

Journal articles:

- Murcott M "The Role of Administrative Justice in Enforcing Socio-economic Rights: Revisiting *Joseph*" 2013 29(3) *South African Journal on Human Rights* 481-495

- Murcott M "The Role of Environmental Justice in Socio-Economic Rights Litigation" 2015 132(4) *South African Law Journal* 875-908

- Murcott M and van der Westhuizen W "The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on *Motau* and *MyVoteCounts*" 2015 7 *CCR* 43-67

- Murcott M "Transformative Environmental Constitutionalism's Response to the Setting Aside of South Africa's Moratorium on Rhino Horn Trade" 2017 6(4) 84 *Humanities* 1-15

Papers presented at international conferences:

- 2014 Murcott M *The role of environmental justice in South African socio-economic rights litigation*. Third Annual Global Network for the Study of Human Rights and the Environment Symposium on *Reimagining "humanity" in the nexus between human rights and the environment*. Tarragona, Spain July 2014

- 2015 Murcott M *Fighting for fish, forestry and people: pursuing transformative environmentalism in the Dwesa-Cwebe Nature Reserve of the Eastern Cape, South Africa*. IUCN Academy of Environmental Law's 13th Annual Colloquium on *Forest and Marine Biodiversity*. Jakarta, Indonesia. September 2015

- 2015 Murcott M *The role of a legal theory of transformative environmentalism in solving South Africa's Acid Mine Drainage (AMD) crisis*.

Environmental Law Association Annual National Conference. Drakensberg, South Africa. August 2015

- 2016 Murcott M *South Africa's need for a legal theory of "transformative environmentalism"*. Symposium on New Frontiers in Global Environmental Constitutionalism: Implementing Human Rights and Environmental Rights in Global Contexts. Potchefstroom, South Africa. April 2016

- 2016 Murcott M *Setting aside South Africa's rhino horn trade moratorium: a consequence of the proceduralisation of environmental rights cases?*. IUCN Academy of Environmental Law's 14th Annual Colloquium on *The Environment in Court*. Oslo, Norway. July 2016

- 2017 Murcott M *The procedural environmental right to access to information as a pathway to corporate compliance, accountability and transparency in South Africa's Vaal Triangle*. IUCN Academy of Environmental Law's 15th Annual Colloquium on *Stories of the World We Want – The Law as its Pathway*. Cebu, Philippines. June 2017

- 2017 Murcott M *Transformative environmental constitutionalism's response to the setting aside of South Africa's moratorium on rhino horn trade*. World Humanities Conference on *Challenges and Responsibilities for a Plant in Transition*. Liège, Belgium. August 2017

- 2017 Murcott M *The transformative content of the White Paper on Environmental Management, 1997, forgotten, but not gone!*. Environmental Law Association Annual National Conference. Cape Town, South Africa. November 2017

- 2018 Murcott M *Exploring the potential of resilience thinking to respond to the plight of South Africa's Dwesa-Cwebe fishing community*. IUCN Academy

of Environmental Law's 16th Annual Colloquium. Strathclyde University, Glasgow, United Kingdom. July 2018

- 2019 Murcott M *Towards good health and well being and climate action in the South African courts – a critical appraisal of Earthlife Africa Johannesburg v Minister of Environmental Affairs and others (Earthlife).* IUCN Academy of Environmental Law 17th Annual Colloquium. Universiti Teknologi Mara, Kuala Lumpur, Malaysia. August 2019

- 2019 Murcott M *Trends in the adjudication of environmental law disputes*. Environmental Law Association Annual National Conference. Salt Rock, South Africa. September 2019.

Chapter 2 Connecting transformative constitutionalism and transformative adjudication to environmental constitutionalism

2.1 Introduction

Like other accounts of transformative constitutionalism,[1] this thesis engages with the term in a manner that is "lawyer-led" and "law(yer)-centric" in its focus.[2] It does so to illustrate that the source of the judiciary's power and duty in the transformative adjudication of environmental law disputes to adopt a social-ecological perspective that recognises and addresses the interconnected nature of social, environmental and climate injustices, emerges from within the *Constitution* and its project of transformative constitutionalism.[3] To be sure, the transformation required by the *Constitution* undoubtedly extends far beyond the courts and other realms of lawyers into all aspects of South African society, and includes the need, for what Fish Hodgson[4] refers to as, "constitutional literacy" amongst the public. Moreover, the courts ought not to be viewed as the exclusive guardians of a constitution or the only means to pursue constitutionally mandated transformation and social justice.[5] However, as Gargarella *et al* explain, courts can and should play an important role in social transformation in the context of litigation.[6] This is so, not least because (even when unsuccessful) litigation can serve "to instigate political action and influence over public debate" and "to foster a 'culture of legal struggle' that 'continually informs and inspires future generations to challenge oppressive practices'".[7] Further,

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1 See generally, for example, Pieterse 2005 *SAPL*; Langa 2009 *Stellenbosch Law Review*; Brickhill and Van Leeve 2015 *Acta Juridica* who build on Klare 1998 *SAJHR*. Klare's focus on adjudication as a form of law-making and an important site of transformation was motivated, among other things, by the court's role in enforcing the justiciable human rights enshrined in the *Constitution*, and in pursuing justice.

2 Fish Hodgson 2015 *Acta Juridica*.

3 This chapter lays the descriptive foundation for the argument that transformative environmental constitutionalism could facilitate the emergence of a social justice-oriented environmental law jurisprudence when courts adjudicate environmental law disputes.

4 Fish Hodgson 2015 *Acta Juridica*.

5 Gargarella *et al* "Courts and Social Transformation" 273. See also Hoexter 2008 *SAJHR* 283-284.

6 Gargarella *et al* "Courts and Social Transformation" 273.

7 Gargarella *et al* "Courts and Social Transformation" 273, quoting Lobel 1995 *Cornell Law Review* 1347.

litigation can ensure that a particular vision of the law is kept alive: one that serves to advance the needs of the oppressed.[8]

It has been more than 20 years since the publication of Klare's[9] seminal work arguing that South Africa's *Constitution* necessitates a project of transformative constitutionalism, post-apartheid, to shift South Africa's "political and social institutions and power relationships in a democratic, participatory and egalitarian direction…through processes grounded in law". Brickhill and Van Leeve[10] explain that transformative constitutionalism is now "a recognised feature of the Constitution…sourced in a range of [its] provisions". When Klare[11] coined the term transformative constitutionalism, he did so to describe the manner in which South African society in general, and the courts and legal community in particular, ought to transform in pursuit of the kind of society envisaged by the *Constitution*: one in which the quality of life of all people is improved, and in which the potential of each person is freed.[12] A shift toward the kind of society envisaged by the *Constitution* entails the pursuit of social justice in a substantive sense as articulated in chapter 1 of this thesis: the equitable distribution of benefits in a material sense, and facilitating people's functioning and flourishing in society.[13]

A proliferation of scholarly accounts of transformative constitutionalism has emerged since Klare coined the term.[14] The ensuing discourse reveals that although widely supported, transformative constitutionalism remains a contested notion. Scholars

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8 Gargarella *et al* "Courts and Social Transformation" 273.

9 Klare 1998 *SAJHR* 150.

10 Brickhill and Van Leeve 2015 *Acta Juridica* 146-147. The provisions referred to include:

> the founding values; the duty placed on the state to 'respect, protect, promote and fulfil' all the rights in the *Bill of Rights*; the horizontal application of the *Constitution* to private actors; the right to equality, especially the recognition of the legitimacy of restitutionary measures (or 'affirmative action'); the inclusion of socio-economic rights that must be progressively realised; and the limitations clause.

11 Klare 1998 *SAJHR* 156.

12 Preamble of the *Constitution*.

13 Agyeman *Just Sustainabilities* (e-Book).

14 See for instance: Pieterse 2005 *SAPL*; Roux 2009 *Stellenbosch Law Review*; Langa 2009 *Stellenbosch Law Review*; van Marle 2009 *Stellenbosch Law Review*; Sibanda 2011 *Stellenbosch Law Review*; Fish Hodgson 2015 *Acta Juridica*; Brickhill and Van Leeve 2015 *Acta Juridica*; Fish Hodgson 2018 *SAJHR*.

representing an elite white minority view the concept in a negative light on the basis that transformative constitutionalism:

> has been used to dilute property rights, to justify turning affirmative action into the application of racial targets…and to detract from language and other cultural rights.[15]

These criticisms proceed from the flawed premises that property rights and Afrikaner nationalism, for instance, are inherently good and worthy of legal protection, whilst affirmative action, for instance, is inherently problematic an undeserving of legal protection. They fall to be rejected as failing to appreciate that South Africa's constitutional design is explicitly aimed at uplifting the poor and marginalised as opposed to preserving the interests of the white minority that was privileged under apartheid.

On the opposite end of the political spectrum, some argue that transformative constitutionalism is not capable of facilitating the radical – in the sense of politics that is sufficiently urgent, far-reaching and systemic – change that South Africa's poor majority require.[16] Modiri,[17] for instance, is critical of the rights-discourse intrinsically bound up with the notion of transformative constitutionalism because:

> The presentation of rights as a benign defence of the innocent and the powerless against a negligent State and rapacious economic powers centres on a moralistic discourse of pain and suffering rather than a political discourse of comprehensive justice and liberation.

15 Kane-Berman 2018 https://www.politicsweb.co.za/documents/the-concourt-and-transformation. See also Malan 2018 https://www.politicsweb.co.za/opinion/the-totalitarianism-of-transformationism who is critical of the Constitutional Court for participating in what he describes as the ruling party's "ideology of transformationism (also called the national democratic revolution), which includes typical extreme leftist characteristics such as the drive towards centralisation, the suppression of cultural diversity in favour of an craving for cultural homogenisation, the achievement of racial representivity (as a strategy to achieve a homogeneous national culture) and the weakening of private property rights. The jurisprudential record of the Constitutional Court overwhelmingly proves its active participation in the achievement of the ideology of transformationism." I reject the argument that the Constitutional Court's jurisprudence espouses this ideology in general, and specifically in the implementation of environmental constitutionalism as discussed in this thesis.

16 Sibanda 2011 *Stellenbosch Law Review* 490-499. See also Fish Hodgson 2018 *SAJHR*.

17 Modiri 2015 *PER* 249.

Modiri[18] also critiques liberal rights-discourse as conferring rights in the abstract, rather than being responsive to concrete realities.[19] He argues that the South African constitutional order falls foul of this critique by conferring rights in the abstract that do not translate into real change as a result of neo-liberal capitalist approaches to their implementation.[20] Millions of impoverished South Africans have been afforded rights to access to water, food and housing, for instance, but have no access in reality.[21]

Whilst accepting the limits of the law in general – it is certainly not a panacea to the wicked problems of poverty and inequality – and of liberal rights-discourse in particular,[22] this thesis acknowledges that judgments, as a form of rights-discourse, can be powerful political tools.[23] This thesis seeks to harness the potential of rights-discourse in the context of the adjudication of environmental law disputes in the implementation of environmental constitutionalism.[24]

Transformative constitutionalism allows judges to acknowledge the material power relations of race, class and gender that underly South African society.[25] Transformative constitutionalism also permits the judicial diagnosis of poverty as injustice in a political manner as emerging from historically entrenched structural and systemic inequality.[26] This is because the construction of transformative

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18 Modiri 2015 *PER* 249. See also Sibanda 2011 *Stellenbosch Law Review* 491-495.

19 For a further critique on the Western and liberal origins of rights see Collins 2007 *Dalhousie Law Journal* 85-90.

20 Modiri 2015 *PER* 249.

21 Modiri 2015 *PER* 249-250.

22 On the limits of liberal rights-discourse see, for instance: Cooper 2017 *Journal of African Law* 75-76.

23 Lobel 1995 *Cornell Law Review* 1332. *Minister of Health v Treatment Action Campaign* 10 BCLR 1033 (CC) (discussed in Pieterse 2008 *Journal of Law and Society*) illustrates the significant role that rights can play as powerful political tools.

24 On this potential see Kotzé "Six Constitutional Elements" 30, who explains that:

> rights properly postulate the idea that people have certain universal (belonging to everyone everywhere), inborn (the fact of being human bestows a right), inalienable and imprescriptible claims (rights cannot be transferred, forfeited, waived or lost due to them not being claimed), that may not be infringed upon by governments or other persons.

25 Brickhill and Van Leeve 2015 *Acta Juridica* 155.

26 Brickhill and Van Leeve 2015 *Acta Juridica* 155.

constitutionalism adopted in this thesis recognises that the *Constitution* is a political instrument, committed to social justice, albeit having emerged through negotiation and compromise.[27] This construction is widely supported as a basis upon which to interpret the *Constitution* and engage in legal philosophy in South Africa.[28] I align myself, for instance, with the views of Roux[29] who explains that the argument that the *Constitution* mandates a "collective project of legally-driven social change" to achieve social justice imperatives ought to be "entirely non-contentious". Arguably, the disproportionate burden of deepening socio-ecological degradation in the Anthropocene experienced by South Africa's poor demands that the pursuit of social justice as a constitutional imperative ought to be viewed as interconnected with the pursuit of environmental and climate justice for the poor. In other words, the imagery of the Anthropocene calls for a socio-ecological understanding of transformative constitutionalism's goals that treats social, environmental and climate injustice as interconnected.

Klare's[30] conception of transformative constitutionalism recognises not only that the *Constitution* mandates the pursuit of certain societal goals, but also envisages methods of legal reasoning required of lawyers and judges in order to fulfil that mandate. The invocation of these methods is referred to as transformative adjudication, which requires "that judges interpret and apply the Constitution's provisions in a manner that furthers their transformative purpose".[31] In order for transformative adjudication to be pursued, a particular model of separation of powers must be embraced, which is elaborated upon below.[32] Further, South Africa's legal culture needs to transform so as to adopt a more substantive, as opposed to a predominantly formal vision of the law,[33] as discussed below.[34]

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27 Langa 2009 *Stellenbosch Law Review*.

28 See for instance Roux 2009 *Stellenbosch Law Review* 260; Fish Hodgson 2018 *SAJHR*.

29 Roux 2009 *Stellenbosch Law Review* 261.

30 Klare 1998 *SAJHR* 156 argued that the *Constitution* requires "a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals".

31 Pieterse 2005 *SAPL* 164.

32 Fish Hodgson 2018 *SAJHR*.

33 Cockrell 1996 *SAJHR* 3. Sibanda 2011 *Stellenbosch Law Review* 494.

34 It will be argued that South Africa's model of separation of powers arguably permits transformative adjudication, but that the success of South Africa's project of transformative constitutionalism will depend, to a great extent, on the willingness of judges and lawyers to

The significance of transformative constitutionalism and transformative adjudication in the context of environmental law disputes arises from the manner in which environmental protection has been constitutionalised in South Africa from a rights-based perspective. Environmental constitutionalism essentially entails the inclusion of the environment as a proper subject for protection in constitutional texts, and the power of courts to give effect to this protection.[35] Post-apartheid South Africa is a pioneer of the global phenomenon of environmental constitutionalism, at least on paper.[36] Pursuant to the phenomenon of environmental constitutionalism, various rights and laws fall to be invoked in environmental law dispute adjudication. These include the environmental right provided for by section 24 of the *Constitution*, and a vast body of environmental legislation aimed at giving effect thereto. Procedural rights and laws aimed at giving effect thereto are also often implicated. Finally, substantive rights that are interrelated with and mutually reinforcing of the environmental right and legislation giving effect to those rights may be relevant. The implementation of these laws in a manner that pursues transformative constitutionalism through transformative adjudication is elaborated upon below.

2.2 About this chapter

In light of the foregoing, this chapter sets out to answer the question: *what is the capacity of the South African judiciary, with reference to the concept of transformative constitutionalism and its call for transformative adjudication, to respond to social, environmental and climate injustice as interconnected concerns in environmental law disputes through the implementation of environmental constitutionalism?*

challenge, in adjudication, an underlying conservative, formalist legal culture, and its liberal democratic assumptions (see for example, Sibanda 2011 *Stellenbosch Law Review* 493).

35 May and Daly *Global Environmental Constitutionalism* 1. See also Kotzé 2015 *Widener Law Review* 196-198 and Kotzé "Six Constitutional Elements" 15-20.

36 Kotzé 2015 *Widener Law Review* 196-198.

The chapter first describes transformative constitutionalism with reference to its goals, which include the pursuit of social justice. I argue that transformative constitutionalism's goal of overcoming social injustice ought also to entail the pursuit of environmental and climate justice as interconnected with social justice. The chapter then explores the capacity of the judiciary to pursue transformative constitutionalism's goals. The chapter describes the practice of transformative adjudication: substantive, value-laden reasoning and interpretation in adjudication that is responsive to the plight of the poor and that is undertaken regardless of the manner in which cases are argued so as to give full effect to the *Constitution* and its transformative project.[37] I argue that South Africa's model of separation of powers[38] empowers the judiciary to play a relatively activist role in pursuing transformative constitutionalism's goals through transformative adjudication.[39] The chapter also engages with the need for South African legal culture to free itself from a formalistic, conservative and ultimately, restrictive legal culture in order for transformative adjudication to be pursued. Finally, this chapter describes environmental constitutionalism in South Africa, which adopts a rights-based approach to environmental protection, and which ought to be implemented in South Africa in environmental law disputes in a manner that pursues transformative constitutionalism through transformative adjudication.

Having described the links among transformative constitutionalism, transformative adjudication and the implementation of environmental constitutionalism, this chapter concludes that South African judges are provided the legal means to implement environmental constitutionalism in environmental disputes in a manner that pursues social, environmental and climate justice as interconnected concerns so as to be more responsive to the socio-ecological crisis we face in the Anthropocene, and its

37 Quinot 2010 *CCR*.

38 I agree with Fish Hodgson 2018 *SAJHR* 2 that a clear and distinctively South African separation of powers doctrine is yet to emerge, but I elaborate the model to the extent that it is apparent.

39 Bilchitz "Constitutionalism" 52-53 for instance, explains that socio-economic rights can be understood as a prerequisite for legitimacy of a constitution, particularly in societies where millions live in poverty, and that when courts in these societies enforce constitutional guarantees aimed at improving the lived realities of the poor against other branches of government, they are thus not acting in an undemocratic manner, but "are defending the conditions necessary for the very legitimacy of the constitutional order itself".

unjust consequences for South Africa's poor. The problematic manner in which environmental constitutionalism is in fact implemented is investigated with reference to trends discussed in chapter 3.

2.3 The goals of transformative constitutionalism

In this part I elaborate upon the goals of transformative constitutionalism, which form its normative core, and emerge to a great extent from South Africa's apartheid history.[40] Although emerging from the past, at the same time, transformative constitutionalism's goals are also forward-looking, as they tell us something about the kind of society South Africa aspires to be. The *Constitution*'s stated goals include the pursuit of a society based on democratic values, social justice and fundamental human rights.[41] The Constitutional Court in *Kaunda v President of the Republic of South Africa* highlighted the significance of these goals, and their relationship with the *Constitution*'s values:

> As a nation, we have committed ourselves to establishing "a society based on democratic values, social justice and fundamental human rights". The very first provision of the Constitution sets out the founding values upon which our constitutional democracy is founded. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms. Our democratic state is therefore committed to the advancement and protection of fundamental human rights. This commitment is immediately apparent in the Bill of Rights, which is the cornerstone of our constitutional democracy and which affirms democratic values of human dignity, equality and freedom.[42]

South Africa's project of transformative constitutionalism as articulated by Klare,[43] emerges from these goals and values, as well as from the various rights and other provisions flowing therefrom, which collectively illustrate self-conscious and overarching commitments to social transformation and reconstruction, participatory

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40 Bilchitz "Constitutionalism" 44.

41 Preamble of the *Constitution*, read with ss 1 and 7(1) and (2).

42 *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) (*Kaunda*) para 156.

43 Klare 1998 *SAJHR* 153-156. Klare explains that these (and other) transformative themes emerge from the *Constitution* such that, in sum "the South African Constitution in sharp contrast to the classical liberal documents, is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission". For Klare these features arguably render the *Constitution* "postliberal".

governance and substantive (redistributive), as opposed to formal equality. Further, transformative constitutionalism emerges from the positive duties imposed upon the state to uphold human rights, including rights to socio-economic entitlements and environmental protection.[44] Finally, transformative constitutionalism emerges, at least in part, from the *Constitution*'s capacity for horizontal application,[45] which is a transformative feature given that structural and systemic inequality and racism were entrenched not only in the public sphere, but also in private relationships. Put differently, the central features or goals of transformative constitutionalism are "the attainment of substantive equality, the realisation of social justice, the infusion of the private sphere with human rights standards and the cultivation of a culture of justification in public law interactions".[46] Pieterse's[47] account of transformative constitutionalism explains that:

> South African constitutionalism attempts to transform our society from one deeply divided by the legacy of a racist and unequal past, into one based on democracy, social justice, equality, dignity and freedom.

The late Justice Pius Langa[48] explained that the postamble to South Africa's interim *Constitution* offers a further basis for transformative constitutionalism by articulating the goal of the *Constitution* as:

> a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans.

Langa[49] argued that at the core of the change required by the *Constitution*'s transformative mandate was a shift to a truly equal society – one based on substantive equality. Langa[50] emphasised the social justice imperative of transformative constitutionalism in this context by acknowledging that only by

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44 Klare 1998 *SAJHR* 153-156.
45 Klare 1998 *SAJHR* 153-156.
46 Pieterse 2005 *SAPL* 161.
47 Pieterse 2005 *SAPL* 158.
48 Langa 2006 *Stellenbosch Law Review* 352.
49 Langa 2006 *Stellenbosch Law Review* 352-353.
50 Langa 2006 *Stellenbosch Law Review* 359.

achieving social justice (which would include levelling socio-economic playing fields) would South Africa be in a position to heal the divisions of the past and achieve "social reconciliation of the entire nation" post-apartheid.

According to Klare,[51] the transformative features of the *Constitution* illustrate that it is representative of "an empowered model of democracy", and ought to be construed as a "postliberal" document. It is postliberal since in contrast to a classical liberal document, it "embraces a vision of collective self-determination parallel to (not in the place of) its strong vision of individual self-determination".[52] Further, it contains a number of political commitments.[53] These political commitments include the *Constitution*'s call for "caring" and "communitarian" interpretations.[54] That "political commitments" as articulated by Klare can be attributed to the *Constitution* is, for Roux,[55] uncontroversial. Roux[56] argues that "no South African lawyer reading the *Constitution* conscientiously according to accepted conventions of legal reasoning could come to any other conclusion". However, Roux[57] rejects the idea that a postliberal reading of the *Constitution* is necessary in order to adopt this view. Several other accounts of transformative constitutionalism confirm the view that judges and lawyers ought to read the *Constitution* so as to pursue "an empowered model of democracy".[58] However, what this model means varies from one scholar to the next. Whilst Klare[59] argues that transformative constitutionalism requires "transformation vast enough to be inadequately captured by the phrase 'reform', but

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51 Klare 1998 *SAJHR* 152.
52 Klare 1998 *SAJHR* 153.
53 Klare 1998 *SAJHR* 153.
54 Klare 1998 *SAJHR* 152. Roux 2009 *Stellenbosch Law Review* 280-281.
55 Roux 2009 *Stellenbosch Law Review* 280-281.
56 Roux 2009 *Stellenbosch Law Review* 262. Roux is critical of some aspects of Klare's account of transformative constitutionalism, but agreed with this aspect thereof, and reasoned that the normative content of the transformative themes that Klare argues emerge from the *Constitution* are "uncontroversial". In his critique of Klare's account of transformative constitutionalism Roux rejects, in particular, the idea that a "post-liberal reading of the Constitution" is necessary or appropriate in order to advance transformative constitutionalism.
57 Roux 2009 *Stellenbosch Law Review* 266.
58 Pieterse 2005 *SAPL* 161-162; Langa 2009 *Stellenbosch Law Review* 352-354; Brickhill and Van Leeve 2015 *Acta Juridica* 142-143.
59 Klare 1998 *SAJHR* 150.

something short of or different from 'revolution' in any traditional sense of the word", Langa[60] felt that a "a social and economic revolution" was indeed required.

Although a divergence of views clearly exists around the scope, breadth and depth of the notion of transformative constitutionalism, the focus of this thesis is its social justice-orientation.[61] The various goals of, and justifications for transformative constitutionalism, viewed collectively, arguably contemplate the pursuit of social justice in a substantive sense (by promoting the equitable distribution of goods and bads in society in a way that recognises the equal moral worth and dignity of all human beings), and in a procedural sense (by providing for a participatory democracy that shows due recognition of all "people's membership of the moral and political community…and ensuring their inclusion in political decision-making").[62] Indeed, former Deputy Chief Justice of the Constitutional Court, Dikgang Moseneke,[63] describes social justice as "a vital component" of the rule of law under the *Constitution* that must be invoked as part of South Africa's post-apartheid democratic project "to push back the frontiers of racism, poverty and inequality".

According to Moseneke[64] the courts, in giving effect to the *Constitution*'s transformative mandate, ought to engage more fully with the rule of law as a tool for social justice. Similarly, Pieterse[65] explains that "the socio-economic upliftment of the majority of South Africans and the concomitant achievement of social justice may be classified as integral components of the constitutional transformation

60 Langa 2006 *Stellenbosch Law Review* 352.

61 Social justice-oriented approaches to transformative constitutionalism emerge from Sibanda 2011 *Stellenbosch Law Review*; Fish Hodgson 2015 *Acta Juridica*; Brickhill and Van Leeve 2015 *Acta Juridica*. Bilchitz 2010 *SAPL* argues that transformative constitutionalism ought also to be understood to require the recognition of animal rights. Although a social-ecological perspective on transformative constitutionalism arguably supports the recognition of rights for non-human life (i.e. rights of nature and animal rights), this topic falls outside of the scope of this thesis, and will form the subject of future research.

62 Agyeman *Just Sustainabilities* (e-Book).

63 Moseneke 2016 http://hsf.org.za/resource-centre/lectures/helen-suzman-memorial-lecture-2016-1.

64 Moseneke 2016 http://hsf.org.za/resource-centre/lectures/helen-suzman-memorial-lecture-2016-1.

65 Pieterse 2005 *SAPL* 160.

project". In practical terms, the pursuit of social justice mandated by the *Constitution* requires, for Pieterse[66], amongst other things:

> the redistribution of social capital along egalitarian lines, an explicit engagement with social vulnerability in all legislative, executive and judicial action and the empowerment of poor and otherwise historically marginalised sectors of society through proactive and context-sensitive measures that affirm human dignity.

Liebenberg[67] further points out the transformative character of the *Constitution* is not determined solely by reference to responding to the injustices of South Africa's apartheid past. The *Constitution*'s transformative project is also forward-looking and continuous.[68]

Over and above the ample scholarship focusing on transformative constitutionalism's social justice imperative, the Constitutional Court has embraced a social justice-oriented lens in a number of significant decisions, by acknowledging disproportionate impacts of hardship on poor and vulnerable South Africans.[69] However, as this thesis exposes, environmental and climate justice are yet to emerge for the judiciary as interconnected with social justice as an imperative of transformative constitutionalism.

The socio-ecological crisis of the Anthropocene, including the threat of a "climate apartheid", [70] arguably require that the judiciary pursues transformative constitutionalism's social justice imperative from a social-ecological perspective that appreciates the interconnected nature of social, environmental and climate justice. The closest the Constitutional Court has come to recognizing that well-functioning socio-ecological systems create the necessary conditions for the achievement of

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66 Pieterse 2005 *SAPL* 159.

67 Liebenberg *Socio-Economic Rights* 27.

68 Liebenberg *Socio-Economic Rights* 27.

69 See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) in the context of expropriation; *Kaunda* in the context of extradition; *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) in the context of the development of the common law of delict; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) in the context of the rights of gays and lesbians.

70 UN Special Rapporteur on extreme poverty and human rights 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E.

social justice[71] was in *Fuel Retailers* (although the court used the language of "environmental protection", rather than the phrase "well-functioning socio-ecological systems"). In the context of setting aside a decision by the state to approve a new petrol station, the court remarked that:

> 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.[72]

With reference to the Brundtland Report, the Constitutional Court regarded both development and ecological integrity as means to improve "the lot of humankind".[73] However, the court did not consider the disproportionate impacts of environmental destruction on the poor, or the social, environmental and climate injustices caused thereby.[74] That the court was not explicitly asked to do so is neither here nor there – the court had a constitutional duty to consider issues of impoverishment and vulnerability, and not simply "the lot of humankind" in general.[75]

The imagery of the Anthropocene creates the impetus for courts to acknowledge that humans are driving ecological destruction, and that behaviour causes human suffering, since when the environment suffers, people suffer, and the poor are first and hardest hit.[76] The conditions of the Anthropocene will set South Africa back in

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71 The deteriorating state of the biosphere and impacts thereof are symptoms of existing injustice, in that those responsible for environmental deterioration, and who benefit from it do not experience the impact of that deterioration, whereas poor communities experience least responsible for deterioration experience the impact thereof disproportionately (see for example Schlosberg and Collins 2014 *WIREs Clim Change*). Moreover, Schlosberg and Collins 2014 *WIREs Clim Change* point out that a deteriorating environment will serve to drive injustice. The biosphere refers to "that sphere that embraces all air, water and land on the planet in which all life is found" (Stockholm Resilience Centre 2015 https://www.stockholmresilience.org/research/research-news/2015-02-19-what-is-resilience.html).

72 *Fuel Retailers* para 44.

73 *Fuel Retailers* para 44.

74 In chapter 4 at 4.3 below, I illustrate the potential for courts to take judicial notice of such matters, rather than to overlook them.

75 See Pieterse 2005 *SAPL* 159 on the type of judicial action required in order to pursue transformative constitutionalism.

76 Watkins *Human Development Report 2007/2008* 73-89, Schlosberg and Collins 2014 *WIREs Clim Change*, Gonzalez 2015 *Santa Clara Journal of International Law*, Bratspies 2015 *Santa Clara Journal of International Law* 34.

the fulfilment of its project of transformative constitutionalism,[77] since as poverty and inequality deepen, it will become harder for South Africa to shift towards the kind of society envisaged by the *Constitution*: one founded on dignity, equality and social justice. Given this perspective, the pursuit of environmental justice (inclusive of climate justice) ought to be viewed as an imperative of the *Constitution*, and as embodied by the *Constitution*'s spirit, purport and objects. Empirical research in relation to the plight of impoverished communities in South Africa reveals the disproportionate impacts of environmental destruction on the poor.[78] For instance, the relationship between injustice and harmful environmental conditions is exposed in numerous reports of non-governmental organizations.[79] A plain reading of these reports suggests that the social, environmental and climate injustices exposed by these reports originate from past racist laws and practices, but are becoming more pressing in the current socio-ecological crisis and as a result of systemic maladministration and corruption. For example, recent droughts in South Africa's South Western Cape region resulting from the lowest rainfall years on record between 2015 and 2017[80] represent a severe threat to the realisation of the rights to water and sanitation for people living in the area, particularly for those occupying

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77 IPCC 2018 http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf.

78 The court is empowered, for instance, to take judicial notice of the statistics outlined in chapter 1 at 1.1 above.

79 The Harvard Law School International Human Rights Clinic 2016 http://hrp.law.harvard.edu/wp-content/uploads/2016/11/The-Cost-of-Gold-Full-Report-Final.pdf exposes that the environmental legacy of mining in South Africa is borne disproportionately by the poor. It is contributing to climate change and severe health problems for millions of poor South Africans. The Centre for Environmental Rights 2016 https://fulldisclosure.cer.org.za/2016/ reveals that corporates externalise the costs of their polluting activities that are then borne disproportionately by the poor. The International Federation for Human Rights 2017 https://www.refworld.org/docid/588b25884.html reveals that poor communities in the Blyvooruitzicht mining village are exposed to air containing harmful dust and contaminated water and soil suffer from higher levels of asthma, cancer and organ damage. Hallowes and Munnik 2006 http://www.groundwork.org.za/reports/gWReport2006.pdf illustrate that poor communities in the Vaal Triangle are disproportionately exposed to the environmentally devastating consequences of polluting industries, and are more vulnerable to the impacts of greenhouse gas emissions. Ntshona *et al* 2009 https://www.ecsecc.org/documentrepository/informationcentre/160909115823.pdf address the struggle of the Dwesa-Cwebe communities as conservation efforts serve to deprive impoverished people of access to marine life on which they depend for their livelihoods, which is depleting, in large part, due to climate change and commercial over exploitation, for which they are not responsible.

80 Otto and Wolski 2019 https://www.iol.co.za/news/opinion/global-warming-has-raised-risk-of-more-severe-droughts-in-cape-town-18656511.

the five hundred thousand indigent households accounted for in the Western Cape as at 2016.[81] The drought risk has been found to have increased substantially due to global warming.[82] As this thesis argues in chapter 4, this kind of evidence ought to be pertinently brought to the attention of the courts in future environmental law disputes so as to facilitate a socio-ecological systems perspective to adjudication more responsive to the conditions of the Anthropocene.

In this part I have described transformative constitutionalism's goals, and argued that a social-ecological perspective ought to be adopted in relation to the *Constitution*'s social justice imperative which views social, environmental and climate justice as interrelated. The concept of transformative adjudication: the manner in which judges are able to participate in South Africa's project of transformative constitutionalism, is discussed in the next part of this chapter.

2.4 Transformative adjudication

In this part I elaborate upon the judiciary's capacity to pursue the transformative goals of the *Constitution* through transformative adjudication. When Klare[83] coined the term transformative constitutionalism he indicated that the *Constitution* would require a more politicised understanding of adjudication and the rule of law than under apartheid: one that could co-exist with and support the *Constitution*'s call for fundamental change in South African society. Pieterse[84] subsequently pointed out that transformative constitutionalism "poses the most significant challenge to the…judiciary and legal community", since:

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81 City of Cape Town 2017 "Socio-Economic Profile" https://www.westerncape.gov.za/assets/departments/treasury/Documents/Socio-economic-profiles/2017/city_of_cape_town_2017_socio-economic_profile_sep-lg_-_26_january_2018.pdf reveals that as at 2016 some 516 321 households in the Western Cape were indigent (comprising a family earning a combined income of less than R3,200 per month) and that this number was growing.

82 Otto and Wolski 2019 https://www.iol.co.za/news/opinion/global-warming-has-raised-risk-of-more-severe-droughts-in-cape-town-18656511.

83 Klare 1998 *SAJHR* 166-171.

84 Pieterse 2005 *SAPL* 164.

> Constitutional provisions come alive mainly through interpretation and by being applied in particular concrete contexts. This becomes controversial when the provisions that are to be interpreted and applied require that those tasked with interpretation and application aspire to achieve the political goals embodied by the provisions.

The scholarly and judicial response to the challenge articulated by Klare[85] and Pieterse[86] is that under the *Constitution*, judges are required to do their work differently.[87] Drawing on the metaphor that South Africa's democratic transition represented "a bridge from authoritarianism to a new culture of justification" in which exercises of power ought to be justified, Klare[88] reasons that as part of South Africa's project of transformative constitutionalism, judges need to "innovate and model intellectual and institutional practices appropriate to a culture of justification". This means that judges must engage in transformative adjudication, which connotes legal reasoning and interpretation in a manner that serves to advance the *Constitution*'s transformative purposes.[89] According to Du Plessis,[90] to the extent that transformative adjudication entails statutory interpretation, transformative constitutionalism must operate as an interpretive mindset and style that pursues "optimum realization of the rights in the Bill of Rights". Moseneke[91] argues that although it will be difficult to accomplish, transformative adjudication "must occur" in pursuit of the *Constitution*'s values. This kind of adjudication is further explicitly required by section 39(2) of the *Constitution*, which requires that the courts actively promote constitutional values in statutory interpretation.[92] Currie and De Waal[93] explain:

> Section 39(2) places a general duty on every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. Statutory interpretation must positively promote the Bill of Rights and other provisions of the Constitution, particularly the fundamental values in s1. In other words, the legislature is presumed to have intended to

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85 Klare 1998 *SAJHR* 166-171.
86 Pieterse 2005 *SAPL* 164.
87 Moseneke 2002 *SAJHR* 318.
88 See Klare 1998 *SAJHR* 147, reflecting on Mureinik 1994 *SAJHR* 32.
89 Hoexter 2008 *SAJHR* 286-287.
90 Du Plessis "Interpretation" 32/80.
91 Moseneke 2002 *SAJHR* 315.
92 Liebenberg *Socio-Economic Rights* 98.
93 Currie and De Waal "Application" 57.

> further the values underlying the Bill of Rights by passing legislation that is in accordance with the Bill of Rights, unless the contrary is established.

As a general rule, parties to a dispute must themselves identify and raise issues to be determined by a court.[94] However, transformative adjudication pursuant to section 39(2) of the *Constitution* may require that the courts consider relevant norms *mero motu* (i.e. of their own accord or own volition) where the parties to a dispute have not explicitly raised them.[95] Points may be raised by the court *mero motu* where they have been sufficiently canvassed and established by the facts, and where a determination on the point is necessary for the proper adjudication of a case.[96] The court is then entitled to request that the parties make argument in respect of the point raised.[97]

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* (*Bato Star*) the court, adopting a transformative approach with reference to section 39(2) of the *Constitution*, was prepared to adjudicate an application for judicial review on the basis of section 6 of the *Promotion of Administrative Justice Act* 3 of 2000 (*PAJA*), even though *PAJA* had not been pleaded.[98] The court did so since it was "clear from the facts alleged by the litigant that the section is relevant and operative", but noted that it was "desirable for litigants…to identify clearly…the legal basis of their cause of action".[99] In *CUSA v Tao Ying Metal Industries* the Constitutional Court found in the context of constitutional adjudication that "[w]here a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to

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94 *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) (*Barnard*) paras 217-218.

95 See *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC) (*Link Africa*) paras 33-36. As I discuss in chapters 3 and 4, relevant norms may include substantive provisions in applicable environmental legislation or rights that are interrelated to or mutually reinforcing of a right on which the parties have placed reliance in the litigation.

96 *Barnard* paras 217-218.

97 *Barnard* paras 217-218.

98 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) (*Bato Star*) paras 25-27.

99 *Bato Star* para 27.

deal therewith".[100] This was confirmed in *DE v RH*.[101] The Supreme Court of Appeal had raised, *mero motu*, whether a claim for loss of consortium arising from adultery ought to remain part of our law as a matter of public policy.[102] In the Constitutional Court, in considering whether or not the matter raised a constitutional issue, it was found:

> The question raised *mero motu* by the Supreme Court of Appeal engages the development of common law in accordance with public policy. Public policy is now infused with constitutional values and rights contained in the Constitution.[103]

The Constitutional Court was prepared to adjudicate the point raised *mero motu* by the Supreme Court on the basis that it was "constitutional in nature" and "an arguable point of law of general public interest".[104] In *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* (*Link Africa*) the Constitutional Court, in the course of statutory interpretation, engaged *mero motu* with the constitutionality of a provision with reference to the right to property provided for in section 25 of the *Constitution*.[105] The Constitutional Court did so on the basis that in terms of section 39(2), all provisions in the *Bill of Rights* which might be relevant, had to be considered.[106]

2.4.1 The political nature of transformative adjudication through substantive reasoning

Legal liberalism's objection to transformative adjudication is its overtly "political" nature.[107] In a liberal legal order judges ought not to engage in a value-laden

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100 *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) para 68.
101 *DE v RH* 2015 (5) SA 83 (CC) (*DE v RH*).
102 *DE v RH* para 4.
103 *DE v RH* para 9.
104 *DE v RH* para 10.
105 *Link Africa* paras 33-36.
106 *Link Africa* paras 35-36 and 114-119. Notwithstanding this finding, the Constitutional Court frequently neglects to consider rights that could be relevant. For instance, as discussed in chapter 3 with reference to Fuo 2013 *PER*, in *Grootboom* the court overlooked the relevance of s 24 of the Constitution (the environmental right), and focused primariliy on s 26 (the right to adequate housing).
107 Moseneke 2002 *SAJHR* 315-317.

adjudicative style.[108] However, commenting on the role of judges under a transformative constitution, Langa[109] has responded to this objection by pointing out that:

> judges bear the ultimate responsibility to justify their decisions not only by reference to authority but also by reference to ideas and values. This approach to adjudication requires an acceptance of the politics of the law. There is no longer place for assertions that law can be kept isolated from politics.

Hoexter[110] agrees. She argues further that it is "inevitable" and "normal" for judges to be influenced by norms and values in the exercise of their discretion – they are "social engineers, whether they know it or not".[111] The *Constitution* simply makes the choice of norms and values available to South African judges explicit, and requires, in pursuit of a culture of justification, that they make their choices consciously and openly.[112] Pursuant to transformative adjudication, judges are empowered to approach interpretation and legal reasoning in a manner that embraces transformative constitutionalism as an interpretive mindset and style, as well as a basis for a substantive, social justice-oriented model of adjudication.[113]

According to Quinot[114] substantive reasoning is "a key element of transformative constitutionalism" and a function of transformative adjudication. In the context of the adjudication of rights violations it has been explained that a substantive reason includes "a moral, economic, political, institutional or other social consideration".[115] Substantive and purposive legal reasoning and interpretation is arguably best suited to the fulfilment of the transformative goals of the *Constitution*. It entails that:

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108 Moseneke 2002 *SAJHR* 315-317.
109 Langa 2009 *Stellenbosch Law Review* 353.
110 Hoexter 2008 *SAJHR* 283-284. See also Penfold 2019 *SALJ* 87-88.
111 Hoexter 2008 *SAJHR* 283-284.
112 Hoexter 2008 *SAJHR* 283-284.
113 Du Plessis "Interpretation" 32/42.
114 Quinot 2010 *CCR* 113.
115 Cockrell 1996 *SAJHR* 5.

> Judges are thus obliged openly and honestly to tell us what the substantive bases of their decisions are, including what values, policy objectives or political considerations truly motivated a particular outcome.[116]

Substantive reasoning also calls for a "contextual approach" to legal interpretation.[117] Courts are empowered to adopt this approach by section 39(2) of the *Constitution*, which permits the re-interpretation of legal provisions as "human rights-creating or -enhancing provisions, as far as their language and structure will reasonably allow".[118] A contextual approach requires that:

> Decisions on violation of constitutional rights must be seen in the context of socio-economic conditions of the groups concerned in the light of social patterns, power relations and other systematic forms of deprivation, which may be relevant. Also the historical context of the case must be heard.[119]

In *Link Africa* the court pointed out that the context could "include other relevant provisions of the statute which may reveal the purpose of the interpreted section", thus opening the door for the court to consider other statutory provisions *mero motu* so as to give effect to section 39(2) of the *Constitution*.[120]

A good example of this kind of reasoning emerges from the separate concurring judgment of Ngcobo J in *Bato Star*, in which the importance of transformation in interpreting the *Marine Living Resources Act* 18 of 1998 (*MLRA*) was emphasised.[121] *Bato Star* concerned, amongst other things, the proper approach to interpreting section 2(j) of the *MLRA*, which imposes a duty upon the Minister when exercising power under the *MLRA* to have regard to the need to restructure the fishing industry and address historical imbalances, so as to pursue equity in the industry. Ngcobo J insisted that the *MLRA* be interpreted in a contextual manner with emphasis on the

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116 Quinot 2010 *CCR* 113.
117 Moseneke 2002 *SAJHR* 318.
118 Le Roux 2009 *Stellenbosch Law Review* 46.
119 Moseneke 2002 *SAJHR* 318. See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) (*Hyundai*) paras 21-23.
120 *Link Africa* para 33.
121 *Bato Star* paras 69-115.

Constitution's commitment to equality as a necessity to overcome decades of systemic racial discrimination.[122] Ngcobo J further noted, in view of section 39(2) of the *Constitution*, that the "emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous".[123]

The Constitutional Court has also embraced a contextual approach in litigation concerning the right to equality.[124] In her critique of the Constitutional Court's equality jurisprudence, Albertyn[125] points out that "[s]ome of the Court's most detailed contextual analyses concern the egregious impact of apartheid and racism in our society". In addition, Albertyn[126] explains that "much of the contextual analysis is derived from judicial notice", a phenomenon upon which I elaborate in the context of the implementation of environmental constitutionalism in chapter 4 below.

