

# The right to the city and the urban environment: Re-imagining section 24 of the 1996 Constitution

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## 1 Introduction

The majority of the world's population now lives in cities, and the tide of urbanisation shows no sign of ebbing. People come to cities to sustain themselves and to improve their lives. Once there, many languish in extreme poverty, living in deplorable conditions and caught in cycles of unemployment, disease and exploitation. Alongside them, concrete signs of progress, privilege and opulence abound. Cities are the physical sites of inequality, of unequal distribution of income, services and the privileges of citizenship.<sup>1</sup> Yet, their infrastructure, the access they provide to services essential for human survival, upliftment and flourishing, as well as the economic, social and cultural activity with which they brim, all remain symbols of a better life within reach. Cities are where socio-economic rights are enacted, asserted, struggled for, attained and denied.<sup>2</sup>

The growth and functioning of cities obviously has a significant environmental impact. Urban pollution, sprawl and energy consumption pose real and lasting threats to the natural environment, whereas climate change, poor environmental health and intensifying resource scarcity increasingly threaten the ability of cities to fulfil the needs of those who inhabit them.<sup>3</sup>

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<sup>1</sup>Swilling 'Local governance and the politics of sustainability' in van Donk *et al* (eds) *Consolidating developmental local government: Lessons from the South African experience* (2008) 77 at 79.

<sup>2</sup>See Pieterse 'Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa' (2014) 131 *SALJ* 148 at 153.

<sup>3</sup>See Du Plessis 'South Africa's constitutional environmental right (generously) interpreted: What is in it for poverty?' (2011) 27 *SAJHR* 279 at 287-288; Kidd 'Environment' in Currie and De Waal (eds) *The Bill of Rights handbook* (2013) 516 at 525; Swilling (n 1) 79-81.

It is therefore understandable that the environmental impact of urbanisation, urban growth and development tends to be assessed predominantly with reference to the natural environment (for instance, when contemplating the effects of pollution, the destruction of ecosystems and the depletion of natural resources).<sup>4</sup> Comparatively little attention is devoted to environmental issues within towns and cities. Yet, the physical form of cities determines the living conditions of their inhabitants as well as the distribution of goods, services and opportunities within them. The urban environment is thus an important factor in, and indicator of, the progressive realisation of socio-economic rights as well as the enjoyment of the civil and political rights with which they intersect. The potential of cities to fulfil the needs of their inhabitants may be enhanced therefore by improving the urban environment, whereas that potential will inevitably be inhibited by the deterioration thereof.

It often happens that ostensible public or private attempts to improve the urban environment, for instance through infrastructure programmes or urban regeneration schemes, are opposed because of their detrimental impact on the livelihoods and access to the objects of socio-economic rights of urban inhabitants, especially the poor. As often, socio-economic upliftment and poverty alleviation projects are challenged because of their perceived environmental impact. Indeed, a number of the socio-economic rights decisions handed down by South African courts in recent years have involved either of these forms of opposition. *Minister of Public Works v Kyalami Ridge Environmental Association*,<sup>5</sup> for instance, involved opposition by residents of a wealthy neighbourhood to the erection of temporary housing for poor flood victims in their vicinity, ostensibly out of concern for the environmental impact this would have. More directly, *Occupiers of 51 Olivia Road v City of Johannesburg*<sup>6</sup> involved a challenge to the evictions of inner city Johannesburg residents from abandoned and deteriorated buildings, in terms of a policy aimed at urban regeneration and the enhancement of urban health and safety. Similarly, *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*<sup>7</sup> involved the relocation of inhabitants while the informal settlement was upgraded and redeveloped. Other cases, such as *Mazibuko v City of Johannesburg*,<sup>8</sup> have involved opposition against city management's attempts to reduce and structure urban resource consumption (in *Mazibuko's* case, water), partly due to environmental concerns.

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<sup>4</sup>Du Plessis (n 3) 292-293; Dugard and Alcaro 'Let's work together: Environmental and socio-economic rights in the courts' (2013) 29 SAJHR 14 at 17.

<sup>5</sup>2001 3 SA 1151 (CC).

<sup>6</sup>2008 3 SA 208 (CC).

<sup>7</sup>2010 3 SA 454 (CC).

<sup>8</sup>2010 4 SA 1 (CC).

In all of these cases, courts have (to a greater or lesser extent) pitted environmental rights or concerns against socio-economic rights and have implicitly attempted to strike a balance between these, either in their interpretation of the socio-economic rights concerned, or through a limitation clause-type proportionality exercise.<sup>9</sup> This approach struggles, for the most part, to grasp and reflect the interconnectedness between collective claims to the urban environment, the actualisation of individual socio-economic rights and the developmental responsibilities of local government. Accordingly, it has failed to provide guidance for future developmental attempts to improve the urban environment or to adequately negotiate the tradeoffs inherent to the actualisation of socio-economic rights through urban governance.

In this article, I attempt to lay the foundations for a jurisprudential approach to these issues that better reflects and accommodates these interconnections. In doing so, I turn to the environmental right in the 1996 Constitution, which predominantly thus far has been invoked and developed in relation to the natural environment. I argue that the environmental right, if progressively interpreted and applied in an urban setting, provides an appropriate constitutional arena within which to balance the competing concerns elaborated above and through which to assess the individual and collective gains from socio-economic development in both the short- and the long-term. Accordingly, this article joins the growing chorus of scholarship arguing for increased and more explicit articulation between the environmental right and the different socio-economic rights in the Constitution.<sup>10</sup>

Conceptually, the article draws from two related strands of urban development theory. The first, somewhat predictably, is that concerning urban resilience and sustainability, where my focus is on the appropriation of such theory in relation to the notion of sustainable development in the 1996 Constitution. Secondly, and more explicitly, I rely on development-based literature on the so-called 'right to the city', a decidedly pro-poor concept which gives effect to the interconnectedness of civil, political and socio-economic rights within the urban environment and which I believe should inform the interpretation of an urban environmental right.

