

Rights of Rivers in South Africa: is transformative adjudication up to the task?

by

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Declaration

I declare that this report is my own, unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by coursework and research report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

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Abstract

Freshwater is a valuable and scarce natural resource, whose ongoing degradation threatens not only rivers, wetlands and aquifers themselves, but also their surrounding ecosystems, Earth's essential biodiversity, and the ability of humans and nature to co-exist and thrive. Society's prevailing value system measures water's worth to the extent that it benefits people. But this anthropocentric approach is failing to engender behaviour that is necessary to stem catastrophic biodiversity loss and the concomitant threat to human wellbeing. Rights of Nature is emerging as a paradigm rooted in an alternative ethic of respect and justice for all Earth's subjects. Rights of Rivers is a branch of the Rights of Nature that has been a catalyst in confirming the intrinsic value of thriving riverine ecosystems. Recent river rights cases in developing countries have set the stage for changing legal norms: Courts in Columbia, India and Bangladesh have played a transformative role in pursuing social as well as environmental justice through acknowledging Rights of Rivers and espousing an eco-centric theory of value. In South Africa, the Constitution envisages radical change to a society based on equity and dignity, but but courts have been slow to acknowledge the intersection of environmental, socio-economic and political rights. This paper argues that adjudication must contribute to the transformative constitutional project by adopting a progressive stance: both jurisprudentially, in following a method of value-based, substantive, contextual reasoning; as well as politically, in recognising eco-centric principles of interspecies equity, justice and interdependence. The shortcomings of a narrow judicial perspective are discussed via the Mabola water-use license judgment. The paper offers an alternative judgment, grounded on an interdependent, egalitarian human-nature relationship.

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1. Introduction

Humanity and non-human species are experiencing a global freshwater crisis. A third of the world's population suffer insecure access to safe water;¹ severe droughts and floods are increasing;² water pollution is soaring³ and freshwater species are facing rapid extinction.⁴ Fresh water is indispensable for all life on Earth, yet humans continue to pollute and over-exploit it.⁵ The threat to water resources endangers Earth's essential biodiversity.⁶ It also endangers a range of subsistence, health, livelihood, cultural and ecological benefits that people obtain from thriving, biodiverse aquatic ecosystems.⁷

The focus of this research report is an analysis of the value system underpinning the policies, institutions and practices that have allowed Earth's freshwater resources to reach this state of deterioration. Humanity's behaviour towards Nature⁸ is underpinned by a dominant, anthropocentric value system that narrowly focusses on utility to humans.⁹ Moreover, the overriding assessment method for water's utility is economic and does not include non-use values such as water's intrinsic worth.¹⁰

How should we then recognise the value of water? The cases of the Atrato, Ganges, Yamuna, and Turag rivers provide case studies where the judiciary has taken the lead, as part of a broader movement to recognise Rights of Nature, and extended existing legal frameworks by adopting an eco-centric worldview and values.¹¹ Eco-centrism acknowledges the inherent worth of all Earth's component parts, which form a fundamentally interdependent unit. Through value-driven adjudication, judges sought to advance a constitutional vision of wellbeing and respect for the Earth and for humanity as part of the Earth.

¹ UNESCO, 'The United Nations World Water Development Report 2019: Leaving No One behind - Facts and Figures' 2,4.

² *ibid* 3.

³ *ibid* 2.

⁴ 'WWF Living Planet Report 2022 - Building a Nature-Positive Society' (WWF 2022) 36.

⁵ UNESCO (n 1) 2.

⁶ 'WWF Living Planet Report 2022 - Building a Nature-Positive Society' (n 4) 37.

⁷ World Resources Institute, *Millennium Ecosystem Assessment: Ecosystems and Human Well-Being: Synthesis* (WRI 2005) 1.

⁸ Capitalising 'Nature' reflects an eco-centric, egalitarian approach, recognising its intrinsic value and Nature as holder of rights.

⁹ Loretta Feris, 'Constitutional Environmental Rights: An Under-Utilised Resource' (2008) 24 *South African Journal on Human Rights* 29, 32.

¹⁰ UNESCO, 'UN World Water Development Report 2021: Valuing Water' 21.

¹¹ Refer Section 4.2.

This paper examines the role of the judiciary in South Africa in addressing the freshwater crisis. In particular, how it has deprioritised the interests of Nature and the Rights of Rivers. It examines the responsibility of judges to develop an eco-centric value system and progressive stance that align with the inclusive, egalitarian ideals of the Constitution of South Africa, 1996. These principles are embodied in the theory of transformative environmental constitutionalism. I employ the methodology of judgment re-writing, through the lens of transformative environmental constitutionalism, to critique two existing water-use licence judgments.¹² I first analyse the key characteristics of transformative environmental constitutionalism from theory and case law, then apply them in my own re-written judgment. The re-writing aims to show that judges must foster a fairer balance between social, economic and environmental rights, that this perspective brings about a more just decision.

Section Two traces how, notwithstanding the multiple and diverse values of freshwater for all life on Earth, humans have caused its critical degradation. Section Three examines why our underlying anthropocentric values and accompanying economic exploitation of natural resources are incompatible with wellbeing for the whole Earth. It sketches how an eco-centric theory of value provides an egalitarian and sustainable solution. Section Four analyses transformative environmental constitutionalism in South Africa, and why it demands adjudication that is jurisprudentially and politically progressive. It then provides three examples of progressive adjudication in Columbia, India and Bangladesh that have advanced the Rights of Rivers. Section Five notes where eco-centric values have started to emerge in predominantly anthropocentric legislation. Lastly, Section Six contrasts the traditional, anthropocentric and legalistic approach of adjudication in the Water Tribunal case of *Endangered Wildlife Trust v Director-General, Department of Water and Sanitation*¹³ and its High Court appeal¹⁴ (the Mabola cases), with a re-written judgment that transparently recognises equal worth, dignity and wellbeing for a community that includes both humanity and Nature.

¹² Kathryn Gooding, 'How Can the Methodology of Feminist Judgment Writing Improve Gender-Sensitivity in International Criminal Law?' (2020) 5 LSE Law Review 115.

¹³ (WT/03/17/MP) [2019] ZAWT3 (henceforth *Mabola Tribunal*).

¹⁴ (A155/2019) [2023] ZAGPPHC 524 (henceforth *Mabola Appeal*).

2. Freshwater resources: valuable, yet imperilled

Water sustains both people and all of non-human Nature. It is the source of all life on Earth. Unlike any other natural resource, water does not merely support economic development, it is a pre-requisite for human life and all ecosystem existence. Freshwater makes up a mere three per cent of all Earth's water, but excluding ice caps and glaciers leaves only 0,6% groundwater and 0,03% easily accessible surface water.¹⁵ Yet 40% of the world's plant and animal species find their breeding grounds in wetlands, which are considered the most biologically diverse of all ecosystems.¹⁶

Just as water allows Nature to flourish, so Nature's healthy ecosystems, or biodiversity, are essential for secure water flows.¹⁷ Biodiverse ecosystems replenish, purify and protect water as it moves through Nature.¹⁸ Rivers, lakes, wetlands, aquifers and coastal estuaries form the base of freshwater ecosystems. Together, the surrounding vegetation and animal life, aquatic organisms, and waterbody's bed, banks and sediments form a completely integrated freshwater ecosystem.¹⁹ They are pivotal to sustaining terrestrial, coastal and marine ecosystems.

Beyond sustaining biodiversity and ecosystems, water provides people with benefits, with the means to survive and thrive. The Millennium Ecosystem Assessment conceptualised Nature's contributions to people as ecosystem services: highlighting Nature's utility to humans.²⁰ Examples are legion: rivers dilute pollutants, peatlands capture carbon, wetlands regulate floods, lakes offer recreation. Freshwater ecosystems services are indispensable for water and food provisioning, for human health and livelihood, for energy security and climate resilience, for socio-cultural expression.²¹

Water is invaluable but scarce: globally over two billion people do not have access to safe drinking water and shortages affect up to three billion.²² In South Africa some 5% of households rely on unsafe water sources.²³ South Africa receives less than half the global annual rainfall,

¹⁵ *Watermark: The Lasting Impression of the Ecological Reserve* (Water Research Commission 2016) 22.

¹⁶ Ramsar, 'Wetlands and Biodiversity Factsheet' 1

<https://www.ramsar.org/sites/default/files/ramsar_50_factsheet_biodiversity_english_as_v7.pdf>.

¹⁷ Andrew L Skowno, *National Biodiversity Assessment 2018: The Status of South Africa's Ecosystems and Biodiversity: Synthesis Report* (SANBI 2019) 4.

¹⁸ *Watermark: The Lasting Impression of the Ecological Reserve* (n 15) 22.

¹⁹ Le Maitre, 'Why Is There an Ecological Reserve?' [2014] *The Water Wheel* 27,28.

²⁰ World Resources Institute (n 7) 10.

²¹ UNESCO (n 10) 31,39.

