

*Environmental Constitutionalism: linking  
Sustainable Development, Environment and Human  
Rights*

2019 JUDICIAL COLLOQUIUM

SDG 16: ROLE OF JUDICIARY IN PROMOTING THE RULE OF  
LAW IN ENVIRONMENTAL MATTERS

# Overview

- Threshold inquiry
- Trends in the Environment in Constitutions
  - #1: Constitutional incorporation around the globe
  - #2: Judicial Receptivity
  - #3: Rights of Nature
  - #4: Procedural Environmental Rights
  - #5: Sustainability
  - #6: Dignity
  - #7: Climate Change

# Threshold Questions

- Are Environmental Rights Human Rights (and if so or maybe regardless ...)
- Should Environmental Rights be enshrined in national constitutions?
- How about subnational constitutions?
- (How about an international charter?)

# Are Environmental Rights Even Human Rights?

- “Both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights, even the right to life itself.”
- “Man have the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”

-Stockholm Declaration on the Human Environment (1972)

# Trend #1: Evolving Environmental Constitutionalism

- “Global Environmental Constitutionalism proposes new cognates and constructs in the global conversation about how constitutionalism in general and environmental constitutionalism in particular can serve as a necessary if not sufficient mechanism for advancing sustainability, improving environmental outcomes, protecting human dignity, and responding to the Anthropocene.”

-Louis Kotze, *Global Environmental Constitutionalism in the Anthropocene* (Hart, 2016)

# In the beginning

- “The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.”
- Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.
- “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”
- “Everyone has the right to a healthy and ecologically balanced environment and the duty to defend it.”

# In the beginning, answered

- “The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.” N.Y. Const. art. XIV, § 1 (1894)
- Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law. IL CONST. art. XI, § 2 (1971)
- “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.” Pennsylvania Const. art. I Article I, § 27 (1971)
- “Everyone has the right to a healthy and ecologically balanced environment and the duty to defend it.” Portugal Const. art. 66 (1976)

# Constitutional Protection for the Environment

~ 170 national constitutions address the environment:

- 85+ expressly provide for **right to a healthy environment**
- 15+ recognize environmental rights **implied** from other constitutional rights, such as right to life, right to dignity
- 30+ afford special **procedural environmental rights to information, participation and/or access to justice**
- 100+ impose **duties** to protect the environment
- 40+ incorporate **sustainability, public trust or the rights of future generations**
- 30+ provide for **rights to water**
- 8 address **climate change**
- 5+ **require renewable energy**
- 1 **expressly provides for rights of nature**
- 2 establish **requirements for forest cover**: Bhutan (60%); Kenya (10%)
- Dozens address specific resources (e.g. minerals)



# Constitutional Environmental Rights

- “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 . . . .” (South Africa, 1996)
- “All persons are entitled to an ecologically balanced environment, which is an asset for the people’s common use and is essential to a healthy life.” (Brazil, 1998)
- “Each one has the right to live in a balanced and respectful environment of health (France, 2005)
- Ecuador (2011): Citizens have a “fundamental right to a healthy environment”
- More recently: Fiji (2013); Vietnam (2013); Tunisia (2014) and Grenada (2015)

# Countries Recognizing Right to Environment Implied by Other Right(s) (e.g. life, health, dignity)

- Pakistan
- India
- Nepal
- Bangladesh
- United States (well, hardly)
- Elsewhere

# Not (yet?) Recognize a Right to a Healthy Environment

- 9/193 haven't:
  - US
  - Canada
  - Japan
  - Australia
  - New Zealand
  - China
  - Oman
  - Afghanistan
  - North Korea

# Environmental Rights in National Constitutions



Source: UN Environment and ELI, *Environmental Rule of Law* (2019)

# Trend #2: Increasing Judicial Receptivity

- “Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.” - *Juliana v. United States*, (D.Or. 2016)
- Philippines: “...[T]he right to a balanced and healthful ecology ... [is not] less important than any of the civil and political Rights ... Such a right belongs to a different category Of rights altogether for it concerns nothing less than Self-preservation and self-perpetuation ... the Advancement of which may even be said to predate Governments and constitutions. [T]hese basic rights need not even be written in the Constitution for they are assumed to exist from the Inception of humankind.” *Oposa v. Factoran* (1994)
- Pakistan: “[A] judge today must be conscious and alive to the beauty and magnificence of nature, the interconnectedness of life systems on this planet and the interdependence of ecosystems. ... Our environmental jurisprudence ... has weaved our constitutional values and fundamental rights with the international environmental principles.” *Asghar Leghari v. Federation of Pakistan* (2018)

# Judicial Recognition of Environmental Rights– Selected Recent Examples: Materials

2015

Pro Public v Godavari Marble Industries Pvt. Ltd. and Others (Supreme Court of Nepal)  
Teitiota v Ministry of Business Innovation & Employment (Supreme Court of New Zealand)  
La Camaronera en la Reserva Ecológica (Corte Constitucional del Ecuador)  
Urgenda Foundation v. The State of the Netherlands, C/09/456689/HA ZA 13-1396 (Hague District Court)