2.4.2 The need to overcome formalism

Formalism connotes unduly formal, conceptual, technical or mechanistic reasoning that obscures questions about the underlying substance or purpose of law.[127] This approach to legal reasoning discourages judges from considering the extent to which laws are pliable and plastic.[128] Formalism is also problematic because it can serve to obscure neo-liberal capitalist and other influences on legal reasoning.[129] It can have this effect by "denying the [moral and political] choice that is open to the decision-maker and presenting the outcome as inexorable".[130] During apartheid judges

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122 *Bato Star* paras 72-77.
123 *Bato Star* para 90.
124 See for example *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) and *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) discussed in Albertyn 2007 *SAJHR*.
125 Albertyn 2007 *SAJHR* 273.
126 Albertyn 2007 *SAJHR* 274.
127 See for example Hoexter 2004 *Macquarie Law Journal* 168; Hoexter 2008 *SAJHR*; Quinot 2010 *CCR*; Langa 2006 *Stellenbosch Law Review*.
128 Klare 1998 *SAJHR* 171.
129 Penfold 2019 *SALJ* 87; Sibanda 2011 *Stellenbosch Law Review* 494-499; Murcott 2015 *SALJ* 904-905.
130 Penfold 2019 *SALJ* 87.

routinely engaged in formalistic reasoning, and formalism became rooted in South African legal culture.[131]

It is generally accepted that formalism is inconsistent with South Africa's project of transformative constitutionalism post-apartheid.[132] According to Cockrell,[133] an aspect of formalism is a formal vision of law, whereas what transformative constitutionalism requires is arguably a substantive vision of the law in pursuit of social justice. Whilst under a formal vision of the law "the hard edges of legal rules were seen to screen off consideration of substantive reasons" by judges, a substantive vision of the law entails accepting that the consideration of substantive reasons is now constitutionally mandated.[134] Rejecting formalism, Langa[135] called for a shift, post-apartheid, in legal culture on the part of judges, since:

> The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.

Despite the call to shift away from formalism post-apartheid, it arguably remains pervasive in South African legal culture to a considerable degree, particulalry in the context of judicial review of public power on procedural grounds, as will be discussed in chapter 3 with reference to the adjudication of environmental law disputes.[136] According to Quinot:[137]

> Administrative law…still suffers from excessive conceptualism and consequently formalism. It seems that the fundamental changes in substantive law introduced by the Constitution have not by themselves

131 Hoexter 2008 *SAJHR* 285-286. Klare 1998 *SAJHR* 172 defines legal culture loosely to refer to lawyers' "repertoire of argumentative moves, rhetorical devices and intellectual instincts".
132 Penfold 2019 *SALJ* 92; Klare 1998 *SAJHR* 170.
133 Cockrell 1996 *SAJHR* 10.
134 Cockrell 1996 *SAJHR* 10.
135 Langa 2006 *Stellenbosch Law Review* 353.
136 Sibanda 2011 *Stellenbosch Law Review* 488-494; Quinot 2010 *CCR* 117-126. See chapter 3 at 3.4 below.
137 Quinot 2010 *CCR* 118.

> managed to shift adjudication in administrative law towards a transformative methodology, which endorses substantive reasoning that openly acknowledges the policy and political motivations behind particular outcomes.

More recently, Penfold[138] illustrates that whilst some judicial decisions in the context of administrative law are "imbued with substantive reasoning", others continue to "stray into formalism". According to Hoexter,[139] *KwaZulu-Natal Joint Liaison Committee v MEC, Department of Education, KwaZulu-Natal* is an example of an "anti-formalist" judgment in the context of the judicial review of public power, representing the exception, rather than the rule.

A form of judicial avoidance (also referred to as "judicious avoidance" or minimalism) is sometimes invoked to justify formalism and limit the kind of substantive and purposive legal reasoning and interpretation that transformative adjudication requires.[140] Dugard and Roux[141] describe the Constitutional Court as having "settled into" an adjudicative style that demonstrates "a reluctance on the part of the Court to pronounce on any issue that does not have to be decided for purposes of settling the case". Although the Constitutional Court has been progressive and substantive in its reasoning in some contexts, such as litigation concerning eviction and homelessness,[142] overall Dugard and Roux[143] observe a failure "to pursue a rights-based analysis of the content of social rights and the nature of the state's obligations". This approach can serve to hinder transformative adjudication in the context of statutory interpretation when judges construe the range of issues that have to be decided for purposes of settling the case too narrowly.[144] This is because judges often do not reach important questions about

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138 Penfold 2019 *SALJ* 111.

139 Hoexter 2015 *SALJ* 211-218, commenting on *KwaZulu-Natal Joint Liaison Committee v MEC, Department of Education, KwaZulu-Natal* 2013 (4) SA 262 (CC) (*KZN JLC*).

140 Dugard and Roux "The Record" 110; Bilchitz 2010 *CCR* 51; Quinot 2010 *CCR* 115, 134.

141 Dugard and Roux "The Record" 110.

142 See for instance *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), discussed in Dugard and Roux "The Record" 114-116.

143 Dugard and Roux "The Record" 115-116. See also generally, Bilchitz 2010 *CCR*.

144 Dugard and Roux "The Record" 110.

the content of constitutional rights that ought to inform the statutes being interpreted, or about the social justice issues underpinning litigation.[145]

This thesis argues that judicial avoidance or minimalism ought not to be invoked as a basis for the judiciary to engage in formalistic reasoning or to shirk its responsibility to fulfil its transformative mandate through transformative adjudication.[146] Correctly understood, judicial avoidance requires substantive engagement with constitutional values, and the indirect (as opposed to direct) application of rights and values where possible.[147] Avoidance does not entail that constitutional issues be formalistically avoided altogether.[148] As Currie and De Waal[149] explain:

> In principle, and where possible, a legal dispute should be decided in terms of the existing legal principles or rules of ordinary law, properly interpreted or developed with reference to the values contained in the Bill of Rights, prior to any direct application of the Bill of Rights to the dispute. When it comes to statutory law the principle simply means that a court must first attempt to interpret legislation in conformity with the Bill of Rights (indirect application) before considering a declaration that the legislation is in conflict with the Bill of Rights and invalid.

This thesis demonstrates in chapter 3 that both formalism and judicial avoidance (of the kind described by Dugard and Roux)[150] are prevailing features in the context of the adjudication of environmental law disputes. A necessary shift to a progressive legal culture is, to a great extent, yet to materialise. However, legal culture is not fixed. Legal education and improved "constitutional literacy" can contribute to the necessary shift in legal culture.[151] Further, until the necessary shift to a progressive legal culture is readily discernible, lawyers and judges must be continuously reminded of the need for that shift, given the insidious nature of South Africa's

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145 See chapter 3 at 3.5, where it is argued that this style of reasoning contributes to the courts' failure to properly interpret s 24 of the *Constitution*.
146 I agree with Bilchitz 2010 *CCR* 52.
147 Currie and De Waal "Application" 24-25.
148 Currie and De Waal "Application" 24-25.
149 Currie and De Waal "Application" 64.
150 Dugard and Roux "The Record" 110.
151 See Fish Hodgson 2015 *Acta Juridica* on the concept of constitutional literacy. See, for instance, Langa 2006 *Stellenbosch Law Review* on legal education as a means to pursue South Africa's project of transformative constitutionalism.

formalist legal culture, and that its participants are invariably "so steeped in it as to take it for granted".[152] This thesis offers such a reminder, and proposes, in chapter 4, transformative environmental constitutionalism as a means to shift to a more progressive legal culture.

2.4.3 Transformative adjudication and the separation of powers doctrine

The remainder of this part of the chapter is devoted to addressing the question whether and to what extent the separation of powers operates to constrain judges engaged in transformative adjudication. I do so to establish that the judiciary is institutionally competent to engage in transformative adjudication. Fish Hodgson[153] contends that more than 20 years after democracy, problematically, the content of a South African model of separation of powers remains largely unclear and highly contested amongst the judiciary. He notes that "it seems to appear, disappear, reappear and evolve at the Court's convenience and whim".[154] However, some basic ideas about the content of separation of powers in the South African context do emerge from scholarship, the judiciary and the constitutional design.[155] Proceeding from the premise that there is no universal model of separation of powers, and that each model ought to be fashioned with reference to the relevant historical context, Fish Hodgson[156] argues that:

> the distinctly South Africa conception of separation of powers is designed to eliminate inequality and eradicate poverty with obvious and dramatic implications for property relations: a large-scale transfer of wealth from white people to black people is one essential part of this project.

This model of separation of powers is thus radically different from a liberal construction of separation of powers embraced by other countries, and contemplates

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152 Hoexter 2008 *SAJHR* 286.

153 Fish Hodgson 2018 *SAJHR* 59.

154 Fish Hodgson 2018 *SAJHR* 59.

155 Fish Hodgson 2018 *SAJHR* 68-89.

156 Fish Hodgson 2018 *SAJHR* 66, where the author agrees with the view expressed by Davis 2016 *SALJ* 264. See also Klare 2015 *Stellenbosch Law Review* 446.

an activist role for each branch of government to achieve these goals.[157] The South African model is implicitly incorporated in the *Constitution* in an "ever-present" manner, through a vast range of mechanisms aimed at setting out the powers of the three branches of the state in a manner that ensures accountability, responsiveness and openness.[158] Fish Hodgson[159] reasons that:

> because the entirety of the state machinery is constitutionally obliged to respect, protect, promote and fulfil all rights in the Bill of Rights, the constitutional conception of separation of powers is never disconnected from the Constitution's ambition to combat poverty and inequality.

In this sense separation of powers incorporates a normative component – it is not merely about controlling power, or ensuring efficiency, but also about social justice.[160] Further, the South African model of separation of powers does not envisage a "pure" separation of the judiciary from the legislature and executive.[161] Rather, it envisages a flexible or fluid relationship, including a system of checks and balances, such that the judicial branch is required to intrude on the domain of the legislature and executive in order to ensure that they do not abuse their power, and to ensure the fulfilment of the rights enshrined in the *Constitution*.[162] Pursuant to this flexible or "fluid" relationship, the judiciary is empowered to "interfere" with the exercise of power by the other branches so as to uphold the values of the *Constitution* through transformative adjudication.[163] In the context of responding to separation of powers objections to the enforcement of social rights, Gargarella *et al*[164] explain:

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157 Fish Hodgson 2018 *SAJHR* 63, 66-68; Davis 2016 *SALJ* 265-266 discussing the conception of separation of powers that emerges from the dissenting opinions in *Obergefell v Hodges, Director, Ohio Department of Health* 576 US Supreme Court (2015).

158 Fish Hodgson 2018 *SAJHR* 73; *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

159 Fish Hodgson 2018 *SAJHR* 73.

160 Fish Hodgson 2018 *SAJHR* 88-89; Moseneke 2016 http://hsf.org.za/resource-centre/lectures/helen-suzman-memorial-lecture-2016-1.

161 Gargarella *et al* "Courts and Social Transformation" 260. See also Liebenberg *Socio-Economic Rights* 66-71.

162 Gargarella *et al* "Courts and Social Transformation" 260; Fish Hodgson 2018 *SAJHR* 76-77; Davis 2016 *SALJ* 267; Liebenberg *Socio-Economic Rights* 68-71.

163 Gargarella *et al* "Courts and Social Transformation" 260; Fish Hodgson 2018 *SAJHR* 76-77; Davis 2016 *SALJ* 267; Liebenberg *Socio-Economic Rights* 68-71.

164 Gargarella *et al* "Courts and Social Transformation" 260.

> the system of checks and balances is best understood as being integral to the very notion of separation of powers, such that the one cannot be said to exist without the other…[and] the mere fact that the judicial enforcement of social rights may and does result in judges interfering with the political branches' domains of power does not constitute a violation of the separation of powers doctrine. On the contrary, for a constitutional system based on this principle to work, judges *must* 'interfere' in the affairs of the other branches – reproaching them for abusing their power, signalling their mistakes, and generally suggesting better alternatives to chosen courses of conduct.

The South African constitutional design provides that the judiciary is an independent branch of the state, subject only to the *Constitution* and the law.[165] Liebenberg[166] explains that the *Constitution* thus enables the judiciary to ensure that the legislature and executive act within the law and fulfil their constitutional responsibilities, and that transformative adjudication is the appropriate manner in which they should do so.[167] When engaged in legal reasoning, judges ought not to be restrained to the extent that they fail to provide adequate protection for individual's rights, and fail to ensure that the state fulfils its socio-economic obligations.[168] Judges must, however, reason in a manner that respects their own institutional role, as well as the roles of the legislature and the executive respectively.[169] Langa[170] explained that the separation of powers means that when judges are engaged in transformative adjudication they may not completely

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165 S 165 of the *Constitution*. Examples of the Constitutional Court articulating and giving effect to this constitutional design in response to concerns about corruption and mismanagement in the executive branch of the state include: *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 (2) SACR 442 (CC); *Black Sash Trust v Minister of Social Development* 2018 (12) BCLR 1472 (CC); *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) (*EFF v Speaker of the National Assembly*). In para 1 of *EFF v Speaker of the National Assembly* the court stated:

> One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the *Constitution* as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.

166 Liebenberg *Socio-Economic Rights* 71.

167 Liebenberg *Socio-Economic Rights* 71-75. The author uses the phrase "promoting a transformative jurisprudence" rather than "transformative adjudication", but argues that this must be done in a "substantive and transparent" manner that evaluates the rights and values at stake.

168 Lentz 2004 *SAJHR* 567.

169 Liebenberg *Socio-Economic Rights* 71.

170 Langa 2006 *Stellenbosch Law Review* 357.

disregard the text they are interpreting and applying. To do so would be to enter the domain of the legislature.[171] However, judges remain vested with law making powers as part of South Africa's model of separation of powers where it is necessary to bring the law in line with the rights and values provided for in the *Constitution*.[172] The model of separation of powers outlined above supports, rather than constrains transformative adjudication and substantive legal reasoning aimed at the pursuit of social justice:

> A radical approach to separation of powers is about, in specific contexts, expanding the ability of the state – seen as a whole – to act as vehicle for the redress of poverty and inequality.[173]

2.5 Environmental constitutionalism in South Africa

Environmental constitutionalism – the inclusion in constitutional texts of provisions aimed at environmental protection that are enforceable in the courts – can assist in procuring "the health of the global environment [as] a long-term value that should be held to constrain those who would allow environmental degradation to gain a perceived short-term benefit".[174] Kotzé[175] argues that in the Anthropocene, environmental constitutionalism ought to be given effect through "robust constitutional provisions that seek to protect socioecological interests in society". He goes on to summarise some of the advantages of environmental constitutionalism of this kind, which include: first, affording environmental care elevated, entrenched constitutional protection which goes beyond mere statutory regulation; secondly, providing a constitutional architecture for environmental governance that allows for improved environmental protection "through various constitutional features such as fundamental rights and duties, the rule of law, and aspirational values such as ecological sustainability", and thirdly, the pursuit of a paradigm shift in society that sees the state and people in a state adopt an environment-centred approach to their cultural, political, social, and legal experiences and practices, and that entrenches

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171 Langa 2006 *Stellenbosch Law Review* 357.
172 Langa 2006 *Stellenbosch Law Review* 357.
173 Fish Hodgson 2018 *SAJHR*.
174 May and Daly *Global Environmental Constitutionalism* 48.
175 Kotzé "Six Constitutional Elements" 14.

"environmental care as a common ideology and moral/ethical obligation".[176] Some of these advantages of environmental constitutionalism have been acknowledged in South African courts. For instance, in *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs* (*BP*) it was held that:

> By virtue of Section 24, environmental considerations, often ignored in the past, have now been given rightful prominence by their inclusion in the Constitution.[177]

In *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (*Save the Vaal*) the court remarked that:

> Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.[178]

In this part I elaborate upon environmental constitutionalism in South Africa. I do so to describe the juridical tools available to judges in the adjudication of environmental law disputes from a rights-based perspective, which are required to be implemented in a manner that pursues transformative constitutionalism's goals, through transformative adjudication, discussed above. A critical appraisal of these tools and the extent to which they are implemented so as to pursue transformative constitutionalism and transformative adjudication follows in chapters 3, 4 and 5.

The laws that potentially operate to implement environmental constitutionalism in South Africa fall into three broad categories, all of which are rights-based. Importantly, although they impose obligations primarily on the state, they are also capable of imposing obligations on private citizens pursuant to section 8 of the

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176 Kotzé "Six Constitutional Elements" 18.

177 *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) (*BP*).

178 *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA) 719 C-D (*Save the Vaal*).

Constitution.[179] The categories of laws are first those that are *explicitly* aimed at the protection of the environment or components thereof and that give effect to the environmental right. The second category of laws includes procedural rights and the laws giving effect thereto *when* they operate to enable environmental protection through mechanisms requiring transparent, lawful, fair and reasonable environmental decision-making. The third category of laws includes substantive rights such as rights to socio-economic entitlements like water, food and housing, and rights that protect cultural practices, and the laws giving effect to these rights. This category of laws is aimed at ensuring that all people in South Africa live, in a substantive sense, in a dignified manner.[180] Although they are not explicitly concerned with environmental protection, they are interconnected therewith, in the sense that a healthy environment is a prerequisite for the fulfilment thereof. For instance, people's right to access to water to meet their basic needs cannot be fulfilled if their water is polluted. I pause to emphasize that the second and third categories of laws respectively are relevant in this thesis to the extent that they are (or ought to be) invoked to operate in conjunction with, or as interconnected with the laws explicitly aimed at environmental protection in the first category. Nonetheless, it is apparent that a plethora of laws is potentially relevant in the implementation of environmental constitutionalism in South Africa in the resolution of environmental law disputes. I elaborate upon the three categories next.

2.5.1 Category 1: Laws explicitly aimed at the protection of the environment and/or components

The constitutional environmental right provides that:

> 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 legislative and other measures that –

[179] See generally Bhana 2013 *SAJHR*; Currie and De Waal "Application" 41. See also Kidd *Environmental Law* 30 and Glazewski 1999 *Acta Juridica* 10 on the horizontal application of the environmental right.

[180] On the links between rights aimed at protecting dignity and environmental rights see generally Daly and May 2016 *Journal of Human Rights and the Environment*.

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.

It offers a broad statement of objectives in relation to the protection of the environment, with reference to which all other environmental laws must be understood in the implementation of environmental constitutionalism in South Africa.[181] Kotzé and Du Plessis[182] point out that:

> The entire South African environmental law and governance framework is premised on the environmental right. This right is therefore the rationale behind, justification for, and foundation and impetus of environmental governance in South Africa.

The environmental right is sometimes regarded as a socio-economic right, to the extent that it is concerned with ensuring a basic quality of life and human welfare.[183] As a constitutionally embodied environmental provision, the environmental right is more durable than non-entrenched rights or principles, its normative function is superior to other instruments, and it offers a compelling mandate for compliance by the public and the state.[184] According to May and Daly,[185] following their comparative assessment of environmental rights worldwide, the environmental right contained in the *Constitution* is an example of one of the most "expansive" and "sophisticated". For instance, the right provides for the protection of well being, which encompasses "the essence of environmental concern, namely a sense of environmental integrity; a sense that we ought to utilise the environment in a morally responsible and ethical manner".[186]

Du Plessis[187] points out that well being "is necessary to living meaningfully beyond simply being healthy", such that the incorporation of the term in the environmental

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181 May and Daly *Global Environmental Constitutionalism* 42. S 24 of the *Constitution*.
182 Kotzé and Du Plessis 2010 *Journal of Court Innovation* 166.
183 Fuo 2013 *PER* 12/487-13/487; Du Plessis 2011 *SAJHR* 282.
184 May and Daly *Global Environmental Constitutionalism* 33. For a discussion on the limitations of the environmental right see Kidd "Transformative Constitutionalism" 118-125.
185 May and Daly *Global Environmental Constitutionalism* 70.
186 Glazewski 1999 *Acta Juridica* 8.
187 Du Plessis 2011 *SAJHR* 291.

right could be viewed as requiring human flourishing and the pursuit of justice in a manner that enables people to achieve and fulfil their capabilities.[188] The environmental right also provides for inter- and intra-generational equity in the context of environmental protection: the environment is to be protected for the benefit of both present and future generations,[189] which I will argue in chapter 4 involves the pursuit of social, environmental and climate justice as interconnected concerns. Inter-generational equity means that "the present generation should ensure that the health, diversity and productivity of the environment is maintained for the benefit of future generations".[190] Intra-generational equity focuses on equity within a single generation.[191]

The environmental right provides for sustainable development, a (often contested) notion linked to the notions of inter- and intra-generational equity.[192] The right requires the introduction of legislative measures aimed at, among other things, securing *ecologically* sustainable development and use of natural resources while promoting only justifiable economic and social development. In *Fuel Retailers* the court acknowledged that section 24 recognises that environmental considerations must be balanced with socio-economic considerations "through the ideal of sustainable development".[193] As discussed in chapter 4, the judiciary is yet to engage in a meaningful way with the *Constitution*'s emphasis on ecological sustainability, however.[194]

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188 See Agyeman *Just Sustainabilities* (e-Book) on a "capabilities approach to environmental justice" and Sen *The Idea of Justice* 244: a capabilities approach to justice is concerned with "people's ability to live the kinds of lives they have reason to value".

189 See for instance *Earthlife* para 82, where commenting on s 24 of the *Constitution* the court remarked that:

> Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures protect the environment "for the benefit of present and future generations" and hence adequate consideration of climate change. Short-term needs must be evaluated and weighed against long-term consequences.

190 Harding 2006 *Desalination* 235.

191 Harding 2006 *Desalination* 236. See also Field 2006 *SALJ* 417-419.

192 Field 2006 *SALJ* 411-417; Kotzé 2014 *Journal of Energy and Natural Resources Law* 136-138, 150-154; Adelman "Sustainable Development Goals" 21-27.

193 *Fuel Retailers* para 45.

194 There is also limited scholarship on the significance of the *Constitution*'s emphasis on ecological sustainability. Feris 2008 *CCR* 252 briefly engages with the idea. See also Murcott "Introducing Transformative Environmental Constitutionalism" 291-292.

Glazewski[195] points out that the environmental right must be seen in the context of various policies, principles, legislation and case law that have emerged in post apartheid South Africa. Perhaps one of the most significant policies is the *White Paper on Environmental Management Policy for South Africa, 1998*.[196] Although not judicially enforceable,[197] the White Paper is a useful starting point for understanding the vision, principles and strategic goals and objectives, as well as regulatory approaches the government ought to invoke for environmental governance in South Africa. The *White Paper*'s point of departure is socio-ecological in that it defines its subject matter, the environment, as "the biosphere in which people and other organisms live",[198] thus recognising that humans and the environment are "strongly coupled to the point that they should be conceived as one social-ecological system".[199] The *White Paper* goes on to explain that "people are part of the environment and are at the centre of concerns for its sustainability".[200]

The *White Paper* arguably sought to align environmental governance with South Africa's project of transformative constitutionalism, not least by connecting environmental governance and protection with the pursuit of social justice. For instance, it links the ideas of environmental care to human flourishing in that one of its goals is "to unite the people of South Africa in working towards a society where all people have sufficient food, clean air and water, decent homes and green spaces in their neighbourhoods enabling them to live in spiritual, cultural and physical harmony with their natural surroundings".[201] The *White Paper* further recognises that this goal cannot be achieved without protecting the environment as a precondition for the attainment of social justice. It states that the state must pursue

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195 Glazewski 1999 *Acta Juridica* 8.

196 White Paper on Environmental Management Policy for South Africa Gen Not 749 in GG 18894 of 15 May 1998 (hereafter the White Paper).

197 Fuo 2013 *PER* 5/487-7/487 describes White Papers as examples of "political policies" as opposed to judicially enforceable "executive policies".

198 White Paper 9.

199 Stockholm Resilience Centre 2015 https://www.stockholmresilience.org/research/research-news/2015-02-19-what-is-resilience.html. The terms "socio-ecological system" and "social-ecological are used interchangeably. See also Fischer *et al* 2015 *Current Opinion in Environmental Sustainability* 144-148.

200 White Paper 9.

201 White Paper 13.

"a new paradigm of sustainable development" that addresses, among other things: "equitable access to land and natural resources", "the integration of economic development, social justice and environmental sustainability", "public participation in environmental governance", and "the custodianship of our environment".[202] The *White Paper* acknowledges that section 24 of the *Constitution* establishes a constitutional imperative pursuant to which the state is under "a legal duty to act as a responsible custodian of the nation's environment".[203]

In South Africa most environmental legislation has been enacted post-1996 so as to give effect to the environmental right and is required by the *White Paper* to pursue its vision, principles and strategic goal since they seek to elaborate on the content of the environmental right.[204] The environmental right ought to serve to inform and bolster the environmental regime introduced pursuant to it. It can also potentially operate as a safety net when environmental legislation purports to permit conduct that violates that right.[205] The *National Environmental Management Act* 107 of 1998 (*NEMA*) operates as a framework environmental statute. *NEMA*'s preamble adopts a social justice-orientation by recognising that "inequality in the distribution of wealth and resources, and the resultant poverty, are among the important causes as well as the results of environmentally harmful practices". *NEMA* further provides for justice-oriented principles of environmental governance in South Africa, that apply to "the actions of all organs of state that may significantly affect the environment".[206] In *Earthlife* the court emphasized the binding, directive nature of the *NEMA* principles, which "serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of *NEMA* or any statutory provision concerning the protection of the environment".[207] Pursuant to the *NEMA* principles the state, in taking decisions that may significantly affect the environment, acts as a public trustee, and must pursue environmental justice.[208] Private companies who

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202 White Paper 13.
203 White Paper 17, 18.
204 White Paper 20-24 and 27-29.
205 May and Daly *Global Environmental Constitutionalism* 35-36.
206 S 2 of *NEMA*.
207 *Earthlife* para 80.
208 S 2(4)(o) of *NEMA* provides for public trusteeship as follows:

cause significant pollution may also be required to act in a manner consistent with the *NEMA* principles.[209] In *MEC for Agriculture, Conservation and Land Affairs, Gauteng v Sasol Oil* it was found that "the interpretation of any law concerned with the protection and management of the environment must be guided by [NEMA's] principles".[210] I will argue in chapter 4 that these principles make it possible for *NEMA* to operate as a tool in support of social justice-oriented environmental jurisprudence.

A host of specific environmental management acts (SEMAs) operate within *NEMA*'s framework.[211] A range of subordinate legislation (regulations, plans, notices, declarations, etc.) has been enacted in terms of *NEMA* and the SEMAs.[212] Each of

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> The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

See also generally, van der Schyff 2013 *SALJ* and van der Schyff and Viljoen 2008 *Journal for Transdisciplinary Research in Southern Africa*.

Environmental justice as a response to the mal-distribution of environmental harms is provided for in s 2(4)(c) of *NEMA* which states:

> Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.

Environmental justice in the sense of the just distribution of environmental benefits is provided for in s 2(4)(d) of *NEMA* which states:

> Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well being must be pursued and special measures must be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.

209 *VEJA* para 66.

210 *MEC for Agriculture, Conservation and Land Affairs, Gauteng v Sasol Oil* [2006] All SA 17 (SCA) (*Sasol Oil*) para 15.

211 They include the *National Water Act* 36 of 1998 (*NWA*), the *Mineral and Petroleum Resources Development Act* 28 of 2002 (*MPRDA*), the *National Environmental Management: Air Quality Act* 39 of 2004 (*NEMAQA*), the *National Environmental Management: Waste Act* 59 of 2008 (*NEMWA*), the *National Environmental Management: Biodiversity Act* 10 of 2004 (*NEMBA*) and the *National Environmental Management: Protected Areas Act* 57 of 2003 (*NEMPAA*), *Marine Living Resources Act* 18 of 1998 (*MLRA*).

212 Examples of subordinate legislation under *NEMA* include the Environmental Impact Assessment Regulations, GNR 982 in GG 38282 of 4 December 2014; Environmental Impact Assessment Regulations Listing Notice 1, GNR. 983 in GG 38282 of 4 December 2014; Environmental Impact Assessment Regulations Listing Notice 2, GNR.984 in GG 38232 of 4 December 2014; and Environmental Impact Assessment Regulations Listing Notice 3, GNR.985 in GG 38282 of 4 December 2014. Examples of subordinate legislation under *NEMPAA* include the Declaration of the Dwesa-Cwebe Marine Protected Area GN 1073 of 2015 in GG 39379 of 6 November 2015; Dwesa-Cwebe Marine Protected Area Regulations GN 1074 of 2015 in GG 39379 of 6 November 2015; and Norms and Standards for the Inclusion of Private Nature Reserves in the Register of Protected Areas of South Africa, GN 1157 in GG 41224 of 3 November 2017. See further Glazewski *Environmental Law in South Africa*.

the SEMAs explicitly contemplates a social justice-oriented purpose. The *National Water Act* 36 of 1998 (*NWA*) aims to ensure that South Africa's water resources are protected, used, developed, conserved, managed and controlled so as to give effect to section 24 of the *Constitution*, including by promoting equitable access to water and redressing the results of past racial and gender discrimination.[213] The *NWA* proceeds from a recognition that "while water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources", and acknowledges that the state must pursue "equitable allocation of water and the redistribution of water".[214] The *NWA* provides that the state is the public trustee of the nation's water resources, such that the Minister of Water and Sanitation is responsible for ensuring "that water is allocated equitably and used beneficially in the public interest, while promoting environmental values".[215] The *Mineral and Petroleum Resources Development Act* 28 of 2002 (*MPRDA*) provides for equitable access to South Africa's mineral and petroleum resources in a manner consistent with section 24 of the *Constitution*.[216] It requires a commitment "to eradicating all forms of discriminatory practices in the mineral and petroleum industries",[217] which must include environmental injustices arising from past unjust mining practices.[218] The *National Environmental Management: Air Quality Act* 39 of 2004 (*NEMAQA*) aims to protect the environment by providing for the protection and enhancement of air quality in South Africa and the prevention of air pollution and ecological degradation.[219] It acknowledges that "the burden of health impacts associated with polluted ambient air falls most heavily on the poor", whilst "the high social, economic and environmental cost [of air pollution]…is seldom borne by the polluter".[220] The *National Environmental Management: Waste Act* 59 of 2008 (*NEMWA*) provides for, among other things, waste management and the reduction, re-using, recycling and recovery of waste,

[213] S 2 of the *NWA*.
[214] Preamble of the *NWA*.
[215] S 3 of the *NWA*.
[216] S 2 of the *MPRDA*.
[217] Preamble of the *MPRDA*.
[218] See for example the harmful impacts of mining discussed in International Federation for Human Rights 2017 https://www.refworld.org/docid/588b25884.html.
[219] S 2 of *NEMAQA*.
[220] Preamble of *NEMAQA*.

including to prevent pollution and ecological degradation, and remediate contaminated land.[221] *NEMWA* further proceeds from the premises that "the impact of improper waste management practices are often borne disproportionately by the poor".[222] The *National Environmental Management: Biodiversity Act* 10 of 2004 (*NEMBA*) provides for the management and conservation of biodiversity in South Africa, including through the fair and equitable sharing of the benefits from bioprospecting involving indigenous biological resources.[223] The *National Environmental Management: Protected Areas* Act 57 of 2003 (*NEMPAA*) provides for the declaration and management of protected areas as part of a strategy to manage and conserve biodiversity.[224] *NEMPAA* envisages that local communities participate in the management of protected areas where appropriate.[225] Both *NEMBA* and *NEMPAA* must be implemented by the state in its role as public trustee of South Africa's biodiversity and protected areas in a manner that pursues inter- and intra-generational equity.[226] The *MLRA* provides for the conservation and management of marine ecosystems and marine living resources.[227] The Minister of Environmental Affairs is required, in the exercise power under the *MLRA*, to have regard to a number of principles and objectives, including "[t]he need to achieve optimum utilisation and ecologically sustainable development of marine living resources", and "the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry".[228]

In addition to NEMA, the SEMAs, and regulations promulgated in terms thereof, South Africa's commitments under international environmental law are a relevant interpretive source of law in the adjudication of environmental law disputes, since the *Constitution* requires that the courts must, when interpreting any legislation, "prefer any reasonable interpretation…that is consistent with international law over

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221 S 2 of *NEMWA*.
222 Preamble of *NEMWA*.
223 S 2 of *NEMBA*.
224 S 2 of *NEMPAA*.
225 S 2 of *NEMPAA*.
226 Pursuant to the state's obligations as public trustee of biological diversity under s 3 of *NEMBA* and s 3 of *NEMPAA*.
227 S 2 of the *MLRA*.
228 Ss 2(a) and (j) of the *MLRA*.

any alternative interpretation that is inconsistent with international law".[229] South Africa is a signatory, for instance, to the *UNFCCC*, and the *Paris Agreement*, as well as the *Convention on Biological Diversity*, 1992, among many other treaties.[230] In *Fuel Retailers* the Constitutional Court recognised that the concept of sustainable development had to be understood with reference to relevant international environmental law.[231] In *Earthlife* the High Court recognised that *NEMA* had to be interpreted in a manner consistent with South Africa's obligations under international law, including the *UNFCCC* and the *Paris Agreement*.[232]

2.5.2 Category 2: Laws requiring transparent, lawful, participatory, fair and reasonable decision making

A number of laws operate in conjunction with laws that provide explicitly for the protection of the environment so as to ensure transparent, lawful, participatory, fair and rational or reasonable environmental decision-making. When the substantive laws discussed above (i.e. those explicitly aimed at the protection of the environment) are implemented in a manner that is not transparent, lawful, participatory, fair and/or rational or reasonable, this second category of laws creates a basis upon which to enforce the substantive laws in judicial review proceedings.[233] Judicial review entails a process through which judges review the constitutionality of actions taken by the legislature, executive or private parties and declare such actions invalid to the extent that they are inconsistent with the *Constitution*.[234] The bases upon which judicial review occurs in South Africa to enforce substantive laws are primarily the principle of legality emerging from the rule of law,[235] and the right to just administrative action.[236] The latter encompasses a right to lawful, reasonable

[229] S 233 of the *Constitution*.
[230] Kidd *Environmental Law* 45-65.
[231] *Fuel Retailers* paras 46-56.
[232] *Earthlife* para 83.
[233] Kotzé 2015 *Widener Law Review* 198.
[234] Quinot (ed) *Administrative Justice in South Africa*. The cases discussed in this thesis involve this kind of judicial scrutiny as opposed to attempts to enforce the environmental right directly.
[235] S 1 of the *Constitution* provides that South Africa is founded on a number of values, including the supremacy of the *Constitution* and the rule of law.
[236] S 33 of the *Constitution*.

and fair (participatory) administrative decision-making.[237] Additionally, here access to information is not provided, the refusal to provide information may be taken on review on the basis of the right to access to information.[238] I discuss these bases for judicial review in turn below.[239]

The constitutional value of the rule of law has been found to create a basis for judicial review of public power in terms of the principle of legality on the grounds that the public power has been exercised in a manner that is irrational or inconsistent with the law.[240] The principle of legality may be invoked, including in the context of environmental decision-making, to challenge public power where no other more specific basis for judicial review exists.[241] The principle of subsidiarity entails that where a more specific basis for judicial review of public power exists, that basis must be invoked to challenge the public power.[242]

The procedural right to just administrative action amounts to a constitutional basis for the review of public power that constitutes administrative action (a specific type of public power).[243] Pursuant to this right, all administrative action, which includes

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[237] S 33 of the *Constitution*. In South Africa the constitutional requirement of fair administrative action requires public participation as prescribed by s 4 of *PAJA*. See Murcott "Procedural Fairness" 159-163..

[238] S 32 of the *Constitution*.

[239] Whilst the procedural protections provided for in terms of the value of the rule of law, the right to just administrative action, and the right to access to information are critical in enabling environmental protection, one of the key issues discussed in chapter 3 at 3.4 below with reference to Murcott 2015 *SALJ* 901-903 and Dugard and Alcaro 2013 *SAJHR* 19 is the trend in South Africa for environmental law disputes to be "over-proceduralised" when litigated through the lens of these procedural laws in an excessively formalistic manner. Moreover, it will be argued in chapter 3 with reference to Hoexter 2008 *SAJHR* that these disputes are often determined in a formalistic manner. As Hoexter 2008 *SAJHR* 287 explains, formalistic legal reasoning connotes unduly "formal, technical or mechanistic reasoning" in the interpretation and application of laws, to the exclusion of a purposive and substantive approach. The potential pursuit of purposive and substantive reasoning in the determination of environmental law disputes through transformative adjudication and a legal theory of transformative environmental constitutionalism is addressed in chapter 4.

[240] See for example *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Council* 1999 (1) 347 (CC).

[241] An example of the application of the principle of legality in respect of public power concerning the implementation of environmental law see *Normandien Farms*.

[242] *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) (*Motau*). For a discussion on subsidiarity in the context of judicial review of public power and the role of legality see Murcott and van der Westhuizen 2015 *CCR* 49-53.

[243] S 33 of the *Constitution*. The term "administrative action" is defined in s 1 of *PAJA*, and its meaning has been the subject of extensive litigation (see Quinot and Maree "Administrative

much of the decision making by the executive branch of government involved in the implementation of environmental laws, must be lawful, fair and reasonable, and written reasons must be provided for administrative action on request.[244] This right is given effect by *PAJA*. The purpose of *PAJA* is to promote an efficient administration and good governance, and a culture of accountability, openness and transparency in the exercise of public power.[245] Among other things, *PAJA* defines administrative action, sets out the requirements that must be fulfilled in order for administrative action to be procedurally fair, details the grounds upon which administrative action may be taken on judicial review by someone adversely affected thereby, and provides for remedies that may be granted in judicial review proceedings.[246] Since its enactment, "[t]he cause of action for the judicial review of administrative action now ordinarily arises in PAJA".[247] A litigant must rely on *PAJA* and not section 33 in judicial review proceedings to challenge administrative action.[248] Many environmental law disputes to challenge environmental decision-making are adjudicated in the context of judicial review proceedings founded in *PAJA*, since the implementation of *NEMA* and the SEMAs generally amounts to "administrative action".[249]

The procedural right to access to information imposes an obligation on the state and private actors to provide access to information on request.[250] When information is requested from private actors it must be required for the protection of a right. Information will be regarded as being required for the protection of the

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Action" 76-93). In essence "administrative action" connotes a decision of an administrative nature involving the exercise of public power, whether by the state or a private actor, that has an "adverse affect" on "rights" or "legitimate expectations", is final in effect, and is not specifically excluded from the definition. As Murcott and van der Westhuizen 2015 *CCR* explain, exercises of public power that amount to "administrative action" are, in terms of the principle of subsidiarity, regulated not directly by the principle of legality as an aspect of the value of the rule of law, but instead by the more specific right to just administrative action provided for in s 33 of the *Constitution*, which is given effect by *PAJA* (discussed below).

244 S 33 of the *Constitution*.

245 Preamble of *PAJA*.

246 See *PAJA* s 1 (definitions), ss 3 and 4 (requirements for procedural fairness), s 6 (grounds of review) and s 8 (remedies) respectively.

247 *Bato Star* para 25.

248 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 92-96.

249 *Earthlife* para 10.

250 S 32 of the *Constitution*.

environmental right where, for instance, communities seek access to records from polluters whose conduct they allege is impacting upon their health and well being.[251] The right to access to information is given effect by the *Promotion of Access to Information Act* 2 of 2000 (*PAIA*).[252] *PAIA* recognises that during apartheid, the system of government fostered a culture of secrecy and unresponsiveness amongst the public and private sectors, which resulted in human rights violations and the abuse of power.[253] *PAIA* goes on to state that the right of access to information is required to promote a culture of transparency and accountability.[254] Further, *PAIA* recognises that the right enables the people of South Africa to more fully exercises and protect all of their rights through effective access to information.[255] *PAIA* sets out the details of how a request for access to information may be made,[256] and the limited grounds on which a request may be refused.[257]

2.5.3 Category 3: Substantive rights interrelated with and mutually reinforcing of environmental protection

May and Daly[258] explain that environmental rights that stand on an equal footing with other rights can be "inextricably intertwined with other rights, [and]…offer symbiotic opportunities to advance complementary norms". The fulfilment of the environmental right is indeed interrelated with, and mutually reinforcing of, the fulfilment of substantive rights.[259] This is because environmental degradation as a result of climate change, biodiversity loss, pollution, etc. has far reaching implications for the enjoyment and fulfilment of other human rights,[260] particularly

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251 *VEJA* paras 49-53.

252 For a recent example of s 32 and *PAIA* operating in an environmental law dispute to ensure transparent environmental decision making by a private actor see *VEJA*. A recent example of s 32 and *PAIA* operating to ensure transparent environmental decision making by an organ of state is *De Lange*.

253 Preamble of *PAIA*.

254 Preamble of *PAIA*.

255 Preamble of *PAIA*.

256 Ss 11 and 18 provide for a request from the state. Ss 50 and 53 of *PAIA* provide for a request from a private body.

257 Ss 33-46 of *PAIA* provide for grounds of refusal that may be invoked by the state and ss 62 to 70 of *PAIA* provide for grounds of refusal that may be invoked by private bodies.

258 May and Daly *Global Environmental Constitutionalism* 45.

259 See Knox and Pejan "Introduction" (e-Book).

260 See for example Peel and Osofsky 2018 *Transnational Environmental Law* 42-45; May and Daly *Global Environmental Constitutionalism* 25; Boyd The Environmental Rights Revolution 82.

for poor and vulnerable people.[261] Positively stated, "[a] healthy environment is necessary for the full enjoyment of human rights".[262] In South Africa the judiciary has recognised that all rights are interconnected.[263] As such, there is scope in environmental law disputes for the environmental right and other environmental laws giving effect to it to be interpreted and applied by the judiciary alongside a number of constitutionally enshrined substantive rights.[264] Relevant substantive rights enshrined in the *Constitution* which cannot be fulfilled in an environment that is harmful to health or well being include, but are not limited to,[265] the rights to life,[266] dignity,[267] culture and customary law rights,[268] and rights conferring socio-economic entitlements such as the rights access to sufficient food and water,[269] and to adequate housing.[270] A vast array of legislative and other measures, such as executive and administrative policies have been put in place to give effect to these rights.[271] Such legislative and other measures are judicially enforceable to the extent

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261 Schlosberg and Collins 2014 *WIREs Clim Change*.

262 Knox and Pejan "Introduction" (e-Book).

263 *Grootboom* paras 23 and 24.

264 This thesis engages with the problem that the judiciary has not fully explored the interrelated nature of the environmental right to other substantive rights (as discussed in Fuo 2013 *Obiter*). Its potential to do so is explored in this thesis which argues that recognising the interconnected nature of the environmental right to other rights could facilitate a more substantive and purposive interpretation and application of environmental laws in environmental law disputes by the judiciary, and a move away from formalism.

265 All of the rights in enshrined in the *Constitution* are arguably only capable of full realisation in well-functioning socio-ecological systems where the environment is protected. For instance, the rights of the child (s 28) and the right to education (s 29) are severely compromised in environments that are harmful to health and well being, and civil and political rights can become meaningless when people live in environments that are harmful to their health and well being. However, for reasons of length and scope, I limit my discussion to just some of the socio-economic rights enshrined in the *Constitution*.

266 S 11 of the *Constitution* provides: "Everyone has the right to life."

267 S 10 of the *Constitution* provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

268 S 30 of the *Constitution* provides: "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights." S 31 of the *Constitution* provides that persons belonging to a cultural community may not be denied the right to enjoy their culture.

269 S 27 of the *Constitution* provides for the progressive realisation of these rights through reasonable legislative and other measures.

270 S 26 of the *Constitution* provides for the progressive realisation of this right through reasonable legislative and other measures.

271 Examples include: the *Housing Act* 107 of 1997, the National Housing Code, 2009, the *Water Services Act* 108 of 1997, the Free Basic Water Policy, 2001 and the National Sanitation Policy, 2016.

that they seek to realise and give effect to the environmental right and rights conferring socio-economic entitlements.[272]

2.6 Conclusion

This chapter has offered a lawyer-led and lawyer-centric account of South Africa's project of transformative constitutionalism. It has shown that transformative constitutionalism requires the pursuit of social justice: a constitutional imperative that emerges not least from the *Constitution*'s foundational values. It has shown that this goal is capable of being construed, from a social-ecological systems perspective, as requiring the pursuit of environmental and climate justice, interconnected with social justice. Such a construction is further fitting in the context of the Anthropocene and the imagery of its socio-ecological crisis.

The practice of transformative adjudication: substantive, value-laden reasoning and interpretation in adjudication that is responsive to the plight of the poor and that is undertaken regardless of the manner in which cases are argued so as to give effect to the *Constitution* and its transformative project was described.[273] It was illustrated that South Africa's model of separation of powers[274] empowers the judiciary to play a relatively activist role in pursuing transformative constitutionalism's goals through transformative adjudication.[275] However, formalism, still embedded in South African legal culture to a considerable degree, serves to undermine transformative adjudication.

Environmental constitutionalism in South Africa, which adopts a rights-based approach to environmental protection, was then described. This description revealed

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272 Fuo 2013 *PER* 28/487.
273 Quinot 2010 *CCR*.
274 Fish Hodgson 2018 *SAJHR*.
275 Bilchitz "Constitutionalism" 52-53 for instance, explains that socio-economic rights can be understood as a prerequisite for legitimacy of a constitution, particularly in societies where millions live in poverty, and that when courts in these societies enforce constitutional guarantees aimed at improving the lived realities of the poor against other branches of government, they are thus not acting in an undemocratic manner, but "are defending the conditions necessary for the very legitimacy of the constitutional order itself".

that in South Africa, a broad, sophisticated environmental right serves to elevate the status of environmental protection under the law to the highest possible juridical level. Further, a plethora of laws is potentially relevant in the implementation of environmental constitutionalism in South Africa in the adjudication of environmental law disputes. All of these laws proceed from and support the environmental right, and must be read in the context of relevant policies, including the *White Paper*, which aligns with South Africa's project of transformative constitutionalism. Moreover, much of the relevant legislation explicitly pursues equity in environmental decision making and recognises the need to respond to past social and environmental injustices. A number of procedural protections emerging from the *Constitution* establish a basis to challenge environmental decision-making in judicial review proceedings when the environmental decision-making is not transparent, lawful, participatory, fair and/or rational or reasonable. Further, there is scope in environmental law disputes for the environmental right and other environmental laws giving effect to it, to be interpreted and applied by the judiciary alongside a number of other constitutionally enshrined substantive rights. These substantive rights cannot be fulfilled in an environment that is harmful to health or well being.