²² Human Rights Council, 'Human Rights and the Global Water Crisis: Water Pollution, Water Scarcity and Water-Related Disasters. A/HRC/46/28' (2021) art 10,12,14.

²³ *Watermark: The Lasting Impression of the Ecological Reserve* (n 15) 13.

unevenly spread geographically and extremely variable, making water a strategic and scarce resource.²⁴

Society has extracted great value from Nature, but unprecedented growth in global goods and services during the past 70 years, has come at the cost of enormous environmental degradation.²⁵ The services we extract from Nature have now exceeded six of nine planetary boundaries, including the freshwater boundary, risking abrupt and irreversible planetary change.²⁶ Biodiversity, already below the level needed to support resilient, reliable ecosystem functioning, continues declining precipitously.²⁷ Water resources are particularly affected, with more than 85% of wetland areas lost globally since 1700 (30% in the last 50 years).²⁸ Freshwater populations have dropped 83% since 1970.²⁹ In South Africa, wetlands and estuaries are the most threatened and least protected ecosystems: approximately 80% are endangered and up to 60% critically endangered.³⁰ Over 60% of river ecosystems are threatened,³¹ as is human health from agricultural or recreational use.³² Despite this state of affairs, South Africa's Strategic Water Source Areas remain overwhelmingly unprotected.³³

United Nations (UN) Special Rapporteur David R Boyd cautions that humans are inflicting 'catastrophic damage' on freshwater ecosystems, thereby imperilling the benefits we derive from them.³⁴ The threat to freshwater biodiversity is set to increase as human activity leads to habitat degradation, pollution, overexploitation, invasive species and climate change.³⁵ As society threatens the existence of freshwater, our existence is threatened in turn.

²⁴ David Le Maître, 'Strategic Water Source Areas: Vital for South Africa's Water, Food and Energy Security' 7, 9.

²⁵ Partha Dasgupta, 'The Economics of Biodiversity: The Dasgupta Review. Abridged Version' (2021) 16.

²⁶ 'Planetary Boundaries' <<https://www.stockholmresilience.org/research/planetary-boundaries.html>> accessed 24 September 2023.

²⁷ IPBES, 'Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services' (2019) 10; 'WWF Living Planet Report 2022 - Building a Nature-Positive Society' (n 4) 47.

²⁸ IPBES (n 27) 11.

²⁹ 'WWF Living Planet Report 2022 - Building a Nature-Positive Society' (n 4) 36.

³⁰ Skowno (n 17) 12.

³¹ *ibid* 88,90,100.

³² Department of Water and Sanitation, 'National State of Water Report 2022' ii,iii.

³³ Statistics South Africa, 'Accounts for Strategic Water Source Areas, 1990 to 2020' (2023) 31.

³⁴ Human Rights Council (n 22) 3.

³⁵ Biosafety Secretariat of the Convention on Biological Diversity, 'Inland Waters Biodiversity - What's the Problem?' (31 May 2007) <<https://www.cbd.int/waters/problem/>> accessed 1 September 2023.

3. Evolving systems of value

3.1. A problem of (economic) value

Despite water's multiple values and meanings, its economic-utility value remains most widespread and dominant in society.³⁶ Various relational, existence or intangible values are disregarded, not being measurable with a monetary yardstick. This leads to decisions on natural resources that do not represent all stakeholders or interests, and that are socially unfair and environmentally unsustainable.³⁷

The concept of sustainable development has become the lodestar of environmental conservation since the 1992 Rio Earth Summit. It relies on balancing economic needs, social development and environmental protection.³⁸ This concept is firmly entrenched in South African law. The Bill of Rights affirms that everyone has the right to have the environment protected, through reasonable measures that secure ecologically sustainable development, while promoting justifiable economic and social development.³⁹ National environmental legislation reiterates the requirement to balance social, economic, and environmental factors in environmental protection.⁴⁰

In practice, the intended equitable balancing of sustainable development is skewed in favour of economic interests.⁴¹ The preference is rooted in the benefits and beneficiaries we choose to acknowledge in determining the worth of social, economic and environmental factors.⁴² Anthropocentrism acknowledges Nature as a stockpile of resources, to be conserved specifically in the interest of utility to human beings, as opposed to valuing the richness and diversity of Nature in itself.⁴³ Moreover, it is well-established that within the varied instrumental uses of Nature, it is market-based, material values that are narrowly prioritised over relational values.⁴⁴ We prize natural resource values that reflect economic prosperity. The 2019 Global Assessment Report on Biodiversity and Ecosystem Services identified economic

³⁶ UNESCO (n 10) 21.

³⁷ Sander Jacobs and others, 'A New Valuation School: Integrating Diverse Values of Nature in Resource and Land Use Decisions' (2016) 22 *Ecosystem Services* 213, 214.

³⁸ UNGA, A/Res/70/1 Transforming our world: 2030 Agenda for Sustainable Development 2015 art2.

³⁹ The Constitution of the Republic of South Africa, 1996 s24(b).

⁴⁰ The National Environmental Management Act 107 of 1998 s1, s2.

⁴¹ RK Craig and JB Ruhl, 'New Realities Require New Priorities: Rethinking Sustainable Development Goals in the Anthropocene' in J Owley and K Hirokawa (eds), *Environmental Law Beyond* (2020) 7.

⁴² Jacobs and others (n 37) 215.

⁴³ Feris (n 9) 30,32.

⁴⁴ IPBES, 'Summary for Policymakers of the Methodological Assessment of the Diverse Values and Valuation of Nature' (Zenodo 2022) 22.

growth and the societal values that drive it, as a key reason for Nature loss.⁴⁵ A capitalist insistence on economic growth undermines the true concept of sustainable development.

Various scholars have cautioned that our pursuit of economic prosperity imperils Nature's productivity and resilience. Craig shows how governments, in pursuit of Sustainable Development Goals (SDGs), consistently prioritise short-term, development goals over longer-term, less quantifiable environmental goals.⁴⁶ The Dasgupta Review echoes that our excessive economic demands are at the cost of 'natural capital'.⁴⁷ Murcott criticises 'economically' sustainable development that takes the guise of environmentalism but is inconsistent with the constitutional duty of a healthy environment and disregards social justice considerations.⁴⁸

Proponents of sustainable development have further attempted to incorporate Nature values by recognising ecosystem services. The ecosystem services approach attempts to make Nature's worth 'economically legible', to enable Nature to compete on an equal footing when balanced against economic development interests.⁴⁹ Many scholars find the problem of continuing Nature loss still lies in not fully *accounting* for environmental benefits: many of Nature's public goods are free; negative externalities are not captured, and natural capital assets are not valued.⁵⁰ To that end, initiatives like the System for Environmental-Economic Accounting (SEEA) have been launched to integrate Nature's utility value into national accounting systems.⁵¹ However, the state of water, its biodiversity and ecosystems, continue to decline.

There is a dissenting view, namely, that the anthropocentric approach of measuring Nature's utility to humans in monetary or economic terms does not reflect the unique significance of the environment.⁵² 'It may be not just impossible but ethically quite objectionable to put a monetary value on things that have intrinsic value.'⁵³ Lele shows that it is limiting to cast the environmental crisis as an economic problem of undervaluation.⁵⁴ He sees biodiversity loss as an ethical violation that is unjust to future generations, inequitable in present society, and

⁴⁵ IPBES (n 27) 2.

⁴⁶ Craig and Ruhl (n 41) 7.

⁴⁷ Dasgupta (n 25) 16.

⁴⁸ Melanie Murcott, 'Introducing Transformative Environmental Constitutionalism in South Africa', *New Frontiers in Environmental Constitutionalism* (E Daly et al (eds) 2017) 287.

⁴⁹ Daniel Chiu Suarez and Jessica Dempsey, 'Ecosystem Services' in M Hulme, N Castree and J Proctor (eds), *Companion to Environmental Studies* (Routledge 2018) 173,177.

⁵⁰ Dasgupta (n 25) 4.

⁵¹ SEEA is an international standard, adopted by the UN Statistical Commission, measuring economic contributions of the environment.

⁵² UNESCO (n 10) 33.

⁵³ Sharachchandra Lele and others, 'Ecosystem Services: Origins, Contributions, Pitfalls, and Alternatives' (2013) 11 *Conservation and Society* 343, 351.

⁵⁴ *ibid* 352.

denying of the rights of non-human species. At the same time he sees biodiversity loss as a threat to human welfare, both in aggregate and in its fair distribution and social justice.⁵⁵ Lele thus proposes a much broader conception of wellbeing, based on values of sustainability, equity, inter- and intra-generational justice and justice to other species.⁵⁶ Sustainable development depends on more than balancing socio-economic and environmental issues, it depends on the values we attach to them. What value system do we need then, to change our behaviour and stem ecological annihilation?

