The Role of Substantive Equality in Finding Sustainable Development Pathways in South Africa

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This article explores how substantive equality, as it has been applied to the realization of socio-economic rights in South Africa, can be employed to shift the sustainable development paradigm from environmentalism to poverty eradication. Making this shift requires alternative pathways that counter the dominant sustainable development discourse. This article discusses how to open up such alternatives by applying the legal rhetoric of substantive equality to issues of sustainable development as presented in cases of socio-economic rights dependent on ecosystem goods and services, referred to here as "socio-ecological rights". Under the conditions of natural resource scarcity that are projected in the medium- to long-term, it is important to understand the principles governing our resource allocating institutions. Substantive equality provides a useful context in which to start incorporating global environmental discourse on distributive justice into domestic legal frameworks that recognize sustainable development as both environmental stewardship and social justice.

Cet article explore la façon dont l'égalité substantive, telle qu'appliquée lors de la prise de conscience des droits socioéconomiques en Afrique du Sud, peut être employée afin que le paradigme du développement durable se transforme de l'environnementalisme à l'éradication de la pauvreté. Ce déplacement requiert des méthodes alternatives allant à l'encontre du discours dominant en matière de développement durable. Cet article aborde la manière dont ces alternatives peuvent être facilitées, notamment par l'application d'une rhétorique légale de l'égalité substantive à des enjeux relatifs au développement durable tel que présenté dans les cas où les droits socioéconomiques étaient dépendants des biens et des services de l'écosystème, ci-après référencés comme des « droits socio-écologiques ». Sous réserve de l'extinction des ressources naturelles qui est prédite dans le moyen à long terme, il est important de comprendre les principes gouvernant nos institutions rattachées à l'allocation des ressources. L'égalité substantive présente un contexte utile dans lequel commencer l'incorporation du discours global environnemental sur la justice distributive dans les structures légales domestiques qui reconnaissent le développement durable à la fois comme un régulateur de l'environnement et une justice sociale.

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INTRODUCTION

1. SUSTAINABLE DEVELOPMENT AND SUBSTANTIVE EQUALITY
   1.1 “Sustainable Development” as a Politically Fuzzy Concept
   1.2 Sustainable Development Implementation in South Africa
   1.3 Substantive Equality

2. INSTITUTIONALIZING SUBSTANTIVE EQUALITY IN SOUTH AFRICA: TRANSFORMATION, DIGNITY, AND DIFFERENCE
   2.1 Dignity
   2.2 Difference
   2.3 Transformation

3. SUBSTANTIVE EQUALITY AND THE RIGHT OF ACCESS TO WATER: CASE STUDY ON WATER PRIVATIZATION IN SOUTH AFRICA
   3.1 The Right of Access to Water
   3.2 Cases Involving the Right of Access to Water in South Africa
   3.3 Case Analysis and the Role of Substantive Equality in the Judgments
   3.4 Substantive Equality under Resource Scarcity

4. LESSONS FOR SUSTAINABLE DEVELOPMENT AND POVERTY ERADICATION

5. CONCLUSIONS: LINKING SUSTAINABLE DEVELOPMENT AND SUBSTANTIVE EQUALITY UNDER RESOURCE SCARCITY
Throughout 2014, discussion has raged on the form and substance of the Sustainable Development Goals (SDGs) that seek to replace the Millennium Development Goals (MDGs), which expire in 2015. If nothing else emphasizes the vital link between poverty eradication and sustainable development, the international community’s commitment to SDGs at Rio+20 in Brazil in 2012 does. However, the concept of sustainable development remains vague. The term, which has been developed to refer to the three pillars of economy, society, and the environment, can be moulded, adapted, and configured to meet the objectives of whoever employs it.¹ The ethereal nature of the term is both a blessing and a curse. On one hand, it has enabled it to command near-universal support from diverse actors across the world, and seems almost “beyond criticism, [a] contemporary [version] of motherhood and apple pie.”²


On the other hand, it eludes any attempt to be prescriptive. This vagueness has resulted in the limited applicability of sustainable development to domestic law. In this article, the usefulness of an equality argument in giving substance to the sustainable development discourse is tested in the South African context. Sustainable development and substantive equality have much in common, but have not yet been analyzed for their synergistic ability to tackle poverty through the provision of basic needs such as food and water.

The article draws theoretically from the Social, Technological, and Environmental Pathways to Sustainability (STEPS) Centre Pathways Approach, which challenges dominant pathways and instead tries to liberate “multiple narratives, each suggesting different pathways to different sustainabilities.” In the water sector, the term “liquid dynamics” is employed to convey “the patterns of complexity and interaction between the social, technological and ecological/hydrological dimensions of water and sanitation systems.” The term is relevant insofar as it conveys the complex and dynamic nature of water resources. Achieving universal access to water requires more than building infrastructure or putting a policy in place, it is also related to socio-ecological interactions with cultural practices and has implications for human dignity. The ontological underpinning of the STEPS approach is that different narratives privilege different system characteristics and thus different strategies for coping with an uncertain future. Governance processes emphasize particular approaches over others, often those of powerful actors and institutions that tend “to 'close down' around stability-focused strategies and narratives that emphasize narrow, risk-based notions of incomplete knowledge” about the future. These dominant pathways become the main channels for policy, consequently ignoring alternative by-ways that often better reflect the priorities, goals, knowledge, and values of poorer and more marginalized people. Achieving sustainability objectives requires making the plurality of alternatives more explicit and developing the political and legal tools that can build pathways that are currently hidden.

This article discusses a particular tool for opening up alternative pathways. It applies the legal rhetoric of substantive equality to sustainable development issues that arise in cases of socio-economic rights dependent on ecosystem goods and services, referred to here as socio-


Elizabeth Chatterjee, Carl Death & Laura Pereira, “Sustainable development in India, Brazil, and South Africa” (2013) 199 QEH Working Paper Series 5; Frazier, supra note 1; Lipschutz, supra note 1.


Ibid.

Steve R Carpenter et al, eds, Ecosystems and Human Well-Being: Scenarios: Findings of the Scenarios Working Group, Millennium Ecosystem Assessment (Washington, DC: Island Press, 2005). The term “ecosystem goods and services” was popularized in the Millennium Ecosystem Assessment. It refers to the benefits that humans derive from the environment including goods such as food and water as
ecological rights. This article proposes that sustainable development has failed to be implemented in South Africa because courts and policy makers have failed to recognize that sustainable development is inherently linked to substantive equality, despite a growing number of authors emphasizing its transformative potential. This article argues that this link needs to be made explicit in a way that so far, as shown in the cases presented in Section 4, it has not.

The layout of the article is as follows. The next two sections describe sustainable development and substantive equality as they relate to the law. Following this is a review of how these concepts have entered South African jurisprudence, with particular focus on the Bill of Rights in the South African Constitution. The evolution of thinking about substantive equality in realizing socio-ecological rights is then discussed through the analysis of cases dealing with the right of access to water. The conclusion analyzes the relevance of the cases in arguing that there is a need to integrate the substantive equality discourse when discussing sustainable development at the national level, especially under future scenarios of natural resource scarcity.

1. SUSTAINABLE DEVELOPMENT AND SUBSTANTIVE EQUALITY

1.1 “Sustainable Development” as a Politically Fuzzy Concept

The implementation failure of sustainable development in global policy thus far has been attributed to the “politically expedient fuzziness” of its definition as well as the false belief that environmental degradation is unrelated to poverty eradication, uncertainty about the role of economic growth and free trade in achieving sustainable development, a plethora of uncoordinated multilateral environmental treaties, and the vagueness of suitable indicators of sustainable development, particularly for the “social pillar”. The most common definition of sustainable development comes from the World Commission on Environment and Development (WCED) and is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” The WCED’s report, also known as the Brundtland report, is historically embedded in fifteen years of international discussion on the topic of sustainable development that began in Stockholm at the Conference on the Human Environment in 1972. In Stockholm, the cracks were already beginning to show in well as services like carbon sequestration and climate regulation. Here, I refer to those human rights that are dependent on these environmental services such as the right of access to food, the right to a healthy environment and the right of access to water.


the global discourse on environmentalism between the industrialized nations and developing countries—many of which had only just become independent after colonial rule. The Founex report, prepared for Stockholm by a group of twenty-seven experts, mainly from developing countries, began to highlight the issue of distributive justice that lies at the heart of sustainable development:

Clearly there is a scope for a better allocation of the presently available resources … If the concern for human environment reinforces the commitment to development, it must also reinforce the commitment to international aid. It should provide a stimulus for augmenting the flow of resources from the advanced to the developing countries. Unless appropriate economic action is taken, there are a number of ways in which the developing countries could suffer rather than profit from the new emphasis on the environment.  

