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Transformative Environmental Constitutionalism's Response to the Setting Aside of South Africa's Moratorium on Rhino Horn Trade

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Abstract: South Africa's rhino population is under threat of extinction due to poaching for purposes of illegal international trade of rhino horn. The South African government has thus far been unable to regulate rhino poaching effectively. One of the legal responses was to introduce a moratorium on local trade of rhino horn. However, in 2015 the High Court set aside the moratorium. Subsequent appeals against the High Court's decision to the Supreme Court of Appeal and the Constitutional Court were dismissed without a hearing. The anthropocentric approach to the protection of biodiversity under South African environmental law is reflected upon in this article. It is argued that the High Court adopted an unapologetic and uncritical anthropocentric approach to the issues before it. A legal theory of transformative environmental constitutionalism is proposed as a means to infuse litigation about global environmental problems with substantive environmental considerations, such as precaution, prevention and equity. These principles could facilitate a more ecocentric orientation towards the application of environmental laws.

Keywords: rhino; environmental law; transformative environmental constitutionalism

1. Introduction

Species extinction and biodiversity loss are two of the many disturbing impacts of the Anthropocene, a time that acknowledges 'the devastating and overwhelming impact of people on Earth and its systems', as 'the consequences of human actions have become the major factor in influencing ecological outcomes'¹. One of the many species facing extinction in the Anthropocene is the rhino (Taylor et al. 2014, p. 7). Around 80% of the world's rhino population is located in South Africa (Mohammed 2016). South Africa currently has around 19,000 white rhino and 2011 black rhino (Taylor et al. 2014, pp. 14, 18). The principal threat to South Africa's rhino population is poaching for purposes of supplying a market for rhino horn in parts of Asia where, among other things, the horn is believed to have medicinal value (Emslie et al. 2016). Poaching of South Africa's rhino population increased at 9000% between 2007 and 2014 (Mohammed 2016). A total of 1054 rhino were poached in 2016 (Department of Environmental Affairs 2017). While the number of poaching incidents in 2016 represents a slight decline from 2015, it belies the fact that dwindling rhino populations have made it harder for poachers to meet demand in parts of Asia for rhino horn products.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) imposes restrictions on trade in rhino horn internationally,² and has done so since the 1970s. White rhino are listed on Appendix II of CITES, as a species not immediately threatened with

¹ (Kotzé 2014a) As the author notes, 'recent decades have seen a dramatic loss of biodiversity around the world'.

² CITES defines 'trade' as export, re-export, import and introduction from sea.

extinction, but in respect of which unregulated trade could risk their survival in the wild.³ Black rhino are listed on Appendix I of CITES: trade is required to be subject to ‘particularly strict regulation in order not to endanger further their survival’, and must only be permitted in ‘exceptional circumstances’⁴. South Africa, a country rich in biodiversity, has been a party to CITES since 1975. National laws aimed at conserving South Africa’s biodiversity give effect to CITES. The National Environmental Management Biodiversity Act 10 of 2004 (NEMBA) makes it illegal to trade in listed species within South Africa without a permit issued by the Department of Environmental Affairs.⁵ It was, however, only in 2009 that a moratorium was introduced to prohibit all local trade of rhino horn within South Africa.⁶ Although there is no demand for rhino horn products within South Africa, the moratorium was introduced in response to concerns that local trade in rhino horn was being undertaken with the intention of illegally smuggling rhino horn out of the country to supply the Asian market, in breach of CITES (Taylor et al. 2014, p. 21). The moratorium within South Africa was thus aimed at more effective conservation of South Africa’s rhino population. It was introduced in the implementation of environmental laws giving effect to a substantive constitutionally entrenched environmental right. Like CITES, South African environmental laws are anthropocentrically-orientated: they lend themselves to interpretations and application that treat human interests as more valuable than those of all other forms of life on earth (Washington et al. 2017). Anthropocentrically oriented laws can be contrasted with ecocentrically oriented laws which recognize the inherent value of all forms of life, since ‘Earth, not humanity is the Life-centre ... Earth is the whole of which we are subservient parts’ (Washington et al. 2017; Rowe 1994).

In 2015, the moratorium was set aside by the High Court in the judgment of *Kruger v Minister of Water and Environmental Affairs* [2016] 1 All SA 565 (GP) (*Kruger*). In this article, it is argued that in setting aside the moratorium on the grounds that it was an administratively unjust decision, the court failed to engage with or respond to the challenges of the Anthropocene. It did so through an unapologetic and uncritical application of anthropocentrically oriented laws. It will be demonstrated that the court’s approach is indicative of a lack of appreciation of the need to locate environmental problems within the context of the Anthropocene. The High Court interpreted and applied South African administrative justice laws alongside anthropocentrically oriented environmental laws providing for biodiversity conservation in a manner that showed scant regard for the impact of its order on rhino populations. When legislative measures aimed at protecting rhino populations are under scrutiny in the courts, the risk of extinction ought to be of paramount concern. It ought to be appreciated that ‘further biodiversity loss and other forms of ecological decay will probably exacerbate the conditions that are leading to a state shift in the biosphere’ (Kotzé 2014a, p. 14). Biodiversity loss and ecological decay will, in turn, impact all aspects of the environment, including human health and wellbeing. Questions about the effectiveness of legislative measures aimed at protecting rhino populations thus raise questions about survival: of humankind and the earth’s systems of which we are a part. We are presented, in the Anthropocene, with a ‘new context in which we are going to have to consider how we should deal with the effects of global human-induced ecological change, which is mostly as a result of our energy-intensive processes and consumer-driven, neo-liberal economies’ (Kotzé 2014b, p. 123). Law-makers, courts and lawyers need to take seriously their role in preventing the decimation of species such as the rhino in the Anthropocene. This article aligns with Kotzé’s view that: ‘If part of the solution to the socio-legal, political, economic and ecological problems that arise in the Anthropocene lies in socio-institutional intervention and

³ Article II.2 of CITES.