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<sup>9</sup>Dugard and Alcaro (n 4) 26-27; Wynberg and Fig 'Realising environmental rights: Civil action, leverage rights, and litigation' in Langford *et al* (eds) *Symbols or substance: The role and impact of socio-economic rights strategies in South Africa* (2014) 310 at 311.

<sup>10</sup>Dugard and Alcaro (n 4) 15; 26-27; Du Plessis (n 3) 292; Feris 'Constitutional environmental rights: An under-utilised resource' (2008) 24 *SAJHR* 29 at 30; 38; Fuo 'The transformative potential of the constitutional environmental right overlooked in *Grootboom*' (2013) 34(1) *Obiter* 77; Humby 'Environmental justice and human rights on the mining wastelands of the Witwatersrand gold fields' (2013) 43(1) *Revue Generale de Droit* 65; Stewart and Horsten 'The role of sustainability in the adjudication of the right to access to adequate water' (2009) 24 *SA Public Law* 486 at 489-490; Wynberg & Fig (n 9).

I proceed below to briefly elaborate the content of the right to the city and to indicate how this right can be rendered concrete in the literal context of the South African Bill of Rights. Thereafter, I zoom in on the text of section 24 of the Constitution, contemplating the significance of the various concepts employed there for the attainment of urban social justice and indicating how these may assist in solving disputes concerning the realisation of socio-economic rights in an urban setting. I then critically engage with the relevant socio-economic rights jurisprudence, with the aim of pointing towards areas in which grappling with the environmental right could have enriched the analysis.

## 2 The right to the city

Given that cities provide the spatial context for much sustainable development and the realisation of socio-economic rights,<sup>11</sup> it is unsurprising that the most progressive theoretical framework for urban social justice has emerged from the disciplines of town planning, architecture and, more recently, urban development. 'The right to the city' is a concept rooted in Left-leaning architecture and town planning scholarship, having been coined first by French writer Henri Lefebvre around the time of the French student riots of the late 1960s.

Lefebvre famously described the right to the city as a 'cry and a demand' by urban insurgents, marginalised masses and malcontents, to be accommodated in city life, to share in the spoils of the city and to participate in the making and remaking of the urban form.<sup>12</sup> Above rhetoric, this 'cry and demand' is expressed physically, through the appropriation and inhabitation of city space and the active participation, through the rituals of everyday struggle, in shaping the form and character of the city. By asserting their presence in urban space, the poor, the marginalised and the excluded at once draw attention to their concerns, demand the accommodation thereof and contribute to shaping authorities' response thereto.<sup>13</sup>

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<sup>11</sup>Swilling (n 1) 79.

<sup>12</sup>Lefebvre *Le Droit a la Ville* (1968), translated and reprinted as part of Lefebvre (Kofman and Lebas-trans) *Writings on cities* (1996). See specifically 173-174.

<sup>13</sup>Lefebvre (n 12) 158-159; 173-174. See further, for instance, Coggin and Pieterse 'Rights and the city: An exploration of the interaction between socio-economic rights and the city' (2012) 23 *Urban Forum* 257 at 259-260; Harvey 'The right to the city' (2008) 53 *New Left Rev* 23 at 23; Marcuse 'From critical urban theory to the right to the city' (2009) 13 *City* 185 at 190-193; Mitchell *The right to the city* (2003) 18-20; Pindell 'Finding a right to the city: Exploring property and community in Brazil and in the United States' (2006) 39 *Vanderbilt J of Transnational Law* 435 at 442; Pieterse (n 2) 152-153; Purcell 'Excavating Lefebvre: The right to the city and its urban politics of the inhabitant' (2002) 58 *GeoJournal* 99 at 102-103; Simone 'The right to the city' (2005) 7(3) *Interventions* 321 at 323.

In focusing on the production of urban space, the right to the city is implicated by all actions that impact on the form of the city and on the experiences of its inhabitants, including, for instance, actions by government, private developers, property owners and other urban inhabitants.<sup>14</sup> The main object of the right to the city is the physical form of the city itself. Lefebvre spoke of the 'oeuvre' of the city, viewing it as a multi-authored work continuously in progress, shaped by competing, contradictory and diverse forces, actions and voices.<sup>15</sup> The urban environment is thus both the stage on which the right to the city is asserted, as well as the object of the right.

In recent years, this notion of 'the city' has been appropriated in development studies literature, in trying to make sense of the role of the developmental state in urban development. This literature views the role of the State as being focused on creating, enabling, sustaining and facilitating an urban environment which is conducive to the realisation of the constituent parts of the right to the city by urban inhabitants.<sup>16</sup> Development projects must therefore aim to make it possible for people to meaningfully access and make use of cities and the various socio-economic amenities they have to offer, as well as to participate in decisions and actions that shape their urban environment.<sup>17</sup>

Elsewhere, Thomas Coggin and myself have attempted to distil what the right to the city could mean for South African human rights scholars and practitioners, given that the urban context increasingly underlies socio-economic rights litigation and adjudication. In the context of the Bill of Rights in the 1996 Constitution, we showed that the right to the city implicates a conglomerately exercised, interrelated package of socio-economic and civil and political rights. These include the rights to freedom of movement, freedom of assembly, security of the person, access to housing, access to food, water and health care services, equality and, importantly, the environmental right. In addition, the right to the city encompasses a number of rights not listed in the Bill of Rights but implied by the developmental responsibilities of local government, such as rights to work, energy, sanitation, mobility and telecommunications.<sup>18</sup> Its usefulness, as a

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<sup>14</sup>Pieterse (n 2) 154; Purcell *op cit* (n 13) 101-03.

