NUS Law Working Paper 2020/015

NUS Asia-Pacific Centre for Environment Law Working Paper 20/03

Environmental Rights

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[May 2020]

This paper can be downloaded without charge at the National University of Singapore, Faculty of Law Working Paper Series index: http://law.nus.edu.sg/wps/

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ENVIRONMENTAL RIGHTS

Jolene Lin*

A. INTRODUCTION

In a study of 196 national constitutions, O'Gorman found that 148 contain environmental references.[1] The fact that the vast majority of constitutions around the world have come to embrace environmental constitutionalism has been described as evidence of an 'environmental rights revolution'.[2] Asia has not been an exception to this trend, although there are significant differences amongst the various Asian jurisdictions in the degree to which environmental rights are protected. This chapter provides an overview of environmental constitutionalism in selected jurisdictions in Asia. It then focuses on the use of environmental rights litigation to address what has been characterized as the 'defining issue of our age': climate change.[3] Climate litigation is at an early stage of development in Asia.[4] However, this situation may well be set to change. There is growing recognition of the importance and urgency of addressing climate change and its impacts. A slew of climate change laws and policies have been introduced in Asian jurisdictions including Japan, Singapore, Vietnam, and Thailand.[5] It is not far-fetched to suggest that there are potential

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[1] Roderic O'Gorman, 'Environmental Constitutionalism: A Comparative Study' (2017) 6(3) Transnational Environmental Law 435, 436.

[2] David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012), 3.

[3] UN Secretary General Ban Ki-Moon, 'Opening Remarks at 2014 Climate Summit' (23 September 2014) <https://www.un.org/sg/en/content/sg/speeches/2014-09-23/opening-remarks-2014-climate-summit> accessed 9 January 2018>.

[4] See Part D of this chapter. For discussion, see Jolene Lin and Douglas A. Kysar (eds.), Climate Change Litigation in the Asia Pacific (CUP 2020).

[5] This is largely driven by the fact that all these countries are party to the United Nations Framework Convention on Climate Change and to the 2015 Paris Agreement on Climate Change. Pursuant to their international legal obligations under the Paris Agreement, these countries have pledged greenhouse gas emission reduction targets (known as Nationally Determined Contributions in the jargon) and have passed domestic laws and policies to achieve these reduction goals. Singapore, for example, has designated 2018 as the Year of Climate Action. Amongst other things, the law establishing a carbon tax scheme will be tabled in Parliament in 2018 and the carbon pricing scheme will come into force in 2019. For discussion,

litigants waiting in the wings, particularly in jurisdictions where there are NGOs that are part of a transnational climate justice movement and rights-based litigation is part of a multi-pronged strategy to galvanize pressure on national governments and private actors to act responsibly.

B. WHAT IS ENVIRONMENTAL CONSTITUTIONALISM?

Constitutionalism commonly refers to the restraining of government to better realize the fundamental principles of a political regime.[6] It is also frequently associated with liberalism, specifically the protection of individual rights against the state. Reflecting the convergence of environmentalism and constitutionalism, environmental constitutionalism refers to a different (albeit related) set of ideas. May and Daly define environmental constitutionalism as 'a relatively recent phenomenon at the confluence of constitutional law, international law, human rights and environmental law'.[7] It includes constitutional environmental rights (for example, the right to a clean environment that is constitutionally enshrined) and procedural environmental rights (i.e., rights to information, participation and access to justice) that are found in international treaties such as 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 (commonly referred to as the Aarhus Convention), as well as in domestic environmental statutes.[8] Environmental constitutionalism also includes the derivation of substantive

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see Melissa Low, '2018 as Singapore's Year of Climate Action' (*Energy Studies Institute, Policy Brief 21,* 29 January 2018) <http://esi.nus.edu.sg/docs/default-source/esi-policy-briefs/2018-as-singapore%27s-year-of-climate-action.pdf?sfvrsn=2> accessed 16 October 2019. For discussion of the Paris Agreement, see Daniel Klein et al (ed), *The Paris Agreement on Climate Change: Analysis and Commentary* (OUP 2017).