⁴ Article II.1 of CITES.

⁵ Section 57(1) read with Section 101 of NEMBA makes it an offence to perform a restricted activity in respect of a listed species. Section 1 of NEMBA defines restricted activity to include ‘selling or otherwise trading in, buying, receiving, giving, donating or accepting as gift, or in any way acquiring or disposing of any specimen of a listed threatened or protected species’.

⁶ ‘Moratorium on the trade of individual rhinoceros horns and any derivatives or products of the horns’ published under Government Notice 148 in Government Gazette 31899, 13 February 2009.

human transformation, then we must also turn to law (and governance) as human constructs and mediating social interventions in our efforts to respond to the many challenges of the Anthropocene' (Kotzé 2014b, p. 124). From this point of departure, it is argued here that in the Anthropocene it is both necessary and appropriate to investigate ways in which biodiversity protection laws can help to overcome humankind's dominance over and abuse of ecology through a more ecocentric approach. This article thus explores an aspect of the 'residual utility' of the anthropocentric/ecocentric binary, while being cognizant of the limitations thereof (De Lucia 2017, p. 191). As Cormac Cullinan explains 'the failure of our legal and political systems to recognize the rights of Nature has enabled humans to create many of the environmental crises now facing us' (Cullinan 2008, p. 12). The potential of introducing more ecocentrically-oriented biodiversity protection laws, which recognize the intrinsic value of, and confer explicit rights on nature, ought to be investigated. A discussion about the nature and content of such laws falls outside the scope of this article. Instead, this article engages with the limitations of anthropocentric approaches to biodiversity conservation (Scholtz 2005, pp. 70–71). These approaches are consistent with capitalism's ethos pursuant to which 'Mother Earth is converted into a source of raw materials, and human beings into consumers and a means of production, into people that are seen as valuable only for what they own, and not for what they are' (Adelman 2017, p. 302).

In the absence of genuinely ecocentric laws, those aspects of current environmental law that create the potential for ecocentric application should be explored if we are to respond to the challenges posed by the Anthropocene. The view that awarding greater recognition to the rights of nature ought to be rejected outright on the basis that 'most natural objects do not have a moral claim' (Scholtz 2005, p. 71) is contested. As Cullinan argues:

'the key issue is whether or not the law provides an effective remedy if humans fail to respect the autonomy of other members of the Earth community or to comply with the ordering principles of that community. Unless there is a remedy with tangible consequences for the wrong-doer, there is little prospect of the law succeeding in its aim of deterring undesirable or anti-social behavior.' (Cullinan 2008, p. 16)

This article posits a legal theory of transformative environmental constitutionalism as a conceptual framework for grappling with how, notwithstanding the predominantly anthropocentric orientation of South African environmental laws, ecocentrism can be pursued by lawyers and applied by courts so as to be more responsive to the challenges and context of the Anthropocene. Precisely because of the prevailing legal landscape, South African environmental law scholarship adopts a predominantly anthropocentric point of departure, largely focused on human rights (See for example (Scholtz 2005; Du Plessis 2011)). Scholarship exists about the importance of recognizing nature's intrinsic value in South Africa and beyond (See for example (Cullinan 2008)), but the implications thereof in practice, and from the perspective of enhancing the interconnected concerns of human dignity and equality and environmental protection require further discussion. This article is an attempt to explore the significance of a more ecocentric approach to South African environmental laws aimed at biodiversity conservation.⁷ The courts have arguably opened the door for such an approach. In South Africa courts are enjoined to interpret legislation in a manner that promotes the spirit, purport and object of the Constitution.⁸ The transformative spirit of the Constitution arguably calls for an interpretation of relevant environmental law that is more ecocentric and gives recognition to the intrinsic value of rhino in disputes concerning conservation. Pursuant to Section 39(2), a minority judgment of the Supreme Court of Appeal adopted a somewhat ecocentric orientation to the interpretation of animal welfare statutes. In his minority judgment, Cameron JA remarked that 'the statutes recognize that animals are sentient beings that are capable of suffering and of

⁷ Limited scholarship on this topic is beginning to emerge. See for example, (Bilchitz 2017).

⁸ Section 39(2) of the Constitution.

experiencing pain'.⁹ The Constitutional Court, interpreting the powers of the National Society for the Prevention of Cruelty to Animals, has recognized that 'the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals'.¹⁰ The challenge remains for courts to further develop these strands of ecocentric thinking, including when administrative law reviews are brought that implicate biodiversity conservation, as opposed to animal welfare, so as to facilitate improved environmental governance in South Africa, more responsive to the Anthropocene.