3.2. The prospect of inclusive values

Our senses of value about Nature shape how we see the obligation to protect it, as well as how we balance Rights of Nature against other rights.⁵⁷ Our values determine what we consider just in our society; they form the basis of our norms: our shared expectation of acceptable behaviour, from moral standards to informal behavioural rules to formal laws. Changes in societal norms can drive institutional change and Nature-conscious decision-making. To understand how values of Nature drive Nature loss, the 2022 Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) Values Assessment considered people's disparate interactions with Nature. People's differing worldviews and values relating to Nature were succinctly expressed as '*living from nature, in nature, with nature or as nature*'.⁵⁸ *Living from nature* signifies Nature's importance to our livelihood and its instrumental, utility value as a resource; *living in Nature* suggests how Nature shapes our sense of belonging and identity in a particular landscape; *living with or as Nature* manifests an increasingly eco-centric worldview, where the inherent worth of biodiversity is recognised and responsibility, respect and stewardship are guiding principles.⁵⁹ IPBES calls for transformative change that incorporates all of the diverse values of Nature.

Scientific consensus warns that the world cannot achieve conservation goals on current trajectories without transformation of our paradigms, goals and values.⁶⁰ We need to change established norms that drive Nature loss. New scientific information, previously disregarded indigenous knowledge systems, and drastic changes in our planet's physical environment have already shifted worldviews, acknowledging the mutual interdependencies between humans and

⁵⁵ *ibid.*

⁵⁶ *ibid* 353.

⁵⁷ Suarez and Dempsey (n 49) 176.

⁵⁸ IPBES (n 44) 18.

⁵⁹ *ibid.*

⁶⁰ IPBES (n 27) 14.

Nature. Still, the principal models of ethics continue to be anthropocentric: human obligations to Nature are based on the extent to which supporting Nature's ecosystem services can further human rights.⁶¹ Yet, anthropocentric self-interest is failing to stem Nature's degradation and so society urgently needs to engage with justice for 'nonhuman' Nature.

As an alternative to the dominant philosophy of anthropocentrism, Sovacool proposes a spectrum of ethical theories based on nonhuman-centred and non-Western philosophies.⁶² The various theories progressively extend the human sphere of moral concern to animals, to living organisms and to whole ecosystems of living and non-living Nature. Animal-centred theories recognise animal rights based on principles of natural law and sentience of animals.⁶³ Life-centred or biocentric theories acknowledge that all living organisms have intrinsic worth and are entitled to their own form of life. These are underpinned by scientific evolution that places humans in a mutually dependent network of life, not at the top of a hierarchy. They base compassion and respect for life, both sentient and non-sentient, on the elemental interest or drive to survive.⁶⁴ Eco-centric theories are grounded in understanding the whole ecological system with all its elements as a single, fundamentally interdependent community.⁶⁵

Eco-centrism is strongly influenced by Earth Jurisprudence, in which humans, animals, plants, rivers and other-than-humans must each have the right to fulfil their unique evolutionary role.⁶⁶ Aldo Leopold suggested extending our community to include Nature, to change a person 'from conqueror of the land-community to plain member'.⁶⁷ Naess too reduced humanity's unique role, underscoring ecological egalitarianism in his philosophy of Deep Ecology.⁶⁸ Nature is no longer an object, a possession valued only through its use by humans. As Thomas Berry advanced, Nature is a 'communion of subjects' and all Nature has inherent rights, by the mere fact of existence.⁶⁹

Non-Western philosophies that fall in the spectrum between life- and eco-centric worldviews include Taoism, Hinduism, indigenous American beliefs, amongst others.⁷⁰ The South

⁶¹ Benjamin K Sovacool and others, 'New Frontiers and Conceptual Frameworks for Energy Justice' (2017) 105 Energy Policy 677, 15.

⁶² *ibid* 3.

⁶³ *ibid* 15.

⁶⁴ *ibid* 16.

⁶⁵ *ibid* 18.

⁶⁶ Pablo Solón, 'The Rights of Mother Earth' in Vishwas Satgar (ed), *The Climate Crisis* (Wits University Press 2018) 119.

⁶⁷ *ibid* 111.

⁶⁸ Sovacool and others (n 61) 20.

⁶⁹ Thomas Berry, *Evening Thoughts- Reflecting on Earth as Sacred Community* (Sierra Club 2006) 17.

⁷⁰ Sovacool and others (n 61) 8,11.

American, indigenous goal of *buen vivir* is based on the belief that true wellbeing is only possible as part of the extended Earth-community comprising all animals, plants and life. The African concept of Ubuntu rests on interdependence. Ubuntu, as a communitarian ethic, values people through their relationship with society and within the natural world and implies care and respect for their integrity.⁷¹

Eco-centrism is aligned with values that support sustainable, interdependent wellbeing for the whole planet. We need a radical shift in our consciousness towards the environment and our place in it to achieve tangible institutional reform.⁷² Legal frameworks need to progressively evolve alongside the principles of an eco-centric value system to enforce change. To conclude this section, I summarise in table 1 the main systems of value that underlie social norms and shape human behaviour towards Nature.

Value system	Anthropocentric	Biocentric	Eco-centric
Area of moral concern	<ul style="list-style-type: none"> Human beings Hierarchy with human dominion Humans as subjects of rights, and nature as an object for possession 	<ul style="list-style-type: none"> Humans, animals and plants, or living beings Respect for living world 	<ul style="list-style-type: none"> All living and non-living parts of Earth, ecosystems Members of the Earth community Comprehensive conception of equity that applies between and within generations and species
Dominant values	<ul style="list-style-type: none"> Egoistic concern for human beings, self-interest Utility and instrumental value to the extent that it benefits people; economic valuation Nature as service provider Material consumption, wealth, livelihood, health Under-recognition of intangible, relational, socio-cultural values of nature 	<ul style="list-style-type: none"> Altruistic concern for living beings Care, responsibility and stewardship 	<ul style="list-style-type: none"> Biospheric concern and communitarian values Inherent value by the fact of existence Ubuntu, indigenous conceptualisation of <i>buen vivir</i> Interdependence and unity Egalitarian ethos Richness and diversity of life, sustainability

Table1: Spectrum of value systems and characteristic values regarding Nature

4. The judiciary's role: from values to legal norms

Courts, through their discourse, play a transformative role in shaping the way social and legal norms evolve to accommodate differing, changing worldviews and values. Nature as a service-

⁷¹ *ibid* 6.

⁷² Christopher Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' 493–495.

provider is embedded in our policies, laws and institutions.⁷³ However, ‘we must question the values and legitimacy of any law that surpasses the ecological limits of the environment to satisfy the needs of one species.’⁷⁴ All the more as the marginalisation of certain worldviews often results from power imbalances in society where minority, vulnerable or indigenous groups are excluded. Given the prevailing functional, commercial approach to the human-Nature relationship, it is imperative that we recognise and reconcile progressive, often incommensurable values. ‘Discourses influence our ontological worldviews, shape law and policy priorities and - in the context of human-Earth relations - human behaviours and impacts on the planet.’⁷⁵

4.1. Transformative constitutionalism and adjudication

Transformative constitutionalism is the use of processes grounded in law to effect ‘large-scale social change’ in a ‘democratic, participatory and egalitarian direction’.⁷⁶ It is based on fundamental constitutional values. In South Africa the advent of the Constitution proclaimed a decisive break with an inequitable, authoritarian past: the promise of momentous social change is premised on a justiciable Bill of Rights and on a culture of transparency and justification.⁷⁷ The constitutional dispensation accords a primary role to the judiciary as the interpreter of the content of fundamental values and the legal norms that give effect to them.⁷⁸ To understand what judicial interpretation entails in the pursuit of transformative change, I turn to Klare’s theory of transformative constitutionalism. While acknowledging the restriction of the written Constitution, he encourages adjudicative freedom that is ‘politically and morally engaged’ and moreover, that forthrightly admits its character is not neutral.⁷⁹

Klare disputes that judges can or should filter out personal ideology in legal interpretation: it is inherent and inevitable in the normal process of adjudication.⁸⁰ In a juristically progressive culture, value-laden decisions are candidly acknowledged as part of transparent and accountable government - it brings to the fore the power and responsibility of the judiciary for

⁷³ Helen Dancer, ‘Harmony with Nature: Towards a New Deep Legal Pluralism’ (2021) 53 *The Journal of Legal Pluralism and Unofficial Law* 21, 22.

⁷⁴ Sólón (n 66) 113.

⁷⁵ Dancer (n 73) 22.

⁷⁶ Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal of Human Rights* 146, 150.

⁷⁷ *ibid* 147.

⁷⁸ Lael K Weis, ‘Environmental Constitutionalism: Aspiration or Transformation?’ (2018) 16 *International Journal of Constitutional Law* 836, 839.

⁷⁹ Klare (n 76) 149–151.

