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Constitutional Protection for Environmental Rights: The Benefits of Environmental Process.

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Abstract

More and more constitutions around the world - from Bangladesh to Bolivia, and from the Philippines to the countries of the EU -- are explicitly protecting environmental rights and the values of a clean and healthy environment. In many instances, environmental rights are recognized not as substantive entitlements (which would allow litigants to sue if the government polluted their rivers or clearcut their forests), but as procedural rights. Examples of procedural rights include imposing on governments the obligation to consult with communities before they take actions that will affect their environment or giving individuals the right to participate in governmental processes that will affect their environment. While procedural rights do not guarantee a particular outcome, they may be more effective in preventing environmental degradation. This paper assesses the efficacy of these procedural constitutional environmental protections and seeks to determine whether procedural rights can be more efficacious than substantive environmental rights.

Introduction

Dozens of national constitutions contain provisions aimed at protecting the environment and interests relating to the environment. In fact, most of the world's people live under constitutions that do protect the environment. These constitutional environmental rights (CERs) come in several different forms: they can be enforceable or not -- if not, they are matters of directive principle or principles of state policy that are designed to galvanize, though not compel, legislative activity to protect the environment. They can be express or implied from other guarantees, notably the right to life (Zia v. WAPDA (Pakistan)) the right to dignity (Abu Masad v. Water Commissioner (Israel)) or sometimes more specific rights such as the right to health. They can refer to just one part of the environment (such as water, flora, fauna, natural resources), or to the environment generally. Typically, they qualify the right with adjectives purporting to establish a goal, or at least a benchmark: the right may be to a healthful environment, or one that is clean, safe, adequate, harmonious, balanced, or otherwise desirable.

More and more constitutional systems from around the world include courts with the power (and developing habit) of judicial review; that is, the power to hold the government responsible for fulfilling its constitutional obligations. These courts have had widely varying reactions to the prospect of enforcing constitutional environmental rights. Some have shied away from the endeavour out of fear of treading too deeply and irreversibly into the waters of policy and line drawing that are more appropriately relegated to politically accountable legislatures. Others, however, have embraced the challenges, boldly and apparently fearlessly determining where the needs of industry and economic development end and the demands of sustainable environmental

protections prevail. Courts in Latin America and India and its neighbors have been particularly energetic in this regard. However, because the constitutional provisions are invariably so open-ended and potentially far-reaching, protecting the environment necessarily requires courts to engage in careful line-drawing and balancing, whether they admit it or not.

This paper analyzes this problem in the context of the two types of CERs that are most likely to be enforced by the courts: substantive and procedural environmental rights. Substantive environments are what we typically think of as environmental rights: they guarantee the right to quality environment. The very first constitution to protect environmental rights was Portugal's: "Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it," and it goes on to "charge the state" with fulfilling the obligation in eight specific ways. (Constitution of Portugal (1976) Art. 66). Colombia's constitution is representative of current constitutions: "Every person has the right to enjoy a healthy environment." (Constitution of Colombia (1991) Art. 79). Kenya's 2010 constitution provides slightly more elaboration on the same theme: "Every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations…" (Constitution of Kenya (2010) Art. 42(a)).

On the other hand, procedural environmental rights don't guarantee any particular level of environmental protection. Rather, following the template set in the Aarhus Convention, most focus on three pillars of procedural rights: access to information, participation in decision making, and access to justice. The French constitutional bloc incorporates the 2004 Charter of the Environment which guarantees that "every person has the right, under conditions and limits defined by law, to access information relative to the environment that is held by government authorities and to participate in the development of public decisions having an impact on the environment."(Charte de l'environment (2004), art. 7). In many constitutions, procedural and substantive rights are conjoined. Brazil's constitution, for instance, protects the substantive right "to an ecologically balanced environment" but also requires the government to "ensure the effectiveness of this right" including the obligation to demand and make public environmental impact studies." (Constitution of Brazil (1988) Art. 225). In addition, many countries' judicial systems include environmental tribunals, chambers or courts which have special procedures designed to facilitate the bringing of actions to promote vindication of environmental rights.

