

# Empowerment, Fairness, Integration: South African Answers to the Question of Constitutional Environmental Rights

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## I. INTRODUCTION

We live in an era of increasing awareness of the pressing claims of environmentalism. We are more mindful of the risk of environmental degradation and more acutely aware of the human role in it than in any previous era. Additionally, the late twentieth century and recent decades have seen an explosive growth in the number of new constitutions, many with expansive and relatively novel rights protections. These modern developments typify a period of assertive constitutionalism and a relative confidence that constitutions can solve problems that ordinary politics can or will not. As applied to environmental concerns, there has been a pronounced trend toward textual reference to the environment—including (in an ever-growing number of constitutions) enumeration of enforceable environmental rights guarantees.

Perhaps surprisingly, an overwhelming majority of contemporary constitutions expressly refer to support for, or rights to protect or sustain, a clean and healthy environment.<sup>1</sup> However, these rights remain extraordinary and of uncertain practical effect in constitutional adjudication. Even in this era of triumphant constitutionalism and pending and present environmental crisis,

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1. DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* 50 (2012).

we have only infrequently seen robust enforcement of constitutional environmental rights.<sup>2</sup>

From the standpoint of traditional constitutional adjudication, it is difficult to imagine a court halting a coal-fueled power plant exclusively on the basis of the harm it will do to future generations' enjoyment of a beautiful natural world. And, in light of practical judicial considerations like plaintiff standing, traceable causation, and discrete, identifiable harms, it is almost impossible to conceive of a judge issuing an injunction on foresting because of incalculable future contributions to global warming. Indeed, it is hard to imagine adjudicatory solutions to all but the most tangible and immediate environmental harms. But imagination is just the point: there has been a failure of imagination on the part of many constitutional courts. Despite the prevalence of environmental rights language in national constitutions, few national courts have consistently held environmental rights to be enforceable limits on state or private actors.<sup>3</sup>

In this modern era of constitutionalism, the South African Constitutional Court has been hailed as one of the "most respected legal institutions in the world"<sup>4</sup> and the South African Constitution has been described as "the most admirable constitution in the history of the world."<sup>5</sup> And yet, the response of the post-apartheid Constitutional Court typifies the tension created by constitutional environmental rights: inclusion of aggressive textual rights in the Constitution but an inclination toward meek judicial enforcement.

However, there are numerous reasons why South Africa is uniquely positioned to influence and advance the use of constitutional rights to protect the environment. South Africa demonstrates a collection of special capacities to address domestic adjudication concerns and influence comparative dialogue regarding constitutional environmental rights. The Constitutional Court evidences potential domestic solutions through its modest, extant jurisprudence and offers a far greater potential for positive outcomes through its practice of constitutionalizing environmental framework legislation. Additionally, the Court holds a uniquely

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2. *Id.* at 71-76.

3. *Id.* at 45-76.

4. Karl Klare, *Legal Subsidiarity & Constitutional Rights: A Reply to AJ van der Walt*, 9 CONST. CT. REV. 129, 129 (2008).

5. CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 261 (2002).

influential position in the field of comparative constitutional law with its expansive rights protections, permissive jurisdictional rules, hard-wired consideration of foreign and international law, and its unrivaled reputation among academics and jurists.

This Article will assess the current level of constitutional protection provided by the South African Constitution and its potential to facilitate and influence the uncertain rise of constitutional environmental rights in the modern era. Following this Introduction, Part II recreates and examines the process by which environmental protections became part of the post-apartheid South African Constitution, drawing from original source research. Part III provides a detailed analysis of the textual right that arose from the constitutional process and reviews the core environmental case law of the Constitutional Court so far. And the final section, Part IV, analyzes the viability of this model of environmental adjudication and the potential consequences for South Africa and comparative constitutionalism.

## II. THE SOUTH AFRICAN CONSTITUTIONAL RIGHT TO A CLEAN AND SUSTAINABLE ENVIRONMENT

Because pollution and degradation of the natural environment are as old as human civilization, social and legal responses to environmental degradation can be traced back nearly as far.<sup>6</sup> Of course, the development of new technologies, the pace of industrialization, and the population boom of the last two centuries have exacerbated the harm humans inflict upon the Earth. To some extent the increased prospect of ruination has yielded novel potential solutions. While many legal mechanisms exist for stewardship of natural resources, the assurance of a healthful environment, and the advancement of sustainable means of development, it is only in recent decades that we have seen such protections take a constitutional form. The invention of constitutional environmental rights<sup>7</sup> is a particularly recent trend

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6. See J. DONALD HUGHES, *AN ENVIRONMENTAL HISTORY OF THE WORLD: HUMANKIND'S CHANGING ROLE IN THE COMMUNITY OF LIFE* (2002); see also *THE ENVIRONMENTAL HISTORY TIMELINE*, <http://www.environmentalhistory.org> (last visited Feb. 27, 2013).

7. By the general term "constitutional environmental rights" in this Article, I am referring broadly to the incorporation of environmental concerns into the framework of a constitution's protection of human rights. This can take an array of forms and includes both procedural and substantive rights and duties. Most of this Article will focus on the specific South African form of constitutional environmental rights, but even the more

even within that short-lived history of protective environmental law.<sup>8</sup>

While there is little controversy to the assertion that environmental degradation crosses borders and has detrimental impacts outside the particular state where it originates,<sup>9</sup> there has nevertheless been significant impetus to create national protections for the environment. This is likely further motivated by the potentially ineffectual nature of international law protections in addition to specifically domestic concerns with environmental degradation.

A surprising number of countries currently reference the environment in their national constitutions. The 2012 book, *The Environmental Rights Revolution*, reported that 147 out of 193 countries mentioned the environment in some form in their constitutions as of 2011 and 92 included substantive environmental rights in their constitutional text.<sup>10</sup> In some regions, almost no countries have such rights (North America) while in other regions nearly every country includes them (Latin America and Europe).<sup>11</sup> Nearly all such textual references have been the result of drafting or amending constitutions in the last several decades—particularly since the 1972 Stockholm Declaration, the first substantial international human rights document to address environmental rights.<sup>12</sup> In 1972 there were six such constitutions, which increased to 45 by the end of the 1980s and 113 by 1999.<sup>13</sup> Since 2000, 34 countries have adopted constitutions or constitutional amendments that refer to the environment in text.<sup>14</sup>

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general references are meant to include express, judicially enforceable rights.

8. KATHRYN L. SCHROEDER, ENVIRONMENTAL LAW 22-25 (2007).

9. United Nations Conference on the Human Environment, June 2-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev. 1 (1972) (stating in Principle 24: “Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres”).

10. BOYD, *supra* note 1, at 49.

11. *Id.* at 53-57.

12. United Nations Conference on the Human Environment, *supra* note 9 (stating in Principle 1: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”).

13. BOYD, *supra* note 1, at 49.

14. *Id.*

This rise of environmental rights in international and foreign constitutional law coincided with the end of apartheid and the inauguration of constitutional democracy in South Africa. The country's political parties and its constituent assembly were drafting a constitution intended to

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;  
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;  
Improve the quality of life of all citizens and free the potential of each person; and  
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.<sup>15</sup>

Constitutional environmental rights, although not directly related to the core values of dignity and equality in the post-apartheid Constitution, were part of the human rights conversation that was at the heart of South Africa's transformation.

*A. The End of Apartheid and the Rise of Constitutionalism in South Africa*

Although the South African constitutional drafting process involved significant struggle and uncertainty, it ultimately achieved a goal considered impossible for decades: a relatively nonviolent transition from "racial autocracy to a nonracial democracy, by means of a negotiated transition, the progressive implementation of democracy, and respect for fundamental human rights."<sup>16</sup> Although environmental protections were not central to the democratic transition, they were included in both of South Africa's transitional constitutions—with initially modest protections expanded significantly in the final Constitution. The centrality of human rights in the constitutional process, the timely evolution of the notion of environmental rights, and the noncontroversial nature of such rights (relative to the larger issues separating the core negotiating parties) facilitated the ultimate inclusion of substantial environmental rights in the South African Constitution.

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15. S. AFR. CONST., 1996, pmb1.

16. Albie Sachs, *Constitutional Developments in South Africa*, 28 N.Y.U. J. INT'L L. & POL. 695, 695 (1996); AFRICAN NATIONAL CONGRESS, *A Brief History of the African National Congress*, <http://www.anc.org.za/show.php?id=206> (last visited April 7, 2013).

1. *The Interim Constitution and democratic elections.*

The initial, core conflict between the dominant parties at the 1991-92 constitutional convention, the Convention for a Democratic South Africa (CODESA), was a disagreement about the process for drafting the constitution.<sup>17</sup> Was the purpose of CODESA merely to create a minimalist constitutional framework to facilitate democratic elections and enable a popularly-elected body to draft the Constitution? Or, were the party-appointed CODESA delegates intended to write the entire constitution? The opposing positions represented the fundamental strategic goals of the African National Congress (ANC), the popular and newly unbanned anti-apartheid party, and the National Party (NP), representing the still-powerful, white-minority apartheid government. The ANC wanted CODESA to have the most constrained possible directive so that the new constitution would be drafted by a newly elected (and sure-to-be ANC-dominated) legislature. The NP, aware of its ever-decreasing power, wanted CODESA to write an entire constitution that would protect the white minority through codification of individual and group rights, protection from prosecution for apartheid-era actions, and clauses preserving the economic status quo.<sup>18</sup> The compromise solution to this problem was a two-stage constitutional drafting process with a newly-formed constitutional court enforcing the parties' negotiated agreement.<sup>19</sup>

The first stage of the process involved drafting a preliminary constitution (the 1993 "Interim Constitution"), holding South Africa's first fully democratic elections, and selecting members of the new Parliament that would choose a new president. The

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17. The total work of the CODESA (and its follow-up negotiations, the Multi-Party Negotiating Process) was carried out by five Working Groups. The bulk of the Bill of Rights determinations and the procedural details of the constitutional process—and the vast majority of the most divisive issues—came out of Working Group Two. Other Groups addressed different aspects of the transition to democracy. See LOURENS DU PLESSIS & HUGH CORDER, UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS 4-6 (1994) [hereinafter UNDERSTANDING].

18. See generally ALLISTER SPARKS, TOMORROW IS ANOTHER COUNTRY: THE INSIDE STORY OF SOUTH AFRICA'S ROAD TO CHANGE (1995); PATTI WALDMEIR, ANATOMY OF A MIRACLE (1997) (providing general histories of the political transformation of South Africa at the end of the apartheid era).

19. The basic structure of this plan was originally proposed by Nelson Mandela one year prior to the start of CODESA, tacitly approved by President de Klerk at CODESA's inaugural session, and formalized over the course of CODESA. PATTI WALDMEIR, ANATOMY OF A MIRACLE 194-95 (1997).

second stage gave the task of crafting the final constitution (the 1996 Constitution)<sup>20</sup> to the newly elected Parliament and Senate in their additional role as the Constitutional Assembly. Two safeguards linked the two stages of the process: a set of thirty-four inviolable constitutional principles (known as the Thirty-four Principles), which were agreed upon by the initial negotiating parties to constrict the subsequent final constitution,<sup>21</sup> and a constitutional court appointed under the Interim Constitution with the task of certifying that the final Constitution conformed with the negotiated agreement preserved in the Thirty-four Principles.<sup>22</sup>

Altogether, nearly two years passed between the start of formal constitutional negotiations at CODESA and the approval of the Interim Constitution and the thoroughly negotiated Thirty-four Principles.<sup>23</sup> The provisions of the Interim Constitution—with its Bill of Rights inclusive of a modest environmental right—came into effect on the first day of South Africa's first multiracial elections, April 26, 1994.<sup>24</sup> The results of the election—important because of the elected ministers' role as drafters of the constitution that would replace the Interim Constitution—gave the ANC 62.7 percent of the National Assembly and made Nelson Mandela the President of the Republic of South Africa.<sup>25</sup>

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20. It is, of course, a bit of a misnomer to refer to the 1996 Constitution as the final constitution. The "final" Constitution has been amended twelve times since its completion in December 1996, although none are directly relevant to this Article. SOUTH AFRICAN CONSTITUTIONAL COURT, <http://www.constitutionalcourt.org.za/site/constitution/english-web/index.html> (last visited Sept. 30, 2012); CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (1996), available at <http://www.info.gov.za/documents/constitution/amendments.htm> (listing and noting amendments).

21. S. AFR. (INTERIM) CONST., 1993, sched. 4.

22. *Id.*; Albie Sachs, *South Africa's Unconstitutional Constitution*, 41 ST. LOUIS U. L.J. 1249, 1255 (1997).

23. Work was completed by the party delegates late in the evening on November 17, 1993. UNDERSTANDING, *supra* note 17, at 2-17.

24. ELECTION '94 SOUTH AFRICA: THE CAMPAIGN, RESULTS AND FUTURE PROSPECTS 187 (Andrew Reynolds ed., 1994) [hereinafter ELECTION '94].

25. South Africa's democratic elections were held over several days beginning on April 26, 1994. Despite serious allegations of fraud and ballot tampering, the results (outside KwaZulu-Natal) conformed with expectations to a significant degree: the ANC received a strong but not overly dominant 62.7 percent, the NP received a disappointing 20.4 percent, the Zulu-nationalist Inkatha Freedom Party won the KwaZulu-Natal Province, and the extremist parties on both the left and right received only marginal percentages. *Id.* at 183.



2. *The “final Constitution,” the Public Participation Programme, and certification*

The Constitutional Assembly began working on the text of the final Constitution in May 1994. Under the Interim Constitution, the Assembly was given two years to complete its task.<sup>26</sup> Most of the work was conducted primarily in small “theme committees” rather than in public sessions.<sup>27</sup> The committees held hearings; analyzed submissions from the political parties, private organizations, and citizens; and identified areas of agreement and disagreement. Theme Committee findings were then forwarded to the Constitutional Committee, the authoritative party-based negotiating body of the Constitutional Assembly, where the core of the decision-making process occurred.<sup>28</sup>

Additionally, the Constitutional Assembly inaugurated a widespread public education and popular engagement program. The Public Participation Programme recognized the “fundamental significance of a Constitution in the lives of citizens” and thus sought to place public participation “at the centre of the Constitution-making process.”<sup>29</sup> The Public Participation Programme was meant to instill a feeling of citizen involvement in the constitutional process and to provide legitimacy for its outcome.<sup>30</sup> More than two million submissions were received from

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26. S. AFR. (INTERIM) CONST. 1993, ch. 5, § 73.

27. Theme committees were identified by number and had the following foci:

(1) character of state, (2) structure of state, (3) relations between levels of government, (4) fundamental rights, (5) judiciary and legal systems, and (6) specialized structures. See Jeremy Sarkin, *The Drafting of South Africa’s Final Constitution from a Human-Rights Perspective*, 47 AMJ. COMP. L. 67, 70 n.23 (1999).

28. The Constitutional Committee was comprised of members of the seven political parties represented in Parliament in proportion to the number of seats they held in the National Assembly: the ANC (252 seats in parliament), the NP (82), the IFP (43), the Democratic Party (7), the Freedom Front (9), the Pan African Congress (5), and the African Christian Democratic Party (2). See ELECTION ’94, *supra* note 24, at 183.

29. Const. Assembl., Rep. of S. Afr., The Public Participation Programme, <http://www.constitution.org.za/fct22115.html#PART> (last visited Jan. 13, 2007) (cited in Eric C. Christiansen, *Ending the Apartheid of the Closet*, 32 N.Y.U J. INT’L L. & POL. 997 (2000); see also HASSEN EBRAHIM, THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA 239-50 (1999) (detailing the successes of the Public Participation Programme in engaging the public).

