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NEW FRONTIERS IN ENVIRONMENTAL CONSTITUTIONALISM



NEW FRONTIERS IN ENVIRONMENTAL CONSTITUTIONALISM

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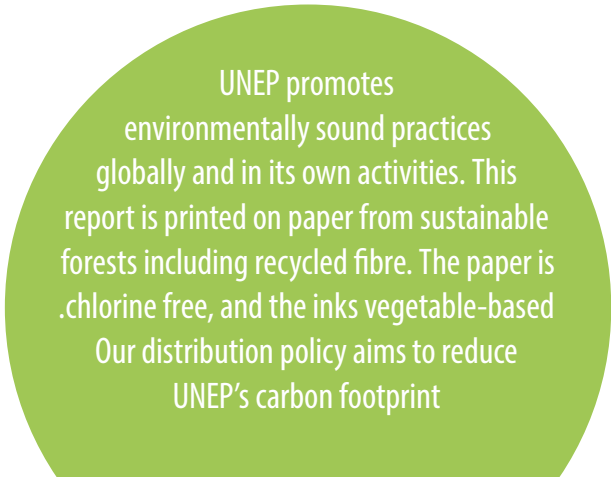
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NEW FRONTIERS IN ENVIRONMENTAL CONSTITUTIONALISM

Edited by Professors Erin Daly (Widener University Delaware Law School), Louis Kotze (North-West University Law Faculty), James May (Widener University Delaware Law School), and Caiphas Soyapi (PhD candidate, North-West University Law Faculty). On behalf of UN Environment, this publication was edited by Arnold Kreilhuber (Law Division), Lara Ognibene (Law Division), and Angela Kariuki (Law Division)



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The book examines new frontiers in the implementation of constitutional, international, and regional rights-based approaches to promote environmental protection. The contributions collected here represent the research of scholars from across the globe who were invited to participate in a Symposium on New Frontiers held at North-West University in South Africa in April 2016 by Professors Erin Daly (Widener University Delaware Law School), Louis Kotzé (North-West University Law Faculty), and James May (Widener University Delaware Law School), and doctoral candidate at the North-West University Law Faculty, Caiphaz Soyapi. The symposium was made possible through generous funding by the Konrad Adenauer Foundation.

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Preface

The United Nations Mandate on Human Rights and the Environment

John H. Knox

United Nations Special Rapporteur on human rights and the environment

In March 2012, the United Nations Human Rights Council (Council) decided for the first time to create a new mandate on human rights and the environment. Later that year, I had the honor of being appointed to carry out the mandate. In this foreword, I will describe the evolution of the mandate, and how it is helping to clarify the relationship between human rights and environmental protection.

The Council often appoints special rapporteurs to investigate and report on specific human rights issues. Usually, the norms are clear and the focus of the special rapporteur is to monitor and encourage their compliance, either in a particular thematic area or by a particular country.

Occasionally, however, the Council appoints independent experts to clarify the application of human rights obligations to a specific field. For example, in 2005, the Human Rights Commission (which was replaced by the Council in 2006) requested the United Nations Secretary-General to appoint a Special Representative to examine human rights and transnational corporations and other business enterprises. The Secretary-General appointed John Ruggie, who issued a series of reports culminating in Guiding Principles on business and human rights, which were endorsed by the Council in 2011. Similarly, in 2008 the Council appointed Catarina de Albuquerque as its first Independent Expert on the human right to safe drinking water and sanitation. She helped to establish the basis for the rights to water and sanitation, and to explore their scope and content.

The decision of the Council to establish a mandate on human rights and the environment was in line with these precedents. Specifically, the Council decided to appoint an independent expert with a three-year mandate:

- (a) To study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; [and]
- (b) To identify, promote and exchange views on best practices relating to the use of human rights obligations to inform, support and strengthen environmental policymaking.¹

The relationship between human rights and the environment needed clarification largely because environmental human rights – that is, human rights related to environmental protection – are late arrivals to the body of human rights law. The Universal Declaration of Human Rights of 1948 does not mention the environment. Nor, in the 1940s, did the national constitutions to which the drafters of the Universal Declaration looked for inspiration. The silence was understandable. Although human beings have always known of our dependence on the environment, we were only beginning to realize how much damage our activities could cause to the environment and, as a result, to ourselves. Efforts to mitigate environmental degradation were then still in their infancy.


As the environmental movement grew, from the 1960s on, there began to be calls for human rights law to recognize the importance of environmental protection. The recognition of the close relationship between human rights and the environment took two forms.

The first was the adoption of an explicit new right to an environment characterized in terms such as healthy, safe, satisfactory or sustainable. In 1976, Portugal became the first country to adopt a constitutional “right to a healthy and ecologically balanced human environment”. Since then, about 100 States have adopted similar rights in their national constitutions. Regional human rights agreements drafted after the 1970s have also recognized a stand-alone right to a healthy, or satisfactory, environment. Examples include the 1981 African Charter on Human and Peoples’ Rights, the 1988 Additional Protocol to the American Convention on Human Rights, and the 2004 Arab Charter on Human Rights.

But despite repeated efforts, no global instrument sets out an explicit right to a healthy (or satisfactory, safe or sustainable) environment. Instead, United Nations human rights bodies, including the Human Rights Council, the special procedures, and the treaty bodies charged with overseeing international treaties, have concentrated on “greening” existing human rights – that is, they have applied a wide range of recognized human rights, including rights to life, health, food, water, and housing, to environmental issues.

¹ Human Rights Council Res. 19/10, para. 2 (22 March 2012).





Regional human rights tribunals, including the European Court of Human Rights and the Inter-American Court of Human Rights, have done likewise. As a result, these human rights bodies have created environmental human rights jurisprudence.

By the time the Human Rights Council created its mandate on human rights and the environment, this jurisprudence was quite extensive. However, it had developed in many different forums, and it was not obvious whether it was coherent enough to give rise to a set of human rights norms relating to the environment. Therefore, my first task as the Independent Expert was to study this developing field of law. To that end, I held consultations in every region of the world, in cooperation with UN Environment. I heard from hundreds of people working to bring human rights norms to bear on environmental issues. And, with the assistance of attorneys and academics working pro bono, I researched what human rights tribunals, international bodies, and domestic courts had said about the relationship.

In 2014, I published 14 reports compiling the statements of human rights bodies on how the rights within their purview applied to environmental issues.² Each of these “mapping” reports was devoted to a particular human rights body or set of bodies. Five reports examined global human rights treaties, as they had been interpreted by the treaty bodies charged with their oversight. Other reports described the jurisprudence of regional human rights tribunals, including the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, and the African Commission on Human and Peoples’ Rights. Still other reports looked at statements by UN human rights mechanisms, including special rapporteurs and the Human Rights Council itself. Finally, one set of reports examined international environmental instruments, including the Rio Declaration, the Aarhus Convention, and a number of other multilateral environmental agreements.

Despite the differences in scope and jurisdiction of these sources, they have reached remarkably similar conclusions about the relationship of human rights and the environment.

First, they have made clear that environmental harm can and does interfere with the full enjoyment of a vast range of human rights. This may seem obvious. It is well understood, for example, that pollution causes the deaths of millions of people every year, and that climate change threatens the lives of millions more over the coming decades. Nevertheless, even 15 years ago, many governments were reluctant to accept the conclusion that

² The reports are available at <http://srenvironment.org/mapping-report-2014-2/> and <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx>.

naturally follows – that environmental harm interferes with the enjoyment of rights to life and health, among many others. That has changed. Not only human rights bodies, but also governments, have accepted the basic idea that environmental harm threatens and often infringes so many human rights.

In addition, human rights bodies have emphasized that human rights law requires States to take steps to protect people from such environmental harm. Specifically, they have identified three categories of obligations: procedural obligations, substantive obligations, and the heightened obligations States owe to those who are especially vulnerable to environmental harm.³

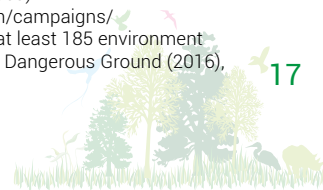
Procedural obligations include obligations: (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to effective remedies for environmental harm. These obligations are often considered to correspond to civil and political rights, but in the environmental context they have been derived from the full range of human rights whose enjoyment is threatened by environmental harm, including rights to health, food, and water.


The obligation to facilitate public participation includes the obligations to respect and protect the rights of freedom of expression and association. Individuals have rights to speak out against or in favor of proposed policies that would affect the environment on which they depend. Human rights tribunals have emphasized that governments must protect environmental defenders when they are subject to threats, refrain from placing restrictions that would hinder the performance of their work, and conduct serious and effective investigations of any violations against them.⁴ Unfortunately, governments often fail to comply with these obligations. Environmental human rights defenders are at great risk of harassment, violence, and even murder. On the basis of a comprehensive investigation, the human rights organization Global Witness found that at least 908 environmental and land defenders were murdered between 2002 and 2013, and that the problem was growing worse.⁵

3 The following paragraphs follow the language of the summary mapping report presented to the Human Rights Council in March 2014. See Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Mapping report, UN Doc. No. A/HRC/25/53 (30 December 2013).

4 See, e.g., Inter-American Court of Human Rights, *Kwas-Fernandez v. Honduras*, ¶ 145 (2009).

5 Global Witness, *Deadly Environment* (2014), available at <https://www.globalwitness.org/en/campaigns/environmental-activists/deadly-environment/>. Its most recent report found that in 2015, at least 185 environmental and land defenders were killed, an average of more than three a week. Global Witness, *On Dangerous Ground* (2016), available at <https://www.globalwitness.org/en/reports/dangerous-ground/>.





States also have substantive obligations to protect against environmental harm that interferes with the enjoyment of human rights. Specifically, every State has a duty to adopt a legal framework that protects against such environmental harm. This obligation includes a duty to protect against such harm when it is caused by corporations and other non-State actors, as well as by State agencies. The obligation to protect human rights from environmental harm does not require the cessation of all activities that may cause any environmental degradation. States have discretion to strike a balance between environmental protection and other issues of societal importance, such as economic development and the rights of others. However, the balance cannot be unreasonable, or result in unjustified, foreseeable infringements of human rights. In determining whether an environmental law has struck a reasonable balance, relevant factors include whether it meets national and international health standards, and whether it is non-retrogressive. There is a strong presumption that retrogressive measures are not permissible. Moreover, once a State has adopted environmental standards into its law, it must implement and comply with those standards.

Finally, States must take into account the situation of groups particularly vulnerable to environmental harm. States must not discriminate against groups on prohibited grounds in the application of their environmental laws and policies. And they must take additional steps to protect certain groups. These obligations are developed in most detail with respect to indigenous peoples who, because of their close relationship with the environment, are particularly vulnerable to impairment of their rights through environmental harm. Those duties include obligations of States to recognize the rights of indigenous peoples in the territories they have traditionally occupied, to allow extractive activities within those territories only with their free, prior and informed consent, and to ensure that they receive a reasonable benefit from any development in their territories.

In response, the Human Rights Council adopted a resolution in March 2014 recognizing that “human rights law sets out certain obligations on States that are relevant to the enjoyment of a safe, clean, healthy and sustainable environment, and that the enjoyment of the corresponding human rights and fundamental freedoms can be facilitated by assessing environmental impact, making environmental information public and enabling effective participation in environmental decision-making processes, and that in that regard a good practice includes adopting, strengthening and implementing laws and other measures to promote and protect human rights and fundamental freedoms in the context of environmental legislation and policies.”⁶ The Council urged States to

“comply with their human rights obligations when developing and implementing their environmental policies.”⁷

The following year, I presented a report to the Council compiling good practices in the use of the human rights obligations identified in the mapping report.⁸ Through the regional consultations and through responses to a questionnaire, I identified more than 100 good practices. The largest conference, which represented the culmination of the process, was at Yale University in September 2014. It was hosted by Yale and the United Nations Institute for Training and Research (UNITAR), with assistance from a number of other partners, including UN Environment and the United Nations Development Programme (UNDP). It brought together more than 150 scholars and policy experts, who presented and commented on papers concerning the relationship between human rights and environmental protection.

A one-page summary of each good practice is available at the website of the Office of the High Commissioner for Human Rights (OHCHR),⁹ and at a dedicated website, <http://environmentalrightsdatabase.org>, which allows the practices to be easily searched by type and region. The summary of each practice includes its implementing actors and location, a brief description of the practice, and links to websites where further information about the practice may be found.

Several of the examples of good practices in the implementation of the right to environmental information involve the use of online databases or notification systems. For example, the AKOBEN program adopted by the Ghanaian Environmental Protection Agency (GEPA) uses a five color rating scheme to assess the performance of mining and manufacturing operations. GEPA annually discloses the ratings to the general public and the media, and makes the disclosures available on the GEPA website.¹⁰ Other examples include annual reports on environmental monitoring activities. For example, the South African Department of Environmental Affairs publishes an annual report on all enforcement-related activities. This report provides information on statistics for enforcement, including administrative citations and fines issued, criminal cases brought, number of convictions, number of facilities inspected, and number of staff working on compliance monitoring and enforcement.¹¹ According to the Executive Director of

7 Id. para. 8.


8 Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Compilation of good practices, UN Doc. A/HRC/28/61 (3 February 2015).

9 The OHCHR page on the good practices is: <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/GoodPractices.aspx>.

10 See <http://www.epaghanaakoben.org/>.

11 The reports are available at the website of the Department of Environmental Affairs, https://www.environment.gov.za/mediarelease/necer_201213report.





the Centre for Environmental rights, a South African environmental NGO, the annual compliance and enforcement report "gives incredibly valuable information to civil society to use to empower it to take legal action and to use as softer advocacy tools, such as to criticize companies engaged in illegal activities."

Other good practices include reduced barriers to standing in environmental cases, which enable plaintiffs to have easier access to effective remedies for environmental harm. For example, the Supreme Court of the Philippines has enacted Rules of Procedure for Environmental Cases that include many mechanisms that assist petitioners. The Rules, which list as an objective "[t]o protect and advance the constitutional right of the people to a balanced and healthful ecology," include a broad standing provision. They state, "Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws." For such citizen suits, the Court will also defer the payment of any filing or other legal fees until after the Court issues a judgment.¹²

Another way to enable access to justice in environmental matters is to create dedicated "green tribunals" to address environmental harms. There are now hundreds of these environmental courts around the world. A recent notable example is the National Green Tribunal of India, which has been operating since July 2011. It provides relief and compensation to victims of pollution and other environmental damage, for restitution of property damaged, and for restitution of the environment. As another benefit, it helps to reduce the burden of litigation in other Indian courts.¹³

Another type of good practice is the facilitation of information-sharing between judges who may face issues concerning human rights and the environment. For example, in July 2010, the Asian Development Bank hosted the first of three Asian Judges Symposia on Environmental Decision Making, the Rule of Law, and Environmental Justice. Around 120 senior judges, environment ministry officials, members of civil society, and experts in environmental law discussed ways to promote environment protection through effective environmental adjudication and law enforcement. One of the main conclusions from the Symposium was agreement on the need for a judicial network on the environment, which resulted in the creation of the Asian Judges Network on Environment (AJNE). The AJNE serves as an information and experience sharing arrangement among senior judges of the Association of Southeast Asian Nations (ASEAN) and the South Asian Association for Regional Cooperation (SAARC).¹⁴

12 Republic of the Philippines Supreme Court, Rules of Procedure for Environmental cases, A.M. No. 09-6-8-SC, 29 April 2010, http://www.law.pace.edu/sites/default/files/IJIEA/Rules_of_Procedure_for_Environmental_Cases.pdf.

13 The website of the tribunal is <http://www.greentribunal.gov.in/>.

14 The website is: <http://www.asianjudges.org/>. The final outcome document from the 2010 Symposium is available at: <http://www.adb.org/sites/default/files/publication/29631/symposium-environmental-decisions-law-justice.pdf>.

In March 2015, at the conclusion of the first three-year term of the mandate, the Human Rights Council decided to renew it for another three years.¹⁵ It changed the title of the mandate-holder from Independent Expert to Special Rapporteur, and it asked him to promote and report on the realization of the human rights obligations relating to the environment, and to identify challenges and obstacles to their full realization. In this respect, it aligned the mandate more with other thematic mandates, by shifting its focus more to compliance. At the same time, the Council requested the Special Rapporteur to continue to study the human rights obligations relating to the environment, and to continue to identify, promote and exchange views on good practices in their use.¹⁶

In accordance with this revised mandate, I have proceeded along two tracks since 2015. I have tried to promote implementation of the human rights obligations relating to enjoyment of a safe, clean, healthy and sustainable environment by, among other things, undertaking country visits and receiving communications alleging human rights violations, as other special rapporteurs do. On the basis of an expert meeting and a questionnaire in 2015, I presented a report to the Council in March 2016 setting out a large number of methods of implementing environmental human rights obligations.¹⁷ The Council adopted a resolution encouraging States to adopt many of the suggested methods, including:

- facilitating “the exchange of knowledge and experiences between experts in the environmental and human rights fields, and to promote coherence among different policy areas”;
- exploring “ways to incorporate information on human rights and the environment, including climate change, in school curricula, in order to teach the next generations to act as agents of change, including by taking into account indigenous knowledge”;
- seeking “to ensure that projects supported by environmental finance mechanisms respect all human rights”;
- collecting “disaggregated data on the effects of environmental harm on vulnerable groups, as appropriate”;
- building “capacity for the judicial sector to understand the relationship between human rights and the environment”; and
- fostering “a responsible private business sector and to encourage corporate sustainability reporting while protecting environmental standards in accordance with relevant international standards and agreements and other ongoing initiatives in this regard”.¹⁸


¹⁵ Human Rights Council Res. 28/11 (26 March 2015).

¹⁶ Ibid. para. 5.

¹⁷ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/HRC/31/53 (28 December 2015).

¹⁸ Human Rights Council Res. 31/8, para. 5 (23 March 2016).





I have also worked with UNITAR to develop an online course on human rights and the environment, which enrolled its first students in the summer of 2016. And I have worked with UN Environment and other partners to initiate a joint global effort to sensitize the judiciary on constitutional environmental rights and to evaluate the impact of these rights. The first workshop was held in South Africa in April 2016 and brought together judges from South and West Africa. We plan later workshops in other regions of the world, including Latin America and the Caribbean.

At the same time, I continue to work to clarify the application of human rights law to specific areas. In 2015, I focused on climate change. I issued a report describing the adverse effects on human rights that would follow from even a two-degree increase in global average temperature¹⁹ and, together with other special rapporteurs and independent experts; I urged the negotiators of the new climate agreement to take human rights into account.²⁰ The Paris Agreement adopted in December 2015 does include a strong reference to human rights in the preamble, which makes it the first global environmental agreement to do so. I reported on the relationship of human rights and climate change to the Human Rights Council at its March 2016 session.²¹

I prepared a report on another thematic area: the relationship of human rights and the conservation of biological diversity. I presented this report to the Council in March 2017.

One of the great benefits of my work on the UN mandate has been the opportunity to meet some of the many people who are working on human rights and the environment all over the world, in governments, civil society organizations, international institutions, and academia. We have a long way to go to ensure that everyone is able to enjoy a healthy environment and the human rights that depend on it, but I am always encouraged and inspired by the examples of the people who are working so hard to bring that day nearer.

This excellent collection of papers and research was first presented at a Symposium in April 2016 titled New Frontiers in Global Environmental Constitutionalism. The collection examines how human and environmental rights are being implemented in global contexts, and the extent to which constitutional and other rights-based approaches, including international and regional human rights, promote environmental protection.

19 The report was prepared for the Climate Vulnerable Forum, and it is available at <http://www.thecvf.org/wp-content/uploads/2015/05/humanrightsSRHRE.pdf>.

20 See Joint statement by UN Special Procedures on the occasion of World Environment Day (5 June 2015): Climate Change and Human Rights, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16049&LangID=E>.

21 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/HRC/31/52 (1 February 2016).

We hope that this publication will help to further the global conversation on comparative environmental rights-based approaches among policy-makers and governments, practitioners, non-governmental organizations, civil society, scholars, educators, and post-graduate students. Finally, we are most grateful to all our contributors from all over the world for sharing their research and work with us. Without them, this publication would not have been possible.





New Frontiers in Global Environmental Constitutionalism

Arnold Kreilhuber
UN Environment

The late Nigerian environment activist, Ken Saro-Wiwa is quoted as saying 'The environment is man's first right. Without a clean environment, man cannot exist to claim other rights, be they political, social, or economic.' I believe it is the growing realization that a liveable, a healthy, a sustainable environment is indeed at the core of humanity's aspirations for a better, healthier, more peaceful future for all, that drives the new frontiers of global environmental constitutionalism.

When I left my home in Nairobi for the airport to attend the Symposium on New Frontiers in Global Environmental Constitutionalism, the city had just started to awake from its slumber and began filling with life. People on all imaginable modes of transport setting out to make a living, to improve their daily lives and the lives of their loved ones. Goods on offer everywhere, congested roads; the hustle and bustle of this African metropolis was already in full swing by the time I made it, luckily on time, to Jomo Kenyatta International Airport. I didn't think much more about the courageous shortcuts my driver took through Nairobi's industrial area and other hotspots for commercial activity to get me to the airport on time – until later when, already on the plane, I saw a notice on the airline's on-board magazine that discouraged the reckless disposal of used oil, its consequences for safe water supply, and warned that offenders could face lengthy prison terms if caught by the authorities. Only two simple pictures and a few lines of text on a single page of paper. But this was a powerful illustration of an environmental crime and a good illustration of how much havoc the violation of environmental laws and environmental rights can wreak on the aspirations of millions of people who, like people in Nairobi, set out every morning with the goal to better their lives.

The new frontiers for environmental constitutionalism will play out in this very context: the relationship to human rights, climate change as the emblematic environmental challenge of our time, and the 2030 Sustainable Development Agenda which aims to leave no one behind on the path to a better and more sustainable future.

The protection of the environment and the promotion and protection of fundamental rights, including human rights are increasingly recognized as intertwined and complementary.


Ecosystems and the services they provide, including food, water, disease management, climate regulation, spiritual fulfilment and aesthetic enjoyment, are the foundations for the full enjoyment of human rights, such as the right to life, health, food and safe drinking water. At the same time, human rights are instrumental in fostering sustainable development and environmental objectives. In 2013, at the occasion of the first ever universal session of UN Environment's Governing Body following the Rio+20 Conference, the world's Governments *"welcomed the important contributions made to sustainable development by environmental law and constitutional provisions and rights of some countries related to nature"*.

Success going forward will depend on our ability to operationalize these linkages, advance environmental rights and make them felt in the daily lives of people. Let me give an example: At the second session of the United Nations Environment Assembly, UN Environment presented a report on legal limits for lead in paint. Lead in paint is a good indication of some of the tests environmental constitutionalism will face going forward and why it is so vital to push forward with a strong resolve. Despite many constitutional provisions and the clear human rights implications, millions of people – and especially children – continue to be poisoned by lead in decorative and other paints. New York University has estimated that the developmental and societal costs associated with this go into billions of dollars. In some countries, the costs amount to 3% of GDP. In times where many countries struggle to grow their GDP at all, this is very significant.

The topic of human rights and the environment, and constitutional environmental rights, has particular relevance in Africa. There was a time, not that long ago, when it might have been thought strange to suggest that the rest of the world stood to learn from an examination of human rights law in Africa. However, so much has changed in recent years, both on the ground in Africa, and in received views about the continent.

The inspirational power of African human rights movements arises from, amongst other things, the directness with which the African human rights documents address issues. As is well known, among the human rights treaties, only the African Charter on Human and Peoples' Rights proclaims environmental rights in broadly qualitative terms. It protects both the right of peoples to 'the best attainable standard of health' and their right to 'a general satisfactory environment favorable to their development'. In contrast, such a right, if it is to be found in most 'developed' states' constitutions, has to be discovered through legal interpretation.

Meanwhile, some important, trailblazing litigation has come out of the African Commission on Human and Peoples' Rights over the last 15 years, including the widely



heralded Ogoniland decision - the first decision by an international human rights body dealing directly with the violation of economic, social, and cultural rights. This decision goes further than any previous human rights case in the substantive environmental obligations it places on states.

It is of note too that some 'Western' courts have already made reference to the African Charter in their decisions. This is not surprising as this instrument has introduced some innovations to the international human rights scene.

In addition to its unique enforcement mechanism, the African Charter is the only regional human rights instrument that incorporates economic, social and cultural rights as well as civil and political rights in one document, and subjects them all to the same complaints procedure. This is very significant because these rights (including to health, water and food, for example) clearly have a strong environmental overlap and therefore allow people to bring environment related cases to the African Commission on Human and Peoples Rights and the African Court. The human rights protection body under the African Charter is therefore the very first human rights body capable of deciding on multiple breaches of both first and second-generation human rights in one decision.

South Africa, where the chapters of this volume were originally presented at the New Frontiers conference in April 2016, has been a leader on the continent, and indeed the world, in terms of advanced environmental constitutionalism. South Africa has both a progressive Constitution that guarantees environmental rights and an interesting and exciting suite of comprehensive environmental legislation that makes extensive provision for public participation in environmental policy and decision-making. To add to that, the country has an incredibly strong and alive civil society culture, always prepared to challenge gross environmental injustice. Isn't this what it is all about at the end of the day? Justice and fairness. This, I believe, must be the end goal for environmental constitutionalism.

Let me take you back to UN Environment Governing Council Decision 27/9 for a moment. After recognizing the positive contribution that environmental constitutionalism has played, the decision went on to say that the violation of environmental law has the potential to undermine sustainable development and the implementation of agreed environmental goals and objectives at all levels and that the rule of law and effective governance play an essential role in reducing such violations.

Decision 27/9 is the first inter-governmentally-negotiated document to establish the term environmental rule of law. Why is this important in the context of environmental constitutionalism?

Environmental rule of law is central to sustainable development and the success of environmental constitutionalism. The ever increasing environmental pressures from climate change, biodiversity loss, water scarcity, air and water pollution, soil degradation, among others, have far reaching economic and social consequences. They contribute to poverty and to growing social inequalities. Conflicts over natural resources and environmental crimes exacerbate the problems. At least 40 percent of internal conflicts over the last 60 years have a link to natural resources. The risks of violent conflict increase when exploitation of natural resources causes environmental damage, loss of livelihood, or unequal distribution of benefits. Poor people are especially vulnerable, as are women and girls.

However, natural resources that are managed sustainably, transparently, and on the basis of rights and the rule of law can be the engine for sustainable development as well as a platform for peace and justice.


To be effective, environmental rule of law entails:

1. Fair, clear and implementable environmental laws;
2. Public participation in decision-making, and access to justice and information in environmental matters, in accordance with Principle 10 of the Rio Declaration;
3. Accountability and integrity of institutions and decision-makers, including through the active engagements of environmental auditing and enforcement;
4. Accessible, fair, impartial, timely, and responsive dispute resolution mechanisms, including developing specialized expertise in environmental adjudication, and innovative environmental procedures and remedies.
5. Recognition of the mutually reinforcing relationship between human rights and the environment; and
6. Specific criteria for the interpretation of environmental law.

The 2030 Sustainable Development Agenda and the Sustainable Development Goals (SDGs) provide a unique opportunity to advance environmental rule of law by ensuring sustainable development is based on rights and affords all people equality in environmental protection. They also provide a vehicle for translating the hundreds of existing environmental commitments into action – including the many constitutional provisions the world over.

A rights-based approach to guide decision-making will lead to better results in implementing the 2030 Sustainable Development Agenda and the SDGs and in addressing the impact of environmental degradation generally and in particular its impact





on the world's poorest and most vulnerable populations. It will encourage economic development that recognizes that healthy ecosystems are a precondition for reducing poverty and an opportunity for development and economic growth.

To this end, legal and practical means to increase transparency, strengthen access to information and enhance public participation in environmental decision-making processes will be needed. We need to increase the capacity of those critical to implementing environmental rule of law. This includes in particular courts and other tribunals, law enforcement agencies, auditing institutions and other stakeholders at the national, sub-regional, regional, and international levels.

Globally, courts and tribunals now address environmental issues in a variety of settings. More than 50 states have established specialized environmental courts and tribunals. Yet, citizen access to justice in environmental matters differs greatly from country to country and is far from being barrier-free. These barriers must be removed and the capacity of courts and tribunals to dispose of environmental cases must be strengthened to ensure the full reach of environmental constitutionalism. Effective environmental constitutionalism without the rule of law seems unthinkable.

This is why this volume is so important: it offers us an opportunity to exchange and learn from each other as to how we can move environmental constitutionalism forward to ensure the achievement of these global aspirations and goals, combat the violation of these rights through civil, administrative and criminal enforcement, and safeguard against the regression on existing rights.

Going forward, this effort will need all of us working together, academic institutions -- and the work of many eminent representatives of some of the world's finest institutions are included in this volume, -- business, and civil society, governments, and the entire UN family.

UN Environment was very proud to be associated with the conference in South Africa and with this publication which collects and makes permanent the scholarly contributions to this event. UN Environment has been involved in several important developments in this area, to integrate human rights and environment linkages in UN system-wide strategies, as well as moving the agenda ahead among Governments. In collaboration with the UN Office of the High Commissioner for Human Rights and the UN Special Rapporteur on Human Rights and the Environment, Prof. John Knox, UN Environment has produced a large number of informational tools on Human Rights and the Environment linkages, including reports, compendia, and online resources, all of which are available on a

dedicated Human Rights and Environment section of the UN Environment website, as well as on the websites of partner institutions. Among these is a compendium of best practices in environmental rights.

We have also already begun to team up with partners to develop a training programme for the judiciary to be rolled out globally, to promote the utilization of constitutional environmental rights in the broader sustainability agenda – something we are very excited about. The first step in this project was a Workshop associated with the New Frontiers conference sponsored by connected North-West University and Widener University Delaware Law School in which African judges critically engaged on constitutional environmental rights themes from a comparative perspective. The outcomes of that workshop fed into the development of training materials for the judiciary.

As Thomas Paine said: A Constitution is not the act of a Government, but of a people constituting a government and a government without a constitution is a power without a right. In the age of the Anthropocene, constitutionalism – and especially environmental constitutionalism – will be measured even more rigorously by the ability it creates to achieve just and sustainable development outcomes.



Introduction to Environmental Constitutionalism

Erin Daly, Louis Kotzé, James R. May

Environmental constitutionalism examines the development, implementation and effectiveness of incorporating environmental rights, procedures, and policies into constitutions around the globe. Through alchemy of international engagement, constitutional reform, legislative implementation, and jurisprudential vindication – informed by legal scholars and civil society change agents – environmental constitutionalism is undeniably an influential and growing field of law and public policy with potential to advance and improve environmental outcomes in ways that only outright constitutionalism can.

Environmental constitutionalism's emergence is nothing short of astonishing. Arguably owing its genesis to the 1948 Universal Declaration on Human Rights, and 1966's twin international covenants on Civil and Political and Economic, Social and Cultural Rights, it entered the lexicon at 1972's Stockholm Convention on the Human Environment, which is widely considered to be the global impetus that sparked the exponential growth of international, regional and national environmental law regimes, including their rights-related aspects. It included the following intertwining of human and environmental rights:

In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. 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 the right to life itself.²²

While it is difficult to determine exactly when the first environmental provision of any kind was incorporated into a constitution²³ the current wave began on the heels of Stockholm.²⁴ From there, constitutional incorporation was slow but steady through the 1970's and 1980's, persistent in the 1990's, and pervasive ever since. Now, about

22 Declaration of the United Nations Conference on the Human Environment, 1972 Preamble, para 1. See also its Principle 1.

23 One estimation is that this occurred in 1866 in the Romanian Constitution Zachary Elkins, Tom Ginsburg and James Melton "Comparative Constitutions Project Characteristics of National Constitutions" 2014 version 2.0, available at <http://comparativeconstitutionsproject.org/ccp2015/download-data/>. The first of the modern constitutional environmental provisions is seen in the state constitution of Pennsylvania, whose Environmental Rights Amendment was adopted by statewide referendum in 1971, the year before the Stockholm Convention.

24 Joshua Gellers "Explaining the Emergence of Constitutional Environmental Rights: A Global Quantitative Analysis" 2015 6(1) Journal of Human Rights and the Environment 75-97.


one-half of all constitutions on the planet expressly or implicitly recognize a right to the environment as a fundamental right. About a third of those also contain procedural environmental rights provisions explicitly asserting rights to information, participation, and access to justice in environmental matters. Some provisions are common – such as those expressly recognizing a right to a beneficial or healthful environment – while others are less so, such as those recognizing the rights of nature, requiring environmental education, advancing sustainability, or incorporating human dignity as essential to environmental protection. Whether or not countries are intentionally copying each other, they are aware of the currents that are bringing environmental constitutionalism to all parts of the world.

In some constitutions, the environmental provisions are directive principles of public policy, encouraging governments to care for the environment, while some constitutions insist that the government owns environmental resources in trust for the benefit of the people and must care for them accordingly for present and future generations; others still guarantee environmental rights as in indivisible aspect alongside other rights, such as the right to free expression, the right to vote, the right to education, the right to dignity, or the right to life. This rights-based approach signals a shift from the conventional understanding of environmental protection which has primarily happened at the international level of multi-lateral treaties on pollution, biodiversity, climate change, and so on, or by domestic statutes that seek to secure clean water or air, for instance.

From modest beginnings, environmental constitutionalism has become a common if not constant consideration at international conferences, constitutional conventions, and academic symposia, and in courtrooms, boardrooms, and classrooms. It stands on the shoulders of countless conversations and contributors. Whether there is a human right to a healthy environment, and if so, how that notion ought to be reflected in international instruments and national and subnational constitutions and laws has been fertile field for thought. A robust body of scholarship exists that tracks trends in environmental constitutionalism, advocates for constitutional incorporation of substantive and procedural environmental rights, identifies correlations to related concepts like human rights and human dignity, contextualizes it to challenges such as climate change, and acknowledges its potential as a saving grace in the Age of the Anthropocene.

The growing recognition of the need for constitutional institutions, provisions and processes to embrace environmental care and to extend constitutionalism into the environmental domain confirms the entrenchment of global environmental constitutionalism, in all its aspects and throughout the world. While some have called





for “a wider range of options [and] a new paradigm”²⁵ in this respect, others suggest that in addition to legitimate and accountable government, judicial review, democracy, and respect for human rights, “the constitutionalism of the future” must as a result of contemporary threats and challenges, embrace notions such as human solidarity for the preservation of the planet and its resources and equitable principles in the allocation of scarce resources within and among people and countries.²⁶ Thus, the need to consider where environmental constitutionalism is headed next – that is, its new frontiers.

Focusing on “new frontiers” represents a certain audacity of both descriptive and normative dimensions. For a discipline so young – the first wave of scholarly engagements with the topic having appeared within the last 10 years – the invitation to explore new frontiers signals that knowledge and understanding in this field are developing quickly, with continual transnational conversations taking place within and across communities of scholars and practitioners. But it also calls upon contributors to reckon creatively and seriously with the challenges of environmental constitutionalism: how should constitutional provisions be written so as to maximize their effectiveness? What is the relationship between environmental rights and other constitutional rights? How can environmental rights be used to protect human interests as well as environmental interests? And, perhaps most importantly, how can courts be encouraged to take up the challenge of vindicating constitutional environmental rights? These difficult and urgent questions are materializing against the backdrop of the Anthropocene, when humans are facing unprecedented environmental threats, but also have more resources than ever before to combat those threats. The promise, and challenge, of environmental constitutionalism is to make those guarantees matter. This collection invites scholars to explore how to do that.

One of the hallmarks of environmental constitutionalism is that it has always been part of a transnational conversation – countries look to each other in developing their constitutional texts and as their courts seek to interpret and apply them. Indeed, constitutional environmental drafters, interpreters, and scholars are in a continual dialogue, learning from each other and adapting norms and practices evolved in one place to their unique local conditions. It is thus entirely apt to bring together some of the leading voices in this global dialogue and to present those contributions in the form of this book for others to consider and adapt to their own thinking.

25 Brain Gareau “Global Environmental Constitutionalism” 2013 40(4) Boston College Environmental Affairs Law Review 403-408 at 408.

26 Bertrand Ramcharan “Constitutionalism in an Age of Globalisation and Global Threats” in Morly Frishman and Sam Muller (eds) *The Dynamics of Constitutionalism in the Age of Globalisation* (Hague Academic Press, 2010) 18-19.

We are therefore delighted to present the contributions to this volume, the fruits of a stimulating symposium that took place in 2016 at the North-West University in Potchefstroom, South Africa. The symposium was a joint collaboration between the Faculty of Law, North-West University; Widener University, Delaware Law School; the United Nations Special Rapporteur on Human Rights and the Environment; the Konrad Adenauer Foundation; and the United Nations Environment Programme. We hope that you find this volume to be helpful in contributing to the conversation about new frontiers in environmental constitutionalism.





Photo credit: © Kim Greenhalgh



part 1

International and Regional Perspectives





New Frontiers: Europe, Human Rights, and the Environment - The Continuing Need for Innovation

Karen Morrow

1. Introduction

Europe tends to pride itself on its record on human rights, though nowadays this is perhaps more the product of a tendency to rest on former glories than a reflection of reality. Arguably there is no area in which the limitations in Europe's track record on human rights are more apparent than in the vexed relationship between the environment and human rights, in particular where substantive (in marked contrast with procedural²⁷) environmental rights are concerned. This chapter briefly considers the innovative coverage for environmental concerns crafted from applying a patchwork of established human rights under the European Convention on Human Rights 1950²⁸ (ECHR) to emerging human rights claims raising environmental concerns. It discusses some of the necessary limitations of this approach and argues that it may have reached the limit of its potential. The chapter briefly outlines a number of ways in which the fabric of the human rights protection that is offered in environmental contexts under the ECHR may be further developed. The chapter concludes by considering the potential of European Union (EU) accession to the ECHR and of the Charter of Fundamental Rights of the European Union (CFREU)²⁹ as future means of addressing environmental human rights claims.

27 Europe can legitimately claim to be innovative in regard to applying procedural rights in environmental contexts – see the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information Public Participation in Decision-making and Access to Justice in Environmental Matters at <<http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>> accessed 21 March 2016.

28 Online at <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 21 March 2016.

29 OJ 2012/C 326/02, 26/10/2012.

2. The ECHR Regime and Environment-Based Rights Claims – Making the Best of a Difficult Situation?

The absence of coverage for environmental rights in the main body of the ECHR is of course entirely understandable given its vintage. The subsequent failure to add discrete coverage of environmental rights to the Convention regime is less explicable, however, and presents an ongoing practical and jurisprudential challenge. While (as we shall see below) the ECHR's signatory states have been at best dilatory in engaging with the human rights concerns arising from environmental issues, the same cannot be said of the European Commission for Human Rights³⁰ and the European Court of Human Rights (ECtHR). By the early 1990s, applicants under the Convention were beginning to attempt to raise human rights claims founded on environmental concerns, as adverse conditions in respect of the ECtHR were increasingly seen to act to the detriment of the ECHR. While this development offered potential opportunities to pursue redress to applicants and for the Convention machinery to further augment its jurisdiction,³¹ in the first instance the practicalities of making

an environment-based claim under the ECHR in the absence of any coverage of environmental issues in the Convention had to be engaged with. Given the raw material at hand, with the Convention's coverage being focused primarily on "first generation" civil and political rights, with "second generation" social and economic rights playing a subsidiary role; the fit with environmental rights claims, commonly deemed to invoke "third generation"³² rights, was not immediately apparent. Nonetheless the Convention machinery rose to the challenge by exploiting the latitude available to it under the "living instrument"³³ approach to interpreting the ECHR.



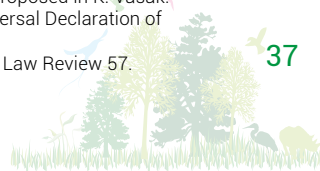
Figure 1: Between a rock and a hard place, Llanberis, Wales

30 This body was abolished on the entry into force of Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby 1994, in 1998 online at <http://www.echr.coe.int/Documents/Library_Collection_P11_ETTS155E_ENG.pdf> accessed 21 March 2016. The Commission initiated the regime's engagement with environment-based claims by finding them admissible to the ECtHR in *S v France* App no 13728/88 (ECHR, 23 January 1990).

31 *Guerra and others v. Italy* App no 14967/89 (ECHR, 19 February 1998) para 43, which outlines the Court's definitive role in determining its jurisdiction.

32 Employing, for the sake of convenience, the commonly used (if contentious) terminology proposed in K. Vasak: 'Human rights: A thirty-year struggle. The sustained efforts to give force of law to the Universal Declaration of Human Rights', UNESCO Courier, 30:11.

33 A. Mowbray: 'The Creativity of the European Court of Human Rights' (2005) Human Rights Law Review 57.



2.1. The ECtHR and Environment-based Human Rights Claims – the Patchwork Approach

In order to accommodate environmental claims under the ECHR, what may be termed a “patchwork”³⁴ approach was adopted, fashioning coverage for environment-based claims by piecing together the application of established Convention rights in a novel context. Both procedural and substantive Convention rights were pressed into service in this way in adjudicating environment-based claims, the key procedural rights invoked being Article 6 - the right to a fair hearing, and Article 13 – the right to a remedy in domestic law. The main substantive rights that tend to be litigated are Article 8 - the right to privacy and family life; Article 10 – freedom of expression (which includes the right to receive information); Article 1 to the First Protocol - the right to enjoyment of property; and ultimately, though infrequently, Article 2 - the right to life. Although these Convention rights are expressed in broad terms, none of them is absolute and they can therefore be subject to legitimate interference by States if certain conditions are met. In evaluating what qualifies as such, the Court employs concepts such as the need to arrive at a “fair balance” between the interests of affected individuals and society more generally, and the “margin of appreciation”, which is rooted in the fundamentally

subsidiary nature of the Convention³⁵ and founded on the understanding that states are better placed than the ECtHR to make decisions, given their knowledge of domestic conditions. Both of these concepts feature prominently in the case law on environment-based human rights claims, unsurprisingly, given the need for a somewhat circumspect judicial approach necessitated by the lack of specific Convention coverage for environmental issues and the fact that in this area, perhaps above all others, knowledge of prevailing conditions on the ground is of central importance.

What began as an *ad hoc* endeavor rapidly developed jurisprudential critical mass, as the ECtHR capitalized on the opportunities presented to it by multiple claims in this newly modish sphere, and numerous landmark cases emerged in fairly short order, with *Lopez Ostra v Spain* App no 16798/90 (ECHR 9 December 1994) leading the way. In this case the Court found that the state’s failure to protect an individual’s home from “serious” pollution emanating from a waste treatment plant violated Article 8, in failing to respect her home, privacy, and family life.

In *Taskin v Turkey* App no 46117/99 (ECHR, 8 April 2005), the Court stressed the states’ obligations extended not only to setting up appropriate regulatory regimes but also to securing their enforcement.

34 K. Morrow: ‘After the Honeymoon: The Uneasy Marriage of Human Rights and the Environment Under the European Convention on Human Rights and in UK Law Under the Human Rights Act 1998’, (2013) 43 *Revue générale de droit* 317

35 *Hatton and others v. United Kingdom*, App no 360022/97 (ECHR, 8 July 2003).

Here, a gold mine that had been operating under a state permit was unlawfully emitting cyanide. Eventually the domestic courts ruled that it should be closed, but this was not done. The state's failure to comply with its own regulatory law was found to be in breach of Articles 8 and 6.

Further, *Hamer v Belgium* App no 21861/03 (ECHR, 27 February 2008) took further important steps in recognizing the societal significance of the environment. While the Court pointed once again to the wide margin of appreciation enjoyed by States in regard to environmental affairs,³⁶ it also declared that: "... in today's society the protection of the environment is an increasingly important consideration".³⁷ Furthermore the Court stated that:

The environment is a cause whose defense arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard.³⁸

This articulation of the public interest in environmental regulation and the question of the potential qualification of individual rights in light of it (in the instant case under Article 1 to the First Protocol) - subject to satisfying the requirement of fair balance - is of considerable interest. Whilst the focus adopted by the Court here remains anthropocentric, the range of human impacts considered explicitly brings collective, as well as individual interests, into the equation, adding substance to the content of the margin of appreciation and the concept of fair balance. That said, the collective nature of environmental interests and their relationship to individual rights remains the conceptually fraught centre to ECHR claims based on environmental concerns.³⁹

In terms of conflicting interests, *Bacila v Romania* App no 19234/04 (ECHR, 30 March 2010), an Article 8 claim on a failure to regulate adequately saw the ECtHR take the view that the economic need to keep the offending plant open should not have been allowed to prevail over the locals' "right to enjoy a healthy environment".⁴⁰ This approach was reiterated - and arguably augmented - in the Article 13 case of *Di Sarno and others v Italy* App no 30765/08 (ECHR, 10 January 2012).

36 Online at <hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id.> accessed 22 March 2016, at para 78.

37 *ibid* at, para 79.

38 *ibid*.

39 F. Francioni: 'International human rights in an environmental horizon' (2010) *European Journal of International Law* 41.

40 Para 70-71.



Kania v Poland App no 12605/03 (ECHR, 21 October 2009) was also significant in that the ECtHR reiterated its commitment to the use of Article 8 as a means of disposing of environment-based claims, despite the continuing absence of coverage a right to “a clean and quiet environment” in the Convention.

Another significant development in the ECtHR’s case law has seen it tap into broader environmental jurisprudence, making increasing reference to more generally established environmental law concepts to support its approach with, for example, risk assessment and the precautionary principle featuring in *Tatar v Romania* App no 657021/01 (ECHR, 27 January 2009).

2.2. Some Limitations in the ECtHR’s Patchwork Approach to Environment-based Human Rights Claims

The immediate and pragmatic appeal of the patchwork approach is obvious, though in the longer term the problems of principle that it raises and their ramifications have become more apparent. Thus while considerable progress has been forged by the ECtHR in a comparatively short time, particularly given relatively unpromising beginnings, it is also the case that development has inevitably been piecemeal, dependent as it is on the happenstance of case law, and the need to respond to specific

fact scenarios; the very nature of which impedes the development of a coherent over-arching approach. One result of this is that the Court’s attempts at a judicial formulation of an environmental human right necessarily lack the comparative uniformity (at least in terms of framing) that a clear and coherent treaty base for an environmental right would give. That said, there is discernible at the core of the Court’s decisions a strong shared emphasis on securing human welfare. This is, however, at best a rather narrow interpretation of an environmental right and could just as easily be adequately encapsulated in a human right to public health - indeed the latter would sit much more comfortably and coherently in the ECHR’s fairly narrow conception of human rights.

More fundamentally, being based on extrapolating jurisdiction from extant human rights and essentially repurposing them to address environment-based claims, the patchwork approach inevitably encounters conceptual limitations in attempting to incarnate an environmental human right. This is apparent in *Kyratos v Greece* App no 41666/98 (ECHR, 22 May 2003), in which a tourist development had destroyed a swamp area that had hosted protected species, eroding its scenic and habitat value. The applicants’ argument that this had interfered with their Article 8 rights failed as they had not shown that they were directly affected by these environmental changes. This approach, more explicitly than in previous cases,

represents a narrow view of environment-based human rights claims, focusing coverage tightly on adverse effects on individual human beings. Indeed, when *Kyratos* is read in conjunction with *Bacila* and *Di Sarno* the scope of protection offered to human interests may be narrowing to threats to an individual's physical well-being – broader welfare-based claims failing to gain traction with the Court.

Furthermore, *Kyratos*, in brushing aside an attempt to claim predicated on “pure” environmental degradation, gives cause for concern in two ways: first in its unequivocally and exclusively instrumental approach to the environment; and second, in precluding another avenue⁴¹ to “representative” suits to protect the environment under the ECHR regime, in cases where individuals were minded to attempt to use a rights route to attempt to advance environmental protection.

To sum up, while much has been achieved by the ECtHR regime using the patchwork approach, it is arguable that this route to canvassing environment-based human rights claims has progressed as far as it is likely be able to. The patchwork approach is looking increasingly hard-pressed in light of the unprecedented, even existential challenges posed by environmental threats. This then begs the question: how, given prevailing political considerations and institutional constraints, might the



Figure 2: Contemplating the “Ghost Forest” - Llanarthne, Wales

ECHR regime engage with human rights claims related to the environment in the future?

3. How Might the ECHR Better Engage with Environment-Based Human Rights Claims?

In an ideal world, acknowledging the extent of our ecological crisis would prompt us to develop a jurisprudence that places value on the natural world in its own right in order to better inform our consideration of how the relationship between human rights and the environment ought to be understood. Unfortunately, in the real world such an environmental enlightenment is not a realistic prospect. Nevertheless, even if we stop well short of such a radical approach, there is still much that can be done to re-

41 NGO claims already being precluded in the absence of individual ‘victim’ status – see *Asselbourg and others v Luxembourg* App no 29121/95 (ECHR, 29 June 1999).



frame the nature of the nexus between human rights and the environment more credibly under the ECHR.

3.1. Adopting a Human Right to a (Variously Defined) Environment?

Superficially, extending protected human rights under the ECHR to include an environmental human right would be the most attractive option of those available. There are, however, real (and perhaps even intractable) problems with this. Most fundamentally, agreeing on what an “environmental human right” might entail is fraught with difficulty,⁴² as evidenced by the now notable continued absence of a general, substantive, hard law right of this type in the global human rights canon. Nonetheless this difficulty is surmountable as is apparent from the proliferation of variously defined environmental human rights in domestic constitutions,⁴³ and in other regional international law instruments.⁴⁴ There has been considerable support for the idea of developing the ECHR’s coverage in this way from a wide range of sources, not least the United Nations,⁴⁵ and the non-governmental organization (NGO) community.⁴⁶ Within the Convention regime, however, the picture is somewhat

less sanguine. While, as we have seen, the ECtHR has forged ahead with some success, a more strategic approach is not within its gift – this falls to the Convention’s political machinery, principally the Committee of Ministers (CoM) (the regime’s prime decision-making organ), and the Parliamentary Assembly of the Council of Europe (PACE) (with powers to investigate, make recommendations, and advise), and here there is marked division. The PACE has been particularly active on environmental concerns, persistently advocating the addition of an “environmental right” (albeit variously defined) to the Convention for many years. None of the PACE’s proposals have found favor with the CoM, however, and there seems to be no realistic prospect of their doing so. It is therefore unsurprising that discussion of the issue appears to have dropped from prominence within the regime of late.

3.2. Considering Individual Rights, Collective Rights, and the Environment

Even if an environmental human right were to be agreed upon and adopted under the ECHR, this would raise further questions. One concern that would need to be addressed would be the extent to which

42 A. Boyle: ‘Human Rights and the Environment: Where Next?’ (2012) 23.3 *European Journal of International Law* 613.

43 C. Jeffords, *Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions*, (2013) online at <http://www.christopherjeffords.com/Constitutions_Jeffords.pdf> accessed 23 March 2016.

44 See, Article 24 of The African Charter of Human and People’s Rights 1981 at <<http://www1.umn.edu/humanrts/instree/z1afchar.htm>> accessed 23 March 2016 and Article 11 of the additional protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988 at <<http://www.oas.org/juridico/english/treaties/a-52.html>> accessed 23 March 2016.

45 UN GA Res 64/157, 08/03/2010.

46 Notably the broad-based NGO Stand Up For Your Rights Initiative, see <<http://standupforyourrights.org/ip/uploads/downloads/SUFYR%20on%20Right%20to%20Environment.pdf>> accessed 24 March 2016.

it is actually appropriate to individuate human rights insofar as we apply them to the environment. Individual human rights claims may, and often do, conflict with one another and with the interests of the public at large – and such conflicts inevitably feature prominently in environment-based cases. In light of the inevitable importance of the broader interests implicated in such cases, a more nuanced approach to rights is required. The ECtHR already gives a degree of credence to the need for such an approach, even if in a somewhat attenuated fashion, by deploying the general Convention jurisprudence on “fair balance” and the “margin of appreciation” in its environmental case law. The central question here, and arguably the prime question for human rights-based approaches to environmental issues is a profound one: Can the essentially individualistic approach normally applied in a human rights context ever really work where collective environmental concerns are involved? The application of the aforementioned concepts suggests that this is not viable – at least in its pure form. Property rights in particular raise huge moral and practical questions in this regard – and these need to become the subject of renewed legal inquiry as we seek to render the incorporation of environmental considerations meaningful. Reflection may ultimately lead to the conclusion that it would be worth canvassing a rather more principled approach than that

currently in use under the ECHR in order to dispose of this issue more effectively. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁴⁷ offers potentially interesting insights in this regard, reflecting (in common with some emerging domestic law regimes, notably in South America) cosmologies that differ significantly from those that currently prevail in much of the world. While UNDRIP recognizes a species of environmental right, it does so in the form of the right of indigenous peoples to “... the conservation and protection of the environment and the productive capacity of their lands or territories and resources”, invoking host state obligations in this regard. Crucially, this right is collective rather than individual in its focus.⁴⁸ While such an approach is novel (or even alien) to mainstream human rights law, it is arguably highly appropriate in environmental contexts, in accommodating the limitations of individuation in respect of environmental rights claims. Incorporating an explicitly collective dimension as a qualifier to an individual environmental right could therefore be a useful addition to the ECHR approach.

Nevertheless, as discussed above, it remains the case that while adding an environmental right however defined to the Convention is legally possible, it is not at present politically viable – which prompts the consideration of potential alternative courses of action.

47 United Nations General Assembly (2007) Resolution 61/295 'Declaration on the Rights of Indigenous Peoples at <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> accessed 23 March 2016.

48 *ibid.*, Article 29.



3.3. Re-visiting our Understanding of the Patchwork Approach as a Starting Point

Given political reality, alternatives to adopting an environmental right must also be considered. Revising how the patchwork approach is viewed, characterizing it not as an unsatisfactory judicial fabrication, but rather as recognizing (albeit from a pragmatic rather than a principled perspective) the foundational importance of environmental conditions to the enjoyment of the specific rights that the Convention guarantees would be one place to start such an exercise. In fact, the patchwork approach arguably situates environmental considerations much more accurately than would the attempt to develop an environmental human right, as it recognizes that no human right – or indeed human activity – is sustainable in the long term in the absence of viable environmental conditions. Thus the patchwork approach could continue to be viable if it is viewed as being grounded on the understanding that a viable environment is a precursor to the effective realisation of human rights. While the case law of the ECtHR effectively already recognizes this approach to a marked degree for certain rights, a more thoroughgoing approach is required to fully encapsulate it – ideally one grounded in the Convention itself.

There are a number of avenues worth exploring whereby this might be achieved, notably through invoking the jurisprudentially credible use of the preamble to the ECHR as an interpretative tool. The preamble manifests a number of characteristics that offer potential inroads for a change of orientation in the Convention regime. First, while not part of the binding text, the preamble identifies the conceptual and practical underpinnings of the provisions contained in the body of the agreement (invoking, amongst other things, justice, peace, and democracy, underpinned by "... a common understanding and observance of the Human Rights upon which they depend",⁴⁹ which could potentially be interpreted as requiring viable environmental conditions to sustain them). Second, it points to the broader legal context within which the Convention is located (specifically making reference to the UNHR, and facilitating the importation of the now common understanding that many of the rights contained therein can be frustrated by adverse environmental conditions). Third, it can articulate issues that are not deemed appropriate for substantive coverage but which are nonetheless central to the prospects of success of the treaty regime (which could again include recognition of the need to secure sustainable environmental conditions as a prerequisite to realizing the rights guaranteed in the body of the Convention).

Alternatively, rather than trying to infer environmental credentials into a preamble that never envisaged them, with all of the challenges that this could entail, the possibility of amending the preamble could be considered. This is not unprecedented in the Convention regime,⁵⁰ though there would of course be difficulties as both political will and cross-regime support would be required to promote such a development. Past experience suggests that the CoM would likely present the most prominent obstacle, though this less direct course of action may offer a more attractive option, by authoritatively altering the interpretive environment, rather than creating a binding, substantive environmental right. If the Convention regime adopted this approach, it would go a considerable way towards solving the key problem of viably reflecting in law the factual relationship between human rights and the environment – and could legitimately claim to be at the cutting edge of legal science in doing so.

4. European Union Accession to the ECHR?

Although there has been a lengthy history of interaction between the ECHR and EU law, the EU's Court of Justice (CJEU) Opinion 2/13⁵¹ appears to have derailed (perhaps permanently) the prospect of any closer relationship between the two regimes by effectively scuppering the most recent, painstakingly negotiated attempt to secure the EU's accession to the Convention. This development has hugely negative ramifications for the protection of human rights in Europe generally and also represents a missed opportunity to interweave the established ECHR regime, with its marked degree of functional coverage for environment-based human rights claims, and EU law with its extensive substantive environmental law credentials. The stronger legal fusion envisaged could, as far as it goes, have provided a firmer underpinning for judicial intervention in both regimes⁵² and possibly remedied at least some of the deficiencies of each, enabling them to amount to rather more than the sum of their parts.

50 Council of Europe, Explanatory Report: Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213) online at <http://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf> accessed 27 July 2016.

51 Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties. Opinion 2/13 online at <<http://curia.europa.eu/juris/liste.jsf?num=c-2/13>> accessed 31 March 2016.

52 There is a common misconception that accession to the ECHR is a prerequisite for EU membership. This is not in fact the case, though all 28 member states have in fact acceded to the ECHR regime. EU states comprise just over half of the 47 signatories to the ECHR.



5. The Charter of Fundamental Rights of the European Union (CFREU)

The Charter of Fundamental Rights of the European Union (CFREU) is also now in play in protecting human rights in Europe. Disappointingly, although created in 2000, the CFREU adopts a conservative approach to human rights and offers only limited engagement with environmental concerns. These appear under Title IV on "Solidarity" (which covers a range of collective concerns) in Article 37, which states that:

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Thus the coverage offered, despite its location in the CFREU, is not in fact clearly rights based; instead it merely restates the need for Member States to adhere to their treaty obligations with regard to the environment. Nonetheless, Article 37 may serve to provide explicit underpinning for another example of the patchwork approach to addressing human rights-based environmental concerns when read

alongside, for example, Articles: 2 (Right to Life); 7 (Respect for Private and Family Life); 11 (Freedom of Expression and Information); 12 (Freedom of assembly and Association) and 17 (Right to Property) - all of which are rights already contained in the ECHR and, distinctively, Article 1 (the Right to Human Dignity).

6. What Next?

While EU accession to the ECHR is no longer, in the short term at least, a realistic prospect, this does not preclude further development of the EU's human rights agenda. Indeed, this may be an area ripe with possibility with the CJEU's evident ambition for its own position in tandem with its zeal to augment the role and importance of the CFREU⁵³ offering opportunities for innovative development. Not for the first time, a court's jurisdictional acquisitiveness may have useful by-products – and human rights-based claims generally (in the EU itself) and those triggered by environmental considerations (in the ECHR regime) have form for providing just this sort of self-aggrandizing opportunity for institutional adjudicatory machinery. That said, such an uber-instrumental approach to the issues, particularly when viewed against the background of the CJEU's signal failure most recently expressed on Opinion 2/13 to grasp the necessity and import of human rights protection

53 A. Lazowski and R. A. Wessel: 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16 German LJ 179.

as a necessary curb on the undesirable effects of unalloyed legal supremacy on the citizenry, should be regarded with considerable caution. Nonetheless, environmental lawyers are rarely purists –

we will use such tools as are available to us to attempt to forge progress – and the current context certainly offers potentially innovative ways forward to explore and exploit.

Photo credit: © Peter John Maridable



An International Tribunal on the Human Rights Impacts of Fracking: Structure, Grounding and Purposes

Tom Kerns

“Barbarism is the absence of standards to which appeal can be made.”
- José Ortega y Gasset⁵⁴

1. Introduction

In 2017, the Permanent Peoples’ Tribunal Session on the Human Rights Impacts of Fracking will ask its judges to apply the standards of international human rights law to six subcases addressing the experiences of individuals and communities around the world who are being impacted by unconventional oil and gas extraction and usage, and by its resulting climate effects.

An additional day of tribunal hearings will be devoted to arguing the subcases on the grounds of the rights of nature as expressed in national constitutions such as Ecuador’s, case law based on those constitutions and in formal statements such as the Universal Declaration of the Rights of Mother Earth presented to the United Nations in April 2011.⁵⁵

These human and environmental rights, whether expressed in national and international law or in national and sub-national constitutions, are often insufficiently brought to bear or protected by standard, state-based enforcement mechanisms. This failure of states to respect and enforce environmental rights can open the door for intervention by non-state actors such as the Permanent Peoples’ Tribunal (the Tribunal) and other civil society institutions. The decisions and actions by these bodies, less influenced by the pressures of national politics and economic interests, can articulate and stand up for environmental human rights standards when states and international bodies fail to do so.

This Tribunal Session on the Human Rights Impacts of Fracking and Climate Change is intended to serve exactly that purpose. Firstly, it will collect, vet, and organize relevant expert and personal testimony. Secondly, it will provide prosecutors the opportunity to rehearse arguments grounded in human rights law and in environmental and constitutional

54 The Revolt of the Masses, chapter 8, 1929.
55 <https://pwccc.wordpress.com/programa/>

law. Finally, it will result in findings and recommendations that can provide a quasi-legal precedent useful as an interpretive aid in future human rights, environmental and constitutionally-based legal actions.

2. Beginnings

In 2011 the Tribunal held a Session in Bangalore, India indicting the six largest transnational agrichemical corporations on charges of human rights abuses related to their manufacture, marketing, distribution and use of pesticides, fertilizers and other agricultural chemicals.⁵⁶ That session was held over a period of several days and was streamed live so that anyone anywhere in the world could watch it, and I did.

Two years later when a group of us was preparing a Human Rights Impact Assessment of Fracking in the United Kingdom,⁵⁷ we asked the Tribunal if they would be interested in holding a Session on human rights and fracking. In January 2014 Dr. Gianni Tognoni, Secretary General of the Permanent Peoples' Tribunal in Rome, confirmed that the Tribunal was indeed interested in such a Session. He explained the petition process to us and indicated that he thought our team would be well positioned to initiate such a petition and to help organize a Session. Anna Grear, Damien Short and I developed

a proposal petitioning the Tribunal to schedule a Session on the human rights dimensions of hydraulic fracturing and other unconventional methods of oil and gas extraction and their consequences. In January 2015 we submitted a petition to indict a list of oil and gas corporations on charges of human rights abuses related to their fracking practices.

After some deliberation, though, we decided to indict states rather than corporations because states are the clear duty bearers in international human rights law. Whether non-state actors such as corporations have any clear human rights obligations is not as well established as the obligations of states. Moreover, we decided that rather than indicting the states directly, we would ask the panel of judges to determine whether sufficient evidence exists to indict states. That is the formal question on which the panel of judges will be asked to rule. The petition was thus modified in those two ways, submitted to the Tribunal Secretariat and was formally approved in May of 2015. One month later we launched our Tribunal website,⁵⁸ issued press releases, and sent announcements to a variety of media outlets and relevant non-governmental organizations.

56 <http://www.agricorporateaccountability.net/en/page/ppt/2>

57 A Human Rights Impact Assessment of Hydraulic Fracturing and other Unconventional Gas Development in the UK, commissioned by the Bianca Jagger Human Rights Foundation and prepared by the Global Network for the Study of Human Rights and the Environment, Environment and Human Rights Advisory, and the Human Rights Consortium, Grear, A; Grant, E; Kerns, T; Morrow, K; Short, D, 2014

58 <https://www.tribunalonfracking.org>



3. The Tribunal, Vietnam and two philosophers

Today's Permanent Peoples' Tribunal, headquartered in Rome is a descendant of the 1966 Bertrand Russell-Jean-Paul Sartre Vietnam War Crimes Tribunal,⁵⁹ which was also international in scope and held sessions in Stockholm, Sweden and Denmark.

Following that tribunal, and two or three subsequent international tribunals on similar human rights issues,⁶⁰ it was decided in 1979 that the world needed a Permanent Peoples' Tribunal. The goal of this Tribunal would be "Recovering the authority of the Peoples when States and international bodies have failed to protect the rights of the Peoples."⁶¹ The Tribunal was founded in Bologna, Italy, under the auspices of the Lelio Basso International Foundation for the Rights and Liberation of Peoples,⁶² with the engagement of a range of legal experts, writers and leaders in civil society, including five Nobel Prize laureates. The Tribunal headquarters are now in Rome and it has, since 1979, held over forty Sessions on a variety of human rights situations.

The Tribunal, as it stands now, is an internationally recognized public opinion tribunal functioning independently of state authorities, national politics and vested economic interests. It hears cases based on the broadly recognized standards of international human rights law and, increasingly, on human rights standards embodied in national constitutions.

As Jayan Nayar, lecturer in the Law in Development program at the University of Warwick, has said,

"It is true that the Tribunal has no power to compel the 'accused' to appear before it, nor to enforce its judgment, [but] rather, it serves as a legitimating forum. Its judgments stand as a public record of the truth - and of the crime of denial. The doing of law for the Tribunal is essentially a process of listening, giving to the narratives of suffering the dignity denied them elsewhere."⁶³

59 Bertrand Russell / Jean-Paul Sartre Vietnam War Crimes Tribunal, 1966 https://en.wikipedia.org/wiki/Russell_Tribunal accessed 21 April 2016

60 In one subsequent Tribunal, for example, the Russell Tribunal II on Repression in Brazil, in Chile and in Latin America, two public sessions were held, the first in Rome (March 30-April 6, 1974) and the second in Brussels (January 11-18, 1975). http://dlib.nyu.edu/findingaids/html/tamwag/tam_098/bioghist.html accessed 21 April 2016

61 <http://www.tribunalonfracking.org/permanent-peoples-tribunal>

62 <http://www.fondazionebasso.it> accessed 23 April 2016

63 <http://www.truth-out.org/news/item/33066-permanent-peoples-tribunal-highlights-fracking-s-threat-to-human-rights> accessed 25 April 2016

4. This Trial

The Tribunal's normal procedure is to impanel a selection of nine, eleven or thirteen judges, about half of whom are human rights jurists from around the world, and about half of whom are "respected members of civil society." The initiating organizations have no say in who those judges are or how many will be selected for the panel; the Tribunal arranges that independently.

When the selection of judges is impanelled, and when the Tribunal hearings begin, the formal question the judges will be asked to consider is:

"Does sufficient evidence exist, as measured against international human rights law and as embodied in national constitutions, to indict certain named States⁶⁴ on charges of failing to adequately respect the human rights of citizens as a result of their allowing hydraulic fracturing and other unconventional oil and gas extraction techniques within their jurisdictions?"⁶⁵

The overarching question is thus: Does sufficient evidence exist to indict these named states?

Legal standards to be applied include both international human rights law and environmental and human rights norms embodied in national and subnational constitutions. For example, this would include the public trust standard expressed in the Pennsylvania state constitution,⁶⁶ and in a handful of other national constitutions and state constitutions in the United States of America (US).⁶⁷

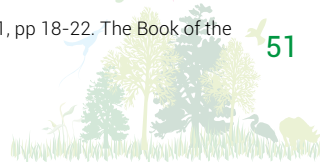
While this appears to be only one question that will be put to the judges - is there sufficient evidence to indict? - since fracking has such a wide range of impacts on so many different dimensions of human concern, we have broken that overarching question down into six subcases. The prosecuting team will thus be arguing the following six subcases, all on human rights grounds.

64 In this case so far, that includes the US and the UK, perhaps also Australia and Canada, and maybe others that may come on board as the Tribunal gets closer.

65 For purposes of this Tribunal the term "fracking" will refer to the extraction of shale gas, coal-bed methane/coal seam gas (CBM/CSG) and "tight oil." A scaled-up form of hydraulic fracturing (high volume), involving injecting fluids under high pressure to crack the rock, is often used to release hydrocarbons during unconventional oil and gas extraction (UCG). UCG is a complex process, involving pad construction, well drilling, casing, stimulation (often including but not limited to hydraulic fracturing), extraction, waste disposal, well plugging (or failure to do so) and abandonment, as well as associated infrastructures such as pipelines, storage facilities, compressor stations and export terminals. The Tribunal will examine evidence on the full range of impacts of all forms of unconventional gas and oil production including, but not limited to, "fracking."

66 Article 1, Section 27 reads "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic 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."

67 English, A and Carroll, JJ, "State Constitutions and Environmental Bills of Rights," chapter 1, pp 18-22. The Book of the States 2015, The Council of State Governments, 2015



5. Six subcases

- 1) The human health subcase will examine the human rights implications of fracking – both acute and chronic, especially for vulnerable groups – resulting from exposures to, *inter alia*, endocrine disruptors, known and probable carcinogens, radon gas, neuro- and developmental toxicants, ozone, and noise.
- 2) The climate subcase will examine the human rights implications, for both present and future generations, of fracking on the climate system which may result from a CO₂-intensive extraction process, fugitive and intentional methane emissions and releases, fostering a continued reliance on fossil fuels, and so on.
- 3) The ecosystems case will examine the human rights implications of fracking on, *inter alia*, ecosystems, oceans, wildlife, on contamination and depletion of ground and surface waters, and on the contribution to earthquake swarms.
- 4) The social costs case will address, amongst others, the human rights impacts of fracking on communities, social services, roads, housing, property values, and relations among neighbors. Both economic cycles of boom and bust trigger a wide range of human rights concerns.
- 5) The public participation case will examine the human rights

implications of a lack of opportunities for public participation in decision-making about fracking.

- 6) And finally, the fuels infrastructure case will examine human rights impacts resulting from fracking infrastructure, such as pipelines, compressor stations, export facilities, Liquid Natural Gas facilities and storage facilities.

The prosecuting team will argue that there are human rights concerns in a wide range of dimensions for each of the above six subcases.

6. Elements of the Trial

The main elements in this Tribunal will be the same as the main elements in many other trials. There will be a panel of judges and a prosecuting team that brings to bear evidence of various kinds. This will include expert evidence on the processes, impacts and consequences of fracking, biomedical and public health research, greenhouse gas and climate research, as well as ecological and social science research. Several hundred government and industry reports, investigative reports and peer reviewed studies on these issues have been summarized, annotated and referenced in the Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking.⁶⁸ This Compendium has been prepared by Physicians for Social

Responsibility and by Concerned Health Professionals of New York.⁶⁹ Its most recent edition is readily available on several websites.

Absolutely key in human rights trials is personal testimony – the personal narratives of individuals, families and communities who have been impacted by fracking.

Prosecutors will bring to bear on all the subcases both international and domestic human rights law and relevant human and environmental rights provisions in state constitutions.

A trial requires a defense team too, of course, so at some point the Tribunal will send out a summons to the indicted states explaining the details of the Tribunal and the rights, duties, and obligations of the indicted states. The states will be invited to provide defense attorneys to represent their interests. If they choose to ignore the summons, as they might, then the Tribunal provides defense attorneys for them, much as a domestic court would provide public defenders.

The Tribunal's plenary hearings are scheduled to take place in late 2017. After those hearings have been completed, the judges will retire to deliberate for some period of time and eventually issue findings and recommendations.

7. Mini-tribunals and Fact Finding Hearings

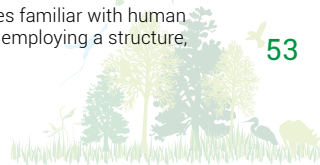
In anticipation of the plenary hearings, activists or interested parties anywhere in the world are invited to schedule and hold preliminary Mini-tribunals⁷⁰ and/or Fact Finding Hearings.

- The format of a Mini-tribunal would simply be as a smaller version of the large plenary sessions. That is, the same question would be posed to the judge or judges and attorneys, hopefully both prosecution and defense, would then present evidence and argue the law before those judges. The findings and recommendations of the Mini-tribunals would later be submitted for use during the main plenary hearings.⁷¹ One such

69 "The Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (the Compendium) is a fully referenced compilation of the evidence outlining the risks and harms of fracking. Bringing together findings from the scientific and medical literature, government and industry reports, and journalistic investigation, it is a public, open-access document that is housed on the websites of Concerned Health Professionals of New York (www.concernedhealthny.org) and Physicians for Social Responsibility (www.psr.org)."

70 <<https://www.tribunalonfracking.org/preliminary-mini-tribunals/>> accessed 23 April 2016

71 The more legally robust a mini-tribunal, the more powerful and relevant its findings will be. Elements of robustness include the heft and quality of submitted evidence; including defense attorneys in the process in addition to prosecutors; the reliability of personal testimony; including more than one judge, and judges familiar with human rights law; civil society representatives held in high regard for their character and wisdom; employing a structure, venue and procedures approved by the Tribunal; and so on.



preliminary tribunal, sponsored by the Australian Earth Laws Alliance, the Social Justice Commission Toowoomba, the Sisters Of Mercy, the Lock the Gate Alliance, the Western Downs Alliance and others, is scheduled to take place in Brisbane in February 2017.

- Fact Finding Hearings⁷² would be a much simpler, local event that might cost very little to put on, maybe nothing at all. It would simply require an announcement of the date and location, and an invitation to people to share their story and submit their testimony about the impacts that fracking has had on them and their community, so it can be recorded. It should be made especially clear that that testimony can be presented in whatever form people are comfortable with. It could be presented orally in person, streamed live from elsewhere or submitted in written form or as an audio or video recording. Testimony could also be submitted by proxy and either with identification or anonymously. There are numerous obvious problems with anonymous testimony, but there is so much justifiable fear around standing up against the industry that a Fact-finding Hearing will want to make it as easy as possible for affected persons to submit their story.

8. Pre-tribunal developments

Quite a significant range of pre-Tribunal human rights work on fracking and climate change has already been completed.

- A 2011 *Human Rights Impact Assessment of Fracking in New York State*⁷³ was commissioned by Earthworks in Washington DC, prepared by Environment and Human Rights Advisory and submitted to the New York State Department of Environmental Conservation.
- A *Human Rights Impact Assessment of Fracking in the United Kingdom*⁷⁴ was commissioned by the Bianca Jagger Human Rights Foundation,⁷⁵ co-authored by members of our team and hand-delivered by Bianca and some of the authors to Ten Downing Street.
- The Sisters of Mercy and Mercy International put together a third Human Rights Impact Assessment of Fracking titled *A Guide to Rights-based Advocacy: International Human Rights Law and Fracking*.⁷⁶
- The 2013 Pennsylvania Supreme Court findings in *Robinson Township v. Commonwealth of Pennsylvania* held that major parts of Pennsylvania's

⁷² <<https://www.tribunalonfracking.org/preliminary-mini-hearings/>>

⁷³ A Human Rights Assessment of Hydraulic Fracturing for Natural Gas, commissioned by Earthworks, prepared for the New York State Department of Environmental Conservation, prepared by Environment and Human Rights Advisory, Kerns, T, 2011

⁷⁴ op.cit.

⁷⁵ <<http://www.biancajagger.org>>

⁷⁶ Prepared by the Sisters of Mercy, Mercy International (NGO), O'Connor, A, RSM, et al, 2015.

Act 13 (a statute enacted to facilitate fracking) were unconstitutional based largely on the public trust doctrine expressed in the state constitution's Article 1, Section 27.⁷⁷

- In December 2015 the Inter-American Commission on Human Rights issued a report on extraction industry impacts on indigenous and Afro-Descendant communities, titled *Understanding Human Rights and Climate Change*.⁷⁸
- The Earth Law Center's 2015 report, *Fighting for Our Shared Future: Protecting Both Human Rights and Nature's Rights*, examines 100 cases from around the world involving co-violations of both human rights and rights of nature.
- Two United Nations reports on the human rights impacts of climate change were issued in 2015, one from the office of the United Nations High Commissioner on Human Rights⁷⁹ and one by the United Nations Environment Programme.⁸⁰
- In November 2015, just prior to the Conference of Parties (COP21) meetings in Paris, a team of scholars with the Global Network for the Study

of Human Rights and the Environment issued a *Draft Declaration on Human Rights and Climate Change*.⁸¹ That document, after soliciting and receiving extensive feedback and review from all over the world, has now been issued in final form.⁸²

- And, of course, the papal encyclical, *Laudato Si*⁸³ issued in mid-2015 should not be ignored, since it too looks at climate change and unconventional fossil fuel extraction as moral issues.

In addition to those pre-Tribunal documents, the preliminary Mini-tribunals and Fact Finding Hearings mentioned above are also being planned in various countries. The responsibility of these preliminary events will be to collect personal and local testimony about the impacts of fracking, and to explore and develop legal and moral human and environmental rights arguments applicable to that testimony. These testimonies will then be submitted for use in the plenary hearings.

77 Dernbach, John C. and May, James and Kristl, Kenneth, *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications* (March 1, 2014). Rutgers U. L. Rev. Vol. 67, 2015; Widener Law School Legal Studies Research Paper No. 14-10, <<http://dx.doi.org/10.2139/ssrn.2412657>>

78 *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, prepared by the Inter-American Commission on Human Rights, December 31, 2015.

79 UN Office of the High Commissioner for Human Rights, prepared for the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, 26 November 2015.

80 Report on Human Rights and Climate Change, United Nations Environment Programme, December 2015.

81 <<http://gnhre.org/tag/declaration/>>

82 <http://gnhre.org/declaration-human-rights-climate-change/>

83 *Laudato Si: On Care for our Common Home*, Pope Francis, 2015.

<http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html> accessed 21 April 2016



9. The Actors

The actors so far in this Tribunal are:

- The Permanent Peoples' Tribunal in Rome;
- The three initiating organizations:
 - The Global Network for the Study of Human Rights and the Environment;⁸⁴
 - The Environment and Human Rights Advisory;⁸⁵
 - The Human Rights Consortium;⁸⁶
- The Steering Group, with members in the US and in the UK, is composed of Initiators, researchers and directors of supporting non-governmental organizations; and
- The Kentucky Environmental Foundation⁸⁷ is fiscal sponsor.

10. Roles and responsibilities

It is the responsibility of the Tribunal itself to identify, select and impanel judges to hear the cases, provide defense attorneys if the indicted states fail to send their own, call the court to order, and support the judges in their deliberations and issuance of findings.

It is the responsibility of the Kentucky Environmental Foundation, as fiscal sponsor, to accept funds and to hold and disburse them as needed.

In their role as Initiators, it is the responsibility of the three initiating organizations to petition the Tribunal, on behalf of complainants who have been affected by fracking and its consequences, to accept their case. This responsibility has now been completed.

The Steering Group, in their role as researchers testing an hypothesis about fracking and human rights, has a responsibility not unlike that of a Principle Investigator who is conducting a research trial.

In the sciences, a researcher who has a question about something, formulates that question into a testable hypothesis, designs a research protocol to test that hypothesis and then conducts the trial. Standard trial protocols vary widely among the different sciences, of course. The design of an astrophysics protocol to test whether light waves are affected by gravity, for example, will be very different than the design of a biomedical protocol to test whether a new drug is safer or more effective than a previous drug. That in turn will differ from the design of a political science protocol to test an hypothesis about the effect of natural resource extraction on the representativeness of governments.

84 <http://gnhre.org>. Anna Grear (Cardiff Law School) is the Director. She is also the editor in chief of the Journal of Human Rights and the Environment.

85 <http://www.environmentandhumanrights.org>. Tom Kerns, Director, in the US.

86 <http://www.sas.ac.uk/hrc>, Damien Short, Director, in the School of Advanced Study at the University of London

87 <http://www.kyenvironmentalfoundation.org>

The standard protocol for testing an hypothesis about the impacts of a fossil fuel extraction method on human rights norms is the “trial.” That is, the system of contending advocacy before a disinterested judiciary following standard rules of evidence with appropriate application of relevant law. In this role, the Steering Group serves as the Principal Investigator who is using a standard protocol in the field to test the hypothesis that human rights norms are at issue in fracking.

Finally, in their role as organizers, the Steering Group’s responsibility is to organize the trial. Not to directly conduct the trial, but to set the groundwork and establish the conditions necessary for conducting the trial. Just as it is the responsibility of a Principal Investigator in the physical or social sciences to put in place the requirements, structures and financing to ensure that their trial is conducted according to standards, so too is that the responsibility of the Steering Group. This responsibility includes providing communication before, during and after the trial, identifying suitable venues, securing funding, selecting a prosecuting team, assisting the prosecuting team in locating expert evidence and personal testimony, and promulgating the Tribunal’s eventual findings and recommendations.

11. Why human rights?

Human rights norms have a uniquely moral grounding that underpins their legal and policy force, and it is that moral grounding to which people impacted by fracking normally appeal. So a trial that addresses those moral concerns and frames them in human rights terms will be best suited to this situation.

In addition there are practical and legal considerations that differentiate human rights law from other kinds of law and may make it more amenable to people and communities impacted by fracking and its consequences.

The importance of personal narratives

One is the recognition of the special importance of personal narratives describing what has been directly experienced. Simple, clear personal accounts of direct impacts that fracking processes have had on individuals, families and communities, rooted in the “situated knowing” of personally impacted witnesses, are considered a priority in human rights law. They are also essential for awakening the moral imagination and evoking the compassion necessary for systemic change.⁸⁸

88 Claims of injury in such narratives may need to be substantiated by reference to scientific studies or expert testimony, just as the moral intuitions about right and wrong will need to be substantiated by reference to human rights norms.



Standing

Every individual person is considered to have legal standing in international human rights courts, which eliminates one of the larger obstacles to having a case heard.⁸⁹

Standards of proof

Standards of proof in international human rights courts favor the plaintiff over the state. As Picolotti and Taillant explain in their book, *Linking Human Rights and the Environment*, "Unlike most national courts, the [Inter-American] Commission and Court have low standards of proof,"⁹⁰ sometimes admitting circumstantial evidence. This can benefit plaintiffs who often have less than perfect evidence to support claims of causality and health effects.

Burden of proof

The burden of proof in human rights courts is on the state in such an action, rather than on the plaintiff, even though the state would be the defendant.⁹¹ This means that facts presented by the claimant would be presumed true unless proven otherwise by the state.⁹²

Transnational

One significant problem has been that many bodies of law that could be seen as relevant to fracking are domestic and have efficacy only within the bounds of a given state. Human rights norms and law, however, are to some extent transnational, transcending the boundaries of individual states. This means that the findings and recommendations of a human rights tribunal are more likely to have bearing in jurisdictions elsewhere in the world than findings resulting from other kinds of law.⁹³

Those are the basics of this Tribunal's history, structure, pre-tribunal work, actors, responsibilities and standards.

The section below outlines the purposes and anticipated benefits of this Tribunal. The subsequent section then mentions the Tribunal's current needs.

89 "One of the most important successes of international human rights law is that it has given victims direct access to international human rights fora. Thus in international human rights law, individuals are subjects of law and can legally claim against human rights abuses perpetrated by states." Picolotti, R and Taillant, JD, *Linking Human Rights and the Environment*, University of Arizona Press, 2003, p 120.

90 *Ibid.* p 133.

91 "That is... the facts reported in the petition shall be presumed to be true if, during the maximum period set by the Commission, the government of the State in question has not provided pertinent information to the contrary.... If the State denies the evidence, it must specifically prove that the evidence is not valid." *Ibid.*

92 These last three apply at least in the Inter-American human rights system, and perhaps in some other regions as well.

93 Taking a human rights approach may have disadvantages as well since corporations, considered as legal persons, have been making the claim that courts should treat them as holders of human rights as well, a claim which is closely examined in Gear, A, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity*, Palgrave Macmillan, 2010. On the other hand, this Tribunal process could also serve as an opportunity for testing those corporate claims.

12. Purposes and benefits

One of the Tribunal's key purposes is to provide opportunity for those who have been personally affected by fracking to share their experience, to have it be heard, taken seriously⁹⁴ and documented. It will then be entered into the public record so it can be made available for this Tribunal and for any future legal actions anywhere in the world (if individuals give permission for that). Kathleen Dean Moore has said this especially well in her article for Truthout explaining why this Tribunal is so important. One of its goals, she says there, is to give voice to those whose voices have been

"...actively silenced by industry, pressured into silence by neighbors, frightened into silence by possible repercussions, or battered into silence by poverty, social situation, and distance from resources - marginalized and ignored by industry and government alike."⁹⁵

One of the Tribunal's primary goals is to give voice to the marginalized, the poor, children, indigenous communities, and future generations and, as Bertrand Russell said, to "expose the crime of silence." And most important, Moore continues, it will

offer a voice to those who have no voice at all - "future generations of people, plants, and animals, all the young and hopeful ones. They are the ones who will pay the price of hydraulic fracturing in the currency of their health and prospects."⁹⁶

As such, one of the Tribunal's main purposes is to provide opportunity for impacted persons to tell their story and make it part of the public record.

