

Dignity Rights and Climate Justice

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Colloquium on Environmental Constitutionalism and Climate Justice

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This colloquium is designed precisely to ENHANCE THE CAPACITY OF PARTICIPATING JUDGES AND LEGAL STAKEHOLDERS TO IMPLEMENT CONSTITUTIONALLY-ENTRENCHED ENVIRONMENTAL RIGHT ... SO THAT THEY CAN BE MORE EFFECTIVELY ENFORCED IN THE PURSUIT OF CLIMATE and social JUSTICE.

Today we are focusing much more tightly on the work of judges – what do judges do when they are confronted with a claim of environmental constitutionalism, or a claim of climate justice, what are the issues judges must confront and how do they confront them. (You have all by now received memory sticks with the additional material to support your work. I will mention a few issues to frame the discussion that we will have in the rest of this session.)

First, it's always useful to define our terms. What are Environmental constitutionalism and Climate Justice cases?

Cases involving environmental constitutionalism or climate justice aren't always labeled that way. Property rights cases, for instance, often implicate the use of the environment. A private nuisance may often be a public nuisance depending on the harms that the defendant causes. A private wrong may implicate the public trust doctrine if the government is failing to protect the natural resource for the good of all.

Conversely, an environmental claim – pollution, or claims relating to resource extraction – may have human rights and especially gender rights implications that the parties themselves may not be focusing on but that are *real* to people not party to the action.

Second, what is the relevant constitutional law?

167 of 193 constitutions have environmental provisions. This includes 85 express substantive right to a quality environment and 36 with procedural environmental rights – information, participation, access to justice provisions.

These provisions can be difficult to apply, raising fundamental and inescapable questions such as: What is the environment? What does it mean to be "healthy" or "quality"? Who is "everyone" who has this right?

Given these interpretive challenges, it is remarkable that these provisions *are* being enforced. Sometimes, it can take time: The Pennsylvania environmental rights provision lay

dormant for 42 years until the state Chief Justice realized that just by applying the law that was written into the Bill of Rights of the state constitution, he could preserve the state's magnificent natural beauty and landscapes and protect the state's residents from harmful hydrofracking right in their back yards. Those are the easy cases because the constitution itself insists that judges protect the environment.

But even in jurisdictions where the constitution does not speak of environmental rights, or climate justice, courts are applying other provisions. There are 15 countries where courts have implied EC where the constitutions have not been explicit, and most of them are in this region. Most commonly, EC is being implied from the right to life and the right to dignity, and often a combination of the two: the constitutional right to live with dignity includes the right to live in a healthy environment – that is, an environment that is capable of providing adequate food and clean water and one where noise, air, water pollution are reduced.

So the constitutional right to dignity is becoming an important way to protect the environment, whether or not the constitution is otherwise explicit on this point. Thus, a few words about dignity rights in relation to environmental and climate justice are in order.

Human dignity is protected in most of the world's constitutions as an enforceable right. Sometimes it is a stand-alone right ("the right to dignity shall be inviolable"), sometimes it is associated with other values (privacy of the home, the prohibition on cruel and unusual punishment or torture, discrimination, etc.) and sometimes with particularly vulnerable segments of the population (women, elderly, disabled, children).

Because dignity can be a stand-in for many other rights, it helps to highlight what is truly at stake when the environment is despoiled or when the climate changes. The circumstances of climate refugees (whether or not they meet the international law definition of refugees) or internally displaced people. People who are forced to move from their homes due to changes in the climate rendering their homelands inhospitable lose (among other things), employment and shelter; their mental and physical health needs go unmet; children experience ruptures or total loss of educational opportunities; parents lose family structure, the ability to nurture and guide their children, and the communities that keep their families strong. With the loss of social community, they lose their emotional support system; with the loss of political community, they become stateless and their ability to exercise their civil and political rights of speech, assembly, and association become compromised. All of these impact human dignity. Dignity rights span the whole breadth of rights and the impacts of climate threaten human dignity in myriad ways.

Climate changes and environmental degradation impinge on the right to dignity more directly too. Dignity refers to the principle of self-determination, whether of a person or of a people: the ability to control the course of one's life, to create a life plan, and to recreate it. (This is the notion of dignity suggested in Hannah Arendt's writings).

When we talk about vulnerable people, this is what we are talking about: people who have lost the ability to control their lives due to climate changes or environmental conditions. Courts around the world -- especially in this region -- are recognizing this, and acting on it.

What does this show?

A judicial willingness to act, -- action not activism. If judges don't pay attention to these issues, who will? How will governments and people be encouraged to be responsible stewards of the environment if judges don't insist on environmental rule of law?

Attention to the law as it is written -- Protecting climate, environment, life, dignity, the health and wellbeing of the people, as it is written or implied in the meaning of the words, the structure of the document.

Creativity, -- reading the provisions of the law to achieve social and climate justice

Still, notwithstanding hotspots of judicial engagement in parts of the world -- including this one -- there is still a global record of judicial under-enforcement, of the unfulfilled potential of environmental constitutionalism.

What we have seen is that the environment can't protect itself and too often people won't protect the environment unless they're compelled to by courts.

So courts are necessary, but not sufficient, in the struggle for climate justice.

They *must* act, but they can't act alone. As the Asian Pacific courts in particular have shown, courts must recognize the limitations of the political branches and the private sector, but also their potential, and work with government, civil society, NGOs and international NGOs to impel effective solutions to the climate crisis.