⁸⁰ *ibid* 157, 163.

the social order constructed by their decisions.⁸¹ The Constitutional Court accepts that the judge must reference values outside the constitutional text to be able to conscientiously balance competing rights.⁸² It is part of a legal culture that fosters public debate and persuades by transparently acknowledging the judge's personal 'underlying political and moral convictions and preconceptions'.⁸³ Conversely, judges that rely on the limitation of legislative supremacy or legal necessity, easily obscure their underlying political choices.⁸⁴ Justice Langa sees it as 'evading a search for justice' through a formalistic, technical approach, instead of employing substantive reasoning.⁸⁵ Techniques to overemphasise the textual legitimacy of decisions in fact deny judicial agency. Klare advocates for conservative South African legal culture, its accepted arguments and strategies, to evolve and align with the substantive aspirations of the new democracy.⁸⁶ A conservative adherence to the determinacy of texts, stands in contrast to a progressive culture that is more oriented towards policy and real-world social outcomes. It can limit substantive legal innovation and the constitutional transformation project.⁸⁷ Klare suggests an open-minded method that doesn't divorce strategic moral pursuits from faithful legal interpretation.⁸⁸

The Constitution equally intends a politically progressive reading, in its vigorous commitment to a 'universalistic, caring and aspirational egalitarian ethos'.⁸⁹ Judicial political progressiveness requires a commitment to social justice. The principle of substantive equality pervades the Constitution, linking lived, socio-economic circumstances to meaningfully exercising rights. Like Klare, Justice Langa finds that transformative constitutionalism demands substantive reasoning, decisions justified by values, express acceptance of the politics of law and the permanent ideal of change where 'better ways of being' are constantly explored.⁹⁰

Following a value-based interpretation is moreover mandated by the Constitution s39(1)(a). It requires every court, tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Section 39(2) requires

⁸¹ *ibid* 164.

⁸² *ibid* 157.

⁸³ *ibid* 163.

⁸⁴ *ibid* 172.

⁸⁵ Justice Pius Langa, 'Transformative Constitutionalism' (2006) 17 Stellenbosch Law review 357.

⁸⁶ Klare (n 76) 187.

⁸⁷ *ibid* 171.

⁸⁸ *ibid* 159.

⁸⁹ *State v Makwanyane, 1995 (6) BCLR 665 (CC)* 262.

⁹⁰ Langa (n 85) 353,357.

promoting the spirit, purport and objects of the Bill of Rights when interpreting any legislation, or when developing the common law or customary law.

Environmental constitutionalism similarly concerns the judicial enforcement of constitutional rights, but specifically to advance environmental causes.⁹¹ Its goal is for fundamental environmental rights to remedy the failure or insufficiency of existing legislation, by enhancing or overriding unsustainable policies and laws. Murcott combines both concepts in the theory of transformative environmental constitutionalism. She argues that environmental constitutional norms do not merely enhance, but are essential for and intrinsic to transformative social change – yet they are not being adequately considered.⁹² Hence, the failure of legal discourse to properly engage with environmentalism contributes to the deplorable social conditions of South Africa's poor.⁹³ The rich environmental right and other fundamental rights are mutually supportive and interdependent: the environmental right not only affects ecological conservation, but also human health and wellbeing, which interlinks with the rights to life, dignity, equality, water, and housing.⁹⁴ Murcott also highlights the importance of contextual influence in transformative constitutionalism: socio-economic as well as environmental lived realities must inform solutions. She advocates for environmental protection grounded on constitutional values that are 'progressive and social-justice oriented'.⁹⁵ Environmental justice holds that everyone must fairly participate in environmental benefits and burdens. Transformative justice can repair past disenfranchisement for all members of the interdependent Earth community.

To fulfil the transformative promise of the Constitution, the role of the judiciary thus entails (based on the preceding analysis) adopting jurisprudentially and politically progressive adjudication. An eco-centric value system requires that the judicial political project extends the Constitution's egalitarian ethos to achieve social, environmental and interspecies justice; to achieve a community that includes the disadvantaged current generation, future generations and Nature's other-than-human members; and to reflect the interdependence of environmental and socio-political rights. It requires that judicial culture embraces its political nature, substantive reasoning, value-driven choices including environmental principles, contextual influence including the environmental crises, and constant evolution of the democratic ideal. In adopting

⁹¹ Weis (n 78) 838.

⁹² Murcott (n 48) 281.

⁹³ *ibid.*

⁹⁴ *ibid* 282.

⁹⁵ *ibid* 288.

the outlined interpretive framework, judges can more fairly balance competing economic, social and environmental rights for sustainability. The framework aligns with an eco-centric system of values, including respect, caring, fairness and justice.

4.2. Rights of Rivers case law

The active, politicised role of courts looms large in the international establishment of river rights.⁹⁶ In the following cases, the language of rights and constitutional norms were used to achieve reforms that transcend prevailing regulatory frameworks which are failing rivers. The Rights of Rivers were developed primarily by the judiciary without formal legislation. Judges responded to Earth Jurisprudence and to ethical, indigenous and scientific principles that require rethinking law to achieve radical transformation.

From 2016 to 2019, in quick succession, the Atrato river in Colombia, the Ganges and Yamuna rivers in India and the Turag river in Bangladesh were recognized as legal subjects with their own rights, to secure protection from degradation, development and pollution. These were landmark decisions for Rights of Rivers and Rights of Nature.

4.2.1. Columbia

In 2016 the Constitutional Court of Columbia had to consider devastating environmental damage caused by illegal mining around the Atrato river. Situated in Chocó, the river supports one of the most biodiverse regions in the world, and supports mainly afro-descendent and indigenous communities whose constitutional right to life and a healthy environment was being violated.⁹⁷ In addition to upholding the communities' rights, the court acknowledged other 'existences worthy of protection in themselves'.⁹⁸ The court recognised a non-human entity, the river, as a legal subject with rights to protection, conservation and restoration and created a commission of guardians for the river.⁹⁹ The court gave legal expression to an eco-centric perspective, in founding its decision on the unity and interdependence of humans and Nature: humans as integral parts of the cosmos, rather than dominators.¹⁰⁰

⁹⁶ Elizabeth Macpherson and others, 'Where Ordinary Laws Fall Short: "Riverine Rights" and Constitutionalism' (2021) 30 Griffith Law Review 438, 444.

⁹⁷ Philipp Wesche, 'Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision' (2021) 33 Journal of Environmental Law 531, 535.

⁹⁸ *ibid* 540.

⁹⁹ *Judgment T-622/16 (The Atrato River Case)* (Constitutional Court of Colombia) 5.9 & 9.32.

¹⁰⁰ *ibid* 9.30.

‘Only from an attitude of deep respect and humility with Nature, its members and their culture, is it possible to enter into relationships with them in fair and equitable terms, leaving aside any concept that is limited to the simply utilitarian, economic or efficient.’¹⁰¹

In making this finding, the court recognized a need to move away from an anthropocentric approach to constitutional law.¹⁰² Instead, it found that constitutional environmental obligations go beyond the explicit text of provisions, and ‘integrates, in an essential way, the spirit that informs all of the Constitution’.¹⁰³ The court’s detailed reasoning considered the ‘constant evolution’ of the constitutional relationship with the environment, the global trend in progressive legal recognition of biodiversity and the mega-biodiversity of Columbia.¹⁰⁴ It found irreversible harm caused by mining in particular implies more rigorous application of the precautionary principle and more stringent, drastic guarantees for Nature: a commitment ‘toward a world that respects others’.¹⁰⁵ Furthermore, the court acknowledged in the Columbian context the close link between diverse cultural practices and their biodiverse natural environment. The ‘profound unity between Nature and the human species’ led to the court’s protection of ‘biocultural’ rights.¹⁰⁶

4.2.2. India

In 2017 the High Court of Uttarakhand, India found that extreme degradation threatened the ‘very existence’ of the Ganges and Yamuna rivers.¹⁰⁷ The government’s continued failure to implement and enforce statutory protections prompted the private action for an order for the state to fulfil its duty. The rivers are ‘scared and revered’ in Hindu beliefs and are essential to the health and wellbeing of half the Indian population.¹⁰⁸ The court stated that the Ganges and Yamuna rivers with their tributaries are juristic persons and living (minor) persons.¹⁰⁹ It appointed guardians to promote the health and wellbeing of and to protect the interests of the Ganges and Yamuna rivers.¹¹⁰ Following the Supreme Court precedent of giving Hindu idols legal personality, the important status of rivers led the court to find that legal personhood would

¹⁰¹ *ibid* 5.10.

¹⁰² *ibid* 5.7-5.9.

¹⁰³ Earth Law Centre, ‘Rights of Rivers- A Global Survey of the Rapidly Developing Rights of Nature Jurisprudence Pertaining to Rivers’ (Earth Law Centre, International Rivers, Cyrus R Vance Centre) 23.

¹⁰⁴ *Judgment T-622/16 (The Atrato River Case)* (n 99) 5.3-5.6.

¹⁰⁵ *ibid* 7.39, 7.40.

¹⁰⁶ *ibid* 9.32.

¹⁰⁷ *Mohd Salim v State of Uttarakhand and Others (Writ Petition (PIL) No 126 of 2014 (High Court of Uttarakhand, Dec 5, 2016)* 11.

¹⁰⁸ *ibid* 10,17.

¹⁰⁹ *ibid* 16.

