

Workshop: Twenty Years of South African Constitutionalism

Growing Capacity to Deploy Environmental Constitutionalism in South Africa: A Law School Practicum

Erin Daly & James R. May¹
Widener Law Delaware (USA)

Environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights, and environmental law. It embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide.²

This paper and accompanying presentation first provides a brief introduction to environmental constitutionalism and jurisprudence in South Africa (Part I), some challenges to vindicating these provisions (Part II), some of the extent to which courts have engaged these provisions thus far (Part III), and how upper-division law students at Widener Law Delaware are helping to deploy and implement these important constitutional innovations in a new full-year course entitled, “Global Environmental Constitutionalism Practicum” (Part IV).

I. Introduction to Environmental Constitutionalism in South Africa

The constitutions of about three-quarters of nations worldwide address environmental matters in some fashion, some by committing to environmental stewardship, others by recognizing a basic right to a quality environment, and still others by ensuring a right to information, participation, and justice in environmental matters. Dozens of nations and many subnational governments have adopted constitutional guarantees to environmental rights in recent years. Indeed, most people on earth now live under constitutions that protect environmental rights in some way. And environmental constitutionalism continues to emerge and evolve in courts all around the globe, although many constitutionally-embedded environmental rights provisions have yet to be energetically engaged.

At least 76 countries explicitly recognize an individual right to a quality environment, including South Africa. Several more are *considering* whether to adopt explicit provisions. A dozen or so have done so *implicitly* or as constitutional function of *incorporating* other legal paradigms, such as a right to life, health or dignity. Environmental constitutionalism exists in just about every nook and cranny on the globe, with growing significance, including in a growing corpus of scholarship about embodying environmental rights constitutionally³ and the emergence of such rights in the global order of environmental law.⁴

Environmental constitutionalism has an especially firm foothold under Section 24 of the South African Constitution, which provides:

“Everyone has the right:

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

Section 24 is remarkably progressive, embodying a subjective right to a quality environment for everyone, as well as forcing legislative actions to protect the environment for future generations. Indeed, in viewing subsection (a), the South African Constitutional Court remarked in *Save the Vaal*,

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

Subsection (b)’s consideration of future generations requires policymakers to hold the environment in trust, as the Court in *Fuel Retailers* observed:

“The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment.”

This trust responsibility reflects evolving notions of sustainability. *Fuel Retailers* again:

“The very idea of sustainability implies continuity. It reflects a concern for social and developmental equity between generations, a concern that must logically be extended to equity within each generation. This concern is reflected in the principles of inter-generational and intra-generational equity which are embodied in both s 24 of the Constitution”

Moreover, the South African Constitution grants affected persons wide *locus standi* to vindicate their claims. Section 38 of the South African Constitution, provides access to justice for:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights [including section 24] has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- a) anyone acting in their own interest;
- b) anyone acting on behalf of another person who cannot act in their own name;
- c) anyone acting as a member of, or in the interest of, a group or class of persons;
- d) anyone acting in the public interest; and
- e) an association acting in the interest of its members.

II. Some Challenges to Enforcing Environmental Constitutionalism in South Africa

One might presume that given this unique alchemy of text, trust, opportunity and intentional constitutional design, that Section 24 would be commonly featured in South African jurisprudence. Yet despite these innovations in constitutionalism, there have been decidedly few significant decisions from the South African Constitutional Court interpreting these provisions.⁵

Accordingly, despite one of the most robust constitutional provisions protecting environmental rights, South African environmental constitutionalism has failed to fulfill its potential in its first twenty years. Only occasionally have the South African courts vindicated Section 24 rights, and Constitutional Court decisions on the environment are rarer still. This, in a country that faces

environmental challenges of monumental proportions, including the potential for severe water scarcity, the ravages of mining and fracking, a legacy of ill-managed public and private lands. And, this in a country that depends on sustainable development for its resources-based economy (and that contains a micro-climate (the Cape Floristic Region) that is a UNESCO World Heritage Site).