Twenty years later at the Earth Summit in Brazil, it looked as if the world was beginning to take note. Holding the summit in a developing country legitimized the event for countries in the Global South. The Earth Summit provided the largest ever gathering of its kind, resulting in Agenda 21: forty chapters of agreement on issues including socio-economics, conservation, resource management, and strengthening the role of “major groups” (including women, children, and indigenous people). Of great interest was the emphasis placed on the means of implementing this agenda in developing countries, which was estimated to cost over US$600 billion between 1993 and 2000. Much of this funding was supposed to come through developed countries’ Official Development Assistance target of 0.7 percent of their gross national product. Unfortunately, despite this recognition of the global burden of financing sustainable development initiatives, only a fraction of the money had been forthcoming ten years later at the time of the World Summit on Sustainable Development in Johannesburg, despite the necessary governance structures having been established.  

This inability of the global community to implement sustainable development stems not only from a lack of international financial backing and ineffectual governance mechanisms, but also from a plurality of understandings as to what sustainable development actually means. The underlying assumption of the dominant market-led pathway is that there is a corresponding link between growth or wealth creation and improvement in social, environmental, and psychological wellbeing, thereby reinforcing gross domestic product as the sole

15 Ibid at 33.18.
16 Ibid at 33.13.
17 Guimarães, supra note 1 at 206.
measure of successful development. This is in essence the “trickle-down theory”, criticized by Bill Hopwood and others, which allows multinational corporations to recognize sustainable development as important, but subsequently to continue their economic growth without fundamentally changing their position regarding poverty. Such a neoliberal economic view makes environmental concerns just another market sector problem and decreases the potential for developing alternative solution pathways. In this vein, some argue that putting a price on the environment will internalize environmental externalities and thus lead to less environmental damage. In contrast, others warn that the commodification of nature and the increasing areas of human activity will move society further away from the core principles of sustainable development. This argument has played out significantly in discussion on the privatization of water as well as the control that foreign companies exercise over developing country water systems in a world dominated by Bretton Woods institutions.

An alternative framing lies with socio-ecological theorists who focus on the link between the growing environmental crisis and continuing social problems, placing the emphasis on social justice and equity. This article argues from the latter perspective, asserting that the earth is a system that is facing a combination of social and environmental pressures and that these are so interlinked that they cannot be distinguished and dealt with separately. Dealing with the

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18 Mark Mawhinney, *Sustainable Development: Understanding the Green Debates* (Oxford: Blackwell, 2002) at 33. See also Bill Hopwood, Mary Mellor & Geoff O’Brien, “Sustainable Development: Mapping Different Approaches” (2005) 13 Sustainable Development 38 at 41 [Hopwood et al] which maps approaches to sustainable development along an axis of an increasing environmental concern and against an axis of increasing concern for socio-economic equality. The observation that economic approaches to sustainable development lie on a spectrum is useful. However, this article’s focus is on the benefits of a shift away from economic approaches. As such, it does not dwell on differences between different economic approaches.

19 The “trickle-down theory” or “trickle-down economics” refers to economic policies based on the assumption that economic benefits for businesses or those in upper income levels will result in more money “trickling down” to lower income groups.

20 Hopwood et al, supra note 18 at 40.


25 Leach, Scoones & Stirling, supra note 4.

complexity of these socio-ecological pressures requires a diversity of potential responses, which means opening up alternative solutions that lie outside of the dominant neoliberal paradigm.27

In spite of the Brundtland report’s findings, there has been a continued decline in social equity and environmental quality, which may be due largely to ineffective institutions and a lack of demonstrable political will on many levels.28 The global climate since the 1990s has been one where environmental concerns have been of secondary importance due to socio-cultural and economic reformation resulting from the development of post 9/11 religious factions, an increasing emphasis on national security, and “the decline of the nation-state and the rise of the agents of private capital.”29 These factors have separated economic forces from states and have concentrated power in the hands of those who benefit from unsustainable resource use and growth.30 Globally, crises like 9/11 and subsequently the 2008 financial crisis have focused the world’s attention on these financial and security issues, the responses to which favour pathways of sustainable development that prioritize financial risk factors, national security, and continued economic growth whilst closing down narratives that place social justice and environmental integrity as focal points. At the same time, global interdependence or “double exposure”31 has increased rapidly through “fast” processes of global ecological and economic integration, which have outpaced the “slow” transformation of global political integration that has to deal with entrenched notions of sovereignty and historic geopolitical concentrations of power.32 Many argue that the status quo of power distribution and governance institutions is unable to deal with the complexity of global socio-ecological challenges that the world faces and that more transformative steps need to be taken in order to realize sustainable development.33 If the SDGs are to be effective, these concerns need to be addressed as a matter of importance. Furthermore, the issues of distributive equity that lie at the heart of discussions on sustainable development need to be made explicit. The difficulty of dealing with such issues is exemplified in the discussion of sustainable development in South Africa in the next section.

27 Leach, Scoones & Stirling, supra note 4.
29 Ibid at 257.
30 Ibid.
1.2 Sustainable Development Implementation in South Africa

As with most of South Africa’s policies, the sustainable development discourse is bound to the country’s history. Under the apartheid regime, concern for the environment was centered around “green” issues such as nature and wildlife conservation—concerns of the white minority—while other environmental issues such as pollution, waste management, land degradation, and other “brown” issues affecting the majority of people were largely ignored.34 This created a negative bias against environmental issues, tainting them as discriminatory against the poor, black majority. After 1994, there was a sea change in the manner in which environmental issues were dealt with through recognition that environmental problems like land degradation had detrimental social and economic effects on the poor who had suffered most under apartheid. Environmental issues were therefore viewed as central to the process of reconstruction and development.35 There was subsequently an attempt to include the “brown” agenda in the plethora of environmental legislation that was passed in the late 1990s.36 However, despite the history of environmental protection under South Africa’s democratic government, the goal of sustainable development continues to suffer from the siloed nature of legislation production in the country. South African sustainable development policy is still primarily focused on the

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35 Ibid.
36 In particular, the preambles of these acts refer to environmental principles encapsulating a shift toward a “brown” agenda. For example, the preamble of the National Environmental Management Act, 1998, (S Afr), No 107 of 1998 [NEMA] states that “the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities; inequality in the distribution of wealth and resources, and the resultant poverty, are among the important causes as well as the results of environmentally harmful practices; sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations.”

The Marine Living Resources Act, 1998, (S Afr), No 18 of 1998 serves “to provide for the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources and the orderly access to exploitation, utilisation and protection of certain marine living resources; and for these purposes to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa.”

The preamble of National Water Act, 1998, (S Afr), No 36 of 1998 recognizes “that while water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources.”

Finally the preamble of the National Forests Act, 1998, (S Afr), No 84 of 1998 recognizes that “everyone has the constitutional right to have the environment protected for the benefit of present and future generations; natural forests and woodlands form an important part of that environment and need to be conserved and developed according to the principles of sustainable management … and the economic, social and environmental benefits of forests have been distributed unfairly in the past.”
environment and has failed to integrate other critical areas of development policy, such as job creation and land reform.  

Taking an either strongly developmental or environmentalist approach will not produce the results made possible by a shift toward a sustainable development paradigm that acknowledges the interdependency of environmental and economic objectives. Unfortunately, the environmentalist approach has become an entrenched paradigm in the implementation of South Africa’s progressive environmental legislation, with the lines having been drawn between what is good for the environment and what is good for development. The alleged dichotomy is frequently reinforced. For example, a former Minister of Housing has said that the Environmental Impact Assessment (EIA) process is slowing housing development. Similarly, environmental NGOs have advocated for the protection of an individual species without taking into account the social and economic impacts of such a demand. In spite of the anthropocentric language of the legislation, this false dichotomy makes it challenging to address socio-economic and environmental issues within a sustainable development framing despite these principles being espoused in the preambles of most environmental statutes. Considering South Africa’s history and its commitment to erase past injustices through development, it is argued that a sustainable development approach to environmental issues must be institutionalized.