<sup>15</sup>Lefebvre (n 12) 101-03. See also Coggin and Pieterse (n 13) 260-26; Frug 'The geography of community' (1996) 48 *Stanford LR* 1047 at 1051; 1077-79; Jacobs *The death and life of great American cities* (1961, 3ed 1993) at 72-73; 95; Mitchell (n 13) 17-18; Pindell (n 13) 438; Pieterse (n 2) 153.

<sup>16</sup>Parnell and Pieterse 'The "right to the city": Institutional imperatives of a developmental state' (2010) 34 *International J of Urban & Regional Research* 146 at 151. See further Blanes 'Key governance principles underpinning urban sustainable development planning and management' in Gospodini, Brebbia and Tiezzi *The sustainable city V: Urban regeneration and sustainability* (2008) 55 at 57; Pieterse (n 2) 157.

<sup>17</sup>See Coggin and Pieterse (n 13) 259 and authorities there cited.

<sup>18</sup>*Id* 261-263. See also Parnell and Pieterse (n 16) 148; Pieterse (n 2) 153.

concept, lies in the manner in which it draws attention to the inter-linkages between the various listed and non-listed rights, which must inform the interpretation of any number of implicated rights in a legal dispute concerning urban social justice.

Overall then, the right to the city paints a picture of an urban environment to which a wide range of diverse people, but especially the poor, have meaningful access and in which they can exercise civil, political and socio-economic rights freely, effectively and by way of participation. Inherent to this is the need for conflicting claims to, and appropriations of, the city to be balanced against one another and for every individual's right to the city to be mediated against that of all other inhabitants of the city. Importantly, the city itself forms the backdrop for this balancing exercise.

### 3 An urban environmental right in the 1996 Constitution

Whereas the predominant focus of environmental law in South Africa, as elsewhere, has been on the protection and preservation of the natural environment, the notion of environmental justice is a broader one, that encompasses the place of humans within the environment and draws attention to the conditions within which people live.<sup>19</sup> The environmental right in the 1996 Constitution, while thus far underdeveloped in constitutional law scholarship and jurisprudence,<sup>20</sup> is certainly phrased in a manner that gives effect to this broader notion of environmental justice.

Section 24 of the Constitution determines:

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.

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<sup>19</sup>Cock 'Sustainable development or environmental justice: Questions for the South African labour movement from the Steel Valley struggle' (2007) 40 *Labour, capital & society* 37 at 48-49; Dugard and Alcaro (n 4) 19; Humby (n 10) at n 10 and accompanying text.

<sup>20</sup>Du Plessis (n 3) 289; Feris (n 10) 30; 38; Humby (n 10) n 46 and accompanying text.

From the phrasing of section 24(a) it is clearly possible for the provision to apply beyond the natural environment, in order to be relevant to other places in which people find themselves, including cities. Despite the narrower understanding of the term 'environment' emerging from leading environmental legislation such as the National Environmental Management Act 107 of 1998 ('NEMA'),<sup>21</sup> several scholars have argued that section 24 should therefore also be understood to refer to the urban environment.<sup>22</sup> Such an understanding of the notion 'environment' in section 24 would not only make the provision directly relevant to a far greater number of South Africans, it would also provide an interesting entry portal for the 'right to the city' into the constitutional scheme.<sup>23</sup>

In the remainder of this section, I illustrate how the various concepts employed in section 24 may be applied in relation to the urban environment, and how they may assist in advancing our understanding of socio-economic rights, concretising the right to the city and balancing the conflicting tensions inherent to both.

### 3.1 *An environment not harmful to health or well-being*

Environmental rights are often conceived of as collective, with the notion of a joint entitlement to the preservation and protection of the environment as common good being central to much of environmental justice thinking. This notion of social solidarity and common good, often missing from individual socio-economic rights challenges and campaigns, presents a useful basis for understanding and reconciling competing claims for urban resources.<sup>24</sup> Inherent to an urban environmental right, thus, is that competing individual claims to different aspects of the right to the city have to be balanced in the overall common interest.<sup>25</sup>

The substantive entitlement embodied in section 24(a) then, is a collective one, to a living environment that does not harm (public) health or well-being. While the notion of 'health' in this regard is pretty straightforward and easily leads one to pinpoint everyday infringements of the urban environmental right (from

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<sup>21</sup>Section 1(xi) of the NEMA defines 'environment' as 'the surroundings within which humans exist and that are made up of – (i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being'.

<sup>22</sup>See Cock (n 19) 48; Dugard and Alcaro (n 4) 19; Glazewski *Environmental law in South Africa* (2005) 76; Kidd (n 3) 518-519; 526.

<sup>23</sup>Coggin and Pieterse (n 13) 263.

<sup>24</sup>See Bond 'Water rights, commons and advocacy narratives' (2013) 29 *SAJHR* 125 at 138-141; Dugard and Alcaro (n 4) 18; Roithmayr 'Lessons from Mazibuko: Persistent inequality and the commons' (2010) 3 *Constitutional Court Rev* 317 at 329-334.