[6] Keith E Whittington, 'Constitutionalism' in Keith E Whittington, R Daniel Kelemen and Gregory A Caldeira (ed), *The Oxford Companion of Law and Politics* (OUP 2008) 281.

[7] James R May and Erin Daly, Judicial Handbook on Environmental Constitutionalism (United Nations Environment Programme 2017) 1.

[8] Principle 10 of the Rio Declaration on Environment and Development ([1992] 31 ILM 874) sets out three fundamental rights—access to information, access to public participation and access to justice—as key pillars of good environmental governance. Governments adopted the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters at the 11th Special Session of UNEP Governing Council/Global Ministerial Environmental Forum in Bali, Indonesia (Bali Guidelines) in 2010 to promote the implementation of Principle 10 in their domestic laws <http://web.unep.org/about/majorgroups/partnership/participation-information> accessed 19 October 2017.

environmental rights and duties from constitutional guarantees such as the right to life. The Supreme Court of India led the charge in the creation of environmental rights through judicial interpretation of existing constitutional provisions, particularly the right to life.[9] Outside Asia, the Dutch Supreme Court set a global precedent in December 2019 when it upheld the lower courts' decision requiring the state to reduce greenhouse gas emissions by at least twenty-five percent by 2020, based on its interpretation of the constitutional and tort duties owed by the Dutch government to Dutch citizens.[10]

There are various rationales for conceptualizing the protection of the environment through the medium of constitutionalism and constitutional rights. At the most basic level, this connection elevates environment-related interests to defend a fundamental bulwark against private encroachment and also compel states and non-state actors alike to act affirmatively to address environmental concerns. But environmental constitutionalism can also serve as a discursive framework that transforms the way environmental statutes are understood. As Fisher has suggested, environmental statutes should be viewed as 'constitutions' in the sense of being 'constitutive' of the legal and political structure.[11]

Skeptics of environmental constitutionalism contend that the aim to guarantee 'certain basic, absolute levels of environmental protection' reflects a 'combination of political idealism and scientific naivety'.[12] In their view, the constitutional enshrinement of any particular environmental policy is premature given substantial disagreement in society about such fundamental questions as the appropriate levels and types of environmental protection.[13] It can be argued that such skepticism points to a greater normative challenge to the environmental constitutionalism project in so far as its scope

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[9] *Subhash Kumar v State of Bihar et al,* WP (Civil) No 381 of 1988, D/-9-1-91 (Supreme Court of India); *M.C. Mehta v India*, WP (Civil) No 12739 of 1985 (Supreme Court of India); *Indian Council for Enviro-Legal Action v Union of India et al* [1996] 5 Supreme Court Cases 281. For discussion, see J Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International 2004). This chapter will not discuss the Indian jurisprudence on environmental rights, as this Handbook does not include India in its coverage.

[10] *State of the Netherlands v Stichting Urgenda* (19/00135)

[11] Elizabeth Fisher, 'Towards Environmental Constitutionalism: A Different Vision of the Resource Management Act 1991?' (*Resource Management Law Association of New Zealand*, 2014) <http://www.rmla.org.nz/wp-content/uploads/2016/09/lfisher.pdf> accessed 20 October 2017, 6, *citing* Joseph Raz 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (CUP 1998) 153. .

[12] Barton H Thompson Jr, 'Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions' (2003) 64(1) Montana Law Review 157, 187.

[13] Ibid, 197.

extends beyond the usual temporal and anthropocentric boundaries of constitutionalism to cover future generations, as well as non-human life forms or even the environment itself.[14]

Whatever the merits of this skeptical view may be, environmental constitutionalism need not be viewed as a radical departure from the liberal ethos. Kysar argues that environmental constitutionalism essentially seeks to achieve two improvements to liberal thinking.[15] The first is to replace the prevalent view that infinite resources exist for the sake of unbridled economic exploitation with a more ecologically sound assumption about nature's finitude.[16] This ecological assumption, Kysar contends, does not have to be considered anti-market as sustainability constraints on the use of natural resources can be implemented through market-based instruments, such as emissions trading to promote allocative efficiency through decentralized private decision-making.[17] Secondly, environmental constitutionalism aims to force liberalism to move beyond its anthropocentricism 'to become more self-conscious of its membership decisions'.[18] It aims to make us rethink our notions of dignity and to question whether social ordering in our communities could be made more inclusive, issues that sit at the heart of liberalism.

