

# Footprints of ‘Rights of Nature’ and ‘Non-Human Interests’ within ‘Constitutional Governance’: Some Reflections

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## **I. Introduction**

One obvious criticism of the Sustainable Developments Goals (SDGs) is that they are still fundamentally centred on humans and in fact, on one particular vision of human flourishing, based on economic growth. Even conservation agendas are largely driven by the concept of ecosystem services which place extrinsic value on natural processes in terms of what they can do for us as humans. It has also been suggested that the notion of sustainable development is in itself ‘anthropocentric’ and places a greater emphasis on economic and social sustainability than environmental sustainability. The incorporation of this dominant idea can be seen in all the national and international legal and policy settings. All actions related to environmental conservation and pollution prevention were intended primarily for human benefit. The environment was/is to be protected due to its instrumental value to humanity. Intuitively, we need to think beyond human needs and place intrinsic value on other life forms and natural processes. The current and ongoing environmental crises, such as climate change, biodiversity loss, and ecosystem degradation, necessitate an immediate shift towards eco-centrism. The concept of ‘Eco-centrism’ is a movement that calls for the extension of rights and legal personhood to nature. This approach recognizes the intrinsic value of all forms of life and ecosystems, beyond their utility to humans.

The ‘rights of nature movement’ seek to challenge the anthropocentrism approach of environmental law by recognizing the inherent value of the environment and extending legal rights to natural entities. It has gained legal recognition around the world, with the most significant developments occurring in New Zealand, Bolivia and Ecuador so far. But the extent of implementation is still questionable. For instance, Ecuador's legal personhood of nature is revolutionary, but the realization of these rights has been challenging due to lack of constitutional normative hierarchy. To achieve a truly eco-centric reorientation of environmental law, the rights of nature must become a ‘grundnorm’ of national constitutions.

There have been attempts to bring eco-centric approaches to a global level like the Earth Charter, Universal Declaration of the Rights of Mother Earth and 2012 Rio+20 Earth Conference. These developments suggest that the rights of nature movement are gaining recognition in international legal forum but still has a long way to go.

To achieve this, four key developments must take place: constitutions and other national legislation must clarify their status, a global paradigm shift towards eco-centrism, wealthier states in the Global North must support climate action in the Global South, and there should be a binding international instrument that recognizes the latter two shifts. However, the scope of the current study is limited to the evaluation and analysis of the existing constitutional and legal framework for environmental protection in India.

This research at hand attempts to question and critique the pervasive anthropocentric and human centric approach in the Indian environmental governance and attempts to explore how this approach may give way to eco-centric approach of governance (one which is pragmatic and real). The challenge is to practice eco-centrism and position it at the heart of the environmental governance model. Therefore, the paper highlights the anthropocentrism of current environmental legal regulations and explores the possibilities of making Indian environmental legal framework more eco-centric in approach. This would require rethinking the foundational aspects of Constitutional law and environmental law and envisioning non-human interests within these charters.

## II. Re-imagining Constitutional Law

Evidence from around the world shows that constitutional environmental rights and responsibilities are a catalyst for stronger environmental laws, better enforcement of those laws and enhanced public participation in environmental governance. There is a strong positive correlation between superior environmental performance and constitutional provisions requiring environmental protection.<sup>1</sup> Constitutions are also the only legal instruments that frame and permeate all areas of domestic law and thus have the potential to move “environmental law” from the margins into the very fabric of legal systems (including corporate, financial and property law).<sup>2</sup>

Therefore, an ecological constitution has been argued for which would reorient nation-states towards more sustainable development routes, serve as a guide for environmental law, and inject an ecological conscience into all domestic legislation. The Colombian Constitutional Court has succinctly said that “the Ecological Constitution... is far from being a mere rhetorical [idea] inasmuch as it has a definite normative substance consisting of principles, basic rights and responsibilities... of the State.”<sup>3</sup>

This article, therefore, focuses on domestic constitutions as a vehicle for achieving global sustainability through coordinated local activity. It lays out an “ecological transformation”<sup>4</sup> of domestic constitutions to bring them into compliance with the unchangeable laws of nature, as the Anthropocene age requires such alignment. Reimagining constitutions along these lines might be critical in the collaborative effort to create a sustainable future for people, animals, ecosystems, and the planet we all share.