30. As the media releases from the Constitutional Assembly described it: “The final submission was hand-delivered to the Constitutional Assembly at 11:30pm and at midnight the fax lines were still humming as the country’s greatest ever public participation campaign came to a close [on February 20, 1996].” Constitutional Assembly, *Constitutional Talk: The Official Newsletter of the Constitutional Assembly*, vol. 2, (Mar. 8, 1996). Participation in all aspects of the program exceeded expectations. See *id.* vol. 9, (June 30, 1995).

citizens and domestic groups.<sup>31</sup> While there were complaints that the program was not fully effective at reaching rural communities, informal settlements, women, and elderly citizens, a 1996 independent survey found that the media campaign had reached 18.5 million people, seventy-three percent of adult South Africans.<sup>32</sup>

The text of the final Constitution was adopted by an overwhelming majority in both houses of Parliament—80 of 90 Senators and 321 of 400 National Assembly members—significantly above the required two-thirds majority of the entire Constitutional Assembly.<sup>33</sup> However, the proposed final Constitution could not be signed by the President or come into force unless and until the Constitutional Court certified it.<sup>34</sup> The

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31. Submissions in phase one totaled 1.8 million and submissions for phase two totaled 250,000. *Id.* vol. 8, (June 8, 1995). Additionally, over 80,000 people attended public meetings and constitutional education workshops sponsored by the Assembly throughout the country. More than 10,000 calls were recorded on the Constitutional Talk-line, a five-language information source. Thousands more tuned in to weekly television and radio broadcasts. The Internet Project placed a host of available documents online: Assembly minutes, working drafts of the Constitution, submissions as they were received, Assembly press releases, and articles from the official newsletter *Constitutional Talk*. *Id.* vol. 2, (Mar. 8, 1996).

32. The survey was conducted by the Community Agency for Social Equality. *Id.* vol. 3, (Apr. 22, 1996). This number, up from sixty-five percent as reported in *Constitutional Talk*, vol. 5, 1995 (Mar. 17, 1995), was significantly improved by the publication of the working draft of the Constitution in November 1995. *Id.* vol. 2, (Mar. 8, 1996). Over four million copies of a special thirty-two page *Constitutional Talk* edition were produced in all eleven official languages. The publication contained the complete text of the draft Constitution, explanatory articles outlining the issues, and a series of graphics aimed at making the often complex constitutional issues accessible to ordinary South Africans. *Id.* vol. 1, (Feb. 9, 1996).

33. The Constitutional Assembly consisted of the 400 newly elected members of the National Assembly and the ninety members of the Senate. 3 DEBATES OF THE CONSTITUTIONAL ASSEMBLY, Rep. of S. Afr. 447-52, 524-25 (1996). Only one party, the African Christian Democratic Party, voted against the text (with two votes). The Freedom Front, a white right-wing party, abstained from the vote with 13 votes. *Id.*

34. See S. AFR. (INTERIM) CONST., 1993, ch. 5, § 71(2) (“The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(a).”). “It is necessary to underscore again that the basic certification exercise involves measuring the [final constitutional text] against the [Thirty-four Principles]. The latter contain the fundamental guidelines, the prescribed boundaries, according to which and within which the [Constitutional Assembly] was obliged to perform its drafting function.” *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para. 32 (S. Afr.) [hereinafter *Certification I*]. “Suffice it at this stage to make two points. First, that this Court’s duty—and hence its power—is confined to such certification. Second, certification means a good deal more than merely checking off each individual provision

Constitutional Court, established under the Interim Constitution, was required to declare whether the proposed text complied with each of the Principles annexed to the 1993 Constitution.<sup>35</sup>

The Interim Constitution's Thirty-four Principles established "the fundamental guidelines, the prescribed boundaries, according to which and within which the [Constitutional Assembly] was obliged to perform its drafting function."<sup>36</sup> The inclusion of environmental rights was one set of provisions—among many—challenged as impermissibly included in the Constitution when the Certification case came before the Constitutional Court.

### B. *Environmental Rights and South African Constitutionalism*

#### 1. *Apartheid and the environment.*

Much of the contemporary relationship between South Africans and the natural world derives from colonial and apartheid policies designed to ensure racially-determined occupation and ownership of land. The systematic dislocation of black South Africans, created endemic poverty that exacerbated the existing pressures on the natural world. The seminal statement of opposition to apartheid, the 1955 Freedom Charter, stated that "our people have been robbed of their birthright to land" and thus asserted that "[r]estrictions of land ownership on a racial basis shall be ended, and all the land redivided amongst those who work it to banish famine and land hunger."<sup>37</sup>

But in fact the relationship between apartheid oppression and the environment is far greater than just the forced removals of black South Africans from their homes and land. It also encompasses wildlife conservation (through "reservations," reserving wildlife for white hunting and viewing), the designation of "Protected Areas" that excluded most South Africans, and the enforced patterns of residence to facilitate industrialization in the Nineteenth and Twentieth Centuries.<sup>38</sup> This history underlies

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of the [final text] against the several [Principles]." *Id.* at ch.1, § B, para. 17.

35. *Certification I*, *supra* note 34, paras. 1-19, 26-31.

36. *Id.* para. 32.

37. AFRICAN NAT'L CONG., *The Freedom Charter* (1955), available at <http://www.anc.org.za/show.php?id=72> (as adopted at the Congress of the People, Kliptown, on Jun. 26, 1955).

38. See generally, Farieda Khan, *Environmentalism in South Africa: A Sociopolitical Perspective*, 9 MACALESTER INT'L 156 (2000).

popular attitudes both supporting and opposing environmental protections in the post-apartheid constitution.

Colonialism itself, which began in the Sixteenth Century in South Africa,<sup>39</sup> was often destructive to the environment.<sup>40</sup> The rise in population following the influx of first Dutch and then British colonists to South Africa, as well as the increase in and changing patterns of natural resource usage, introduced previously unknown ecological pressures and harms. Over-population resulted in over-hunting, over-grazing and deforestation; and the relocation of indigenous peoples—often to areas lacking resources—added pressures and resulted in environmental degradation in expanded areas.<sup>41</sup>

In South Africa, where colonialism eventually evolved into the modern apartheid state, the environmental consequences were particularly severe. From the mid-Nineteenth to mid-Twentieth Century, patterns of enforced settlement grew more rigid and more damaging to native populations.<sup>42</sup> Increasingly the land was divided into European settlement areas, African communal areas and (effectively European) conservation areas. Even before the onset of full apartheid in 1948,<sup>43</sup> the law assigned only thirteen percent of the total land area in South Africa to indigenous people representing seventy-one percent of the South African population.<sup>44</sup> These restrictions on residence and movement left cities as areas primarily for white Europeans and left significant rural areas unoccupied. Most natural resources were similarly available for use or exploitation by whites only.<sup>45</sup>

The government often used the designation of Protected Areas

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39. LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 32-34 (2001).

40. L. A. LEWIS & L. BERRY, AFRICAN ENVIRONMENTS AND RESOURCES 94 (1998).

41. People and Parks Programme, *History*, DEP'T OF ENVTL. AFFAIRS, REPUBLIC OF S. AFR., <http://www.peopleandparks.com/about/history.htm>.

42. THOMPSON, *supra* note 39, at 110-86; *see generally* SOUTH AFRICA HISTORY ONLINE, <http://www.sahistory.org.za> (last visited May 30, 2013).

43. THOMPSON, *supra* note 39, at 143; *see generally* SOUTH AFRICA HISTORY ONLINE, <http://www.sahistory.org.za> (last visited May 30, 2013).

44. Johan van Tooyen & Bongwiwe Njobe-Mbuli, *Access to Land: Selecting the Beneficiaries*, in AGRICULTURAL LAND REFORM IN SOUTH AFRICA: POLICIES, MARKET, AND MECHANISMS 461 (J. van Zyl ed. 1996) ("Approximately 87 per cent of agricultural land is held by almost 67,000 white farmers and accommodates a total population of 5.3 million. The remaining 71 per cent of the population, which is predominantly black, live on 13 per cent of the land in high density areas—the former homelands.")

45. *See generally* Khan, *supra* note 38.

as the legal basis for forced removals of black South Africans.<sup>46</sup> The small areas of land to which blacks were removed typically had inadequate resources, services, and opportunity. The consequences for black South Africans were severe and enduring, resulting in insurmountable cycles of poverty. Inevitably, poor health resulted from pollution caused by overcrowding and the frequent absence of even rudimentary clean water or waste management services.<sup>47</sup> With the discovery of gold and the increased pursuit of South Africa's mineral wealth, the patterns of worker residence (temporary residence in shanty towns neighboring industrial sites or in excessively overcrowded hostels) exacerbated the creation of and exposure to unhealthy environmental conditions.<sup>48</sup> The same elements that contributed to poverty and poor health for relocated black South Africans also damaged the environment. Informal settlements without adequate facilities for clean water or waste removal polluted their surrounding areas and inadequate resources for fuel resulted in rapid deforestation, soil erosion, and other harms to the natural world.<sup>49</sup>

The poor and marginal suffer the brunt of environmental pollution and natural resource degradation. Indeed they often suffer outright expropriation of land, forests, fisheries, and other natural resources. Moreover, because the rights of the poor to have a political voice receives less protection, they are often the least able to press for just compensation—or to say “no” to unwanted development.<sup>50</sup>

The “jewel” of South African environmentalism has always been the designation of unoccupied (or forcibly cleared) land as national parks and game reserves. The first game parks emerged in the late Eighteenth Century with a primary purpose of restricting hunting by indigenous people and preserving game for white European hunters.<sup>51</sup> Even the establishment of parks for legitimate conservation purposes inevitably resulted in the forcible removal

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46. Khan, *supra* note 38., at 158.

47. ALAN B. DURNING, APARTHEID'S ENVIRONMENTAL TOLL 7-14 (1990).

48. *Id.*

49. *Id.*

50. HUMAN RIGHTS AND THE ENVIRONMENT: CONFLICTS AND NORMS IN A GLOBALIZING WORLD 1 (Lyuba Zarsky, ed. 2002).

51. Khan, *supra* note 38, at 158.

or relocation of native communities and the termination of rights to the resources that had been traditionally available to them.<sup>52</sup>

Moreover, any benefits that resulted from the conservation efforts were legally or effectively denied to black South Africans. For example, the world-renowned Kruger National Park remained segregated in its facilities until the 1980s.<sup>53</sup> In practice, most areas of South Africa were open to white South Africans only. Either through grand apartheid (the policies of geographic relocation and separation) or through petty apartheid (the enforced segregation in public places including beaches, parks, and much more), most South Africans were denied access to the areas reserved for enjoying the natural world.<sup>54</sup>

In summary, the result in the waning years of the apartheid era was that ostensibly “pro-environment” policies had been used to facilitate apartheid-era harms. Even as the influx of Europeans applied heightened pressures on food and other natural resources, many South Africans were denied a means of subsistence by the creation of game reserves and were forcibly removed from their land by discriminatory laws. “Environmentalism” had offered black South Africans essentially no benefit under apartheid: wildlife protections had been the basis for a denial of sustenance and an attack on a traditional way of life, and land conservation had been a tool of political control and socio-economic oppression. As the new Constitution was being drafted, there was fear that environmental conservation would be used to deny the land restitution claims that were a central tenet of the claims of anti-apartheid groups.<sup>55</sup> Because much of the land claimed by

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52. Khan, *supra* note 38, at 175.

53. See JANE CARRUTHERS, *THE KRUGER NATIONAL PARK. A SOCIAL AND POLITICAL HISTORY* (1995); SALOMON JOUBERT, *THE KRUGER NATIONAL PARK: A HISTORY* (2007); Hasani Patrick Shikolokolo, *An Evaluation of the Impact of Kruger National Park's Development Programme on the Hlanganani Community in the Limpopo Province* (2010) (unpublished Masters thesis) (on file with the University of Limpopo), available at <http://ul.netd.ac.za/bitstream/10386/327/1/Shikolokolo%20H.P%20dissertation.pdf> (“The park’s policies prevented Black Africans from visiting the parks. And few who could afford visiting the park were sometimes not tolerated. . . . This process resulted in negative attitude and perceptions developing towards the park and conservation in general.”).

54. Apartheid segregation and discrimination prohibited in law or in practice. See, e.g., Reservation of Separate Amenities Act 49 of 1953 (S Afr.); Group Areas Act 41 of 1950 (S. Afr.). “Grand Apartheid” established separate homelands and residence and working areas, and “Petty Apartheid” segregated public places including parks, beaches, and other outdoor venues. LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 125 (2001).

55. Annika Dahlberg, Rick Rohde & Klas Sandell, *National Parks and Environmental Justice: Comparing Access Rights and Ideological Legacies in Three Countries*, 8 CONSERV. & SOC’Y

black South Africans was in Protected Areas, conservation had the potential to thwart the rights of black South Africans.<sup>56</sup> This set up a potential conflict between the core goals of the ANC (as the post-apartheid government) and environmentalists.

## 2. *Environmentalism and the ANC.*

The ANC affirmed the need for a justiciable Bill of Rights in a post-apartheid constitution in its 1989 publication *Constitutional Guidelines for a New South Africa*: “The Constitution shall include a Bill of Rights based on the Freedom Charter.<sup>57</sup> Such a Bill of Rights shall guarantee the fundamental human rights of all citizens . . . and shall provide appropriate mechanisms for their enforcement.”<sup>58</sup>

Environmental rights were not mentioned in the *Constitutional Guidelines*, just as they had not been mentioned in the Freedom Charter. The primary concerns were the rejection of apartheid legal norms and the promotion of political equality and socioeconomic opportunity. Of course, the relationship of the state to “land” was central to the justice sought, but the primary concern was restitution to address the history of forced removals of black South Africans from their land.<sup>59</sup> Protection of the environment did not initially qualify as a central concern.

However, at the start of the 1990s, environmental rights were

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209, 212-13 (2010).

56. *Id.* This concern about constitutional rights entrenching the existing economic injustice is a component of the general concern about rights in a post-apartheid state. This public property concern mirrored a concern over private property rights; too vigorous protection of either public land use designations or of private property rights would merely protect the dramatically unjust status quo of the apartheid years.

57. Adopted by the 3,000-delegate Congress of the People on June 26, 1955, the ANC-authored Freedom Charter was the political manifesto of the anti-apartheid movement. In addition to the core tenet of multi-racialism, the document also emphasized redistribution of wealth, land ownership by those who work it, equal protection of the law, and other social and economic rights. It was the primary ANC statement of values throughout most of the organization’s history and has been retroactively labeled a proto-Bill of Rights. For full text of the Charter, see Congress of the People, *The Freedom Charter* (1955), as reprinted in 21 COLUM. HUM. RTS. L. REV. 249, app. C at 249-51 (1989-1990).

58. African National Congress, *Constitutional Guidelines for a Democratic South Africa*, 21 COLUM. HUM. RTS. L. REV. 235, app. A at 237 (1989-1990). The guidelines were the subject of extensive review and critique in South Africa. “Indeed, so many bodies have taken up, analysed, and criticised the Guidelines that they have ceased to be simply an ANC document; instead they have become a working text for the entire anti-apartheid movement.” Albie Sachs, *A Bill of Rights for South Africa: Areas of Agreement and Disagreement*, 21 COLUM. HUM. RTS. L. REV. 13, 17 (1989-1990).

59. *Id.*

increasingly appearing in national constitutions. Following the 1972 Stockholm Declaration, several dozen countries had added environmental provisions to their constitutions, but overall the rights were still relatively uncommon.<sup>60</sup> Prior to 1990, only three African countries had incorporated environmental rights: Madagascar in 1959 (the second in the world), Tanzania in 1977, and Equatorial Guinea in 1982.<sup>61</sup>

But as the end of apartheid approached, the ANC (and, as well, the NP) was engaged in serious internal discussions of which constitutional rights should appear in the post-apartheid constitution. Both showed a willingness to consider a broader spectrum of rights than appeared in many constitutions.<sup>62</sup> By the time the ANC Constitutional Committee publicized their draft bill of rights in May 1992, environmental rights had been added to the provisions. Article 12, entitled “Land and the Environment,” stated, “The land, the waters and the sky and all the natural assets which they contain, are the common heritage of the people of South Africa who are equally entitled to their enjoyment and responsible for their conservation.”<sup>63</sup>

The provisions of the section “Environmental Rights” addressed traditional ecological concerns:

[14.] All men and women shall have the right to a healthy and ecologically balanced environment and the duty to defend it.