As is already apparent from this brief overview, there are many facets to the environmental constitutionalism project. At the most general level, the project reflects an effort by activists and scholars to vest their strategies for environmental protection in the constitutional paradigm because the current ecological crisis is so severe that it requires nothing less than an intervention through the form of fundamental law.

C. CONSTITUTIONAL ENVIRONMENTAL RIGHTS

A common view of constitutional environmental rights is that they place limits on governmental powers, allowing judges to override inadequate or environmentally unsound executive or administrative decisions. When environmental rights find their place in a constitution, they can also serve as principles that provide normative guidance for a state's

[14] Douglas A Kysar, 'Global Environmental Constitutionalism: Getting There from Here' (2012) 1(1) Transnational Environmental Law 83, 84.
[15] Ibid, 86.
[16] Ibid.
[17] Ibid.
[18] Ibid.

environmental policy.[19] This quality, it can be argued, gives constitutional environmental rights the unique power to transform the way a state manages its natural resources, and therefore can be a powerful tool for sustainability.

Another view, perhaps a more pragmatic one, is that the inclusion of environmental rights in a constitution is a declaration of a society's commitment to protecting its natural resources and the environment which supports its existence. However, the inclusion of such rights is only a starting point. A constitution does not usually dictate how a society ought to go about fulfilling its commitment by, for example, stipulating how environmental risks are to be managed and the regulatory mechanisms to be used. This open-endedness should not be viewed as unhelpful vagueness.[20] In fact, it is argued that constitutions simply cannot provide such detailed prescriptions for environmental governance because these prescriptions (such as water quality standards) will rapidly become obsolete in light of dynamic environmental conditions and increasing scientific knowledge. Furthermore, the questions of how a society ought to protect its environment, the trade-offs it is prepared to accept and the risks that it is willing to bear are fundamental and ought to be the subject of inclusive and dialogical discourse. It is through such discourse amongst regulatory agencies, citizens, corporations and civil society that answers may emerge. In this line of thinking, the participatory rights (i.e., the rights to information, public participation and access to justice) are particularly important for supporting and facilitating a community's dialogue on environmental protection. The inclusion of environmental rights in a constitution merely, but importantly, moves the conversation's starting point from 'whether to protect' to the more important but challenging issue of 'how to protect'.

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[19] In some constitutions, the relationship between the state, its citizens and the environment is couched in terms of duties rather than rights. For example, Article 45 of the Constitution of Myanmar provides that '[t]he Union shall protect and conserve the natural environment'. I see no distinction between a right to a clean environment being conferred upon citizens or a duty to protect the environment being placed on the state (and its people). It is fairly uncontroversial to state that the stipulation of a right to a clean environment in a constitution necessarily creates a corresponding duty to protect the environment. The controversy lies in determining the scope of the duty and we have limited case law to provide guidance on this determination.

[20] The fact that most environmental provisions within national constitutions are qualitative and framed in broad terms has led to some criticism that the lack of guidance on the sort of measures that should be taken to enforce them renders these provisions ineffective. See, for example, Sionaidh Douglas Scott, 'Environmental Rights in the European Union- Participatory Democracy or Democratic Deficit' in Alan E. Boyle and Michael R. Anderson (ed), *Human Rights Approaches to Environmental Protection* (OUP 1996) 110.

Yugoslavia's inclusion of an environmental right in its constitution in 1974 supposedly marked the first time such a right appeared in a constitution.[21] It was only two years earlier that the right to environment was first given international expression in the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).[22] Principle 1 states 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'.

At a regional level, the ten member states of the Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Human Rights Declaration in 2012.[23] Article 28(f) of the declaration states that every person has the right to an 'adequate standard of living' which includes '[t]he right to a safe, clean and sustainable environment'.[24] It should be noted that this declaration has 'recommendatory status' only.[25] Further, there are no mechanisms available at the regional level to an individual seeking recourse for alleged infringements of his or her rights.[26]

The right to a healthy environment has found its way into a number of Asian constitutions, including those of Indonesia, Nepal, South Korea, Bhutan, the Philippines and Thailand. For example, Article 2 (Section 16) of the 1987 Constitution of the Philippines states that '[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature'.[27] In

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[21] Joshua Gellers, 'Explaining the Emergence of Constitutional Environmental Rights: A Global Quantitative Analysis' (2015) 6 Journal of Human Rights and the Environment 75.