In essence, the problem of institutionalization lies in the tension between the desire to exploit and the obligation to protect the natural resource base. In developing countries that maintain relatively sound natural resource bases, this choice between exploitation and protection becomes more difficult to make due to the widespread need for “development” that improves the lives of citizens economically. This is namely because of the relatively quick wins one can gain from following a development trajectory that erodes this natural capital and replaces it with financial capital in the model of the fast-paced industrialization of many northern countries. The difficulty comes in realizing that long-term economic development is more often likely to rely on a sound environmental resource base than a degraded one. Inculcating this notion into economic policy is the biggest challenge because economic and social concerns will not be addressed together with environmental issues until the concept of “sustainable development” is no longer associated purely with environmentalism. As mentioned earlier, in South Africa, environmental legislation must initially take up the mantle of develop-

39 Ibid.
40 NEMA, supra note 36.
ment before socio-economic policies will start to recognize the importance of the environment outside of environmental legislation.

Section 1 of NEMA defines sustainable development as “the integration of social, economic and environmental factors into planning, implementation, and decision-making so as to ensure that development serves present and future generations.” Attempts to place sustainable development in a human rights context have extended this definition. Several international legal instruments inform South African environmental law on the subject of sustainable development. One of the most notable instruments is the African Charter on Human and People’s Rights, which includes the right to “a generally satisfactory environment favourable to [people’s] development.”

The South African Constitution contains a right to the environment in section 24. Although section 24 has been criticized for being too anthropocentric, Scholtz argues that anthropocentrism is inevitable and that an approach to sustainable development that does not recognize this is futile, thereby emphasizing the importance of framing environmental concerns within socio-economic interests. The Constitutional Court has been critiqued for not providing a contextual interpretation of section 24 that includes environmental conservation and addresses the developmental needs of poverty, unemployment, housing backlogs, and the need for infrastructural development. Furthermore, the court has been criticized for not considering the section 2 NEMA principles, which root the concept of sustainable development in South African jurisprudence, in its interpretation of section 24. However, the imperative that NEMA gives to authorities to consider not only environmental, but also social and economic factors in environmental impact assessments has been underlined by the courts, most notably in the Fuel Retailers and Sasol cases. In both cases, the two highest appeal courts (the

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44 Constitution of the Republic of South Africa, 1996, No 108 of 1996, s 24: 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.


47 Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservations and Environment, Mpumalanga Province and Others [2007] 6 SA 4 (CC); MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil Pty (Ltd) and Another [2006] 2 All SA 17 (SCA). See also Alan Paterson, “Fuelling the Sustainable Development Debate in South Africa” (2006) 123:1 SALJ 53, where he also discusses cases in light of sustainable development.
Supreme Court of Appeal and Constitutional Court, respectively) held that the inclusion of socio-economic as well as environmental factors was valid in applying and implementing regulations related to NEMA. This article reinforces the argument that it is essential not to separate the environmental, economic, and social aspects of sustainable development. The article claims that this can be more easily done by incorporating the notion of substantive equality into cases dealing with sustainable development law.

In spite of these examples of environmental law jurisprudence concerning sustainable development in South Africa, policy and legislative reform in general have thus far not been implemented successfully, as will be demonstrated in the analysis of the right of access to water cases below. Rather, in South Africa, the effective implementation of sustainable development requires a fundamental shift in the way that this idea is understood within the country's historical context that previously excluded the majority of the population from accessing the country's natural resources. There is evidence that this shift is occurring at least on paper. The recent National Strategy for Sustainable Development and Action Plan explicitly refers to the need to integrate the fundamental principles of the Constitution into the country's sustainable development agenda. The document includes an emphasis on social equity and justice, although equality is not mentioned outside the context of economic inequality. However, shifting from words on paper to effective implementation is where South Africa continues to struggle. In order to aid in effective transformation to sustainability, it is necessary to extend the diversity of pathways for achieving sustainable development. It is suggested that combining notions of substantive equality with a socio-economic rights discourse could aid in effecting such a transformation toward sustainable development. The next section provides a brief synopsis of what substantive equality means before going on to discuss its relevance in the South African context.

1.3 Substantive Equality

Like sustainable development, equality is also difficult to define. Essentially, equality indicates the relationship between things that are deemed equal. Society has grappled with the notion of defining equality for millennia: the Aristotelian definition is to treat like as like and unalike differently. This differs from the notion of formal equality: that everyone is born equal, as professed by liberalists like Thomas Hobbes and John Locke. A critique of formal equality is that although we are or should all be equal (e.g., have equal access to human rights), we are not

all the same (e.g., men and women are biologically different)\textsuperscript{53} and that ignoring fundamental historical differences (i.e., that women have been historically treated as inferior to men) creates inequalities between those that should be equal. Williams argues that equality is regarded not as gratuitously egalitarian, aiming at equal treatment for reasons, for instance, of simplicity or tidiness, but as affirming equality which is believed in some sense already to exist, and to be obscured or neglected by actual social arrangements.\textsuperscript{54}

Such ideas of equality are closely linked to Aristotle’s \textit{justitia distributiva}, which Okereke employs as the mechanism through which to achieve (intra-generational) global environmental justice\textsuperscript{55} and that Henderson refers to in her use of the Rawlsian theory of justice to build a framework for intergenerational sustainable development.\textsuperscript{56} However, for relationships between individuals rather than states, it is more problematic to define how the right to treatment as equals (e.g., to treat people of all races as equals) differs from equal treatment (which would not allow for positive discrimination, for example, in the form of quota systems benefitting previously disadvantaged groups), or rather, how to enforce substantive equality in practice.\textsuperscript{57}

Whilst these issues continue to be debated on a philosophical level, there are clear problems in moving from such a philosophical discussion on what substantive equality is to a discussion about how to achieve it. For example, the principle employed for centuries (such as in South Africa under apartheid), whereby people were treated differently on account of their race, can be likened to “a purely arbitrary assertion of will like that of a Caligulan ruler who decided to execute everyone whose name contained three ‘Rs’.”\textsuperscript{58} However, rectifying such an arbitrary past injustice requires novel forms of differential treatment in an attempt to account for those past injustices—a notion encapsulated in the concept of transformative constitutionalism discussed in the next section. There is thus somewhat of a fine line between substantive equality and discrimination, depending on whether the different treatment that people receive is arbitrary or founded in a factual situation or a need to rectify past injustices. Judge Tanaka eloquently addresses this distinction in the International Court of Justice’s South West Africa cases. He notes that

\begin{quote}
the most fundamental point in the equality principle is that all human beings as persons have an equal value in themselves but, this idea does not exclude different treatment of persons from the consideration of the differences of factual circumstances such as sex, age, economic conditions etc. … To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently. Accordingly, not every different treatment can be justified by the exis-
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\textsuperscript{56} Gail E Henderson, “Rawls and Sustainable Development” (2011) 7:1 JSDLIP 1.


\textsuperscript{58} Williams, supra note 54 at 233.
tence of differences, but only such as corresponds to the differences themselves, namely that which is called for by the idea of justice.\textsuperscript{59}

In order to reach this natural equality in an inherently unequal world, differences imposed by social and economic situations must be taken into account so as to realize the true equality of individuals. As per the South African Constitution, achieving equality through differentiation is only justified when dignity is the core principle that guides the differential treatment of individuals. The socio-economic rights in the Constitution are tools for realizing transformative justice, but at the same time, they institutionalize a vision of the developmental state\textsuperscript{60} that aims to enable all its citizens to have access to the basic resources to live a dignified life. Due to past injustices, not all citizens have access to the resources needed to meet basic needs, making the realization of socio-economic rights a question of substantive equality. At the same time, the realization of these rights is largely dependent on a sound natural resource base\textsuperscript{61}—the fundamental premise of sustainable development. The right to equality can therefore promote the mainstreaming of sustainable development by shifting the focus away from environmentalism and toward an argument based on development that results in living with dignity. The law is as much a critical tool for the implementation of substantive equality as it is for sustainable development. In the following section, this link between substantive equality and rights is discussed further.