A second key purpose is to foreground human rights standards as part of the conversation about fracking and its consequences. Human rights have not been a significant part of the conversation thus far, and the hope is that this Tribunal, and the events leading up to it, will promote an appreciation of those moral and legal dimensions of the conversation. Impacted persons already have a clear, if inchoate, sense of outrage⁹⁷ that something is fundamentally wrong with what industry has been allowed to do to people and communities. However, they do not yet have an adequate language for articulating that outrage. We think that human rights language can help serve that purpose.⁹⁸

A third purpose is to have expert and personal testimony formally and publicly

94 Many impacted persons feel as if they have told their story multiple times but that it has not been heard, or has not been taken seriously or has been dismissed altogether.

95 Kathleen Dean Moore, 'Fracking Goes on Trial for Human Rights Violations' Truthout, 14 November 2015. <http://www.truth-out.org/opinion/item/33588-fracking-goes-on-trial-for-human-rights-violations> accessed 21 April 2016

96 ibid

97 Tom Kerns, 'Schopenhauer's Mitleid, environmental outrage and human rights' in Anna Grear and Evadne Grant (eds), *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar 2015) pp 220-248

98 Kerns, T, Ten Practical Advantages of a Human Rights Approach to Environmental Advocacy, *Journal of Environmental Studies and Sciences*: Vol 3, Issue 4 (2013), Page 416-420.



presented and vetted against defense attorneys and judges so it can be made available for use in future legal cases.

A fourth purpose is to provide prosecuting attorneys an opportunity to rehearse legal arguments and explore precedent in the Tribunal, which may later be used in national and international courts if actions are brought.

A fifth purpose is for the Tribunal's findings and recommendations to provide a quasi-legal precedent that could be referenced as interpretive "soft law" in the event of future legal actions.

A sixth purpose is to provide grounding and support for the growing movement to instantiate human environmental norms within national and subnational constitutions.

The final purpose is to simply show those who might like to bring a future action what a legal action against unconventional oil and gas extraction might look like. The section below describes some of the Tribunal's current needs.

13. Current needs

As David Bollier, policy strategist and co-founder of the Commons Strategies Group, reminds us in his blog post of July 29, 2015:

"Like any commons, the Tribunal does not go of itself; it relies upon people's active participation and help. People are invited to submit witness statements, donate to help fund the proceedings (travel, lodging, office services); conduct mini-tribunals in their countries; and to endorse the Tribunal."⁹⁹

In addition, the Tribunal's Steering Group needs to finish assembling the legal team¹⁰⁰ which consists of legal advisors, litigators for each of the six subcases and legal researchers to help the litigators develop their cases. The expectation is that the researchers will primarily be law students and law clinics, and there will be a further need for a research-volunteer coordinator. Assistance in collecting evidence, including organizing and conducting fact-finding hearings and mini-tribunals, will also be required.

⁹⁹ David Bollier, " 'People's Tribunal to Assess Fracking and Human Rights' (News and Perspectives on the Commons, 29 July 2015) <http://bollier.org/blog/people-s-tribunal-assess-fracking-and-human-rights> accessed 26 April 2016

¹⁰⁰ Our legal Advisors to date include Mary Christina Wood, Professor, University of Oregon School of Law, author of *Nature's Trust*; Evadne Grant, Associate Head, Department of Law, University of the West of England; Editor, *Journal of Human Rights and the Environment*; Evan Hamman, Faculty of Law, Queensland University of Technology, Brisbane, Australia; Burns Weston served as legal Advisor and Steering Group member until his untimely death in the fall of 2015. Current Litigators include Don Anton, Professor of International Law at Griffith University Law School in Brisbane, Barrister & Solicitor, Victoria and High Court of Australia and Attorney & Counselor of the Supreme Court of the US; Benedict Coyne, President of the Australian Lawyers for Human Rights; and Linda Sheehan, Director and Attorney at the Earth Law Center, who will argue the cases from a Rights of Nature perspective.

Truthout, the alternative news outlet, has offered eighteen articles on the Tribunal. Two of those have already been published¹⁰¹ and authors will be needed for the next sixteen. What those articles would cover has already been outlined and experts identified who could be contacted for each.

This Tribunal has real potential and it would be important to have a record of it and to know how it came to be. To that end, the services of an historian will be required. Kathleen Dean Moore¹⁰² will be covering the hearings live as a reporter and analyst, so if the Tribunal were to be the subject of a book or a dissertation, her reporting could serve as important source material.

14. Conclusion

One of the purposes of human rights law is similar to a purpose for which the Babylonian Code of Hammurabi (1754 BCE) was enacted. This was, according to its introduction, “so that the strong should not harm the weak.”¹⁰³

The Permanent Peoples’ Tribunal does not enjoy state sanctioned power to compel enforcement of its findings. However,

according to Kathleen Dean Moore, it does still matter “to tell the truth in a public place. It matters to affirm universal standards of right and wrong, to clearly say, ‘There are things that ethical people do not do to one another and to the Earth.’”¹⁰⁴

“Business-as-usual,” she continues, “has a terrible power.” If people do not stand up and say “These things are wrong,” then those wrongs become simply “stuff that happens.”

Silence normalizes iniquity; silence normalizes the violation of human rights. The violation becomes, in the popular expression, “the new normal.” The result is a sliding baseline of morality as people expect less and less of their corporations and governments, and hold them less and less to account.¹⁰⁵

This Tribunal will ask whether fracking should be accepted as “the new normal.” It will also encourage people to not expect less of their governments, but instead to hold their governments accountable to the legal standards embodied in their constitutions and to the moral standards they have publicly espoused.

101 <http://www.truth-out.org/news/item/33066-permanent-peoples-tribunal-highlights-fracking-s-threat-to-human-rights> and <http://www.truth-out.org/opinion/item/33588-fracking-goes-on-trial-for-human-rights-violations> accessed 15 July 2016

102 Kathleen Dean Moore is professor emerita of environmental philosophy at Oregon State University, co-editor of *Moral Ground: Ethical Action for a Planet in Peril*, and author of *Great Tide Rising: Toward Clarity and Moral Courage in a Time of Planetary Change*.

103 < <http://www.constitution.org/ime/hammurabi.htm>>

104 < <http://www.truth-out.org/opinion/item/33588-fracking-goes-on-trial-for-human-rights-violations>>

105 *ibid.*



Can an Ecocentric Approach Open New Frontiers for a Legally Binding International Environmental Right? A Study of Norway's Environmental Constitutional Right

Adriana Giunta

We entered the 21st century more than a decade ago, and we are witnessing unprecedented anthropocentric environmental degradation that brings a new challenge to international law, and particularly to human rights and environmental rights legitimacy. Following the publication in 2014 of the report on the International Bar Association (IBA) Task Force on Climate Change Justice and Human Rights' (the 'Task Force') report - *Achieving Justice and Human Rights in an Era of Climate Disruption*¹⁰⁶ – it is clear that climate change justice cannot be achieved if concrete solutions are not implemented.

The report adopts a justice oriented approach for current climate change policies on mitigation and adaptation, while it provides a comprehensive study of environmental law, human rights law, trade law and state responsibility, including the difficulties of relying on any or all of these laws under international, regional and national regimes addressing climate change issues. Thus, the Task Force recommends short-, medium- and long-term practical solutions for each of the current legal challenges hindering the achievement of climate change justice. Of particular relevance are the calls on the international community to recognize a free-standing right to a safe, clean, healthy and sustainable environment in addition to 'greening' existing rights in existing treaties and, outlining a minimum core of rights and duties inherent in those 'greened' rights. These recommendations are extremely welcome.

Even so, the call for a free-standing right to environment faces challenges. The report does not address the interface between society, the environment, and nature. And such debate is strongly needed given that food security, for example, and the realisation of the right to food is adversely affected by climate change.¹⁰⁷ The global conversation about comparative environmental rights-based approaches cannot continue to ignore the interdependence

106 IBA Climate Change Justice and Human Rights Task Force Report, 'Achieving Justice and Human Rights in an Era of Climate Disruption', London July 2014.

107 FAO, International Fund for Agricultural Development (IFAD) and World Food Programme (WFP), 'The State of Food Insecurity in the World 2015: Meeting the 2015 International Hunger Targets: Taking Stock of Uneven Progress', (Rome, 2015).



'Gateway to the Arctic'- Tromsø, Norway

between human rights and the environment and, the climate change justice implications for the natural environment itself. The need for environmental protection of flora, fauna and water - all elements essential to the fulfilment of global food security and for the protection of the right to

food and human security – solidify the debate for the recognition of a legally binding environmental right having an anthropocentric as well as an ecocentric perspective on environmental protection from environmental-climate change degradation.¹⁰⁸

108 A Giunta, BOOK REVIEW: International Bar Association Climate Change Justice and Human Rights Task Force Report, 2014: Achieving Justice and Human Rights in an Era of Climate Disruption, (2016) Journal of Human Rights and the Environment, Vol. 7. 1.



Further scope for debate comes from new insights into the cause-effect relationship between the global population growth and greater worldwide demand for food which appears to have weighed most heavily on the protection of the natural environment. Ecocentric and anthropocentric approaches are not always complementary when environmental degradation is caused by 'Intensive Livestock Operations' (ILOs),¹⁰⁹ deforestation and loss of habitats due in part to a rising need of using land for food production, as has happened in developing countries like Madagascar.¹¹⁰ Thus, sometimes the protection of the right to food can conflict with the protection of the environment.

As recommended in the report, concrete solutions are needed now more than ever. It is time for global leaders and the international community in general to realize that a free-standing environmental right cannot have an anthropocentric approach only. A free-standing environmental right should have an ecocentric-anthropocentric approach in order to tackle environmental-climate change degradation and at the same time to provide a legal framework that will deliver climate change justice. A close examination of current international law highlights that an ecocentric-anthropocentric approach was already recognized more than forty-years ago.

The 1972 Stockholm Declaration adopts a human rights language and sets the foundation for an ecocentric approach. In fact, Principle 1 of the Stockholm Declaration affirms that 'Man is both creature and moulder of his environment [...]'. This Principle aims at developing proposals for incorporating non-conventional subjects as rights-holders, including defending rights of non-humans. Hence, Principle 1 of the Stockholm Declaration recognizes that '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 such as the right to life itself.' The ecocentric approach contained in the Stockholm Declaration is expanded into the principle of sustainable development adopted in Principle 1 of the 1992 Rio Declaration which places 'Human beings [...] at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'

Principle 1 of the Rio Declaration in the first paragraph adopts a clear anthropocentric approach, but then it embraces an ecocentric approach when it affirms that human being life has to be in harmony with nature. Moreover, the ecocentric approach adopted in the second paragraph of Principle 1 is further affirmed and expanded in Principle 7 of the Rio Declaration which establishes

109 CW Abdalla, *The Industrialization of Agriculture: Implications for Public Concern and Environmental Consequences of Intensive Livestock Operations*, (2002) 10 Penn St. Envtl. L. Rev. 175.

110 USAID, 'Madagascar – Environmental and Climate Change', at <https://www.usaid.gov/madagascar/environment> [last accessed 26th August 2016]

that 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.' This means that the protection of environmental rights is aimed not only at humans but also at the natural environment itself in order to guarantee the integrity of the Earth's ecosystem. Similarly, article 8 (d) of the Convention on Biological Diversity stipulates the need to 'Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.'

In fact, the 1992 Rio Conference did not only produce the Rio Declaration, it also directed public attention towards climate change and protection of biodiversity. It further led to the ratification of the legally binding UN Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity. Both conventions, together with the 2003 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), for instance, have all influenced Norway's environmental-climate change policies and protection of biodiversity to a large extent.

We have a strong example of how, from a practical perspective to environmental governance, the Stockholm Declaration's ecocentric-anthropocentric approach to human rights protection is translated in other international instruments and several

constitutional environmental rights. Interestingly the Stockholm Declaration and the Rio Declaration, both non-legally binding sources of international law, have paved the way to create legally binding international law and constitutional rights having an ecocentric-anthropocentric approach. The *lex superior* contained in article 110b of the Norway Constitution (*Grunnloven*) provides a solid example of how non-legally binding international instruments can be used as sources of national law and, arguably vice-versa – how constitutional environmental rights good practice can lead the way to develop an international free-standing environmental right.

Indeed, article 110b of the Constitution of Norway combines a substantive and a procedural environmental right. In addition, it offers the opportunity for discussion for an international legally binding environmental right having an ecocentric as well as an anthropocentric approach to global environmental rights protection. However, this debate should not simply be reduced to the responsibility of States. It requires joint efforts and shared responsibilities of States, and non-state actors to correct environmental protection failures and shape global environmental governance. This should be done in a way that enables the effective implementation of a free-standing environmental right whilst assuring environmental, social, and economic sustainable development and, ultimately climate change justice.



Such an environmental governance model has already been developed in Norway and has been fairly well implemented for the past few decades. Undoubtedly, Norway is in a privileged economic situation due to its rich natural resources - hydropower production and offshore petroleum activities. However, Norway's inspiration from the Stockholm Declaration and Rio Declaration is the driving force behind article 110b and the development of its strong environmental governance model. On the one hand, the Stockholm Declaration inspired Norway to establish the Ministry of Environment in 1972. This Ministry is responsible for Norway's environmental policy and management system as a whole, including pollution sources (CO₂ emissions and other greenhouse gas emissions), nature conservation measures and management of biological diversity and protected areas. On the other hand, the Norwegian Government set up the Government Pension Fund - Global (GPF) in 1990. It is a sovereign wealth fund (SWF) to ensure that the country's oil wealth can benefit all generations of Norwegians while fulfilling an important ethical obligation in line with the principle of intergenerational equity, exercising good corporate governance and promoting sustainable development in economic, social and environmental terms.¹¹¹

With a Ministry of Environment and an active environmental policy since 1972, Norway has considerably reduced some environmental problems, such as industrial pollution, chemicals and urban waste discharge into watercourses and fjords. It has also established several protected areas and natural reserves, and cleaned up the mentioned watercourses and fjords over the last few decades. Despite the fact that Norway's energy production is based on hydropower, and therefore a 'clean energy source', Norway has a high level of energy consumption in general and the highest consumption of electricity per capita in the world. In fact, the average emission of a Norwegian person amount to nearly 11 tons CO₂ equivalent.¹¹² As a result, other problems have increased, such as car traffic and energy consumption.

Nevertheless, the total CO₂ emission in Norway has been steady since 1996 in spite of a considerable economic and population growth. Norway is also in a rather exceptional situation when it comes to reduction of greenhouse gas (GHG) emissions because Norway is among the largest net exporters of natural gas and oil in the world, which means that Norwegian gas export contribute to a reduction of CO₂ in European and other countries. With the increase of gas export though, there has also been an increase over the past decades of road, rail, air and sea

111 AM Halvorsen, 'Addressing Climate Change Through the Norwegian Sovereign Wealth Fund (SWF) - Using Responsible Investments to Encourage Corporations to Take ESG Issues into Account in their Decision-Making' (University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2010-06). file:///C:/Users/Adriana/Downloads/SSRN-id1712799.pdf [last accessed 26th August 2016]

112 HC Bugge, 'Environmental Law in Norway' (2nd ed. Kluwer Law International, The Netherlands, 2014) 117.

transport within Norway and, around 32% of Norway's CO₂ emissions now come from the transport sector. Consequently, Norway has received criticism for this. There is also a legitimate question to ask: to what extent should Norway aim to reduce its own emission 'at home' versus through the use of the flexible mechanisms in the Kyoto Protocol and the EU Emission Trading System (EU-ETS)?¹¹³

In some respect, Norway's contribution to international CO₂ emissions reduction is appreciated in spite of their increased CO₂ emissions at home. Ironically, Norway's CO₂ emissions obligations were even 10% below Kyoto's emission obligations requirement for the first Kyoto period under Kyoto Protocol. This issue clearly challenges the effectiveness of the CO₂ trading credit system, rather than the effectiveness of the Norwegian constitutional environmental norm. This brief comment draws attention to one of the many environmental concerns highlighted by the Task Force report's examination of the credit trading systems which to some extent is hindering the achievement of climate change justice. Still, Norway's environmental constitutional right can play an important role in shaping an international legally binding environmental right. In fact, Norway's inspiration from the Stockholm and Rio Declarations' long term policies have been reached in accordance with the principle of sustainable development

taking into account environmental, social and economic concerns. No other human right has a closer interrelation to the core of sustainable development than the right to a healthy environment.

Therefore, in order to understand the significance of article 110b of the Constitution of Norway, it is relevant to provide a brief background about the development of the Norway's environmental constitutional right and other domestic environmental law.¹¹⁴ From a legal perspective, Norway is party to all the most significant international agreements in the field of environmental and human rights law at both the regional and global level. As a consequence, the European environmental legislation has also contributed to the development of Norway's environmental law. Hence, Norwegian law is based on the principle of *presumption*. This means that Norwegian law is presumed to comply with international law and the national rule should, as far as possible, be interpreted in accordance with the European and international norm. Furthermore, in May 2014 the Parliament reformed a new article 92 Norwegian Constitution stating that all governmental bodies shall respect and secure the rights and freedoms stemming from any international human rights treaty to which Norway is party. This reform has strengthened the right of individuals to challenge state actions on the basis of human rights.

113 Ibid 118.

114 Although, Norway is not member of the European Union, it joined the European Economic Area in 1992.



The Constitution of Norway was adopted on 17 May 1814. A constitutional environmental right amendment was first proposed in 1972 at the time of the UN Conference on the Human Environment in Stockholm. However, the Parliament unanimously adopted article 110b on environmental protection after twenty years of discussion, following the opening of the UN Conference on Environment and Development in Rio de Janeiro in May 1992. Article 110b is, therefore, a *lex superior* to other domestic laws and the principle of integration will be applied. Again, this means that the decision-making must integrate its environmental constitutional right into other Norwegian laws, and that public authorities have a duty to assess environmental effects in all sectors of Norwegian's society.

The unique nature of Norway's *lex superior* contained in article 110b lies in recognizing a substantive and a procedural environmental right having an anthropocentric-ecocentric approach, which focuses on sustainable development. In fact, article 110b recognizes:

'Every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained.'

Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.

In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

The authorities of the State shall issue specific provisions for the implementation of these principles.'

If we analyse the content of each paragraph in article 110b, we will identify that the first sentence in the first paragraph of article 110b - *Every person has a right to an environment that is conducive to health and to natural surroundings [...]* - adopts a clear anthropocentric approach. But in the second sentence of the same paragraph it embraces an ecocentric approach when it continues [...] and to a natural environment whose productivity and diversity are maintained. Thus, the first paragraph of article 110b wording of right for the individual indicates an anthropocentric approach, a clear protection of the environment as a public good, as well as the inherent value of the natural environment.¹¹⁵

This same first paragraph contains a substantive environmental right for Norwegian citizens which goes beyond the health aspect to environmental rights. In fact, it goes further to recognize citizens' right to a natural environment whose productivity and diversity are preserved. This means that the protection of environmental rights is aimed not only at humans but also at the natural environment itself in order to preserve the productivity and diversity of the natural environment. Furthermore, the second paragraph of article 110b affirms the objectives and values of sustainable development '*Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well*'. Clearly, Norway's substantive environmental constitutional right's focus on sustainable development is aimed not only at the protection of humans but also to preserve the productivity and diversity of the natural environment so that this right will be safeguarded for future generations as well.

Arguably, the significance of Norway's substantive environmental right having an ecocentric-anthropocentric approach goes further than the important ethical obligation in line with the principles of sustainable development and intergenerational equity. Article 110b gives the ethical obligations of sustainable development and intergenerational equity a legal status, although in a general form,

to fulfil legal obligations in line with both the principles of sustainable development and intergenerational equity. Moreover, the third paragraph of article 110b - citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out - explicitly laid down the procedural right to environmental information and gives constitutional status to the principle of Environmental Impact Assessment (EIA).

Thus, citizens have the right to access all the relevant information about the status of the natural environment and the health risk of environmental quality, including pollution levels, biodiversity loss, and other important environmental concerns. The final sentence in article 110b calls on *the authorities of the State [to] issue specific provisions for the implementation of these principles*, from which the special Act on the Right to Environmental Information and Participation in Decision-making in Environmental Matters (Environmental Information Act) was enforced in 2003. The Environmental Information Act clarifies the various rights and duties that follow from the above general right to information found in article 110b. This paragraph clearly puts a duty on the State – through the legislative and executive powers – to take the necessary steps to fulfil the substantive and procedural environmental right enshrined in article 110b of the Constitution.



Before turning to the Environmental Information Act and other Norwegian environmental laws developed from article 110b, it is important to emphasize the fundamental importance of the three pillars of the principle of sustainable development under Norway's constitutional environmental right. The principle of sustainable development contained in article 110b has subsequently been adopted in all Norwegian environmental law and it can be seen to be the most fundamental objective of Norwegian environmental laws, policies and governance.

In the *travaux préparatoires*¹¹⁶ there is clear reference to the 1987 Brundtland Report, in which 'sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. If we analyse the use of sustainable development under Norwegian legislation, it is apparent that sustainable development means sustainable use or sustainable resources management, as expressed for example in the Municipal Act (1992), the Act on Genetically Modified Organisms (1993), the Farmland Act (1995), the Marine and Resources Act (2008), the Planning and Building Act (2008) or the Nature Diversity Act (2009).

Surprisingly, the Norwegian legislation does not contain a legal definition of sustainable development. Nonetheless, it

is fair to say that here the core meaning of the principle of sustainable development is environmental sustainability, as any activity on the environment and natural resources must be assessed in all sectors of society under Norwegian law. Such meaning is directly taken from the third paragraph of article 110b, from which *natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well and, the authorities of the State shall issue specific provisions for the implementation of these principles*. It is evident from this paragraph that there exists, under article 110b of the Constitution of Norway, a strong emphasis on sustainable development. This means that the three pillars of sustainable development under Norway's constitutional environmental right is - in its core - first, environmental sustainable development, second social sustainable development and third economic sustainable development, rather than economic first, social second and environmental sustainable development last.

As mentioned above, there are two very important Acts originating from article 110b that are worth discussing: the 2009 Nature Diversity Act, and the 2003 Environmental Information Act. Both Acts originated from article 110b and were influenced by to the Convention on Biological Diversity and the Aarhus Convention respectively. Hence, they are

both based on the principle of integration and the principle of presumption. The first Nature Protection Act (NPA) was adopted in 1910, followed by a new NPA in 1954 and subsequently by the 1970 Nature Conservation Act. The 2009 Nature Diversity Act introduced two new categories of protected areas – habitat management areas and marine protected areas – in addition to the previous protection of landscapes, natural reserves, national parks and natural monuments.

The purpose of the 2009 Nature Diversity Act is 'to protect biological, geological and landscape diversity and ecological processes through conservation and sustainable use, and in such a way that the environment provides a basis for human activity, culture, health and wellbeing, now and in the future, including a basis for Sami culture.'¹¹⁷ In application with the principle of integration with article 110b and presumption with article 8 of the Convention on Biological Diversity, Section 1 draws a very important balance between conservation of biological diversity, from which environmental protection is sought and the sustainable use of natural resources in order to achieve also other social and economic objectives. This point is further emphasized in Section 14 of the Act which states that 'measures [...] shall be weighed against other important public interests'.¹¹⁸

Thus, the Nature Diversity Act lays down important *management objectives* for habitat types, ecosystems and species, besides providing a clear definition of each of those species, habitats or ecosystems. Perhaps three sections are particularly relevant in fulfilling a strong sustainable development and climate change justice. Section 6 provides a *general duty of care*, which applies to any person, including individuals in their private capacity as well in their professional work. It also applies to corporate enterprises, institutions and public bodies. Everybody is required to have a general knowledge of the value of nature because 'if there is a risk of serious or irreversible damage to biological, geological or landscape diversity, lack of knowledge shall not be used as a reason for postponing or not introducing management measures.'

Interestingly, Section 10 states that 'any pressure on an ecosystem shall be assessed on the basis of the cumulative environmental effects on the ecosystem now or in the future.' This is a very innovative approach with the potential to tackle climate change. The aim of the Act is to avoid many small actions with insignificant effects per se that might sum up leading to serious environmental harm or even to cumulative climate change effects. However, it is not clear from the Nature Diversity Act itself how the ecosystem approach and cumulative environmental effects principle can be

117 Section 1 Act of 19 June 2009 No. 100 Relating to the Management of Biological, Geological and Landscape Diversity (Nature Diversity Act).

118 Section 9.



applied and managed in practice. Perhaps, the enforcement of this principle is clearer through Norway's implementation of the EU Water Framework Directive, which requires that the authorities establish water quality objectives with regards to fresh water sources and coastal water.

The other important legislation that originates from article 110b is the Environmental Information Act. In accordance with article 110b, the purpose of the Environmental Information Act is to ensure public access to environmental information in line with the right of individuals to contribute to the protection of the environment, to protect themselves against injury to health and environmental damage, and to influence public and private decision-makers in environmental matters.¹¹⁹ Thus, every citizen has a right to environmental information from public authorities, as well from private enterprises¹²⁰ about the condition of the environment and environmental consequences of the activities carried out by public authorities and private enterprises.

The right to information also implies the public authorities; as well private enterprises have a *duty to have knowledge* about environmental aspects of their activities, including effects on the environment from production or distribution of a product outside Norway's

borders, insofar as such information is available.¹²¹ This means that a farmer, for example, must have knowledge of possible effects of pesticide used on his/her land, and factory owners must have knowledge of the environmental risk of their production and products. And the public must always have access to information about pollution that is harmful to health or that may cause serious environmental damage, in addition to measures to prevent or reduce damage, including unlawful intervention in or damage to the environment.¹²² The Act also intends to promote public participation in decision-making processes of significance relating to the environment. This norm was introduced into Norwegian law following the adoption of the Aarhus Convention; and it is now widely used in practice.

The brief discussion of these two Acts is relevant because, although individuals cannot enforce article 110b through a court, they can enforce the principles and rule of law that originated from the lex superior through those Acts before an administrative, civil and criminal court (depending on the seriousness of the violation committed). What might indicate a limitation to Norwegian liability law in environmental issues, is the little progress made to compensate for damages on the natural environment, as only economic loss may be compensated and, the rule on retroactivity. Both limitations are linked

119 Section 1 Act of 9 May 2003 No.31 Relating to the Right to Environmental Information and Public Participation in Decision-making Processes Relating to the Environment.

120 Articles 4, 5 and 10.

121 Article 16(2).

122 Article 12.

to article 105 and 97 of the Constitution. Article 105 of the Constitution recognizes that 'a citizen is entitled to full compensation if his property is taken for a public purpose.' This refers explicitly to expropriation, but what about citizens' full compensation for economic loss?

While article 97 of the Constitution states that 'no law may be given retroactive effect', again what about pollution or environmental damage committed before an Act of parliament was adopted? And who will be accountable for such environmental damage? These questions, and the case-law generating from them, raises a number of issues. Interestingly, in a case prohibiting building within 100m from shoreline along the coast, a landowner was denied compensation for the reduced value of the island, as the court did not find a violation because a landowner is not entitled to compensation for economic loss when competing with a general rule protecting the environment.¹²³ This case highlights possible conflicts arising between property rights and environmental rights, as well as between environmental protection and economic development.

Furthermore, what happens if the retroactive rule applies for environmental damage? The general rule in Norwegian law is strict liability for pollution

damage.¹²⁴ However, strict liability applies to the owner if she/he is the person who actually operate, uses or possesses the property. This means that if the owner is not the one who operates the property, the responsibility will fall on the operator, or on both if they jointly use the property.¹²⁵ For instance, in a case before the Supreme Court, it was held that a new Act might oblige the operator of a waste pump to remove it, even if it was legal when it was set up.¹²⁶ Yet, the question remains: What happens when a polluted land has changed ownership several times since the actual contamination occurred? Who is responsible in such cases? The initial polluter or the current operator? There is no clear rule, but if the strict liability rule applies the current operator should be liable. Still, the owner's responsibility is also important as the principle of due diligence applies to the owner to get the buyer or operator to examine his/her property before the purchase.¹²⁷

These examples show the complexity of environmental law in general, and Norwegian law in particular. On the one hand, Norway's environmental constitutional right represents an important example of good practice in the protection of environmental rights. On the other hand, the retroactive rule contained in article 97 and the limitation of article 105 on article 110b show how those two

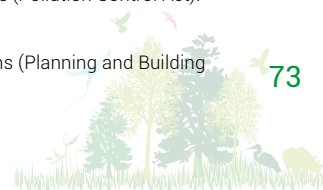
123 Norsk Retstidende 1970, 67.

124 Act of 13 March 1981 No.6 Concerning Protection Against Pollution and Concerning Waste (Pollution Control Act).

125 Article 55.

126 Norsk Retstidende 1979, 1279.

127 Act of 27 June 2008 No. 71 relating to Planning and the Processing of Building Applications (Planning and Building Act).



other constitutional rights can cause lack of clarity that may affect the functionality of article 110b. This point may be seen as a weakness of article 110b of the Norwegian Constitution. Furthermore, the question of *locus standing* in civil court cases has also been seen as a weakness, because plaintiffs must be directly affected by the environmental matter to justify the use of the court system. However, environmental NGOs have recognized a "legal interest" in environmental cases.¹²⁸ And the Supreme Court has also accepted locus standing for environmental NGOs in cases of compensation for pollution damage.¹²⁹

Nevertheless, it is fair to say that article 110b of Norway's Constitution breaks new ground on environmental rights protection. Not least to mention the establishment in 1996 of the State Nature Inspectorate in charge of surveillance and enforcement of legislation concerning the protection of natural and cultural heritage values under the Nature Diversity Act, in order to safeguard national environmental value and prevent environmental crime. A police specialist agency and a public prosecutor's office with national authority, the National Authority for Investigation and Prosecution of Economic and Environmental Crime in Norway (ØKOKRIM) has also been established.

What are the strengths of article 110b of the Norwegian Constitution? Undoubtedly, article 110b of the Norwegian Constitution

is a political and legal statement. It is a very important political symbol even if individuals cannot enforce article 110b directly in a court of law. The adoption of article 110b shows the Parliament commitment to protect the environment and give the constitutional environmental right the status of *lex superior* to any other environmental domestic law. Thus, article 110b is an important tool to interpret other legislation, in particular environmental legislation.

Undeniably, article 110b is much more than a political symbol and guideline. It recognizes legal obligations for the institutions of the State to take necessary legislative and regulatory measures to ensure the proper implementation of the constitutional environmental right. Indeed, Norway's environmental constitutional right's anthropocentric-ecocentric approach introduces both a substantive and a procedural environmental right as a *lex superior*, and it contains a strong sustainable development.

Concluding Observations

From the above analysis it is evident that the Stockholm Declaration ecocentric-anthropocentric approach to human rights protection is translated into the Rio Declaration, other international instruments and several constitutional environmental rights. From there, the 1992 Rio Conference led to the ratification

128 Norsk Retstidende 1980, 1569 ('Alta case I')
129 Norsk Retstidende 1992, 1618.

of the legally binding UNFCCC and the Convention on Biological Diversity. Therefore, the Stockholm Declaration and Rio Declaration, both non-legally binding sources of international law, have played an important role in creating legally binding international law and constitutional rights with an ecocentric-anthropocentric approach.

Both declarations together with the 2003 Aarhus Convention and other international instruments have all influenced Norway's constitutional environmental right, environmental-climate change policies, protection of biodiversity and access to information. Article 110b of the Norwegian Constitution thus provides an important example of how non-legally binding international instruments can be used as sources of national law.

Subsequently, the adoption of article 110b in Norway has led to the development of administrative and environmental law, as well as environmental policies aimed at tackling climate change and reduce CO₂ emissions. In fact, since the 1990s Norway has introduced several CO₂ taxes, such as the CO₂ tax part of the general consumer tax on petrol, the CO₂ tax part of the tax on domestic fuel/oil, the CO₂ tax on national use of gas, the CO₂ tax on emissions from the burning of oil and gas on the offshore petroleum industry and the CO₂ heavy-duty GHGs, HFK and PFK.¹³⁰



Photo credit: © Savanna Vaun

By way of investigating how article 110b of Norway's Constitution enhances not only an anthropocentric but also an ecocentric approach to environmental protection, it offers the opportunity for discussion for an international legally binding environmental substantive and procedural right that could have an ecocentric as well as an anthropocentric approach. Furthermore, article 110b is an example of good environmental practice that provides for strong sustainable development - based on environmental, social and economic sustainable development. Such a hierarchy would eliminate conflicts

¹³⁰ Since the introduction of the emission trading system in Norway, some taxes have been removed or the rate has been changed.



between protection of environmental rights and sustainable development.

It is relevant to mention that the Constitution of Norway is not a sporadic example of an ecocentric-anthropocentric approach to environmental protection influenced by the Stockholm and Rio Declarations. Indeed many developing and developed countries' constitutions emphasize on the importance of an ecocentric-anthropocentric approach.¹³¹ For instance, in 2008 Ecuador amended its 1998 Constitution recognizing the right of nature; and an amendment to the Constitution of France adopts an anthropocentric approach.¹³² Yet, the way different societies value the environment, environmental rights and sustainable development has caused uncertainty because sustainable development is often interpreted primarily as economic development.

Understandingly, States have to deal with competing issues that need to be taken into account when implementing environmental policies. Thus, decision-makers have to strike a balance between the need to protect the environment and the need to develop, which involves allowing activities or industries to operate within their territories even if they may cause environmental harm. However, currently there is a gap between environmental rights protection and economic

development. This issue raises two questions: whether environmental rights protection should trump other rights, which at times may compromise the right to development; and whether Norway's example can be followed by less energy-rich and less-developed countries? It is clear that climate change is one of the main causes of environmental disaster and indirectly it contributes to basic human rights violations. Not prioritizing an ecocentric-anthropocentric environmental rights protection will compromise all human rights protection and the right to development (including environmental, social and economic development).

Hence, whether less energy-rich and developed countries can follow Norway's example depends: first, in the UN and the international community support and co-operation; and second on individual States willingness to adopt an ecocentric-anthropocentric environmental right that promotes the environmental, social and economic sustainable development hierarchy. It will take years to follow Norway's legal and structural environmental protection level, as shown. Nevertheless, with the support of the UN and the international community assistance and co-operation an environmental protection infrastructure should be started to be built based

131 DR Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, (University of British Columbia Press, 2011).

132 The French Charter for the Environment - Constitution of France, 1958 (amended 2008) – Charter for the Environment' article 1.
http://www.wipo.int/wipolex/en/text.jsp?file_id=179092 [last accessed 26 August 2016]

on the recognition of an ecocentric-anthropocentric environmental right; and effective environmental education programmes should be used particularly to help less energy-rich and developed countries to set up an effective environmental protection infrastructure.

The Wild Silk Markets project in Madagascar¹³³ is a good example of an environmental education programme that has connected people and the natural environment in a mutually beneficial way. The peoples in the Madagascar region where this project is based are now engaged in subsistence agriculture when before they were contributing to desertification created by deforestation of the land for agricultural or pastoral purpose.

As recommended by the Task Force, concrete solutions are much needed at a time when climate change is affecting the lives of millions of peoples who are not protected from the impact of climate change under international, regional and national law. The Task Force encourages actors at all levels of governance to take joint bold actions aimed at achieving climate change justice. Consequently, the UN contribution is paramount in shaping the global environmental-climate change action plan strategy, including taking bold actions aimed at recognizing an ecocentric-anthropocentric environmental right.

An example of a successful bold action taken by the UN Economic, Social and Cultural Committee (the Committee) in 2002 is the adoption of General Comment 15, which contains the controversial decision to recognize the right to water even if it was not explicitly contained in the International Bill of Rights.¹³⁴ The Committee was then accused of avoiding a political debate with States Parties. Perhaps, the avoidance of an international political debate was, precisely, the strength of General Comment 15 because ten years later no State has rejected the recognition of a legally binding right to water. Therefore, the UN should invest heavily (with the support of the international community) on environmental education programmes, including providing training and clear interpretation to the definition of sustainable development and, implement a legally binding ecocentric-anthropocentric environmental right.

Arguably, the impact of climate change should give impetus to prioritize the protection of natural environmental rights because without the protection of flora, fauna and water first, the protection and fulfilment of the right to food, water, human dignity and right to life itself cannot be guaranteed any longer. Clearly, developed countries such as Norway have a responsibility to co-operate on climate change, including helping developing countries to set a similar environmental

133 FAO, 'Natural Wild Silk: Making the Most of Madagascar's Biodiversity', November 2010. <http://www.fao.org/docrep/013/am036e/am036e09.pdf> [latest accessed on 26th August 1016]

134 Committee on Economic, Social and Cultural Rights, General Comment 15 (The Right to water: arts.11 and 12), 26 November 2002.



protection infrastructure present in Norway.

A dramatic step has to be taken to respond effectively to this unprecedented environmental-climate change degradation, loss of biodiversity and food shortage. A turning-point for the world goes beyond human rights protection because climate change justice is a matter of environmental and human rights protection. It is about sharing responsibilities and achieving environmental accountability for environmental-climate change degradation at the international, national and local level.

The author wishes to express her gratitude to Professor Timo Koivurova for his comments on this article.



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The Humanization of International Environmental Law: Calming Anxieties over Fragmentation and Reaffirming a Rights-Based Approach

Musa Njabulo Shongwe

I. Introduction

The expansion and diversification of international law has been marked by “the rise of specialized rule-systems that have no clear relationship to each other”¹³⁵, that are not subject to coordination or review, and that are not based on any hierarchical relations. Indeed, the complexity and diversification of international law has resulted in inevitable overlaps among regimes, which are necessary for the effective operation of the international legal system as a whole. Contemporary international law is characterized by an “intense process of normative cross-fertilization, motivated by the prestige of some sources, and the necessity to find solutions for similar problems”.¹³⁶ Uncontrolled proliferation and the resulting overlaps of norms and institutional competencies can present problems for international law.¹³⁷ Conflicts have been known to occur whenever “self-contained regimes”¹³⁸ collide with other regimes.

A self-contained regime may loosely be defined as a specialized regime within the international legal system. It consists of a rule-system laid down in an international agreement, or group of agreements, regulating a specific subject matter such as trade law, environmental law and the law of the sea, or human rights law. Specialized regimes may claim to be autonomous, exceptional or claim primacy over other rules of international law. Those claims are strongest when the regimes have set up their own institutions



Photo credit: © www.etfovoice.ca

135 The International Law Commission, Report of the Study Group of the International Law Commission on Fragmentation of International Law “Difficulties Arising from the Diversification and Expansion of International Law” U.N. Doc. A/CN.4/L.682 (2006) 245 par. 483 (hereafter “ILC Report”).

136 Marcelo D. Varella, “Central Aspects of the Debate on the Complexity of International Law” [2013] Vol. 27 Emory International Law Review 5.

137 Ralph Michaels and Joost Pauwelyn, “Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of Public International Law” [2012] Duke Journal of Comparative and International Law 367.

138 See Simma B and Puldowski D “Of Planets and the Universe: Self-Contained Regimes in International Law” Vol. 17 (3) European Journal of International Law (2006) 483-529.



to regulate and ensure observance of their own rules, and they have created specialized courts to administer their own remedies for breach of the rules.¹³⁹ But specialized regimes are not entirely self-contained in the strictest sense of the term; rather, they may be said to be semi-isolated. This is because it is inevitable that regimes interact with each other, and with general international law.

A common problem is that the norms upon which specialized regimes are established could be interpreted in light of the object and purpose of that particular regime, and this could result in an “autonomous interpretation” of treaties.¹⁴⁰ That issue is an aspect of a larger academic problem referred to as ‘the fragmentation of international law’. In my view, fragmentation is a theory that presupposes divergence, disunity and incoherence of the international legal order. Upon studying the problem of fragmentation in 2006, the International Law Commission (ILC) foresaw that future tensions would exist between different branches of international law, and hence recommended that “increasing attention will have to be given to the collision of normative regimes as well as the rules, methods and techniques for dealing with such collisions”.¹⁴¹

This chapter aims to advance one such technique of responding to fragmentation: the reassertion of convergence in international law. The discussion advances this technique through an assessment of the inter-relationship between two particular regimes, international environmental law and human rights law. In light of the fragmentation debate, I argue that the intimate relationship between these two regimes dispels many anxieties about conflicts or divergence. Despite some minute differences in articulation, the human rights and environmental protection regimes share many common concerns. The chapter also examines the role and impact of human rights law in environmental protection. The analysis begins with a general examination of the pre-eminence of human rights in international law, and particularly in environmental protection. I advance an argument that the legitimate linkages between the two regimes justify a human rights-based approach to environmental protection. I also argue that instead of being viewed as autonomous or isolated regimes, we must advance the ultimate objective of human rights and environmental protection laws, which is the ultimate preservation of humanity and the world. Overall, this paper aims to show how the relationship between human rights and environmental protection can be

139 Kuijper R J “Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO” International Centre for Trade and Sustainable Development (ICTSD) Issue Paper No. 10 (2010) at 8 par 3.2.2.

140 Autonomous interpretation means an interpretation driven by the needs of the organization which may not follow the normal rules of interpretation of international law. This was observed earlier by Jenks W “The Conflict of Law-Making Treaties” Vol. 30 British Yearbook of International Law (1953) 401-453.

141 ILC Report (n 1) par 493.

taken as a good example of convergence and the unity of international law.

II. The Pre-eminent Role of Human Rights Law

International human rights law today has extended its reach to many fields of international law including environmental law. This has been observed by cynical scholars as human rights law's 'imperial ambitions' which constitute a threat to the coherence of international law. They argue that a majority of those regimes to which human rights law has expanded are already governed by long-standing specialized regimes and may have already developed their own frameworks for balancing various rights and obligations.¹⁴² They therefore view human rights law as an unnecessary and unwelcome intruder as it sows confusion into established law, hence stimulating even greater fragmentation of the legal order.¹⁴³ Indeed it is true that human rights are increasingly being raised in the context of environmental challenges, investment disputes,¹⁴⁴ in trade law cases¹⁴⁵ etc. The linkages which are constantly established between human rights and other substantive areas imply that tribunals in different specialized branches

of international judicial architecture may be faced with human rights claims,¹⁴⁶ and those tribunals can possibly render conflicting decisions or even exclude the applicable law simply because those courts are not human rights courts, and have different and specific mandates to fulfill.

But it must be noted that the featuring of human rights in almost all substantive areas is important and necessary today because society requires protection of their ideal standards of human, civil, economic and social interaction. Fragmentation is therefore inherent from the human rights perspective because the protection of human rights is now a legitimate topic of inquiry in multiple *fora*.¹⁴⁷ Optimistic scholars therefore view the reach of human rights law into other areas of law as a necessary "humanization"¹⁴⁸ of international law. They correctly argue that "human rights law provides a set of unifying rules and principles that can stitch together a fragmenting international legal system".¹⁴⁹ In that light, one may argue that human rights norms have a justiciable role at the top of a perceived hierarchy of international norms. Though international law supposedly features a horizontal system of norms enforced

142 Geoffrey S. Corn, "Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict" [2010] Vol. 1 Journal of International Humanitarian Legal Studies 52, 53.

143 Ibid at 54.

144 See Pierre-Marie Dupuy, Human Rights in International Investment Law and Arbitration (Oxford, 2009) 10.

145 Philippe Sands et al., Principles of Environmental Law (Cambridge University Press, 2012) 801.

146 Jose E. Alvarez and David W. Leeborn, "Linkages" [2002] 96 American Journal of International Law 5.

147 Kristen E. Boon, "The Law of Responsibility: A Response to Fragmentation?" [2012] Vol. 25 Global Business and Development Law Journal 397.

148 Ruti Teitel and Robert Howse, "Cross-Judging: Tribunalization in a Fragmented but Inter-Connected Global Order" [2009] Vol. 41 NYU Journal of International Law and Politics 959, 964.

149 Ibid at 965.



through a decentralized system, an arguable hierarchy between norms can be established. This argument has been supported by the ILC when it states that:

“As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels”.¹⁵⁰

An important part of human rights practice and literature pushes international human rights law to the top of the hierarchy of international law: a concept also known as the primacy of human rights.¹⁵¹ Judicial practice indicates that when conflicts do arise between human rights obligations and certain other categories of international obligations such as immunities, collective security, trade as well as environmental law, the resolution of such disputes is always carried out with the primary goal of protecting or consolidating basic human rights.¹⁵² There is therefore a prevailing view that human rights norms have acquired a special hierarchical standing *vis-à-vis* other international norms.¹⁵³ This is also true because most of the international norms qualifying as *jus cogens* and/or erga

omnes norms are human rights norms, or are norms which are necessary or a corollary to the respect for human rights – such as the right to self-determination, prohibition of aggression, slavery, and genocide. This study considers human rights norms¹⁵⁴ as being well-placed at the top of the hierarchy, and consequently, it argues that the elevation of human rights law above the environmental protection normative framework is desirable. There has been a notable shift from the approach to environmental protection that was previously based on public regulation through the imposition of duties, to a rather new approach based on the recognition of individual rights to a certain quality of environment.¹⁵⁵ This new approach, described below, realizes and exploits the legitimate connections between environmental protection and human rights.

III. Linkages and Convergence

There are significant links between human rights and environmental protection. Firstly, a healthy and safe environment is a prerequisite for the enjoyment of rights such as the right to life, health, water, food and property rights. States

150 ILC Report (n 1) par 1.

151 Marianne Lamour, “Are Human Rights Law Rules ‘Special’?: Study on Interactions between Human Rights Law Rules and Other International Law Rules” in Norma Weib and Jean-Mark Thouvenin (eds) *The Influence of Human Rights on International Law* (Springer, 2015) 27.

152 Erika De Wet and Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (Oxford, 2012) 2.

153 See in this regard Erika De Wet, “The Emerging International Constitutional Order: The Implications of Hierarchy in International Law for the Coherence and Legitimacy of International Decision-Making” [2007] Vol. 2 PER 3.

154 De Wet and Vidmar (n 18) 7.

155 Dinah Shelton, “Human Rights and the Environment: Problems and Possibilities” [2008] 38 *Environmental Policy and Law* 42.

parties to environmental treaties have an obligation to ensure within their domestic law a degree of environmental protection required for the full realization of protected rights. Secondly, it has become essential to regard the right to a healthy and safe environment as a human right in itself. Thirdly, certain rights must be implemented so as to ensure environmental protection, including the right to access to information, access to justice as well as public participation. The three elements above have been established through a process of recognizing and accepting the significance of the links between human rights and environmental protection by the international community. That process is described in greater detail below.

At the 1972 United Nations Conference on the Human Environment held in Stockholm, the international community declared that-

“Man has 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”.¹⁵⁶

This declaration provided the basis for subsequent elaboration of human rights in environmental treaty law and in national constitutions.¹⁵⁷ It also laid the ground for the development of environmental rights. It is interesting to note, however, that this statement was not repeated in the 1992 Rio Declaration. The Rio Declaration modestly states that human beings are “the central concern of sustainable development”, and refers to humans as being “entitled to a healthy and productive life in harmony with nature”.¹⁵⁸ According to Shelton, the Rio Declaration’s failure to give greater emphasis to human rights at that time indicated an uncertainty about the proper place of human rights law in the development of international environmental law.¹⁵⁹ That uncertainty gave rise to academic anxieties over fragmentation -- that is, concerns about the substantive (in)compatibility of both regimes.¹⁶⁰

Fragmentation theory postulates that even though environmental rights may to a certain extent be compatible with human rights, they are not necessarily the same as human rights. Environmental rights originally did not form part of the corpus of human rights law found in some important human rights treaties such as

156 Stockholm Declaration on the Human Environment Principle 1 U.N. Doc. A/CONF.48/14/Rev.1 (16 June 1972), 11 ILM 1416.

157 According to David Boyd, the first states to adopt the right to a healthy environment to their constitutions included Portugal (1976) and Spain (1978). See David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, Vancouver, 2012) 62.

158 Rio Declaration on Environment and Development, Principle 3 U.N. Doc. A/CONF.151/26/Rev.1 (14 June 1992).

159 Dinah Shelton, “What Happened in Rio to Human Rights?” [1992] Vol. 3 Yearbook of International Environmental Law 75, 82.

160 See Martti Koskenniemi and Paivi Leino, “Fragmentation of International Law: Postmodern Anxieties” [2002] Vol. 15(3) *Leiden Journal of International Law* 553; and Cinnamon Carlane, “Good Climate Governance: Only a Fragmented System of International Law Away” [2008] *Law and Policy* 450.



the ICCPR, the ICESCR, the ECHR, and the IACHR¹⁶¹ (save for the African Charter on Human and Peoples' Rights, 1981). The recognition of the right to a healthy and safe environment came a bit too late to be codified in the major international human rights conventions.¹⁶² The international human rights regime developed separately and earlier when compared to the international environmental protection regime. Therefore, fragmentation theory has pointed out a normative difference that exists between international human rights norms and environmental protection norms. On the one hand, human rights norms created individual and group rights exercisable against the state, and on the other hand, environmental protection norms in treaty law generally placed obligations for states (save for the 1998 Aarhus Convention). It then became important for the international community, after 1972, to develop principles of environmental law that would be linked directly to environmental rights, and that those principles be translated into human rights law. Examples of such principles are the principle of non-discrimination, the principle of preventative action, the precautionary principle and the polluter pays principle. After the Stockholm Conference, human rights approaches to environmental protection gained

momentum. There emerged a practice known as "greening of rights",¹⁶³ according to which human rights norms were infused with environmental standards through progressive interpretation.

The ICJ first pronounced the existence of linkages between the two regimes in 1997: Judge Weeremantry delivered a separate opinion in the *Case Concerning the Gabčíkovo-Nagymaros Project*,¹⁶⁴ recognizing that the enjoyment of internationally recognized human rights depends upon environmental protection. In this case it was stated that the protection of the environment is a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health, and the right to life itself.¹⁶⁵ Weeremantry's opinion reflected what has today become accepted by the international community that human rights are inseparable from environmental quality.¹⁶⁶ This kind of approach in which a judicial body interpreted environmental issues in light of human rights norms can be found in the recent jurisprudence of the ICJ particularly in the *Pulp Mills* and *Whaling in the Antarctic*¹⁶⁸ cases. Today it is widely recognized that states have a duty to refrain from conduct that will directly violate the rights of persons.

161 John H. Knox, "Climate Change and Human Rights Law" [2009] *Virginia Journal of International Law* 163.

162 John H. Knox, "Human Rights, Environmental Protection, and the Sustainable Development Goals" [2015] Vol. 24 *Washington International Law Journal* 517, 520.

163 Alan Boyle, "Human Rights and the Environment: A Reassessment" [2007] *Fordham Environmental Law Review* 2.

164 *Case Concerning the Gabčíkovo-Nagymaros Project* [1997] I.C.J. Rep. 7.

165 *Ibid* at 91-92.

166 Klaus Bosselmann, "Environmental and Human Rights in Ethical Context" in Anna Grear and Louis J Kotze (eds) *Research Handbook on Human Rights and the Environment* (Edward Elgar, USA 2015) 531, 537.

167 *Pulp Mills on the River Uruguay (Arg. V. Uru)*, Judgment, 2010 I.C.J. 14, 83.

168 *Whaling in the Antarctic (Austl. V Japan: N.Z. intervening)*, 2014 I.C.J. 148 PAR. 45.

The pursuit of public interest in environmental matters was accentuated in 1998 by the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Section 2(4) of this Convention entrenched procedural rights. In *SERAC v. Nigeria*, also known as the *Ogoniland* case¹⁶⁹, the African Commission addressed the element of public interest in protecting the environment. The Commission stated that the rights to environment and health together “obligate governments to desist from directly threatening the health and environment of their citizens”.¹⁷⁰ In the analysis of the courts’ reasoning, Boyle argued that the Commission’s decision could be viewed as a challenge to the sustainability of oil extraction in Ogoniland.¹⁷¹ This is because the emphasis on procedural measures as a way to safeguard environmental protection may reflect a concern that human rights law prohibits states from developing their resources. It is my submission, however, that such concerns lack merit in the sense that the human rights regime sets only minimum standards for the protection of people’s rights, rather than outright proscription of state development.

In light of the Aarhus Convention, many states have accepted and entrenched the principle of public participation in their national constitutions and legislation.

The fundamental principles of the Aarhus Convention include the recognition by states of every person’s right to live in an environment adequate to his or her health and well-being, and the duty to protect and improve the environment for the benefit of present and future generations. This kind of normative fusion bears out the inextricable links between environmental protection and human rights, and reinforces the right to a healthy environment for future generations.

New developments also show that the UN is adopting an aggressive strategy of harmonizing the tensions between the two regimes. For example, in 2009 the Office of the High Commissioner on Human Rights (OHCHR) and the United Nations Environment Programme (UNEP) sought means to promote integrated strategies and policies for the protection of human rights and the environment. Their Report emphasized the key point that:

“While the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing”.¹⁷²

169 Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria (“SERAC v. Nigeria – the Ogoniland Case”) AfCHPR Communication 155/96 (2002) par 52–53.

170 Ibid at par 52.

171 Alan Boyle (n 29) 4–5.

172 UN HRC “Report of the OHCHR on the Relationship between Climate Change and Human Rights” UN Doc.A/HRC/10/61 (15 January 2009) par 18.



The 2011 OHCHR Report states that “human rights obligations and commitments have the potential to inform and strengthen international, regional and national policy-making in the area of environmental protection and promoting policy coherence, legitimacy and sustainable outcomes”.¹⁷³ In 2011, the Human Rights Council adopted a Resolution¹⁷⁴ which affirmed that human rights obligations, standards, and principles have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy, and sustainable outcomes. In 2012 the UN Conference on Sustainable Development affirmed that “democracy, good governance and the rule of law ... are essential for sustainable development”.¹⁷⁵ In the same year, the UN Human Rights Council created the office of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, whose mandate has been extended to 2018. In 2013, the UN Secretary General Ban Ki-Moon stated that “an essential element of the sustainable development agenda is “a far reaching vision of the future firmly



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anchored in human rights and universally accepted values and principles”.¹⁷⁶ The Rio+20 Conference has produced the most recent recognition by the international community of the importance of the right to a safe and healthy environment by reaffirming respect for the rights to health, food and safe drinking water.¹⁷⁷ There are also good examples of

173 OHCHR, Analytical Study on the Relationship between Human Rights and the Environment UN Doc.A/HRC/19/34 (16 Dec. 2011) par 2.

174 UNHRC A/HRC/RES/18/22 “Human rights and climate change” 17 October 2011.

175 United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil, June 20-22, 2012, The Future We Want U.N. Doc. A/CONF.216/L.1 (June 19, 2012) 9, 10.

176 U.N. Secretary General, A Life of Dignity for All: Accelerating Progress Towards The Millennium Development Goals and Advancing the United Nations Development Agenda Beyond 2015: Report of the Secretary General, U.N. Doc. A/68/202 (July 26, 2013) 74-75.

177 UN, “The Future We Want: Outcome document of the United Nations Conference on Sustainable Development” Rio de Janeiro, Brazil, 20-22 June 2012; and “Human Rights and the Environment Rio+20 Joint Report OHCHR and UNEP” (2012).

convergence taken from state practice, such as regional conventions¹⁷⁸ and state constitutions¹⁷⁹ affirming and recognizing environmental rights a human-rights approach to environmental protection, as well as the agreeability of national courts. The importance of taking into account international perspectives in addressing similar issues contributes not only to the effectiveness of international law as a whole, but to its stability.

Through all the above examples, the argument that prevails is that environmental harm interferes with the enjoyment of human rights, specifically, the right to life, health, the right to an adequate standard of living, the right to food, and water.¹⁸⁰ It is clear therefore that the above developments are a proof of convergence rather than fragmentation between the two regimes. Without doubt, human rights law is progressively dominating the international environmental law.

IV. Advantages of a Rights-Based Approach

Human rights are the core values of humanity that require preservation. Because human beings depend on the environment, a healthy and safe environment is essential to the full enjoyment of human rights. Without a safe, healthy and sustainable environment, the survival and development of humanity cannot be guaranteed. It has been argued that the human rights approach is anthropocentric (human-centered) because it focuses on the harmful impact of environmental degradation on humans, rather than on the environment itself.¹⁸¹ But according to Boyle, a human rights approach to environmental protection directly addresses environmental impacts on the life, health, and property of individuals; it secures higher standards of environmental quality based on the obligation of states to take measures to control pollution affecting health and private life; and above all, it promotes the rule of law by ensuring the direct accountability of governments for their failure to regulate and control environmental nuisances.¹⁸²

178 Examples: The African Charter on Human and People's Rights article 24; The Arab Charter on Human Rights, article 38; The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of San Salvador, article 11; and The ASEAN Human Rights Declaration, article 28.

179 According to John Knox, over 90 countries had adopted a constitutional right to a healthy environment in 2012. See U.N. Independent Expert, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox: Preliminary Report, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012) 12.

180 See generally U.N. Independent Expert, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H Knox: Mapping Report, U.N. Doc. A/HRC/25/53 (Dec. 30, 2013) 17-22.

181 Philippe Sands (n 11) 776.

182 Alan Boyle, "Human Rights and the Environment: Where Next?" [2012] Vol. 23 (3) EJIL 613.



The human rights approach clearly departs from fragmentation theory in that it reinforces the concept of “common concern”¹⁸³ for mankind and “complementarity”.¹⁸⁴ Fragmentation theory has incorrectly framed the relationship between the two regimes in terms of irreconcilable tensions. But today, we can point out a variety of examples of convergence and advantages of a rights-based approach. For example, the rights to life and health can now be used to compel governments to regulate environmental risks, enforce environmental laws, or even disclose environmental information.¹⁸⁵ When national law provides human rights guarantees, it also ensures inclusive and meaningful public participation environmental law-making. Human rights guarantees in both international and national law give birth to procedural rights including the right to access information, as well as substantive rights including freedom of expression.

V. Concluding Remarks

It is important to continuously entrench the coherence of international law as a unitary legal system.¹⁸⁷ That aim does not mean that actors in international law must altogether lose sight of fragmentation, for fragmentation is a permanent feature of the international law. Methods of attaining convergence and unifying the international legal system must be given more attention. In light of the systemic nature of international law, it is no longer helpful to view the law as broken up into separate specialist fields.¹⁸⁸ Instead, we must endeavor to explore and exploit the concept of “mutual supportiveness”¹⁸⁹ and the different interpretative techniques of harmonization of international law such as “systemic integration”.¹⁹⁰ It remains important to maintain the objective strengthening the overall coherence of international law, by exploiting the synergies between different regimes. This paper has shown how the interactions and linkages between the human rights and environmental protection regimes facilitate a just international legal order. A human rights approach to

183 Werner Scholtz, “Human Rights and the Environment in the African Union Context” in Anna Grear and Lois Kotze (eds) *Research Handbook on Human Rights and the Environment* (Edward Elgar Publishing, UK 2015) 404.

184 Donald Anton and Dinah Shelton, “Environment as a Human Rights Issue” in Donald K Anton and Dinah L Shelton (eds) *Environmental Protection and Human Rights* (Cambridge University Press, New York 2011) 119.

185 See UN HRC Report of the OHCHR on the Relationship Between Climate Change and Human Rights UN Doc. A/HRC/10/61 at par 18.

186 See for example Principle 10 of The Rio Declaration on Environment and Development, 1992.

187 See generally Mads Andenas & Eirik Bjorge, *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015).

188 Sir Michael Woods, Report of the International Law Commission 64th Session U.N. Doc. A/67/10 (2012) 108.

189 Boisson de Charzournes Laurence and Makane Moise Mbengue, “A ‘Footnote as a Principle’: Mutual Supportiveness in an Era of Fragmentation” in Holger Hestermeyer et al (eds), *Coexistence Cooperation and Solidarity – Liber Amicorum Rudiger Wolfrum* (Leiden, Martinus Nijhoff, 2011) 1615-1638.

190 Matz-Luck Nele, “Harmonization, Systemic Integration, and Mutual Supportiveness as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation” [2006] *Finnish Yearbook of International Law* 39-53.

environmental protection reasserts unity and convergence. The 'reassertion of convergence'¹⁹¹ is a positive and welcome

response to fragmentation that can finally put the fragmentation debate to rest.



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191 Mads Andenas, "Reassertion and Transformation: From Fragmentation to Convergence in International Law" [2015] Georgetown Journal of International Law 686, 693.



Rights-based Approaches to Environmental Protection in International and Regional European Environmental Assessment and Maastricht Recommendations

Leila Neimane

I. Introduction

The Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (Maastricht Recommendations or Recommendations)¹⁹² address the question of an effective and meaningful implementation of the second “pillar” of environmental democracy: “public participation”. The Recommendations are based on existing good practices and are aimed at being a practical, invaluable tool and helpful guideline to improve the implementation of the provisions of the international treaties. Such treaties include the seminal Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).¹⁹³

The Recommendations offer innovative approaches for managing problems related to the enhancement of the quality of public participation. They address the effective implementation of decisions that concern the environment and affect the public. The Maastricht Recommendations outline both ideological arrangements (best practice principles) and practical arrangements (participatory tools and techniques) for public participation in environmental assessments. They encompass the nexus of the Aarhus Convention with other international treaties and guidance material. However, for purposes of this chapter, the focus will be on participatory tools and techniques, highlighting the Maastricht Recommendations as part of a set of global guidelines internationally applicable at a national level.

192 United Nations Economic Commission for Europe (UNECE), Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (United Nations 2015) (Maastricht Recommendations).

193 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) was adopted in Aarhus, Denmark on 25 June 1998 and entered into force on 30 October 2001 <www.unece.org/env/pp/treatytext.html> accessed 15 August 2016

This chapter is divided into five parts. First, it briefly discusses the origins of the Maastricht Recommendations and the state of the international legal framework concerning public participation in environmental assessment procedures. Second, it considers the specifics of public participation in those procedures. Third, it presents an analysis of the innovative tools and techniques of public participation that result from the Maastricht Recommendations. Fourth, it provides a compact overview of the implications of the Maastricht Recommendations on national legal frameworks. Finally, the conclusion is presented, identifying future research needs.

2. Maastricht Recommendations and their Foundations

Before turning to the specific participatory tools and techniques (participatory techniques)¹⁹⁴ of public participation, it is useful to set the scene by outlining the legal framework in which public participation operates in environmental assessment.

Besides the national legal frameworks that stipulate the provisions relating to public participation in environmental

assessments, there are several international and regional treaties. Among them the most prominent, unique, “globally significant example of the legal consolidation of measures to enhance public participation”¹⁹⁵ and, in the words of the former UN Secretary-General Kofi Annan, “the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations,”¹⁹⁶ is the Aarhus Convention. The Aarhus Convention outlines, and clearly incorporates, three interrelated “pillars” of procedural environmental rights: access to environmental information (right to information), participation in decision-making processes (right to participation) and access to courts (right to a fair trial, judicial challenging right). In this chapter, the Aarhus Convention is placed in the context of a discussion of public participation in the environmental assessment procedure, claiming that the right to participate extends beyond the formal obedience of procedural requirements, but also means the meaningful realisation of the right to be heard and the right to affect decisions. The interaction between national legal frameworks and the Convention is two-sided. Effective implementation depends not only on a high level of awareness of the Convention, but also on the national instruments that are introduced to enact it.¹⁹⁷

194 Author's remark: For the purpose of this chapter, no distinction between the notions “tools” and “techniques” is made.

195 Benjamin J Richardson and Jona Razzaque, ‘Public Participation in Environmental Decision-making’ in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability: A Reader* (Hart Publishing 2006) 174.

196 Jonas Ebbesson and others, *The Aarhus Convention: An Implementation Guide* (2nd edn, United Nations 2014) 253.

197 Jeremy Wates, ‘The Future of Aarhus Convention. Perspectives Arising from the Third Session of the Meeting of the Parties’ in Marc Pallemmaerts (ed), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011) 394.



To date, the Aarhus Convention has 47 parties (including the European Union (EU)) represented by the United Nations Economic Commission for Europe (UNECE) member states,¹⁹⁸ with some notable absences (namely: the Russian Federation and Turkey).¹⁹⁹

The Convention is open to accession by states outside the UNECE region.²⁰⁰ Although no state from outside this region has yet acceded to the Convention, the environmental legislation in many countries around the globe has been widely inspired by this Convention (e.g., in Nigeria, Brazil, and Mauritius, to mention just a few; also see the Public Participation Strategy²⁰¹ of Organization of American States).²⁰²

Occasionally, the laws and practices of public participation in the countries that are not parties to the Aarhus Convention might align with, and even surpass, best practices; in other cases, they may fall short.²⁰³

For example, the South African National Environmental Management Act



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(1998) lists principles specific to public participation²⁰⁴ and the country's legal provisions on public participation in environmental decision-making are "comparable with the best practices in OECD [Organization for Economic Development] member countries and with the Aarhus Convention."²⁰⁵ They have "many features in common with internationally accepted principles of environmental management which can be seen when one compares these principles

198 UNECE, 'Aarhus Convention. Parties to the Aarhus Convention and their dates of ratification' <www.unece.org/env/pp/aarhus/map.html> accessed 24 July 2016

199 Wates (n 6) 399-400.

200 "The Convention's article on signature excludes the possibility for Member States of the United Nations from outside the ECE region to sign the Convention (Article 17), but allows them to accede upon approval by the Meeting of the Parties (Article 19(3))." Wates (n 6) 400-401; Maastricht (n 1) 5. See also - Lucca Declaration, para. 32 (ECE/MP.PP/2/Add.1); Almaty Declaration, para. 24 (ECE/MP.PP/2005/2/Add.1); Riga Declaration, para. 23 (ECE/MP.PP/2008/2/Add.1); decision II/9 on accession of non-UNECE member states to the Convention and advancement of the principles of the Convention in other regions and at the global level ECE/MP.PP/2005/2/Add.13; decision III/8 on the strategic plan for 2009-2014, objective II.4 (ECE/MP.PP/2008/Add.16, para. 10 (d)).

201 Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (Organization of American States, 2001).

202 Uzuazo Etemire, 'Law and Practice on Public Access to Environmental Information and Participation in Environmental Decision-Making: A Comparative Analysis of Nigerian Legal Regime with International Best Practice' (DPhil thesis, University of Strathclyde 2014) ii, 17-18, 21-22.

203 *ibid* ii.

204 National Environmental Management Act 107 of 1998, s 2(4), (b) (f) - (k), and (o).

205 Organisation for Economic Development (OECD), Environmental Performance Reviews: South Africa 2013 (OECD Publishing 2013) 40.

with the Rio principles.”²⁰⁶ In addition, in 2010, the voluntary United Nations Environment Programme (UNEP) Bali Guidelines were adopted with the purpose for providing “general guidance [...] to States, primarily developing countries, on promoting effective implementation of their commitments to Principle 10 of the 1992 Rio Declaration on Environment and Development within the framework of their national legislation and processes.”²⁰⁷

Published in November 2015, the Maastricht Recommendations’ aim is to improve the implementation of the Aarhus Convention’s provisions on public participation in decision-making by providing ideas for more innovative approaches in practice.²⁰⁸ The Maastricht Recommendations profess both ideological arrangements and practical arrangements for public participation in environmental assessment procedure, encompassing the nexus of the Aarhus Convention with other international treaties and guidance material.

The ideological arrangements of the Recommendations could stand for the best practice principles of public participation (e.g., neutrality of the persons or bodies to which the organization of public participation is delegated, the duty of public authorities to

consult with existing social science, etc.). Many of these arrangements correspond with, and could be derived from, those declared by professional organizations, such as the International Association for Public Participation and the International Association for Impact Assessment, and described in the Implementation Guide of the Aarhus Convention.²⁰⁹ Although these principles have undeniable importance, this chapter focuses on the participatory techniques (e.g., informal public discussions and seminars, bilateral consultations, facilitated group processes, consensus conferences, round-table discussions, stakeholder dialogues, citizens’ juries, and multi-optional decision-making, etc.).

Whether the accession of states from other continents to the Aarhus Convention will become a political reality remains unseen. However, even if a separate (global) convention or several regional conventions on environmental matters are made—counterparts to the Aarhus Convention—“it is almost certain the Aarhus Convention system (and the Bali Guidelines) would form the core framework around which such a treaty is built.”²¹⁰ Now, along with the Bali Guidelines, the Maastricht Recommendations form part of a set of global guidelines applicable in all countries worldwide.

206 Michael Kidd, *Environmental Law* (2nd edn, Juta & Company (Pty) Ltd 2011) 38.

207 United Nations Environment Programme (UNEP), *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*. Adopted by the Governing Council of the UNEP in decision SS.XI/5, part A of 26 February 2010 (UNEP 2011) 4. See also Stephen Sec and others, *Putting Rio Principle 10 into Action: An Implementation Guide* (UNEP 2015).

208 Maastricht Recommendations (n 1) 6.

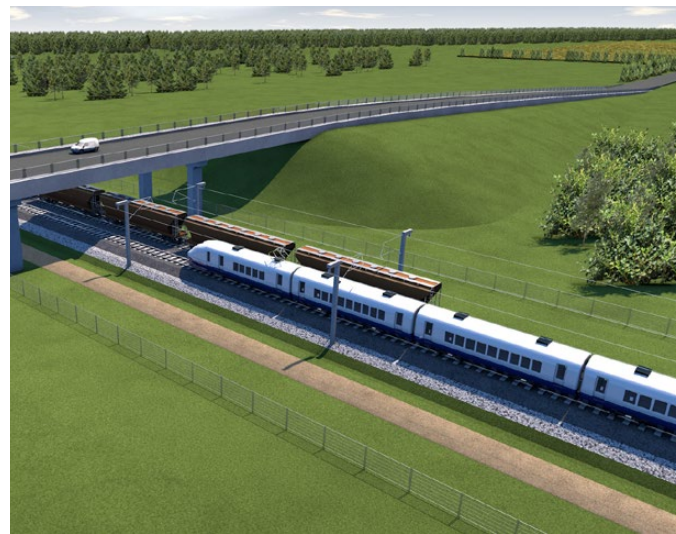
209 Ebbesson and others (n 5).

210 Etemire (n 11) 22.





Source: Ieva Čīka/LETA



Source: Partnership RB Latvija

A special consultative working group created in April 2015 to discuss the railway route alternatives in the Salacgrīva region (environmental impact assessment project “Rail Baltica”; Latvia)

3. Specifics of Public Participation in Environmental Assessment

For this chapter, the author understands public participation in the same vein as defined by the World Bank: as “a process through which stakeholders influence and share control over **development initiatives**, and the decisions and resources which affect them.”²¹¹

The term “environmental assessment” (in the context of “development initiative”)

is taken to refer to two instruments of environmental decision-making that are reflected in the Aarhus Convention: environmental impact assessment (EIA; Article 6) and strategic environmental assessment (SEA; Article 7). In conjunction, these instruments “result in environmental assessments being conducted at all levels of decision-making, ranging from policy/plan/program formulation (SEA²¹²) to project management, implementation and ultimately operation and decommissioning (EIA²¹³).”²¹⁴ Although the Aarhus Convention provides for public participation in regulation-making

211 World Bank, *The World Bank Participation Sourcebook* (World Bank 1996) xi (emphasis added).

212 For example, “water management programmes, urban development plans, regional and local waste management plans, national energy strategies and plans,” also - “national biosafety strategies, air management plans, nature conservation plans, emergency plans for hazardous activities/installations, or anti-smog programmes,” etc. Maastricht Recommendations (n 1) 46-47.

213 Aarhus Convention (n 2) Annex I.

214 Shardul Agrawala and others, *Incorporating Climate Change Impacts and Adaptation in Environmental Impact Assessments: Opportunities and Challenges*. 24 OECD Environmental Working Paper (OECD Publishing 2010) 10.

processes and decision-making regarding genetically modified organisms, these types of public participation lie outside this chapter's scope.

The other treaties containing explicit public participation clauses for environmental assessment are the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)²¹⁵ and the Protocol on SEA to the Espoo Convention (SEA Protocol).²¹⁶ The Aarhus Convention,²¹⁷ the Espoo Convention²¹⁸ and the SEA Protocol²¹⁹ reflect the link between environmental assessment and public participation. However, only the Aarhus Convention is exclusively dedicated to public participation and remains "the most advanced treaty on public participation concluded so far."²²⁰

Environmental assessment is one of the mechanisms "for ensuring the

participation of potentially affected persons in the decision-making process."

²²¹ Public participation, in conjunction with transparency, is one of the foundational principles of the environmental assessment, as "the process should provide appropriate opportunities to inform and involve the interested and affected publics, and their inputs and concerns should be addressed explicitly in the documentation and decision making,"²²² forming part of "more direct participation of citizens to supplement representative democracy."²²³

Public participation is an integral component for attaining sustainable development, as it assists with integrating environmental, economic, and social objectives in the environmental assessment,²²⁴ and ensures socially acceptable environmental results.²²⁵

215 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) was adopted in Espoo, Finland on 25 February 1991 and came into force on 10 September 1997 <www.unece.org/env/eia/about/eia_text.html> accessed 15 August 2016

216 Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (SEA Protocol) was adopted in Kyiv on 21 May 2003 and entered into force on 11 July 2010 <www.unece.org/env/eia/about/sea_text.html> accessed 15 August 2016

217 Aarhus Convention (n 2) Preamble, para. 23, Art. 6, Annex I.

218 Espoo Convention (n 24), see, for example, Arts. 2(2), 2(6), 3(1), 3(8), 4(2). See also Jonas Ebbesson, The Notion of Public Participation in International Environmental Law (1997) 8 Yearbook of International Environmental Law 88.

219 SEA Protocol (n 25) Art. 8, Annex V; see also, for example, Preamble, paras. 5, 6, Arts. 1(d), 2(6), 5(3), 6(3), 10(4), 11(2), 15.

220 Ebbesson (n 27) 96.

221 Philippe Sands and others, Principles of International Environmental Law (3rd edn, Cambridge University Press 2012) 601.

222 Pierre Senécal and others, 'Principles of Environmental Impact Assessment Best Practice' (International Association for Impact Assessment 1999) <www.iaia.org/uploads/pdf/principlesEA_1.pdf> accessed 24 July 2016

223 Anél du Plessis, 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' (2008) Potchefstroom Electronic Law Journal <www.saflii.org/za/journals/PER/2008/12.html> accessed 25 July 2016

224 Ebbesson (n 27) 53-54; Richardson and Razzaque (n 4) 179.

225 William A Tilleman, 'Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and European Community' (1995) 33 Columbia Journal of Transnational Law 337. Quoted by: Jona Razzaque, 'Participatory rights in natural resource management: the role of communities in South Asia' in Jonas Ebbesson and Phoebe Okowa (eds), Environmental Law and Justice in Context (Cambridge University Press 2009) 124.

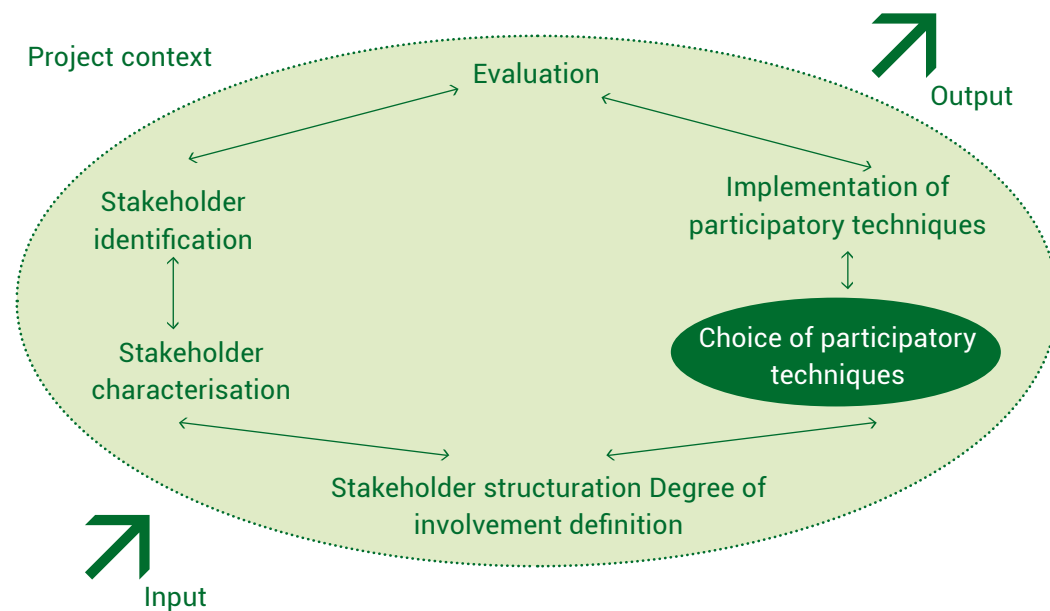


It must be emphasized that public participation “does attract wider public attention than many other project components because of the emotional involvement of people, and hence its failure will not go unnoticed.”²²⁶ The main challenge of a meaningful and effective—or “the most comprehensive, broad, active and accessible”²²⁷—public participation is to avoid situations where “the participation is measured by how many come to meetings, take brochures home, or answer a questionnaire.”²²⁸ “What citizens achieve in all this activity is that they have ‘participated in participation.’ And what power-holders achieve is the evidence

that they have gone through the required motions of involving ‘those people.’”²²⁹

In this chapter, there are two main assumptions: first, that effective public participation is an integral part of the environmental assessment’s effectiveness; and second, that effective environmental assessments are based on legislation which has a “clear purpose, specific requirements, and prescribed responsibilities.”²³⁰ This means that public participation and the effectiveness of environmental assessment are “influenced also by the adequacy of the policies and laws of the government and how well they

Figure 1. Framework for public participation and scope of this chapter



Source: Vincent Luyet and others, ‘A framework to implement stakeholder participation in environmental projects’ (2012) 111 *Journal of Environmental Management* 214.

226 Samuel Paul, *Community Participation in Development Projects* (World Bank Discussion Papers 6, 1987) 10.
 227 Maastricht Recommendations (n 1) 13.
 228 Sherry R Arnstein, ‘A Ladder of Citizen Participation’ (1969) 35(1) *Journal of the American Institute of Planners* 219.
 229 *ibid.*
 230 Barry Sadler, *Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance* (final report, Canadian Environmental Assessment Agency, International Association for Impact Assessment 1996) 21.

are implemented."²³¹ For example, "[e]ven if governments and donors are persuaded that [public participation] is appropriate to their projects, they are unlikely to incorporate [public participation] in project design as long as they have no guidance in terms of the relevant methodologies."²³²

In line with the preamble to the Aarhus Convention,²³³ the Maastricht Recommendations,²³⁴ the comparative studies of the Canadian, United States of America and European EIA processes,²³⁵ and other academic reviews,²³⁶ there is a link between the extent of public participation and the quality of the environmental assessment process, which impacts the quality of the decisions and the effectiveness of their implementation. Thus, the Aarhus Convention's provisions must be valued under their meaningful and effective implementation, namely the practical, real differences they bring about. While public participation is a broad concept, one of the preconditions for successful public participation is an understanding of the project management of participatory techniques²³⁷ (see Figure 1, circled in red), which are now set forth by the Maastricht Recommendations.

Although a plethora of participatory techniques²³⁸ has been identified in the literature, the Maastricht Recommendations offer a unique set of the innovative techniques to be used in the environmental assessment, specifically for institutionalizing the environmental democracy.

4. Selected Tools and Techniques of the Maastricht Recommendations

Despite the achievements of the Aarhus Convention, there are also several criticisms that "[t]he Aarhus Convention attempts to mitigate the dominance of economic interests by involving NGOs, but does little to encourage more general public involvement."²³⁹ Effectively, "the Aarhus Convention provides a useful framework for public participation along the lines of the liberal-democratic model."²⁴⁰ In turn, some of the participatory techniques offered by the Maastricht Recommendations do not fit within the current framework

231 Paul (35) 28.

232 *ibid* IX.

233 Aarhus Convention (n 2) Preamble, para. 9.

234 Maastricht Recommendations (n 1) 12.

235 Tilleman (n 34); Christopher Wood, *Environmental impact assessment: A comparative review* (2nd edn, Pearson Education Limited 2003) 405; John Glasson, Riki Therivel and Andrew Chadwick, *Introduction to Environmental Impact Assessment* (4th edn, Routledge 2012) 392.

236 Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66 *The Modern Law Review* 82-83; Mark S Reed, 'Stakeholder participation for environmental management: A literature review' (2008) 141 *Biological Conservation* 2417; Ebbesson (n 25) 68-69.

237 Vincent Luyet and others, 'A framework to implement Stakeholder participation in environmental projects' (2012) 111 *Journal of Environmental Management* 216.

238 James L Creighton, *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* (John Wiley & Sons 2005); Vincent Luyet and others (n 46) 213.

239 Lee and Abbot (n 45) 87.

240 Richardson and Razzaque (n 4) 175.



established through Articles 6 and 7 of the Convention. For example, “[t]he type of participation described through Article 6 of the Convention falls at a particular level on the ladder of participation²⁴¹—somewhere above pure consultation but well below co-decision-making.”²⁴² The participatory techniques proffered by the Maastricht Recommendations provide the opportunity for direct dialogue between the public, public bodies (agencies), and the private sector in the spirit of participative or deliberative democracy, which requires more extensive mechanisms than traditional consultation²⁴³ and “emphasizes both participation and the creation of mechanisms for informed dialogue.”²⁴⁴

In line with the Maastricht Recommendations, the author has selected the participatory techniques, classifying them into two categories. In this chapter, they will be referred to as “indirect or corrective participatory techniques” and “direct participatory techniques” (see Figure 2). Indirect participatory techniques are techniques that are not pure participatory tools, but rather mechanisms that can trigger the application of the direct participatory techniques. Direct participatory techniques can be applied directly to facilitate and organize public

participation. The participatory techniques can be applied simultaneously across both types of classification and within each category. However, the results deployed in Figure 2 were chosen selectively and do not represent an exhaustive list of all the participatory techniques of the Maastricht Recommendations. In the framework of this chapter, only a particular part of the general recommendations is analyzed.²⁴⁵

The techniques of the general recommendations the author identified are depicted in Figure 2. A brief textual characterization will be given for some of them to exemplify the specifics of both types of the participatory techniques and their interrelationship. For example, the use of tools and techniques that are proportional to the complexity and potential impact (the corrective participatory technique) implies that “for activities subject to the Convention of high potential environmental significance or affecting a large number of people, more elaborate procedures may be appropriate to ensure effective public participation.”²⁴⁶ For activities with less significant formal environmental effects, it would be enough to provide access to relevant information and the opportunity to submit written comments and to have due account taken of them.²⁴⁷ For example, some EU member

241 Author’s remark - here is meant the well-known Arnstein’s ladder of citizen participation: see – Arnstein (n 34) 216.

242 Wates (n 6) 408. See also Jerzy Jendroška, ‘Public Participation in Environmental Decision-Making. Interactions Between the Convention and EU Law and Other Key Legal Issues in its Implementation in the Light of the Opinions of the Aarhus Convention Compliance Committee’, Marc Pallemmaerts (ed), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011) 98.

243 Lee and Abbot (n 45) 86.

244 Creighton (n 47) xvi.

245 Maastricht Recommendations (n 1) 11-21.

246 *ibid* 14.

states (such as Austria, Denmark, Sweden, Italy, Greece,²⁴⁸ and the Netherlands)²⁴⁹ have adopted “simplified” environmental assessment procedures for projects with limited effects on the environment and “full-fledged” procedures for more complex cases.