[15.] In order to secure this right, the State, acting through appropriate agencies and organs shall conserve, protect, and improve the environment, and in particular:

a. prevent and control pollution of the air and waters and degradation and erosion of the soil;

b. have regard in local, regional and national planning to the maintenance or creation of balanced ecological and biological areas and to the prevention or minimizing of harmful effects on the environment;

c. promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability;

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60. BOYD, *supra* note 1, at 49.

61. *Id.* Although notably, South Africa’s immediate neighbors, Mozambique and Namibia, adopted constitutional environmental rights in 1990.

62. SACHS, *supra* note 58, at 16-17.

63. ALBIE SACHS, *ADVANCING HUMAN RIGHTS IN SOUTH AFRICA* 224 (1992) (including the ANC Draft Bill of Rights in the appendix). A copy of the ANC Bill of Rights can be found in the ANC’s online archives at <http://www.anc.org.za/show.php?id=231>.



d. ensure that long-term damage is not done to the environment by the industrial or other forms of waste;

e. maintain, create and develop natural reserves, parks, and recreational areas and classify and protect other sites and landscapes so as to ensure the preservation and protection of areas of outstanding cultural, historic and natural interest.

[16.] Legislation shall provide for co-operation between the State, non-governmental organisations, local communities, and individuals in seeking to improve the environment and encourage ecologically sensible habits in daily life.

[17.] The law shall provide for appropriate penalties and reparation in the case of any damage caused to the environment, and permit the interdiction by any interested person or by any agency established for the purpose of protecting the environment, of any public or private activity or undertaking which manifestly and unreasonably causes or threatens to cause irreparable damage to the environment.<sup>64</sup>

Apartheid had been bad for the environment as well. And unsurprisingly, the people who most acutely experienced these harms were black South Africans.

By the end of the year, the ANC had formulated their constitutional proposals in a more popular form, as presented in the document *Ready to Govern*.<sup>65</sup> The purpose of the document was to outline the ANC's vision for the future of South Africa. Rather than being a draft legal document, it was a statement of political principles approved by the ANC leadership. One of its sections was devoted to explaining the ANC's positions on environmental issues. It began with an overarching policy statement:

The ANC believes that all citizens of South Africa at present and in the future, have the right to a safe and healthy environment, and to a life of well-being. Accordingly, the broad objectives of our environmental policy are aimed at fulfilling this right. In this context, growth and development within South Africa must be based on the criteria of sustainability.<sup>66</sup>

This broad policy statement was followed by a series of

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64. *Id.*

65. See AFRICAN NAT'L CONG., *Ready to Govern: ANC Policy Guidelines for a Democratic South Africa* 21-2 (Dec. 1992), available at <http://www.anc.org.za/show.php?id=227>.

66. *Id.*

“guiding principles” intended to illustrate the meaning of this policy:

- Sustainable development;
- Equitable access to environmental resources;
- Public participation in all planning decisions which affect the development and management of natural resources;
- Public right of access to information and the courts on issues of environmental concern;
- An integrated approach to environmental issues that relates to all sectors of society;
- Recognition of the integrated nature of the global environment and the need for international cooperation in policy making.

With the publication of the draft bill of rights and *Ready to Govern*, the ANC had announced its commitment to protecting the environment to both elite and mainstream audiences.

The National Party had a corollary document to the ANC’s *Ready to Govern* entitled the *Constitutional Rule in a Participatory Democracy*.<sup>67</sup> The document focused on the NP’s primary concerns: the structuring and division of political power in the post-apartheid state. Neither the environment nor environmental protections were mentioned.<sup>68</sup>

### 3. *Environmental rights and the Interim Constitution.*

In 1993, the initial drafting of the interim Bill of Rights was assigned to the Technical Committee on Fundamental Rights During the Transition. The Technical Committee consisted of lawyers, civil rights workers, and former activists with legal backgrounds.<sup>69</sup> Hence, much of the drafting of the content of the Bill of Rights was the work of rights “experts” rather than party negotiators.<sup>70</sup>

The authors’ task was carefully circumscribed in theory: they were to draft a proposed list of the minimal rights necessary for the envisioned two-year interim period prior to adoption of the final

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67. FED. COUNCIL OF THE NAT’L PARTY, CONSTITUTIONAL RULE IN A PARTICIPATORY DEMOCRACY: THE NATIONAL PARTY’S FRAMEWORK FOR A NEW DEMOCRATIC SOUTH AFRICA (1991).

68. *Id.*

69. UNDERSTANDING, *supra* note 17, at 24-25.

70. *Id.* at 39-40.

Constitution. The elected Constitutional Assembly would then draft the full Bill of Rights for the final Constitution.<sup>71</sup> The Technical Committee saw its duty as striking a balance “between protecting, on the one hand, too many and, on the other, too few fundamental rights during the transition.”<sup>72</sup> The rights list proposed by the Committee was meant to be affirmed by the drafting convention as a whole in advance of the elections.<sup>73</sup> The Technical Committee far exceeded its mandate, producing a relatively detailed Bill of Rights based on a variety of foreign and international precedents.<sup>74</sup> The resulting final Bill of Rights, although “neither a full nor a final Bill of Rights,”<sup>75</sup> identified an extensive list of individual and group rights, made the rights justiciable against the state and private actors, and explicitly identified a very narrow set of circumstances in which the rights could be overcome by other state priorities.<sup>76</sup>

The Technical Committee’s first Progress Report in May 1993 identified some elements of its methodology for evaluating rights for inclusion. All rights in the Interim Constitution’s Bill of Rights should “enjoy legitimacy among the vast majority of the population so as to facilitate the legitimacy of similar means and mechanisms” in the final Constitution’s Bill of Rights. The starting point was the Bill of Rights proposals already prepared by the

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71. *Id.* at 40-42.

72. SUMMARY OF THE SECOND PROGRESS REPORT OF THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION 1 (May 21, 1993), available at <http://www.constitutionnet.org/files/3202.PDF>.

73. UNDERSTANDING, *supra* note 17.

74. The sources for the Bill of Rights were both international rights documents and foreign constitutions, with particular preference for more recent national documents, “reflecting accumulated wisdom in international as well as domestic human rights jurisprudence.” *Id.* at 47. Throughout, the Committee remained essentially closed to outside scrutiny (other than its reports to the senior representatives of the lead parties on the Negotiating Council), but as the process advanced, the main parties weighed in on the issue of the content of the enumerated rights. *See id.* at 49-51.

75. UNDERSTANDING, *supra* note 17, at 45.

76. S. AFR. CONST., 1996, ch.2, § 36 (1):

The rights of the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose.

various negotiating parties (and others), so as to identify “areas of agreement on minimal or essential fundamental rights and freedoms which can simply not be excluded in the transitional period.”<sup>77</sup>

By the time the parties’ draft proposals were submitted to the Technical Committee, the Committee was able to identify environmental rights as among those rights agreed to by the various political parties.<sup>78</sup> As a consequence, a slim version of the eventual environmental right appeared in the first Technical Committee report: “The right to an environment which is safe and not detrimental to health.”<sup>79</sup> It was “formulated negatively and therefore restrictively” because the Technical Committee believed a more expansive right was more appropriately left for the more complete drafting process that would occur during the transition period.<sup>80</sup> This right was identified as one of the agreed “minimal or essential rights and freedoms which must be accommodated” during the transitional period.<sup>81</sup> Presumably because of this narrow scope of the right, “no reference is made to a duty to act in such a way that the environment remains ecologically sustainable.”<sup>82</sup> Although the standards applicable to the determination of which rights should be included in the interim Bill of Rights went through several reformulations over the initial months, the list of included rights varied little.<sup>83</sup>

Over the course of the six months during which the Technical Committee met,<sup>84</sup> the text of the environmental right changed little—especially in comparison to most of the other proposed rights.<sup>85</sup> Early on, it took on the formulaic committee language,

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77. TECHNICAL COMM. ON FUNDAMENTAL RIGHTS IN THE TRANSITION, FIRST PROGRESS REPORT §§ 2.1, 2.3 (May 14, 1993), available at <http://www.constitutionnet.org/files/3201.PDF>.

78. *Id.* § 4.

79. *Id.*

80. SUMMARY OF THE SECOND PROGRESS REPORT OF THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS IN THE TRANSITION (May 21, 1993), available at <http://www.constitutionnet.org/files/3202.PDF>.

81. SUMMARY OF THE FIRST PROGRESS REPORT OF THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS IN THE TRANSITION (May 14, 1993), available at <http://www.constitutionnet.org/files/3201.PDF>.

82. UNDERSTANDING, *supra* note 17, at 46.

83. *Id.* at 40-46.

84. The Technical Committee on Fundamental Rights in the Transition worked six months from May 10, 1993 to November 18, 1993. *Id.* at 8-9.

85. *Compare* SUMMARY OF THE FIRST PROGRESS REPORT OF THE TECHNICAL

“Every person shall have the right,”<sup>86</sup> and relatively late in the process, the description “safe and not detrimental” was changed to merely “not detrimental.”<sup>87</sup> But the right, one of very few third generation rights to be included in the interim Bill of Rights, was never removed after its first inclusion.<sup>88</sup> As stated by one member of the Technical Committee, “Once listed, it was difficult for the political negotiators to argue persuasively that the environment did not need constitutional protection in the short term.”<sup>89</sup> Hence the final text of the Interim Constitution that went into effect on April 26, 1994 stated its promise of environmental rights in the following manner: “[Section] 29. Every person shall have the right to an environment which is not detrimental to his or her health or well-being.”<sup>90</sup>

The choice of the more constrained, “negative” phrasing of the right served the purpose of not placing “too great a burden on a future government, which was likely to be preoccupied with urgent demands on the socioeconomic front.”<sup>91</sup> The use of language that focused on the individual as the holder of the right and echoed the social welfare protections that immediately preceded it in the document was intentional as well.<sup>92</sup> The affirmative obligations of such a right were assumed to be appropriately left to the Constitutional Assembly to evaluate.<sup>93</sup> In his testimony before the Negotiating Committee, Technical Committee convener Lourens du Plessis specifically stated that the proposed text was not “the full spectrum of the environmental rights” but rather “a basis on which further protection can be built in the future. . . . [T]he idea here was just to lay down certain basic

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COMMITTEE ON FUNDAMENTAL RIGHTS IN THE TRANSITION, *available at* <http://www.constitutionnet.org/files/3201.PDF>, *with* TECHNICAL COMM. ON FUNDAMENTAL RIGHTS IN THE TRANSITION, ELEVENTH PROGRESS REPORT, *available at* <http://www.constitutionnet.org/files/3211.PDF>.

86. TECHNICAL COMM. ON FUNDAMENTAL RIGHTS IN THE TRANSITION, TENTH PROGRESS REPORT, *available at* <http://www.constitutionnet.org/files/3210.PDF>.

87. *Id.*

88. *Compare* TECHNICAL COMM. ON FUNDAMENTAL RIGHTS IN THE TRANSITION, FIRST PROGRESS REPORT, *available at* <http://www.constitutionnet.org/files/3201.PDF>, *with* TECHNICAL COMM. ON FUNDAMENTAL RIGHTS IN THE TRANSITION, ELEVENTH PROGRESS REPORT, *available at* <http://www.constitutionnet.org/files/3211.PDF>.

89. UNDERSTANDING, *supra* note 17, at 184.

90. S. AFR. (INTERIM) CONST. 1993.

91. UNDERSTANDING, *supra* note 17, at 184-85.

92. TECHNICAL COMM. ON FUNDAMENTAL RIGHTS IN THE TRANSITION, FIFTH PROGRESS REPORT, *available at* <http://www.constitutionnet.org/files/3205.PDF>.

93. UNDERSTANDING, *supra* note 17, at 45-46.

guidelines on which further elaboration would be possible in a future [constitution].”<sup>94</sup>

4. *Environmental rights and the final Constitution.*

When the new Constitutional Assembly began its work on the final Constitution following the April 1994 elections, there was little likelihood it would write a new constitution that differed dramatically from the Interim Constitution. The Thirty-four Principles circumscribed the field of allowable innovation. And the Assembly was meeting as a regular legislature as well, passing new laws and amending apartheid era laws, throughout this period. Moreover, time was limited: the legislative body was only given two years from its first post-election meeting to complete their task. Failure to complete the draft would have required President Mandela to dissolve Parliament and call a new general election<sup>95</sup>—an occurrence everyone sought to avoid. This pressure ensured that attention was focused on the most highly disputed and controversial topics, which did not include environmental rights.

Much of the drafting of the constitutional text happened in the Constitutional Assembly’s various theme committees with sign-off required by the party-based negotiators on the core Constitutional Committee.<sup>96</sup> Theme Committee Four was charged with drafting the Bill of Rights for the final Constitution.<sup>97</sup>

One of the earliest proposed change appeared in the *Final Report on Group and Human Rights* drafted by the quasi-independent South African Law Commission while the NP was still in power under apartheid.<sup>98</sup> The Final Report proposed that the Interim Constitution provision should be altered to read: “Every person

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94. MINUTES OF THE SIXTH PROGRESS REPORT OF THE THEME COMMITTEE ON FUNDAMENTAL RIGHTS IN THE TRANSITION TO THE NEGOTIATING COUNCIL, *available at* <http://www.constitutionnet.org/files/332.PDF>.

95. *See* S. AFR. (INTERIM) CONST. 1993, ch. 5, § 73.

96. Theme committees were identified by number and had the following foci: (1) character of state, (2) structure of state, (3) relations between levels of government, (4) fundamental rights, (5) judiciary and legal systems and, (6) specialized structures. *See* Jeremy Sarkin, *The Drafting of South Africa’s Final Constitution from a Human-Rights Perspective*, 47 AM. J. COMP. L. 67, 70 n.23 (1999).

97. *Id.* The Committee met thirty-two times between September 19, 1994 and August 14, 1995 to discuss the content of the final Bill of Rights. The Constitutional Assembly, Republic of South Africa, *Second Annual Report of the Constitutional Assembly* (1996), at \*15.

98. SOUTH AFRICAN LAW COMMISSION FINAL REPORT ON GROUP AND HUMAN RIGHTS PROJECT 58 (1994), SOUTH AFRICAN LAW COMMISSION INTERIM REPORT: GROUP AND HUMAN RIGHTS PROJECT 58 (1991).

shall have the right to an environment which is not detrimental to the *public* health or well-being.<sup>99</sup> This version presumably would have protected people from large scale ecological harms rather than incidents or practices that harmed individual health. The Commission's commentary directly opposed the inclusion of rights related to sustainable development and use or conservation. Such rights, "like socioeconomic rights," are "not suitable for judicial protection as a fundamental right."<sup>100</sup> The proposal was not adopted by the drafters despite some parties' expressed interest.<sup>101</sup>

Instead, the environmental rights section of the interim Constitution was expanded prior to disclosure of the first proposed text of the final Constitution. The first draft of the final Constitution kept similar language for the personal right to a healthy environment, but added a second element regarding a right to have the environment protected with specific reference to pollution, conservation, and sustainable development.<sup>102</sup>

Environmental rights were not much discussed in the Public Participation Programme that was conducted alongside the formal drafting process. They certainly did not elicit comments with the frequency of hot-button social issues like abortion, lesbian and gay equality or the death penalty.<sup>103</sup> Nevertheless, the Constitutional Assembly reported receipt of 220 signatories to petitions addressing environmental issues in the first phase of the Public Participation Programme.<sup>104</sup> (None were submitted in the

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99. SOUTH AFRICAN LAW COMMISSION FINAL REPORT ON GROUP AND HUMAN RIGHTS PROJECT 58 (1994); SOUTH AFRICAN LAW COMMISSION INTERIM REPORT: GROUP AND HUMAN RIGHTS PROJECT 58 (1991) (emphasis added); Vryheids Front [Freedom Front], Submissions to the Theme Committee 4 (Fundamental Rights), 9-10, *available at* <http://www.constitutionnet.org/files/11882.PDF> [hereinafter Vryheids Front] (containing political party comments on proposed fundamental rights in the final constitution).