It seems therefore, at least on face value, that South African judges have the juridical tools, in theory,[276] to implement environmental constitutionalism in environmental disputes through transformative adjudication that pursues social, environmental and climate justice as interconnected concerns as part of a project of transformative constitutionalism, in a manner that is responsive to the social-ecological crisis we face in the Anthropocene and its unjust consequences for South Africa's poor. The extent to which the courts have, in practice, engaged in transformative adjudication as described in this chapter in environmental law

[276] Environmental consciousness is arguably in South Africa and beyond with, amongst other things, increasing media coverage of the problem of climate change and its impacts on the poor (see for example Tutu 2019 https://www.ft.com/content/9e4befae-e083-11e9-b8e0-026e07cbe5b4 and Hargreaves 2019 https://www.dailymaverick.co.za/article/2019-09-27-the-shops-are-burning-the-women-are-burning-the-climate-is-burning-connecting-the-dots/). Accordingly, even though the judiciary may not have an awareness of the concept of the Anthropocene *per se*, they ought nonetheless to be cognisant of the socio-ecological crisis it represents.

disputes so as to give effect to transformative constitutionalism's goals is evaluated in chapter 3.

Chapter 3 Trends in the implementation of environmental constitutionalism in South Africa

3.1 Introduction

A multitude of environmental law disputes have been adjudicated in the South African courts since the introduction of the environmental right in 1996, and a large body of post-apartheid environmental law jurisprudence has emerged.[1] Ten years after the introduction of the environmental right, Kidd[2] observed that much of the environmental law jurisprudence was relatively weak in that there was little engagement with the relevant environmental laws, and environmental considerations were not typically given proper attention. For instance, in the adjudication of some environmental law disputes the courts sought to narrow, or even ignored, the application of relevant provisions in *NEMA*.[3] In response to these problems Kidd called for "more consistency in the courts' correctly considering, interpreting and applying environmental law".[4] Further, courts often treated the environmental context as peripheral, and tended to focus instead on questions about administrative justice.[5] Concern was thus expressed about a judicial unwillingness to grapple with technical and/or scientific considerations relating to the environmental context of environmental law disputes, which it was argued could result in

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1 Some of the more recent cases will be discussed below. For discussion on some of the most significant cases see generally, Kidd 2006 *PER*; Kidd 2010 *PER*; Dugard and Alcaro 2013 *SAJHR*; Feris 2008 *CCR*; Feris 2008 *SAJHR*.

2 Kidd 2006 *PER* 72/118-78/118.

3 *Merebank Environmental Action Committee v Executive Member of KwaZulu-Natal Council for Agricultural and Environmental Affairs* unreported case number 2691/01 (D), *All the Best Trading CC t/a Parkville Motors v SN Nayagar Property Development and Construction CC* 2005 (3) SA 396 (T) (*Parkville Motors*) and *Capital Park Motors CC v Shell South Africa Marketing (Pty) Ltd* unreported case number 3016/05 (T) are illustrative of the courts ignoring *NEMA*, and *Bareki v Gencor Ltd* 2006 (1) SA 432 (T) and *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) are illustrative of the courts misinterpreting *NEMA*. These cases are discussed in Kidd 2006 *PER* 73/118-79/118.

4 Kidd 2006 *PER* 79/118. The author also argued that this consistency would require legal practitioners to come to grips with "the burgeoning body of environmental law".

5 Kidd 2006 *PER* 80/118-83/118 referring to *Lloyd v The Premier, Eastern Cape Province* unreported case number 333/2004 (E) and *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C).

jurisprudence that was detrimental to the environment and undermined the environmental right.[6]

In 2008 the Constitutional Court engaged with the environmental right for the first time in detail in *Fuel Retailers*. Soon thereafter a number of commentators observed that notwithstanding the court's thorough engagement in *Fuel Retailers* with the notion of sustainable development under the environmental right, the judgment left a lot to be desired in terms of the development of South African environmental law jurisprudence generally.[7] Couzens,[8] for instance, explains that in *Fuel Retailers* the court appeared to misread the content of relevant environmental laws, and a result, used erroneous, clumsy or inaccurate terminology when describing these laws. Thus, *Fuel Retailers* revealed to Couzens[9] that "the judiciary as a whole [was] still struggling to understand South Africa's new raft of principled environmental laws – both its jurisprudential basis; and the details of the laws themselves". Couzens[10] further lamented that the Constitutional Court did not, in *Fuel Retailers*, consider or draw upon the developing body of environmental case law, which he considered to be "a startling omission". Du Plessis'[11] critique of *Fuel Retailers* engages with the court's failure to explicate key terminology in the environmental right beyond the notion of sustainable development. For instance, the court failed to give content to the terms "environment", "health" or "well being". Du Plessis[12] consequently urged the courts to interpret the term "health" broadly, "as soon the opportunity arises", to

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6 Kidd 2006 *PER* 80/118-84/118.

7 See for example Du Plessis 2008 *SAJELP* 62 who explains that the court in *Fuel Retailers* "focused the tension between sustainability considerations and the need to create an acceptable balance between them when public authorities engage in environmental decision-making", with reference to the environmental right, but failed to address other crucial aspects. See also Kidd 2008 *SAJELP* 85-102 and generally, Couzens 2008 *SAJELP*.

8 Couzens 2008 *SAJELP* 49-50. Feris 2008 *CCR* 253 notes that *Fuel Retailers* was also problematic at a deeper level, since "[t]he majority judgment failed to interrogate the normative nature of sustainable development comprehensively and in the process provided us with an inherently flawed and incomplete application of the concept". This chapter focuses on normative failings in environmental law jurisprudence such as those identified by Feris.

9 Couzens 2008 *SAJELP* 55.

10 Couzens 2008 *SAJELP* 31-33 and 55 referring to the court's failure to engage with, amongst others, *Save the Vaal* and what the author describes as South Africa's growing body of "filling station jurisprudence" in *Parkville Motors*, *Sasol Oil (Pty) Ltd v Metcalfe* 2004 (5) SA 161 (W), and *BP*.

11 Du Plessis 2008 *SAJELP* 60-81.

12 Du Plessis 2008 *SAJELP* 64-65.

cover "projected or future health impacts" given that "environmental change and, in particular, climate change can…have severe impacts on the health conditions of future generations of people and subsequently on intergenerational equity". To date, the judiciary has not responded to this call.

Not long after *Fuel Retailers*, in their analysis of 15 years of environmental rights jurisprudence in South Africa, Kotzé and Du Plessis[13] commented that overall, the courts have endeavoured to uphold, interpret and apply South Africa's environmental laws, and have contributed to a deepening of environmental discourse and to law-making. However, they acknowledged that environmental law was "still in its infancy when compared to other legal disciplines in South Africa" and pointed to some weaknesses in the evolving environmental law jurisprudence.[14] They observed that in many cases "the courts have not taken the opportunity to concretize section 24 and have 'neglected' to interpret the environmental right where the facts and circumstances begged for this right to be applied in a concrete way".[15] Where the courts have engaged with the environmental right, such engagement was found to be limited.[16]

Building on the commentary on South African environmental law jurisprudence referred to above, this thesis considers the extent to which the judiciary has engaged in transformative adjudication of environmental law disputes from a socio-ecological systems perspective. I analyse the emerging body of environmental law jurisprudence from a *lex lata* perspective to illustrate various problematic trends. I argue that in the adjudication of environmental law disputes the courts often fail to engage in transformative adjudication, and thus rarely unpack or respond to social, environmental and climate justice issues in a meaningful way. There can be no doubt that more than ten years after *Fuel Retailers* was decided the judiciary's

[13] Kotzé and Du Plessis 2010 *Journal of Court Innovation* 159-160.
[14] Kotzé and Du Plessis 2010 *Journal of Court Innovation* 174.
[15] Kotzé and Du Plessis 2010 *Journal of Court Innovation* 169, referring to *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 2001 (3) SA 1151 (CC) and *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC).
[16] Kotzé and Du Plessis 2010 *Journal of Court Innovation* 170-174, referring to *BP*, *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 (5) SA 512 (T) (*HTF Developers HC*) and *Fuel Retailers*.

understanding of the jurisprudential basis and detail of South Africa's environmental laws has deepened. However, the courts have not yet fully, in the implementation of environmental constitutionalism in environmental law disputes, embraced transformative adjudication in pursuit of South Africa's project of transformative constitutionalism. Due to several problematic trends in the adjudication of environmental law disputes the emerging jurisprudence is, in general, yet to adopt a social justice orientation.

3.2 About this chapter

This chapter engages with the questions: *What are the current trends in the adjudication of environmental law disputes in South Africa, and how do these trends impact upon the emergence of a social justice-oriented environmental law jurisprudence?* The discussion of four trends seeks to reveal the extent to which the courts implement environmental constitutionalism in environmental law disputes by pursuing transformative adjudication so as to give effect to transformative constitutionalism's goals, particularly the *Constitution*'s social justice imperative. The first trend discussed, illustrated by *Adendorffs Boerderye* and *Kenton on Sea*, relates to the courts' tendency to overlook social, environmental and climate injustices in the adjudication of environmental law disputes (trend 1). The discussion of trend 1 also exposes the courts' tendency not to acknowledge that the environment and people are strongly coupled, to the extent that they exist in socio-ecological systems.[17] The discussion then addresses problems that potentially arise when environmental law disputes are adjudicated on the basis of procedural rights violations (i.e. problems arising from "over-proceduralisation"), particularly when the courts engage in formalistic reasoning to the exclusion of relevant substantive concerns relating to the underlying environmental context, or relevant environmental laws (trend 2). *Normandien Farms*, *Barberton Mines HC* and *Barberton Mines SCA* are considered so as to illustrate trend 2. Next, I expose a third trend, related to the

[17] See note 1 of chapter 3 above.

first and second trends, that despite the environmental right being self-executing,[18] the substantive content thereof is rarely given any meaningful judicial attention in environmental law disputes, and remains undeveloped (trend 3).[19] *Propshaft* and *iSimangaliso* are representative of this trend. The fourth and final trend that is discussed is that environmental rights violations are not generally treated as linked to violations of other substantive rights, such as the rights to access to housing and water and vice versa (trend 4). I illustrate with reference to *Grootboom*, *Melani*, *Mazibuko*, *FSE 1* and *FSE 2* that environmental law disputes are sometimes determined with reference to substantive rights, such as the rights access to housing or water, without reference to the environmental right, even where the environmental right is arguably central.[20] This problem was highlighted in Humby's analysis of the struggles for environmental justice of impoverished communities in South Africa.[21] She attributes the failure to integrate the environmental right with socio-economic rights to (among other things) the fact that "[t]here is no established jurisprudence that integrates environmental and social justice concerns".[22]

In each of the judgments discussed, environmental constitutionalism (discussed in chapter 2) is implemented. The judgments concern environmental law disputes (as described in chapter 1) involving conflicts about the functioning of socio-ecological systems, and within those systems, the distribution of environmental benefits and

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18 As May and Daly *Global Environmental Constitutionalism* 78 explain, a self-executing environmental right is one that is capable of being enforced "without the need for interceding legislative action". This thesis argues that the existence of legislation that purports to give effect to the right does not render the content of the right irrelevant.

19 As illustrated in the cases discussed in the works of Feris 2008 *SAJHR* 38-45 and Kotzé and Du Plessis 2010 *Journal of Court Innovation* 169-175. See also Du Plessis 2011 *SAJHR* 293-297, who explains that very little judicial attention has been given to the concepts of "health" and "well being" as aspects of the environmental right. Recent examples of this failure are discussed below.

20 Feris 2008 *SAJHR* 45-48; Fuo 2013 *Obiter* 95; Murcott 2015 *SALJ* 894-908; Murcott "Transformative Environmental Constitutionalism" 292-293. Drawing on the Indian experience, for instance, violations of other substantive rights, such as the rights to life (s 11 of the *Constitution*) and dignity (s 10 of the *Constitution*) could also be linked to environmental rights violations: see Rajamani 2007 *Review of European, Comparative and International Environmental Law* 277-279. See also generally Owosuyi 2015 *PER* on the relationship between cultural rights and the environmental right.

21 Humby 2013 *Revue générale de droit* 44, 87-88.

22 Humby 2013 *Revue générale de droit* 87-88.

burdens, and/or concerns about participation in environmental decision-making, and/or a lack of recognition of the equal moral worth of everyone in South Africa in environmental decision-making.[23] Some of them might seem, at first glance, to be "ordinary" judgments addressing environmental law, and not particularly noteworthy.[24] They are, however, noteworthy for purposes of this thesis precisely because of the trends they illustrate. Further, not all of the environmental law disputes discussed relate directly or obviously to the plight of the poor in South Africa.[25] Instead, some concern the court's role in securing well-functioning socio-ecological systems more broadly. However, this thesis recognises that the deterioration of socio-ecological systems inhibits, at a more general level, the pursuit of dignity, equality, democracy and social justice, particularly for the poor.[26] By way of example, the poor will be first and hardest hit by the devastating loss of marine and terrestrial biodiversity arising from climate change.[27] Among other things, the poor are often dependent upon marine and terrestrial biodiversity for their food security, water security and livelihoods.[28] Further, they are most vulnerable to the impacts of climate change, in that:

> People in poverty tend to live in areas more susceptible to climate change and in housing that is less resistant; lose relatively more when affected; have

[23] Judicial engagement with these issues is often not explicit. Rather, these issues arise since well-functioning socio-ecological systems create the conditions in which social justice and human flourishing can occur, whereas dysfunctional socio-ecological systems give rise to socio-ecological conflicts.

[24] In this sense they contrast with the landmark judgments discussed in chapter 5 at 5.3, 5.4 and 5.5 below: *Earthlife*, *VEJA* and *Gongqose SCA*. Further, to a much greater degree than the judgments discussed in this chapter, *Earthlife*, *VEJA* and *Gongqose SCA* are illustrative of transformative adjudication and potentially pave the way for the introduction of a legal theory of transformative environmental constitutionalism discussed in chapter 4 below.

[25] In this sense too the judgments discussed in chapter 3 contrast with those discussed in chapter 5 at 5.3, 5.4 and 5.5 below. Each of *Earthlife*, *VEJA* and *Gongqose SCA* were part of social movements concerning struggles for social, environmental and/or climate justice, and for this reason too, are useful illustrations of the potential value of the legal theory of transformative environmental constitutionalism discussed in chapter 4 below.

[26] See chapter 1 at 1.1.2 above.

[27] See chapter 1 at 1.1.2 above. See further James 2015 https://theconversation.com/climate-change-is-hitting-south-africas-coastal-fish-44802 and Midgley *et al* 2002 *Global Ecology and Biogeography*.

[28] See for example, Ogden *et al* 2013 *Frontiers in Ecology and the Environment* 343; Vörösmarty *et al* 2010 *Nature* 558-559.

> fewer resources to mitigate the effects; and get less support from social safety nets or the financial system to prevent or recover from the impact.[29]

This insight reveals that judicial engagement with questions about ecological integrity in South Africa are very much connected to the lived realities of the poor, even when that connection is not pertinently in issue before the court. As such, courts adjudicating environmental law disputes about the protection of socio-ecological systems should engage in transformative adjudication so as to contribute to the fulfilment of their role in South Africa's transformative project. I now turn to discuss trends 1 to 4.

3.3 Trend 1: Overlooking social, environmental and climate injustices in environmental law disputes

In this part I argue that the courts often fail to acknowledge that harmful environmental conditions experienced by South Africa's poor give rise to environmental rights violations that are connected to social injustices and thus to environmental and climate injustices, even where evidence of that injustice is placed pertinently before the courts.[30] Where such evidence is not placed before the courts, they are empowered to take judicial notice of facts that establish these injustices, as discussed more fully in chapter 4.[31] It is important that courts consider such evidence or take judicial notice of such facts so as not to ignore or demean the social, environmental and climate injustices experienced by South Africa's poor, and so as to engage in transformative adjudication.

I discuss *Adendorffs Boerderye* and *Kenton on Sea* to illustrate the phenomenon of courts overlooking justice issues in the adjudication of environmental law disputes. An aspect of this problem is that courts tend not to appreciate that humans and the

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29 UN Special Rapporteur on Extreme Poverty and Human Rights 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E.

30 As discussed in chapter 5 at 5.5 below, evidence of injustice of the Dwesa-Cwebe communities was placed before the court in *Gongqose HC*, but the court failed meaningfully to engage with that evidence.

31 On the concept of judicial notice see Schwikkard and Van der Merwe *Principles of Evidence* 482 discussed further in chapter 4 at 4.3 below.

environment exist in socio-ecological systems, such that concerns for human health and well being, particularly of poor and vulnerable people, are intrinsically connected to access to environmental goods and governance of environmental bads. From this perspective the protection of the environment is a necessity for the attainment of social justice. Several other cases were considered, and could equally have been illustrative of the trend discussed in this part.[32] I have limited my discussion to two examples of cases that are illustrative of these problems for reasons of relevance, scope and length.

3.3.1 Adendorffs Boerderye

Adendorffs Boerderye concerned a cattle farm owner who sought to remove cattle of Mr Shabalala from its farm on the basis of the *Conservation of Agricultural Resources Act* 43 of 1983 (*CARA*) read with section 24 of the *Constitution*. Mr Shabalala had lived on the farm since he was a child, and secured grazing rights for his cattle in terms of an agreement with a previous owner of the farm.[33] His parents and siblings were buried on the farm, and he had worked there until his father passed away.[34] Shabalala asserted that his cattle were his only source of livelihood, and removing the cattle from the farm would cause him severe hardship.[35]

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32 Other examples not discussed in this part due to limitations of scope and length include *Normandien Farms*, *Stern HC* and *Stern SCA* where the court failed to engage with evidence revealing that proposed hydraulic fracturing activities (fracking) in water scarce areas could cause social, environmental and climate injustice for poor and vulnerable people in those areas. On the experiences of those who are "water-poor" in South Africa (i.e. people "who regularly experience insufficient access to water [and] inevitably also suffer from myriad associated consequences, including problems relating to health, as well as pressures on finance and time", see Cooper 2017 *SAJELP* 34, 67-68. *Earthlife*, *VEJA* and *Gongqose* HC are also illustrative of this trend to some extent, as will be discussed in chapter 5. A more recent example is *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs* 2019 (5) SA 231 (GP) (*MEJCON*).
Coastal Links Langebaan v Minister of Agriculture, Forestry and Fisheries unreported case number [2016] ZAWCHC 196 of 31 October 2016 represents a notable counter example; it is an environmental dispute where the court carefully considered justice issues in the context of equitable access to marine living resources. See also, more recently, *WWF South Africa v Minister of Agriculture, Forestry and Fisheries* 2019 (2) SA 403 (WCC).

33 *Adendorffs Boerderye* para 8.

34 *Adendorffs Boerderye* para 8.

35 *Adendorffs Boerderye* paras 11 and 29.

The court reasoned that the *CARA*, read with section 24 of the *Constitution*, entailed conserving soil on a farm for the benefit of the farm owner, without regard to the impact on the livelihoods and vulnerability of his former farmworkers whose cattle were grazing thereon.[36] The court thus ordered the removal of Shabalala's cattle from the farm. In its interpretation of the *CARA* the court failed to take judicial notice of South Africa's racist legacy of land distribution and patterns of social and environmental injustice concerning inequitable access to land and the benefits accruing therefrom.[37]

It is a well-established fact in South Africa that owing to apartheid there is gross inequity in land distribution and ownership in South Africa, and that this inequity continues to cause severe hardship and instability, particularly for historically marginalised and poor South Africans.[38] For instance, Sisulu[39] writes:

> Critically, this apartheid legacy means that today, 72% of agricultural land is owned by white people; 15% by coloured people; 5% by Indian people; and 4% by African people. This in a country where white people constitute 8.9% of the population; coloured people 8.9%; Indian people 0.2%; and African people 79.2%.

Further, the South African Human Rights Commission argues that if land reform addressing this legacy is not successfully implemented "a life characterised by dignity, equality and freedom will not materialise for those who remain landless".[40] Overlooking this context and such facts, the court was able to justify prioritising the interests of the land owner over those of poor and vulnerable former farmworkers.

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36 *Adendorffs Boerderye* paras 26 and 31-32.

37 The issue of the need for land reform and the racist legacy of land distribution is prevalent in South African discourse, as illustrated by media reports such as McAlphine and Oosthuizen 2016 http://www.702.co.za/articles/12528/confronting-racism-land-and-land-ownership, and government reports such as South African Government https://www.gov.za/issues/land-reform. *Moller v Kiemoes School Committee* 1911 AD 635 643 is authority for the proposition that courts can take judicial notice of facts of a sociological character of this nature. See also McGregor 2011 *De Jure* 123.

38 South African Government https://www.gov.za/issues/land-reform.

39 Sisulu 2018 https://www.news24.com/Columnists/GuestColumn/false-information-on-the-land-reform-process-a-disservice-to-south-africa-20180827.

40 South African Human Rights Commission 2018 https://www.sahrc.org.za/home/21/files/Commissions%20Position%20on%20Expropriation%20Without%20Compensation.pdf.

Judicial reasoning that overlooks the plight of the poor in the context of agriculture and land distribution is problematic given that the global climate crisis, with its impacts on rainfall patterns and the resulting heightening of water scarcity in South Africa, will serve to deepen injustice for the poor as discussed in chapter 1.[41]

The court did not recognise that the dispute concerned the land, farm owner, farmworkers, cattle and soil, existing within a single socio-ecological system as diverse human and nonhuman entities interacting with one another, with the farmworkers being particularly vulnerable to the kinds of social, environmental and climate injustice discussed in chapter 1. Within this socio-ecological system, equitable distribution of the land, and sound environmental governance could help to create the conditions in which the farmworkers would experience social, environmental and climate justice. The issue of soil conservation on the farm was instead treated as disconnected from the farmworkers' concerns for their livelihoods, including their food security. In the context of climate change, soil conservation represents an adaptation challenge with which poor communities are particularly ill-equipped to respond.[42] For instance, according to the Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, climate change threatens to "exacerbate existing poverty and inequality" for the poor, since:

> [t]heir livelihoods and assets are more exposed and they are more vulnerable to natural disasters that bring disease, crop failure, spikes in food prices, and death or disability.[43]

However, the court in *Adendorffs Boerderye* overlooked these justice issues and adjudicated the matter purely from the perspective of the cattle farmer's rights as land owner.

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41 See Hanjra and Qureshi 2010 *Food Policy* 367-368.

42 See Hanjra and Qureshi 2010 *Food Policy* 367-368.

43 UN Special Rapporteur on Extreme Poverty and Human Rights 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E.

3.3.2 Kenton on Sea

In *Kenton on Sea* residents of Kenton on Sea and Bushman's River Mouth complained that the Ndlambe Local Municipality was failing in its duty to manage, properly, a sewage works and waste dumpsite. As a result, the Bushman River estuary was being polluted. Residents complained of the discharge of raw foul-smelling sewage into the Bushman's River as a result of the failure to manage the sewage works, and of waste and plastic packets spreading over a large area and burning of rubbish as a result of the failure to manage the waste dumpsite.[44] In 2009 the residents had obtained a court order compelling the municipality to fulfil its obligations in relation to the sewage works, but the municipality had not fully complied with this order. The residents accordingly sought a contempt order against the municipality. The residents also sought an order compelling the municipality to properly manage the dumpsite, to decommission the dumpsite and commission an alternative dumpsite.

It would be well known among all reasonably well-informed persons in Kenton on Sea that poor, black South Africans live closest to, and were most affected by the mismanagement of the sewage works and dumpsite. Yet, statistics reveal that they would typically generate less household waste than affluent people in the area, and have less access to sanitation services.[45] In other words, the impacts of the environmental hardships resulting from the municipality's conduct were felt first and hardest by the poor in the area, even though they were least responsible. However, this context, and the social and environmental injustice revealed thereby, was overlooked. In granting the relief sought by the residents, the court did not take judicial notice of these well-known facts.[46] Thus the court did not reason or justify the granting of the relief sought in a manner that acknowledged the social and environmental injustices experienced by poor and vulnerable people as a result of the municipality's conduct, so as to explicitly pursue social justice. The court remarked that "*the dumpsite* is often subject to extensive fire and air pollution with

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44 *Kenton on Sea* paras 41, 74 and 82.

45 Statistics South Africa 2011 http://www.statssa.gov.za/?page_id=4286&id=568.

46 On the potential of the courts to do so see McGregor 2011 *De Jure*, discussed in chapter 4 at 4.3 below.

acrid and toxic smoke drifting across the nearby areas posing a fire risk".[47] By focussing on the dumpsite, the court's remarks reveal a failure to put a human face to those most affected by pollution and risk arising from the dumpsite: poor and vulnerable people living nearby.[48]

The court failed to recognise the complexity of the socio-ecological system with which the dispute was concerned. The system involved includes the Bushman River estuary, the municipality, the affluent residents who brought the matter to court, the poor and vulnerable people most affected by the municipality's conduct, and the dumpsite and sewage works. Proper environmental governance was necessary for the functioning of the socio-ecological system as a whole. By failing to reason from a socio-ecological systems perspective, the court overlooked the connection between the proper governance of the dumpsite and sewage works to the living conditions of poor and vulnerable people most affected by their mismanagement. Whilst the relief granted by the court would have (in an incidental manner) come to the assistance of these people, the court's reasoning failed to grapple with their plight.

The court's approach could also have been more responsive to climate change, and its justice implications for the poor, given that landfill methane and wastewater contribute towards greenhouse gas emissions, and represent climate mitigation challenges.[49] Failing to address this challenge will serve to exacerbate climate change and the vulnerabilities and climate injustices arising therefrom for the poor.[50] As the Report of the UN Special Rapporteur on Extreme Poverty and Human Rights points out, unless greenhouse gas emissions are drastically reduced, many regions, including South Africa, could experience extreme temperature rises that will "leave disadvantaged populations with food insecurity, lost incomes and livelihooods, and worse health".[51]

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47 *Kenton on Sea* para 74 (my emphasis).
48 As called for by Pieterse 2005 *SAPL* 159.
49 Bogner *et al* "Waste Management, In Climate Change 2007" 588.
50 UN Special Rapporteur on Extreme Poverty and Human Rights 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E.
51 UN Special Rapporteur on Extreme Poverty and Human Rights 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E.

3.4 Trend 2: Over-proceduralising environmental law disputes

The vast majority of environmental law disputes are adjudicated on the basis of procedural rights violations in judicial review proceedings founded in the principle of legality, *PAJA* or *PAIA*.[52] These bases for judicial review empower the courts to uphold the rule of law by requiring accountability, openness, participation and transparency, including in the context of environmental governance.[53] Judicial review in terms of the principle of legality requires that courts assess whether public power has been performed in a manner that is rational and lawful such that it is consistent with the value of the rule of law enshrined in section 1(c) of the *Constitution*.[54] Judicial review in terms of *PAJA* requires that courts assess whether public power that amounts to "administrative action" as defined in *PAJA*,[55] has been performed in a manner that is lawful, procedurally fair and reasonable as required by the right to administrative justice in section 33 of the *Constitution*. *PAJA* has detailed procedural fairness requirements,[56] and envisages review for reasonableness that can entail an examination of the proportionality and effectiveness of administrative action over and above rationality.[57] *PAJA* thus allows for more rigorous scrutiny of administrative action in judicial review proceedings than legality review entails in respect of public

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52 For a discussion on judicial review in South Africa on the basis of legality, *PAJA* and *PAIA* see Hoexter *Administrative Law in South Africa* 64-65 and 94-102. Environmental law disputes adjudicated in judicial review proceedings on the basis of *PAJA* or the principle of legality include: *Fuel Retailers, BP, Sasol Oil, Bengwenyama*, *Shelton*, *Earthlife*, *Stern HC*, *Stern SCA*, *Barberton HC*, *Barberton Mines SCA*, *Normandien Farms*, *MEJCON* and *Minister for Environmental Affairs v Aquarius Platinum (SA) (Pty) Ltd* 2016 (5) BCLR 673 (CC). Environmental law disputes adjudicated on the basis of procedural rights violations in terms of *PAIA* include: *Biowatch*; *VEJA* and *De Lange*.

53 See Murcott and van der Westhuizen 2015 *CCR* 49-50; Murcott "Implementing" 200. See also s 195 of the *Constitution* discussed in Hoexter *Administrative Law in South Africa* 58-60.

54 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras 56 and 58 and *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 148 discuss the principle of legality's lawfulness requirement. *Motau* paras 69 discusses legality's rationality requirement. See also Hoexter *Administrative Law in South Africa* 121-125.

55 S 1 of *PAJA*.

56 Murcott 2013 *SALJ* 268. Murcott "Procedural fairness" 167-168. In terms of s 4 of *PAJA*, these requirements include public participation when administrative action has a general impact on the public.

57 Hoexter *Administrative Law in South Africa* 355-359.

power that does not amount to administrative action.[58] Although judicial review in terms of the principle of legality and *PAJA* is typically concerned with public power exercised by the state, the courts have recognised that public power may also be performed by non-state actors, and have thus applied these bases of review horizontally as well as vertically.[59] In judicial review proceedings founded on *PAIA*, courts assess whether access to records has been validly refused,[60] or whether such records ought to be disclosed so as to give effect to the right to access to information in section 32 of the *Constitution*.[61] Since the right to access to information explicitly applies vertically and horizontally, judicial review proceedings for access to records have been pursued both against the state and against non-state actors.[62]

Adjudicating environmental law disputes in judicial review proceedings on the abovementioned procedural grounds (emerging from the value of the rule of law, the right to administrative justice or the right to access to information) is sometimes referred to in environmental law discourse as "proceduralisation".[63] Daly[64] explains that proceduralisation, understood as the reliance on procedural rights in environmental law disputes, is advantageous for a number of reasons. Procedural rights generally demand that courts identify procedures pursuant to which decisions should be made, such that the analytical framework for their enforcement is

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58 See *Motau* paras 33-44. Legality is, however, a burgeoning principle, that is often used instead of *PAJA* as a basis for review in violation of the principle of subsidiarity (see generally, Murcott and van der Westhuizen 2015 *CCR*).

59 Hoexter *Administrative Law in South Africa* 125-131 and 189-192.

60 Grounds for refusal are set out in ss 33 to 46 and 62 to 70 of *PAIA*.

61 S 82 of *PAIA*.

62 Hoexter *Administrative Law in South Africa* 98-102.

63 See for example Francioni 2010 *European Journal of International Law* 42-43. In environmental law scholarship, the notion of proceduralisation is often used in a neutral, or even positive way to refer to the use of legal instruments that facilitate participation of interested and affected parties in environmental decision-making. Importantly, the notion has been used pejoratively in scholarly discourse concerning South African socio-economic rights cases to critique the courts' tendency to merely require that the state, in order to respond to conditions of poverty and hardship, act in a manner consistent with good governance standards, as opposed to actually requiring the alleviation of poverty and hardship, among other things, by developing the content of the socio-economic entitlements at issue – see Pieterse 2007 *Human Rights Quarterly* 811-812; Brand "Proceduralisation" 37; Murcott 2015 *SALJ* 896-906; Murcott 2013 *SAJHR* 483-484, 490-494.

64 Daly 2012 *International Journal of Peace Studies* 76-78.

"narrower and more objectively bounded" than that of substantive rights.[65] Reliance on procedural rights can facilitate meaningful participation in environmental decision-making, and thus improve the quality of the decisions.[66] Courts may remain in their judicial comfort zone, as they do not generally need to engage in broad-ranging policy determinations when enforcing procedural rights as they sometimes do when enforcing substantive rights.[67] Further, the remedies handed down – the granting of access to records or the setting aside of a decision not taken following a proper process – are generally easier to enforce and less policy-laden than the remedies handed down when direct reliance is placed on substantive rights in litigation.[68]

This thesis has no quarrel with proceduralisation as reliance on procedural rights in environmental law disputes *per se*.[69] Rather, it is critical of the trend of what I refer to as "over-proceduralisation": a formalistic and excessively minimalist approach in legal reasoning that continues to be particularly pervasive in judicial review on the basis of procedural grounds, particularly when reliance is placed on *PAJA*, including in the adjudication of environmental law disputes.[70] It entails, among other things, neglecting relevant substantive considerations, including socio-ecological systems considerations, and avoiding pronouncements about rights, even where such pronouncements are necessary and desirable.[71] As discussed in chapter 2, substantive reasoning is an essential component of constitutionally mandated transformative adjudication, including in the enforcement of procedural rights. In the enforcement of socio-economic rights, such as the rights to access to health care, and access to housing, courts have tended to be more willing to engage with

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65 Daly 2012 *International Journal of Peach Studies* 76-77.

66 Du Plessis 2008 *PER* 24/34-26/34.

67 Daly 2012 *International Journal of Peach Studies* 76-77.

68 Daly 2012 *International Journal of Peach Studies* 77.

69 For a discussion of procedural strategies of environmental regulation, and a call for "thick proceduralization" see Black 2000 *Oxford Journal of Legal Studies*.

70 See Hoexter 2008 *SAJHR* 286; Hoexter 2004 *Macquarie Law Journal* 167-169; Hoexter *Administrative Law in South Africa* 248; Hoexter 2015 *SALJ* 211-218; Quinot 2010 *CCR* 117; Penfold 2019 *SALJ* 111; Murcott 2017 *Humanities* 93.

71 Bilchitz 2010 *CCR* 52. As I will argue in chapter 4 below, for environmental constitutionalism to effectively respond to environmental problems, relevant rights must be invoked so as to connect in a concrete way to the harm caused to the environment and the actual or potential injustices caused thereby.

substantive considerations, albeit sometimes to a limited degree.[72] I illustrate below that as a result of over-proceduralisation in environmental law disputes concerned with the enforcement of procedural rights, the courts have been less inclined to engage with substantive considerations. Formalism instead often carries the day.

As mentioned in chapter 2,[73] formalistic reasoning refers generally to reliance in adjudication on technical or mechanistic reasons to the exclusion of substantive principles and social, economic or moral considerations.[74] Conceptualism, a species of formalistic reasoning, has been particularly problematic in administrative law cases.[75] Conceptualism connotes reliance purely on legal concepts as a method of solving legal problems.[76] When judges engage in conceptualism they treat the presence or absence of a concept as dispositive of a case.[77] As with other types of formalistic reasoning, substantive issues underlying a dispute are often not treated as relevant.[78] This is so, even though courts ought, by virtue of transformative adjudication, to engage with such considerations, irrespective of whether they are concerned with the enforcement of procedural or substantive rights.[79]

In the context of the adjudication of environmental law disputes Kidd[80] argued in 2006 that the emerging judgments often obfuscated the substantive environmental issues at stake and relevant substantive legal principles responsive thereto. An abstract (formalistic) level of scrutiny in judicial review proceedings arguably detracted from engagement with, for instance, relevant scientific information of substance in environmental law disputes.[81] Kidd[82] thus wisely urged judges to familiarise themselves with relevant scientific considerations where appropriate to

72 Pieterse 2007 *Human Rights Quarterly* 811-812; Murcott 2013 *SAJHR* 485-495; Quinot 2010 *CCR* 119-123.
73 Chapter 2 at 2.4.2 above.
74 Hoexter 2004 *Macquarie Law Journal* 168.
75 Hoexter 2004 *Macquarie Law Journal* 168; Quinot 2010 *CCR* 118.
76 Hoexter 2004 *Macquarie Law Journal* 168.
77 Hoexter 2004 *Macquarie Law Journal* 168; Penfold 2019 *SALJ* 95-97.
78 Penfold 2019 *SALJ* 85-88.
79 On substantive reasoning being constitutionally mandated and desirable in administrative law cases see generally Penfold 2019 *SALJ*.
80 Kidd 2006 *PER* 80/118-84/118. Kidd called for the "greening the judiciary" to address this problem.
81 Kidd 2006 *PER* 81/118-84/118.
82 Kidd 2006 *PER* 83/118.

enable them to assess the reasonableness or rationality of public power in judicial review proceedings; a task he argued judges could undertake without unduly usurping the role of the executive. Dugard and Alcaro[83] argue that the problem raised by Kidd[84] in 2006 persists, as underlying environmental problems continue to remain peripheral in environmental law disputes adjudicated with reference to *PAJA* or *PAIA*.[85]

In matters concerning protected areas and biodiversity, for instance, crucially relevant scientific information could include overwhelming evidence that in order to be responsive to the "climate emergency" facing the planet, habitat and biodiversity loss must be quickly curtailed.[86] The failure to engage with scientific information entails "the risk of judges inevitably deferring to administrative decisions when they involve technical or scientific elements of any complexity".[87] This approach could further undermine the fulfilment of the environmental right, as scientific evidence often comprises the substantive considerations at the heart of the environmental problems that underlie a dispute.[88] A notable illustration is that scientific evidence supports the view that in order to be responsive to the planet's climate emergency, all nations need to transition away from energy generation through fossil fuels, such as coal-fired power, and energy generated from shale gas extraction.[89] This evidence (readily available in the public domain) could arguably assist in the fulfilment of the environmental right in disputes where the underlying issue relates to the extraction or consumption of fossil fuels.[90] A failure to consider this kind of evidence as an aspect of formalistic reasoning points to the trend of over-proceduralisation in environmental law disputes, on which I elaborate below.

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83 Dugard and Alcaro 2013 *SAJHR* 24.

84 Kidd 2006 *PER* 80/118-84/118. Kidd called for the "greening the judiciary" to address this problem.

85 Dugard and Alcaro 2013 *SAJHR* refer to *Earthlife Africa (Cape Town) v Director-General Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (CC) and *Biowatch*.

86 See for example Ripple *et al* 2019 *BioScience* 1-3.

87 Kidd 2006 *PER* 83/118.

88 Kidd 2006 *PER* 81/118-84/118.

89 See for example Ripple *et al* 2019 *BioScience* 1-3. This evidence was not considered in *Kruger v Minister of Water and Environmental Affairs* [2016] 1 All SA 565 (GP) (*Kruger*), for example, a case concerning conservation of rhino.

90 Relevant examples of such disputes include *Barberton Mines HC*, *Barberton Mines SCA*, and *Normandien Farms* discussed next, and *Earthlife*, discussed in chapter 5 at 5.3 below).

In this part I discuss *Normandien Farms*, *Barberton HC* and *Barberton SCA* (collectively, the *Barberton Mines* judgments) as illustrative of the over-proceduralisation of environmental law disputes. Many other cases are illustrative of this problem, but I have limited my analysis to these examples for reasons of relevance, scope and length.[91] As discussed below, in *Normandien Farms*, the underlying environmental context of the dispute was completely obscured. Although the environmental context was brought to the fore in the *Barberton Mines* judgments, the courts engaged in conceptualism to resolve the dispute, as opposed to engaging in substantive legal reasoning with reference to the environmental context. In *Normandien Farms* and the *Barberton Mines* judgments, with their focus on matters of process, the courts failed to engage in substantive reasoning with reference to the environmental right or relevant substantive provisions in environmental legislation such as the justice-oriented principles in *NEMA*.[92] The *NEMA* principles are intended, among other things, to guide the interpretation and administration of *NEMA* and any other law concerned with the protection of the environment.[93] They are justice-oriented in a number of respects,[94] and could facilitate an appreciation of the interconnected nature of social, environmental and climate injustices in environmental law disputes. They call for environmental decision-making that acknowledges substantive environmental injustice and vulnerability, and that fosters participation and recognition of poor and historically marginalised communities.[95] A failure to engage with these and other relevant substantive provisions is related to trend 1, since these provisions afford the judiciary the means to be responsive to injustices that arise in environmental law

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[91] Other cases where to varying degrees and in various respects, the courts also arguably fell foul of not fully embracing transformative adjudication (substantive, rights-based adjudication) that are not discussed in this part due to limitations of scope and length include: *Stern HC, Stern SCA*, *Earthlife*, *Long Beach Homeowners Association v MEC: Economic Development, Environmental Affairs and Tourism (Eastern Cape)* unreported case number [2018] ZAECGHC 26 of 29 March 2018, *Gongqose HC* and *Kruger*. For a discussion on *Kruger* see generally Murcott 2017 *Humanities*.

[92] As discussed in chapter 2 at 2.5 above, s 2(4) of *NEMA* provides for justice-oriented principles of environmental management in South Africa that apply to "the actions of all organs of state that may significantly affect the environment". See also, for instance, s 3(1) of the *NWA*, which designates National Government as the public trustee of South Africa's water resources.

[93] S 2(1) of *NEMA*.

[94] Field 2006 *SALJ*, Kidd *Environmental Law* 301, Murcott 2015 *SALJ* 883, 891, 904.

[95] See for example ss 2(4)(c), (d), (f) and (o) of *NEMA*.

disputes. Where such provisions are not specifically relied upon by the parties, the courts are empowered to consider them *mero motu* to the extent that they form part of the context for statutory interpretation, and their relevance emerges from the facts pleaded.[96]

3.4.1 Normandien Farms

Normandien Farms is a startling illustration of how underlying issues of substance about the environment can be obfuscated by a focus on a failure to fulfil procedural requirements. A farm owner sought to set aside the acceptance by the South African Agency for Promotion of Petroleum and Exploitation SOC Ltd (PASA) of an application for an exploration right in terms of section 79 of the *MPRDA*. The broader underlying socio-ecological context of the dispute was that the acceptance of the application for an exploration right could culminate in controversial hydraulic fracturing (fracking) activities in the Karoo.[97] Exposing this context could have brought to the fore a range of social, environmental and climate justice issues, all of which are evidenced by scientific information in respect of the risks and opportunities of fracking.[98] However, this context did not emerge from the judgment at all.

Fracking involves the extraction of shale gas from deep within the earth's surface, in a manner that has the potential to cause severe pollution to and degradation of the environment.[99] Fracking is set to take place in the Karoo, a semi-arid to arid area that covers more than half of South Africa, and that is of ecological, geological, archaeological and paleontological significance.[100] It is well known among all

96 *Link Africa* para 33.
97 Wolhuter 2017 https://www.iol.co.za/capetimes/news/judge-stops-fracking-exploration-8961486.
98 For a discussion on scientific evidence that would inform justice issues arising from fracking in the Karoo see for example, generally, Esterhuyse *et al* 2016 *Journal of Environmental Management* and Coetzee and Kotzé "Shale Gas Development and Water".
99 Esterhuyse *et al* "Potential Impact of Unconventional Oil and Gas Extraction on Karoo Aquifers", Avenant *et al* "Potential Impact of Unconventional Gas Mining on Surface Water Systems of the Karoo" and Todd *et al* "The Potential Impacts of Fracking on Biodiversity of the Karoo Basin, South Africa".
100 See for example Esterhuyse *et al* "Potential Impact of Unconventional Oil and Gas Extraction on Karoo Aquifers", Avenant *et al* "Potential Impact of Unconventional Gas Mining on Surface Water

reasonably well-informed persons in South Africa that there is a great deal of opposition to fracking, including among poor communities in the area, who fear that fracking could jeopardise their already limited access to water and their subsistence farming activities, and thus their water and food security.[101] These fears are not unfounded, as there is a great deal of scientific evidence that fracking could be harmful to socio-ecological systems in South Africa, particularly for those living in poverty, and given that the Karoo is a water scarce area.[102] The state and oil and gas companies promote fracking on the grounds that it will facilitate economic development and energy security, including for the benefit of the poor.[103] However, impoverished communities in the Karoo have expressed concerns that short-term economic benefits could be far outweighed by long-term costs, such as negative health impacts, job losses in other more sustainable sectors such as agriculture and tourism, and a loss of social cohesion.[104] As such, fracking raises social and environmental justice concerns.

Fracking as a means to generate energy from shale gas, a fossil fuel, also raises climate justice concerns due to its high GHG emissions relative to the generation of solar and wind energy representing a climate change mitigation challenge.[105] For instance, according to the Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, addressing climate change requires "decoupling improvements in economic well-being from fossil fuel emissions".[106] The Report indicates that failing to adopt appropriate mitigation measures will not only have "devastating

Systems of the Karoo" and Todd *et al* "The Potential Impacts of Fracking on Biodiversity of the Karoo Basin, South Africa".

101 See for example Fakir 2015 http://sacsis.org.za/site/article/2308.

102 Esterhuyse *et al* "Potential Impact of Unconventional Oil and Gas Extraction on Karoo Aquifers"; Avenant *et al* "Potential Impact of Unconventional Gas Mining on Surface Water Systems of the Karoo".