2. South African Environmental Law's Predominantly Anthropocentric Approach to Biodiversity Conservation

Before critiquing the High Court's anthropocentric application of South African law in *Kruger*, it is appropriate to engage with the predominantly anthropocentric orientation of South African environmental laws, with a focus on those laws aimed at biodiversity conservation. The laws are hierarchically arranged.¹¹ At the top of the hierarchy is the right to an environment not harmful to health of wellbeing contained in Section 24 of the Constitution of the Republic of South Africa, 1996. The Constitution provides that it is the supreme law of South Africa, such that all other law must be consistent with it in order to be valid. In terms of the common law (which emerged prior to the enactment of the Constitution, and must now be developed so as to be consistent therewith) animals are 'a thing' capable of being privately owned by humans (Kidd 2011). After the enactment of the Constitution, in order to give effect to Section 24, framework environmental legislation was enacted, the National Environmental Management Act 107 of 1998 (NEMA), with which all specific environmental legislation must be read. NEMA falls in the middle of the hierarchy. Specific environmental laws, such as NEMBA, which is aimed at biodiversity conservation, fall at the lower end of the hierarchy. Regulations enacted in terms of NEMBA, together with NEMBA itself, constitute the primary laws applicable to biodiversity conservation. NEMBA and its regulations must be read in a manner consistent with NEMA and the environmental right, as well as with the values enshrined in the Constitution pursuant to Section 39(2) of the Constitution.

Section 24 of the Constitution provides that everyone has a right to an environment not harmful to health or well-being; that the environment is to be protected for the benefit of present and future generations; and that reasonable legislative and other measures are to be taken to give effect to this right. The right specifies that such reasonable measures must 'promote conservation' and 'secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.

Section 24 is typically construed anthropocentrically. South African courts tasked with interpreting the environmental right have thus far interpreted the term 'everyone' to mean every human, and the term 'generations' as referring to generations of humans. Moreover, the requirement that reasonable measures must 'secure ecologically sustainable development and use of natural resources' has an anthropocentric orientation. Non-human life may, in terms of Section 24, be regarded merely as a utility or commodity for the benefit of (sustainable development and use by) humans, and biodiversity need only be protected from this vantage point. However, David Bilchitz contends that Section 24 of the Constitution can, and should be interpreted in a more inclusive, ecocentrically-oriented manner that recognizes, at least, the rights of non-human animals (Bilchitz 2010, pp. 276–81). This more inclusive and ecocentrically-oriented interpretation of Section 24 would align with a legal theory of transformative environmental constitutionalism, and be more responsive to the challenges and context of the Anthropocene. Although there is very little environmental rights jurisprudence emerging

⁹ *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] 4 All SA 225 (SCA) para 38.

¹⁰ *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2017 (4) BCLR 517 (CC) paras 55–61.

¹¹ South African law applies the principle of subsidiarity. See (Murcott and van der Westhuizen 2015).

from the South African courts (Kotzé and du Plessis 2010), it is argued below that the potential for a transformative approach towards the environmental right is possible, and would align with South Africa's project of transformative constitutionalism.

NEMA, as framework environmental legislation to give effect to the environmental right, contains in Section 2, a number of principles with which the state must comply when it engages in environmental governance (when it performs action that may significantly affect the environment). The principles are applicable when the state implements NEMBA and its regulations. The importance of the NEMA principles has been recognized by the courts on numerous occasions.¹² Although courts, when environmental decision-making is at issue, ought to grapple with whether the principles have been applied by the state, they rarely do so. As explained below, the courts' focus is often fixed on administrative law requirements alone. Michael Kidd observed in 2006 that South Africa's judiciary requires 'greening' in that judges 'must correctly consider, interpret and apply the relevant environmental law, and give environmental considerations appropriate deliberation' (Kidd 2006). Although there has been some 'greening of the judiciary' since 2006,¹³ Kidd's call for 'greening' remains pertinent.

The principles, and thus the perspective from which environmental governance occurs in South Africa, are predominantly anthropocentric. Section 2(2) of NEMA provides: 'Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably'. Section 2(4)(d) treats non-human life as 'environmental resources, benefits and services' that must be equitably distributed so as to 'meet basic human needs'. Sections 2(4)(a)(v) and (vi) are drafted from the perspective that the environment is a resource for 'development', 'use' and 'exploitation' by humans.

However, some of the principles arguably create the potential for recognizing the intrinsic value non-human life independent of its value to human life. A number of provisions speak to 'ecologically sustainable development'. Section 2(4)(a)(i) speaks to avoiding the disturbance of ecosystems and loss of biodiversity, and where such disturbance cannot be altogether avoided, requires that it be minimized and remedied. Section 2(4)(a)(vii) provides for the precautionary principle, while 2(4)(a)(viii) gives effect to the preventive principle. Section 2(4)(b) provides: 'Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option'. The best practicable environmental option is defined in Section 1 as 'the option that provides the most benefit or causes the least damage to the environment as a whole, at a cost acceptable to society, in the long term as well as in the short term'. It is argued here that the existence of principles that create the potential for recognizing the intrinsic value non-human life independent of its value to human life could facilitate the interpretation and application of environmental law that is more responsive to the Anthropocene. It is illustrated below that this potential was not explored in *Kruger*.