The direct participatory technique—co-decision power (in the form of referendums at the national, regional, or local levels, as appropriate)²⁵⁰—is perhaps the most contradictory suggestion of the Maastricht Recommendations. There are, however, possibly some more moderate forms, for example, by “enabling members of the public concerned to participate in the process of generating the set of options that will be considered in the decision-making process, and thereafter expressing their preferences with respect to those options”²⁵¹ (at the “screening” stage or at the “scoping” stage) or using advisory referendums (not binding). Switzerland offers a notable and relevant example of giving citizens the right to decide certain environmentally significant matters through referendums.

In most countries with representative democracy, the idea of awarding to citizens the right to vote on environmental matters might be a challenging issue. In Latvia,

for example, the bill for a “Referendum Law in Local Municipalities”²⁵² has been discussed for several years. The bill is yet to pass the third reading in parliament. If the parliament adopts its current version, the citizens will have the right to initiate voting on a municipal sustainable development strategy (an SEA). However, the more ambitious proposal on awarding voting rights for municipal land plans, their amendments, and local plans was removed during the second reading.

The choice of the form of the co-decision power, however, largely depends on the choice of tools and techniques that are proportional to the complexity and potential impact. Occasionally, it might be enough to involve that portion of the public (including NGOs and/or other members of the public) with relevant expertise in advisory bodies for the decision-making procedure (through specialized commissions and for environmental assessment—EIA commissions).²⁵³ Such an involvement technique resembles the so-called national quality committees (e.g., independent agency—the Netherlands Environmental Assessment Commission in the Netherlands, or internal committees in France, Italy, and Greece).²⁵⁴ However, this practice is not in line with the suggestions of the Maastricht

247 *ibid.*

248 European Commission. Proposal for a Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. Brussels, 26 October 2012, SWD(2012) 355 final, 28, see also 38, 144.

249 Act to Modernise Environmental Assessment, came into force on 1 July 2010.

250 Maastricht Recommendations (n 1) 14.

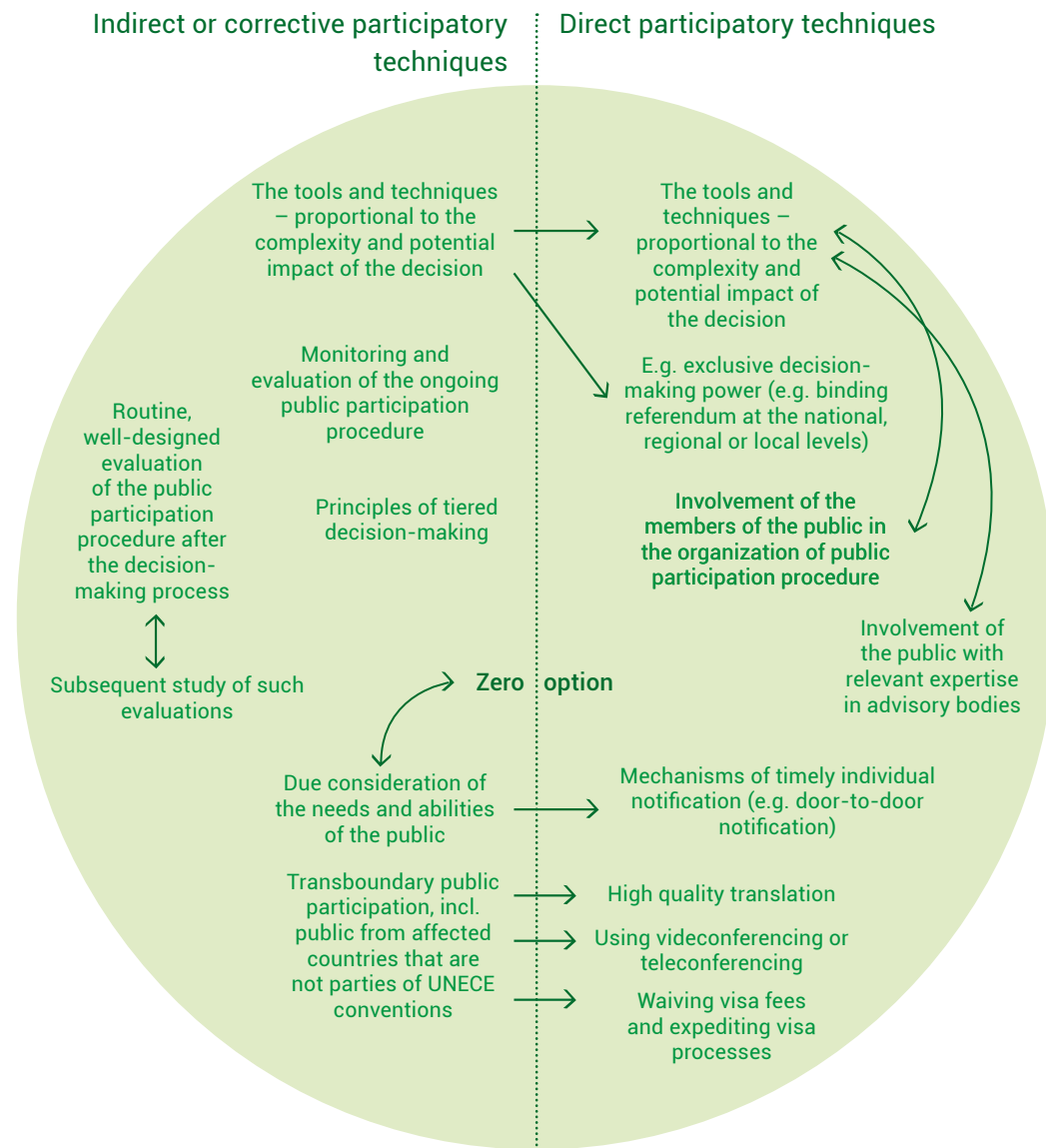
251 Wates (n 6) 408.

252 Parliament of the Republic of Latvia (Saeima). Vietējo pašvaldību referendumu likums (Referendum Law in Local Municipalities) <[http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/webAll?SearchView&Query=\(\[Title\]=*Viet%C4%93jo+pa%C5%A1vald%C4%ABbu+referendumu+likums*\)&SearchMax=0&SearchOrder=4](http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/webAll?SearchView&Query=([Title]=*Viet%C4%93jo+pa%C5%A1vald%C4%ABbu+referendumu+likums*)&SearchMax=0&SearchOrder=4)> accessed 31 August 2016

253 Maastricht Recommendations (n 1) 17.



Figure 2. Indirect or corrective participatory techniques and direct participatory techniques of the Maastricht Recommendations.



Source: the author, inspired by United Nations Economic Commission for Europe (UNECE). Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters (United Nations 2015) (Maastricht Recommendations).

Recommendations. They specifically reflect on the involvement of the public in the work of such commissions and not only participation by experts from natural and technical sciences, or by those exclusively nominated by the government.

Another direct participatory technique is tailored mechanisms of timely individual notification. These notifications are not only given through classical mediums such as print and electronic mass media (TV, radio, Internet), posting of notices and bill-posting, but also by less traditional approaches. These approaches include “electronic mailing lists and automatic notifications connected to electronic databases; in regions where significant parts of the public lack regular access to the Internet, other effective and culturally appropriate means of individual notification should be used, e.g. by mail or even door-to-door notification.”²⁵⁵ The choice of the mechanism of timely individual notification is related to the corrective participatory technique; namely, considering the needs and abilities of the public and identifying vulnerable/marginalized groups. This includes the participation of poor, disadvantaged, and rural communities, including women, youth, indigenous peoples, and farmers. For example, it has been found that these groups have been addressed insufficiently for EIA procedures in South Africa.²⁵⁶

It must be acknowledged that the participatory techniques reflected in the Maastricht Recommendations echo the spirit of the reviews of the literature on public participation. For example, the Maastricht Recommendations’ suggesting using tools and techniques that are proportional to the complexity and potential impact of the decision is in-line with the well-known “wheel of participation” developed in the literature.²⁵⁷ However, some of the suggestions made in the Recommendations go beyond the findings of literature, as some academic commentators apply a cautious approach to different co-decision power tools (e.g., the eventuality of the use of referendums).

5. Implications of the Maastricht Recommendations to National Legal Frameworks

It is not possible to agree on a “one-size-fits-all” approach to public participation in all contexts.²⁵⁸ Legal systems vary across a wide range of geographical, cultural, historical, and institutional settings. For example, even at the EU member-state level, the contexts in which procedural rights of the Aarhus Convention and the EU supranational legislation operate “are diverse, and reflect differences of legal and

254 European Commission (n 57) 80, 119.

255 Maastricht Recommendations (n 1) 17.

256 OECD (n 14) 64-65.

257 Scott Davidson, ‘Spinning the wheel of empowerment’ (1998) 3 Community Planning 14.

258 Maastricht Recommendations (n 1) 13-14; Luyet and others (n 46) 214; Ebbesson (n 27) 59; du Plessis (32).



democratic traditions."²⁵⁹ Another example concerns referendums. The question of what of shape this mechanism might take in different constitutional contexts is left open to future discussion. An obvious starting point is an assessment, reflection, and where appropriate, further elaboration on existing norms and standards in relation to public participation in environmental assessments.

Even though several best practice principles and elements "can be identified that should be reflected in participatory processes,"²⁶⁰ the Maastricht Recommendations are "neither binding nor exhaustive".²⁶¹ The presented list of the participatory techniques is not exhaustive. It is possible to develop and use other techniques as well (e.g., the active role of the public in monitoring, as seen in the "flood protection Linth 2000 project" in Switzerland²⁶² or in sharing project benefits).²⁶³

Against this background, the notion of "national legal framework" must be interpreted broadly, including all sources of national law: constitutional, legislative, regulatory, and administrative provisions, as well as case law and administrative

practice.²⁶⁴ Also, "best practice" recommendations are considered to be a constitutive element of the sources of modern legal theory.²⁶⁵ In some cases, inflexible national policy and regulations might make it difficult to act when new and more interactive approaches are used and irregular insights and agreements gained (reported cases from the Netherlands (Meuse basin), England, and Wales (Ribble basin)).²⁶⁶ The use of the best practice recommendations and the need to elaborate existing legal provisions are directly correlated. The states shall not limit themselves to the simple transposition of the formal procedural provisions in their national legal frameworks, but shall consider the most suitable mechanisms, in line with "best practice" recommendations.

The first steps towards fulfilling the agenda of adopting the Maastricht Recommendations in national legal frameworks are in translating the Recommendations into relevant national languages and organizing training for officials in applying the Recommendations.²⁶⁷ Following this, two scenarios are possible: as a minimum, to introduce innovative participatory

259 Richardson and Razzaque (n 4) 177.

260 Ebbesson (n 27) 59.

261 Maastricht Recommendations (n 1) 6.

262 HarmoniCOP Project, Public Participation in River Basin Management of Switzerland: "Fighting against Floods" (HarmoniCOP 2003) 20-21.

263 Paul (35) 2-3.

264 Maastricht Recommendations (n 1) 12.

265 cf. Peter Malanczuk, Akehurst's Modern Introduction to International Law (7th edn, Routledge 1997) 54-55; Michelle Everson and Julia Eisner, The Making of a European Constitution: Judges and Law Beyond Constitutive Power (Routledge 2007) 214.

266 Erik Mostert and others, Social learning in European river-basin management: barriers and fostering mechanisms from 10 river basins (2007) 12(1):19 Ecology and Society <www.ecologyandsociety.org/vol12/iss1/art19/> accessed 15 August 2016

techniques through guidance; and as a maximum, to merge political (voting and elections) and organizational dimensions of public participation through legislation. The provisions of these techniques professed by the Maastricht Recommendations must be complemented by and can be elaborated on through constitutions (e.g., the use of the referendums) and statutory provisions. However, possibly, some of the techniques might be associated with regulation, while some (e.g., choice of the type of referendums) may be left as voluntary guidelines.

6. Conclusion

The right to participate in the environmental assessment procedure extends beyond the formal obedience of procedural requirements. It reflects the meaningful realisation of the right to be heard and the right to affect decisions concerning the environment and affecting the lives of people.

Inspired by the Maastricht Recommendations, several participatory techniques are presented, some of which are briefly discussed. The difference between direct and indirect or corrective participatory techniques has been explained.

The participatory techniques of the Maastricht Recommendations provide the opportunity for direct dialogue between the public, public bodies (agencies),

and the private sector in the spirit of deliberative democracy. They extend beyond the framework of the relevant provisions of the Aarhus Convention and, occasionally, the findings of the literature on public participation.

The techniques of the Maastricht Recommendations will favor the meaningful public participation in environmental assessment procedures, eventually becoming an internationally recognized standard. However, on the national level, the choice of best appropriate participatory techniques shall be based on joint decision-making (and not unilateral action), considering a wide range of geographical, cultural, historical, and institutional settings.

Future research needs to analyse different participatory techniques for diverse stages ("screening" and "scoping") of environmental assessment and explore all the innovative approaches offered by the Maastricht Recommendations. The interrelationship between the Aarhus Convention and other international treaties, and the Maastricht Recommendations and other guidance material, must be investigated and established. This would improve understanding of the most suitable participatory techniques in environmental assessment procedures and favor their legal recognition.



An Environmental Dignity Rights Primer

Erin Daly

I. Introduction

The relationship between dignity rights and environmental rights is historically interesting, conceptually complex, and multi-dimensional in practice. Both of them attend to life on earth, which is as old as the world itself, and yet both areas of law have emerged only within living memory, to address matters that had been previously thought unamenable to regulation. And yet both types of rights have proliferated in constitutions around the world. Dignity rights emanated from the founding architecture of modern international human rights law while environmental rights grew out of the fusion of international environmental law and human rights law,²⁶⁸ now embodied largely in global constitutionalism. In the last few decades, both types of rights have become so prevalent in domestic constitutional texts that hardly a new constitution is promulgated without reference to one or both. As a result, both dignity rights and environmental rights have increasingly gained the attention of domestic constitutional courts, as well as regional human rights tribunals, where they have been interpreted and applied in a vast array of settings.

Cases about dignity implicate the entire human experience, from gestation to death and everything in between, including our identity, what language we speak, where we live, how we learn, what work we do, whom we marry, whether and when we have children, what beliefs we hold and express, how we organize our society, how we participate in community decisions, and more. Cases about the environment, on the other hand, implicate everything outside of the human being: the air we breathe, the soil we walk on and plant, and the water we drink, use, and revel in. The two areas together encompass the gamut of the human and natural world.

268 The International Bill of Rights comprises the Universal Declaration of Human Rights (UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 4 September 2016]), the International Covenant on Civil and Political Rights (UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 4 September 2016]) and the International Covenant on Economic, Social, and Cultural Rights (UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 4 September 2016]), all three of which root the protection of human rights in the inalienable and equal dignity that is the birthright of every member of the human family.

Curiously, notwithstanding the extraordinary breadth of global dignity jurisprudence, dignity cases so far have not reached environmental issues. And while the environment is increasingly seen to affect all manner of human rights, few environmental cases so far have characterized environmental degradation or the impacts of climate change as threats to human dignity. Thus, while both areas of law are gaining increasing attention from jurists and scholars, the relationship between the two remains underdeveloped.

This paper suggests some ways to think about the relationship between environmental and dignity rights, to the benefit of both.²⁶⁹ In particular, this paper – part of a larger project on environmental dignity rights – aims to suggest ways in which the already robust constitutional jurisprudence of dignity might inform our understanding of environmental rights as that jurisprudence further develops. Part I provides an overview of human dignity as it is rendered in constitutional case law. I use a taxonomy of dignity rights derived from the Colombian constitutional court as a starting point, develop it a bit further from there, and then draw the boundaries that delimit what dignity is and is not in the case law. In Part II I link this understanding to environmental rights and their emergent case law. In the final Part,

I suggest ways in which linking the two areas might strengthen our understanding of rights-based approaches to dignity and environmental law, and show how reference to dignity could alleviate some of the inherent tensions that have gripped this area of law. Ultimately, this approach can help deepen our understanding of how our environments impact who we are.

I. A taxonomy of dignity rights

Human dignity is a supremely powerful concept because it applies equally and inherently to every person. And if it applies to every member of the human family, it can stretch across time (applying to future generations as well as to the present one) and space (applying to individuals and to communities and cultures across the globe).²⁷⁰

Cases involving the right to dignity are by now far too numerous to count, and form part of the infrastructure, or *grundnorm*, of constitutionalism in Latin America, Europe, much of Asia and parts of Africa and the Middle East. In the aggregate, the cases represent the idea that every person has value that is equal and that must be respected at least by government if not also by private entities. This simple assertion transcends almost every aspect of human life and, as a result,

269 Some of the ideas articulated here have been explored elsewhere, including Daly & May, *Bridging Environmental and Dignity Rights*, 7.2 JHRE 160 (2016).

270 For an overview of dignity cases, see Barak A *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press Cambridge 2015); Daly E *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (U. Penn Press Philadelphia 2012); Dupré C *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Bloomsbury Publishing London 2015).



dignity rights cases have arisen in an astounding array of factual situations. Cases recognizing human dignity have implicated the choice of names, access to housing and water, information about birth control, prison conditions, health-care coverage, protection against rape, voting and the right to run for office, advertising, terrorism, families, and more. Human dignity can stand on its own, or it can be associated with civil and political rights as well as with socio-economic and cultural rights. It can be substantive or procedural. It can be individual or collective.²⁷¹

Among the courts that have been most interested in the elucidation of the concept of dignity as a constitutional device are the German Constitutional Court (elucidating dignity as an eternal and foundational right),²⁷² the Israeli Supreme Court (describing dignity as a “mother right,” particularly under the guidance of former President Judge Aharon Barak),²⁷³ the South African Constitutional Court (since even before the adoption of the 1996 Constitution),²⁷⁴ and the Colombian Constitutional Court.²⁷⁵ The latter court, in particular, has applied dignity in a dizzying array of cases and has provided



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a taxonomy for its definition that may be useful as an organizational tool to illustrate the implications of dignity rights for environmental protection. It has identified three clear and distinct lines of thinking: human dignity can be understood (1) as autonomy or the possibility of designing a

271 See, e.g., Düwell M et al *Cambridge Handbook of Human Dignity* (Cambridge University Press Cambridge 2014) and McCrudden C *Understanding Human Dignity* (Oxford University Press Oxford 2013) for some of the more recent contributions to the field.

272 German Basic Law, Art. 1(1): ‘Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.’ Also see, e.g., BVerfGE 133, 241 *Aviation Security Act case*.

273 See Barak at 156-169, and cases cited therein.

274 See, e.g., *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) and see the South Africa Constitution, s. 1: ‘The Republic of South Africa is one, sovereign, democratic state founded on the following values: a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.’

275 The Hungarian Constitutional Court should also be mentioned for its elucidation of dignity as a general personality right having far-reaching applications; this jurisprudence withered in 2011 when the new constitution eliminated the foundational value of human dignity and erased the previous case law. See Dupré C *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart Publishing 2003).

life plan and self-determination according to one's own desires; (2) as entailing certain concrete material conditions of life; and (3) as the intangible value of physical and moral integrity.²⁷⁶ As shorthand, the court characterizes these three dimensions, respectively, as living as one wishes, living well, and living without humiliation.²⁷⁷ To these three I would add procedural rights as a fourth category of dignity interests that has particular salience for environmental rights practice.

A. Living as one wishes

The Colombian Court describes this first category as “autonomy or the possibility of designing one's life plan and to self-determination according to one's own characteristics.”²⁷⁸ This corresponds most closely with the conception of dignity we see in industrially developed countries, concerned as such constitutional democracies are with the individual ability to define the course of one's own life. It resonates strongly with the German conception of dignity, which has developed largely within a Kantian framework that

puts the individual as the subject, not the object, of the government's interest.²⁷⁹ In the United States, where human dignity jurisprudence is incipient, the Supreme Court has also viewed dignity as the value that protects each person's control over his or her own life.²⁸⁰ Dignity here is a matter of agency and control; its predominant attributes are individualism and rationality – although in the same sex marriage cases, the emotive aspects of dignity are also recognized.²⁸¹

B. Living well

This dimension of dignity rights implicates socio-economic interests so as to ensure that people live with sufficient material comfort as to assure a life of dignity. Some constitutions – particularly those in wealthy social states – provide for social support explicitly. Finland's constitution, for instance, provides that “Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care.”²⁸²

276 Sentencia T 088/08 at 3.5.5 (Constitutional Court of Colombia): Y es que el contenido de la expresión dignidad humana puede presentarse de dos maneras: a partir de su objeto concreto de protección ya partir de su funcionalidad normativa. Al respecto, en la sentencia T 881 de 2002 esta Corporación manifestó: Al tener como punto de vista el objeto de protección del enunciado normativo dignidad humana, la Sala ha identificado a lo largo de la jurisprudencia de la Corte, tres lineamientos claros y diferenciables: (i) La dignidad humana entendida como autonomía o como posibilidad de diseñar un plan vital y de determinarse según sus características (vivir como quiera). (ii) La dignidad humana entendida como ciertas condiciones materiales concretas de existencia (vivir bien). Y (iii) la dignidad humana entendida como intangibilidad de los bienes no patrimoniales, integridad física e integridad moral (vivir sin humillaciones).

277 .Id. Also see Sentencia T-009/09.

278 Id.

279 See Dupre C, The Age of Dignity at 70: 'To paraphrase Article 1 of the draft German Basic Law, individuals do not exist for the state, but the state exists for the individual.'

280 See e.g. Planned Parenthood v. Casey, 505 U.S. 833 (1992), Indiana v. Edwards, 554 U.S. 164 (2008).

281 See e.g. Obergefell v. Hodges, 135 S. Ct. 1732 - 2015 , Halpern v Canada (AG), [2003] O.J. No. 2268 (Ct. App. Ont.), Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).

282 Finland Constitution, sec. 19.

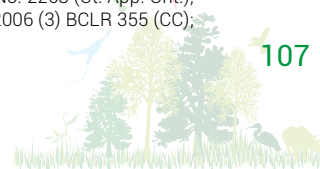




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Where it is not explicit in the text, courts have inferred a modicum of comfort as indispensable to human dignity. The Indian Supreme Court has read the constitutionally protected right to life as denoting something more than mere “animal existence,”²⁸³ elaborating that to ensure that people “live with human dignity and all that goes along with it” the government should ensure access to “the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”²⁸⁴

Thus, cases involving housing,²⁸⁵ education,²⁸⁶ pension,²⁸⁷ and health care,²⁸⁸ have also been held to implicate people's ability to live with dignity. In some cases, the right to live in dignity is explicitly a social right, as it is in the Indian case quoted above, and in this Israeli case, where the Supreme Court said: “Human dignity is violated if a person wishes to maintain his life as a human being within the society to which he belongs, but finds that his means are poor and his strength is too weak to do so.”²⁸⁹ These cases reinforce the relationship between one's dignity and one's social environment.

C. Living without humiliation

This aspect of dignity ensures that those who are dependent on the state or on others for their well-being, whether by virtue of their own incapacity or not, are treated with sufficient respect for their dignity that they are able to live without humiliation, even if not independently. In the context of prisoners' rights, the Israeli Supreme Court has said, “Prisoners should not be crammed like animals into inadequate spaces. Even those suspected of terrorist activity of the worst kind are entitled to conditions of detention which satisfy minimal standards of

283 Chairman, Railway Board & Ors v. Chandrima Das & Ors (2000) 2 LRI 273, 33

284 Daly, Dignity Rights at 126-7.

285 Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

286 See e.g. HCJ 5373/08 Abu Levada v. Minister of Education (6.2.2011) (Heb.), cited in Barak, at 299.

287 See e.g. BVerfG, judgment of the First Senate of 09 February, 2010. 1 BvL 1/09 – Rn. (1-220) (Hartz IV).

288 Meza Garcia v. Ministry of Health, Exp.N. 2945-2003–AA/TC, (Apr. 20, 2004) (Peru Constitutional Tribunal), para. 25, quoted in Daly, Dignity Rights at 121.

289 HCJ 366/03 Commitment to Peace and Social Justice Society v. Minister of Finance, 60(3) PD 464 [2005] (Isr.), 2617, See Daly, Dignity Rights at 119.

humane treatment and ensure basic human necessities. How could we consider ourselves civilized if we did not guarantee civilized standards to those in our custody?"²⁹⁰ Even for those who cannot fully control their surroundings or the course of their own lives, these cases illustrate the psychic aspect of dignity and reinforce the principle that one's sense of self-worth and humanity is impacted by one's surroundings.

D. Participating in a political community

To the three dimensions of dignity rights proposed by the Colombian Constitutional Court, I would add a fourth that would recognize the value of living in community with others, and particularly the value of participating in a political community. Courts of several jurisdictions have implicitly recognized that, as the African concept of Ubuntu says, each of us exists only in relation to other people.²⁹¹ Our communal experience is essential to human existence and especially to human dignity. Thus, courts have recognized not just the individual but the social value of health, of identity, of reputation, and of expression, among many other things.²⁹³

Moreover, philosophers from Aristotle to Arendt have recognized the human necessity of participating in political communities: exclusion, ostracism, denaturalization, statelessness, and other forms of political excommunication are all violations of human dignity of the most serious and fundamental nature. Thus, human dignity constitutes a theoretical justification for civic and political rights and, in particular, for democratic rights of participation, including rights associated with free speech, freedom of the press, rights of association, electoral rights, and so on.²⁹⁴

E. What dignity is and is not

The global jurisprudence of dignity is broad, but not infinite; its form is still evolving, though it is not formless. While the scope of dignity may be seriously debated and while different conclusions may be reached, I would propose a definition of dignity that is supported by the bulk of constitutional cases from around the world. The fundamental lesson of the dignity cases is that each person has value that is inherent (just by virtue of being a member of the human family) and that is equal to that of every other

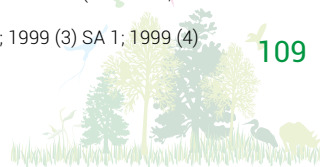
²⁹⁰ HCJ 3278/02 *Center for the Defense of the Individual v. Commander of the IDF* (2002), 101, quoted in Daly, *Dignity Rights* at 67.

²⁹¹ See generally, Cornell D, *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation* (Fordham U Press 2014).

²⁹² See e.g. ADI 3510 (Brazil, 2008) (a case involving the social health benefits resulting from stem cell research), discussed in Daly, *Dignity Rights* at 119.

²⁹³ See, generally Volk C, *Arendtian Constitutionalism: Law, Politics and the Order of Freedom* (Bloomsbury 2015). Also see Dupre C, *The Age of Dignity* 72, noting that 'Kant made the connection between humanity, dignity and participation in the making of the universal law,' and that Arendt 'derived the "right to have a place in the world" and to belong to a political community from human dignity', citing Arendt, *The Origins of Totalitarianism* (New York, Harcourt Brace 1973) 267-304.

²⁹⁴ See e.g. *August and Another v Electoral Commission and Others* (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (Constitutional Court of South Africa, 1 April 1999).



person; that is, no one's value may be subordinated for the benefit of another, whether private or public.

This has several important implications that are particularly salient for environmental protection.

- First, the dignity of which we speak is associated with human beings. This derives from the characterization of dignity in the Universal Declaration of Human Rights, which attributes it to every member of the human family.²⁹⁵ Dignity is thus a decidedly anthropocentric value. This is an important limitation in the context of environmental rights because it excludes the attribution of dignity rights to animals and to nature itself. While it need not be denied that animals and nature (as a whole or as parts thereof) have rights, those rights have yet to be identified and defined, but for our present purposes they are presumed to exclude rights of dignity.
- Second, dignity rights are associated with every human being - past, present, and future. Thus, children as well as future generations may be assumed to have the same dignity as presently living adults. Claims to environmental dignity would be equally strong whether asserted on behalf of present or future generations.

- Third, the concept of human dignity as it is rendered in law seeks to define the human person not as an unconnected atom but as he or she exists within a social and natural environment. Thus, while some of the cases tether dignity to rationality and the decision-making process – how we plan the course of our lives, how we make political decisions about our communities – other cases place individuals in the environments in which they live,



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295 '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.

considering how human beings relate to one another in social and political settings, as well as to their non-human surroundings. Examples include dignity cases about access to water, or to cultural endowments found in nature (including subsistence farming and fishing, as well as the protection of sacred spaces). That human dignity should include how people relate to their natural environments should be evident as a matter of common sense. One's dignity is threatened or diminished if one's natural environment does not support at least a subsistence level of existence. And as climate change threatens the ecosystems on which human beings depend for their survival, threats to human dignity will be commensurately heightened.²⁹⁶ The environment is therefore critical to the full respect for human dignity.

II. Environmental dignity rights

The precise relationship between human dignity and the natural environment is fluid, multivalenced, and complex, though the taxonomy suggested above will help illustrate how environmental concerns affect people's ability to live with dignity. Living as one wishes refers to the interest

in controlling the course of one's own life which, in turn, depends in part on the condition of the natural environment in which one lives. If the air is polluted, water resources are inadequate or unclean, or the soil is infertile, one's ability to design and implement one's life plan is limited. Extreme dependence on unyielding natural surroundings increases the portion of one's life allocated to collecting water, gathering wood for fuel, and harvesting productive crops, with attendant burdens on people's health and bodily integrity and their psychological well-being. Conversely, one's dignity is more easily protected when one's natural surroundings amply provide the necessities of life and one can spend one's residual resources attending to the full development of one's personality.

This aspect of dignity is distinct from but clearly related to the second dimension: living well. Here, courts have been concerned with the *quality* of life even beyond the level of subsistence - a concern that just as surely implicates the natural environment. Cases involving the environmental aspects of *living well* arise out of the construction of dams,²⁹⁷ access to clean water,²⁹⁸ impacts on health,²⁹⁹ and so on. Similar cases also concern discrimination in the availability and accessibility of the natural environment and of its spoliation. In its more extreme

296 See e.g. Mohammed Jameel Abdulla, 'This is why extreme weather conditions are an issue of inequality,' <http://abahlali.org/node/15648/> (visited September 4, 2016).

297 Friends of Lake Turkana Trust v. Attorney General, ELC Suit No. 825 of 2012 (May 19, 2014) Environment and Land Court (Nairobi).

298 Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009).

299 General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewral, Jhelum v. The Director, Industries and Mineral Development, Punjab, Lahore, 1994 SCMR 2061 (Supreme Court of Pakistan 1994).





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form, environmental degradation can create humiliating conditions that violate people's dignity by forcing them to live in substandard housing, or none at all.

Some of the most extreme ways that the natural environment can impact human dignity is when it in fact threatens the very lives of those who seek to protect

the environment. This implicates human dignity as well, as people's capacity to participate in community decision-making on environmental matters and to control their own and their community's destiny is impacted by difficult environmental conditions. International law has for nearly two decades recognized the critical importance of procedural rights in environmental matters as articulated most effectively in the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which establishes three pillars of procedural justice: the right to information, the right to participation, and the right of access to justice.³⁰⁰ These principles are now entrenched in three dozen constitutions.³⁰¹ Insofar as human dignity compels avenues for participation in public decision-making, the Aarhus principles ensure that such participation is available in matters of environmental concern. Yet the Special Rapporteur for Human Rights and the Environment has highlighted the killing of environmental rights defenders as one of the major threats to the protection of environmental human rights,³⁰² and thus to human dignity.

300 2161 UNTS 447; 38 ILM 517 (1999).

301 Boyd, *Environmental Rights Revolution* 106 (UBC 2012); May and Daly, *Global Environmental Constitutionalism* 31, 236-255 (2015).

302 See Knox J, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/28/61 (3 February 2015) at 11-12.

III. Transcending the tensions in environmental human rights

Better understanding of the links between human dignity and the environment would advance both environmental and human rights in three important ways. First, recognizing the ways in which human dignity depends on environmental health and sustainability would enrich dignity rights jurisprudence. Second, environmental rights jurisprudence would be strengthened by the recognition that environmental health is necessary not only for environmental sustainability but also to assure human dignity and its associated rights. Third, a better understanding of the relationship between human dignity and the natural environment could help transcend some of the conceptual obstacles that have stalled the fulfilment of the potential of the law of environmental human rights. The final part of this essay explores these objectives.

Improving the global body of dignity rights jurisprudence. Dignity jurisprudence has reached almost every aspect of the human experience, from our innermost thoughts and efforts to forge individual and unique identities, to our relations with family, friends, and our social, cultural, and political communities. The entire range of

human life is reflected in the dignity cases – except for our relationship to the natural environment that surrounds us. Only a few cases about the right to water recognize that inadequate or unavailable clean water is a threat to human dignity,³⁰³ but for the most part these cases are neither true dignity cases – characterizing the lack of water as primarily a threat to human life, rather than to the experience of human dignity – nor true environmental cases, as they consider water as a commodity for human consumption more than as an essential element of any ecosystem. This work posits that understanding the relationship between one's environment and one's dignity would extend the depth and enhance the relevance of dignity rights cases.

Enhancing the developing body of environmental human rights law. The scholarship proposing the fusion of international environmental law and human rights law is not new,³⁰⁴ but the idea has only recently begun to take root and flourish. The 2015 appointment of the Special Rapporteur for Human Rights and the Environment is one indication of the seriousness with which the international community is beginning to address the impact of our imperiled environment on human beings around the world. His attention has turned in some significant part to the large swathes of the earth's population who are most

303 See Mazibuko, above; and see Abu Masad v. Water Commissioner (Israel Supreme Court 2011)
304 Shelton D 'Human Rights, Environmental Rights, and the Right to the Environment,' 28 Stanford J. Intl L. 103 (1991). Also see Kravchenko S and Bonine J Human Rights and the Environment: Cases, Law and Policy (Carolina Academic Press 2008).



vulnerable to changing climatic and environmental conditions, including the extremely poor, children, and the politically marginalized.³⁰⁵ And yet (perhaps because legal jurists and academics are among the least vulnerable), it seems as though the arguments need repeatedly to be made anew, as we continually rediscover more ways in which the advancement of human rights and the protection of the environment for the present and future generations are interdependent and indeed indivisible.³⁰⁶

To the extent that some human rights are implicated in environmental matters, it stands to reason that dignity rights would be among them. It is hard to imagine an environmental condition that does not implicate human dignity. Recognizing the salience of human dignity would enhance the development of rights-based approaches to environmental protection at the domestic, regional, and international levels.

Constitutional environmental litigation is gradually accepting the idea that environmental endowments can be protected as assets to human development, both individually and socially. This requires a rethinking of how environmental interests map onto traditional individual rights litigation, implicating issues from

standing to remedies. For instance, in environmental constitutional litigation it is often quite difficult to prove standing for two principal reasons. First, it is difficult to prove that environmental degradation affects one individual more than any other(s) sufficient to show, in American jurisprudential parlance, that the injury is individualized. Second, it can sometimes be difficult to show any injury at all. Clearcutting a forest and excessive waste



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305 See e.g. Knox J Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (Mapping report) A/HRC/25/53 (30 December 2013).

306 'The commitment of European constitutionalism to human dignity is a constant reminder of the principle of indivisibility of human rights, and that emerging human rights must arguable be crafted with reference to the protection of human beings understood, not just as biological units, but rather as part of the human family, and in order to promote constructive and fulfilling interrelationships, including with generations yet to come.' Dupré, *Age of Dignity*, at 73. Also see Daniel Whelan, *Indivisible Human Rights: A History* (U. Penn 2010).

in a river cause real but not necessarily calculable or cognizable injury, particularly if the actions challenged do not have clearly adverse impacts on health. When the issues concern climate change, a third problem is showing the causal link between the defendant's action (whether it be a governmental entity's failure to regulate or a private entity's emissions of greenhouse gases) and the change to the climate. Some of these problems may be alleviated by focusing on the harm to human dignity caused by environmental degradation. Poor sanitation, infertile soil, excessive smog, ugly empty landscapes - all of these impact human beings' personal dignity, even if it is impossible to establish a causal link to health or life.

In terms of interpretation and application, dignity rights cases suffer from many of the same disabilities as environmental rights jurisprudence: courts can be deterred from engaging with these provisions (even when they are clearly justiciable and self-executing) because the language is vague and seems unbounded. But courts have engaged with dignity rights and have developed a sophisticated common law from which novice courts can draw insights and inspiration as they seek to define, delimit, and apply environmental rights provisions.

Lastly, environmental rights remedies could benefit from attention to dignity interests. An acknowledgment of harm done can represent a serious step toward

remediation that respects the dignity of the victims. Compensation for harm done and the remediation of injuries caused can also be keyed to the demands of human dignity as a benchmark. This would necessarily entail the participation and active engagement of the impacted community.

Better understanding of the relationship between people and the environment. Finally, better integrating dignity and environmental rights could enhance not only the development of the law but our understanding of how we live in relation to nature. While the predominant anthropocentric view is one of dominance, consumption and exploitation of an environment that is unlikely to survive our generation, let alone future generations, the dignity cases reflect a necessary harmony between the individual and his or her surroundings, such that threats to the environment threaten human dignity, and the protection of one advances the protection of the other.

This is evident in the narrative we so often see relating to indigenous groups and their harmonious relationship with nature. The Ecuadorian protection for the rights of nature itself is based on the concept of *sumac kawsay*, which was how some of the indigenous populations of the Andes articulated the idea of living in harmony with nature.³⁰⁷ Under this balanced and interdependent view of human and environmental

307 Constitution of Ecuador, Art. 71-74 (2008).



nature, sustainable ecological practices enhance the dignity of the communities as they protect the environment for generations to come. Whether this mischaracterizes, mythologizes, and essentializes indigenous populations is a fair question, but even if this attitude is not appropriately attributed to any or all indigenous populations, the point remains valid: it is possible to imagine a version of dignity that thrives in conjunction with the sustainable protection of the natural environment rather than in competition with it.



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Transformative constitutionalism and the interface between environmental justice, human rights and sustainable development

Michael Kidd

I. Introduction

Did Lindiwe Mazibuko, the applicant in the Constitutional Court case bearing her name, live in an environment not harmful to health or well-being?³⁰⁸ Did the approximately seventeen people on the South African Highveld who die from exposure to air pollution every year live in an environment not harmful to health or well-being?³⁰⁹ Did the three babies who died from drinking contaminated water in Bloemhof, South Africa in 2014 live in an environment not harmful to health or well-being?³¹¹ Are the people in the Tudor Shaft informal settlement in Johannesburg living in an environment not harmful to health or well-being? Was Sikhosiphi “Bazooka” Radebe killed because he was trying to protect this right for his community?³¹² Can we describe every South African’s environment as not harmful to health or well-being if the law allows valuable catchment areas and agricultural land to be mined for coal?³¹³

It is not difficult to think of countless South Africans, as in the above examples, both dead and alive, who are growing up, working, living and often dying in an environment that does not appear to meet the requirements of section 24 of South Africa’s constitution. This section reads in subsection (a): Everyone has the right to an environment that is not harmful to health or well-being. Most people interested in South African debates

308 See *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC). Ms Mazibuko passed away after the case was concluded.

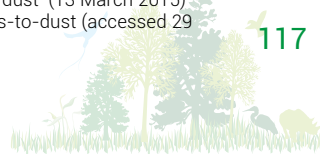
309 See Siphos Kings ‘How Eskom’s coal kills’ (20 June 2014) *Mail & Guardian*, available at <http://mg.co.za/article/2014-06-19-power-stations-are-deadly-internal-report-reveals> (accessed 29 August 2016).

310 See Melissa Fourie ‘Three infants die from polluted water in NorthWest: Justice must be done’ (9 June 2014) *Daily Maverick*, available at <http://www.dailymaverick.co.za/opinionista/2014-06-09-three-infants-die-from-polluted-water-in-northwest-justice-must-be-done/#.V8Pv2TXxGbE> (accessed 29 August 2016).

311 See Tracy-Lynn Humby ‘Environmental Justice and Human Rights on the Mining Wastelands of the Witwatersrand Gold Fields’ (2013) 43 *Revue générale de droit* 67.

312 See ENCA ‘Anti-mining leader assassinated’ (23 March 2016), available at <https://www.enca.com/south-africa/anti-mining-leader-assassinated> (accessed 29 August 2016).

313 See, for example, Centre for Environmental Rights *Zero Hour: Poor governance of mining and the violation of environmental rights in Mpumalanga* (May 2016); Siphos Kings ‘Mines turning our farms to dust’ (13 March 2015) *Mail & Guardian*, available at <http://mg.co.za/article/2015-03-12-mines-turning-our-farms-to-dust> (accessed 29 August 2016).



about the Constitution and its role in improving South African society will be familiar with Karl Klare's notion of transformative constitutionalism.³¹⁴ This notion can be summed up in the idea of the Constitution's role in transforming South African society into one which is more democratic, participatory and egalitarian. If we focus the project of transformative constitutionalism for our present purposes on one particular aspect of the Constitution – the environmental right (section 24) – the question that can legitimately be asked is whether the existence of section 24 has provided or is providing a positive impetus in lifting people out of situations of environmental injustice and, if not, why not? In other words, why, after more than 20 years of a Constitution aimed at improving people's lives and their environments, are so many people living in environments that are not improving or, in many cases, getting worse than they were 5, 10 or 20 years ago?

The first issue to bear in mind that lawyers often ignore (not necessarily consciously) is that the Constitution and human rights do not operate as a kind of magic spell that can wish away poverty, deprivation and the unacceptable living and other conditions in which many South Africans find themselves. All that the Constitution

does in this context is guide the way in which government³¹⁵ in all its spheres and branches acts in addressing these concerns. And the courts become involved only when it appears as if the government is failing, for whatever reason, to follow such guidance. The Constitution and the human rights it incorporates have a limited (if any) direct role in providing the resources, human skills, economic and environmental conditions that are conducive to achieving a better life for many.

In this regard, the second part of section 24 of the Constitution is relevant in that it speaks of everyone having the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that meet certain stated objectives, which are considered in detail below. In this paper I will consider both legislative and other measures (focusing for the purposes of this paper on executive or administrative measures) that can foster the section 24 right, and I reflect on why in many cases such measures are not doing so.

Legislative measures

Section 24(b) clearly envisages (as do many of the other rights in our Constitution) that the legislative branch of government

314 Described as '... a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'. Transformative constitutionalism 'connotes 'an enterprise of inducing large-scale social change through non-violent political processes grounded in law'. Is it 'possible to achieve this sort of dramatic social change through law-grounded processes'? (both quotes from Karl Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 SAJHR 146 at 150)

315 I am emphasizing government here because it is primarily responsible for addressing the kinds of problems I am discussing in this paper. This statement must obviously not be interpreted to suggest that the Constitution is not binding on non-state entities and individuals.

(at whatever level, provided it has the necessary Constitutional competence) is required to enact appropriate legislation in order to give effect to the substantive right. In cases where such legislation exists – and in the environmental context there is an admirable set of environmental statutes, most of these having been enacted in the Constitutional era and explicitly giving effect to section 24 – the Constitutional principle of avoidance requires reliance on that legislation before the invocation of a constitutional principle (or human right). So in most cases involving a legal challenge aimed at improving environmental conditions, the applicant would more than likely be relying on an environmental statutory provision rather than directly on the Constitution. If he or she were successful in invoking the relevant provision, this would be likely to improve the situation but not necessarily result in an outcome where the environmental right would be completely fulfilled. In many cases, there would still be a substantial gap between the reality and the ideal encapsulated in section 24.

For example, a person affected by exposure to air pollution may apply to a court asking for industries in her area to be forced to comply with the applicable emission standards. If successful, and if there were full compliance with the court

order, she would nevertheless still be exposed to air pollution. The reason for this is that pollution legislation, whether in South Africa or elsewhere, allows a certain level of pollution. The law is concerned with drawing a line between what is an acceptable level and what is not. What determines that line? We'll return to that question shortly. To exacerbate the situation, South Africa's legislation allows for industry to apply for the right to postpone their efforts to comply with the law, resulting in some of the most polluting industries being allowed, in terms of the law, to continue to pollute and, to put it bluntly, to kill people.³¹⁶

Why does the law allow this and, related to this question, is such a law consistent with the Constitution? Certain levels of pollution – and this is where the “drawing the line” issue arises – are inevitable in modern life. If the law allowed no pollution there would be no industry, no modern agriculture, no sewage purification, the only transport would be non-fuel-burning and, with the current technology used in South Africa, there would be very little electricity. The decision as to where this line must be drawn ultimately emanates from the idea of sustainable development, which is itself an element of South Africa's environmental right. As the Constitutional Court observed in the *Fuel Retailers* case: “socio-economic

316 See reg 6 of listed activities notice GN 248 in GG 33064 of 31 March 2010, issued in terms of s 21 of the National Environmental Management: Air Quality Act 39 of 2004; SANews ‘Minister grants reprieve to meet minimum emissions standards’ (24 February 2015), available at <http://www.sanews.gov.za/south-africa/minister-grants-reprieve-meet-minimum-emissions-standards> (accessed 29 August 2016). Note that the Minister's announcement of over 30 applicants who were granted postponements appears not to have been officially published in the Government Gazette.



development invariably brings risk of environmental damage as it puts pressure on environmental resources".³¹⁷ Not only does such development put pressure on environmental resources, it also affects people's health and well-being.

Feris has observed that the idea of a healthy environment can be an "elusive" concept, one for which there cannot "always be a universal standard", and asks "how does one establish some kind of threshold of quality below which the right may be violated?"³¹⁸ If this observation is accurate, it will assist us in answering the questions asked above relating to whether laws allowing certain levels of pollution are legally and constitutionally acceptable. I would argue that the idea of a healthy environment is not a difficult issue to define and thus would disagree with Feris that it is an elusive concept. Rather, what is difficult to ascertain is the extent to which the law ought to permit limitation of the right. Rights in South Africa's Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.³¹⁹

What this means is that the right in section 24 may be limited by laws that are designed to give effect to the very right they are limiting. If we look at the National Environmental Management: Air Quality Act,³²⁰ for example, it explicitly refers to section 24 in its objectives.³²¹ So at the same time as explicitly having the purpose of "the prevention [not reduction] of air pollution and ecological degradation" and to "enhance the quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people", the Act allows continuing air pollution at levels that harm or potentially harm human health. This is not merely a product of inadequate implementation – even if the Act were perfectly implemented it would still allow air pollution for reasons I set out above. This is because the Act is also aimed at "promoting justifiable economic and social development". This brings us back to the question of where

317 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) para 58.

318 Loretta Feris 'Constitutional environmental rights: An underutilised resource' (2008) 24 SAJHR 29 at 35.

319 Section 36 of the Constitution.

320 Act 39 of 2004.

321 Section 2. Also see the preamble. Section 2 reads 'The object of this Act is (a) to protect the environment by providing reasonable measures for-

- (i) the protection and enhancement of the quality of air in the Republic;
- (ii) the prevention of air pollution and ecological degradation; and
- (iii) securing ecologically sustainable development while promoting justifiable economic and social development.

(b) generally to give effect to section 24(b) of the Constitution in order to enhance the quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people'.

to draw the line between acceptable and unacceptable pollution (not just in relation to the Air Quality Act but all “pollution legislation”) and in this regard we need to look more closely at sustainable development and, in particular, what this means in the context of section 24.

Section 24 provides that everyone has the right to “have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that, *inter alia*, secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”. In order to determine how to draw the line between acceptable and unacceptable pollution in a constitutionally valid manner, it is necessary to consider what the purpose of development is, because section 24 requires economic and social development to be “justifiable”.

This is not the place to examine in any detail the precise meaning of sustainable development (even if that were possible), or even its meaning in a South African context. What is necessary is to provide sufficient meaning to be able to carry out the balancing acts that the law provides in a coherent and legally justifiable manner. If we continue with the example of the Air Quality Act, it is clearly not feasible, despite its stated aims, for the Act to prevent pollution. It therefore has to draw a line between the level of acceptable pollution and pollution that is not

acceptable. This clearly has ramifications for the economic situation (not only economic development, in the sense that development connotes moving forward in a positive direction, but also the economic status quo) in relation to industry, mining and, particularly important in the current South African context, energy generation. Energy is a prerequisite for development and this probably means that legislation which would have the effect of curtailing energy production would be regarded as unjustifiable. This appears to be the case even where such economically useful activity is killing people.

But even if it is not feasible to completely prevent economic activity that is harmful to people, sustainability surely requires the line to be drawn in the way that minimizes as far as possible environmental harm where that harm is particularly serious? It is submitted that human deaths are a sufficiently serious consequence of economic activity that restrictions on such activities ought to receive heightened scrutiny in order to ensure minimum harm. It would appear, however, that current South African priorities emphasize the holy grail of development to such an extent that negative consequences, even if they are considered in the legislative process, are regarded as collateral damage.

One of the ways in which this could be ameliorated is by focusing increased attention on exactly what is required by development in the South African context. It seems as if “development” is often seen



as self-evidently good along the lines of the “biggering and biggering” referred to in the famous Dr. Seuss book *The Lorax*.³²² In other words, the concept of economic growth is accepted uncritically. The National Development Plan, assuming it still plays any meaningful policy role, has as its “guiding objectives” the elimination of poverty and reduction of inequality.³²³ If these objectives are accepted as legitimate, then development must meet these objectives. “Sustainable development” in the South African context envisages, to put it simply, development that will lead to the elimination of poverty and the reduction of inequality while minimizing impacts on the environment. It is probably in the realm of administrative and executive decisions that development decisions are most frequently made that may have impacts on people’s environmental rights, and this will be considered further in the next section.

Executive/administrative decisions

In this section we will consider decisions made by members of the executive. The distinction between administrative and executive decisions is not significant for the purposes of this paper, but the types of decisions we are envisaging include environmental authorizations, licensing and permitting decisions, exemptions and so on. These would also include administrative decisions relating to the provision of services (such as water

services) that have environmental significance. For the purposes of this paper they will be referred to as “administrative decisions”.

Some administrative decisions are made primarily to improve the environmental situation of people. There are not that many of this type of decision. Examples that spring to mind are decisions relating to the setting of ambient air pollution standards and other decisions under the Air Quality Act, such as the declaration of priority areas. Some of these decisions are not yet beyond “paper decisions” – such as setting broad policy directions etc. (the declaration of priority areas, for example) – with the result that there is not yet any improvement in reality in people’s environments. Other examples suffer from the same problems as legislative decisions discussed above: while there may be improvement, there still remains a gap between the idea envisaged by section 24 and the reality.

The majority of administrative decisions that would have a bearing on the environmental right are those that involve action that would have a negative effect on the environment. Let us consider decisions in terms of section 24 of the National Environmental Management Act – so called environmental authorizations. Such decisions entail authorizing developments (primarily physical projects) having taken into account their economic, social and

³²² Dr Seuss *The Lorax* (1971).

³²³ National Planning Commission National Development Plan: Vision for 2030 (2011) at 2.

environmental impacts.³²⁴ In most cases, the primary thrust would be economic – a developer wanting to construct a physical structure(s) that would have at least some detrimental impact on the environment. The purpose (at least, the purpose on paper) of the environmental authorization would be to ensure that the development would have as small an impact on the environment as possible, taking into account the striking of some sort of balance between the economic, social and environmental factors in play. In most cases, the social and economic factors seem to be combined, so the process appears to entail striking a balance between what is referred to as socio-economic factors and environmental considerations.³²⁵ (In passing, it is worth observing that the combination of social and economic considerations is not well-advised, since decisions favoring the economic often have negative social (as well as environmental) impacts). Environmental authorizations are thus often seen as trading off employment (which is understandably a very important goal in the context of poverty reduction) and the environment. In most cases, it is the latter which usually comes off worse. Once again, this is due to subscribing to the idea of sustainable development, even if the adjective receives short shrift. In many cases, the decision favoring the economic objectives is justifiable, often because there is not much negative impact on the environment. There are, however,

often cases when the environmental impacts seem to be underestimated to the benefit of somewhat dubious economic objectives. Often development seems to be regarded as a self-evident good when careful analysis of the development benefits would reveal that there is little, if any, impact on poverty and inequality and that the profits from the development are repatriated to other countries.

I am not purporting to provide watertight economic analysis in this regard, but rather the point that I am attempting to make is that the social and economic benefits are often put on a pedestal and are not subject to the same levels of scrutiny as the environmental impacts (such scrutiny, in the case of the environmental impacts, usually aiming to minimize their importance). Ultimately, however, the legal justification for the balancing act is the primacy of the idea of sustainable development in the decision-making process, with environmental rights playing very much a background role.

Some administrative decisions do not explicitly involve consideration of the environmental impact or section 24 but certainly do have an impact on people's section 24 right. For example, the decision of the City of Johannesburg to install pre-paid water meters in the Mazibuko case had the effect of adversely affecting numerous people's section 24 right, but the right was not mentioned in any of the

324 As was the case in the Fuel Retailers case (note 10 above), for example.

325 See, for example, para 58 in Fuel Retailers (note 10).



judgments.³²⁶ More explicit consideration of the right and ideas of environmental justice would be beneficial in cases such as these.³²⁷

Then there are numerous cases of non-decisions that affect environmental rights. These are instances where government bodies are under a constitutional or statutory duty (often both) to make decisions but fail to do so, with the effect that people's environmental rights (and often other rights too) are infringed. One of the best examples of this in the current South African context is the pervasive problem of the failure to treat waste water (sewage) evidenced in the various *Green Drop Reports*³²⁸, as well as several cases where the water provided by municipalities, previously potable, is no longer safe to drink, as evidenced in the *Blue Drop Reports*³²⁹. There are no direct legal impediments to the resolution of these problems but they are not simple to address in practice. Solutions involve a combination of legal, political, economic and capacity considerations that are almost intractable in some cases.

How would judicial invocation of the section 24 right in such cases be able to improve

the situation? Firstly, due to the principle of avoidance, the applicants would have to rely on the relevant legislation – the Water Services Act³³⁰ and National Water Act.³³¹ But even if they were able to rely directly on the section 24 right, usual remedies may fall short because the problems are not simply cases of a negligent (or wilful) failure to comply with legislation and would often involve spending considerable amounts of money in order to make good the shortcomings.

Regular judicial remedies would also probably be deficient in cases where an applicant argues in court that he is living in an environment that does not meet the standards of section 24. Assume someone living in the south Durban basin argued in court that the Ethekewini municipality is required by section 24 to ensure that he does not live in an environment harmful to health and well-being.³³² Even if the court found in his favor, there would seem to be only two possible remedies (in broad terms): either the causes of the pollution in the area would have to be closed down or significantly restricted, or provision would have to be made for his relocation. It is extremely unlikely that the former remedy would be feasible because

326 Mazibuko v City of Johannesburg Unreported Case No. 06/13865 (W); City of Johannesburg and Others v Mazibuko and Others 2009 (3) SA 592 (SCA); and Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC).

327 See Melanie Murcott 'The role of environmental justice in socio-economic rights litigation' (2015) 132 South African Law Journal 875.

328 These reports, produced by the Department of Water and Sanitation, are available at https://www.dwa.gov.za/dir_ws/gds/Docs/DocsDefault.aspx (accessed 29 August 2016). See Michael Kidd 'Poisoning the right to water in South Africa: What can the law do?' (2011) International Journal of Rural Law and Policy 17pp available at <http://epress.lib.uts.edu.au/journals/index.php/ijrlp/article/view/2604/2834> (accessed 29 August 2016).

329 Available at <https://www.dwa.gov.za/dir%5Fws/DWQR/default.asp> (accessed 29 August 2016).

330 Act 108 of 1997.

331 Act 36 of 1998.

332 See Groundwork Slow Poison: Air Pollution, Public Health and Failing Governance (2014) for a description of the air quality in the south Durban area (at 27).

of the significantly adverse economic consequences. The problem with the second is that persons in such situations are often reluctant to relocate, despite the negative attributes of their current living conditions.

Conclusion

Thinking out of the box might lead to innovative remedies and legal ways of ameliorating some of the problems outlined in this paper. More critical consideration of the objectives of and need for development in individual projects may also lead to improvements. The bottom line, however, is that the environmental right in section 24 contains an internal modifier – sustainable development – that is ultimately inimical to the full realisation of the right to an environment that is not harmful to health and well-being (and, consequently, inimical to the

achievement of environmental justice). Not only is sustainable development an internal modifier but is also a justification for limitation in terms of section 36 of the Constitution. With the pursuit of development seen to be a prerequisite for the alleviation of poverty and inequality, the priorities in South Africa are such that the best that section 24 can achieve is the right to an environment that is not *unreasonably* harmful to health and well-being.

This paper still leaves many questions unanswered, the most obvious of which is one that I am not able to answer at this juncture but ought to give anyone interested in this topic pause for thought. And that is whether development can ever be sustainable if it leads to people dying? From a normative perspective one would expect the answer to be no, but what we are seeing in reality suggests otherwise.



Loss of Sense of Place as Displacement – New Frontiers for Environmental Rights

Loretta Feris

I. Introduction

The human rights impact of involuntary resettlement and displacement as a result of development project has long been recognized.³³³ However, many communities have no choice but to live within a natural environment that has been severely degraded and polluted as a result of newly developed roads, coal-fired power plant, mines etc. They bear the brunt of environmental degradation and pollution. As a result, their lived experience and relationship with the environment changes and their sense of place is altered - to the point where they feel displaced. This chapter argues that loss of sense of place is a form of displacement. Furthermore, that this form of displacement infringes upon environmental rights; and, as such, there is room for an environmental rights approach to address this form of displacement.

2. Loss of sense of place as displacement

Literature details the connections between displacement and loss of sense of place quite expansively.³³⁴ Sense of place can be expressed in a multitude of dimensions. This section focuses on three of these dimensions as expressions of sense of place. First, a person may experience an emotional bond to a particular space or piece of land.³³⁵ This has been articulated as 'the emotional significance that geographic spaces are able to take on in human experience that transforms them into places'.³³⁶ Fried made the argument that the

333 See C. McDowell, *Understanding impoverishment: The Consequences of Development-Induced Displacement*, Berghahn books, 1996; Robinson, *Risks and rights: The causes, consequences, and challenges of development-induced displacement*, Washington DC, Brookings Institution, 2003; L. Clark, 'World Bank and Human Rights: The Need for Greater Accountability' *Harvard Human Rights Journal*, vol. 15, 2002; T. Downing, *Avoiding New Poverty: Mining-Induced Displacement and Resettlement*, vol. 52, London, International Institute for Environment and Development, 2002.

334 See for example J. E. Windsor and J. A. Mcvey 'Annihilation of Both Place and Sense of Place: The Experience of the Cheslatta T'En Canadian First Nation within the Context of Large-Scale Environmental Projects', *The Geographical Journal*, vol. 171, no. 2, 2005, pp. 146-165; S.M. Low et al, *Place Attachment*, New York, Springer, 1992; J. Dixon and K. Durrheim, 'Dislocating Identity: Desegregation and the Transformation of Place', *Journal of Environmental Psychology*, vol. 24, no. 4, pp. 455-473.

335 J. Cross, 'What is sense of place', 12th Headwaters Conference, Western State College, 2001, p. 1 in S. Low, 'Symbolic ties that bind: Place attachment in the plaza' in I. Altman & S.Low (eds) *Place Attachment: Human Behaviour and Environment*, 1992.

336 Y.Tuan, *Topophilia A Study of Environmental Perception, Attitudes, and Values*, New Jersey, 1974 cited in V. Guliani, *Theories of Attachment*, Aldershot, 2003, p. 146.

forced transfer of people from their place of residence represents an interruption in the individuals' sense of continuity in that it involved the fragmentation of two essential components of identity – namely spatial identity and group identity, which are associated with strong emotional elements.³³⁷ In more recent work, the concept of place attachment is directly linked to environmental quality allowing for an acknowledgment of the psychological complexity of individual-environment relationship.³³⁸ A strong argument is made for the recognition of this bond as one that goes beyond affection, and as a relationship with an enduring quality, directed toward a specific place, not interchangeable with another with the same functional quality.³³⁹ Similarly, it could be argued that this relationship is not interchangeable with one in which environmental quality has been significantly deteriorated. Furthermore when a place's environmental quality is lost or is severely degraded it can sever the bond that people have with the affected land.

Second, loss of sense of place is also loss of place identity.³⁴¹ In other words a person sees his or her identity as intrinsically connected to a particular space or place.



Figure 1: Industrial operations in action ³⁴⁰

The cultural practices, ancestry, symbolic meanings and heritage of a place contribute to place identity. Displacement erodes the role of sense of place in individual and collective identity formation, in the way time, history and space are encoded and contextualized by way of interpersonal, community and intercultural relations³⁴² – as expressed in a particular environment. The transformation of the physical space carries the potential of fracturing these cultural identities and community bonds.

A third facet of sense of place is that of place dependence, articulated as the 'degree to which occupants perceive themselves to be strongly associated with

337 Study by Fried on the psychological effects of the forced dislocation of the population of a Boston suburb, the West End, in the course of a vast programme of urban redevelopment in V. Guliani, *Theories of Attachment*, Aldershot, 2003, p.144.

338 V. Guliani, *Theories of Attachment*, Aldershot, 2003, p.148.

339 *ibid.*

340 With permission from Carin Bosman@.

341 F. Steele, *The Sense of Place*, New York, CBI Publishing Co, 1981, p.12.

342 A. Smith, 'Displacement, resistance and the critique of development: from the grass roots', Report Prepared for ESCOR R7644 and the Research Programme on Development Induced Displacement and Resettlement Refugee Studies Centre, University of Oxford, 2001, p. 64.



and dependent on a particular place'.³⁴³ This association is typically based on the fulfilment of a specific need such as being close to sources of livelihood.³⁴⁴ As such, when that place is faced with ecosystem change it alters the basis of place dependency. Thus when land use is altered, water is polluted and biodiversity is stripped away, livelihoods are stripped away.



Irresponsible coal mining ³⁴⁵

3. Displaced while Still at Home: The People of Mooifontein

The erosion of place attachment, place identity and place dependency is vividly illustrated in the battle of the people of Mooifontein against Optimum Coal Mine. As depicted in a documentary on the plight of this community,³⁴⁶ the mining company contracted with South Africa's power supplier, Eskom to supply coal to its Hendrina Power Station until 2018.³⁴⁷ In order to do deliver on the contract, the mining company had to expand its operations, which in turn required the nearby community of Mooifontein to be relocated. While the bulk of the community agreed to relocation, approximately twenty households rejected the settlement offer of the mine and have remained.³⁴⁸ A primary reason for staying was to retain the pastoral lifestyle these 20 households enjoyed in their environment prior to the mining.

But the community was unable to retain their previous lifestyle. The rejection of the settlement offer means that the community now lives with blasting operations which requires residents to evacuate on a daily

343 R. Moore and A. Graefe, 'Attachments to recreation settings: The case of rail-trail users', *Journal of Leisure Sciences*, vol.16, no1. 1994, p19.

344 J. Cross, 'What is Sense of Place', Paper prepared for the 12th Headwaters Conference, Western State College, 2001, p. 8.

345 With permission from Carin Bosman ©.

346 Checkpoint: The Forgotten People, [online video], 2016, <https://www.enca.com/south-africa/checkpoint-forgotten-people> (Last accessed 29 August 2016).

347 J. Eybers, 'Workers Refuse to Move', *City Press*, 25 June 2016, <http://city-press.news24.com/News/farm-workers-refuse-to-move-for-tegeta-20160618> (Last accessed 29 August 2016).

348 S. Njobeni, 'Optimum Coal fine: Eskom sticks to its guns', *IOL*, 12 February 2016, <http://www.iol.co.za/business/companies/optimum-coal-fine-eskom-sticks-to-its-guns-1983466> (Last accessed 29 August 2016).

basis, and produces excessive dust, incessant noise disturbance, structural damage to housing and loss of agricultural and pastoral land. It is a community whose group identity has been fractured, whose peaceful space has been invaded, whose members' health is in peril from dust and noise, and whose environmental landscape no longer provides an income. It is a community that has been displaced, while still at home.



A home damaged by blasting from a mine operation³⁴⁹

4. New Frontiers for Environmental Rights?

The plight of vulnerable communities such as the Mooifontein community is generally recognized as a form of environmental injustice,³⁵⁰ central to which is an inextricable connection between the environment, race, gender and socio-economic status. Environmental injustice is thus understood as a form of inequity that impacts on people disproportionately on the basis of race, gender, culture and socio-economic status. There is thus a link between environmental injustice and human rights. In this respect, "the absence of certain human rights values (such as equality and dignity) can profoundly impact on people's entitlement to environmental goods and services – and indeed – that if we construct 'environment' to the exclusion of these values, we succeed in sustaining structural disadvantage."³⁵¹

Beyond rights to equality and dignity, this form of displacement also impacts on the right to live in an environment which is not detrimental to one's health and well-being.³⁵² As illustrated in the case

349 With permission from Simon Mathebula/Sunday Times ©. See also B. Jordan and K. Ndabeni, 'Fearless granny Poppi takes on a mining giant', Sunday Times, 14 June 2016, <http://www.timeslive.co.za/sundaytimes/stnews/2015/06/14/Fearless-granny-Poppi-takes-on-a-mining-giant-Glencore> (Last accessed 29 August 2016).

350 See for example R. Doyle and Bullard, *Dumping in Dixie: Race, class, and environmental quality*, vol.3, Boulder, CO: Westview Press, 2000; R. Doyle and Bullard, *Quest for Environmental Justice*, Sierra Club Books, 2005; T.Madihlaba, 'The fox in the henhouse. The environmental impact of mining on communities in South Africa', *Environmental Justice in South Africa*. University of Cape Town Press, Cape Town, South Africa, 2002, pp. 156-167; J. Dugard and A. Alcaro 'Let's work together: environmental and socio-economic rights in the courts' *South African Journal on Human Rights* 29, 2013, p. 14; C. Soyapi and L.J. Kotzé, "Environmental justice and slow violence: Marikana and the post-apartheid South African mining industry in context", 2016, p.4; *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia, and Latin America*, forthcoming.

351 L. Feris, 'Equality—Finding Space in the Environmental Discourse', *Oñati Socio-Legal Series*, Vol 3.5, 2013, pp.878-879.

352 See Constitution of the Republic of South Africa, 1996, sec. 24(a):'everyone has the right to an environment that is not harmful to his or her health or well-being'.



of the Mooifontein community, the dust and noise impacts from the mine clearly impacts on the health of the neighboring community. But what is also clear from the documentary is the sense of loss and desolation experienced by the community. The community has lost its connection to the land and this has had a profound impact on its members' psychological wellbeing. As noted above, connections to the physical environment correlates strongly with environmental well-being. As such, loss of sense of place has been characterized as "a chronic condition tied to the gradual erosion of the sense of belonging (identity) to a particular place and a feeling of distress (psychological desolation) about its transformation (loss of wellbeing)".³⁵³

Glazewski notes that environmental well-being encompasses a sense of environmental integrity and explains that it is 'a sense that we ought to utilize the environment in a morally responsible and ethical manner. If we abuse the environment we feel a sense of revulsion akin to the position where a beautiful and unique landscape is destroyed, or an animal is cruelly treated.'³⁵⁴ This view emphasizes the emotional connections that we may hold with respect to the biophysical space in which we find

ourselves, and the ways in which we find our identity as part thereof.

Equally important is the relationship between structural social inequality and well-being. Kidd argues persuasively that well-being is a critical component of the study of poverty and poverty alleviation and that poverty is in fact, the absence of well-being.³⁵⁵ In this context, three dimensions of human well-being are foregrounded; material deprivation, relationships and subjective experiences.³⁵⁶ As noted above, it is often poor communities that are most vulnerable with respect to the impacts of a polluted environment, in that workers live in close proximity to polluting activities and are without the financial means to be mobile and relocate out of reach of these activities or to control the extent of their exposure thereto.

One can also of course not ignore the spiritual and cultural dimensions of well-being³⁵⁷ which correlate strongly with place identity. This loss is strongly felt in respect of the displacement of indigenous communities. In a decision³⁵⁸ in the Inter-American Court of Human Rights concerned with the displacement of an indigenous community in Paraguay from lands that formed part of their traditional territory, the Court in relation to the Article

353 G.Albrecht et al., 'Solastalgia: The distress caused by environmental change', *Journal of Australasian Psychiatry*, vol. 15, 2007, p. 95.

354 J. Glazewski, *Environmental Law in South Africa*, Durban, Lexis Nexis, 2000 p.86.

355 M. Kidd, 'Environment' in I. Currie and J. De Waal (6 ed.), *The Bill of Rights Handbook*, Cape Town, Juta, 2013, pp. 516-521.

356 *ibid.*

357 L. Feris and D. Tladi, 'Environmental rights' in C. Heyns and D. Brand, *Socio-Economic Rights in South Africa: Analysis and Documents*, Pretoria, Pretoria University Press, 2005, p. 201.

358 *Yakye Axa Indigenous Community v. Paraguay*, 2005, p. 125.

21 right to property,³⁵⁹ emphasized “the special meaning of communal property of ancestral lands for the indigenous peoples, including the preservation of their cultural identity and its transmission to future generations.”³⁶⁰ The Court found that property in this context “must take into account the close ties of indigenous peoples with their traditional territories and the natural resources therein associated with their culture, as well as the components derived from them.”³⁶¹ Significantly, the Court noted that property includes intangible value.³⁶² This is a very important recognition of the relationship between communal land ownership and indigenous tradition, customs, rituals, values, art and relationships with nature.³⁶³ These relationships to land speak to a community’s sense of place and the well-being inherent thereto.

In essence, any activity or project that leads to wide-scale environmental pollution and degradation affects people’s ways of ‘being’ with the environment, their

emotional and psychological connections with the environment, their livelihood connections, their cultural connections and their spiritual connections. What is important, then, is to consider how displacement through loss of sense of place can be protected as an environmental right.

5. Displacement through Loss of Sense of Place and Environmental Rights

Environmental rights can be useful in the context of displacement through loss of sense of place or constructive displacement in four material ways. Firstly, by way of procedural rights or what is known in international environmental law as Principle 10 rights.^{364,365} Indeed, these procedural rights have been said to be the key to environmental rights.³⁶⁶ The idea is that if principles of democratic governance such as openness,

359 As set out in the American Convention on Human Rights O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (Nov. 22, 1969)

360 *ibid* para. 51.

361 *ibid* para. 137.

362 *ibid*.

363 United Nations Environment Programme, UNEP Compendium on Human Rights and the Environment, http://www.unep.org/environmental-governance/Portals/8/publications/UNEP_Compendium_HRE.pdf (Last accessed 15 June 2016).

364 This refers to Principle 10 of the Rio Declaration on Environment and Development UN Doc. A/CONF.151/26, vol. I, 1992, 31 ILM 874. The Rio Declaration is one of five agreements coming out of the United Nations Conference on Environment and Development (also known as the “Earth Summit”) in Rio de Janeiro in June 1992. It sets forth important principles of international environmental law, especially sustainable development.

365 For a discussion see A Eide, C Krause & A Rosas *Economic, social and cultural rights: A textbook* (1995) 261 et seq. The authors discuss *EW and Others v The Netherlands* Communication No. 429/1990 as an example of how this may be achieved. See also in South African context *Van Huyssteen NO v Minister of Environmental Affairs and Tourism* 1995 9 BCLR 1191 (C) where the court held that opponents to a proposed development had both *locus standi* and the right to access to information.

366 See e.g. the 1990 European Community Directive on the Freedom of Access to Information on the Environment (90/313/EEC). See for further support S. Scott ‘Environmental rights in the European Union: Participatory democracy or democratic deficit?’ in A Boyle & M Anderson (Eds) *Human rights approaches to environmental protection* (Oxford, 1996) and J Cameron & R Mackenzie ‘Access to environmental justice and procedural rights in international institutions’ in Boyle & Anderson.



accountability and civic participation are adhered to, then environmental standards will be maintained, or at least improved. Principle 10 sets out three fundamental rights: access to information, access to public participation and access to justice. These rights play a vital role in environmental governance and serve to promote transparency, inclusivity and accountability in decision-making processes. Any process or development project that could lead to the virtual displacement of communities must adhere to these procedural rights.

However, procedural safeguards provide at a minimum, adherence to processes, but do not necessarily lead to substantive outcomes. For example, public participation in no way equates to participation in or even the influencing of the final decision-making with respect to the activity that is assessed. Public participation is not decision-making in consultation with, but decision-making after consultation which does not ensure that comments of those that are affected will play an integral part in the final decision. Furthermore public participation processes are not implemented in ways that acknowledge and address structural inequalities of participants and the presence of predetermined positions of power (social power, political power and economic power) that is part of this

process. The production and perpetuation of inequalities remains an important part of the inability of law to achieve environmental justice. It is the production, ownership and use of power in a post-apartheid South Africa, for example that continues to define and weaken opposition to activities such as mining.

Secondly, the recognition of loss of sense of place as a form of displacement would bring it into the realm of State obligation. At present the physical displacement of persons and communities engender broad State obligations. The UN High Commissioner for Refugee's Basic Principles and Guidelines on Development-Based Evictions and Displacement addresses displacement resulting from environmental destruction or degradation³⁶⁷ and makes it clear that forced evictions 'constitute gross violations of a range of internationally recognized human rights. This includes the human rights to adequate housing, food, water, health, education, work, security of the person, security of the home, freedom from cruel, inhuman and degrading treatment, and freedom of movement.'³⁶⁸ Moreover it sets out the duties of States with respect to displacement and provide inter alia that "States shall: refrain from violating human rights domestically and extraterritorially; ensure that other parties within the State's jurisdiction and effective

367 Basic Principles and Guidelines on Development Based Evictions and Displacement Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living A/HRC/4/18 at para 9. See also T. Downing, 'Avoiding new poverty: mining-induced displacement and resettlement', vol. 52. International Institute for Environment and Development, 2002, p 3.

368 Basic Principles and Guidelines on Development Based Evictions and Displacement at para 6.

control do not violate the human rights of others; and take preventive and remedial steps to uphold human rights and provide assistance to those whose rights have been violated."³⁶⁹ These guidelines articulate the three important dimensions of State obligations vis-à-vis human rights; the obligation to respect (i.e. refrain from interfering with the enjoyment of the right), to protect (i.e. prevent others from interfering with the enjoyment of the right) and to fulfil (i.e. adopt appropriate measures towards the full realization) of the specific right. In view of these duties it is important to recognize loss of sense of place as a form of displacement that would engender State obligations similar to that of physical displacement. This means that States will need to at a minimum ensure that sense of place is addressed through processes such as environmental impact assessments and that appropriate and considered mitigation with respect to sense of place is provided for.

Thirdly, an environmental right influences the making and implementation of policy. It plays a role in the drafting of policy, legislation, regulations, plans and guidelines. It requires adherence in respect of the implementation of these policy and regulatory instruments. It

also offers guidance for the court in scrutinizing the regulatory framework and/or the implementation thereof. There is, for example a growing call for mandating a human rights impact assessment as part of³⁷⁰ or in addition to the EIA process.³⁷¹ With respect to the environmental right, policy and legislation mandating an environmental assessment, should adhere to the requirements of such a right. At the implementation stage an overarching standard in the assessment process should be whether an activity or project may lead to an infringement of environmental health and well-being including protection of the sense of place. Finally, the court as arbiter must ensure that this standard is met.

Fourthly, environmental rights can and should be litigated. While substantive environmental rights litigations remains an under-utilized tool,³⁷² some jurisdictions have begun to develop some jurisprudence on environmental rights.³⁷³ Furthermore at the level of regional tribunals the African Commission on Human and Peoples' Rights has found oil development practices in the Ogoni region of Nigeria to be in violation of the right to a general satisfactory environment,³⁷⁴ as guaranteed under article 24 of the

369 Basic Principles and Guidelines on Development Based Evictions and Displacement at para 21.

370 CIEL EIAS in Practice: Potential Lessons for Human Rights Impact Assessment, June 2010, http://ciel.org/Publications/EIA_Brief_Jun10.pdf, (accessed August 2016).

371 D. Olawuyi, 'Climate justice and corporate responsibility: taking human rights seriously in climate actions and projects', *Journal of Energy & Natural Resources Law*, Vol 34, no.1, 2016, pp. 27-44.

372 L. Feris, 'Constitutional Environmental Rights: An Under-utilised Resource', *South African Journal on Human Rights*, vol. 24, no. 1, 2008, pp. 29-49.

373 Examples of this include the Chagra de la Merced case in Argentina.

374 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, 2001, AHRLR p. 60. See also *The African Commission on Human and People's Rights v. Kenya*, 2012.



African Charter.³⁷⁵ Litigation has some clear advantages, in that it provides a remedy for those who feel that their voices are not heard and that they are disempowered. It furthermore provides an opportunity for the courts to engage with novel view-points such as the notion of virtual displacement posited here and the ability to carve out innovative and creative remedies. Most profoundly because of the system of precedent in common law systems it can lead to systemic change.

6. Conclusion

People can be displaced while still at home; any activity or project that creates wide-scale environmental pollution and degradation has the potential to create an emotional disconnect between people and their physical location in a way that infringes upon their right to environmental health and well-being. As such, displacement through loss of sense of place can and should be protected as an environmental right. This notion of “virtual displacement” to some extent is unchartered territory and as such requires more consideration. Regardless, it offers new challenges to the field of environmental rights and as noted above, it is a challenge that can be taken up in a number of ways. Ultimately, it should assist communities such as the Mooifontein Community to find their sense of place.

375 African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 1982, entered into force Oct. 21, 1986.





Photo credit: © Canadian wilderness³⁷⁶

376 Open access photo by Kalen Emsle downloaded from https://unsplash.com/photos/Bkoi_8qcdvQ



Regional and Country Studies

part 2



Environmental Constitutionalism in the Americas

Lynda Collins

1. Introduction

Human rights approaches to environmental protection are particularly relevant in the Americas as the pressure of resource extraction mounts throughout the region. Mining, logging and petroleum exploitation threaten the environmental rights of indigenous peoples and other local communities, while the processing of these resources (for example, through oil refining and metallurgical smelting) results in urban pollution and related human health effects. And yet, against this backdrop of intensive resource extraction and the pressure to expand rather than constrain these activities, this region of the world has demonstrated both leadership and innovation in the area of environmental human rights.

2. Latin America

There is little doubt that the leading American nations in the area of environmental constitutionalism are those of Latin America. The majority of Latin American countries enjoy constitutional environmental rights and some constitutions in this region actually provide detailed provisions fleshing out environmental rights as well as reciprocal government duties.³⁷⁷ Others (such as Brazil) also include environmental rights within sub-national constitutions.³⁷⁸

With respect to the impact and efficacy of constitutional environmental rights, Argentina, Brazil, Colombia and Costa Rica stand out as leading jurisdictions.³⁷⁹ In these nations, substantial and meaningful improvements in environmental legislation, enforcement and performance have resulted from the constitutionalization of environmental rights.

³⁷⁷ See David Richard Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012) at 117 et seq.

³⁷⁸ James R May & Erin Daly, *Global Environmental Constitutionalism* (Cambridge: Cambridge University Press, 2014) at 211.

³⁷⁹ Boyd at 117 et seq.

Simplified, low-cost “writ of protection” procedures (variously known as the *amparo*, *tutela*, and *accion de proteccion*) have allowed individual citizens and non-governmental organizations to effectuate the constitutional right to environment through litigation.³⁸⁰ Literally thousands of cases have been filed in Latin America to vindicate constitutional environmental rights and the success rates in such litigation have been relatively high.³⁸¹

There have also been bold judicial remedies in Latin American nations. Latin American courts have struck down resource extraction permits, required the construction of sewage treatment plants, and ordered compensation paid to victims of pollution. One example is the very significant case law of the Argentine Supreme Court regarding the clean-up of the Matanza-Riachuelo river basin, which was historically one of the most polluted watersheds in that nation.³⁸² Among other things, the Supreme Court required the government to conduct a comprehensive environmental assessment of the river; to inspect all polluting facilities; close illegal dumps; clean up the river banks; improve the storm-water, sewage and wastewater systems; and develop a regional environmental health plan.³⁸³ Hundreds of thousands of people now enjoy access

to safe drinking water and sanitation as a result of these judgments. Problems do remain in this area, however, and most recently in the fall of 2015, the Supreme Court ordered an updated comprehensive remediation plan including short-, medium- and long-term goals as well as indicators for measuring progress.³⁸⁴

Perhaps the most innovative development in Latin America is the recognition of rights for Nature, which are now legally recognized in both Ecuador and Bolivia. The Constitution of Ecuador provides that “Nature, or Pachamama, where life is reproduced and created, has the right to integral respect for her existence, her maintenance and for the regeneration of her vital cycles, structure, functions and evolutionary processes.”³⁸⁵ In *Wheeler c. Director de la Procuraduria General Del Estado de Loja* the Ecuadorian court held that the precautionary principle applies to claims under this provision and there is a presumption in favor of the rights of Nature:

[U]ntil it can be shown that there is no probability or danger to the environment of the kind of work that is being done in a specific place, it is the duty of constitutional judges to immediately guard and to give effect to the constitutional right of

380 Ibid at 69.

381 Ibid 117 et seq.

382 See Beatriz Silvia Mendoza et al. v. National Government et al. (Damages stemming from contamination of the Matanza-Riachuelo River), M. 1569, July 8, 2008, Supreme Court of Argentina.

383 Ibid; also see Silvia Coria, Presentacion de un Case Argentino de Acceso a la Justicia Ambiental: Caso ‘Mendoza,’ IJE Editores (Aug. 29, 2012), <http://www.ijeditores.com.ar/articulos.php?idarticulo=62812&print=1>.

384 <http://www.lanacion.com.ar/1837677-riachuelo-la-justicia-ordeno-que-se-haga-un-nuevo-plan-de-limpieza>.

385 Constitution of the Republic of Ecuador, Article 71 found at <<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.



nature, doing what is necessary to avoid contamination or to remedy it.³⁸⁶

In summary, the Latin American nations have been high achievers in the development of environmental constitutionalism. Major challenges nonetheless remain at the domestic level in Latin America and the Caribbean. Economic pressures to continue and indeed increase resource extraction remain constant; in many countries resources available for environmental regulation are limited; corruption impedes enforcement efforts; and conflicts persist between corporate actors and affected communities. These tensions, and the potential for human rights violations, are particularly acute in indigenous communities in the Americas. In response, petitioners have repeatedly sought recourse to the Inter-American human rights system.

At the regional level, the Inter-American human rights system administers the American Convention on Human Rights and the 1999 San Salvador Protocol which includes in Article 11 the right to a healthy environment and the reciprocal state duty to protect, preserve and improve the environment. Unfortunately the right to a healthy environment in the San Salvador Protocol suffers from limited justiciability; it

is subject to progressive realization and is not eligible for the individual petitions process. Nevertheless, both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have vindicated indigenous environmental rights through the use of related provisions.³⁸⁷ The Commission has recognized indigenous environmental rights repeatedly through reports, recommendations to states, and the referral of cases for adjudication by the Court.

As early as in 1985, in its decision in *Yanomami Indians v. Brazil*, the Commission found that Brazil had violated the Yanomami people's rights to life, liberty and personal security by failing to prevent serious environmental damage



Amazon Rainforest³⁸⁸

386 Wheeler c. Director de la Procuraduría General Del Estado de Loja, Juicio No. 11121-2011-0010; Erin Daly, 'The Ecuadorian Exemplar' (2012) 21:1 RECIEL 63.

387 The Inter-American Commission on Human Rights engages in fact-finding, makes recommendations, and can refer cases to the Court, which in turn is the adjudicative body in the Inter-American system and has the power to make binding orders to states party.

388 Open Access photo, on-line: <<https://pixabay.com/en/amazon-rainforest-brazil-260797/>>.

caused by resource companies.³⁸⁹ In 2000 the Commission requested that Argentina conduct adequate consultation with the Lhaka Honhat Aboriginal Communities in response to concerns that a highway construction project would violate the group members' rights to life and health.³⁹⁰ In 2004 it found that Belize had violated a Mayan indigenous group's right to property through the granting of logging and oil concessions.³⁹¹

At the Inter-American Court of Human Rights, the right to property under Article 21 of the *American Convention* has also been viewed as a major locus for indigenous environmental rights. In its 2001 decision in the matter of *Mayagna (Sumo) Awas Tingni v Nicaragua*, the Court found that the state's granting of logging concessions on the Awas Tingni's traditional territory constituted a violation of their communal right to property under Article 21.³⁹² The Court ordered Nicaragua to demarcate the applicant's territory and to ensure that nothing would "affect the existence, value, use or enjoyment of the property".³⁹³ In *Awas Tingni* and subsequent cases, the Court recognized an "all-encompassing" relationship between indigenous peoples and their lands, which

were necessary for their cultural, spiritual and material survival.