103 Esterhuyse *et al* 2016 *Journal of Environmental Management* 420-421.

104 Legalbrief Environmental 2019 https://legalbrief.co.za/diary/legalbrief-environmental/story/karoo-communities-fear-long-term-effects-of-fracking/print/.

105 Wakeford "The South African Energy Context" 157-163.

106 UN Special Rapporteur on Extreme Poverty and Human Rights 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E.

consequences for people in poverty", but will also "pull vast numbers into poverty".[107]

In *Normandien Farms* the farm owner's challenge was adjudicated with reference to the requirements of the principle of legality.[108] The court considered, in some length, whether the conduct at issue was administrative or not, and thus susceptible to review in terms of *PAJA* or the principle of legality.[109] PASA's acceptance of the application was found to be inconsistent with the demands of legality because a number of procedural requirements for the lawful acceptance of the application for an exploration right had not been complied with, such that PASA's conduct fell to be reviewed and set aside.[110]

The court's reasoning was formalistic in the sense that its focus was on whether or not PASA had complied with peremptory provisions in the law,[111] whilst showing virtually no regard to the substantive reasons for such provisions, and the broader social, moral, economic and environmental impacts of a failure to comply. The court considered the process pursuant to which an application for an exploration right is required to be published,[112] and found that PASA had not fully complied.[113] The court also addressed, in formalistic terms, the need for consultation with interested and affected parties when application is made for an exploration right.[114] The court concluded that because the farm owner had not had a proper opportunity to object to the acceptance of the application, its opportunity to object and participate in decision-making about the "environmental issues" had been curtailed.[115] The judgment only hints at what the relevant "environmental issues" could be. For instance, the court made a mere passing reference to the fact that the ultimate granting of an exploration right could have grave impacts on "the rights of a land

[107] UN Special Rapporteur on Extreme Poverty and Human Rights 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E.
[108] *Normandien Farms* para 24.
[109] *Normandien Farms* paras 22-24.
[110] *Normandien Farms* paras 24-29.
[111] *Normandien Farms* para 28.
[112] *Normandien Farms* paras 5-8 and 11.
[113] *Normandien Farms* para 12.
[114] *Normandien Farms* paras 15-19 and 30.
[115] *Normandien Farms* para 26.

owner",[116] and could cause "economic loss", since the owner had recently set up a water bottling plant on one of his farms.[117] The court's vague reference to the environment emerges from an acknowledgement that economic loss could be suffered by virtue of the potential impact "on water extracted from the earth".[118] The environmental issue of hydraulic fracturing was thus obfuscated, as the dispute was resolved in a formalistic manner focused on non-compliance with processes provided for in the *MPRDA* and *NEMA*.[119] Further, no mention was made of the environmental right or substantive and justice-oriented provisions in environmental legislation giving effect thereto, such as the *NEMA* principles.

3.4.2 The Barberton Mines judgments

Barberton Mines HC and *Barberton Mines SCA* (the *Barberton Mines* judgments) are illustrative of conceptualism in the adjudication of environmental law disputes. The litigation concerned judicial review proceedings arising from a decision of the Department of Minerals and Energy (as it was known at the time) to grant a prospecting right to Barberton Mines (Pty) Ltd (Barberton Mines). The prospecting right entitled Barberton Mines to prospect for gold and silver in the District of Barberton where the Barberton Mountain Land is situated.[120] Evidence on record revealed that the Barberton Mountain Land is an area of great ecological significance due to its bird and plant life and unique geology, including "the oldest and best preserved sequence of volcanic and sedimentary rocks on Earth".[121] As a result, the area was placed on South Africa's Tentative List of World Heritage Sites in 2008.[122]

Given this ecological significance, the Mpumalanga Tourism and Parks Association (MTPA) and the Mountainlands Owners Association (MOA) were troubled by the

[116] *Normandien Farms* para 25.
[117] *Normandien Farms* para 26.
[118] *Normandien Farms* para 26.
[119] The court could have taken judicial notice of pollution concerns related to hydraulic fracturing, given that these seem to have been alluded to in the context of the threat to the farm owner's investment in a water bottling plant.
[120] *Barberton Mines SCA* para 1.
[121] *Barberton Mines SCA* para 1.
[122] *Barberton Mines SCA* para 1.

possibility of prospecting or mining activities occurring in the Barberton Mountain Land. Barberton Mines was accordingly refused access to the prospecting area and thus prevented from prospecting by the MTPA and the MOA. Barberton Mines then launched an application for declaratory relief confirming that it was indeed entitled to commence prospecting in terms of the right granted to it by the Department. In response, the MTPA and MOA launched a counter application, seeking to review and set aside the granting of the prospecting right. The MTPA and MOA asserted that the prospecting area was part of a nature reserve or protected area regulated in terms of *NEMPAA*. They argued further that as section 48 of *NEMPAA* prohibits commercial prospecting or mining activities in a protected area, Barberton Mine's prospecting right was invalid, and Barberton Mines ought not to be granted the declaratory relief it sought.[123]

Apart from the ecological significance of the Barberton Mountain Land contributing to the proper functioning of South Africa's socio-ecological system as a whole, and thus contributing to ensuring the conditions in which social justice can occur, the broader underlying socio-ecological context of the dispute is that mining is historically one of the most exploitative and environmentally destructive economic activities in the country.[124] It is well established that, in particular, poor, black South Africans have been exposed to immense social and environmental injustice as a result of mining.[125] Further, scientific evidence reveals that mining is a major

123 For a discussion on s 48 of *NEMPAA* and the court's ruling thereon in *MEJCON* see Vinti 2019 *SAJHR*.

124 Harvard Law School International Human Rights Clinic 2016 http://hrp.law.harvard.edu/wp-content/uploads/2016/11/The-Cost-of-Gold-Full-Report-Final.pdf; Murombo 2013 *Law, Environment and Development Journal*.

125 The Harvard Law School International Human Rights Clinic 2016 http://hrp.law.harvard.edu/wp-content/uploads/2016/11/The-Cost-of-Gold-Full-Report-Final.pdf exposes that the environmental legacy of mining in South Africa is borne disproportionately by the poor. It is contributing to climate change and severe health problems for millions of poor South Africans. The Centre for Environmental Rights 2016 https://fulldisclosure.cer.org.za/2016/ reveals that corporates, including mining companies, externalise the costs of their polluting activities which are then borne disproportionately by the poor. The International Federation for Human Rights 2017 https://www.refworld.org/docid/588b25884.html reveals that poor communities in the Blyvooruitzicht mining village are exposed to air containing harmful dust and contaminated water and soil suffer from higher levels of asthma, cancer and organ damage.

contributor to GHG emissions, and therefore represents a climate change mitigation challenge raising climate justice concerns.[126]

In *Barberton Mines HC* it was found that the prospecting area was not part of a nature reserve or protected area as defined in *NEMPAA*.[127] The High Court adopted a highly conceptualist approach to this question, in which it reasoned on narrow, technical grounds that the area was not protected under *NEMPAA*, without engaging with the ecological significance of this determination.[128] The High Court found that neither a 1985 resolution (issued under a 1983 ordinance) declaring part of the Barberton Mountain Land a nature reserve, nor subsequent proclamations concerning the area, had the effect of declaring the area "a nature reserve" for purposes of *NEMPAA*.[129] The High Court reached this conclusion by invoking, in a conceptualist manner, technical administrative law arguments about the lawfulness of the resolution and proclamations.[130] The High Court thus granted Barberton Mine's application for declaratory relief, which had the effect of permitting prospecting to occur. The High Court further dismissed the MTPA and MOA's review application on the formalistic, technical basis of their undue delay in the launching thereof.[131]

Significantly, in spite of the ecological significance of the proposed prospecting area, the High Court's reasoning made no mention of substantive provisions in environmental legislation, such as the *NEMA* principles or *NEMPAA*'s purpose and objects of protecting and conserving ecologically viable areas representative of South Africa's biological diversity and natural landscapes.[132] Reliance on these

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126 See for example Jansen van Vuuren 2018 https://www.miningreview.com/news/introduction-links-between-gold-climate-change/ and Immink *et al* 2018 *Journal of Energy in Southern Africa*.

127 *Barberton Mines HC* paras 42-66.

128 *Barberton Mines HC* paras 42-66.

129 *Barberton Mines HC* paras 42-66.

130 *Barberton Mines HC* paras 42-66.

131 *Barberton Mines HC* paras 70-84.

132 Relevant principles in s 2(4) of *NEMA* would have included that in the context of environmental management the disturbance of ecosystems and loss of biological diversity should be avoided (s 2(4)(a)(i)) and the disturbance of landscapes and sites that constitute the nation's cultural heritage should be avoided (s 2(4)(a)(iii)). Even if these principles were not brought to the court's attention, the court ought to have considered them *mero motu* in light of previous

provisions could have facilitated a more purposive and substantive approach to the issues.[133] A failure to engage with these provisions represents excessive minimalism (a problematic form of judicial avoidance).[134]

In the Supreme Court of Appeal the MTPA and MOA did not pursue their review application, but sought to have the declaratory relief granted by the High Court dismissed. In contrast with the High Court, the Supreme Court of Appeal approached the dispute from "the starting point" of the protection to the environment under section 24 of the *Constitution*, and the idea that the granting of prospecting rights under the *MPRDA* is subject to environmental protections and constraints, including those in *NEMPAA*.[135] Regrettably, the Supreme Court of Appeal said nothing more about the nature and scope of the environmental protection that ought to be afforded the Barberton Mountain Land pursuant to section 24, or any other relevant environmental legislation, including the *NEMA* principles. Instead the court resolved the matter on the basis of a technical, conceptualist approach to relevant laws, by considering whether the area could be regarded as a protected area within the meaning of section 48 of *NEMPAA*.[136] Pursuant to this conceptualist approach, the court concluded that the prospecting area fell within an area protected from prospecting pursuant to section 48 of *NEMPAA*. The court did so in a formalistic manner without any reference to the underlying purpose of *NEMPAA*, and its

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jurisprudence such as *Sasol Oil* para 15, affirming their significance. See further, chapter 4 at 4.4.1 below.

133 *NEMA* s 2(4), the preamble of *NEMPAA*, and s 2 of *NEMPAA*. Further, the High Court made no mention of the environmental right provided for in section 24 of the *Constitution*. The court was, however, required by section 39(2) of the *Constitution* to do so, in order to pursue the spirit, purport and object of the *Constitution* when engaged in statutory interpretation.

134 Bilchitz 2010 *CCR* 52.

135 *Barberton Mines SCA* para 11.

136 *Barberton Mines SCA* paras 12-20. To some extent the *Barberton Mines* judgments may be contrasted with the approach adopted in *MEJCON*, which also concerned a review in terms of *PAJA* of a decision to authorise mining without complying with s 48 of *NEMPAA*. At para 10.7 the court interpreted s 48 of *NEMPAA* in a purposive manner so as to give effect to s 24 of the *Constitution* and the *NEMA* principles, and placed emphasis on the roles of the Minister of Environmental Affairs and Minister of Mineral Resources as custodians of the protected environment, which required that they were to act "with a strict measure of scrutiny". Unfortunately, the court did not explain why s 24 of the *Constitution* required such an approach, and did not specify exactly which *NEMA* principles were significant or why they were significant. By failing to justify its approach in these respects, the court arguably failed fully to embrace transformative adjudication, though the court in *MEJCON* certainly adopted a far less formalistic approach than the courts in *Barberton Mines HC* and *Barberton Mines SCA*.

important role in securing ecological sustainability as envisaged by section 24 of the *Constitution*. Nonetheless, the Supreme Court of Appeal's formalistic approach yielded a favourable result, since the effect of the court's conclusion was that Barberton Mine's application for declaratory relief permitting it to prospect was viewed as tantamount to seeking "to compel an illegality".[137] Thus the declaratory relief granted in the High Court was found not to be competent. The Supreme Court of Appeal relied on a formal, process-oriented application of the rule of law as the basis to protect the environment, and avoided engaging substantively with the enviornmental right. Barberton Mines' subsequent application to the Constitutional Court for leave to appeal the ruling of the Supreme Court of Appeal was dismissed without a hearing, simply on the grounds that it had no prospects of success.[138]

3.5 Trend 3: Under-development of the environmental right

As discussed in chapter 2, section 24 of the *Constitution* contains, in theory, one of the most "expansive" and "sophisticated" environmental rights worldwide.[139] In spite of this theoretical potential, several scholars echo the view of Feris[140] that the environmental right is under-utilised, as the courts continue to neglect to engage with its content and normative potential.[141] For instance, the environmental right requires the protection of the environment so as not to harm people's "health" or "well-being", and so as to secure "ecological sustainability" and "inter- and intra-generational equity". Judicial engagement with these ideas could reveal the ways in which the right requires the attainment of well-functioning socio-ecological systems that foster the conditions in which social justice can occur. However, the courts are yet to elaborate upon them.[142] A related problem, discussed in chapter 4, is the

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137 *Barberton Mines SCA* para 20.

138 *Barberton Mines (Pty) Ltd v Mpumalanga Tourism and Parks Agency* unreported order number CCT84/17 of 3 August 2017.

139 May and Daly *Global Environmental Constitutionalism* 70.

140 Feris 2008 *SAJHR* 38-43.

141 This observation in Feris 2008 *SAJHR* 38-43 is referred to, for instance, in Pieterse *Can rights cure?* 161, Dugard and Alcaro 2013 *SAJHR* 26, Kotzé and Du Plessis 2010 *Journal of Court Innovation* 175.

142 As I discuss below, this arguably represents the problematic form of judicial avoidance or minimalism discussed in chapter 2 at 2.4.2 above, where I engage with Dugard and Roux "The Record" 110; Quniot 2010 *CCR* 136; Bilchitz 2010 *CCR* 52.

courts' limited engagement with the notion of ecologically sustainable development provided for in section 24.[143] When engaging with the notion of sustainable development, many decisions simply quote *Fuel Retailers'* economic-centred pronouncements about it, without going much further in their analysis or challenging the prevailing narrative.[144]

In this part I discuss two cases that are illustrative of the courts' tendency to pay mere lip service to the environmental right, such that its content and normative potential remain largely in doubt: *Propshaft* and *iSimangaliso*. Although there are a few cases where the courts have paid some attention to the content to the environmental right (such as *Fuel Retailers*, *BP*, *HTF Developers HC*), these cases represent the exception rather than the rule.[145]

After discussing *Propshaft* and *iSimangaliso*, I illustrate, with reference to *Harmony Gold 2006* and *Harmony Gold 2014*, that as an aspect of the under-utilisation of the environmental right, courts appear to presume that various substantive provisions in environmental legislation give effect to the environmental right, without any meaningful analysis in this regard.[146] In other words, to the extent that courts

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[143] See *Fuel Retailers* paras 44-58 discussed in Feris 2008 *CCR* 240-253. See also Feris 2008 *SAJHR* 41.

[144] See for instance *HTF Developers CC* and *Sole*. In *Long Beach Homeowners Association v Great Kei Municipality, Amatole District, Eastern Cape* unreported case number [2016] ZAGPPHC 610 of 26 April 2016 (*Great Kei Municipality*) the court, somewhat remarkably, asserted that right to environmental protection was in conflict with the right to ecologically sustainable development. On the facts before the court the development in question was arguably simply not ecologically sustainable or economically or socially justifiable, and thus the right to environmental protection and ecologically sustainable development could have been viewed as mutually reinforcing of one another.
See also *Langebaan Ratepayers And Residents Association v Western Cape Provincial Minister for Local Government Environmental Affairs and Developmental Planning* unreported case number [2014] ZAWCHC 212 of 19 August 2014 and *Nanaga Property Trust v Director-General of the Department of Agriculture, Forestry and Fisheries* unreported case number [2016] ZAECGHC 18 of 16 February 2016.

[145] See Kotzé and Du Plessis 2010 *Journal of Court Innovation* for a discussion on *BP*, *HTF Developers HC* and *Fuel Retailers*, three cases where, according to the authors, "the judiciary took on the opportunity to grapple (albeit to a limited degree) with the substantive content of section 24". More recently, see *WWF*, discussed in chapter 4 at 4.4.1.2 below.

[146] I have limited my analysis to these examples of the under-utilisation of the environmental right for reasons of relevance, scope and length. Other cases that are illustrative of this trend include: *Minister of Water and Environmental Affairs v Really Useful Investments No 219 (Pty) Ltd* 2017 (1) SA 505 (SCA) para 28, where in justifying its interpretation of provisions of the *Environmental Conservation Act* 73 of 1989, the court paid lip service to s 24, but failed to

invoke substantive and value-laden provisions in environmental legislation, they typically do so without evaluating the demands thereof against the content of the environmental right in any detail.[147] Doing so could help to develop the normative content of the environmental right, which is important not least because the meaning of a number of important concepts, including sustainable development, is "controversial, vague or uncertain".[148]

The court's limited engagement with section 24 of the *Constitution* can be attributed, at least in part, to a distorted view of judicial avoidance or minimalism often invoked by courts to justify formalism;[149] representing as it arguably does, a failure to engage in transformative adjudication. Pursuant to this distorted view of avoidance, courts often decline to make pronouncements on any issues that are "not essential" in order to settle a case.[150] However, as I argued in chapter 2, judicial avoidance or minimalism ought not to be invoked as a basis for the judiciary to shirk its responsibility to fulfil the *Constitution*'s transformative mandate and to fully justify its decisions in a manner consistent with transformative adjudication. Correctly understood, judicial avoidance merely requires avoiding the *direct* application of rights, whilst engaging with constitutional issues through the indirect application of rights and values where possible.[151] Avoidance further does not require that constitutional issues be avoided altogether.[152] As I argue in chapter 4, in the context of environmental law disputes, the indirect application of the environmental right in

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engage with it in any meaningful way and *Long Beach Homeowners Association v MEC: Economic Development, Environmental Affairs and Tourism (Eastern Cape)* unreported case number [2018] ZAECGHC 26 of 29 March 2018, where the court reasoned that a provision in *NEMA* required a "purposeful reading" with reference to s 24 of the *Constitution*, but failed to engage with what the purpose of s 24 is and how the content of s 24 makes provision for that purpose. The court merely referenced s 24 in passing in *Barberton Mines SCA* para 11. In *Adendorffs Boerderye* para 31 the court reasoned that the right is "echoed" by the objects of the *CARA* without explaining why with reference to specific content of the right. See also *MEJCON* para 10 where the content of the environmental right is not expounded upon in any meaningful way, albeit that the court adopts a purposive interpretation of s 48 of *NEMPAA*.

147 See also *Earthlife* para 80 and *Sasol Oil* para 15 where the courts referred to some of the *NEMA* principles, or to all of the *NEMA* principles collectively without explaining how they give effect to s 24 of the *Constitution*.

148 Feris 2008 *SAJHR* 39.

149 Dugard and Roux "The Record" 110. In this sense trend 3 is related to trend 2 discussed above.

150 Dugard and Roux "The Record" 110.

151 Currie and De Waal "Application" 24-25.

152 Currie and De Waal "Application" 24-25.

a more thorough and considered manner could go some way in developing the content and normative potential of the right, whilst at once giving effect to a proper understanding of the idea of judicial avoidance.

Subsidiarity theory, which requires that disputes be adjudicated with reference to the most specific norms rather than more general norms,[153] can also not be relied upon to justify the under-utilisation of section 24. This is because, according to subsidiarity theory, specific norms must be viewed as being on a continuum (in the context of environmental constitutionalism, a continuum of constitutional environmental accountability).[154] On this continuum, lower order norms (specific environmental laws) must be read and understood in the context of and with reference to the higher order (more general) norms such as the environmental right, so as to give effect to the more general norms.[155] Thus, although subsidiarity requires that disputes must be adjudicated with reference to available lower order norms such as those arising from environmental legislation, as opposed to direct reliance on section 24 of the *Constitution*, courts ought still to interrogate and explain whether lower order norms are consistent with section 24, and how they give effect thereto. Doing so could result in meaningful utilisation of the environmental right in a manner that is responsive to the interconnected nature of social, environmental and climate injustices giving rise to environmental law disputes.

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153 Murcott and van der Westhuizen 2015 *CCR*.

154 This is an application of the ideas expressed in Murcott and van der Westhuizen 2015 *CCR* 43-44, 50-51 to the implementation of environmental constitutionalism. The authors discuss the continuum of accountability in the context of the relationship between *PAJA* and the principle of legality.

155 Murcott and van der Westhuizen 2015 *CCR* 43-44.

3.5.1 Under-development by virtue of courts paying lip service to the environmental right

3.5.1.1 Propshaft

In November 2016 flash flooding in Gauteng resulted in flooding of a section of a stream known as the Eastleigh Spruit and damage to the riverbed, necessitating repairs and rehabilitation thereto.[156] The Eastleigh Spruit passes under the Plantation Road Bridge, and culverts beneath the bridge had become blocked with rubble and debris causing water build up and further damage to surrounding areas.[157] Three businesses in the area launched an application to compel the Ekurhuleni Metropolitan Municipality to rehabilitate and remediate the damage caused by the flooding.[158]

Arising from this background, in *Propshaft* the court acknowledged that the businesses had founded their application on the environmental right.[159] The court remarked that:

> [the applicants had] correctly submitted that a person's sense of environmental security in relation to the potential risks and dangers of environmental disaster fall within the scope of protection provided by Section 24 of the Constitution.[160]

However, the court did not explain why this was so with reference to the content of section 24.[161] Without any further discussion on the environmental right, the court concluded, based on undisputed factual evidence related to the damage caused by

156 *Propshaft* para 3.
157 *Propshaft* para 3. According to Cambridge University Press 2019 https://dictionary.cambridge.org, a "culvert" is "a pipe for waste water that crosses under roads, railways, etc."
158 *Propshaft* para 4.
159 *Propshaft* paras 8.3.
160 *Propshaft* paras 8.3 and 8.4.
161 *Propshaft* paras 8.3 and 8.4.

the flooding, and the Municipality's failure to rehabilitate and remediate the area, that the applicants' environmental rights were being infringed upon.[162]

By merely referencing the environmental right and saying nothing about how or why it protects a "sense of environmental security" or what aspects of the right were being infringed upon, the court wasted an opportunity to develop its content and normative potential, and engaged in an excessively minimalist approach. As many impoverished South Africans live in low-lying areas that are particularly vulnerable to flooding,[163] developing the idea that a "sense of environmental security" in response to flooding is recognised under the environmental right would potentially have given people in their position guidance as to the nature and content of the environmental right, and the protection to which they are entitled. Further, municipalities could have been made aware of their constitutional and legislative mandates, particularly as they arise from the environmental right, to respond to the plight of poor and vulnerable people who are exposed to flooding risks, increasingly so as a result of climate change.[164] In this way, the court could have contributed towards South Africa's project of transformative constitutionalism in pursuit of social justice through transformative adjudication.

3.5.1.2 iSimangaliso

In *iSimangaliso* the court was concerned with a dispute about the management of the iSimangaliso Wetland Park (the Park) on the KwaZulu-Natal coast by the iSimangaliso Wetland Park Authority (the Authority). Undisputed evidence on record revealed that the Park, an international tourist attraction, was declared a World Heritage site owing to

162 *Propshaft* para 9.3.
163 Drimie and van Zyl "Human vulnerability" 283-286. See also de Greef 2019 https://www.nytimes.com/2019/04/24/world/africa/durban-floods.html. de Greef K "South Africa Floods Leave at Least 60 Dead" in *The New York Times* https://www.nytimes.com/2019/04/24/world/africa/durban-floods.html accessed 12 July 2019.
164 Du Plessis and Kotzé 2014 *Journal of African Law* 152, 167-169 and 171-172. On the role of municipalities in environmental governance more broadly, see generally Philipp Aust and Du Plessis "Good Urban Governance".

> its outstanding examples of geomorphological and biological processes occurring on its five ecosystems, its geographical diversity and scenic vistas and its exceptional biodiversity and threatened species of African fauna for whom the Park provides a habitat.[165]

The Park includes the uMfolozi river mouth and four wetlands, including St Lucia, the largest estuarine system in Africa and a critical habitat for a diverse range of species.[166]

A number of farmers involved in sugar cane farming on land adjacent to the uMfolozi river (known as the uMfolozi floodplain since 1911) were unhappy with the manner in which the Authority was managing the wetlands as the approach was giving rise to flooding that was harmful to their farming activities. Their unhappiness gave rise to the litigation, as they sought to compel the Authority to manage the wetlands in a manner that addressed their concerns.[167] At issue before the court was whether the Authority had failed to comply with various statutory obligations in relation to the management to the uMfolozi river mouth. The Authority was accused of making arbitrary decisions in the management of the Park that had adverse impacts upon the farmers.

The court took note that the farmers were demanding that the river mouth be managed in such a way as to serve the interests of shareholders, as opposed to the environmentally sound approach proposed by the Authority in view of its statutory obligations.[168] After a careful analysis of the factual background and the Authority's statutory obligations, the court concluded that the Authority had acted lawfully.[169] Despite the environmental significance of the area under management, the environmental right was not considered in this analysis. The environmental right was only mentioned in passing in the context of whether a custom could create the basis

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165 *iSimangaliso* para 2.

166 *iSimangaliso* para 2. The complex relationship between the uMfolozi river mouth and the St Lucia estuary is set out in para 21.

167 *iSimangaliso* para 8.

168 *iSimangaliso* paras 102-103.

169 *iSimangaliso* para 109.

for the court to declare that the farmers were entitled to a declaration that the Authority was required to continue artificially breaching the uMfolozi river mouth for their benefit.[170] For such a custom to be relied upon, it would have to be reasonable.[171] The court was not persuaded that the custom of artificial breaching was reasonable, however.[172] The court remarked that:

> To the contrary, the insistence on breaching the river mouth on the basis of custom to protect the interests of the shareholders, reflected a self-serving and dated perspective and a conscious lack of concern that environmental degradation runs contrary to s 24 of the Constitution…The management of the St Lucia Estuary was informed by the results of scientific investigation and valid environmental and socio-economic considerations and sought to serve not only the collective interests of the current Park community (including the interests of the owners of land adjacent to the Park) and stakeholders, but to preserve the world heritage site for the benefit of future generations.[173]

Save for these remarks, the court said nothing about the environmental right and how, why and to what extent the environmental degradation at issue ran counter to it. The court wasted an opportunity to develop the content and normative potential of the right in *iSimangaliso*, and adopted an unduly minimalist approach to section 24. In these respects the court arguably failed to implement environmental constitutionalism in a manner that pursued transformative adjudication.

Although *iSimangaliso* did not directly raise issues about the plight of the poor, it nonetheless evoked the courts' role in ensuring the proper functioning of a socio-ecological system that benefits the poor. This is because, by securing the functioning of the Park, the judgment had very real implications for poor and vulnerable communities whose livelihoods are dependent thereon. It was reported in 2016 that over 80% of the people living around the Park live below the poverty line, with only

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[170] *iSimangaliso* paras 114 and 141. Artificially breaching a river mouth entails using machinery to open the river mouth artificially, for instance, so that flooding of low-lying areas does not occur (see Cambridge University Press 2019 https://dictionary.cambridge.org on the term "breach" in this context).

[171] *iSimangaliso* para 140.

[172] *iSimangaliso* paras 140-141.

[173] *iSimangaliso* para 141.

15% of the population being economically active.[174] Some 187 entrepreneurs (including many "survivalist entrepreneurs", who are pursuing the only economic activity open to them to survive) benefit from a programme offered by the Park that pursues:

> a model for conservation that tackles the large-scale restoration of complex natural ecosystems at the same time as improving the quality of life of the people in whose hands the future of the Park belongs.[175]

Viewed in this light, the development of the normative content of the environmental right in *iSimangaliso* was important, as it could have allowed the right to operate more effectively as a means to promote the proper functioning of the Park as a socio-ecological system on which poor and vulnerable depend.

3.5.2 Under-development by virtue of courts presuming that substantive provisions in environmental legislation give effect to the environmental right

In this part I discuss *Harmony Gold 2006* and *Harmony Gold 2014*, two cases that illustrate the courts' tendency to treat principles emerging from environmental legislation as giving effect to the environmental right without fully justifying, with reference to the content of the right, why this is the case. Both cases concerned efforts by the state to require mining companies to take remediation and rehabilitation measures under the *NWA* in response to the problem of acid mine drainage (AMD). AMD is a phenomenon that occurs when "rock containing sulphide minerals is exposed to air and water, either as a result of opencast or underground excavation, or from tailings disposal areas, resulting in the production of highly acidic water".[176] The acidic water is harmful to human health and the environment, and represents a significant water pollution issue, threatening water security in

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174 iSimangaliso Wetland Park Authority 2016 https://isimangaliso.com/newsflash/isimangaliso-its-about-people/. In 2016 the population comprised around 640 000 people.

175 iSimangaliso Wetland Park Authority 2016 https://isimangaliso.com/newsflash/isimangaliso-its-about-people/.

176 Feris and Kotzé 2014 *PER* 2108.

South Africa, which is a water scarce country.[177] AMD has received extensive media coverage and has given rise to litigation, including *Harmony 2006* and *Harmony 2014*.[178] Feris and Kotzé[179] explain that not only does pollution from AMD threaten South Africa's scarce water resources:

> AMD will also impact on all the parameters of sustainability, including ecological, social and economic concerns. In particular, AMD is set to affect infrastructure, displace people and affect their livelihoods, influence economic activity, impact on the resource extraction industry, and affect South Africa's policies and actions in relation to climate change.

The problem of AMD is one of South Africa's most pressing social, environmental and climate justice issues, as the poor are first and hardest hit by its impacts.[180] In the typical pattern of environmental injustice, poor communities live closest to abandoned mines and other areas affected most acutely by AMD.[181] Amongst other health concerns, they face an increased risk of cancer, as a result of the high concentration of heavy metals in AMD.[182] A particularly haunting example of AMD's impacts on the poor are the ailments, including diarrhoea and skin problems, suffered by children who unwittingly play in contaminated water near their homes.[183] In disputes about measures to mitigate these impacts, among other things by holding responsible mining companies to account, the courts are in a position to promote better-functioning socio-ecological systems and, in turn, social,

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177 Feris and Kotzé 2014 *PER* 2106. On water scarcity in South Africa see also Cooper 2017 *SAJELP* 36-38.

178 See news coverage, for instance in Du Toit 2018 https://www.wits.ac.za/news/latest-news/research-news/2018/2018-05/the-heat-of-acid-mine-drainage.html and Bega 2017 https://www.iol.co.za/news/south-africa/gauteng/residents-left-in-dark-over-acid-mine-drainage-treatment-7709811. In addition to *Harmony 2006* and *Harmony 2014*, *FSE 1 and FSE 2* arose as a result of AMD.

179 Feris and Kotzé 2014 *PER* 2106.

180 NGO Pulse 2011 http://www.ngopulse.org/article/acid-mine-drainage-prolific-threat-south-africa's-environment-and-mining-industry. Feris and Kotzé 2014 *PER* 2107. Harvard Law School International Human Rights Clinic 2016 http://hrp.law.harvard.edu/wp-content/uploads/2016/11/The-Cost-of-Gold-Full-Report-Final.pdf.

181 Harvard Law School International Human Rights Clinic 2016 http://hrp.law.harvard.edu/wp-content/uploads/2016/11/The-Cost-of-Gold-Full-Report-Final.pdf.

182 Harvard Law School International Human Rights Clinic 2016 http://hrp.law.harvard.edu/wp-content/uploads/2016/11/The-Cost-of-Gold-Full-Report-Final.pdf.

183 Harvard Law School International Human Rights Clinic 2016 http://hrp.law.harvard.edu/wp-content/uploads/2016/11/The-Cost-of-Gold-Full-Report-Final.pdf.

environmental and climate justice as part of South Africa's project of transformative constitutionalism. Courts ought to do so through transformative adjudication.

In *Harmony Gold 2006* the Department of Water Affairs had issued two directives in terms of section 19 of the *NWA* to Harmony Gold Mining Company Ltd, one of a number of gold mining companies operating in what is known as the Klerksdorp, Orkney, Stilfontein, Hartebeesfontein (KOSH) basin of the North-West Province.[184] Section 19 of the *NWA* confers on the Department wide powers to issue directives compelling polluters (broadly construed) to take "reasonable measures" to prevent and mitigate water pollution.[185] In terms of the directives, Harmony Gold was required to take certain measures, at its cost, to remove, manage and treat underground acidic water arising from mining in the KOSH basin, including from a defunct, neighbouring mine that had not been not operated by it, but by a company that had gone into liquidation.[186] If not removed, managed and treated, water from the defunct mine would ultimately reach Harmony Gold's mine.[187] Harmony Gold objected to having to take measures in respect of the defunct mine in liquidation.[188]

The Supreme Court of Appeal had to determine whether the Department had acted within its powers in directing Harmony Gold to take reasonable measures in terms of section 19 of the *NWA* in respect of pollution occurring on the land of the defunct mine, or whether the Department was only empowered to direct Harmony Gold to take such measures on its own land. The Supreme Court of Appeal *per* Howie P concluded in relation to the language of section 19 of the *NWA* that:

> I find nothing in the wording…which warrants the conclusion that the measures required are intended to be confined to the land of the person obliged to take such measures. The wording is wide enough to include measures on another's land.[189]

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[184] *Harmony 2006* paras 1 and 6-10.
[185] For a discussion on these powers see Feris and Kotzé 2014 *PER* 2130-2136.
[186] *Harmony 2006* paras 6-10.
[187] *Harmony 2006* para 33.
[188] *Harmony 2006* paras 23-24.
[189] *Harmony 2006* para 32.

The court therefore reasoned that the Department was acting within its powers, and that Harmony Gold's objection fell to be dismissed.[190] In reaching this conclusion the court remarked, in passing, that its interpretive role must commence with reference to section 24 of the *Constitution*, and proceeded to summarise the basic content thereof.[191] The court did not, however, elaborate upon the content of section 24 of the *Constitution*, save to state that "the constitutional and statutory anti-pollution objectives would be obstructed" if it were to adopt the narrow interpretation of section 19 of the *NWA* supported by Harmony Gold.[192] Instead of elaborating on the content of section 24, the court proceeded to summarise various provisions in the *NWA*, including its purpose to protect, conserve and manage the nation's water resources, and the obligation imposed on the state to act as the public trustee of the nation's water resources.[193] The court reasoned that it was required to prefer a reasonable interpretation of the *NWA* that gives effect to its purpose, over one that was inconsistent therewith.[194] Implicit in the court's approach is that the provisions of the *NWA* with which it engaged were presumed to be consistent with section 24 of the *Constitution*. However, the court neglected to explain why or how section 24 was implicated. The court's approach represents a weak (and minimalist) indirect application of section 24, where the principles in environmental legislation are presumed to give effect thereto without a proper justification.

In 2008, Harmony Gold ceased to be involved in mining operations in the KOSH basin when Pamodzi Gold Orkney (Pty) Ltd acquired the gold mining business operated by Harmony Gold.[195] Following from this acquisition, in *Harmony 2014*, at issue was whether, having ceased to manage mining operations in the KOSH basin, Harmony Gold remained responsible to take reasonable measures in terms of the directives previously issued to it in terms of section 19 of the *NWA*.[196] Harmony Gold asked the Department to withdraw its directive, and when the Department refused

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190 *Harmony 2006* paras 33-34.
191 *Harmony 2006* para 17.
192 *Harmony 2006* para 17.
193 *Harmony 2006* paras 18-21.
194 *Harmony 2006* para 22.
195 *Harmony 2014* paras 1 and 11.
196 *Harmony 2014* paras 12-13 and 18.

to do so, Harmony Gold sought to review and set aside the refusal on the grounds that the Department had misconstrued its powers.[197] Harmony Gold argued that it could only lawfully be required to take reasonable measures in terms of section 19 of the *NWA* "for as long as it remains the person who owns, controls, occupies or uses the land".[198]

The Supreme Court of Appeal considered Harmony Gold's argument by making, again, a passing reference to section 24 of the *Constitution* and the duty provided for therein for reasonable legislative and other measures to be put in place to ensure environmental protection.[199] The court regarded *NEMA* as one such measure, including the principles provided for in section 2, which were relied upon as an interpretive point of reference. The court highlighted section 2(4)(a)(viii) of *NEMA*, which requires the anticipation, prevention, minimisation and remedying of negative impacts on the environment and on people's environmental rights, and section 2(4)(p) of *NEMA*, which sets out the polluter pays principle.[200] In light of the purpose of the *NWA* and these principles, the court rejected the interpretation of section 19 of the *NWA* proposed by Harmony Gold.[201] The court noted that:

> Harmony's restrictive interpretation…would result in the absurdity that a polluter could walk away from pollution caused by it with impunity, irrespective of the principle that it must pay the costs of preventing, controlling or minimising and remedying pollution.[202]

The court reasoned further that:

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197 *Harmony 2014* paras 12-13.
198 *Harmony 2014* para 18.
199 *Harmony 2014* para 19.
200 *Harmony 2014* para 20. S 2(4)(p) of *NEMA* states that:

> the costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.

201 *Harmony 2014* paras 22-26.
202 *Harmony 2014* para 24.

> An interpretation that does not impose the limitation on the Minister's powers under [section 19(3) of the NWA] contended for by Harmony is consistent with the purpose of the NWA (reducing and preventing pollution and degradation of water resources); accords with the NEMA principles that pollution be avoided or minimised and remedied and that the costs of preventing, minimising, controlling and remedying pollution be paid for by those responsible for harming the environment; and gives expression and substance to the constitutionally entrenched right of everyone to an environment that is not harmful to health or well-being and to have it protected through reasonable measures that amongst others prevent pollution and ecological degradation.[203]

Although the court should be praised for referencing *NEMA* principles and adopting an environment-centred interpretation of section 19 of the *NWA*, it is unfortunate that the court did not explain in any detail how section 24 of the *Constitution* was given expression by its approach. Its remarks concerning section 24 were vague, and the court seemed to presume, without justifying in any way why or how, that the *NEMA* principles referred to give effect to the right to an environment not harmful to health or well being.[204] Again, the court's approach represents a weak (and minimalist) indirect application of section 24 of the *Constitution* and represents a failure to pursue transformative adjudication in the implementation of environmental constitutionalism. Further, the court made no mention of the significance of the right of access to water in section 27 of the *Constitution* or other relevant constitutional rights (such as the rights to dignity provided for in section 10 and the right to life provided for in section 11), as mutually reinforcing of the environmental right and its interpretation of section 19 of the *NWA*.

3.6 Trend 4: Overlooking the relationships among environmental rights and other interrelated and mutually reinforcing rights

In *Grootboom*, the Constitutional Court recognised the interrelated and mutually reinforcing nature of South Africa's constitutional rights.[205] In the context of enforcing the right to access to adequate housing the court remarked that:

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[203] *Harmony 2014* para 25.

[204] The court's approach may be contrasted with that of Ngcobo J in *Bato Star* paras 78-99.

[205] *Grootboom* paras 23 and 24.

> All rights in our Bill of Rights are interrelated and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter…Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.[206]

As Fuo[207] points out, section 24 of the *Constitution* intersects with what he refers to as "transformative rights" in that the fulfilment of South Africa's environmental right can contribute towards the realization of various socio-economic rights aimed at meeting the basic needs of the poor.[208] In spite of this intersection and the Constitutional Court's recognition of the interrelated and mutually supporting nature of rights in the *Bill of Rights*, the fourth trend discussed in this chapter is the courts' failure, in general, to recognise this interrelationship in the adjudication of environmental law disputes.[209]

Fuo[210] highlights that in *Grootboom*, although the court engaged in transformative adjudication in response to the plight of South Africa's poor from the perspective of a violation of their right to access to adequate housing, the court did not seem to appreciate that these people were also experiencing environmental rights violations. *Grootboom* concerned people living in intolerable environmental conditions "perilously close" to roads, in "shacks permanently flooded during winter rains".[211] Although the court recognised these conditions, it failed to consider the relevance of the environmental right in responding thereto by treating the right to housing and the environmental right as interrelated and mutually reinforcing of one another in

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206 *Grootboom* paras 23 and 24.

207 Fuo 2013 *Obiter* 84-91. See also Feris 2008 *SAJHR* 45-48.

208 On the relationship between the right to water and other rights, including the environmental right, see Cooper 2017 *SAJELP* 40-41.

209 Pertinent examples of this trend include *Mazibuko*, as discussed in Fuo 2013 *Obiter* 95 and Murcott 2015 *SALJ*. See also *Beja v Premier of the Western Cape* 2011 (10) BCLR 1077 (WCC), as well as *FSE 1* and *FSE 2*. A counterpoint is illustrated by *Kenton on Sea*, where the court addressed the interrelated nature of waste management and the realisation of socio-economic rights. The court's failure to link a violation of the environmental right with violations of the rights to culture and customary law practices will be discussed in relation to the *Gongqose* judgments in chapter 5 at 5.5 below.

210 Fuo 2013 *Obiter* 93-95.

211 Fuo 2013 *Obiter* 93.

the context of that case.[212] The environmental right was not raised in argument, but given the pleaded facts and the notion that all provisions in the *Bill of Rights* which might be relevant must be considered in constitutional adjudication, the court was empowered to consider the environmental right *mero motu*.[213]

More recently, in *Melani v City of Johannesburg* (*Melani*) the High Court was called upon to consider decisions of the City of Johannesburg about how to progressively realise the right to housing for residents of the Slovo Park Informal Settlement. The court did so without considering the potential relevance and role of the environmental right as mutually reinforcing of, and interrelated with, the right to housing.[214] The court acknowledged that the matter concerned the plight of the residents, "10,000 very poor people living in 3,700 households…for up to 21 years…in deplorable conditions [with] no access to electricity".[215] The court further noted undisputed evidence that "fatal" shack fires break out in the area once every two months, and that "ambulances refuse to collect the sick from Slovo Park because the roads are not formally demarcated, do not appear on a map, are not signposted and as a result individual residents cannot be located".[216] These living conditions represented violations of the residents' environmental right as well as violations of their rights to access to adequate housing.

Residents of Slovo Park argued that the City ought to fulfil its undisputed constitutional obligation to provide housing for them in terms of the Upgrading of Informal Settlement Programme (UISP).[217] Instead, the City had determined to relocate the residents to Unaville on the basis that the area was 'suitable for development'.[218] The residents argued that the decision to relocate the residents to Unaville was unlawful on the basis that it was:

212 Fuo 2013 *Obiter* 93.
213 *Link Africa* paras 35-36 and 114-119.
214 Fuo 2013 *Obiter* 84-91.
215 *Melani* para 3.
216 *Melani* para 3.
217 The Upgrading of Informal Settlement Programme (UISP) Part 3, Volume 4 of the National Housing Code 2009.
218 *Melani* para 11.

> at odds with the UISP's prescription, i.e. that upgrading *in situ* must wherever possible be preferred to relocation, and that housing developments under the UISP must include everyone living in a particular settlement, even individuals who would not normally qualify in terms of other housing programmes.[219]

The court found that the City had violated the residents' rights to housing and to just administrative action.[220] The environmental right was not viewed as interrelated with or mutually reinforcing of the residents' housing rights, even though the court acknowledged that the intent of the UISP was to provide the residents and others living in informal settlements with tenure security and a healthy environment through "a holistic development approach with minimum disruption to or distortion of existing fragile community networks and support structures".[221] *Melani* is illustrative of a missed opportunity to invoke mutually reinforcing and interrelated housing and environmental rights in a dispute concerning the plight of the poor. Again, given the pleaded facts, the court was empowered by section 39(2) of the *Constitution* to consider the significance of the environmental right *mero motu*.[222]

As I have argued elsewhere, in *Mazibuko* the matter was framed by the parties and the court as concerning the right to access to water, whilst other potentially relevant rights were overlooked.[223] In particular, no mention was made of the need to uphold the environmental right so as fulfill the right to access to water.[224] Similarly, in *FSE 1* and *FSE 2* an impoverished community sought to enforce their right to access to water in circumstances where AMD had polluted their water supply. Although the court recognised that the community had been exposed to unhygienic, polluted water, the court failed to place any reliance on the environmental right in enforcing the community's right to access to water.[225] The court was arguably empowered by

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219 *Melani* para 12.
220 *Melani* paras 42-43.
221 *Melani* para 34.
222 *Link Africa* paras 35-36 and 114-119, discussed in chapter 2 at 2.4 above.
223 *Mazibuko* discussed in Murcott 2015 *SALJ*.
224 See generally Murcott 2015 *SALJ*. Kotzé 2010 *Journal of Human Rights and the Environment* 160 has argued that the court's approach to the right to access to water in *Mazibuko* was consistent with the conservative and sustainable use of natural resources in the face of climate change; a view I reject (see Murcott 2015 *SALJ* 893), from a justice-oriented perspective, to the extent that such use has the effect of leaving the most vulnerable in society without access to water.
225 *FSE 1* para 9, *FSE 2* paras 13 and 23-24 discussed in Murcott 2015 *SALJ* 907-908. See also Fuo 2013 *Murdoch University Law Review*.

s 39(2) to engage with the environmental right *mero motu*, since it was a particularly relevant provision in the context of the dispute.[226]

The link between the fulfillment of the right to access to water and securing ecologically sustainable development is recognised by Cooper,[227] who notes that "social and human security cannot be separated from environmental and ecological security". However, Cooper[228] remarks, with reference to legislation and regulations concerning access to water and the court's approach in *Mazibuko*, that the realisation of sustainable development in providing water services has been "inchoate at best, marking a serious shortfall in both judicial and legislative contributions to fulfilling people's right to access to sufficient water, both now and in the future". I would add that that the situation also marks a shortfall in fulfilling the environmental right.