NEMBA provides for the management and conservation of South Africa's biodiversity. It is anthropocentrically oriented in that its objectives include 'the use of indigenous biological resources in a sustainable manner' (Section 2(a)(ii)) and the fair and equitable sharing among stakeholders of benefits arising from bioprospecting involving indigenous biological resources (Section 2(a)(iii)). It further imposes a duty on the state to act as trustee over, or custodian of the nation's biodiversity, including its 'genetic resources' (Section 3(a)). The stated purpose of provisions in NEMBA dealing with ecosystems and species that are threatened or in need of protection is the ecologically sustainable

¹² *MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil* [2006] 2 All SA 17 (SCA) para 15. *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (10) BCLR 1059 (CC) (*Fuel Retailers*) paras 66–67.

¹³ A good example of the 'greening of the judiciary' is *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* [2015] 1 All SA 261 (SCA). See also the cases discussed in (Kotzé and du Plessis 2010).

utilization of biodiversity (Sections 51(d) and (e)). However, the purpose is also to ensure the survival of species in the wild, and the ecological integrity of ecosystems (Sections 51(a) and (b)). This part of NEMBA goes on to empower environmental authorities to determine lists of threatened, vulnerable, endangered and critically endangered species and ecosystems, and to require that permits be applied for in respect of activities pertaining to those species and ecosystems. Overall, NEMBA's approach to conservation treats biodiversity as a utility for human consumption, rather than a part of nature with intrinsic value.

The predominant orientation of South African environmental laws described here is anthropocentric (this observation applies equally to other environmental laws not discussed here), although there do exist provisions that create the potential for more ecocentric application. The potential of these more ecocentrically-oriented provisions is explored later in this article.

Alongside South African environmental laws are laws regulating the conduct of the administration of the state. In South Africa the administration of the state (including the implementation of South African environmental law) is required to be consistent with the right to just administrative action in Section 33 of the Constitution. In terms of this right, administrative action must be performed in a manner that is lawful, procedurally fair and reasonable. Environmental decision-making by government must (where it falls within the definition of 'administrative action') be consistent with these requirements. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) gives effect to the right to just administrative action. It provides for procedures that must be followed in order for administrative action to be fair, and provides for grounds upon which administrative action may be challenged in court when someone aggrieved by a decision believes it to be unjust (unlawful, unfair or unreasonable). PAJA is anthropocentrically oriented. It gives effect to humans' right to administrative justice. When litigation about environmental decision-making turns purely on issues of administrative injustice (such as the failure to follow a fair procedure for the benefit of humans), questions about environmental harm can easily be sidelined, with the potential of an ecocentric application of laws being obscured. It is argued here that this is what occurred in *Kruger*, the judgment setting aside the moratorium on rhino horn trade. As courts in South Africa are enjoined to interpret statutes in a manner that upholds the spirit, purport and objects of the Constitution, a more transformative approach was possible, and, indeed, appropriate.

3. The *Kruger* Litigation

3.1. *A Tale of Two Farmers*

In 2012, two wealthy South African rhino horn farmers, Johan Kruger and John Hume, instituted judicial review proceedings against the Minister of Water and Environmental Affairs. They sought to set aside the moratorium in terms of PAJA as an unlawful administrative action, since before it was put in place the Minister had failed to ensure full adherence with procedures provided for in NEMBA in order for a moratorium to be issued.

There is little information publicly available about Johan Kruger. It is reported that Kruger's participation in the *Kruger* litigation was at the instance of, and funded by notorious safari operator Dawie Groenewald, who along with several others is reported to be accused of several wildlife crimes including 'illegally killing rhinos, illegally dehorning rhinos, trading in rhino horn, racketeering, money laundering, and related crimes' (Christy 2016). Although not accused of wildlife crime, like Groenewald, John Hume is infamous in South Africa. It is reported that Hume 'owns more rhino than anyone else in the world': 1300 rhino (Christy 2016). For several years he has been harvesting rhino horn as a 'renewable natural resource' by dehorning rhino, and his stockpile is currently around six tons (Bale 2016). The lifting of the international trade ban on rhino horn pursuant to a resolution of the conference of the parties to CITES would enable Hume freely to trade his horn stockpile, which is reportedly worth around \$235 million (Latimer 2015). Although he characterizes himself as 'conservationist', there can be no doubt that Hume views rhino as worthy of conservation as a

commodity: one 'more valuable than gold' (Ripple et al. 2015). He stands to gain financially from the lifting of the moratorium, and his financial gains would be even more significant were the international rhino horn trade ban to be lifted. Hume's conservationist ethic is reminiscent of that of the colonial environmentalists of the early 1900s, when '[w]ildlife conservation was an ideology that appealed to those sectors of both the Afrikaner and Anglophone communities who had the property and financial means, together with sufficient access to power, to ensure that they could monopolize access to the chase' (Brown 2002).