2. INSTITUTIONALIZING SUBSTANTIVE EQUALITY IN SOUTH AFRICA: TRANSFORMATION, DIGNITY, AND DIFFERENCE

The institutionalization of substantive equality in South African socio-ecological rights jurisprudence has the potential to open up and transform the sustainable development discourse in South Africa, but it has not yet been applied to cases where it could be. In this section, the transformative potential of the section 9 right to equality\textsuperscript{62} is discussed as well as some of the


\textsuperscript{60} While there is ongoing debate as to whether South Africa can be classified as a developmental state, its policies are often framed within the political ambition to be one. See William Gumede, “Delivering a democratic developmental state in South Africa” (February 2011) Policy Brief Number 1 Development Bank of Southern Africa 1.

\textsuperscript{61} See Fuo, supra note 9 at 88; Anél du Plessis, “South Africa’s Environmental Right (Generously) Interpreted: What Is in It for Poverty?” (2011) 27:2 SAJHR 279; Feris, supra note 9 (who links notions of transformative justice and dignity to the realization of access to environmental goods and services, entrenched in the section 24 environmental right).

\textsuperscript{62} Section 9 of the Constitution of the Republic of South Africa, supra note 44 states that:

\begin{enumerate}
\item Everyone is equal before the law and has the right to equal protection and benefit of the law.
\item Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
\item The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
\item No person may unfairly discriminate directly or indirectly against anyone on one or more
difficulties associated with its implementation. The following section then refers to specific cases where the notion of substantive equality was referred to, but never fundamentally dealt with. The two cases discussed involve the right of access to water.

One of the key aspects of the South African Constitution that the country’s legal system has grappled with is the idea that the concept of equality can generate legal and court-driven solutions that may result in transformative change in the country, often referred to as “transformative constitutionalism.” While other works have focused on the broader theory regarding the relationship between the Constitution and the court’s ability to effect social change, the emphasis in this section is on describing the difficulties and successes in the South African context as they relate to the principle of substantive equality.

Although equality as a value is recognized as a core pillar of the South African Constitution, its interpretation and application as a right has often been critiqued for not being sufficiently revolutionary. A purposive reading of the equality clause in section 9 of the Final Constitution (section 8 of the Interim Constitution), while taking into account the underlying values of the Constitution (an open and democratic society, human dignity, equality and freedom), indicates an emphasis on substantive equality, but this interpretation alone is insufficient for effecting transformation. However, examining the three overlapping elements that underpin substantive equality in South African jurisprudence will reveal the transformative potential of substantive equality as a concept. These three elements are: dignity, difference, and transformation.

grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

64 First referred to by Karl Klare in “Legal Culture and Transformative Constitutionalism” (1998) 14 SAJHR 146 and then elaborated on by Justice Pius Langa, “Transformative Constitutionalism” (2006) 17:3 Stell LR 351.
66 Fuo, supra note 9 has already undertaken a substantive discussion of the centrality of the section 24 environmental right in light of the transformative potential of the Constitution in meeting the other socio-economic rights such as housing, healthcare, food, and water. This paper looks more broadly at using a substantive equality argument for better realizing socio-ecological rights.
2.1 Dignity

The role of dignity in South African equality jurisprudence has come under severe criticism and has also been defended. Its relevance lies in the argument that human dignity is the underlying rationale for equality jurisprudence. Section 9’s right to equality (and its substantive interpretation) is arguably a mechanism through which to shift those perceptions and stereotypical assumptions of society that entrench the injustices of apartheid. In South Africa’s historical context, the realization of socio-economic rights is closely linked to the values outlined in the Constitution because, as Justice Chaskalson elaborates:

This was seen most obviously in the disparities of wealth and skills between those who had benefited from colonial rule and apartheid and those who had not. In the contrast between those with land and the millions of landless people; between those with homes and the millions without adequate housing, between those living in comfort and the millions without access to adequate health facilities, clean water or electricity...These conditions already existed when the constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality lies at the heart of our new constitutional order.

Here, Justice Chaskalson recognizes the Constitution as the core framework within which to transform South Africa into a country that embodies the principles of dignity, equality, and freedom. This transformative agenda is associated with the realization of the socio-economic rights that lie at the foundation of people’s enjoyment of the other rights enshrined in the Constitution. Although the interconnectedness of the Constitution’s foundational principle of equality to socio-economic rights has been emphasized in assessing how responsive South Africa’s jurisprudence is to the mutually reinforcing processes of poverty and inequality, the argument has not yet been made in the courts in the context of achieving sustainable development goals. There has been a healthy academic discussion on the equality discourse, but defining a practical solution for implementation in the South African legal system has been challenging because it requires lawyers and judges to understand the context in which inequal-


69 Arthur Chaskalson, “Equality as a Founding Value of the South African Constitution” (Eighth Oliver Schreiner Memorial Lecture, delivered at the University of the Witwatersrand, 22 February 2001) at 8, 11.


71 However, there are discussions in the literature that are starting to make this link (see e.g. Feris, supra note 9).
ity occurs. This becomes more complicated when the second element of substantive equality is addressed, that of difference.

2.2 Difference

It is generally understood in South African academic discourse that one of the fundamental purposes of the equality provision in the South African Constitution is that of transformation: to address the injustices of the past in order to create an egalitarian and free society. This focus on benefiting a previously disadvantaged group (i.e., positive discrimination) is provided for in section 9(2) and is aimed at protecting groups that have suffered “from structural disadvantage, from patterns of exclusion and not just from some incidental negative impact.” This approach necessitates an asymmetrical application of equality in order to justify the unequal treatment of people so as to address historical differences. It focuses on affording vulnerable groups advantages by recognizing that harm against these groups is a greater evil than the accompanying disadvantage to powerful and privileged groups.

This means that in order to get rid of unfair discrimination and to address the vulnerability of certain groups, we need to reinforce categories and classifications, thereby entrenching differentiation. Judge O’Regan acknowledged this problem in Hugo, finding that there cannot always be equal treatment in conditions of established inequality without entrenching the inequality that the Constitution seeks to eradicate in the first place. The role of substantive equality in transformation creates a positive duty to rectify inequalities in society based on previous discrimination. These positive duties often are those needed to realize the socio-economic rights of those who do not have access to the basic goods and services necessary for a life of dignity. However, the transformative dimension of substantive equality does not shed light on when it is no longer necessary to reinforce differences between groups. The potential for the difference to be continuously reinforced not only has implications for those being “discriminated against” due to holding previously privileged positions, but also for the marginalized and excluded whose difference is continuously emphasized in order for them to benefit from the principle of substantive equality. The ability of substantial equality to reinforce difference is paradoxical. This paradox is not easily overcome, as will become evident in the discussion of the cases in the next section.

72 Albertyn, supra note 63 at 259.
73 Albertyn & Goldblatt, supra note 68.
2.3 Transformation

Equality is still very much framed as an aspirational goal of South Africa’s constitutional democracy, since achieving true substantive equality would require “a social and economic revolution in which all gain equal access to the resources and amenities of life, and are able to develop their full human potential.” Albertyn argues that the substantive equality discourse should at the very least be able to dislodge dominant and systematic cultural and social norms and stereotypes that suppress marginalized and unequal groups and to create new norms of equality. Such opening up of new norms and systems of values that are more inclusionary and potentially transformative can be likened to the creation of new pathways for sustainability, not just in the legal system, but also in policy and broader governance processes. Policy and legislative change take a long time to come into effect, whereas the law is frequently being re-applied and interpreted in the courts. It therefore makes sense that new pathways to sustainable development can be opened up through novel applications of the law to new factual situations, for example, by using the Bill of Rights as a transformative tool in cases involving socio-ecological rights. This in turn allows for a space where the views of the less powerful can be heard and their needs represented. Section 4 will demonstrate this more practically by referring to substantive equality in cases involving the right of access to water.

Realizing this transformative potential requires a paradigm shift in legal systems. The system must “[learn] to speak the language of equality.” This language is not only a means of communication, but also an embodiment of the norms, attitudes, and culture expressed through that language. The Honorable Justice L’Heureux-Dubé argues that it is only by learning to speak in terms of substantive equality, and by letting it permeate and change the underlying assumptions of the traditional doctrines of equity and common law rather than merely applying it in a vacuum, that it can be realized. However, this opening up of novel transformative framings that incorporate principles of equality is more easily written about than applied.