3.7 Conclusion

This chapter has discussed four trends that indicate that a social justice-oriented environmental law jurisprudence is yet to emerge due to the courts' failure to engage in transformative adjudication in environmental law disputes.

The discussion on trend 1 illustrated with reference to *Adendorffs Boerderye* and *Kenton on Sea*, the courts' tendency to overlook justice issues and the fact that humans and the environment exist in socio-ecological systems, such that social, environmental and climate injustices ought to be viewed as interconnected in the adjudication of environmental law disputes. By failing to engage with relevant justice issues the courts failed to adopt a "contextual approach". This context could have facilitated transformative adjudication that viewed environmental rights violations from the perspective of "the socio-economic conditions of the people concerned…in

226 *Link Africa* paras 35-36 and 114-119, discussed in chapter 2 at 2.4 above.
227 Cooper 2017 *Journal of African Law* 59.
228 Cooper 2017 *Journal of African Law* 59-76.

the light of social patterns, power relations and other systematic forms of deprivation, which may be relevant".[229]

The discussion on trend 2 explored problems arising from "over-proceduralisation" of environmental law disputes. *Normandien Farms* and the *Barberton Mines* judgments illustrated the courts' formalistic mode of adjudication that results in the obfuscation of substantive environmental considerations and relevant substantive provisions in environmental legislation. This formalism has the effect of "the hard edges of legal rules" screening off important substantive considerations as an aspect of transformative adjudication.[230] For instance, with their focus on process and conceptualist reasoning, and by overlooking the underlying environmental context of the disputes, the courts in *Normandien Farms* and the *Barberton Mines* judgments failed to engage with relevant *NEMA* principles, and how those principles might be responsive to the crucial substantive issues arising from the disputes.

The discussion on trend 3 revealed the courts' failure to pursue transformative adjudication that adopts a substantive, rights-based approach in that the content and normative potential of the environmental right is typically given very little meaningful judicial attention in environmental law disputes, and remains undeveloped. *Propshaft* and *iSimangaliso* were discussed as illustrative of the courts' tendency to make no more than a passing reference to section 24 of the *Constitution*. *Harmony 2006* and *Harmony 2014* were discussed as illustrative of the courts' tendency to presume that various provisions of environmental legislation give effect to section 24 of the *Constitution*, without explaining how or why. By doing so the courts miss opportunities to give normative content to the environmental right, and to provide clarity and certainty on key concepts that could enrich environmetnal jurisprudence.

The discussion on trend 4 showed that the courts tend not generally to treat environmental rights violations as linked to violations of other substantive rights,

229 As called for by Moseneke 2002 *SAJHR* 318.

230 A criticism levelled by Cockrell 1996 *SAJHR* 10 in relation to South Africa's legal culture after apartheid, which arguably prevails to a great extent.

such as the right to access to housing (in *Grootboom* and *Melani*) and the right to access to water (in *Mazibuko* and *FSE 1* and *FSE 2*). Environmental law disputes are instead determined with reference to these other substantive rights to the exclusion of the environmental right. In this way, the potential of the environmental right to reinforce claims arising from other rights that serve to promote social justice and human flourishing, remains obscured.

In chapter 4 I argue that a legal theory of transformative environmental constitutionalism offers legal means grounded in the *Constitution* to pursue social justice for South Africa's poor through the implementation of environmental constitutionalism in a transformative manner that recognises that harmful environmental conditions and the social injustices experienced by South Africa's poor are interconnected concerns.

Chapter 4 Unpacking the content of transformative environmental constitutionalism

4.1 Introduction

In 2017 I began to develop the notion of transformative environmental constitutionalism building on the ideas of environmental justice, social justice and transformative constitutionalism in the South African context.[1] I did so on the basis that:

> South Africa's project of transformative constitutionalism has not adequately engaged environmentalism as a concern for the protection of the environment that is interconnected to the pursuit of social justice for the people who live in them, particularly the poor and vulnerable.[2]

I argued that transformative constitutionalism is largely about responding to the socio-economic hardships arising from the deplorable living conditions of South Africa's poor through legal means, grounded in the *Constitution*.[3] I then posited that "transformative environmental constitutionalism entails recognizing that these hardships are also environmental issues to which environmentalism must respond".[4] I tentatively suggested ways in which environmental constitutionalism could, in broad terms, be configured so as to contribute more meaningfully towards South Africa's project of transformative constitutionalism through a legal theory of transformative environmental constitutionalism.[5]

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1 Murcott "Transformative Environmental Constitutionalism". Whilst various authors (see for instance Collins "Environmental Constitutionalism in the Americas" 145, Collins "Judging the Anthropocene" 310, May and Daly 2015 *Widener Law Review* 152) have discussed the transformative potential of environmental constitutionalism, my work is the first to develop a theory of transformative environmental constitutionalism in the South African context.

2 Murcott "Transformative Environmental Constitutionalism" 280.

3 Murcott "Transformative Environmental Constitutionalism" 287.

4 Murcott "Transformative Environmental Constitutionalism" 287.

5 Murcott "Transformative Environmental Constitutionalism" 288-293. I discussed the transformative environmental constitutionalism as entailing the protection of the environment as a necessity for the attainment of dignity, the concepts of intra- and inter-generational equity, and the notion of ecological sustainability. I elaborate below on the potential role of the courts to engage below with some of these ideas in the adjudication of environmental law disputes.

Although transformative environmental constitutionalism should operate as a theoretical frame for environmental governance generally, the focus of this thesis is on the capacity of the judiciary to contribute as a key governance actor, to ensuring well-functioning socio-ecological systems that create the conditions in which social justice can occur.[6] As I have argued above, not only ought courts to engage more effectively in the implementation of environmental constitutionalism so as to enhance environmental protection in South Africa,[7] but also as a necessity for the attainment of interconnected social, environmental and climate justice for the poor. By doing so, social, environmental and climate injustice experiences of the poor, which are already heightening in the Anthropocene, may be exposed and addressed in the adjudication of environmental law disputes. Collins[8] explains:

> As the arbiters of justice in the Anthropocene, judges have the potential to radically transform environmental governance in the public interest or, alternatively, to be mere spectators in the ongoing process of environmental degradation.

South African judges, as important agents of social transformation, [9] are constitutionally mandated to "radically transform environmental governance in the public interest" so as to respond not only to the immense socio-ecological impacts of apartheid,[10] but also to the chilling prospect of a "climate apartheid" set to emerge as a result of the climate crisis of the Anthropocene.[11] Transformative environmental constitutionalism seeks to operate as a theory pursuant to which judges in South Africa may do so. It calls upon the judiciary, in fulfilling its constitutional mandate to pursue social justice,[12] to engage with the law in a radical manner that recognises the links between environmental degradation in a time of socio-ecological crisis, and

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6 Collins "Judging the Anthropocene" 311.

7 Kotzé and Du Plessis 2010 *Journal of Court Innovation* 175.

8 Collins "Judging the Anthropocene" 310.

9 See Gargarella *et al* "Courts and Social Transformation" 273; Hoexter 2008 *SAJHR* 283.

10 Pieterse 2005 *SAPL* 157; Steyn 2005 *Globalizations*.

11 UN Special Rapporteur on extreme poverty and human rights 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E.

12 The preamble of the *Constitution* requires that the judiciary interpret and enforce constitutional rights and the legislation giving effect thereto so as to "establish a society based on democratic values, *social justice* and fundamental rights" and to "improve the quality of life of all citizens and free the potential of each person".

the plight of South Africa's poor. As explained in chapter 1, the thesis proceeds from the premise that the lived realities of South Africa's poor, the state of the environment and the wicked nature of deepening inequality and poverty[13] are issues of *justice*.[14] The South African judiciary is required to be responsive to these issues of justice in the interpretation and application of environmental laws by virtue of the transformative nature of the *Constitution* and their role as ultimate guardians of the *Constitution*.

In the face of pervasive failures by the state to implement environmental laws effectively, despite worsening environmental conditions and deepening poverty and inequality,[15] in the adjudication of environmental law disputes the courts can play a number of key roles. First, they can play an accountability-enhancing role in the pursuit of improved environmental governance.[16] The courts can potentially hold to account a range of governance actors, including the state, but also corporations who would exploit the environment unabated in pursuit of profit.[17] This is because the courts are a platform, open to civil society, to vindicate concerns about the degradation of environment and the impact thereof on South Africa's poor.[18] Further, the potential to apply rights in the *Constitution* horizontally means that corporations can be taken to task for their dominant role in shaping and driving the

13 In the sense that these problems are not discrete or easily solvable, are structural and systemic problems, and are beyond the reach of mere technical knowledge and traditional forms of governance.

14 Justice is conceptualised in this thesis in the sense argued for by Sen *The Idea of Justice* 21 as "preventing manifestly severe injustice" rather than pursuing "some perfectly just society". Ebbesson "Introduction: dimensions of justice in environmental law" explains that "[a]lthough well-established concepts in environmental law…appear neutral on their face, a closer study, or simply placing them in context, may reveal disproportionate burdening or restricting effects for certain groups or categories when these concepts are applied. It may also show how certain interests or subjects are ignored or demeaned". This thesis aims to place environmental laws in their context and to bring to the fore the plight of the poor whose interests are often ignored or demeaned in the context of the adjudication of environmental law disputes.

15 Discussed in chapter 1 at 1.1.1 above.

16 Collins "Judging the Anthropocene" 311.

17 Wheeler "The Corporation and the Anthropocene" 289-297; Simons 2004 *Relations industrielles* 104-105. See also Centre for Environmental Rights 2016 https://fulldisclosure.cer.org.za/2016/; International Federation for Human Rights 2017 https://www.refworld.org/docid/588b25884.html; Hallowes and Munnik 2006 http://www.groundwork.org.za/reports/gWReport2006.pdf.

18 I draw parallels here with the work of Bogojević 2013 *Law & Policy* 187 who discusses climate change litigation in the European Union.

conditions that lead to the Anthropocene's socio-ecological crisis.[19] Secondly, the judiciary can play an important story-telling role in environmental law disputes by making the socio-ecological systems and justice implications of climate change and other environmental issues known to a wide audience.[20] In the adjudication of environmental law disputes, concerns about the degradation of the environment can be rendered "tangible and immediate".[21] When courts interpret and apply laws they can potentially reveal and grapple with myriad socio-ecological and economic concerns. In so doing the courts can alert the public to the fact that climate change and the socio-ecological crisis of the Anthropocene more generally will give rise to social, environmental and climate injustice. Further, by virtue of the authoritative nature of judicial pronouncements, the courts can legitimise concerns about environmental issues, and enhance public discourse in respect thereof.[22] The judiciary can potentially encourage policy shifts on the part of state and non-state actors that are more responsive to the hardships experienced by the poor as connected to the state of the environment.[23]

As discussed in chapter 2, the judiciary is equipped with the juridical tools to implement environmental constitutionalism in a manner that gives effect to the spirit, purport and objects of the *Constitution*, particularly its social justice imperative.[24] Further, for the reasons set out in chapter 2, the model of separation of powers envisaged by South Africa's constitutional design requires that the judiciary do so in an activist fashion.[25] As I argued in chapter 2, the doctrine of separation of powers in South Africa empowers courts to engage in "judicial activism" construed as substantive, rights-based judicial review from a social justice-oriented perspective that aligns with the *Constitution*'s transformative mandate.[26] Developing a legal theory of transformative environmental constitutionalism focused

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19 Wheeler "The Corporation and the Anthropocene" 289-290; Adelman "Sustainable Development Goals" 19, 27.
20 Bogojević 2013 *Law & Policy* 187. Fisher 2013 *Law & Policy* 243.
21 Bogojević 2013 *Law & Policy* 186. Fisher 2013 *Law & Policy* 242.
22 Bogojević 2013 *Law & Policy* 187. Fisher 2013 *Law & Policy* 242.
23 Bogojević 2013 *Law & Policy* 187.
24 Chapter 2 at 2.4 and 2.5 above.
25 Fish Hodgson 2018 *SAJHR* 68-75. Bilchitz "Constitutionalism" 52-53. Pieterse 2005 *SAPL* 164-165.
26 Fish Hodgson 2018 *SAJHR* 75, discussed in chapter 2 at 2.4.3 above.

on this judicial role entails uncovering, from a *de lege ferenda* perspective, some of the ways in which environmental constitutionalism can, in theory, be implemented by the courts through transformative adjudication that facilitates the emergence of a social justice-oriented environmental law jurisprudence.

4.2 About this chapter

This chapter asks the questions: *What is transformative environmental constitutionalism and how can it respond to some of the problematic trends in the adjudication of environmental law disputes and facilitate the emergence of a social justice-oriented environmental law jurisprudence that is more responsive to the transformative mandate of the Constitution?* I argue that transformative environmental constitutionalism entails invoking the juridical tools described in chapter 2 so as to "restore social justice as a premier foundational value of our constitutional democracy",[27] and curb the problematic trends in adjudication of environmental law disputes outlined in chapter 3.

Transformative environmental constitutionalism entails first, that environmental law disputes ought to be framed in a justice-oriented manner that adopts a socio-ecological systems perspective that shows an appreciation of the interconnectedness of social, environmental and climate injustice. Secondly, I argue that transformative environmental constitutionalism calls for purposive and substantive rights-based adjudication of environmental law disputes that (i) engages with the content and import of relevant justice-oriented provisions in environmental legislation; (ii) develops the normative content of the environmental right provided for in section 24 of the *Constitution*; and (iii) recognises the mutually reinforcing and interrelated nature of the environmental right and other relevant substantive rights concerned with the flourishing of humans and the environment. For the reasons argued in chapter 2, South Africa's project of transformative constitutionalism entails that the kind of substantive reasoning proposed should be pursued in every environmental law dispute (irrespective of whether or not they are adjudicated as procedural rights

[27] Moseneke 2002 *SAJHR* 314.

violations). Since environmental law disputes are typically adjudicated as procedural rights violations in a formalistic manner, transformative environmental constitutionalism will require a departure from South Africa's prevailing formalistic legal culture, and a shift towards a progressive legal culture as discussed in chapter 2.

4.3 Justice-oriented framing of disputes

Environmental law disputes invariably (though not necessarily explicitly) engage issues of justice in relation to the functioning of socio-ecological systems:[28] they involve conflicts about the interactions among diverse human and non-human entities existing within a single system,[29] and the distributional (substantive) and/or procedural injustices arising therefrom.[30] Transformative environmental constitutionalism entails courts recognising and explicitly engaging with relevant justice issues from a socio-ecological systems perspective in the adjudication of environmental law disputes. This perspective requires that the courts systematically acknowledge environmental concerns "conceptualised as a set of interconnected ecological pressures that require a similarly interconnected economic, social and political response",[31] whilst appreciating that these environmental concerns impact on human flourishing and thus on social justice.[32] Pursuant to this approach, the "invisible poor"[33] can become visible in the adjudication of environmental law disputes, and it could be possible for their plight no longer to be demeaned or overlooked. The argument is that should the courts view environmental concerns in this holistic, justice-oriented manner, they could contribute to breaking down the supposed dichotomy of brown and green environmental agendas.[34] Binary thinking in this manner is arguably undesirable given that struggles for environmental

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28 See the discussion of justice in chapter 1 at 1.1.2 above.

29 Fischer *et al* 2015 *Current Opinion in Environmental Sustainability* 144-148.

30 Miller *Principles of Social Justice* 11 points out that the subject-matter of social justice includes that which is "justice-relevant" in the sense of ensuring a fair share of those resources necessary to enable people to flourish, and those things which inhibit flourishing. Further "distribution" is concerned with "the ways in which a range of social institutions and practices together influence the shares of resources available to different people".

31 Curran and Hollander 2015 *Australasian Journal of Environmental Management* 23.

32 Schlosberg *Defining Environmental Justice* (e-Book).

33 Scott and Oelofse 2005 *Journal of Environmental Planning and Management* 448.

34 On the need to bridge social and environmental issues see Cock "Connecting" 20.

protection and for social justice are connected as argued in chapter 1. The Anthropocene imagery brings with it an appreciation that humans and the environment exist in a single system,[35] such that humans can no longer exercise dominium over nature without severe socio-ecological consequences, particularly for the poor.[36] By departing from binary thinking, courts may begin to grapple explicitly with the idea, for instance, that human health, a so-called brown agenda issue, cannot be secured without ecosystem health, a concern of the green agenda. Similarly, nature (itself a contested concept) cannot serve human needs as a goal of the brown agenda, unless it is protected as a goal of the green agenda.[37]

The justice issues that courts ought to consider in framing environmental law disputes may arise in a distributional (substantive) sense, for instance, where the negative impacts of climate change, pollution, environmental degradation or other threats to ecological integrity are disproportionately experienced by the poor, and serve to exacerbate inequality and conditions of poverty.[38] Alternatively or additionally, injustice may arise in a procedural sense, where the state and/or corporations fail to recognise the moral worth of, and ensure meaningful participation by, the poor in environmental decision-making.[39] These injustices ought to give rise to interconnected concerns for social, environmental and climate justice, and further constitute substantive, moral considerations and part of the context with which the courts ought to engage as an aspect of transformative adjudication. Framing environmental law disputes in this manner would entail a departure from trend 1 discussed in chapter 3 above with reference to *Adendorffs Boerderye* and *Kenton on Sea*.

Evidence of relevant social, environmental and climate justice issues ought to be explicitly placed before the courts. Where it is not, courts are empowered under

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[35] Fischer *et al* 2015 *Current Opinion in Environmental Sustainability* 148.

[36] Adelman "The Sustainable Development Goals" 37-40.

[37] In this sense I find accounts that dichotimise these agendas to be of limited value. For such an account see for instance Du Plessis 2015 *PER* 1851.

[38] Schlosberg *Defining Environmental Justice* (e-Book); Agyeman *Just Sustainabilities* (e-Book).

[39] Schlosberg *Defining Environmental Justice* (e-Book); Agyeman *Just Sustainabilities* (e-Book).

South African law of evidence to take judicial notice thereof.[40] Judicial notice "allows a judicial officer to accept the truth of certain facts which are known to him or her, even though no evidence was led to prove these facts".[41] Judicial notice may be taken, first, of facts that are so well-known so as not to be of reasonable dispute (general knowledge requiring no external evidence).[42] Secondly, judicial notice may be taken of facts that are "notorious among all reasonably well-informed people in the area where the court sits", or is readily ascertainable by accurate sources such that it is not necessary to require evidence thereof.[43] McGregor[44] argues in the context of the adjudication of labour law disputes that:

> South Africa's history of past discrimination of colonialism, apartheid and patriarchy and its resultant disadvantage for certain groups are sufficiently notorious to form a proper subject for judicial notice: it is a matter of historical knowledge.

McGregor[45] contends that taking judicial notice in this context would facilitate transformative constitutionalism by contributing to healing the divisions of the past. Similarly, in the context of the adjudication of environmental law disputes, the deplorable living conditions of poor communities in South Africa, including the high pollution levels and undesirable land uses to which many are exposed, are sufficiently notorious to form proper subjects for judicial notice. They are well-documented phenomena, as appears, for instance, from statistical information and relevant White Papers concerning the impacts of environmental degradation on the poor.[46] Likewise, biodiversity and habitat loss, water and food scarcity and other climate change impacts and vulnerabilities are increasingly becoming sufficiently notorious to be proper subjects for judicial notice. Evidence thereof emerges from

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40 Schwikkard and Van der Merwe *Principles of Evidence* 482.
41 McGregor 2011 *De Jure* 121.
42 Schwikkard and Van der Merwe *Principles of Evidence* 482.
43 Schwikkard and Van der Merwe *Principles of Evidence* 482.
44 McGregor 2011 *De Jure* 123.
45 McGregor 2011 *De Jure* 125.
46 Government reports and policies are replete with such facts, and such facts are also collated as part of the census and other surveys performed by the government. See for example South African Government https://www.gov.za/issues/land-reform; Statistics South Africa 2017 http://www.statssa.gov.za/?p=10341; Statistics South Africa 2015 https://www.statssa.gov.za/publications/P0318/P03182015.pdf; the White Paper.

reports of the South African government and the IPCC, for instance.[47] Taking judicial notice of such facts could contribute towards improved environmental protection in pursuit of social, environmental and climate justice, as an aspect of a legal theory of transformative environmental constitutionalism.

4.4 Substantive, rights-based adjudication

Transformative environmental constitutionalism requires transformative adjudication of environmental law disputes from a rights-based perspective; i.e., substantive legal reasoning that gives effect to, and is consistent with, relevant rights and the overarching substantive vision of the *Constitution*, including the pursuit of social justice, dignity and equality.[48] This kind of substantive reasoning in environmental law disputes could facilitate engagement with the environmental context and its impact on the poor, which, in turn, could serve to "augment the attention that constitutional environmental rights receive in public discourse", and further "meaningfully contribute to the success of environmental claims in future".[49] Such reasoning would entail a departure from the formalistic reasoning that occurs when environmental law disputes are over-proceduralised as illustrated in the discussion of trend 2 in chapter 3. Further, this kind of reasoning could facilitate the utilisation of the environmental right, and thus a shift away from the under-utilisation of the environmental right, representing inappropriate judicial avoidance as illustrated by trend 3 discussed in chapter 3.

In this part I explain three ways in which courts, by invoking a legal theory of transformative environmental constitutionalism, could engage in transformative adjudication in environmental law disputes. The theory could be applied irrespective of whether or not such disputes are brought to court on, for example, procedural grounds founded in the principle of legality,[50] the right to administrative justice,[51] or

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47 See for example Drimie and van Zyl "Human vulnerability" and IPCC 2018 http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf.

48 See Cockrell 1996 *SAJHR* 5-6.

49 May and Daly *Global Environmental Constitutionalism* 89.

50 S 1(c) of the *Constitution*, which provides for the value of the rule of law and is enforceable through the principle of legality as discussed in chapters 2 and 3 above.

the right to access to information.[52] As discussed in chapter 2, it is well established that procedural rights can be, and often are, invoked to facilitate the (indirect) attainment of substantive rights, including the environmental right.[53] Regardless of the grounds (procedural or substantive) on which environmental law disputes are founded, at issue is *how* courts adjudicate such disputes. I argue first, that transformative environmental constitutionalism entails that courts must meaningfully invoke relevant justice-oriented provisions in environmental legislation giving effect to the environmental right. For reasons of relevance, scope and length, I focus on legislative provisions aimed at environmental justice[54] and public trusteeship.[55] Principles that are not discussed, but that could form part of a further research agenda, include the precautionary principle,[56] the polluter pays principle,[57] and the principle of avoidance.[58] Next, I argue that courts should develop the normative content of the environmental right when considering violations thereof, particularly the notions of intra- and intergenerational equity and the notion of ecological sustainability, which I argue can be viewed as justice-oriented.[59] The judiciary has left these aspects of the environmental right and their potential to be invoked so as to be responsive to social, environmental and climate injustices experienced by the poor largely undeveloped and uncharted. Other potentially relevant aspects of the right, which are not further developed in this thesis, but that could form the basis for a future research agenda, relate to the notions of "well-being" and "health" provided for in s 24 of the *Constitution*.[60] Finally, I argue that courts ought to recognise the mutually reinforcing and interrelated nature of the environmental right and other substantive rights. The courts ought to engage in this kind of transformative adjudication whether they are confronted with the direct or indirect application of

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51 S 33 of the *Constitution*, given effect by *PAJA*.

52 S 32 of the *Constitution*, given effect by *PAIA*.

53 Dugard and Alcaro 2013 *SAJHR*. See also Daly 2012 *International Journal of Peace Studies*.

54 Ss 2(2) and 2(4)(c), (d), (f), (h) and (k) of *NEMA*.

55 S 2(4)(o) of *NEMA*.

56 S 2(4)(a)(viii) of *NEMA*.

57 S 2(4)(p) of *NEMA*.

58 S 2(4)(a)(i) to (iii) of *NEMA*.

59 The right could also be read with s 10 of the *Constitution* to require the protection of the environment for the attainment of dignity.

60 Du Plessis 2011 *SAJHR* 292-307 offers valuable insights on how other aspects of the environmental right could and should be generously interpreted given the links between poverty and the environment, including in relation to the notions of "well being" and "health". For a discussion of the term "well being" see also Du Plessis "Where 'Well-being' Thrives".

rights.[61] In view of the principle of subsidiarity,[62] most environmental law disputes are adjudicated with reference to environmental legislation giving effect to the right to an environment not harmful to health or well being, or legislation giving effect to rights to access to socio-economic entitlements such as water or housing.[63] In these situations the indirect application of rights entails that the legislation concerned must be interpreted in conformity with relevant rights, which necessarily entails giving content to those rights.[64]

4.4.1 Substantive engagement with justice-oriented provisions in environmental legislation

As discussed in chapter 2, South Africa's environmental legislation contains numerous provisions that could be invoked in the adjudication of environmental law disputes to facilitate the emergence of social justice-oriented environmental jurisprudence. Trend 2 discussed in chapter 3 revealed with reference to *Normandien Farms* and the *Barberton Mines litigation* that as a result of the over-proceduralisation of environmental disputes the *NEMA* principles and other relevant justice-oriented provisions are not effectively invoked in environmental law disputes. In this part I explain why and how they should and could be invoked, with specific reference to provisions aimed at environmental justice and public trusteeship. For reasons of relevance, length and scope I focus on environmental justice and public trusteeship as they emerge from the *NEMA* principles.[65] I argue that by engaging with provisions pursuing environmental justice and public trusteeship, courts could explicitly pursue the social justice imperative of the *Constitution* and give content to the notions of intra- and intergenerational equity enshrined in the environmental

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61 Currie and De Waal "Application" 24-25.

62 Murcott and van der Westhuizen 2015 *CCR* 46-49.

63 For instance, in *Harmony 2014* and *Harmony 2006* (discussed in chapter 3 at 3.5.2 above) the court was concerned with the application and interpretation of the *NWA*, and was arguably required to interpret that legislation in conformity with s 24 and s 27 of the *Constitution* (the environmental right and the right to access to water), and in *Melani* the court was concerned with the application and interpretation of the UISP and was arguably required to interpret that policy in conformity with s 24 and s 26 of the *Constitution* (the environmental right and the right to housing).

64 Currie and De Waal "Application" 64.

65 Other relevant principles are discussed above (see notes 54 to 58 in chapter 4). See also Murcott 2015 *SALJ* 889-892.

right.[66] In doing so, courts might arguably then be in a position to depart from over-proceduralising environmental law disputes, and the formalistic reasoning characteristic thereof, as the discussion of trend 2 in chapter 3 revealed.

As discussed in chapter 2, the *NEMA* principles apply to "the actions of all organs of state that may significantly affect the environment".[67] Further, it has been held that corporations who cause significant pollution may also be required to act in a manner consistent with the *NEMA* principles.[68] In *MEC for Agriculture, Conservation and Land Affairs, Gauteng v Sasol Oil* it was found that "the interpretation of any law concerned with the protection and management of the environment must be guided by [NEMA's] principles".[69] To the extent that litigants do not refer to these principles in argument, courts may, by virtue of section 39(2) of the *Constitution*, engage with them *mero motu* given that they will typically form an important and relevant part of the statutory context for the interpretation of environmental laws in environmental law disputes.[70]

4.4.1.1 Environmental justice

The *NEMA* principles require environmental justice in a substantive and procedural sense in environmental decision-making.[71] As I will show below, they encapsulate an expansive, redistributive, participatory and transformative understanding of environmental justice.[72] They are thus consistent with the transformative vision of the *Constitution* and the spirit, purport and objects of the *Bill of Rights*. Further, as discussed below, key principles are concerned with the unjust distribution of environmental goods and bads that influence equality, dignity and human flourishing, and go on to address the causes of that injustice, including the fact that

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66 S 24 of the *Constitution* provides for the protection of the environment for the benefit of present and future generations. See further the discussion on intra- and inter-generational equity below.

67 S 2 of *NEMA*.

68 *VEJA* para 66.

69 *Sasol Oil* para 15.

70 See *Link Africa* para 33. The significant role and normative status of *NEMA*'s principles has been emphasised, for instance, in *BP* and *Fuel Retailers*.

71 Ss 2(2) and 2(4)(c), (d), (f), (h) and (k) of *NEMA*.

72 Schlosberg and Carruthers 2010 *Global Environmental Politics* 14. Murcott 2015 *SALJ* 876. Du Plessis 2008 *PER* 19/34.

poor South Africans have been marginalised and excluded in environmental decision making.[73] These principles make it plain that this marginalisation and exclusion must be addressed in order to respond to environmental injustice.

The *NEMA* principles provide first for environmental justice in a substantive (distributional) sense. Section 2(2) requires environmental management that places "people and their needs at the forefront of its concern" and that serves, in an equitable fashion, "their physical, psychological, developmental, cultural and social interests". A socio-ecological systems perspective on this provision highlights that absent environmental protection people's needs and interests cannot be met in an equitable manner as envisaged. Section 2(4)(c) recognises the need to address the mal-distribution of environmental harms by providing that:

> Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.

Further, section 2(4)(d) provides that:

> Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures must be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.

By pursuing environmental justice in a substantive, redistributive manner as envisaged by these provisions, courts could challenge the neo-liberal capitalist view that sees economic growth as "essential and inevitable".[74] Pursuant to this view, water and other life support systems of the Earth are treated as commodities to be bought and sold, as opposed to benefits to be shared equitably amongst all people, including the poor, whilst ensuring ecological sustainability.[75]

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73 As discussed in note 25 in chapter 1 above, the term "black" includes all people of colour who were historically disadvantaged during apartheid, though black Africans were worst affected by social, economic and environmental hardships, and millions remain caught in a "poverty trap". See Carter and May 2001 *World Development* 1988; Adato *et al* 2006 *Journal of Development Studies* 229-245; Modiri 2015 *PER* 229.

74 Adelman "Sustainable Development Goals" 19.

75 Murcott 2015 *SALJ* 905. Adelman "Sustainable Development Goals" 40.

The *NEMA* principles also provide for environmental justice in a procedural sense. Section 2(4)(f) provides for participation in environmental decision making, particularly by vulnerable and disadvantaged persons. Section 2(4)(g) provides that "all forms of knowledge, including traditional and ordinary knowledge" must be recognised in decision making. Section 2(4)(h) provides for community well being and empowerment, including through sharing knowledge. Section 2(4)(k) demands open and transparent decision making and access to information. Courts could, with reference to these provisions, inquire into whether environmental decision-making has occurred in a manner that ensured meaningful participation by all people, including the poor, not as mere passive recipients of goods and services, but as active participants whose environment (and indeed survival) is at stake.[76] In *VEJA* the court relied upon *NEMA* principles that provide for environmental justice in a procedural sense (sections 2(4)(f) and (k) of *NEMA*) to justify granting an order compelling ArcelorMittal to provide information about its polluting activities to environmental activists.[77] Beyond this, the courts have not explicitly relied upon or engaged with the *NEMA* principles concerned with environmental justice in any meaningful way.[78]

Judicial reliance on the *NEMA* principles concerned with environmental justice could facilitate substantive adjudication by encouraging courts to consciously and openly articulate concerns for environmental justice (connected to social and climate justice) that ought to inform their choices in their interpretations and applications of relevant laws.[79] The courts could, in the face of social, environmental and climate injustice, thus pursue "the attainment of substantive equality, the realisation of social justice, the infusion of the private sphere with human rights standards and the promotion of a 'culture of justification' in public-law interactions" in the adjudication of environmental law disputes.[80] For instance, these provisions could bring to the

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76 Murcott 2015 *SALJ* 905.

77 *VEJA* para 66 to be discussed further in chapter 5 at 5.4 below.

78 My review of the case law reveals that there has not been any meaningful engagement by the courts with ss 2(c) or 2(d) of *NEMA*.

79 Hoexter 2008 *SAJHR* 283-284. See also Quinot 2010 *CCR* 113.

80 Pieterse 2005 *SAPL* 161. See also Hoexter 2008 *SAJHR* 286-287.

fore important justice-oriented considerations about the plight of the poor in disputes concerned with the interpretation and application of seemingly neutral provisions concerned with granting permits or authorisations.[81] These seemingly neutral provisions can have disproportionate burdens and restricting effects on the poor and vulnerable, and adjudication that grapples with these burdens and effects could be responsive to their plight so as to give effect to transformative environmental constitutionalism.[82]

4.4.1.2 Public trusteeship

Section 2(4)(o) of *NEMA* provides that:

> The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

This *NEMA* principle is reflective of the public trust doctrine. According to this doctrine:

> natural resources are held in trust by government for present and future generations of citizens and cannot be alienated or depleted to an extent that would undermine their long-term viability.[83]

Sand[84] claims that public trusteeship entails that "the sovereign rights of nation states over certain environmental resources are not proprietary, but fiduciary". Pursuant to section 2(4)(o) of *NEMA* and various other provisions in environmental legislation that appoint the state as public trustee of specific components of the environment,[85] the state is vested with fiduciary responsibility over the environment and must act in the public interest in fulfilling that responsibility.[86] The trust

81 Examples will be discussed in chapter 5 below.
82 Ebbesson "Introduction: dimensions of justice in environmental law" (e-Book).
83 Collins "Judging the Anthropocene" 315. See also Takacs 2008 *NYU Environmental Law Journal* 746; Sand 2004 *Global Environmental Politics* 47-71.
84 Sand 2004 *Global Environmental Politics* 48.
85 S 3 of the *NWA*, s 3 of the *MPRDA*, ss 11 and 12 of the *National Environmental Management: Integrated Coastal Management Act* 24 of 2008 (*NEMICMA*).
86 Van der Schyff 2013 *SALJ* 381-382. See also generally Van der Schyff 2010 *PER*.

beneficiaries are present and future generations collectively rather than individually.[87] Their interests must further be secured in an equitable fashion.[88]

Collins[89] argues that the public trustee doctrine can operate through the courts "as a binding domestic mechanism for implementing the international concept of intergenerational equity".[90] It justifies enhanced, equitable environmental protection for the benefit of present and future generations on the basis of the state's role as trustee of the environment.[91] In South Africa, therefore, the doctrine may also be understood as giving effect to the constitutional obligation in section 24 of the *Constitution* to protect the environment for the benefit of present and future generations, as will be discussed in more detail in the next part of this chapter. The doctrine has received some judicial recognition in South Africa.

In *Fuel Retailers* the court recognised that in interpreting the environmental right the judiciary has a duty to ensure that the duty of trusteeship over the earth owed by the present generation to future generations is upheld.[92] In *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* (*HTF Developers HC*) it was acknowledged that by virtue of the state's role as trustee of the environment, all other stakeholders that interact with the environment are obliged to respect the fiduciary relationship that exists.[93] In particular, the court held that the doctrine has the effect of limiting ownership rights.[94] It is thus no longer acceptable for an owner to use land "in a way which may prejudice the community in which he or she lives because to a degree he or she holds the land in trust for future generations".[95] Recently, in *WWF South Africa v Minister of Agriculture, Forestry and Fisheries*

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87 Van der Schyff 2013 *SALJ* 383.
88 Collins 2007 *Dalhousie Law Journal* 103.
89 Collins "Judging the Anthropocene" 315.
90 Collins "Judging the Anthropocene" 316-319.
91 Collins "Judging the Anthropocene" 316-319.
92 *Fuel Retailers* paras 102-104. At para 102 the court stated as follows:

> The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out.

93 *HTF Developers HC* para 19, discussed in Van der Schyff 2013 *SALJ* 372.
94 *HTF Developers HC* para 19.
95 *HTF Developers HC* para 19.

(*WWF*), the court elaborated upon the notion of public trusteeship in South Africa in a transformative manner.

WWF concerned the judicial review of a decision by the Department of Agriculture, Forestry and Fisheries to determine a total allowable catch of West Coast Rock Lobster. Scientific evidence confirms that the lobsters are critically depleted in South Africa, such that the total allowable catch determined would threaten their sustainability.[96] WWF South Africa thus argued that the determination decision fell to be reviewed and set aside on the basis that it was inconsistent with section 24 of the *Constitution* and relevant provisions in *NEMA* and the *MLRA*, including the doctrine of public trusteeship as reflected in section 2(4)(o) of *NEMA*.[97] The Department argued that its decision was motivated by the need to use marine living resources in pursuit of economic growth and job creation and that the determination was necessary to contribute towards food security, socio-economic development and the alleviation of poverty.[98]

In rejecting the Department's arguments and finding that the determination decision was reviewable, the court acknowledged the links between overcoming poverty and environmental protection with reference to the doctrine of public trusteeship.[99] The court reasoned that economic development and job creation are not promoted by allowing an already endangered resource to be further depleted, and that food security would be jeopardised, rather than enhanced, which the court remarked represents "the reverse of 'development'".[100] The court noted that poverty alleviation could not be understood as entailing "short-term provision of a dwindling income to a dwindling number of fishers competing for a dwindling population of lobsters".[101] The protection of the environment, so as equitably to meet the needs of present and future generations in a manner consistent with public trusteeship (as an aspect of the notion of intergenerational equity), meant recognising that:

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96 *WWF* paras 86-87.
97 *WWF* paras 9 and 11-14.
98 *WWF* paras 88-89.
99 *WWF* paras 88-93.
100 *WWF* paras 88.
101 *WWF* paras 90.

> Many people in the past, the present and the future have depended, do depend or will depend for their economic well being on exploiting renewable resources. To enable them to do so, and thus to preserve food security and avoid poverty, one cannot allow the resource of the many to be exhausted for the benefit of the few (I speak relatively of the 'few' current participants in the lobster sector as against all of those who will come after them).[102]

The court's comments in *WWF* are consistent with transformative environmental constitutionalism: they reflect transformative adjudication through substantive engagement with the doctrine of public trusteeship from a socio-ecological systems perspective that views the protection of the environment as a precondition for the pursuit of social justice for the poor.

The notion of public trusteeship emerging from the *NEMA* principles justifies enhanced, equitable environmental protection by virtue of fiduciary duties conferred upon the state and all other stakeholders interacting with the environment.[103] By viewing environmental endowments as held in public trust for the benefit of present and future generations the courts could, in environmental law disputes, contribute to realising access to water, food and land, particularly for the poor in pursuit of social justice.

Judicial enforcement of the doctrine could result in substantive engagement with questions about whether government decisions concerning the distribution of water, marine life, atmospheric pollution, etc. are equitable and consistent with the state's role as trustee over the environment for the benefit of the people.[104] The doctrine of public trusteeship further lends support to giving judicial consideration to the needs of poor and vulnerable people often not represented in environmental law disputes, given that all people are beneficiaries of the state's trusteeship. Finally, the doctrine, with its emphasis on long-term sustainability and justice, supports viewing the

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[102] *WWF* paras 91-93.

[103] *HTF Developers HC* para 19, discussed in Van der Schyff 2013 *SALJ* 372. *Fuel Retailers* para 102-104. On the link between the state's role as public trustee and the pursuit of a climate resilient society in South Africa see generally Du Plessis 2015 *SAJHR*.

[104] For a comparative discussion see Preston 2005 *Asia Pacific Journal of Environmental Law* 203-210.

components of the environment not purely as commodities to be bought and sold for short-term gain, but as ecological gifts to be equitably and sustainably distributed and conserved.[105] It also supports viewing people not purely as consumers of the environment, but also as custodians thereof.[106] By adopting these perspectives in environmental law disputes with reference to the doctrine of public trusteeship, courts could be more critical of problematic neo-liberal capitalist agendas of the state and corporations in the context of environmental governance. These agendas tend to focus on sustained economic growth without regard to the destructive environmental consequences thereof.[107] They are further problematic because they permit dominant market participants to operate with very few restrictions so as to maximise profits on the false premise that wealth will eventually trickle down to impoverished people, oblivious to systemic and structural inequalities that render advancement for the majority of South Africans impossible.[108] Judicial recognition of the public trust doctrine could facilitate the courts looking beyond these agendas to the protection of socio-ecological systems that serves to preserve the environment as a condition for the attainment of social justice.

4.4.2 Developing the normative content of the environmental right

The environmental right provides that the environment is to be protected for the benefit of present and future generations through reasonable legislative and other measures that, among other things, secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[109] As discussed in chapter 3, trend 3 revealed with reference to *Propshaft* and *iSimangaliso* that in the adjudication of environmental law disputes, the judiciary tends to pay little more than lip service to the content of the environmental right, particularly its normative potential. More thorough judicial

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[105] Murcott 2015 *SALJ* 903-904.

[106] Murcott 2015 *SALJ* 903-904.

[107] Adelman "Sustainable Development Goals" 18-19; Adelman "Epistemologies of mastery" 25; Bosselmann "The ever-increasing importance of ecological integrity" 230.

[108] Cock 2011 *Focus* 47-48, Murcott 2015 *SALJ* 877-878; Adelman "Sustainable Development Goals" 19.

[109] S 24 of the *Constitution*.

engagement with section 24 of the *Constitution* is consistent with transformative environmental constitutionalism's call for a substantive rights-based approach to environmental protection that has the potential to protect "[a]ll of our environments – from urban to wilderness areas – that are being stressed, polluted and commodified while corporations and government agencies increasingly are challenging the general public and local communities for control over them".[110]

By virtue of the principles of avoidance and subsidiarity, the development of the content of the environmental right argued for in this part would typically occur indirectly in accordance with section 39(2), so as to inform the interpretation of legislation and development of the common law and customary law in a manner that promotes the spirit, purport and objects of the *Bill of Rights*, including its social justice imperative. Where its relevance emerges from the facts pleaded, courts are further empowered to engage with the environmental right *mero motu* where it is not relied upon by the parties.[111]

Transformative environmental constitutionalism argues for an ecologically-centered and social, environmental and climate justice-oriented vision of the environmental right. In order to pursue this vision of the environmental right, I discuss below the notions of ecological sustainability and inter- and intra-generational equity. The courts are yet to engage meaningfully with these notions emerging from section 24 of the *Constitution*,[112] and there is very little scholarship on how they could be invoked by the courts in order to respond to the ecological crisis of the Anthropocene and the injustices arising therefrom.[113] I argue that the judiciary must engage with these concepts with an appropriate degree of realism that recognises the Earth's ecological limits,[114] and the impacts of exceeding those limits, particularly on the poor in the South African context. To do so, courts must grapple with

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110 Pezzullo and Sandler "Revisiting" 1.
111 *Link Africa* paras 35-36 and 114-119.
112 Feris 2008 *CCR* 2008 252-253; Murcott "Transformative Environmental Constitutionalism" 291-292.
113 Kotzé 2014 *Journal of Human Rights and the Environment* 137.
114 Washington *Demystifying* 194.

"scientific discourse at the very frontiers of the human/environment interface" when making hard choices.[115]

Before I consider the ecologically-centered and justice-oriented potential of the environmental right, I comment next on the economic-centred articulation of sustainable development that has emerged from the South African courts as the primary concern of the environmental right thus far in *Fuel Retailers*.[116] In *Fuel Retailers*, the first case in which the Constitutional Court meaningfully engaged with the environmental right, the court focused on sustainable development as requiring the integration of social, economic and environmental considerations in environmental decision-making.[117] The court's emphasis was on balancing environmental considerations with socio-economic considerations in a manner reflective of an economic-centered approach to development rather than an environmentally or ecologically-centered approach to integration in pursuit of sustainability.[118] The approach to the environmental right articulated in *Fuel Retailers* is often replicated in the adjudication of environmental law disputes without judicial consideration of other aspects of the environmental right.[119]

Before *Fuel Retailers*, the High Court, in *BP*, was asked to set aside a refusal by the Department of Agriculture, Conservation, Environment and Land Affairs of an application by BP Southern Africa (Pty) Ltd to develop a filling station. The Department refused the application to develop the filling station, among other things, on the basis of a risk-averse approach toward pollution, cumulative impacts and social impacts.[120] BP argued that the reason for the refusal was not that the

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115 Doing so entails "ecological thinking" (an "holistic, systemic and biosphere-based approach") as proposed by Morrow "Of Human Responsibility" 274. A discussion of this approach falls outside of the scope of this thesis.

116 Feris 2008 *CCR* 253. For critique on an economic-centred approach to sustainable development generally, see Adelman "Sustainable Development Goals".

117 *Fuel Retailers* para 55. This focus on integration is consistent with the manner in which sustainable development is defined in section 1 of *NEMA* to mean "the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations".