Consistent with the understanding of rhino as a commodity, in the *Kruger* litigation Hume complained that any restriction on the trade of rhino horn would infringe his property rights. The rhino he breeds are his property and, so he argued, he should be free to use and enjoy them as he pleases.¹⁴ From this point of departure he filed an 'expert environmentalist's' statement asserting that an animal welfare, rather than an animal rights perspective ought to be adopted in the litigation about lifting the moratorium.¹⁵ Such an approach would support the 'humane use' of animals by humans in the same way that Roman Law permitted the Romans to 'use' their human slaves. The High Court *per* Legodi J implicitly adopted the animal welfare paradigm in its judgment.¹⁶ What the court failed to grapple with, however, is that the use of animals from this anthropocentric perspective occurs pursuant to a power relationship in which humans are treated as dominant over nature, rather than a part thereof. This perspective not only perpetuates the distortion of human dominance over nature, but obscures the intrinsic value of rhino as a part of nature. Yet, it is precisely this distortion, and a failure to appreciate nature's intrinsic value, that has led to the Anthropocene. Unfortunately, this anthropocentric perspective was not challenged by any of the role-players in the *Kruger* litigation. The focus of the litigation was on administrative injustice for the benefit of humans.

3.2. Administrative Injustice

In *Kruger* it was accepted that the Minister's decision to issue the moratorium was administrative action. Thus, the moratorium was required to be issued in a manner that was lawful, reasonable and procedurally fair. The High Court held that the moratorium was issued in a manner that violated the right to administrative justice provided for in Section 33 of the Constitution. Although the moratorium was lawful and likely reasonable, it was found not to have been issued in a manner that was procedurally fair. In order for the Minister, in publishing the moratorium, to adhere strictly with the procedural fairness requirements of administrative justice, it was necessary, in terms of NEMBA, for notice of the proposed moratorium to be published in one national newspaper.¹⁷ The Minister failed to comply with this procedural requirement.¹⁸ Although notice of the proposed moratorium was published elsewhere, including on the internet, several provincial newspapers, and by notice to organizations to which Kruger and Hume belong, and although there can be little doubt that Kruger and Hume were aware of the proposed moratorium, the court seized upon this failure as a basis upon which the moratorium had to be set aside. For the court, in order for the moratorium to protect human interests in the environment, proper notice had to be given to allow public participation and 'meaningful representations or objections'.¹⁹ Notice given to the general public in the Government Gazette failed to give adequate information to the public to enable them to make meaningful representations on the moratorium.²⁰ Given 'the substantial implications of the

¹⁴ *Kruger* paras 7 and 63.

¹⁵ *Kruger* paras 1–2.

¹⁶ See for example *Kruger* para 17, where the court links the procedural requirements for imposing a moratorium on rhino horn trade with the provisions in the environmental right providing for the sustainable use of natural resources, rather than with the provisions relating to conservation.

¹⁷ *Kruger* paras 10–13.

¹⁸ *Kruger* para 13.

¹⁹ *Kruger* paras 16–22.

²⁰ *Kruger* para 30.

moratorium' (on humans, rather than on the environment as a whole) consultation with the public had to be comprehensive, such that, in the court's view, the Minister's failure to comply with the procedural requirements of administrative justice aimed at consultation should render the moratorium invalid.²¹ The court's focus was on the loss of employment and financial opportunities arising from the imposition of the moratorium: anthropocentric concerns which warranted more rigorous public consultation. The court did not consider the intrinsic value of rhino independent of its instrumental value to humans.

The court then noted that to find that the Minister had substantially complied with the procedural requirements for the issuing of a moratorium would 'serve to undermine and infringe everyone's constitutional right enshrined in Section 24 of the Constitution'.²² This construction of the environmental right provided for in Section 24 of the Constitution is anthropocentric and narrow. Here the concept of 'everyone' clearly refers to every human, and not to other aspects of the environment. The court treated environmental protection in terms of Section 24 as predominately about ensuring public participation in environmental decision-making, rather than protecting the environment for its own sake. Although public participation is important, its role in environmental decision-making ought not to be disconnected from the underlying goal of protection of the environment.

Having found the moratorium to be invalid on procedural grounds, the court went on to consider whether the moratorium was a rational and reasonable measure on the part of the Minister. To be a rational measure, the imposition of the moratorium had to be related to the public good it sought to achieve. The court noted the Minister's reasons for the imposition of the moratorium:

- 'to stem the flow of rhino horn into the international market and indirectly to curb the demand for horn and horn products';
- to support compliance with CITES 'by closing loopholes that had previously existed under the South African regime which . . . allowed horn illegally to flow into the international market'; and
- to make 'horn smuggling far easier to prosecute and police'.²³

Notably, the Minister's reasons did not present the rhino as intrinsically valuable. The reasons accept idea that rhino horn is a commodity by speaking to 'curbing' rather than stopping, trade altogether.

The court held, given the Minister's reasons for instituting the moratorium, that there was no basis to find the decision to impose the moratorium irrational.²⁴ Further, the court would have 'difficulties in finding that the Minister in imposing the moratorium acted unreasonably'.²⁵

The court also held that the moratorium amounted to lawful administrative action aimed at giving effect to NEMBA.²⁶ Thus, the only basis for setting aside the moratorium was the Minister's failure to give proper notice.

Despite the narrow, procedural basis for finding the moratorium to be invalid, the court declined to suspend its order setting the moratorium aside. The effect of suspending its order of invalidity would be to leave the moratorium in place while allowing the Minister to rectify the procedural non-compliance by engaging in a more comprehensive public participation process. Leaving the moratorium in place would ensure that rhino populations could continue to be protected by it, and that the Minister's procedural failure be corrected. By failing to suspend the operation of its order the court permitted rhino horn to be legally traded as if the moratorium had never been put in place,

²¹ *Kruger* paras 31 and 34.