¹¹⁰ *ibid* 19,20.

serve a useful societal purpose.¹¹¹ It used the mechanism of legal rights, an existing legal tool, to swiftly achieve a significant shift in legislation protecting rivers.¹¹² Both existence and spiritual values moved the court to extend existing legal doctrine. However, the decision is on appeal and stayed by the Supreme Court of India, due to lack of clarity on the role of river guardians.

4.2.3. Bangladesh

In 2019 the High Court of Bangladesh considered increasing encroachment of the Turag river. The Turag river is one of the most polluted in the world, suffering industrialisation's side effects of toxic wastewater and riverside construction. Faced with ongoing, inadequate protection the court gave the Turag and the whole network of more than 700 rivers across the country status of a legal person, legal entity and living person.¹¹³

It based its decision on the public trust doctrine, international environmental principles of precaution and polluter pays, and the fact that rivers are shrinking daily due to illegal encroachment.¹¹⁴ The court issued further directions to ensure the appointed river guardian is effective and independent. It also prescribed extensive public education to raise awareness on ecosystems and river preservation.¹¹⁵ The Appellate Division of the Supreme Court confirmed the decision in 2020.

4.2.4. Impact of river rights cases

The key elements of politically and jurisprudentially progressive adjudication can all be found in the three cases discussed. They show how the courts took the local context and urgent, persistent environmental deterioration into account, as well as constitutional norms like respect and equality in crafting new solutions. The judgments were explicit in recognising the influence of their respective contexts, the interdependency of rights and in refusing to acquiesce in or perpetuate the ongoing failure of legislative and executive measures to protect Nature.

¹¹¹ *ibid* 16.

¹¹² Erin L O'Donnell and Julia Talbot-Jones, 'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India' (2018) 23 *Ecology and Society* 7.

¹¹³ Anima Mundi Law Initiative, 'Turag River' 2 <<https://www.animamundilaw.org/rights-of-nature-case-studies>>. No English language primary sources were found, hence the use of a secondary source.

¹¹⁴ *ibid*.

¹¹⁵ Earth Law Centre (n 103) 47.

In each case considered, existing environmental laws had failed to stem persistent, severe harm to both environment and people, whether through deficiency in the law itself or in enforcement. Existing legal approaches focus on the anthropocentric view of the economic value the river holds and risks undervaluing Nature itself.¹¹⁶ In adopting a Nature-rights approach, the courts protected the ecological integrity of the rivers, but simultaneously acknowledged values of the communities that are consistent with care for the river: their spiritual and cultural ties to the river.¹¹⁷ The High Court of Bangladesh explicitly acknowledged ‘the inherent interdependence and interconnectedness of humanity and its inhabited ecosystems: “if we destroy Nature, it will take revenge on us”’.¹¹⁸ Immovilli et al use the term ‘socionatures’ in the context of Rights of Nature, to show that ecological and social processes co-constitute each other – they both form part of a single social-ecological system.¹¹⁹

Doubt exists whether legal personhood can provide an effective remedy against river destruction. Implementation and enforcement remains an issue for Rights of Rivers as for other rights, especially in developing countries with a poor rule of law and weak institutions.¹²⁰ Often seen as ‘symbolic’, the impact on community participation in river policy formulation has for the Atrato river outweighed the lagging and difficult enforcement of rights, according to Wesche.¹²¹ The success of Earth-centred law should be seen in its ability to challenge deeply-vested economic and political interests that imperil Earth’s integrity.¹²² It contributes to incremental social reform and constitutional environmental recognition.¹²³ The courts’ recognition of eco-centric values allows a more just balancing of economic growth, social welfare and environmental protection and challenges the prevailing view of water solely as resource.

Earth-centred jurisprudence incorporates new perspectives of indigenous worldviews, it raises the previously unthinkable possibility of extending justice to all Earth’s subjects. It changes the human-dominion-hierarchy by making Nature’s components like rivers more visible. The court decisions immediately spurred similar cases, elicited academic research, prompted policy

¹¹⁶ O’Donnell and Talbot-Jones (n 112) 3.

¹¹⁷ Macpherson and others (n 96) 464.

¹¹⁸ John Page and Alessandro Pelizzon, ‘Of Rivers, Law and Justice in the Anthropocene’ *The Geographical Journal* 6.

¹¹⁹ Marco Immovilli and others, ‘Exploring Contestation in Rights of River Approaches: Comparing Colombia, India and New Zealand’ (2022) 15 575.

¹²⁰ Wesche (n 97) 554.

¹²¹ *ibid* 548.

¹²² Paola Calzadilla and LJ Kotzé, ‘Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia’ (2018) 7 *Transnational Environmental Law* 397, 424.

¹²³ Macpherson and others (n 96) 443.

reviews, provoked public debate and thus raised Nature's political priority.¹²⁴ Changing the legal status of rivers forms a bridge to an imagined future of a restored relationship with rivers. River rights have the potential to continue changing our values and consciousness and thus to achieve more equitable human-Nature relationships that lead to wellbeing for all: 'We just wouldn't do certain things that damage the planet, just as you wouldn't cut off your own finger.'¹²⁵

5. Global emerging eco-centric legal norms

5.1. International norms

Despite the prevalence of anthropocentric legislation, the seeds of eco-centric value have started to sprout in environmental legislation and case law. Rivers have been 'the catalyst for a fundamental jurisprudential shift'.¹²⁶ The preceding section detailed how the reconceptualisation of Nature in law has been driven by river-rights adjudication. The UN resolution on Earth Jurisprudence highlights the awareness and capacity of judges as critical to advance Earth-centred law.¹²⁷ 'The time is already upon us when we may have to consider subordinating some human claims to those of the environment per se'.¹²⁸

The Rights of Nature are fundamentally egalitarian, recognising that all Earth's ecosystems and species have the inherent right to exist, to thrive and to regenerate.¹²⁹ Rights of Nature are strongly influenced by Thomas Berry's ten principles of Earth Jurisprudence, Cormac Cullinan's Wild Law and indigenous conceptions of the sacredness of Mother Earth.¹³⁰ A watershed moment came in 2008 when Ecuador adopted the first national constitution recognising Rights of Nature.¹³¹ Bolivia shortly thereafter enacted the Law of the Rights of Mother Earth, which establishes rights for the living system of *indivisible* community that encompasses both Nature *and* human beings.¹³² It is based on the Universal Declaration on the Rights of Mother Earth, adopted at the World's Peoples Conference on Rights of Mother Earth

¹²⁴ Page and Pelizzon (n 118) 6.

¹²⁵ Sólón (n 66) 116.

¹²⁶ Page and Pelizzon (n 118) 7.

¹²⁷ UNGA, A/RES/77/244 Report on Earth Jurisprudence 2022 art40.

¹²⁸ Stone (n 72) 492.

¹²⁹ Global Alliance for the Rights of Nature, 'Universal Declaration for the Rights of Mother Earth' <<https://www.garn.org/universal-declaration-for-the-rights-of-mother-earth/>> accessed 9 July 2023.

¹³⁰ Sólón (n 66) 116.117.

¹³¹ Constitution of the Republic of Ecuador, 2008 art 71-74.

¹³² Plurinational State of Bolivia, Law 71 of 2010.

in Bolivia in 2010.¹³³ Each member of the Earth community has the right to fulfil its role. Rights are species-specific and limited: humans have human rights; rivers have river rights.¹³⁴ In 2020 civil society launched the Universal Declaration on the Rights of Rivers which aims to protect freshwater ecosystems. It states that rivers and their watersheds are living entities, entitled to fundamental rights including the right to flow; to regenerate; to native biodiversity; to be free from pollution, and the right to legal guardians that act solely on their behalf.¹³⁵

The UN, through its Harmony with Nature programme and various General Assembly resolutions, calls for a holistic and integrated approach to sustainable development¹³⁶ that will guide humanity to live in harmony with Nature,¹³⁷ which it equates with the practice of Earth Jurisprudence.¹³⁸ It encourages planetary health, letting Nature 'thrive, just like human beings'.¹³⁹ Instead of the 'dominant growth-insistent economic model', it reflects a budding consciousness of an Earth-centred ethic, steeped in equity and respect.¹⁴⁰

There is no binding international treaty or generally accepted international law that assigns rights to Nature, or parts of Nature like rivers. Nevertheless, there is a growing body of national, regional and local legislation recognising Nature's legally enforceable rights. As at 2021, the legal and institutional implementation of Rights of Nature has extended to over 400 initiatives in 39 countries.¹⁴¹ A forerunner in river rights legislation was New Zealand's Te Awa Tupua Act 2017, granting legal personhood to the Whanganui River. In Europe the first recognition of legal personality for Nature was by Spain, for the Mar Menor lagoon via Ley 19/2022.

The health and resilience of water sources is also directly affected by the conservation of biodiversity. The objective of the nearly universally endorsed Convention on Biological Diversity is both to conserve biodiversity and to ensure the sustainable use of its components.¹⁴² The treaty opens with the parties' awareness of the *intrinsic value* of biological diversity and lists its ecological, genetic, social, scientific, educational, cultural, recreational and aesthetic values alongside its economic value.¹⁴³ Its ambitious Kunming-Montreal Global Biodiversity

¹³³ Global Alliance for the Rights of Nature (n 129).