<sup>25</sup>On such balancing through 'traditional' environmental law and neighbour law see, for instance, Glazewski (n 22) 74-75.

poor health outcomes as a result of pollution to the negative health and safety effects of crumbling infrastructure and of a lack of access to essential services such as water, sanitation and electricity),<sup>26</sup> the idea of 'well-being' in section 24 is somewhat more ambiguous. Usually taken to refer to physical, emotional, social and economic well-being, a progressive interpretation of the concept can see the environmental right being implicated in an urban context in relation to various determinants of the quality of urban life, such as the quality, quantity and accessibility of public space, urban safety and security, urban aesthetics, as well as access to a wide range of urban facilities, from essential services to entertainment.<sup>27</sup>

Read with the State's obligations to 'respect, protect, promote and fulfil' the rights in the Bill of Rights, in terms of section 7(2) of the Constitution, section 24(a) thus appears, at a minimum, to impose an obligation on the State and other powerful urban actors to not cause a deterioration of the urban environment, to the extent that this would diminish the health or well-being of inhabitants. As to the positive dimensions of the right, it is clear that the substandard living conditions associated with severe urban poverty fall foul of section 24(a), and that fulfilling the right thus requires the realisation of a wide range of socio-economic rights implicated by poverty.<sup>28</sup>

### 3.2 *Environmental protection, urban resilience, inter- and intra-generational equity*

The right to have the environment protected in section 24(b) of the Constitution explicitly places a number of positive obligations upon the State. It is enjoined to take reasonable measures to prevent pollution and degradation of the environment, promote its conservation and secure sustainable development, for both present and future generations.<sup>29</sup> When these enumerated responsibilities are viewed through an urban lens, the obligation to protect the environment calls to mind literature on urban resilience – the ability of cities to adapt to challenging conditions such as environmental threats, climate change, economic setbacks and sudden population growth.<sup>30</sup> The State's responsibility to protect the urban

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<sup>26</sup>See Bilchitz 'Citizenship and community: Exploring the right to receive basic municipal services in Joseph' (2010) 3 *Constitutional Court Rev* 45 at 53-54; Du Plessis (n 30) 293-295; Feris (n 10) 43; Fuo (n 10) 89-90.

<sup>27</sup>See Du Plessis (n 3) 295-296; Fuo (n 10) 90; Glazewski 'Environmental justice and the new South African democratic legal order' (1999) *Acta Juridica* 1 at 7; Kidd (n 30) 520; 526.

<sup>28</sup>Du Plessis (n 3) 295; 299; Feris (n 10) 43; Kidd (n 3) 521.

<sup>29</sup>Du Plessis (n 3) 298-299.

<sup>30</sup>See, for instance, South African Cities Network *Towards resilient cities: A reflection on the first decade of a democratic and transformed local government in South Africa 2001-2010* (2011) 12-13; 48; 89.



environment further appears to link with a number of the developmental responsibilities of local government, as listed in section 152 of the Constitution.<sup>31</sup> Practically, section 24(b) appears to require measures such as road and traffic management, public transport provision, upgrading of informal settlements, sustainable essential service delivery, promotion of energy efficiency, reduction of pollution, inner city regeneration programmes, enforcement of health and safety laws as well as protection of built heritage.

The obligation in section 24(b), however, is qualified by the proviso that environmental protection must be for the benefit of both present and future generations. This means that the obligation has to be understood in accordance with the environmental law principles of inter-generational and intra-generational equity, which are both inherent to the notion of sustainable development.

In terms of the principle of inter-generational equality, the environmental costs and benefits of development ought to be distributed equally between the present generation of urban inhabitants. This means that existing maldistributions of urban resources (access to services, public space, transport, etc) fall foul of the obligation to protect the environment, as do development or regeneration projects which disproportionately benefit or disadvantage a particular sector of the city. Examples of the latter would include resource (such as water or energy) conservation programmes targeting only the poor or failing to address wasteful over-consumption by the rich, public environment upgrades being limited to certain areas in the city, instances where the effect of the privatisation of public space (for instance, through the private upgrade and management of inner city improvement districts) is to exclude the poor, and so forth. The principle further draws attention to the fact that the poor disproportionately bear the burdens of environmental degeneration and thus requires of environmental protection measures to prioritise the alleviation of their plight.<sup>32</sup>

The principle of intra-generational equity is somewhat more complex, in that it requires attention to be paid also to the needs of future inhabitants of the city.

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<sup>31</sup>Du Plessis 'Local environmental governance and the role of local government in realising section 24 of the South African Constitution' (2010) 21 *Stellenbosch LR* 265 at 268; 273; 286-287; Pieterse (n 2) 156-157. Section 152 of the Constitution determines that the objectives of local government are '(a) to provide democratic and accountable government for local communities; (b) to ensure the provision of services to communities in a sustainable manner; (c) to promote social and economic development; (d) to promote a safe and healthy environment; and (e) to encourage the involvement of communities and community organisations in the matters of local government'.

<sup>32</sup>On these and other features of inter-generational equity, see Angotti and Sze 'Environmental justice praxis: Implications for interdisciplinary public health' in Freudenberg, Klitzman and Saegert (eds) *Urban health and society* (2009) 19 at 22-23; Cock (n 19) 47-48; Feris (n 10) 41; Field 'Sustainable development versus environmentalism: Competing paradigms for the South African EIA regime' (2006) 123 *SALJ* 409 at 416; Roithmayr (n 24) 336; Stewart and Horsten (n 10) 489; 491; Swilling (n 1) 82-87.

Environmental law recognises that natural resources are finite and that the negative effects of environmental degradation are most harshly felt a few generations down the line. Accordingly, it requires development to take heed of the needs of future generations, which sometimes means that the current development-related interests of the present generation have to yield in favour of long-term environmental sustainability.<sup>33</sup> Understood in light of theory on the right to the city, this obligation means that the city's ability to serve the socio-economic needs of future generations must be taken into account when considering the obligation to protect the urban environment. Thus understood, the principle of intra-generational equity may serve to justify the short-term negative impact of, for instance, regeneration projects (such as displacement caused by the redevelopment of an area, or evictions from degenerated buildings which are to be rehabilitated), given the need to ensure that the city remains able to fulfil the needs of its inhabitants in future.