This idea of substantive equality has been embraced by foreign legal systems and has had an impact on South Africa’s learning of the language of equality as it applies in the unique post-apartheid context, but it has also led to confusion. Substantive equality as a concept is crowded with many complex issues, many of which the courts have dealt with, but the neces-

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78 Albertyn, supra note 63 at 257 (describing Chief Justice Langa’s views).
79 Ibid at 256.
80 Pathways open up when perspectives change, when dominant approaches are put aside and alternative viewpoints and a different vision of the future are valued. It is not a specific method or outcome, but the process of engaging with multiple viewpoints that is the key aspect of this approach.
81 L’Heureux-Dubé, supra note 68.
82 Ibid at 336.
sary retreat from legal formalism toward an understanding that the law can be inscribed with transformative power is still in progress. Law as transformation is a deep paradigm shift that will open up pathways that disrupt systemic inequalities. Legal formalism merely follows dominant discourse, but adds a cursory emphasis on the inclusion of previously marginalized or discriminated against groups. Realizing the full potential of substantive equality necessitates building new rationales for including this discourse in extending the reach of existing concepts, like sustainable development, that have transformative potential.

In the next section, the equality discourse in South Africa is extended through an analysis of two cases dealing with the right of access to water. As water is an essential aspect of life, not only for drinking, but also for sanitation, the notion of dignity is closely linked to the provision of water. At the same time, the argument made by the South African state is that providing water services is expensive and that a systemic transformation in access to water services requires financial capital. The requirement of having access to financial resources emphasizes the difference between those who can and those who cannot afford to pay for basic services like water provision. The valid arguments and framings of access to water issues brought to the table by all parties highlight the complexity of the issue. Courts are thus increasingly unwilling to weigh in and suggest access to water remedies when government is already taking action (even if that action is inadequate). However, the court’s ability to apply substantive equality rhetoric in the discussion of socio-ecological rights is vital in creating new pathways for achieving sustainable development in all its complex guises. The cases below and subsequent discussions shed light on why this is such an important task to undertake in the South African legal system.

3. SUBSTANTIVE EQUALITY AND THE RIGHT OF ACCESS TO WATER: CASE STUDY ON WATER PRIVATIZATION IN SOUTH AFRICA

We want the water of this country to flow out into a network—reaching every individual—saying: here is this water, for you. Take it; cherish it as affirming your human dignity; nourish your humanity…. Water—gathered and stored since the beginning of time in layers of granite and rock, in the embrace of dams, the ribbons of rivers—will one day, unheralded, modestly, easily, simply flow out to every South African who turns a tap. That is my dream.

3.1 The Right of Access to Water

Socio-economic rights are institutions through which the eradication of poverty is attempted. As mentioned above, by requiring that basic needs such as housing (section 26), and access to food, water, and social security (section 27) be met, socio-economic rights set the bar for a basic

84 Albertyn, supra note 63 at 257.
85 Ibid at 258.
set of requirements\textsuperscript{87} for a person to be able to realize the right to human dignity and freedom. Weston has emphasized that equality is comparative in nature and thus cannot produce substantive results without attaching itself to other forms of analysis.\textsuperscript{88} Weston emphasizes the importance of having an underpinning right when applying the principle of substantive equality.\textsuperscript{89} The rights associated with substantive equality are more often than not socio-economic in nature as distributive justice is the principle underlying their existence.

Until now, judicial recognition of socio-economic rights has been somewhat adequate. The five socio-economic cases that have thus far reached the Constitutional Court demonstrate that entrenched socio-economic rights enable the government to pursue substantive equality by enacting policies that enable previously disadvantaged groups to have their basic needs met. Most litigation in the South African Constitutional Court has concerned the reasonableness and justifiability of the progressive realization or limitation of these rights,\textsuperscript{90} where the Constitutional Court has ruled on the reasonableness of a governmental policy in meeting these socio-economic rights claims.\textsuperscript{91} It is not within the scope of this article to discuss the arguments of the court with respect to these limitations, but rather to assess the achievement of substantive equality as the rationale behind the decisions of the courts as they relate to sustainable development.

The only case that has dealt with the relevance of equality with respect to socio-economic rights is \textit{Khosa and Others & Mahlaule and Another v Minister of Social Development}.\textsuperscript{92} In this case, the court examined the constitutionality of excluding permanent residents from receiving social grants for the aged under the \textit{Social Assistance Act 59 of 1992 (Khosa)} and from receiv-

\begin{itemize}
  \item However, the South African Constitutional Court has held that there is no minimum core establishing the level to which these needs must be met or a threshold that cannot be crossed, which is discussed further below. See \textit{Mazibuko and Others v City of Johannesburg and Others [2009] ZACC 28} at paras 52–56, [2010] 4 S Afr LR 1, (CC) O’Regan J [\textit{Mazibuko}].
  \item Weston, \textit{supra} note 52 at 579.
  \item Section 36 of the Constitution allows for the limitation of rights to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. Section 27 rights have a further internal limitation. Section 27(2), on the positive obligation on the State to achieve this right, stipulates that the State need only take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.” Section 27 states that everyone has the right to have access to—
    \begin{itemize}
      \item Health care services, including reproductive healthcare;
      \item Sufficient food and water; and
      \item Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
    \end{itemize}
  \item There have only been five socio-economics rights cases that have reached the Constitutional Court so far. See \textit{Government of the Republic of South Africa and Others v Grootboom [2000] ZACC 2001, 2001} 1 S Afr LR 46, (CC) [Grootboom]; \textit{Minister of Health and Others v Treatment Action Campaign and Others [2002] ZACC 15, [2002] 5 S Afr LR 721, (CC); Khosa and Others v Minister of Social Development and Others [2004] ZACC 11, (CC) [Khosa]}
  \item \textit{Khosa, supra} note 91; Feris, \textit{supra} note 9 at 886.
\end{itemize}
Pereira

Volume 10: Issue 2  167

ing child-support and care-dependency grants under the Welfare Laws Amendment Act 106 of 1997 (Mahlaule). The analysis of the court essentially took place under section 27(1)(c) of the Constitution, which grants everyone the right of access to social security, including appropriate social assistance if a person is unable to support him or herself and his or her dependents. However, while permanent residents were recognized as a “vulnerable group” by the court, the approach of the court in this case necessarily differed slightly from the application of substantive equality that is required to provide South Africans with access to the resources that they were previously denied under the apartheid regime. Khosa dealt with present discrimination against vulnerable groups by state policy due to the state's financial constraints, whereas the cases that address the right to access resources such as food and water are more fundamentally about rectifying past injustices. Access to resources was historically denied to black South Africans due to the apartheid government’s establishment of homelands, where the majority of the population was forced to live off a disproportionately small amount of land. The discussion in this section will therefore reference two cases that explicitly deal with the provision of what this article has termed a socio-ecological right: the right of access to water enshrined in section 27(1)(b).

According to the UN Committee on Economic, Social and Cultural Rights (CECSR), there is a negative duty not to directly or indirectly interfere with a person’s enjoyment of the right of access to water. The duty mandates

- refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.

However, in terms of the actual provisioning of water services as a basic human right, there is still much debate. The recommended allocation ranges between twenty and one hundred litres per person per day for domestic consumption.

The right of access to water has also been discussed in the context of privatization, where private market mechanisms distribute goods and services according to willingness and ability to pay. Some have argued that privatization is incompatible with access to basic services as core rights in the Constitution, if read in conjunction with the views of the CESCR. The CESCR explicitly states that “[w]here water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe

and acceptable water,” and that regulations must be established to prevent such abuses. \(96\) In spite of this recognition by the CESCR of the potential abuses associated with the privatization of water, after the Dublin Declaration of 1992, “the characterization of water as an economic good often overshadows other meanings and roles of water, especially in the socio-cultural and symbolic realms.” \(97\) The complex “liquid dynamics” referred to earlier comes into play dramatically in the discussion of commodifying water in order to realize the right to it. \(98\) These complex dynamics also come into play in the cases discussed below.