2016

Raub Australian Gold Mining v. Hue Shieh Lee (Court of Appeal, Malaysia)  
Rio Atrato (T-622/16) (Constitutional Court of Colombia)

2017

Salim v. State of Uttarakhand & Miglani v. State of Uttarakhand & others (High Court of Uttarakhand at Nainital)  
Earthlife Africa Johannesburg v Minister of Environmental Affairs (High Court of South Africa, Gauteng Division)  
Friends of the Irish Environment v Fingal City Council (Irish High Court)  
Pennsylvania Environmental Defense Foundation v. Commonwealth (Supreme Court of Pennsylvania)  
In Re Application of Maui Electric Company (Supreme Court of Hawai‘i)

2018

Ashgar Leghari v. Federation of Pakistan (Lahore High Court)  
Juliana v. United States (9<sup>th</sup> Circuit)

# Trend #3: Constitutional Rights of Nature: Legal Personification?

- Ecuador: “This reflects a new juridical nature-human relationship, a biocentric vision in which nature is prioritized in contradistinction with the classical anthropocentric conception in which human beings are the center and nature is considered just a provider of resources.” Wheeler (2008); Mangrove case (2015)
- Colombia: “[We thereby] RECOGNIZE the Atrato River, its basin and tributaries, as an entity subject to rights to protection, conservation, maintenance and restoration by the State and ethnic communities...” (River Atrato Decision)
- India: “Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea. ... Thus, to protect the recognition and the faith of society, Rivers Ganga and Yamuna are required to be declared as the legal persons/living persons.” (Ganga and Yamuna Rivers Cases)(accord for glaciers)

## Trend #4: Incorporation of Procedural Environmental Rights

- Informational: Timely information about activities that affect the environment. (15)
- Participatory: Shape environmental decisionmaking via comments and other measures. (12)
- Access to Justice: Access to the courts, open standing, viable remedy and ability to enforce environmental rights. (12)



# A. Constitutionalized Rights to Information About Environmental Matters (Examples)

- **Albania:** “Everyone has the right to be informed about the status of the environment and its protection.”
- **Argentina:** “The authorities shall provide for environmental information and education.”
- **Azerbaijan Republic:** “Everyone has the right to collect information on the environmental situation ...”

## B. Constitutionalized Right to Participation In Environmental Matters (Examples)

- **Brazil:** The constitution “requires, as provided by law, a prior environmental impact study, which shall be made public, for installation of works or activities that may cause significant degradation of the environment.”
- **Colombia:** “Every individual has the right to enjoy a healthy environment. The law will guarantee the community's participation in the decisions that may affect it.”
- **Ecuador:** Article 71: “All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.”

## C. Constitutionalized Right to Have Access to Judicial System About Environmental Matters: (Example)

- **Angola:** “Every citizen, either individually or through associations representing specific interests, shall have the right to take legal action in the cases and under the terms established by law, with the aim of annulling acts which are harmful to ... the environment ...”

# Trend #5: Constitutional Sustainability

- “Development which meets the needs of the present without compromising the ability for future generations to meet their own needs” (*World Commission on the Environment*, 1987)
- “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.” (*Transforming our World: The 2030 Agenda for Sustainable Development*, U.N. General Assembly, Sept. 25, 2015)
- Mindfulness about doing fair share to advance well-being and human dignity

# The Future We Want: Transforming our world: the 2030 Agenda for Sustainable Development

**Preamble:** “This Agenda is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger freedom. We recognize that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.”

**Goals and Targets: 17 Goals; 169 Targets**

(Resolution adopted by the General Assembly on 25 September 2015)

# Examples of Constitutional Sustainability

- Colombia (“plan the handling and use of natural resources in order to guarantee their sustainable development . . .”)
- Montenegro (“state is responsible for the preservation of nature, sound environment, sustainable development, [and] balanced development of all its region.”)
- Nepal (“sustainable use and for equitable distribution of the benefit derived from it.”)

# With Consideration of Future Generations

- Andorra (directs policy makers to protect natural resources “for the sake of future generations.”)
- Brazil (“The Government and the community have a duty to defend and to preserve the environment for present and future generations.”)
- Ethiopia (“a sacred trust for the benefit of present and succeeding generations.”)
- Lesotho (duty of the state to protect the environment “for the benefit of both present and future generations.”)