### 3.3 *Sustainable development*

The notion of sustainable development is central to both environmental justice and development discourse, and 'provides a backdrop for struggles over the nature and form of future urban development'.<sup>34</sup> Regularly used in development literature to denote a necessary balance between (often competing) environmental and developmental concerns, as a moral principle sustainable development requires us 'to pursue equity in the light of a certain consciousness of the linkages between human and natural systems in the context of past and continuing unsustainable practices'.<sup>35</sup>

Embodying both the principles of inter-generational and intra-generational equity, sustainable development aims to balance the often competing tensions between the need to preserve and protect the natural environment, the need for poverty alleviation and economic growth, as well as the constitutional imperative of achieving substantive equality.<sup>36</sup> It is further associated with principles of good environmental governance (such as the obligation to prevent harm and the principle of common but differentiated responsibility), public participation in decision-making and pre-development assessment of environmental impact.<sup>37</sup>

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<sup>33</sup>See Du Plessis (n 3) 286; 290; 297-298; Feris (n 10) 41; Field (n 32) 415-416; Fuo (n 10) 88; Kotzé 'Phiri, the plight of the poor and the perils of climate change: Time to rethink environmental and socio-economic rights in South Africa?' (2010) 1 *J of Human Rights and the Environment* 135 at 158.

<sup>34</sup>Coggin and Pieterse (n 13) 263.

<sup>35</sup>Field (n 32) 417.

<sup>36</sup>Du Plessis (n 3) 282; 285; 290-291; 297-298; Feris (n 10) 39-40; Field (n 32) 414-419; 426; Fuo (n 10) 87; Kidd (n 3) 524; Kotzé (n 33) 136; Stewart and Horsten (n 10) 489; 491-492.

<sup>37</sup>Blanes (n 16) 55; Field (n 32) 416; Fuo (n 10) 87. See further ss 2(3) and 2(4) of the NEMA.

In the urban context, sustainable development is about improving the living conditions of the poor whilst increasing the ability of the city to satisfy their present and future needs alongside those of other inhabitants. This must be done whilst heeding principles of inter- and intra-generational equity and participatory governance, and should ultimately aim to transform cities into more environmentally sustainable organisms by, for instance, increasing densification while reducing sprawl, reducing motorised traffic, increasing green space, becoming more resource- and energy-efficient, and so on.<sup>38</sup>

### 3.4 Reasonable legislative and other measures

Section 24 determines that the obligation to protect the environment (inclusive of principles of sustainable development, inter- and intra-generational equity) should be effected through the adoption and implementation of 'reasonable legislative and other measures'. This immediately calls to mind the similar obligation upon the State, in terms of sections 26 and 27 of the Constitution, to pursue the progressive realisation of socio-economic rights by way of reasonable legislative and other measures, within the State's available resources. Accordingly, a number of scholars have remarked that the import of the reasonableness standard into section 24 provides a gateway for the infiltration of the substantive socio-economic rights jurisprudence of the Constitutional Court into the environmental realm.<sup>39</sup>

Indeed, the Constitutional Court's well-known line of decisions giving effect to socio-economic rights has elevated an inquiry into the reasonableness of measures aimed at progressively realising socio-economic rights to being the central yardstick for compliance with the rights embodied in sections 26 and 27 of the Constitution. In *Government of the RSA v Grootboom*, the Court held that reasonableness required of such measures to be balanced, coherent, flexible, inclusive, transparent and capable of achieving the progressive realisation of the relevant rights, both in their conception and in their implementation. Measures further had to balance the achievement of short-, medium- and long-term needs, had to pay specific attention to the plight of the most vulnerable and desperate rights-beneficiaries and had to cater for the satisfaction of their urgent needs.<sup>40</sup>

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<sup>38</sup>These and other demands of sustainable urban development are embodied, for instance, in the South African National Department of Environmental Affairs and Tourism's *National framework for sustainable development in South Africa* (2008). See 3; 13; 38.

<sup>39</sup>See Du Plessis (n 3) 299-305; Glazewski (n 22) 79; Kidd (n 3) 522-523; Kotzé (n 33) 155-156; Stewart and Horsten (n 10) 488; 492.

<sup>40</sup>*Government of the RSA v Grootboom* 2001 1 SA 46 (CC) at paras 39-44. The reasonableness yardstick was subsequently applied, *mutatis mutandis*, in well-known socio-economic rights decisions including *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC); *Khoza v Minister of Social Development* 2004 6 SA 505 (CC) and *Mazibuko* (n 8).

The reasonableness standard has been exhaustively analysed and criticised elsewhere, not least for its seeming conceptual ‘emptiness’, with the Constitutional Court ostensibly assessing compliance with the standard a-contextually and without reference to the substantive content of the rights to which it aims to give effect.<sup>41</sup> Understood in the substantive context of the environmental right, however, the *Grootboom* reasonableness standard is valuable for prescribing the manner in which the State must go about carrying out its obligation to protect the environment, with due regard for the constraints within which it operates.<sup>42</sup> In particular, the standard’s emphasis on the needs of the most vulnerable and desperate rights-beneficiaries means that urban authorities have to be cognisant of the effects of their actions on the everyday lives of the poorest and most vulnerable urban inhabitants. This ensures that the needs of the poor are not sidelined in urban management, regeneration and development policies and that the potential adverse consequences of the implementation of such policies on the lives of the most vulnerable urban inhabitants are considered, and ameliorated as far as is possible. Applying the reasonableness standard in evaluating State attempts to protect the environment therefore goes a long way towards minimising infringements of the right to the city.

A number of scholars have further suggested that the concepts of sustainability, equity and participation inherent to the obligation to protect the environment should, in turn, inform courts’ application of the reasonableness standard in socio-economic rights matters, especially when considering the availability of resources as well as when balancing short-, medium- and long-term needs.<sup>43</sup> This makes particular sense in the urban environment, where policies aimed at giving effect to any particular socio-economic right will, due to the intricate interconnections inherent to the right to the city, likely impact on other dimensions of the right, either in the medium- or in the long-term.