[22] UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

[23] ASEAN Intergovernmental Commission on Human Rights <http://aichr.org/documents/> accessed 25 October 2017.

[24] For discussion of the declaration, see Catherine Shanahan Renshaw, 'The ASEAN Human Rights Declaration 2012' (2013) 13(3) Human Rights Law Review 557.

[25] Tan Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia* (CUP 2011) 157.

[26] In the ASEAN Intergovernmental Commission on Human Rights (AICHR) Terms of Reference, it is stated that the AICHR is intended to foster intergovernmental cooperation among the ten ASEAN member states to strengthen the protection of human rights (Article 1.3 and Article 1.5). The commission is a 'consultative body' (Article 3). It does not have the mandate to handle individual complaints. For more information, see AICHR, 'What You Need to Know (ASEAN 50th Anniversary Edition, A Compendium)'. This document and the AICHR Terms of Reference are available here: <http://aichr.org/documents/> accessed 03 September 2018

[27] The Constitution of the Philippines <http://www.officialgazette.gov.ph/constitutions/the-1987-constitution-of-the-republic-of-the-philippines/the-1987-constitution-of-the-republic-of-the-philippines-article-ii/> accessed 25 October 2017.

Thailand, the concept of community rights to protect natural resources emerged with the 1997 Constitution.[28] Section 56 prohibited 'any project or activity which may seriously affect the quality of the environment' from taking place without an environmental impact assessment (EIA).[29] The 1997 Constitution also explicitly protected the right of a person to bring legal action against governmental bodies and private actors to enforce environmental rights.[30] The 2007 Constitution of Thailand goes further by requiring health impact assessments, in addition to an EIA, to be conducted when an activity might pose harm to the environment and human health.[31] Furthermore, Articles 56, 57 and 66 respectively protect the right of communities to participate in the management and preservation of natural resources and biological diversity, the right to access public information, and '[t]he right to receive information, explanation, and reason from government agencies…before the approval or implementation of a project or activities which might have a serious impact on the environment…'. The 2008 Constitution of Bhutan offers a rare example of a state including quantitative environmental standards—more commonly found in legislation and administrative orders—within its constitutional order; Article 5(3) imposes a duty on the Bhutanese state to ensure that a minimum of sixty percent of the country's total land mass remains under forest cover at all times.[32]

D. CLIMATE LITIGATION

[28] Vitit Muntarbhorn, *The Core Human Rights Treaties and Thailand* (Brill J Nijhoff 2016) 14.
[29] EIA is a process of evaluating the likely environmental impacts of a proposed project, with the aim of finding ways to reduce adverse impacts and better design projects to suit local circumstances. For more information, see Hussein Abaza, Ron Bisset and Barry Sadler, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (*United Nations Environment Programme*, 2004) <https://unep.ch/etu/publications/textonubr.pdf> accessed 25 October 2017.
[30] The 1997 Constitution of Thailand <http://www.asianlii.org/th/legis/const/1997/1.html#S067> accessed 25 October 2017.
[31] Article 67 of the 2007 Constitution of Thailand <http://www.asianlii.org/th/legis/const/2007/1.html> accessed 25 October 2017.
[32] The Constitution of Bhutan <http://unpan1.un.org/intradoc/groups/public/documents/UN-DPADM/UNPAN039330.pdf> accessed 1 November 2017. For discussion of the inclusion of quantitative standards in the Bhutanese constitution, see Stephen J. Turner, 'Quantitative Standards within the Environmental Provisions of National Constitutions – Bhutan and Kenya' in Erin Daly and others (ed), *New Frontiers in Environmental Constitutionalism* (UN Environment 2017). See also, Nima Dorji and Michael Peil, 'Bhutan', in this volume.