In a trilogy of cases against Paraguay involving displaced indigenous peoples coping with appalling living conditions in temporary settlements, the Inter-American Court also recognized environmental quality (including adequate food and water) as an aspect of the right to life. More particularly, the Court clarified that the right to life encompasses the right to a "decent" or "dignified" life – *vida digna* in Spanish. In the *Yakye Axa* case in this trilogy, the Court also specifically recognized the "right to cultural identity" as a basic right despite its absence from the provisions of the *American Convention*.³⁹⁴

The famous case of La Oroya illustrates the interplay between domestic constitutional rights, the Inter-American Commission and the Inter-American Court. La Oroya is one of the most polluted cities in the world, the result of years of toxic emissions from heavy metal mining and mineral processing. 99% of children in La Oroya have unsafe levels of lead in their blood. Finding a violation of the applicants' right to a healthy environment, Peru's Supreme Court ordered the Ministry of Health to

389 Yanomami Case, Case 7615 Inter Amer CHR 24, IACHR no 7615, Annual Report of the Inter-American Commission on Human Rights: 1985, on-line: http://www.wcl.american.edu/pub/humright/digest/Inter-American/english/annual/1984_85/res1285.html.

390 Aboriginal Cmty of Lhaka Honhat ("Our Land") v. Argentina, Petition 12.094, Inter-Am. CHR, Report No. 78/06 (Oct. 21, 2006).

391 Maya Indigenous Communities of Toledo Dist. v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1 (2004).

392 Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua (2001), Merits, Reparations and Costs Judgment, Inter-Am Ct HR (Ser C) No 79.

393 Mayagna (Sumo) Awas Tingni Community v Nicaragua, Inter-Am Court HR (Ser C) No 79 (31 August 2001).

394 See Thomas M. Antkowiak, 'Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court' (2013) 35 U. Pa. J. Int'l L. 113



declare a health emergency in La Oroya, and to put in place an emergency health plan for the city. Unfortunately its order was not enforced and the applicants accordingly petitioned the Inter-American Commission alleging, among other things, violations of the rights to life, privacy and family life, humane treatment, access to information, and judicial protection. In 2007 the Inter-American Commission granted precautionary measures, requesting that the Peruvian State adopt appropriate measures to provide the beneficiaries with specialized medical diagnoses; provide appropriate specialized medical treatment to those persons whose diagnoses indicated that there was a danger of irreparable harm to their personal well-being or their lives; and coordinate implementation with the petitioners and the beneficiaries.³⁹⁵ The Commission has referred the case to the Inter-American Court and it remains in process.

The Inter-American Court of Human Rights and the national courts of Latin America have produced a globally important body of jurisprudence on environmental rights. Progress has been slower in North America, but there are early signs of the emergence of environmental constitutionalism in this region.

3. North America

In the North American region, environmental constitutionalism is most fully expressed at the sub-national level. In the United States (US), the federal constitution contains no environmental right. In a series of cases beginning in the 1970s, litigants tried to convince American courts to recognize a right to environmental quality within the "penumbra" of the Ninth Amendment, a provision recognizing (but not exhaustively enumerating) fundamental rights.³⁹⁶ The American courts consistently rejected claims for the recognition of a substantive constitutional right to environment at the federal level.³⁹⁷

However, six states (Illinois, Pennsylvania, Montana, Massachusetts, Hawaii and Rhode Island) have environmental rights provisions in their respective state constitutions, which have the ability to grant rights to citizens over and above those contained in the federal constitution. All but one mention the public trust doctrine and the interests of future generations. Pennsylvania's constitution, for example, provides that

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

395 Paula Spieler, 'The La Oroya Case: The Relationship between Environmental Degradation and Human Rights Violations' (2010) 18 No. 1 Hum. Rts. Brief 19.

396 Carol L. Gallagher, 'The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present' (1997), 9 Fordham Env'tl LJ 107.

397 Ibid.

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.³⁹⁸

When citizens challenged a state law exempting oil and gas activities from environmental regulations,³⁹⁹ the Supreme Court of Pennsylvania struck down these provisions, ruling that “laws of the Commonwealth that unreasonably impair the right are unconstitutional” and that there is “an obligation on the government’s behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action.”⁴⁰⁰

Two Canadian provinces and three territories recognize the right to a healthy environment in their respective environmental bills of rights. The province of Quebec has enshrined this right in its (provincial) Charter of Human Rights and Freedoms, a quasi-constitutional statute that binds government actors. The remaining provincial/territorial environmental rights provisions are found

within ordinary statutes and are largely hortatory rather than substantive. A bill currently before the Manitoba provincial legislature would provide its citizens with a substantive and enforceable right to a “healthy and ecologically balanced environment”, but this has yet to pass into law.

No court has yet recognized a generalized, national right to a healthy environment in Canada or the US, but both countries enjoy a significant jurisprudence on indigenous environmental rights.⁴⁰¹ This might seem surprising given that both Canada and the US owe their existence to the subjugation of indigenous peoples and the forcible separation of first peoples from their lands and resources.⁴⁰² Perhaps in answer to these historical and continuing injustices, courts in both the US and Canada have recognized indigenous environmental rights in a number of significant cases.

In cases such as *Tsawout Indian Band v. Saanichton Marina Ltd*,⁴⁰³ *Halfway River First Nation v. British Columbia*,⁴⁰⁴ and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,⁴⁰⁵ Canadian courts have recognized that

398 Pennsylvania Constitution, Article 1 (Declaration of Rights), section 27 (Environmental Rights Amendment, 1971).
399 ‘Act 13,’ the 2012 Pennsylvania Oil and Gas Act Amendments, 2012 Pa. Laws 87 (Feb. 14, 2012), codified at 58 Pa. Cons. Stat. Ann. §§ 2301-3504.
400 Robinson Township et al. v. Commonwealth of Pennsylvania et al. (2013) Supreme Court of Pennsylvania, J-127A-D-2012, Dec. 19, 2013.
401 See eg Lynda Collins, “Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution” (2015) 71 Supreme Court Law Review (2d) 519; Carol L. Gallagher, “The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present” (1997), 9 Fordham Envtl LJ 107.
402 See Lynda Collins & Meghan Murtha, “Indigenous Environmental Rights in Canada: the Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish and Trap” (2010) 47:4 Alberta Law Review 959; Natasha Bakht & Lynda Collins, “The Earth is our Mother: Freedom of Religion and the Preservation of Aboriginal Sacred Sites in Canada” (2017) McGill Law Journal (forthcoming).
403 *Tsawout Indian Band v. Saanichton Marina Ltd* (1989), 57 DLR (4th) 161 (BCCA).
404 *Halfway* (BCSC).
405 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2001] FCJ No. 1877 (FCTD).



environmental degradation may violate constitutionally protected Aboriginal resource rights. Recently, the Federal Court of Canada granted an injunction to the Haida Nation suspending the 2015 commercial herring fishery in Haida Gwaii⁴⁰⁶ (the lands and waters of which are subject to an Aboriginal title claim). Taking a precautionary approach, it held that irreparable harm would ensue if the government permitted commercial fishing in the claimed area. In its most recent judgment on Aboriginal title, the Supreme Court of Canada also held that the environmental rights of Aboriginal title-holders include an intergenerational component. The Court held that “incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land”⁴⁰⁷ and further that Aboriginal title lands cannot be put to uses that would “destroy the ability of the land to sustain future generations of Aboriginal peoples”.⁴⁰⁸

In the US, courts have repeatedly recognized that treaty rights to reservation lands, hunting and fishing include the right to adequate water to sustain the rights in question. For example, American courts have protected tribal fishing rights by

prohibiting the construction of a dam that would have flooded a tribal fishery, the diversion of water away from spawning habitat, and the construction of a road culvert that would have interfered with salmon migration.⁴⁰⁹

Despite the absence of an explicit environmental right in the federal constitutions of Canada and the US, there are signs that environmental constitutionalism may be on the rise in North America. Two ongoing American cases are seeking judicial recognition of implicit constitutional environmental rights in the US, one arising from intergenerational harms caused by climate change and one from the massive contamination of drinking water in Flint, Michigan.⁴¹¹ The United States District Court recently rejected a motion to dismiss the climate suit, suggesting some judicial openness to these kinds of arguments. Taken together, these suits could catalyze a renaissance in environmental constitutionalism at the national level in the US. They represent very strong factual foundations on which to base calls for the recognition of a fundamental environmental right that may be found within the “penumbra” of several US constitutional provisions.⁴¹²

406 Haida Nation v Canada (Fisheries and Oceans), 2015 FC 290.

407 Ibid at para 86.

408 Id at para 121.

409 See generally, Barbara Cosens & Judith Royster, eds, *The Future of Indian and Federal Reserved Water Rights: The Winters Centennial* (Albuquerque: University of New Mexico Press, 2012).

410 *Juliana v United States of America*, 2016 WL 1442435 (April 8, 2016).

411 *Mays v Snyder* available at <http://flintwaterstudy.org/wp-content/uploads/2015/11/Mays-vs.-Snyder-et-al.-Complaint-and-Jury-Demand-Final-1.pdf> (last visited 28 April 28, 2016).

412 See Gallagher at 11 (summarizing US environmental advocates’ argument that humans have “man [sic] has a basic, fundamental right to live a healthy life and to enjoy the environment in which he lives. Therefore, although the Constitution and the Bill of Rights do not specifically mention environmental rights, it follows that such rights are implicit to, and emanate from, the penumbra of the Bill of Rights.”)

Similarly, a newly-filed Canadian case involving mercury poisoning caused by state-permitted clear-cutting has alleged environmental violations of the petitioners' constitutional rights to life and security of the person. Both the facts and arguments in this case are compelling; it represents the most promising opportunity in Canadian history for the judicial recognition of an implicit right to a healthy environment within Canada's constitutional *Charter of Rights and Freedoms*.

4. Conclusion

There is a pervasive tension between resource-driven economic development and environmental protection throughout the Americas. At the same time, we have seen a paradigm-shifting legal evolution in environmental human rights in this region. Environmental constitutionalism

is flourishing at the national and regional levels in Latin America and has begun to make inroads in North America as well. Canada and the US have lagged behind their Latin American counterparts, but hope remains for the judicial recognition of constitutional environmental rights that have yet to be expressed explicitly in the constitutions of these nations. Throughout the regions environmental human rights are perhaps most at risk in indigenous communities affected by resource extraction, and courts at the domestic and regional levels are responding through the tool of environmental constitutionalism. This pattern reveals the transformative potential of constitutional approaches to environmental protection, suggesting that environmental constitutionalism may be one of the most important developments in the history of environmental law.



The “Constitutionalisation” of French Environmental Law under the 2004 Environmental Charter

Christian Dadomo

1. Introduction

Promised by President Chirac during the 2002 campaign for the Presidential elections, the Environmental Charter has become the third branch of the French 1958 Constitution. It has been incorporated alongside the 1789 Declaration of the Rights of Man and of the Citizen and the Declaration of Economic and Social Rights in the Preamble of the 1946 Constitution.

France is bound at international and European levels by a number of conventions and treaties in favor of sustainable development and French environmental law is well developed. Yet, at that time, there was still a common perception that the establishment of superior constitutional fundamental principles was lacking.

The Environmental Charter was primarily adopted in order to:

- respond to and address the concerns of the French civil society;
- bring French law in line with foreign models of ‘constitutionalisation’ of environmental protection;
- address the insufficiencies of French environmental law, notably with regard to the place held by environmental principles in the hierarchy of French legal norms; and
- give constitutional force to environmental protection as a human right.

Since its adoption by both Houses of Parliament, everyone living in France “...has the right to live in an environment which is balanced and respectful of health” (Article 1). Such right is not a statutory right but a right that has been attached to the 1958 Constitution. It has thus been given equal status and force to the set of rights contained in the 1789 Declaration of the Rights of Man and of the Citizen and in the Preamble to the 1946 Constitution. These were incorporated into the so-called “*bloc de constitutionnalité*” (the

block of constitutional provisions) by the Constitutional Court in the early 1970s.⁴¹³

The Charter provisions are protected, interpreted and enforced by the Constitutional Court as well as the administrative and ordinary courts. It applies to all persons, natural and legal, private and public, and can be used as an instrument for interpretation of all international environmental treaties and conventions signed by France. This chapter examines the process of the 'constitutionalisation' of the Charter and discusses its content.

I. Content of the Charter

1.1 The preamble

The preamble has seven paragraphs, or *considérants*, which constitute a series of general statements.

The first two paragraphs make a general statement on the interdependence of mankind and its natural environment. They also mention the indissoluble link between the environment and the current existence and future of the human race. The third one recalls the universal dimension of environmental protection and that the environment is the common heritage of all human beings.⁴¹⁴ In the fourth paragraph, it is acknowledged

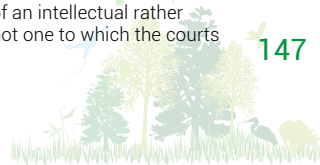
that humans increasingly influence living conditions and their own evolution. This paragraph constitutes the basis for the principle of environmental liability laid down in Article 4 of the Charter.

The fifth one refers to the effects on the environment of consumption and production patterns and the excessive exploitation of natural resources. The sixth paragraph states that environmental protection is to be granted the same importance as other national fundamental interests such as France's independence and security, the protection of its population, etc. It is therefore up to public authorities to take into account the environment when defining new national policies. Yet, as suggested by the wording of this paragraph, environmental protection takes no precedence over other national interests. It therefore falls on the legislator to find the right balance between all fundamental national interests.

Finally, the concept of sustainable development is given constitutional force in the seventh paragraph. It is defined as "the choices aimed at addressing today's needs without compromising the capacity of future generations and other peoples to satisfy their own needs". The emphasis is on the concept of solidarity between current and future generations and peoples. The Charter is thus designed

413 See Decision 70-39 of 19 June 1970 and Decision 71-44 of 16 July 1971; see Dadomo & Farran, *French Substantive Law. Key Elements* (Sweet & Maxwell London 1997) at 151-153

414 As opposed to common heritage of mankind, the international law concept applicable to Antarctica and extra-atmospheric space and which carries legal effects. Here, the concept of heritage is more of an intellectual rather than of a legal nature. This concept must be regarded as having universal value only and not one to which the courts would give legal force.



to establish a balance between economic development, social progress and environmental protection. And indeed, a careful reading of the whole preamble shows that the principle of sustainability underlies each paragraph, thus giving the Charter its overall coherence.

1.2 The Charter provisions

The Charter consists of ten provisions. While Article 1 creates a right for everyone to an environment which is balanced and respectful of health, Article 2 imposes on every person an obligation to take part in its protection and improvement. Both provisions are of general character and, as such, are the foundation of the Charter. Their application and effectiveness depend on the subsequent provisions: Articles 3 (duty of prevention), 4 (duty to remedy), 5 (precautionary principle) and 7 (participation and access to information) to provide the necessary means to ensure effective environmental protection and justice.

The right to live in a balanced environment, respectful of health

The scope of Article 1 is rather broad as it covers two concepts: a “balanced environment” and an “environment respectful of health”. The first one is understood as covering not only balances of ecosystems (conservation of biodiversity, low levels of pollution, etc.) but also the balance between urban and rural areas. The second concept of

“environment, respectful of health” is to be understood as an unpolluted and undamaged environment.

This wording seems to be more neutral than that of “healthy environment” or that of “environment favorable to one’s health”, which was the terminology used in the draft Charter of 27 June 2003. Although the latter wording was more precise and specific than that used in the Charter, it was not adopted mainly on the ground that it would be unreasonable to expect the environment to play a pro-active role in human health. In addition, if a damaged environment can have adverse effects on human health and living conditions, a balanced one does not necessarily have a noticeable favorable effect on health. For that reason, the concept of an environment which is respectful of health was preferred and adopted in the final draft.

As a counterpart to the rights created under Article 1, Article 2 imposes on every person a duty to take part in the protection and the improvement of the environment.

The duty to protect and improve the environment

This duty is to be understood primarily as a moral rather than a legal obligation imposed on all natural and legal persons. However, this moral obligation has constitutional value which cannot be ignored in subsequent legislation. Each individual has a responsibility to ensure the sustainable use of natural resources

and the improvement of environmental conditions. The expression "take part in" implies that this can only be exercised within one's individual limits. What matters is that everyone is aware that environmental protection is a shared responsibility, and a matter of concern for all. This moral obligation is further re-enforced by a strict legal obligation of prevention.

The duty of prevention

Under Article 3, natural, legal, public or private persons have an obligation, within limits laid down by the law, to prevent any damage that they are likely to cause to the environment or, failing that, to limit the consequences of such damage. The prevention principle is already recognized and well established under Article L 110-1-II(2) of the Environmental Code, which provides that environmental damage must be redressed primarily at its source.⁴¹⁵ In the Code, the prevention principle is based on three components: the distinction between preventive action and the redressing of the damage at its source, the use of the best available techniques, and the acceptable economic cost.

In the Charter, preventive action can only be defined in broad terms because of the general character of constitutional provisions and could not be laid down as an absolute principle as it is in the Code.



Photo credit: © Jurgen. Creative commons

The primary role of the Charter is indeed to guarantee a general obligation of prevention whose conditions of application are to be defined further in statutory law as Article 3 provides. Furthermore, as the Charter's rights and principles must comply with other constitutional principles and values and have no precedence over them, if given an absolute character, preventive action could come up against other constitutional principles such as entrepreneurial freedom.

⁴¹⁵ "Principle of preventive action and of the redressing, primarily at its source, of environmental damage, including the best available techniques at an economically viable cost." It is to be noted that in the French version of this provision, the word "correction" (best rendered by "redressing" or "correcting") is used instead of the term "réparation" (best rendered by "remedying").



The principle is also defined in broad terms with regard to its objective. The environmental damage need not be certain for the prevention principle to apply as the expression “...likely to cause ...” suggests. The scope of application of the prevention obligation extends beyond that of major pollution accidents or industrial pollution, and includes risks whose existence is scientifically established and whose probability can be objectively assessed by statistical analysis or by logical reasoning (calculation of probabilities).

Defined broadly as to its object, conditions of application and its addressees, the obligation of prevention was also given a realistic objective. Article 3 imposes an obligation to prevent any damage to the environment or, failing this, to limit the consequences of the damage. This provision may give the impression that a potential polluter has a choice between preventing damage and limiting its effects. This could be seen as a step backwards in comparison to the generally accepted definition of the prevention principle. Most economic activities are capable of causing, directly or indirectly, some damage to the environment. To address this, the duty of prevention as set out in the Charter encourages methods of production and consumption with limited impact on natural resources and of producing limited waste. Article 3 of the Charter therefore seems to offer a realistic definition of the duty of prevention, which, as such, cannot

be deemed to be in contradiction with the principle of preventive action as laid down in Article L. 110-II(2) of the Code. The latter provision does not guarantee the prevention of environmental damage in absolute terms either. Further, Article 3 does not prevent the Parliament from passing legislation imposing an absolute duty of prevention in certain cases. Going hand in hand with the obligation to prevent environmental damage, the duty to remedy it is specified under Article 4.

The duty to remedy environmental damage

Article 4 provides that “(w)ithin conditions laid down by statute, anyone must contribute to the remedying of any damage that they have caused to the environment.” While the principle of civil liability, laid down in Article 1240 of the Civil Code (“anyone’s act whatsoever which causes harm to another, creates an obligation by whose fault it was caused to compensate it”) and which applies to environmental damage, had already been given constitutional force by the Constitutional Court, there was no specific regime applicable to environmental damage.⁴¹⁶

Despite its connection with this duty to remedy environmental damage, the “polluter-pays” principle is defined in Article L 110-1-II(3) of the Environmental Code as a principle whereby “the costs

⁴¹⁶ With the exception of cases of dangerous activities where specific regimes of strict liability apply as a result of international obligations, such as nuclear accidents (Acts of 1968 and 1990) and maritime transport of petroleum products (Article L. 218-1 of the Environmental Code).

of prevention of, reduction of, and fight against pollution must be borne by the polluter” and is therefore viewed more as an obligation to prevent and reduce pollution rather than as an obligation to remedy any damage caused. The actual inclusion of the “polluter-pays” principle in the Charter was open to fierce debate. While this principle was viewed by many as too ambiguous and interpretable as a right to pollute to be included in the Charter, others thought that it would have been a setback to exclude it from the provisions of the Environmental Code.

The first position prevailed for three reasons. Firstly, although the “polluter-pays” principle is one of efficiency, it can be perceived as having little impact. The fact that the financial burden is born primarily by the polluter does not prevent the victims of pollution from bearing the costs too, either as indirect victims or as taxpayers. As a principle of financial liability, it is not economically efficient. Secondly, the principle does not necessarily provide a remedy for all environmental damage, notably for damage to natural habitats. Thirdly, Article 5 of Charter integrates this principle in a wider dual dimension of prevention and remedying without contradicting the Environmental Code provision. Although Article 4 establishes no specific regime of environmental liability, such task being left to Parliament, it gives the principle of environmental liability constitutional force.

The precautionary principle

Unlike the principle of prevention which is of general application, the precautionary principle can only be triggered in exceptional cases as defined under Article 5. The Charter provides that “(w)hen the occurrence of damage, despite being uncertain in the light of scientific knowledge, could affect the environment in a serious and irreversible manner, public authorities must ensure, under the precautionary principle and within their competences, that risk assessment procedures are set out and that provisional and proportionate measures are adopted in order to avert the occurrence of damage.”

Article 5 is the only provision in the Charter to refer expressly to a principle. Indeed, it provides a clear and rigorous constitutional definition of the principle, based on rationality and efficiency. It strictly defines its scope of application and the procedural rules for its implementation. Precautionary measures can only be triggered if three conditions are simultaneously met.

First, there must be a threat of damage to the environment. Since the precautionary principle as established in the Charter has constitutional force only in the field of environment and does not extend to other areas, notably health. -Article 5 cannot thus be read in conjunction with Article 1 of the Charter which refers to “an environment, respectful of health”. This is because

the Charter is not one that is focused particularly on public health, and the two areas remain separate and distinct. Yet Article 5 applies to all threats of damage to the environment having effects on health and its scope of application cannot be restricted by an Act of Parliament when applied to the environment.

Lack of scientific certainty regarding the damage is the second condition. This allows the line to be drawn between the scope of application of the precautionary principle and that of prevention. While the latter applies to a known or even potential threat, the former is a “principle of methodological action, the activation of which is dependent on a legitimate doubt about the existence of a threat.”⁴¹⁷

Finally, the threat of damage must have serious and irreversible consequences. While generally considered alternatively in international conventions,⁴¹⁸ those two criteria are cumulative in the Charter. This was viewed as essential to effectively assess the threat of damage in the context of scientific uncertainty.

Article 5 of the Charter lays down strict procedural rules for the application of the principle. While Article L.110-1-II of the Environmental Code does not specify to whom, private or public bodies, the principle applies, Article 5 makes it

clear that it is up to “public authorities (to) ensure, [...] that risk assessment procedures are set up, and that provisional and proportionate measures are adopted [...]”. In this respect, unlike Articles 2 to 4 of the Charter, Article 5 does not impose obligations on private individuals, yet they would have to comply with administrative or legislative measures implementing the precautionary principle.

The issue as to whether the principle should be applied by central government authorities only or by all public authorities⁴¹⁹ was central to the debate prior to the adoption of the Charter. The second option prevailed in order to better reflect the territorial dimension of environmental protection and to maintain some coherence with the decentralized powers in the domain of environmental protection exercised by local authorities. To avoid the occurrence of damage, public authorities have a dual obligation under Article 5: setting up risk assessment procedures and adopting precautionary measures.

Following an adequate risk assessment based on research programmes aimed at reducing scientific uncertainty, dissemination of information regarding the means of preventing damage, the setting up of environmental control procedures and, above all, scientific expertise, public

417 Prof. G. Martin as quoted in ‘Historique du Principe de Précaution’ in Annex 1 to Ph. Kourilsky & G. Viney, ‘Le Principe de Précaution. Rapport au Premier Ministre’ (La Documentation Française, 2000) in fn 224 at 65.

418 See Principle 15 of the Rio Declaration and Article 3(3) of the UN Framework Convention on Climate Change.

419 The term “public authorities” can be interpreted in the same way as in Article 7 of the Charter on the right of information and participation in reference to the 1998 Aarhus Convention.

authorities can then adopt provisional and proportionate precautionary measures. Their provisional nature is viewed as inherent to the principle of precaution since, unlike preventive measures, which are usually definitive, precautionary measures must be regularly reviewed, amended or reversed in the light of new scientific knowledge and information available. They must also be proportionate to the seriousness of the threat of damage and to the duration of the research on that threat.

Although Article 5 does not refer specifically to “an economically acceptable cost”, it is implied that the proportionality of the precautionary measures must also be measured in those terms. To verify that the cost of precautionary measures does not exceed their expected benefit, courts will have to analyse the costs and benefits, or “*bilan coûts-avantages*”, which is widely used by French administrative courts and the European Court of Justice. However, its use is made even more difficult by the uncertain nature of the threat of damage and, therefore, of the expected advantage derived from the precautionary measures, in the short and long term, as the purpose of the precautionary principle is to protect future generations.

Article 5 can thus be seen as having created a set of obligations and requirements turning the precautionary principle into a solid bastion of legal certainty in areas where safety is the condition for action.

This is not the case of Article 6 which is designed to define a line of conduct to promote sustainable development without imposing imperative requirements on policy-makers.

Promoting sustainable development and integration

Article 6 provides that sustainable development must be promoted by public policies, which “shall reconcile environmental protection and improvement, economic development and social progress”. Far from being innovative, this provision merely lays down two principles that are widely recognized in international, European and French legislation.

It requires that environmental protection and improvement, economic development and social progress, the three pillars of sustainable development, are equitably taken into account in public policies.⁴²⁰

In order to ensure that the objective of sustainable development has the widest possible impact, Article 6 also provides that it shall be integrated not only in policies on territories and the environment, but also in all public policies as defined in statutory laws and regulations. It therefore extends the scope of application of the principle of integration beyond the limits laid down in Article L. 110-1 of the Environmental Code and provides a constitutional foundation

420 The original version of Article 6 provided that public policies “shall take into consideration environmental protection and improvement and reconcile them with economic and social development”.



to existing laws which incorporate the integration principle (e.g. Article L. 123-1 of the Urban Planning Code, Art. 14 of the new Public Procurement Code or even Article L. 225-102-1 of the Commercial Code).

This provision imposes on Parliament a constitutional obligation to assess more carefully, give more consideration to the impact that any public policy may have on the environment, and find the right balance between all three components of sustainable development. Consequently, any newly adopted legislation which fails to meet those conditions can be reviewed or declared unconstitutional by the Constitutional Court on the ground of '*erreur manifeste d'appréciation*' or 'manifest error of assessment (of facts)'.⁴²¹

The right to information and participation

Subject to conditions and restrictions as defined by law, Article 7 gives "(e)very person (...), the right to access information relating to the environment held by public authorities and to participate in the drawing up of public decisions which have an effect on the environment." It gives additional constitutional status to two rights already fully guaranteed under Articles L 110-1(4) and (5)⁴²² and L.124-

1 of the Environmental Code, the 1998 Aarhus Convention and the two European Directives of 2003 on Public Access to Environmental Information and on Public Participation in respect of the Drawing up of certain Plans and Programmes relating to the Environment.

Unlike Article 1 which creates a right to a balanced environment for the benefit of individuals only ("*chacun*"), Article 7 is the only provision of the Charter that extends the benefit of a right to "every person" ("*toute personne*"). Like in Articles 2 to 4, this expression has to be understood as including all natural and legal public and private persons. In doing so, the provision of Article 7 recognizes the well-established case-law of the Constitutional Court and administrative courts extending the benefit of constitutional fundamental rights to legal private and public persons.

In the Environmental Code, the two principles of access to information and of participation were not sufficiently and clearly distinguished. Article 7 remedies this undesirable situation and defines them more neatly. In line with Articles 4 and 5 of the Aarhus Convention, the right of access to information applies to "information relating to the environment held by public authorities". The interpretation of the

421 This concept is widely used in judicial review by the French Constitutional Court and the Conseil d'Etat (the highest administrative court) and also by the Court of Justice of the European Union (see, for instance, Case C-427/12 Commission v European Parliament and Council EU:C:2014:170, para. 40), the EFTA (European Free Trade Association) Court (eg, Case E-15/10 Posten Norge AS v EFTA Surveillance Authority [2012] EFTA Ct. Rep. 246, paras 95-102). It can be broadly equated to the English law Wednesbury principle of unreasonableness. The court does not substitute its own assessment for that of the public authority (not reviewable) but checks that the assessment by the public authority is based on accurate, consistent and complete evidence (reviewable).

422 As amended by the recent Act 2012-1460 of 27 December 2012 on the application of the principle of public participation as defined in Article 7 of the Environmental Charter (Official Journal nr 302 of 28 December 2012).

concept of “environmental information” which has been traditionally based on the concept of access to administrative documents and, consequently, that of public service, had to be broadened to comply with Directive 2003/4 on Public Access to Environmental Information.

With respect to the right of participation in the drawing up of public environmental decisions, Article 7 simply creates a procedural right for the public to be appropriately consulted during the decision-making process itself as the final decision being taken by the public authority. Here, the wording of Article 7 was significantly different from that of former Article L.110-1(4) of the Environmental Code: every person can participate in the drawing up of public decisions. This is in contrast to the provision for “the drawing up process of projects.” Moreover, the effect of such decisions need no longer be “important”.⁴²³ The formulation of new Article L.110-1(5) has now been aligned on Article 7 of the Charter by the 2012 Act.

In order to give this right more substance and clarity, some of the detailed provisions contained in Article 6 and 8 of the Aarhus Convention could have been inserted in Article 7. Unfortunately, the French legislator did not deem it necessary to do so. The reasons behind this are two-fold: 1) for stylistic purposes, and 2) a basic assumption that further legislation

implementing Article 7, such as the 2012 Act on the application of the principle of public participation as defined in Article 7 of the Environmental Charter, would have to be Convention-compliant anyway.

Article 3(3) of the Aarhus Convention on the promotion of environmental education and environmental awareness among the public was another provision that had not been given effect in French law.

The role of education and training in environmental protection

By providing that “education and training must contribute to the exercise of the rights and duties provided for in the Charter”, Article 8 now fills this legal gap by establishing a direct link between education and the rights and obligations that every person has under this Charter. While it does not impose a strict obligation to change the content of the school curriculum, it provides a general objective to include environmental education into school and university programmes as well as in continuing education.

Research and innovation

Like the 1972 Stockholm Declaration, Article 9 of the Charter takes into account research and innovation by providing that they “...must contribute to the protection and improvement of

⁴²³ Originally the principle of participation was strangely defined under the 1995 Barnier Act as a right “...whereby every person has access to information relating to the environment...” The 2002 Act on Démocratie de proximité (bringing democracy closer to the citizens) amended this provision by adding the right of the “...public (to be) involved in the drawing up process of projects which have an important effect on the environment or town and country planning”.



the environment". By moving research and innovation in environmental matters into the constitutional sphere, Article 9 reinforces the role of existing legislation, which already encourages research aimed at improving the environment⁴²⁴. The objective of Article 9 is not to restrict all research to environmental research programmes but its wording seems to emphasize the pervasive nature of environmental research which too often suffers from a sectoral approach unsuitable for dealing with environmental problems in an effective and global way.

The European and international policy of France

Article 10 provides that "the present Charter shall inspire the European and international action of France". This primarily stresses the fact that environmental protection is meaningless without international action and that France must play a leading role at international and European levels.

2. The constitutionalisation of the Charter

2.1 The process of 'constitutionalisation'

Once adopted in 2004, the Charter had to be incorporated into the constitution by means of a loi constitutionnelle

(Constitutional Act). This is an Act of constitutional amendment which must be adopted according to a special procedure under Article 89 of the Constitution. Article 89 provides that the amending Act must be approved in identical terms by both houses of Parliament. It must then be approved and adopted by referendum, or, as in this case – because the proposed Act originated from the Government – by a majority of three fifth of the votes cast in both houses of Parliament convened in a Congress.

The Constitutional Act on the environmental Charter was adopted by the Congress on 1 March 2005. It consists of three provisions, the second of which is the Charter itself. The first Article inserts into the Preamble to the Constitution a reference to "...the rights and duties as defined in the 2004 environmental Charter". Under Article 3, protection of the environment is added to the legislative competence and powers of Parliament as defined in Article 34 of the Constitution.

2.2 Legal force and effect of the Charter

The Charter automatically acquires constitutional force and value by reason of its adoption in a Constitutional Act, and because of the reference to it in the Preamble to the Constitution. This was confirmed by the Constitutional Court in

⁴²⁴ See in particular Article L.321-1 of the Environmental Code which provides that policies for the protection of the coastal line shall include research and innovation into its resources and distinctive features. Equally, Article L.331-14 states that national parks authorities must participate in research programmes aimed at the economic, social and cultural development of the parks.

its GMO (Genetically Modified Organisms) law decision (DC 2008-564, 19 June 2008, JurisData 2008-010652) and by the *Conseil d'Etat*⁴²⁵ in *Commune d'Annecy* ruling (CE Ass, 3 October 2008, JurisData 2008-074233): "the rights and obligations as defined in the environmental Charter, and like all provisions of the preamble of the Constitution, have constitutional value".

Yet a more important issue is that of the direct effect of the Charter provisions i.e. the extent to which they can be relied upon by individuals in French ordinary and administrative courts. This can be done either in private proceedings or against public authorities and, since 1 March 2010, in the Constitutional Court by way of the *question prioritaire de constitutionnalité* or QPC procedure (a *posteriori* control of constitutionality of legislation)⁴²⁶ under Articles 61(1) and 62 of the French Constitution.

According to the case-law of the Constitutional Court, a constitutional provision will have direct effect provided it satisfies three criteria: it is a legal norm; it is sufficiently precise and it is unconditional. This means that it does not require further legislative intervention.

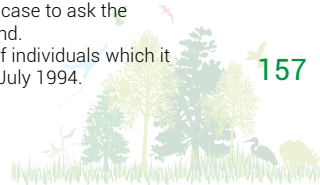
Applying those criteria, the Charter provisions can be divided into five categories:

- The Preamble: as it contains general statements only, the Preamble can be deemed to be of a declaratory nature. Apart from the last 2 paragraphs, it is rather philosophical and scientifically verbose, with little legal value.⁴²⁷ However, it is always possible for the Constitutional Court to infer some constitutional principles from its interpretation ;
- Provisions with limited direct effect: because the effectiveness and applicability of Articles 1 and 2 depend on the application of the other Charter provisions, those can be relied upon in the Constitutional Court, but not directly in ordinary or administrative courts. In its decision of 8 April 2011 (Michel Z, QPC 2001-116, JurisData 2001-015527) under the QPC procedure, the Constitutional Court interpreted Articles 1 and 2 jointly so as to create a new general duty to protect the environment;
- Provisions with full direct effect: the only provision is Article 5, which clearly and precisely defines the conditions of application of the precautionary principle without the requirement for further legislation. However, while it is not an absolute condition for the application of the principle, further legislation might be desirable and necessary to define in more detail certain aspects of its application such

425 The Conseil d'Etat is the highest French administrative court and has the ultimate authority on administrative law cases.

426 The QPC is a French Constitutional Law procedure allowing persons involved in a pending case to ask the Constitutional Council to assess the constitutionality of the laws relating to the case at hand.

427 The Constitutional Court did so for instance with the principle of safeguard of the dignity of individuals which it inferred from the Preamble to the 1946 Constitution in its decision no 94-343 & 344 of 27 July 1994.



as the risk assessment procedures, the status of the experts, and general principles regarding the reviewability, reversibility and proportionality of precautionary measures to be taken by the public authorities;

- Provisions without direct effect: Articles 3, 4 and 7 refer to, and require further legislation (“subject to conditions as defined by law”) and, as such, cannot have direct effect⁴²⁸;
- Provisions imposing a line of conduct rather than an obligation: Article 6 defines a line of conduct to promote sustainable development, to be followed by public policy-makers, and does not impose any imperative requirement upon them. Equally, Article 9 does not require that research and innovation contribute to environmental protection and improvement. The same applies to Article 8 on education. Finally, Article 10 merely mentions that the Charter is supposed to be a source of inspiration for the French government at international and European levels. The legal force of those provisions is therefore questionable.

At the time of its adoption, the Environmental Charter was presented as an instrument to drive the protection and enhancement of the environment in French law. Has the Charter lived up to these expectations? Compared to international or European environmental law, the Charter adds nothing to the definition of the main

principles of environmental law, notably the precautionary principle, sustainable development, and access to information and participation. The most innovative aspect of the Charter rests rather in the new constitutional requirements it imposes on the French Parliament when legislating in the domain of environmental law. As such, Parliament can only pass new legislation which complies with the new constitutional principles laid down in the Charter. As such, the Charter provides greater coherence to French environmental law and reduces the risks of conflicts, albeit limited, between domestic and international, and notably, European laws. The Charter has also been instrumental in the evolution and development of French environmental law which had to gradually find its place in French law in general, and at the top of the hierarchy of French legal norms in particular.

However, like any new constitutional norm, the Charter had to be recognized as a legal norm capable of interpretation and application. Fortunately, it did not experience the same fate as the 1789 Declaration of the Rights of Man and of the Citizen which became prominent in the jurisprudence of the Constitutional Court only since the 1970s. Although one can state that the main provisions of the Charter are interpreted and applied by all French courts, and notably the Constitutional Court and the *Conseil d’Etat*, it is clear that some have greater legal force and are more effective than others.

428 Article 7 not only mentions “conditions” but also “restrictions as defined by law”.

The full effectiveness of the Charter very much lies in the way the new QPC procedure is used and whether it is able to develop in the future from a mere control of constitutionality of environmental legislation into a proper instrument of enforcement of constitutional environmental rights. It will also depend on whether or not the written procedure in

the Constitutional Court is able to adapt to the very technical nature of environmental law. As a result, the Constitutional Court might need to adopt a new method of interpretation and reading of the Charter in order to deal with new fundamental issues arising at the crossroad of environmental protection and the development of a new economy.



Legal Recognition of the Human Right to a Healthy Environment in Australia: Useful, Redundant or Dangerous?

Meg Good

1. Introduction

Australia holds the (perhaps dubious) distinction of being the only western democratic nation without a national bill of rights.⁴²⁹ It is therefore unsurprising to note that Australia is one of only fifteen nations that does “not yet recognize that their citizens possess a legal right to a healthy environment”.⁴³⁰ Australia is also yet to recognize the human right to water, or the rights of non-human animals and environmental entities.⁴³¹ Accordingly, an important question to consider is why Australia has failed to embrace rights-based approaches to environmental protection and governance, and whether and to what extent these approaches may be of some utility in the Australian context. Countries around the world have begun to integrate versions of the human right to a healthy environment into their constitutions, laws, policies and political rhetoric, and Australia is well placed to learn from this experience in order to make an informed decision about whether it should join the “environmental rights revolution”.⁴³² The aim of this paper is to explore whether legal recognition of the human right to a healthy environment in Australia could offer potential benefits for environmental protection, or whether legal recognition may in fact prove redundant or even dangerous in its operation.

2. Understanding Australian Exceptionalism

Australia is currently one of only fifteen nations (including Canada and the United States of America) which does not recognize the human right to a healthy environment at the federal level.⁴³³ Australia’s premier piece of environmental protection legislation, the *Environment*

429 Australian Human Rights Commission, ‘How are Human Rights Protected in Australian Law?’ <<https://www.humanrights.gov.au/how-are-human-rights-protected-australian-law>> accessed 10 March 2016.

430 David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press 2012) 48.

431 See generally Meg Good, ‘Implementing the Human Right to Water in Australia’ (2011) 30 (2) *University of Tasmania Law Review* 107.

432 For an excellent summary of the ‘environmental rights revolution’ see generally, Boyd (n 2).

Protection and Biodiversity Conservation Act 1999 (Cth) (the “EPBC Act”), does not contain any explicit environmental rights. Owing to the absence of a federal bill of rights, there is also no scope to recognize the right, or other environmental rights through the “greening” of existing human rights. Similarly, at the state/territory level no environmental rights are included within bills of rights legislation in the Australian Capital Territory and Victoria. There have been no legislative attempts to introduce environmental rights at either level of government, and politically the issue has been relatively untouched. However, despite this lack of legislative implementation, there have been some calls for the recognition of environmental rights in Australia.

In particular, support has been expressed by various non-governmental entities for the legal recognition of the human right to water and some form of human right to a clean and healthy environment.⁴³⁴ For instance, the Environmental Defenders Office (New South Wales (NSW)) and Environment Defenders Office (Victoria) Ltd have recommended “specific protection of environmental rights either in the form of an encompassing right to a clean and healthy environment or a set

of related environmental rights.”⁴³⁵ It is important to consider why Australia has failed to follow these recommendations to recognize environmental rights, in order to identify potential challenges for attempts to recognize these rights in the future. Arguably, Australian exceptionalism can be attributed to three main factors: the nature of the Australian legal and political system, the nature of Australian approaches to the protection of human rights and the environment, and the perception that current approaches to environmental protection are adequate.

2.1 Australia's legal and political systems and approach to rights protection

Due to its foundations as a former English colony, Australia has a common law legal system characterized by observance of the rule of law, respect for parliamentary sovereignty, and adherence to the concepts of representative and responsible government. Interestingly, other comparable Commonwealth nations with common law legal systems, such as Canada and New Zealand, are similarly notable exceptions to the environmental rights trend.⁴³⁶ In Australia there is a longstanding preference for rights to be

433 *ibid* 92.

434 For example, Action for Aboriginal Rights, The Bendigo & District Environment Council Inc, the Public Interest Advocacy Centre and the Environment Defenders Office (Victoria) Ltd all advocated the addition of environmental rights into Victoria's Charter of Human Rights and Responsibilities Act 2006 (Vic): Scrutiny of Acts and Regulations Committee (Vic), Review of the Charter of Human Rights and Responsibilities Act 2006 (2011) 51 <http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc_charterreviewreport.pdf> accessed 10 March 2016.

435 Environment Defenders Office (NSW) and Environment Defenders Office (Victoria) Ltd, 'Protection of Human Rights and Environmental Rights in Australia' (2009) 12 <https://envirojustice.org.au/downloads/files/law_reform/edo_vicnsw_humanrights_environment.pdf> accessed 10 March 2016.

436 Boyd (n 2) 92.



developed gradually over time through judicial precedent, rather than through broad rights declarations in legislation. Although Australia has not passed comprehensive legislation recognizing the human rights contained within the major international human rights treaties to which it is a party, it has various mechanisms in place for achieving human rights protection. This protection is achieved through a combination of constitutional interpretation, the common law, specific human rights legislation, the system of parliamentary democracy, and government policies intended to create a human rights culture.

At a more general level, there has been a traditional reluctance in Australia to engage in comprehensive recognition of human rights at the federal level. Despite significant public support for the introduction of a federal statutory bill of rights and a 2009 recommendation from the National Human Rights Consultation Committee supporting the reform,⁴³⁷ the federal government has failed to introduce a federal bill of rights. Although one state and one territory jurisdiction have enacted human rights charters,⁴³⁸ Australia is yet to join the majority of the world's liberal democracies by declaring a list of the fundamental rights of its citizens in a codified legislative instrument or constitution.

This reluctance to embrace broad rights declarations can be attributed to various factors, including (but not limited to):

- A belief that the most effective way to secure rights protection is through the gradual development of common law precedent and, where relevant, the legislative recognition of specific rights negotiated through the political process;
- A concern that broad rights protection could lead to unintended and undesirable consequences;
- A perception that broad rights declarations are inconsistent with the nature of Australia's legal and political systems (for example, the notion of parliamentary sovereignty);⁴³⁹
- A concern that providing the legislative or constitutional recognition of broad human rights would place the judiciary in an inappropriate position, both in terms of interpretation and enforcement; and
- A concern that defining a list of comprehensive rights could actually serve to limit rights protection.⁴⁴⁰

Whilst all of these beliefs, concerns and perceptions can be challenged, they do play an important role in explaining Australia's exceptionalism in this regard.

437 National Human Rights Consultation Committee, National Human Rights Consultation Report (2009) <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter15#_ftnref9> accessed 10 March 2016.

438 Human Rights Act 2004 (ACT) and the Charter of Human Rights and Responsibilities Act 2006 (Vic).

439 George Williams, A Bill of Rights for Australia (University of New South Wales Press 2000) 35-41.

440 *ibid.*

Those jurisdictions which have embraced rights declarations have restricted their recognition to civil and political rights.⁴⁴¹ As explained by Taylor, the “core concept” of civil and political rights is the “liberty of the individual, which is to be protected against the abuse and misuse of state authority”.⁴⁴² Arguably, these rights sit better with the underlying foundations of the Australian legal and political system, as both are built upon “the political philosophy of liberal individualism and economic laissez-faire”. As civil and political rights are liberty rights which grant citizens “freedom from” certain treatment but do not entail great demands upon the state,⁴⁴⁴ they are better suited to this underlying political philosophy. In contrast, economic, social and cultural rights operate as “claims to social equality” (i.e. positive rights), and accordingly, where necessary, aim to compel state intervention to achieve their fulfilment.⁴⁴⁵ Economic, social and cultural rights, typically the category under which environmental rights fall, do not sit as

well with the Australian legal and political system, and for this reason they have been consistently denied legal recognition at both the federal and state/territory levels.⁴⁴⁶

As environmental rights are by their very nature broad rights, it is perhaps unsurprising given the context outlined that there has been a reluctance to afford them legal recognition.⁴⁴⁷ One of the main reasons for hesitation regarding the implementation of economic, social and cultural rights in Australia relates to the interpretation and enforcement role of the judiciary. According to the concept of the separation of powers, the judiciary is authorized to exercise only judicial power and must remain independent from the two political arms of government. Concerns over the politicization of the judiciary have been cited as reasons for not recognizing economic, social and cultural rights at both the federal and state/territory levels.⁴⁴⁸

441 With the exception of the right to education (an economic, social and cultural right) recognised under the ACT legislation.

442 Prudence E Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1997-1998) 10 (2) Georgetown International Environmental Law Review 309, 318.

443 *ibid* 317.

444 *ibid* 318.

445 *ibid* 318.

446 Proposals to include ESC rights in rights legislation have been rejected at the national, and state/territory levels. For example, in a 2011 review of the Victorian Charter of Human Rights and Responsibilities Act 2006, by the Victorian Scrutiny of Acts and Regulations Committee ('SARC'), the SARC did not support the Law Institute of Victoria's submission to include social and economic rights in the Charter. Law Institute of Victoria, 'Lawyers Disappointed at Charter Wind Back Proposals by Parliamentary Committee' (Media Release, 14 September 2011) <<http://www.liv.asn.au>> accessed 10 March 2016; Scrutiny of Acts and Regulations Committee (Vic), Review of the Charter of Human Rights and Responsibilities Act 2006 (2011) 52 <http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sasa.charterreviewreport.pdf> accessed 10 March 2016.

447 This conclusion is supported by Boyd's research, which found that "[o]f the twenty-three nations employing exclusively common-law systems, only three have environmental provisions in their constitutions": Boyd (n 2) 51.

448 Helen Irving explains that concerns over the inappropriate politicisation of the judiciary under a national Human Rights Act factored into the National Human Rights Consultation Committee's ultimate decision to recommend against the recognition of economic, social and cultural rights in the proposed charter. However, she notes that these concerns are also applicable in the context of the recognition of civil and political rights: Helen Irving, 'The Dilemmas in Dialogue: A Constitutional Analysis of the NHRC's Proposed Human Rights Act' (2010) 33 (1) UNSW Law Journal 60, 80.



Economic, social and cultural rights often concern controversial topics involving issues of distributive justice.⁴⁴⁹ As noted by Meyerson, if economic, social and cultural rights are made justiciable, “then courts are given the power to affect the distribution of resources”.⁴⁵⁰ For instance, in regards to environmental governance, some critics argue that the courts are an inappropriate institution for the resolution of complex environmental regulation issues.⁴⁵¹ In the United States (US) the judiciary has been reluctant to adjudicate disputes of this nature due in part to its “apprehension about playing the role of arbiter of ... value-laden and technical questions”, such as the meaning of a “clean and healthy environment”.⁴⁵² It is likely that the Australian judiciary would demonstrate similar caution over engaging in the determination of such questions on the grounds that they are more appropriately dealt with by the democratically elected legislature and executive.

2.2 Australian approach to environmental protection

Australia’s approach to environmental protection is not characterized by a willingness to make broad-sweeping

guarantees of environmental protection through policy or law. The *Australian Constitution* does not contain recognition of the importance of environmental protection, and in fact contains no specific federal head of legislative power to enable the federal parliament to legislate directly with respect to environmental matters. Accordingly, the federal legislature must utilize heads of legislative power which do not specifically pertain to the environment (such as the external affairs power and the corporations power) in order to pass federal environmental laws. As a result of this constitutional *lacuna*, considerable uncertainty, conflict and debate has focused on the respective roles of the federal and state/territory governments in environmental protection and natural resources management.⁴⁵³

Similarly, in the US the “federal government has no general plenary authority to enact laws”, and has traditionally relied upon the commerce clause to achieve the passage of environmental legislation.⁴⁵⁴ Hill, Wolfson and Targ argue that the US legislature’s failure to embrace environmental rights can in part be attributed to this lack of direct constitutional power, rather than to “any specific objection to the creation of an environmental right.”⁴⁵⁵ It may be

449 For an exploration of this issue in the South African context, see generally Christopher Mbazira, *Litigating Socio-Economic Rights in South Africa* (Pretoria University Law Press, 2009).

450 Denise Meyerson, *Jurisprudence* (Oxford University Press 2011) 267.

451 As noted by Boyd, “...critics argue [that] courts lack institutional capacity, technical expertise, and resources required to address complex environmental issues and are the wrong place for resolving polycentric issues involving conflicting values and diverse interests”: Boyd (n 2) 28.

452 *ibid* 391.

453 Particularly with respect to the management of critical natural resources such as water.

454 Barry E Hill, Steve Wolfson and Nicholas Targ, ‘Human Rights and the Environment: A Synopsis and Some Predictions’ (2003-2004) 16 *Georgetown International Environmental Law Review* 359, 390.

455 *ibid*.

the case that Australia's federal division of legislative power and environmental governance responsibilities has similarly influenced attitudes regarding the necessity for and desirability of environmental rights recognition. There are also other aspects of Australia's approach to environmental protection which may have influenced the decision not to embrace environmental rights.

Australia has mostly adopted traditional command and control approaches to environmental protection, situated within a broader framework designed to achieve the goal of ecologically sustainable development.⁴⁵⁶ A rights-based approach would represent a potentially significant alteration to the status quo, as it involves a different conceptualization of the human/environment relationship. Rather than conceptualizing environmental protection as a service that the state chooses to provide, rights-based approaches often conceive of environmental protection as a right owed to the citizenry by the state.

2.3 Perception of the effectiveness of the current approaches to environmental protection

It is possible that Australia has chosen not to adopt a rights-based approach to environmental protection due to a perceived lack of necessity. Examining the context within which other countries have embraced environmental rights perhaps sheds light on Australia's decision not to follow suit. In many of these jurisdictions, environmental rights have been viewed as a means of pursuing environmental justice and empowering citizens who feel that the current law provides them with inadequate recourse for public participation in environmental decision-making.⁴⁵⁷ Some of the most ambitious environmental rights declarations have occurred in nations with less than ideal environmental protection track records. In the context of governance systems struggling to achieve adequate protection of the environment due to broader governance issues, the recognition of environmental rights may be perceived as more necessary. It is possible that due to the existence of various functional environmental protection systems, laws and processes, there is a perception that the recognition of environmental rights is less of a necessity in Australia. However,

456 Legislation adopting a command and control approach exists at both the federal level (for instance, the Environment Protection and Biodiversity Conservation Act 1999 (Cth) contains command and control approaches) and at the state/territory level in Australia. For a summary of the relevant state/territory statutes, see Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2009), 159-160.

457 For instance, Boyd's research found that this particular benefit of the recognition of the human right to a healthy environment was particularly pronounced in various developing nations: Boyd (n 2) 239.



it remains that Australia is yet to achieve the goal of ecologically sustainable development, and therefore there does appear to be space to explore new approaches to ascertain whether they may assist in the achievement of this goal.

Boyd's research reveals that the constitutional recognition of environmental rights results in many of the anticipated benefits and few of the potential drawbacks forecast by legal experts.⁴⁵⁸ These benefits include but are not limited to providing an impetus for stronger legislation, bolstering the implementation and enforcement of existing environmental laws and policies, offering a safety net by filling gaps in environmental legislation and protecting environmental laws and regulations from rollbacks under future governments.⁴⁵⁹ Whilst the recognition of environmental rights does not constitute a "silver-bullet for today's environmental problems",⁴⁶⁰ it is an avenue which Australia should consider exploring.

3. Constitutional Recognition of Environmental Rights in Australia

One hundred and fifty countries around the world provide for constitutional recognition of the human right to a healthy environment.⁴⁶¹ Australia's failure to follow suit can be explained through an examination of Australia's broader constitutional context. The *Australian Constitution* was never intended to act as a comprehensive statement of the respective roles and duties of each arm and level of government, and the individual rights of Australian citizens.⁴⁶² Although the framers of the Australian Constitution were able to look to the Constitution of the United States of America as a model, they deliberately chose not to emulate the American style of express constitutional rights. This was motivated partly by a concern that the "judicial interpretation of abstract rights could have unpredictable and undesirable consequences".⁴⁶³ Very few express rights exist in the text of the Constitution, and for various reasons, Australians continue to "remain wary of constitutionally entrenched rights".⁴⁶⁴ In addition to this reticence to recognize

458 *ibid* 251.

459 *ibid* 28.

460 *ibid* 42.

461 David R Boyd, 'Constitutions, Human Rights, and the Environment: National Approaches' in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015), 170, 172.

462 As noted by Chief Justice Gleeson in *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 172 [1]: 'The Australian Constitution was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals. It was not the outcome of a revolution, or a struggle against oppression. It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies'.

463 Jeffrey Goldsworthy, 'Introduction' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing 2006) 2, 2.

464 *ibid* 3.

constitutional rights, the framers provided minimal express reference to the natural environment. Unlike the majority of the world's constitutions,⁴⁶⁵ the *Australian Constitution* does not contain any declaration as to the importance of the environment or the values which should govern environmental protection.

Despite the critical importance of environmental governance in a land characterized by climatic instability, the division of governmental responsibility for environmental protection and regulation is also not directly addressed under the Constitution. The failure to address this issue was partially due to the presumption that such matters would generally remain within the ambit of state/territory jurisdiction. It can also be attributed to the socio-historical context of the document's creation – at the turn of the century when the Constitution was created, environmental protection was not the mainstream governance issue that it is today.

In the absence of express recognition of the right, it may be possible to found a basis for implication from the text and structure of the *Constitution*. However, it

is extremely unlikely that the High Court would recognize an implied right to a healthy environment, for various reasons, principally the general reluctance of the Court to engage in this interpretive exercise, and the fact that there are arguably few, if any, grounds which could act as the basis for such an implication. Unlike the *Constitution of India*, where the Supreme Court has been able to derive environmental rights through interpretation of the broader "right to life",⁴⁶⁶ the *Australian Constitution* does not contain any analogous express rights. Implied freedoms under the *Australian Constitution* are best characterized as "implied freedoms from governmental power".⁴⁶⁷ The human right to a healthy environment can be conceptualized as both a negative and positive right (a 'freedom from' and a 'right to'). Its positive elements necessarily involve a demand on government resources.⁴⁶⁸ The High Court has not indicated any intention to recognize implied rights of this nature. As noted by Williams and Hume, "the Constitution protects freedoms from, rather than freedoms to".⁴⁶⁹ The currently recognized implied freedom of political communication can be justified as a necessary implication from the text of

465 See generally, Christopher Jeffords, 'Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions' in Lanse Minkler (ed), *The State of Economic and Social Human Rights: A Global Overview* (Cambridge University Press 2013) 329.

466 See *Mehta v Union of India et al*, 1988 A.I.R. 1115; *Bandhua Mukti Morcha v Union of India*, 3 S.C.C. 161 (1984); *Subhash Kumar v State of Bihar* A.I.R. 1991 SC 420. For a discussion of these cases in the broader context of other jurisdictions where courts have utilised the right to life as a basis for implication of environmental rights, see: Donald K Anton and Dinah L Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011) 460-463.

467 Patrick Keyzer, *Constitutional Law* (2nd ed, LexisNexis Butterworths 2005) 303.

468 Williams and Hume note that even the recognition of negative rights can involve government expenditure. They cite the example of the constitutional requirement that states maintain a court system, which 'clearly has fiscal consequences': George Williams and David Hume, *Human Rights under the Australian Constitution* (2nd ed, Oxford University Press 2013) 154.

469 *ibid* 153.



the *Constitution* (primarily sections 7 and 24). The High Court has not recognized any implied economic, social and cultural rights, and it is unlikely that it could or would do so in the future.

3.1 Options for the constitutional recognition of the human right to a healthy environment in Australia

Despite the foregoing, it is possible to provide express recognition of the right to a healthy environment under the *Australian Constitution*. However, any addition or alteration to the text of the *Constitution* must proceed through the amendment procedure outlined under section 128. The amendment procedure established under section 128 is notoriously difficult to satisfy, with only eight out of 44 proposed changes having met the requirements and resulting in amendments to the *Constitution*.⁴⁷⁰ As a result, the *Constitution* has only undergone a few alterations since its creation, despite the passage of over a century of important social, economic, political and cultural developments. Accordingly, achieving any form of express inclusion of the right will face a significant obstacle in section 128. A further issue relates to the location and nature of its inclusion in the text of the

document, which may have implications for its operation and effect.

Various forms of Commonwealth constitutional recognition are available, including incorporation within the broader context of a constitutional bill of rights. Providing constitutional recognition of an environmental right could lead to a potentially increased scope for Commonwealth intervention in environmental protection, increased governmental accountability through expanded options for public interest environmental litigation, and constitutional guidance for environmental legislation.⁴⁷¹ In Chapter Seven of David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (UBC Press, 2012), Boyd explores how benefits experienced in other jurisdictions may be realised if Canada provided constitutional recognition of the right. In particular, he considers its ability to strengthen environmental laws, improve enforcement of environmental laws and prevent environmental law rollbacks.

Whilst there may be benefits for environmental protection associated with constitutional recognition, the fact remains that there has never been a successful attempt to constitutionalize a comprehensive bill of rights under the

470 As noted by the Parliamentary Education Office, '[s]ince 1906, when the first referendum was held, Australia has held 19 referendums in which 44 separate questions to change the Australian Constitution have been put to the people. Only eight changes have been agreed to': Parliamentary Education Office, 'How the Constitution Can Be Changed' (2014) <<http://www.peo.gov.au/learning/closer-look/the-australian-constitution/how-the-constitution-can-be-changed.html>> accessed 10 March 2016.

471 A number of these benefits have been experienced in other jurisdictions recognising a constitutional right to a healthy environment: Boyd (n 2) 233-252.

Commonwealth Constitution.⁴⁷² Proposals for the recognition of certain rights have been put forward and debated and in some cases voted upon at referendums. However, since federation, no new express rights have been introduced into the *Australian Constitution*.⁴⁷³ Most constitutional commentators, in the light of this history, consider the prospect of a constitutionally entrenched bill of rights to be highly unlikely. The likelihood of constitutional recognition of the human right to a healthy environment is even lower, due to three main factors.

Firstly, the amendment procedure outlined under section 128 creates a significant hurdle to reform, as it requires a high level of agreement. Achieving this level of agreement in relation to such a politically contentious reform would most likely prove extremely difficult. Secondly, there has been a historical reluctance to entrench express rights in the *Constitution* via a referendum. Two proposals have been taken to referendum involving the introduction of express rights into the Constitution, and both of them were unsuccessful.⁴⁷⁴ Finally, the potentially controversial nature of the right may mean that even if a constitutionally entrenched bill of rights were to be introduced, the right to a healthy environment would not be included. It is most likely that only civil and

political rights would be recognized, and that any recognition of economic, social and cultural rights would be limited to more established rights.

4. Legislative Recognition of Environmental Rights in Australia

Although constitutional recognition of the human right to a healthy environment in Australia is highly unlikely at present, it is possible to recognize the right under federal and/or state/territory legislation. Legislative recognition of human rights has traditionally been the preferred method of legal recognition in Australia.⁴⁷⁵ However, recognition has favored civil and political, rather than economic, social and cultural rights. For reasons discussed above, as an economic, social and cultural right, the right to a healthy environment would inevitably face various obstacles to its recognition, especially if it were deemed justiciable. There are three main options for the legislative recognition of the human right to a healthy environment at the Commonwealth level: recognition as an independent right under a statutory bill of rights, recognition as a derivative right under a statutory bill of rights, and recognition as an independent right under specific legislation.

472 For a summary of Australia's 'history of rejection' in regards to bills of rights proposals, see generally Paul Kildea, 'The Bill of Rights Debate in Australian Political Culture' (2003) 9 (1) *Australian Journal of Human Rights* 7.

473 However, in 1977 the existing right to vote in referendums under s 128 was extended to residents of the territories.

474 Bruce Stone and Nicholas Barry, 'Constitutional Design and Australian Exceptionalism in the Adoption of National Bills of Rights' (2014) 47 (4) *Canadian Journal of Political Science* 767, 776.

475 For example: Age Discrimination Act 2004 (Cth); Disability Discrimination Act 1992 (Cth); Sex Discrimination Act 1984 (Cth); Racial Discrimination Act 1975 (Cth).



At the Commonwealth level, arguably the preferable form of legislative recognition is recognition of an independent human right to a healthy environment in a statutory bill of rights. Although this is an ambitious option, it would provide the most comprehensive and secure recognition of the right. The other potential options for Commonwealth recognition are limited for various reasons. Implied recognition renders the existence and interpretation of the right at the mercy of the judiciary, whilst express recognition of the right under specific “right to a healthy environment” legislation fails to recognize the interrelated and indivisible nature of economic, social and cultural rights. At the state/territory level, for the same reasons, introducing the right into existing and proposed state/territory rights charters is arguably the preferable form of legislative recognition.

Although relying on recognition by derivation from other rights is perhaps the most politically feasible option at present, express recognition of an independent right at both levels of government is preferable. This is because it bypasses the problematic aspects of implied recognition and provides stronger protection for the right. It is acknowledged, however, that any form of legislative recognition of a bill of rights generally, or the human right to a healthy environment specifically, is unlikely to occur in the near future. In terms of the appropriate model for recognition, arguably the preferable model is implementation of

the “dialogue model”. The dialogue model involves all three arms of government engaging in a dialogue, with each assigned particular roles in the process of debating human rights recognition and protection.⁴⁷⁶ This is the preferable model for two main reasons.

Firstly, the dialogue model represents a political compromise between increasing human rights protection and maintaining parliamentary sovereignty. It is unlikely that any greater incursion on the scope of governmental power would receive support in light of the history of political reluctance in this regard. Secondly, the dialogue model has already been successfully adopted in two Australian jurisdictions (the Australian Capital Territory and Victoria). Accordingly, there is precedent for the effective operation of this model in the Australian context. If the right were recognized under the dialogue model, this could have various impacts on government decision-making processes in Australia which could be characterized as beneficial for environmental protection.

Firstly, during the legislative process, proposed legislation would be scrutinized for consistency with the right, through the issuing of statements of compatibility. This could proactively prevent the introduction of legislation which jeopardizes the government's ability to protect, respect and fulfil the right. Secondly, it could require all public authorities to act in a way that is compatible with the right. This

could have implications for the actions of key government agencies involved in environmental management. Thirdly, it could ensure that the court interprets legislation in a manner compatible with the right, and in instances where such an interpretation is not possible, the court could be empowered to issue a declaration of inconsistent interpretation. This would encourage a dialogue between the legislature, executive and judiciary on the legislation's impact on the right. As the right would be considered during the creation, implementation and interpretation of legislation, the government would be better able to prevent and respond to breaches of the right. This safety net of protection would not suffice to address all potential and actual breaches of the right, or even guarantee the right's full realisation. However, it would ensure that the right enters the legal and policy discourse on issues concerning environmental governance and sustainable development.

4.1 Limitations of legislative recognition

Recognizing a human right to a healthy environment under a federal statutory bill of rights adopting the dialogue model could increase government accountability, encourage rights awareness in executive decision-making, facilitate proactive action on legislation which has the potential to breach the obligations imposed by the right, and create more avenues for review of government decision-making. Whilst there are evidently a number of potential

benefits associated with legislative recognition there may, however, be some limitations regarding the utility of the right as a tool for environmental protection. These limitations can be attributed partly to the nature of the proposed form of recognition, and partly to the broader context in which the right must operate.

Under the proposed model, all three arms of government would necessarily be restricted in their ability to consider and realize the right. As the legislature would be obliged only to consider the compatibility of proposed legislation with the right, the Parliament would retain the power to override identified incompatibility in order to allow incompatible proposed legislation to become law. The judiciary would be similarly restricted. Where the court identified that it was not possible to adopt an interpretation consistent with the right, it might issue a declaration of inconsistent interpretation. However, such declarations do not impact on the validity of the law, and whilst the government would have to provide a response, it would have no duty to amend the law to render it consistent with the right. Arguably, these limitations represent a necessary compromise in a legal system such as Australia's. Granting the judiciary greater interpretive scope, or providing the court with the ability to invalidate legislation on the grounds of incompatibility would represent a significant departure from the status quo. Similarly, limiting parliamentary sovereignty in order to provide better protection of the right during the legislative



process would be highly controversial. Whilst respecting this compromise may be the only way to achieve legal recognition of the right, it may do so at the expense of limiting its effectiveness.

Another important area of limitation relates to the fact that many of the key challenges facing the full realisation of the right to a healthy environment cannot be resolved simply through legal recognition of the right. These issues include political disagreements over environmental policy, competing economic, social and cultural interests, sourcing funding for monitoring and enforcement, differing social attitudes and values, technical challenges, and scientific uncertainties. Solutions to these varied and significant issues are generally beyond the scope of a limited legal tool. In many instances, what is required in order to improve environmental protection is systemic or cultural change. Whilst recognition of the right could provide an impetus for such change, it could not of itself address many of the key problems impeding the achievement of sustainable environmental management. There are inherent constraints limiting the effectiveness of environmental protection approaches created by the broader social, political and legal context.

Rodriguez-Rivera notes that critics have questioned the utility of the human right

to a healthy environment on the grounds that it “may not address the complex and technical issues” involved in environmental protection, and that it “merely addresses the social symptoms and does not solve the structural causes of environmental degradation...”⁴⁷⁷ Weston and Bollier argue that the operation of the right is limited by this context as “our formal/official national and international legal orders are structurally organized to contribute to – and not prevent – the deterioration of the natural world”.⁴⁷⁸ They contend that as environmental governance must operate within the broader context of the capitalist system, “the mainstream economic and political paradigm will not take the right to environment seriously, and it will remain an idiosyncratic influence at best.”⁴⁷⁹

Whilst these arguments have merit, it is important not to underestimate the importance of recognizing environmental protection as a human rights issue. Duncan argues that it is problematic to conceptualize a healthy environment as a human right as “the environment needs to be protected not for, but from, human beings”.⁴⁸⁰ However, arguably one of the most effective ways to improve protection from human impacts is to characterize environmental protection as a human interest. Historically, a lack of appreciation of the link between human health and environmental health has hindered efforts

477 Luis E Rodriguez-Rivera, 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 (1) Columbia Journal of International Environmental Law and Policy 1, 31.

478 Burns Weston and David Bollier, Regenerating the Human Right to a Clean and Healthy Environment in the Commons Renaissance (2011) 24 <<http://www.commonslawproject.org/>> accessed 10 March 2016.

479 ibid 25.

480 Myrl L Duncan, 'The Rights of Nature: Triumph for Holism or Pyrrhic Victory?' (1991) 31 Washburn Law Journal 62, 68.

to improve environmental protection. For instance, failure to acknowledge the inherent interest all human beings possess in ensuring the maintenance of a healthy natural environment can impact on the ability to access justice in environmental protection matters. The right recognizes that adequate protection of the environment and the enforcement of environmental protection laws are in the interests of all human beings. Accordingly, limiting access to justice in this regard to individuals and organizations with more “direct” interests in matters concerning the environment could be viewed as contrary to the right. This was recognized recently in Australia in response to an attempt by the Australian Government to remove an extended standing provision under Australia’s national environmental protection legislation. One aspect of the dialogue model is already in operation at the federal level in Australia due to the creation of a Commonwealth Parliamentary Joint Committee on Human Rights which scrutinizes legislation for compatibility with human rights. The Committee concluded that the proposed amendments “could result in a failure to properly enforce the protections” under the environmental protection legislation, and therefore could “engage and limit the right to health and a healthy environment”.⁴⁸¹

They reasoned that, as the United Nations Committee on Economic Social and Cultural Rights has stated that a violation of the right to health can occur where pollution laws are inadequately enforced, limiting the ability of environmental protection advocates to enforce those laws might “engage and limit” the human right to a healthy environment.⁴⁸² Accordingly, it can be seen that even though the operation of the right may not compel a particular outcome, it can create an important dialogue on environmental protection issues couched in the politically powerful language of human rights. Whilst under the dialogue model it is open to the government to proceed with legislation which limits the right, the recognition of the human rights dimension helps to transform the discussion from one of “policy choice” to consideration of human rights obligations.⁴⁸³ Moreover, once a particular environmental protection measure has been deemed necessary for fulfilment of these obligations, it may be much more difficult to justify any “rollbacks” on that protection.⁴⁸⁴

5. Conclusion

The aim of this paper was to explore whether legal recognition of the human right to a healthy environment in Australia could offer potential benefits for environmental protection. It has been

481 Parliamentary Joint Committee on Human Rights, Twenty-Seventh Report of the 44th Parliament (2015) 4 [1.19].

482 *ibid* 5 [1.25]-[1.26].

483 As noted by Shelton, rights-based approaches ‘are preferred by many...because human rights are maximum claims on society, elevating concern for the environment above a mere policy choice that may be modified or discarded at will’: Dinah L. Shelton (ed), *Human Rights and the Environment Volume I* (Edward Elgar 2011) x.

484 Boyd (n 2) 27-32.



concluded that legal recognition could increase government accountability, encourage rights awareness in executive decision-making, facilitate proactive action on legislation which has the potential to breach the obligations imposed by the right, and create more avenues for review of government decision-making. However, it is important to recognize that a vast range of complicated factors contribute to Australia's environmental protection issues, which are beyond the scope of redress by a limited legal tool. Many of the key challenges facing the protection of Australia's natural environment stem from a systemic acceptance of environmental harm. Recognition of the human right to a healthy environment cannot be expected to address the fact that Australia's

environmental protection regimes operate on the presumption that a certain (and sometimes significant) degree of environmental harm is legally tolerated. The risk of unintended or "dangerous" consequences flowing from such recognition does not constitute a strong argument against recognition. There are risks inherent with any legislative change, and experience in other jurisdictions and with the state/territory human rights legislation demonstrates that for the most part these concerns are not significant issues in practice. Accordingly, this paper advocates for consideration of the adoption of a statutorily recognized human right to a healthy environment as an additional tool for improving environmental protection in Australia.

Environmental constitutionalism and the ecocentric rights paradigm: the rights of nature in Ecuador and Bolivia

Paola Villavicencio Calzadilla
Louis J. Kotzé

1. Introduction

Worldwide, the constitutionalization of environmental law has become popular to augment juridical environmental protection.⁴⁸⁵ This is premised on the belief that environmental protection at the constitutional level can improve environmental governance regimes and can make a positive contribution to the results that environmental law and governance seek to achieve.⁴⁸⁶ Presently, the clearest expression of environmental constitutionalism is generally accepted as manifesting itself through human rights and, more particularly, through environmental rights. The increased popularity of rights as means to strengthen environmental protection is evident from the fact that the environment was not a regulatory concern during the first significant global constitutional moment that saw the almost universal endorsement, if not the blanket global adoption, by states of an impressive catalogue of human rights following the Universal Declaration of Human Rights in 1948.⁴⁸⁷ Environmental rights began to feature in domestic constitutional orders only following the United Nations Conference on the Human Environment in 1972, which provided the impetus for couching environmental concerns in rights terms.⁴⁸⁸ Thus, over recent decades the rights-based approach to environmental protection has grown impressively and has gained traction, both as a field of analytical enquiry and as a normative project of constitutional protection of the environment. Nowadays approximately three quarters of the world's constitutions (150 out of 193) contain references to environmental rights and/or environmental responsibilities.⁴⁸⁹

485 For a general discussion see Louis Kotzé *Global Environmental Constitutionalism in the Anthropocene* (Hart Publishing, 2016).

486 James May and Erin Daly *Global Environmental Constitutionalism* (Cambridge University Press, 2015); Louis Kotzé "Arguing Global Environmental Constitutionalism" 2012 1(1) *Transnational Environmental Law* 199-233; David Boyd *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012); David Boyd "Constitutions, Human Rights, and the Environment: National Approaches" in Anna Grear and Louis Kotzé (eds) *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015) 170-199.

487 Louis Kotzé "The Anthropocene's Global Environmental Constitutional Moment" *Yearbook of International Environmental Law* 2014 25(1) *Yearbook of International Environmental Law* 24-60.

488 See Principle 1 of Declaration of the United Nations Conference on the Human Environment, 1972.

489 David Boyd *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012) 47.



Through the course of these developments, environmental rights have, however, remained anthropocentric.⁴⁹⁰ Anthropocentric law and its incorporated juridical constructs of rights are regulatory tools that legally create human entitlements to nature, that justify and legitimize these entitlements, and that strengthen them through legitimizing claims to nature and its benefits to human development as of right. Therefore, in the context of anthropocentric rights, nature is seen as an “inert machine that exists to satisfy the needs, desires (and greed) of human beings”.⁴⁹¹ The anthropocentric orientation of human environmental rights in the possible new geological epoch called the Anthropocene is considered to justify and promote ecological ravaging; to aggravate the enclosure of the commons; to justify and increase the dispossession of indigenous people; to perpetuate corporate neo-colonialism; to intensify asymmetrically distributed patterns of advantage and disadvantage that prevail in society; and to deepen inter- and intra-species hierarchies regarded as systems of obedience and command, including that of human beings over nature.⁴⁹²

Two notable state exceptions to the general anthropocentrism described above are Ecuador and Bolivia. Ecuador bestows rights on nature through its Constitution,

while Bolivia grants rights to nature through a statutory law that is based on the state's constitution.⁴⁹³ On paper at least, such ground-breaking constitutional and subsequent statutory constructions are a historical and potentially transcendent step towards recognizing the importance of nature as a subject of law and a bearer of rights, instead of its being relegated to being an object of protection for the benefit of human beings who, in terms of the prevailing anthropocentric paradigm, are the only legitimate subjects of law, bearers of rights and recipients of law's regulatory protection and benefits. This entrenchment is a clear juridical expression of an ecocentric rights-orientation that invites an ethical acknowledgement of nature's central importance to all life on Earth. In this paper we briefly but critically reflect on the extent to which Ecuador and Bolivia have constitutionally and statutorily entrenched the rights of nature. Similarly, we provide a brief, but critical, appraisal of how the ecocentric rights of nature are playing out in practice in both countries.

490 Louis Kotzé “Human Rights and the Environment in the Anthropocene” 2014 1(3) *Anthropocene Review* 252-275; and more generally, Alexander Gillespie *International Environmental Law, Policy and Ethics* (Oxford University Press 1997) 4-18.

491 Peter Burdon “The Earth Community and Ecological Jurisprudence” 2013 3(5) *Oñati Socio-Legal Series* 815-837, 818.

492 Anna Gear “Deconstructing Anthropos: A Critical Legal Reflection on ‘Anthropocentric’ Law and Anthropocene ‘Humanity’” 2015(26) *Law and Critique* 225-249.

493 Concretely, based on article 33 of the Bolivian Constitution as described later.

2. Rights of Nature in Ecuador

In 2008 Ecuador was at the forefront in terms of promoting and recognizing the rights of nature at the constitutional level. Its constitution remains the first, and still the only, constitution worldwide that recognizes enforceable rights of nature. By announcing the transition from a juridical anthropocentric orientation of rights to an ecocentric one, the constitution (specifically articles 10, 71-74) provides an example of how an ethical acknowledgment of nature's rights could manifest concretely in the juridical sphere. Thus, in the Ecuadorian Constitution nature acquires constitutional rights representing a novelty, or new frontier, in the context of global environmental constitutionalism.

Historical context

During the elections of November 2006 Rafael Correa won the presidency of Ecuador on the strength of advocating that the state undertake a wholesale transformative process aimed at building a new country. Part of Correa's new vision for Ecuador involved the building of a state to redefine and harmonize not just

the fractured relationships between the state, society and the economy, but also the relationship between human beings and nature.⁴⁹⁴ In April 2007 Correa called for the establishment of a Constituent Assembly to draft a new constitution that was approved during a referendum in September 2008. The constitution came into force in October 2008.⁴⁹⁵

The Constitution of Ecuador confronts the prevailing anthropocentric socio-political and economic order in Ecuador that has been characterized for many years by the unbridled exploitation of natural resources (especially oil) that caused vast environmental destruction.⁴⁹⁶ It aims to prioritize and solidify key concerns relating to equity between human beings and between human beings and nature, as well as to propagate a new understanding of nature (or *Pacha Mama*). In this sense, the constitutional protection of rights has been extended in favor of nature, which is now considered a legal subject and a holder of certain enforceable rights.⁴⁹⁷

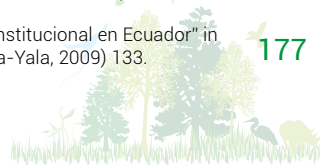
Breaking with the anthropocentric paradigm that considers nature as an object to be exploited for the benefit of human beings and that ignores other radical (indigenous) worldviews of the relationship between people and nature,

494 Alianza País. Plan de Gobierno 2007-2013. Un primer gran paso para la transformación radical del Ecuador, 2006, 8-12.

495 Constitution of the Republic of Ecuador, Official Registry No. 449, October 20, 2008.

496 An example is the severe environmental damage caused by Chevron-Texaco in the Ecuadorian Amazonia from 1964 to 1990 as a result of oil extraction. For a more detailed description see Judith Kimerling Amazon Crude (Natural Resource Defense Council, 1991).

497 Patricio Carpio Benalcázar "El Buen Vivir, más allá del desarrollo. La nueva perspectiva Constitucional en Ecuador" in Alberto Acosta and Esperanza Martínez (eds) El Buen Vivir. Una vía para el desarrollo (Abya-Yala, 2009) 133.





Ecuadorian Amazon region.
Photo credit: © the authors

the Ecuadorean Constitution provides an example of a text in which the ideas of the rights of nature and indigenous “cosmovisions”⁴⁹⁸ that recognize the inextricable links between human beings and nature converge.

While the proposal for the inclusion of the rights of nature in the Ecuadorian Constitution was supported mostly by those in more mainstream political,

academic and civil society circles and within a western liberal constitutionalism paradigm, indigenous peoples managed to introduce into the debate the notion of Buen Vivir (or Sumak Kawsay in the Andean Kichwa language), which means “living well”.⁴⁹⁹ Buen Vivir suggests that people should live, exercise their rights and fulfill their responsibilities within the framework of interculturalism, respect for diversity, and in harmony with nature.⁵⁰⁰ As an indigenous world view that demolishes hierarchies constructed by colonial Western scientific knowledge, Buen Vivir starkly contrasts with the deep anthropocentric conflict arising between dominant human beings and a subservient nature. Under the cosmovision of Buen Vivir, people have to act as part of nature, thus avoiding the nature/society dichotomy.⁵⁰¹

The rights of nature

Considering the need to (re)define the human-nature dichotomy, and on the basis of the Ecuadorian indigenous cosmovision described above, the Constitution of Ecuador includes various provisions on the rights of nature. The Preamble provides a contextual and interpretive background and motivation for the rest of the Constitution’s provisions, showing a significant adjustment of the current

498 See generally Erin Fitz-Henry “Decolonizing Personhood” in Michelle Maloney and Peter Burdon (eds) *Wild Law-in Practice* (Routledge, 2014) 133-148.

499 Fundación Pachamama “Recognizing Rights for Nature in the Ecuadorian Constitution”, available at <http://www.therightsofnature.org/wp-content/uploads/pdfs/Recognizing-Rights-for-Nature-in-the-Ecuadorian-Constitution-Fundacion-Pachamama.pdf> [accessed 15 March 2016].

500 Article 275 of the Constitution.

501 Gordon DiGiacomo *Human rights, Current Issues and Controversies* (University of Toronto Press, 2016) 425.

anthropocentric world-view. It celebrates “nature, the Pacha Mama (Mother Earth), of which we are a part and which is vital to our existence,” and reaffirms Ecuadorean society’s aim “to build a new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living, the *sumak kawsay*”.⁵⁰² The preamble constitutionally legitimizes the idea that the relationship between human beings and nature is ancient and that in this new form of public coexistence, in diversity and in harmony with nature, people and nature are indivisible.

Building on this introductory statement, the first and clearest articulation of the rights of nature can be found in article 10, which provides that “[n]ature shall be the subject of those rights that the Constitution recognizes for it”.⁵⁰³ More specifically, Title II, Chapter Seven of the Constitution refers to the rights of nature. Under article 71 “[n]ature, or Pacha Mama ... has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes”. Therefore, in this moral and juridical relationship people have a duty to treat nature in such a way that it can exist, maintain itself and regenerate to the fullest extent possible.⁵⁰⁴ This provision also offers wide *locus standi* to enable anyone to enforce the rights of nature, regardless of whether

a direct interest exists in invoking and protecting these rights or not. Article 72 goes well beyond traditional duties of compensation or remediation to people for environmental damage. It states that nature has an explicit, independent and inherent “right to be restored”, and imposes on people the duty to “adopt adequate measures to eliminate or mitigate harmful environmental consequences”.⁵⁰⁵ The “right to be restored” places positive obligations on the state to “establish the most effective mechanisms to achieve the restoration [and] to eliminate or mitigate harmful environmental consequences”. Furthermore, article 73 imports the well-known preventive principle and obliges the state to restrict activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles. Article 74, in terms similar to those in which the right to a healthy environment is usually expressed, provides people the “right to benefit from the environment and the natural wealth” through which they are enabled to live well. Thus, this article recognizes human beings as beneficiaries and entitled entities in the human-nature relationship.

The rights of nature that the Ecuadorian constitution recognizes are self-executing, meaning that they may be invoked without the need for legislative embodiment or

502 Preamble.

503 In addition to the rights of nature, article 14 of the Constitution recognizes an environmental right that addresses and guarantees the usual human-centered issues.

504 For example see articles 83(6) and 83(13) as well as article 399.

505 Also see article 396.



implementation. Thus, anyone can revert directly to the Constitution to invoke protection on behalf of nature.⁵⁰⁶ In addition, article 11(4) provides that “[n]o legal regulation can restrict the contents of rights or constitutional guarantees.”⁵⁰⁷ Theoretically this would mean that, given the supremacy of the Constitution⁵⁰⁸, any subsequent law (such as a mineral or oil exploitation laws) which may restrict or infringe the rights of nature could be declared unconstitutional. Such action of unconstitutionality against a norm that violates the content of the rights of nature can be presented by any person, individually or collectively,⁵⁰⁹ and any person or third party can also intervene in the process, contributing elements for the resolution of the conflict.⁵¹⁰

A critical appraisal

Although the ground-breaking constitutional regime in Ecuador is a historical and crucial step taken towards recognizing the rights of nature, the enforcement and promotion of those rights still face significant challenges.