Despite these challenges, there are specific reasons for under-enforcement of Section 24. First is just how to interpret subsection (a). The provision is written in the negative (a right to an environment “that is not harmful”) instead of the positive (to a “healthful” or “quality” environment), which makes enforcement more challenging. It is also unclear whether subsection (a) applies solely to humans as exclusive bearers of anthropocentric rights, reaches biocentric interests, and in either event grants individuals or collective rights.

Unknowns are even more embedded in subsection (b). First is whether “health” only relates to *human* health, including mental, social and physical integrity, or also captures *environmental* health. Second is ascertaining the scope of “well-being,” that is, whether and the extent to which it incorporates emotional, physiological, aesthetic, spiritual and cultural aspects. And last, and most importantly is divining what constitutes “Reasonable legislative and other measures” to protect these rights.

Moreover, courts are increasingly faced with problems of first impression, problems that are answerable less by recourse to each country’s own history and constitutional origins than to contemporary experience and reason. A single nation’s own past practice is unlikely to guide a court’s judgment with regard to diminishing privacy, or the threat of terrorism, or, especially to the challenges of environmental degradation and climate change. These challenges must be answered by reference to the good practices among nations which engender additional specialized research and/or experience. In general, constitutional litigation can be protracted, time consuming and expensive. Constitutionally-embedded constitution provision in particular can be challenging to enforce, owing to issues in intent, textual alignment and epistemology, mentioned above.

And then finally, remedies are an issue. What is a court to do after finding violations of subsections (a) or (b)? Mostly, the challenges in enforcing this provision reflect challenges with setting a universal standard for healthy environment that incorporates health and well-being for future generations. That’s a tall but important order.

III. Building Jurisprudence in Environmental Constitutionalism in South Africa

Thus far, moreover, the Constitutional Court has spoken mightily about section 24, yet sought refuge from its commands by engaging in balancing of competing interests. The penchant to balance was first witnessed in the context of a comparable right to housing in the *Grootboom* case in which the Court held,

“The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole.”

Accordingly, in *Mazibuko*, for example, the Constitutional Court has declined to dictate a core right to a minimum amount of water, in light of competing social and economic rights. Balancing societal needs against the language of the text was evident as well in *BP Southern Africa*, where the Court wrote:

“Environmental rights requirements should be part and parcel of the factors to be considered without any a priori grading of the rights. It will require a balancing of rights where competing interests and norms are concerned.”

In consultation with local partners, the idea reached is that perhaps some degree of The under-adjudication of the environmental provisions in the South African Constitution is due to lack of experienced capacity in the legal community, including shortages in lawyers, litigators, legal services, and law students. Thus, the impetus for a law school practicum emerged.

IV. Capacity Building: Global Environmental Constitutionalism Practicum

The Global Environmental Constitutionalism Practicum at Widener Law Delaware (USA) is a two-semester (full academic year) course designed to help build capacities to adjudicate environmental rights that have been constitutionally embedded. South Africa was chosen as the first country on which to focus due in part to the potential for contribution and familiarity with the country and leading NGO-partners, including the Legal Resources Center, the Center for Environmental Rights, and the Center for Applied Environmental Studies at Wits, and principal contacts Lisa Chamberlain, Melissa Fourie, and Anneline Turpin, as well as Louis Kotze and Josh Gellers, among others.

The practicum entails a doctrinal focus on constitutional environmental rights, particularly as understood within the historical and legal context of South Africa. Applying their learning, students are working in close collaboration with NGOs primarily in South Africa that are advancing constitutional environmental rights claims in their countries. Because students are contributing to ongoing advocacy, litigation and policy efforts, the course combines educational, constitutional and social interests and is rewarding in ways few courses can be. The final component of the course is the delivery of high-quality legal work, typically in the form of a client letter or a legal brief in support of a petition or motion that advances the constitutional cases being brought to vindicate environmental rights.

Course objectives, structure, materials, projects and deliverables were developed in collaboration with practicum partners in South Africa. Currently, students are working on project topics including: (1) How an environmental right interacts with other constitutional rights (such as access to information, administrative justice, and other socio-economic rights like access to water); (2) Horizontal application of Section 24 and SRI/ corporate accountability; (3) Exploration of “well-being”, (4) Use of an environmental rights to protect health; and (5) Remedies for environmental rights violations in SA: Constraints posed by internal appeals and other “domestic remedies,” constraints of interdicts/injunctions and SA courts’ implementation of these requirements to environmental cases the absence of a special, urgent remedy for environmental rights violations, or does NEMA Section 32’s “appropriate relief” provide the statutory framework for such a remedy? Students are researching these issues in comparative perspective with particular attention to South African constitutionalism.