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<sup>41</sup>See, for example, Bilchitz ‘Towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence’ (2003) 19 *SAJHR* 1-26; Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 144-145; 155-157; 159-162; Brand ‘The proceduralisation of South African socio-economic rights jurisprudence, or “What are socio-economic rights for?”’ in Botha; van der Walt and van der Walt (eds) *Rights and democracy in a transformative Constitution* (2003) 33, 36-37; 46; 49-50; 55; Liebenberg *Socio-economic rights: Adjudication under a transformative Constitution* (2010) 173-179; McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009) 173-189; Pieterse ‘Resuscitating socio-economic rights: Constitutional entitlements to health care services’ (2006) 22 *SAJHR* 473 at 486-488.

<sup>42</sup>Also argued by Kotzé (n 33) 155-156.

<sup>43</sup>See Fuo (n 10) 93-94; Kotzé (n 33) 145-146; Mafunganyika ‘The importance of environmental laws in housing developments: Lessons from the Diepsloot housing project’ (2011) 26 *SA Public Law* 202 at 214; Stewart ‘Considering sustainability when evaluating the right to water as a scarce natural resource right in the African Charter’ (2010) 11(3) *ESR Rev* 25-26; Stewart and Horsten (n 10) 489-490; 498; 503.

One crucial element of the right to the city that is inherent to the notion of sustainable development, intrinsic to environmental law practice and increasingly forming part of the Constitutional Court's conception of reasonableness in socio-economic rights matters, is the notion of inhabitants' participation in the shape of the city and in the processes that structure their presence therein.<sup>44</sup> In a range of decisions concerning evictions from inner city buildings or informal urban settlements, most notably those of *Olivia Road* and *Joe Slovo*, the Constitutional Court held that inner-city evictions leading to homelessness, as well as the relocation of urban inhabitants to the urban periphery, are unlikely to be held reasonable if not preceded, accompanied and superseded by meaningful engagement with the affected urban inhabitants.<sup>45</sup> In *Olivia Road*, it held that such meaningful engagement must, in relation to evictions from inner city buildings in the pursuit of urban regeneration and the rehabilitation of the urban environment, at least canvass the consequences of the eviction for the inhabitants, the availability of alternative inner city accommodation for them and the extent to which city management can assist in re-accommodating them.<sup>46</sup>

Section 24(b) imports the reasonableness standard into the obligation to protect the environment, and the standard's incorporation of the notion of meaningful engagement in urban eviction cases makes it clear that sustainable development and the safeguarding and protection of the urban environment have to be participatory processes. This aligns the obligation to protect the environment with the right to the city, in ensuring that policies and processes which change the face of the city are shaped with meaningful input by those who inhabit the city.<sup>47</sup>

#### 4 Urban environmental jurisprudence

As alluded to above, there has been a disappointing lack of articulation between South African human rights jurisprudence concerning socio-economic rights, on the one hand, and that involving the environmental right on the other. In particular, while the state, sustainability and functioning of the urban environment has arguably been central to a large number of the Constitutional Court's decisions in the socio-economic realm, environmental concerns have permeated these decisions at most indirectly.

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<sup>44</sup>On participation as inherent to sustainable development and environmental governance see Du Plessis (n 31) 283; Du Plessis 'Public participation, good environmental governance and fulfilment of environmental rights' (2008) 2 *Potchefstroom Electronic LJ* 3; 13-14; 17-23; Field (n 32) 416.

<sup>45</sup>See *Olivia Road* (n 6) paras 13-14; 16; 44; *Joe Slovo* (n 7) paras 113; 117; 238.

<sup>46</sup>*Olivia Road* (n 6) paras 14-16. For discussion of this finding in light of the right to the city, see Coggin and Pieterse (n 13) 267-268. See further Wilson 'Litigating housing rights in Johannesburg's inner city: 2004-2008' (2011) 27 *SAJHR* 127 at 146-148.

<sup>47</sup>See Pieterse (n 2) 169.

*Kyalami Ridge* to date remains the only case where socio-economic and environmental rights have been pitted against each other explicitly. Residents of a wealthy far-northern Johannesburg suburb objected to the location of a temporary transit camp for flood victims in the vicinity of their neighbourhood, arguing, among other things, that this would threaten their environmental interests and property values. In (correctly) dismissing their claims, the Court appeared to regard the environmental concerns as extraneous to the Constitution and as being in conflict with the right of access to adequate housing. It proceeded to balance these against each other, with the constitutional importance attached to the latter right predictably tilting this balance in favour of the settlement.<sup>48</sup> While this outcome has generally been welcomed, it is unfortunate that the Court failed to perceive the interconnections between the housing and environmental rights,<sup>49</sup> not least because the effect of this was that concerns associated with the right to the city did not enter its reasoning.

Meanwhile, the Constitutional Court's main environmental rights judgment, *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga* (which overturned an administrative decision to grant permission to construct a filling station in a small town, on ecologically sensitive land, where there were already other filling stations in the region, mostly for reasons of economic and ecological sustainability), held forth a sophisticated understanding of sustainable development as encompassing social and economic development alongside environmental protection.<sup>50</sup> The judgment also indicated a willingness to subvert short-term developmental interests to broader, long-term concerns, in considering the likelihood that the abandoned site of an economically unsustainable filling station would be of limited use to future generations.<sup>51</sup> Yet, the judgment failed to explore the links between these conceptions of sustainable development and intra-generational equity on the one hand and socio-economic rights on the other. Nor did it substantively engage with section 24 outside of this assertion. Instead, the judgment descended into the preoccupation with procedure and administrative law for which environmental law adjudication has unfortunately become known.<sup>52</sup>

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<sup>48</sup>See *Kyalami Ridge* (n 5) paras 24; 68; 103-104; 106.

<sup>49</sup>See *Feris* (n 10) 42-43; *Humby* (n 10) n 46 and accompanying text.

<sup>50</sup>*Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga* 2007 6 SA 4 (CC) at paras 44; 55; 79.