100. SOUTH AFRICAN LAW COMMISSION FINAL REPORT ON GROUP AND HUMAN RIGHTS PROJECT 58 (1994) (quoting Hugh Corder, ed., *A CHARTER FOR SOCIAL JUSTICE: A CONTRIBUTION TO THE SOUTH AFRICAN BILL OF RIGHTS DEBATE* 52 (University of Cape Town, 1992)).

101. Vryheids Front, *supra* note 99, at 9-10 (containing political party comments on proposed fundamental rights in the final constitution).

102. Michael Kidd, *Environmental Rights*, 7 S. AFR. HUM. RTS. Y. B. 102 (1996).

103. Eric C. Christiansen, *Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process*, 32 N.Y.U. J. INT'L L. & Pol. 997, 1039-40 (2000). This is supported by research into public opinion at the time the Constitution was being drafted. HENNIE KOTZÉ, *THE WORKING DRAFT OF SOUTH AFRICA'S 1996 CONSTITUTION: ELITE AND PUBLIC ATTITUDES TO THE "OPTIONS"* (1996).

104. The Constitutional Assembly, Republic of South Africa, *Second Annual Report of the Constitutional Assembly*, 1996 (copy on file with author).

somewhat limited second phase.)

The only later alterations appear as an NP proposal in the fourth draft of the final Constitution. The proposed changes, most of which were accepted, primarily addressed the 24(b) provision.<sup>105</sup> The accepted proposals included the addition of language indicating the required protections were “for the benefit of present and future generations” and modification of the reference to sustainable development. The initially proposed sustainability element, which required the state to “secure sustainable development and use of natural resources,” was clarified and expanded in the final draft to require the state to “secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”<sup>106</sup>

Official Constitutional Assembly discussion of the proposed text occurred at the debates during the two “readings” of the legislative bill that proposed the final Constitution. Environmental rights were barely mentioned. A bland comment, “[w]e are pleased about the fact that our Bill of Rights has defined human rights as meaning not only political rights, but also social, economic, and environmental rights,” typifies the few opinions expressed about the environmental provisions.<sup>107</sup> No express opposition was voiced regarding the inclusion of either element of

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105. At the time, environmental rights were still in Section 23. An additional proposal of the National Party to add a “quality of life” reference was rejected. The entirety of the NP proposal in the fourth draft was:

Everyone has the right -

(1) to an environment that is not harmful to their health, well-being and quality of life, and

(2) to have their environment protected through reasonable legislative and other measures for the benefit of present and future generations -

(a) preventing pollution and ecological degradation;

(b) promoting conservation;

(c) securing the ecologically sustainable use of natural resources;

(d) safeguarding the environment while promoting justifiable economic development; and

(e) securing the ecological integrity of the environment.

Fourth Draft of the 1996 Constitution (March 20, 1996), ch. 2, § 23, (S. Afr.), *available at* <http://www.constitutionnet.org/files/4CA18036.PDF>.

106. *Compare* Fourth Draft of S. AFR. CONST. (March 20, 1996), ch. 2, § 23, *available at* <http://www.constitutionnet.org/files/4CA18036.PDF>, *with* S. AFR CONST, 1996, ch. 2, § 24.

107. *See* 3 DEBATES OF THE CONSTITUTIONAL ASSEMBLY, REP. OF S. AFR. 108 (Apr. 23, 1996) (Comment of Mrs. P De Lille).



the final Constitution's environmental rights.

Similarly, there was no significant discussion during the second reading of the Constitution either.<sup>108</sup> The last remark on environmental rights was voiced on the final day of discussion before the proposed text of the Constitution was submitted: "the Bill of Rights guarantees the protection not just of those now living, but also of many generations to come through the right to have the environment protected against pollution and degradation."<sup>109</sup> There is no record of any noteworthy response, nor any formal opposition to the environmental provisions.

When the final text was adopted by overwhelming majorities in both houses of Parliament on May 8, 1996, it included substantially expanded environmental rights. The retention and expansion of environmental rights language in the proposed text of the final Constitution was not in and of itself remarkable; a significant number of rights were expanded and several categories of constitutional protection were added that had not been mentioned in the Interim Constitution at all.<sup>110</sup> The new provisions included prohibitions on government and private actors, as well as broad affirmative duties for all levels of government related to a clean and healthy environment and sustainable development.<sup>111</sup> The entire text of the Constitution was then sent to the Constitutional Court for certification.

##### 5. *Constitutional Court certification.*

The Court's initial certification opinion was announced on September 6, 1996.<sup>112</sup> In what Justice Albie Sachs later identified as a "unique jurisprudential and political event in the world,"<sup>113</sup> the

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108. See 3 DEBATES OF THE CONSTITUTIONAL ASSEMBLY, REP. OF S. AFR. 188 (Apr. 24, 1996) (Comment of Ms Y. L. Myakayaka-Manzini).

109. See 3 DEBATES OF THE CONSTITUTIONAL ASSEMBLY, REP. OF S. AFR. 156 (Oct. 11, 1996) (Comment of M.A. Stofile).

110. Compare S. AFR. (INTERIM) CONST., 1993, ch. 3, with S. AFR. CONST. 1996, ch. 2.

111. See 3 DEBATES OF THE CONSTITUTIONAL ASSEMBLY, REP. OF S. AFR. 447-50 (May 8, 1996). Only one party, the African Christian Democratic Party, voted against the text (with two votes). The Freedom Front, a white right-wing party, abstained from the vote (with 12 votes). *Id.*

112. Five major political parties submitted written documentation as did eighty-four other organizations and individuals. From these written objections—2,500 pages in total—individual speakers and organizational representatives addressed the Court at the oral arguments held July 1-11, 1996. Representatives of the Constitutional Assembly had the opportunity to respond to each objection. See *Certification I*, *supra* note 34, at ch. 1, § D.

113. Albie Sachs, *The Creation of South Africa's Constitution*, 41 N.Y.L. SCH. L. REV. 669,

South African Constitutional Court declared the South African Constitution to be “unconstitutional.”<sup>114</sup> While acknowledging that the drafting marked a “monumental achievement” and that “in general and in the majority of its provisions” the Assembly had succeeded, the Court nevertheless concluded that “the [proposed Constitution] cannot be certified as it stands because there are several respects in which there has been noncompliance” with the Thirty-four Principles.<sup>115</sup>

Environmental rights were not the basis for any significant direct discussion in the *Certification I* decision. Although some objections to the proposed text of the Constitution’s environmental rights provision were noted,<sup>116</sup> the Court deferred, citing its limited role in the drafting exercise. As the Court explained:

There were a variety of other objections to provisions in and omissions from the Bill of Rights. . . . We repeat that it is not for us but for the [Constitutional Assembly], the duly mandated agent of the electorate, to determine—within the boundaries of the [Constitutional Principles]—which provisions to include in the Bill of Rights and which not. We can accordingly express no view on the merits, or otherwise, of the objections which advocated . . . amendments to the sections dealing with equality, affirmative action, privacy, [and] the environment.<sup>117</sup>

The assertions of non-compliance that relate indirectly to environmental protections included a challenge to the inclusion of rights that were not common to most modern constitutions, a description that fairly describes enforceable environmental rights in the 1990s. The basis for this challenge was Constitutional Principle II, which stated that “[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil

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669 (1997).

114. *Id.*

115. *Certification I*, *supra* note 34, at ch.1, § F. In a lengthy opinion, the Constitutional Court identified nine components of the May 1996 draft of the Constitution that failed to comply adequately with the Thirty-four Principles—including problems with labor rights, the independence and impartiality of government oversight mechanisms, and fiscal and structural inadequacies regarding local government. *See Certification I*, *supra* note 34, at chs. 6, 8.

116. *Certification I*, *supra* note 34, para. 282.

117. *Certification I*, *supra* note 34, para. 104.

liberties.”<sup>118</sup> Clearly, the proposed Bill of Rights, with its extensive social welfare rights and its expansive environmental protections, included a greater number of rights than those that could fairly be labeled as “universally accepted.”

The Court addressed this objection to the expansion of the interim Bill of Rights in an early part of its opinion:

It is clear that the drafters intended that only those rights that have gained a wide measure of international acceptance as fundamental human rights must necessarily be included in the [final Constitution]. Beyond that prescription, the [Constitutional Assembly] enjoys a discretion. That this is the case is apparent too from the instruction given in the closing clause of [Constitutional Principle] II which requires [the Assembly] to give due consideration to inter alia the fundamental rights contained in [the Interim Bill of Rights]. The [Assembly] was clearly not obliged to duplicate those rights, nor to match them. They merely had to be duly considered.<sup>119</sup>

Essentially, the Constitutional Principles created a floor of minimum rights requirements but set no ceiling on the work of the Constitutional Assembly.

The environment is otherwise mentioned only in discussions, generally approving, of the division and sharing of legislative competency between the national, provincial, and local levels of government. The Court cited the inclusion of environmental protection authority in the sphere of provincial<sup>120</sup> and local authority<sup>121</sup> as evidence of the significant power granted to the lower levels of government—something required by Constitutional Principle XXI.<sup>122</sup> Of the other issues in the proposed constitutional text, none were related significantly to environmental rights. Nevertheless, other, unrelated “inconsistencies” with the

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118. S. AFR. (INTERIM) CONST., 1993, Schedule 4, Principle II. (“Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.”).

119. *Certification I*, *supra* note 34, para. 51.

120. *Certification I*, *supra* note 34, para. 252.

121. *Certification I*, *supra* note 34, paras. 475-76. This shared authority was the basis for one of the Constitutional Court’s most recent environmental law cases, *Maccsand (Pty) Ltd. v. City of Cape Town* 2012 (4) SA 181 (CC) (S. Afr.), discussed below.

122. S. AFR. (INTERIM) CONST., 1993, Schedule 4, Principle XXI.

Constitutional Principles were identified by the Court.<sup>123</sup>

Consistent with its ruling, the Court returned the text to the Constitutional Assembly for revision. When the amended text returned to the Court in October 1996,<sup>124</sup> the Court focused exclusively on its originally identified “grounds for non-certification” identified in the *Certification I* judgment. Hence, environmental rights were not addressed other than indirectly in changes effecting all constitutional rights. The Court’s *Certification II* opinion noted a suggestion from a private commentator that the text of the right could be clarified but declared that suggestion (and many others) “properly within the province of the [Constitutional Assembly’s] political judgment” and thus not subject to review by the Court in its capacity as certifier.<sup>125</sup>

The amended text was approved by the Constitutional Court on December 4, 1996.<sup>126</sup> On December 10, 1996, Human Rights Day, the new Constitution was signed by President Mandela.

### III. THE SOUTH AFRICAN CONSTITUTIONAL RIGHTS TO A CLEAN AND HEALTHFUL ENVIRONMENT

#### A. *Section 24: The Right to a Clean Environment*

The final approved text of the Constitution included a substantial, multi-element environmental right. Section 24 of the South African Constitution states:

Everyone has the right

(a) to an environment that is not harmful to their health or well-being; and

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123. See *Certification I*, *supra* note 34.

124. The comment was that the Section 24 right “should include a concise formulation of how ‘pollution and ecological (environmental) degradation’ is to be prevented and controlled.” CERTIFICATION OF THE AMENDED TEXT OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1997 (2) SA 97 (CC) Annexure 1: Summary of Objections and Submissions, 125.

125. *Certification of the Amended Text of the Constitution of the Republic of South Africa* 1997 (2) SA 97 (CC), para. 14. The comment was that the Section 24 right “should include a concise formulation of how “pollution and ecological (environmental) degradation” is to be prevented and controlled.” *Id.* at, Annexure 1: Summary of Objections and Submissions, para. 3.

126. *Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1997 (2) SA 97 (CC), para. 205 (“We certify that all the provisions of the amended constitutional text, the Constitution of the Republic of South Africa, 1996, passed by the Constitutional Assembly on 11 October 1996, comply with the Constitutional Principles contained in schedule 4 to the Constitution of the Republic of South Africa, 1993.”).

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

It formally took effect on February 4, 1997<sup>127</sup> and has not been amended since that time.<sup>128</sup>

1. *The rights in section 24.*

Section 24 has a natural division between subsection (a), the healthful environment element, and subsection (b), the environmental protection element. Both sections share a common introductory phrase—“Everyone has the right”—which mirrors the language of the civil and political rights and socioeconomic rights in the Constitution. Needless to say, the two elements are intended to be read and interpreted in conjunction with one another—and with the remainder of the Constitution. This Article will first review the meaning of the textual protections themselves before discussing the Constitutional Court’s enforcement in their primary environmental opinions.

Section 24(a) announces that everyone has a right “to an environment that is not harmful to their [sic] health or well-being.”<sup>129</sup> This is the more common, anthropocentric component of constitutional environmental rights protection globally,<sup>130</sup> directly enforced in some countries and indirectly enforced in other countries as a necessary component of the constitutional “right to life.”

Section 24(b) is slightly more textually complex and includes

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127. See Lionel Williams, *South Africa’s New Constitution Takes Effect Today*, AFR. NEWS SERVICE (Feb. 4, 1997).

128. Amendments are listed and noted in text on the website for the Constitutional Court of South Africa, <http://www.constitutionalcourt.org.za/site/constitution/english-web/index.html> (last visited Sept. 30, 2012) and at the South African Government information website, <http://www.info.gov.za/documents/constitution/amendments.htm> (last visited September 30, 2012).

129. S. AFR. CONST., 1996, ch. 2, §24(a).

130. BOYD, *supra* note 1, at 59-63.

both anthropocentric and ecocentric characteristics. It somewhat awkwardly proclaims a right “to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”<sup>131</sup>

The environmental protection element of Section 24 is phrased as an individual right: each person “has the right to have the environment protected,” which supports the enforceability of the element’s prohibitions against government action. This constitutional circumlocution is only present in Section 24. It is unclear why the drafters did not follow the alternative model of the Section 34 right to just administrative action, which directly requires, “National legislation must be enacted to give effect to these rights.”<sup>132</sup> Perhaps it is because both national and provincial legislation is required and significant executive action (also at both the national and provincial level) as well. Moreover, because of the horizontal applicability of Section 24, the phrasing may be intended to highlight the broad variety of protective measures—legislative and executive, national and provincial, public and private—that may be necessary to protect the environment.

Section 24(b) creates a government duty by creating a private right to environmentally-protective outcomes from the legislative and executive branches of government. The text creates a private claim against government inaction or against government action that is inconsistent with the protective duties of Section 24. This element includes both negative duties, preventing “pollution and ecological degradation,”<sup>133</sup> and affirmative commands, to “promote conservation” and to “secure . . . sustainable development and use of natural resources.” On its face these components of the right—at least when paired with the expansive powers of the South African judiciary—provide the potential for numerous and substantial assertions of noncompliance when the environment is threatened because of inaction (or inadequate or improper action) by government.

Because Section 24 should be read in conjunction with Section

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131. S. AFR. CONST. 1996, ch. 2, §24(b).

132. *Id.* at ch. 2, §33.

133. *Id.* at ch. 2, §24.

8(2), the environmental responsibilities and duties apply horizontally as well as vertically: they apply to private individual or corporate actions as well as governmental action.<sup>134</sup> A significant, as yet undeveloped, area of law results from the ostensibly enforceable obligations placed on private and corporate persons—including mining companies, companies using suboptimal means to avoid environmental degradation, and those otherwise damaging the environment or pursuing unsustainable development practices. The South African Constitution tempers the rights in the environmental protection element of Section 24 with at least two caveats: a reasonableness qualification that may provide common sense limits on expectations of government actors and the acknowledgement that state policies will continue to promote “justifiable economic and social development.”<sup>135</sup>

These potentially mitigating textual elements are not unique to environmental rights. A version of the reasonableness limitation appears multiple times in the Constitution, typically in the social welfare rights provisions. Most social welfare rights include the caveat, “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”<sup>136</sup> In its social welfare rights jurisprudence, the Court has found this phrasing to mean that government officials must take some direct action to address the core constitutional concerns of the particular provision and that care must be taken to address the needs of those most harmed by unavailability of the right.<sup>137</sup> The “while promoting justifiable economic and social development” language could have been interpreted to qualify the commitment to environmental protection and affirm the constitutionality of pursuing increased private wealth and public development.<sup>138</sup> But as we shall see, this part of Section 24 is less a limitation and more a reiteration of the goal of express promotion of sustainable development as a model

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134. *Id.* at ch. 2, §8(2).