3.2 Cases Involving the Right of Access to Water in South Africa

The issue of access to water in South Africa is encapsulated by the following statement: “In dancing to the two tunes of markets and rights, equity considerations are being compromised.” \(99\) The dilemma is that cost recovery (e.g., through prepaid water meters) must be achieved in extending water access to previously disadvantaged areas (mainly black areas like the former townships and homeland areas), while in rich, predominantly white areas the cost of installation and infrastructure was written off during apartheid. This has resulted in the absurd outcome that water costs more per litre in rural KwaZulu Natal than it does in Richard’s Bay, a rich, predominantly white city in KwaZulu Natal. \(100\) Furthermore, free water can only be made available to those who live in areas that already have the infrastructure in place, which further skews access toward previously advantaged groups. \(101\) Although the Constitutional Court held that cross-subsidization of poor areas by rich areas was in line with the principles of substantive equality and therefore not unconstitutional, \(102\) this does not overcome the fundamental economic argument of whether access to these services is affordable to the poorest. The question of the affordability of accessing water and its implications for achieving substantive equality is illustrated by the case of Mazibuko and Others v City of Johannesburg and Others. \(103\)

In that case, the applicants were seeking to appeal the judgment of the Supreme Court of Appeal regarding the correct interpretation of section 17(1)(b) of the Constitution, which states that “[e]veryone has the right to have access to sufficient food and water.” The case concerned the City of Johannesburg’s decision in 2001 to introduce prepaid water meters \(104\) as part

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\(96\) CESCR, General Comment, supra note 93 at para 24.

\(97\) Mehta et al, “Liquid Dynamics”, supra note 6 at 5.

\(98\) Ibid at 5, 31.


\(100\) Flynn & Chirzwa, supra note 95.

\(101\) Ibid at 72.


\(103\) Mazibuko, supra note 87.

\(104\) Mazibuko, supra note 87 at paras 6, 14. The meters, which were generally only installed in poorer areas, provided free six kilolitres per household, after which the meters automatically shut-off unless additional water credit was loaded. See Malcom Landford & Anna Russel, “‘Global Precedent’ or ‘Reasonable No More?: the Mazibuko case”, Case Comment (2008) 19 The Journal of Water Law 73 at 73; Jackie Dugard, “Civic Action and Legal Mobilisation: the Phiri Water Meters Case” in John Handmaker & Remko Berkhout, eds, Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners (The Hague: ISS and Hivos, 2010) 71 at 73–74 [Dugard, “Civic Action”].
of a public campaign to conserve water, called Gcin’Amanzi. Residents of Phiri, a historically poor, black township in Johannesburg, brought a suit challenging the installation of prepaid water meters and seeking to increase the amount of free water provided to each household. To support their claim, the residents of Phiri relied on regulations under the Water Services Act, known as the Free Basic Water policy, which guarantees a national minimum amount of potable water per person, set at twenty-five litres per capita per day (lcpd) or six kilolitres per household per month. However, the city's policy set the guarantee at the household level rather than the per person level, resulting in large households being unable to pay for more water. These households would often spend about two weeks per month without access to potable water. This resulted in a tragic incident where two children died in a house fire because there was not enough water to put out the flames.

The applicants argued that the city’s policy was unconstitutional on the grounds that:
1. “[Six] kilolitres per month is allocated to both rich and poor.”
2. “[T]he amount is allocated per stand rather than per person.”
3. The six kilolitres requirement mandated by the Free Basic Water policy “was based on the misconception … that the City did not consider that it was bound to provide free water to citizens.”
4. The six kilolitre requirement “is insufficient for large households.”
5. The six kilolitre requirement is inflexible.

Both lower courts found for the applicants, but relied on different reasoning. The court of first instance, the Johannesburg High Court, determined that the prepaid meters were substantively and procedurally unlawful. It also found that although the regulated twenty-five lcpd was a reasonable minimum, it was insufficient for the residents of Phiri given their particular demographic and social circumstances, and that based on expert testimony from Dr Peter

105 Ibid at 73.
106 Water Service Act, 1997, (S Afr) No 108 of 1997, ss 9(1) and 73(1)(j). It is interesting to note the previous set of circumstances in Soweto, where the city had provided an unmetered and unlimited supply of water to the township despite much being lost due to leaky pipes. In effect, the total amount of water consumed per household in Soweto (including the water lost due to leaks) was sixty-seven kilolitres per month. Johannesburg Water estimated that although a third of all the water it purchased was supplied to Soweto, it generated only one percent of its revenue from there, as most citizens did not pay their deemed consumption charges (Peter Danchin, “A Human Right to Water? The South African Constitutional Court’s Decision in the Mazibuko Case”, EJIL: Talk! (13 January 2010) online: EJIL: Talk! <www.ejiltalk.org>).
108 Landford & Russel, supra note 104 at 73.
109 Dugard, “Civic Action”, supra note 104 at 85.
110 Mazibuko, supra note 87 at 82.
Gleick,\textsuperscript{111} the free allowance should be increased to fifty lcpd.\textsuperscript{112} The Supreme Court of Appeal also deemed the policy to unconstitutional, but lowered the reasonable minimum to forty-two lcpd using testimony from a civil engineer.\textsuperscript{113}

The Constitutional Court overturned the decision of the previous courts, giving “weight to the government’s arguments that the current policies reflected a need to conserve water and also ensure the utility’s financial viability.”\textsuperscript{114} The court found that the city’s policy was reasonable because

1. The original free six kilolitres allocated to heavy water users was justified “by the extent to which” their water usage “cross-subsidize[s] the free allocation.”\textsuperscript{115}

2. Determining the number of people on any given stand sufficiently regularly to apply a per person daily allowance would impose “an enormous administrative burden” on the city.\textsuperscript{116}

3. The city is only under a constitutional duty “to take reasonable measures progressively to [realize] the achievement of the right.”\textsuperscript{117}

4. Statistics show that the average household size was 3.2 people in 2001, thus the policy would provide on average sixty litres per person per day to the average household. It “would be expensive and inequitable” to raise the basic water allowance for all as “it would disproportionately benefit stands with fewer residents.”\textsuperscript{118}

5. Evidence of the policy changes since the launch of the original application showed that the policy had been revised and it is therefore sufficiently flexible.\textsuperscript{119}

6. Furthermore, the indigent persons policy\textsuperscript{120} was a suitable attempt by the city to provide extra services to the poorest households.\textsuperscript{121}

\textsuperscript{111} The President of the Pacific Institute of Development Studies has written on the topic: see Peter H Gleick, “The Human Right to Water” (1998) 1 Water Policy 487 at 496.

\textsuperscript{112} \emph{Mazibuko and Others v City of Johannesburg} [2008] ZAGPHC 491, [2008] 4 All SA 471, (HCSA) at para 11.

\textsuperscript{113} \emph{City of Johannesburg and Others v Mazibuko and Others} [2009] ZASCA 20, [2009] 3 SA 592, (SCA) at paras 22–24.


\textsuperscript{115} \emph{Mazibuko, supra} note 87 at 83.

\textsuperscript{116} \textit{Ibid} at 84.

\textsuperscript{117} \textit{Ibid} at 85.

\textsuperscript{118} \textit{Ibid} at 87–88.

\textsuperscript{119} \textit{Ibid} at 90, 94.

\textsuperscript{120} This policy is now referred to as the Expanded Social Package Policy or Siyasizana. Any person earning less that R3 366.00 per month and residing in Johannesburg can apply for the programme and will receive the specific benefits for which they qualify, including subsidized water, electricity, rates, sanitation and refuse removal (see City of Johannesburg, “Expanded Social Package & Policy” (May 2008) online: City of Johannesburg <www.joburg.org.za>).

\textsuperscript{121} \textit{Ibid} at 92–93.
The second case, *Carolina*, involves, as applicants, the residents of Carolina and Silobela in Mpumlanga whose water supply was contaminated by acid mine drainage. They sought urgent relief because the municipality's interim measures of providing them with water tanks had proved insufficient, and they had gone more than the seven days annual allowance without access to potable water afforded by regulation 3(b) of the *Regulations Relating to Compulsory National Standards to Measure and Conserve Water*. The High Court held that the respondents (government officials from the Ministry of Water Affairs, the local municipality, and the mayor) must make water readily available within the following seventy-two hours and needed to engage actively with the applicants to ensure that water could once again be accessed through the municipal water supply services. The High Court judge explicitly noted that the municipality had not yet approached the mines to stop their contamination.

Having set out the facts of the cases, the following section provides an analysis of the courts' findings as they relate to how equality can open up new pathways for achieving sustainable development in the context of societies with historically embedded inequalities.