Climate change poses serious challenges for the environment, development and security of countries in Asia. Threatened impacts include increased exposure to disastrous weather events like cyclones, risks to food security from heat waves and droughts, and the potential for low-lying areas to be submerged and populations displaced by rising seas.[33] Weather-related disasters around the world—from Typhoon Haiyan to massive floods in Bangladesh—have highlighted that 'climate change poses a threat to lives, livelihoods and peace and security. It accentuates the gap between rich and poor'.[34] While weather-related disasters in developed countries cause extensive damage to property and sometimes loss of lives, the casualties from extreme weather disasters are often far greater in developing countries. It is therefore 'beyond debate' that the adverse effects of climate change threaten a range of human rights, including the right to life, health, food and housing.[35]

It is only fairly recently that the relationship between human rights and climate change has become a sustained focus in international climate change policy and law-making.[36] At the same time, academics and practitioners have been keen to explore the potential for rights-based climate litigation. While the impacts of climate change on the realization of human rights have become better understood, claimants in a rights-based climate lawsuit still face significant hurdles. These hurdles include:

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[33] Rajendra Pachauri and Leo Meyer (ed), *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (*IPCC*, 2014) <http://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_All_Topics.pdf> accessed 4 February 2018, 50-54.

[34] ''Climate Change Posts a Threat to Lives, Livelihoods and Peace and Security', President's Speech at High-Level Event on Integrating Human Rights in Climate Action' (*23rd Conference of the Parties, Bonn*, 16 November 2017) <https://cop23.com.fj/climate-change-poses-threat-lives-livelihoods-peace-security-cop23-president/> accessed 4 February 2018. Massive floods in Bangladesh have led to thousands of families becoming 'climate migrants' in their own country as more frequent and intense storms, river erosion and salinity intrusion force people to leave their homes in search for more livable conditions elsewhere; online: <https://www.theguardian.com/global-development/2018/jan/04/bangladesh-climate-refugees-john-vidal-photo-essay> accessed 19 January 2018.

[35] Office of the High Commissioner for Human Rights (OHCHR), 'Understanding Human Rights and Climate Change: Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change' (*OHCHR,* 26 November 2015) <http://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> accessed 12 January 2018.

[36] Paragraph 11 of the preamble to the Paris Agreement sets out the expectation that parties 'should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights'. It is the first time that such a provision has been incorporated in a climate treaty, a step that has been described as 'revolutionary' because it represents an attempt at "true incorporation of human rights into the Paris Agreement"; Maria Pia Carazo, 'Contextual Provisions (Preamble and Article 1)' in Daniel Klein and others, *The Paris Agreement* (n 5) 114-115.

- Establishing causal links between a country's greenhouse gas emissions or failure to implement adaptation policies and specific climate impacts (such as sea level rise) which in turn have a detrimental effect on human rights;

- Establishing that a specific climate-related event is attributable to global warming when global warming is often one of multiple contributing factors to climate-change related effects (such as water scarcity);

- Using projections about the future impacts of climate change to ground a claim whereas human rights violations are normally established after the harm has occurred.[37]

These obstacles have not deterred some litigants who have brought claims asserting that climate change is implicated in human rights violations. Peel and Osofsky argue that emerging case law illustrates a trend towards the greater employment of rights claims in climate change litigation and a growing receptivity of courts to this type of framing. This marks an interesting departure from more 'traditional' public law climate litigation. Up to this point, most of the lawsuits in countries with the most extensive climate litigation (the US and Australia) have involved judicial review alleging that the government has failed to adequately take climate change considerations into account in its decision-making processes. The shift away from judicial review, which often turns on statutory interpretation, and towards more right-based arguments holds a certain promise. As Peel and Osofsky point out, the commonalities across both domestic and international legal instruments make rights-based climate lawsuits particularly suited for developing a 'transnational climate change jurisprudence'.[38]

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[37] OHCHR, Report of the Office of the High Commissioner for Human Rights on the relationship between climate change and human rights, UN Doc. A/HRC/10/61, <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Study.aspx> accessed 12 January 2018, para. 70.

[38] Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (*Transnational Environmental Law*, 29 December 2017) <https://doi.org/10.1017/S2047102517000292> 4.