135. *Id.*

136. *Id.* at ch. 2, §26(2).

137. Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 375-76 (2007).

138. There is in fact a different textual model in the South African Constitution for concerns about expenses associated with governmental burdens. Section 32, which provides for access to information states that “[n]ational legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the financial and administrative burdens on the state.” S. AFR. CONST., 1996, ch. 2, §32(2).

for future economic development.

2. *Section 24 and the Bill of Rights.*

Section 24 follows the general model of the various rights provisions in the South African Constitution's Bill of Rights. In 36 sections, including framing provisions with instructions on the meaning, purpose, and proper interpretation of its rights, the South African Bill of Rights protects a panoply of rights—traditional civil and political rights, second generation social welfare rights, and third generation rights including environmental rights, labor rights, and rights related to “cultural, religious and linguistic” communities.<sup>139</sup>

The Bill of Rights, Chapter II of the Constitution, prefaces the list of protected rights with sections discussing the significance and applicability of all rights in the Constitution. While environmental rights do not have special significance (unlike the core values of dignity, equality, and freedom),<sup>140</sup> they are drafted so as to be equal to all the other rights. The rights in the Bill of Rights are the “cornerstone of democracy in South Africa.”<sup>141</sup> The consequence of this, stated early and prominently in the Constitution is that “law or conduct inconsistent with [the Constitution] is invalid, and the obligations imposed by it must be fulfilled.”<sup>142</sup> This command—with both negative and positive elements—is so fundamental that it is reiterated in the first section of the Bill of Rights: “The state must respect, protect, promote, and fulfill the rights in the Bill of Rights.”<sup>143</sup> In those early sections the Constitution makes it clear that its commands and prohibitions apply “to all law, and bind the legislature, the executive, the judiciary and all organs of state.”

Moreover, the Bill of Rights specifically binds private actors—not just government actors. Section 8(2) states that the Bill of Rights provisions bind “a natural or juristic person” where

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139. *Id.* at ch. 2, §§ 23, 30, 31.

140. *Id.* at ch. 2, §7 (“This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”); *id.* at ch. 2, §36 (“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors . . .”).

141. *Id.* at ch. 2, §7.

142. *Id.* at ch. 1, §2.

143. *Id.* at ch. 2, §7.



“applicable, taking into account the nature of the right and the nature of the duty imposed.”<sup>144</sup> Both the inclusion of affirmative obligations on state organs and the extension of restrictions to private actors are likely to be critical innovations in South Africa’s constitutional enforcement of environmental rights.

Following the list of rights, Chapter II includes two additional sections directed at enforcement of the Bill of Rights. Section 39(a) guides the interpretation of the rights, requiring that rights be interpreted in a manner that will “promote the values that underlie an open and democratic society based on human dignity, equality, and freedom.” Section 39(b) facilitates this by requiring consideration of international law (something decidedly relevant for environmental rights) and expressly permitting the consideration of foreign law.<sup>145</sup> Environmental rights, like all rights in the South African Constitution, are also subject to potential limitations under Section 36. The “limitations clause” only allows restrictions on express constitutional rights where the limits derive from a “law of general application” and only “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.”<sup>146</sup>

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144. *Id.* at ch. 2, §8:

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-
  - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
  - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.”

145. *Id.* at ch. 2, § 39(1) (“When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.”).

146. *Id.* at ch. 2, §36 (asserting that the “relevant factors” include “(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent

The placement and framing of environmental rights signifies the essential equality of environmental rights within the scheme of constitutional rights protection in South Africa. Functionally, environmental rights contain both positive and negative aspects, are broadly enforceable, and are intended to be expansively interpreted in line with the values of the post-apartheid constitutional values.

*B. Section 24 at the Constitutional Court*

Before discussing the Court's core environmental cases, the section below presents some of the uncommon characteristics of the Constitutional Court's procedural powers that enable its environmental jurisprudence. Many of these elements specifically empower the Court to effectively address the justiciability concerns that would otherwise arise for environmental plaintiffs in other nations' courts.

*1. A uniquely empowered court.*

The Constitution vested broad judicial review authority in the courts of South Africa generally and the South African Constitutional Court specifically—including the power to review proposed legislation, national and provincial statutes, provincial constitutions, acts of the executive branch and administrative bodies, and decisions of lower courts on all matters related to the Constitution.<sup>147</sup> At its creation, the Constitutional Court was positioned atop the preexisting (that is to say, apartheid-era) legal system and empowered to oversee, guide, and correct lower courts, which were newly empowered by a transformational value set. By creating a new, capstone judicial body, one untarnished by an apartheid history, South Africa was able to maintain its established legal system with experienced judicial officers without sacrificing

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of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.”).

147. *Id.* at ch. 8, § 167. However, other courts are empowered to review the constitutionality of legislative or executive acts. *Id.* § 172(2)(a):

The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

the transformative goals of equality, dignity, and freedom.<sup>148</sup>

As a result, the South African Constitutional Court was the branch of government that was undeniably the first among equals at the conclusion of the constitutional transition. The Court's expansive powers come from institutional characteristics as much as from the generous enumeration of rights in the constitutional text. The Court has very broad jurisdiction over constitutional matters and has far-reaching remedial powers. Additionally, access to the Court is multi-form and generally permissive. These procedural characteristics form a critical aspect of the power and authority of the judiciary and the Court. As will be seen in the discussion below, the Court's powers are demonstrated in its environmental cases and many of its uncommon characteristics are particularly impactful on environmental rights adjudication.

a. *Institutional access.*

The central role of the Court is to oversee the application of the Constitution by lower courts and review the constitutionality of the acts of the other governmental bodies and state actors.<sup>149</sup> This purpose is supported by open access to the judicial system generally and broad capacity of the Constitutional Court to decide particular issues. Generally speaking, standing rules for plaintiffs, such as access generally to the court system, as well as the specific rules of access to the Constitutional Court itself, are discretionary and permissive.<sup>150</sup> The access provisions include an exceptionally broad standing clause, which allows anyone "acting in their own interest . . . on behalf of another person who cannot act in their own name . . . as a member of, or in the interest of, a group or class of persons . . . anyone acting in the public interest [or] . . . an association acting in the interest of its members" to bring suit in "a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief."<sup>151</sup>

The constitutional grant of access for such plaintiffs extends well beyond the commonly-included classes of persons with

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148. Constitutional Court of South Africa, *History of the Court*, <http://www.constitutionalcourt.org.za/site/thecourt/history.htm> (last visited Sept. 30, 2012).

149. S. AFR. CONST., 1996, ch. 8, § 167(4).

150. *Id.* at ch. 2, §38.

151. *Id.*

immediate remediable harms, thus offering unquestionably greater access than most courts.<sup>152</sup> These standing provisions seem to anticipate the practical difficulties for many potential plaintiffs. The express allowance of access for “anyone acting . . . in the interest of . . . a group or class of persons” or “anyone acting in the public interest”<sup>153</sup> seems to be an open invitation to anyone with resources to advance the interests of those without—a critical concern in a nation where issues of poverty, historical discrimination, and poor education would otherwise inhibit access to the justice system. The result is that a far greater number of concerns may be brought to the attention of South African courts—assisting the Court’s role as supervisor of all governmental action and granting it more opportunities to facilitate transformation. These capacious provisions effectively remove the issue of standing as an obstacle to constitutional adjudication—a particularly important development for environmental cases.

As far as traditional, subject matter jurisdictional issues are concerned, the Constitutional Court “is the highest court in all constitutional matters,”<sup>154</sup> such as “any issue involving the interpretation, protection, or enforcement of the Constitution.”<sup>155</sup> And, the Court itself has exclusive competence to decide the jurisdictional appropriateness of any issue before it.<sup>156</sup> The enumerated environmental rights of Section 24 place environmental issues squarely within the purview of the Constitutional Court.

#### b. *Remedial Authority*

As with the laws regarding access to the courts and its jurisdictional grant, the remedial powers of the Constitutional Court (and the South African courts generally) are very broad—both in initial grant and in their interpretation by the Court itself. Section 172 of the Constitution states: “When deciding a constitutional matter within its power, a court (a) must declare that any law or conduct that is inconsistent with the Constitution is

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152. Consider, for example, the American standing requirements of injury, causation, redressability, as well as the judicially-created elements of standing, drawn from the United States Constitution. U.S. CONST. art. III, § 2, cl. 1.

153. S. AFR. CONST., 1996, ch. 2, § 38.

154. *Id.* at ch. 8, § 167(3).

155. *Id.* § 167(7).

156. *Id.* § 167(3).

invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable.”<sup>157</sup>

These provisions stress the two, often distinct, aspects of remedies in constitutional cases: the reviewing court must invalidate actions or laws it finds to be unconstitutional, and it may make any “just and equitable” remedial order to the successful party. The mandatory element ensures the enforcement of the new constitutional values—and is a requirement notably placed on all courts, not just on the Constitutional Court. The permissive element allows great latitude for the courts to ensure their remedies adequately address successful claims.

Indeed, the Court has declared that it has all the necessary powers to fashion any appropriate remedy.<sup>158</sup> In selecting a remedy, the requisite balancing will include weighing: (1) the objective of the remedy (“to address the wrong occasioned by the infringement”); (2) the value of deterrence of future violations of the right; (3) realistic compliance issues; and (4) fairness to all affected.<sup>159</sup> South Africa’s history of human rights violations and the practical difficulty of bringing cases to the Constitutional Court are presented as justifications for generous remedies in human rights cases:

[T]his Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.<sup>160</sup>

The Court’s judgments often portray its remedial power as the core of its constitutional duty. And the Court’s authority and obligation to produce just remedies requires the justices to seek nontraditional solutions:

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157. *Id.* § 172(1).

158. *Hoffmann v. S. African Airways* 2000 (1) SA 1 (CC) para. 42 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2000/17.pdf>.

159. *Id.*

160. *Fose v. Minister of Safety and Sec.* 1997 (3) SA 786 (CC) para. 69 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/1997/6.pdf>.

Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.<sup>161</sup>

For environmental cases, the breadth of the remedial options means that the courts have wide-ranging authority to creatively address ecological harm, permanently alter inadequate processes, or otherwise design a remedy to address novel environmental situations.

Nevertheless, neither the critical importance of the remedial power to the Court nor the statements of the Court that it must “strike effectively” at the source of the “constitutional infringement” has meant that there are not principled limitations on the remedies granted.<sup>162</sup> Section 172 has not provided fodder for unrestrained liberality on the part of the Court. Most particularly, remedies related to substantial expenditures of state resources have evoked caution from the Court: “The court would not lightly make an order the effect of which would be to grossly distort the financial affairs of [the state].”<sup>163</sup> Indeed, the Court occasionally appears to be looking over its shoulder at a long line of potential claimants to any immediate remedy and adjudicating

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161. *Id.* para. 19; *see also Hoffmann* 2000 (1) SA para. 45 (describing the process for fashioning appropriate relief):

The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case.

162. *Fose* 1997 (3) SA para. 96. On occasion, under authority of the Constitution, the Court has made exceptions to this rule—or to the normal non-retroactivity of judgments generally—as required by interests of justice. The Constitution grants this authority. S. AFR. CONST. 1996, sched. 6, § 16(6)(a).

163. *Tsotetsi v Mut. & Fed. Ins. Co.* 1997 (1) SA 585 (CC) para. 9 (S. Afr.). *But see State v. Bhulwana* 1996 (1) SA 388 (CC) para. 399 (S. Afr.) (“It is only when the interests of good government outweigh the interests of the individual litigants that the Court will not grant relief.”).

its orders accordingly.<sup>164</sup>

## 2. *Constitutional Court case law.*

Like many nations, South Africa has both a Constitutional Court, a body with original and appellate jurisdiction on constitutional matters, and a Supreme Court of Appeals, which is the highest court for all non-constitutional appeals.<sup>165</sup> The Constitutional Court is “the highest court for constitutional matters” and hears only cases “involving the interpretation, protection, or enforcement of the Constitution.”<sup>166</sup> Because of this division, this Article focuses exclusively on the case law of the Constitutional Court. Although many important environmental law cases are brought before the Supreme Court of Appeal (and the trial-level High Courts and other, specialized courts), those cases that go on to the Constitutional Court are the cases with the most noteworthy constitutional bases and significant legal arguments.

### a. *Fuel Retailers.*

The 2007 case, *Fuel Retailers Association of Southern Africa v. Director-General Environmental Management, Mpumalanga Province*, came to the Constitutional Court as a review of decisions regarding the siting of a gasoline filling station on land that included a portion of a known aquifer.<sup>167</sup> The case provided the Court with the opportunity to elaborate on the “nature and scope of the obligations of environmental authorities when they make decisions that may have a substantial detrimental impact on the environment” with particular attention to “the interaction between social and economic development and the protection of

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164. The Court’s remedial authority also extends to the awarding of costs. Costs will be considered cautiously in order to balance promotion of legitimate rights litigation and discouragement of frivolous suits. See *Motsepe v. Comm’r for Inland Revenue* 1997 (6) BCLR 692 (CC) para. 30 (S. Afr.). Notably, the Court has also sought to avoid the “chilling” effect of imposing costs against citizen litigants who have sought to uphold their right against the state. *Id.*

165. S. AFR. CONST., 1996, ch. 8, §§ 166-68; *id.* at § 168(3) (“Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters . . .”).

166. *Id.* at ch. 8, §§ 167(3)-(4).

167. *Fuel Retailers Ass’n of S. Afr. v. Director-General Envtl. Mgmt.*, 2007 (10) BCLR 1059 (CC) paras. 8-10 (S. Afr.).

the environment.”<sup>168</sup> *Fuel Retailers* is important for two reasons: its explanation of the proper functioning of national environmental legislation and its discussion of the relationship between environmental protection and development.

i. *Constitutionalizing environmental statutes.*

The Court specifically identifies the 1998 National Environmental Management Act (NEMA)<sup>169</sup> as derived from Section 24 of the Constitution; it is a detailed, practical expression in statutory law of the imprecise principles in the Constitution.<sup>170</sup> Its interpretation is therefore within the purview of the Constitutional Court, rather than merely under the Supreme Court of Appeal as regular legislation.<sup>171</sup> Because the principles identified in Section 2 of NEMA “apply . . . to the actions of all organs of state that may significantly affect the environment,” the statute is without doubt the primary means through which the Section 24 environmental rights influence and guide government decision-making and state action. The NEMA guidelines

provide not only the general framework within which environmental management and implementation decisions must be formulated, but they also provide guidelines that should guide State organs in the exercise of their functions that may affect the environment. Perhaps more importantly, these principles provide guidance for the interpretation and implementation not only of NEMA but any other legislation that is concerned with the protection and management of the environment.<sup>172</sup>

Thus, NEMA informs the protection and enforcement of Section 24 rights in a host of environmental statutes. The Constitution imbues NEMA with authority and NEMA defines and clarifies the appropriate expression of that authority in all other environmental legislation.

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168. *Id.* para. 1.

169. Nat'l Env'tl. Mgmt. Act 107 of 1998 (S. Afr.) [hereinafter NEMA].

170. *Fuel Retailers*, 2007 (10) BCLR 1059, para. 59.

171. The Supreme Court of Appeal is the highest court of appeal in South Africa except where “constitutional matters” are concerned; the Constitution allows direct or appellate access to the Constitutional Court when the issue involves “the interpretation, protection, or enforcement of the Constitution.” S. AFR. CONST. 1996, ch. 8, § 167.

172. *Fuel Retailers*, 2007 (10) BCLR 1059 para. 67.