118 Feris 2008 *CCR* 253. See also Kidd 2008 *SAJELP* 85-102.

119 Subsequent cases that adopt the *Fuel Retailers* approach include: *HTF Developers CC*; *Sole and Great Kei Municipality*.

120 *BP* 133-135.

filling station development would harm the environment, but rather that there were two other existing filling stations close by to the proposed development.[121] The court rejected BP's arguments and dismissed its application to set aside the refusal. In doing so, the court remarked as follows:

> 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.[122]

The court in *BP* thus acknowledged that there was a need for a shift from a purely economic-centred approach to development, and noted that intergenerational equity and sustainable use should be part of that shift. What is noticeably absent from the court's remark is first, that there is no mention of the idea of intra-generational equity (environmental justice for present generations), and secondly, that nothing is said about how *ecologically* sustainable development and use should be pursued whilst promoting only *justifiable* economic and social development. The court focused on integrating environmental, economic and social considerations, and did so in a vague manner. By focusing on integration, the court's promising remarks about a shift from a purely economic-centred approach to sustainable development thus seemed somewhat hollow, for the reasons I explain next.

As Murombo[123] argues, one of the problems with a judicial focus on integration is that it potentially permits "the development-minded to masquerade as environmentalists while protecting only unsustainable commercial interests". This is because the idea of integration tells courts little about how to balance social,

121 *BP* 136.
122 *BP* 144 B-D.
123 Murombo 2008 *SALJ* 489.

environmental and economic considerations.[124] It is vague and devoid of normative content.[125] This critique can equally be leveled at the concept of sustainable development from which the idea of integration emerges.[126] This vagueness has allowed the notion of sustainability to become meaningless.[127] Adelman[128] explains that there are over 70 definitions of sustainable development, many of which problematically perpetuate sustained economic growth that is patently destructive of the environment, and do not seek to pursue justice.[129] Bosselmann[130] argues that "[a]s long as the 'environment' appears as just another issue – among a host of social and economic issues – to be taken into account, the merit of [sustainable development] is highly questionable".

In view of these criticisms, instead of focusing on sustainable development as being concerned predominately with integration, I argue next that the courts ought to develop an ecologically-centered and justice-oriented vision of the notion of sustainable development provided for in section 24 of the *Constitution*. I argue that section 24 is capable of such a construction,[131] and that by adopting this approach courts will better be able to utilise the environmental right (whether directly or indirectly) in a manner that is responsive to myriad injustices arising from South Africa's apartheid past and the Anthropocene's socio-ecological crisis.[132] This kind of utilisation of the environmental right could result in the development of its normative

124 Field 2006 *SALJ* 413.

125 Field 2006 *SALJ* 413. See also Bosselmann *The Principle of Sustainability* 61-62.

126 Adelman "Sustainable Development Goals" 22.

127 Washington *Demystifying* 193.

128 Adelman "Sustainable Development Goals" 22.

129 See also Cock 2011 *Focus* 48-49.

130 Bosselmann 2006 *SAJELP* 41.

131 Kotzé and Calzadilla 2017 *Transnational Environmental Law* 10 suggest that an economic-centred approach to s 24 of the *Constitution* is inevitable given South Africa's particular socio-economic context, and the environmental right's anthropocentric orientation. The approach I propose is more optimistic.

132 Bosselmann "The ever-increasing importance of ecological integrity" 230 argues that sustainability was intended in the 1980s to be understood as pursuing the anti-thesis of a growth paradigm. He states:

> There is ample evidence that the Brundtland Commission aimed for sustainable development as ecologically sustainable development and as a counter model to the 'more is better' growth paradigm of modern economies. Powerful corporates and states prevented sustainable development from becoming such a counter model. Instead, sustainable development remained the meaningless concept of mashing environmental, social and economic interests.

content, and a shift away from trend 3 discussed in chapter 3 above, which sees courts paying mere lip service to environmental right.

4.4.2.1 Ecological sustainability

The environmental right provides that environmental protection must be pursued through reasonable legislative and other measures that "secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".[133] My thesis is that transformative environmental constitutionalism asserts that this aspect of the right ought to be construed so as to pursue ecological sustainability. In this thesis ecological sustainability connotes "using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased".[134] Bosselmann[135] explains that from this perspective "development is sustainable if it tends to preserve the integrity and continued existence of ecological systems; it is unsustainable if it tends to do otherwise".

From a social justice-orientation, ecological sustainability is important since "[a] truly sustainable society is one where wider questions of social needs and welfare, and economic opportunity are integrally related to environmental limits imposed by ecosystems".[136] An ecologically-centered approach to the environmental right entails the systematic acknowledgement of environmental concerns "conceptualised as a set of interconnected ecological pressures that require a similarly interconnected economic, social and political response".[137] In line with the social justice imperative of the *Constitution*, this approach recognises that sustainability must pursue equity for humans and non-humans within socio-ecological systems whilst acknowledging

133 S 24(b)(iii) of the *Constitution*.
134 Drawing on the Australian experience as discussed in Curran and Hollander 2015 *Australasian Journal of Environmental Management* 3. See also Kotzé 2014 *Journal of Energy & Natural Resources Law* 150-154.
135 Bosselmann *The Principle of Sustainability* 53.
136 Agyeman *et al* 2002 *Space and Polity* 78.
137 Curran and Hollander 2015 *Australasian Journal of Environmental Management* 23.

the environmental threats therein.[138] The approach rejects the idea of sustainable development as being about sustainable economic growth,[139] and adopts a strong, as opposed to a weak, sustainability paradigm. Whereas weak sustainability permits substituting money for ecosystem services, strong sustainability seeks to retain ecosystem services and natural capital for humanity.[140] Further, strong sustainability places value on both the human and the non-human world, rather than treating only humans as worthy of legal protection, and the environment as purely instrumental.[141] Viewing environmental concerns in this holistic manner potentially serves to bring together supposedly competing brown and green agendas in the pursuit of justice. [142] This is because the proposed approach to ecological sustainability facilitates an understanding that environmental protection and meeting the basic needs of the poor are mutually reinforcing concerns within complex socio-ecological systems. From this perspective the environment is not relegated to a peripheral issue, or one of many relevant considerations that is separate from human experience.[143] Rather, the environment becomes the central focus.

A strong proponent of ecological sustainability, Bosselmann[144] contends that "[t]his approach encourages (economic and social) development within the parameters of ecology and challenges the whole economic paradigm within which we presently operate". Pursuant to this approach "justifiable economic and social development" under section 24 of the *Constitution* could be construed as development that respects planetary boundaries and a safe operating space for humanity; an approach more consonant with the socio-ecological crisis of the Anthropocene.[145] Assessing whether or not legislation and policies that allow harmful activities amount to "reasonable measures" that give effect to the environmental right could be more focused on the sustaining the ecology as the life force on which humanity depends.

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138 Agyeman *Just Sustainabilities* (e-Book).

139 Washington *Demystifying* 194.

140 Washington *Demystifying* 194. Kotzé 2014 *Journal of Energy & Natural Resources Law* 137 and 150-154.

141 Bosselmann 2006 *SAJELP* 45-46. See further Bosselmann *The Principle of Sustainability*. See also Adelman "Epistemologies of mastery" 25-26 on the concept of ecological justice.

142 Murcott "Transformative Environmental Constitutionalism" 283.

143 Bosselmann 2006 *SAJELP* 41-42.

144 Bosselmann 2006 *SAJELP* 44.

145 Adelman "Sustainable Development Goals" 23-24.

The proposed approach is supported by resilience thinking, which "reflects a complex systems approach to understanding [socio-ecological system] dynamics".[146] As Craig and Benson[147] argue "resilience thinking emphasizes understanding and responding to change rather than identifying and maintaining stationarity".[148] Sustainable development discourse has traditionally incorporated the false assumption that humans know what we can sustain and has arrogantly, and falsely, presumed that we can hold onto some sort of stationarity.[149] In contrast, resilience thinking recognises that socio-ecological systems are constantly in flux.[150] The judiciary could, through transformative adjudication that pursues resilience thinking, view ecologically sustainable development as a tool to consider questions about whether and to what extent laws are being interpreted and applied so as to allow socio-ecological systems to cope with change and remain functional.[151] In this way the judiciary could resist the pursuit of sustainable development in a manner that entails "futile efforts to maintain existing states of being".[152] This approach is important given the inherent unpredictability of ecological conditions in the Anthropocene and since existing states of being typically serve to benefit the wealthy and powerful at the expense of the needs of impoverished people.[153]

The proposed approach is far more nuanced than the economic-centered views about sustainable development generally expressed in the adjudication of environmental law disputes. Rather than pitting developmental needs against the need to protect the environment, or viewing the needs of the poor and the protection of the environment in a linear fashion, it allows a judicial appreciation that

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146 Craig and Benson 2013 *Akron Law Review* 865.

147 Craig and Benson 2013 *Akron Law Review* 865. Kotzé 2014 *Journal of Energy & Natural Resources Law* 154.

148 See also Ebbesson and Hey 2013 *Ecology and Society* 1 who explain that resilience research:

> seeks to identify factors that enhance the resilience of such systems or reduce it for the sake of transformations into new development paths. It thus has an essential normative dimension and through that dimension intends to influence policy to develop in more resilient ways.

149 Kotzé 2014 *Journal of Energy & Natural Resources Law* 137. Craig and Benson 2013 *Akron Law Review* 866.

150 Craig and Benson 2013 *Akron Law Review* 879.

151 Craig and Benson 2013 *Akron Law Review* 879.

152 Craig and Benson 2013 *Akron Law Review* 879.

153 Kotzé 2014 *Journal of Energy & Natural Resources Law* 154.

the needs of the poor are met from the environment, and that livelihoods and justice for the poor must be pursued through the protection of the environment. In this way, the approach can facilitate the pursuit of social, environmental and climate justice as interconnected concerns.

4.4.2.2 Inter- and intra-generational equity

The environmental right provides that the environment must be protected "for the benefit of present and future generations". This aspect of the environmental right requires intra- and inter-generational equity, notions that are often viewed as forming part of the concept of sustainable development.[154] A judicial focus on these notions has the potential to imbue the criticized concept of sustainable development with much-needed normative, justice-oriented content.[155] In the adjudication of environmental law disputes the courts have relied upon the idea of inter-generational equity to some degree, but have not given the notions sufficient attention.[156] It is becoming increasingly important for courts to take up this call given, as Kotzé[157] (writing from a developing country perspective and with a focus on vulnerable people in the global South) points out:

> it is…likely that the intra- and intergenerational divide between rich and poor people will only deepen as ecological disasters and food and energy scarcity in the Anthropocene intensify.

As Harding[158] explains, inter-generational equity means that "the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations", whilst intra-generational equity focuses on equity within a single generation. Bosselmann[159] argues that the distributive justice envisaged by the notion intra-generational equity entails concern for the needs of the poor when considering competing claims and

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154 See for example Bosselmann 2006 *SAJELP* 40.

155 See for instance Field 2006 *SALJ* 417-419.

156 For example, in *BP*, *HTF Developers HC* para 19 and *Fuel Retailers* para 102-104.

157 Kotzé 2014 *Anthropocene Review* 269.

158 Harding 2006 *Desalination* 235-236. See also Kotzé 2014 *Anthropocene Review* 269.

159 Bosselmann 2006 *SAJELP* 45.

priorities in respect of the environment. The notions of inter- and intra-generational equity encapsulated in the environmental right justify the pursuit of substantive (distributional) and procedural justice in environmental decision-making, and judicial reliance on the principle of environmental justice as argued for above. Transformative environmental constitutionalism asserts that if South Africa is to be a just and equal society as its constitutional values and rights demand, the judiciary ought more fully to develop the notions of intra- and inter-generational equity as they emerge from section 24.

For Collins,[160] inter-generational equity recognises that present generations ought to be afforded equitable access to the Earth's resource while conserving the diversity and quality thereof for the future. Inter-generational equity thus also encompasses intra-generational equity. Collins[161] argues in the context of global environmental governance that the notion of inter-generational equity can and should operate as an integrative legal framework that reconciles or counter-balances the paradigm of rights with the paradigm of responsibility towards the environment. A rights paradigm, particularly from a liberal Western perspective, focuses on entitlements owed to individual humans.[162] To be effective, however, environmental protection must go beyond securing individual interests, and should entail accepting collective responsibility towards the environment.[163] A responsibility paradigm overlaps with, but also goes beyond, the ideas of duties and obligations.[164] It imposes an "internal limitation" on the exercise of freedom that might otherwise be conferred by a right.[165] By virtue of its notion of responsibility, inter-generational equity encompasses stewardship over, or trusteeship towards the environment for the benefit of future generations.[166] It thus justifies judicial reliance on the doctrine of public trusteeship as argued for above.

160 Collins 2007 *Dalhousie Law Journal* 103.
161 Collins 2007 *Dalhousie Law Journal* 79-80 and 103.
162 Collins 2007 *Dalhousie Law Journal* 89-90.
163 Collins 2007 *Dalhousie Law Journal* 89-90.
164 Collins 2007 *Dalhousie Law Journal* 83.
165 Collins 2007 *Dalhousie Law Journal* 83.
166 Collins 2007 *Dalhousie Law Journal* 94-96.

Collins'[167] construction of inter-generational equity "validates the interest of the individual in an adequate quality of life and the value of the inter-temporal world community in which every individual is situated". This approach recognises that humans and the environment exist in complex socio-ecological systems, in that the pursuit of inter-generational equity ought to secure the maintenance of the diversity of the Earth's resource base, on balance, for the benefit of future generations, whilst recognising that ecological systems are dynamic and fluid.[168] Further, the notion of inter-generational equity adopts a temporal view of distributional justice,[169] which is valuable given that in the long-term the future generations of poor people, caught in a poverty trap, will suffer the most from reckless environmental decision-making now.[170]

Transformative environmental constitutionalism asserts that by placing intra- and inter-generational equity at the heart of environmental protection in terms of section 24 of the *Constitution*, the judiciary could justify the pursuit of well-functioning socio-ecological systems as a condition for the attainment of social, environmental and climate justice in the adjudication of environmental law disputes. The judiciary, in the transformative adjudication of environmental law disputes could, with reference to intra- and inter-generational equity, take into account injustice in the sense of the unjust distribution of environmental goods and bads amongst people, as well as the unjust causes of that mal-distribution, including a lack of recognition, and the exclusion of people from participation in decision-making about their living conditions.[171] The judiciary could further respond to climate injustice in the sense of the unjust distribution of climate change vulnerabilities and impacts, and the underlying causes thereof, including a lack of recognition and the exclusion of people from participation in decision-making about these impacts and vulnerabilities.[172] For instance, justice ought to be pursued through the imposition of duties attaching to everyone to conserve resources, to use the environment

167 Collins 2007 *Dalhousie Law Journal* 93.
168 Collins 2007 *Dalhousie Law Journal* 102-103.
169 Richardson "Doing Time" 59-60.
170 Gonzalez "Global Justice in the Anthropocene" 221-236.
171 Schlosberg *Defining Environmental Justice* (e-Book).
172 Schlosberg and Collins 2014 *WIREs Clim Change*.

equitably, to avoid adverse impacts on the environment, to prevent disasters, minimize damage and provide emergency assistance, and to compensate for damage to the environment.[173]

4.4.3 Recognising the mutually reinforcing and interrelated nature of the environmental right and other substantive rights

Transformative environmental constitutionalism recognises that environmental degradation, particularly the spectre of socio-ecological collapse in the Anthropocene, has far-reaching implications for the enjoyment and fulfilment of various human rights, particularly for poor and vulnerable people.[174] Peel and Osofsky[175] point out that particularly in developing countries, extreme weather events, for instance, "threaten food supplies and access to clean water, and deprive people of their livelihoods" such that they have "obvious implications for the realization of fundamental human rights". Positively stated, "[a] healthy environment is necessary for the full enjoyment of human rights",[176] including in the pursuit of social, environmental and climate justice for South Africa's poor.

In South Africa the judiciary has recognised that in the adjudication of constitutional matters, all rights should be viewed as interrelated and mutually reinforcing of one another.[177] However, as trend 4 discussed in chapter 3 reveals, environmental rights are not typically invoked in conjunction with other rights in disputes concerning the claims to access to socio-economic entitlements such as water, food and housing. Accordingly, as the discussion of trend 4 in chapter 3 revealed, in *Grootboom* and *Melani* the environmental right was not viewed as mutually reinforcing of the right to access to adequate housing in section 26 of the *Constitution*. In addition, in *Mazibuko*, *FSE 1* and *FSE 2* the environmental right was not viewed as mutually reinforcing of the right to access to water in section 27 of the *Constitution*. Similarly,

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173 Collins 2007 *Dalhousie Law Journal* 104-105.
174 Schlosberg and Collins 2014 *WIREs Clim Change*.
175 Peel and Osofsky 2018 *Transnational Environmental Law* 42. See also May and Daly *Global Environmental Constitutionalism* 25; Boyd *The Environmental Rights Revolution* 82.
176 Knox and Pejan "Introduction" (e-Book).
177 *Grootboom* paras 23 and 24.

trend 3 revealed with reference to *Harmony 2006* and *Harmony 2014* that where the environmental right is relied upon, other relevant substantive rights are not relied upon as mutually reinforcing thereof. Transformative environmental constitutionalism asserts that, departing from trend 4, the environmental right and other substantive rights should work together (whether through their direct or indirect application),[178] so as to strengthen claims concerned with human flourishing and environmental protection.

A range of justiciable human rights enshrined in the *Constitution*[179] could be invoked in conjunction with the environmental right to facilitate a substantive rights-based approach to the adjudication of environmental law disputes in pursuit of social, environmental and climate justice. Relevant rights include the rights to life and dignity,[180] rights to access to housing, food, water, and customary law rights.[181] The environmental right, like these other rights, not only serves to guarantee survival interests, but is also concerned with enabling people to live "decent lives".[182] As Bilchitz[183] explains "[w]hat constitutes a decent life cannot be considered in the abstract alone but must of necessity have regard to modern conditions of life". The modern conditions of life implicating survival interests and the ability of people to live decent lives are vividly represented by the Anthropocene imagery of socio-ecological collapse.[184] This imagery justifies reliance on the environmental right alongside other rights, particularly for the poor who wish to address their appalling living conditions.

Next I consider some of the ways in which the environmental right could serve to strengthen related and mutually reinforcing rights claims. By virtue of the principles of avoidance and subsidiarity, the relevant rights would typically be relied upon

178 Currie and De Waal "Application" 57.
179 On the justiciability of human rights in the *Constitution* see Liebenberg *Socio-Economic Rights* 34-42.
180 S 11 of the *Constitution* (the right to life), s 10 (the right to dignity).
181 S 26 of the *Constitution* (the right to access to housing), s 27 (the rights to access to water and food) and ss 30 and 31 of the *Constitution* (the rights to culture and customary practices).
182 Bilchitz 2010 *CCR* 53.
183 Bilchitz 2010 *CCR* 53.
184 Adelman "Sustainable Development Goals" 16.

indirectly in accordance with section 39(2) of the *Constitution* to inform the interpretation of legislation and development of the common law and customary law in a manner that promotes the spirit, purport and objects of the *Bill of Rights*, including its social justice imperative.[185] Section 39(2) of the *Constitution* further empowers courts to engage (*mero motu* if necessary) with all relevant rights in statutory interpretation so as to properly pursue interpretations that give effect to the spirit, purport and objects of the *Bill of Rights*.[186]

4.4.3.1 The rights to life and dignity

The right to an environment not harmful to health or well being is capable of being invoked in conjunction with the rights to life and dignity so as to strengthen claims in response to rights violations arising from, for instance, climate change impacts, pollution and environmental degradation. To do so, the South African courts are empowered to draw inspiration from foreign courts.[187] In Pakistan, for instance, the judiciary has accepted that climate change poses a serious threat to water, food and energy security, particularly of poor and vulnerable people, such that a failure to address climate change could violate the rights to life, dignity of the person and privacy of the home, and property.[188] Accepting that the right to life includes a right to a healthy and clean environment the court in *Leghari v Federation of Pakistan* ordered the Pakistani government to take measures to combat climate change.[189] In India the judiciary has reasoned that an environmental right is part of the right to life.[190] As a result, the right to life has been invoked in India, amongst other things, to protect the environment from air pollution, to protect forests, and to address

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185 Currie and De Waal "Application" 57.

186 *Link Africa* paras 35-36 and 114-119.

187 S 39(1) of the *Constitution* provides that when interpreting the *Bill of Rights* the courts may consider foreign law. See further Currie and De Waal "Interpretation" 146-148.

188 See Peel and Osofsky 2018 *Transnational Environmental Law* 52-55.

189 *Leghari*, discussed in Peel and Osofsky 2018 *Transnational Environmental Law* 52-55.

190 Rajamani 2007 *Review of European, Comparative and International Environmental Law* 277-278.

waste management problems.[191] Thus far the rights to life or dignity have not generally been relied upon in this manner in South Africa.[192]

4.4.3.2 Socio-economic rights

As Fuo[193] argues, courts ought to recognise that the fulfilment of the right to an environment not harmful to health or well being is central to the fulfilment of various socio-economic rights. Further, the fulfilment of such rights is crucial to fostering the transformative objectives of the *Constitution*.[194] The rights to access to housing, food and water impose both negative and positive obligations.[195] Negative obligations entail not interfering with someone who has a constitutional right to do what they are doing.[196] The negative obligations entail not subjecting the fulfilment of socio-economic rights to "deliberately retrogressive measures", particularly measures that would deprive marginalised and vulnerable groups access to basic services.[197] Permitting the rampant destruction of the environment in a manner that limits people's access to housing, food, water, education and sanitation could be construed as a retrogressive measure that is inconsistent with the negative obligations imposed by socio-economic rights. In such cases, the environmental right could be invoked alongside socio-economic rights in disputes concerned with the interference with access to food, water and land for housing, particularly where such access is threatened by environmentally harmful or unjust conduct to strengthen the claims of poor and vulnerable people.

Positive obligations to fulfil the rights to access to housing, food and water entail taking "reasonable measures" to achieve the "progressive realisation" of the rights "within available resources".[198] A discussion of these requirements, which have been

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191 Rajamani 2007 *Review of European, Comparative and International Environmental Law* 277-278.
192 For a discussion on the potential to bridge dignity rights and environmental rights see generally Daly and May 2016 *Journal of Human Rights and the Environment*.
193 Fuo 2013 *Obiter* 94.
194 Fuo 2013 *Obiter* 94.
195 Liebenberg *Socio-Economic Rights* 187-198, Currie and De Waal "Socio-Economic Rights" 568.
196 Currie and De Waal "Socio-Economic Rights" 568.
197 Currie and De Waal "Socio-Economic Rights" 568, Liebenberg *Socio-Economic Rights* 190.
198 See ss 26 and 26 of the *Constitution* discussed in Cooper 2017 *SAJELP* 53-60.

the subject of extensive scholarly discourse, falls outside of the scope of this thesis.[199] For present purposes, it is simply worth noting that in assessing the reasonableness of measures in place to fulfil socio-economic rights, courts are empowered to consider whether the state has acted so as to achieve the intended results (i.e. progressive realisation of the relevant right) through "well-directed policies and programmes implemented by the executive".[200] Further, it has been held that:

> To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving the realisation of that right.[201]

Reliance on the environmental right could strengthen challenges against measures that are alleged not to meet this reasonableness standard.[202] For instance, such reliance could give rise to a judicial appreciation that positive measures aimed at achieving access to socio-economic entitlements must, to be reasonable, also pursue (or at least not be harmful to) human health and well being.[203] Further, claims to socio-economic rights when raised in conjunction with claims for intra- and inter-generational equity required by the environmental right could bring to the fore questions about whether or not measures aimed at fulfilling socio-economic rights are reasonable in the sense that they are responsive to social, environmental and climate injustice by addressing the unjust distribution of goods and bads, and the underlying causes thereof.[204]

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199 See for instance Bilchitz 2003 *SAJHR,* Lehmann 2006 *American University International Law Review*, Quinot and Liebenberg 2011 *Stellenbosch Law Review*, Wilson and Dugard 2011 *Stellenbosch Law Review*, Chenwi 2013 *De Jure*.

200 *Grootboom* para 42.

201 *Grootboom* para 44.

202 Fuo 2013 *Obiter* 94.

203 Fuo 2013 *Obiter* 94.

204 Murcott 2015 *SALJ*.

4.4.3.3 Cultural rights

Section 30 of the *Constitution* affords everyone the right to participate in the cultural life of their choice, though this right may not be exercised in a manner inconsistent with other provisions in the *Bill of Rights*. The *Constitution* also protects individual and group interests in cultural integrity for those who belong to a cultural, religious or linguistic community.[205] In terms of section 31 of the *Constitution*, persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practice their religion and use their language. By protecting communities and groups, these rights depart from a traditional liberal view of rights that protects the rights of individuals. Further, in terms of section 211(3) of the *Constitution* "courts must apply customary law when that law is applicable, subject to the *Constitution* and any legislation that specifically deals with customary law".

According to Owosuyi[206] culture can be construed as an "anthropological or sociological concept where it pertains to lifestyles, basic human rights, traditions and beliefs".[207] Cultural heritage is further defined in South African law as an aspect of "the environment".[208] For many indigenous communities their cultural life is intertwined with and dependent upon the environments in which they exist – they live from the land and their livelihoods depend upon the land.[209] Sustaining their environment is a precondition for the enjoyment of their culture, and notions of sustainability are part of their cultural practices.[210] For such communities, the environmental right could be invoked to protect the environment and secure its ecological sustainability to bolster the fulfilment of their cultural rights in a manner that recognises the socio-ecological systems in which indigenous communities exist.

205 S 31 of the *Constitution*, discussed in Currie and De Waal "Culture, Language and Education" 626-629.
206 Owosuyi 2015 *PER* 2020.
207 See also Du Plessis and Rautenbach 2010 *PER*.
208 S 1 of *NEMA*, s 1 of the *National Heritage Resources Act* 25 of 1999. See also Du Plessis and Rautenbach 2010 *PER* 41-42.
209 Kusiluka *et al* 2011 *Habitat International* 67-68.
210 Kusiluka *et al* 2011 *Habitat International* 67-68; Du Plessis and Rautenbach 2010 *PER* 42.

The interconnected nature of the cultural rights of indigenous communities and environmental protection is relatively well established in Latin America.[211] In Ecuador, for instance, the *Constitution of the Republic of Ecuador*, Official Registry No. 449, 20 October 2008 gives expression to the rights of nature through recognising indigenous world-views.[212] The Ecuadorian *Constitution*'s preamble expresses a commitment "to build a new form of public co-existence, in diversity and in harmony with nature, to achieve *Buen Vivir*, the *sumak kawsay*".[213] The term *Buen Vivir* (or *sumak kawsay* in the indigenous Andean *Kichwa* language) connotes "living well" within a community in harmony with nature, by subscribing to principles of reciprocity and complementarity.[214]

The ideas encapsulated by *Buen Vivir* (or *sumak kawsay*) are comparable with the southern African notion of *ubuntu*, which connotes that our "humanness is derived from our relatedness with others, not only those currently living, but also through generations, past and future".[215] The notion of *ubuntu* is part of an African ethical perspective that views "human well-being as indispensible from our dependence on and interdependence with all that exists, and particularly with the immediate environment on which all humanity depends".[216] According to Mokgoro[217] "[g]roup solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity" are, among others, key social values of *ubuntu*", that broadly align with the values of the *Constitution*, including the values of dignity, equality, accountability and openness, and the project of transformative constitutionalism.

On the basis of the alignment of constitutional values and the values of *ubuntu*, South African courts have invoked *ubuntu* in their judgments, though not in the context of the adjudication of environmental law disputes.[218] Like the notion of *Buen Vivir* in Ecuador, the notion of *ubuntu* could, in South Africa, serve to bolster an

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211 See Collins "Environmental Constitutionalism in the Americas" 138-142.
212 Kotzé and Calzadilla 2017 *Transnational Environmental Law*.
213 Kotzé and Calzadilla 2017 *Transnational Environmental Law* 17-18.
214 Kotzé and Calzadilla 2017 *Transnational Environmental Law* 17-18.
215 Murove 2004 *Mankind Quarterly* 196.
216 Murove 2004 *Mankind Quarterly* 196.
217 Mokgoro 1998 *PER* 7. See also Himonga *et al* 2013 *PER*.
218 Himonga *et al* 2013 *PER*.

appreciation of the interrelated nature of cultural rights and environmental protection.[219]

4.5 Conclusion

This chapter has developed the notion of transformative environmental constitutionalism and explained some of the ways in which it could be invoked by the judiciary in environmental law disputes so as to address the problematic trends in the adjudication of environmental law disputes discussed in chapter 3. I argued first that transformative environmental constitutionalism requires that courts frame environmental law disputes in a justice-oriented manner that adopts a socio-ecological systems perspective. Courts can do so by carefully considering social, environmental and climate justice issues emerging from the evidence before them, or by taking judicial notice of relevant facts that illustrate social, environmental and climate injustice.

The framing of environmental law disputes as giving rise to injustice for the poor with reference to relevant evidence and facts is an important aspect of transformative environmental constitutionalism as it could place courts in a position to consider and address, explicitly, the social vulnerability of impoverished and historically marginalised communities, and how these communities might be empowered "through proactive and context sensitive measures that affirm human dignity". [220] This could in turn facilitate transformative adjudication through substantive reasoning as envisaged by Pieterse[221] and others,[222] and the pursuit of social justice.

Secondly, I argued that transformative environmental constitutionalism requires transformative adjudication from a rights-based perspective. I argued first that this

219 See for instance Mawere *Environmental conservation through Ubuntu* and Murove 2004 *Mankind Quarterly* 196.
220 Pieterse 2005 *SAPL* 159.
221 Pieterse 2005 *SAPL* 159.
222 Hoexter 2008 *SAJHR*; Quinot 2010 *CCR*.

form of adjudication could be pursued through more meaningful reliance on the principles of environmental justice and public trusteeship as they emerge from *NEMA* and the environmental right. Next I argued that the normative content of the environmental right ought to be developed with reference to the notions of ecological sustainability and inter- and intra-generational equity. Judicial engagement with these notions could lend normative force to the environmental right in a manner that aligns with South Africa's project of transformative constitutionalism and that is responsive to the current ecological crisis.

Thirdly, I argued that the environmental right ought to be relied upon in conjunction with other substantive rights, as it could serve to strengthen claims for such rights, including the rights to life, dignity, socio-economic entitlements and culture. Adjudication of environmental law disputes in this substantive rights-based manner would necessarily require a rejection of the formalistic approach that continues to pervade the adjudication of environmental law disputes as discussed in chapter 3, and could facilitate the emergence of a social justice-oriented environmental law jurisprudence that is more responsive to the transformative mandate of the *Constitution*.

Next, in chapter 5 I will illustrate the practical relevance of the theory of transformative environmental constitutionalism with reference to *VEJA*, the *Gongqose* litigation and *Earthlife*. The working definition of transformative environmental constitutionalism emerging from chapter 4 that I will apply in chapter 5 is as follows. Transformative environmental constitutionalism is a theory requiring envrionmental governance grounded in the *Constitution* in pursuit of social justice, interconnected with environmental and climate justice, including in the interpretation and application of law, so as to be responsive to the socio-ecological crisis of the Anthropocene and its implications for the poor. The theory calls upon the courts to engage in transformative adjudication in a radical manner that recognises the links between environmental degradation in a time of socio-ecological crisis, and the plight of South Africa's poor.

Chapter 5 Transformative environmental constitutionalism's practical significance

5.1 Introduction

Marginalised people in South Africa have increasingly begun to organise and mobilise in response to the wicked problems of deepening inequality and poverty discussed in chapter 1.[1] A number of community initiatives and social movements have emerged.[2] The efforts of the Treatment Action Campaign (TAC), the Social Justice Coalition (SJC) and Abahlali baseMjondolo (Abahlali) represent prominent movements in pursuit of social justice for the poor.[3] Whilst the TAC is well-known for its efforts to improve access to health-care for poor and vulnerable people, the SJC and Abahlali are concerned with the improving the daily lived realities of those living in informal settlements.[4] As Deveaux[5] asserts:

> Grassroots poor collectives and struggles are uniquely placed—epistemically, ethically, and politically—to identify and challenge oppressive, poverty-perpetuating social relations. While excluded from formal institutions of power, poor movements politicize the underlying causes of needs deprivation and put more radical, pro-poor prescriptions onto the public agenda.

Relatively few community initiatives and social movements in South Africa have pursued social justice as interconnected with environmental issues by mobilising around environmental and/or climate justice, however.[6] For instance, Leonard[7] observes that there remains a need amongst South African social movements to

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1 Ballard *et al* 2005 *African Affairs*; Leonard 2018 *Journal of Contemporary African Studies*. As I acknowledge in chapter 1, these problems are experienced, in the main, by black Africans who are caught in a post-apartheid "poverty trap", exacerbated by widespread corruption and maladministration (see generally Adato *et al* 2006 *Journal of Development Studies*, Butler *Contemporary South Africa*, Beresford 2015 *African Affairs*).

2 Ballard *et al* 2005 *African Affairs*; Leonard 2018 *Journal of Contemporary African Studies*; Pieterse 2008 *Journal of Law and Society* 366-369.

3 Pieterse 2008 *Journal of Law and Society* discusses the efforts of TAC; De Beer 2017 *Theological Studies* discusses the efforts of the SJC and Abahlali 3-5.

4 Pieterse 2008 *Journal of Law and Society*; de Beer 2017 *Theological Studies* 3-5.

5 Deveaux 2018 *Political Theory* 699.

6 Leonard 2018 *Journal of Contemporary African Studies* 24; Dugard and Alcaro 2013 *SAJHR*.

7 Leonard 2018 *Journal of Contemporary African Studies* 34-35.

"narrow the social and environmental divide". Nonetheless, Cock[8] illustrates that an "embryonic environmental justice movement is bridging ecological and social justice issues in that it puts the needs and the rights of the poor, the excluded and the marginalised at the centre of its concerns". Earthlife Africa, the Vaal Environmental Justice Alliance, and the Hobeni community of fishers are all part of this environmental justice movement. Their environmental law disputes gave rise to the judgments discussed in this chapter: (i) *Earthlife,* (ii) *VEJA* and (ii) *Gongqose HC* and *Gongqose SCA* (collectively the *Gongqose* judgments), respectively.

This chapter acknowledges that litigation can be an important strategy of community initiatives and social movements to effect societal change, and implicates the courts as a key role player in their struggles.[9] The courts have indeed, at least to some degree, illustrated a willingness to come to the assistance of such initiatives and movements in the context of claims to socio-economic entitlements.[10] This chapter considers the extent to which the courts did so in the implementation of environmental constitutionalism in *Earthlife*, *VEJA* and the *Gongqose* judgments. These judgments represent contrasting environmental, socio-economic, historical and political contexts, which are elaborated upon in a discussion of each case below. In each case the hardships experienced by the poor are to be understood as complex, structural and systemic.[11] As will emerge, apartheid's legacy and post-apartheid failures in the implementation of laws and policies, are significant contributing factors. Whereas *VEJA* and *Earthlife* concerned polluted urban environments, the *Gongqose* judgments concerned the plight of a rural environment in a pristine protected area. Earthlife Africa and the Alliance resorted to the litigation as part of broader social movements addressing environmental issues and their impacts on the poor.[12] The Hobeni community's struggle for access to fish, and the

8 Cock "Connecting" 1-2.

9 Pieterse 2008 *Journal of Law and Society* 378-386.

10 *Grootboom* represent key successes as part of social movements to vindicate socio-economic rights, whereas *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) and *Mazibuko* were considered by many as a significant setback. See further Pieterse 2008 *Journal of Law and Society*; Bilchitz 2010 *SALJ*; Kapindu 2010 *CCR*; O'Connell 2011 *Modern Law Review*.

11 Brand *et al* 2013 *Law, Democracy and Development* 275.

12 See for instance Ashukem 2017 *Law, Environment and Development Journal* on *Earthlife* and Murcott "Implementing" 199 on *VEJA*.

resulting *Gongqose* judgments, evolved into a broader struggle for land rights in Dwesa-Cwebe.[13]

The disputes represented an opportunity for the courts, as part of South Africa's project of transformative constitutionalism, to transform environmental governance in the public interest in a manner responsive to the socio-ecological impacts of apartheid and the Anthropocene in a manner consistent with transformative environmental constitutionalism.[14] Indeed, the courts granted orders in favour of Earthlife, the Alliance and the Hobeni community in *Earthlife*, *VEJA* and *Gongqose SCA*. These landmark orders, and the reasoning giving rise thereto, are illustrative of some of the advantages of rights-based litigation as part, or in support of social movements and community initiatives.[15] They render the judgments useful examples of the potential of a legal theory of transformative environmental constitutionalism towards a social justice-oriented environmental law jurisprudence.

First, the litigation contributed to the tangible alleviation of need through affirmative relief.[16] Secondly, these individual victories have had broader transformative impacts, including by raising the profile of key issues relating to climate change, pollution and exclusionary conservation practices, and causing a shift in societal and political discourse for the benefit of the poor.[17] Thirdly, the judgments have played an important story-telling and accountability-enhancing role in respect of the issues and state and non-state actors before the courts.[18]

Notwithstanding these advantages, this thesis acknowledges the limits of litigation as part of social movements and community initiatives such as those of Earthlife Africa, the Alliance and the Hobeni community in pursuit of social, environmental and climate justice.[19] As Dugard and Alcaro[20] argue, for instance, "even

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13 Wicomb "Addressing Identity Politics" 12.
14 Pieterse 2005 *SAPL* 157; Steyn 2005 *Globalizations*; Collins "Judging the Anthropocene".
15 Pieterse 2008 *Journal of Law and Society* 378-386.
16 Pieterse 2008 *Journal of Law and Society* 381.
17 Pieterse 2008 *Journal of Law and Society* 383. See further Bogojević 2013 *Law & Policy* 186. Fisher 2013 *Law & Policy* 242.
18 Bogojević 2013 *Law & Policy* 187. Fisher 2013 *Law & Policy* 243.
19 See for instance Dugard and Alcaro 2013 *SAJHR* 31.

where…litigation results in judicial wins, such victories might be pyrrhic, leaving the underlying problems unaddressed". Further, social movements that focus or over-rely on litigation can serve to disempower other community efforts aimed at social and environmental justice.[21] This thesis proposes transformative environmental constitutionalism as a means to render litigation more effective when it is pursued. I argue that the advantages of litigation as part of social movements are more likely to materialise in the context of the adjudication of environmental law disputes when courts apply a legal theory of transformative environmental constitutionalism by: (i) framing disputes in a manner that gives voice to the poor and the social, environmental and climate injustices they experience within socio-ecological systems, and (ii) by implementing environmental constitutionalism in a substantive rights-based manner that could contribute towards the emergence of a social justice-oriented environmental law jurisprudence. In other words, I argue that transformative environmental constitutionalism is potentially practically significant to enhance the effectiveness of rights-based litigation as one of the strategies of social movements and community initiatives in response to injustice. It is thus important to ascertain how courts can do so, particularly to the extent that they have not managed to thus far.

5.2 About this chapter

This chapter asks the question: *How can courts pursue transformative environmental constitutionalism in practice as illustrated through an analysis and critique of the Earthlife, VEJA* and the *Gongqose* judgments*?* The chapter examines, in turn, *Earthlife*, *VEJA* and the *Gongqose* judgments (comprising *Gongqose HC* and *Gongqose SCA*) from the perspective of the manner in which each dispute was framed by the court, and the extent to which the courts engaged in transformative adjudication. It does so to reveal the practical relevance of the legal transformative environmental constitutionalism discussed in chapter 4. I argue that *Earthlife*, *VEJA* and the *Gongqose* judgments are illustrative of different ways in which South Africa's

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20 Dugard and Alcaro 2013 *SAJHR* 31.

21 Leonard 2018 *Journal of Contemporary African Studies* 35.

poor experience substantive and/or procedural injustice and rights violations necessitating struggles for social, environmental and/or climate justice. As I explained in chapter 2, transformative adjudication requires substantive, rights-based adjudication regardless of whether courts are concerned with the enforcement of procedural or substantive rights. In some positive and hopeful respects *Earthlife*, *VEJA* and *Gongqose SCA* represent a departure from the trends emerging from the cases discussed in chapter 3, and illustrate the potential signifcance of a legal theory of transformative environmental constitutionalism. The favourable outcomes in these disputes have likely served the interests of South Africa's poor. These outcomes notwithstanding, this chapter critically evaluates the manner in which environmental constitutionalism was implemented by the courts with reference to the theory of transformative environmental constitutionalism discussed in chapter 4. Although the critique is backward looking, I illustrate the potential significance of the practical application of transformative environmental constitutionalism by the courts in future environmental law disputes towards the emergence of a social justice-oriented environmental law jurisprudence. I do so by illustrating the ways in which a legal theory of transformative environmental constitutionalism could have been invoked.

5.3 Earthlife

Earthlife Africa was founded in 1988 and established as an anti-apartheid non-governmental organisation in 1989.[22] Its values include "reverence for the Earth", "freeing human potential", "grassroots democracy" and "solidarity and co-operation with all people who struggle against oppression and exploitation".[23] One of its campaigns is aimed at exposing "the flaws in government energy policy that gives cheap electricity to multi-national companies at the expense of the poor".[24] Earthlife Africa is one of several organisations participating in South Africa's prominent Life After Coal campaign, which aims to "discourage the development of new coal-fired

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[22] Earthlife Africa Johannesburg http://earthlife.org.za/wp-content/uploads/2008/04/website-ELA-Jhb-gen-leaflet.pdf.

[23] Earthlife Africa Johannesburg http://earthlife.org.za/wp-content/uploads/2008/04/website-ELA-Jhb-gen-leaflet.pdf.

[24] Earthlife Africa Johannesburg http://earthlife.org.za/wp-content/uploads/2008/04/website-ELA-Jhb-gen-leaflet.pdf.

power stations and mines; reduce emissions from existing coal infrastructure and encourage a coal phase-out; and enable a just transition to sustainable energy systems for the people".[25] The relief granted in *Earthlife* (discussed below) is one of the outcomes of this campaign.

Earthlife is widely regarded as South Africa's first and only climate change case.[26] It concerned a challenge against a decision of the Chief Director of the Department of Environmental Affairs to grant an authorisation permitting the construction of a coal-fired power station near Lephalale in the Limpopo Province, and the decision of the Minister of Environmental Affairs to uphold the Chief Director's decision on appeal.[27] In terms of *NEMA*, before a listed activity (including the construction of a coal-fired power station) may be conducted, an environmental authorisation must be granted.[28] Such authorisation may only be granted in the event of "all relevant factors", following an environmental impact assessment, having been considered.[29] At the heart of the dispute in *Earthlife* was the Chief Director and Minister's failure to consider the climate change impacts of the construction of the coal-fired power station.[30] Earthlife Africa argued that the Chief Director and Minister's conduct was reviewable in terms of *PAJA* on the grounds that it was unlawful, irrational and unreasonable for the Chief Director and the Minister to approve the environmental authorisation in the absence of a climate change impact assessment.[31] The court upheld Earthlife Africa's challenge to the granting of the authorisation, and ordered the Minister to reconsider her decision to uphold the Chief Director's decision to grant environmental authorisation.[32]

In this part I examine the court's reasoning, first in relation to the extent to which the court framed the dispute in *Earthlife* in a justice-oriented manner that adopted a

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25 Life After Coal 2019 https://lifeaftercoal.org.za.
26 See for example Ashukem 2017 *Law, Environment and Development Journal* and Peel and Osofsky 2018 *Transnational Environmental Law*, Humby 2018 *Journal of Environmental Law*.
27 *Earthlife* para 2.
28 *NEMA* s 24(1). *Earthlife* para 5.
29 *NEMA* s 24O(1). *Earthlife* para 5.
30 *Earthlife* paras 4-9.
31 *Earthlife* para 10.
32 *Earthlife* paras 91, 101, 116.

socio-ecological systems perspective. Thereafter, I consider the extent to which the court in *Earthlife* engaged in purposive and substantive rights-based adjudication of environmental law disputes that: (i) engaged meaningfully with the content and import of relevant justice-oriented provisions in environmental legislation; (ii) developed the normative content of the environmental right provided for in section 24 of the *Constitution*; and (iii) recognised the mutually reinforcing and interrelated nature of the environmental right and other relevant substantive rights concerned with the flourishing of humans and the environment.