The course syllabus follows on the next page.

**Global Environmental Constitutionalism:
An Experiential Practicum
Widener University School of Law – Delaware**

Fall 2014 – Mondays, 10-11:50; Marshall-Dennehey, LIC
Dean Daly & Professor May, edaly@widener.edu; jrmay@widener.edu

Introduction: Welcome to the Global Environmental Constitutionalism, an experiential practicum that explores how certain underutilized constitutional rights work in other systems around the globe. This practicum will provide an opportunity to collaborate with global partners to help to vindicate constitutionally-recognized environmental rights.

While this course is like no other, it has some familiar components. It is in some ways similar to a seminar: students will research a topic, write a paper and make a presentation. It is also similar to a clinic insofar as the fruit of your labor is designed to help the otherwise politically or economically disadvantaged or disenfranchised.

What makes it a “practicum” is that you will collaborate with pre-selected non-governmental organizations from around the globe that are advancing constitutional environmental rights claims in their countries. Because you will be contributing to ongoing advocacy efforts, the course will combine educational, constitutional and social interests and be rewarding in ways few courses can be. As far as we know, it is like no other course in the world.

Outcomes: This practicum is comprised of three components. First, you will learn about essential aspects of global environmental constitutionalism. Second, you will learn about constitutionalism in general and environmental constitutionalism in particular in South Africa. Then, working with participating partners in South Africa, you will research projects that will be relevant to ongoing advocacy and will present your research for peer review and collaborative project development. The final component of the course gives you the opportunity to contribute a high-quality client letter or legal brief. At this point, our primary partners are a cadre of non-governmental groups in South Africa trying to implement various constitutional guarantees to a healthy and sustainable environment, and to deploy corresponding rights to information, participation, and adjudication. (See Appendix.)

Materials: GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2014) (We will post as soon as we have the page proof version), Other materials will be posted (or urls provided) on an ongoing basis.

Assessment: Assessment will be based on six components: (1) Classroom participation (10 percent); Professionalism (10 percent); Oral presentation (10 percent); Outline (10 percent); Draft paper (20 percent); Final Paper (40 percent).

Syllabus

I. Global Environmental Constitutionalism: An Introduction and Overview

Aug 25:1. Introduction to Global Environmental Constitutionalism

■ Introduction

- Chapter 1
- First Assignment: Browse the “Environmental Rights Map,” available at: <http://enviornightsmap.org/>. Find examples of environmental rights provisions from THREE different countries. Come prepared simply to recite that country’s constitutional environmental rights provision.

Sept. 8: 2. Manifestation and Implementation of Constitutional Environmental Rights

- Chapters 2 & 3 (skim)
- Chapter 4 (read)
- Skype call #1 with SA Partners: Introductions (*See Appendix A*)

Sept 15: 3. Remedies and Constitutional Procedural Environmental Rights

- Chapter 5 (read)
- Chapters 6 & 7 (skim)
- Chapter 8 (selected portions)

II. **Environmental Constitutionalism in South Africa**

Sept. 22: 4. Introduction to the South African Constitution

- Historical background
<http://www.constitutionalcourt.org.za/site/theconstitution/history.htm>
- Overview of the South African Constitution:
<http://www.southafrica.info/about/democracy/constitution.htm#.U P1-PldXmR>
- Constitution of South Africa (browse):
<http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN005172.pdf>
- Explanation of rights-based constitutionalism in South Africa:
<http://www.constitutionalcourt.org.za/site/yourrights/thebillofrights.htm>.
- Lessons learned: Heinz Klug, “South Africa’s Experience with Constitution Building,” (2011), available at:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1808168;

Sept. 29: 5. Introduction to Environmental Constitutionalism in SA

Guest Lecturer: Professor Louis Kotze (via Skype)

- Louis Kotze and Anel de Plessis, Anel, *Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa*. *Journal of Court Innovations* 3 (2010) (posted)
- Jackie Dugard and Anna Alcaro, *Let’s Work Together: Environmental and Socioeconomic Rights in the Courts* (2012)
- Michael Kidd, *Public Interest Environmental Litigation: Recent Cases Raise Possible Obstacles* (2010) (posted)
- Discussion of research projects (posted, and Appendix B, below). You will be invited to choose three projects on which you would prefer to work.