These include, among others: tensions between ecocentric and anthropocentric constitutional provisions; the non-existent hierarchy among the constitutional rights; the adoption of laws, policies and governance practices that contradict the spirit and purpose of the rights of nature; and the politicization of judicial processes and judges' lack of knowledge about the nature and extent of these constitutional rights. We explore these further below.

First, not all environment-related provisions of the Ecuadorean Constitution are ecocentric, a fact which arguably highlights a potential tension between ecocentrism and anthropocentrism. The Constitution details, for example, in comprehensive terms and in a predominantly anthropocentric narrative, several “prime duties” of the state, including inter alia the promotion of sustainable development and the equitable redistribution of resources and wealth to enable access to the good way of living (articles 12-34), which is premised on resource exploitation (including mining and the exploitation of hydrocarbons).⁵¹¹

506 Article 11(3), notably through the constitutional protection proceeding (called *Acción de Protección*) provided for in article 88 of the Constitution.

507 This blanket prohibition does seem to be qualified, however, by the provision that “[a]ny deed or omission of a regressive nature that diminishes, undermines or annuls without justification the exercise of rights shall be deemed unconstitutional.” (Article 11 (8)). In other words, it is possible to limit rights as long as the limitation is justified. Worryingly, the Constitution is silent on the criteria for justification, which leaves wide open the question as to what a justifiable limitation could be.

508 See article 424.

509 See articles 439 of the Constitution and 77 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (*Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional (LOGJCC)*, Official Registry No. 52, October 22, 2009).

510 See articles 85 and 12 (related to the figure of *Amicus Curiae*) of the LOGJCC. On this basis, for example, some referred to the unconstitutional nature of the new Mining Law discussed elsewhere in this chapter. See *Amicus Curiae* presented by Alberto Acosta to the Constitutional Court within the action of unconstitutionality against the Mining Law of Ecuador, Case 0011-09-1 and 0008-09-IN, available at http://www.inredh.org/index.php?option=com_content&view=article&id=207:demanda-ley-de-mineria&catid=76:inconstitucionalidad&Itemid=150 [accessed 12 October 2016].

511 See, for example, the National Development Plan (2007-2010).



Oil spill incident occurred in the Ecuadorian Amazon region (2010) Photo credit: © Diocles Zambrana

Similarly, the provisions related to the rights of water (article 12) and a healthy environment (article 14) are focused on human needs and do not refer to the intrinsic rights, value or ecological integrity of water or the environment. They mostly address and guarantee the usual human-centered issues and provide little if any foundation or support for the rights of nature. Likewise, while article 407 establishes a prohibition on the extraction of non-renewable natural resources in protected areas and in areas declared intangible assets, it also indicates that these resources can be exploited "at the substantiated request of the President of the Republic and after a declaration of national interest issued by the National Assembly". Thus, any potential protective guarantees that the Constitution might offer to nature are accordingly subject to government discretion. These contradictions within the Constitution

are barriers that could inhibit the full realization of the rights of nature.

Second, there is no evidence that the rights of nature enjoy any supremacy in the Ecuadorean Constitution. The Constitution instead explicitly states that there is no hierarchy among rights and that all rights compete on an equal footing (article 11.6). It is therefore clear that the Constitution of Ecuador is not a "Constitution for Nature" and does not create an ecological constitutional state, although it presumably creates an expectation that it does that. It remains unclear whether the rights of nature will prevail when they come into conflict with other rights that are constitutionally enshrined. If nature is indeed "vital to [Ecuadorean] existence," as the preamble suggests it is, then one would expect the rights of nature to take precedence over all other rights in the Constitution, including those rights that provide unbridled human entitlements to resources.

Third, the rights of nature do not feature in the transitional provisions of the Constitution that call for the adoption of laws that develop the constitutional provisions.⁵¹² This omission shows that they are considered of lower priority than other issues such as communication, education, culture and sports, which are provided for in the transitional provisions. As a result, beyond being self-executing, no legislation has yet been created to develop and give practical effect to the

512 See "Transitory Provisions One" of the Constitution.



rights of nature. This redirects attention to the possible lack of any political commitment to give full effect to the constitutional commitments indicating, as it presumably does, that the provision of the rights of nature in Ecuador could be a window-dressing exercise or “beautiful rhetoric used to entice support for Ecuador from the international community”⁵¹³ while seeking to expand on the anthropocentric and neoliberal logic of development based on the exploitation of natural resources. In fact, the government has recently adopted laws, policies and governance practices that contradict, rather than promote, the spirit and purport of the rights of nature. Examples of these are the new Mining Law (*Ley de Minería*) which, based on articles 313⁵¹⁴ and 407 of the Ecuadorian Constitution discussed above, authorizes the extraction of non-renewable natural resources in a protected area and allows large-scale and open-pit mining operations.⁵¹⁵ Another is the cancellation of the Yasuni-Ishpingo Tambococha Tiputini Initiative (ITT), which attempted

to prevent the exploitation of oil reserves located in the Yasuni National Park (a UNESCO biosphere reserve and home to indigenous people).⁵¹⁶

Fourth, because of the politicization of judicial processes and a lack of knowledge about the nature and extent of the constitutional rights granted to nature, the judiciary has been unable to fully develop and enforce these rights.⁵¹⁷ There are examples of lawsuits based on the rights of nature, such as the Vilcabamba river case.⁵¹⁸ In this case, the court settled in favor of nature (represented by the plaintiffs), and expressed its concern about the impacts that the construction of a road and the consequent dumping of excavation materials into the river have on its ecosystems.⁵¹⁹ However, in most other cases Ecuadorean courts have failed to address the conflict that the Constitution creates between anthropocentrism and ecocentrism. In 2013, for example, indigenous and non-governmental organizations filed a constitutional

513 Fitz-Henry (n 14) 142.

514 Article 313 acknowledges the non-renewable natural resources in Ecuador as strategic sector for the general welfare of society.

515 Mining Law, Official Registry No. 517, January 29, 2009, article 25.

516 See, among others, Carlos Larrea & Lavinia Warnars “Ecuador’s Yasuni-ITT Initiative: Avoiding emissions by keeping petroleum underground” 2009 (13) *Energy for Sustainable Development* 219-223; Matthieu Le Quang “El sentido político de la Iniciativa Yasuni-ITT: disputa entre capitalismo verde y ecosocialismo” 2015 (32) *Revista THEOMAI* 75-95.

517 For a discussion see Craig Kauffman and Pamela Martin “Testing Ecuador’s Rights of Nature: Why Some Lawsuits Succeed and Others Fail” 9. Paper Presented at the International Studies Association Annual Convention Atlanta, GA, March 18, 2016. Available at http://www.harmonywithnatureun.org/wordpress/wp-content/uploads/Papers/Testing%20Ecuador%E2%80%99s%20RoN_16_04_20.pdf. According to the authors, the rights of nature are part of the national discourse in Ecuador and activists are using such rights to strengthen jurisprudence and norms related to these rights in an adequate way. However, they also noted that the politicization and lack of knowledge are still two important obstacles to successful jurisprudential development.

518 Judgment, Provincial Court of Loja, Case No. 11121- 2011-0010, 30 March 2011, Wheeler vs Director de la Procuraduría General del Estado en Loja). For a discussion see Erin Daly “The Ecuadorean Exemplar: The First Ever Vindications of the Constitutional Rights of Nature” 2012 21(1) *Review of European Comparative and International Environmental Law* 63-66.

519 However, this case still indicated the many challenges that courts experience, especially to establish a clear distinction between the environmental right and the right of nature.

lawsuit against a developer and the Ecuadorian government to suspend the first large-scale open-pit mining project, called “*Mirador*”, which is located in an indigenous territory and which is one of the most mega-diverse and fragile ecosystems in Ecuador. The plaintiffs argued that the mining project would cause serious environmental damage and would therefore constitute an infringement of the rights of nature.⁵²⁰ Despite the fact that the environmental impact assessment carried out by the developer acknowledged that the project would cause severe damage to the environment, the court ruled against the plaintiffs, the ruling being based on the argument that the project would not affect a protected area and that the environmental damage would not violate the rights of nature.⁵²¹ The court argued that far beyond the private interest of the plaintiffs (in this case, civil society), the development of the project represented the public interest, since it was necessary to achieve the state’s sustainable economic development goals and to allow it to fulfill its social development agenda.⁵²² The plaintiffs appealed the decision, but the Appellate Court confirmed the decision of the court of first instance.⁵²³ This case illustrates the lack of knowledge regarding the rights of nature in Ecuador, as well as a questionable interpretation of the contents of these rights. In the *Paramo Tangabana*

lawsuit, judges failed to understand, among other things, the wide locus standi provisions in the Constitution (discussed above) that enable plaintiffs to represent and enforce the rights of nature. Based on procedural grounds, the court ruled against the claimants, arguing that they had proved neither their ownership over the affected area nor that they would be personally affected by its development.⁵²⁴ The claimants appealed the decision but a second instance judge upheld the first ruling.⁵²⁵

These cases suggest that on balance in the Ecuadorian judicial system both the politicization of judicial processes and a lack of knowledge about the rights of nature are still obstacles for developing and enforcing these rights. The lack of a detailed rights of nature statutory framework could also possibly be said to have bearing on the effectiveness of the judiciary.

3. Rights of Nature in Bolivia

As in Ecuador, in 2009 Bolivia responded to its socio-ecological crisis by adopting a new constitution that describes nature in the Preamble as the common home where all forms of life have always coexisted harmoniously. While it does not provide

520 Judgment, Twenty Fifth Civil Court of Pichincha, Case No. 17325-2013-0038, 18 March 2013, *Viteri y otros vs Ecuacorriente S.A, Ministerio de Recursos Naturales, Procurador General del Estado*.

521 Grounds 6 and 9 of the judgment.

522 Ground 7 of the Judgment.

523 Judgment, Provincial Court of Pichincha, Case No. 17111-2013-0317, 20 June 2013 (*Viteri y otros vs Ecuacorriente S.A, Ministerio de Recursos Naturales, Procurador General del Estado*).

524 Judgment, Juridical Court of Colta, Case No. 06334-2014-1546, 10 December 2014 (*Bonilla y otros vs Rhor Hugo*).

525 Judgment, Provincial Court of Chimborazo, Case No. 06334-2014-1546, 24 August 2015.



rights to nature, the Bolivian Constitution recognizes the ancestral values that underpin the Aymara culture, such as the *Vivir Bien* or *Suma Qamaña* (living well).⁵²⁶ Like the principle of *Buen Vivir* or *Sumak Kawsay* in the Ecuadorean Constitution, this principle also refers to the notion of living well in harmony with nature and in equilibrium with all forms of life.⁵²⁷ This led to the adoption of the first statutory framework in the world that recognizes and aims to protect the rights of nature: the Law of the Rights of Mother Earth (*Ley 071 de Derechos de la Madre Tierra*)⁵²⁸ and the Framework Law of Mother Earth and Integral Development for Living Well (*Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien*).⁵²⁹

Historical context

At the dawn of the twenty-first century Bolivia labored through a crisis of statehood as a result of its decaying economic, social, political and legal structures. This process was especially characterized by the marginalization and exclusion of indigenous people and the crisis brought about two events of significant historical importance: the election of the first indigenous president of Bolivia, Evo Morales, and the formation of a Constitutional Assembly that was tasked to draft a new Constitution

for the regeneration of the Bolivian State. In response to popular demand, mainly from indigenous organizations, the Constitutional Assembly presented a constitutional text that was accepted during a Constitutional Referendum in January 2009. It came into force in February 2009.

The active and strong participation of indigenous organizations in the process of drafting the new Constitution led to the inclusion of references to the values of indigenous cultures, especially those related to the relationship between people and nature. Thus, the call to build a new form of coexistence with nature, mutually and complementarily and based on *Vivir Bien*, enabled the adoption of the two laws indicated above. The adoption of these also arose in part from a draft bill on the rights of Mother Earth that was proposed by the main indigenous organizations grouped together in the so-called “Pacto de Unidad”. Eventually submitted to the Plurinational Legislative Assembly,⁵³⁰ the draft bill was based on the proceedings of the World People’s Conference on Climate Change and the Rights of Mother Earth held in Bolivia in April 2010, and it was based on the Universal Declaration of the Rights of Mother Earth adopted during this event.⁵³¹ This Declaration defines Mother Earth as “a unique,

526 Article 8.

527 Fernando Huanacuni Mamani *Vivir Bien/Buen Vivir. Filosofías, políticas, estrategias y experiencias regionales* (Coordinadora Andina de Organizaciones Indígenas-CAOI, 2010) 46.

528 Law of the Rights of Mother Earth No. 071, December 21, 2010.

529 Framework Law of Mother Earth and Holistic Development for Living Well No. 300, October 15, 2012.

530 Pacto de Unidad, “Anteproyecto de Ley de la Madre Tierra”, 7 November 2010, available at <http://www.somossur.net/crisis-del-capitalismo/todo-sobre-el-cambio-climatico/540-ley-de-la-madre-tierra.html> [accessed 24 March 2016].

531 See the Universal Declaration of the Rights of Mother Earth on <https://pwccc.wordpress.com/support/> [accessed 20 March 2016].

indivisible, self-regulating community of interrelated beings that sustains, contains and reproduces all beings",⁵³² and recognizes nature's rights to life, to exist, to be respected, and to restoration, among other things.⁵³³ The work of the *Pacto de Unidad* was also a reaction to the exclusionary policy that was being implemented by the Morales government against indigenous organizations in order to promote the expansion of the extractive industry.⁵³⁴ The draft required the government to establish policies and measures to achieve a shift from an energy matrix based essentially on fossil fuels to one based on clean and renewable resources.⁵³⁵ As Hindery points out, the draft, if adopted, would have prevented the approval of the extractive projects planned by the Bolivian Government.⁵³⁶ The draft was not approved. Instead, the government adopted the Law of the Rights of Mother Earth as an abbreviated version of the draft, and the Framework Law, which is a watered-down version of the draft, as it reflects on the one hand the ecocentrist aspirations of the indigenous people, and on the other, the development agenda of Morales' government.

The statutory provisions

Although the Bolivian Constitution does not recognize the rights of nature in the same explicit way that the Ecuadorean Constitution does, it provides the basis for such recognition at the statutory level through the constitutionalization of the environmental right and the right of *all living beings* to develop in a "normal and permanent" way (article 33), as well as the incorporation of the ancestral indigenous value and cosmovision of *Vivir Bien* or *Suma Qamaña* (living well) in harmony with Mother Earth.

The statute-based Law of the Rights of Mother Earth goes much further than the Bolivian Constitution and, from an ecocentric perspective, recognizes in elaborate terms the inherent rights of nature and the obligations and duties of the State and society to ensure respect for those rights.⁵³⁷ Respect for and recognition of the rights of nature are underpinned in the Law by a set of legally binding core principles such as harmony, promoting the collective good, a guarantee of regeneration, eschewing commercialization, and promoting multiculturalism.⁵³⁸ Mother Earth takes on the character of a collective subject of the public interest and is entitled to all of the rights recognized in the law.⁵³⁹ Thus,

532 Ibid. article 1.

533 Ibid. article 2.

534 Derrick Hindery From Enron to Evo Pipeline Politics, Global Environmentalism, and Indigenous Rights in Bolivia (The University of Arizona Press, 2013) at 217.

535 Pacto de Unidad (n 46), articles 8.8 and 25.8.a.

536 Hindery (n 50) 217.

537 Article 1.

538 Article 2.

539 Article 5.



Mother Earth has the rights to life, to the diversity of life, to water, to clean air, to equilibrium, to restoration and to pollution-free existence.⁵⁴⁰ The Law states that the exercise of individual human rights is limited by the exercise of collective rights in the living systems of Mother Earth, and any conflict of rights must be resolved in ways that do not affect the functionality of such systems.⁵⁴¹ In addition, it attempts to respond to the problems of the representation and justiciability of the rights of nature by establishing the Office of Mother Earth (*Defensoría de la Madre Tierra*), which has the function of ensuring the fulfillment of the rights of Mother Earth.⁵⁴²

The Framework Law, for its part, establishes the vision and fundamentals of notion of integral development in harmony with Mother Earth to achieve *Vivir Bien*, and it seeks to guarantee the continued capacity of Mother Earth to regenerate natural systems, to strengthen local and ancestral practices, and to create (within a rights framework) various obligations and responsibilities with respect to nature.⁵⁴³ Considered a superior law operating at a higher level than other sectorial laws,⁵⁴⁴ the Framework Law reaffirms certain principles, including a

prohibition on the commercialization of Mother Earth's environmental functions, precaution, a guarantee of the restoration and regeneration of Mother Earth, and the importance of a harmonic relationship between the natural environment and the satisfaction of human needs.⁵⁴⁵ By establishing an individual and collective responsibility to report violations of the rights of Mother Earth, the Framework Law confers *locus standi* on public authorities and individuals and groups of people directly affected by such violations.⁵⁴⁶ The Framework Law also refers to the Office of Mother Earth for the protection and enforcement of the rights of Mother Earth (article 39).

A critical appraisal

As a first point, despite these lofty provisions, numerous tensions are evident in the Bolivian Constitution between the ecocentric and anthropocentric approaches. It clearly contains provisions based on an ecocentric approach, but other provisions have a clear anthropocentric orientation. The Constitution establishes that "[t]he State places the highest value on *human beings* and assures development through the equitable redistribution of economic surplus in the social policies..."⁵⁴⁷

540 Article 7.

541 Article 6.

542 Article 10.

543 Article 1.

544 Article 2.

545 Article 4.

546 Article 39. However, that recognition is inconsistent with the *actio popularis* established in the Bolivian Constitution with regard to the defense of the environmental right (article 34).

547 Article 306. Emphasis added.

It consequently recognizes the right to water and the environmental right, which mainly focus on human needs, human health and human well-being.⁵⁴⁸

To eliminate poverty and social and economic exclusion, and to achieve well-being, the Constitution provides that the State must actively promote the industrialization of natural resources as a national priority.⁵⁴⁹ In fact, the exploration, exploitation, refining, industrialization, transport and sale of non-renewable natural resources are characterized as state necessities and public utilities.⁵⁵⁰ Thus, the exploitation of natural resources is still an important component of the Bolivian economy, a reality that perpetuates the anthropocentric and

neoliberal logic of development based on the extraction of natural resources and that seemingly contradicts the central tenet of the laws described above.

Second, similar contradictions and inconsistencies appear in the context of the Framework Law. Despite its reference to the rights of nature, it aims to establish the vision and fundamentals of "integrated development" to achieve the *Vivir Bien* that is mainly focused on human needs. It is also inconsistent with its own core ecocentric foundation and with the rights of nature because it provides for the continued exploitation of natural resources as an obligation of the State in order to achieve social justice.⁵⁵¹ As Prada argues, by promoting both the defense of Mother Earth and the discourse of the model of integral development, the framework law now "allows the endorsement of the extractivist model under the Mother Earth discourse."⁵⁵² To this end, the framework law "becomes a device that legalizes the extractivist model now presented under the *Vivir Bien* discourse".⁵⁵³

Third, there are contradictions and tensions between the progressive policies of welfare based on the extractivist model on the one hand and, on the other, the rights of nature. At the time of writing, the Bolivian Government has neither approved



Bolivian Andes region. Photo credit: © Paola Villavicencio Calzadilla Louis J. Kotzé

548 Articles 16-19.

549 Articles 9.6, 316.6, and 355.

550 Article 356.

551 See, for instance, articles 1, 3 and 18.

552 Raul Prada, 'Matricidio del Estado patriarcal', 25 July 2013, available at <http://horizontesnomadas.blogspot.co.za/2013/07/matricidio-y-estado-patriarcal.html> [accessed 5 April 2016].

553 Ibid.



the enforcement measures needed to give effect to the Law of the Rights of Mother Earth and the Framework Law, nor has it established the Office for the Protection of Mother Earth. The establishment of this Office would have allowed progress to be made in promoting compliance with the rights of nature. Unfortunately, the clear commitment of the Bolivian government to intensifying the extractivist model has led to the adoption of laws and policies fostering the exploitation of natural resources that, as in the case of Ecuador, are in conflict with the requirement to protect the rights of nature. An example is the new Mining and Metallurgy Law (*Ley 535 de Minería y Metalurgia*),⁵⁵⁴ which authorizes mining activities in protected natural areas (article 220)⁵⁵⁵ and imposes limitations on the rights of nature. Another is the Supreme Decree no 2366 of May 2015, which legalizes the possibility of drilling for exploration purposes in all 22 of Bolivia's protected areas.

The contradictions and evident conflicting tensions between the executive and legislative actions described above are clearly reflected in a recent conflict that centered on the construction of a highway across the Isiboro Secure National Park and Indigenous Territory (*Territorio Indígena y Parque Nacional Isiboro Sécure* - TIPNIS) that arose between 2011 and 2012. This project not only affects the rich biodiversity in the region, but also

negatively impacts on the traditional lifestyles of the indigenous people in the area. The TIPNIS conflict is exemplary of the enduring historical struggle for land and indigenous rights that has been taking place since the 1990's, and of how the extractivist model remains paramount in the Bolivian political economy. Such conflict is an example of where the political and economic interests of the government collide with the rights of nature as set out in Bolivian law. More worryingly, it is an example of an instance where the statutory protection of the rights of Mother Earth is unable to withstand the onslaughts of state-sanctioned neoliberal economic development.

4. Conclusion

This brief analysis suggests that the ecocentric-oriented rights of nature paradigm is at long last gaining a foothold in constitutional and statutory regimes. Whereas such a radical juridical regulatory reality would have been unthinkable 70 years ago when the Universal Declaration of Human Rights was adopted in 1948, the Bolivian and Ecuadorean legal regimes are prying open steadfastly closed epistemological and regulatory spaces that allow us to re-imagine the role of human rights in the environmental protection paradigm. While there are evidently stark differences between what exists on paper and what occurs in reality,

554 Mining and Metallurgy Law 535, 28 May, 2014.

555 It must be noted, though, that the Law requires that such activities must comply with environmental and related regulations, and must not affect the achievement of the objective of protecting the environment.

these two countries, as pioneers of the paradigm of the rights of nature, provide us with valuable guidance in our efforts to rid our legal systems of deeply embedded notions of anthropocentrism and to pursue our continued efforts to provide for more ecocentric world views that are so critical in the time of the Anthropocene. Evidently at a practical level much more needs to be done and while it is a crucial first

step to have constitutional and statutory provisions that seek to protect the rights of nature, the extent to which the law will be able to secure and enforce an ecocentric paradigm will significantly depend on political will and practical governance initiatives. In the end, a constitution, its rights, and the law generally are only as effective as the extent to which they are observed, respected and implemented.



The relationship between environmental and human rights protection under regional law in Latin America

Juan Manuel Rivero Godoy

1. The right to a healthy environment in the Inter-American System: The American Convention on Human Rights and the San Salvador Protocol for Social, Economic and Cultural rights

The spirit of the American Convention on Human Rights (ACHR) was to recognize the value of the human being (referred to throughout human rights discourse as “el ser humano” in Spanish) after the Second World War, and to establish the juridical mechanisms to protect basic civil and political rights including freedom, equality, and human dignity. The ACHR does not mention any environmental human rights nor indicate whether national institutions should protect the environment and, if so, how. The only reference to socio-economic and cultural rights in the ACHR is in article 26, which states:

“The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires”.⁵⁵⁶

After the ACHR was adopted, many governments in Latin America realized that the protection of social, economic and cultural rights was fundamental to guarantee effective implementation of human rights. In 1988, the San Salvador Protocol (SSP) was adopted,

⁵⁵⁶ Text in Spanish “Los Estados Partes se comprometen a adoptar providencias, tanto a nivel interno como mediante la cooperación internacional, especialmente económica y técnica, para lograr progresivamente la plena efectividad de los derechos que se derivan de las normas económicas, sociales y sobre educación, ciencia y cultura, contenidas en la Carta de la Organización de los Estados Americanos, reformada por el Protocolo de Buenos Aires, en la medida de los recursos disponibles, por vía legislativa u otros medios apropiados”.

with the intent of consolidating those rights and providing balance to the civil and political rights protected under the ACHR. Article 11 of the SSP establishes that:

- (1) "Everyone shall have the right to live in a healthy environment and to have access to basic public services."
- (2) "The States Parties shall promote the protection, preservation, and improvement of the environment."

While on paper this looks promising, the difficulty, of course, lies in the enforcement of these provisions. Articles 19 (6) and (7) of the SSP provide for direct access to the Inter American Commission - a political institution - but only if rights to education or workers' rights to unionize are violated. The remaining human rights identified in the SSP are not enforceable at the regional level, but only pursuant to national rules and in national institutions of the American States. This includes the right to a healthy environment. Thus, for the social and economic rights (including their rights to a healthy environment) protected in the SSP, the obligation is on States to guarantee the legal, juridical, and administrative mechanisms to ensure that their citizens are able to vindicate them.

2. Implementation of human rights protection in the Inter-American system

The main objective of the ACHR is to reinforce or complement the protection of human rights provided by the domestic laws of the various States of the Americas.⁵⁵⁷ The Charter of the Organization of American States provides that, "States are the first step of protection for human rights as a minimum, as a basic standard."⁵⁵⁸ States must ensure that all persons subject to their jurisdiction enjoy free and full exercise of those rights and freedom (civil, politics, social, economic and social). If not, "anyone" can go to the Inter American system to claim his or her rights. It means that when a serious breach of fundamental rights occurs within the State's borders, affected people can go, first, to the Inter American Commission and then, eventually, to the Inter American Court. Following the Universal Declaration of Human Rights' recognition of the right of petition, the ACHR foresees that everybody must have his or her day in Court, at least in front of national tribunals, because the direct access to the Inter American Court is eventual and uncertain.⁵⁵⁹ But how does this apply in the context of the right to a healthy environment?

557 As it can be seen in "Velázquez Rodríguez vs. Honduras", sentence of 29/07/1988, par. 61, also in "Godínez Cruz vs. Honduras", sentence of 20/01/1989, par. 64 and "Fairén Gabrí y Solís Corrales vs. Honduras", sentence of 15/03/1989, par.85.

558 See e.g. articles 2 and 25 of the ACHR which refer to the right to judicial protection.

559 Couture, 1942, p 101. See Universal Declaration of Human Rights, Art. 10. (1948).



For example, if a community decides to complain about a concession or permit granted for an international company to explore or extract natural resources such as oil or gas or timber, the people must depend on the laws of their State to allow them to bring judicial actions before national tribunals. If the State did no more than provide for administrative consultation, it would be breaching Article 1 of both the ACHR and the SSP. This Article requires States to comply with the obligations therein identified, including the obligation to provide simple and effective access to justice.

Although the SSP acknowledges and guarantees important third generation rights such as the right to a quality environment, the States of Latin America missed a rare opportunity by failing to provide for enforcement of these rights (beyond education and workers' rights) in the Inter-American Commission or the Inter-American Court. Thus, a substantial reform of the Inter-American human rights system is needed at this time if Latin America is to have an effective system that protects the environment and allows all people to access justice in a meaningful way.

Of course it is important to get a full protection of environmental interests indirectly as well, by cases related to right to life, health, freedom, etc. For instance, such cases as "Yanomami vs. Brazil"⁵⁶⁰ or "Indigenous Community of Awas Tingni Mayagna (Sumo) vs. Nicaragua",⁵⁶¹ "San Mateo de Huanchor vs. Perú"⁵⁶² and others have protected the environment indirectly. However, the Inter American system of human rights might work better if it did not depend on other mechanisms to enforce environment rights as a human right.

2.1. The Inter American Commission on Human Rights

Under the rules of procedure of the Inter-American Commission on Human Rights (the Commission), any person or group of persons can lodge legal petitions about the violation of both the ACHR and the SSP. There is, however, a requirement, in articles 1-2 of the ACHR and articles 1-2 of the SSP, that all human rights must be protected and implemented by national jurisdictions concretely or by general obligations undertaken by American States in their domestic jurisdictions. The Commission accepts a case only if these admissibility requirements are satisfied.

560 Resolución 12/85, Caso No. 7615 (Brasil), 5 de marzo de 1985, en Informe Anual de la CIDH 1984-85, OEA/Ser.L/V/II.66, Doc. 10 rev.1, 1 de octubre de 1985, 24, 31 (Caso Yanomami).

561 Caso de la Comunidad Mayagna (Sumo) Awas Tingni vs. Nicaragua. Sentencia de 31 de agosto de 2001. Serie C, n° 79. Disponible en: <http://www.corteidh.or.cr/casos.cfm> (Último acceso el 18-04-2015).

562 V. CIDH. CIDH. Informe N° 69/04, Caso San Mateo Huanchor vs. Perú, OEA/Ser.L/V/II.122, Doc.5, rev.1, octubre de 2004; y Inuit People Petition 1413/05 vs. the United States, December 7, 2005. Cf. OSOFSKY, Hari M. Inuit petition as a bridge? Beyond dialectics of climate change and indigenous people's rights. *American Indian Law Review*. vol. 31 (2007), p. 675-698.

However, the Commission is a political and not a juridical body and its recommendations are therefore not binding. In practice, the Commission's function is to present a legal action to the Inter-American Court of Human Rights if it considers that any of the rights of the Convention or the Protocol have been violated. But this, itself, is a political decision and as a result, there is no direct right in juridical terms of access to the Inter-American Court.

2.2. The Inter American Court of Human Rights

The Inter American Court of Human Rights (the Court) is the judicial organ of the Inter-American system created by the ACHR. Unlike the Commission, it is not an organ of the Organization of American States.

The litigant parties before the Court are the Commission on behalf of the petitioners⁵⁶³ and the States; that is, the people who are the subjects for whom the system was created are represented in the Court only indirectly. Moreover, each State Party must declare that it recognizes as binding the jurisdiction of the Court on all matters relating to the interpretation or application of the ACHR, thus effectively requiring States to allow themselves to be sued by their own nationals before the Court for it to be effective.⁵⁶⁴ Because such suits can

have significant economic and political costs to vulnerable people or individuals, submission before the Court is weak, rendering the SSP less effective than many people had anticipated, because not all the rights envisaged there can be enforced, except in the national legal order where they can sue in their own State courts under domestic laws.

Where the Court finds that there has been a violation of a right or freedom protected by either the ACHR or the SSP, it might rule that the injured party must be assured the enjoyment of the right or freedom that was violated. The remedies can include guarantees of non-repetition requiring the State to adopt national legislation that imposes, amongst other things, economic obligations (as in the case *Gelman vs. Uruguay*), In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court can adopt such provisional measures as it deems necessary in the matter it has under its consideration.

Today, the Court's Latin American jurisprudence does not include any leading case in which petitioners sought protection of the environment as an independent claim. One reason is that States do not recognize the competence of the Court in environmental matters directly in accordance with the text of SSP.

563 ACHR, Art. 55.

564 Not all the States have made a statement in recognition the jurisdiction of the Court for all cases. Even, in a single case the State can make such a statement only for this issue.



Nevertheless, in the cases discussed in the following section, environmental issues were put before the Court, although always indirectly through claims of violation of other rights. In general, references to the violation of specific human rights refer to persons directly affected, and not to the environment as a singular object. But the Court's jurisprudence lacks even a human perspective insofar as neither it nor the Commission recognizes the dignity basis of all of the Convention's rights, whether substantive or procedural. Thus, although some of the cases (as will be seen below) vindicate human rights, they tend to focus on the right narrowly and not in its fuller context as important to the human beings that the inter-American rights protection system are meant to serve.

3. The dependence of environmental protection on human rights claims

This section describes some leading cases that confirm that environmental rights have not yet been fully implemented (directly) in the jurisprudence of the Inter-American Court of Human Rights. These cases are representative of the Court's jurisprudence in these areas.

1. Pueblo Kaliña y Lokono Vs. Suriname (2015)

Suriname granted a national company a public concession for mining within an indigenous reserve. The indigenous

community was concerned about environmental pollution and brought claims to the Commission concerning the right to consultation, the right to information, guarantees of prompt and effective judicial recourse, the right to property, and the right to juridical personality. In this case, the Court based its opinion on the state's failure to have recognized the indigenous groups as bearers of property rights, and the concomitant issuance of licenses for mining operations within natural reserves that formed part of the ancestral lands of the indigenous populations:

... la ausencia, hasta la fecha, de un marco normativo que reconozca la personalidad jurídica de los pueblos indígenas, por lo que esta no ha sido reconocida en favor de los Pueblos Kaliña y Lokono hasta la actualidad. Asimismo, el Estado no ha establecido las bases normativas que permitan un reconocimiento del derecho a la propiedad colectiva de las tierras, territorios y recursos naturales de los pueblos indígenas Kaliña y Lokono. Esta falta de reconocimiento ha sido acompañada por la emisión de títulos de propiedad individuales a favor de personas no indígenas; el otorgamiento de concesiones y licencias para la realización de operaciones mineras, y el establecimiento y continuidad de tres reservas naturales en parte de sus territorios ancestrales. Las violaciones del derecho a la

propiedad colectiva derivadas de esta situación continúan hasta la fecha. Además, ni el otorgamiento de concesiones y licencias mineras ni el establecimiento y permanencia hasta el día de hoy de reservas naturales, han sido sometidos a procedimiento alguno de consulta dirigido a obtener el consentimiento previo, libre e informado de los Pueblos Kaliña y Lokono.⁵⁶⁵

Ultimately, the Court acknowledged that the “protection of the environment is part of the general interest.” However, the Court did not elaborate the scope of the term “general interest”, nor even its content or its meaning to States and to the people for future actions.

2. Pueblo indígena de Kichwa de Sarayaku vs. Ecuador (Indigenous People) (2012)

In this case, Ecuador granted a public permit for works to an international company to prospect for, and extract, oil in the territory of the Kichwas, consequently depriving the local people of access to their own natural resources. Furthermore, the company⁵⁶⁶ used a great quantity of explosives to prospect which affected the availability of food and housing for the indigenous people in question. The Kichwa community claimed violations of their rights to life, private property, personal

liberty, personal integrity, and their rights to consultation. Typically, Latin American countries have adopted internally the right to consultation of the local community before the issuance of a permit to exploit and extract natural resources, although it needs to be implemented according to law or administrative rules.

Agreeing with the Kichwa claims, the Court held that Ecuador must consult the indigenous people every time it decides to grant a public concession or permit for prospecting or extracting natural resources that affect the local community. However, the Court decided the case purely on the basis of the human rights claims, without focusing on the environmental impacts and dimensions of the dispute.

3. Claude Reyes y otros vs. Chile (2006).

This case also involved the failure to consult local residents. The case concerned the future installation of a multinational company in forestation activities which would have had a high environmental impact in the Rio Condor’s Village, despite supposed sustainability aims. Claude Reyes and others represented a civil society organization⁵⁶⁷ that promoted environmental protection. The civil society organization argued that the project would threaten Chile’s sustainable development and its environment, and that the Chilean

565 Sentence of 25/11/2015 Caso “Pueblos Kaliña y Lokono vs. Surinam”, Corte Interamericana de Derechos Humanos.

566 Compañía General de Combustibles (CGC).

567 Fundación Terram. Par. 57-11 of the Opinion.



government had failed to give the public all the information it needed to meaningfully engage in the debate regarding the efficacy of the extractive activities.

Because it was framed in terms of the right to information to debate and to express opinions, the case was lodged as a claim of violation of freedom of thought and expression⁵⁶⁸ and specifically of the right to have prompt and effective recourse to access to information. Again, the Court agreed with the petitioners, but purely on the basis of their human rights, without reference to the environmental impact or to appropriate remedies that would be necessary to protect the environment. In the end, the project was not executed due to financial constraints.

4. Conclusion

The brief analysis in this chapter shows the incremental development of environmental protection within a human rights perspective in Latin America. There are many arguments that conspire against an effective right to a healthy environment for the people of Latin America.

First, the inter-American system requires each State to provide its specific consent

to be sued before either the Commission or the Court can assume jurisdiction and, to date, no State in Latin America countries has allowed itself to be sued by its nationals in the Inter-American Court (or any international tribunal) for violation of environmental rights.

Second, the recognition of environmental rights in the SSP reflects an important acknowledgement of the salience of environmental protection to the people of Latin America. Nevertheless, it does not sufficiently advance these interests because of the impediments it places to those who would seek to vindicate environmental rights. Citizens must have the opportunity to access national tribunals to protect their environmental rights, and to further develop other rights. Unfortunately many countries have not provided such access legislatively or administratively. This imposes a special burden on vulnerable populations and on the marginalized indigenous populations who live throughout the region. While there are channels to gain access to the Commission, its power is limited to providing soft law recommendations and references to the Court where it deems it to be politically appropriate. The Court's own jurisdiction is limited to cases

568 Text in Spanish: Los hechos expuestos por la Comisión en la demanda habrían ocurrido entre mayo y agosto de 1998 y se refieren a la supuesta negativa del Estado de brindar a los señores Marcel Claude Reyes, Sebastián Cox Urrejola y Arturo Longton Guerrero toda la información que requerían del Comité de Inversiones Extranjeras, en relación con la empresa forestal Trillium y el Proyecto Río Condor, el cual era un proyecto de deforestación que se llevaría a cabo en la décimo segunda región de Chile y "podía ser perjudicial para el medio ambiente e impedir el desarrollo sostenible de Chile". La Comisión indicó que tal negativa se dio sin que el Estado "argumentar[la] una justificación válida de acuerdo con la legislación chilena", así como a que supuestamente "no [les] otorgó un recurso judicial efectivo para impugnar una violación del derecho al acceso a la información" y "no [les] aseguró los derechos al acceso a la información y a la protección judicial, ni contó con mecanismos establecidos para garantizar el derecho al acceso a la información pública".

referred to it by the Commission, which in turn is dependent on the acquiescence of the States. Thus, although the Inter-American system for the protection of human rights on paper protects a broad and comprehensive set of rights, the effective implementation of such rights is weakened by procedural and institutional obstacles.

Ultimately, in Latin America, the regional level is just as important as national environmental rights protection, but it is incomplete; if enforcement at the regional level were better, it could help galvanize and support national constitutional environmental rights; as it is, the inter-American system should follow what is being done in some of the national courts where these rights are better respected and more fully advanced.



Judicial implementation of rights based approaches to environmental governance: Regional Perspectives⁵⁶⁹

Evadne Grant

1. Introduction

While it is widely accepted that there is a very close connection between human rights and the environment, what exactly the nature of that connection is, is not always clarified. Two fundamental aspects of the relationship are recognized by John Knox, in his Preliminary Report on human rights and the environment, namely that human rights and the environment are interdependent and secondly, that the relationship of interdependence is complex, involving multiple rights of multiple people and often whole communities.⁵⁷⁰

The question to be addressed in this paper is whether human rights law, as it is currently practiced, adequately recognizes and reflects the complex interdependence of human rights and the environment. In particular, do human rights courts take sufficient account of the complicated ways in which individuals, communities and the environment are interconnected when making decisions in cases concerning the human rights impacts of environmental harm?

2. Protecting the environment via human rights law

Growing evidence of the devastating impact of environmental degradation on a wide variety of human rights has, over the past few decades, led to increased legal recognition of the interface between human rights and the environment. This has taken the form of the 'greening' of human rights law, i.e. the recognition that environmental damage may lead to a violation of rights such as the right to health, the right to life and the right

⁵⁶⁹ For a more detailed discussion of some of the issues raised in this article, see E Grant, 'Re-imagining Adjudication: Human Rights Courts and the Environment' in A Gear and E Grant (eds), *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar 2015) 155.

⁵⁷⁰ Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean healthy and sustainable environment: Preliminary report, A/HRC/22/43, 24 December 2012, para 10.

to an adequate standard of living. There is also increasing recognition on the part of human rights courts of the important role of procedural rights, such as the right to information and participation, in providing support for individuals and organizations concerned with protecting the environment.⁵⁷¹ And there has been increased recognition of a substantive right to a healthy/sustainable environment, particularly in the constitutional context.⁵⁷²

In spite of this, the use of human rights law, particularly international human rights law, in seeking redress for environmental harm is often questioned. As Pederson argues:

From a legal point of view, the fact that a particular [environmental] event threatens the enjoyment of a right does not necessarily entail that the event violates the said right.⁵⁷³

Critics of a rights based approach to pursuing environmental protection, argue that human rights frameworks and adjudication are ill-equipped to deal with environmental claims. For example, it is often contended that human rights law is concerned with the rights of individuals, which severely limits the extent to which human rights claims can be used to address environmental problems, such as pollution, that affect whole communities or global environmental problems such

as climate change.⁵⁷⁴ It is therefore often argued that where environmental damage is considered in human rights cases, consideration is necessarily limited to how a **particular** right of a **particular** individual might have been affected, and a rights based approach is therefore not helpful in addressing the wider impact of environmental degradation on whole communities or the differential impact of environmental damage on multiple rights.

The articulation of rights in many international instruments reinforces an individualistic and disconnected understanding of human rights, defining rights in isolation from each other and from the environmental context. Separation of civil and political rights from social and economic rights by incorporation into separate treaties highlights the disconnection. Worse still, the potential to use social and economic rights adjudication to defend the environment is often further reduced because human rights courts commonly have only limited jurisdiction over social and economic rights.

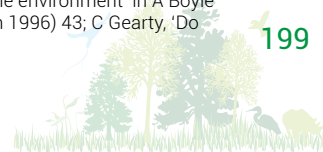
However, while critics of the use of human rights law in addressing environmental concerns undoubtedly have a point, human rights law is much more varied and less static than their account allows. Focusing on the jurisprudence of the

571 See D Shelton, 'Developing substantive environmental rights' (2010) 1 JHRE 89.

572 See D R Boyd, *The Environmental Rights Revolution* (UBC Press 2012).

573 O W Pedersen, 'Climate change and human rights: amicable or arrested development?' (2010) 1 JHRE 236, 244.

574 See for example, A Boyle, 'The role of international human rights law in the protection of the environment' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon 1996) 43; C Gearty, 'Do human rights help or hinder environmental protection?' (2010) 1 JHRE 7.



three regional human rights tribunals, the European Court of Human Rights (ECtHR), the African Commission and Court on Human and Peoples' Rights and the Inter-American Commission and Court of Human Rights, this paper considers, first, how human rights courts approach arguments that environmental harm has led to a violation of human rights and whether these approaches are necessarily limited by a lack of understanding of the interdependence and complexity of the relationship between human rights and the environment. Secondly, it considers how existing practice might assist in developing a human rights approach to environmental protection which fully recognizes and ensures respect for the interdependence of human rights and the environment – in all its glorious complexity.

3. Regional Human Rights Tribunals

Among the three regional human rights systems, only the African Charter on Human and Peoples' Rights (ACHPR) expressly recognizes a substantive environmental human right (Article 24). The ACHPR is also the only regional human rights treaty that does not draw a distinction between civil and political rights and social and economic rights, protecting both categories of rights equally and explicitly acknowledging, in its preamble, that 'the satisfaction of

economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'.

By contrast, the European Convention on Human Rights (ECHR) protects only civil and political rights. Social and economic rights are provided for separately in the European Social Charter (ESC). Neither instrument recognizes a substantive environmental right. While accession to the ECHR is a condition of Council of Europe membership, this is not required for the ESC and the ECtHR has no jurisdiction over the ESC. Within the Inter-American system, the American Convention on Human Rights (ACHR) similarly focuses on civil and political rights, while the San Salvador Protocol to the American Convention makes separate provision for social and economic rights including a right to a healthy environment (Article 11). However, the jurisdiction of the Inter-American Commission and Court of Human Rights over the rights protected under the San Salvador Protocol, including the right to a healthy environment, is limited.⁵⁷⁵

The picture that emerges from this brief summary of the three main regional human rights frameworks is very much - but fortunately not entirely - one of disconnection between civil and political rights and social and economic rights, limited access to legal redress for violation of social and economic rights and lack

⁵⁷⁵ See O R Ruiz-Chiriboga, 'The American Convention and the Protocol of San Salvador: Two Intertwined Treaties – Non-Enforceability of Economic, Social and Cultural Rights in the Inter-American System' (2013) 31 NQHR 159.

of specific provision for environmental rights. Only the African system explicitly incorporates features which clearly facilitate a human rights based approach to environmental protection. But this is, of course, far too limited a view of the operation of the regional human rights systems and of human rights adjudication in general. The meaning and scope of right are not determined by human rights treaties in the abstract, but through interpretation, elaboration and application by human rights institutions. The extent to which environmental harm can be redressed via human rights law is thus crucially dependent on the extent to which those institutions recognize the interdependence of human rights and the environment and the complex ways in which that interdependence plays out in practice.

4. Connecting the dots: Environment, Rights and Communities

Critics of a human rights approach to environmental protection often focus on a number of particular obstacles which, it is argued, limit the extent to which human rights law can provide redress for environmental damage. One of the obstacles often noted is that access to human rights tribunals is restricted due to standing rules that permit only certain individuals to bring claims to

human rights institutions and which therefore exclude many environmental claims. Another limitation is that human rights claims provide opportunities for vindication of individual rights only and that lack of recognition of collective or community rights means that the full impact of environmental damage on whole communities cannot be considered. A third inadequacy often highlighted is that human rights approaches tend to individualize rights by failing to recognize the interdependence of all human rights and the cumulative impact of environmental degradation on diverse rights. But what is the evidence on which these arguments are based? This section considers what the practice of the regional human rights institutions tells us about the perceived obstacles to bringing human rights claims in cases alleging environmental harm.

Scrutiny of the jurisprudence of the ECtHR provides some support for the view that the scope for bringing environmental claims is limited. In relation to standing, for example, the ECHR (art 34) specifies that in order for an applicant to bring a case to the ECtHR, he or she must be a 'victim' of a violation of one of the rights protected under the Convention. The ECtHR has interpreted this narrowly, saying that in order to bring a claim, an applicant or a group of applicants must be 'personally affected by an alleged violation of a Convention right'.⁵⁷⁶ The ECtHR has

576 Karner v Austria App no 40016/98 (ECtHR 24 July 2003) para 25.



also emphasized in a number of cases that the ECHR does not provide protection of the environment as such and that public interest claims seeking to protect the environment as a common good are not permitted.⁵⁷⁷

Despite its restrictive approach to standing, the ECtHR has increasingly been willing to examine complaints that environmental damage has had an adverse impact on particular rights protected under the ECHR and to consider arguments for broadening the scope of a number of ECHR rights to encompass environmental concerns. Thus the ECtHR has recognized that the impact of environmental damage on a number of specific rights, including the right to life (art 2), the right to private and family life (art 8) and the right to a fair trial (art 6), may lead to violation of those rights. For example, the ECtHR has recognized that if environmental pollution or excessive noise and smells have a negative impact on the wellbeing of individuals and prevent them from enjoying their homes, the right to private and family life may be breached.⁵⁷⁸ While not explicitly acknowledged by the ECtHR the jurisprudence does reveal an underlying appreciation of the connections between environmental harm and a number of different rights particularly between the right to private and family life, the right to health and the right to a healthy environment.

However, the ECHR jurisprudence remains rather narrowly focused on the rights of individual claimants. In order to engage article 8 (the right to private and family life), the key question for the ECtHR is whether a direct causal link can be established between the environmental harm complained of and the individual claimant's ability to enjoy his or her home. In *Kyrtatos v Greece*, for example, the applicants argued that their rights under article 8 had been breached because the Greek authorities had failed to prevent the destruction of a wetland situated close to their property and that their enjoyment of their home had been negatively affected as a consequence.⁵⁷⁹ The ECtHR rejected the claim, arguing that it had not been shown that the damage to the wetland and wildlife living there had a **direct** impact on the wellbeing of the applicants and their ability to enjoy their home. This case, arguably, demonstrates the limitations of a narrow approach that focuses exclusively on the extent to which it can be shown that a particular right of a particular individual has been affected and fails to acknowledge the full impact of environmental destruction. However, even in *Kyrtatos*, the majority judgment indicated that if, for example, the argument had been that the destruction of a forest had affected the quality of life of the applicants, they may have had a case. This suggests that if the applicants had

577 See Council of Europe, *Manual on Human Rights and the Environment* (2nd edn, Council of Europe Publishing 2012) 7; *Ilhan v Turkey* App no 22277/93 (ECtHR 27 June 2000) para 52-53.

578 *López Ostra v Spain* App no 16798/90 (ECtHR 9 December 1994); *Guerra v Italy* App no 116/1996/735/932 (ECtHR 19 February 1998); *Hatton v UK* App no 36022/97 (ECtHR 8 July 2003).

579 *Kyrtatos v Greece* App no 41666/98 (ECtHR 22 May 2003).

formulated their complaint more clearly in terms of the impact of deterioration of the environment on their quality of life, rather than in terms of protection of the environment itself, they may have been more successful.⁵⁸⁰

In spite of the narrow approach taken in *Kyrtatos*, the ECtHR has continued to widen the scope of article 8 in 'environmental' cases as demonstrated by the case of *Taşkin v Turkey*.⁵⁸¹ The applicants in *Taşkin* raised concerns about the risk to the environment posed by the use of sodium cyanide during the extraction process at a gold mine situated close to their properties, arguing that this posed a risk to their right to respect for private and family life (art 8) as well as their right to life (art 2). Prior to the granting of permits to operate the mine, an environmental impact report had been prepared for the Turkish government, which identified serious potential risks to the environment and human health. In spite of this, the Ministry of the Environment granted permission for the mine to begin operating. The Turkish authorities subsequently ignored court judgments that highlighted the risks and the judicial annulment of the decision to issue an operating permit. The Turkish government argued that article 8 was inapplicable as it had not been shown that the cyanidation process had in fact directly impacted the applicants' right to respect for private and family life and that in the absence of a 'serious and

imminent risk', there had been no breach of article 8. The Court disagreed, holding that article 8 applied if an environmental impact assessment had established a serious risk that was *likely* to affect the applicants in such a way as to affect their private and family life. The Court reasoned that this conclusion is in line with previous decisions holding that article 8 applies to situations in which environmental pollution affects individuals' wellbeing and enjoyment of their homes, even if there is no evidence of serious danger to their health.

Taşkin moves the jurisprudence forward, making provision for risks to the environment to be considered in the context of article 8, rather than requiring applicants to wait until actual damage has occurred. However, the court is clearly reluctant to consider the potential effect of environmental risks such as those at stake in *Taşkin* in the absence of the risk of impact on the rights of a particular individual or group of individuals who have standing to bring the matter before the court.

Although, as noted above, the ECtHR has explicitly stated that public interest claims are not permitted under the ECHR, there is one area in which the Court has demonstrated an understanding that protection of the environment is a matter of general interest, namely in cases which raise concerns about the environmental

580 See the partly dissenting opinion of Judge Zagrebelsky in *Kyrtatos*.
581 *Taşkin v Turkey* App no 46117/99 (ECtHR 10 November 2004).



consequences of developments on private property. While the right to property enjoys protection under the ECHR, the right is subject to the right of public authorities to 'enforce such laws as it deems necessary to control the use of property in accordance with the general interest' (art 1 of protocol 1 ECHR). In *Hamer v Belgium*, for example, the ECtHR upheld a decision of the Belgian authorities to order demolition of the applicant's holiday home, which had been built in a forest without planning permission.⁵⁸² The Belgian Government argued that the demolition order had been made in order to protect the environment, which was accepted by the court as a legitimate aim. The court concluded on that basis that interference with the applicant's right to property was justified and that there had therefore been no violation of the right. In the course of the judgment, the ECtHR noted that although the ECHR do not provide specific protection for the environment, the importance of environmental protection has become an increasingly important consideration in implementing rights under the Convention. More importantly, the Court indicated unequivocally that in the context of justifying restrictions on property rights, the collective interest of the public in protection of the environment can trump individual rights:

The environment is a cause whose defence arouses the constant and sustained interest of the public, and

consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard.⁵⁸³

While the ECtHR has made important progress in 'greening' rights, particularly in broadening the scope of the right to private and family life and acknowledging environmental concerns in counterbalancing private property rights, the overall assessment of the ECHR 'environmental' jurisprudence is that it provides grist to the mill of critics of a human rights approach to environmental protection. The ECtHR remains constrained by its individualistic focus which fails to acknowledge the interdependence of human rights and the environment, disconnects individuals from communities and turns a blind eye to the large-scale impact of environmental destruction.

In contrast, cases decided by both the African and Inter-American human rights institutions demonstrate far greater engagement with the complexity of the connection between human rights and the environment, moving beyond a focus on individual rights and individual applicants. One of the most significant characteristics of the environmental

582 *Hamer v Belgium* App no 21861/03 (ECtHR 27 November 2007).
583 *Hamer* para 79.

jurisprudence of the African and Inter-American institutions is the recognition of group claims. This is an important factor in the development of a broader approach to environmental human rights that recognizes that most environmental claims concern whole communities rather than isolated individuals and that the relationship between human rights and the environment is much more complex than 'one applicant, one right'.

Like the ECHR, the Inter-American system does not permit public interest claims and although the approach to standing of the Inter-American Commission is somewhat more flexible than that of the ECtHR, evidence of violation of the rights of particular, identifiable human victims remains a requirement.⁵⁸⁴ This was clearly articulated in the case of *Metropolitan Nature Reserve v Panama*, for example, where the Inter-American Commission ruled that a petition brought on behalf of the citizens of Panama challenging the construction of a road through a nature reserve was inadmissible.⁵⁸⁵ Significantly, however, the Commission confirmed that the need for identifiable human victims does not preclude group claims, as long as the group is clearly defined and the rights of individual members of the group are affected.⁵⁸⁶ The recognition of group

claims has opened up more possibilities for bringing environmental claims within the Inter-American system and much of the 'environmental' jurisprudence of the Inter-American Commission and Court of Human Rights has been developed in the context of group claims involving indigenous communities who are able to satisfy the requirement of being clearly identifiable groups.

While the recognition of communal claims is important in itself, it is the understanding of the complex relationship of indigenous communities with the land traditionally occupied by such groups and the broad ranging impact of environmental degradation on multiple rights that has given impetus to environmental claims within the Inter-American system. In the case of *Maya Indigenous Communities of the Toledo District v Belize*, for example, the Inter-American Commission held that the State of Belize had violated the right to property (art 21 ACHR) of the Maya people by its failure to recognize and protect their communal right to traditional lands.⁵⁸⁷ However, as the quote below amply demonstrates, it was not merely the recognition that their traditional lands were owned by the Maya community as a group that is significant - the particular relationship of the Maya people with

584 Inter-American Court of Human Rights, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts 1 and 2 of the American Convention on Human Rights) Advisory Opinion OC-14/94 of 9 December 1994, para 45.

585 *Metropolitan Nature Reserve v Panama*, Inter-American Commission on Human Rights, Case 11.533, Report No 88/03 (22 October 2003) para 34.

586 *Metropolitan Nature Reserve*, para 32.

587 *Maya Indigenous Communities of the Toledo District v Belize*, Inter-American Commission on Human Rights, Case 12.053, Report No 40/04 (12 October 2004) para 151-153. The failure to consult with the Maya people was considered to be an aspect of the violation of the right to property.



the land plays an important part in the recognition that their rights had been violated:

[T]he organs of the inter-American human rights system have acknowledged that indigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them, by which those lands and resources are considered to be owned and enjoyed by the indigenous community as a whole and according to which the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly.⁵⁸⁸

The Inter-American Court of Human Rights subsequently extended recognition of communal rights to property to non-indigenous groups.⁵⁸⁹ In the case of *Saramaka People v Suriname*, for example, it was argued that although the Saramaka people are not indigenous to the area they inhabit, but are descended from African slaves, they are a distinct social, cultural and economic group who have the same cultural, spiritual and material relationship with their lands as indigenous communities.⁵⁹⁰ The Inter-

American Court of Human Rights agreed, holding that the Saramaka people were entitled to the same protection of their communal lands as indigenous groups.⁵⁹¹ Further elaborating on the scope of the communal right to property of indigenous and non-indigenous communities, the court specified that the right to property of indigenous communities encompasses ownership of the natural resources necessary to enable communities to continue their traditional way of life. The court emphasized that protecting the environment was a vital aspect of protecting the right of communities to use and enjoy their traditional lands and that independent environmental and social impact assessments must be carried out before permission is granted for resource exploitation on traditional lands.

While the refusal to permit public interest claims under the Inter-American human rights system continues to inhibit environmental claims, the recognition of group rights to property begins to open up other possibilities for the wider recognition of communal rights to a sustainable and healthy environment. Moreover the recognition that protecting the right to property includes protection of the environment as well as related rights such as the collective right to cultural identity,⁵⁹² challenges many of the arguments put forward by critics of

588 *Maya Indigenous Communities*, para 114.

589 *Moiwana Village v Suriname*, Inter-American Court of Human Rights, Series C No 124 (15 June 2005).

590 *Saramaka People v Suriname*, Inter-American Court of Human Rights, Series C No 172 (28 Nov 2007).

591 *Saramaka*, para 86.

592 See eg *Kitchwa Indigenous People of Sarayaku v Ecuador*, Inter-American Court of Human Rights, Series C No 245 (27 June 2012).

rights based approaches to environmental protection. The Inter-American approach demonstrates an understanding of the interdependence of human rights and the environment and an appreciation of the complex interaction between a range of rights and the environment. Although recognition of communal rights by the Inter-American institutions remains limited to indigenous and quasi-indigenous communities, the extension of recognition of communal rights to property from indigenous to non-indigenous groups suggests that there may be scope for further broadening of communal rights arguments in the environmental context.

The African system demonstrates and even greater capacity to overcome the supposed limitations of a rights-based approach to environmental protection than either the European or Inter-American systems. First, the ACHPR takes a much more generous approach to standing than either of the other regional human rights instruments discussed. It imposes no 'victim' requirement, no requirement that applicants prove that they have been directly affected by the alleged breach or any need, even, for applicants to be citizens of countries that are party to the Charter.⁵⁹³ The African Commission on Human and Peoples' Rights (African Commission), moreover, does not require

that applicants specify which provisions of the Charter are alleged to have been breached, only requiring that enough information is provided to enable it to determine the factual basis of the alleged violation and that sources of information may include media reports.⁵⁹⁴

The progressive procedural framework and the fact that the ACHPR –uniquely among the regional systems –incorporates a substantive environmental human right specifically formulated as a group right greatly facilitates environmental claims. In spite of the fact that the number of environmental cases brought within the African system is regrettably small, important lessons can be learned from the approach of the African institutions.

In the well-known *Ogoni* case, two NOGs filed complaints on behalf of the Ogoni people, a minority community, who live in the Niger Delta, alleging that the Government of Nigeria had violated a number of rights under the ACHPR, including the right to a 'satisfactory' environment (art 24), the right to health (art 16), and the right to life (art 4).⁵⁹⁵ The claim arose from devastating environmental damage, including oil spills and soil and water contamination resulting from oil extraction operations in the Niger Delta, which, it was argued, the

593 Article 55 and 56 ACHPR. In *Maria Baes v Zaire*, African Commission on Human and Peoples' Rights, Communication 31/89 (1995) a Danish national submitted a communication to the Commission which was declared admissible. Access to the African Court on Human and Peoples' Rights is more limited, see art 5 of the Protocol to the ACHPR on the African Court.

594 *Jawara v The Gambia*, African Commission on Human and Peoples' Rights, Communication 147/95 and 149/96 (2000).

595 *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*, African Commission on Human and Peoples' Rights, Communication 155/96 (2001) (*Ogoni case*).



Nigerian Government failed to regulate or monitor satisfactorily.

There are a number of significant features of the decision of the African Commission in the *Ogoni* case which challenge the view that human rights law provides only limited scope to protect the environment. First, the African Commission had no difficulty in recognizing the communication as a public interest claim, or *actio popularis*, which, in its view, was 'wisely allowed under the African Charter'.⁵⁹⁶ This demonstrates very clearly that there is nothing inherent in the nature of human rights law preventing human rights courts from providing an avenue for consideration of claims of environmental damage affecting human rights brought on behalf of the wider community. Perhaps the reluctance on the part of the ECtHR and the Inter-American Commission and Court to permit public interest claims has more to do with fears of opening floodgates than any fundamental characteristic of human rights adjudication.

Secondly, as we have already seen in relation to the Inter-American jurisprudence, the *Ogoni* case demonstrates that there is scope for recognition of communal rights as an aspect of human rights law. This is established by the ACHPR itself, as both the right to a 'satisfactory' environment (art 24) and the right to free disposal of wealth and natural resources (art 21) are expressed as communal rights in

the Charter. The African Commission upheld the complaints in relation to both rights, concluding that 'the Ogoni people' as a distinct community are protected by the peoples' rights provided for in the ACHPR.⁵⁹⁷

The third noteworthy aspect of the decision is the extent to which the Commission acknowledged the interdependence of environmental protection and a range of rights. Rather than focusing on the impact of environmental destruction on a particular individual right, the Commission directed attention to the wider impact of pollution and other environmental damage, linking this to a number of rights - rights which the court clearly viewed as being interdependent. For example, the Commission paid particular attention to the connection between the right to health and the right to a healthy environment, resulting in a wide interpretation of both rights and, more importantly, an interpretation that takes the relationship between those rights into account. In the view of the Commission, compliance with its obligations in relation to both rights required the State to take action to prevent ecological damage, promote conservation and 'secure an ecologically sustainable development and use of natural resources'.⁵⁹⁸ In the view of the Commission, this requires the State to take positive action to protect the environment, including the obligation to carry out environmental and social impact

596 Ogoni case para 51.

597 Ogoni case para 56.

598 Ogoni case, para 54.

assessments, or to permit independent assessments, in relation to all proposals for industrial development as well as ongoing monitoring of the impacts of such developments.

The extent to which the Commission took the interdependence of a number of human rights seriously is a fourth aspect of the case that transcends the traditional narrow approach to protecting individualized rights. The applicants alleged violation of a wide variety of rights protected under the ACHPR. Rather than focus on each right individually, the African Commission paid particular attention to not only the complicated interplay between environmental degradation and rights but also the extent to which rights interrelate. This approach led the Commission to read into the ACHPR two new rights – rights that are not explicitly protected under the Charter - namely the right to food and the right to shelter. This quote in relation to the right to housing, illustrates the Commission's thoughtful and nuanced analysis:

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to

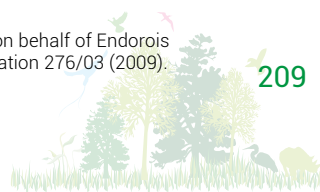
property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.⁵⁹⁹

The African Commission's unequivocal recognition of communal rights and its innovative approach to the interdependence of all human rights is further elaborated in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*.⁶⁰⁰ The communication arose from the removal of the Endorois community from their tribal land by the Kenyan authorities to make way for a game reserve. The communication alleged that the Endorois community considered the land in question to belong to the community as a whole and that their livelihood, cultural traditions, religion and health were intimately bound up with their ancestral lands on the shores of Lake Bogoria in the Rift Valley Province. Relying on the Ogoni case and on the recognition of the importance of community and collective identity throughout the ACHPR,⁶⁰¹ they argued that they were entitled to bring collective

599 Ogoni case para 54.

600 Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya, African Commission on Human and Peoples' Rights, Communication 276/03 (2009).

601 Endorois, para 75



claims relating to violation of a number of rights under the AHCP, including rights that are not specifically defined as group rights in the ACHPR such as the right to practice religion (art 8), right to property (art 14) and right to culture (art 17). The Commission agreed that the Endorois were as 'a distinct tribal group whose members enjoy and exercise certain rights, including the right to property, in a distinctly collective manner'⁶⁰² and upheld their complaint in full.

The *Ogoni* and *Endorois* cases clearly demonstrate that the African Commission understands the importance and the complexity of the interconnections between environmental degradation and the **multiple** rights of **whole communities** and provides significant scope for enhancing environmental protection via human rights law within ACHPR framework.

5. Conclusion

At the commencement of this conference on 'New Frontiers in Global Environmental Constitutionalism', Sam Adelman challenged us to be **innovative, imaginative and insurgent** in how we conceive of and argue about human rights and the environment. There are, of course, many different ways of looking at the current practice of human rights courts and tribunals in environmental cases. My aim in this paper has been to explore whether the perceived limitations of a human rights

approach to protecting the environment are real, by examining the jurisprudence of the three regional human rights tribunals. The analysis has shown that critics of a human rights approach are right, but only in some cases. There are clear examples of an individualistic approach and a lack of understanding of the complexity of the connection between human rights and the environment, particularly when looking at the environmental jurisprudence of the ECtHR. However, the analysis has also shown that there are, perhaps even more, examples of arguments and approaches that transcend those limitations and recognize and give effect to a much more complex and nuanced understanding of the relationship between human rights and the environment.

While the limitations of a rights based approach should not be ignored, there is clearly a much more optimistic story to be told. The case law of the African and Inter-American judicial institutions, in particular, demonstrate that creative and progressive approaches are already part and parcel of their jurisprudence. The small selection of cases examined begin to show some of the ways in which human rights law is being used in an innovative, imaginative and insurgent way to address environmental concerns. They provide us with important examples or models to assist us in the important task of further developing a human rights based approach to the environment that is able to take account of the rich complexity of

⁶⁰² Endorois, para 161.

the relationship between human rights and the environment and the interdependence of all human rights. It is for us as scholars,

lawyers and activists to extend and mobilize those arguments in both national and international fora.



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Quantitative Standards within the Environmental Provisions of National Constitutions – Bhutan and Kenya

Stephen J. Turner

1. Introduction

Since Portugal included the first environmental provision within a national constitution in 1976,⁶⁰³ many countries have followed suit by adopting such provisions themselves. However, until relatively recently the rights and obligations that have been included within such provisions have been qualitative or ambiguously framed rather than quantitative in nature. For example they might refer to the rights of citizens to an environment that is 'healthy' or oblige states to 'protect and improve' the environment. In the last decade there have been isolated examples of states including specific quantitative environmental standards related to forest cover within their national constitutions. Article 5(3) of the 2008 Bhutanese constitution requires the government to ensure that a minimum of sixty percent of the country's total land mass remains under forest cover for all time.⁶⁰⁴ Also, article 69(b) of the 2010 Kenyan constitution states that Kenya shall work to achieve and maintain tree cover of at least ten percent of its land mass.⁶⁰⁵ As such these articles require examination because they represent a 'new frontier' through their departure from the more ambiguously framed provisions that predominate.

Though Bhutan and Kenya share this similarity, they could not be more different in many other respects. They differ in their histories, their topographies, the size of their populations, their cultures, their religions and their political make up. However, one other important factor that they have in common is that both countries have been going through periods of political transition. In the case of Bhutan, this has been the transition from an absolute monarchy to a constitutional monarchy, and in the case of Kenya it has been the transition from an absolute presidential style of government to a more inclusive

603 Art. 66 The Constitution of Portugal. Available at: https://www.constituteproject.org/constitution/Portugal_2005.pdf (last accessed 16th October 2016).

604 The Constitution of Bhutan. Available at: <http://www.bhutanaudit.gov.bt/About%20Us/Mandates/Constitution%20of%20Bhutan%202008.pdf> (last accessed 14th August 2016).

605 The Constitution of Kenya. Available at: <http://kenyalaw.org/kl/index.php?id=398> (last accessed 14th August 2016).

and democratic form. In both cases, it has been these transitions that have led to the new constitutions and the quantitative environmental standards that are included within them.

This chapter will seek to firstly build an understanding of the context within which each of these national constitutions has been promulgated. To do this, it will provide an overview of the legal, political and social developments that led to their adoption and from that platform it will consider the actual meaning of the relevant provisions. It will consider their relevance in terms of the potential for litigation relating to forest cover and the significance that they may have in the ongoing development of national forest policy. From there, the chapter will seek to comment on the importance of these provisions within the wider context of global environmental constitutionalism. It will therefore consider whether or not they can be seen simply as exceptions to the more common type of qualitative environmental provision or whether they have the potential to influence the way that other states develop the environmental provisions in their constitutions in the future.

2. The Quantitative Environmental Standard in the Bhutanese Constitution

First, the background to the promulgation of Bhutan's constitution in 2008 will be addressed as the context and history assist in understanding how its provisions are likely to be regarded, both by the government and the populace of the country. The background also assists in enlightening the analyst to the influences and priorities that exist within Bhutanese government and society. In particular, the relationship that the government has had and continues to have with Buddhism is of fundamental importance, as is the stated governmental objective to achieve 'gross national happiness' (GNH) which was introduced in 1972.⁶⁰⁶ Whilst this chapter focuses on the emergence of quantitative standards within environmental provisions of constitutions, it could be said that the inclusion of the objective of GNH⁶⁰⁷ within Bhutan's national constitution in itself represents a 'new frontier' in environmental constitutionalism. This is because protection of the environment is viewed as one of the main tenets in the accomplishment of GNH.⁶⁰⁸

Bhutan is a nation, which emerged in the 17th century and is now the last

606 Sebastian, Sarish, *Parliamentary Democracy in Bhutan – A Journey from Tradition to Modernity* (New Delhi: Adroit Publishers, 2015), p. 69; Chang, Wen-Cheng; Thio, Li-ann; Tan, Kevin YL & Yeh, Jiunn-rong, *Constitutionalism in Asia – Cases and Materials* (Oxford: Hart Publishing, 2014) at p. 69.

607 Art. 9(2).

608 Chang et al. *supra* n. 4.



Himalayan kingdom. It has a unique history, as it was not colonized by the British, unlike its close neighbors India, Pakistan and Sri-Lanka.⁶⁰⁹ In 1907 the country moved from being a theocracy, in which the Buddhist Monk Body was synonymous with national and local government, to an absolute monarchy.⁶¹⁰ In 1953 the third King of Bhutan Jigme Dorji Wangchuck began a process which moved the country away from a policy of isolationism, abolished serfdom, and increased merit based authority.⁶¹¹ The country at that time was a 'self-contained rural society',⁶¹² which had no motorized transport or paved roads.⁶¹³ The king created the national legislature, which was a 130 member national assembly, and in 1968 he also created a cabinet.⁶¹⁴ In 1971 Bhutan became a member of the United Nations,⁶¹⁵ and in 1998 following political crises involving different factions in the country,⁶¹⁶ the fourth king transferred much governmental authority to an elected cabinet.⁶¹⁷ In 2001, the fourth king instructed the cabinet that the nation

needed a written constitution, which led to an extensive consultation process⁶¹⁸ and the eventual adoption of their first national constitution in 2008.⁶¹⁹

The constitution contained certain key features wherein it:

- transferred much governmental power from the king to Parliament;⁶²⁰
- included the separation of powers of the legislative, executive and judicial branches of government;⁶²¹
- specifically did not include Buddhism as the state religion although it did affirm Buddhism as the 'spiritual heritage' of the country;⁶²²
- effectively removed the Monk Body from its political role for the first time in Bhutanese history;⁶²³ and
- reinforced as a principle of state policy that the country, 'shall strive to promote those conditions that will enable the pursuit of Gross National Happiness'.⁶²⁴

609 Whitecross, Richard W. 'Separating Religion and Politics? – Buddhism and the Bhutanese Constitution, in Comparative Constitutionalism in South Asia, Sunil Khilnani, Vikram Raghavan and Arun K. Thiruvengadam (Eds) (OUP, 2013) pp. 116-144, at p. 116.

610 Ibid at p. 121.

611 Shera Lhundup, 'The Genesis of Environmental Ethics and Sustaining its Heritage in the Kingdom of Bhutan' 14 Geo. Int'l Env'tl. L. Rev., 693, 2001-2002, at p. 695.

612 ibid.

613 ibid.

614 ibid.

615 Bhutan Country Study Guide, Vol. 1. Strategic Information and Developments (Washington D.C.: International Business Publications, 2014) at p. 132.

616 See Banki, Susan, 'The Transformation of Homeland Politics in the Era of Resettlement; Bhutanese Refugees in Nepal and the Disapora' European Bulletin of Himalayan Research 43. pp. 120-143 at p. 128. (2013); also Bothe, Whinnie, 'The Monarch's Gift: Critical notes on the constitutional process in Bhutan' EBHR 40 Spring/Summer issue EBHR, 27-58 (2012) at p. 54.

617 Whitecross supra n.7.

618 Art. 3(1); see Whitecross supra n. 7. at pp. 129 & 141.

619 The Constitution of Bhutan supra n. 2.

620 Arts. 1(10) supra n. 2.

621 Art. 1 (13) supra n. 2.

622 Art. 1(13) supra n. 2 ; see Whitecross supra n.7 at p. 133.

623 Whitecross supra n. 7 at p. 134.

624 Art. 9(2).

In Bhutan's case, as has been the case in many countries, constitutional change has not been confined to a single event but has been a process in which adjustment has been and continues to be gradual. Therefore there are still many questions that relate to the interpretation and role of the constitution, which inevitably affect the meaning and effectiveness of specific provisions.

As the protection of the environment is part of the overall policy of the pursuit of GNH,⁶²⁵ it is of little surprise that the constitution contains duties for both the government and its citizens to protect the environment.⁶²⁶ Generic rights to information⁶²⁷ and 'legal aid to secure justice'⁶²⁸ are included, however, it does not provide specific environmental procedural rights to information, participation in decision-making or access to justice, as is the case with many other national constitutions.⁶²⁹ Whereas most of the environmental provisions within the Bhutanese constitution are unremarkable when seen within the context of the rise of environmental constitutionalism,⁶³⁰ it is clear that Article 5(3) breaks new ground by stating that:

The Government shall ensure that, in order to conserve the country's natural resources and to prevent degradation of the ecosystem, a minimum of sixty percent of Bhutan's total land shall be maintained under forest cover for all time.⁶³¹

As noted above, one of the characteristics of the traditional manner in which environmental rights have been drafted is that they have deliberately been left vague. This has led to the criticism that is encapsulated in the remark of Douglas-Scott that, 'such provisions are by their nature indeterminate and give little idea of the sorts of measures that should be introduced to enforce them.'⁶³² As such, for a state to include a specific quantitative and scientifically measurable requirement relating a particular aspect of the environment within a national constitution is a remarkable step. Having said this for Bhutan itself, the inclusion of this provision probably seemed less remarkable at the time of drafting, as the government had first developed the policy of maintaining at least sixty percent of the country under forest cover in the 1970s.⁶³³

625 Chang et. al. supra n.4.

626 Art. 5 & Art. 8(2).

627 Art. 7(3).

628 Art. 9(6).

629 See Turner, Stephen J., *A Global Environmental Right*, (Abingdon: Routledge, 2014) pp. 24-5; Boyd, David R., *The Environmental Rights Revolution – A Global Study of Constitutions, Human Rights and the Environment* (Vancouver: UBC Press, 2012) at p. 66.

630 See generally Daly, E. & May, J., *Global Environmental Constitutionalism*, (Cambridge: Cambridge University Press, 2014).

631 The Constitution of Bhutan supra n. 2.

632 Douglas-Scott, S., 'Environmental Rights in the European Union – Participatory Democracy Or Democratic Deficit', in Boyle, A., & Anderson, M.A., (Eds) *Human Rights Approaches to Environmental Protection*, (Oxford: Oxford University Press, 1996) at p. 110.

633 Wangdi, T., P. Lhendup & N. Wangdi 2013. *An Analysis of Forestry Policy, Acts and Rules of Bhutan to Mainstream Climate Change Adaptation*. Regional Climate Change Adaptation Knowledge Platform for Asia, Partner Report Series No. 13. Stockholm Environment Institute, Bangkok. Available at: <https://www.weadapt.org/sites/weadapt.org/files/legacy-new/knowledge-base/files/521c8788e61b3bhutan-serie-13-cs5-v7-for-web.pdf> (last accessed 2nd November 2016).



As with all new national constitutions, it takes time before the precise meaning and effectiveness of specific provisions become clear. In the case of Article 5(3), the question of whether or not it can be legally enforced is one that only time will tell. This is for two reasons; the first is that recent statistics indicate that Bhutan currently has somewhere in the region of 69.1 percent of its land area covered by forest;⁶³⁴ although some unofficial sources suggest that the correct figure is closer to 64.5 percent.⁶³⁵ Nevertheless it means that it is unlikely that Art. 5(3) will be actively tested in the near future. The second is that it is uncertain precisely what legal mechanisms would be available to respond to any breach or potential breach. Article 1 states that the Supreme Court is, 'the guardian of this Constitution and the final authority on its interpretation.'⁶³⁶ It therefore appears to vest in the Supreme Court the ultimate authority to determine whether or not the constitution has been complied with and how it should be interpreted. However, it is unclear precisely what rights citizens or other interested parties may have to seek judicial review of government decision-making related to environmental issues. Citizens do have the right to, 'initiate appropriate proceedings

in the Supreme Court or High Court' for the enforcement of their fundamental rights under Article 7.⁶³⁷ All the same, examples of the fundamental rights listed in Article 7 include the right to life,⁶³⁸ the right to property,⁶³⁹ and the right to information,⁶⁴⁰ but not specific rights related to the protection of the environment or levels of forest cover. Additionally Article 21(18) does state that, '[e]very person has the right to approach the courts in matters arising out of the Constitution or other laws subject to section 23 of Article 7'. However, it is uncertain exactly what the procedural requirements for individual citizens to bring such actions would be and whether or not it would be possible to use that provision to challenge government decision-making in relation to Article 5(3).

Additionally, it is important to be aware that the culture of the populace in Bhutan is not one that is entirely used to the concept of litigation and certainly not litigation against the government. Although in recent decades and during the 1990s especially, the government did experience significant opposition to some of its policies from groups within society,⁶⁴¹ it must be borne in mind that traditionally for many Bhutanese people,

634 Purna B.Chetri, 'State of Forest Genetic Resources of Bhutan – Country Report' (Yuispang: RNR Research and Development Centre – Royal Government of Bhutan, 2012). Available at: <http://www.fao.org/3/a-i3825e/i3825e5.pdf> (Last accessed 16th August 2016)

635 Some sources challenge those figures and state that there has been considerable deforestation in recent years which may mean that the government finds it difficult to maintain the constitutionally stated level of forest cover. See Rai, B (2005) 'Bhutan's Forests: The Real Picture' Kuensal Online. Available at: www.kuensalonline.com (Last Accessed 16th August 2016).

636 Art 1 (11).

637 Art. 7(23).

638 Art. 7(1).

639 Art. 7(9).

640 Art. 7(3).

641 Dhurba Rizal, *The Royal Semi-Authoritarian Democracy of Bhutan* (Lanham: Lexington Books, 2015) pp. 91-126.

the concept of challenging the authority of the king and the government is an uncomfortable notion. Shera Lhundup refers to a Bhutanese proverb, '*Zarley babi chulu logni mei, gyalpoi kalu lenthechi*' which means, 'even as the water that falls down the steep cannot return up, so be it with the King's command, once commanded.'⁶⁴² Therefore the potential for any such litigation, would in part, be tied to the capacity of the populace of Bhutan to take ownership of their rights and also their willingness to challenge government decision-making. Having said that Bhutan is definitely modernizing and the High Court has already instituted a 'green bench' to deal with environmental cases, so it is quite possible that there will be marked developments within this field in the future.⁶⁴³

Whilst there is a lack of clarity relating to the precise legal meaning and potential of Article 5(3), it is clear that Bhutan has an extremely rich environmental heritage. It can boast of negative carbon emissions which has led to praise from the former Executive Secretary of the United Nations Framework Convention on Climate Change Christina Figueres who stated in 2014 that, 'Bhutan is already and can continue to be inspiration and a role model for the world on how economies and different countries can address climate change while at the same time improving life of the citizen.'⁶⁴⁴ Therefore although

Bhutan is a relatively small country that is unorthodox in its approach to government by western standards, there may be lessons that can be taken from its approach, owing to the high degree of environmental sustainability that it has achieved and maintained.

3. The Quantitative Environmental Standard within Kenya's Constitution

Consideration will now be given to Kenya's revised 2010 constitution and the quantitative environmental standard that it contains. Unlike Bhutan, which has a very unique cultural and political history, the context of Kenya's constitution is one which is mirrored by numerous other sub-Saharan African countries. An examination of the background to the 2010 constitution highlights the struggles that the people of Kenya have faced since the country achieved independence. Those struggles heavily influenced the way that the constitution was drafted and therefore help to provide an understanding of the underlying context of its environmental provisions.

Kenya became a British Protectorate in 1895 and a Crown colony in 1920.⁶⁴⁵ In 1928 Jomo Kenyatta commenced campaigning for land reform and political rights for African people; this led to fierce

642 Shera Lhundup supra n. 9 at p. 696.

643 Pema Seldon, 'Supreme Court to Allow Public Interest Litigation for Environmental Issues' (Business Bhutan, 19th March 2016) at pp.1 & 15.

644 See BBSBhutan website available at: <http://www.bbs.bt/news/?p=39604> (accessed 16th August 2016).

645 Mwakikagile, Godfrey, Kenya: Identity of a Nation, (Pretoria: New Africa Press, 2007) at pp. 16-17.



conflict in which many died.⁶⁴⁶ Although independence was achieved in 1963 and a national constitution was adopted, it did not bring about fair democratic government but autocratic presidential governments that failed to address the political and tribal tensions that remained following the colonial era.⁶⁴⁷ These were the conditions that ultimately led to widespread suffering and displacement through ethnically based violence.⁶⁴⁸

Eventually in 2008, a coalition government was established in which a President and a Prime Minister from opposing sides shared power with a cabinet that had an equal number of ministers from each side.⁶⁴⁹ This power sharing arrangement led to an effort to reframe the *modus operandi* of government, and a significant part of that process was the drafting of the 2010 constitution. As Prempeh states, the significance of the 2010 constitution is that it has, 'made a credible attempt to revisit the constitutional choices made in the early postcolonial period and undo some of the structural and legal devices that have sustained absolute presidentialism'.⁶⁵⁰

There are three articles in the constitution that together provide a framework of

rights and obligations relating to the environment. First and foremost are the rights and freedoms that are found in Article 42, which states:

Every person has the right to a clean and healthy environment, which includes the right:

- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
- (b) to have obligations relating to the environment fulfilled under Article 70.⁶⁵¹

Article 69 provides a number of obligations that the state has in relation to the environment. These include inter alia obligations relating to the sustainable exploitation of natural resources,⁶⁵² the protection of intellectual property of biodiversity and genetic resources of the communities,⁶⁵³ and the establishment of systems of environmental impact assessment.⁶⁵⁴ It also includes Article 69(1)(b), which provides that the state shall, 'work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya'.

646 *ibid* at pp. 17-18.

647 Koko, Sadiki, 'The Tensions between Power Sharing, Justice and Human Rights in Africa's 'post-violence' societies: Rwanda, Kenya and the Democratic Republic of Congo' (2013) *AHRLJ* pp. 254-280 at p. 272.

648 Baranger, Dennis, & Murray, Christina, 'Systems of Government' in Tushnet, Mark; Fleiner, Thomas & Saunders, Cheryl (Eds.) *Routledge Handbook of Constitutional Law* (Abingdon: Routledge, 2013) at p. 83.

649 *ibid*

650 Prempeh, Kwasi H., 'Constitutional Autochthony and the Invention of 'Absolute Presidentialism' in postcolonial Africa', in Günter Frankenberg (ed.) *Order from Transfer – Comparative Constitutional Design and Legal Culture*, (Cheltenham: Edward Elgar, 2009), pp. 209-233, at p. 230.

651 The Constitution of Kenya. Available at: www.kenyalaw.org/kl/index.php?id=398 (last accessed 18th August 2016).

652 Art. 69(1)(a)

653 Art. 69(1)(c)

654 Art. 69(1)(f)

When the two aforementioned articles are read in conjunction with Article 70, it appears that citizens have the right to take legal action to enforce the government's obligations under Article 69.

Article 70(1) states as follows:

If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

This is followed by a list of orders that the court may give, which include: 'to prevent, stop or discontinue any act or omission that is harmful to the environment' and 'to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment'.⁶⁵⁶ It also states that, '[f]or the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury'.⁶⁵⁷ Whilst these provisions in principle provide a route through which

legal action could be taken to enforce the state's obligations relating to Article 69(1) (b), there is still a certain lack of precision with regard to the state's obligations in this respect. This is because the provision states that the government is required to '...work to achieve and maintain...' the objective rather than providing an unequivocal obligation that it must achieve and maintain ten percent of the land area under forest cover.