The Environmental Conservation Act (ECA),<sup>173</sup> the primary environmental legislation of the waning years of the apartheid era, is the basis for a relatively standard process for ensuring developments with environmental impact are properly evaluated by government authorities. The ECA “forbids any person from undertaking an activity that . . . may have a substantial detrimental impact on the environment without written authorisation by the competent authority.”<sup>174</sup> A report on environmental impacts is required and the authorizing official has authority to impose any necessary conditions to protect the environment.<sup>175</sup>

In *Fuel Retailers*, the Court overturned the determination of local authorities to permit a gas station because the local officials “took a narrow view of their obligations and misconstrued” their duties under NEMA and ECA when considered in light of Section 24 of the Constitution.<sup>176</sup> The environmental authorities viewed their task in too limited a fashion: merely to ensure some entity at some level of government (here, the local municipality) had reviewed the “need and desirability” of the project.<sup>177</sup> The Constitutional Court offered a more purposive approach to interpretation of the constitutional protections. The Court’s broader view requires authorities to make a serious assessment of current circumstances with a “thorough investigation” of possible “environmental and socioeconomic harms.”<sup>178</sup> Because overproliferation or economically unviable filling stations can cause additional harms, the “need for development must now be determined by its impact on the environment, sustainable development and social and economic interests.”<sup>179</sup> Each component is a “mandatory and material condition”<sup>180</sup> that must be assessed before a particular development is “environmentally justifiable.”<sup>181</sup>

Further, the Court stressed that local authorities were not entitled to avoid mitigation or protection against consequences merely because the harms were of undetermined likelihood.

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173. Env'tl. Conservation Act (1989) (S. Afr.).

174. *Id.* § 2.

175. *Id.*

176. *Fuel Retailers*, 2007 (10) BCLR 1059 para. 97.

177. *Id.* para. 82.

178. *Id.* para. 81.

179. *Id.* para. 79.

180. *Id.* para. 89.

181. *Id.* para 85.

Specifically, the Court held that the authorities in *Fuel Retailers* “did not seem to take seriously the threat of contamination to [ground water]. The precautionary principle required these authorities to insist on adequate precautionary measures . . . [even] where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development.”<sup>182</sup> Decision-makers should take a “risk averse and cautious approach” to assessing the “cumulative impact of a development.”<sup>183</sup>

ii. *Constitutionalizing sustainability.*

The *Fuel Retailers* case is also a particularly relevant case for the Court’s examination of the “interrelationship between the environment and development,” a tension familiar to all nations but more acutely felt by developing countries.<sup>184</sup> In language clearly reminiscent of social welfare rights cases, the Court expressly asserts the importance of development—traditionally an indication that a court intends to enfeeble the relevant environmental protections. “What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable ‘economic and social development’ . . . essential to the well-being of human beings.”<sup>185</sup>

But in *Fuel Retailers* the Court is not edifying development at the cost of environmental protection. Rather the Court’s discussion of development in the text of the environmental right intends to harness the notions together by means of their shared goal: benefits for human beings, constitutional welfare in a broader sense.

This Court has recognised that the socioeconomic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment.

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182. *Id.* para. 98.

183. *Id.* para. 81.

184. *Id.* para. 45.

185. *Id.* para. 44.

Thereby the Court attempts to join environmental protection and economic development rather than portray them as opposing forces. But the Court's reliance on the common purpose of development and environmentalism explains only why they are linked, not how they can act in concert. It is more common to picture environmental protection and economic development in tension—one can succeed only where it eclipses the other. Nevertheless, the Constitution “requires those who enforce and implement [it] to find a balance between potentially conflicting principles.”<sup>186</sup>

This tension was known by the authors of the South African Constitution, according to the Court. The Constitution “recognises the need for protection of the environment [and] the need for social and economic development. It contemplates the integration of environmental protection and socioeconomic development.” And, the Court says, the solution to this conundrum is expressly identified in the Constitution, which “envisages that environmental considerations will be balanced with socioeconomic considerations through the ideal of sustainable development.”<sup>187</sup>

Drawing on the insights of international law—especially the 1992 Rio Declaration on Environment and Development<sup>188</sup>—the Court asserts that the notion of sustainable development “offers an important principle for the resolution of tensions between the need to protect the environment on the one hand and the need for socioeconomic development on the other hand.”<sup>189</sup> The key to assigning appropriate weight to the potentially contrarian elements is that modern development in South Africa must “pay attention to the costs of environmental destruction.”<sup>190</sup> In support of the notion that “the environment and development are thus inexorably linked”<sup>191</sup> the Court notes favorably some core insights of the United Nations' Brundtland Report.

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186. *Id.* para. 93.

187. *Id.* para. 45.

188. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992).

189. *Fuel Retailers*, 2007 (10) BCLR 1059 para. 57.

190. *Id.* paras. 44-45.

191. *Id.* para. 44.

[E]nvironmental stresses and patterns of economic development are linked one to another. Thus agricultural policies may lie at the root of land, water, and forest degradation. Energy policies are associated with the global greenhouse effect, with acidification, and with deforestation for fuelwood in many developing nations. These stresses all threaten economic development. Thus economics and ecology must be completely integrated in decision making and lawmaking processes not just to protect the environment, but also to protect and promote development. Economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind.<sup>192</sup>

This aptly conveys the “integration of environmental protection and socioeconomic development” required by the post-apartheid constitutional order.<sup>193</sup>

Ultimately then, *Fuel Retailers* is important for two reasons. It affirms the constitutional significance of environmental legislation – especially NEMA, but also ECA—which empowers the National Assembly to address environmental concerns and raises the stakes through a clear assertion of Court oversight. Even more importantly though, is the Court’s discussion of the interrelation between economic development and environmental protection. The Court essentially “constitutionalizes” sustainable development. It also bolsters the centrality of “sustainable development and use” by emphasizing the centrality of sustainability to all economic development in South Africa. When the Court says that “[p]romotion of development requires the protection of the environment,” they mean that to be so functionally, not just legally. “Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.”<sup>194</sup> Only sustainable development is consistent with the new constitutional order imagined in Section 24.

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192. *Id.* (quoting World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future* (Brundtland Report), ch. 1 para. 42, U.N. Doc A/42/427 (Aug. 4, 1987)).

193. *Id.* para. 45.

194. *Id.*

b. *HTF Developers*.

In *MEC Department of Agriculture, Conservation and Environment v. HTF Developers (HTF Developers)* the Court addresses the applicability of certain internal notice and comment periods under statutory environmental law.<sup>195</sup> The context of the case regarded previously undeveloped “virgin ground,” the development of which would constitute a “substantial detrimental effect on the environment” and was thereby prohibited under the ECA.<sup>196</sup> Although the Court resolved *HTF Developers* on a fairly narrow issue of statutory interpretation (and with a rather short judgment), the case allowed the Court to reiterate and expand upon the importance of certain elements of NEMA.<sup>197</sup>

The Court approvingly discusses NEMA’s “risk-averse and cautious approach, whereby, negative impacts on the environment and on people’s environmental rights [are] anticipated and prevented, and where they cannot be prevented, are minimized and remedied.”<sup>198</sup> The Court acknowledges that the protective procedures mandated by NEMA create “tension with other rights contained in the Bill of Rights, most notably property rights and the right to freedom of trade and occupation” and asserts that, unlike those rights, environmental rights are “collective rights” rather than private rights.<sup>199</sup> Nevertheless, their collective nature does not mean they inherently “supersede or eclipse” other rights.<sup>200</sup> Rather, proper consideration under NEMA (and the Constitution) “must take into account the interests, needs and values of all interested and affected parties.”<sup>201</sup>

Adopting language from an earlier trial court decision, the *HTF Developers* Court supports the notion that the right to a clean environment is a “composite right, which includes social, economic and cultural considerations” to achieve sustainability.<sup>202</sup> This expansive assessment occurs properly when the relevant

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195. *MEC Dep’t of Agric., Conservation and Env’t v. HTF Developers (Pty) Ltd.*, 2007 (4) BCLR 417 (CC) (S. Afr.) [hereinafter *HTF Developers*].

196. *Id.* para. 6.

197. *Id.* paras. 24-26.

198. *Id.* para. 24 (quoting NEMA, *supra* note 169, §2(4)(a)(vii-viii)).

199. *Id.* para. 26.

200. *Id.*

201. NEMA, *supra* note 169, § 2(4)(g).

202. *BP Southern (Pty) Ltd. v. MEC for Agric., Conservation and Land Affairs*, 2004 (5) SA 124 (W) at 144 H-145 A.

government entities consider the provisions of NEMA's Section 2, which identifies a collection of environmental management principles to reconcile economic development and environmental protection.<sup>203</sup> As summarized by Justice Ngcobo,

This requires authorities who are charged with the protection of the environment to consider a diverse range of factors including taking action to avoid, remedy and minimize the disturbance of the eco-system and loss of biological diversity, the pollution and degradation of the environment.<sup>204</sup>

When the Court affirms or announces guidelines for interpreting environmental statutes, like NEMA, ECA, and others, in a manner that supports expansive and protectionist approaches, this strengthens the importance of NEMA for all environmental management decisions. It is appropriate for the Court to do so because those statutes flow directly from the obligation created for government actors under Section 24.

*c. Bengwenyama Minerals.*

In *Bengwenyama Minerals v. Genorah Resources*, the Constitutional Court reviewed the procedures and standards for granting mining and prospecting rights on another's land.<sup>205</sup> In *Bengwenyama* however, the parties differed slightly from the typical case. The respondents at the Constitutional Court, were an established mining company (Genorah Resources, which is a minority owned business subject to treatment as a "historically disadvantaged person")<sup>206</sup> and the national government officials who had granted mining permits to the company. But the applicants were a tribal council, trustees and a mining company affiliated with the land's owner-occupiers, the Bengwenyama-Ye-Maswazi Community in the rural Limpopo Province (the Community), a "community that was previously deprived of formal title to their land by racially discriminatory laws."<sup>207</sup>

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203. NEMA, *supra* note 169 § 2.

204. *HTF Developers*, 2007 (4) BCLR 417 at para. 63, (Ngcobo, J., dissenting) (internal marks omitted).

205. *Bengwenyama Minerals (Pty) Ltd. v. Genorah Res. (Pty) Ltd.*, 2010 (3) BCLR 229 (CC) (S.Afr.) [hereinafter *Bengwenyama*].

206. *Bengwenyama*, 2010 (3) BCLR 229 para. 2.

207. *Id.*

i. *Addressing a history of injustice.*

Over the course of nearly three years prior to litigation, Bengwenyama Minerals and Genorah Resources were pursuing competing licenses to prospect on Community lands, with the license eventually being granted to Genorah by the national mining authority without proper notice or comment from the Community.<sup>208</sup> The controversy arises because of both the historical context and the irregular administrative process.

The Court had to evaluate the appropriateness of administrative action against the backdrop of “the profoundly unequal impact our legal history of control and access to the richness and diversity of the country’s mineral resources has had on the allocation and distribution of wealth and economic power.”<sup>209</sup> This influences the Court’s decision because the Constitution promotes not only formal equality, that is, nondiscrimination under the law, but also substantive equality, such as genuine access for all to the “the full and equal enjoyment of all rights and freedoms.”<sup>210</sup> Thus the Constitution anticipates “legislative and other measures . . . to protect and advance persons disadvantaged by unfair [past] discrimination.”<sup>211</sup> This is relevant to *Bengwenyama* because of South Africa’s apartheid era policies of discriminatory access to land and to mineral wealth. Just as the post-apartheid Constitution provides for land restitution, the “Constitution also furnishes the foundation for measures to redress inequalities in respect to access to the natural resources of the country.”<sup>212</sup> As the Court unsurprisingly states, “[t]here is no denying that past mining legislation and the general history of racial discrimination in this country prevented black people from acquiring access to mineral resources. Dispossession of land aggravated the situation.”<sup>213</sup>

The Court discusses the other rights that inform the application of Section 24 norms as well. Section 25 of the Constitution, which discusses real property rights and is one of the

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208. *Id.* paras. 7-23.

209. *Id.* para. 1.

210. S. AFR. CONST., 1996, ch. 2, § 9(2).

211. *Bengwenyama*, 2010 (3) BCLR 229, para. 3.

212. *Id.* para. 3. One of the parcels of land at issue in *Bengwenyama* was taken from the BEN Community in 1945 but restored under the new post-apartheid Constitutional order. *Id.*

213. *Id.* para. 28.

longest section in the Bill of Rights, “recognizes the public interest in reforms to bring about the equitable access to . . . natural resources, not only land, and requires the state to foster conditions which enable citizens to gain access to land on an equitable basis.”<sup>214</sup> The Court not only acknowledges the existence of “communities with right or interests in law in terms of agreement, custom or [l]aw,” but it announces a “special category of right” for those communities.<sup>215</sup> In addition to their typical rights as owners of real property, they hold a “preferent right to prospect on their land.”<sup>216</sup> This right is held despite the otherwise superseding role of the state as custodian of all natural resources.<sup>217</sup>

The “preferent right” arises from the interaction of Sections 24 and 25 of the Constitution and the Mineral and Petroleum Resources Development Act (MPRDA). Its existence further strengthens the need to consult the community right-holder when a third party seeks a license to exploit resources on their land, since they are yielding substantial rights in addition to being subject to the disturbance and potential harm of prospecting or mining. The absence of notice to the Community of the Genorah application is thereby a greater fault than it would have been if they were merely effected residents – their property rights are at risk, not just their administrative justice rights.<sup>218</sup>

The case includes a substantive discussion of the MPRDA.<sup>219</sup> The MPRDA was enacted in part to remedy past discrimination in access to mineral wealth and to actualize “constitutional norms” related to environmental protection, equitable property rights, and access to food and water.<sup>220</sup> The stated objectives of the MPRDA include to

promote equitable access to the nation’s mineral and petroleum resources . . . [to] substantially and meaningfully expand

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214. *Id.* para. 72.

215. *Id.* paras. 72-73.

216. *Id.* para. 73.

217. Mineral and Petroleum Resources Development Act 28 of 2002, pmb. (S. Afr.).

218. The Court chastises the Department later in the opinion for not making greater efforts to “properly assist[] [the Community] in what was obviously an effort to acquire prospecting rights on their own property.” *Bengwenyama*, 2010 (3) BCLR 229, para. 79.

219. *Bengwenyama*, 2010 (3) BCLR 229, paras. 29-41; Mineral and Petroleum Resources Development Act 28 of 2002 (S. Afr.).

220. *Bengwenyama*, 2010 (3) BCLR 229, para. 3.



opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from [them], [to] advance the social and economic welfare of all South Africans, and [to] give effect to section 24 of the Constitution by ensuring that the nation's . . . resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.<sup>221</sup>

ii. *Administrative and remedial fairness.*

Additionally, principles of fair notice and an opportunity to be heard are discussed in *Bengwenyama* as they are in many of the South African environmental decisions. The considerations are drawn from the Promotion of Administrative Justice Act (PAJA),<sup>222</sup> which is itself a legislative enactment of the due process principles in Section 29 of the Constitution.<sup>223</sup> The *Bengwenyama* Court discusses the requirement that state decision-making must be “taken in accordance with principles of lawfulness, reasonableness, and procedural fairness.”<sup>224</sup>

*Bengwenyama* also allows the Constitutional Court to opine significantly on the availability and appropriateness of remedies in environmental (and property rights) cases arising out of inadequate government action. While it hesitates to “lay down inflexible rules [for] determining a just and equitable remedy” for unlawful administrative action, the Court acknowledges that “each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent.”<sup>225</sup> If the party unknowingly benefited from unlawful actions by a state entity and relied on them to its detriment, the Court has substantial freedom to grant any “fair and just remedy” under the Constitution and the PAJA might require remediation of any overly harsh result.

Because law is often a “pragmatic blend of logic and experience,” the Court asserts it does no harm to “the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful,” for the Court to use its expansive discretion to limit the

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221. Mineral and Petroleum Resources Development Act 28 of 2002 § 2 (S. Afr.).