Oct. 6: 6. Environmental Constitutionalism in Case Context in SA

- *Fuel Retailers*
- *Save the Vaal*
- *Mazibuko*
- *Terginet and Toekoms Action Group* (posted)
- Skype call #2 SA Partners to discuss assignments

Oct. 13:7. EC in SA (cont'd): Project-Related Readings.

- Melissa Fourie: "Getting Environmental Rights on the Agenda: From Rio+20 to the Mpumalanga Coal Fields" (Aug. 25, 2012) (posted)
- Melissa Fourie: "Comments on the Draft Infrastructure Developments Bill, B49-2013 (Nov. 22 2013) (posted)
- Others tba
- Outlines due

Oct. 20:8. Procedural Environmental Rights in SA

Oct. 27:9. Skype call #3 to discuss ongoing research

III. Research Practicum

Nov. 3: 10. Drafts #1 due. Students present & discuss their own papers

Nov. 10: 11. Draft review/workshop #1: students discuss each others' papers

Nov. 17: 12. Drafts #2 due. Students discuss their own papers

Nov. 24: 13. Draft review/workshop #2: students discuss each others' papers

Dec. 1: 14. Final papers due and delivered. Skype call #4

¹ Erin Daly is Interim co-Dean of and Professor of Law at Widener Law School. James R. May is Professor of Law and co-director of the Widener Environmental Law Center. Copyright © 2014, Erin Daly and James R. May. All rights reserved.

² See generally Daly, James R. May and Erin. 'Global Constitutional Environmental Rights.' In *Routledge Handbook of International Environmental Law*, by Shawkat Alam, Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury and Erika J. Techera. Routledge, 2012; Daly, James R. May and Erin. 'Vindicating Fundamental Environmental Rights Worldwide.' *Ore. Rev. Intl. L.* 11 (2010): 365-440; Daly, James R. May and Erin. 'New Directors in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide.' *IUCN Academy of Environmental Law E-Journal* 1 (2011); Daly, James R. May and Erin. 'Constitutional Environmental Rights Worldwide.' In *Principles of Constitutional Environmental Law*, by James R. May. ABA Publishing, Environmental Law Institute, 2011; May, James R. 'Constituting Fundamental Environmental Rights Worldwide.' *Pace Env'tl. L. Rev.* 23 (2006): 113.

³ See, e.g., Brandl, Hartwin Bungert and Ernest. 'Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad.' *Harv. Env'tl. L. Rev.* 16 (1992):1; Shelton, Dinah.

'Human Rights, Environmental Rights, and the Right to Environment.' *Stan. J. Int'l L.* 28 (1991): 103 [hereinafter Shelton I]; Symposium. 'Earth Rights and Responsibilities: Human Rights and Environmental Protection.' *Yale J. Int'l L.* 18 (1993): 18; Sax, Joseph L. 'The Search for Environmental Rights.' *J. Land Use & Envtl L.* (1990): 93; Cf. Fernandez, José L., 'State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?' *Harv. Envtl. L. Rev.* 17 (1993): 333 (objecting to enforcement of constitutional environmental rights).

⁴ Percival, Tseming Yang and Robert V. 'The Emergence of Global Environmental Law.' *Ecology L. Q.* 36 (2009).

⁵ See *Fuel Retailers Association of South Africa (Pty) Ltd v. Director-General Environmental Management Mpumalanga and Others*. 2007 (10) BCLR 1059 (CC) (South Africa Constitutional Court, June 7, 2007), available at <http://www.saflii.org/za/cases/ZACC/2007/13.html>. See generally Kotzé, Anél du Plessis and Louis J. 'Some Brief Observations On Fifteen Years Of Environmental Rights Jurisprudence In South Africa.' *Journal of Court Innovation* 3 (2010): 157.