According to figures published in a 2014 report by Kenya's Forestry Service (KFS), Kenya has 6.99 percent of its land mass covered by forest and is working to gradually increase that figure.⁶⁵⁸ The report specifically refers to the target of ten percent forest cover as part of an overall plan,⁶⁵⁹ which is also included in the Kenya Vision 2030 strategy.⁶⁶⁰ The KFS states that it has a target of increasing the forest cover in Kenya by 1 percent over the period of 2014-17⁶⁶¹ and that the objective of 10 percent forest cover is gradually being integrated into primary and secondary legislation.⁶⁶² Therefore, it appears that the strength of Article 69(1) (b) rests in the authority that it lends to the policy as a whole, and the effect that this has on the integration into subordinate law and policy-making processes which

655 Art. 70(2)(a)

656 Art. 70(2)(b)

657 Art. 70(2)

658 Kenya Forest Service, 'Second Kenya Forest Service Strategic Plan (Period 2014-17)' (2015) at p. 20. Available at: <http://www.kenyaforestservice.org/documents/KFS%20Vision%202015-17%20FINAL%20%20printed.pdf> (Last accessed: 18th Aug. 2016)

659 Kenya Forest Service Ibid at p. 19.

660 Kenya Vision 2030, 'Second Medium Term Plan: 2013-2017' (Government of the Republic of Kenya, 2013). Available at: www.vision2030.go.ke/lib.php?f=second-medium-term-plan-2013-2017 (Last accessed: 18th Aug. 2016)

661 Kenya Forest Service supra n. 56 at p. 8.

662 Kenya Forest Service supra n. 56 at p. 28-9.



in turn renders the government at both the local and national level, more likely to achieve its stated aims.

4. Comment on the Implications of Quantitative Environmental Standards within National Constitutions

Having briefly considered the background and potential application of these types of provisions within the constitutions of Bhutan and Kenya, consideration will now be given to the influence that they may have in the development of environmental constitutionalism in other jurisdictions in the future.

At the international level, the inclusion of these quantitative environmental standards in 2008 and 2010 respectively, was largely overshadowed by other events in the field of environmental rights that took place at that time. For example the inclusion of the right of *pachamama* (the right of Mother Nature) in the Constitution of Ecuador in 2008,⁶⁶³ received much greater attention from the international community, including significant attention at the United Nations level.⁶⁶⁴ However it can be argued that the provisions in

question also deserve attention owing to their significance within the context of the development of environmental rights. In essence, by providing certainty relating to the precise environmental standards that governments are obliged to comply with, they answer the criticism that environmental rights are ambiguous in terms of their meaning and content.⁶⁶⁵ It can of course be argued that constitutional rights are usually qualitative in nature; examples include those relating to due process, free speech and unreasonable search and seizure. However, it can equally be argued that for the aforementioned rights it would be extremely difficult to provide specific quantitative standards within a constitution whereas for certain aspects of the environment (including levels of forest cover), it is possible to do so.

In terms of constitutionalism it can be argued, as Elkin et al. have, that the most important role of specific provisions within national constitutions is that they place necessary constraints on the behavior and decision-making of governments. Similarly Kiss and Shelton have asserted that placing constraints upon governments through environmental provisions within constitutions can be important, 'particularly given the high short-term costs involved in many

663 Art. 71. Available at: <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> (last accessed 20th Aug. 2016).

664 See for example: United Nations Econ. & Social Council. Permanent Forum on Indigenous Issues, 'Study on the need to recognize and respect the rights of Mother Earth' New York. 19-30th April 2010. UN Doc. E/C.19/2010/4.

665 See Douglas-Scott supra n. 30.

666 Elkins, Z; Ginsbury, T & Melton, J; The Endurance of National Constitutions (Cambridge: Cambridge University Press, 2009) at p. 38.

environmental protection measures and the resulting disfavor they experience.⁶⁶⁷ Increasingly there are scientific arguments that there are specific 'planetary boundaries' that governments and the international community should be bound by in decision-making that affects the environment.⁶⁶⁸ As such, it can be argued that a major failure of much national and international environmental law is that it ultimately does not respond adequately to those ecological constraints.⁶⁶⁹ Therefore, one case for the potential inclusion of specific quantitative restrictions within national constitutions would be that they can provide specific standards within aspects of environmental decision-making that relates directly to those 'planetary boundaries'. Equally it can be argued that decision-making relating to the environment rarely follows such clear-cut quantitative limitations. The environment is usually one of a number of important factors that need to be taken into account when decisions are made that impact upon it. As such it could be contended that such an approach is unrealistic except under exceptional and case-specific circumstances. It must also be emphasized as Daly and May point out, that the quality of environmental constitutionalism is not the only factor that influences effective protection of

the environment; there are numerous countries that do not have environmental provisions in their national constitutions at all, but which all the same have developed sophisticated regimes of environmental law.⁶⁷⁰

Whether or not other countries would embrace the idea of including these types of provisions within their own national constitutions would be affected by a number of factors. It is certainly the case that traditionally states have framed environmental provisions within constitutions in ways that leave significant room for interpretation. Therefore, expressions such as the right to, 'an environment that is not harmful to their health or well-being...'⁶⁷¹ and the, 'right to live in an environment free from contamination...'⁶⁷² are typical in the sense that they leave much scope for flexibility on the part of decision-makers. This has meant that in practice courts have a wide margin of appreciation in their interpretation except in the most extreme of cases.⁶⁷³ Therefore of course, states may be deterred from adopting quantitative environmental standards within constitutions, as they may not wish to be constrained by them.

667 Kiss, A. & Shelton, D., *International Environmental Law*, 3rd edn (Ardsley, N.Y.: Transnational Publishers, Inc., 2004), at p. 709.

668 Rockström, J. et al., 'A Safe Operating Space for Humanity' (2009) 461 *Nature*, pp. 472-5;

669 Bosselmann, K., 'Global Environmental Constitutionalism: Mapping the Terrain' (2015) *Wid. L. Rev.* 21(2), 171-86 at pp. 180-2.

670 Daly & May *supra* n. 28, at p. 13.

671 Constitution of South Africa. Art. 24(a).

672 Constitution of Chile. Art. 19(8).

673 See Turner *supra* n. 27 at pp. 63-6.



However, as is clear from the history of constitutionalism, there is a tendency for nations to replicate provisions, or sometimes the form of entire constitutions, in the development of their own constitutions.⁶⁷⁴ Also it has been shown that on average national constitutions have a life of only nineteen years⁶⁷⁵ and in any given year have a 38% chance of being subject to amendment.⁶⁷⁶ Therefore as constitutions become amended over the years there is a tendency for a degree of convergence in terms of the provisions that they include.⁶⁷⁷ Although there are certain notable exceptions to this trend, the majority of countries seek to develop their written constitutions over time. As such it is quite possible that in the future other nations will consider revising their existing constitutions to include the type of quantitative environmental standards that Bhutan and Kenya have adopted.

5. Conclusion

In adopting quantitative environmental standards within their national constitutions, Bhutan and Kenya have done something extraordinary, as these types of provisions had not been included within national constitutions before. Within the field of environmental law, these developments were largely

unheralded and therefore have received little academic attention. This chapter has sought to highlight the nature of these provisions within the very different social, political and environmental contexts from which they have emerged. It has shown why at this stage, it is difficult to calibrate the merits of such provisions in terms of the levels of success that they will have. It is difficult to determine whether or not countries such as Bhutan and Kenya who incorporate such provisions will be more likely to achieve their objectives relating to forest cover, than countries who simply incorporate such goals within their national policies but not within constitutional law.

It appears that in both the cases of Kenya and Bhutan, it is unlikely that the provisions in question will lead to litigation, certainly in the near future. Therefore, the success of such provisions is far more likely to be dependent upon the manner in which the respective governments administer and manage forests in terms of conservation, commercial exploitation and use by rural communities. This in turn is dependent on a host of other factors, which include the quality of administration, subordinate legislation, economic and subsistence needs, commercial and political pressure, levels of corruption and education.

674 Law, D. S. & Versteeg, M., 'The Declining Influence of the United States Constitution' (2012) *N. Y. U. L. Rev.* 87(3), pp. 762-858 at pp. 764-766; Law, D.S. & Versteeg, M., 'The Evolution of Ideology of Global Constitutionalism' (2011) 99 *Cal. L. Rev.*, pp.1163-1257.

675 Elkins et al. *supra* n. 64 at p. 129

676 Elkins et al. *supra* n. 64 at p. 101.

677 Law & Versteeg, n. 72 'The Evolution of Ideology of Global Constitutionalism', at p. 1172.

What is clear is that these developments do bear a certain importance. This is because they represent a departure from the more commonly found environmental rights that are qualitative in nature. They are also important because they may provide an example to other countries of the way that future national constitutional provisions related to the environment can be framed. In other words, it is possible that qualitative environmental rights and obligations within constitutions can be complemented with specific quantitative environmental standards where appropriate. Finally they are important, because on a global level, the international community is currently

considering and debating the role that environmental rights could or should have in the future; as such part of that debate should include the potential of including quantitative environmental standards within environmental rights at the national and international levels.

At this stage, however such provisions are still so new that further research is required to better understand whether or not they have a more prominent role to play in the future, and if they have a greater role to play, what it could be and how it could best be implemented.



Ten building blocks for a sustainable human right to water: an integrated method to assess sustainable access to water for domestic purposes of vulnerable groups

Daphina Misiedjan

1. Introduction

In the quest to realize the right to water for all, states are experiencing a number of challenges. These challenges particularly concern fulfilling their obligations towards unserved and under-served populations. Water resources are becoming scarcer and states are increasingly required to review their overall water management in relation to providing access to water for domestic purposes. The right to water can play a crucial role in assisting the development of context-specific policy and regulations. The exact elements of the right, however, are still developing further, and its position within the overall system of water management needs more deliberation. This chapter provides a method by which the right to water can be observed within the bigger picture of sustainable water management, and in a specific national context.

This chapter discusses an assessment method for water governance in which the rights-based approach to access to water and relevant environmental principles have been integrated with the aim of facilitating the sustainable enjoyment of the right to water by vulnerable groups. The assessment method will be referred to as the 'Ten building blocks for sustainable access to water for domestic purposes of vulnerable groups.' It was built out of a three step multi-disciplinary assessment method for water governance (including issues of water shortage, water quality, and flood risks) developed by authors Van Rijswick, Edelenbos, Hellegers, Kok, and Kuks.

The method is suitable for asking specific questions in relation to water management. It has therefore been adjusted to assess relevant aspects necessary for the implementation of a sustainable right to water for vulnerable groups. It brings together aspects of law, economics, and public administration, and provides for the assessment of basic knowledge of the water system. This is needed for a comprehensive exploration of the main implementation challenges, and for offering recommendations specific to a national

or regional context. The developed method is of a diagnostic nature.⁶⁷⁸ It serves to identify strengths and weaknesses in water governance, with the aim of providing recommendations for dealing with water issues in an efficient and sustainable manner. For this reason the method can be directly applied in national contexts.⁶⁷⁹

2. The assessment method

The Global Water Partnership defines water governance as “the range of political, social, economic and administrative systems that are in place to develop and manage water resources and the delivery of water services at different levels of society.”⁶⁸⁰ It is difficult to formulate an all-encompassing definition of water governance. Governance examines all relevant parties and not merely government. Further, governance includes non-governmental organizations, private sector actors and industries, individuals, and local groups or communities. According to the international human rights based approach, the State is the primary duty-bearer, and national legislation and policies must detail how the State’s human rights obligations will be discharged at national, provincial and

local levels. Legislation should further set out the extent to which individuals, companies, and other non-state actors will directly shoulder responsibility for implementation. Human rights obligations can also attach to non-governmental actors and private individuals. These parties may also contribute to or diminish efforts toward the realization of the right to water for vulnerable groups, and are relevant to discuss within this assessment method.

3. Building blocks of the assessment method

As Figure 1 shows, the assessment method discusses three levels for sound water management; namely content, organization and implementation. These three levels are divided into ten interrelated building blocks. Each of the ten building blocks is described in more details in the sections that follow.

3.1 Vulnerable groups

The assessment method looks specifically at the situation of vulnerable groups, across the ten building blocks.⁶⁸¹ The term “vulnerable groups” in this context refers to those groups that are not able

678 van Rijswijk, M., Edelenbos, J., Hellegers, P., Kok, M., & Kuks, S. (2014). Ten building blocks for sustainable water governance: an integrated method to assess the governance of water. *Water International*, (September), 1–18. <http://doi.org/10.1080/02508060.2014.951828>, p. 2.

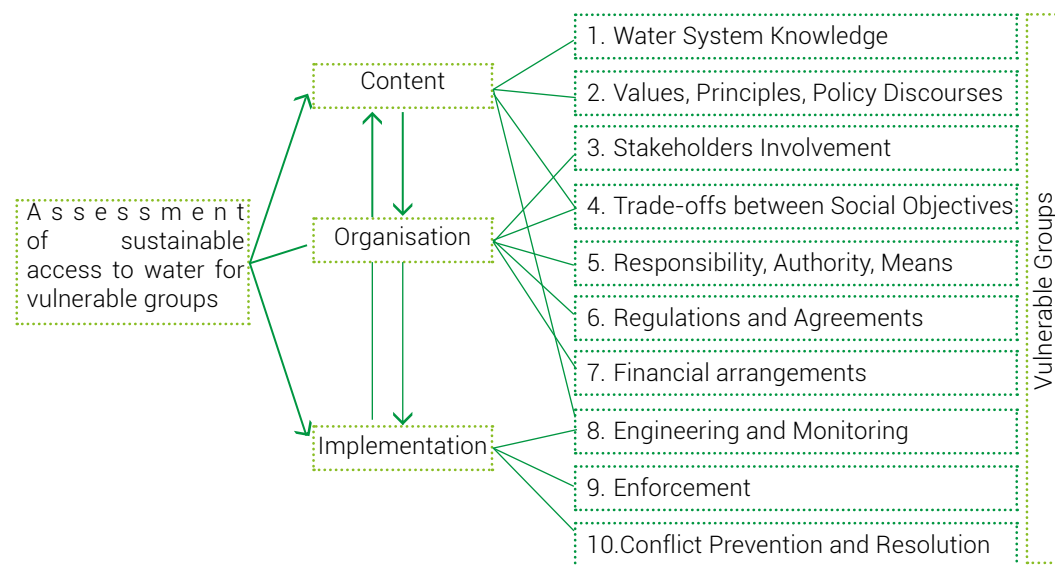
679 This method has been applied to the national contexts of Suriname and Yemen. See Misiedjan, D., van Rijswijk, M., & Tjen A Kwoei, A. (2015). A human right to water while the well runs dry: analysing the legal and regulatory framework of Yemen water law. *The Journal of Water Law*, 24(5/6), 199–206.

680 Rogers, P., & Hall, A. W. (2003). *Effective Water Governance*. *Global Environmental Change* (Vol. 7). Retrieved from <http://dx.doi.org/10.1016/j.gloenvcha.2011.04.003> \nwww.gwpforum.org

681 The term vulnerable has been chosen, as opposed to disadvantaged or marginalized, due to its cross-disciplinary use. Similarly to the issue of water access, the term vulnerability is relevant in the context of the nexus of environmental science and human rights.



Figure 1. Dimensions for the assessment of sustainable access to water for vulnerable groups



to secure sustainable access to adequate quantities of acceptable quality water for domestic purposes due to social and/or environmental factors.⁶⁸² This definition expands on the call by the UN Committee on Economic, Social and Cultural Rights (CESCR) for states to give special attention to certain groups who have traditionally faced difficulty in exercising the right to water.⁶⁸³ Vulnerable groups should be identified in the national context taking into account groups and individuals as suggested in the CESCR's General Comment 15. The categories provided by the CESCR are not always applicable to all national contexts; and not all vulnerable groups are considered as such in every country context.

3.2 Water system knowledge

Improving our knowledge about the water system will in turn improve efforts towards realizing the right to water, and will ultimately enhance the sustainability of this right. The water system is defined as:

"...the combination of natural physical resources (such as rivers, rainfall, seas, lakes etc.) and man-made infrastructure (such as canals, pumping stations, reservoirs, flood defenses etc.). The system supports societal functions, such as domestic and industrial water use, irrigation, shipping, hydropower, safety, etc.,

682 Developed from the term 'water security' (UN-Water) and defined as the capacity of a population to safeguard sustainable access to adequate quantities of acceptable quality water for sustaining livelihoods, human well-being, and socio-economic development, for ensuring protection against water-borne pollution and water-related disasters, and for preserving ecosystems in a climate of peace and political stability."

683 Committee on Economic Social and Cultural Rights. (2002). General Comment No. 15 The right to water. Geneva.

and includes the ecosystems related to water.”⁶⁸⁴

In this definition, a distinction is made between natural physical resources and man-made infrastructure. The focus within the assessment framework discussed in this chapter is on the sustainability of the water system that supports domestic water use. This is defined by the CESCO as water that is used for the following purposes: drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.⁶⁸⁵ There is a need therefore to study the water resources and infrastructure which directly and indirectly support domestic uses.

The CESCO sets out certain recommendations and requirements for the infrastructure to realize the right of access to clean water. However, in relation to actual water resources, the CESCO standards are rather limited. For instance, it discusses quality and quantity standards at service points, but these standards are not yet connected to sustainability requirements. General Comment No.

15⁶⁸⁶ mentions that the realization of the right must be sustainable, but does not elaborate on the manner in which this should take place. The information collected in this first building block assists in this respect. Sustainability in relation to water system knowledge “means that water quality and availability have to be ensured in a way that respects and supports the larger environment. Water contamination and over-extraction must be avoided in order to ensure continued access to safe and sufficient water.”⁶⁸⁷ As a result, states must determine what uses are sustainable on the basis of highly fact-specific analyses of the uses of a particular water resource in a particular context.⁶⁸⁸

3.3 Values and principles

Values are important in a society. They guide and control behavior and assist people in making decisions. In terms of water management, values help in prioritizing water allocation. Values can be elaborated in principles and translated into policy and regulation.⁶⁸⁹ Importantly, multiple values can be upheld in society.

684 van Rijswijk, M., Edelenbos, J., Hellegers, P., Kok, M., & Kuks, S. (2014). Ten building blocks for sustainable water governance: an integrated method to assess the governance of water. *Water International*, (September), 1–18. <http://doi.org/10.1080/02508060.2014.951828>, p. 4.

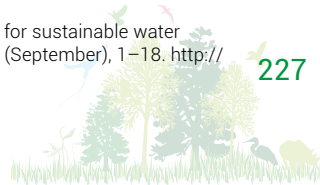
685 Committee on Economic Social and Cultural Rights. (2002). General Comment No. 15 The right to water. Geneva, paragraph 12. “In this context, “drinking” means water for consumption through beverages and foodstuffs. “Personal sanitation” means disposal of human excreta. Water is necessary for personal sanitation where water-based means are adopted. “Food preparation” includes food hygiene and preparation of food stuffs, whether water is incorporated into, or comes into contact with, food. “Personal and household hygiene” means personal cleanliness and hygiene of the household environment.”

686 *ibid.* paragraph 11

687 De Albuquerque, C. (2010). Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation “Compilation of good practices,” p. 16.

688 Dellapenna, J. W. (2004). Is Sustainable Development a Serviceable Legal Standard in the Management of Water? *Water Resources Update*, (127), 87–93, p. 89.

689 van Rijswijk, M., Edelenbos, J., Hellegers, P., Kok, M., & Kuks, S. (2014). Ten building blocks for sustainable water governance: an integrated method to assess the governance of water. *Water International*, (September), 1–18. <http://doi.org/10.1080/02508060.2014.951828>, p. 5.



How these values are followed-up by principles, policy and legislation determine their hierarchy. Examples of commonly held values are justice and human dignity.⁶⁹⁰ It is often argued that societies across the globe have a common set of values.⁶⁹¹ However, how these values are interpreted may differ between societies. These common societal values have contributed to the development of universal human rights. Besides common values, societies may also have more specific values sometimes related to religion or culture.

Principles

Binding human rights principles apply to the human right of access to water. These principles are non-discrimination, equality, access to information, right to participation, sustainability⁶⁹² and non-retrogression. In addition to human rights principles, a number of environmental principles should also be integrated into national strategies to realize the human right of access to water for vulnerable groups. Environmental legislation based on these environmental principles can also complement the human rights framework.⁶⁹³ Environmental principles are articulated in numerous treaties concerning environmental law, including

the 1992 Rio Declaration from the United Nations Conference on Environment and Development. The following principles have been found to be most relevant for this framework: intergenerational equity, integration, common but differentiated responsibilities, public participation, precautionary principle, polluter-pays principle, environmental impact assessment, and international cooperation.

The assessment framework studies which of these principles states have translated into national policies and legislation, and how the realization of the right to water relates to these principles. For instance, translation of the polluter-pays principle can be effective in protecting water resources, used by vulnerable groups, from pollution and thereby support the realization of the right. What is also important is that the principles and values which steer water management are agreed upon and that there are no internal conflicts.

3.4 Stakeholder participation

Different parties are involved in the provision of water supply for domestic purposes and in overall water management. Governments hold the final

690 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 25 October 2016]

691 Klug, F. (2015). A Magna Carta for all humanity. *New Scientist* (Vol. 226). New York: Routledge. [http://doi.org/10.1016/S0262-4079\(15\)30366-3](http://doi.org/10.1016/S0262-4079(15)30366-3), p. 84.

692 The Special Rapporteur deems sustainability to be a fundamental principle for the realization of human rights in general and the human right to water specifically. De Albuquerque, C. (2013). Report of the Special Rapporteur on the human right to safe drinking water and sanitation.

693 Tully, S. (2005). A Human right to access water? A Critique of General Comment No. 15. *Netherlands Quarterly of Human Rights*, 23(15), 35–63, p. 57.

responsibility in providing access to water for domestic purposes to those within their territory, including vulnerable groups and individuals. Nonetheless, governments are often dependent on different stakeholders in order to realize this responsibility. 'In this context, governments sometimes deliberately, sometimes forced by circumstances, give more room to certain stakeholders to influence decision-making and implementation which often have different values and interests.'⁶⁹⁴ How these different interests and values influence access to water for vulnerable groups is highly relevant when assessing the sustainability and the general exercise of the right. This process of influencing and balancing is covered within this building block of stakeholder participation.

The principle of participation is enshrined in many human rights conventions as well as in environmental conventions. In this sense, the practice and theory around this principle within these two fields will enhance its application in relation to the implementation of a sustainable human right to water. Participation, in the human rights sense, qualifies as 'active, free and meaningful participation.'⁶⁹⁵ The environmental perspective of the principle goes further to include aspects of access to information, public participation in decision-making and access to justice. These aspects are considered to be

the clearest elaboration of Rio Principle 10 as it is presented in the Aarhus Convention.⁶⁹⁶ Principle 10 contributes to the specific environmental viewpoint and provides whoever is affected with the option of redress, which is relevant to the right of access to water. This is especially important in circumstances where environmental issues affect the quality and quantity of drinking water available to vulnerable groups.

The ten building blocks framework discusses the participation of all relevant stakeholders in this building block and not merely that of vulnerable groups. It is important to assess how the different viewpoints are presented, represented and weighed. Other stakeholders, who may not be directly involved in the domestic water supply to vulnerable groups may nevertheless affect those groups' access to water. Consequently, the relationship between, for instance, water suppliers and rights-holders, and also the relationship amongst different rights-holders are assessed.

3.5 Trade-offs between social objectives: service-level agreements

Realizing sustainable access to water for vulnerable groups is not solely an issue of establishing the appropriate rules and

694 van Rijswick, M., Edelenbos, J., Hellegers, P., Kok, M., & Kuks, S. (2014). Ten building blocks for sustainable water governance: an integrated method to assess the governance of water. *Water International*, (September), 1–18. <http://doi.org/10.1080/02508060.2014.951828>, p. 7

695 General Assembly, Declaration on the Right to Development, 4 December 1986, A/Res/41/ 128, Art 2(3)

696 ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, entry into force: 30 October 2001



norms and implementing them. Such realization is to be seen as a continuing process of negotiating and tradeoff between stakeholders to come to agreed service levels.⁶⁹⁷ This also ties into the governance perspective which takes into account the different roles, authorities and parties.

States are expected to invest all necessary resources to immediately realize the minimum core obligations of the human right of access to water. However, at times some states may be unable to immediately accomplish this. Nevertheless, in most cases, reallocation of resources can assist states in realizing the minimum core obligations for a greater number of people, if not all.⁶⁹⁸ In order for this reallocation to take place, (re)distribution of water must be renegotiated. This building block analyzes which social trade-offs states have to make. For instance, states may decide to implement subsidies to cover costs for infrastructure instead of raising the price of water services.

3.6 Responsibility, authority and means

Property rights/water rights

Ownership of water supply infrastructure, or the right to use water which is often combined with the right to use land,

indicates power and control. The role and responsibilities that come along with these rights relate to water governance and management in a particular manner and are rooted in formal and informal legislation. Central issues often deal with how property rights are defined, who benefits from these rights, and how the enforcement of these rights is carried out. How ownership rights are regulated really depends on the specific legal context of a state as it formulates whether water is for instance seen as a common good, or its ownership is connected to land ownership. With changing patterns in water supply and demand, revisions of existing legal frameworks are often required. There is a need for well-defined, coherent rules, roles, and responsibilities through legislation of formal and informal water rights. This is assumed to lead to both social and economic benefits as well as environmental benefits.⁶⁹⁹

Responsibility

States are the main duty-bearers under international human rights law and therefore carry the primary responsibility for fulfilling the human right of access to water. The state also has certain obligations in this regard. These obligations can be divided into three categories. The first of these is the tripartite typology, also known as the *responsibility* to respect,

697 Stenekes, N. (2006). Sustainability and Participation in the Governing of Water Use: The case of urban water recycling. University of New South Wales, p. 15.

698 Winkler, I. (2012). The Human Right to Water Significance, Legal Status and Implications for Water Allocation (First). Portland, Oregon: Hart Publishing, p. 122.

699 Charles Batchelor, p. 8

protect and *fulfil*. Second is the general obligation to progressively realize the right of access to water. Finally, the state has minimum core obligations. To discharge these obligations, states can follow the recommendations as formulated in CESCR General Comment No. 15.

Means and capacity

The requirements for the use of means or resources are related to the level of services intended. To put it into human rights terms, the requirements deal with the immediate realization of obligations related to the minimum core and the progressive realization of the human right of access to water. Regarding minimum core obligations, such as access to drinking water to sustain life, states are expected to be able to meet the requirements, and use all necessary resources as a priority matter to bring this about.⁷⁰⁰ Beyond the minimum core, states are expected to exploit the maximum amount of available resources to progressively realize the full enjoyment of the human right of access to water. In this case, the definition of resources that will be followed includes “all relevant resources needed for the realization of human rights”. This includes natural, human, organizational, technological resources, information and other resources.⁷⁰¹

3.7 Regulations and agreements

Appropriateness

Whether the regulations (including planning and policy instruments) and agreements are suitable within the context in which they have to function depends on a number of circumstances. This assessment method looks at the cultural, political, institutional, legal and economic circumstances. For instance, the legal systems or traditions present within a nation will influence whether the agreements and regulations are appropriate. If, for example, a national legal context is pluralistic, regulations and agreements will need to be harmonized or will need to reinforce one another. Otherwise the regulatory system will experience internal conflicts.⁷⁰² The agreements and regulations need to fit within the context essential to function within. It happens often that regulations, which are effective in one context, are transplanted into other legal systems and contexts. This is a challenge as regulations may not yield the same results, or translate well when used in different legal systems.

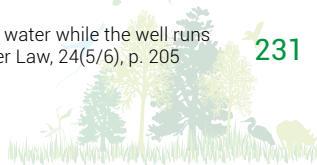
Legitimacy

Agreements and regulations need to be considered as legitimate sources of law and established in a legitimate manner. The legitimacy of the regulations and

700 Winkler, I. (2012). *The Human Right to Water Significance, Legal Status and Implications for Water Allocation* (First). Portland, Oregon: Hart Publishing, p. 122.

701 Categories as suggested in Robertson, R. E. (1994). Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights. *Human Rights Quarterly*, 16, 693–714.

702 See for instance Misiedjan, D., van Rijswijk, M., & Tjen A Kwoei, A. (2015). A human right to water while the well runs dry: analysing the legal and regulatory framework of Yemen water law. *The Journal of Water Law*, 24(5/6), p. 205



agreements is expected to enhance the acceptance of them as norms by the stakeholders.

Legal certainty and adaptiveness

Norms and rules should strike a perfect balance between adaptiveness and legal certainty. The adaptiveness of norms can be realized by including open norms and having procedures that allow for flexibility. Striving for sustainability in the realization of the human right of access to water asks for adaptiveness of the regulatory framework. The availability of water may fluctuate due to, for instance, climate change and pollution. The norms must be able to adapt to these changes.

Nevertheless, the regulatory system should enhance legal certainty. Stakeholders need to be able to anticipate, and be able to base their behavior on the rules that they are aware of.

3.8 Financial arrangements

When it comes to financial arrangements regarding a sustainable right to water for vulnerable groups, two aspects deserve special attention. Firstly, financing and budgeting is necessary in order to realize this basic human right. Secondly, what is

highly relevant for vulnerable groups is the affordability of and access to water.

In developing their budgets, states are obligated to allocate resources for the realization of human rights. They nevertheless have a margin of appreciation.⁷⁰³ Even though the International Covenant on Economic, Social, and Cultural Rights does not include a benchmark, meaning there is no fixed percentage of the budget which must be allocated; it is presumed that states are required to show they have adequately considered the financial resources available to satisfy the right to water.⁷⁰⁴ The 2006 United Nations Development Programme (UNDP) Human Development Report suggests that states should spend a minimum of 1% of their Gross Domestic Product on water and sanitation.⁷⁰⁵

Besides government-raised financing (through, for instance, taxes) and transfers (such as grants from international organizations), household and user contributions are other sources of funding for water and sanitation services. These options are required to be affordable, including for vulnerable groups. Here it is important whether households are connected to informal or formal services. In the case of informal services, it is often

703 Odello, M., & Seatzu, F. (2013). The International Covenant on Economic, Social and Cultural Rights. In The UN Committee on economic, social and cultural rights: the law, process and practice, p.17, London: Routledge. p. 17 & De Albuquerque, C., & Roaf, V. (2014). Financing. In Realising the human rights to water and sanitation: A handbook by the UN Special Rapporteur Catarina De Albuquerque, p. 7.

704 Alston, P., & Quinn, G. (1987). The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights. Human Rights Quarterly, 9, p. 180

705 United Nations Development Programme. (2006). Human Development Report 2006 Beyond scarcity: Power, poverty and the global water crisis. New York. Retrieved from [http://www.undp.org/content/dam/undp/library/corporate/HDR/2006 Global HDR/HDR-2006-Beyond scarcity-Power-poverty-and-the-global-water-crisis.pdf](http://www.undp.org/content/dam/undp/library/corporate/HDR/2006%20Global%20HDR/HDR-2006-Beyond%20scarcity-Power-poverty-and-the-global-water-crisis.pdf), p. 9.

challenging to guarantee affordability and to track developments.⁷⁰⁶ Nevertheless, states are ultimately responsible for ensuring, as much as possible, the affordability of services. In order to ensure that relevant authorities set affordable tariffs, it is advised that states gather information on what percentage of their income households spend on access to water. This information should be differentiated according to income and social groups. It is also important to track where the household contributions are invested, for example by earmarking the incomes generated from taxes or payments of services.⁷⁰⁷

3.9 Engineering and maintenance

When it comes to technology and engineering, the choices need to be appropriate and economically and socially viable. Sustainable services and the technology that goes with them may require a higher investment cost, and may require relatively more maintenance than unsustainable services. For this reason, choices around technology and maintenance must be made based on sufficient information explaining existing

and projected resources for the medium and long term.⁷⁰⁸

One of the dilemmas that states face when resources, especially water resources, are scarce is how to prioritize sustainability and sufficient spending on water and sanitation services to those currently under-serviced.⁷⁰⁹ What states should consider is that, from the human rights perspective, they must firstly strive for equality through efficient use of resources. States should expand access to minimum essential services before improving the services of those already served. In this sense, the principles of equality and sustainability complement each other.⁷¹⁰

3.10 Enforcement, monitoring and follow up after monitoring

Implementation, enforcement and monitoring are essential for the longevity of a sustainable right to water. Not only are they necessary for upholding standards but also for evaluating whether the economic, social and ecological conditions have been met, and whether adjustments and renegotiations are necessary to ensure adaptiveness and the realization of the human right.⁷¹¹

706 De Albuquerque, C., & Roaf, V. (2014). Monitoring. In Realising the human rights to water and sanitation: A handbook by the UN Special Rapporteur Catarina De Albuquerque, p. 18.

707 De Albuquerque, C., & Roaf, V. (2014a). Financing. In Realising the human rights to water and sanitation: A handbook by the UN Special Rapporteur Catarina De Albuquerque, p. 18.

708 Loucks, D. P. (2000). Sustainable Water Resources Management. *Water International*, 25(1), 3–10. <http://doi.org/10.1080/02508060008686793>, p. 6.

709 De Albuquerque, C., & Roaf, V. (2014c). Principles. In Realising the human rights to water and sanitation: A handbook by the UN Special Rapporteur Catarina De Albuquerque, p. 78.

710 *ibid.* p. 78

711 See for instance Pienaar, H., Belcher, A., & Grobler, D. F. (2011). Protecting Aquatic Ecosystem Health for Sustainable Use. In B. Schreiner & R. Hassan (Eds.), *Transforming Water Management in South Africa: Designing and Implementing a New Policy Framework* (pp. 97–118). Springer Science. <http://doi.org/10.1007/978-90-481-9367-7>.



The enforcement of rights and policies is an often neglected aspect in water governance.⁷¹² The emphasis lies on the process of policy development, while implementation and enforcement are of equal importance. By articulating a sustainable right to water in national legislation, the right moves from being a political and moral ambition to an enforceable right. Human rights are not self-enforcing and therefore enforcement mechanisms should be established. Such mechanisms include administrative and/or judicial enforcement where the court system is used for individuals and groups to assert their rights. This is especially important for vulnerable groups as it can empower them directly or indirectly when they, or NGOs on their behalf, go through the court system to enforce these rights.⁷¹³ However, the enforcement of a legal decision can still be challenging and depends on factors such as the capacity available to deal with this, the compliance mechanisms such as fines, and the overall trust in the legal system.

Outside of judicial or administrative enforcement, monitoring is an additional mechanism for realizing access to water. This will stimulate the overall compliance and will assist those who do not assert their rights through the judicial system or

other enforcement mechanisms. States are required to monitor their compliance and that of others with the legal content of the human right of access to water and other environmental obligations.⁷¹⁴ In order to facilitate this, key performance indicators should be developed. The human rights framework requires structural, process and outcome indicators to be defined for monitoring.⁷¹⁵ States should therefore identify standards, targets and indicators regarding availability, accessibility, quality, affordability, acceptability, sustainability and non-discrimination.

Monitoring in itself is not sufficient as it is a tool for both further development of policy and public awareness. Monitoring results require follow up actions after the monitoring results are available. This enhances adaptiveness and a constant improvement of performance. Therefore this building block is linked to, among other blocks, that of stakeholder participation. States must ensure 'that data are adequately collected, organized and stored, and then made public in a timely, accurate, accessible and useful form.'⁷¹⁶ Especially, data concerning the inequalities in water access are important for realizing the right for vulnerable groups. Often states do not supply disaggregated data which is useful for identifying where

712 van Rijswijk, M., Edelenbos, J., Hellegers, P., Kok, M., & Kuks, S. (2014). Ten building blocks for sustainable water governance: an integrated method to assess the governance of water. *Water International*, (September), 1–18. <http://doi.org/10.1080/02508060.2014.951828>, p. 12.

713 van der Valk, M., & Keenan, P. (Eds.). (2011). The right to water and water rights in a changing world. In *Colloquium the right to water and water rights in a changing world*, p. 52.

714 De Albuquerque, C., & Roaf, V. (2014b). Monitoring. In *Realising the human rights to water and sanitation: A handbook by the UN Special Rapporteur Catarina De Albuquerque*, p. 5.

715 *ibid.* p. 7.

716 *ibid.* p. 8.

and how discrimination occurs and also whether progress is being made.

3.11 Conflict prevention and resolution

Conflict prevention

In relation to conflict prevention, particularly for vulnerable groups, sustainability and equity are highly relevant. The principles of intergenerational and intra-generational equity are especially important. This is because with the exploitation of natural resources in many resource-rich developing countries, governments often gain substantial financial benefits. However, the social conditions of vulnerable groups are neglected, threatening human security, which can lead to (armed) conflict between governments and local populations.⁷¹⁷ Because of this, the UNDP recommends in its 2015 'Human Development Report' that in order to prevent conflicts and strive after human security, balance must be found between using and equitably distributing resources, while still considering the needs of current and future generations.⁷¹⁸

Overall, the assumption is that having clear rules based on shared responsibilities and values, which are represented in several

other building blocks, in alignment with the physical circumstances can, in many cases, prevent conflicts from arising. These values and responsibilities should, however, be grounded in equity and sustainability.

Conflict resolution

In the event that conflicts do occur, provision must be made for mechanisms which can deal with these conflicts in an independent manner. Frequently, these mechanisms take the form of independent mediators, arbiters or judges. The absence of conflict resolution mechanisms adversely impacts and excludes affected vulnerable communities.⁷¹⁹ As mentioned in the building block on participation, access to justice is a necessary element in conflict resolution, especially for vulnerable groups. In addition, the principles of public participation and access to information go hand-in-hand with access to justice. Many states have developed laws and regulation regarding access to justice. However, the implementation of these laws is often insufficient.⁷²⁰ For this reason it is not only relevant to assess whether the appropriate laws and regulations are in place, but also whether the outcomes of these mechanisms are enforced and implemented.

717 Marong, A. B. M. (2003). From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development. *Georgetown International Environmental Law Review*, 16(21), p. 38.

718 United Nations Development Programme (2015). Human Development Report. Available at http://hdr.undp.org/sites/default/files/2015_human_development_report.pdf

719 Krchnak, K. M. (2004). Improving Water Governance Through Increased Public Access to Information and Participation. *Sustainable Development Law & Policy*, 5(1), p. 34.

720 *ibid.*



Judicial mechanisms often apply to individual cases only. If the issue is a problem relevant for a broader demographic group than just the individual parties of the case, mechanisms should be in place for the issue to be taken up by other authorities. For instance, if the water allocation mechanism in place has become inappropriate due to a significant change in water quantity and a dispute occurs because of this, other relevant authorities should pick up on this issue leading possibly to necessary policy and legislation changes.

4. Conclusion

To develop an integrated assessment method for sustainable access to water for domestic purposes for vulnerable groups is challenging. This method highlights the main topics which assist in reviewing the national water management regulations and policy. The method incorporates information from different disciplines to paint a clearer picture of the situation. Access to water for domestic purposes is not merely influenced by whether or not the human right of access to water is recognized, but also whether other circumstances influence this access.

The building blocks are interlinked and point out the three different steps of the assessment method: the content, organization, and implementation. The emphasis is that not only the outcome is important, but also the procedure. This is especially important for vulnerable groups whose interests are often left out.

Using human rights to recognize human responsibilities toward nature

Catherine Iorns Magallanes

1. Introduction

The recognition of the relationship between human rights and the environment is one of the fundamental principles necessary in the advancement of justice, governance and law, for environmental sustainability. This relationship works both ways: the protection of the environment is necessary to uphold human rights, and the protection of human rights is necessary to protect the environment. This paper focuses on how the protection of indigenous rights can help protect the environment. It suggests that upholding indigenous rights can contribute to these ends through emphasizing our responsibilities toward nature and de-emphasizing our rights over it.

This paper does not discuss indigenous beliefs themselves. I note here that indigenous peoples stress that their identity is entwined with their relationship with nature. This relationship views nature as a relative to be respected rather than as a resource to be exploited. Humans are part of nature as an interdependent whole, with there being no right of any one part of that whole to dominate another part. To uphold indigenous rights is to uphold such conceptions about our relationship with the natural world. If protective environmental views are respected, then the environment itself is more likely to be better respected and protected.

This paper illustrates this with examples from Aotearoa⁷²¹ New Zealand that recognize the right of Maori to have their relationship with the natural environment upheld in New Zealand law. There are many different such examples in New Zealand law, from recognition of Maori interests in mainstream resource management decision-making, to special arrangements in the management of New Zealand's natural resources. In this summary paper, only the main illustrations are presented. One recent example of

721 This is the Maori term for New Zealand.



a special arrangement is then discussed, because the arrangement has recognized in law the Maori view that the natural environment should be treated more as a person—indeed, as a living relative—rather than simply as a resource.

These examples from Aotearoa New Zealand illustrate ways in which the law can be used to implement and incorporate indigenous conceptions of our responsibilities towards the natural world within a Western society and legal system. They thus illustrate ways that we can better protect the natural environment by upholding human rights. The way that some of these examples have been celebrated by non-indigenous environmentalists illustrates also that such recognition may alter the mainstream constructions of nature, through normalizing the indigenous constructions. Thus, the protection of indigenous rights to culture and religion could help us change our conception of responsibilities toward and thus our relationship with nature, and better secure a healthy environment for all.

2. Maori concepts of responsibility for nature in New Zealand law

Traditional indigenous views of the environment consider humans as being part of nature and acknowledge and reflect humankind's interdependence with nature. Importantly, these indigenous cultures' connections with nature are so deep that the nature is imbued with personality and viewed as kin – it is regarded as a true living ancestor of the people. This view corresponds with responsibilities to protect nature as guardians, as they would in respect to a family member. The adoption of an indigenous perspective within a legal system can provide a set of responsibilities to nature from an eco-centric approach. An example of this exists in Aotearoa New Zealand, where the guardianship relationship of the indigenous Maori with the environment has been recognized and protected in law.⁷²²

Maori relationships with the natural world have been incorporated or upheld in New Zealand environmental law through judicial decisions, legislation, as well as local, regional and national policy. For example, courts have required the Maori spiritual relationship with the environment to be considered by government in making water management decisions, even

722 See Catherine Iorns Magallanes, *Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment*, 21 *WIDENER L. REV.* 273, 273–327 (2015) (hereinafter *Maori Cultural Rights in Aotearoa New Zealand*), for more detailed information on the various different ways that New Zealand law has recognised Maori cosmology in law. See Catherine Iorns Magallanes, *Native American Values and Laws of Exclusion*, in *ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVE APPROACH* 200, 201 (Keith H. Hirokawa ed., 2014), for more information in a US context.

when the legislation did not specifically provide for this.⁷²³ Another judicial decision underlined the need for the “the relationship of Maori with their ancestral land”⁷²⁴ to be given greater recognition in the government’s environmental decision-making, and even “primacy” as a matter of national importance when balancing competing factors.⁷²⁵ Since 1986, New Zealand has made the need to consider Maori culture and the principles of the Treaty of Waitangi⁷²⁶ a core part of the development of all national legislation; and it has become part of policy development requirements within the executive.⁷²⁷

The primary environmental statute in New Zealand is the Resource Management Act of 1991. Its overriding purpose is “to promote the sustainable management of natural and physical resources,” which is widely defined.⁷²⁸ Significantly, “matters of national importance” which all decision-makers under the Act must “recognize and provide for,” include “the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, *waahi tapu* [sacred sites], and other taonga [treasured things].”⁷²⁹ In addition, all decision-makers must “have particular

regard to” “*kaitiakitanga*,” which is defined in the Act as “the exercise of guardianship by the tangata whenua [tribe from an area] of an area in accordance with tikanga Maori [Maori protocol] in relation to natural and physical resources; and includes the ethic of stewardship.”⁷³⁰ Finally, the Act requires all decision-makers to “take into account the principles of the Treaty of Waitangi.”⁷³¹

These provisions upholding responsibility to the environment occur within the anthropocentric, mainstream environmental legal system. However, the application of these provisions has successfully resulted in the consideration, recognition, and even protection of Maori relationships with the natural world in decisions under the Act relating to the use, development, and protection of New Zealand’s natural and physical systems. This has produced positive protection for such interests in some cases, such as through accommodation in the planning and development process, and through being upheld by courts in reviewing decisions made against such interests. For example, as early as 1994, it was decided that, where Maori had an ancestral

723 See, e.g., *Huakina Dev. Trust v. Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

724 *Town and Country Planning Act 1977*, s 3(1)(g) (N.Z.).

725 *Environmental Defence Society, Inc. v. Mangonui Cty. Council* [1989] 3 NZLR 257 (CA).

726 The Treaty of Waitangi is the Treaty between the British Crown and the indigenous Maori that was agreed to in 1840 in order to enable British settlement of New Zealand. The Treaty of Waitangi/Te Tiriti O Waitangi, NEW ZEALAND MINISTRY OF JUSTICE, <http://www.waitangitribunal.govt.nz/treaty-of-waitangi/> (last visited July 30, 2016).

727 PHILIP JOSEPH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND* 82 ¶ 4.9.4. (Brookers, 4th ed. 2014). See also *Cabinet Manual 2008*, s 7.60-61 (NA) (N.Z.).

728 *Resource Management Act 1991*, s 5(2) (N.Z.).

729 *Id.* s 6 (emphasis added). See Catherine Iorns Magallanes, *The Use of ‘Tangata Whenua’ and ‘Mana Whenua’ in New Zealand Legislation: Attempts at Cultural Recognition*, 42 *VICTORIA UNIV. WELLINGTON L. REV.* 259 (2011), for a discussion of the use of Maori terms in legislation.

730 *Resource Management Act 1991*, ss 7, 9 (emphasis added).

731 *Id.* s 8.



relationship with a natural system, then before any permit ("resource consent") could be issued, decision-makers must recognize that ancestral link, provide for the maintenance of that relationship, and provide for the tribe's guardianship—in accordance with Maori culture—over that natural system for the future.⁷³²

The protection has thus ranged from the need to consult with relevant Maori over the impact of a development proposal on their interests,⁷³³ to rejection of development proposals because they interfere with Maori values and their spiritual relationship with the site proposed to be developed. Cases rejecting such interference have concerned a wide range of matters, including the discharge of sewage effluent into the sea,⁷³⁴ the location of a road being too close to old burial sites,⁷³⁵ a television aerial being too close to and thereby interfering with Maori metaphysical relationships with a battle site,⁷³⁶ and a wind farm being too close to—and interfering with Maori metaphysical relationships with—a mountain of spiritual significance.⁷³⁷

The inclusion of these elements respecting Maori culture and spiritual relationships with nature has occurred within an anthropocentric legal framework. However, this is the helpful beginning

of adopting a structure of responsibility, through upholding the indigenous Maori view of nature as an ancestor and devising legal frameworks for better protecting its interests. Indeed, since the 1980s there have been many such examples upholding responsibility. For example, co-governance arrangements have been established between Maori and the government with the express purpose of restoring lakes, rivers, and other aspects of nature, in line with respect for them as ancestors.⁷³⁸ Most recently and most significantly, natural features have been accorded legal personality, with human guardians appointed to protect their interests.

New Zealand has recently adopted a novel method for upholding human responsibility for nature: it has recognized elements of nature as legal persons and appointed guardians to protect the interests of these elements of nature. There are two current examples: a river and a forest. Both were adopted for human rights reasons: to do justice to the indigenous peoples, by settling long-standing grievances between the New Zealand government and the indigenous Maori who consider themselves the rightful guardians of these areas. Indeed, the indigenous tribes concerned consider that the river and the forest are their respective ancestors,

732 See, e.g., *Haddon v. Auckland Regional Council* [1994] 3 NZRMA 49 at 52, 5758 (PT).

733 See, e.g., *Mason-Riseborough v. Matamata-Piako District Council* [1997] 4 ELRNZ 31 (EC).

734 See, e.g., *Te Runanga o Taumarere v. Northland Regional Council* [1996] NZRMA 77.

735 *Te Runanga o Ati Awa ki Whakarongotai, Inc. v. NZ Historic Places Trust* [2002] 8 ELRNZ 265 at 272 (EC).

736 *TV3 Network Services Ltd. v. Waikato District Council* [1998] 1 NZLR 360 at 363–64 (HC).

737 *Outstanding Landscape Protection Society, Inc. v. Hastings District Council* [2007] NZRMA 8 (EC).

738 See, e.g., *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* (N.Z.).



Photo credit: © Jorg Bauer

such that the tribes have the burden and privilege of responsibility of care for them as kin. These examples are discussed in turn.⁷³⁹

1. Te Awa Tupua: Whanganui River Settlement Agreement

The Whanganui River flows through the traditional territory of the Whanganui Maori. The river is said to be “central to the existence of Whanganui Iwi and their health and wellbeing,” providing “both physical and spiritual sustenance to Whanganui Iwi from time immemorial.”⁷⁴⁰ The river

is seen as the ancestor of the Whanganui tribes,⁷⁴¹ and the concept that the people are inseparable from the river “underpins the responsibilities of the iwi [tribes] and hapū [subtribes] of Whanganui in relation to the care, protection, management and use of the Whanganui River in accordance with the kawa and tikanga [protocols]” of the tribes.⁷⁴² It is this that has given rise to the Whanganui saying “*Ko au te awa, ko te awa ko au*”, which means “I am the river and the river is me.”

Many activities of the New Zealand government over the years from the 1800s breached not only the guarantees given to the Whanganui iwi by treaty but also violated what they view as the life force or spirit of the river.⁷⁴³ The New Zealand courts have agreed that such violations of Maori cosmology impacted the Whanganui tribes themselves, and prevented them from exercising their duties of guardianship over the river.⁷⁴⁴ Throughout the breaches, the Whanganui tribes have maintained that they are still the rightful guardians of the river and of its life force, and that the right to control its management should be returned to them. An agreement in resolution of these

739 See Catherine Iorns Magallanes, *Maori Cultural Rights in Aotearoa New Zealand*, supra note 2, for more detailed information on and discussion of these examples.

740 WHANGANUI IWI AND THE CROWN, RURUKU WHAKATUPUA - TE MANA O TE IWI O WHANGANUI cl.1.4 (2014) (hereafter referred to as TE MANA O TE IWI O WHANGANUI), <http://nz01.terabyte.co.nz/ots/DocumentLibrary/140805RurukuWhakatupua-TeManaOTelwiOWhanganui.pdf>.

741 See Id. cls. 2.1–2.25, for the Whanganui iwi account of the origins and the significance of the river to them. This account includes tribal lore about the river’s supernatural guardians and their relationship to the people. Id. cls. 2.19–2.20).

742 Id. cl. 3.2 (italics added).

743 WAITANGI TRIBUNAL, TE IKA WHENUA RIVERS REPORT (1998), https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68382633/Te%20Ika%20Whenua%20Rivers%201998-compressed.pdf.

744 Ngati Rangi Trust and Ors v Manawatu Whanganui Regional Council [2004] NZEnvC 172 at ¶ 318.



grievances⁷⁴⁵ – between the tribes and the government over future joint management of the river – was reached in 2012,⁷⁴⁶ finalized in 2014,⁷⁴⁷ and the legislation to implement the agreement was introduced into Parliament in May 2016.⁷⁴⁸ Significantly, this agreement incorporates the personification of the river held by the indigenous tribes – according to the title Te Awa Tupua – creates a new legal entity for Te Awa Tupua, and upholds the tribes' spiritual relationship with it.

The Whanganui River agreement recognizes the indivisible unity of the river and its metaphysical status as a living being. It adopts the genealogical approach to describing the river, emphasizing the connection of people to the river. These aspects are reflected in a set of overarching "intrinsic values,"⁷⁴⁹ described also as "the natural law and value system... which binds the people to the River and the River to the people".⁷⁵⁰

13 Tupua te Kawa

Tupua te Kawa comprises the intrinsic

values that represent the essence of Te Awa Tupua, namely—

(a) *Ko te Awa te mātāpuna o te ora: the River is the source of spiritual and physical sustenance:*

Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and wellbeing of the iwi, hapū and other communities of the River.

(b) *E rere kau mai te Awa nui mai te Kahui Maunga ki Tangaroa: the great River flows from the mountains to the sea*

Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements.

(c) *Ko au te Awa, ko te Awa ko au: I am the River and the River is me:*

745 See Catherine Iorns Magallanes, 'Reparations for Maori Grievances in Aotearoa New Zealand', in Lenzerini (ed.) *Reparations for Indigenous Peoples* (Oxford: Oxford University Press, 2008) for a summary of a range of modern reparations settlement agreements. See the Office of Treaty Settlements, www.ots.govt.nz/ (last visited July 30, 2016), for more information on settlement of historical Treaty of Waitangi claims. See also *TREATY OF WAITANGI SETTLEMENTS* (Nicola Wheen & Janine Hayward, eds., 2012).

746 The 2012 agreement, entitled *Tutohu Whakatupua*, was signed on August 30 between the Whanganui Iwi and the Crown. *WHANGANUI IWI AND THE CROWN, TUTOHU WHAKATUPUA* (2012), <http://nz01.terabyte.co.nz/ots/DocumentLibrary/WhanganuiRiverAgreement.pdf>.

747 The 2014 Deed of Settlement comprises two documents: *TE MANA O TE IWI O WHANGANUI* supra note 77 (including the main elements of the settlement: apology, recitation of the history of the grievances and claims, and all the elements of the settlement; and *RURUKU WHAKATUPUA - TE MANA O TE AWA TUPUA*, (hereinafter referred to as *TE MANA O TE AWA TUPUA*), <http://nz01.terabyte.co.nz/ots/DocumentLibrary/RurukuWhakatupua-TeManaoTeAwaTupua.pdf> (last visited July 30, 2016) (including the agreed Te Awa Tupua framework for the status and management of the Whanganui River). See *OFFICE OF TREATY SETTLEMENTS*, supra note 82, for more information and the relevant documents, including a summary of the Whanganui River Deed of Settlement.

748 The Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016 (129-1) (N.Z.) (hereinafter *Te Awa Tupua Bill*). At the time of writing the Bill was still under consideration by the NZ Parliament.

749 Id. cl. 13; *TE MANA O TE AWA TUPUA*, supra note 27, cl. 2.6.

750 *TE MANA O TE AWA TUPUA*, supra note 27, at 6.

The iwi and hapū of the Whanganui River have an inalienable interconnection with, and responsibility to, Te Awa Tupua and its health and wellbeing.

(d) *Ngā manga iti, ngā manga nui e honohono kau ana, ka tupu hei Awa Tupua : the small and large streams that flow into one another and form one River:*

*Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively to the common purpose of the health and wellbeing of Te Awa Tupua.*⁷⁵¹

To uphold this in law, the legislation recognizes the river as a legal person: “Te Awa Tupua is a legal person and has all the rights, powers, duties and liabilities of a legal person.”⁷⁵² This is expressly intended to “reflect the Whanganui Iwi view that the River is a living entity in its own right and is incapable of being ‘owned’ in an absolute sense” and to “enable the River to have legal standing in its own right.”⁷⁵³

An official guardian for Te Awa Tupua is being established by the 2016 proposed

legislation.⁷⁵⁴ This guardian will “act and speak for and on behalf of Te Awa Tupua” and uphold “the Te Awa Tupua status” and intrinsic values, “promote and protect the health and well-being of Te Awa Tupua”, and perform other necessary functions for it, including participating in relevant statutory processes and holding property or funds in the name of Te Awa Tupua.⁷⁵⁵ Importantly, the guardian “must act in the interests of Te Awa Tupua and consistently with Tupua te Kawa” (the intrinsic values, above).⁷⁵⁶

The guardian, referred to as Te Pou Tupua, will consist of two persons “of high standing,”⁷⁵⁷ one appointed by the Crown and one appointed collectively by all tribes with interests in the river.⁷⁵⁸ Each appointee must have “the mana [prestige, status], skills, knowledge, and experience to achieve the purpose and perform the functions of Te Pou Tupua.”⁷⁵⁹ Underneath Te Pou Tupua is a 3-person advisory group.⁷⁶⁰

A key interest of the river is its health and wellbeing. This is specifically addressed through the development of a “Whole of River Strategy,”⁷⁶¹ which will be designed “to

751 Te Awa Tupua Bill, supra note 28, cl. 2.7.

752 Id, cl. 14(1).

753 TUTOHU WHAKATUPUA, supra note 26, cl. 2.7.

754 This guardian will be called Te Pou Tupua. Te Awa Tupua Bill, supra note 28, cl. 14(2).

755 Id. cl. 19(1).

756 Id. cl. 19(2).

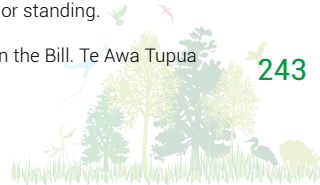
757 TE MANA O TE AWA TUPUA, supra note 27, cl. 3.8; TUTOHU WHAKATUPUA, supra note 26, cl. 2.20.4. The high standing is so as to recognize “both the importance of the role and the need to interact with Ministers and other interested parties at a leadership level.” Id.

758 TE MANA O TE AWA TUPUA, supra note 27, cl. 3.9; TUTOHU WHAKATUPUA, supra note 26, cl. 2.19. See TE MANA O TE AWA TUPUA, supra note 27, cls. 3.9–3.19, for more details of the appointment process, term, and conditions. See Id. cls. 3.20–3.40, for the administrative and advisory support for Te Pou Tupua in carrying out its role.

759 Te Awa Tupua Bill, supra note 28, cl. 20. “Mana” is best translated here as moral authority or standing.

760 The advisory groups is called Te Karewao. Te Awa Tupua Bill, supra note 28, cls. 27–28.

761 TUTOHU WHAKATUPUA, supra note 26, cl. 2.23. This strategy is called Te Heke Ngahuru, in the Bill. Te Awa Tupua Bill, supra note 28, cls. 35–36.



address and advance the environmental, social, cultural and economic health and wellbeing of the Whanganui River.”⁷⁶² To this end, the agreement defines the goals, status and parameters of a strategy to identify and address such issues of health and wellbeing, including recommending actions to address the identified issues.⁷⁶³ It establishes a strategy group of up to 17 members representing various different organizations with interests in the river,⁷⁶⁴ to “act collaboratively” to develop the strategy⁷⁶⁵ and monitor its implementation.⁷⁶⁶ Local government and other decision-makers will be required to consider and take into account the strategy in relevant decisions. It has been noted that the group and the strategy are intended to provide “strategic direction and the lens through which the River is viewed, not day to day management.”⁷⁶⁷

In order to “support the health and wellbeing” of the river, a fund will be established with a Crown grant of NZD30 million.⁷⁶⁸ At earlier stages of the negotiation, this money was described as a clean-up fund for the river.

2. Te Urewera: Tūhoe Settlement Agreement

Until recently, Te Urewera National Park was the largest national park in the North Island of Aotearoa, New Zealand. It is all virgin, original forest or bush, but was created from most of the traditional lands of the Tūhoe people. This taking was the subject of a grievance against the Crown,⁷⁶⁹ and Tūhoe have argued continuously for the need to exercise their spiritual authority over the land through guardianship for it.⁷⁷⁰ In 2013, Tūhoe and the New Zealand government agreed on a settlement to this grievance whereby legal personality would be attributed to the park, and Tūhoe could exercise their responsibility of guardianship over it. The lands would remain protected, but they would maintain a separate identity and be governed through a co-governance arrangement with Tūhoe. Legislation to implement this agreement was passed in July 2014.

A fundamental aspect underlying this agreement is the importance placed on

762 TE MANA O TE AWA TUPUA, supra note 27, cl.4.1; see also TUTOHU WHAKATUPUA, supra note 26, cl. 2.24. In the 2014 agreement this Strategy is called Te Heke Ngahuru. See TE MANA O TE AWA TUPUA, supra note 27, cls. 4.1–4.23.

763 Id. cl. 4.2.

764 This group is called Te Kopuka. Te Awa Tupua Bill, supra note 28, cls. 29–32.

765 TE MANA O TE AWA TUPUA, supra note 27, cl. 5.3.

766 Id. cl.5.4. See Id. cls. 5.1–5.47, for functions, membership matters, procedures meetings, decision-making, and support. See Id. cl. 5.45, stating that the Crown will support it financially.

767 Press Release, New Zealand Government, Whanganui River Deed of Settlement Initialled (Mar. 26, 2014), <http://www.scoop.co.nz/stories/PA1403/S00514/whanganui-river-deed-of-settlement-initialled.htm>.

768 The fund is called Te Korotete. Te Awa Tupua Bill, supra note 28, cls. 57–58.

769 Tūhoe Claims Settlement Act 2014, cl 9(36)–(37) (N.Z.). The detailed Crown acknowledgements of its actions in § 9 and the apology in § 10 provide excellent background to this settlement.

770 See, e.g., Id. cl. 9(36).

the intrinsic value of nature itself.⁷⁷¹ The Te Urewera Act 2014 explicitly identifies the “intrinsic worth” of Te Urewera,⁷⁷² as well as protection of its interests.⁷⁷³ The key means of upholding the Tūhoe view of Te Urewera as an ancestor is to declare it to be its own legal entity, with “all the rights, powers, duties, and liabilities of a legal person.”⁷⁷⁴ It will accordingly hold title to its own land (i.e., title to itself), where that land is inalienable.

Responsibility for the guardianship of Te Urewera is given to the Te Urewera Board, “to act on behalf of, and in the name of, Te Urewera” and “to provide governance for Te Urewera.”⁷⁷⁵ Half of the Membership of the Board is appointed by Tūhoe and half by the New Zealand government.⁷⁷⁶ The Act contains an extensive list of powers and obligations of the Board, including the ability to make by-laws and to grant activity permits with Te Urewera.⁷⁷⁷ Yet the overriding notion is human responsibility for the protection of Te Urewera.

It is too soon to tell how the guardianship regime will operate in practice, including how the interests of Te Awa Tupua or Te Urewera will be defined, and how well they

will be protected. Yet this combination of formally legislating for a natural feature as a legal person and upholding its interests for its own sake, suggests to all—not just to its Maori descendants—that it is more than just a resource to be exploited, even for relatively benign use, such as low-impact recreation.

The Maori New Zealand examples show that responsibility can be articulated in legislation and that guardians can be established to uphold duties of care for nature. Respect for the rights of indigenous peoples, including redress for wrongs suffered and maintenance of their culture, can result in laws that treat the environment in a way that reflects human responsibilities for and toward the natural world, and will likely ultimately better protect it in the future.

3. Conclusion

If we want to encourage the adoption of international and domestic legal systems that ensure the survival of the living world as we know it, then the frameworks that underpin them will need to change. They will have to move from exclusionary

771 Te Urewera Act 2014, s 4 (finding “[t]he purpose of this Act is to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to—
(a) strengthen and maintain the connection between Tūhoe and Te Urewera; and
(b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and
(c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all.”).

772 Id. ss 3(8), 4.

773 Id. s 18(1)(g).

774 Id. s 11(1).

775 Id. s 17.

776 Id. s 21. After three years the Board will increase to nine members, six of which will be appointed by Tūhoe trustees, so that Tūhoe will have a majority.

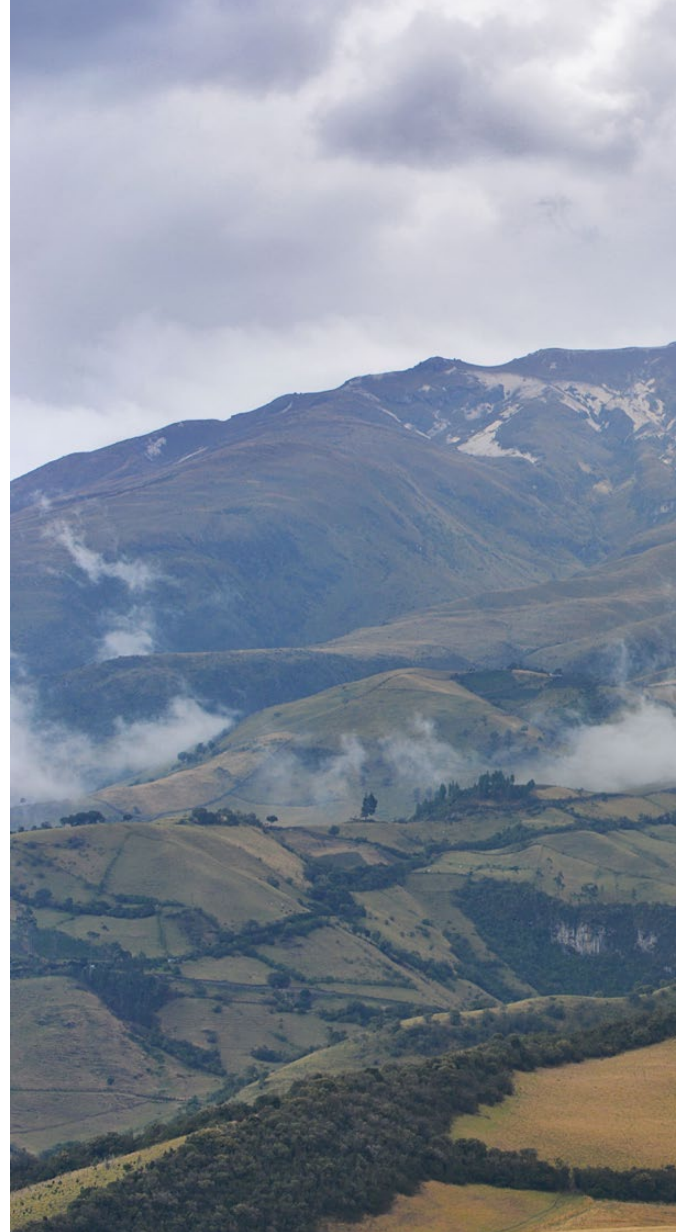
777 Id. s 20.



systems based on human property rights over nature, to a system that is based on responsibilities for nature and includes respect for all life forms and systems. The stance will need to abandon the fiction that we are all separate from and independent of nature, to recognize that we are all part of and completely dependent on the Earth and its systems for our survival.

Despite the anthropocentric nature of human rights, a human rights based approach can help achieve the shift necessary for such system changes. First, respect for the intrinsic value of all life is frequently discussed in the context of – and as a basis for – a rights-based approach.⁷⁷⁸ Secondly, as this chapter has outlined, the recognition of indigenous human rights can be used to recognize and implement human responsibilities for nature and its protection. If we are to truly respect nature and our appropriate place within it, the law needs to recognize – if not be based around – our responsibilities towards it. It is critical to explicitly recognize human responsibility for nature in a way that emphasizes our partnership, guardianship and trusteeship roles, as opposed to the false human construct that we have rights over nature.

These examples in Aotearoa New Zealand have depended upon the existence of the indigenous Maori people and the recognition of their human rights, but I suggest that the examples are generalizable. They



show that we can take ancient concepts of interconnectedness with nature and translate them into a modern, liberal legal system. The enactment of these examples in national and local legislation makes this alternative worldview much more visible as well as obviously implementable. Adopting such provisions and requiring us to act in accordance with them will

778 See, e.g., MYRES S MCDUGALL, ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980) (arguing for respect as a universal human rights principle that would protect the rights of all forms of life, including non-human).



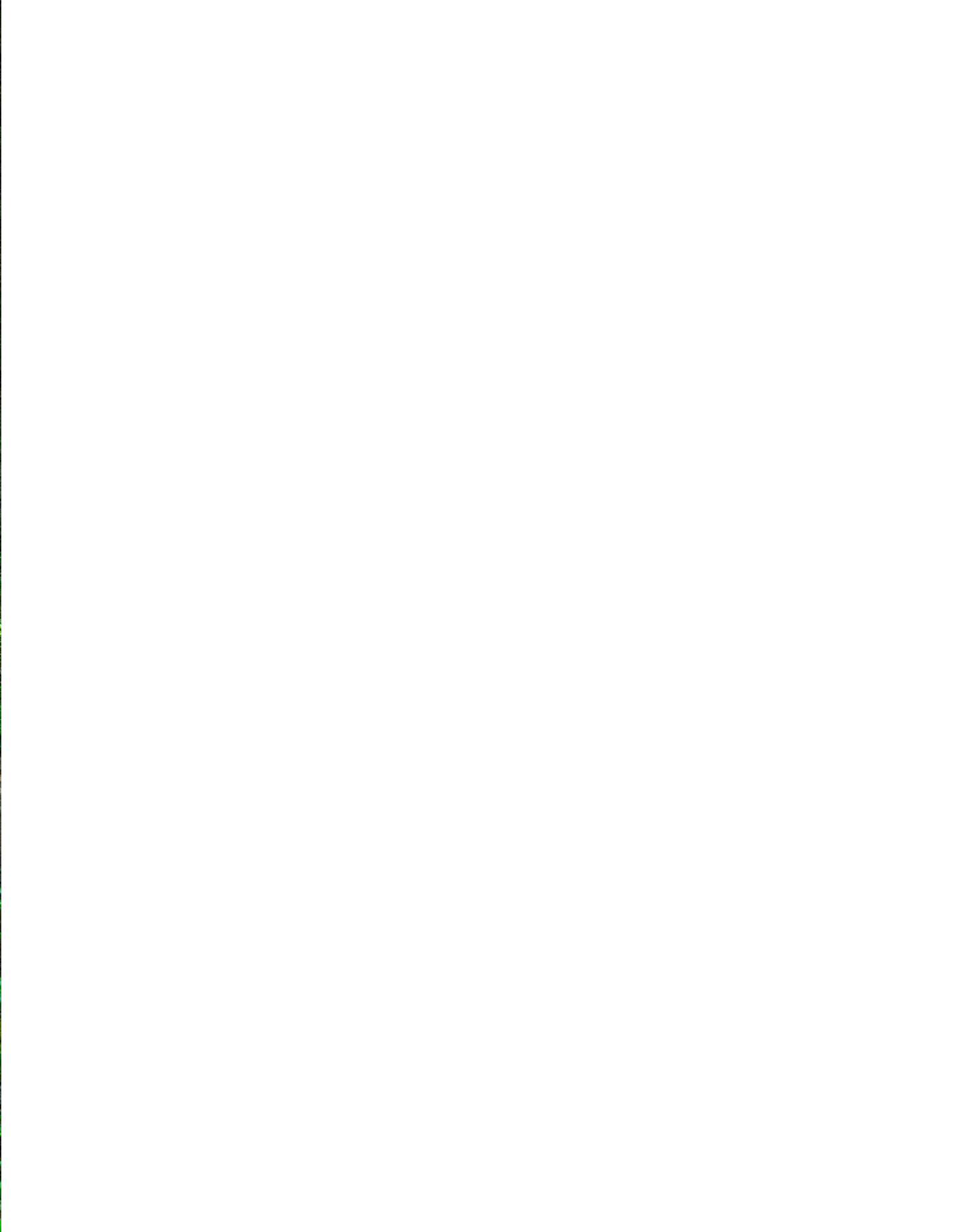
Photo credit: © Andres Medina

start to change our thoughts as well as our actions. I therefore suggest that widespread recognition of indigenous human rights in law will help encourage us all to realize, as our forebears did, that our relationships with the natural world are crucial to identity and survival. All rights come with responsibilities; it is time for our environmental responsibilities to come out from under the shadow of our human rights.





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Regional and Country Studies in Africa

part 3



South Africa's Constitutional Environmental Right and the Pursuit of a Country Where 'Well-being' Thrives

Anél du Plessis

1. Introduction

When we look back in time and imagine the South Africa of 1990, we should recall a country which looked somewhat different from the one we are familiar with today. The South Africa of that time also had an abundance of natural resources and a culturally diverse society, but it did not have a democratic Constitution,⁷⁷⁹ it had no constitutional environmental right,⁷⁸⁰ it had no such thing as a Centre for Environmental Rights,⁷⁸¹ not a single court case addressing the matter of substantive environmental rights, international environmental law had limited real meaning and, in general, lawyers and others still had a particularly narrow view of the meaning of 'the environment'.⁷⁸²

Enter the Constitution of the Republic of South Africa, 1996 and an environmental right that has since had its days in court,⁷⁸³ that is celebrated worldwide as a very fine example of this type of right,⁷⁸⁴ that is supported by strong procedural rights,⁷⁸⁵ and that seems to have influenced the design of constitutional environmental provisions in other African countries such as Kenya and Zimbabwe.⁷⁸⁶ Twenty years down the line,

779 Constitution of the Republic of South Africa, 1996.

780 Section 24 of the Constitution.

781 See on the Centre for Environmental Rights established in 2009, <http://cer.org.za/about/background> (last visited 30 May 2016).

782 The Environmental Conservation Act 73 of 1989, South Africa's main overarching environmental law until 1998, defined the environment as the "aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms."

783 Most notably in the cases of *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC), *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T), *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) and *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP).

784 See for example the description of South Africa's environmental right and its legal framework in the Australian author, Douglas Fischer's work titled: *Legal Reasoning in Environmental Law – A Study of Structure, Form and Language* (Edward Elgar, 2013) 339-343.

785 The Constitution includes the rights to access to information and just administrative action; the relevance of which for environmental protection has been attended to in, inter alia, the recent case of *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA).

786 Stark resemblances exist between the phrasing of section 24 of the Constitution of South Africa and section 73 of the Constitution of Zimbabwe (2013) and section 42 of the Constitution of Kenya (2010).

section 24 of the Constitution has brought about significant positive change – it has resulted in unprecedented environmental law reform spanning from the enactment of framework environmental legislation⁷⁸⁷ and laws on biodiversity, the marine environment, protected areas, air quality, land management and water resources, to the development of very specific norms and standards in relation to hazardous substances, waste management and water services provision.⁷⁸⁸

In 2008, Feris researched environmental law jurisprudence between 1996 and 2008, posing the question whether or not section 24 was an under-utilized resource. She concluded at that point that: 'the content of the right and its value in a developing country, which grapple with highly-contested interests such as economic development versus environmental protection, remain undefined.'⁷⁹⁰ It is in this vein that despite the meaningful inroads referred to above, I argue in this paper that the need remains to establish and embrace the full scope of protection promised in section 24. I specifically argue that the executive branch of government⁷⁹¹ a) has not yet internalized the meaning and implications of the right to an environment not detrimental to

human "well-being" (among other things); and b) battles to implement the measures and actions needed to ensure that people in South Africa live and work in such an environment. In other words, it is argued that the decision-making practices and the acts of government budgeting, planning, procurement, monitoring, auditing etc. may not yet fully be attuned to what the constitutional environmental right demands of public authorities.

The point of departure is that a meaningful nexus exists between the environment, human health and well-being – three notions with independent meanings but all living in section 24(a) of the Constitution. The link that lies therein is that human health and well-being 'are influenced by environmental conditions both positively and negatively, with significant economic and social consequences.'⁷⁹² The flipside of this understanding is that the government's duties arising from the constitutional environmental right are multifaceted.

Following a discussion on the meaning of well-being, this paper explores in preliminary fashion some of the implications of the fact that the concept of well-being was included in section 24(a) of South Africa's Constitution.

787 The National Environmental Management Act 107 of 1998.

788 See on South Africa's environmental law in general, Jan Glazewski *Environmental Law in South Africa* (Butterworths LexisNexis, 2005), Michael Kidd *Environmental Law* (Juta, 2011) and Louis J Kotzé and Alexander Paterson (eds) *Environmental Law and Compliance in South Africa* (Juta, 2009).

789 Loretta Feris "Constitutional Environmental Rights: An Under-Utilised Resource" *SA Journal of Human Rights* 29-49.

790 Loretta Feris "Constitutional Environmental Rights: An Under-Utilised Resource" *SA Journal of Human Rights* 49.

791 Specifically referring to the administration in the national, provincial and local spheres of government.

792 European Environmental Agency 'Report of the EEA Scientific Committee Seminar on Environment, Human Health and Well-Being' 12 February 2014 iv available at www.eea.europa.eu/.../scientific-committee/reports/report-of-the-scientific-committee (last visited 31 May 2016).



2. The meaning of 'well-being' relative to people's environment

The concept of well-being is of the mystical kind – hard to define and highly context specific.⁷⁹³ The way in which people view and experience 'a state of well-being' differs while different scientific or policy angles are used to conceptualize, measure and assess levels of human well-being. The discussion below first revisits some of the existing general definitions and understandings of well-being before turning to a discussion focused on the intersection between human well-being and the environment.

Well-being and ill-being and the (illusory) space between them

Well-being has to date often been defined and described from the perspective of fields such as psychology, philosophy, morality, economics and health. The dictionary meanings of well-being typically refer to a good or satisfactory condition of existence; a state characterized by health, happiness, and prosperity. Words like wretchedness and misery and a condition of being deficient in health, happiness or prosperity typically describe aspects of *ill-being*. Well-being may further belong to a single person or to a 'state' or to people

or a group in the collective sense. Some scholarly definitions and descriptions suggest that well-being:

- Refers to an assessment of a person's quality of life according to his or her own chosen criteria. Quality of life in this context is then described as an 'individual's perception of his or her position in life in the context of the culture and value systems in which he or she lives and in relation to his or her goals, expectations, standards and concerns. It is a broad ranging concept affected in a complex way by the person's physical health, psychological state, personal beliefs, social relationships and his or her relationship to salient features of the environment';⁷⁹⁴
- Must be understood in terms of the highly subjective 'good life';⁷⁹⁵
- Comprises more than just happiness. While well-being is about feeling satisfied and happy it also denotes the development of a person, him or her being fulfilled, and making a contribution to the community;⁷⁹⁶ and
- Comprises as much of psychological, social and physical *resources* as psychological, social and physical *challenges* – well-being depends on an equilibrium between these; it is the set-point for well-being. Stable well-being exists when individuals

793 Rachel Dodge et al "The challenge of defining wellbeing" 2012 International Journal of Wellbeing 2(3) 222 refer to Thomas stating that well-being is 'intangible, difficult to define and even harder to measure'.

794 ibid. 224 with reference to the work of Shin and Johnson and others.

795 ibid. 224.

796 ibid. 225 with reference to the work of Shah and Marks.

have the psychological, social and physical resources they need to meet a particular psychological, social and /or physical challenge. When individuals have more challenges than resources, the see-saw dips, along with well-being and *vice versa*.⁷⁹⁷

Two particularly meaningful discussions in relation to the notion of well-being are found in the work of Amartya Sen and James Griffin. Sen questions 'capability and well-being' from an economics and philosophical perspective. He explores a particular approach to well-being and advantage in terms of a person's *ability* to execute valuable acts or to reach valuable states of being. The relevance of well-being according to Sen, lies in part in the determination of whether a person is deprived in a way that calls for assistance from others or from government.⁷⁹⁸ Well-being and advantage play in on the alternative combination of things that a person is able to do or be – in other words, it determine the various 'functionings' a person can achieve.⁷⁹⁹ Sen refers to a person's 'living' as a combination of various 'doings and beings', with quality of life being assessed in terms of the capability of a person to achieve valuable functionings. Notably, Sen explains that:⁸⁰⁰

Some functionings are very elementary, such as being adequately nourished, being in good health, etc., and these may be strongly valued by all, for obvious reasons. Others may be more complex, but still widely valued, such as achieving self-respect or being socially integrated. Individuals may, however, differ a good deal from each other in the weights they attach to these different functionings – valuable though they may all be – and the assessment of individual and social advantages must be alive to these variations.

Sen further sees well-being as part of the classification of human advantage and makes a distinction between, *inter alia*, the promotion of a person's well-being and well-being freedom.⁸⁰¹ 'The well-being achievement of a person can be seen as an evaluation of the 'wellness' of the person's state of being. The exercise, then, is that of assessing the constituent elements of the person's being seen from the perspective of her own personal welfare. The different functionings of the person will make up these constituent elements.'⁸⁰² These functionings are central to the nature of a person's well-being while the sources of well-being may be 'external to the person' – i.e. they may be impersonal concerns.⁸⁰³ 'Well-being freedom' refers to 'the freedom to enjoy the various possible

797 Rachel Dodge et al "The challenge of defining wellbeing" 2012 International Journal of Wellbeing 2(3) 230.
798 Amartya Sen 'Capability and Well-being' in M Nussbaum and A Sen (eds) The Quality of Life (Clarendon Press, 1993) 36.
799 *ibid.* 30.
800 *ibid.* 31.
801 *ibid.* 35-36.
802 *ibid.* 36.
803 *ibid.* 36-37.



well-beings' as well as to the freedom to choose and to act freely. With reference to well-being freedom, Sen makes it clear that a) standard of living and well-being are two different matters; and that b) there are different role-players involved in a single person's state of well-being:

Being free to live the way one would like may be enormously helped by the choice of others, and it would be a mistake to think of achievements only in terms of active choice by oneself. *A person's ability to achieve various valuable functionings may be greatly enhanced by public action and policy, and these expansions of capability are not unimportant for freedom for that reason.* Indeed ... 'freedom from hunger' or 'being free from malaria' need not be taken to just be rhetoric there is a very real sense in which the freedom to live the way one would like is enhanced by public policy that transforms epidemiological and social environments. But the fact that freedom has that aspect does not negate the relevance of active choice by the person herself as an important component of living freely.⁸⁰⁴

In the most elementary sense, Sen argues that well-being is a matter of choice, of freedom but that the boundaries of choice are inter alia determined by the functionings on offer – functionings that are often created or enabled by authorities and the way in which they govern.

Government does have a hand in a person's ability to execute valuable acts or to reach valuable states of being. The will to execute these acts and to reach these states of being may however depend on the person him or herself.

Griffin casts some additional light on the meaning, measurement and moral importance of well-being. Focusing on human needs as part of a moral theory on well-being, Griffin argues that there are two sorts of needs that a person has because of its aims or ends - some needs are instrumental while others are basic needs.⁸⁰⁵ Instrumental needs are needs we have because of the ends we happen to choose. Basic needs are needs we have just by being human, the needs we have for survival, such as food, rest and health. For Griffin, well-being is the level to which basic needs are met⁸⁰⁶ - basic needs being needs that we do not choose but which are characteristic of human existence. While this may sound straightforward enough, it really is not given that '(a) person's natural expectations (needs) are formed by much more than the real possibilities that face him; they are formed by how good his education happens to be or by how much hope traditions or forms of government have left him',⁸⁰⁷ for example. While the lines often become blurred, a distinction must be made between desires and needs:

804 Amartya Sen 'Capability and Well-being' in M Nussbaum and A Sen (eds) *The Quality of Life* (Clarendon Press, 1993) 44.

805 James Griffin *Well-Being* (Clarendon Press, 1986) 41-42.

806 *ibid.* 42.

807 *ibid.* 44.

Needs generally trump desires. What is at stake with basic needs generally matters much more to our lives than what is at stake with mere desires, *and governments should concern themselves with basic needs and not at all, or at least not much, with mere desires.* But it is a great mistake to move from that truth to the conclusion that needs as such count morally and desires as such do not, or anyway countless. Not all basic needs are morally important, some mere desires are. What we need are deeper categories. We have to get behind talk about needs and desires to their deeper significance in our lives.⁸⁰⁸

Well-being understood this way ties in with personhood - the quality or condition of being an individual person - and it therefore makes sense that it could end up in a constitutionally entrenched right in a Bill of Rights. What is important from the reasoning of Griffin is that 'we all have a right to minimum material provision – the right to what is necessary to carry out any life plan' but what it comes down to is a secure 'use of goods, not a claim that approaches ownership of them'.⁸⁰⁹ This of course, raises difficult questions of distribution. But it also raises the question as to whether or not the right to an environment that is conducive to *well-being* means anything more than

a) the right to life and b) the right to an environment in which one's health is safe. And if it means more than having access to the critical functionings and the fulfilment of basic human needs, what does it mean exactly?