### 3.3 Case Analysis and the Role of Substantive Equality in the Judgments

In essence, the arguments of the Constitutional court centered on the difference between a "minimum core" versus a reasonableness approach to the realization of the right of access to water. In *Grootboom* and *TAC*, the Constitutional Court rejected the notion that socio-economic rights had a minimum threshold value that needed to be provided by the state, and instead preferred an interpretation of reasonableness whereby the government has a duty to ensure the progressive realization of these rights through reasonable legislative and other means. A key justification for this argument is that the court should not interfere with the separation of powers by dictating exact standards, for this is the role of the legislative and executive arms of the government. However, this approach, especially in the case of certain rights, such as the right of access to water, has been severely criticized by some who note that it lends itself to a minimum core approach. Dugard, a member of the applicants' legal team, firmly insists that the applicants in *Mazibuko* had argued against the reasonableness of the policy and had not supported a minimum core approach, but that the court had interpreted the applicant's position as a minimum core argument.

In the wake of the defeat by the applicants in the *Mazibuko* case, Dugard's subsequent analysis of the case emphasizes the importance of countering the dominant view of water as a means of revenue through employing a human rights and substantive equality lens. This approach can empower the disadvantaged and excluded who do not have access to basic necess-

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122 The Federation for Sustainable Environment v The Minister of Water Affairs (35672/12) [2012] JDR 1155, (NGHC) [*Carolina*].
124 *Grootboom*, *supra* note 91.
125 Minister of Health and Others v Treatment Action Campaign and Others (No 1) [2002] ZACC 16, (CC).
126 Danchin, *supra* note 106.
127 *Ibid*.
128 *Ibid*. 
sities, such as water, to take action.\textsuperscript{129} At the same time, this approach continues to highlight the problematic aspect of substantive equality that necessitates the reinforcement of difference in order to transform resource allocation.

In both cases, the judges refer to the need to rectify past injustices concerning the allocation of resources. In the Carolina case, Judge Mavundla refers to a quote by Judge O’Regan:

\begin{quote}
The unjust and unequal allocation of resources over decades, indeed centuries, means that those who live in formerly white suburbs generally have better services and conditions of life than those who live in the townships formerly reserved for black people, and still, as a matter of fact, largely occupied by black people.\textsuperscript{130}
\end{quote}

In the Mazibuko case, Judge O’Regan notes the following: “The achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor.”\textsuperscript{131}

However, despite this reference in the Mazibuko case,\textsuperscript{132} the principle of substantive equality was lost in a discussion of reasonableness. The court discussed the reasonableness of the policy in progressively realizing the right of access to water rather than the reasonableness of the policy in its attempt to achieve substantive equality in actualizing the right of access to water. Substantive equality lies at the heart of the resource allocation issues that underpin socio-economic rights to environmental goods, such as water. However, in South African jurisprudence, substantive equality is referred to as context rather than as a substantive argument in right of access to water cases. The dominant neoliberal paradigm or economic pathway continues to undermine more fundamental transformation that requires opening up alternatives.\textsuperscript{133}

Opening up alternative pathways requires appreciating alternative framings of a problem, such as approaching a socio-economic rights discourse based in the concept of dignity or using an ideology that draws on an understanding of socio-ecological systems as complex and dynamic.

Realizing socio-economic rights is an important step toward poverty alleviation. Socio-economic rights also play a part in incorporating sustainable development principles into a human rights discourse. Unfortunately, although the courts have made explicit reference to the concept of substantive equality, there has not yet been the opportunity to test the inclusion of an equality argument in a sustainable development context. Rather, the argument for the need to conserve water has been put forward as a reasonable justification by the courts for charging people for water, but at the same time, there has been little to no punishment for those companies that are the worst offenders, such as the mining companies responsible for the acid mine drainage in the Carolina case. In South Africa, mining is one of the only sectors where the


\textsuperscript{130} Democratic Alliance and Another v Masondo NO and Another [2002] ZACC 28 at para 57, (CC); Carolina, supra note 122 at para 9.

\textsuperscript{131} Mazibuko, supra note 87 at para 2.

\textsuperscript{132} The Carolina case was more procedural. As it was clear that the residents’ rights had been infringed, the case did not make it to the Constitutional Court on appeal (Carolina, supra note 122).

\textsuperscript{133} Bond & Dugard, supra note 86 at 4.
National Water Act of 1998 is complemented by sector-specific water legislation\(^{134}\) that allows for separate regulations determining how water is used and discharged during mining and related operations.\(^{135}\) This distinction is indicative of the embedded interests that lie behind natural resource allocation in the country. Resource allocation is biased towards industry and exacerbates historical inequalities.\(^{136}\)

Soon, however, there may be a serious need for the courts to deal with substantive equality issues in the context of resource scarcity. These socio-ecological rights are not only dependent on the goodwill or capacity of the state to deliver,\(^{137}\) but are also fundamentally linked to the existence of adequate environmental system from which they can be derived. Under a future of potential resource scarcity, thinking of alternative pathways through which these rights can be realized outside of a dominant neoliberal economic paradigm is necessary.

### 3.4 Substantive Equality under Resource Scarcity

The concept of substantive equality is critical in the allocation of increasingly scarce resources. Free market economics would allow for price increases under scarcity, allowing only those who can afford these resources to purchase them. But this system would be in direct contradiction to constitutional principles. While Judge O’Regan refers to the scarcity of water resources in South Africa and the need to conserve water in *Mazibuko*, the finding of the court was not affected by this scarcity. The court was more concerned with the mechanism of providing access to water than with the allocation of a limited amount of water. But under circumstances of population growth, urbanization, and climate change, South Africa faces a serious challenge in the allocation of water for particular uses—not least of which is for growing food, the right to which is also entrenched in the Constitution.\(^{138}\) In fact, Johannesburg Water’s\(^{139}\) policy was founded on a campaign to save water—Gcin’Amanzi—and so in essence, *Mazibuko* favours those advocating that the market (through privatization) will be able to handle the fair allocation of natural resources by internalizing costs and making people pay for environmental goods such as water. Unfortunately, privatization only leads to the fair allocation of resources in certain contexts, such as the exploitation of a water body source for economic activities,\(^{140}\) and does not lead to fair allocation of water destined for domestic consumption. In fact, in developed economies where water has been privatized such as the United Kingdom, water dis-

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137. See Liebenberg’s discussion on the entrenched governmental duty to respect, protect and fulfill human rights: Sandra Liebenberg, *Socio-economic Rights: adjudication under a transformative constitution* (Cape Town: Juta, Ltd, 2010).
139. Johannesburg Water is the utility through which the city of Johannesburg distributes its water and sanitation services.
140. In the *Carolina* case, the mine causing water pollution is a good example of where this approach could work in saddling the polluter with the cost of clean-up (*Carolina*, *supra* note 122 at para 4).
connections have been banned, as “nobody should have to face cutting down on essential water use because they can’t afford their bill.” This is the opposite in South Africa where cases of disconnection are common. For example, in August 2000, the commercialization of previously free water services in Kgqelenzane, Kwa-Zulu Natal led thousands of people to lose access to water. South Africa’s worst cholera epidemic followed. This incident has led to increasing tensions between the water department and the departments of health and other social services because the water companies, seeking to maximize profit, are not responsible for or even concerned with the social and health impacts of disconnections.

Perhaps a better approach than that used by the City of Johannesburg would be to use affordability as a yardstick for reasonableness. This should correct for economic disparities between recipients under scarcity where prices would increase commensurately to an ability to pay. Using affordability raises administrative costs because it requires performing means tests, which are actually already in place in South Africa for determining the poorest households. Rather than face the perceived stigma of receiving extra free water under the indigent policy, which was an argument put forward by the applicants in Mazibuko to support increasing water allocation across the board, poor people, like everyone receiving water, would be charged according to their ability to pay—a function of tax status or geographical area. A radical proposal perhaps, but it is more in line with substantive equality principles and ensures that future risks of scarcity do not impact the poorest as harshly as they would without intervention. However, even this yardstick approach reinforces the difference between those who can and cannot pay, impeding on the value of dignity that the principle of substantive equality hopes to achieve.