<sup>51</sup>*Id* para 74.

<sup>52</sup>For a lament at the general tendency of environmental cases to gravitate towards proceduralism and administrative law in this context, see *Dugard and Alcaro* (n 4) 27-29.

The Constitutional Court's socio-economic rights jurisprudence has, in recent years, emanated mostly from disputes evoking different elements of the right to the city. In particular, the Court has decided a string of cases pertaining to urban housing and evictions,<sup>53</sup> as well as a number of matters concerning urban service delivery.<sup>54</sup> Both these subsets of its jurisprudence, to my mind, fall somewhat short of grasping the complexities of urban socio-economic rights and the many intersecting dimensions of the right to the city, much as some aspects of the judgments inadvertently give partial effect thereto. In both instances, this is at least partly ascribable to the lack of articulation between the concerns represented by socio-economic rights and those pertaining to the constitutional obligation to protect the environment.

Both *Olivia Road* and *Joe Slovo* involved challenges to the consequences of State-led projects ostensibly aimed at improving the urban environment. *Olivia Road* was brought by residents of a Berea apartment building, who faced eviction in terms of the City of Johannesburg's 'bad buildings policy'. This policy involved, among other things, the eviction of residents from buildings which had deteriorated to such an extent that they were thought to pose a health, safety and fire risk, in order for those buildings to be upgraded and re-appropriated by the City. The policy did not pay any attention to the housing needs of residents and did not allow for the provision of alternative accommodation to them. *Joe Slovo*, meanwhile, concerned the forced relocation of residents of an informal settlement on the outskirts of Cape Town, in the course of a large scale upgrading of the settlement. In *Olivia Road*, the Constitutional Court declared the policy and the pursuant evictions to be unconstitutional, mostly because the evictions were carried out without meaningfully engaging citizens around, among other factors, alternative accommodation. In *Joe Slovo*, the Constitutional Court allowed relocations to proceed, subject to a number of requirements being fulfilled.

In both cases, the intolerable living conditions in which the applicants found themselves, as well as the broader environmental risks posed by these conditions, form part of the backdrop of the decision.<sup>55</sup> Neither case, however, locates the State's responsibility to protect and improve the urban environment within the applicable constitutional framework, meaning that this responsibility did not explicitly feature in the assessment of whether the evictions or relocations

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<sup>53</sup>Such as *Olivia Road* (n 6); *Joe Slovo* (n 7) and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC).

<sup>54</sup>Such as *Mazibuko* (n 8); *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) and *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC).

<sup>55</sup>See *Olivia Road* (n 6) paras 3; 44; *Joe Slovo* (n 7) paras 24; 234-235; 321; 363. More was made of this in the Supreme Court of Appeal's judgment in the *Olivia Road* matter – see *City of Johannesburg v Rand Properties* 2007 6 SA 417 (SCA) at paras 8; 10; 46; 67. See further Mafunganyika (n 43) 226; Pieterse (n 2 ) 167; Wilson (n 46) 132-135.

were reasonable. While it is true that, in both cases, City officials rather cynically raised the environmental issues to justify measures arguably also motivated by other (economic) concerns,<sup>56</sup> and while the Court's judgments in both matters, which affirmed that urban regeneration projects will not pass constitutional muster unless they meaningfully involve inhabitants and duly consider their most urgent socio-economic needs, are to be welcomed, this is unfortunate.

It is important that courts perceive regeneration projects such as those challenged in *Joe Slovo* and *Olivia Road* as being attempts to fulfil the constitutional obligation to protect the (urban) environment, not least because this means that the reasonableness standard by which the State's actions is judged must then be informed also by the substantive concerns explicitly associated with the obligation in section 24 – sustainable development, inter- and intra-generational equity, and the construction and preservation of an environment which enables collective well-being. *Grootboom* reasonableness, conceived and applied in relation to the right to housing only, lacks these nuances and thus threatens to overlook important factors that must enter the balancing exercise between competing interests inherent to the right to the city.<sup>57</sup> Similarly, the meaningful engagement requirement inherent to reasonableness could have been significantly enriched if it were conceptualised in relation to the right to the city, within the parameters of section 24.

The *Joe Slovo* court arguably sensed this instinctively. Throughout, the different judgments in the matter it has been asserted that the reasonableness inquiry has to take into account the long-term benefits of the proposed development (which would extend beyond the applicants in the present matter), as well as the unsatisfactory and unsustainable nature of the *status quo*.<sup>58</sup> Yacoob J goes as far as to state that the hardship suffered by the applicants is a necessary sacrifice to be made for the greater good.<sup>59</sup> But this 'greater good' remains largely unarticulated and lacking in constitutional foundation, with the result that, while the Court correctly senses that something in the challenged measures falls short of achieving it, it is unable to pinpoint what that is. As is typical in socio-economic rights cases, the judgment accordingly struggles to articulate the nature of the communal interests to which the individual claims must yield and the extent to which they must do so.

The same weakness is evident from the manner in which the Constitutional Court decides service delivery matters, with the widely lamented *Mazibuko* judgment being a case in point. *Mazibuko* concerned a challenge to the installation of pre-paid water meters in the poor Soweto suburb of Phiri, in terms

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<sup>56</sup>Wilson (n 46) 141-143.

<sup>57</sup>For a similar argument in relation to the *Grootboom* judgment itself, see Fuo (n 10) 94-95.

<sup>58</sup>*Joe Slovo* (n 7) paras 108; 184-185; 189; 234-235; 321; 363.