Now the most pertinent questions that arise at this juncture is - what is meant by “ecological constitutionalism”? What would the structure of an ecological constitution be? What would a constitution look like if it made a sincere effort to protect a country's environment throughout time? How relevant is a constitution that fails to make the effort, to put it more provocatively?

Lynda Collins has made an attempt to answer these questions. She states that, an ecological constitution is one that codifies, at the very least, the following fundamental ideas: the principle of sustainability; intergenerational equity; the public trust doctrine; environmental human rights; rights of nature; the precautionary principle and non-regression; and rights and responsibilities related to a healthy climate. These concepts are crucial instruments for altering awareness and promoting practical policy changes

<sup>1</sup> David R. Boyd and Emmett Macfarlane, “Should environmental rights be in the constitution?”, Policy Options, March 03, 2014, available at: <https://policyoptions.irpp.org/magazines/opening-eyes/boyd-macfarlane/>

<sup>2</sup> See Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, 2nd ed. (London: Routledge, 2016).

<sup>3</sup> Constitutional Court of Columbia, 10 November 2016, *Center for Social Justice Studies et al v. Presidency of the Republic et al*, Judgment T-622/16 at para 5.4. See also Oscar Darío Amaya Navas, *La Constitución Ecológica de Colombia*, 3rd ed. (Bogotá: Universidad Externado de Colombia).

<sup>4</sup> See Carla Sbert, *The Lens of Ecological Law: A Look at Mining* (Cheltenham: Edward Elgar, 2020) at 219 [Sbert, Lens of Ecological Law].

throughout the globe in the context of the global environmental disaster that defines the present Anthropocene period.<sup>5</sup> She has further tried to highlight some of the important contextual prerequisites to build an ecological constitution. Some of the basic requirements are as follows -

- A. Eco-constitutional clauses must be enforced rather than aspirational since ecological constitutionalism is essentially focused on bringing about significant change in the actual world.<sup>6</sup> Hence, drafters should incorporate ecological provisions in actionable (i.e. self-executing) parts of their different constitutions, and courts should deem such provisions to be justiciable.
- B. Ecological constitutions should create governing bodies tasked with advising the executive and legislative branches and upholding environmental rights and obligations in court in order to make implementation easier. For instance, the *Ministerio Publico* in Brazil is authorised by the country's constitution to bring legal action against those who violate environmental laws (including the constitutional right to a healthy environment), and over the years, the *Ministerio* has used this authority frequently and successfully.<sup>7</sup>
- C. In addition to governmental implementation, ecological constitutions must include permanent clauses that let any member of the public or nongovernmental organisation to file a lawsuit for enforcement. For example, Ecuador's famous 2008 constitution includes a provision declaring that "all persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature"<sup>8</sup> and another that allows "any natural person or legal entity, human community or group" access to judicial and administrative bodies in order to guarantee the right to a healthy and ecologically balanced environment.<sup>9</sup>
- D. Ecological constitutions should make specific provision for promoting access to justice and the expeditious resolution of constitutional environmental claims. For instance, many Latin American nations have constitutional provisions establishing lower-cost, simplified legal procedures (e.g. the *amparo* and *tutela*)<sup>10</sup> that "dramatically increase access to the judicial system in constitutional cases". Similarly, in India, "public interest litigation"<sup>11</sup> procedures have improved access to justice in constitutional matters, though major challenges remain.<sup>12</sup> In the Philippines also, the Writ of *Kalikasan*<sup>13</sup> (nature) provides an expedited process for cases involving an actual or threatened

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<sup>5</sup> Lynda Collins, *The Ecological Constitution: Reframing Environmental Law* (Routledge, 2021).