Although more than 90 countries' constitutions contain substantive environmental rights, only 30-40 contain procedural environmental rights. The number is subject to some interpretation because of the differing ways that procedural rights can be characterized. Nonetheless, a conservative assessment would include the constitutions of Albania, Armenia, Azerbaijan, Belarus, Bhutan, Bolivia, Brazil, Burkina Faso, Chechnya, Chile, Colombia, Costa Rica, the Czech Republic, Ecuador, Ethiopia, Finland, France, Georgia, Kazakhstan, Kenya, Kyrgyzstan, Latvia, Macedonia, Madagascar, Moldova, Montenegro, Norway, Poland, Portugal, the Russian Federation, Senegal, Serbia/Macedonia, the Slovak Republic, Southern Sudan, Thailand, and Ukraine. Other countries' constitutions have separate provisions guaranteeing broad participation rights, and rights relating to access to justice

including standing rules and other procedural rules that are applied in environmental cases, though not specifically or exclusively designed for them. The fact that procedural and substantive rights are so often found together in constitutions suggests, according to David Boyd, "that procedural environmental rights are viewed as a complement to, rather than a substitute for, substantive environmental rights." (Boyd, 2012 at pp. 66-67). Thus, substantive and procedural environmental rights appear at a glance to use similar means - individually vindicable constitutional rights - to accomplish the same ends: protection of the nation's environmental heritage. And insofar as they entail similar language, they appear to present courts with similar challenges.

Challenges of enforcing constitutional environmental rights

Constitutionally enshrined environmental rights are particularly challenging for courts for a number of reasons, many of which flow from the lack of certainty about what the "environment" actually entails and how a meaningful conception of the environment can be incorporated into the practice of constitutional adjudication.

Unlike specific interests like housing or medical care, the environment may encompass everything, and almost everything that happens in society can implicate the environment. As Philippine Justice Feliciano famously said in his concurrence in the landmark case of *Minors Oposa v. Factoran*:

> "It is in fact very difficult to fashion language more comprehensive in scope and generalized in character than a right to 'a balanced and healthful ecology.' The list of particular claims which can be subsumed under this rubric appears to be entirely open-ended: prevention and control of emission of toxic fumes and smoke from factories and motor vehicles; of discharge of oil, chemical effluents, garbage and raw sewage into rivers, inland and coastal waters by vessels, oil rigs, factories, mines and whole communities; of dumping of organic and inorganic wastes on open land, streets and thoroughfares; failure to rehabilitate land after strip-mining or openpit mining; *kaingin* or slash-and-burn farming; destruction of fisheries, coral reefs and other living sea resources through the use of dynamite or cyanide and other chemicals; contamination of ground water resources; loss of certain species of fauna and flora; and so on." (Minors Oposa).

In Chile, the Supreme Court reached a similar conclusion: "[T]he environment, environmental heritage and preservation of nature, of which the Constitution speaks and which it secures and protects, is everything which naturally surrounds us and that permits the development of life, and it refers to the atmosphere as it does to the land and its waters, to the flora and fauna, all of which comprise nature, with its ecological systems of balance between organisms and the environment in which they live." (Pedro Flores v. Codelco).

In one case, the environment must be protected because it constitutes an object of religious, cultural, and historical importance. (Advocate Prakash Mani Sharma for Pro Public vs His Majesty Government (Nepal)). In another case, the environment is the physical landscape of a people's history and future (Ogiek People v. District Commissioner (Kenya)). In yet another case, it is not the physical space itself but the animals that live in the forests (Greenwatch vs. Uganda Wildlife Authority) or marine life (Pedro Flores v. Codelco (Chile)). Other cases demonstrate that such actions as forced evictions, extraction of natural resources from land, and dredging or draining of waterways will all invariably affect their environment. It may include not only what is natural and pristine, but what has been built into the environment over time: pipelines, dams, electrical transmission wires, boreholes, and so on. With this broad conception of the environment in mind, it is easy to see why admitting - or rather denying - particular environmental claims would be difficult.