²² *Kruger* para 36.

²³ *Kruger* para 45.

²⁴ *Kruger* paras 45, 53.

²⁵ *Kruger* paras 56–57.

²⁶ *Kruger* paras 58–62.

notwithstanding the potentially devastating consequences on rhino. The court adopted this stance on the following bases:

- A moratorium is, by definition, a temporary measure such that the moratorium could not have been intended to be a permanent measure aimed at conserving rhino; and
- The Minister failed to prove that the moratorium had reduced poaching or smuggling of horn into the international market, or that the moratorium had not contributed to a rise in poaching.²⁷ Despite a lack of scientific evidence that the moratorium had, as a fact, contributed towards a rise in poaching, Legodi J remarked that ‘its role in adding to the surge in poaching cannot be excluded’.²⁸

Without comprehensively justifying these points, writing for the court, Legodi J concluded: ‘what disastrous implications would be brought about by the immediate lifting of the moratorium? I cannot think of any.’²⁹ For the court, the onus was on the Minister to prove that uplifting the moratorium would not have adverse consequences on rhino populations.

The court ought to have taken its role in upholding the environmental right far more seriously. This environmental right is not intended to be merely about ensuring public participation in environmental decision-making. It is intended as an instance of environmental constitutionalism in a ‘thick sense’ to ‘facilitate better environmental protection, and improve environmental governance’, including through carefully engaging questions about ecological sustainability and inter-generational equity (Kotzé 2015, pp. 195–98). The court ought to have engaged thoroughly with whether the moratorium was a legislative measure responsive to rising extinction rates that threaten earth’s systems as a whole, and in turn to the environmental crisis that the earth faces in the Anthropocene. Instead, the court dismissed the potential role of the moratorium in protecting rhino populations in a glib manner. Questions about environmental harm were side-lined. Indeed, the court mentioned the plight of the rhino in just a handful of places in Kruger:

- The court recognized that the rationale of the moratorium is to ‘curb and reduce poaching of rhinos’;³⁰
- The court accepted that poaching had ‘taken a toll on the survival of the rhino community’;³¹ and
- In finding that the moratorium was lawful, the court relied on the Minister’s submission that it was ‘driven by the need to prevent extinction of the rhinos and also to ensure conservation of natural resources and species by protecting the survival of rhinos from poaching and smuggling of horns into the international market’.

The court’s limited engagement with the impact of rhino poaching on rhino populations no doubt arises from an anthropocentric perspective that sees rhino as merely a resource to humans, over which humans are dominant. Regrettably the Supreme Court Appeal and the Constitutional Court had no quarrel with Legodi J’s approach, in spite of their willingness to adopt more ecocentric approaches in other contexts.³² On 20 May 2016 the Supreme Court of Appeal dismissed the Minister’s appeal against the High Court’s judgment. It did so without giving reasons. On 5 April 2017 the Minister’s appeal to the Constitutional Court was also dismissed. Again, no reasons were given, save that the appeal had no prospects of success. While appeal proceedings were pending before the Supreme Court of Appeal and then the Constitutional Court the effect of the High Court’s order was suspended. Once the

²⁷ *Kruger* paras 88–89.

²⁸ *Kruger* para 89.

²⁹ *Kruger* para 89.

³⁰ *Kruger* para 28.

³¹ *Kruger* para 50.

³² See *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2017 (4) BCLR 517 (CC) para 57; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] 4 All SA 225 (SCA) para 38; and *Lenthongthai v S* 2015 (1) SACR 353 (SCA) para 20.

Constitutional Court dismissed the Minister's appeal, the High Court's order became operational. As such, those wishing to trade rhino horn could do so provided they had been issued with the relevant permit in terms of NEMBA. Unsurprisingly, following the Constitutional Court's order, Hume set in motion an online auction so as to trade his rhino horn stockpile (France-Presse 2017). The auction took place at the end of August 2017. Plans to host a further auction are underway. In a statement about the 'success' of the auction in re-establishing a legal trade in rhino horn, Hume's attorneys say: 'No longer will rhino need to be killed for their horn. No longer shall the supply [of horn] come exclusively from dead rhino. From this day live rhino shall become more valuable than dead rhino . . . ' (Du Toit 2017). For Hume and his attorneys, the commodification of rhino is something to be celebrated from an uncritically anthropocentric perspective of South African environmental law.

A more ecocentric orientation towards South African environmental law could challenge the perspective, also reflected in Legodi J's judgment in *Kruger*, and endorsed by the Supreme Court of Appeal and Constitutional Court. A more ecocentric approach would see the court grapple with the potential of recognizing the intrinsic value of rhino as beings worthy of legal protection irrespective of their financial worth to rhino farmers like Hume. South African courts ought to consider doing so, since a failure to recognize the intrinsic value of nature, and accord nature rights serves to heighten, rather than respond to the global environmental crisis of the Anthropocene. A legal theory of transformative environmental constitutionalism envisages a more ecocentric approach.