In several landmark cases, Asian jurisdictions have been at the forefront of this developing jurisprudence. In Pakistan, for example, *Leghari v Pakistan* represents a breakthrough success in the use of rights-based arguments as the legal foundation of a climate lawsuit.[39] Using public interest litigation to bring his case, Mr. Ashgar Leghari contended that climate change posed a serious threat to water, food, and energy security in Pakistan.[40] Furthermore, he contended that the state's failure to properly implement both the country's National Climate Change Policy 2012 and the supporting Framework for Implementation of Climate Change Policy (2014-2030) offended the fundamental rights to life (Article 9 of Pakistan's Constitution), dignity of the person and privacy of the home (Article 14) and property (Article 23).[41] During the proceedings, various government agency officers gave evidence that left no doubt that there had been little, if any, concerted effort to implement the national climate change policies.

The Lahore High Court ruled that the governmental failure offended fundamental rights, like 'the right to life [Article 9] which includes the right to a healthy and clean environment.'[42] In reaching its conclusion, the Court also referred to the constitutional principles of democracy, equality, and social justice.[43] In line with its tradition of an activist approach in public interest litigation, the Lahore High Court went on to design judicially administered remedies to address the breaches of fundamental rights. These remedies included directing the relevant government agencies to nominate a focal person to work closely with the Ministry of Climate Change, as well as establishing an expert climate change commission to assist the Court in monitoring the government's progress in implementing the national climate change policies.[44]

Another leading jurisdiction in the new environmental constitutionalism is the Philippines. There, the right to a 'balanced and healthful' ecology has created an enabling environment for litigation seeking to galvanize both private and public actors to address climate change. Moreover, the Philippine Supreme Court has crafted a set of innovative

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[39] *Ashgar Leghari v. Federation of Pakistan* (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 September and 14 September 2015 <https://elaw.org/PK_AsgharLeghari_v_Pakistan_2015> accessed 18 January 2018.
[40] Ibid, para 1.
[41] Ibid.
[42] Ibid, para 7.
[43] Ibid.
[44] Ibid, para 8.

procedural rules, the *Rules of Procedure for Environmental Cases*, to facilitate protection of the people's constitutionally enshrined rights to life and a healthy environment.[45] The Rules came into force on 29 April 2010 and govern procedure in civil and criminal cases in the first and second level courts that involve alleged violations of environmental laws, rules and regulations. What is particularly notable about these Rules is the introduction of the Writ of Kalikasan (or Writ of Nature). Petitioners can apply for a Writ of Kalikasan to be issued when the alleged environmental damage is of such magnitude that it adversely affects life, health or property of inhabitants in two or more cities or provinces. The remedy is available to 'a natural or juridical person', can be exercised on behalf of persons '*whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation*', and is enforceable against 'an unlawful act or omission of a *public official or employee*, or *private individual or entity*…'(emphasis added).[46] Under the Rules, hearings will take place and the court will render judgment within sixty days from the day on which the writ is filed.[47]

Global Legal Action on Climate Change v the Philippine Government was the first climate change-related lawsuit filed using the Writ of Kalikasan.[48] The action was brought against a number of government departments, including the Climate Change Commission, the Department of Public Works and Highways, and the Department of Interior and Local Government. The plaintiffs sought to compel the government to perform its duty under Republic Act 6716 to construct rainwater collectors in every *barangay* (village) throughout the country 'in such number as may be needed and feasible' to ensure that the population enjoys a sustained supply of freshwater and is safe from flooding which occurs frequently

[45] This was the result of an initiative led by Chief Justice Puno of the Philippines Supreme Court to promote public interest litigation in the quest for environmental justice. A copy of these Rules can be found at: <http://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html>. For discussion, see Gloria Estenzo Ramos, 'Innovative Procedural Rules on Environmental Cases in the Philippines: Ushering In a Golden Era for Environmental Rights Protection' 2011(1) IUCN Academy of Environmental Law e-Journal Issue <http://www.iucnael.org/en/e-journal/previous-issues/157-issue-20111.html> accessed 21 November 2017.

[46] Rule 7, section 1.

[47] Rule 7, section 15.