Nor do the adjectives that are often associated with the environment or nature in the constitutional texts help to define the concepts any more precisely; more often, they exacerbate the problem by adding a level of vagueness: how "clean" must the environment be to satisfy the constitutional requirement? How can a court determine whether an environment is "safe" or "balanced"? The challenges mount when one remembers that almost no environment starts out in pristine condition but already bears the marks of use and possible degradation even before the defendants' actions began. But the problem is not just a question of baselines and standards. The ambiguity is deeply embedded in the concept of a "healthy" environment, by far the most commonly used modifier (Boyd at 62). If "healthy" modifies the environment, then the right would extend to cases involving environmental degradation per se. This would include cases requiring the clean-up of beaches of Chañaral, Chile, for instance, where copper tailing wastes had been deposited for 50 years onto the beaches, destroying all marine life, without regard to the impact of the environmental degradation on humans (Pedro Flores). What would need to be shown is that the environment itself is not healthy, not balanced, or not capable of generating life. But more often, the courts consider a "healthy environment" to be one that has deleterious health effects not on the ecosystem itself but on the local population, so that the right to a healthy environment is violated when it can be shown that vehicle pollution, for instance, is making people sick, without regard to its effect on air quality or the ozone (Farooque v. Government of Bangladesh).

Sometimes the anthropocentric nature of the right is justified or even demanded by the constitutional text itself: The Peruvian constitution creates the right for every person "to peace, tranquility, enjoyment of leisure time and to rest, as well as to a balanced and appropriate environment for the development of his life." (Constitution of Peru (1993), Art. 2(22)). In one case against an American corporation operating a lead smelter, plaintiffs showed that the health of the children in the local community was severely impacted, although there was little evidence of degradation to the environment per se (Sentencia De Pablo Miguel Fabián Martínez Y Otros (Peru)). But in other countries, the constitutional language is ambiguous, as in the case of Argentina, where "All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty

to preserve it." (Argentina Constitution Art. 41.) This seems to go beyond a traditional human right to a clean environment, suggesting broader protection for the environment itself. In the landmark case requiring the clean-up of the Matanza-Riachuelo River Basin, there was evidence of both harm to the water quality and harm to the people who live near it, but the court's analysis of the two spheres of inquiry was intermingled. At the extreme, these cases can in fact have very little to do with the environment, such as, for instance, where a court determines questions of access to water when it is limited not by environmental conditions but by political and business interests, such as in the South African *Mazibuko* case. In general, the cases do not readily distinguish between the two types of harms. This doctrinal fluidity may be due in part to the interlinked nature of the harms themselves. Access to drinking water for instance may be a human right unrelated to environmental interests as long as there is sufficient supply but it may evolve into an environmental right when it becomes scarce (perhaps due to desertification) or polluted (perhaps in violation of environmental laws). Nonetheless, it cannot be gainsaid that what we think of as the environment is virtually all-encompassing and requires careful balancing of competing interests by the judicial authorities.

These difficult questions of public policy may, in some instances, even require rethinking the location and the very validity of the distinction between the public and private spheres. While some governments are held responsible for the environmental degradation caused by their licensees, some corporations are required to take on public goods like environmental clean-up. Environmental litigation may often in fact invert the normal expectations relating to the roles of public and private parties. Whereas traditional constitutional rights litigation pits the private individual against the public authority, environmental litigation often pits members of the public against a private entity (thereby invoking the principle of the horizontal application of constitutional rights and obligations). Moreover, in many of these cases, private individuals are asserting public rights, whereas the government is facilitating private gain. (See e.g. Minors Oposa; Kravchenko and Bonine). Environmental litigation is increasingly forcing courts to adjust long-held views about the proper allocation of public and private power and to become protectors of broadly held and diffuse interests.