4. Transformative Environmental Constitutionalism's Response to *Kruger*

4.1. What Is Transformative Environmental Constitutionalism?

Transformative environmental constitutionalism seeks to bring together two concepts: transformative constitutionalism and environmental constitutionalism (See Murcott 2017). The notion of transformative constitutionalism in South Africa proceeds off the premise that our Constitution is a tool for social justice: one that calls for a shift in our disgracefully racist, authoritarian, apartheid past, to a more egalitarian society founded on dignity, equality and freedom (Klare 1998).³³ Environmental constitutionalism is a relatively recent global phenomenon that essentially entails 'the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide' (May and Daly 2015). A foundation of environmental constitutionalism is the idea that constitutional rights (for people and environments) are valuable tools for enhancing environmental protection, notwithstanding their limitations (See Bratspies 2015).

Transformative environmental constitutionalism insists that environmental protection must be pursued in order for the other social justice oriented, transformative goals of South Africa's Constitution to be attained. As David Schlosberg argues, the environment creates the conditions for social justice to occur (Schlosberg 2013). If social justice (for instance, in the form of access to water, food, housing) is to be pursued, all forms of life must be valued, respected and protected. Transformative environmental constitutionalism recognizes that all forms of life are interconnected, just as all injustices are interconnected, and that the Anthropocene serves to heighten all forms of injustice by threatening all forms of life. From this point of departure, the theory contends that South African environmental law ought to pursue a more ecocentric orientation towards laws aimed at biodiversity conservation in litigation about global environmental problems: one that recognizes the intrinsic value of all life on earth, including non-human life, regardless of the value (or lack thereof) attributed to such life by humans. The theory aligns with Bilchitz's view that claims to dignity and equity built into the South African Constitution call for overcoming all forms of dominance, including interspecies injustice (Bilchitz 2010), and thus require that in decision-making concerning the environment, the impacts of human behavior and law on biodiversity must carefully be considered.

³³ *S v Makwanyane* 1995 (3) SA 391 para 262.

Thus, in litigation about the validity of a measure aimed at conserving rhino, the theory calls for explicit engagement with the import of substantive (and potentially ecocentrically-oriented) environmental considerations that promote the dignity and equitable treatment of all forms of life in the pursuit of social justice. A legal theory of transformative environmental constitutionalism offers a conceptual framework for grappling with how laws regulating environmental protection can be more responsive to the challenges and context of the Anthropocene. Transformative environmental constitutionalism posits that in the absence of genuinely ecocentric laws conferring rights on nature, those aspects of current environmental law that create the potential for ecocentric application should be explored if we are to respond to the challenges posed by the Anthropocene. Thus, a particular brand of 'greening the judiciary' is pursued through the theory. It calls on the judiciary to engage with the crisis we face in the Anthropocene, which demands recognizing the intrinsic value of nature in environmental decision-making, and the interconnectedness of the pursuit of social justice and environmental protection as part of South Africa's project of transformative constitutionalism. This brand of greening the judiciary could result, for instance, in the development of the recognition of the rights of nature, although a discussion about the nature and content of such laws falls outside the scope of this article. This article has merely attempted to highlight some of the limitations of an anthropocentric approach to biodiversity conservation. Next, those aspects of environmental law that create the potential for ecocentrism are explored.

4.2. Exploring the Ecocentric Potential of South African Environmental Laws in *Kruger*

It has been illustrated that in *Kruger*, the High Court adopted an anthropocentric perspective in the application of administrative justice laws, showing scant regard to the impact of the litigation on rhino. At the same time, the potential of substantive environmental laws and principles with an ecocentric-orientation, was obscured. The next part of this article engages with South African environmental laws' potential to inform more ecocentric perspectives in litigation about the conservation of biodiversity, with reference to a theory of transformative environmental constitutionalism. In particular, the potential of: (i) the constitutionally enshrined concept of ecological sustainable development; and (ii) certain ecocentrically oriented NEMA principles.

4.2.1. The Ecocentric Potential of Section 24 of the Constitution

Consistent with the trend in South Africa of courts failing to explore the content of Section 24 of the Constitution, at no point in *Kruger* did the court attempt to engage with the concept of 'ecologically sustainable development' articulated therein. A growing number of scholars claim that globally, a more ecocentric understanding of the term sustainable development is required in the Anthropocene, which redefines it to refer to development that 'meets the needs of the present while safeguarding Earth's life-support system, on which the welfare of current and future generations depends' (Kotzé 2014b, p. 154; Griggs et al. 2013, p. 306). This definition would be more consonant with notion of ecologically sustainable development provided for in Section 24 of the Constitution, and understood through a transformative lens. Drawing from Australian legal discourse, ecologically sustainable development can be understood to require 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased' (Curran and Hollander 2015, p. 3). Transformative environmental constitutionalism sees ecologically sustainable development as connected to social justice: in order to shift to a more just and equitable society, environmental constitutionalism must recognize ecological limits as connected to limits to human flourishing. Had the court adopted a more ecocentric understanding of the concept of sustainable development provided for in the Constitution in *Kruger*, its focus might have shifted from the impact of the moratorium on

Kruger and Hume as property owners with procedural rights,³⁴ toward safe-guarding individual rhino as an intrinsically valuable aspect of Earth's life-support system. The Constitution is arguably capable of being interpreted in this generous manner, given that it has been held by our Constitutional Court that:³⁵

A constitution is an organic instrument. Although it is enacted in the form of a statute it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid "the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government.