5.3.1 The framing of the dispute in Earthlife

In framing the dispute before it in *Earthlife*, the court's focus was on whether climate change could be regarded as a relevant factor in the environmental impact assessment process, such that it ought to have been assessed and reported on in order for the state, as a matter of administrative law, to act lawfully and rationally when granting an environmental authorisation. Put differently, the court considered whether the administrative action performed by the Chief Director and the Minister was tainted by irregularity as a result of their failure to consider climate change impacts.[33] The "narrow question" before the court was "whether a climate change impact assessment was required before authorising new coal-fired power stations".[34] The court reasoned that:

> A plain reading of section 24O(1) of NEMA confirms that climate change impacts are indeed relevant factors that must be considered. The injunction to consider pollution, environmental impacts or environmental degradation logically expects consideration of climate change. All parties accepted in argument that the emission of GHGs from a coal-fired power station is pollution that brings about a change in the environment with adverse effects and will have such an effect in the future. All the relevant legislation and policy instruments enjoin the authorities to consider how to prevent, mitigate or remedy environmental impacts of a project and this naturally, in my judgement, entails an assessment of the project's climate change impact and measures to avoid, reduce or remedy them.[35]

33 *Earthlife* paras 77-78.
34 *Earthlife* para 90.
35 *Earthlife* para 78.

That the court was prepared to acknowledge the problem of climate change, and insist that its impacts be taken into consideration is a positive step:[36] it shows a judicial appreciation of the need to respond to the climate crisis of the Anthropocene. By doing so the court raised the profile of the problem of climate change in South Africa, and legitimised concerns about the links between climate change and coal-fired power in South Africa in a manner that could enhance public discourse in respect thereof.[37] The court further played an important accountability-enhancing role by compelling the state to consider the climate change impacts of the proposed coal-fired power station. But to what extent did the court adopt a social justice-orientated approach in framing the dispute?

In framing the dispute with reference to section 24O(1) of *NEMA*, transformative environmental constitutionalism would require that the court engage with the disproportionate impacts of climate change on the poor in Lephalale with reference to the evidence and facts before it, so as to locate the plight of the poor at the centre of the dispute, in the manner proposed in chapter 4.[38] Whilst the court acknowledged "the substantial risk" of climate change to sustainable development in South Africa generally,[39] the court failed meaningfully to engage with evidence and facts concerning the disproportionate risks for the poor. Relevant evidence and facts are discussed next.

The proposed new coal-fired power station at issue in *Earthlife* is to be constructed by Thabametsi Power Project (Pty) Ltd and Thabametsi Power Company (Pty) Ltd near the Laphalale local municipality, in the Limpopo Province of South Africa. It is well-known that Lephalale is a water scare area that has a problematic historical legacy as a coal mining area.[40] In 1957 an apartheid parastatal, the South African Iron and Steel Corporation (Iscor), acquired vast areas of agricultural land for coal

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36 Humby 2018 *Journal of Environmental Law* 146.

37 As discussed in chapter 4 at 4.1 above, this is one of the benefits of climate change litigation according to Bogojević 2013 *Law & Policy* 187.

38 See chapter 4 at 4.3 above. Doing so would entail a judicial appreciation of the injustices associated with climate change discussed in chapter 1 at 1.1.2 above.

39 *Earthlife* para 82.

40 Phadi and Pearson 2018 https://47zhcvti0ul2ftip9rxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/20180412_LephalaleReport.pdf.

mining, and exercised "pervasive control" over the basic resources in the area, especially water and land.[41] These resources continue to be unjustly distributed in a manner that causes severe hardship for the poor, and raises issues of social, environmental and climate injustice.[42]

Water is provided to the Lephalale municipality principally by coal mining company, Exxaro Coal (Pty) Ltd, at great financial cost due to the infrastructure required to treat the water.[43] In 2011, only 39,5% of the population had access to a flush toilet connected to sewage and 31,4% had access to piped water inside their dwellings.[44] Phadi and Pearson[45] reported in 2018 that:

> The villages are acutely affected by the lack of water. Even with a system whereby water is pumped from wells and boreholes to storage reservoirs owned and operated by the municipality, many village residents are still forced to carry water from taps. According to the 2012/2013 Annual Report: '35.6% of the rural population does not have water that falls within the RDP standard of maximum cartage distance of 200 metres from point of use'. These sources of water are not purified but rather chlorinated with line feeders.

Meanwhile, Exxaro's mining operation is hugely water intensive.[46] The court took note of the following evidence in this regard:

> The power station will require 1,500,000m^3 of water each year in a highly water stressed region and hence is likely to aggravate the impact of climate change in the region by contributing to water scarcity, raising in turn questions about the viability of the power station over its lifetime.[47]

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41 Phadi and Pearson 2018 https://47zhcvti0ul2ftip9rxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/20180412_LephalaleReport.pdf.

42 Phadi and Pearson 2018 https://47zhcvti0ul2ftip9rxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/20180412_LephalaleReport.pdf.

43 Phadi and Pearson 2018 https://47zhcvti0ul2ftip9rxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/20180412_LephalaleReport.pdf. On the privatisation of water in South Africa in the mining sector see generally Kotzé and Fuo 2016 *Journal of Energy and Natural Resources Law*.

44 StatSA 2011 http://www.statssa.gov.za/?page_id=993&id=lephalale-municipality. Poor service delivery can be attributed, in large part, to maladministration and corruption in the Limpopo Province (see for example Molefe 2019 https://www.news24.com/SouthAfrica/News/forensic-probe-reveals-litany-of-corruption-in-limpopos-modimolle-mookgophong-municipality-20190824).

45 Phadi and Pearson 2018 https://47zhcvti0ul2ftip9rxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/20180412_LephalaleReport.pdf.

46 Exxaro 2019 https://www.exxaro.com/media/blog/2019/world-water-day.

47 *Earthlife* para 44.

The court noted further that the most significant risk of the power station as revealed by a "resilience report" on record was "the threat of increasing water scarcity in the Lephalale district", which would "affect the operation of the plant and deprive the local communities of water".[48] This passing reference to the deprivation that would be experienced by "local communities" represents the court's only acknowledgment of the links between human health and well-being and the state of the environment in which those humans exist. The court did not take note of the fact the "local communities" comprise largely of poor and vulnerable people whose health and well being are materially harmed by water scarcity in Lephalale, and who are experiencing environmental injustice.

In relation to the justice issues arising from emissions, it is well-known that the Medupi and Matimba power stations are located in the area, and cause high levels of pollution.[49] According to a study conducted by Holland,[50] pollution from Medupi is responsible for around 364 premature deaths per year, around 1552 children between the ages of 6 to 12 contracting bronchitis, and more than 162 000 lost working days (representing more health impacts than any other coal-fired power station in the country). Holland[51] further reports that Matimba is responsible for around 262 premature deaths per year and over 116 000 lost working days. The health impacts of this existing coal-fired power generation on the surrounding communities, many of whom live in conditions of poverty, are thus severe.[52] These impacts would invariably be exacerbated by additional coal-fired power generation in Lephalale. Further, the introduction of an additional coal-fired power station would necessarily represent a failure to mitigate greenhouse gas emissions, and

48 *Earthlife* para 49.

49 groundWork 2014 https://www.groundwork.org.za/specialreports/Slow%20Poison(e).pdf; Kings 2014 https://mg.co.za/article/2014-07-02-eskom-making-mpumalanga-sick; Phadi and Pearson 2018 https://47zhcvti0ul2ftip9rxo9fj9-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/20180412_LephalaleReport.pdf.

50 Holland 2017 https://cer.org.za/wp-content/uploads/2017/04/Annexure-Health-impacts-of-coal-fired-generation-in-South-Africa-310317.pdf.

51 Holland 2017 https://cer.org.za/wp-content/uploads/2017/04/Annexure-Health-impacts-of-coal-fired-generation-in-South-Africa-310317.pdf.

52 Holland 2017 https://cer.org.za/wp-content/uploads/2017/04/Annexure-Health-impacts-of-coal-fired-generation-in-South-Africa-310317.pdf.

exacerbate, rather than alleviate, social, environmental and climate injustice. The pollution and impacts thereof arising from Medupi and Matimba, have received extensive media coverage,[53] and could have been taken into consideration in *Earthlife* with reference to the evidence on record. For instance, the court acknowledged evidence on record that emissions from the proposed power plant were of relatively high intensity (including by international standards), and that proper consideration of their cumulative impacts was required.[54] In particular, the court noted that:

> the power station will generate over 8.2 million tonnes of carbon dioxide per year and over 246 million tonnes of carbon dioxide over its lifetime. The expected emissions could constitute 1,9% to 3,9% of South Africa's total GHGs - the larger percentage hopefully reflecting a higher ratio of a declining emissions rate after 2025 when other coal fired power stations are decommissioned.[55]

The court went on to observe that the relatively high emissions were the result of "technological limitations in the design of the power station", and that the project would "not make use of carbon capture and storage, an acknowledged effective emissions mitigation technique".[56] However, the court failed to consider the disproportionate health impacts arising from a failure to properly address emissions on poor and vulnerable people in Lephalale, with reference to the experience from other power stations in country. The court also overlooked the potential cumulative impacts of the power stations. These impacts are illustrative of environmental and climate injustice.

Although the court traversed, by way of background, evidence of the impacts of the proposed power station on water and emissions, in the framing of the dispute the court paid little attention to this evidence. In particular, the court failed to acknowledge that the introduction of a new power station would disproportionately

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53 See for example pre-*Earthlife*: Kings 2014 https://mg.co.za/article/2014-07-02-eskom-making-mpumalanga-sick. Post-*Earthlife* see: Yellend 2018 https://www.fin24.com/Economy/the-sorry-state-of-air-pollution-from-eskoms-coal-fired-power-stations-20190225 and Kings 2019 https://mg.co.za/article/2019-02-22-00-pollution-kills-as-power-plants-fail.

54 *Earthlife* paras 47 and 64.

55 *Earthlife* para 47.

56 *Earthlife* para 48.

impact upon the health and well being of the poor and exacerbate the injustices they experience. For instance, their water resources would be further depleted, their air would become more polluted, and their health and well being would be further impaired as a result. The notion that the poor will be first and hardest hit by impacts of climate change did not seem to feature in the court's framing of the dispute.[57] To the extent that evidence of these justice issues did not emerge from the record, the court was in a position to take judicial notice thereof.[58]

By failing to frame the dispute before it in *Earthlife* with reference to this evidence, the court failed to approach the dispute from a socio-ecological systems perspective that recognised that environmental concerns (such as climate change impacts as a relevant factor in the granting of an environmental authorization) hinder human flourishing and thus the attainment of social justice.[59] Those living in poverty, who stand to be worst affected by the proposed power station in Lephalale, were arguably rendered invisible in the adjudication of *Earthlife*, as their plight was demeaned and overlooked. The practical application of transformative environmental constitutionalism would instead entail framing the dispute with a primary focus on the plight of the poor and the injustices they experience. By doing so the court could have, for instance, considered in its reasoning the extent to which the climate change impact assessment ought to address procedural and substantive injustice experienced in Lephalale, and what mitigation and adaptation measures would be appropriate in response. Further, the court could have facilitated a shift in societal and political discourse towards greater concern for the plight of poor and vulnerable people in Lephalale.

5.3.2 Purposive and substantive rights-based adjudication in Earthlife

As *Earthlife* entailed judicial review of administrative action in terms of *PAJA*, the court was concerned with the implementation of environmental constitutionalism

57 See James 2015 https://theconversation.com/climate-change-is-hitting-south-africas-coastal-fish-44802 and Midgley *et al* 2002 *Global Ecology and Biogeography*.
58 Schwikkard and Van der Merwe *Principles of Evidence* 482.
59 Schlosberg *Defining Environmental Justice* (e-Book).

through the indirect application of relevant rights. In adjudicating Earthlife Africa's contention that section 24O(1) of *NEMA* ought to be interpreted to require that climate change impacts be treated as a relevant factor in the granting of environmental authorisations, the court engaged in substantive and purposive reasoning to the extent that it interpreted section 24O(1) of *NEMA* in a manner that broadly pursued environmental protection. The court further recognised the significance of the ever-deepening climate crisis.[60] In addition, the court resisted Thabametsi's attempts to delegitimize Earthlife Africa's review as being improper and politically motivated as part of its broader social movement against coal-fired power generation.[61] The court recognised Earthlife Africa as playing an important accountability-enhancing role in response to the problem of climate change. However, the court failed: (i) to engage meaningfully with the content and import of relevant justice-oriented provisions in environmental legislation, (ii) to develop the normative content of the environmental right provided for in section 24 of the *Constitution*; and (iii) to recognise the mutually reinforcing and interrelated nature of the environmental rights and other relevant substantive rights concerned with the flourishing of humans and the environment.

The court made mention of the important role of *NEMA*'s directive principles in environmental governance, namely, that "[t]hey guide the interpretation, administration and implementation of *NEMA*, and any other law concerned with the protection or management of the environment".[62] However, the court engaged with the principles in a superficial manner, simply noting that they "promote sustainable development and the mitigation principle that environmental harms must be avoided, minimised and remedied".[63] The court further remarked that the *NEMA* principles "caution decision-makers to adopt a risk-averse and careful approach especially in the face of incomplete information".[64] Nothing was said about other potentially relevant justice-oriented provisions. In particular, the court failed to engage with the idea that climate change impacts should be considered so as to

60 *Earthlife* para 82.
61 *Earthlife* para 23, discussed in Humby 2018 *Journal of Environmental Law* 152.
62 *Earthlife* para 80.
63 *Earthlife* para 80.
64 *Earthlife* para 80.

pursue environmental justice, particularly for the benefit of poor and vulnerable people in Lephalale. The court further failed to consider the state's role as public trustee of the environment when considering whether or not to grant an environmental authorisation.

For the reasons advanced in chapter 4, it is arguable that to the extent that Earthlife Africa did not refer to these principles in argument, courts may engage with them *mero motu*.[65] Engagement with these justice-oriented principles, as called for by a legal theory of transformative environmental constitutionalism, could result in the plight of the poor being treated as a valid justification for requiring that the state conscientiously fulfil its role as trustee of the environment by considering climate change impacts. In this way, transformative environmental constitutionalism could enhance rights-based litigation as part of a social movement in response to injustice. The court made it clear that in interpreting section 24O(1) of *NEMA* it was required to adopt a purposive approach that accords with the spirit, purport and objects of the *Bill of Rights*.[66] The court proceeded to rely on the environmental right in section 24 of the *Constitution* as well as relevant international law as the bases to find in favour of Earthlife Africa.[67] As Peel and Osofsky[68] note in relation to the court's approach in *Earthlife*:

> While by no means a direct application of the South African environmental rights provision, this decision suggests that rights arguments were at least a relevant part of the 'extra-statutory context' taken into account by the Court in reaching its conclusion that an environmental authorization for a new coal-fired power station could not be issued without first having a proper assessment for the project's climate change impacts.

The court's engagement with section 24 of the *Constitution* was, however, limited. The court stated:

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65 The significant role and normative status of *NEMA*'s principles has been emphasised, for instance, in *BP* and *Fuel Retailers*.

66 *Earthlife* paras 80-81 (with reference to s 39(2) of the *Constitution*).

67 *Earthlife* paras 82-83 and 91.

68 Peel and Osofsky 2018 *Transnational Environmental Law* 60.

> Section 24 recognises the interrelationship between the environment and development. Environmental considerations are balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Climate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to tat reasonable measures [to] protect the environment 'for the benefit of present and future generations' and hence adequate consideration for climate change. Short-term needs must be evaluated and weighed against long-term consequences.[69]

As this passage reveals, although the court acknowledged that climate change poses a "substantial risk to sustainable development in South Africa", it failed to define "the ideal of sustainable development" in a meaningful way. The court merely mentioned in a vague manner the need for integration or balancing of environmental, social and economic considerations. [70] Although the court acknowledged that "short-term needs must be evaluated and weighed against long-term consequences", the court did not elaborate upon how this evaluation or weighting should be done with reference to the content of section 24, including how "ecologically sustainable development" should be "secured" or how "justifiable social and economic development" should be "promoted". The court further made a mere passing reference to the notion of inter-generational justice, as requiring "adequate consideration of climate change", without giving any further content to the notion of inter-generational justice as an aspect of the environmental right.[71] No mention was made of intra-generational justice or how environmental degradation compromises the pursuit thereof, particularly for poor and vulnerable people.

The court could have adopted a social justice-oriented approach to its discussion of the environmental right by acknowledging that the "substantial risks" of climate change are felt first and most acutely by the poor. It failed to do so. In sum, the

69 *Earthlife* paras 82.
70 *Earthlife* paras 82 and 91.
71 *Earthlife* paras 82.

court did not contribute meaningfully towards developing the normative content of the environmental right. Substantive engagement with section 24 of the *Constitution*, to give practical effect to transformative environmental constitutionalism, would entail developing the content of relevant aspects of the right in the manner proposed in chapter 4, and could have enhanced litigation as a part of Earthlife Africa's social movement in response to injustice.

The only right with which the court engaged in *Earthlife* was the environmental right provided for in section 24 of the *Constitution*. Other relevant rights in the context of the dispute, given the potential impacts of the power station on water and air quality, could include the right to access to water provided for in section 27, and the rights to life and dignity provided for in sections 11 and 10 respectively.[72] Applying transformative environmental constitutionalism as argued for in chapter 4, would entail grappling, from a socio-ecological systems perspective, with the interrelated nature of the right to an environment not harmful to health and well being, and other rights aimed at human flourishing; with an appreciation that Lephalale is made up of a diverse range of human and non-human actors, interacting with and dependent upon one another in an integrated socio-ecological system. In particular, the issue of water scarcity in Lephalale could have given rise to consideration of the relationship between the right to access to water and the environmental right.[73] Engagement with other relevant rights *mero motu* as called for by transformative environmental constitutionalism could have enhanced the litigation as part of Earthlife Africa's social movement in response to the injustices experienced by poor and vulnerable people in Lephalale.

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[72] On the potential role and significance of other relevant rights, see for example Rajamani 2007 *Review of European, Comparative and International Environmental Law*, Daly and May 2016 *Journal of Human Rights and the Environment* and Fuo 2013 *Obiter*.

[73] See generally Murcott 2015 *SALJ* and Fuo 2013 *Murdoch University Law Review*.

5.4 VEJA

The Vaal Environmental Justice Alliance is a non-governmental community organisation that has been engaged in environmental advocacy since 2004.[74] It is an alliance of five environmental organisations with a focus on air quality, waste, water pollution and climate change in the Vaal Triangle, one of the most polluted areas in South Africa.[75] One of the Alliance's objectives is "to promote an understanding of the interrelated nature of social, political, environmental and economic factors limiting or enabling the achievements of [a] sustainable, equitable and just society".[76] It is campaigning, amongst other things, "to address the impacts of how the energy practice has historically been conducted in South Africa", including by responding to the plight of the excluded and marginalised through renewable energy methods that can contribute towards energy sovereignty for the people.[77] *VEJA* is the result of their campaign against the pollution caused by the steel works of Arcelormittal South Africa Ltd in the Vaal Triangle. Arcelormittal is one of the most significant contributors to pollution in the area.[78]

The Alliance requested access to information of Arcelormittal in relation to its polluting activities.[79] When Arcelormittal refused the request, the Alliance instituted proceedings in terms of *PAIA*.[80] In a value-laden judgment, the Supreme Court of Appeal ordered disclosure of the information requested, and rebuked Arcelormittal for its obstructive stance to the Alliance's request.[81] For instance, the court forcefully remarked that:

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74 Vaal Environmental Justice Alliance http://www.veja.org.za/about.html.

75 Vaal Environmental Justice Alliance http://www.veja.org.za/about.html.

76 Vaal Environmental Justice Alliance http://www.veja.org.za/about.html.

77 Vaal Environmental Justice Alliance http://www.veja.org.za/campaigns.html.

78 *VEJA* para 52. Centre for Environmental Rights 2016 https://fulldisclosure.cer.org.za/2016/. On violations of environmental laws committed by Arcelormittal see National Environmental Compliance and Enforcement Report 2009/2010, 25–26, National Environmental Compliance and Enforcement Report 2010/2011, 44–45; National Environmental Compliance and Enforcement Report 2011/2012, 43; National Environmental Compliance and Enforcement Report 2012/2013, 44; National Environmental Compliance and Enforcement Report 2013/2014, 44.

79 *VEJA* paras 8-13.

80 *VEJA* paras 14-16.

81 *VEJA* paras 82-83.

> Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced.[82]

VEJA has been heralded as a landmark victory in the context of social movements' struggles for environmental justice and corporate accountability.[83] In the aftermath of *VEJA*, when the records requested were made public, the Alliance and the public more generally could better determine whether or not to take further legal action against Arcelormittal. Although no legal action has been pursued to date, the judgment has contributed towards a culture of transparency and openness in South Africa in the context of environmental governance. It has further played an important story-telling role by raising awareness about Arcelormittal's polluting activities and the impacts thereof on people living in the Vaal Triangle, and had the effect of putting Arcelormittal "on notice". These are important victories given that transnational corporations such as Arcelormittal are key drivers of "Earth system decay" in the Anthropocene, and consequently of myriad human rights violations, such that enhancing corporate accountability is a priority.[84]

In this part I examine the court's reasoning in *VEJA*, first in relation to the extent to which the court framed the dispute in a justice-oriented manner that adopted a socio-ecological systems perspective. Thereafter, I consider the extent to which the court engaged in purposive and substantive rights-based adjudication of the dispute that: (i) engaged meaningfully with the content and import of relevant justice-oriented provisions in environmental legislation; (ii) developed the normative content of the environmental right provided for in section 24 of the *Constitution*; and (iii) recognised the mutually reinforcing and interrelated nature of the environmental right and other relevant substantive rights concerned with the flourishing of humans and the environment.

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82 *VEJA* para 82.

83 eNCA 2015 https://www.enca.com/south-africa/landmark-case-reveals-truth-about-arcelormittal-sa-pollution-vanderbijlpark.

84 Kotzé 2019 *Journal of Human Rights and the Environment* 73. See also Wheeler "The Corporation and the Anthropocene".

5.4.1 The framing of the dispute in VEJA

In framing the dispute in *VEJA* the court began by acknowledging that "the world…is becoming increasingly ecologically sensitive", and that "citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of governments and in relation to corporations".[85] The court thus engaged in substantive reasoning in its framing of the dispute with reference to the values of ecological sensitivity and the need for openness and responsiveness in response, and so created a basis to link the procedural right of access to information to the substantive right to environmental protection and sustainability as provided for in the environmental right.[86] The judgment was further written from the perspective of the need "to reset our environmental sensitivity barometer" given the perils of global warming.[87] This approach shows an appreciation for deteriorating environmental conditions in the Anthropocene and is thus a welcome departure from other more narrowly cast cases where access to information is disconnected from the environmental harms in respect of which information is sought. Nonetheless, the court could have gone further by adopting a social justice-orientation that acknowledged that the poor suffer first and most acutely from the impacts of pollution and the perils of global warming.

The court noted that the litigation raised two "competing interests" encapsulated in the environmental right through the notion of sustainable development:[88] industrial activity and its "significance for the country's development and economy" on the one hand, and "concerns about the preservation of the environment for the benefit of present and future generations" on the other.[89] Arcelormittal had asserted that the court should consider in its favour that by virtue of its activities it "obviously" causes pollution, but is also "a boon to the country's economic development".[90] At this point, in setting the scene, the court regrettably placed no emphasis on the need to

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85 *VEJA* para 1.
86 Ss 32 and 24 of the *Constitution*.
87 *VEJA* para 84.
88 *VEJA* para 4.
89 *VEJA* para 3.
90 *VEJA* para 3.

limit development by ensuring that it is "justifiable" and ecologically sustainable as required by section 24 of the *Constitution*. However, in evaluating whether or not Arcelormittal should be compelled to provide access to its information, the court stated that the "industrial activities, impacting as they do on the environment, including on air quality and water resources, [have] an effect on persons and communities in the immediate vicinity and [are] ultimately of importance to the country as a whole".[91] This statement is an important acknowledgement of Arcelormittal's significant contribution to pollution in South Africa. The statement established Arcelormittal's role as a polluter as an environmentally-centred justification for its duty to disclose the information requested by the Alliance. However, the court's statement also represents a failure to appreciate that the persons and communities in the immediate vicinity of the industrial activities in question are poor and live in deplorable conditions.[92]

Evidence on record and readily ascertainable in the public domain reveals that poor and vulnerable communities in the Vaal Triangle are, in the main, shouldering the impacts of Arcelormittal's polluting activities.[93] Their plight is most immediately and tangibly exacerbated by Arcelormittal's polluting activities: they experience environmental and climate injustice in that they are exposed to a disproportionate share of environmental burdens and are particularly vulnerable to ill-health as a result thereof.[94] For instance, the Alliance alleged that:

> Pollutants from the plant's industrial waste have reportedly seeped through the ground, contaminated local aquifers and affected the groundwater of nearby communities. [Arcelormittal] is also one of the top three polluters of particulate matter, sulphur dioxide and carbon dioxide in the Vaal Triangle industrial region, where an estimated 65 percent of chronic illnesses in the area are reported to be caused by industrial pollution.[95]

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91 *VEJA* para 52.

92 Hallowes and Munnik 2006 http://www.groundwork.org.za/reports/gWReport2006.pdf.

93 Annexures "SM28", "SM29", "SM30", "SM31" and "SM 33" of the Founding Affidavit in *VEJA*. See also Mzini *Community food projects* 2, where it is explained that in the Sedibeng District Municipality (where Arcelormittal is located) around 51% of the population lives in poverty.

94 Hallowes and Munnik 2006 http://www.groundwork.org.za/reports/gWReport2006.pdf.

95 Founding Affidavit in *VEJA* para 41.

This evidence that poor and vulnerable communities were disproportionately exposed to hardship as a result of Arcelormittal's pollution did not feature in a material way in the judgment. Explicit engagement by the court with this context and the consequent social and environmental injustices revealed thereby could have highlighted the importance of access to information about environmentally harmful conduct of corporations so as to respond to such injustice. The court, however, showed limited appreciation of the single socio-ecological system in which local communities, comprising poor and vulnerable people, and Arcelormittal were operating – the links between the negative impacts on the health and well being of these local communities and the harmful activities of Arcelormittal were overlooked.[96]

Transformative environmental constitutionalism would entail that the injustices experienced by these people as a result of the untenable environmental conditions to which they were exposed were at the forefront of the court's mind. Addressing that injustice ought to have been central in the court's reasoning given the transformative mandate and social justice imperative of the *Constitution*. Engagement with the plight of poor and vulnerable people in the Vaal Triangle could have enhanced the Alliance's litigation as part of its social movement in response to Arcelormittal's polluting activities, by raising the profile of their plight, and shifting societal and political discourse towards a greater concern for the hardships they experience.

5.4.2 Purposive and substantive rights-based adjudication in VEJA

VEJA concerned the implementation of environmental constitutionalism through the indirect application of the environmental right in the context of a judicial review in terms of *PAIA* of Arcelormittal's refusal to grant the Alliance access to information. As I discuss next, in adjudicating the review, and granting the application for access to information, the court engaged to a considerable degree with the content and import of relevant justice-oriented provisions in environmental legislation, but

96 Hallowes and Munnik 2006 http://www.groundwork.org.za/reports/gWReport2006.pdf.

neglected to develop the normative content of the environmental right provided for in section 24 of the *Constitution*, or to recognise the mutually reinforcing and interrelated nature of the environmental rights and other relevant substantive rights concerned with the flourishing of humans and the environment. Although in some respects the court's reasoning can be characterized as purposive, substantive and social justice-oriented, the court could arguably have gone further.

As discussed in chapter 2, a private body such as Arcelormittal is required to grant access to information to the extent that the information is required for the protection of a right. The court in *VEJA* found that the information was required for the protection of the environmental right in section 24 of the *Constitution*. It did so with reference to various substantive and justice-oriented provisions in environmental legislation on which the Alliance had placed reliance, including *NEMA*, *NEMWA* and the *NWA*.[97] The court traversed relevant provisions in these statutes. The court further supported the view (expressed by the court *a quo*) that refusing access to the information sought by the Alliance "would hamper the organisation in championing the preservation and protection of the environment".[98] Regrettably, beyond engaging with statutory provisions aimed at giving effect to the environmental right, the court did not develop the normative content of section 24 of the *Constitution* in any meaningful way, and did not engage with other relevant substantive rights, such as the rights to access to water and housing, and the rights to dignity and life. The court's engagement with the environmental right was limited to repeating the economic-centred, integration-focused articulation of sustainable development in *Fuel Retailers* in the introductory paragraphs of the judgment as discussed above.[99]

The practical application of a legal theory of transformative environmental constitutionalism would instead require a genuine attempt to develop the normative content of the environmental right, and engagement with the other relevant rights. For instance, the court could have attempted to link the idea of "environmental

97 *VEJA* paras 60-61.
98 *VEJA* para 42.
99 *VEJA* paras 3-4.

sensitivity" (on which it relied to frame the dispute as discussed above) to the notion of ecological sustainability. By applying transformative environmental constitutionalism more fully, the Supreme Court of Appeal could have contributed more to the Alliance's social movement in response to Arcelormittal's polluting activities. Despite the limitations of *VEJA*, the court's engagement with relevant statutory provisions strengthened the implementation of environmental constitutionalism in South Africa, as will emerge from the discussion that follows.

The court made reference to various justice-oriented principles in section 2 of *NEMA*. Despite *NEMA* explicitly limiting the application of the principles only to the state, the court found that the principles apply "principally to the state", and went on, remarkably, to find that they could also apply to corporations.[100] The court reasoned that they "must, in principle, apply to corporate decisions and activities that impact on the environment and thus implicate the public interest, particularly when their activities require regulatory approval".[101] In this way the court, presumably on the basis of statutory interpretation that promotes the spirit, purport an objects of the *Bill of Rights* as required by section 39(2) of the *Constitution*, extended the application of the *NEMA* principles to the conduct of Arcelormittal.[102]

Further, the court created a valuable precedent for the invocation of the *NEMA* principles in the context of environmentally harmful behaviour of corporations. To do so, the court impliedly applied section 24 of the *Constitution* horizontally. The court acknowledged that Arcelormittal has duties under the environmental right that justified the horizontal application of the *NEMA* principles. The court then granted an order to compel Arcelormittal to disclose the records requested by the Alliance so as to give effect to the environmental right. As discussed in chapter 2, horizontal application of the *Constitution* is an important feature of transformative constitutionalism, given that inequality and racism were entrenched not only in the public sphere, but also that non-state actors, such as corporations were also key role

100 *VEJA* paras 66.
101 *VEJA* paras 66.
102 As discussed in chapter 2 at 2.4.3 above, this kind of judicial activism is arguably countenanced by South Africa's unique and normatively infused model of separation of powers.

players.[103] The court ought to have explicitly justified its extension of the *NEMA* principles to corporations by explaining why the environmental right was horizontally applicable. Nonetheless, the extension of the application of the *NEMA* principles to the private sphere is arguably the most significant contribution of *VEJA* to environmental law jurisprudence. This development is consistent with a growing acceptance of the need for multinational corporations to respect and promote human rights, including in relation to the environment.[104] The extension of the *NEMA* principles entails that the implementation of environmental constitutionalism can implicate not only the state, but also private actors. This approach arguably facilitated the pursuit of social justice through the horizontal application of rights. Horizontality is, in turn, a crucial aspect of South Africa's project of transformative constitutionalism, since "[t]he power wielded by private actors is often comparable to, if not greater than, that of the state itself".[105] The court arguably implemented environmental constitutionalism so as to hold Arcelormittal to account in respect of an underlying environmental evil – a culture of environmental non-compliance that secrecy can facilitate. In other words, the court went beyond holding Arcelormittal accountable for its failure to provide access to information.[106]

Having found that the *NEMA* principles apply to private actors, the court engaged with the principle in section 2(4)(b) of *NEMA*, which provides that environmental management must acknowledge that "all elements of the environment are interrelated" and "must take into account the effects of decisions on all aspects of the environment and all people in the environment". Next, the court highlighted section 2(4)(f) of *NEMA*, which states that participation of all interested an affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured". Finally, the court referred to the principle in section 2(4)(k) of *NEMA*, which requires that "[d]ecisions must be taken in an

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103 Klare 1998 *SAJHR* 153-156.

104 See for instance Nolan 2004 *University of New South Wales Law Journal* and Newell 2001 *IDS Bulletin*.

105 Bhana 2013 *SAJHR* 353.

106 See *VEJA* paras 78; Centre for Environmental Rights 2016 https://fulldisclosure.cer.org.za/2016/.

open and transparent manner, and access to information must be provided in accordance with the law". These provisions are reflective of the pursuit of environmental justice in a procedural sense, as articulated in chapter 1, in that they require "recognition of the various cultures and races that have been at the receiving end of…inequity, authentic inclusion and political participation of a broad array of peoples and interests".[107]

The court further highlighted the value of public participation in pursuit of environmental protection (as recognised in other public interest litigation), and thereby justified affording the Alliance "a seat at the table" in the context of environmental governance in the Vaal Triangle.[108] This perspective was doubtless facilitated by the court's recognition that the Alliance is made up of "genuine advocates for environmental justice".[109] The court reasoned that the Alliance was thus entitled to monitor the operations of Arcelormittal and its effects on the environment as a legitimate environmental stakeholder with whom Arcelormittal had committed to engaging in its "collaborative corporate governance" efforts.[110] The court's approach had the effect of treating the environmental right, the right to access to information and the values of "accountability, responsiveness and openness" as mutually reinforcing of one another.[111]

Given that the impacts of Arcelormittal's polluting activities are felt first and most acutely by the poor, thereby resulting in social, environmental and climate injustice, the court could have gone further by engaging (*mero motu* if necessary) with the principle in section 2(4)(c) of *NEMA*, which entails an injunction to pursue environmental justice in a substantive (as opposed to procedural) sense "so that adverse environmental impacts are not distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons".

107 Schlosberg and Carruthers 2010 *Global Environmental Politics* 14.
108 *VEJA* paras 70-71, where reference is made to *Biowatch* para 19 and *Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government* [2013] All SA 416 (SCA) paras 61-63.
109 *VEJA* para 53.
110 *VEJA* paras 53, 71 and 80.
111 S 32 of the *Constitution* (right to access to information), s 1(d) of the *Constitution* (values of accountability, responsiveness and openness).

Further, the court could have engaged with section 2(4)(d) of *NEMA*, which demands that "[e]quitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued", including through taking "special measures" for "persons disadvantaged by unfair discrimination". These provisions constitute part of the statutory context in which Arcelormittal's duty of disclosure was located.

In its engagement with *NEMWA* the court repeated parts of the preamble, including that "the impact of improper waste management practices are often borne disproportionately by the poor". This part of the preamble shows an appreciation of the social and environmental injustice, in a distributional sense, of improper waste management. The court, by acknowledging this part of *NEMWA*'s preamble, can be seen as treating transparency and access to information in pursuit of environmental governance as responsive to social and environmental injustice.

The court went on to highlight that the *NWA*, which gives effect to the environmental right and the right to access to water, requires that the nation's water resources must be protected so as to meet the basic needs of present and future generations.[112] The court also noted with reference to section 3(1) of the *NWA* that the state is the public trustee of the nation's water resources.[113] Unfortunately the court did not elaborate on the significance of the notion of public trusteeship, discussed in chapter 4. Doing so could have resulted in valuable social justice-oriented jurisprudence on the notion that could serve to enhance our understanding of the state's role as public trustee of the nation's water. Nonetheless, by engaging with the *NWA*, the court arguably recognised that the environmental right requires access to clean water, a basic human need to be met in an equitable fashion. The court arguably recognised further that access to information can help secure both the rights to access to water, and the right to an environment not harmful to health and well-being. This engagement with the *NWA* is the only sense in which the court acknowledged, indirectly, the mutually reinforcing nature of the environmental right

112 *VEJA* paras 67-68.
113 *VEJA* para 70.

and other substantive rights aimed at human flourishing. Transformative environmental constitutionalism would arguably entail far more thorough and explicit engagement with the ways in which enforcing the procedural right of access to information can operate to render substantive rights such as the environmental right, the right to access to water, the rights to life and the right to dignity, vital.

5.5 The Gongqose judgments

The *Gongqose* judgments (i.e. *Gongqose HC* and *Gongqose SCA*) arose when the Hobeni community of fishers on the East coast mobilised in response to community members being arrested and detained for fishing in contravention of conservation laws in the Dwesa-Cwebe Nature Reserve.[114] The Reserve had been declared a "no take" marine protected area by the state in order to conserve marine life.[115] The effect of the declaration was that it became a criminal offence in terms of the *MLRA* for the community to fish in the Reserve.[116] Some community members were convicted of various offences as a result of their fishing activities.[117] In the face of this fortress approach to conservation,[118] community members challenged their convictions with reference to their cultural practices and livelihoods, which they consider to be deeply connected to the Dwesa-Cwebe area and the marine life in the ocean.[119] Although their challenge was based on their customary law rights, when asked by their lawyers about these rights, one community member informed the lawyers:

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114 Wicomb "Addressing Identity Politics" 9.

115 The state sought to manage the decline in the marine fish species (caused by commercial, recreational and subsistence fishing) without showing due regard to the severe impacts on the community.

116 The Minister acted in the implementation of s 43 of the *MLRA*, which was subsequently repealed and replaced by s 90(3) of *NEMPAA*. S 43(2)(a) of the *MLRA* made it a criminal offence for anyone to fish or attempt to fish in a marine protected area.

117 *Gongqose SCA* paras 13-15.

118 Fortress conservation is defined by Castree *et al A Dictionary of Human Geography* as "The creation of protected areas for terrestrial or marine wildlife by the coerced displacement or exclusion of the existing inhabitants". See further Thondhlana and Cundill 2017 *International Journal of Biodiversity Science*, Watts and Faasen 2009 *South African Geographical Journal* 27 and Hulme and Murphree 1999 *Journal of International Development* 279.

119 Wicomb "Addressing Identity Politics" 12.

> You are using the wrong words. We didn't have a 'right' to fish. Fishing was simply life. What you call 'rights', for us was simply a part of life. It is you who use this language of rights. We don't know that. We want our life, but if we can't have that, then maybe at a minimum we can have these rights to fish that you are talking about.[120]

In *Gongqose HC* judicial review proceedings were instituted on behalf of the community in terms of *PAJA* to challenge the decision to declare the Reserve a marine protected area. It was argued further that the community's cultural and customary law rights remained in place notwithstanding environmental legislation purporting to deprive them from access to fish in the Reserve, such that their conduct should not be regarded as criminal, and the convictions and sentences imposed should be set aside. The community members' argument was unsuccessful in the High Court. In the Supreme Court of Appeal, in *Gongqose SCA*, it was found that the community had proved their tradition of utilising marine and terrestrial resources in the Reserve and that the *MLRA* (and declaration in terms thereof) had not extinguished the customary law rights that had accrued to the community.[121] Accordingly, the Supreme Court of Appeal set aside the convictions and sentences imposed upon the community members.

In this part I examine the courts' reasoning (with a focus on the reasoning of the Supreme Court of Appeal in *Gongqose SCA*). I analyse first the extent to which the dispute was framed in a justice-oriented manner that adopted a socio-ecological systems perspective. Thereafter, I consider the extent to which the courts in the *Gongqose* judgments engaged in purposive and substantive rights-based adjudication of the dispute that: (i) engaged meaningfully with the content and import of relevant justice-oriented provisions in environmental legislation; (ii) developed the normative content of the environmental right provided for in section 24 of the *Constitution*; and (iii) recognised the mutually reinforcing and interrelated nature of the environmental right and other relevant substantive rights concerned with the flourishing of humans and the environment.

120 Wicomb "Addressing Identity Politics" 12.
121 *Gongqose SCA* para 64.

5.5.1 *Framing of the dispute in the Gongqose judgments*

Both the High Court and the Supreme Court of Appeal framed the dispute in the *Gongqose* judgments as concerning an entitlement of fishing communities to exercise their customary rights to access marine resources in a marine protected area. Whilst the High Court in the framing the dispute placed no emphasis on the deprivation or injustices experienced by the communities as a result of the restrictions placed on their access to marine resources, in the Supreme Court of Appeal, issues of deprivation, and the injustice caused thereby, were given considerable weight.

Undisputed evidence on record, including from expert witnesses, revealed that the community was a vulnerable, historically marginalised group that had experienced environmental injustice in a procedural and substantive sense as a result of the declaration of the Reserve as a "no take" marine protected area.[122] The community had not been properly consulted about the declaration,[123] and thus experienced environmental injustice in a procedural sense. Further, the community experienced environmental injustice in a substantive sense in that it was disproportionately impacted by the restriction on their access to fish in the Reserve in a number of ways. It was established that the community members are among the poorest people in the country.[124] They were dependent upon the fish in the Reserve for food for their families,[125] and to sustain their livelihoods.[126] They had to walk long distances to fish elsewhere, as they had limited or no funds for transport to these areas.[127] Access to the fish and other natural resources in the Reserve helped to promote substantive equality and the fulfilment of the community's socio-economic rights.[128] Their deprivation, through "fortress-conservation",[129] caused them

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[122] *Gongqose SCA* paras 4-12 chronicles the history of dispossession of land experienced by the community members over a 300 year period. See also Wicomb "Addressing Identity Politics".

[123] *Gongqose SCA* para 31.

[124] *Gongqose SCA* para 31. *Gongqose HC* para 69.

[125] *Gonqose SCA* para 27

[126] *Gongqose SCA* para 4.

[127] *Gongqose SCA* para 28.

[128] *Gongqose SCA* para 31. Specific socio-economic rights were not mentioned, but could have included the right to access to adequate housing (s 26 of the *Constitution*), and access to food (s 27 of the *Constitution*), as well as rights to dignity (s 10) and life (s 11).

substantial hardship and environmental injustice.[130] In view of this evidence, it was argued on behalf of the fishing community that the declaration of the Reserve as a marine protected area was, among other things, inconsistent with "the right to environmental justice and equitable access to natural resources".[131]

In *Gongqose HC* the High Court placed no store in the facts and arguments concerning the social and environmental injustice experienced by the community.[132] The disproportionate impact of the restriction on the rights of the community to fish was demeaned and overlooked. The High Court dismissed the community's review of the declaration of the Reserve as a marine protected area primarily on the basis of procedural rules under *PAJA*, and seemed to treat the evidence of environmental, and thus social injustice, as irrelevant in doing so.[133] The High Court further failed to adopt a socio-ecological systems perspective to the dispute.[134] Such a perspective would arguably instead entail acknowledging the community's reliance on the marine life in the Reserve for their survival, given that the community and the Reserve exist in a single system, rather than two disconnected systems. In other words, the High Court failed, in its framing of the dispute, to acknowledge the significance of evidence of a strong coupling among the needs of the local community and their access to marine life in the Reserve.

In contrast, in *Gongqose SCA* the Supreme Court of Appeal adjudicated the dispute from the perspective of the historical legacy of dispossession experienced by the community, and the hardship it caused, acknowledging the close relationship amongst the community, the land and the marine life therein.[135] The Supreme Court of Appeal arguably appreciated that it is the environment that creates the conditions in which social justice can occur, by recognising that "[a]ccess to natural resources promotes socio-economic rights and substantive equality".[136] Moreover, although the

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129 See note 118 in chapter 5 above.
130 *Gongqose SCA* para 31.
131 *Gongqose HC* para 54.
132 *Gongqose HC* paras 69-73.
133 *Gongqose HC* paras 65-68.
134 See notes 1 and 9 in chapter 1 above.
135 *Gongqose SCA* paras 4-12 and 27.
136 *Gongqose SCA* para 31.

Supreme Court of Appeal did not explicitly frame the deprivation experienced by the community as causing social or environmental injustice in a substantive and procedural sense *per se*, it noted that:

> The Dwesa-Cwebe communities are among the poorest in South Africa and the loss of access to marine resources has caused them substantial hardship. The closure of marine resources took place without consulting the communities.[137]

In these ways, the Supreme Court of Appeal framed the dispute in a manner consistent with a legal theory of transformative environmental constitutionalism. The reasoning of the Supreme Court of Appeal also, to some extent, entailed the practical application of transformative environmental constitutionalism by responding to the injustice experienced and recognising the mutually reinforcing nature of substantive rights. In this sense the reasoning of the Supreme Court of Appeal stands in stark contrast with the reasoning of the High Court, as I discuss next.