A final difficulty is whether the country possesses the wherewithal to enforce constitutional fundamental environmental rights. While line-drawing questions attend many other types of rights that are routinely included in constitutions, fundamental environmental rights magnify the problem because environmental problems are so conceptually distant from the traditional form of constitutional litigation. While constitutional litigation is typically specific to a discrete set of facts that can be supported by clear evidence, environmental degradation is broad and its contours are vague, creeping into many different areas of life: a single leak may pollute the water and the air, prevent farming, poison the water, cause disease and premature death, and produce social insecurity. The ambiguities and uncertainties multiply when the principles of sustainable development (Vellore Citizens Welfare Forum v. Union of India; Development Board v. C.Kenchappa) and the challenges of climate change (May 2008) are brought into the constitutional fold.

While constitutions are often criticized for being aspirational if not downright unrealistic, fundamental environmental rights epitomize this problem: In what society are policies promulgated "in accord with the rhythm and harmony of nature"? (Constitution of Philippines, (1987), Art. II, § XVI). How can a country promote industry, create jobs, provide housing, and provide for the other things the people need without throwing nature—"the created world in its entirety" (Minors Oposa at 185) — out of balance? Indeed, environmental constitutionalism often raises several of the concerns that actually define the outer scope of judicial authority. As the U.S. Supreme Court explained in *Baker v Carr*, the American political question doctrine precludes judicial cognizance of an issue when there is "a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" and so on. How can a court, with limited political authority and negligible enforcement power, actually determine the contours of the right "to live in an environment free of pollution," (Pedro Flores) and enforce that judgment against public and private actors who have different views and who are beholden to a public that may be equally divided? Although courts around the world do not typically expressly invoke the American political question doctrine, their reluctance to engage with fundamental environmental rights may be attributable to the same concerns: institutional bodies with frail historical legitimacy and with neither police power nor economic muscle to buttress their orders are reluctant to try to force coordinate branches or politically protected private enterprise to make radical policy changes.

Substance and Procedure: Divergent Paths

Some argue that procedural rights are weak versions of substantive rights: they do not secure the thing that is of value - a clean or healthy environment - but only the opportunity to pursue the thing of value, and even that opportunity is subject to political manipulation and requires time, effort, and expense to exercise. And even then, there is no guarantee of success. Moreover, in principle, there is no reason why procedural environmental rights should escape the vagaries discussed above of substantive environmental rights: if it is difficult for a court to define the outer boundaries of the relevant environment for substantive purposes, the environment becomes no more limited or defined when a court seeks to protect it procedurally.

But in fact, the divergent structures of substantive rights and procedural rights indicate that they perform distinct functions in the development of constitutional law. Procedural environmental rights sound in procedure more than in ecology. Substantive environmental rights require that courts assess what the environment is or requires in order to be safe, healthy, or clean. Procedural environmental rights, by contrast, demand only that courts identify specific procedures by which certain decisions are to be made. True, the rights are triggered by the impact on the environment, but the rights themselves are commonly recognized rights of access and participation. Thus, the analytic framework entailed in enforcing procedural rights is narrower and more objectively bounded than what substantive environmental rights demand. To

determine whether there has been a violation of procedural rights, the court needs to decide that the issue is in some manner environmental, and then needs to determine if the constitutionally mandated procedures have been followed. The discretion involved in these determinations is minimal and, in nature, is strictly judicial. It raises few of the broad-ranging and policy-based considerations that inhere in determinations of substantive environmental law.

Procedural rights are also easier to enforce than substantive rights. Remedial orders in environmental cases can be elaborate and often creative mandates to a variety of public and private defendants to engage in a range of activities over long periods of time, including, for instance, clean-up, payment of medical costs, development of policy, and ongoing injunctions against repeated violations - all of which can obligate the court to maintain ongoing or permanent jurisdiction over the defendants with attendant obligations involving continued monitoring and enforcement proceedings. Remedial orders in procedural cases, by contrast, tend to emanate directly from the constitutional requirements relating to the dissemination of information, the effective means of participation, and access to justice.