# Trend #6: Environmental Dignity Rights

- “Whereas recognition of the **inherent dignity** and of the **equal and inalienable rights** of all members of the human family is the foundation of freedom, justice, and peace in the world...” (Universal Declaration of Human Rights, Preamble, 1948)
- 160 Nations incorporate dignity constitutionally
- About one-half also incorporate a substantive right to a healthful environment



# Example: Morocco

- “It develops a society of solidarity where all enjoy security, liberty, equality of opportunities, **of respect for their dignity** and for social justice” (Preamble)
- To protect and to promote the mechanisms of the Rights of Man and of international humanitarian law and to contribute to their development **within their indivisibility** and their universality (Preamble)
- “No one may inflict on others, under whatever pretext there may be, cruel, inhuman, [or] **degrading treatments or infringements of human dignity.**” (Title II, Article 22)
- The National Council of the Rights of Man charged with taking cognizance of all the questions relative to the defense and ... **the preservation of the dignity.**”

# Human Rights, Dignity and the Environment

- “Man have the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”

-Stockholm Declaration on the Human Environment, 1972

- “Human rights are grounded in respect for fundamental human attributes such as dignity, equality and liberty. The realization of these attributes depends on an environment that allows them to flourish ... Human rights and environmental protection are inherently interdependent.”

-John Knox, Fmr. U.N. Special Rappateur on Human Rights and the Environment

# Dignity & the Covenant on Social, Economic and Cultural Rights

- “Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.”

Committee General Comment No. 15.

# Dignity and the SDGs

“We are determined to end poverty and hunger, in all their forms and dimensions, and to ensure that all human beings can fulfil their potential in *dignity and equality and in a healthy environment.*”

“Billions of our citizens continue to live in poverty and are denied a life of dignity.”

“Recognizing that the dignity of the human person is fundamental, we wish to see the Goals and targets met for all nations and peoples and for all segments of society. And we will endeavour to reach the furthest behind first.”

“We envisage a world of universal respect for human rights and human dignity ...”

# Environmental Dignity in the Courts: Gbemre v. Shell

- “That the constitutional guarantee of right to life and dignity of human person available to them as citizens of Nigeria includes the right to a clean, poison-free and pollution-free air and healthy environment conducive for human beings to reside in for our development and full enjoyment of life; and that these rights to life and dignity of human person have been and are being wantonly violated and are continuously threatened with persistent violation by these gas flaring activities.”

Gbemre v Shell Petroleum Development Co. and Others

(Federal High Court, Nigeria 2005)

# Pro Public v. Godavari Marble

- It should be understood that all rights necessary for living a dignified life as a human being are included in [the right to dignity.] Not only that, it cannot be imagined to live with dignity in a polluted environment rather it may create an adverse situation even exposing human life to dangers.

Pro Public v Godavari Marble Industries Pvt. Ltd. and Others

(Supreme Court of Nepal 2015)

# Friends of Irish Environment v. Fingal City Council

“A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally ... that there is a personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large and upon which those duties and responsibilities will be constructed. This the court does.”

-Friends of the Irish Environment v Fingal City Council (Irish High Court, 2017)

# Trend #7: Climate Constitutionalism

## Express Provisions

- Cote D’Ivoire (2016)
- Dominican Republic (1998, 2015)
- Ecuador (2008)
- Thailand (2017)
- Tunisia (2014)
- Venezuela (1999)
- Viet Nam (2013)
- Zambia (2016)

## Inferred from Other Rights

- Right to a Healthy Environment (Colombia, France? Norway? South Africa)
- Right to Life (Pakistan)
- Right to Dignity (Ireland? Nigeria; Pakistan)
- Right to Welfare (Netherlands)
- Due Process (US)



# Examples

- Dominican Republic: “The formulation and execution, through the law, of a plan of territorial ordering that assures the efficient and sustainable use of the natural resources or the Nation, in accordance with the need of adaption to climate change, is [a] priority of the State.”
- Venezuela: “It is a fundamental obligation of the State ... to guarantee that the population develops in an environment free of contamination, where the air, the water, the coasts, the climate, the ozone layer, the living species are especially protected in conformity with the law.”

# Example case

- “The principle of fairness means that policy should not only start from what is most beneficial to the current generation at this moment, but also what this means for future generations, so that future generations are not exclusively and disproportionately burdened with the consequences of climate change.”

*-Urgenda Foundation v. The State of the Netherlands*

# Asghar Leghari v. Pakistan

- “Climate Justice and Water Justice go hand in hand and are rooted in articles 9 (right to life) and 14 (right to dignity) of our Constitution and stand firmly on our preambular constitutional values of social and economic justice.”

Asghar Leghari v. Pakistan, (Lahore High Court, Pakistan 2018)

# Trend #8: International Environmental Constitutionalism

- More than 1150 multilateral environmental agreements, but not on environmental rights.
- UN Environmental Rights Initiative
- Environmental Pacte?
- 3<sup>rd</sup> Covenant on a Right to a Healthy Environment?
- Customary International Law?
- Environmental rights to animate existing MEA's

# Conclusion

- Courts around the globe can play an essential but not sufficient role in advancing constitutionally-incorporated environmental and procedural rights, sustainability and human dignity, and in addressing climate change.

# Additional References

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# Conversation/questions

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Thank you!