5.5.2 Purposive and substantive rights-based adjudication in the Gongqose judgments

The *Gongqose* judgments entailed the implementation of environmental constitutionalism with reference to the relationship between environmental right, and legislation explicitly giving effect thereto, and customary law rights. Whether the Hobeni community could lawfully exercise their customary law right to fish turned, in essence, on whether this practice was viewed as mutually reinforcing of, or at odds with, the environmental right. The High Court in *Gongqose HC* viewed the protection of the environment and the exercise of the customary law rights of the community as competing with one another.[138] It did so by viewing the *MLRA*, to the exclusion of the customary practices of the community, as giving expression to the notion of sustainable development provided for in the environmental right.[139] The High Court noted that the legislature "in its wisdom" had enacted the *MLRA* for the purposes of

137 *Gongqose SCA* para 31.
138 *Gongqose HC* paras 36-39.
139 *Gongqose HC* para 38.

conserving marine ecosystems and ensuring the sustainable utilisation thereof.[140] If the community wished to exercise its customary law rights to fish, it was required to apply for an exemption from the restrictions imposed in terms of the *MLRA*, and should not expect customary laws to operate alongside the *MLRA*.[141] The High Court went on to assert that the rights to culture are not to be exercised in a manner that is inconsistent with any provision in the *Bill of Rights*, including the right in section 24.[142] The High Court reasoned further that "the mere existence of a customary law right" ought not to negate the unlawfulness of a charge of illegal fishing under the *MLRA* – to permit this state of affairs would entail elevating cultural rights at the expense of the environmental right and would "make a nonsense of the objects of the MLRA" (namely, conservation and sustainable utilisation of marine life).[143] What is worrying is that the High Court seemed to reach this conclusion without considering the mutually reinforcing nature of the particular customary practice at issue and the environmental right. This relationship was established by the record and detailed in *Gongqose HC* as follows:

> The record establishes that when the appellants were arraigned and eventually convicted they, and the rest of the members of the Dwesa-Cwebe communities, had been accessing the MPA and fishing not only to sustain their families, but as an expression of the communities' culture and for economic reasons; they regarded the sea, rocks and coastline at and around the Reserve as sacred to them and the home of their ancestors; they claim to have known and used a range of fish and other inter-tidal resources since the time of their ancestors; they understood that nature had a way of protecting itself and this is what regulated their harvesting; the tides and the weather did not allow them to go fishing every day; they also had their own way of making sure that there would be enough fish for the generations to come, having been taught by their fathers and elders not to take juveniles and to put the small fish back.[144]

The evidence as to the nature and content of the customary law right thus confirmed that allowing the community to exercise the right would be entirely consistent with the *MLRA*'s objectives of conservation and sustainable use of marine life, and would not make a nonsense thereof, as the High Court proclaimed. The

[140] *Gongqose HC* para 36.
[141] *Gongqose HC* para 37.
[142] *Gongqose HC* para 39.
[143] *Gongqose HC* para 39.
[144] *Gongqose HC* para 23.

High Court, however, seemed to appeal to the logic of "fortress conservation".[145] It did so first, by ignoring relevant evidence of the community's cultural practices, and secondly by treating the state as the only legitimate source of control over the marine life in the Reserve, whilst negating the role, integrity and authority of the poor and marginalised communities dependent thereon. As a result, the High Court heightened, rather than responded to the environmental injustice experienced by the community.

The Supreme Court of Appeal departed from the approach adopted by the High Court in a number of important respects. In the discussion of *Gongqose SCA* that follows, I argue that although the Supreme Court of Appeal adjudicated the dispute in a far more purposive and substantive manner than the High Court, and, to a degree, recognised the mutually reinforcing and interrelated nature of the environmental rights and cultural rights, it failed to engage with relevant justice-oriented provisions in environmental legislation, or to develop the normative content of the environmental right as called for by a legal theory of transformative environmental constitutionalism. Doing so would have enhanced the judgment's contribution towards Hobeni's community initiative in response to the injustice and deprivation experienced.

In *Gongqose SCA* the Supreme Court of Appeal recognised the existence of the community's customary law right in a manner that showed respect for indigenous knowledge and practices. The court further acknowledged that:

> Customary rights and conservation can co-exist. And it is important to remember that as regards conservation and sustainable utilisation of marine resources in the MPA, the Dwesa-Cwebe communities have a greater interest in the marine resources associated with their traditions and customs, than any other people. These customs recognise the need to sustain the resources that the sea provides.[146]

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[145] See note 118 in chapter 5 above.
[146] *Gongqose SCA* para 56.

The Supreme Court of Appeal further rejected the finding of the High Court that the recognition of the community's customary law right in this case would entail elevating the rights to culture at the expense of the environmental right.[147] The Supreme Court of Appeal did so, among other things, on the basis that the facts revealed that the exercise of the customary rights was not inconsistent with section 24 of the *Constitution*.[148] In this way, the Supreme Court of Appeal acknowledged that the community's customary law rights could exist alongside relevant environmental legislation, and that the recognition of the customary law rights could be reinforcing of the environmental right. The court was arguably able to do so by appreciating that the community and the Reserve are strongly coupled and operate within a single socio-ecological system – rather than viewing them as separate from one another. The court bolstered its approach, amongst other things, with reference to relevant international law, including article 26 of the *UN Declaration on the Rights of Indigenous Peoples*.[149] The court acknowledged that article 26 requires that states must give legal recognition and protection to lands, territories and resources of indigenous peoples with due respect to their customs, traditions and land tenure systems.[150]

The Supreme Court of Appeal is to be applauded for showing respect to indigenous knowledge and practices, and thus upholding environmental justice as recognition of the equal moral worth (in the sense discussed in chapter 1), of the Hobeni community. This approach resulted in *Gongqose SCA* securing tangible alleviation for the Hobeni community, raising the profile of their struggle for justice, and shifting societal and political discourse to facilitate an appreciation of the mutually reinforcing nature of their customary practices and environmental protection.

Unfortunately, the Supreme Court of Appeal neglected to engage with relevant justice-oriented provisions that could have further supported its approach to the Hobeni community's customary rights, including those requiring environmental

[147] *Gongqose SCA* para 66.
[148] *Gongqose SCA* para 66.
[149] *UN Declaration on the Rights of Indigenous Peoples*, 2007.
[150] *Gongqose SCA* para 58, *UN Declaration on the Rights of Indigenous Peoples*, 2007.

justice in environmental decision-making and those requiring public trusteeship over the environment discussed in chapter 4. Further, beyond acknowledging the relationship between customary law rights and the environmental right, the court failed to develop the normative content of the environmental right. The court could have developed the content of the notion of intergenerational equity provided for in section 24 of the *Constitution*. It could have done so, for instance, with reference to the community's legacy, passed from generation to generation, entailing an appreciation for the environment and a close relationship of dependence with the environment.[151] The court could further have considered the ways in which the community's customs and practices are consistent with the idea of ecologically sustainable development as provided for in section 24 of the *Constitution*, including with reference to the resilience thinking, discussed in chapter 4. Finally, the court could have considered the significance of *ubuntu* in the context of the customary laws at issue, which as discussed in chapter 4, views human well-being as "indispensable from our dependence on and interdependence with all that exists, and particularly with the immediate environment on which all humanity depends".[152] In these respects, the court arguably missed an opportunity to practically implement transformative constitutionalism in a manner that could have strengthened the conclusions reached in *Gongqose SCA*.

5.6 Conclusion

This chapter has illustrated the extent to which a legal theory of transformative environmental constitutionalism was put in practice by the courts in the implementation of environmental constitutionalism in *Earthlife*, *VEJA* and the *Gongqose* judgments. To the extent that the courts did not apply aspects of a legal theory of transformative environmental constitutionalism this chapter brought to the fore the ways in which the courts could have done so. In *Earthlife* by adopting a substantive and purposive approach to section 24O(1) of *NEMA*, the court was able to find that a climate change impact assessment is a relevant consideration in the

151 *Gongqose SCA* para 27.
152 Murove 2004 *Mankind Quarterly* 196. See also Mokgoro 1998 *PER* 7. See also Himonga *et al* 2013 *PER*.

granting of an environmental authorisation, and in this sense was responsive to the climate crisis of the Anthropocene. In *Earthlife*, by taking into account of evidence social, environmental and climate injustice, the court could have adopted a far more social justice-oriented approach, however. Further, the court could have engaged with relevant justice-oriented provisions in environmental legislation, developed the normative content of the environmental right, and considered the interrelated nature of the environmental right and other relevant rights.

In *VEJA* the court's reasoning justifying an order to compel Arcelormittal to provide access to information to the Alliance in terms of *PAIA* was value-laden, and environment-centred. In requiring Arcelormittal to comply with standards of transparency and accountability in respect of its polluting activities through the horizontal application of the *Bill of Rights*, the court acknowledged that transnational corporations are key drivers of Earth system decay in the Anthropocene. However, the court could have considered far more closely the social, environmental and climate justice implications of Arcelormittal's conduct, developed the normative content of the environmental right, and engaged with the relationship between the environmental right and other substantive rights.

In *Gongqose SCA* the Supreme Court of Appeal, in recognising a customary law right to fish, framed the dispute from a justice-oriented perspective, and illustrated the mutually reinforcing nature of the environmental right and cultural rights. The Supreme Court of Appeal could have considered the significance of *ubuntu* to bolster its approach. Further, the Supreme Court of Appeal could have engaged with relevant justice oriented provisions in environmental legislation and developed the normative content of the environmental right. Doing so could have facilitated an appreciation that the needs of the poor are met from the environment, and that livelihoods and justice for the poor must be pursued through the protection of the environment.

In each case, by applying a legal theory of transformative environmental constitutionalism more fully, the courts could have strengthened the extent to which

their judgments, in the implementation of environmental constitutionalism, adopted a social-justice orientation more responsive to the plight of South Africa's poor and the need to protect the environment as interrelated concerns. Arguably, the application of a legal theory of transformative environmental constitutionalism would render litigation a more meaningful tool as part of strategies of social movements fighting for environmental justice.

Chapter 6 Conclusion

6.1 Problem statement

This study set out to answer the following central question: *How can and should South African courts invoke transformative environmental constitutionalism through transformative adjudication in environmental law disputes to respond to social, environmental and climate injustices experienced by South Africa's poor, and in so doing develop a social justice-oriented environmental law jurisprudence?*

Subsequent related research questions were formulated around which each chapter of this thesis was designed. They questions were:

- What are transformative constitutionalism, transformative adjudication and environmental constitutionalism, how are they connected, and how do they reveal the judiciary's capacity to engage with and respond to the interconnectedness of social, environmental and climate injustices experienced by South Africa's poor through the adjudication of environmental disputes? (Chapter 2)

- What are the trends in the adjudication of environmental law disputes in South Africa currently, and how do these trends impact upon the emergence of a social justice-oriented environmental law jurisprudence? (Chapter 3)

- What is transformative environmental constitutionalism and how can it respond to some of the problematic trends in the adjudication of environmental law disputes and facilitate the emergence of a social justice-oriented environmental law jurisprudence that is more responsive to the transformative mandate of the *Constitution*? (Chapter 4)

- How can courts pursue transformative environmental constitutionalism in practice as illustrated through an analysis and critique of *VEJA*, the *Gongqose* judgments, and *Earthlife*? (Chapter 5)

6.2 Objectives and structure of the discussion

In answering these questions, and as its central objective, this thesis sought to illustrate how courts can contribute to responding to the wicked problems of poverty and inequality in South Africa through the adjudication of environmental law disputes in pursuit of social, environmental and climate justice as interconnected concerns. A related objective was to facilitate the emergence of a much-needed social justice-oriented environmental law jurisprudence given the socio-ecological crisis of the Anthropocene and the specter of a form of climate apartheid.[1] This thesis offered a legal theory of transformative environmental constitutionalism as a means to re-orient the adjudication of environmental law disputes in a way that is more sensitive to social, environmental and climate justice concerns, and adopting a socio-ecological systems perspective.

In revealing the judiciary's capacity to respond more effectively to social, environmental and climate injustice as interconnected concerns, and so as to provide the study with an ideological and theoretical foundation, the study elaborated upon the notion of transformative constitutionalism, and its calls for the pursuit of social justice through transformative adjudication in the implementation of environmental constitutionalism. The discussion in chapter 2 exposed how transformative constitutionalism ought, from a social-ecological perspective, in the adjudication of environmental law disputes, to pursue social justice as interconnected with environmental and climate justice. Next, taking a *lex lata* stance, in chapter 3 the study evaluated, with reference to the ideological and theoretical orientation of the thesis, the manner in which courts adjudicate environmental law disputes. The study sought to expose current trends in the implementation of environmental

[1] UN Special Rapporteur on Extreme Poverty and Human Rights 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E.

constitutionalism in environmental law disputes as failing to pursue transformative adjudication of environmental law disputes in a number of respects. Further, the study aimed to show the impacts of the current trends in the adjudication of environmental law disputes on the emergence of a social justice-oriented environmental law jurisprudence.

Having illustrated a number of problematic trends in adjudication of environmental law disputes, the study sought to adopt, in response to these trends, a *de lege ferenda* perspective in chapter 4 by developing the content of a legal theory of transformative environmental constitutionalism. Departing from the theoretical concepts in chapter 2, the study sought to describe what transformative environmental constitutionalism demands of the judiciary in theory and how it could, in theory, facilitate the emergence of social justice-oriented environmental law jurisprudence. Finally, with a view to illustrating the practical relevance and significance of a legal theory of transformative environmental constitutionalism, in chapter 5 the study offered analysis and critique of judgments emerging from three environmental law disputes: *Earthlife, VEJA* and the *Gongqose* judgments.

6.3 Summary of main findings

The following main findings were made in each chapter.

6.3.1 Chapter 2: Connecting transformative constitutionalism and transformative adjudication to environmental constitutionalism

This chapter asked: *what is the capacity of the South African judiciary, with reference to the concept of transformative constitutionalism and its call for transformative adjudication, to respond to social, environmental and climate injustice as interconnected concerns in environmental law disputes through the implementation of environmental constitutionalism?* The following key terms were described, which were invoked throughout the thesis:

- Transformative constitutionalism was described as an on-going project of constitutional interpretation and enforcement committed to achieving radical changes of South Africa's political and social institutions and power relationships, through processes grounded in law, so as to heal the divisions arising from the past and establish a new society based on democratic values, social justice and fundamental rights. It requires engaging with the *Constitution* with a focus on its social justice imperative, and with the aim of improving the living conditions of the poor.[2]

- Transformative adjudication was described as the manner in which courts are required to adjudicate disputes so as to participate in the *Constitution*'s transformative project. This model of adjudication requires substantive, purposive, context-sensitive and value-laden reasoning and interpretation that is responsive to the plight of the poor and that must be undertaken regardless of the manner in which cases are argued so as to give effect to the *Constitution* and its social justice imperative.[3]

- Environmental constitutionalism was described as the inclusion of the environment as a proper subject for protection in constitutional texts, and the power of courts in terms of those texts to give effect to such protection.[4]

The discussion in chapter 2 offered a lawyer-led and lawyer-centric account of South Africa's project of transformative constitutionalism. It showed that transformative constitutionalism requires the pursuit of social justice: a constitutional imperative that emerges not least from the *Constitution*'s foundational values. It was argued that the socio-ecological crisis of the Anthropocene, including the threat of a "climate apartheid", [5] require that the judiciary pursue transformative constitutionalism's social justice imperative from a social-ecological perspective that appreciates the interconnected nature of social, environmental and climate justice.

2 Chapter 2 at 2.3 above.
3 Chapter 2 at 2.4 above.
4 Chapter 2 at 2.5 above.
5 Special Rapporteur on Extreme Poverty and Human Rights 2019 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735&LangID=E.

This perspective warrants viewing environmental justice (inclusive of climate justice) as a constitutional imperative embodied by the spirit, purport and objects of the *Constitution*.

In examining the court's role in South Africa's project of transformative constitutionalism, the notion of transformative adjudication was expounded upon.[6] Transformative adjudication requires that courts engage in substantive, rights-based legal reasoning, which is overtly political, and which takes into account relevant moral, economic, political or social considerations. Transformative adjudication stands in stark contrast with formalism that is deeply embedded in South African legal culture. Formalism entails unduly formal, conceptual, technical or mechanistic legal reasoning, that also restricts the possibility of substantive, rights-based reasoning. The significance of section 39(2) of the *Constitution* in achieving transformative adjudication was discussed. This provision imposes a constitutional injunction upon the courts to engage in statutory interpretation in a manner that promotes the spirit, purport and objects of the *Constitution*, and thus sanctions transformative adjudication. Pursuant to section 39(2) of the *Constitution*:

- statutory interpretation must pursue optimum realisation of constitutional rights, by adopting a purposive approach;

- relevant norms (i.e. constitutional values and rights, as well as statutory provisions) that reveal the purpose of the statute being interpreted must be taken into consideration. Where necessary, such norms may be considered *mero motu*, provided that they are sufficiently canvassed and established by the facts and are necessary for the proper determination of the case; and

- a contextual approach to interpretation is required. The context to be considered may include relevant norms (i.e. constitutional values and rights, as well as statutory provisions), the historical context, and socio-economic

6 Chapter 2 at 2.4 above.

and environmental context of poor and vulnerable people experiencing social injustice.[7]

It was further illustrated that South Africa has a unique model of separation of powers, which incorporates a normative component and is not merely about controlling power, or ensuring efficiency, but also about social justice (and thus also environmental and climate justice), and overcoming inequality and poverty.[8] This model of separation of powers empowers the judiciary to play a relatively activist role in pursuing transformative constitutionalism's goals through transformative adjudication in the interpretation and application of environmental laws. It does not envisage a "pure" separation of the judiciary from the legislature and the executive, but rather a flexible relationship, including a system of checks and balances, such that the judicial branch is required to intrude on the domain of the legislature and executive in order to ensure that they do not abuse their power, and to ensure the fulfilment of the rights enshrined in the *Constitution*. This understanding of separation of powers justifies judicial activism in interpretation and legal reasoning, particularly when adjudicating disputes concerning poor people in "desperate need". Such activism is also warranted in environmental law disputes, given that the deterioration of the environment will exacerbate poverty, inequality and injustice. Judicial avoidance, properly construed, is not a barrier to this kind of adjudication. Judicial avoidance merely requires the indirect, rather than direct reliance on relevant constitutional provisions where possible.[9]

The chapter then connected environmental constitutionalism to transformative constitutionalism and its call for transformative adjudication through a discussion of the rights-based laws that could potentially be invoked in the adjudication of environmental law disputes in the implementation of environmental constitutionalism pursuant to a legal theory of transformative environmental constitutionalism. Three categories of laws were discussed:[10]

[7] Chapter 2 at 2.4 above.
[8] Chapter 2 at 2.4 above.
[9] Chapter 2 at 2.4 above.
[10] Chapter 2 at 2.5 above.

- Category 1: Laws explicitly aimed at the protection of the environment and/or components thereof. These laws include the environmental right provided for in section 24 of the *Constitution*, which must be seen in the context of various policies, principles, legislation and case law that have emerged in post apartheid South Africa. One of the most significant policies is the *White Paper on Environmental Management Policy for South Africa*, 1998 which adopts a socio-ecological systems perspective to environmental governance and seeks to connect environmental governance and protection to the pursuit of social justice. Environmental legislation, including *NEMA* and the various SEMAs operating within its framework, fall within this category of laws; as do the myriad regulations giving effect thereto. They are capable of being construed in a social justice-oriented manner, given that each of them was explicitly enacted to pursue a social and environmental justice-oriented purpose. Various justice-oriented principles in *NEMA* are required to inform all environmental decision-making.[11]

- Category 2: Laws requiring transparent, lawful, participatory, fair and reasonable decision-making. These laws include the constitutional value of the rule of law, the procedural right to just administrative action given effect by *PAJA* and the procedural right of access to information given effect by *PAIA*. They may be invoked in judicial review proceedings where the constitutionality of conduct of the state or private parties is subjected to scrutiny and declared invalid to the extent that it is inconsistent with the *Constitution*. In the implementation of environmental constitutionalism they can operate in conjunction with laws that provide explicitly for the protection of the environment so as to ensure transparent, lawful, participatory, fair and rational or reasonable environmental decision-making.[12]

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11 Chapter 2 at 2.5.1 above.
12 Chapter 2 at 2.5.2 above.

- Category 3: Substantive rights interrelated with and mutually reinforcing of environmental protection. These laws include substantive rights, such as rights to socio-economic entitlements like water, food and housing and rights that protect cultural practices, as well as the various pieces of legislation and the regulations and policies that seek to give effect to these rights. They are concerned with human flourishing, and the pursuit of a substantively just and equal society. Although these laws do not directly or explicitly address environmental protection, they are interconnected therewith, in the sense that a healthy and well-functioning environment is a prerequisite for the fulfilment thereof. Given that all rights in the *Constitution* are to be viewed as interconnected, in the implementation of environmental constitutionalism these laws may be invoked alongside laws explicitly concerned with environmental protection so as to facilitate an appreciation that it is the environment that creates the conditions in which the social justice imperative of the *Constitution* may be fulfilled.[13]

The discussion revealed that the laws in each of the categories discussed are capable of being construed in a substantive, value-laden manner that pursues social justice and environmental protection as mutually reinforcing concerns. Given the nature and scope of the laws potentially capable of being invoked, the chapter concluded that at least on face value, South African judges have the juridical tools, in theory, to implement environmental constitutionalism in environmental disputes through transformative adjudication that pursues social, environmental and climate justice as interconnected concerns. Doing so would form part of South Africa's project transformative constitutionalism. Such adjudication would arguably be more responsive to the social-ecological crisis we face in the Anthropocene, and its unjust consequences for South Africa's poor, and could facilitate the emergence of a social justice-oriented environmental law jurisprudence.

[13] Chapter 2 at 2.5.3 above.

6.3.2 Chapter 3: Trends in the implementation of environmental constitutionalism in South Africa

This chapter asked: *what are the current trends in the adjudication of environmental law disputes in South Africa, and how do these trends impact upon the emergence of a social justice-oriented environmental law jurisprudence?* The chapter exposed four trends in the adjudication of environmental law disputes with reference to recent case law, as listed below. The trends represent a failure by the courts, in general, to engage in transformative adjudication in various respects. Thus the trends are illustrative of the court's a failure to fully participate in South Africa's project of transformative constitutionalism in the implementation of environmental constitutionalism. Each of the cases discussed (*Adendorffs Boerderye*, *Kenton on Sea*, *Normandien Farms*, *Barberton Mines HC*, *Barberton Mines SCA*, *Propshaft*, *iSimangaliso*, *Harmony Gold 2006*, *Harmony Gold 2014*, *Grootboom*, *Melani*, *Mazibuko*, *FSE 1* and *FSE 2*) concerned an environmental law dispute involving a conflict about the functioning of socio-ecological systems, and within that system, the distribution of environmental benefits and burdens, and/or concerns about participation and environmental decision-making and/or a lack of recognition of the equal moral worth of everyone in South Africa in environmental decision-making. Although not all of the disputes related directly or obviously to the plight of the poor, they all concerned the functioning of socio-ecological systems more broadly. The analysis of all of the disputes proceeded from the study's overall point of departure that the deterioration of socio-ecological systems inhibits the pursuit of dignity, equality, democracy and social justice, particularly for the poor. The four trends identified were as follows:

- Trend 1: It was illustrated with reference to *Adendorffs Boerderye* and *Kenton on Sea* that the courts tend to overlook justice issues in the adjudication of environmental law disputes, and tend not to appreciate that humans and the environment co-exist in socio-ecological systems, such that social, environmental and climate injustices ought to be viewed as interconnected. This trend represents a failure on the part of the courts to adopt a contextual

approach as an aspect of transformative adjudication that could facilitate viewing environmental rights violations from the perspective of the poor and the deplorable lived realities and systemic forms of deprivation to which they are exposed. This approach hinders the courts' capacity to be responsive to social, environmental and climate injustice as interconnected concerns as a result.[14]

- Trend 2: The courts tend to "over-proceduralise" environmental law disputes, as was illustrated with reference to *Normandien Farms* and *Barberton Mines HC* and *Barberton Mines SCA* (the *Barberton Mines litigation*). Over-proceduralisation entails, in the adjudication of disputes, particularly on the basis of procedural rights, a formalistic mode of adjudication that results in the obfuscation of substantive environmental considerations and relevant substantive provisions in legislation. Legal rules are viewed in an excessively mechanical or conceptualist manner, which constrains transformative adjudication. For instance, with their focus on process and conceptualist reasoning, and by overlooking the underlying environmental context of the disputes before them, the courts tend not to engage meaningfully with relevant substantive provisions, such as the justice-oriented provisions in *NEMA*.[15]

- Trend 3: The courts tend not to adopt a substantive, rights-based approach in the adjudication of environmental law disputes in that although they may pay lip service to the environmental right, the content and normative potential of the environmental right is typically given very little judicial attention, and remains undeveloped. This trend was illustrated with reference to *Propshaft*, *iSimangaliso*, *Harmony Gold 2006* and *Harmony Gold 2014*. In these disputes the environmental right is generally indirectly applicable, as courts are typically engaged in adjudication about the proper interpretation and application of the plethora of environmental legislation enacted to give effect

[14] Chapter 3 at 3.3 above.
[15] Chapter 3 at 3.4 above.

to section 24 of the *Constitution*. In this context, courts seem to have a tendency to invoke a distorted view of judicial minimalism or avoidance as a basis to shirk their responsibility to fulfil their transformative mandate. Specifically, courts fail to engage meaningfully with constitutional issues through the indirect application of relevant rights and values as required by section 39(2) of the *Constitution*. This approach arguably inhibits the utilisation of the environmental right in a manner that is responsive to the interconnected nature of social, environmental and climate injustices giving rise to environmental law disputes, and the emergence of a social justice-oriented environmental law jurisprudence.[16]

- Trend 4: The courts tend not generally to adopt a substantive, rights-based approach in the adjudication of environmental law disputes that views rights as interrelated and mutually reinforcing of one another. In particular, it was illustrated with reference to *Grootboom*, *Melani*, *Mazibuko*, *FSE 1* and *FSE 2* that courts tend not to treat environmental rights violations as linked to violations of other rights aimed at human flourishing, such as the rights to housing, water and culture. Environmental law disputes are sometimes determined with reference to other substantive rights to the exclusion of the environmental right, even where it could be invoked to reinforce claims arising from other rights that serve to promote human flourishing.[17]

Each of these trends represents a failure on the part of the court to engage in transformative adjudication in the implementation of environmental constitutionalism, and arguably inhibits the emergence of a social justice-oriented environmental law jurisprudence.

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16 Chapter 3 at 3.5 above.

17 Chapter 3 at 3.6 above.

6.3.3 Chapter 4: Unpacking the content of transformative environmental constitutionalism

This chapter asked: *what is transformative environmental constitutionalism and how can it respond to some of the problematic trends in the adjudication of environmental law disputes and facilitate the emergence of a social justice-oriented environmental law jurisprudence that is more responsive to the transformative mandate of the Constitution?* A working definition of a legal theory of transformative environmental constitutionalism emerged. Transformative environmental constitutionalism may be defined as a legal theory requiring envrionmental governance grounded in the *Constitution* in pursuit of social justice, interconnected with environmental and climate justice, including in the interpretation and application of law, so as to be responsive to the socio-ecological crisis of the Anthropocene and its implications for the poor. The chapter argued that in the context of the adjudication of environmental law disputes, transformative environmental constitutionalism entails the judiciary invoking the juridical tools described in chapter 2 in pursuit of social, environmental and climate justice as interconnected concerns, in a manner that could curb the problematic trends in the adjudication of environmental law disputes outlined in chapter 3.

Adopting a *de lege ferende* approach, the chapter asserted first that transformative environmental constitutionalism would entail framing environmental law disputes in a justice-oriented manner that adopts a socio-ecological systems perspective.[18] Secondly, it was argued that transformative environmental constitutionalism calls for purposive and substantive rights-based adjudication of environmental law disputes that: (i) engages with the content and import of relevant justice-oriented provisions in environmental legislation; (ii) develops the normative content of the environmental right provided for in section 24 of the *Constitution*; and (iii) recognises the mutually reinforcing and interrelated nature of the environmental rights and other relevant substantive rights concerned with the flourishing of

[18] Chapter 4 at 4.3 above.

humans and the environment.[19] This kind of adjudication entails a departure from South Africa's prevailing formalistic legal culture, a shift towards a more progressive legal culture, and embracing the judiciary's activist role under South Africa's unique model of separation of powers.

In relation to the justice-oriented framing of environmental law disputes, it was argued that:

- Courts ought to take cognisance of injustice in a distributional (substantive) sense, for instance, where the negative impacts of climate change, pollution, environmental degradation or other threats to ecological integrity are disproportionately experienced by the poor, and serve to exacerbate inequality and conditions of poverty. Alternatively or additionally, courts ought to take cognisance of injustice in a procedural sense, where the state and/or corporations fail to recognise the moral worth of, and ensure meaningful participation by, the poor in environmental decision-making;

- Taking cognisance of these injustices would facilitate an appreciation of the interconnected nature of social, environmental and climate justice, and further promote transformative adjudication with reference to substantive, moral considerations and the context with which the courts ought to engage; and

- Where courts are not presented with evidence of relevant social, environmental and climate justice issues, courts are empowered under South African law of evidence to take judicial notice thereof, to the extent that such evidence constitutes facts that are so well-known so as not to be of reasonable dispute (general knowledge requiring no external evidence), is sufficiently notorious, or is readily ascertainable by accurate sources such that it is not necessary to require evidence thereof.[20]

19 Chapter 4 at 4.4 above.
20 Chapter 4 at 4.3 above.

The framing of environmental law disputes with reference to such evidence could facilitate a social justice-oriented environmental law jurisprudence by allowing the poor to become visible in the adjudication of environmental law disputes, such that their plight, which is already heightening as a result of the Anthropocene's socio-ecological crisis, is not demeaned or overlooked. The evidence could include scientific discourse that engages with the human/environment interface, including statistics, and reports of the UN and the IPCC.[21]

In relation to purposive and substantive rights-based adjudication of environmental law disputes as an aspect of transformative environmental constitutionalism, it was argued as follows:

- The notions of environmental justice and public trusteeship as they emerge from the *NEMA* principles ought to be invoked so as to advance the social justice imperative of the *Constitution*.[22]

  - Environmental justice is provided for in *NEMA* in a substantive (distributional) sense, as well as in a procedural sense. Judicial reliance on these provisions could facilitate substantive adjudication by encouraging courts to consciously and openly articulate concerns for environmental justice connected to social and climate justice that ought to inform their choices in the interpretation and application of relevant laws.[23]

  - Public trusteeship as encapsulated in *NEMA* vests the state with fiduciary responsibility over the environment as public trustee for the benefit of present and future generations. It justifies enhanced, equitable environmental protection by virtue of fiduciary duties

[21] Chapter 4 at 4.3 above.
[22] Chapter 4 at 4.4.1 above.
[23] Chapter 4 at 4.4.1.1 above.

conferred upon the state and all other stakeholders interacting with the environment. Judicial enforcement of the notion of public trusteeship:

- could result in substantive engagement with questions about whether government decisions concerning the distribution of water, marine life, atmospheric pollution, etc. are equitable and consistent with the state's role as trustee over the environment for the benefit of the people;

- lends support to giving judicial consideration to the needs of poor and vulnerable people often not represented in environmental law disputes, given that all people are beneficiaries of the state's trusteeship; and

- supports, by virtue of its emphasis on long-term sustainability and justice, viewing the components of the environment not purely as commodities to be bought and sold for short-term gain, but as ecological gifts to be equitably and sustainably distributed and conserved.[24]

- The normative content of the environmental right ought to be developed in environmental law disputes (pursuant to section 39(2) when the right is indirectly applicable) so that an ecologically-centred and social, environmental and climate justice-oriented vision of the right emerges.[25]

  - In relation to the requirement in the environmental right that environmental protection must be pursued through reasonable legislative and other measures that "secure ecologically sustainable development…whilst promoting justifiable economic and social development", it was argued that:

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24 Chapter 4 at 4.4.1.2 above.

25 Chapter 4 at 4.4.2 above.

- the phrase ought to be construed so as to pursue ecological sustainability in the sense of "using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased";[26]

- "justifiable economic and social development" should be viewed as that sort of development that respects planetary boundaries and a safe operating space for humanity, an approach more consonant with the socio-ecological crisis of the Anthropocene;

- assessing whether or not legislation and policies that allow harmful activities amount to "reasonable measures" that give effect to the environmental right could be more focused on the sustaining the ecology as the life force on which humanity depends; and

- the judiciary could, through transformative adjudication that pursues resilience thinking (which acknowledges that socio-ecological systems are constantly in flux), view ecologically sustainable development as a tool to consider questions about whether and to what extent laws are being interpreted and applied in a manner that allows socio-ecological systems to cope with change and remain functional.[27]

- The requirement in the environmental right that the environment be protected "for the benefit of present and future generations" requires intra- and inter-generational equity. Transformative environmental constitutionalism asserts that if South Africa is to be a just and equal

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[26] Drawing on the Australian experience as discussed in Curran and Hollander 2015 *Australasian Journal of Environmental Management* 3.

[27] Chapter 4 at 4.4.2.1 above.

society as its constitutional values and rights demand, the judiciary ought more fully to develop the notions of intra- and inter-generational equity. The judiciary could, with reference to intra- and inter-generational equity:

- justify the pursuit of well-functioning socio-ecological systems as a condition for the attainment of social, environmental and climate justice in the adjudication of environmental law disputes;

- take into account injustice in the sense of the unjust distribution of environmental goods and bads amongst people, as well as the unjust causes of that maldistribution, including a lack of recognition, and the exclusion of people from participation in decision-making about their living conditions;

- respond to climate injustice in the sense of the unjust distribution of climate change vulnerabilities and impacts, and the underlying causes thereof, including a lack of recognition and the exclusion of people from participation in decision-making about these impacts and vulnerabilities; and

- impose duties attaching to everyone to conserve resources, to use the environment equitably, to avoid adverse impacts on the environment, to prevent disasters, minimize damage and provide emergency assistance, and to compensate for damage to the environment. In South Africa, in pursuit of the social justice imperative of the *Constitution*, the judiciary ought to impose these duties with a particular focus on the plight of

impoverished people most impacted by environmental degradation.[28]

- The environmental right and a range of other substantive rights – including the rights to life and dignity, socio-economic rights to access to housing, food, water, and customary law rights protecting cultural practices – could work together (whether through their direct or indirect application) to strengthen claims to rights in the *Constitution* concerned with human flourishing and secure environmental protection. The Anthropocene imagery of socio-ecological collapse, which implicates a range of survival interests, justifies reliance on the environmental right alongside other rights, particularly for the poor who wish to address their appalling living conditions.[29]

  - Drawing on foreign jurisprudence, the rights to life and dignity could be invoked as a basis to protect the environment alongside the environmental right, particularly for the poorest and most vulnerable people in South Africa.[30]

  - Various socio-economic rights, such as the rights to water, food and housing, are required to be pursued through reasonable legislative and other measures that will progressively realize these rights within available resources. By viewing these rights as interrelated with the environmental right courts could be encouraged to inquire into whether measures in place are reasonable from the perspective of achieving access to the socio-economic entitlement at issue as well as an environment conducive to human health and well being. Claims to socio-economic rights, when raised in conjunction with claims for intra- and inter-generational equity required by the environmental right, could bring to the fore questions about whether or not measures aimed at poverty alleviation are reasonable in the sense that they are

[28] Chapter 4 at 4.4.2.2 above.
[29] Chapter 4 at 4.4.3 above.
[30] Chapter 4 at 4.4.3.1 above.

responsive to social, environmental and climate injustice by addressing the unjust distribution of goods and bads, and the underlying causes thereof.[31]

- Cultural rights to participate in one's cultural life and secure cultural integrity could reinforce environmental, social and climate justice to the extent that the cultural life of indigenous communities is intertwined with and dependent upon the environments in which those communities exist (i.e. where they live from the land and their livelihoods are dependent upon the sustainability and flourishing of the land). The environmental right could be invoked to protect the environment and secure its ecological sustainability to bolster the fulfilment of their cultural rights in a manner that recognises the socio-ecological systems in which indigenous communities exist. Like the notion of *Buen Vivir* in Ecuador, the notion of *ubuntu* could, in South Africa, serve to bolster an appreciation of the interrelated nature of cultural rights and environmental protection.[32]

Transformative adjudication that invokes a legal theory of transformative environmental constitutionalism by: (i) framing environmental law disputes in a justice oriented manner from a socio-ecological systems perspective, (ii) engaging with and applying justice-oriented principles in environmental legislation such as those providing for environmental justice and public trusteeship, (iii) developing the normative content of the environmental right, and (iv) viewing the environmental right and other substantive rights as mutually reinforcing of one another, could contribute towards the emergence of a social justice-oriented environmental law jurisprudence.

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[31] Chapter 4 at 4.4.3.2 above.
[32] Chapter 4 at 4.4.3.3 above.

6.3.4 Chapter 5: Transformative environmental constitutionalism's practical significance

This chapter asked: *how can courts pursue transformative environmental constitutionalism in practice as illustrated through an analysis and critique of the Earthlife, VEJA* and the *Gongqose* judgments*?* The chapter examined, in turn, *Earthlife*, *VEJA* and *Gongqose HC* and *Gongqose SCA* (collectively, the *Gongqose* judgments) from the perspective of the manner in which each dispute was framed, and the extent to which the courts engaged in transformative adjudication comprising substantive rights-based adjudication. It does so to reveal the practical relevance of the legal transformative environmental constitutionalism discussed in chapter 4. I argued that *Earthlife*, *VEJA* and the *Gongqose* judgments are illustrative of different ways in which South Africa's poor experience substantive and/or procedural injustice and rights violations necessitating struggles for social, environmental and/or climate justice. Favourable outcomes in *Earthlife*, *VEJA* and *Gongqose SCA* respectively have served the interests of South Africa's poor. These outcomes notwithstanding, this chapter critically evaluated the manner in which environmental constitutionalism was implemented by the courts with reference to the theory of transformative environmental constitutionalism.

Although the critique was backward looking, I illustrated the potential significance of the practical application of transformative environmental constitutionalism by the courts in future environmental law disputes towards the emergence of a social justice-oriented environmental law jurisprudence. The following findings were made:

- In *Earthlife* by adopting a substantive and purposive approach to section 24O(1) of *NEMA*, the court was able to find that a climate change impact assessment is a relevant consideration in the granting of an environmental authorisation, and in this sense was responsive to the climate crisis of the Anthropocene. The court could have adopted a far more social justice-oriented approach, however, by taking into account of evidence social, environmental and climate injustice in framing the dispute. Further, the court

could have engaged in transformative adjudication by applying relevant justice-oriented provisions in environmental legislation, developing the normative content of the environmental right, and considering the interrelated nature of the environmental right and other relevant rights.[33]

- In *VEJA* the court's reasoning justifying an order to compel Arcelormittal to provide access to information to the Alliance in terms of *PAIA* was value-laden, and environment-centred. In requiring Arcelormittal to comply with standards of transparency and accountability in respect of its polluting activities through the horizontal application of the *Bill of Rights*, the court acknowledged that transnational corporations are key drivers of Earth system decay in the Anthropocene. However, in framing the dispute the court could have considered far more closely the social, environmental and climate justice implications of Arcelormittal's conduct for communities in the Vaal Triangle. Further, although the court engaged in transformative adjudication to some extent, by recognising the mutually reinforcing nature of the environmental right and the right to access to information, and by engaging with a range of substantive provisions in environmental legislation in support of the need for transparency, the court could have gone further. The court could have engaged in transformative adjudication by engaging with *NEMA* principles concerning environmental justice in a substantive (distributional sense) and with the notion of public trusteeship, developing the normative content of the environmental right, and engaging with the relationship between the environmental right and other relevant substantive rights.[34]

- The Supreme Court of Appeal in *Gongqose SCA*, in recognising a customary law right to fish, framed the dispute from a justice-oriented perspective, and illustrated the mutually reinforcing nature of the environmental right and cultural rights. The Supreme Court of Appeal could have considered the significance of *ubuntu* to bolster its approach. Further, the Supreme Court of

[33] Chapter 5 at 5.3 above.
[34] Chapter 5 at 5.4 above.

Appeal could have engaged with relevant justice oriented provisions in environmental legislation concerned with environmental justice and public trusteeship, and developed the normative content of the environmental right. The import of other relevant substantive rights such as the community's rights to access to food, and rights to life and dignity could also have been considered.[35]

Earthlife and *VEJA* represent the outcomes of rights-based litigation as part of social movements, whereas the *Gongqose* judgments were the product of a community initiative in response to injustice. *Earthlife*, *VEJA* and *Gongqose SCA* illustrate the potential for the emergence of a social justice-oriented environmental law jurisprudence to the extent that aspects of the theory of transformative environmental constitutionalism were arguably applied. Their contribution to raising the profile of the plight of poor and vulnerable people, holding the state and non-state actors involved accountable, as well as facilitating a shift in societal and political discourse towards an appreciation of the links between the plight of the poor and the deterioration of the environment could have been enhanced by invoking a legal theory of transformative environmental constitutionalism more fully.

6.4 Recommendations

In order to effectively implement transformative environmental constitutionalism and facilitate the emergence of a social justice-oriented environmental law jurisprudence, the judiciary ought, in the adjudication of environmental law disputes:

- to engage in transformative adjudication that fully embraces substantive, rights-based adjudication aimed at addressing the plight of the poor and fulfilling the social justice imperative of the *Constitution*;

- to view the pursuit of environmental justice as a constitutional imperative embodied by the spirit, purport and objects of the *Constitution*;

[35] Chapter 5 at 5.5 above.

- to take into account evidence pleaded in respect of the social, environmental and climate injustices experienced by the poor;

- to take judicial notice of facts giving rise to social, environmental and climate injustice experienced by the poor where evidence thereof is not pleaded;

- to consider and engage with justice oriented provisions, particularly the *NEMA* principles addressing environmental justice and public trusteeship, including, if necessary, *mero motu* where the parties do not place reliance on them, but their applicability emerges from the pleaded facts;

- to develop the normative content of the environmental right, particularly the notions of inter- and intra-generational equity and ecological sustainability; and

- to engage with the mutually reinforcing nature of the environmental right and other rights aimed human flourishing, including the various socio-economic rights, cultural rights and rights to life and dignity (*mero motu*, where necessary and appropriate).

Judicial training workshops, and, in environmental law disputes, contributions by *amici curiae* who bring social justice-oriented arguments to the fore, could play a role in giving effect to these recommendations, and thus in the emergence of a social justice-oriented environmental law jurisprudence.

6.5 Future research agenda

This thesis expounded upon a legal theory of transformative environmental constitutionalism by addressing, in a systematic and comprehensive manner, the linkages amongst the concepts of social, environmental and climate (in)justice, transformative constitutionalism, transformative adjudication and environmental

constitutionalism. This thesis did so to expose some of the ways in which, in the adjudication of environmental law disputes, the judiciary could contribute more meaningfully to South Africa's project of transformative constitutionalism in the implementation of environmental constitutionalism through transformative adjudication.

I argued that by doing so, the courts would be more responsive to the social, environmental and climate injustices experienced by South Africa's poor as a result of the wicked problems of poverty and inequality and the Anthropocene's socio-ecological crisis. The thesis focused on four strategies that the courts could invoke in the adjudication of environmental law disputes, which constitute aspects of a legal theory of transformative environmental constitutionalism: (i) framing environmental law disputes in a justice-oriented manner that adopts a socio-ecological perspective; (ii) applying and engaging with the import of justice-oriented provisions, particularly those that provide for environmental justice and public trusteeship, (iii) developing the normative content of the environmental right, specifically with reference to the notions of ecological sustainability and inter- and intra-generational equity, and (iv) considering the mutually reinforcing nature of the environmental right and other relevant substantive rights.

There is ample scope for further research in relation to the content and role of a legal theory of transformative environmental constitutionalism. Within South Africa, as eslewhere, the imagery of the Anthropocene and its disproportionate consequences for the poor, viewed in conjunction with the evolving nature of the country's project of transformative constitutionalism, call for a continuous re-evaluation of laws aimed at addressing environmental problems and responses to social injustice. Further, given the spectre of a "climate apartheid" across the globe, a theory of transformative environmental constitutionalism could offer a means for re-evaluating laws in other jurisdictions. A future research agenda around a legal theory of transformative environmental constitutionalism could include the following questions:

- A socio-ecological perspective towards issues of justice in the Anthropocene raises the questions:

  - what is socio-ecological justice and how could it contribute towards responses to the Anthropocene?

  - how could inter-species justice and rights of non-humans be addressed pursuant to a legal theory of transformative environmental constitutionalism?

  - how could the notion of "ecological thinking", representing an "holistic, systemic and biosphere-based approach", contribute towards the development of a legal theory of transformative environmental constitutionalism?

- Given the focus of this thesis on the principles of environmental justice and public trusteeship provided for in South African environmental law, the question arises as to whether and, if so, how, other environmental principles, such as the precautionary principle, the polluter pays principle and the principle of avoidance, could be incorporated into a legal theory of transformative environmental constitutionalism?

- Given the focus of this thesis on the development of the normative content of the environmental right with reference to the concepts of ecological sustainability and intra- and inter-generational equity, the question arises: how could other aspects of the environmental right, such as notions of "well being" and "health", be understood from an ecologically-centred and social justice-oriented perspective as part of a legal theory of transformative environmental constitutionalism?

- Given the focus of this thesis on the laws and role of the judiciary in South Africa:

- how could a legal theory of transformative environmental constitutionalism be valuable to lawyers and activists in public interest litigation?
- what is the potential value of a legal theory of transformative environmental constitutionalism for the role of the executive and the legislature?
- what is the potential value of a legal theory of transformative environmental constitutionalism elsewhere in the world?

- Finally, given their significant impact on the socio-ecological crisis of the Anthropocene, how could a legal theory of transformative environmental constitutionalism influence non-state actors, particularly transnational corporations, and enhance their moral and legal responsibilities relating to human rights and the environment?

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