The uncertain boundaries of substantive environmental rights force courts onto a tightrope when they seek to enforce substantive rights. If they read the rights too narrowly, they risk damage to the environment which could have deleterious effects on the ecosystem and the dignity and health of the population for generations to come. Over-enforcing substantive environmental rights, however, may unduly limit development and economic progress that could have benefited the local population and perhaps the nation as a whole. In Nepal, the court held that the government's obligation to hold land in the public trust precluded the construction of a medical college on land that had historical, cultural, and archaeological significance (Yogi Narahari Nath v Honorable Prime Minister). In India, the Supreme Court ordered the closure of tanneries - which had provided jobs and economic opportunities for local residents - because of the resultant pollution to the Ganges (M.C.Mehta vs. Union of India 1988). Judges seeking to enforce these rights must constantly balance competing policy claims, and weigh the costs and benefits of each decision: how much sustainability, how much development?

Procedural rights do not raise the same concerns because there is virtually no danger to over-enforcement. The boundaries of procedural environmental rights are more clear and their enforcement more verifiable and easily managed and there is less likelihood that courts will mis-read them. But perhaps more importantly, there is little harm done in the event that courts do overreach. Casting the net too broadly - that is, subjecting too many policy determinations to constitutional requirements - does not limit economic opportunity or development, but merely opens up too many processes to democratic engagement: more government decisions will be subject to discussion in local communities, their environmental impacts will have to be assessed and the reports disseminated. To be sure, over-democratization has some costs, in terms of the time it takes to come to a final determination and the actual expense of holding meetings, distributing information and developing and modifying initial decisions. But these minimal burdens are simply the costs of a functioning democracy. Moreover, the costs, properly borne, are designed to produce better results that have been more widely debated and more fully considered. As a result, courts should not have the

same separation-of-powers-based reluctance to enforce procedural rights as they might have to substantive rights. Whereas vindication of substantive rights requires courts to make policy decisions that either cross the boundaries of judicial authority or at the very least raise the specter of doing so, vindication of procedural rights not only don't invade the political sphere, but in fact enhance it. By ensuring that more people can participate in more policy decisions, armed with more information and through more types of participatory encounters, judicial protection for procedural environmental rights promotes democratic values and practice. This contrasts starkly with most other forms of judicial activity, where expansion of the judicial sphere derogates from its political counterpart, often to the detriment of democratic authority and accountability. Thus, whereas in most contexts, courts quite rightly exercise their authority prudently - not to say, judiciously - courts enforcing procedural rights of democratic participation need not be so niggardly: the more such rights they vindicate, the richer becomes democratic discourse. And it is likely that, as civil society learns to take advantage of increased opportunities to participate with meaningful information in decision making on public policy, it, too, will become more sophisticated and will develop additional tools and fora for engaging in public discourse in this way, not only on issues of environmental protection but quite likely on other issues as well.

Conclusion

More than one-half of the constitutions of the world now include protections for environmental rights, and roughly one-third of these protect procedural, as well as substantive, environmental rights (Boyd, pp. 47-67.) While these two types of rights appear on the surface to merely complement each other, furthering the same goals by different means, they in fact perform very differently in the development of democratic constitutionalism. While substantive environmental rights are difficult to define and tend to foster at least the appearance of judicial activism, procedural environmental rights enhance, rather than diminish, robust democratic discourse on vital public issues. In terms of the balance of governmental powers and authority, then, procedural environmental rights have much to contribute.

Procedural rights may nonetheless be perceived as less efficacious for the protection of the environment since a judicial victory earns the claimants not a clean or healthy environment but simply a right to more process, which in turns takes more time, and more effort, and more resources to exercise. On the other hand, given the difficulty of securing judicial victories of substantive rights in most courts around the world and, perhaps even more significantly, the difficulty of ensuring enforcement of those victories that are gained, it is not obvious that procedural rights are less likely to achieve the ultimate goal of environmental protection than substantive rights. And it is quite possible that the process of pursuing and exercising participatory rights will inure to the benefit not only of the environment but of civil society as a whole.

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