222. Promotion of Administrative Justice Act 3 of 2000 (S. Afr.).

223. S. AFR. CONST., 1996, ch. 2.

224. *Bengwenyama*, 2010 (3) BCLR 229, para. 61; Promotion of Administrative Justice Act 3 of 2000 § 6 (S.Afr.).

225. *Bengwenyama*, 2010 (3) BCLR 229, para. 85.

detrimental effect on the recipient of improper administrative determinations. The consequence of the Court's approach in *Bengwenyama* is that the Community and their allied parties secure their rights and a reward for the time and effort of litigation but the cost to non-governmental respondents is mitigated to the extent they relied on plausible state administrative processes.

The consequence of the case as a whole is found in two elements. First, is the announcement of the "preferent right" for owner-occupiers. This necessarily incorporates environmental concerns into the larger South African program of land (and natural resource) restitution. It strongly supports close consideration of the rights and interests of native owner-occupiers. Secondly, *Bengwenyama* demonstrates that additional pieces of statutory law, here the MPRDA and PAJA will be used by the Court to advance the eco-protective principles of the Constitution.

d. *Maccsand v. City of Cape Town*.

In *Maccsand Ltd. v. Cape Town (Maccsand)*,<sup>226</sup> the Court again discussed environmental rights in the context of mining. Apartheid era officials had been extremely accommodating to mining interests and the post-apartheid Constitution made mining and natural resources an area of exclusive national competence—even though environmental protection was an area of national and provincial shared competence.<sup>227</sup> The *Maccsand* Court noted that "Mining plays an important role in the national economy"<sup>228</sup> and the interplay of mining and environmental issues "clearly raises constitutional issues."<sup>229</sup>

The Mineral and Petroleum Resources Development Act was a very new statute when the *Maccsand* dispute first arose in 2007.<sup>230</sup> The MPRDA is intended, according to the Court, to be "transformative" legislation, seeking to "eradicate all forms of discriminatory practices in the mineral and petroleum industries" and declaring mineral and petroleum resources to be "the heritage of all the people" with "the state [as] custodian."<sup>231</sup>

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226. *Maccsand (Pty) Ltd. v. City of Cape Town* 2012 (4) SA 181 (CC) (S. Afr.) [hereinafter *Maccsand*].

227. S. AFR. CONST., 1996, sched. 4, pt. A.

228. *Maccsand*, 2012 (4) SA 181, para. 39.

229. *Id.* para. 37.

230. Mineral and Petroleum Resources Development Act 28 of 2002 (S. Afr.).

231. *Maccsand*, 2012 (4) SA 181, para. 3.

Acting though the national Minister for Mineral Resources, who has expansive powers to assign mining rights, South Africa uses the MPRDA to control and regulate access to natural resources throughout the country.

The Minister had authorized mining operations in several areas including several undeveloped areas of Cape Town. However, Maccsand could not mine the Cape Town locations because the nationally approved areas were not zoned for mining or prospecting under municipal law. Cape Town relied on the provincial Land Use Planning Ordinance (LUPO)<sup>232</sup> to prohibit Maccsand's mining operations on city-owned public open space within the municipality. The city opposed the mining because the area was near schools and homes. Maccsand claimed that the local land use law could not limit their rights to mine because "in the event of a conflict between [national and provincial] laws, the MPRDA prevailed because it regulated a functional area vested in the national sphere of government."<sup>233</sup> Cape Town insisted that their zoning laws created an independent and valid restriction on the use of regulated municipal land.

The Court sided with Cape Town and their authority under LUPO. Although the provinces have no authority in assigning mining licenses, "mining may only be undertaken on land if the zoning scheme permits it (or a departure is granted). If not, rezoning of the land must be obtained before the commencement of mining operations."<sup>234</sup> There is no "conflict between LUPO and the MPRDA. Each is concerned with different subject matter." MPRDA evaluates mining authorization against national standards and LUPO assesses the appropriate uses for municipal lands.

The fact that in this case mining cannot take place until the land in question is appropriately rezoned is therefore permissible in our constitutional order. It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere. . . .<sup>235</sup>

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232. Land Use Planning Ordinance 15 of 1985 (Western Cape) (S. Afr.).

233. *Maccsand*, 2012 (4) SA 181, para. 27.

234. *Id.*

235. *Id.* para. 48 (citing *Minister of Public Works v. Kyalami Ridge Env't Ass'n* 2001 (7) BCLR 652 (CC) para. 59 (S. Afr.)).

The creation of multi-level authorization requirements is important for at least two reasons related to environmental protection. First, it challenges the notions that mining is extraordinary and the mining industry is too economically vital to be subject to regulation. This is important because of the environmental damage caused by mining processes. Furthermore, the exceptional status of mining companies—evident in the overwhelming deference to the industry during apartheid and mining’s special constitutional status as an exclusively national concern<sup>236</sup>—seems to be at an end.

Secondly, it empowers local governments to evaluate environmental harms in the context of appropriate land use determinations. The municipality and people who reside in the area are likely to have a far greater investment in the accurate assessment and successful mitigation of environmental harms. Of course, local entities may also have a greater interest in secondary economic benefits from industrial employment, but the significant change is the affirmation of local governmental authority over potentially damaging land uses. Municipalities will not have the only say in such decisions; the mining companies can appeal to the provincial government when stymied by towns. And the Court reminds all the government entities of their constitutional duty “to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.”<sup>237</sup>

#### IV. THE SIGNIFICANCE OF SOUTH AFRICAN ADJUDICATION OF ENVIRONMENTAL RIGHTS

All the elements discussed previously in this Article—the rise of constitutional environmentalism, the history and text of the environmental protections, and the case law—contribute to the importance of the South African Constitution’s protections and the Court’s jurisprudence. As a result of its unique history and

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236. Mineral and Petroleum Resources Development Act 28 of 2002, pmbl. (S. Afr.).

237. S. AFR. CONST., 1996, ch. 3, § 41 (cited in *Maccsand*, 2012 (4) SA 181 para. 47). Of note, the Court failed to address an additional question, declaring the issue was not yet ripe. The national Minister of Water Affairs and Environment also claimed authority to weigh in on mining authorizations. *Maccsand* and others argued that NEMA did not apply to decisions made under MPRDA because the Mining Act worked outside the NEMA framework. *Id.* paras. 27-28. A future case is likely to present this issue before the Court more directly.

constitutional structure, the South African Constitutional Court possesses special capacities to address domestic environmental concerns and impact comparative law discourse regarding constitutional environmental rights. The judiciary has already demonstrated successful, albeit modest, domestic adjudication through its early environmental jurisprudence and it exhibits the potential for even more significant outcomes in the future. The Court holds a highly influential position in the field of comparative constitutional law because of its expansive rights protections, permissive jurisdictional rules, hard-wired consideration of foreign and international law, and its unrivaled reputation among academics and jurists. Altogether, this highly influential court is intellectually and politically capable of supporting a dramatic evolution in the field of constitutional environmental rights.

*A. Environmental Adjudication in South Africa*

*1. Characteristics of the current jurisprudence.*

The Court's environmental jurisprudence occurs against the background discussed earlier in this paper: enumerated rights to an environment that is not harmful to health and is protected to ensure sustainability; purposive rights interpretation in service of the core constitutional values of dignity, equality, and democracy; and provisions allowing liberal access to the courts and broad discretion in judicial remedies.

Although there have been a limited number of environmental rights cases before the Constitutional Court, the Court's announcement of broad but impactful enforcement principles allows us to highlight several elements that characterize the Court's early environmental jurisprudence. Many of the lessons of the cases are easily applicable beyond their narrow facts and specific history. Moreover, the congruent structure and interrelated nature of environmental legislation in South Africa (at least at the dominant national level) has the consequence of making the constitutional rulings in any one case relevant to multiple pieces of environmental legislation.

For purposes of this Article, the jurisprudential elements are gathered under three general themes: empowerment, fair process, and integration.

a. *Empowerment.*

Several elements of the Court's case law evidence the theme of empowerment in its environmental jurisprudence—empowerment of people and local governments. The *Bengwenyama* case demonstrates the Court's dedication to empowering local residents when environmental decision-making may harm their communities. Partially, this is accomplished through fair procedural standards, also discussed below, because empowerment of residents involves open information and meaningful consultation and is supported by the threat of invalidation of the authorizations granted where local concerns are inadequately addressed.

Additionally, the *Maccsand* judgment pointedly empowers local government. By affirming the on-going role of municipalities in land use assessment, even where national mining interests are concerned and national permissions have been granted, the Court gives power to local officials to choose if some environmentally harmful land uses are appropriate for their community. Or, where they wish, officials can presumably bargain for (or at least expect) cleaner or otherwise more beneficial characteristics to mining, power generation and other industrial projects over which they effectively have a veto.

The final empowerment element is evident in the willingness of the Court to address the mining industry. Mining is one of the most potentially destructive and polluting commercial activities in South Africa, but mining is also one of the most economically important industries in South Africa. The “enormous damage mining can do to the environment and ecological systems” has been recognized repeatedly in the case law and by environmental organizations.<sup>238</sup> Hence, the Court has demonstrated the breadth of Section 24 application in a particularly strong way by limiting the environmentally damaging acts of mining companies in several of its early cases.

b. *Fair and cautious processes.*

The issue of procedural fairness comes up in most environmental cases. Among the cases discussed here, *Bengwenyama* and *Maccsand* are particularly concerned about the

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238. *Director: Mineral Dev., Gauteng Region v. Save the Vaal Env't* 1999 (2) SA 709 (SCA) para. 20 (S. Afr).

processes that lead to environmental decisions. Has the necessary information been made available; have the effected parties been consulted with a reasonable opportunity to critique and effect the result; and have the appropriate governmental agencies been consulted relative to their differing expertise and concerns? The effectiveness and fairness of decision-making procedures, a concern in many areas of rights adjudication, is central to the Court's jurisprudence in the area of environmental protections. As the Court has said in a related case: "The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making process."<sup>239</sup>

Moreover, the Court affirms the use of cautious standards in decision-making that may harm the environment. In both *Fuel Retailers* and *HTF Developers*, the Justices cite NEMA's "risk-averse and cautious approach, whereby, negative impacts on the environment and on people's environmental rights [are] anticipated and prevented, and where they cannot be prevented, are minimized and remedied."<sup>240</sup> The Court has particularly favored caution when the harms are unknown or uncertain. Rather than requiring evidence of assured harm, the Court supports an approach that is generally more protective than permissive.

*c. Integration.*

It goes without saying that the Court's interpretation of Section 24 rights is broadly construed to serve the goal of a healthy, sustainable environment in the context of a country seeking to advance dignity, equality, and freedom. Those elements of the Court's jurisprudence are fixed by the Constitution's textual requirements for interpretation.<sup>241</sup> But there are several interpretive elements that are unique to the environmental jurisprudence.

The Court has shown the interrelation of Section 24 with the property rights provision and the constitutional scheme for land

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239. *Doctors for Life Int'l v. Speaker of the Nat'l Assembly*, 2006 (6) SA 416 (CC), para. 116 (S. Afr.).

240. *Bengwenyama*, 2010 (3) BCLR 229, para. 24; *Fuel Retailers*, 2007 (10) BCLR 1059, ¶81 (quoting Section 2(4)(a) (vii-viii) of NEMA).

241. S. AFR. CONST., 1996, ch. 2, § 39.

restitution. In the *Bengwenyama* discussion of the “preferent right” of owner-occupiers previously denied their land rights, the Court integrates fair procedural requirements, constitutional property rights of “equal access to natural resources,” and environmental protections through privileged disclosure, consultation and influence for the resident Bengwenyama Community.

Additionally, the Court’s affirmation of the National Environmental Management Act reflects the efficacy of integration. The Court speaks highly of NEMA in nearly all environmental law cases. The principles that begin NEMA are frequently cited as elucidating the pithy expression of environmental values of the constitutional text.<sup>242</sup> The core, quasi-constitutional task of the statute is seen in the full title of NEMA, which identifies its role as framework legislation meant to

provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-coordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith.<sup>243</sup>

Creation and judicial support for framework legislation of this kind streamlines the introduction and maintenance of constitutional values in modern and apartheid era statutes and more effectively disseminates the Court’s rulings throughout legislative and executive actions.

Additionally, integration is the overarching premise of the Court’s approach to economic development and environmental protection. In both *HTF Developers* and *Fuel Retailers* the Court stresses the centrality of the concept of sustainable development to understanding the functional relationship between a wealthy and healthy future South Africa. The Constitution “envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development.”<sup>244</sup> Sustainability as a concept is itself integrative,

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242. *Fuel Retailers*, 2007 (10) BCLR 1059, para. 40.

243. NEMA, *supra* note 169.

244. *HTF Developers*, 2007 (4) BCLR 417, para. 44-45.



supporting consideration of both present and future generations and present and future environmental conditions. Sustainable development is also a famously slippery concept, but the Court's insistence on evaluating sustainable development and sustainable use of natural resources at least ensures that the considerations of sustainability will not merely be presumed to be satisfied for any of the legislation passed under statutes with internal sustainability requirements.

The Court presentation of environmental right jurisprudence as involving a "composite right," one that includes consideration of social, economic, and cultural elements also demonstrates the commitment to integration. The Court expresses a need to evaluate and consider the cumulative impacts of individual environmental harms but also the socioeconomic impact of environmental decisions in *HTF Developers*.

In general, the Court's environmental jurisprudence is typified by robust enforcement of expansively interpreted environmental rights to a healthy environment and sustainable development and use of natural resources. The Court particularly requires integrated decision-making processes; they must proceed cautiously, consider all relevant social, economic, and cultural factors, and meaningfully involve effected persons and communities.

## 2. *Assessing the Court's environmental rights jurisprudence.*

At his retirement, the first President of the South African Constitutional Court affirmed the Court's central duty:

What the Constitution demands of [the Court's justices] is that a legal order be established that gives substance to its founding values—democracy, dignity, equality and freedom; a legal order consistent with the constitutional goal of improving the quality of life of all citizens, and freeing the potential of each person. The challenge facing us as a nation is to create such a society; the challenge facing the judiciary is to build a legal framework consistent with this goal.<sup>245</sup>

Any assessment of the current environmental jurisprudence of the Court must begin with a reminder of the goal: a viable and

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245. Justice Arthur Chaskalson, Farewell Speech given at the Constitutional Court of South Africa (Jan. 3, 2011).

beneficial legal framework for environmental protection in accordance with constitutional values.

But the capacity of courts to effect significant change is limited. Those limits are likely to be even more significant when courts are adjudicating rights other than traditional civil and political rights, when there is less comparative or international support for their adjudication, or when the adjudication of the rights potentially raises significant separation of powers issues or threatens economic development. And, each of those descriptions applies to South African enforcement of constitutional environmental rights in the last two decades. Hence, observers are rightly skeptical of the judiciary's capacity to, in this case, "save the planet."

Additionally, any assessment of the Court's jurisprudence must also recognize the particular challenges in the context of environmental protection—transnational harms and the need for transnational solutions, the significant potential for rulings to interfere with political decisions, and the need for highly-specialized knowledge, among other concerns. The only reasonable expectations are genuinely modest ones—at least when measured against the enormity of the problems of environmental degradation, especially in poor areas and resource-heavy developing countries. It is in light of such humble expectations (and perhaps only in that context) that the Court's work can be seen as substantially beneficial in the four ways discussed below.

a. *Reaffirming constitutional values.*

The Constitutional Court is the "the key institution of [South African] constitutional democracy," the primary guardian and expositor of the Constitution.<sup>246</sup> From the time it was founded and given the task of certifying the Constitution and guaranteeing inclusion of the previously negotiated characteristics of the final Constitution to its on-going charge to monitor the lower judiciary and the assess the validity of government actions, the Court has been at the center of South Africa's transition. It is the most visible symbol of the modern constitutional state.