The right of access to food is secured in the same section of the South African Constitution as the right of access to water, section 27(1)(b). Although no case has yet come to the court regarding the right to food, such a case could be significant given the discussion above and the element of affordability included in the Food and Agriculture Organization’s definition of food security. India has recently enacted landmark legislation ensuring the right to food. The Indian government pledges, among other commitments, to provide “five kilograms of foodgrains per person per month” at a subsidized rate. This forward-looking legislation, which takes into account notions of substantive equality through a lens of affordability of basic resources, could spark a paradigmatic shift through which to view the legal ramifications of ensuring human rights like the right of access to water and food. In countries like South

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141 Flynn & Chirwa, supra note 95.
142 Bond & Dugard, supra note 86 at 8.
143 Ibid at 9. This also reinforces the siloed nature of how these complex problems are addressed in the South African context. Despite having synergistic properties, many of the socio-economic rights in the Constitution are still delivered departmentally, and the lack of service delivery in one area can infringe on the successful realization of a right in another.
144 FAO, World Food Summit, Rome Declaration on World Food Security and World Food Summit Plan of Action, UN Doc WFS 96/REP (November 1996) [mimeo].
145 The National Food Security Act, 2013 (India), No 20 of 2013, s 3.
146 Sparked by a 2001 Supreme Court ruling that the right to food was inherently linked to the right to life. See Olivier de Schutter, “The Right to Eat” Project Syndicate (1 November 2013) online: Project Syndicate <www.project-syndicate.org/commentary>.
Africa and India where the transformative potential of legislative tools is leveraged to rectify past injustices, continuing to deliver on these socio-ecological rights will become increasingly difficult in a future under double exposure to global environmental change and globalization.

4. LESSONS FOR SUSTAINABLE DEVELOPMENT AND POVERTY ERADICATION

There is an undisputable link between environmental degradation and social problems such as poverty. Indeed, sustainability means ensuring the existence of the ecological conditions necessary to support human life at a certain, specified level of well-being through future generations.147 Pursuing sustainability evidences a dichotomy between the priorities of developed countries and those of developing countries. While the developed world industrialized through exploitation of natural resources (many of which came from the developing world), the developing world now faces the dilemma of needing to develop, but recognizing that they will suffer the socio-ecological consequences of rapid natural resource depletion before they are able to achieve the levels of industrialization in the developed world.148

The inequity embedded within this dichotomy is not just evident in the global system, it is fractal and multi-level. At the international negotiations level, for example, in negotiating a renewed commitment period for the Kyoto Protocol, it is clear that a treaty can only be enforced once it is ratified by the respective states. Similarly, national law needs to be implemented at the level of specific projects. Equally, distributive justice argued for at the global level149 has ramifications on substantive equality at the national level. Much has been written on the need for creating greater equality in negotiation processes in the international environmental arena in order to achieve distributive justice.150 However, similar inequalities exist at the domestic level. Effeh has argued that a key aspect of the right to development, entrenched in the United Nations Declaration on the Right to Development, is not the international community’s onus or duty to developing nations, but that of individual states to their citizens.151

The principles of sustainable development as highlighted in Agenda 21 and the three pillars—economy, environment, and society—are alleged to be of equal importance and interdependent when discussing the trade-offs between them. Unfortunately, the neoliberal emphasis on economic growth has continued to dominate international discourse on development152 while sustainability has become synonymous with the environmental movement. Especially in the South African context, sustainable development has remained within an environmentalist

148 Chatterjee, Death & Pereira, supra note 3 at 13, 14, 22.
149 Okereke, supra note 55.
150 Ibid.
paradigm, in part because the concept is entrenched in NEMA, an act dealing specifically with management of the environment.

However, economic growth and the need to address social and economic inequalities conflict where a neo-liberal conceptualisation of constitutionalism is replacing that of the more state interventionist, post-socialist models of ‘state capitalism’ or ‘social democracy’, whereas the concept of social citizenship (with its egalitarian undertones) is being replaced by more liberal ideas of market citizenship. 153

The problem of developing a system that satisfies economic and market growth while still providing socio-economic rights and protecting or advancing previously disadvantaged groups is central to some of the inherent contradictions espoused in a market-centered pathway to sustainable development. Enabling states to intervene and provide for disadvantaged groups through the mechanism of socio-economic rights is contrary to the free market model of sustainable development espoused by the Bretton Woods institutions. In this model, the market is not only supposed to be able to achieve poverty eradication through trickle-down economics, but to internalize environmental externalities as well. It is in the context of the neoliberal economic model that the world continues to attempt, but fails, to achieve substantive equality by realizing socio-economic rights. Shifting economic policies away from a growth-centered approach to development is a central tenet of more radical versions of the sustainable development discourse. Redistributing resources according to a substantive equality argument is another means of achieving poverty eradication while reframing the sustainable development discourse outside of an environmentalist paradigm. Coupled with this shift to alternative development pathways is a need for different indices of sustainability. Then, solutions to environmental problems that reference equity, pro-poor agency, power dynamics, and resilience may be possible. 154

5. CONCLUSIONS: LINKING SUSTAINABLE DEVELOPMENT AND SUBSTANTIVE EQUALITY UNDER RESOURCE SCARCITY

Despite the efforts of scholars, in practice it has proven very difficult to combine the seemingly contradictory notions of “development” and “sustainability” into a workable framework that has moved beyond the pages on which it is written. The world is facing a sustainability crisis where it is approaching tipping points in many of its critical systems, such as the climate, biogeochemical cycles, and the ocean. 155 Countries need to think seriously about how to deal with the allocation of resources under conditions of increasing stress, scarcity, and variability. In developing countries, these choices come with the prerogative of poverty eradication in the here and now—a difficult political trade-off. However, meeting certain socio-economic rights requires a sound environmental resource base upon which to develop. There are some rights, such as the rights to access to food and water, that are directly linked to the safety and stabil-

155 Rockström et al, supra note 26.
ity of providing ecosystem goods and services. Thus there is a vital link between realizing these socio-ecological rights and achieving environmental integrity that has not yet been made explicit.

At the global level, sustainable development deals with both intra- and intergenerational equity in the use of the Earth’s natural resources. Thus scholars have likened the implementation of sustainable development principles to distributive justice, allowing the redistribution of resources back to those whose were previously exploited and excluded for the development of others. Substantive equality brings this notion down to the level of the nation state, which must allocate resources to meet the needs of the disadvantaged in order to reach equality in living standards. However, this has not yet been put to its real test—that of the reallocation of resources under conditions of scarcity. True substantive equality would allocate resources in such a way that the outcome is equality, but under conditions of scarcity, equality could mean everyone is in a worse state. How will our legal and political institutions deal with these difficult decisions? More importantly, will they be able to pre-empt scenarios and implement responses that deal with wasteful behavior, thereby curtailing the escalation of scarcity in the future?

This article argues that it is necessary to open up new and unexplored pathways for achieving sustainability. In the international discussions on the right of access to water, the problem of exclusion is one that will only be exacerbated by the effects of a changing climate and other environmental changes. The STEPS approach requires equity to be taken into account and requires services to be accessible and affordable to all. This approach insists that “attitudinal, environmental and institutional barriers, including poor accountability mechanisms” must be addressed. It will be impossible to realize true sustainable development as envisaged in the Brundtland report without incorporating notions of substantive equality and the institutional changes that are necessary to achieve it.

As is illustrated in the South African cases on the right of access to water, this link can be managed through the incorporation of sustainable development principles into a human rights discourse. However, socio-economic rights are often difficult to realize even when they are legally recognized. In the South African legal system, explicitly incorporating the principle of substantive equality into arguments around the realization of socio-economic rights relating to sustainable development provides a by-way to counter conventional arguments of reasonableness that are often embedded in neoliberal economic theory. If nothing else, it will have the impact of shifting sustainable development out of an environmental paradigm and into mainstream development theory, and in particular as a tool for poverty eradication and social

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156 Sarukhán & Whyte, supra note 147 at 21–22. While the article does not employ a rights-based approach, the relevance of this article lies in the explicit link it makes between the need of maintaining ecosystems in order to contribute to human wellbeing, such as through the provision of food and water. This complements a rights-based approach that emphasizes people’s right of access to food and water by drawing attention to the fact that these rights are underpinned by ecosystem services.


158 Nicol, Mehta & Allouche, supra note 154.
justice. At the same time, it will also enable current discussions of substantive equality in socio-economic rights to have a long-term view, which sees that it is imperative for development to take place sustainably now so that greater challenges of resource allocation do not arise under conditions of scarcity and variability in the future.