What we get from Griffin's work is that 'perhaps needs are indeed the best index ... of how well a person's life goes, but perhaps they take in too little of a person's life to be called, with its all-encompassing air, 'well-being'. But well-being does not always suggest how life goes as a whole.'⁸¹⁰ Still, it is not wrong or misleading to confine the interpretation of well-being to some conception of 'absence' – be it a state of misery (in the absence of what someone views as a state of well-being) or the lack of basic needs.

Well-being and people's environment

A plethora of materials exists on the meaning of well-being in relation to human development. These studies are often less focused on the individual and her well-being than on the collective, the state or the nation. In the fields of economics and human ecology studies have been conducted for example on: how to measure well-being;⁸¹¹ the validation and improvement of population well-being;⁸¹² factors for the prediction of

808 *ibid.* 47.

809 *ibid.* 292.

810 *ibid.*

811 Pedro Conceição and Romina Bandura 'Measuring Subjective Wellbeing: A Summary Review of the Literature' (UNDP, 2008) 1-24 available at http://www.undp.org/content/dam/undp/library/corporate/Development%20Studies/subjective_wellbeing_conceicao_bandura.pdf

812 Lindsay E Sears et al 'The Well-Being 5: Development and Validation of a Diagnostic Instrument to Improve Population Well-Being' Population Health Management 2014 1-9.



subjective well-being of nations;⁸¹³ trade-offs to be made between biodiversity conservation and human well-being;⁸¹⁴ the linkages between ecosystem services and well-being;⁸¹⁵ the relationship between well-being and environmental impacts;⁸¹⁶ urban environmental quality and well-being;⁸¹⁷ and the relationship between well-being, affluence and technology.⁸¹⁸

That a nexus exists between human health, the environment and well-being, is uncontested. In the main, human health and well-being are understood to be 'intimately linked to environmental quality'.⁸¹⁹ In other words, human health and well-being depend on the quality of the environment. This understanding is reinforced by the view that four environmental principles are central to maintaining, improving and managing risks to human health and well-being namely the principles of precaution, prevention, polluter-pays and rectification of damage at source.⁸²⁰ Still, it has been held that one must look not just at 'disease outcomes' in the nexus between health, the environment and well-being but also

at maintaining additional 'functions' – children's blood lead concentrations at levels below current exposure limits have for example been associated with lower school performance and behavioral issues.⁸²¹

Particularly meaningful work has been done on human well-being and the natural environment by Dasgupta.⁸²² He views the natural environment as a source of human well-being – albeit not the only one – a source which depends on the carrying capacity of the earth.⁸²³ He also regards the link between the natural environment and human well-being to be understood on the basis of a pluralist conception of *personal well-being* (much in the same vein as Sen and Griffen) which then becomes part of the broader conceptualization of *social well-being*.⁸²⁴

Natural resources are of direct use in consumption (fisheries), or indirect use as inputs in production (oil and natural gas; the wide array of ecosystem services), and of use in both (air and water). The

813 Ed Diener et al 'Factors Predicting the Subjective Well-being of Nations' *Journal of Personality and Social Psychology* 1995 Vol 69(5) 851-864.

814 Thomas O Mshane et al 'Hard choices: Making trade-offs between biodiversity conservation and human well-being' *Biological Conservation* 144 (2011) 966-972.

815 Elena Blanco and Jona Razzaque 'Ecosystem Services and Human Well-Being in a Globalized World: Assessing the Role of Law' *Human Rights Quarterly* 31 (2009) 692-720.

816 Thomas Dietz et al 'Environmentally Efficient Well-Being: Rethinking Sustainability as the Relationship between Human Well-Being and Environmental Impacts' *Human Ecology Review* Vol 16(1) 2009 114-123.

817 Irene van Kamp et al 'Urban Environmental Quality and Human Well-being Towards a Conceptual Framework and Demarcation of Concepts: A Literature Study' *Landscape and Urban Planning* 65 (2003) 5-18.

818 Indur M Goklany 'Affluence, Technology, and Well-Being' *Case Western Reserve Law Review* Vol 53 369-390.

819 European Environmental Agency 'Report of the EEA Scientific Committee Seminar on Environment, Human Health and Well-Being' 12 February 2014 1 available at www.eea.europa.eu/.../scientific-committee/reports/report-of-the-scientific-committee (last visited 31 May 2016).

820 *ibid.*

821 *ibid.*

822 Partha Dasgupta *Human Well-being and the Natural Environment* (2001, Oxford University Press).

823 *ibid.* xx.

824 *ibid.* xxi.

value of a resource may be utilitarian (as a source of food, or as a keystone species) – economists call this its use-value; it may be aesthetic (places of scenic beauty), or it may be intrinsic (primates). In fact, it may be all these things (biodiversity). Their worth to us could be from extraction (timber) or from their presence as a stock (forest cover), or from both (forests). Interpreting natural resources in a broad way, as we are doing here, enables us to consider a number of substantive issues. Included on our list of resources are assets that provide the many and varied ecosystem services upon which life is based. We should also add minerals and fossil fuels. Note too that environmental pollution is the reverse side of natural resources. In some cases the emission of pollutants amounts directly to a degradation of ecosystems (the effects of acid rains on forests). In others, it means a reduction in environmental quality (deterioration of water quality), which also amounts to degradation of ecosystems (watersheds).⁸²⁵

It follows that the natural environment and the protection thereof is not a luxury or a mere desire (in the words of Griffin) – a large part of what the natural environment offers us is a necessity, a basic need. The services offered by the natural environment include, for example: 'maintaining a genetic library,

preserving and regenerating soil, fixing nitrogen and carbon, recycling nutrients, controlling floods, filtering pollutants, assimilating waste, pollinating crops, operating the hydrological cycle, and maintaining the gaseous composition of the atmosphere.'⁸²⁶ In this vein it has been held in the European context that multiple systemic links exist between the environment, health and well-being and that, as a consequence, there is a need to shift from the prevailing pollution-focused agenda to policies that address wider socio-economic and well-being issues and that recognize relations with systems of production and consumption, behavior, water and land-use and urban issues, and that draw on emerging concepts such as resilience and ecological public health.⁸²⁷

Be it as it may, well-being may be individualistic and attached to a person or may be a collective descriptor of a country (a state) or a community. A combined reading of the works of Sen, Griffin and Dasgupta suggests that there are functionings that are central to the nature of a person's well-being and that some of the sources of well-being may be external to the person – i.e. they may be situated in the surrounding natural environment. A person should have the freedom to enjoy various possible 'well-beings' as well as the freedom to choose and to act freely. For this, access to inter alia natural resources

825 *ibid.* 124-125.

826 *ibid.* 125-126.

827 European Environmental Agency 'Report of the EEA Scientific Committee Seminar on Environment, Human Health and Well-Being' 12 February 2014 1 available at www.eea.europa.eu/.../scientific-committee/reports/report-of-the-scientific-committee (last visited 31 May 2016).



is needed. The freedom to choose arguably lies in access to the quantity and quality of natural resources necessary for the fulfilment of basic needs (e.g. air to breathe, water to drink and soil to produce food) as well as natural resources needed for the achievement of other, non-basic needs-related functionings (e.g. water for recreational activities, land for purposes of land acquisition and biodiversity for aesthetic purposes). There are also different role-players involved in creating a person's state of well-being (or ill-being) – one of which is the custodian of the natural resource base, the public trustee, the government.⁸²⁸

Well-being protected in a constitutional environmental right

Section 24(a) of the Constitution of the Republic of South Africa determines that: 'everyone has the right to an *environment that is not harmful to his or her health or well-being*'. Authorities that have to date examined section 24(a) and the courts that have dealt with it, mostly emphasized what can potentially be harmful to human health. Very limited attention has been paid to the meaning of *well-being* – a concept which must have been deliberately added to section 24(a) when one considers the formulation of the section. The drafters of the Constitution

could have referred simply to a clean environment or to a healthy environment – as many state constitutions do. Instead the drafts team included two separate descriptors or modifiers – health *as well as* well-being.

Authorities and judges that have at some point attempted to define, describe or explain what well-being in the context of South Africa's constitutional environmental right means, left us with the following understandings:

- Well-being is a broad and contested concept that relates to those instances where a person's environmental interests - which do not necessarily have evident health implications - are affected. Whereas the concept of 'health' covers issues of pollution, 'well-being' guards against the destruction of natural habitats of the kind which does not necessarily have direct health impacts or satisfy the definition of pollution;⁸²⁹
- Well-being has a spiritual or psychological meaning which may include the aesthetic, cultural or religious value that the environment and natural objects such as certain rock formations, water courses or portions of land have for people,⁸³⁰ yet the courts have been reluctant so far

828 See on this idea in general, Anél Du Plessis 'The Tomorrows of the Unborn: Legal Perspectives on the Future's Implications for 'Climate Resilient Development' in South Africa' SA Journal on Human Rights 31 (2) 269-293.

829 Anél Du Plessis 'South Africa's Constitutional Environmental Right (Generously) Interpreted: What Is in It for Poverty?' South African Journal of Human Rights 2011 (27) 296.

830 Lynda Collins 'Are We There Yet? Revisiting the Right to Environment in International and European Law' 2007(3) McGill International Journal of Sustainable Development Law and Policy 150.

to provide such a wide interpretation of well-being;⁸³¹

- While harm to well-being need not amount to mental or physical ill-health, something more is required than a sense of emotional insecurity or aesthetic discomfort before section 24(a) becomes applicable;⁸³²
- A person's knowledge or reasonable anticipation of a threat to the environment anywhere may impact on his or her well-being.⁸³³ It is possible to derive from this that well-being may in fact be the subjective or psychological counterpoint to objectively determinable physical health;
- Well-being links with physical discomfort and is a subjective matter while impact on well-being involves a considerable measure of subjective import. The courts found for example that to be in an environment contaminated by H₂S (hydrogen sulphate) is adverse to one's well-being.⁸³⁴ This raises questions about the quantum of ill-being versus the quality of well-being and the scope of violations and about what it takes to prove a violation;

- Well-being covers the built environment or the sense of place (environment) when the identity or economic value of a particular setting or settlement has everything to do with the surrounding natural environment;⁸³⁵ and
- The protection of environmental integrity⁸³⁶ (maintaining the natural habitat, composition and abundance of native species and biological communities and its supporting processes in ecosystems etc.) forms part of human well-being.

I have argued before that the well-being envisioned in section 24(a) talks to people's welfare which has to do with being happy and prosperous and to the ability of a community to be content and at ease⁸³⁷ – in other words, it covers those individual and collective environmental interests that may not have anything to do with physical health per se. Following this line of thinking, the concept of well-being typically comprises of developments such as improved urban livability and mobility and the protection of indigenous knowledge on the use of fauna and flora, for example. The prosperity-dimension

831 See the discussion of Loretta Feris 'Environmental Rights and Locus Standi' in Louis J Kotzé and Alexander Paterson (eds) *Environmental Law and Compliance in South Africa* (Juta, 2009) 135-136.

832 Loretta Feris 'Environmental Rights and Locus Standi' in Louis J Kotzé and Alexander Paterson (eds) *Environmental Law and Compliance in South Africa* (Juta, 2009) 135 note 48 referring to the work of Sandra Liebenberg.

833 Michael Kidd *Environmental Law* (Juta, 2011) 23.

834 *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004(2) SA 393 (E).

835 John McConnachie 'Environmental Conservation in South Africa – Its Application to the Built Environment' (1998) 5 *South African Journal of Environmental Law and Policy* 99, 104-9.

836 See the discussion in Anél Du Plessis 'South Africa's Constitutional Environmental Right (Generously) Interpreted: What Is in It for Poverty?' *South African Journal of Human Rights* 2011 (27) 295-297.

837 Anél Du Plessis 'South Africa's Constitutional Environmental Right (Generously) Interpreted: What Is in It for Poverty?' *South African Journal of Human Rights* 2011 (27) 295.



has to do with the ability of a person to live and work in a 'safe' place which protects human comfort and safety needs but that also protects environmental interests close to a community's very being, generally, e.g. its heritage resource interests.

In hindsight I would rather argue that well-being as included in section 24(a) must be seen as the cup holding the interests in the environment that are not directly tied to a) the protection of human health or, b) the conservation of the natural resource base. The protection of environmental interests related to health lies with the clear reference to human health in section 24(a) while section 24(b) elaborates on the right of everyone to have the environment protected and preserved. I would like to argue that there is a space in between and that section 24(a)'s reference to human 'well-being' should be understood in the context of the following:

- 1) Well-being is one of the things that feed into a person's ability to execute valuable acts or to reach valuable states of being;
- 2) While people's health and well-being are connected, they are not identical states of being;
- 3) Well-being and standard of living are different things with standard of living referring specifically to the level of wealth, comfort, material goods and necessities available to a certain socioeconomic class or a certain geographical area based on factors

such as income, gross domestic product, economic and political stability and safety;

- 4) Well-being depends inter alia on protection of what the environment provides;
- 5) Only some aspects of the comprehensive notion of 'well-being' tie in with, or relate directly to people's natural environment;
- 6) Well-being denotes the absence of ill-being in a person with respect to his or her personhood in relation to the state of his or her natural resource base;
- 7) The state of well-being is subjective and is influenced by expectations arising from education, prior exposure and want (desire), for example; and
- 8) There are basic or critical well-being needs and there are needs in relation to well-being that may at most be desirable.

At this point, the so what question arises. What is it to know that well-being has a meaning of its own and has deliberately been included in the constitutional environmental right in South Africa and in so doing, expands the scope and strengthens the level of protection afforded by this specific right? This is not a trivial question given the wording in section 7(2) of the Constitution and the duty of the state to respect, protect, promote and fulfil all of the rights in the Bill of Rights. The fact that the Constitution boasts an environmental right is one thing; but the fact that this right includes the right to an environment that is not detrimental to the

very composite being of a person – his or her well-being- is something else.

Above an attempt was made to articulate aspects of the potential meaning of well-being as it features in section 24 of the Constitution. The next question to be addressed is namely what this suggests for the duty-bearing, South African government. While national environmental legislation in South Africa specifies various kinds of reporting and monitoring, the mandates generally are aimed at measuring *legal compliance* rather than *environmental outcomes*. I am of the view that human well-being is an environmental outcome entrenched in the Constitution, for example. This outcome must be sought in multiple ways including via the principles guiding environmental decision-making and how authorities decide on priorities when it gets to spatial and strategic planning, for example. This discussion on how environmental outcomes must be achieved in and through the work of government is imminent but falls beyond the scope of this paper.

3. Qua vadis

With the above said, it remains necessary to make a distinction between perceived prosperity and true prosperity – harm or degradation is often invisible and very gradual which could result in false confidence about the state of a community or a person's environment and well-being.

To question the meaning and presence of well-being in relation to the environment is inter alia about questioning accountability for the type of living and working environment promised in South Africa's transformative Constitution. I fully agree with Boyd who holds that environmental rights matter only if they make a difference in peoples' lives.⁸³⁸ Given South Africa's history and the transformative present and future vision of the Constitution, I doubt if the inclusion of well-being in section 24 can be reduced to having been included for mere symbolic purposes. The dilemma is that the right to an environment not detrimental to 'well-being' is not going to self-generate its meaning. What is in the space between 'merely symbolic' and 'self-generating' is also questionable.

I argue, and I find support for this reasoning in the available literature on well-being, that given the present environmental and population pressures in the world '*underdevelopment is unsustainable*'. Wealth and technology are at least two of the integral parts of a so-called 'Cycle of Progress' which provides the means for improving well-being both for people and the natural resource base. To help ensure that the Cycle of Progress moves forward, it is important to bolster the institutions and processes that fuel the cycle: secure property rights, honest, predictable, transparent and fiscally responsible government and bureaucracies, adherence to the rule of law, constitutionalism etc.

838 David Boyd *The Environmental Rights Revolution – A Global Study of Constitutions, Human Rights, and the Environment* 290.



It is for this reason that we must question the design, measures and behavior of those institutions and processes in government that are the custodians of people's well-being. And not only should we question this as academics, scholars, officers of the court or curious practitioners. We should critically assess the institutions, we should fiercely challenge processes and we should courageously correct the wrong.

More interdisciplinary work is needed in this area but the preliminary observation is that the well-being of South Africans as entrenched in section 24(a) of the Constitution must be:

- seen as having much more than cosmetic meaning and to extend the scope of the environmental right and the concomitant duties of especially the executive branch of government, beyond the matters of human health and the conservation of natural resources; and that it must be
- informed by what people in South Africa themselves, through participatory democracy and other processes, indicate to be necessary specifically to: secure resource access;

ensure security from disasters; provide adequate livelihoods; provide sufficient nutritious food and shelter; enable physical and mental strength in relation to the environment; provide sufficient access to good quality water and air; and to give people freedom of choice and action of the kind supported by the right to human dignity and the constitutional values – i.e. to provide society with the type of environment needed to be able to achieve what 'the individual in South Africa values *doing, and being*'.

Given its history and its future, the well-being of South Africans are very relevant for the transformative vision the Constitution sets out to achieve. The mandate to care for the well-being of the people is scattered across various legal provisions. I wish to express the hope that this mandate will increasingly become an intrinsic part of the mindset, planning and action of the three sphered government, the executive, legislature and the judiciary and, most of all, part of the way in which civil society actively guards over the environmental and other interests of those still to be born.

Access to justice in light of the Atabong case: a means to ensure the realization of article 24 of the Banjul Charter?

WD Lubbe

1. Introduction

Article 24 of the African Charter on Human and Peoples' Rights, 1981 (the Banjul Charter) contains the right to a general satisfactory environment favorable to peoples' development. On the African Continent, the environment plays a central role in sustaining the livelihoods of people and is therefore crucially important to the health and well-being of present and future generations. The conservation and sustainable use of natural resources is therefore important to ensure socio-ecological security on the African Continent. With natural resources being depleted at a rate converse to the best interest of present and future generations, the question posed by this paper is how individuals can secure the right encapsulated in article 24 of the Banjul Charter through judicial means. This question is posed against the background of many African countries not having well-functioning judicial systems and the fact that human rights abuses are rife on the continent. It is here that article 24 read with other fundamental rights relating to access to justice could potentially be employed to secure socio-ecological security on the African Continent.⁸³⁹ Although this paper will primarily focus on access to justice, a brief discussion of the right contained in article 24 of the Banjul Charter is required to provide a specific backdrop against which a "general satisfactory environment" should be viewed.

2. Article 24 of the Banjul Charter

The wording of article 24 clearly dictates the anthropocentric nature of this right with the wording "favorable to their development." This comes as no surprise, as Africa is a developing region and socio-economic development has always been seen as a primary concern. The term "satisfactory environment" used in article 24 can be argued to be

839 Mosaffa Nasrin and Zargari Hadi, 'International Instrument of Human Rights: Compliance and Non Fulfilment in Africa' [2014] World Politics 101.



a weak standard desired by the Banjul Charter for such an important resource. It is also vague, as “satisfactory” can mean different things to different people, thus contributing to the weakness of the provision.⁸⁴⁰ With article 24 juxtaposing the environment and development, the notion of sustainable development becomes part and parcel of the content and interpretation thereof.⁸⁴¹ The notion of sustainability is important in Africa since most of its citizenry depend on natural resources for their daily livelihoods. For example, 80 per cent of Africa's rural population depend on biodiversity for traditional medicine.⁸⁴² The importance of the natural environment is captured in the second *Africa Environmental Outlook* report:

The productivity and sustainability of Africa's environment is heavily dependent on how this asset is managed. This, in turn, can affect the availability, stocks and functioning of the remaining assets, either enhancing opportunities or putting livelihoods at risk.⁸⁴³

Unfortunately the hard truth is that since the *Brundtland* Report⁸⁴⁴ provided traction to the notion of sustainable development

in law and policy, we have made little progress in relation to environmental sustainability and therefore livelihoods are more at risk.⁸⁴⁵ In fact, based on earth systems science, mankind is currently crossing planetary boundaries with the effect of irreversible damage to earth systems.⁸⁴⁶ The maths for the current dilemma can be simply explained by arguing that the environmental sphere in the three-sphere sustainable development model is not given enough weight. Socio-economic development inevitably trumps environmental conservation (especially in Africa). Accordingly, it can be argued that this three-sphered approach is inherently flawed, looking at the results achieved so far. Winter denotes the dilemma in stating that:

if we stick to pre-environmental or old environmental paradigms and theory frameworks, we are in fact acting against theory for sustainable development. The previous paradigms are not capable of easily (if at all) adapting intergenerational equity in legal thinking and combining it with ecological understanding, where *inter alia* non-linearity is an ever present issue and the widespread tradition in legal science of dealing with law as is,

840 For a discussion on art 24 see Morne Van der Linde and Lirette Louw, 'Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and People's Rights in Light of the SERAC Communication' *African Human Rights Law Journal* [2003] 167.

841 See for example the discussion of the African Commission on Human and Peoples' Rights in the Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, 2001 communication on the interpretation of art 24.

842 UNEP 2013 Africa Environment Outlook 3: Summary for Policy Makers 10.

843 UNEP 2006 Africa Environment Outlook 2: our Environment, our Wealth 2.

844 WCED 1987 Our Common Future 1.

845 See in general Christina Voigt, 'The principle of sustainable development: integration and ecological integrity' in Christina Voigt (ed), *Rule of Law for Nature* (Cambridge University Press 2013).

846 Johan Rockström et al, 'A safe operating space for humanity' [2009] *Nature* 472.

efficiently slows down not to say obstructs completely significant developments towards adequate legal theory for sustainable development.⁸⁴⁷

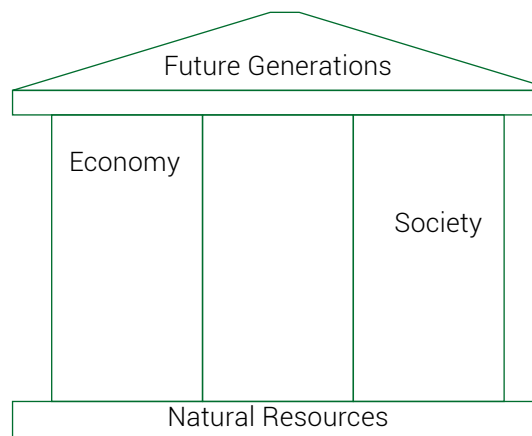
We (human beings) are dependent on nature. Social and economic development are dependent on the environment. Therefore the environment should be the first or base concern when conceptualizing sustainable development. It should be a concern on its own and it should be considered as the paramount concern. To encapsulate the foregoing argument, Winter reconceptualizes the sustainable development model in what he calls a “fundament and two pillars” approach. This is portrayed in figure 1 below:

As can be seen from this figure, natural resources are the basis of sustainable

development and therefore the most important factor to be weighed when decisions are to be taken. This makes sense as we, as human beings, cannot have any development without the environment.

Although Africa is endowed with rich and vast natural resources, political instability; warfare, deforestation, and many other challenges cause concern as to the sustainability of the natural resources.⁸⁴⁹ In the light of the Banjul Charter, the question now turns to whether African citizens will have access to justice (in this context specifically access to the African Court on Human and Peoples' Rights (ACHPR)) to utilize article 24, where the environment and thus the basis of their livelihoods is being jeopardized by their governments. This question is

Figure 1: A fundament and two pillars⁸⁴⁸



847 Gerd Winter, 'Eco-logical proportionality - an emerging principle of law for nature?' in Christina Voigt (ed), Rule of Law for Nature (Cambridge University Press 2013).

848 Gerd Winter, 'A Fundament and Two Pillars The Concept of Sustainable Development 20 Years after the Brundtland Report' in Hans C Bugge and Christina Voigt (eds), Sustainable Development in International Law (Europa Law Publishing 2008).

849 Kalembe Mwambazambi, 'A Glance on Environmental Protection in Africa: Theological Perspective' [2009] Ethiopian Journal of Environmental Studies and Management 19.



specifically focused on access to justice in the ACHPR, where state parties are members of the Banjul Charter but have not accepted the jurisdiction of the ACHPR in terms of article 34(6) of the Protocol on the Establishment of the ACHPR. The following figures elucidate the challenge and reasoning behind the question posed in the paper. The Banjul Charter has been signed and ratified by 53 member states of the African Union.⁸⁵⁰ In stark contrast, only 24 member states have signed and ratified the Protocol establishing ACHPR – the primary instrument entrusted with the protection and enforcement of the rights contained in the ACHPR.⁸⁵¹ Viewed in the context of these figures, it seems that virtually all African states have committed themselves to human rights in terms of the Banjul Charter but fewer than half of the states are willing to be held accountable under the jurisdiction of the ACHPR. These latter states render their signature and ratification of the Banjul Charter useless if they do not, at national level, implement and effect the rights of the Charter. Access to the ACHPR is regulated in terms of article 5 of the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 1998 (the Protocol). Article 5(3) determines that the ACHPR may entitle individuals to institute cases directly before it in accordance with

article 34(6) of the Protocol. Article 34(6) in turn determines that:

[a]t the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.

In effect, article 34(6) allows the states to decide whether or not their citizens will have access to the ACHPR. On a continent riddled with a history of human rights abuses, it is troubling that states can decide whether or not individuals can approach the continental judicial body that is the primary custodian of the rights encapsulated in the Banjul Charter. The validity of article 34(6) was challenged before the ACHPR in *Atabong Denis Atemnkeng v African Union* (Atabong case).⁸⁵² Although the case did not address article 24 of the Banjul Charter, it serves as the perfect illustration of the challenges posed to access to the ACHPR in Africa and is therefore relevant to the context of this paper.

850 <<http://www.achpr.org/instruments/achpr/#a3>> accessed 30 August 2016. Only one of the 54 member states has not signed and ratified the Banjul Charter.

851 <<http://www.achpr.org/instruments/court-establishment>> accessed 30 August 2016. 25 of the member states have signed but not ratified and 5 member states have not signed or ratified.

852 *Atabong Denis Atemnkeng v African Union* (014/2011). A similar question was adjudicated in *Femi Falana v African Union* (001/2011), but due to length restrictions the focus here will be on the Atabong case only.

3. Facts of Atabong

Mr. Atabong brought an application before the ACHPR arguing the following:⁸⁵³

1. That article 34(6) is inconsistent with the *Constitutive Act of the African Union, 2000* (Constitutive Act);
2. That article 34(6) gives violators the power to prevent individuals access to the ACHPR;
3. The African Union must ensure that its rules are consistent with the Constitutive Act and the Banjul Charter; and that
4. Every African has an obligation to defend the Constitutive Act and without the ability to defend both the rights and principles enshrined in the Constitutive and Banjul charter, the rights and principles become meaningless.

In this context, Mr. Atabong sought that article 34(6) be declared null and void as it is contrary to the spirit and letter of the Constitutive Act and Banjul Charter.⁸⁵⁴ Counsel for Mr. Atabong also argued that article 34(6) was null and void in the light of *jus cogens*. The latter argument, although quite controversial, seems to have some traction among academics and regional human rights courts.⁸⁵⁵ The Respondent

in this case (the African Union) relied on the following submissions in response to those presented by Mr. Atabong:⁸⁵⁶

1. It argued that Mr. Atabong had no capacity to seize the court as Mr. Atabong is a national of a state which has not yet made a declaration in terms of article 34(6) and Mr. Atabong can therefore not approach the court;
2. It was submitted that member states have the right to negotiate, adopt, sign and ratify any treaty as they see fit and further that the Protocol and all of its provisions including article 34(6) conformed to rules prescribing the nature and content of treaties;
3. Furthermore, the Respondent argued that it is not a party to any of the documents in question and can therefore not be brought before the court in terms of article 34 of the *Vienna Convention on the law of Treaties*⁸⁵⁷

In the above context the Respondent sought that the application be rejected and that Mr. Atabong bear the costs.

853 Paras 17-24 Atabong Denis Atemnkeng v African Union (014/2011).

854 Para 25 Atabong Denis Atemnkeng v African Union (014/2011).

855 For example see Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' [2008] *European Journal of International Law* 491. Also see Antônio AC Trindade, *The access of individuals to international justice* (Oxford University Press, 2011) and Francioni Francesco, (Ed), *Access to justice as a human right* (Oxford University Press 2007).

856 Paras 26-29 Atabong Denis Atemnkeng v African Union (014/2011).

857 Vienna Convention on the Law of Treaties 8 I.L.M. 679.



4. Judgement

Majority

The ACHPR concluded that the African Union is not a party to the Banjul Charter nor to the Protocol, and since Cameroon (where Mr. Atabong has citizenship) did not make a declaration as required by article 34(6), it has no jurisdiction over the matter. Accordingly, the ACHPR did not go further to consider the merits of the case and dismissed the application.

Dissenting

The dissenting opinion emphasized the applicant's argument that article 34(6) violates article 2, 3 and 7 of the Banjul Charter.⁸⁵⁸ The court stated that the African Union should be held liable where states abandon the rights and principles set out in the Constitutive Act and the Banjul Charter.⁸⁵⁹ Furthermore the judges controversially stated that access to justice is a peremptory norm – *jus cogens*.⁸⁶⁰

5. Brief critical analysis

The majority judgement cannot be found wanting in terms of *lex lata*. From a purely positivistic point of view, the majority judgement is correct. One can ask, however, whether the majority judgement is just and fair. By applying the procedural rules rigidly, the court ignores principles such as equality, fairness, and justice.⁸⁶¹ The view of the court is very positivistic in nature and this may be detrimental to legal development and more specifically human rights protection. If we look back in history, many if not most human rights violations were justified in legal systems that were not influenced by natural law principles such as equality, fairness and justice.⁸⁶²

The question that needs to be raised is: can states decide whether or not they can be held accountable for respecting human rights? The answer is quite simple – yes, they can decide. This is the basis of sovereignty and statehood. Is this position desirable, especially where states have ratified the Banjul Charter? In other words, where they have committed themselves to the protection of human rights? On a

858 Arts 2, 3 and 7 contain the following provisions: 'art 2 Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. Art 3 (1) Every individual shall be equal before the law (2) Every individual shall be entitled to equal protection of the law. Art 7(1) Every individual shall have the right to have his cause heard. This comprises: (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) The right to be presumed innocent until proved guilty by a competent court or tribunal; (c) The right to defence, including the right to be defended by counsel of his choice; (d) The right to be tried within a reasonable time by an impartial court or tribunal.'

859 Dissenting opinion Atabong Denis Atemnkeng v African Union (014/2011).

860 Dissenting opinion Atabong Denis Atemnkeng v African Union (014/2011).

861 These principles are broadly encapsulated in the Banjul Charter, especially in arts 2,3 and 7.

862 The legal systems supporting Nazi-Germany and Apartheid South Africa are but two examples.

Continent with a history of human rights abuses these are important questions. One could argue that the ACHPR fails its duty as human rights custodian when an opportunity to answer these question arises and it chooses a positivistic and stringent interpretation of procedure to dismiss the merits of such a case.

As stated earlier, the dissenting opinion supported the arguments raised by Mr. Atabong. A challenge in their dissenting opinion is however the fact that they did not substantiate their view that access to justice is a peremptory norm – *jus cogens*. One would have expected some form of argument and reference to other case law to give weight to this statement as there are various sources to support this statement. The importance of this is not for the case at hand but for future applicants who wish to raise similar arguments. By putting forth a good argument as to why access to justice is indeed a peremptory norm – *jus cogens*, the minority judgement could have influenced future jurisprudence in the ACHPR and potentially influenced the legality of article 34(6). This notwithstanding, one could argue that even in its current unsubstantiated format, the minority judgment can be seen as a positive step in human rights protection in Africa.

6. Conclusion

The legal status of access to justice in international law remains uncertain. As argued above, the dissenting opinion could have provided some form of future reference for applicants that will face the same challenge and in so doing, positively contribute towards jurisprudence in Africa. Given that the African Union is mandated with human rights protection, it needs to reconsider access to justice for individuals in the ACHPR. The current position undermines human rights protection and the very nature of the Banjul Charter. Perhaps the answer lies in the development of the positive law in accordance with natural law principles, as argued. Such an approach may avoid the various pitfalls presented by peremptory norms. However, it does require a willing and progressive judiciary. As the situation currently stands, less than half of the citizenry on the African Continent are allowed direct access to the ACHPR. The effect is that they will not be able to protect their livelihoods (in terms of article 24) where they are being infringed upon. Given that the environment is argued to be the primary concern in establishing both economic and social development and well-being, this is a challenge needing urgent attention on the African Continent.

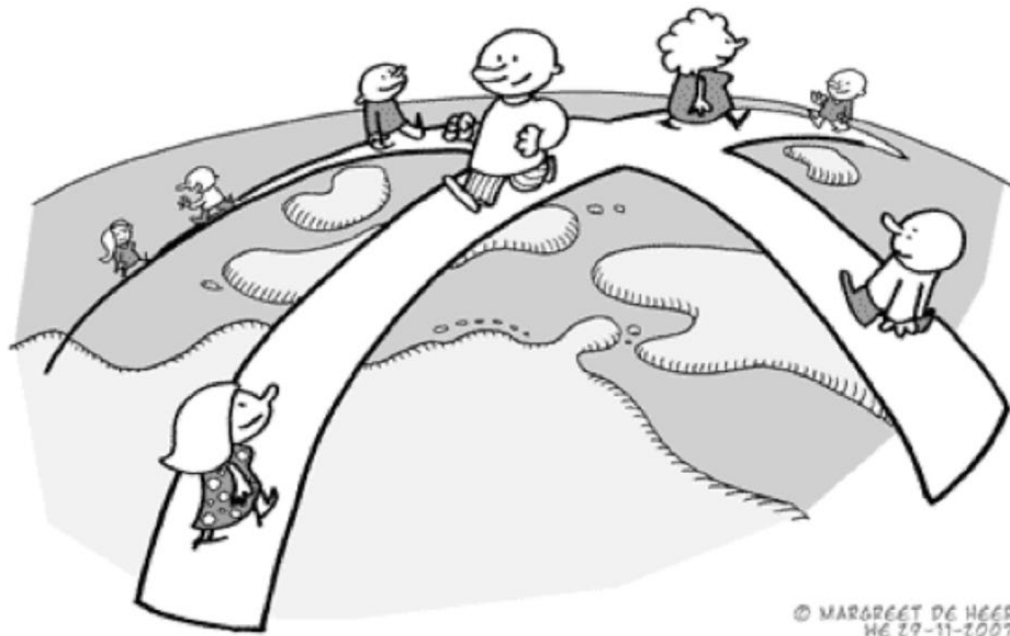


The emerging transnationality of environmental rights

Caiphas Brewsters Soyapi

1. Background

TRANSNATIONALITY



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The theory of transnationality in law evolved from Phillip Jessup's Storrs lectures in which he argued that transnational law is 'all law which regulates actions or events that transcend national frontiers', including both public and private international law and other rules which do not wholly fit into such standard categories.⁸⁶³ Transnational law (TL) as perceived by Jessup is thus sufficiently flexible to be an umbrella term for rules and

norms that cannot be categorized under national, inter-national or international law. With the impacts of globalization, the theory of the transnationality of law has been expanding, as it has been applied to broader legal fields like trade, commerce and environmental law. In the latter context, a term of art has developed: transnational environmental law (TEL). At the core of what TEL is, and in line with Jessup's orations, we see that it is cross-cutting; permeating the national, the inter-national, the regional and the supranational divide. If one functional characteristic of TEL is to be identified, it would be its ability to be identified beyond the confines of national environmental law and international environmental law. Furthermore, it is the primary site for the confluence between international and domestic, and inter-national and cross-regional environmental legal processes that are not only confined to the state, but that extend well into the non-state domain. A primary example of how transnational processes have been (marginally) changing the regulatory space is the development of constitutional environmental rights. Although these rights have been developing globally, this paper will primarily use examples from Africa to demonstrate how transnational juridical processes have cumulatively contributed to the recognition of constitutional environmental rights.

2. TEL as a framework of inquiry/analytical perspective

Transnationality could represent the emergence of a body of law in a normative sense or transnationality could purely serve as an analytical perspective/methodology on law. Those who support the first approach see TL as occupying a space that is diverse and discernible as a result of the dislodgment of the exclusive focus of the law on nation states.⁸⁶⁴ Following this approach in the environmental context, TEL as a distinct body of law could be seen in the regulatory space operated by supranational/regional bodies like the European Union, the African Union and Southern African Development Community. Within such groupings, TEL might take three forms. It could mean the normative practices in that region in pursuance of their general principles of international environmental law; it could denote 'some common or core minimum standards of environmental norms' which are observed by some states in that region; or it could be a corpus of environmental rules operating within that region only.⁸⁶⁵

The first approach is, however, still debatable. In recent times, transnationality has been discussed more as an analytical perspective on law. Zumbansen has

864 Cotterrell R "A Legal Concept of Community" 1997 *Can. J.L. & Soc* 12:2, 75-91, 76. See also Halpin A and Roeben V "Introduction" in Halpin A and Roeben V (eds) *Theorising the Global Legal Order* (Hart Publishing Portland 2009) 3 and Aleinikoff TA "Transnational Spaces: Norms and Legitimacy" 2008 *Yale Journal of International Law* 33, 479-490, who all speak of a space above the nation state.

865 Crawford J "The Role of Transnational Environmental Law in Protecting the Environment of Asia and the Pacific" 1992 *Asia Pacific Law Review* 1, 32-50, 33.



argued that we should refrain from quickly depicting the 'transnational' as a distinct regulatory space different from the national and international because of its 'de-territorial scope and its hybrid, public-private constitution'.⁸⁶⁶ He proposes that TL is a certain 'perspective on law' in a society that cannot by and of itself be conceived solely in terms of national or de-nationalized boundaries.⁸⁶⁷ In the environmental domain, Heyvaert and Eddy⁸⁶⁸ observe that TEL:

... does not conjure into existence a new, previously unknown layer of jurisdiction that is untrammelled by either the geographical limitations of national/regional law or the legitimacy and authority deficits of international/global law.

The authors add that TEL is more than a domain and 'embodies an approach to legal studies and practice'.⁸⁶⁹ For Carlarne and Farber:⁸⁷⁰

...the concept of transnational environmental law may be a tool to organize our debates about domestic environmental law, comparative environmental law,

and international environmental law. That is, framing analysis in terms of transnational environmental law may improve our understanding of how these systems come into being, exist, interact and evolve.

The authors conceive of TEL as a framework of analysis, much in the same way that Zumbansen considers TL to be a methodology on law. In other words, we could use transnationality to identify national environmental laws that are applicable within states but which have become transnational in that there are commonalities in the manner in which the rules are provided for, applied or interpreted.

Glaringly, there is no global environmental rights treaty, yet there has been an explosion of environmental rights globally. How do we explain this? David Boyd considers this explosion in terms of a revolution in the environmental rights domain⁸⁷¹ while Professors James May and Erin Daly explain this in a very recent book in terms of global environmental constitutionalism.⁸⁷² Following the second approach above, the explosion could also be explained in the provision and

866 Zumbansen P "Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism" 2011 Osgoode CLPE Research Paper No. 21, 23-24.

867 Zumbansen P "Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism" 2011 Osgoode CLPE Research Paper No. 2123-24. See also Backer LC 2012 Transnational Law as Field or Method <http://lbackerblog.blogspot.com/2012/01/transnational-law-as-field-or-method.html>.

868 Heyvaert V and Eddy T "Introducing Transnational Environmental Law" 2012 Transnational Environmental Law 1:1, 1-11, 2.

869 *ibid.*

870 Carlarne C and Farber D 'Law Beyond Borders: Transnational Responses to Global Environmental Issues' 2012 Transnational Environmental Law 1:1, 13-21, 14.

871 Boyd DR The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment (UBC Press Vancouver 2011).

872 May JR and Daly E Global Environmental Constitutionalism (Cambridge University Press New York 2015).

interpretation of environmental rights in terms of transnationality. Put differently, one could argue that there is an emerging transnationality of environmental rights. Arguably, there are 5 interrelated 'transnational juridical processes' that have largely contributed to the transnationality of environmental rights and which could assist in the creation and spread of innovative ways of advancing and interpreting environmental rights.

3. Transnational juridical Processes

3.1 Transplantation/borrowing

History is filled with evidence of the interaction of legal systems.⁸⁷³ Watson defines legal transplantation as 'the moving of a rule or system of law from one country to another'.⁸⁷⁴ Through a process of such transplantation or borrowing, legal developments in one country can serve as the basis upon which other countries develop their own legal systems.⁸⁷⁵ There are various ways through which this process happens. It could be that countries

with less developed legal systems try to catch up with more developed systems in other countries by importing rules or principles into their own legal systems. This essentially means that laws in different states could become 'similar' because of copying or cross-pollination by one state of another's provision/law (which could happen as a result of scholars being exposed to other judicial systems through networking).⁸⁷⁶ Similarly, in describing why this happens in the context of TEL, Bell, Macgillivray and Pedersen argue that a rule developed or used in one state might find its way into other jurisdictions because the adopting jurisdictions view it or consider it to be desirable or convenient to adopt the rule.⁸⁷⁷ One example is that of the development and implementation of environmental impact assessment which originated in the United States of America (US). Environmental impact assessment is now widely accepted and operational beyond the US from where it evolved.⁸⁷⁸ This includes its incorporation into international environmental law. Thus, environmental laws around the globe could become 'similar' because of copying or cross-pollination by one state

873 Twining W "Implications of 'Globalisation' for Law as a Discipline" in Halpin A and Roeben V (eds) *Theorising the Global Legal Order* (Hart Publishing Portland 2009), 52.

874 Wiener JB "Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law" 2001 *Ecology Law Quarterly* 27, 1295-1371, 1298.

875 Yang T and Percival RV "The Emergence of Global Environmental Law" 2009 *Ecology L.Q.* 36, 615-664, 617; Percival RV "Human Rights and the Evolution of Global Environmental Law" in Rajkhowa S and Stuti D (eds) *Economic, Social & Cultural Rights, Volume 2* (Eastern Book House Guwahati 2013), 2. This was earlier echoed by Watson who stated that "[A]mong the most important causes of similarities is borrowing or transplanting". Watson A "Legal Transplants and European Private Law" 2000 *Electronic Journal of Comparative Law* 4:4.

876 See the discussion on networking below.

877 Bell S, Macgillivray D and Pedersen O *Environmental Law* (Oxford University Press London 2013), 87. The authors further argue that states borrow or transplant because it is easier to pick existing laws "off the shelf". However, if states just adopt rules without changing/contextualizing them to suit their particular system, such 'off the shelf' could affect the worth and utility of the particular laws concerned.

878 Sand PH 'Lessons Learned in Global Environmental Governance' 1991 *Boston College Environmental Affairs Law Review* 18:2, 213-277, 256.



of another's legal system, notably to the extent that these are shaped by regional and international law.

Globally, there are many environmental rights provisions that are strikingly similar.⁸⁷⁹ Various African countries, for instance, have provisions that could have been the result of transplantation. The 1995 Ugandan Constitution provides that 'Every Ugandan has a right to a clean and healthy environment.'⁸⁸⁰ In 1996 South Africa went a step further, providing for the following:

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.⁸⁸¹

In 2010, Kenya's new Constitution provides the following:

Every person has the right to a clean and healthy environment, which includes the right (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70.⁸⁸²

Zimbabwe's 2013 Constitution provides the following:

(1) Every person 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 economic and social development. (2) The state must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of the rights set out in this section.⁸⁸³

879 See May JR and Daly E Global Environmental Constitutionalism (Cambridge University Press New York 2015).

880 Section 39 of the Constitution of Uganda, 1995.

881 Section 24 of the Constitution of the Republic of South Africa, 1996.

882 Section 42 of the Constitution of Kenya, 2010.

883 Section 73 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

Interestingly, Tanzania's 2013 draft constitution has an environmental right that is strikingly similar to all the above. It reads as follows:

- 1) Every person resident in the United Republic has the right to live in a clean and safe environment.
- (2) The right to live in a clean and safe environment includes the right of every citizen to use public spaces or various places that have been reserved for entertainment, delivery of educational services, medical services, for religious gatherings, cultural and economic activities.
- (3) Any person who is resident in Tanzania is responsible for protecting the environment and informing the authorities of the land of activities or anything that is harmful or is likely to adversely affect the environment.⁸⁸⁴

What is evident from these examples is that the transnationality of laws through transplantation could involve conversations and interactions that are both horizontal and vertical in an international sense and international sense. Borders are irrelevant here and rules migrate between different levels to fulfil

a particular common function between states.

3.2 Convergence

Convergence is a process whereby environmental laws of some states develop similarly not because of deliberate acts of transplantation or borrowing, but as a result of similar external pressures and common functional demands to which these laws must respond.⁸⁸⁵ It could involve the growth of expert networks and the spread of a type of 'universal' world culture.⁸⁸⁶ Ultimately, convergence is an elaborate process that results in the increased similarity of policies in a certain field across a set of jurisdictions over a period of time in reaction to global regulatory problems such as climate change.⁸⁸⁷ Processes of convergence will normally be driven by states, but non-state actor initiatives might also play a part. The process of convergence allows a more harmonious global regulatory framework to be created when the self-interests of a state are aligned with those of other states or other global governance actors.⁸⁸⁸ In other words, if there is a convergence of interests, a transnational emergence of norms and principles might occur along the lines of those interests.

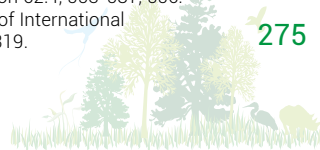
884 Section 40 of Tanzania's Draft Constitution. Available at <http://www.constitutionnet.org/vl/item/proposed-constitution-tanzania-sept-2014>.

885 Yang T and Percival RV "The Emergence of Global Environmental Law" 2009 *Ecology L.Q.* 36, 615-664, 627.

886 Shaffer G and Bodansky D "Transnationalism, Unilateralism and International Law" 2012 *Transnational Environmental Law* 1:1, 31-41, 33.

887 Holzinger K, Knill C and Sommerer T "Environmental Policy Convergence: The Impact of International Harmonization, Transnational Communication, and Regulatory Competition" 2008 *International Organization* 62:4, 553-587, 556.

888 Cremades BM and Plehn SL "The new Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions" 1984 *Boston University International Law Journal* 2, 317-348, 319.



Examples of convergence can be seen in Southern Africa. For instance, South Africa responded to the environmental and social ills caused by apartheid through strong anthropocentric environmental provisions that are focused on transformation and social justice. Similarly, Zimbabwe adopted a new constitution with environmental rights after a broad coalition of civil society organizations pressured and called for the inclusion of environmental rights. Both events that led to the emergence of environmental rights in these two states are very different, but the similar pressures they presented to governments led to the same result: the adoption of environmental rights in the countries' new constitutions.

3.3 Integration and harmonization

Integration and harmonization refer to multi-country efforts that result in similar approaches to various regulatory issues such as transboundary water governance.⁸⁸⁹ Unlike convergence, which could happen without states specifically cooperating to reach a certain level of

standard of homogeneity, integration and harmonization are usually the result of concerted efforts by states to achieve specific goals.⁸⁹⁰ Shaffer and Bodansky specifically note TEL 'involves cooperative action among states – for example, to mutually recognize each other's licences and permits'.⁸⁹¹ There are various examples regional environmental governance organization that have been constituted on the basis of the need for integration and harmonization. For example, the East African Community has made an effort to have environmental issues handled through integration and harmonization. In 2009 the East African Community developed the *EAC Draft Bill of Rights* which contains a right to a clean environment.⁸⁹² This draft has been ratified by two of the five East African Community member states. If states develop or amend their environmental rights along Article 31, this could be an indication of harmonization and integration.⁸⁹³ In some instances, there is a clear link between regional desired goals and the harmonization and integration efforts that drive the pursuit of those goals.

889 Yang T and Percival RV "The Emergence of Global Environmental Law" 2009 Ecology L.Q. 36, 615-664, 627; Shaffer G and Bodansky D "Transnationalism, Unilateralism and International Law" 2012 Transnational Environmental Law 1:1, 31-41, 33. See also Fisher E "The Rise of Transnational Environmental Law and the Expertise of Environmental Lawyers" 2012 Transnational Environmental Law 1:1, 43-52, 46 who prefers the term regulatory diffusion.

890 Holzinger K, Knill C and Sommerer T 'Environmental Policy Convergence: The Impact of International Harmonization, Transnational Communication, and Regulatory Competition' 2008 International Organization 62:4, 553-587, 556. See also Boyd DR The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment (UBC Press Vancouver 2011), 108. As Yang and Percival note, integration links national legal systems and harmonisation concerns the adjusting and conforming of countries' standards and requirements to a particular international system or to each other; Yang T and Percival RV "The Emergence of Global Environmental Law" 2009 Ecology L.Q. 36, 615-664, 627.

891 Shaffer G and Bodansky D "Transnationalism, Unilateralism and International Law" 2012 Transnational Environmental Law 1:1, 31-41, 33.

892 See Article 31.

893 It is however not clear from the Bill whether states would be required to amend their constitutions to incorporate such rights. It could be assumed that upon the Bill becoming functional, ratification would operationalise the Bill in the same manner in which other rights are recognised (depending on whether a state follows a monist or dualist approach).

As a caveat, it must be noted that where processes of integration and harmonization occur, it does not mean that the laws of states have become uniform or similar in every respect.⁸⁹⁴ Even though there might be concerted efforts to address a particular issue or even similar issues driving convergence, states will always have some leeway over the framing and implementation of laws within their jurisdictions.⁸⁹⁵ However, '[t]he very notion of harmonization across nations or peoples through law depends not simply on the identification of a common law for all subject to it, but on the assurance that the same law can have the same impact in its different settings'.⁸⁹⁶ Thus, while the provision of environmental rights might be different in various jurisdictions, the substance and the purpose of the laws are what resemble some degree of similarity; and it is from such substance and purpose that one can identify transnationalism.

3.4 Networking

The creation, sharing and dissemination of ideas by networks of like-minded and influential individuals or groups are essential

and significant to the development of TEL.⁸⁹⁷ At a conceptual level, Benford prefers the term 'transnational social movements' to describe networks or groups of civil society that seek to impact the outcomes of global governance. Chirico and Larouche present a persuasive economic argument for networking. For them, 'network effects' occur when the value of certain products to individual users increases as the number of users also increases.⁸⁹⁸ They apply this theory to law where they first lay out a general proposition that the market for legal ideas is also subject to network effects.⁸⁹⁹ The result is that 'the more members of the legal epistemic community subscribe to a given opinion, the more attractive it becomes, sometimes irrespective of its inherent validity'.⁹⁰⁰ As such, these epistemic communities are also perceived to contribute to the development of TEL by facilitating the exchange of knowledge that could indirectly affect normative development.⁹⁰¹

When these non-state actor networks are actively involved in environmental issues, they are able to influence legal processes by being 'transnational norm

894 Fisher E "The Rise of Transnational Environmental Law and the Expertise of Environmental Lawyers" 2012 *Transnational Environmental Law* 1:1, 43-52, 48.

895 Holzinger K, Knill C and Sommerer T 'Environmental Policy Convergence: The Impact of International Harmonization, Transnational Communication, and Regulatory Competition' 2008 *International Organization* 62:4, 553-587, 557.

896 Halpin A and Roeben V "Introduction" in Halpin A and Roeben V (eds) *Theorising the Global Legal Order* (Hart Publishing Portland 2009), 5.

897 Boyd DR *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press Vancouver 2011), 109; Kotzé LJ *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar Cheltenham 2012), 145.

898 Chirico F and Larouche P "Convergence and Divergence, in Law and Economics and Comparative Law" in Larouche P and Cserne P (eds) *National Legal Systems and Globalization* (T.M.C Asser Press The Hague 2013), 13.

899 *ibid.*

900 *ibid.*, 14.

901 Young OR *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press New York 1994), 96; Haas P "Epistemic Communities" in Bodansky D, Brunnee J & Hey E (eds) *The Oxford Handbook of International Environmental Law* (Oxford University Press Oxford 2007), 792.



entrepreneurs'.⁹⁰² A good example is the Permanent People's Tribunal which functions as a public opinion tribunal because its judgments have no binding force. It has collaborated with the Global Network for the Study of Human Rights and the Environment to hold hearings on hydraulic fracturing and its impact on human rights and the environment.⁹⁰³ Arguably, the activities and networks of these groups focus on practical and current matters, specific cases and concrete expressions of human solidarity. While they remain unable to participate fully in global environmental law making and diplomacy due to their lack of international legal personality, they increasingly influence the outcomes of the more formal global juridical processes, thereby indirectly contributing to the development of environmental norms and structures beyond the state.

3.5 Judicial comparative borrowing

Courts and arbitral bodies also play an important role in facilitating the transnationality of laws. While discussing global environmental constitutionalism,

May and Daly argue that 'by borrowing and learning from one another, courts are developing a rich and varied set of responses to the challenges of environmental protection'.⁹⁰⁴ With regard to process, Dupré notes that judicial reliance on foreign and comparative law has been referred to as cross-fertilization, judicial dialogue, constitutional borrowing, importation and migration.⁹⁰⁵ Clearly, the jurisprudence from other jurisdictions could be important to the extent that they can provide guidance to another court. For example, the broad interpretation of environmental rights in the Indian Constitution⁹⁰⁶ is reported to have influenced other courts like the Argentinian Supreme Court in shaping and interpreting the Argentinian environmental right.⁹⁰⁷

It must be noted that transnationality through judicial work could also be enhanced by judicial networks and communities across borders.⁹⁰⁸ It has been argued that through such networks and communities, transnational dialogues flow more naturally because the 'judges share common beliefs, values and a self-perception and understanding of their role in the legal system and in society'.⁹⁰⁹

902 Shaffer G and Bodansky D "Transnationalism, Unilateralism and International Law" 2012 *Transnational Environmental Law* 1:1, 31-41, 35.

903 Short D 2015 Media Release – Fracking Goes on Trial, <https://www.tribunalonfracking.org/news/media-release/>.

904 May JR and Daly E *Global Environmental Constitutionalism* (Cambridge University Press New York 2015), 10.

905 Dupre C "Globalisation and Judicial Reasoning: Building Blocks for a method of Interpretation" in Halpin A and Roeben V (eds) *Theorising the Global Legal Order* (Hart Publishing Portland 2009), 107.

906 Some of these cases as cited by Yang T and Percival RV "The Emergence of Global Environmental Law" 2009 *Ecology L.Q.* 36, 615-664, 634 are S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149; M.C. Mehta v. Union of India (Taj Trapezium Case), A.I.R. 1997 S.C. 734; M.C. Mehta v. Union of India (Municipalities), A.I.R. 1988 S.C. 1115; M.C. Mehta v. Union of India (Shriram Gas Leak Case), A.I.R. 1987 S.C. 965

907 Yang T and Percival RV "The Emergence of Global Environmental Law" 2009 *Ecology L.Q.* 36, 615-664, 634.

908 Boyd DR *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press Vancouver 2011), 109.

909 De Visser M and Claes M "Judicial Networks" in Larouche P and Cserne P (eds) *National Legal Systems and Globalization* (T.M.C Asser Press The Hague 2013), 346.

A recent gathering that exemplifies a move towards judicial networking is the establishment of the Global Judicial Institute for the Environment in Brazil by judges from 15 countries.⁹¹⁰ These judges, along with environmental law experts prepared a Charter for the Global Judicial Institute for the Environment.⁹¹¹ Some of the Charter's objectives include:

- Providing research, analysis and publications on various environment related matters;⁹¹²
- Strengthening the capacity of judges in adjudicating and administering environmental cases; and⁹¹³
- Providing a forum for the creation of partnerships that would lead to collaborations and information exchange on environmental law issues.⁹¹⁴

Arguably then, courts have and continue to significantly contribute to the transnationalisation of environmental law in general. Through their work, legal systems can potentially mirror each other as a result of the extent to which different courts within different jurisdictions give content and meaning to legal principles.⁹¹⁵ To be sure, '[t]he increased citation of

judgments and borrowing of legal doctrines from international and foreign courts by domestic judges is a concrete sign of a developing transnational legal culture.'⁹¹⁶

4. Conclusion

As a framework of analysis, TEL allows for the viewing of environmental law in liberating terms that are broader than the national and the international. It also allows for the globalization of environmental rights. Through the transnational juridical processes identified above, one could argue that environmental rights have indeed become transnational. Despite the absence of a global environmental rights treaty, it is evident that constitutional environmental rights have been progressively developing the world over. However, this global recognition of constitutional environmental rights is only one part of the equation, as interpretation and application demand more than just theoretical acceptance. The practical worth of these rights will be determined by how policy makers infuse environmental rights principles in their decision making and how judicial officers become environmentally conscious in their adjudication.

910 IUCN 'Judges Establish the Global Judicial Institute for the Environment' 2016 available at <https://www.iucn.org/news/judges-establish-global-judicial-institute-environment>.

911 The Charter is available at <http://welcongress.org/wp-content/uploads/2016/05/Charter-of-the-Global-Judicial-Institute-Rio-de-Janeiro-29-April-2016-....pdf>.

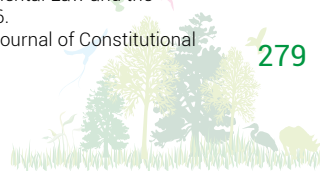
912 Article III(a).

913 Article III(b).

914 Article III(c).

915 Kotzé LJ and Du Plessis AA "Some brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa" 2010 *Journal of Court Innovation* 157-176, 168. See also Fisher who describes this as 'the overlap between different dispute resolution forums', Fisher E "The Rise of Transnational Environmental Law and the Expertise of Environmental Lawyers" 2012 *Transnational Environmental Law* 1:1, 43-52, 46.

916 Ip EC "Globalization and the Future of the Law of the Sovereign State" 2010 *International Journal of Constitutional Law* 8:3, 636-655, 644.



Introducing Transformative Environmental Constitutionalism in South Africa

Melanie Murcott

1. Introduction

This chapter on a legal theory of transformative environmental constitutionalism is an attempt at progressive legal scholarship. It seeks to engage with the concerns of pressing social movements responding to environmental degradation in South Africa.⁹¹⁷ It does so by introducing the concept of transformative environmental constitutionalism. The aim of the concept is to bridge a juridical and, as a result, practical, divide in legal discourse between environmental considerations on the one hand and social justice considerations on the other. It is trite that under environmental law, the concept of sustainable development, in theory, concerns the integration and balancing of environmental, social and economic considerations in environmental decision-making. That is not the focus of this chapter. Rather, this chapter considers how environmental law can contribute towards radical societal change and the attainment of socio-economic entitlements in an unequal and unjust society. This, change is demanded by South Africa's project of transformative constitutionalism, discussed in the next part of this chapter.

Transformative environmental constitutionalism proceeds off the premise that South Africa's project of transformative constitutionalism has not adequately engaged environmentalism as a concern for the protection of the environment that is interconnected to the pursuit of social justice for the people who live in them, particularly the poor and vulnerable. Although a heterogeneous concept, environmentalism at its most basic entails a concern for environmental integrity and the preservation of the environment. A key feature of South African environmentalism historically, consistent with apartheid policies more generally, is environmental racism, including in the form

917 As called for by Tshepo Madlin'gozi, 'Legal Academics and Progressive Politics in South Africa: Moving Beyond the Ivory Tower' (2005) PULP Fictions 5, 6, who argues that:

In South Africa, progressive politics and social transformation have no meaning unless those who claim to be "progressives" connect with the struggle that is being waged by new social movements. In other words, progressive legal scholars need to take these struggles into account in their research.

of fortress conservation and exclusion,⁹¹⁸ forced removals, unequal access to water, sanitation, housing and waste removal services, and the citing of hazardous land uses near poor black communities.⁹¹⁹ Post-apartheid, the focus of those involved in environmental governance at the level of application of law or implementation of policy has been largely reduced to the granting of authorizations, permits and licences by answering technical questions about whether the impacts of activities will fall within 'acceptable' limits. This disconnects environmental governance from the social justice issues at stake.

This chapter argues that South Africa's project of transformative constitutionalism will be enhanced by a more thorough engagement with and transformation of environmentalism, through the development of a legal theory of transformative environmental constitutionalism. This chapter speaks first to the emerging phenomenon of environmental constitutionalism, in which South Africa is a leading light on paper, but less so in practice. Secondly, it explains the South African concept of transformative constitutionalism and attempts to link environmental constitutionalism to this concept. In doing so, this chapter describes some of the deplorable living conditions of South Africa's poor so as to illustrate how

our society measures up to the goal of transformative constitutionalism. It argues that these living conditions are a failure not only of transformative constitutionalism, but also of environmentalism, due to a limited vision of environmentalism in our legal discourse. Finally, this chapter proffers the vision of environmentalism that we need to respond to the plight of South Africa's poor and render our project of transformative constitutionalism more effective.

The chapter draws inspiration from, amongst others, the struggles of the Amadiba Crisis Committee, a community-based organization representing the Amadiba residents of Xolobeni, in South Africa's Wild Coast. The Committee has mobilized a strong social movement against open-cast titanium mining in the area, one of our country's most beautiful stretches of coast line, by an Australian mining company, Mineral Commodities Ltd. It has been a difficult and controversial project, culminating in the 22 March 2016 assassination of the Committee's chairperson, Sikhosiphi Bazooka Rhadebe. In response, civil society organizations worldwide have condemned the intimidation and violence against those opposed mining in Amadiba.⁹²⁰ Struggles of this nature are about the intersection of the need to secure the protection of

918 Jan A. Hough and Heidi E. Prozesky, "'But we don't spoil it, we protect it': Coleske residents' conceptualisations of the Baviaanskloof Nature Reserve and its protection' *South African Geographical Journal* 92(2) December 2010 160, 161.

919 Melanie Murcott, 'The role of environmental justice in socio-economic rights litigation' (2015) 132(4) *South African Law Journal* 875, 885–889.

920 See for example Right to Know, 'Statement: 193 Civil Society and International organisations condemn the assassination of Sikhosiphi Bazooka Rhadebe, chairperson of Amadiba Crisis Committee!' <<http://www.r2k.org.za/2016/03/23/amadiba-assassination/>> (accessed 26 September 2016).



environments, and justice for the people living them. They highlight the need to re-think the ways in which the law can be invoked to strengthen such struggles, using the normative framework that the Constitution offers to develop a legal theory of transformative environmental constitutionalism.

2. Environmental constitutionalism

Environmental constitutionalism is a relatively recent global phenomenon that essentially entails 'the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide'.⁹²¹ Post-apartheid South Africa is arguably a pioneer of this phenomenon, at least on paper,⁹²² having constitutionalized environmental protection in both a thin and a thick sense.⁹²³ The Constitution of the Republic of South Africa, 1996 provides for thin environmental constitutionalism 'as a means to determine, at the highest possible level, the ordering, composition

and architecture of environmental governance' because it contains provisions that 'constitute, establish, legitimize and guide the day-to-day governance of environmental matters in South Africa'.⁹²⁴ It provides for thick environmental constitutionalism not least by incorporating 'a rights-based approach to environmental governance'.⁹²⁵

The Constitution provides for procedural rights to access to information⁹²⁶ and to administrative justice,⁹²⁷ including in relation to environmental decision-making. In South Africa these procedural rights have the capacity to 'facilitate participative, representative and transparent environmental governance',⁹²⁸ and they are frequently invoked in this manner. In addition, the Constitution includes not only a rich substantive environmental right that speaks to health, well-being, intra- and inter-generational equity, conservation, pollution control and ecologically sustainable development,⁹²⁹ but also a number of potentially interrelated and mutually reinforcing substantive rights. These include the rights to life,⁹³⁰ dignity,⁹³¹

921 James R. May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge: Cambridge University Press, 2015), 1.

922 Louis Kotzé, 'The Conceptual Contours of Environmental Constitutionalism' (2015) 21 *187 Widener Law Review* 194, 196–198.

923 Kotzé (n 922) 194, 196–98.

924 Kotzé (n 922) 193–94.

925 Kotzé (n 922) 197.

926 Section 32 of the Constitution.

927 Section 33 of the Constitution.

928 Kotzé (n 922) 197. See also James R. May, 'Constitutional Directions in Procedural Environmental Rights' (2013) *Journal of Environmental Law and Litigation* 28.

929 Section 24 of the Constitution provides that 'everyone has a right to an environment not harmful to health or wellbeing' and 'to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures', including measures that 'secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.

930 Section 11 of the Constitution.

931 Section 10 of the Constitution.

equality,⁹³² water, food and sanitation,⁹³³ and housing,⁹³⁴ all of which 'have a direct bearing on the environment'.⁹³⁵

The entrenchment of socio-economic rights and rights to dignity and equality, with the underlying goal of poverty alleviation, as well as the interconnectedness of all rights under the Constitution, means that on paper South African environmental constitutionalism offers the potential to pursue at least three important goals. First, it arguably pursues the protection of the environment as a necessity for the attainment of dignity, so that it is not harmful to health or well-being, particularly of poor South Africans. A second goal is intra- and inter-generational equity in relation to the equal access to gifts of the environment. Thirdly, ecologically sustainable development and use of natural resources are called for, which is important given that basic needs to water, food and housing cannot be met without ecological sustainability.

This chapter elaborates on these goals when it engages with the transformative potential of environmental constitutionalism in South Africa below.

In doing so, this chapter does not seek to pursue an exclusively so-called brown or green agenda. Rather, it proceeds off the premise that these agendas are mutually supportive of, rather than opposed to each other.⁹³⁶ For instance, human health, a so-called brown agenda issue, cannot be secured without ecosystem health, a concern of the green agenda. Similarly, nature cannot serve human needs as a goal of the brown agenda, unless it is protected as a goal of the green agenda.⁹³⁷

It is necessary to explore this potential because, in practice, the environmental right remains under-utilized,⁹³⁸ and environmental constitutionalism is rarely regarded as a concern for environmental protection as interrelated with and mutually reinforcing of other socio-economic rights in struggles for social justice for South Africa's poor. Nor are other socio-economic rights regarded as interrelated with and mutually reinforcing of the environmental right. The aim of this chapter is to illustrate the potential of environmental constitutionalism as a transformative tool that can respond to conditions of poverty in South Africa by connecting the concept of transformative

932 Section 9 of the Constitution.

933 Section 27 of the Constitution.

934 Section 26 of the Constitution.

935 Kotzé (n 922) 198. On the relationship between dignity rights and environmental rights see Erin Daly and James May, 'Bridging Constitutional Dignity and Environmental Rights Jurisprudence' Forthcoming in *Journal of Human Rights and the Environment* Widener University Delaware Law School Legal Studies Research Paper Series No. 16-09 May 2016.

936 See Peter S. Wenz, 'Does Environmentalism Promote Injustice for the Poor?' in Ronald Sandler and Phaedra C. Pezzullo (eds) *Environmental Justice and Environmentalism: The Social Justice Challenge to the Environmental Movement* (2007 Massachusetts Institute of Technology) 57, 64–78.

937 In this sense I find accounts that dichotomise these agendas to be of limited value. For such an account see for instance AA Du Plessis, 'The "Brown Environmental Agenda and the Constitutional Duties of Local Government in South Africa: A Conceptual Introduction' (2015) 18(5) *Potchefstroom Electronic Law Journal* 1846, 1851.

938 Loretta Feris, 'Constitutional environmental rights: An under-utilised resource' (2008) 24 *South African Journal on Human Rights* 29.



constitutionalism to environmentalism. Next, this chapter considers the concept of transformative constitutionalism.

3. Transformative constitutionalism

As David Boyd points out, since the mid-1970s there has been a 'remarkable shift toward constitutional democracy across the globe'.⁹³⁹ In countries in Eastern Europe, Latin America and Africa, constitution-making has entailed responding to 'tragic legacies of fascism, colonialism and communism',⁹⁴⁰ to contribute toward radical societal change. South Africa's Constitution is a notable example of this trend. It has been found to demand 'a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive'.⁹⁴¹ It is overtly transformative in nature, in the sense that because of our apartheid past, it demands radical reform in our country in the pursuit of social justice and equality.⁹⁴² Thus, Karl Klare asserted in 1998 that South Africa must embark upon a project of transformative constitutionalism, requiring:

constitutional enactment, interpretation and enforcement committed...to transforming [our] country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction inducing large-scale social change through processes grounded in law.

Although the term 'transformative constitutionalism' does not appear anywhere in the Constitution, it has been recognized as a key feature.⁹⁴³ Accordingly, in 2006, the late former Constitutional Court Chief Justice Pius Langa asserted that:

The provision of services to all and the leveling of the economic playing fields that were so drastically skewed by the apartheid system must be absolutely central to any concept of transformative constitutionalism.⁹⁴⁴

Though there is no agreement on what the term means,⁹⁴⁵ in South Africa transformative constitutionalism should entail, at a minimum, improving the living conditions of the poor in the pursuit of social justice.⁹⁴⁶ Transformative

939 David R. Boyd, 'The Environmental Rights Revolution' (UCB Press, Vancouver, 2012) 4.

940 Boyd (n 939) 4.

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

942 See Soobramoney v Minister of Health (KwaZulu-Natal) 1998 1 SA 765 (CC) para 8; Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 (3) SA 454 (CC) para 142.

943 Karl Klare, 'Legal culture and transformative constitutionalism' (1998) 14 South African Journal on Human Rights 146, 150.

944 Justice Pius Langa, 'Transformative Constitutionalism' (2006) 17(3) Stellenbosch Law Review 351, 352.

945 Langa (n 944) 351.

946 See for example more the recent accounts of transformative constitutionalism of Sanele Sibanda 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22(3) Stellenbosch Law Review 482; Tim Fish Hodgson, 'Bridging the gap between people and the law: Transformative constitutionalism and the right to constitutional literacy' (2015) Acta Juridica: Transformative Justice: Essays in Honour of Pius Langa 189; Jason Brickhill and Yana Van Leeve, 'Transformative Constitutionalism – Guiding Light or Empty Slogan?' (2015) Acta Juridica: Transformative Justice: Essays in Honour of Pius Langa 141.

constitutionalism viewed in this way is not merely a theoretical concept. It 'envisages a meaningful improvement in the material conditions of people's lives together with real change in legal culture'.⁹⁴⁷ It has been argued that the 'content and implementation of transformative constitutionalism... cannot be considered in the abstract, but must be informed by actual socio-economic conditions'.⁹⁴⁸ The focus of those concerned with the study and implementation of transformative constitutionalism has been socio-economic conditions as disconnected from the environment. This chapter asserts that environmental considerations must also be considered in addressing the plight of South Africa's poor. This is so, because evidently, those who lack access to food, water, sanitation, housing and health-care, also live in environments that are harmful to their health and well-being.

This means environments that are inherently unjust and unequal, and that violate the dignity of the people existing within them. As David Schlosberg argues, '[t]he environment and nature create the conditions for social justice'.⁹⁴⁹ By way of elaboration, this chapter offers two illustrations of the intersection between

socio-economic and environmental struggles of poor South Africans. These illustrations reveal that our society has a long way to go in its project of transformative constitutionalism, and expose the potential for transformative environmental constitutionalism.⁹⁵⁰

Water is a gift of the earth essential for sustaining all life. When people do not have piped water and flush toilets, their rights to dignity, to access to water and sanitation are implicated. In addition, they are exposed to environments that are harmful to their health and well-being. Many people in South Africa are deprived of a just share of the country's water supply, however. Mining communities are particularly hard hit.⁹⁵¹ For instance, impoverished communities living on the outskirts of Randfontein have limited access to clean water. Informal settlements in this area, such as the one pictured below, are the result of '[a]varice and opportunism rather than careful planning with an eye to long-term sustainability', influenced by mining activities.⁹⁵²

According to Statistics South Africa, as at 2011 only 79,3% of the population of Randfontein had access to flush toilets

947 Brickhill and Van Leeve (n 946) 143.

948 Brickhill and Van Leeve (n 946) 143.

949 David Schlosberg, 'Theorising environmental justice: the expanding sphere of a discourse' (2013) 22(1) *Environmental Politics* 37, 38.

950 John Gaventa and Carin Runciman, '12. Untangling economic and political inequality: the case of South Africa' in ISSC, IDS and UNESCO World Social Science Report 2016, *Challenging inequalities: Pathways to a Just World* UNESCO Publishing, Paris 70–73.

951 See for example Tracy-Lynn Humby, 'Environmental justice and human rights on the mining wastelands of the Witwatersrand goldfields' (2013) 43 *Revue générale de droit* 65.

952 J.F. Durand, 'The impact of gold mining on the Witwatersrand on the rivers and karst system of Gauteng and North West Province, South Africa' (2012) 68 *Journal of African Earth Sciences* 24, 25



connected to sewerage, and 61,9% had piped water inside their dwelling.⁹⁵³ In addition, the manner in which water is distributed is unequal. As Jacklyn Cock observed in 2010, more than half of South Africa's domestic water consumption 'goes to the largely white, affluent suburbs with their gardens, swimming pools and golf courses',⁹⁵⁴ whilst many vulnerable people lack adequate access to clean water. This unjust distribution implicates the right to equality.



Informal settlement in the West Rand of Johannesburg, South Africa
Photo credit: © Melanie Murcott

It is easy to forget that when we are in our homes, we exist in an environment. Those who live in shacks in informal settlements and lack access to housing are not only

deprived of their right to housing and to dignity, but also live in environments harmful to their health and well-being. This is illustrated by *Melani and Others v City of Johannesburg and Others*, a case concerning 10,000 residents living in an informal settlement in Johannesburg, Slovo Park, who sought to enforce their rights to housing.⁹⁵⁵ Finding in favor of the residents, the court remarked upon the 'deplorable' living conditions of Slovo Park, including the lack of access to electricity and resultant, often fatal, shack fires occurring once every two months.⁹⁵⁶ Further, because roads are not formally demarcated in Slovo Park, and do not appear on a map, ambulances refuse to fetch the sick.⁹⁵⁷ Living conditions of this kind represent a failure not only of constitutional rights to housing, dignity and equality, but also of the environmental right and of environmentalism, which ought to be regarded as part of our project of transformative constitutionalism.

As a result of lived realities of this kind, we have become known as 'the protest capital of the world' as South Africans who face intolerable living conditions in townships and informal settlements protest and look to the courts for relief in relation to violations of their rights access to water, sanitation, housing and electricity.⁹⁵⁸

953 See Statistics South Africa <www.statssa.gov.za/?page_id=993&id=randfontein-municipality> (accessed 26 September 2016).

954 Jacklyn Cock "'Green Capitalism' or Environmental Justice? A Critique of the Sustainability Discourse' (2010) Paper presented at the XVI SASA Congress, University of Fort Hare, June 13, 2010 47.

955 2016 (5) SA 67 (GJ).

956 *Melani* (n 955) para 3.

957 *Melani* (n 955) para 3.

958 *Gaventa and Runciman* (n 950) 72.

If transformative constitutionalism entails responding to these socio-economic hardships through legal means, grounded in the Constitution, transformative environmental constitutionalism entails recognizing that these hardships are also environmental issues, to which environmentalism must respond. It has not yet effectively done so, however. The focus of those implementing environmental legislation and policy is largely on permitting or allowing industry to grow or to be maintained. Accordingly, an industry friendly environmentalism emerges whose focus is economically sustainable development. This type of environmentalism is inconsistent with what our Constitution requires: it is not grounded in social justice considerations and the preservation of a clean and healthy environment as a prerequisite to meet, at least, the basic needs of the poor, and to aspire to enabling all people to flourish.

For instance, in 2015 the Department of Environmental Affairs decided to grant applications postponing the application of time frames for compliance with Minimum Emission Standards prescribed by the National Environmental Management Air Quality Act 39 of 2004. Amongst the applicants were major polluters in the Witbank area, an area that is reported to have the worst air quality in the world.⁹⁵⁹

Unsurprisingly, the incidence of respiratory illness of the poor and vulnerable people who live there is reported to be very high.⁹⁶⁰ In response to opposition about her ministry's decision to grant postponement applications, Environmental Affairs Minister Edna Molewa contended that she was simply acting within her mandate of securing sustainable development in the country.⁹⁶¹ The Minister's response seems to treat environmental deterioration as disconnected from the lived realities of South Africa's poor. Moreover, the views of the Minister represent the weakness of grounding environmentalism in the notion of sustainable development, a concept the heart of our environmental legislation. Because sustainable development is such a flexible concept:

for those advocating economic growth, the emphasis would fall on the economic growth value of sustainable development. As such sustainable development could mean "lasting economic growth", with the aim being to sustain economic growth.⁹⁶²

Commenting on Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga

959 groundWork 'The Health Impact of Coal' (2014) <www.groundwork.org.za/specialreports/groundWork%20The%20Health%20Impact%20of%20Coal%20final%2020%20May%202014.pdf>.

960 ibid.

961 Al Jazeera English, 'Polluted air affecting health of South Africans' <www.youtube.com/watch?v=NUPI_9iORL0>, 2 April 2015 (accessed 10 December 2015).

962 Loretta Feris, 'Sustainable development in practice: Fuel Retailers Association of South Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province' 2008 (1) Constitutional Court Review 235, 250.



Province & others,⁹⁶³ South Africa's only Constitutional Court jurisprudence about meaning of sustainable development, Tumai Murombo warned that this case:

may unwittingly send the wrong message to industrialists who perceive the concept as being aimed at making “development” sustainable and not to achieve integrated sustainability in the radical sense of scrutinizing activities that are not sustainable socially, economically and environmentally.

Unfortunately, Murombo's warning was not heeded, and this approach to sustainable development appears to have permeated mainstream environmentalism in South Africa. This is because, as Loretta Feris points out, '[o]n its own, the concept fails to address practical and normative considerations'.⁹⁶⁴

The problematic approach to the constitutionally entrenched notion of sustainable development raises the question of whether and, if so, how, it can be recast. A legal theory of transformative environmental constitutionalism can assist in reframing environmentalism in South Africa. Transformative environmental constitutionalism would entail stepping sustainable development in normative considerations consistent with

South Africa's project of transformative constitutionalism. In other words, it would mean that sustainable development in South Africa is aimed at addressing the plight of the poor and overcoming social injustice, whilst remembering that these struggles are intrinsically connected with and dependent upon, the preservation of the environment. The next part of this chapter seeks to illustrate this connection.

4. Transformative environmental constitutionalism

A legal theory of transformative environmental constitutionalism facilitates a much-needed value-laden approach to environmentalism that breathes transformative content into the concept of sustainable development. It does so because it calls for a rights-based approach to environmentalism, grounded in our transformative Constitution that has the potential to protect '[a]ll of our environments – from urban to wilderness areas – that are being stressed, polluted and commodified while corporations and government agencies increasingly are challenging the general public and local communities for control over them'.⁹⁶⁵ This approach demands a progressive, social-justice oriented vision of environmentalism attached

963 2007 (6) SA 4 (CC) (Fuel Retailers).

964 Feris (n 962) 253.

965 Phaedra C. Pezzullo and Ronald Sandler, 'Revisiting the Environmental Justice Challenge to Environmentalism' in Ronald Sandler and Phaedra C. Pezzullo (eds) *Environmental Justice and Environmentalism: The Social Justice Challenge to the Environmental Movement* (2007 Massachusetts Institute of Technology) 1.

to a set of normative considerations for those involved in environmental governance, at the level of policy making and the implementation of environmental legislation, for those concerned with the resolution of environmental disputes, and for those engaged in environmental scholarship, education and activism.

In South Africa the relevant normative considerations emerge from the Constitution as well as the principles of our framework environmental legislation, the National Environmental Management Act 108 of 1997 (NEMA).⁹⁶⁶ At least three of environmental constitutionalism's goals are (as articulated above) first, the protection of the environment as a necessity for the attainment of dignity, so that it is not harmful to health or well-being, second, intra- and inter-generational equity in relation to the environment, and third, ecologically sustainable development and use of natural resources. This part of the chapter comments briefly upon these goals so as to expose the transformative potential of environmental constitutionalism in South Africa.

The protection of the environment as a necessity for the attainment of dignity

As Erin Daly and James May argue, '[h]uman dignity is inextricably linked to a quality environment, and vice versa'. They point out further that:

Many threats to the environment are at least as harmful to human life and health and to people's ability to fully develop as privacy, education, association and other interests pertinent to human dignity: exposure to lead in water can stunt intellectual growth; air pollution causes respiratory illnesses that reduce life expectancy and productivity; deforestation diminishes protection from storms, threatening homes and communities and reducing soil fertility—which in turn increases farmers' dependence on global markets for their own subsistence; reduced access to water and food in turn means that people (especially women) spend more time securing food for themselves and their families and less time on education or on income-producing work, diminishing their life choices and making them more vulnerable to further human and environmental threats.⁹⁶⁸

In South Africa, all of these threats impact the poor and vulnerable – those with limited access to resources to meet their basic needs – the most. Because the Constitution protects both a right to dignity and a right to an environment not harmful to health or well-being as mutually reinforcing and interrelated rights, environmental constitutionalism in South Africa invites legal responses

966 See section 2(4) of NEMA.

967 Daly and May (n 935) 1.

968 Daly and May (n 935) 10.



to conditions of poverty that invoke both rights so as to respond to social injustice.

Intra- and inter-generational equity

The South African environmental right provides for the protection of environment 'for the benefit of present and future generations'. How should this benefit accrue? If South Africa is to be a just and equal society as its constitutional values and right to equality demand, the manner in which present and future generations ought to 'benefit' from the protection of the environment must also be equitable both amongst present and future generations, and within present generations. As Harding explains, inter-generational equity means that 'the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations', whilst intra-generational equity focuses on equity within a single generation.⁹⁶⁹ Tracy-Lynn Field explains how equity ought to be regarded as central to sustainable development in the South African context. She argues:

At the very core of the notion of sustainable development is the moral choice 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. Equity, not environmental protection, is the absolute core of sustainable development, notwithstanding the concept's origin in texts aimed at environmental protection. But equity requires, more than ever before, an enhanced understanding, consideration and respect for our precarious and finite natural environment, and the desire to transform our human systems so as to be in harmony with that environment.⁹⁷⁰

She goes on to contend that:

If equity – defined in terms of meeting basic needs both now and in the future – is kept in sight as the goal [of sustainable development] toward which we are moving, there is a good likelihood that we will eschew economic activities that overexploit the finite resource base on which we all depend.⁹⁷¹

Placing equity at the heart of sustainable development entails, both within the current generation, and for the benefit of future generations, the pursuit of environmental justice. Environmental justice is a transformative concept that has the potential to respond to environmental racism and other forms of social injustice. Environmental justice requires the just

969 R Harding, 'Ecologically sustainable development: Origins, implementation and challenges' 2006 (187) 229, 235–36.

970 Tracy-Lynn Field, 'Sustainable Development Versus Environmentalism: Competing Paradigms for the South African EIA Regime' (2006) 123 South African Law Journal 409, 417.

971 Field (n 970) 419.

distribution of environmental endowments such as water, food, housing, and of environmental harms such as pollution and degradation.⁹⁷² It further calls for participation of all affected by decision-making about the environment and the recognition of the basic needs of all people in environmental decision making.⁹⁷³ Finally, a capabilities approach to justice demands 'institutions, resources, social and physical environments, and behaviors that permit individuals to flourish'.⁹⁷⁴ This idea of flourishing can be connected to the constitutional entitlement to well-being under section 24 of the Constitution.

Closely connected to environmental justice, is the notion of public trusteeship. It denotes government stewardship over the earth's ecological gifts in the public interest.⁹⁷⁵ When the government adopts the role of steward, it must do so in a just and equitable manner. Taken together, environmental justice and public trusteeship help us to see water, food and housing, all of which come from the earth and are essential for our survival, not merely as commodities to be regulated by 'neutral' market forces, but as environmental endowments held in trust by government for the people, to be distributed equitably pursuant to participatory processes,

so as to progressively realize access to them. Both concepts are provided for in our environmental law and are linked to the rights to equality, dignity and the environment.⁹⁷⁶ Their potential as legal constructs in struggles for social justice abounds.

Ecologically sustainable development

In South Africa, the environmental right provides that the environment must be protected for the benefit of present and future generations through reasonable legislative and other measures that 'secure ecologically sustainable development... while promoting justifiable economic and social development'. This chapter argues above that it is implicit in the Constitution that this benefit must be secured equitably. Explicitly, the benefit focuses on ecological, rather than economic sustainability.