To the extent that the Court's review of current controversies encourages popular or legislative dialogue about constitutional

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246. CONSTITUTIONAL COURT OF SOUTH AFRICA, *About the Court*, <http://www.constitutionalcourt.org.za/site/thecourt/history.htm> (last visited May 30, 2013). As the Court's website states: "[T]he 11 judges stand guard over the Constitution and protect everyone's human rights." *Id.*

commitments to the environment, it further advances the values of the Constitution. It reminds all South Africans that the Constitution's historic promises remain relevant to present problems. This strengthens and reinforces the role of the Constitution in contemporary society. Indeed, it is perhaps a particularly vital role of these early generations of the Constitutional Court to reinforce the values of the founding generation through their written judgments. With its review of environmental disputes, the Court advances the express commitments to a healthy environment and to environmental protections in Section 24 but also supports the rights to fair administrative action, land restitution and the core values of dignity, equality, and democratic self-governance.

The Court's insistence on fair, participatory procedures and open administrative hearings and decision-making promotes the constitutional values of democratic involvement and public governmental action. Similarly, the Court's has affirmed the complementarity of environmental rights and land reform rather than casting them in opposition. The announcement of a preferent right in *Bengwenyama* demonstrates one means of coordinating these two constitutional principles.

Moreover, with environmental rights, which some people likely view as inhibiting economic progress or contributing to unemployment (when, for example, development projects are halted for environmental reasons), the Court plays a critical role, reminding South Africans of the commitments they made in the Constitution—even if those commitments appear inconvenient or undesirable in particular circumstances. This is facilitated by the Court's enviable position of perceived neutrality, which allows the Court to assert environmentalism as a constitutional value in a more credible way than advocates could. The discussion of sustainable development and use in *Fuel Retailers* is an example where the Court takes on this role of impartial evaluator and educator. It explains and affirms the Constitution's values rather than adopting the values of one side or other in the dispute.

b. *Providing a basis for rights claims.*

Even among the many countries with environmental rights, few countries have substantial, consistent, and protective case law under their environmental rights provisions. Either because the country has a weak rule of law, the provisions are textually

identified as unenforceable, or due to judicial under-enforcement, many nations do not adjudicate environmental rights as they do other rights. Moreover, even among countries with enforceable constitutional environmental rights, few have the permissive access provisions that the South African Court does. Hence the most direct way in which the Constitutional Court advances environmental protection in South Africa is by hearing claims, enforcing rights and remedying harms under Section 24. The Constitutional Court has asserted the enforceability of Section 24 along with all other rights. It has affirmed the actual justiciability of environmental rights in practice. And, the Court has announced tangible remedies that have altered the behavior of private industry and government agencies. The Court has reaffirmed the parity of all the rights included in the Bill of Rights, including Section 24. “In the current constitutional dispensation the right to a clean environment must enjoy recognition equal to that which is accorded other rights.”<sup>247</sup>

Moderate success has been evident in the Court’s judgments in the specific substantive areas brought before it. The Court has affirmed local government land use authority as independent from national licensing authority. It has prohibited siting a gas station where insufficient consideration was given to sustainability issues. It has halted development of “virgin ground” where the constitutional principles that animate environmental statutes were insufficiently considered. And, it has denied mining permits where the local community was given insufficient input. These are not insignificant results for a modest number of cases over a less-than-two-decade history.

Moreover, the Section 24 protections yield both interpretive guidance and substantive constitutional rights. The case law is most often a reflection of constitutional values as justifications for broad, purposive interpretation of statutory environmental law, but Section 24 also gives rise to substantive, constitutional requirements. In the presence of a statute, interpretation consistent with Section 24 will be the guide, but in the absence of any appropriately protective law, the substantive provisions of the constitution permit independent claims.

But even these direct influences are not necessarily the most consequential, despite the Court’s expansive powers. The Court’s

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<sup>247</sup> *HTF Developers (Pty) Ltd. v. Minister of Envtl. Affairs & Tourism* 2007 (5) SA 438 (SCA) at para. 25 (S. Afr.).

case law has a much more substantial effect indirectly through other South African courts. The High Courts and other lower courts in South Africa consider a far greater number of environmental cases. The Court has not only provided direct precedent for some issues, but it has provided general guidance for many more. The Court has modeled a means of interpreting statutory law that is informed by constitutional environmental values in addition to modeling direct constitutional enforcement. In fact, by constitutionalizing the major environmental statutes—especially the NEMA framework legislation—the Court has authorized the lower courts to interpret elements of that Act and similar statutes in expansive ways that serve environmental purposes.

*c. Influencing policymakers and decision-makers.*

The third notable benefit of the Court's environmental adjudication is its intentional and proactive use of its judgments and judicial orders to steer state actors to act consistently with their constitutional obligations. Courts to some extent always use this guidance function; the nature of legal precedent is intended to inform private and state actors of the import of particular legal results for relatively similar parties in relatively similar, future situations. But the South African Constitutional Court has gone further.

The Court's willingness to robustly enforce the Constitution's provisions guides governmental outcomes through indirect influence and the direct threat of invalidation. This can occur in more abstract ways, such as in the perceived rejection of *carte blanche* authority for the mining industry (as a result of *Maccsand*), or in specific ways through identification of required elements for environmental review, such as the meaningful inclusion of affected local communities in *Bengwenyama*. Because of respect for the Court—and its capacity to step into future disputes—the Court's opinions inform legislative decision-making and facilitate appropriate executive action. Presumably, future legislative drafting or amending of legislation relevant to environmental protection will be informed by the existing jurisprudence—as will executive policies and procedures.

Indeed, occasionally this guidance becomes censure. The South African courts have also evidenced frustration with under-

enforcement of environmental provisions.<sup>248</sup> Other governmental actors would be naïve to think the Court will not step in and act when the facts in a future case demonstrate “the slow and inexorable grinding of wheels across a bureaucratic landscape regardless of the urgency of the situation.”<sup>249</sup> The threat of this kind of opprobrium should motivate (at least minimally) adequate government responses to future environmental concerns.

The impact the threat of judicial review has had in promoting environmental legislation at a national and provincial level is an ultimately unknowable (and unpredictable) element of the “success” determination. But it seems reasonable to assume that the combination of enumerated environmental rights and active enforceability by the Court will aid alignment of environmental needs and governmental action over time.

Certainly, the Court’s environmental rulings are warnings to private industry, where litigation and expense pressures may be even more persuasive. The Court’s expressed standards for popular consultation and environmental impact assessment steer rational decision-making by private economic actors in ways that facilitate environmental values. A natural resources company is more likely to choose extraction methods that are less damaging to the environment if there is a real threat that the otherwise less expensive means will be challenged in court and are likely to then to reject. Even the cost-benefit analysis of bribing local officials is different if there is a real chance of secondary review of the decision by the courts.

d. *Supporting civil society.*

One of the most foreseeable elements of the Court’s jurisprudence is the requirement for local consultation—but it is also potentially the one with the most significant consequence. Requiring disclosure and consultation, or as the Court states it in another context, “meaningful engagement,”<sup>250</sup> arises from both

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248. *Wildlife Soc’y of S. Afr. v. Minister of Env’tl. Affairs & Tourism* 1996 (1) BCLR 1221 (T) at 42 (S. Afr.) (“It is difficult to understand why, in the face of overwhelming evidence of illegal land practice uses, it was considered necessary to determine ‘political support’ for action to be taken . . . and why there should have been such a remarkable and disturbing reluctance immediately to [enforce the law].”).

249. *Id.* at 43. This case from the Transkei Provincial Division was decided under the interim Constitution before the coming into force of the 1996 Constitution and the re-organization of the courts.

250. See, e.g., *Occupiers of 51 Olivia Rd., Berea Twp. v. City of Johannesburg* 2008 (5)

the Constitution and statutory law.<sup>251</sup> The Court strengthens these requirements and increases their influence through actual, qualitative evaluation of engagement. The Court not only asserts an expectation that public disclosure and consultation will actually occur but also issues orders with real consequences when it does not.

Civil society groups are also strengthened through the Court's jurisprudence and rules. Local community groups are empowered in their dealings with corporations (and even the national government) because the groups' opinions about the quality of local consultation and the failings of any approved plans may inform future litigation. The threat of litigation is real because of South African courts' expansive standing provisions and the perpetual fallback position of a constitutional claim before the Constitutional Court. The Court demonstrated an even greater consequence of local consultation rules in the context of post-apartheid land reform in *Bengwenyama*, where the Court invalidated a previously issued government license for mining because the local owner-occupiers had a preferent right to select the recipient of licenses for resource extraction.

At the present stage, eighteen years after the Court began hearing cases under the post-apartheid Constitution, there is evidence of modest success on the part of the Court at openly reaffirming the nation's commitment to a healthy environment and sustainable development and actively identifying specific deficiencies in governmental management and regulation of the environment and corporate environmental practices. Moreover, the Court has indirectly pressured the government to advance the protective goals of the constitutional text and conspicuously supported the work of formal and informal civil society groups. The results may be limited at this stage but they are significant in relative terms and there are reasons to believe they will grow most significant in time.

#### B. *The South African Constitution as a Global Model for Human Rights*

If end-of-the-century human rights scholars had written a "best practices" manual for

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BCLR 475 (CC) paras. 18-23 (S. Afr.).

251. S. AFR. CONST., 1996, ch. 2, § 33 ("Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."); Promotion of Administrative Justice Act 3 of 2000 (S. Afr.).

constitution drafters, the chapter on “What to Include in Your New Bill of Rights” would look very much like the South Africa Bill of Rights in the 1996 Constitution. Of course, this is no coincidence. The process of drafting the South African Constitution was “a deliberate attempt to have a fundamental instrument of government that embraced basic human rights.”<sup>252</sup> The final text not only included numerous, enforceable rights but one of its primary identified purposes was to “establish a society based on democratic values, social justice and fundamental human rights.”<sup>253</sup>

Moreover, the first generation of justices to interpret the Constitution, they themselves steeped in the international human rights tradition,<sup>254</sup> saw rights adjudication as a core purpose of their institution. As former Chief Justice Chaskalson described it, “[u]nder our Constitution the normative value system and the goal of transformation, are intertwined.”<sup>255</sup> This ideology is focused on an image of South Africa as a reformed nation—not just a liberal democracy but a “human rights state”—which is in the process of rising to its great potential to transform itself and to be an example to other nations.<sup>256</sup> The “Constitution demands [of judges] . . . a legal order be established that gives substance to its founding values—democracy, dignity, equality and freedom.”<sup>257</sup>

One result of this constitutional history is a great deal of respect for the South African Constitution, which has been described as one of the “newer, sexier and more powerful operating systems in the constitutional marketplace.”<sup>258</sup> American Supreme Court Justice Ruth Bader Ginsberg agreed, recently

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252. Jonathan Faull, *Praising the South African Constitution*, AFRICA IS A COUNTRY (Feb. 16, 2012), <http://africasacountry.com/2012/02/16/praising-the-south-african-constitution/> (quoting U.S. Supreme Court Justice Ruth Bader Ginsburg).

253. S. AFR. CONST. 1996, pmbl.

254. Many of the justices, especially the ANC members, had joined foreign law faculties, human rights organizations, and NGOs, or had participated in meetings or international conferences related to apartheid and human rights. See website of the CONSTITUTIONAL COURT OF SOUTH AFRICA, *Judges*, <http://www.constitutionalcourt.org.za> (last visited Jan. 6, 2012) (providing biographies of current and former justices).

255. Chaskalson, *supra* note 245.

256. S. Afr. Const. 1996, pmbl.

257. Chaskalson, *supra* note 245.

258. Adam Liptak, *‘We the People’ Loses Appeal with People Around the World*, N.Y. TIMES, Feb. 6, 2012, available at <http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html>; Jonathan Faull, *supra* note 252. Even South Africa agrees. S. AFR. CONST. 1996.



encouraging Egypt to look to the model of the South African Bill of Rights as an exemplar for its new constitution.<sup>259</sup> This makes the Constitution even more important in comparative context; it is recommended as an example for burgeoning democracies. Although the lived reality could not possibly match the promise of its founding document, “South Africa’s pro-human rights constitution, stable government, democratic institutions, independent judiciary, and strong economy mean it has great potential to become a global human rights leader.”<sup>260</sup>

The content of the constitutional provisions matters as well. South Africa chose to include both the healthy environment element and an environmental protection element. This decision by the drafters to include expansive constitutional environmental rights in the South African Constitution has impact far beyond the country’s borders. The South African Constitution is a well-respected extant model for other countries and future constitutions.

The Constitutional Court’s jurisprudence is also a model for other nations. With an eye on the international community, the Court’s work helps to build a “united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”<sup>261</sup> In pursuit of this project, the Court has boldly advanced traditional political rights, as well as social welfare rights and now environmental rights. The Court’s opinions are frequently discussed by comparative legal scholars, appear in many comparative law textbooks and its judges are frequent visitors and speakers at law schools worldwide. There is abundant exposure to South African constitutional law because of the respect for the Constitutional Court judges, the admiration for its Bill of Rights, and the nation’s compelling history as a human rights state born out of apartheid.

This bolsters the significance of the Court’s environmental rights jurisprudence. The South African Constitutional Court, drawing on a greatly respected Constitution and considering international and comparative law in its decisions, finds environmental rights to be justiciable and enforceable. Because the judgments come from the South African Court, they are more

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259. Liptak, *supra* note 258.

260. HUMAN RIGHTS WATCH, 2011: *South Africa Annual Country Report*, <http://www.hrw.org/world-report-2011/south-africa>.

261. S. AFR. CONST. 1996, pmb1.

likely to be noticed and they may more easily join the comparative law conversation about human rights adjudication. The South African Court has always seen itself as part of a global conversation about constitutional values and constitutionalism; but when the Court speaks about environmental rights in its cases, it is not only speaks to an international audience but it addresses a topic of global concern.

## V. CONCLUSION

“Bold constitutions require bold judges.”<sup>262</sup> So said the then-member of the ANC Constitutional Committee (and later Constitutional Court Justice) Albie Sachs in a book about human rights during the negotiations that ended apartheid. And the insight remains true as modern constitutional drafters include bold new rights to a healthful and sustainable environment in their governing documents. But traditional models of adjudication may be inadequate; novel rights require new processes and approaches. The South African model of adjudication is one such innovative approach.

The South African Constitutional Court has already demonstrated successful, albeit modest, domestic adjudication through its early environmental case law. Moreover, its social welfare rights jurisprudence and capacious purposive approach to rights adjudication reveal potential avenues for even more significant outcomes in the future. The Court has interpreted South Africa’s Section 24 environmental rights provisions not only in light of its protection of a healthy and sustainable environment but in light of other enumerated rights and the purposive charge of the Constitution generally: to advance liberty, dignity and equality.

So, is South Africa an environmental lawyer’s paradise? No. The long standing exploitation of land, the economic reliance on resources that are finite or destructive to the land when extracted (such as diamonds and gold), and the historical use of land regulation in the larger scheme of apartheid have contributed to unsustainable exploitation of natural resources and pollution. The relative novelty of environmental rights, their relative unimportance in the scheme of immediate human needs, a lack of information about constitutional and legislative remedies, and a

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262. SACHS, *supra* note 63, at 214.

lack of resources to educate or assert such rights contribute to the present inadequacies of environmental protection in South Africa.

However, the current circumstances are also encouraging. The Constitution includes expansive protections for the environment and the Court has prohibited ecological harms and affirmed requirements for government protection in its early case law. Ultimately, constitutions are expressions of a nation's ideals, reflections of enduring values and commitments. For many modern nations like South Africa, environmental values are a part of that.

Environmental problems are greater than a single nation and thus the comparative value of their potential solutions are particularly vital. In comparative perspective, the South African Constitution and the Constitutional Court are noteworthy and progressive. South Africa is uniquely positioned to advance and influence the use of constitutional rights to protect the environment. The Court holds a uniquely influential position in the field of comparative constitutional law with its expansive rights protections, permissive jurisdictional rules, hard-wired consideration of foreign and international law, and its unrivaled reputation among academics and jurists. The South African model is thus important because its values of empowerment, fair process, and integration have elicited a substantive, protective environmental rights jurisprudence.