

PLANTING THE SEEDS OF FUNDAMENTAL PRINCIPLES: ENVIRONMENTAL GUARANTEES INSPIRED BY FOREIGN CONSTITUTIONS

K. D. Ratnapala

Introduction

According to Camena Gunaratne (2015) there is an urgent need to re-draft the constitution's fundamental rights chapter to include justiciable environmental rights; including basic rights to food, water, shelter, health and education as well as the right to a clean and healthy environment. Gunaratne, goes on to observe that the need is for a new constitution. The 1978 constitution (hereafter 'the constitution'), amongst its countless shortcomings, has failed to facilitate the legal precedence for a clean and healthy environment in Sri Lanka.

It is a rudimentary error to view human and fundamental rights or the right to life in isolation without due recognition to the ecosystems that sustain life. However, since independence many attempts to institute 'new' constitutions have failed the litmus test for justiciable environmental guarantees. The latest attempt - prior to the Public Representative Committee (PRC) on Constitutional Reform - was the Government of Sri Lanka Draft Constitution Bill (No 372 of 2000), which also failed to acknowledge any rights to nature¹. The failures *inter alia*, were due to the central focus upon the need for a limited executive and realization of individual freedoms against the backdrop of an increasingly authoritarian state

Acknowledging deficits existing in environmental law making, this essay explores two entangled questions: why environmental guarantees are critical in modern constitution making? And which environmental guarantees are to be assured in the new constitution? In engaging with these questions two probable causes for the constitution's environmental deficit are presented. Thereafter, specific foreign constitutional experiences, focusing on the right to remedy and states' environmental

¹ Thus far Ecuador is the only Country to explicitly recognize the inalienable rights to nature that have thus far been only guaranteed to human. *Refer* Constitution of the Republic of Ecuador, 2008 Article 10, 71 and 72

obligations will be studied whilst arguing in favour of the need to import experiences to effect justiciable environmental guarantees in the new constitution.

Methodology

This article has relied heavily upon text synthesis ranging from foreign constitutions to peer-reviewed journal articles.

Results and Discussion

A leading detractor of the constitution has repeatedly asserted that “(it) was designed to suit the personal vision of one man – J.R. Jayawardena” who sought to free the executive from an omnipotent parliament, which was justified under the guise of realizing rapid economic development. Environmental provisions - briefly mentioned - in the un-justiciable chapter on directive principles of state² is testament to the view that counter to the 1970s pro-environmental thrust, natural endowments continued to be viewed by states as a source of unlimited resources for narrow *raison d'État*. This was especially prevalent in developing states, which perceived such considerations as luxuries, which only the industrialized world could afford to dwell upon. Furthermore, within the backdrop of an environmentally unconscious legal tradition in Sri Lanka, the impact of the ‘Unthinkable’ has also been just as pervasive.

In 1972 Christopher Stone stated: “Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable. We are inclined to suppose that the rightlessness of rightless “things” to be a decree of nature not a legal convention acting in support of some status quo. As such, the granting of inalienable right to trees and forests, among other natural and physical resources or systems was not only laughable but also baffling. Together these two conceptual limitations alongside ignorance and intellectual isolationism have crippled local environmental governance. Firstly, through the failure of a body of case law to develop as in India³ or secondly through

² Constitution of the Democratic Socialist Republic of Sri Lanka, Art 27 (1)

³ T.N Godavarman Thirumulpad vs. Union of India & Others: The seminal verdict read that Environmental Justice could be achieved only if ‘we’ (Indians) drift away from anthropocentric principles.

the Supreme Court's dependence upon the equality provisions (Art. 12) under the constitution to deliver environment related judgements.

However, the 'baffling' rights of nature, thought to only extend to humans, are not outlandish as perceived. In 2008 Ecuador became the first - and only - nation to constitutionally recognize these inalienable right, which interestingly were not prompted by western elite thinking rather, due to the cultivation of local value systems known as '*Buen Vivir*' – good living.

In implementing mandatory legislature towards the argued ends, prudence requires the positive recognition of provisions such as: environmental rights (Nepal, 2015), environment related duties (Spain, 1978), right to environmental information (Moldova, 1994), right to environmental education (Colombia 1991) etc.⁴ However, (i) the right to remedy alongside (ii) states' environmental obligations are in the author's view *sine qua non* in the systematic adoption of the 'Rights to Nature' and related guarantees in the proposed constitution and subsequent wider legal structures. For instances, the Argentine Constitution (Art. 43) guarantees *locus standi* against public and private infringements "*that presently or imminently harms, restricts, alters or threatens, in an arbitrary or manifestly illegal manner, the rights and guarantees recognized by this Constitution*". Furthermore, in addition to a general chapter on state duties, framers have opted for specific provisions on environmental obligations. The Constitutions of Nepal (Art 51.e) and the Constitution of Kenya (Art 42, 69 and 70) include justiciable provision for citizen or concerned group to hold the state accountable to its citizens and environment. In Portugal, eight specific charges are listed to ensure the right to environment within an overall framework of sustainable development and the protection of all life. These charges *inter alia* cover town and country planning, controlling pollution, rational use of natural resources and seminally, fiscal policy⁵.

4 *Inter alia* guarantees include right on: Genetic Technology, On Bio-Diversity preservation, Sustainable Energy Policy and Ecological reading on the Protection of Forests.

5 Constitution of Portugal (1976) Article 66.1 and 66.2a- 66.2h

Conclusion

Inspired by inclusive and plural precedence, the impact of the international on Sri Lanka is evident through the establishment of the PRC and subsequent dissemination of its findings⁶. Next, building upon this momentum, the Constitutional Assembly must study and where applicable adopt foreign constitutional experiences to ensure that fundamental environmental guarantees are adopted as prerequisites for a more stringent legal and enforcement mechanism in Sri Lanka.

References

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⁶ The PRC published in May 2016 the finds of the public consultations in a 333 page report titled ‘Report on Public Representations on Constitutional Reform’.