4.2.2. The NEMA Principles

It has been explained that in *Kruger* the court focused on administrative justice to the exclusion of relevant and potentially ecocentrically-oriented environmental laws with which the court is empowered to engage. In adopting a greener approach, Legodi J would have engaged with the import of the NEMA principles in *Kruger*. In litigation concerning the review of an approval of a coal fired power station without first considering climate change impacts, the Western Cape High Court explained:³⁶

The directive principles serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of NEMA or any statutory provision concerning the protection of the environment. They guide the interpretation, administration and implementation of NEMA, and any other law concerned with the protection or management of the environment. Competent authorities must take into account the directive principles when considering applications for environmental authorization.

Legodi J failed to grapple with whether the introduction of the moratorium was consistent with the NEMA principles, however. In assessing the validity of the moratorium and whether it was appropriate to set it aside with retrospective effect, the court should have considered, for instance, with reference to Sections 2(4)(a)(i) and 2(4)(a)(viii) of NEMA, whether the moratorium was a measure aimed at preventing negative impacts on the environment and avoiding the disturbance of ecosystems and loss of biodiversity, or where such impacts and disturbance cannot be altogether avoided, minimizing and remedying them.

Legodi J was enjoined by Section 39(2) of the Constitution to engage with the content of these principles so as to give effect to the spirit, purport and object of the Constitution. Consistent with a theory of transformative environmental constitutionalism, the Supreme Court of Appeal has held, in the context of handing down a criminal sentence on a rhino horn trader, that:³⁷

The duty resting on us to protect and conserve our biodiversity is owed to present and future generations. In so doing, we will also be redressing past neglect. Constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general.

³⁴ The state, as public trustee of the nation's biodiversity (in terms of Section 3 of NEMBA), is empowered to protect the rhino through a moratorium. Further, Kruger and Hume's right to property (Section 25 of the Constitution) is limited in that a person may be deprived of their property by a law of general application, provided such deprivation is not arbitrary.

³⁵ *S v Mhlungu* 1995 (3) SA 391 (CC) para 8, quoting *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 407 at 418.

³⁶ *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 para 80.

³⁷ *Lemthongthai v S* 2015 (1) SACR 353 (SCA) para 20.

With reference to Section 39(2), and the approach espoused by the Supreme Court of Appeal, instead of imposing on the Minister the burden to prove the effectiveness of the moratorium, the court could have considered whether the moratorium gave effect to the precautionary principle provided for in Section 2(4)(a)(vii) of NEMA. This principle demands that in protecting ecology, a risk-averse and cautious approach should be applied, which takes into account the limits of current knowledge about the consequences of decisions and actions (Glazewski and Plit 2015). The principle has received little judicial attention in South Africa, and has not been interpreted in cases related to biodiversity conservation, despite its potential value in this context. In *Fuel Retailers*, a case concerning the granting of approval for the construction of a filling station in spite of the risk of water contamination, the Constitutional Court pointed out that '[the precautionary] principle is applicable where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development'.³⁸

Brian Preston explains, the precautionary principle can be invoked to 'transfer the evidentiary burden to a proponent of an activity to prove that a threat of environmental damage does not in fact exist or is negligible' (Preston 2014, p. 82). Preston goes on to state that an ecocentric approach to the precautionary principle: 'involves applicants for approval for an activity to use, exploit or harm the environment having to bear the burden of proving that the activity will not cause particular types of environmental harm which have been specified as material; the activity will achieve some environmental outcome or standard specified to be acceptable; the economic or social benefits of the proposed activity outweigh the environmental costs; and the approval ought to be granted for the proposed activity' (Preston 2014, p. 82). Had the court applied the precautionary principle as articulated in Section 2(4)(a)(vii) of NEMA in the manner proposed by Preston, Legodi J would have had to insist that Kruger and Hume prove that the uplifting of the moratorium would not unduly impact rhino populations, rather than imposing an undue evidentiary burden on the Minister. Finally, with reference to the principle expressed in Section 2(4)(b) of NEMA, before invalidating the on purely procedural grounds, the court should have engaged with the interconnectedness of rhino populations to other aspects of the environment, and to human existence. Having done so, the court ought to have inquired into whether setting the moratorium aside retrospectively would cause the least damage to the environment as a whole, at a cost acceptable to society, in the long term as well as in the short term (in other words whether invalidating the moratorium was the best practicable environmental option). Had the court in *Kruger* grappled with the significance of each of these principles, the impact of setting aside the moratorium on rhino populations, as well as on rhino's intrinsic as opposed to merely instrumental value could have come to the fore.

A more ecocentrically-oriented interpretation of Section 24 of the Constitution, and engagement with key NEMA principles could have influenced the manner in which *Kruger* was decided. Instead of treating the impact of poaching on rhino population as peripheral, and human interests in administrative justice as central, the court could have been more responsive to the challenges of the Anthropocene. Such an approach is what a legal theory of transformative environmental constitutionalism demands. Social justice cannot be achieved without an appreciation that human dominance over nature can no longer be countenanced—this dominance is destroying the earth's systems upon which all life depends and will serve to deepen injustice in all its forms. If South African environmental law is to be responsive to the Anthropocene and pursue the Constitution's transformative goals, courts, law-makers and lawyers must be willing to explore transformative environmental constitutionalism's potential.

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³⁸ *Fuel Retailers* para 98.

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