¹³⁴ Sólón (n 66) 119.

¹³⁵ 'Rights of Rivers' (*Rights of Rivers*) <<https://www.rightsofrivers.org>> accessed 2 September 2023.

¹³⁶ UNGA A/Res/70/1 Transforming our world: 2030 Agenda for Sustainable Development (n 38) art3.

¹³⁷ UNGA, A/RES/77/169 Harmony with Nature 2022 preamble, 11.

¹³⁸ UNGA, A/RES/75/266 Report on Earth Jurisprudence 2020 92.

¹³⁹ UNGA A/RES/77/244 Report on Earth Jurisprudence (n 127) art32,34.

¹⁴⁰ *ibid.*

¹⁴¹ Alex Putzer and others, 'Putting the Rights of Nature on the Map. A Quantitative Analysis' (2022) 18 *Journal of Maps* 89,90.

¹⁴² The Convention on Biological Diversity 1992 article 1.

¹⁴³ *ibid* preamble.

Framework targets urgently reversing biodiversity loss by 2030 for the benefit of people *and* planet, ‘to bring about a transformation in our societies’ relationship with biodiversity’.¹⁴⁴

5.2. South African norms

South Africa’s democratic constitutional order has brought with it rich, substantive and procedural environmental rights and duties to safeguard Nature. Freshwater resources, as a fundamental part of the environment, find protection in s 24 of the Bill of Rights, which accords everyone the right to an environment that is not harmful to their health or wellbeing and to have the environment protected, for the benefit of present and future generations.¹⁴⁵ Section 24(b) imposes specific duties on the state to ‘prevent pollution and ecological degradation’ and ‘promote conservation’.¹⁴⁶

Despite the Constitution’s anthropocentric framing, the Constitutional Court adopted a more progressive animal-centred value system in *NSPCA v Minister of Justice and Constitutional Development*, explaining that the reason animal welfare is protected has shifted from ‘safeguarding the moral status of humans to placing intrinsic value on animals as individuals’, which is based upon constitutional norms requiring a ‘caring attitude toward human, animals and the environment in general’.¹⁴⁷

Traditional water law is primarily concerned with the regulation and management of water infrastructure and its use as an economic resource. The National Water Act 36 of 1998 (NWA), which governs the conservation and management of water resources, establishes a new inclusive regime that also addresses social inequity and aquatic ecosystem integrity¹⁴⁸.

The key values of trusteeship, interdependence and integrity of water ecosystems are the foundation for ecological emphasis throughout the Act, namely: establishing national government as public trustee of the nation’s water resources; formulating an expansive, holistic definition of water resources, their uses and grounds for authorising water-use; and recognising the integrity and interdependence of the hydrological cycle.¹⁴⁹

¹⁴⁴ Secretariate of the CBD, ‘Relevance of Water-Ecosystems to the Goals of the Kunming-Montreal GBF’ 1.

¹⁴⁵ The Constitution of the Republic of South Africa, 1996 s24.

¹⁴⁶ *ibid* s24(b)(i),(ii).

¹⁴⁷ *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2017 (4) BCLR 517 (CC) 57.

¹⁴⁸ National Water Act 36 of 1998 s2.

¹⁴⁹ *ibid* preamble,s1,3,13,21,27.

Trusteeship entails that the Minister for Water and Sanitation has the power and duty to manage water equitably and sustainably in the public interest.¹⁵⁰ It draws on national sustainable environmental management principles that protect the environment as the peoples' common heritage, require special attention for vulnerable ecosystems and a precautionary and preventative approach.¹⁵¹ In *WWF South Africa v Minister of Agriculture, Forestry and Fisheries* the court upheld an ethic of stewardship toward the ocean.¹⁵² It found (in the context of marine harvesting quotas) that the 'further depletion of an already critically depleted resource' is contrary to development and inter-generational equity: it is not justified by economic wellbeing, even in a developing nation.¹⁵³ In *Sustaining The Wild Coast NPC v Minister of Mineral Resources and Energy* the court considered the impact of allowing Shell to conduct seismic surveys off the Wild Coast.¹⁵⁴ The court clearly respected the traditional community's cultural and spiritual relationship with the ocean.¹⁵⁵ It noted the importance of their ocean rituals, or socio-ecological interactions – although not going as far as the Colombian court in naming them biocultural rights. It acknowledged the community's sense of place and of self linked to the water.¹⁵⁶ The court refused to accept Shell's considerable financial loss as justification to infringe on the affected communities cultural and spiritual rights.¹⁵⁷

At the core of the NWA is the creation of the Reserve. It is the quantity and quality of a water resource set aside for two purposes: i) to supply humans with their basic needs and ii) to protect aquatic ecosystems in order to secure ecologically sustainable development and use – the Ecological Reserve (ER).¹⁵⁸ The Reserve is guaranteed and trumps other claims to water that are subsequently negotiated through authorisation.¹⁵⁹ The purpose of the ER is to ensure human use does not compromise the long term sustainability of water-related ecosystems.¹⁶⁰ Not just water, but its ecosystem integrity of living organisms and non-living surroundings is protected.

¹⁵⁰ *ibid* s3.

¹⁵¹ The National Environmental Management Act 107 of 1998 s2(4)(a,o,r).

¹⁵² *WWF South Africa v Minister of Agriculture, Forestry and Fisheries* 2019 (2) SA 403 (WCC).

¹⁵³ *ibid* par 89,91-93.

¹⁵⁴ *Sustaining The Wild Coast NPC v Minister of Mineral Resources and Energy* 2021 (ZAECGHC) 118. The interim interdict sought in this case, was followed by a Part B application, where the court followed the same approach in *Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy* 2022 (ZAECMKHC) 55 par 112-114. _

¹⁵⁵ *ibid* 32.

¹⁵⁶ *ibid* 12,38.

¹⁵⁷ *ibid* 68.

¹⁵⁸ National Water Act 36 of 1998 s1.

¹⁵⁹ Derick du Toit, Sharon Pollard and Ramin Pejan, 'A Rights Approach to Environmental Flows: What Does It Offer?' 3.

¹⁶⁰ *ibid*.

The ER is eco-centric in holistically recognising the ecological sustainability of interdependent ecosystems alongside human needs.

The 2023 White Paper on the Conservation and Sustainable Use of South Africa's Biodiversity clearly promotes aspirational biodiversity conservation. It incorporates Ubuntu, defined as a 'unifying way of life that recognises the interdependent and respectful relationships among the human, natural and spiritual elements' with principles such as dignity, communalism and caring for another and the environment.¹⁶¹ It explicitly recognises conserving biodiversity and its components for their intrinsic value, 'to improve the wellbeing of people *and* nature' (my emphasis).¹⁶² It sets a vision of a nation 'living in harmony with nature' and emphasises both people and nature thriving together.¹⁶³

Eco-centric legal norms hold a promise of greater justice and equity, yet the following discussion of the Mabola case highlights their still tenuous assimilation in judicial practice.

6. The Mabola judgments

This section discusses two appeals against the granting of a water use licence, that considered how public authorities should fulfil their duty of care towards the country's water resources, how they should balance ecological processes and human livelihoods. The analysis provides context for the case, then examines both the Water Tribunal and the High Court's anthropocentric, non-aspirational political stance and conservative legal method. The section concludes with an alternative finding: following the progressive adjudicative framework discussed in Section Four, the re-written judgment is rooted in eco-centric values and premised on the prerequisite of interdependent wellbeing for both Nature and people.

The Mabola case concerns a water-use license granted to a proposed coal mine in Mpumalanga. Yzermyn covers an approximate area of 1250 hectares that contains rivers, springs and various kinds of wetland in the declared Mabola Protected Environment and in the Enkangala Strategic Water Source Area.¹⁶⁴ Key to the case is the impact of proposed mining land-use on aquatic

¹⁶¹ Department of Forestry, Fisheries and the Environment, White Paper on Conservation and Sustainable Use of South Africa's Biodiversity, GN3537 in GG48785 of 14 June 2023 20,22.

¹⁶² *ibid* 19.

¹⁶³ *ibid* 26.

¹⁶⁴ *Mabola Tribunal* (n 13) [3,19].

ecosystems that are strategically important to South Africa. The Water Tribunal appeal and subsequent High Court appeal on questions of law were dismissed.