Ecological sustainable development is also a term used in Australia, where in 1990, when the concept was being debated by the Australian government:

environmental groups, concerned that the sustainable development discussion process would be hijacked by business and industry

972 Murcott (n 919) 876.

973 Schlosberg (n 949) 44.

974 Julian Agyeman, 'Introducing Just Sustainabilities' (Zed Books, London, 2013).

975 See Elmarie van der Schyff, 'Stewardship Doctrines of Public Trust: Has the Eagle of Public Trusteeship Landed on South African Soil?' 2013 130 South African Law Journal 369; E van der Schyff and G Viljoen, 'Water and the Public Trust Doctrine – a South African perspective' 2008 4(2) The Journal for Transdisciplinary Research in Southern Africa 339–354.

976 See Murcott (n 99) 889–892 on the recognition of environmental justice in South African environmental law. See E van der Schyff, 'Unpacking the Public Trust Doctrine: A Journey into Foreign Territory' 2010 (13)5 Potchefstroom Electronic Law Journal 122, 122–123 on the recognition of public trusteeship in South African environmental law.



and interpreted as just *economically sustainable development, successfully fought for inclusion of the [term] ecologically, in the official definition.*⁹⁷⁷

As a result of the ecological focus of sustainable development in Australia, a number of key principles emerged for environmental decision-making, including inter- and intra-generational equity, precaution, conservation of biological diversity and ecological integrity.⁹⁷⁸ These principles are also reflected in South African environmental law.⁹⁷⁹ As in Australia, ecologically sustainable development in South Africa can be understood to require 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'.⁹⁸⁰

This approach to sustainable development requires the systematic acknowledgement of environmental concerns, 'conceptualized as a set of interconnected ecological pressures that required a similarly interconnected economic, social and political response'.⁹⁸¹ In South Africa this response must address the most pressing needs of the poor and struggles against social injustice. This is because

environmental harm is exacerbated, and the potential to conserve the environment is undermined by conditions of poverty. As Agyeman argues, 'environmental limits result in unfair distribution of environmental "goods", thus exacerbating the effects of unfair distribution of environmental "bads"'.⁹⁸² In South Africa, in order to achieve a more just and equitable society, environmental constitutionalism must recognize ecological limits as connected to limits to human flourishing.

5. Conclusion

This chapter has argued that environmental constitutionalism can meaningfully contribute towards South Africa's project of transformative constitutionalism and struggles for social justice. It has offered some tentative ideas about how legal constructs emerging from environmental constitutionalism can be invoked to do so. The first step is to view environmental constitutionalism not merely as concerned with the enactment of environmental rights, but as entailing a broader rights-based approach to environmental protection that serves the environment and the people dependent upon it for their survival. Environmental constitutionalism thus entails a holistic and interconnected understanding of multiple rights that can work together to

977 Harding (n 969) 233.

978 Harding (n 969) 235.

979 See section 2(4) of NEMA.

980 See Giorel Curran & Robyn Hollander, '25 years of Ecologically Sustainable Development in Australia: paradigm shift or business as usual?' 2015 (22) 1 *Australasian Journal of Environmental Management* 2, 3.

981 Curran and Hollander (n 980) 3.

982 Agyeman (n 974).

serve the environment and thus create the conditions for social justice.

In this way, the links between a right to an environment not harmful to health or wellbeing and rights to dignity and equality rights, and rights to housing, water, sanitation and food come into focus – they are interrelated to and mutually reinforcing of one another. This focus in turn reveals some of the key goals of environmental constitutionalism: the protection the environment as a necessity for the attainment of dignity, so that it is not harmful to health or well-being; intra- and inter-generational equity in relation to the environment; and ecologically sustainable development and use of natural resources.

This chapter has argued that these goals can be invoked in legal discourse so as to lend transformative force to environmental constitutionalism. They embody normative considerations – environmental justice, public trusteeship, that facilitate the pursuit of equality and dignity in decision-making concerned with the environment, and thus enable environmentalism meaningfully to contribute towards South Africa's project of transformative constitutionalism: towards transformative environmental constitutionalism.





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part 4

Human Rights, Sustainable Development
and Climate Change



Rethinking Global Environmental Governance

Sam Adelman

1. Introduction

Climate change and environmental devastation are arguably the biggest threats facing humanity in the Anthropocene. This is the result of unsustainable production and consumption. Unfortunately, global environmental governance appears unable to control or ameliorate these problems – primarily due to the dominance of neoliberal orthodoxies and the predominance of “soft” international environmental law. History suggests that the deepening ecological and climate crises cannot be resolved through business as usual or law as usual. As Naomi Klein cogently argues, the epistemologies of mastery that have brought us to this critical juncture cannot provide solutions to the problems they have caused.⁹⁸³ Since it is beyond question that endless economic growth is not possible on a finite planet, business as usual merely deepens the climate and ecological problems that confront us. And since credit, debt, interest and growth are hardwired into legal systems, environmental problems cannot be adequately addressed through law as usual.⁹⁸⁴ It follows that sustainable development, which is predicated upon the illusion that it is possible to simultaneously achieve economic growth, social justice and environmental protection is equally problematic because it is an oxymoron; sustainable development should not be confused with genuine sustainability.

2. Sustainable Development

Sustainable development emerged at the 1988 World Conference on Environment and Development in the famous Brundtland definition: “Sustainable development is development that meets the needs of the present without compromising the ability of

983 Naomi Klein, *This Changes Everything: Capitalism vs the Climate* (Allen Lane 2014). Sam Adelman, ‘Epistemologies of mastery’ in Anna Grear and Louis Kotzé (eds) *Research Handbook on Human Rights and the Environment* (Edward Elgar 2015).

984 Stephen Turner argues that architecture of international facilitates environmental degradation. Stephen Turner, *A Global Environmental Right* (Routledge 2013).

future generations to meet their own needs". This called for development to be aimed at meeting the human needs of current and future generations.⁹⁸⁵ It accepted the existence of limits to growth, both insuperable limits such as the finitude of resources and the capacity of ecosystems, and flexible limits dependent upon economic, political and social choices. But it ultimately comes down in favor of development as economic growth, for which the conservation of natural resources is a precondition. At a stroke, the report promises to reconcile the irreconcilable: the simultaneous achievement of endless growth, social justice and environmental protection – as if capitalism were non-existent.

Gudynas notes that environmental warnings emerged as early as 1972 in *Limits to Growth*, which questioned the possibility of perpetual growth, the central element in hegemonic development discourse.⁹⁸⁶ Bosselmann notes the unresolved tensions between growth and sustainability but appears to view this as a misfortune that can be corrected rather than a problem intrinsic to economic activity. He argues that sustainability should be the underpinning or Grundnorm of global environmental constitutionalism and in favor of a right

to sustainability. This is because there is currently "no global consensus on the importance of sustainability similarly to constitutionalized values such as human rights, democracy, or peace... Promoting an overarching sustainability objective should be at the heart of global environmental constitutionalism."⁹⁸⁷

Stephen Gill argues that global constitutionalism is a form of disciplinary neoliberalism.⁹⁸⁸ "New constitutionalism is the political-juridical counterpart to 'disciplinary neoliberalism'" which promotes the power of capital by seeking to naturalize and spread market values and disciplines into every aspect of social life and environmental governance. Everything can be priced because nothing has value. New global constitutionalism "is the *political/juridical* form specific to neoliberal processes of accumulation and to market civilization."⁹⁸⁹ In the twenty-first century global constitutionalism is underpinned by trade pacts such as the Trans-Pacific Trade Pact, which harmonize standards at the lowest possible level and exclude dispute settlement from national, public courts.

In a process of *de facto* constitutionalism under the aegis of the international economic institutions, which are

985 World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) 34.

986 Donatella H Meadows, Dennis L. Meadows, Jorgen Randers, and William W. Behrens, *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (Universal Books 1972). Eduardo Gudynas, 'Debates on development and its alternatives in Latin America: a brief heterodox guide' (2013) in Miriam Lang et al. (eds) *Beyond Development: Alternative Visions from Latin America* (Transnational Institute 2013).

987 Klaus Bosselman, 'Global Environmental Constitutionalism: Mapping the Terrain' (2015) *Widener Law Review* 21179.

988 Stephen Gill, 'Constitutionalizing Inequality and the Clash of Globalizations' (2002) *International Studies Review* 4(2) 47.

989 *ibid.*, 48 (emphasis in original).



undemocratic and unaccountable, global constitutionalism promotes neoliberal orthodoxies at the expense of environmental protection.⁹⁹⁰ The contrast between the hard law of the World Trade Organization and the soft law in the 2015 Paris Agreement is stark. The problem is that all legislation and constitutions, no matter how progressive, can be subverted by the rule of markets. Against law's self-presentation as neutral, impartial and objective, law should instead be understood as constitutive of market civilization in which corporations have what Upendra Baxi has termed trade-related, market-friendly human rights.⁹⁹¹ As Bosselmann acknowledges, "the omnipresence of free market ideology has certainly undermined efficiency and enforceability of environmental rights."⁹⁹²

3. Global environmental governance

Global environmental governance is dysfunctional because it does not prevent climate change and environmental degradation due to ceaseless extractivism and the breaching of planetary boundaries.⁹⁹³ Gill argues that contemporary global governance reflects "an *impasse* shaped by the degenerative structures and processes associated with

disciplinary neoliberalism, with no clear or generalized progressive solution yet in sight, and, indeed, with the potential for authoritarianism to prevail in the context of intensifying global competition for resources and food and the emerging politics of austerity." In his view, solutions are obstructed by the underlying assumption that "material progress can continue regardless of ecological and environmental constraints."⁹⁹⁴

If, as Kotzé argues, global governance is designed to attend to the ecological crisis confronting us, "evidence suggests that it is failing to solve pervasive global environmental problems such as climate change, biodiversity loss, and the destruction of the biosphere."⁹⁹⁵ Amongst the problems he identifies are the lack of corporate liability, core ecological and ethical values, and the absence of fundamental, enforceable and universal environmental rights.⁹⁹⁶ Kotzé is one of several writers who highlight the difficulty of addressing environmental problems in a period in which neoliberalism is dominant and market solutions are promoted despite conclusive evidence that the commodification and monetization of the environment rarely enhance the protection of ecosystems.⁹⁹⁷ For example, green capitalism, heavily promoted by the United

990 Gill, 2002 48.

991 Upendra Baxi, *The Future of Human Rights* (Oxford University Press 2013).

992 177.

993 Will Steffen et al, 'Planetary Boundaries: Guiding human development on a changing planet' (2015) *Science* 347.

994 Stephen Gill, 'Organic crisis, global leadership and progressive alternatives' in Stephen Gill (ed), *Global Crises and the Crisis of Global Leadership* (Cambridge University Press 2012) 237.

995 Louis Kotzé, 'Arguing Global Environmental Constitutionalism' (2012) 1 *Transnational Environmental Law* 199, 200.

996 *Ibid* 203.

997 See Sam Adelman, 'Rio+20: sustainable injustice in a time of crises' (2013) *Journal of Human Rights and the Environment* 4(1).

Nations Environment Programme and the Reducing Emissions from Deforestation and Forest Degradation Plus (REDD+) framework is suffused with terms such as natural capital and payment for environmental services in language that implicitly assumes that nature is an endless set of resources existing only to satisfy insatiable consumption. As Death writes, "The 'green economy' is the latest repackaging of long-running debates, programmes and discourses ostensibly seeking to reconcile economic growth and capitalist development with ecological sustainability." Whereas proponents of the green economy present it as an unquestionable good, critics view the discourse as "contradictory, distracting or politically dangerous, legitimating new forms of expropriation and accumulation."⁹⁹⁸

Environmental justice cannot be achieved without addressing current levels of inequality. This in turn is not possible without distributive, climate, gender and global justice. From one perspective, the intertwined climate, ecological and economic crises present daunting ethical, political and governance problems difficult to address simultaneously, but

from another viewpoint they constitute an unprecedented opportunity because they cannot be solved separately.⁹⁹⁹ Murcott describes how neoliberalism has undermined transformative constitutionalism in South Africa because environmental justice has been subordinated to the spurious discourse of sustainable development.¹⁰⁰⁰ She highlights the difficulties that arise from bolting together different concepts in ways that militate against a coherent, holistic approach to the ecological crisis.

A large part of the problem lies in resolutely anthropocentric law. Anthropocentrism "has fundamentally informed not only the way modern law constructs, categorizes and orders nature, but also the manner in which law protects nature" primarily for the benefit of people and not for the sake of the environment itself.¹⁰⁰¹ Anthropocentric law, based upon instrumentalist rationality and possessive individualism, turns nature into property and subjects it to exploitation as of right.¹⁰⁰² The "image of nature that emerges ... is that of a lifeless, inert machine that exists to satisfy the needs, desires (and greed) of human beings."¹⁰⁰³ New forms of law are gradually emerging that seek to address

998 Carl Death, 'Four discourses of the green economy in the global South' (2015) *Third World Quarterly* 36(12) 2207.

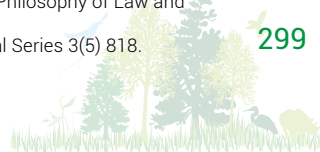
999 "As part of the project of getting our emissions down to the levels many scientists recommend, we once again have the chance to advance policies that dramatically improve lives, close the gap between rich and poor, create huge numbers of good jobs, and reinvigorate democracy from the ground up." Klein n 1 10.

1000 Melanie Murcott, 'The role of environmental justice in socio-economic rights litigation' (2015) *South African Law Journal* 132(4).

1001 Vito de Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' 2015 *Journal of Environmental Law* (27) 95.

1002 Mariachiara Tallacchini 'Human Right to the Environment or Rights of Nature?' in Rex Martin and Gerhard Sprenger (eds) *Rights: Proceedings of the 17th World Congress of the International Association for Philosophy of Law and Social Philosophy Volume I* (Franz Steiner Verlag 1997) 126.

1003 Peter Burdon 'The Earth Community and Ecological Jurisprudence' 2013 *Oñati Socio-Legal Series* 3(5) 818.



this problem, primarily by giving rights to nature - albeit in a contradictory manner that creates a tension between human rights and the rights of nature.

Innovative and imaginative juridical and political responses are required to ensure that global environmental governance protects human rights, as well as those of other species and Mother Earth (*Pachamama*) itself. However, as Friends of the Earth argue, there are numerous barriers to effective governance, including “development politics, lack of trust, widespread discounting of the future, excessive or incoherent fragmentation, challenges of scale, the dominance of economic interests in multilateral relations, and the ambition for a grand plan together with ‘bandwagoning’.”¹⁰⁰⁴ Friends of the Earth identify two basic approaches. The first is the reform of governance institutions by addressing their relative weakness in relation to economic forces. The second involves alternative approaches that view environmental problems as “wicked” and address broader contextual and structural issues.

May and Erin discern four rapidly developing concepts in global environmental governance: the rights of nature, sustainability, public trust,

and climate change. They maintain that constitutionalizing the rights of nature is “part of a growing global movement highlighting the importance of the natural environment for its own sake and as a whole, rather than as an aggregation of resources to be harnessed by humans for various purposes.”¹⁰⁰⁵ They view it as one of the most promising forms of governance because it addresses the inadequacies in Western conceptions of development based upon the dominance of nature by human beings, the exploitation of private property rights, and a false notion of sustainability.

4. The Need for Alternative Conceptions of Global Economic Governance

Kotzé argues that the current global environmental governance regime requires urgent reform.¹⁰⁰⁶ In *The Conceptual Contours of Environmental Constitutionalism* he analyses the ways in which constitutional features may be “thin,” operating as a framework for governance, or “thick” and value-laden, and provide the components necessary for rights-based constitutionalism.¹⁰⁰⁷ Environmental constitutionalism exhibits both thin and thick features, but is most

1004 Friends of the Earth, ‘A synthesis of literature regarding the governance of the commons together with the identification of interventions to increase the likelihood of sustainable management of the global commons’ 4 </www.foe.co.uk/sites/default/files/downloads/protecting_the_global_commons.pdf> accessed 1 August 2016.

1005 James May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press 2014) 255. See Christopher Stone’s seminal work *Should Trees Have Standing: Law, Morality, and the Environment* (Oxford University Press 2010). On the possibility of a global environmental right, see Stephen Turner, n 2 and his chapter in this volume.

1006 Louis Kotzé, ‘Arguing Global Environmental Constitutionalism’ (2012) *Transnational Environmental Law* (1)1 200. See also Louis Kotzé, *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar 2012).

1007 Louis Kotzé, ‘The Conceptual Contours of Environmental Constitutionalism’ (2015) *Widener Law Review* 21 187.

effective when it provides a “thick” right to a healthy environment. He argues that global environmental constitutionalism is a means of incorporating its normative aspects “into existing domestic and global regulatory arrangements that seek to mediate the human-environment interface.” It embodies a “transformative approach that relies on constitutions to provide for the architecture of environmental governance, whereupon it then acts to improve environmental protection through various constitutional features such as fundamental rights and duties, principles of environmental governance, the rule of law and endearing aspirational values.” Edenhofer et al. view the problem of global climate policy as the transformation of the governance of the atmosphere from an open-access into a global commons regime.¹⁰⁰⁸

Earth jurisprudence and wild law are emergent legal theories that seek to redefine the legal relationship between human and non-human entities and to develop biocentric law capable of protecting the integrity and health of ecosystems. The goal of Earth jurisprudence is a “non-anthropocentric” earth justice in which the rights of nature are given equal, if not more, weight than human rights. It is predicated upon the view that human beings have an ethical responsibility as stewards to prevent

activities which harm the planet and the idea that there is an intimate connection in nature between all animate and inanimate entities that determines physical laws and therefore underpins positive laws as well. Earth jurisprudence seeks to realign human governance systems by developing coherent new theories or philosophies. In Cullinan’s view, this follows from the fact that people are an integral part of the Earth system, and this existential unity means that we are embedded in and influenced by the larger Earth community. The way we govern ourselves must therefore of necessity have as its “purpose to ensure that the pursuit of human well-being does not undermine the integrity of the Earth, which is the source of our well-being” Only by creating a jurisprudence that reflects this reality, he argues, “will we be able to begin a comprehensive transformation of our societies and legal systems.” To this end, it is necessary to establish “wild” laws that foster rather than stifle creativity and the human connection to nature.¹⁰⁰⁹

The most well-known alternative to Western forms of global environmental governance has emerged from Latin America. “*Buen Vivir*” - living well - is based upon Andean cosmovisions that provide an alternative conception of development. It eschews anthropocentrism, the society/nature dualism, and ideas of linear progress central to Western epistemologies, and

1008 Ottmar Edenhofer, Christian Flachslund, Michael Jakob, and Kai Lessmann, ‘The Atmosphere as a Global Commons – Challenges for International Cooperation and Governance’ Discussion Paper 2013-58 (Harvard Project on Climate Agreements, August 2013).

1009 Cormac Cullinan, ‘A History of Wild Law’ in Peter Burdon (ed) Exploring Wild Law: The Philosophy of Earth Jurisprudence (Wakefield Press 2011) 170-171. On the essential wildness of nature and the environment, see Steven Vogel, Thinking Like a Mall: Environmental Philosophy After the End of Nature (MIT Press 2015).



focuses instead on the well-being of people and nature through co-dependency. It privileges traditional forms of knowledge without being limited to them, and draws on progressive thought that is critical of modernity such as biocentric environmentalism and ecofeminism. “*Buen Vivir* is a set of attempts to build other social and economic orders that break free of the bounds imposed by Modernity.”¹⁰¹⁰ The aim of *buen vivir* is to move beyond the antagonistic relationship between human beings and nature in which the former seek to subordinate the latter without any regard for its intrinsic value for the purposes of capitalist consumption and extractive development.

An ecocentric conception of global environmental governance is outlined in the *People's Agreement of Cochabamba*, which calls for a paradigm shift leading to Mother Earth (*Pachamama*) being recognized as the source of life for a new system of global environmental governance based inter alia on the principles of harmony and balance among all and with all things; complementarity, solidarity, and equality; people in harmony with nature; and the recognition of human beings for what they are, not what they own.¹⁰¹¹ The Preamble reads:

We confront the terminal crisis of a civilizing model that is patriarchal and based on the submission and destruction of human beings and nature that accelerated since the industrial revolution.

The capitalist system has imposed on us a logic of competition, progress and limitless growth. This regime of production and consumption seeks profit without limits, separating human beings from nature and imposing a logic of domination upon nature, transforming everything into commodities: water, earth, the human genome, ancestral cultures, biodiversity, justice, ethics, the rights of peoples, and life itself.¹⁰¹²

Under capitalism, Mother Earth is converted into a source of raw materials, and human beings into consumers and a means of production, into people that are seen as valuable only for what they own, and not for what they are.

Several constitutions, including those of Germany and Lithuania, contain provisions protecting nature but do not confer rights on it. In contrast, biocentric environmental constitutionalism that recognizes the rights of nature has emerged in Latin America. Bolivia has a

¹⁰¹⁰ Gudynas n 4 35.

¹⁰¹¹ People's Agreement of Cochabamba, World People's Conference on Climate Change and the Rights of Mother Earth, 22 April, Cochabamba, Bolivia.

¹⁰¹² Bodansky points out that multilateral environmental agreements do not possess a global constitutional nature and that the distinctive features of international environmental law “do not amount to a constitution in any meaningful sense of the term.” Daniel Bodansky, ‘Is there an International Environmental Constitution?’ (2009) *Indiana Journal of Global Legal Studies* 16 579.

framework law recognizing the rights of nature and Ecuador's constitution states: "Nature, or Pachamama, where life is reproduced and created, has the right to integral respect for her existence, her maintenance, and for the regeneration of her vital cycles, structure, functions, and evolutionary processes."¹⁰¹³ In a chapter devoted exclusively to the rights of nature, the constitution grants public authority to each "person, community, people, or nationality" to exercise public authority to enforce the right.¹⁰¹⁴ *Wheeler c. Director de la Procuraduría General Del Estado de Loja* was the first case anywhere to vindicate the Rights of Nature. The suit was filed in 2011 for permitting a road expansion project that narrowed the width of the Río Vilcabamba and doubled its speed due to the dumping of debris. The project went ahead without an environmental impact assessment or the consent of the local community. Two local residents claimed that the rights of the river had been violated rather than conventional property rights. In setting an important precedent, the court confirmed that the burden of proof lay on the defendant to prove that no damage had been caused to nature and held that "the rights of nature trump other constitutional rights because in its view a 'healthy' environment is more important, and more pervasive, than any other constitutional right" (para. 5).

Unlike in Bolivia, where it functions more as an ethical principle, *Buen Vivir* was incorporated into the new Constitution of Ecuador in 2008 as a set of rights to health, shelter, education, and food as well as the innovative inclusion of the rights of Nature "that should be fulfilled in an intercultural framework, respecting their diversity, and in a harmonious coexistence with Nature."¹⁰¹⁵

The Bolivian formulation offers more options for cultural diversity than the Ecuadorian, but does not include *Buen Vivir* as a right. The Ecuadorian text clearly stated that development in line with *Buen Vivir* is required to fulfil the rights of Nature or *Pachamama* (with a biocentric posture that recognizes intrinsic values in the environment). The Bolivian text does not recognize intrinsic values in Nature, and the environment is presented within the classical third generation human rights (quality of life and protection of the environment).¹⁰¹⁶

The Preamble of the Constitution refers to a "new form of social coexistence that respects diversity and is in harmony with nature in order to attain good living, the *sumak kawsay*." Nature becomes a legal subject rather than an object of exploitation. Article 71 states that nature or "*Pachamama*, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure,

1013 Constitución Política de la República del Ecuador, title II, ch. 7, arts. 71-74.

1014 Article 71. On Ecuadorian case law arising from chapter 7 of the constitution, see May and Daly n 22 257-260.

1015 Gudynas, E. 'Buen Vivir: Today's Tomorrow' (2011) *Development* 54(4) 443.

1016 *ibid*.



functions and evolutionary processes". Article 72 asserts that "nature has the right to restoration" and article 83 states that Ecuadorians have a constitutional obligation to respect the rights of nature.

Attempting to use the rights of nature has inevitably proved to be contradictory due to the tension between economic growth and environmental protection at the centre of all conceptions of development. Manzano argues that, far from a paradigm shift away from Western-style developmentalism, environmental governance has not been strengthened, and equating the "rights of nature" with the "rights of man" invariably results in the subordination of the former to economic rights. He illustrates this claim by analyzing numerous cases through which, he argues; the judiciary has provided a veneer of environmental protection while protecting people rather than ecosystems.¹⁰¹⁷ As Manzano observes:

Ecuador cannot escape from taking part in the process of capitalist accumulation, because it requires foreign investment and foreign consumption of its raw materials to provide economic opportunity for Ecuadorans. In this way the Constitution reinforces extractive development and economic dependence.¹⁰¹⁸

Manzano argues that enshrining the rights of nature in the constitution is misguided because it threatens to disconnect human beings from their responsibility of stewardship towards the nation. Instead, he argues, we should limit human rights according to the availability and vulnerability of natural resources. He concludes that the rights-based approach in the Ecuadorian Constitution has failed, and that:

the paradigm of care, responsibility and stewardship demands something more than placing nature's rights on a par with the multitude of human rights. In fact, if respect for nature is to limit human behavior, then a holistic transformation of the perspective on the place of human beings within nature must take place so that the goals of humanity cease to be absolute and all other things are no longer regarded as existing solely to meet human needs.¹⁰¹⁹

Iorns Magallanes believes that protecting indigenous rights, both constitutionally and in other ways, is a precondition for protecting the environment, and that upholding indigenous rights is a way of protecting the human rights of everyone as well as the environment.¹⁰²⁰ She shows that it is possible for Western legal systems to confer and protect the rights of

1017 Jordi Jaria I Manzano, 'The rights of nature in Ecuador: an opportunity to reflect on society, law and environment' in Robert V. Percival, Jolene Lin and William Piermattei (eds) *Global Environmental Law at a Crossroads* (Edward Elgar, Cheltenham 2014).

1018 Manzano n 35 54.

1019 Manzano n 35 61-62.

1020 Catherin Iorns Magallanes, 'Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment' (2015) *Widener Law Review* 21.

nature through innovative and imaginative approaches that incorporate the onto-epistemologies of indigenous peoples. She highlights the differences between anthropocentric Western thinking, which emphasizes the separation of human beings and nature, endless growth, consumption, possessive individualism and progress, and indigenous Maori cosmology, which views people as an interdependent part of nature. She describes how a kind of constitutional cosmology has informed New Zealand legislation about natural resources affecting Maori in special arrangements that have “recognized in law the Maori view that the natural environment should be treated more as a person - indeed, as a relative - rather than simply as a resource.” She argues that these “illustrate ways in which the law can be used to implement and incorporate indigenous cosmologies with a Western society and legal system and better protect the natural environment in the process,” resulting in a healthier environment for everyone. She believes that courts in New Zealand have shown just how constitutionalism can promote environmental norms and protection by advancing indigenous rights.¹⁰²¹ These legal changes have occurred to protect human rights rather than the environment (but for the Maori these are inextricably linked) and “do not fit squarely within the standard environmental protection

paradigm, whereby nature is protected apart from people.” Instead, they reflect “the indigenous cosmological view of people as part of nature, not separate nor above it. Indeed, the legal recognition of personality in these examples also recognizes the Maori cosmology of ancestral nature and the indivisibility of the physical and metaphysical elements of the natural world.”

Weston and Bollier also propose an alternative conception of global environmental governance. They argue that effective and just environmental protection can be achieved through commons- and rights-based ecological governance, which they call green governance.¹⁰²² Human rights and the rights of nature are, they argue, implicit in ecological commons governance. The centerpiece of their green governance is the rigorous application of a reconceptualized human right to a clean and healthy environment (or a right to environment) designed to promote environmental well-being while meeting the basic needs of all people. Like Bosselmann, they call for a shift from anthropocentrism to biocentrism, for an end to self-defeating and counterproductive growth fetishism, and a move away from the neoliberal alliance between State and Market (‘State/Market’) primarily responsible for the current, failed paradigm of ecological

¹⁰²¹ Iorns Magallanes uses the examples of the judicial recognition of agreements that recognise the legal personalities of the Whanganui River and Te Urewera forest: “A fundamental – though perhaps less obvious – aspect underlying these examples is the importance placed on the intrinsic value of nature itself.”

¹⁰²² Burns H. Weston and David Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge University Press 2013). They cite the work of Elinor Ostrom, who identified principles of effective commons governance at 147ff.



governance. This will occur through the emergence of Vernacular Law in the form of organic rule, norms and sanctions. This is an approach that could productively be extended to all ecosystems. One example is Weston and Bollier's argument that commons offer an alternative form of environmental governance favorable to both human rights and the rights of nature if both State and Vernacular law and practice are remodeled to mutually reinforce each other.¹⁰²³ They propose a *Universal Covenant Affirming a Human Right to Commons- and Rights-based Governance of Earth's Natural Wealth and Resources*.

Another possibility is a dedicated treaty on sustainability and the rights of nature, although the UN Special Rapporteur on Human Rights and the Environment, John Knox, opposes it at this stage because although "a declaration could certainly have the benefits its proponents describe, it would also become a central point of attention for the period of its negotiation, which might distract from the continuing development of the norms at the national, regional and international levels ... [a]t this point in their evolution, some issues might better be resolved through their continued consideration by a variety of human rights bodies, rather than be addressed in an intergovernmental negotiation."¹⁰²⁴

Knox argues that it is preferable that states should continue constitutionalizing the right to a healthy environment or at least "strong environmental laws ensuring, among other things, rights to information, participation and remedy" and establishing dedicated environmental courts. The implementation of the Sustainable Development Goals is "highly important to the promotion of human rights and environmental protection."¹⁰²⁶ The problem with this approach is twofold. First, despite the fact that environmental rights are protected in more than 165 of the 193 states in the UN through articles promoting environmental stewardship, the right to a safe or clean and healthy environment or by ensuring some level of public participation in environmental decision making, environmental degradation and ecosystem destruction continues unabated.¹⁰²⁷

Environmental rights and values are more widespread than the protections they envisage. Second, such a right is not the best way of dealing with environmental pollution from greenhouse gases and is therefore inappropriate as a means of dealing with climate change.

These alternative conceptions of global environmental governance, which are gaining strength in Latin America, New

1023 Weston and Bollier n 40 179.

1024 UN Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, (A/HRC/31/53, 28 December 2015) 4.

1025 Ibid. 12.

1026 Ibid. 13.

1027 James R May, 'Introduction: Symposium on Global Environmental Constitutionalism: An Introduction and Overview Widener Law Review Symposium Issue 2015' (2015) Widener Law Review 21 139.

Zealand and elsewhere, demonstrate that it is possible to use environmental law to protect ecosystems. However, this is possible only if the law is matched by sufficient political will to subordinate economic imperatives to the needs of nature in pursuit of genuine sustainability rather than sustainable development, which merely fosters the illusion of endless growth on a finite planet.

Bosselman correctly argues that global environmental constitutionalism has a coherence lacking in international environmental law but accepts that it is not yet clear whether it is capable of protecting the environment and human rights. International comparison shows that:

the process of “greening” of national constitutions and international law is slow, incomplete, sketchy, and not following an overarching objective. There is, as of now, no global consensus on the importance of sustainability similarly to constitutionalized values such as human rights, democracy, or peace. Likewise, policy objectives tend to focus on economic prosperity and largely ignore its dependence on sustainability.¹⁰²⁸

Facing planetary environmental and climate crises, effective global environmental governance is urgent but some way off and time is fast running out. It is far from hyperbolic to argue that humanity's future depends on our ability to govern the environment effectively in the interests of all species and the planet itself.

¹⁰²⁸ Bosselman n 5 179.



Sustainability and Global Environmental Constitutionalism

James R. May

1. Introduction

At first blush, the relationship between sustainability and environmental constitutionalism seems strained if not strange. Environmental sustainability represents a there-and-then perspective that promotes the idea that present lives in being should consume natural resources at a rate and in a way so as to preserve comparable opportunities for future generations; in other words, the Native American proverb that “We do not inherit the Earth from our ancestors: we borrow it from our children.”¹⁰²⁹

‘Sustainability’¹⁰³⁰ has witnessed an astonishing pattern of development. Since the concept was first promoted as a single-sentence principle of international law at the Stockholm Conference in 1972, it is now a common if not ubiquitous feature in legal expressions at the international, national and subnational levels, culminating in 17 Sustainable Development Goals the United Nations (UN) established in 2015, to achieve by 2030.¹⁰³¹

Sustainability is a central feature in international and domestic relations. It has long served as a principle of international environmental law, including as an interpretive principle in international accords¹⁰³² and with international tribunals resolving environmental disputes.¹⁰³³

¹⁰²⁹ This proverb, along with some close variants, is attributed to several sources, including Chief Seattle, Antoine de St. Exupery, Jane Goodall, Ralph Waldo Emerson and David Bower, among others. See Giga Quotes. Earth. <http://www.giga-usa.com/quotes/topics/earth_t001.htm>

¹⁰³⁰ This essay treats ‘sustainability’ and ‘sustainable development’ as synonyms.

¹⁰³¹ See generally, May, James R. & Kelly, J. Patrick, *The Environment and International Society: Issues, Concepts, and Context*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* (Shawkat Alam, Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury and Erika J. Techera, Eds, Oxford, 2012).

¹⁰³² See, e.g., R.K.L. Panjabi. *The Earth Summit at Rio: Politics, Economics, and the Environment*. New England: Northeastern Univ. Press, 1997, 17 (describing how the Earth Summit in Rio led to a new global consciousness of sustainability in treaty making).

¹⁰³³ See Roslyn Higgins, *Natural Resources in the Case Law of the International Court*, in *International Law and Sustainable Development* 87, 111 (Alan Boyle & David Freestone, eds., 1999) (using the International Court of Justice to highlight environmental sustainability in international courts and other arenas).

Environmental constitutionalism, on the other hand, for the most part, addresses the here and now, the challenges that human beings and the environment face on a daily basis, including access to environmental dignity and quality, natural resources, fresh water, and to information, participation and justice in pressing environmental matters, in the ways explored elsewhere¹⁰³⁴ and throughout this book.¹⁰³⁵

Much like sustainability, environmental constitutionalism has taken on a life of its own, and is now a common feature in most national constitutional systems. The vast majority of the nations in the world have national constitutions that address environmental matters.¹⁰³⁶ About

one-half of the world's constitutions guarantee a substantive right to a clean or quality or healthy environment explicitly or implicitly, and about half of those also guarantee procedural rights to information, participation or access to justice in environmental matters. Nearly 70 constitutions specify that individuals have responsibilities or duties to protect the environment and others include directive principles of state policy.¹⁰³⁷ Other constitutions address specific environmental endowments including water, flora, and fauna, while others define the environment in certain ways, including as a public trust.¹⁰³⁸ Moreover, some state constitutions in federal systems – including Germany, Brazil, and the United States – include environmental

1034 See generally, James R. May & Erin Daly, *Global Environmental Constitutionalism* (Cambridge Press 2015); James R. May & Erin Daly, *Environmental Constitutionalism: A Research Compendium* (Edward Elgar 2016); Symposium on Global Environmental Constitutionalism: An Introduction and Overview, 21 *Widener L. Rev.* 139 (2015); Kotze, Louis J. The Conceptual Contours of Environmental Constitutionalism, 21 *Widener L. Rev.* 187 (2015); James R. May & Erin Daly, *Robinson Township v. Pennsylvania: A Model for Environmental Constitutionalism*, 21 *Widener L. Rev.* 151 (2015); Erin Daly & James R. May, *Comparative Environmental Constitutionalism*, *Jindal Global Law Review* (Special issue on Environmental Law and Governance – Indian and International Perspectives) (2015); *Constitutional Directions in Procedural Environmental Rights*, 28 *Jrnl. Evtl. L. & Lit.* 101 (2014); James R. May & Erin Daly, *Environmental Rights and Liabilities*, 3 *Eur. J. Env. Lia.* 75 (2012); James R. May & Erin Daly, *New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide*, *IUCN Academy of Environmental Law E-Journal*, vol. 1, 2011, posted Feb. 22, 2011. See also, Boyd, David R. *The Right to a Healthy Environment: Revitalizing Canada's Constitution*. UBC Press, 2012: 65. See also Hiskes, Richard P. *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*. Cambridge University Press 2008; Hayward, Tim. *Constitutional Environmental Rights*. Oxford University Press, 2005.

1035 See generally, *Global Environmental Constitutionalism*.

1036 See generally, James R. May & Erin Daly, *Global Environmental Constitutionalism* (Cambridge Press 2015); James R. May & Erin Daly, *Environmental Constitutionalism: A Research Compendium* (Edward Elgar 2016); Symposium on Global Environmental Constitutionalism: An Introduction and Overview, 21 *Widener L. Rev.* 139 (2015); James R. May & Erin Daly, *Robinson Township v. Pennsylvania: A Model for Environmental Constitutionalism*, 21 *Widener L. Rev.* 151 (2015); Erin Daly & James R. May, *Comparative Environmental Constitutionalism*, *Jindal Global Law Review* (Special issue on Environmental Law and Governance – Indian and International Perspectives) (2015); *Constitutional Directions in Procedural Environmental Rights*, 28 *Jrnl. Evtl. L. & Lit.* 101 (2014); James R. May & Erin Daly, *Environmental Rights and Liabilities*, 3 *Eur. J. Env. Lia.* 75 (2012); James R. May & Erin Daly, *New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide*, *IUCN Academy of Environmental Law E-Journal*, vol. 1, 2011, posted Feb. 22, 2011. See also, Boyd, David R. *The Right to a Healthy Environment: Revitalizing Canada's Constitution*. UBC Press, 2012: 65. See also Hiskes, Richard P. *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*. Cambridge University Press 2008; Hayward, Tim. *Constitutional Environmental Rights*. Oxford University Press, 2005.

1037 See e.g. Benin Constitution Art 27: "Every person has the right to a healthy, satisfying, and lasting environment, and has the duty to defend it." Cameroon Constitution, Art. 55: "Everyone is obliged to preserve nature and prevent damages, as well as to be careful with removing natural riches." India Constitution, Art. 51A(g): "It shall be the duty of every citizen of India ... to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures."

1038 *Global Environmental Constitutionalism*, Chs. 7-10.



provisions, some of which are even more elaborate than their counterparts at the national level.¹⁰³⁹

Sustainability and environmental constitutionalism share a past, present and future. Like sustainability, environmental constitutionalism was arguably born at the Stockholm Conference in 1972, and has experienced a comparable if not divergent growth pattern.¹⁰⁴⁰ Surprisingly, sustainability has infiltrated constitutionalism around the globe. Presently, more than three-dozen countries incorporate sustainability in their constitutions by advancing ‘sustainable development,’ the interests of ‘future generations,’ or some combination of these themes.¹⁰⁴¹ These include Belgium (“pursue the objectives of sustainable development in its social, economic and environmental aspects”); Dominican Republic (“nonrenewable natural resources, can only be explored and exploited by individuals, under sustainable environmental criteria . . .” and provides for the protection of the environment “for the benefit of the present

and future generations ...”); France (“Care must be taken to safeguard the environment along with other fundamental interests of the Nation. In order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardize the ability of future generations and other peoples to meet their own needs ...”); Nepal (“provision shall be made for the protection of the forest, vegetation and biodiversity, its sustainable use and for equitable distribution of the benefit derived from it”); and, Uganda (“Parliament shall, by law, provide for measures intended—to manage the environment for sustainable development”). These constitutional provisions help bridge the gap left by international and domestic laws, even given the array of sustainability provisions already in existence.¹⁰⁴²

Sustainability and environmental constitutionalism also share a future in advancing environmental, social and economic equity in a variety of contexts, including dignity,¹⁰⁴³ human rights,¹⁰⁴⁴ climate change, access to and

1039 *ibid.*, Ch. 8.

1040 *ibid.*

1041 See May and Daly, *Global Environmental Constitutionalism* (Cambridge, 2015), Appendix E and associated text May, James R. and Daly, Erin, *Global Environmental Constitutionalism* (2015, Cambridge) (denoting role of sustainability in the development of international and national law, and analyzing constitutional provisions that embed sustainability from around the world); May, James R. ‘The North American Symposium on the Judiciary and Environmental Law: Constituting Fundamental Environmental Rights Worldwide.’ *Pace Environmental Law Review* 23 (2005/2006): 113, Appendix B (listing countries that have constitutionally entrenched environmental policies as a governing principles, some including sustainability).

1042 Ansari, Lekha Laxman and Abdul Haseeb. “The interface between TRIPS and CBD: efforts towards harmonization.” *Journal of International Trade Law and Policy* 11 (2012): 108-132.

1043 Daly & May, *Bridging Environmental and Dignity Rights*, 7.2 JHRE 160 (2016).

1044 See Knox J, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/28/61 (3 February 2015) at 11-12.

1045 May, James R. “Of Development, daVinci and Domestic Legislation: The Prospects for Sustainable Development in Asia and its Untapped Potential in the United States.” *Widener Law Symposium Journal* 3 (1998): 197

availability of fresh water,¹⁰⁴⁵ shale gas development,¹⁰⁴⁶ corporate practices, and higher education.¹⁰⁴⁷

This chapter examines the extent to which countries have incorporated sustainability constitutionally. Part One provides a brief taxonomy of sustainability in constitutionalism, and surveys provisions from the three-dozen or so countries that constitutionally incorporate sustainability and related concepts. Part Two discusses the potential that sustainability in constitutionalism has for advancing positive environmental outcomes.

2. The Taxonomy of Sustainability Constitutionalism

The concept of sustainability recently entered its fifth decade. In 1972, the Stockholm Declaration on the Human Environment was the first international instrument to recognize a principle of sustainability.¹⁰⁴⁸ Fifteen years later, the World Commission on Environment and Development released its pioneering study, *Our Common Future*,¹⁰⁴⁹ which defines 'sustainable development' as

'development . . . that . . . meets the needs of the present without compromising the ability of future generations to meet their own needs.'¹⁰⁵⁰

In 1992, the Earth Summit's Rio Declaration provided that sustainable development must 'respect the interests of all and protect the integrity of the global environmental and developmental system.'¹⁰⁵¹ The Rio Declaration's blueprint document, Agenda 21, provides that "integration of environment and development concerns . . . will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future."¹⁰⁵² Parties at the Earth Summit's 20th anniversary in 2012 (Rio +20) released a follow-up document, *The Future We Want*, which underscored the import of sustainability to promote peace and prosperity, and alleviate poverty.¹⁰⁵³

Most recently in September 2015, more than 190 nations of the UN General Assembly issued the 2030 Agenda for Sustainable Development, which describes sustainability's role as one to "Promote peaceful and inclusive societies for sustainable development, provide

1046 Dernbach, John C., and May, James R., *Shale Gas and the Future of Energy: Law and Policy for Sustainability* (2016, Edward Elgar) (suggesting laws and policies needed to ensure that shale gas development fosters transition to sustainability). Available at <http://www.e-elgar.com/shop/shale-gas-and-the-future-of-energy>.

1047 Dernbach

1048 "Stockholm Declaration on the Human Environment." 11 ILM 1416. 1972.

1049 World Commission on Environment and Development. *Our Common Future*. New York: Oxford Univ. Press, 1987.

1050 *ibid* at para. 8.

1051 "Rio Declaration on Environment and Development." 31 ILM 874. 1992.

1052 UN Conference on Environment and Development, Annex II. "Agenda 21: A Programme for Action for Sustainable Development." UN Doc A/Conf. 151/26. August 12, 1992. (Agenda 21).

1053 UN Conference on Sustainable Development. 'The Future We Want, A/CONF.216/L.1*.' June 20-22, 2012.



access to justice for all and build effective, accountable and inclusive institutions at all levels.”¹⁰⁵⁴ Effective January 1, 2016, the 2030 Agenda incorporates the UN’s 17 Sustainable Development Goals (SDGs), including reflecting human dignity; adapting to climate change; ensuring clean water, air and soil; reducing poverty; promoting gender equity; and respecting sovereignty, among other ambitious objectives, by 2030.¹⁰⁵⁵

Resort to sustainability as a governing norm has grown exponentially since the Earth Summit.¹⁰⁵⁶ Since then, sustainability has been regularly acknowledged by international accords,¹⁰⁵⁷ by the laws and regulations of nations,¹⁰⁵⁸ in local building codes,¹⁰⁵⁹ and in corporate mission statements and practices worldwide,¹⁰⁶⁰ as well as by some courts,¹⁰⁶¹ although not in the United States.¹⁰⁶²

Sustainability has also found footing in a growing number of national constitutions, either by advancing ‘sustainable development,’ ‘future generations,’ or some variation of these themes, outlined below.

A. ‘Sustainable Development’

Nearly 20 countries expressly recognize a constitutional goal of ‘sustainability’ or ‘sustainable development’, though most of these are in sections of the constitutions or written in language that indicates that they are not amenable to judicial enforcement.¹⁰⁶³ For example, Albania’s constitution proclaims that the state “aims to supplement private initiative and responsibility with: Rational exploitation of forests, waters, pastures and other natural resources on the basis of the principle of sustainable development.” Belgium’s

1054 See generally, <www.ceres.org> (detailing corporate sustainability practices worldwide).

1055 See <<https://sustainabledevelopment.un.org/topics>> (last visited September 6, 2016).

1056 Dernbach, John C. Agenda for a Sustainable America. Washington, D.C: ELI Press, Environmental Law Institute, 2009, 2-3.

1057 See, e.g., R.K.L. Panjabi. The Earth Summit at Rio: Politics, Economics, and the Environment. New England: Northeastern Univ. Press, 1997, 17 (describing how the Earth Summit in Rio led to a new global consciousness of sustainability in treaty making).

1058 See, e.g., Nelson, Antria. ‘Steering Sustainability: What, When, and Why’, in A. Nelson (ed.) Steering Sustainability in an Urbanizing World: Policy Practice and Performance. Ashgate Publishing Inc., 2007, 1, 2-3 (explaining the national policy and reform considerations behind urban sustainability); May, James R. ‘The North American Symposium on the Judiciary and Environmental Law: Constituting Fundamental Environmental Rights Worldwide.’ Pace Environmental Law Review 23 (2005/2006): 113, Appendix B (listing countries that have constitutionally entrenched environmental policies as a governing principles, some including sustainability).

1059 See, e.g., MacLaren, V. et al. “Engaging Local Communities in Environmental Protection with Competitiveness: Community Advisory Panels in Canada and the United States.” In Sustainability, Civil Society and International Governance, by J.J. Kirton and Peter Hajnal. Aldershot: Ashgate Publishing, 2006, 31, 36. (examining examples of Community Advisory Panels in the United States and Canada and how they affect sustainability in the communities).

1060 See, e.g., Biagiotti, Isabelle. “Emerging Corporate Actors in Environment and Trade Governance: New Vision and Challenge for Norm-setting Processes.” In Participation for Sustainability in Trade, by S. Thoyer and B. Martimort-Asso. Aldershot: Ashgate Publishing, 2007, 121, 122 (describing how global corporations are focusing more on environmental sustainability).

1061 Higgins, Rosalyn. “Natural Resources in the Case Law of the International Court.” In International Law and Sustainable Development: Past Achievements and Future Challenges, by Alan Boyle and David Freestone. Oxford: Oxford University Press, 1999, 87, 111 (using the International Court of Justice to highlight environmental sustainability in international courts and other arenas).

1062 May, James R. “Not at All: Environmental Sustainability in the Supreme Court.” Sustainable Dev. L. & Pol’y 10 (2009): 20.

1063 See Global Environmental Constitutionalism, Ch. 9, Appendix E.

constitution bespeaks a commitment to “pursue the objectives of sustainable development in its social, economic and environmental aspects.” Bolivia’s constitution states that “the Natural assets are of public importance and of strategic character for the sustainable development of the country.” Colombia’s constitution requires policy makers to “plan the handling and use of natural resources in order to guarantee their sustainable development...” Montenegro’s Preamble outlines its “conviction that the state is responsible for the preservation of nature, sound environment, sustainable development, [and] balanced development of all its region.” Nepal’s constitution provides that “provision shall be made for the protection of the forest, vegetation and biodiversity, its sustainable use and for equitable distribution of the benefit derived from it.” The constitution of Seychelles provides that the state will “ensure a sustainable socio-economic development of Seychelles by a judicious use and management of the resources of Seychelles.” Somalia’s constitution provides that “Land shall be held, used and managed in an equitable, efficient, productive, and sustainable manner.” Switzerland’s constitution contains a specific section entitled “Sustainable Development,” which provides that “The Confederation and the Cantons shall endeavor to achieve a balanced and sustainable relationship between nature and its capacity to renew itself and the demands placed on it by the

population.” The Ugandan constitution states that “Parliament shall, by law, provide for measures intended—to manage the environment for sustainable development.” The constitutions of Greece, Mozambique, Poland, Serbia, and Thailand also expressly require that environmental policy be developed in accordance with ‘sustainable development.’

B. ‘Future Generations’

Sustainability recognizes responsibilities owed to those who follow. The constitutions from about a dozen countries give at least a passing nod to ‘future generations.’¹⁰⁶⁴ For example, Andorra’s constitution directs policy makers to protect natural resources “for the sake of future generations.” Argentina’s constitution directs the state to manage resources for “a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations...” Armenia’s constitution requires that the state “pursue the environmental security policy for present and future generations.” Brazil’s declares that “The Government and the community have a duty to defend and to preserve the environment for present and future generations.” Ethiopia’s constitution provides that its natural resources are “a sacred trust for the benefit of present and succeeding generations.” Papua New Guinea’s constitution requires the state to hold environmental resources

¹⁰⁶⁴ See Global Environmental Constitutionalism, Ch. 9, Appendix E.



“in trust for future generations” and “for the benefit of future generations.” The constitutions of both Niger and Vanuatu provide for protection of the environment in the “interests of future generations.” Germany’s constitution expresses “its responsibility toward future generations.” Norway’s constitution directs that natural resources be “safeguarded for future generations.” The constitution of Iran provides for the “preservation of the environment, in which the present as well as the future generations have a right to flourishing social existence.” Lesotho’s lists a duty of the state to protect the environment “for the benefit of both present and future generations.”

C. ‘Sustainable Development’ and ‘Future Generations’

The strongest embodiment of environmental sustainability would seem to stem from those constitutions that promote sustainable development for the purpose of protecting the interests of future generations. The constitutions from about a dozen and one-half countries contain this sort of hybrid pronouncement.¹⁰⁶⁵ For example, Albania’s constitution bespeaks a “healthy and ecologically adequate environment for the present and future generations.” Mozambique’s requires the state, “[w]ith a view to guaranteeing the right to the environment within the framework of sustainable development... shall adopt policies aimed at guaranteeing the rational utilization of natural resources

and the safeguarding of their capacity to regenerate, ecological stability and the rights of future generations.” France’s amended constitution proclaims that “Care must be taken to safeguard the environment along with other fundamental interests of the Nation...In order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardize the ability of future generations and other peoples to meet their own needs...” Eritrea’s provides for state management of natural resources in a “sustainable manner” for “present and future generations.” The constitutions of Namibia and Swaziland provide for the protection of the environment and natural resources “on a sustainable basis” for the benefit of “present and future” citizens and generations. Qatar’s provides for protection of the environment “so as to achieve sustainable development for the generations to come.” The constitution of South Sudan provides that “Every person shall have the right to have the environment protected for the benefit of present and future generations, through appropriate legislative action and other measures that...secure ecologically sustainable development and use of natural resources...” Uganda’s provides that “The State shall promote sustainable development and public awareness of the need to manage land, air and water resources in a balanced and sustainable manner for the present and future generations.” In addition, the constitutions of Angola, Bhutan, Georgia, Guyana,

¹⁰⁶⁵ *ibid.*

Malawi, Maldives, Sweden, East Timor, and Zambia provide for the “sustainable development” of environmental resources in the interests of “future generations.” One might also include South Africa’s here.

The constitutions of some countries require that specific resources be developed with future generations in mind. For example, the Dominican Republic provides that “nonrenewable natural resources, can only be explored and exploited by individuals, under sustainable environmental criteria...” and provides for the protection of the environment “for the benefit of the present and future generations.” The Dominican Republic is the only country on the planet with a constitution to address sustainability, future generations, and climate change.

3. The Potential of Sustainability Constitutionalism

The incorporation of sustainability into domestic constitutions has great potential to advance both sustainability and constitutionalism. Ansari, for one, has examined the relationship among sustainable management, the utilization of the environment, and the constitutional safeguards of environmental rights. He

notes how constitutional provisions help bridge the gap left by international and domestic laws, even given the array of sustainability provisions already in existence.¹⁰⁶⁶ Even though the vast majority of these provisions create no judicially enforceable rights, they nonetheless affirm national values of environmental sustainability to which courts and others may advert.

The principal strength – and some would say weakness – of ‘sustainability’ is its wide applicability. It can mean many different things in many different contexts. Sustainability principles are shape-shifters, adaptive to most environmental decision making, including water and air quality, species conservation, and national environmental policy in the United States and around the globe.¹⁰⁶⁷ But when used appropriately, Dernbach posits that sustainability can advance passing along an environment that is as suitable for existence as what was inherited; a promise to future generations of opportunity, wealth, satisfaction, or peace; optimal sustained yields of agriculture, animals or resources; continued employment or employability; or economic development.¹⁰⁶⁸

Sustainability constitutionalism can still serve to advance normative objectives in specific ways, even in countries lacking express constitutional incorporation. For

¹⁰⁶⁶ Ansari, Lekha Laxman and Abdul Haseeb. “The interface between TRIPS and CBD: efforts towards harmonization.” *Journal of International Trade Law and Policy* 11 (2012): 108-132.

¹⁰⁶⁷ See generally, *Ibid.* James R. May, *Of Development, daVinci and Domestic Legislation: The Prospects for Sustainable Development in Asia and its Untapped Potential in the United States*, 3 *Widener L. Symp. J.* 197 (1998).

¹⁰⁶⁸ Dernbach, John. *Stumbling Toward Sustainability*. Environmental Law Institute, 2003.



example, laws requiring environmental impact assessments (EIA) come closest to advancing sustainability as a legal prerogative. An EIA is the process whereby an agency evaluates the environmental impacts of a proposed action, determines which impacts are unavoidable, and then provides for planning to avoid, mitigate or compensate for them. In the United States for example, EIAs are required for certain types of federal and state actions. At the federal level, the National Environmental Policy Act (NEPA)¹⁰⁶⁹ is intended to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.” NEPA has promoted sustainability in wide and vast, if often overlooked, ways.

EIA is not solely a phenomenon at the federal level in the United States as embodied in NEPA. In fact, a half-dozen states – including New York and New Jersey – have adopted what are known as “little NEPAs” to address state agency actions that may affect sustainability. Moreover, federal and pollution control laws – such as the Clean Air Act, Clean

Water Act, and Resource Conservation and Recovery Act – and their state analogues, advance many sustainability goals.

The elasticity of the concept of sustainability can frustrate implementation and enforcement as a legal construct. But because it contains no limiting principle or metrics, its potential application across and even within judicial cultures may be varied and even inconsistent. There is very little jurisprudence applying constitutionally embedded provisions regarding sustainability and related provisions. For example, more than four decades removed from Stockholm, the United States Supreme Court—and no member of it—has yet to recognize or even acknowledge the concept of sustainability. Since Stockholm, the United States Supreme Court has decided more than 4,000 cases, including more than 300 involving environmental matters.¹⁰⁷⁰ Yet the word “sustainability” appears not at all before the Court in any majority, concurring or dissenting opinion.¹⁰⁷¹

Sustainability stands very little chance of being taken seriously by the current Supreme Court. Sustainability is a guiding principle, not a constitutionally enshrined doctrine, and it is not readily shaped into a traditional legal case

1069 42 U.S.C. § 4321 et seq., (“NEPA”).

1070 See Lazarus, Richard J. “Restoring What’s Environmental About Environmental Law in the Supreme Court.” *UCLA L. Rev.* 47 (2000): 703, 708 (estimating the Court decided more than 240 environmental law cases between 1969 and 2000); see also, May, James R. “The Intersection of Constitutional Law and Environmental Litigation.” In *Environmental Litigation: Law and Strategy*, by Cary R. Perlman. ABA, 2009, 359 (number approaching 300); Glicksman, James R. May and Robert L. “Justice Rehnquist and the Dismantling of Environmental Law” *Envtl. L. Rep.* 36 (2006): 10585 (2006) (number approaching 300).

1071 May, James R. “Not at All: Environmental Sustainability in the Supreme Court.” *Sustainable Dev. L. & Pol’y* 10 (2009): 20.

or controversy. No United States law requires or even recognizes sustainability, and the United States has not ratified an international treaty that does so either. Moreover, no member of the Court studied environmental law. None of them has much if any practical experience with environmental law in general, and sustainability in particular. Few Supreme Court justices have held elected political office, and few have regulatory experience that would sensitize them to environmental concerns and the complexities and challenges of sustainability. Indeed, most of the current Court's legal experience has been predominantly on the business or "development" side of the sustainable development equation. Surprisingly, sustainability—even as a governing principle—has not managed to capture the imagination of litigants, who seldom if ever invoke sustainability in pleadings, briefs, and oral arguments.¹⁰⁷² The experience in the United States is typical: lacking constitutional recognition, sustainability has not yet triggered juridical engagement.

While South Africa's constitution embraced sustainable development in 1996, the

provision has had little practical effect.¹⁰⁷³ Likewise, while Section 225 of the Brazilian constitution requires that governmental policies promote ecologically sustainable development, apex courts there rarely enforce this provision.¹⁰⁷⁴ On the other hand, sustainability has earned a foothold with some international tribunals.¹⁰⁷⁵ Yet, these novel provisions hardly seem to register in everyday decision making in environmental matters. Two decades after the end of apartheid, the provision's constitutional or normative status is unclear. Social striation, economic disparity, and despoliation of natural resources in South Africa accentuate the difficulty of breathing life into the concept of sustainable development. As Kotzé reports, the country's Constitutional Court hasn't engaged the provision so as to define what it means, who can enforce it, to whom it applies, what remedies might redress infractions, or what role sustainable development could play in the broader environmental constitutionalism paradigm.¹⁰⁷⁶ The passing of President Mandela and the rise of corrupt elements in the present government will undoubtedly serve to place additional strain on the

¹⁰⁷² Based on a search of cases, briefs and transcripts of the search terms "sustainability," "sustainable development," "ecologically sustainable development," on Westlaw (last searched September 12, 2016), and on the U.S. Supreme Court data base, <<http://www.supremecourtus.gov/>> (last visited September 12, 2016).

¹⁰⁷³ See Kotzé, *Arguing Global Environmental Constitutionalism* 2012 1(1) *Transnational Environmental Law* 199-233; Kotzé *Sustainable Development and the Rule of Law for Nature: A Constitutional Reading in Voight C (ed) Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (CUP, 2013).

¹⁰⁷⁴ E.g., *Associação Nacional do Transporte de Cargas e Logística v. Governador do Estado de São Paulo*, S.T.F., ADPF 234 MC/DF, DJe 06.02.12 (Rel. Min. Marco Aurélio) (Braz.) (case brought by asbestos transporters against a state law on constitutional grounds).

¹⁰⁷⁵ Higgins, Rosalyn. "Natural Resources in the Case Law of the International Court." In *International Law and Sustainable Development: Past Achievements and Future Challenges*, by Alan Boyle and David Freestone. Oxford: Oxford University Press, 1999, 87, 111 (using the International Court of Justice to highlight environmental sustainability in international courts and other arenas).

¹⁰⁷⁶ See Kotzé, *Arguing Global Environmental Constitutionalism* 2012 1(1) *Transnational Environmental Law* 199-233; Kotzé *Sustainable Development and the Rule of Law for Nature: A Constitutional Reading in Voight C (ed) Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (CUP, 2013).





Sustainable Argan Oil Women's Cooperative, Morocco. Photo credit: © James R. May

implementation of cultural, social and economic rights, including environmental constitutionalism, in South Africa. And while Section 225 of the Brazilian constitution requires that governmental policies promote ecologically sustainable development, apex courts there rarely enforce this provision.¹⁰⁷⁷

Another leading (by way of lagging) example is the United States Supreme

Court. More than four decades removed from Stockholm, the Court—and no member of it—has yet to recognize or even acknowledge the concept of sustainability. Since Stockholm, the U.S. Supreme Court has decided more than 4,000 cases, including more than 300 involving environmental matters.¹⁰⁷⁸ Yet the word “sustainability” appears not at all before the Court in any majority, concurring or dissenting opinion.¹⁰⁷⁹

4. Conclusion

Sustainability and environmental constitutionalism emerged at roughly the same time, and have each experienced wide distribution in legal orders throughout the world. About 30 countries have incorporated sustainability constitutionally. The influence that these relatively young provisions will have, remains to be seen, although they hold potential for advancing both concepts and improving environmental outcomes.

¹⁰⁷⁷ E.g., Associação Nacional do Transporte de Cargas e Logística v. Governador do Estado de São Paulo, S.T.F., ADPF 234 MC/DF, DJe 06.02.12 (Rel. Min. Marco Aurélio) (Braz.) (case brought by asbestos transporters against a state law on constitutional grounds).

¹⁰⁷⁸ See Lazarus, Richard J. “Restoring What’s Environmental About Environmental Law in the Supreme Court.” *UCLA L. Rev.* 47 (2000): 703, 708 (estimating the Court decided more than 240 environmental law cases between 1969 and 2000); see also, May, James R. “The Intersection of Constitutional Law and Environmental Litigation.” In *Environmental Litigation: Law and Strategy*, by Cary R. Perlman. ABA, 2009, 359 (number approaching 300); Glicksman, James R. May and Robert L. “Justice Rehnquist and the Dismantling of Environmental Law” *Envtl. L. Rep.* 36 (2006): 10585 (2006) (number approaching 300).

¹⁰⁷⁹ May, James R. “Not at All: Environmental Sustainability in the Supreme Court.” *Sustainable Dev. L. & Pol’y* 10 (2009): 20.

Climate change mitigation in the African Union - differentiated responsibilities in the progressive realisation of human rights

Michelle Barnard

1. Introduction

The African Union (AU) is a continental union consisting of 54 member states with the common goal of fostering regional economic integration by means of regional cooperation on matters of common concern.¹⁰⁸⁰ Climate change is identified by the New Partnership for Africa Development (NEPAD) (2001) as one such matter of common concern, and further mandates regional action on mitigating the effects thereof.¹⁰⁸¹ In its 2007 report, the Intergovernmental Panel on Climate Change (IPCC) describes the vulnerability of the African continent by listing the various sectors which show specific sensitivity to climate change. These sectors include water, health, agriculture, ecosystems, and human settlements and infrastructure.¹⁰⁸²

While the aggregate AU contribution to global greenhouse gas (GHG) emissions is among the lowest globally, individual member states' levels of greenhouse gas emissions (GHG) vary extensively.¹⁰⁸³ South Africa, for instance, is the 13th highest GHG contributor globally with an output of 476 metric tons of carbon dioxide (CO₂) or equivalent (MtCO₂) while the Central African Republic only emits 0.3MtCO₂.¹⁰⁸⁴ Considering the discrepancy in the extent to which these two AU member states contribute to climate change, it stands to reason that their actions in mitigating the effects of climate change must differ proportionally. The foregoing statement speaks directly to the international environmental law principle of common but differentiated responsibilities and capabilities (CBDR-RC).

1080 The Treaty Establishing the African Economic Community (1992), article 4(1) and the Constitutive Act of the African Union (2000), article 3(j) - (l).

1081 New Partnership for Africa Development (2001), Paras 113, 114, 138 and 176.

1082 Intergovernmental Panel on Climate Change Fourth Assessment Report (2007) 436 – 440.

1083 Terry Barker, and others 'Technical Summary' in Bert Metz and others (eds.), *Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge, United Kingdom and New York 2007) 31.

1084 For more information on the national ghg emission levels of the global community visit <http://www.globalcarbonatlas.org/?q=en/emissions>.



This chapter discusses the following themes: the CBDR-RC principle in international law, and specifically the international climate change regime; climate change as an environmental and developmental challenge in the AU, and the content of the AU's climate change mitigation mandate; and the progressive realisation of human rights via differentiated mitigation responsibilities of AU member states.

Common but Differentiated Responsibilities and Capabilities:

A definition

The CBDR-RC principle, as originally stated in the text of the Rio Declaration (1992), reads:

“In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

Relying on this original definition of the CBDR-RC principle one sees that it includes two fundamental elements. The first concerns the common responsibility of States for the protection of the environment, or parts of it. The second concerns the need to take into account

each State's contribution to the evolution of a particular environmental challenge and its ability to prevent, reduce and control the threat. States therefore have common responsibilities to protect the environment, but the level of their responsibility in remedying a specific environmental challenge hinges upon the level to which they are responsible for said problem. The principle, therefore, provides for asymmetrical rights and obligations in relation to environmental rights and standards.

The impacts of climate change poses one of, if not the major challenge to the realisation of the African human rights to an adequate environment and development, as contained in articles 24 and 22 of the *African Charter on Human and Peoples' Rights* (1986). Mitigating these impacts via the progressive realisation of the above-mentioned rights places a continuing obligation on States to work towards the realisation of each right, as well as minimum core obligations imposed by the attempt at realisation. The foregoing leads to the following central assumption underpinning this research, namely the different contributions (GHG emissions) of countries to the global environmental challenge of climate change stands in direct correlation to the extent of their respective responsibilities to mitigate.

Two inter-related hypotheses linked to the stated assumption are:

- a. The different contributions (GHG emissions) of AU member states to climate change should stand in direct correlation to the extent to which each member state is responsible to mitigate; and
- b. Different mitigation obligations of AU member states should be seen to embody the content of each member states' minimum core obligation in progressively realizing the rights to development and environment

In expounding these hypotheses, this chapter discusses the following themes: the CBDR-RC principle in international law, and specifically the international climate change regime; climate change as an environmental and developmental challenge in the AU, and the content of the AU's climate change mitigation mandate; and the progressive realisation of human rights via differentiated mitigation responsibilities of AU member states.

Linking responsibility with contribution: a closer look at the normative development of the CBDR-RC principle within global climate change law

The normative content of the CBDR-RC principle can only truly be understood by considering the definitions afforded to it during its legal historical evolution. The mention of the CBDR-RC principle can be identified through the textual interpretation

of various multi-national treaties and instruments.¹⁰⁸⁵ It was accepted as an international environmental norm in 1992, with the drafting of the three binding international law instruments to result from the Rio Earth Summit. Undoubtedly one of the best examples of the CBDR-RC principle in action is in the global climate change legal regime. In the text of the *United Nations Framework Convention on Climate Change*, 1992 (UNFCCC), it is stated that parties should act to protect the climate system "on the basis of equality and in accordance with their common but differentiated responsibilities and respective capabilities." Similar language exists in the text of the *Kyoto Protocol* (1997) which clearly distinguishes between proposed goals for climate change mitigation for Annex I and non-Annex I countries. The bases for these distinctions being that developed States are better able to mitigate climate change, and also because of the levels of their contribution to climate change.

The UNFCCC seeks to address the disproportionality in terms of global 'climate change liability' (contribution to the environmental challenge of climate change) with regard to mitigation by noting that industrialized countries are the source of most past and current GHG emissions. It then lists the countries in Annex I to the UNFCCC and makes specific mention of the fact that these countries should therefore be expected to

¹⁰⁸⁵ Rio Declaration on Environment and Development (1992); United Nations Framework Convention on Climate Change (1992); and the Convention on Biological Diversity (1992).



do the most to cut emissions domestically (and, by implication, internationally). The UNFCCC therefore places the responsibility for global climate change mitigation squarely on the shoulders of the Annexed countries, and furthermore obliges them to financially assist non-Annexed countries in mitigation efforts. In the Kyoto Protocol, Annex I party countries are obligated to take on binding emission reduction targets in the form of Quantified Emission Limitation or Reduction Objectives (QUELROs) with 1990 emission levels being used as the baseline. During the first commitment period (2008 – 2012) the goal is to reduce GHG emissions to 5% under 1990 levels and, in the second commitment period (2013 – 2020), to reduce to 18% under 1990 level. The Protocol also prescribes three market based mitigation mechanisms, namely: Emissions Trading; Joint Implementation and the Clean Development Mechanism from which Annex I parties are obliged to choose. Non-Annex I countries are not obliged to implement national mitigation mechanisms; but if they voluntarily do so, it should take place in accordance with their economic, technical and scientific capabilities.

A particularly important aspect of the CBDR-RC principle is international assistance, including financial aid and technology transfer. As developed countries have played the greatest role in creating most global environmental problems, and have superior ability to address them, they are expected to

take the lead on tackling environmental problems. In addition to moving toward sustainable development on their own, developed countries are expected to provide financial, technological, and other assistance to help developing countries fulfil their international responsibilities. This aspect of the principle is highlighted by the Paris Agreement drafted at the 21st Conference of the Parties (COP) to the UNFCCC held in Paris in 2015.

Article 2 of the Agreement states: "This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances." The construction of the Paris Agreement definition of the CBDR-RC principle deviates to some extent from the Kyoto definition in the sense that the 1997 instrument refers to a list of Annexed or non-Annexed countries, while the 2015 Agreement instead refers to developed and developing nations. Another point of dissention is that the Kyoto Protocol placed mitigation responsibilities on only the Annex I (industrialized) countries, the Paris Agreement is very clear on the fact that both developed and developing countries have global mitigation responsibilities. The Paris Agreement therefore establishes global climate change mitigation as a common responsibility but, with reference to the differentiation between the two groups of countries, focuses strongly on the topic of climate financing. The Agreement is very

clear that differentiated responsibilities must be placed on developed countries to financially assist developing countries in reaching global and individual mitigation goals.

Climate change; mitigation and the principle of CBDR-RC in the AU - a cursory glance

From a cursory glance of the data on greenhouse gases, it is evident that Africa is virtually at the receiving end of global climate change and the impacts it is set to have, despite its relatively infinitesimal contribution to the world's greatest externality. The people of the continent are therefore veritable victims of the anthropogenic excesses of the historic emitters who, in temporal and spatial terms, are largely responsible for precipitating such an ominous state of affairs globally.¹⁰⁸⁷ Scientific evidence and scenarios projected by global climate experts acknowledge that Africa will bear the greatest brunt and suffer the most devastation caused by the world's largest externality, climate change. The natural resource based sectors (most notably agriculture, forestry and hydro-electric power), upon which most of the economies of African countries are dependent, are extremely vulnerable to climate change. Estimates are that the region will suffer a wide range of

detrimental environmental, social, and economic climate-related impacts. Climate change is already bringing about extreme weather events such as drought, floods, sea-level rise, storm surges, and others. The impacts generally foreseen include, but are not restricted to, reduced agricultural production, reduced fresh water availability, loss of biodiversity, increased food insecurity, increased health problems and increased migration.¹⁰⁸⁸

A fundamental issue of equity relating to climate change and Africa is that those least responsible for the problem of global climate change are most vulnerable to its impacts.¹⁰⁸⁹ Figure 1 below sets out in graphic detail the extent of the disproportionality characterizing global contribution (responsibility) to climate change versus the impacts felt.

It is very clear from the image above that those countries least responsible for climate change will in most instances carry the heaviest burden when it comes to the impacts of climate change - with Africa being one of the most prominent examples. The global image must, however, not be considered in isolation when applying the CBDR-RC principle to climate change mitigation. If this was to be the case, the classic application of the principle would lead to the recommendation that the most

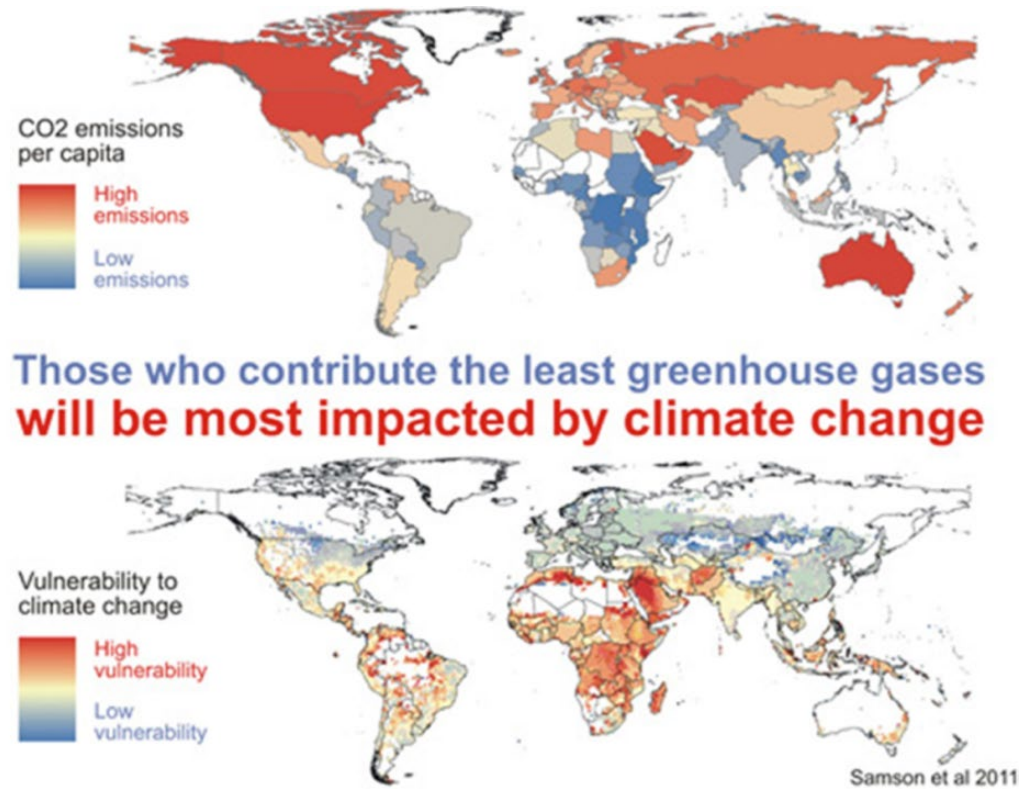
1086 http://unfccc.int/kyoto_protocol/items/2830.php

1087 Draft AU Strategy on climate change (2014) 8.

1088 Intergovernmental Panel on Climate Change Fourth Assessment Report (2007); Intergovernmental Panel on Climate Change Fifth Assessment Report (2011) and Intergovernmental Panel on Climate Change Sixth Assessment Report (2012).

1089 International Energy Agency Key World Energy Statistics from the IEA (Paris, France 2012)



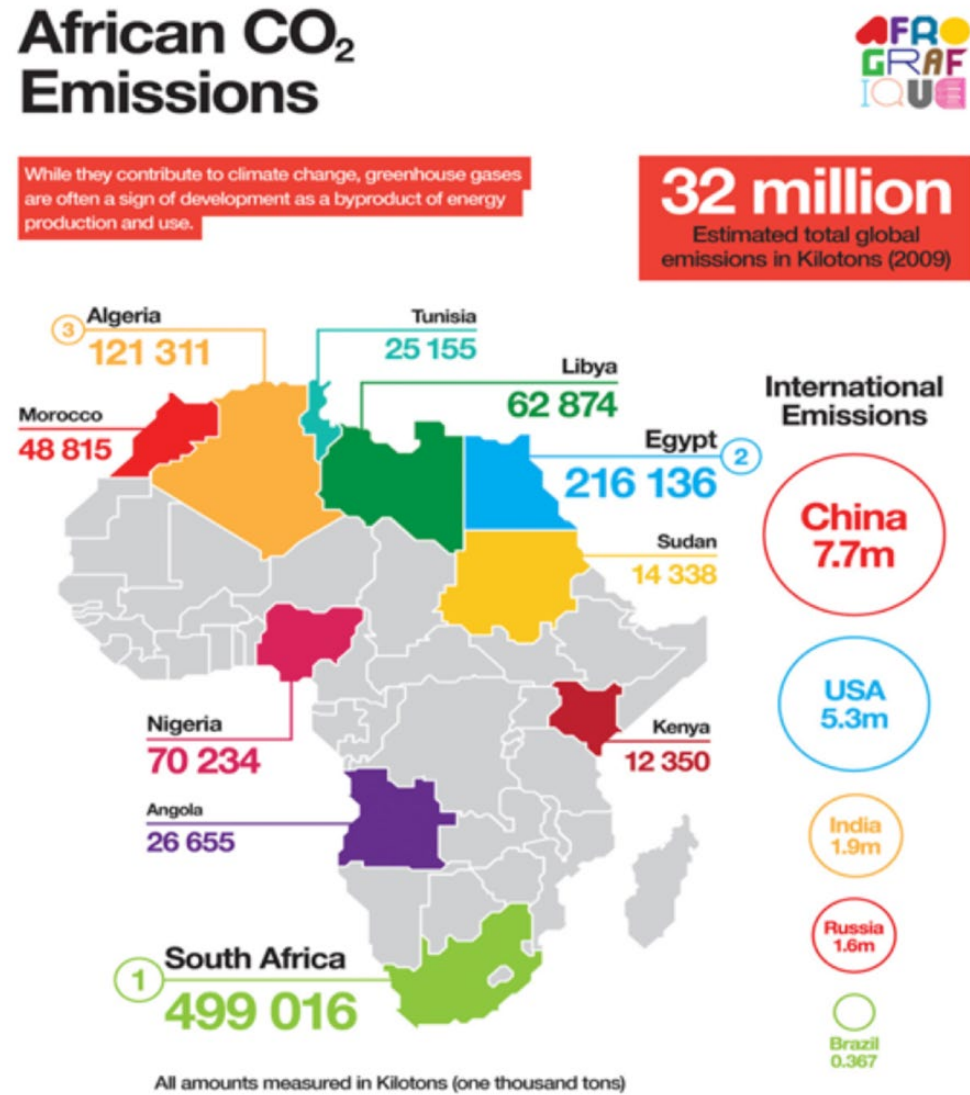
Figure 1: Global emission levels against levels of climate vulnerability¹⁰⁹⁰

responsible states should be held to a proportional mitigation responsibility or should contribute proportionally more to global climate finance. In essence this would mean that all AU member states are eligible for the same “discount” on global climate change mitigation, and the same access to global climate finance. This would not speak to the notion of CBDR-RC - especially considering the disproportionality at the regional level of AU members’ national contributions to global climate change as per Figure 2 below.

Within the AU legal regime, the CBDR-RC principle is mentioned in three climate change instruments, namely: the Algiers Declaration on Climate Change (2009); the African common position on climate change (2009); and the Draft AU Strategy on climate change (2014). All three instruments note the difference between developed and developing countries, and furthermore establish that developed states have mitigation commitments while developing states have voluntary mitigation actions. It must, however, be stated that the developed and developing states referred to in these documents

¹⁰⁹⁰ Jason Samson, and others ‘Geographic disparities and moral hazards in the predicted impacts of climate change on human populations’ (2011) *Global Ecology and Biogeography* 20 538.

Figure 2: National CO₂ emission levels of African states¹⁰⁹¹



Source
data.worldbank.org

afrographique.tumblr.com
Infographic designed by @lvanisawesome

pertain to the global distinction (as per the UNFCCC, Kyoto Protocol and Paris Agreement) and not the regional level.

AU member states differ substantially in terms of their respective contribution to climate change - a situation which correlates directly to the level of industrial

¹⁰⁹¹ <http://afrographique.tumblr.com/post/85612160539/infographic-depicting-the-largest-co2-emitting>



development in different member states. Coupled with this, AU member states also differ substantially in terms of their economic and institutional capabilities in mitigating climate change. South Africa is by far the largest contributor to climate change and should therefore (in terms of the CBDR-RC) shoulder the heaviest responsibility for driving mitigation action at the continental level. From the foregoing it is clear that AU member states are disproportionately responsible in terms of their contributions to global (and indeed regional) climate change - both in relation to one another as well as the global community. However small AU member states' contributions are, their mitigation responsibilities and its linkages with realizing human rights are clearly set out by a number of regional instruments. These will be discussed in the section below.

Common but differentiated climate change mitigation responsibilities and the progressive realisation of human rights in the AU

With regard to the topic of climate change mitigation as common responsibility and the realisation of African human rights, the text of African Commission on Human and Peoples' Rights (African Commission) Resolution on Climate Change and Human Rights and the Need to Study its Impact on Africa (2009) states that:

“the lack of human rights safeguards in various draft texts of the conventions under negotiation could put at risk the life, physical integrity and livelihood of the most vulnerable members of society notably isolated indigenous and local communities, women, and other vulnerable social groups.”

The African Commission refers to the right to development and the right to a satisfactory environment favorable to development contained in articles 22 and 24 of the African Charter on Human and Peoples' Rights (1986) (Banjul Charter) as legal bases for concerted efforts towards addressing climate change at the AU level. Article 22 (Right to Development) reads:

- (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
- (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 24 (Environmental Right) of the Banjul Charter holds that “All peoples shall have the right to a general satisfactory environment favorable to their development. In terms of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), progressive realisation entails that states:

“take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

Further, the principle of progressive realisation (as contained in the ICESCR) imposes both a continuing obligation on states to work towards the realisation of each right, as well as minimum core obligations imposed by the attempt at realisation. A lack of resources cannot justify inaction or indefinite postponement of measures to implement these rights. States must demonstrate that they are making every effort to improve the enjoyment of economic, social and cultural rights, even when resources are scarce. For example, irrespective of the resources available to it, a State should, as a matter of priority, seek to ensure that everyone has access to, at the very least, minimum levels of rights, and target programmes to protect the poor, the marginalized and the disadvantaged. Alston argues that each right must give rise to an absolute minimum entitlement, in the absence of

which a state party is to be considered to be in violation of [its] obligations.¹⁰⁹²

The primary impetus for the development of the ‘minimum core’ concept was to respond to the problem created by progressive realisation in relation to resources.¹⁰⁹³ Scholarly debate over how the core is intended to function has been mapped closely the shifting function ascribed to the core in international human rights law. These debates coalesce around whether the core refers to absolute or relative content (in relation to resources and national needs), or to state obligations in relation to such content. And if it refers to obligations, should these be of result or of conduct?¹⁰⁹⁴

For the purposes of the current discussion, the author takes minimum core obligations to refer to the resources available and national needs. The progressive realisation of fundamental rights at the AU level is restricted to the minimum core approach in terms of article 29(6) of the Banjul Charter which holds that “States parties have an obligation to ensure the satisfaction of, at the very least, the minimum essential levels of each of the economic, social and cultural rights contained in the Banjul Charter.” There is therefore a duty that rests upon AU member states to progressively realize

1092 Phillip Alston, ‘Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights’ (1987) *Human Rights Quarterly* 9 352–3.

1093 Lisa Forman, and others ‘Conceptualising minimum core obligations under the right to health: How should we define and implement the ‘morality of the depths’ (2016) *The International Journal of Human Rights* 5.

1094 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations (1990) para. 1.



the right to an adequate environment and development via climate change mitigation. Moreover, the CBDR-RC principle is directly applicable in this context. The extent to which each AU member state has contributed (by way of national GHG emissions) to climate change directly correlates to the minimum obligation (mitigation action), resting upon said states, to realize the rights to development and an adequate environment.

Conclusion

The disproportional contributions of AU member states to the environmental challenges posed by climate change should serve as directory which should direct their respective responsibilities in mitigating these environmental challenges. In this regard, the CBDR-RC principle should be applied to ascertain every AU member states' minimum core obligation when it comes to climate change mitigation. In practical terms this

means that existing scientific data on actual GHG emissions should be used to "rank" AU member states in order of their level of responsibility to mitigate. The application of the CBDR-RC principle in this manner should reflect its interpretation in the text of the Paris Agreement. This means that climate change mitigation is seen as a common duty resting on all AU member states - irrespective of level of responsibility or capability. However, the onus rests firmly on the more developed African member states to lead the way in mitigation by establishing national goals for emission reduction, and contributing financially and on a technology transfer level to the mitigation efforts of their less developed African neighbors. Reaching the common goal of realizing inalienable human rights via climate change mitigation in the AU rests equally upon the shoulders of all member states - how this goal is to be reached, however, is a burden divided along the lines of different capabilities.



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