<sup>6</sup> David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012) [Boyd, *Environmental Rights Revolution*].

<sup>7</sup> David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012) [Boyd, *Environmental Rights Revolution*].

<sup>8</sup> Constitution of 2008 of the Republic of Ecuador (20 October 2008) at article 71.

<sup>9</sup> Constitution of 2008 of the Republic of Ecuador (20 October 2008) at article 397.

<sup>10</sup> The *tutela* is a constitutional injunction that aims to protect fundamental constitutional rights when they are violated or threatened by the action or omission of any public authority. This mechanism is incorporated in Article 86 of the Constitution of Colombia.

The writ of *amparo* (writ of protection) or *recurso de amparo* is a remedy for the protection of constitutional rights, found in certain jurisdictions like Spain, Argentina, Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, etc. However, it originated in Mexico and Mexico's "*recurso de amparo*" is found in Articles 103 and 107 of the Mexican Constitution.

<sup>11</sup> According to the Constitution of India, the petition can be filed under Article 226 before a High Court or under Article 32 before the Supreme Court of India.

<sup>12</sup> James Fowkes, "How to Open the Doors of the Court: Lessons on Access to Justice from Indian PIL" (2011) 27:3 S Afr J Hum Rts 434.

<sup>13</sup> A Writ of *Kalikasan* is a legal remedy under Philippine law that provides protection of one's constitutional right to a healthy environment, as outlined in Section 16, Article II of the Philippine Constitution.

violation of the constitutional right to a balanced and healthful ecology involving “environmental damage of such magnitude as to prejudice the life, health or property of inhabitants of two or more cities or provinces”.<sup>14</sup>

- E. Ecological constitutionalism also demands that courts provide each level of government the fullest feasible power to seek ecological sustainability in federal states.<sup>15</sup> We must allow "jurisdictional bickering" to obstruct important environmental protection efforts.<sup>16</sup>
- F. Last but not least, given how environmentally interconnected the globe is in reality, ecological constitutionalism inherently necessitates international collaboration. Developing countries will need international assistance to skip over unsustainable modes of development and have the chance to put eco-constitutional approaches into practise on the ground, in addition to the crucial efforts to optimise international environmental law and create a truly global environmental constitution.<sup>17</sup>

### Concluding Remarks

The call for ‘environmental governance’ and the necessity of the shift towards ‘eco-centricism’ is not something new and this has been asserted and expressed on numerous occasions by numerous agencies and through numerous soft and hard instruments of law and policy. It must now be clearly, unconditionally, unambiguously and unapologetically asserted in the constitutional charters of various states and executed likewise. With few instances reflected in the paper earlier, it is indicated that ‘ecocentric governance’ can be manifested through the constitutional governance of the nations and this may position ‘environment’ and ‘non-human interest’ as real and tangible concepts rather than abstract philosophies unconnected to reality.

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<sup>14</sup> Hilario G Davide Jr, “The Environment as Life Sources and the Writ of Kalikasan in the Philippines” (2012) 29:2 Pace Envtl L Rev 592 at 597.

<sup>15</sup> See e.g. Dayna Scott, “Federalism, the Environment and the Charter in Canada” in The Law Society of Upper Canada, Special Lectures 2017: Canada at 150: The Charter and the Constitution (Toronto, 2018) 188 at 188 -201.

<sup>16</sup> Nathalie J Chalifour, “Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament’s Greenhouse Gas Pollution Pricing Act” (2019) 50:2 Ottawa L Rev 197.

<sup>17</sup> Louis J Kotzé, Global Environmental Constitutionalism in the Anthro- pocene (Oxford: Hart Publishing, 2016) [Kotzé, Global Environmental Constitutionalism]; Paulo Magalhães et al., eds, The Safe Operating Space Treaty: A New Approach to Managing Our Use of the Earth System (Cambridge: Cambridge Scholars, 2016).