The mine required licensing for various water-uses under the NWA s21, as the mine's watercourse and wastewater use will be on and close to wetlands, partially destroy wetlands, construct roads through wetlands, discharge waste water with a potentially detrimental effect on wetlands and remove groundwater by pumping out mine adits.¹⁶⁵ The impacts on water bodies that threaten to violate the s24 constitutional environmental right, are a reduced groundwater level during mining and contaminated water decant 45-60 years post-mining.¹⁶⁶ Civil society environmental organisations challenged the failure of the licensing authority to consider a number of relevant factors, including the likely effects of the proposed water use on water resources and other water users, its efficient and beneficial use in the public interest and its socio-economic impact, as required under NWA s27; the precautionary principle as required under s2(1) of NEMA; as well as material information regarding the strategic importance of the water use.¹⁶⁷ In the High Court the failure to recognise the strategic value of water security and biodiversity of the mine area and the precautionary principle was again at issue.¹⁶⁸ I will briefly sketch the economic and environmental background, before analysing the case.

6.1. The context for social and environmental justice

South Africa is plagued by poverty and extreme social inequality, which are key priorities targeted by the National Development Plan 2030. The need for social and economic development has contributed to government's growth-without-limits mindset, in which natural resource exploitation leaves little room to debate environmental harm, even as it affects society's vulnerable and derails sustainable development.¹⁶⁹ Environmental sustainability is easily opposed as 'anti-poor, anti-black' and anti-development,¹⁷⁰ instead of embraced as essential to sustainable development.

On the one hand, coal mining is entrenched as strategic in the economy and touted as a means to Black Economic Empowerment, although its dependence on low-skilled labour maintains

¹⁶⁵ *ibid* [7].

¹⁶⁶ *ibid* [15,16].

¹⁶⁷ *ibid* [14].

¹⁶⁸ *Mabola Appeal* (n 14) [3].

¹⁶⁹ Phia Steyn, 'The Lingering Environmental Impact of Repressive Governance: The Environmental Legacy of the Apartheid Era for a New South Africa' (2005) 2 *Globalizations* 6,11.

¹⁷⁰ *Mabola Tribunal* (n 13) [98.4].

widespread poverty.¹⁷¹ Its pollution and degradation of water sources is well documented and continues despite comprehensive water regulation.¹⁷² Compliance and enforcement is severely lacking: 54 Mpumalanga mines operated without a water licence in 2010 and the state had to pay the billions needed to remediate nearly 6,000 derelict mines.¹⁷³

On the other hand, a secure water supply underpins national development goals. Strategic Water Source Areas (SWSA) contribute disproportionately: a mere eight percent of the country's surface area supplies water for 90% of urban water users, 70% of agriculture irrigation and 60% of economic activity.¹⁷⁴ Due to land-use changes, a third of SWSAs are already at or over the threshold that threatens their continued ecological functioning and benefit to humans.¹⁷⁵ In the last 30 years Enkangala has suffered a 36% increase in intensively-modified land cover.¹⁷⁶ Enkangala SWSA feeds South Africa's economic heartland through the Vaal water scheme, it feeds three internationally recognised Ramsar wetland sites downstream, and a quarter of the area's population rely on water supply directly from its rivers and springs.¹⁷⁷ Yet only eight percent of the entire Enkangala SWSA is protected.¹⁷⁸ The intrinsic value of Enkangala's protected environment is incalculable, even more as it includes wetlands, nationally critically endangered ecosystems.¹⁷⁹ The interdependence of economic, social and environmental needs underscores the necessity of respecting each of them.

6.2. Judicial method and ideology

In the Mabola case the very crucial politics of sustainable water resources is disappointingly not made evident by the High Court. The extent of the court's interpretation is restricted upfront by its decision on the scope of the appeal: that the court may not interfere with a discretionary decision of the tribunal, unless based upon an incorrect legal principle.¹⁸⁰ The court dismisses the Appellants' claim that the tribunal at law incorrectly excluded strategic information.¹⁸¹ Instead, by focussing on textual minutiae,¹⁸² it accepts the tribunal's assertion that it did in fact

¹⁷¹ Kally Forrest and Lesego Loate, 'Power and Accumulation Coal Mining, Water and Regulatory Failure' (2018) 5 *The Extractive Industries and Society* 154, 155.

¹⁷² *ibid.*

¹⁷³ *ibid* 160.

¹⁷⁴ Statistics South Africa (n 33) 2.

¹⁷⁵ *ibid* 32.

¹⁷⁶ *ibid* 33.

¹⁷⁷ *ibid* 160.

¹⁷⁸ *ibid* 165.

¹⁷⁹ Refer Section Two

¹⁸⁰ *Mabola Appeal* (n 14) [143].

¹⁸¹ *ibid* [86].

¹⁸² *ibid* [96-99].

consider all relevant factors. The court's technical approach compounds the tribunal's original failing. The tribunal labels strategic information 'unhelpful', discounting information that would support a more balanced weighting of economic, social and environmental factors.¹⁸³ It dismisses the relevance of scientific research on SWSAs as a factor to consider in a water use licence application under NWA s27(1).¹⁸⁴ It finds firstly that scientific reports are not legally binding, being neither policy nor law.¹⁸⁵ Secondly, the tribunal insists that at law a water licence decision is based on site-specific information, that national, strategic reports 'cannot guide' a project-decision.¹⁸⁶ Mkhonza points to two other cases where South African courts have accepted the relevance of factors that are not explicitly stated in environmental laws, where climate change was deemed a relevant factor in water licensing and in environmental authorisation.¹⁸⁷

Both adjudicators lose sight of the substantive reason for considering all relevant information as they focus on rigid, formalistic categories of information to consider. Their restricted approach neglects expert testimony demonstrating that project-level decisions ignore cumulative impacts; that mining water use in a SWSA is inappropriate; and that it affects SA's water security.¹⁸⁸ It is precisely the disproportionately large, national effect that small SWSA have, that qualifies them as strategic national assets. Moreover, the statutorily prescribed NWRS2 proposes strategic action to protect, maintain and restore strategic wetland ecosystems and priority freshwater areas - which applies to the Yzermyn mine area.

The tribunal explains the principles of sustainable development at length and acknowledges the need to harmonise environmental protection and socio-economic development.¹⁸⁹ It creates the impression of an inevitable, inherently constitutional outcome, but the information it is prepared to consider does not evince a generous approach, nor does it lead to a transformative outcome. Despite not clearly espousing a transformative goal, the court's (inevitable) political motivation is discerned in its acceptance of the Respondent's arguments: in its interpretation of the 'fundamental anthropocentric character' of the law and the NEMA s2(2) provision to put people first.¹⁹⁰ Although presented as a legally neutral requirement, its underlying anthropocentric

¹⁸³ *Mabola Tribunal* (n 13) [156.1].

¹⁸⁴ *ibid* [73.2].

¹⁸⁵ *ibid* [73.2, 84].

¹⁸⁶ *ibid* [164.1].

¹⁸⁷ Amanda Mkhonza, 'Strengthening the Recognition of Strategic Water Source Areas in Decisions on Water Use Licences' (2022) 33 *Stellenbosch Law Review* 161, 323.

¹⁸⁸ *Mabola Tribunal* (n 13) [86.9, 73.3, 82].

¹⁸⁹ *ibid* [146-151].

¹⁹⁰ *Mabola Appeal* (n 14) [44,94].

ethic prioritises the right to development and use of natural resources.¹⁹¹ The environmental right is framed as opposing all the other constitutional rights, as a choice against social transformation, whereas mining development is held as indispensable for poverty alleviation.¹⁹² As the chairperson paradoxically pointed out elsewhere, making only ‘development’ sustainable is the ‘wrong message’: radical scrutiny of integrated social, economic and environment sustainability is the correct approach.¹⁹³ The tribunal perceives environmental needs as a constraint on development, rather than as an issue with equal standing. From the outset, the tribunal repeatedly emphasises that the law does not absolutely prohibit development in a protected area or a SWSA.¹⁹⁴ Formalism exaggerates the impression that it is constrained by law to allow economic development, and minimises the extent of the tribunal’s political, substantive choice in determining if the development is justifiable and ecologically sustainable. The court similarly emphasises a sense of legal necessity, characterising the right to development as the historical, legal starting point, to be tempered but not trumped by environmental factors.¹⁹⁵ Murcott warns this ‘industry friendly environmentalism’ does not accord with constitutional social justice.¹⁹⁶

Regarding the precautionary principle, the court contents itself to follow the ‘generally accepted view’, considering the scientific uncertainty of a decision’s impact, not of the mitigation measures.¹⁹⁷ A progressive approach would interrogate the substantive reasons for applying different meanings to the precautionary principle; it would interrogate changing values and context, as exemplified in the Columbian case discussed in Section Four.

The tribunal insists ecosystem needs *per se* are not enough in the context of other factors in NWA s27(1), but does not clearly elaborate how other factors weigh against acknowledged environmental sensitivity.¹⁹⁸ The social benefit of mining jobs to the community is accepted as self-evident, despite their contested impact and limited 15-year duration.¹⁹⁹ The long-term, sustainable socio-economic impact of not authorising the water use (such as conserved habitats that promote tourism growth) is scarcely weighed in the balance.²⁰⁰ Yet, Murcott reminds us

¹⁹¹ *ibid* [60].

¹⁹² *ibid* [64].

¹⁹³ Murcott (n 48) 288.