<sup>59</sup>*Id* para 107.



of a local government pilot programme aimed at reducing overconsumption and underpayment for water. The meters would disperse a monthly amount of free water, but would thereafter disconnect the supply unless users purchased additional water. The applicants challenged the legitimacy of installing the meters in the first instance (especially given that a similar system was not implemented elsewhere in Johannesburg, including in middle and upper-class suburbs, where water delivery operated on a credit supply system) and also contended that the amount of free water to which the policy entitled citizens was too little to satisfy the needs of large households in Phiri. The Constitutional Court refused to be drawn into a debate over how much free water citizens were constitutionally entitled to receive, and instead assessed the policy for reasonableness. It found that it was reasonable, not least because it allowed for an amount of free water which was sufficient for average-sized households.

The scarcity of water as a resource and the concomitant need to conserve it for present and future generations is explicitly mentioned in the judgment and clearly underlies much of the reasonableness analysis.<sup>60</sup> Yet, there is no mention of the section 24 environmental right, nor are scarcity and the need for conservation explicitly mentioned as factors impacting on the 'availability of resources' in terms of the reasonableness analysis conducted under section 27 of the Constitution.<sup>61</sup> The effect of this was that the reasonableness of the policy was ultimately assessed without explicit reference to sustainability.

It has been argued that a lot of *Mazibuko's* shortcomings may be ascribed to the individual rights paradigm within which the matter was argued and decided, which had the effect of obscuring the more systemic and structural inequities inherent to overall water delivery and consumption in Johannesburg, and the ultimate unsustainability thereof.<sup>62</sup> Specifically, whilst the need to conserve water was acknowledged as a background factor impacting the reasonableness of a water conservation policy targeting the poor, the analysis failed to consider the principle of inter-generational equity, which pinpoints the significantly more voluminous and wasteful water consumption by rich and industrial Johannesburg as a far greater problem, begging the question why only the poor's access to water was restricted in the quest for sustainability.<sup>63</sup> Conversely, had the challenge succeeded, intra-generational equity would likely have suffered, in that

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<sup>60</sup>*Mazibuko* (n 8) paras 2-3; 7; 150; 166. See further Du Plessis (n 3) 289; Humby (n 10) n 46 and accompanying text; Kotzé (n 33) 156-157.

<sup>61</sup>Kotzé (n 33) 156; Stewart and Horsten (n 10) 488; 496.

<sup>62</sup>Bond (n 24) 129; 138; 141-143.

<sup>63</sup>*Id* 141; Bond and Dugard 'The case of Johannesburg Water: What really happened at the pre-paid "parish pump"' (2008) 12 *Law, Democracy & Development* 1 at 6-7; Dugard 'Rights, regulation and resistance: The Phiri water campaign' (2008) 24 *SAJHR* 593 at 603-605; Stewart and Horsten (n 10) 491.

Johannesburg's ability to continually deliver adequate water to future generations would have been compromised by a ruling barring innovative conservation measures and increasing a basic entitlement to free water in excess of average need.<sup>64</sup>

As in the housing cases discussed above, acknowledging and giving effect to the inter-linkages between the environmental right and the right of access to water by explicitly infiltrating the reasonableness analysis with a consideration of issues of sustainability, inter- and intra-generational equity, could have significantly enriched the *Mazibuko* judgment. As it stands, the judgment failed to pave the way for jurisprudence on access to essential urban services that reflects the interconnections and tensions inherent to the right to the city.

## 5 Conclusion

The attainment of urban social justice depends, to a large extent, on the manner in which the urban environment is shaped, maintained and developed. Given the increasing legalisation of development policies and processes subsequent to the constitutional enshonement of socio-economic rights,<sup>65</sup> it is necessary for legal scholars, practitioners and judges to ensure that the collective and environmental dimensions of such processes are not overlooked or sidelined.<sup>66</sup>

This article has argued that the environmental right contained in section 24 of the 1996 Constitution, if interpreted beyond the natural environmental context for which it was primarily intended, provides a useful conceptual and constitutional framework within which to understand and balance the various competing claims and tensions that arise in the context of urban development and sustainability. In doing so, the article has pointed to the rich literature on the right to the city as providing substantive guidance for reimagining the environmental right in an urban context.

However, as has been shown, the environmental right has thus far remained neglected in South African jurisprudence on socio-economic rights and urban development. The Constitutional Court's preference for adjudicating matters in relation to discrete rights and for underplaying the interdependence between rights, other than on a purely rhetorical level, has led it to fail to grasp the intricacies involved in matters pertaining to urban development and conservation of the urban environment.<sup>67</sup> This has sometimes resulted in the State's motives for particular developmental projects remaining unquestioned, whereas it has, on other occasions, failed to lend appropriate weight to the constitutional obligations

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<sup>64</sup>Kotzé (n 33) 157-159.

<sup>65</sup>Coggin and Pieterse (n 13) 274-275.

<sup>66</sup>See Bond (n 24) 129; 138; 143; Roithmayr (n 24) 318-320; 328-329; 346.

<sup>67</sup>See also Dugard and Alcaro (n 4) 26-27.

that (ought to) underlie those motives. Apart from a recent acknowledgment by the Pietermaritzburg High Court that local governments are bound by the provisions of section 24 of the Constitution when exercising their developmental responsibilities in sections 152 and 153 read with Schedules 4 and 5 of the Constitution,<sup>68</sup> policies giving effect to such responsibilities remain to be adjudicated in a constitutional vacuum, according to an a-contextual review standard that fails to capture and balance the tensions inherent to the right to the city.

It is necessary for socio-economic rights adjudication to step back from the overly individualised and immediate rights paradigm that has caused courts to shy away from their concrete vindication. The interdependency and interconnectedness of various competing socio-economic claims across generations need to be acknowledged, whereas the constitutional rights and responsibilities pertaining to the actual, physical environments within which these rights claims arise, are exercised and conflict on a daily basis, need to be given more prominence in their balancing through adjudication.

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<sup>68</sup>*Le Sueur v Ethekwini Municipality* [2013] ZAKZPHC 6 paras 19-20.