¹⁹⁴ *Mabola Tribunal* (n 13) [16.5,86.9,73,84,86.6,151,164.4].

¹⁹⁵ *Mabola Appeal* (n 14) [60,67].

¹⁹⁶ Murcott (n 48) 287.

¹⁹⁷ *Mabola Appeal* (n 14) [139].

¹⁹⁸ *Mabola Tribunal* (n 13) para [156.9].

¹⁹⁹ *ibid* [160.9].

²⁰⁰ *ibid* [13,156.11].

that preserving the environment ‘creates the conditions for social justice’ and improving ‘the plight of the poor’.²⁰¹

The tribunal’s anthropocentric stance dominates even where the law incorporates eco-centric elements, such as determining water-use impact on water resources and other users.²⁰² Determination of the reserve is accepted as assuring water for ecological needs to some extent.²⁰³ The Ecological Reserve is not recognised as an indicator of the intrinsic value and fundamental importance of healthy, aquatic-ecosystem functioning for integrated wellbeing. The tribunal rather criticises a lack of evidence showing prejudice to farmers or community members.²⁰⁴ In *Gace v Department of Water and Sanitation*, considering the impact of an unauthorised dam, the same chairperson gave a different opinion, stating it is an error that ‘only other human water users should complain’ for there to be prejudice, that *despite the lack of human complaint* unlawful water use potentially threatens ecological needs and water resources.²⁰⁵

The tribunal does not engage with the contextual reality of urgent, persistent and significant water pollution from coal mining: that despite good policies, coal mines become abandoned or poorly managed and cause acid mine drainage many decades after their closure.²⁰⁶ The tribunal dismisses the state’s lack of enforcement capacity as irrelevant to licensing, but crucially relies on ‘adequate’ mitigation measures counting in the balance for environmental protection.²⁰⁷ The tribunal’s deference to the separation of powers stands in contrast to the determination of the judiciary in the river rights cases to forge substantive justice when faced with ongoing executive failure. The tribunal and High Court offer no alternative to a critical and worsening water crisis, nor do they deepen the constitutional transformative mindset by inspiring greater care and respect for Nature.

6.3. An eco-centric approach

As an alternative critique of the Mabola judgment, I draw on the methodology of ‘re-writing’ judgments,²⁰⁸ but applied in the context of river rights. It demonstrates how cases ‘could have

²⁰¹ Murcott (n 48) 285,289.

²⁰² National Water Act 36 of 1998 s27(1)(f).

²⁰³ *Mabola Tribunal* (n 13) [160.8].

²⁰⁴ *ibid* [156.9].

²⁰⁵ *Gace v Department of Water and Sanitation (WT 04/19/KZN) [2022] ZAWT 1 (31 May 2022) [50]*.

²⁰⁶ *Mabola Tribunal* (n 13) [79-81].

²⁰⁷ *ibid* [165.1].

²⁰⁸ Gooding (n 12) 115.

been reasoned differently', in a fairer, contextual, inclusive way, through a different judicial choice of perspective.²⁰⁹

I use the characteristics of transformative environmental constitutionalism as set out in Section Four, to create my own 'Transformative Environmental Re-Writing':

South Africa's valuable freshwater resources are being critically degraded as we persistently fail to develop in a sustainable manner. Our water stress, already high for a water-scarce country, is only set to escalate. Science has demonstrated the profound interdependence of people and the integrated water cycle, making aquatic ecosystems indispensable in themselves and to human wellbeing. They are in urgent need of restoration and conservation. Our economic growth goals are exceeding environmental boundaries to threaten our own existence.

South Africa's Constitution is intentionally transformative, equitable, caring. In recognising the injustices of the past and setting out to improve the quality of life of all citizens, it guarantees not only socio-economic rights, but also the right to a healthy, protected environment.²¹⁰ In this case, the perpetual transformative process of the Constitution must be followed towards a meaningful, lived goal of integrated social and environmental justice. The underlying constitutional spirit aligns with South Africa's indigenous, communitarian ideology of Ubuntu, which recognises value through caring, respectful relationship to others. It also aligns with eco-centric values of inherent worth, dignity, interdependence and unity of the whole biosphere. Our worldview is evolving, shifting from living from nature's bounty, to living as nature, as a single Earth community that thrives jointly. An anthropocentric, utilitarian approach that egoistically places people and their needs alone at the forefront, is no longer adequate to address our precarious reality. Nor is it ethically just, in striving for an egalitarian society, to threaten the existence of other-than-human members of the Earth community. We need to consider the wellbeing of an environmental and social co-created 'socio-nature'. Aligned with South Africa's recent biodiversity policy that prioritises the wellbeing of 'people and nature' and acknowledges nature's intrinsic value, an eco-centric frame of value is appropriate and required to address our social, economical and environmental challenges.

The state has a duty to respect, protect, promote and fulfil constitutional rights.²¹¹ The Ecological Reserve, as the legislative enactment of nature's right to water, is violated

²⁰⁹ *ibid* 117,118.

²¹⁰ The Constitution of the Republic of South Africa, 1996 preamble, s24.

²¹¹ *ibid* s7(2).

persistently, suffering dismal non-compliance.²¹² Legally protecting SWSAs would secure South Africa's most significant headwaters and their Ecological Reserve – it would be a start to fulfilling nature's right to water. Despite government's long-stated intention to do so, it has thus far neglected to protect SWSA.

Due to Yzermyn's siting in a SWSA, the mine's water-use licence has a potential impact far outside the project site. It is the entire economic, social and environmental cost of polluting the extended downstream and transferred river flows from Enkangala, more than a generation hence, that have to be weighed against the disputed economic benefit of local mining jobs for 15 years. Both the likelihood and magnitude of the risks and benefits must be taken into account. Even if mitigation renders water degradation unlikely, the disproportionate negative impact cannot be ignored. Strategically, water targets are key to enabling all SDGs: Government's own assessment demands that South Africa systematically consider better conservation of protected areas.²¹³

The proposed Yzermyn mine falls within the miniscule 0,3%²¹⁴ of South Africa that is strategic protected wetland.²¹⁵ Country-wide only half a percent of SWSAs overlap with coalfields, which would seem to indicate sufficient scope to develop coal mining outside of these highly sensitive areas.²¹⁶ It is necessary to find ecologically sensitive ways to reduce poverty and economic exclusion, instead of exploitative ways. I find that the tribunal failed to consider the strategic importance of the mine area for water security and biodiversity.

7. Conclusion

The aim of this paper was to examine the role of courts and the underlying value system they espouse, in addressing the worsening freshwater resource crisis in South Africa.

The paper highlighted that the dominant, anthropocentric institutional approach is unsustainable: it prioritises an economic, utilitarian value of water, at the expense of less-quantifiable or non-tangible values of water. The paper showed the ethical failing of anthropocentrism, compared to eco-centric values such as expansive justice, equity and

²¹² Sharon Pollard, Stephen Mallory and Edward Riddle, 'Towards Improving the Assessment and Implementation of the Reserve' (Water Research Commission 2012) iii.

²¹³ Statistics South Africa, 'Sustainable Development Goals: Country Report 2019' 250.

²¹⁴ Only 2,7% of SA consists of wetland and only 11% of wetlands are protected.

²¹⁵ Statistics South Africa (n 213) 172.

²¹⁶ Jeanne Nel, Colvin and David Le Maître, 'South Africa's Strategic Water Source Areas' 22.

equality, which all operate within and between generations and species. It is clear from the state of water resources that anthropocentric approaches do not adequately protect them.

The judiciary's role in transformative environmental constitutionalism was challenged: it needs to become progressive in its method of interpretation and in pursuing an ideology of integrated social justice and environmentalism.

The paper traced how Rights of Rivers were born from an awareness of the fundamental interdependence and inherent right to existence of all members of the Earth community. By way of the Atrato, Ganges and Turag cases, the paper demonstrated how the judiciary has been able to craft innovative legal solutions to problems of combined environmental and cultural, spiritual or economic motivation, by appealing to higher-level constitutional norms when ordinary legislation failed. Their progressive adjudication signalled a fundamental jurisprudential shift for Rights of Nature.

The seeds of Earth Jurisprudence and eco-centrism are slowly taking root in international and local legislation. Judges are critical in advancing eco-centric law. Yet, the Mabola case demonstrated a people-first, development-first ethic that does not integrate Nature's wellbeing with human wellbeing. It is clear that without the judicial culture changing to support the elevation of Nature's right to water to an equivalence with economic claims, there is unlikely to be a material change in the protection of South Africa's water resources, which will ultimately lead to not only failure of aquatic ecosystems and biodiversity loss, but also to severe social and economic consequences.

Justice Langa considered the metaphor of the Constitution as a bridge to arrive at desired future. He preferred the value of the bridge as a permanent space to cross 'over and over', where 'dialogue and contestation are truly possible, in which new ways of being are constantly explored and created'.²¹⁷ South Africa's degraded rivers offer many opportunities to cross, if the judiciary is willing to take the step.

²¹⁷ Langa (n 85) 4.

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