[48] The author is grateful to the principal petitioner in this case, Antonio A. Oposa, Jr. for sharing information about this landmark case. The case is unreported because it was eventually settled by the signing of a Memorandum of Understanding. This test case of the Writ of Kalikasan is also discussed in Hilario G. Davide, Jr, 'The Environment as Life Sources and the Writ of Kalikasan in the Philippines' (2012) 29(2) Pace Environmental Law Review, Article 9 (the author is the retired Chief Justice of the Philippines [1998-2005]).

because of the absence of a proper rainwater collection system.[49] Republic Act 6716 went into effect in March 1989 but was never implemented.[50] The petition was therefore advocating for effective climate change adaptation by seeking enforcement of an existing law. Eventually, a work plan was submitted to the Supreme Court and the defendant government departments signed a Memorandum of Understanding undertaking to carry out the construction works.[51] The implementation of the work plan was to be monitored by the Supreme Court, as was the case for the remediation of Manila Bay.[52]

Despite the transformative potential of the Writ of Kalikasan, would-be litigants of environmental rights still face significant obstacles. *Victoria Segovia et al v Climate Change Commission et al*, a recent decision by the Philippine Supreme Court, is illuminating in this respect.[53] The facts are briefly as follows. The 'Road Sharing Principle' was first articulated in Executive Order 774 (Reorganizing the Presidential Task Force on Climate Change) and subsequently finds its expression in the Framework Strategy on Climate Change and the Environmentally Sustainable Transport Strategy. The principle is that '[t]hose who have less in wheels must have more in road'. The petitioners in *Victoria Segovia* included those who refer to themselves as Carless People of the Philippines, parents, children, and children of the future. They alleged, inter alia, that the failure of the Department of Transportation and Communications (DOTC) and the Department of Public Works and Highways (DPWH) to implement the Road Sharing Principle resulted in the continued degradation of air quality—particularly in Metro Manila—and a consequent violation of the petitioners' constitutional rights to 'a balanced and healthful ecology'. This petition failed on the grounds that the petitioners could not establish the requirements for

[49] Paras. 13.1, 14 of the Global Legal Action on Climate Change v the Philippine Government petition (on file with author).
[50] Hilario G. Davide, Jr, 598.
[51] Email correspondence with Antonio A. Oposa, Jr. (on file with author).
[52] In Metro Manila Development Authority v Concerned Citizens of Manila Bay, GR 171947-48 (S.C. Dec 18, 2008), a group of citizens succeeded in compelling the government to clean up Manila Bay after nearly ten years of litigation. The Supreme Court adopted a procedure that has been incorporated in the *Rules of Procedure for Environmental Cases* as the Writ of Mandamus. This Writ is an extensive and continuing order by the Court. To ensure that there is implementation of its environmental remediation orders, the Court requires the defendant government departments to submit written progress reports every ninety orders till the Court is satisfied that its orders have been compiled with.
[53] *Victoria Segovia et al v Climate Change Commission et al*, GR 211010 (S.C. March 7, 2017) <http://sc.judiciary.gov.ph/jurisprudence/2017/toc/march.php> accessed 03 September 2018. 'The Road-Sharing Case' is discussed in Jolene Lin, 'Litigating Climate Change in Asia' (2014) 4 Climate Law 140 when the petition was first filed.

the Writ of Kalikasan, as they could not satisfy the Supreme Court that the defendants were guilty of any unlawful act or violation of environmental laws that breached their right to a balanced and healthful ecology.[54] Furthermore, in deciding that the Writ of Mandamus was also not available to the petitioners, the Court emphasized that the petitioners were not seeking to compel the performance of an executive act but to implement a policy principle in accordance with their own preferences (i.e., the bifurcation of traffic lanes into all-weather sidewalks, bicycle lanes, and roads for Filipino-made transport vehicles).

The result in *Victoria Segovia* encapsulates a key lesson for future potential litigants. A petition for the Writ of Kalikasan cannot merely contain 'repeated invocation of the constitutional right to health' and 'bare allegations that their right was violated'.[55] The petition must clearly state the specific environmental laws, rules, or regulations that have allegedly been violated; it is through establishing the breach of such laws, rules, or regulations that the Court can determine that the petitioner's environmental right has been violated. This points to one of the difficulties in relying on litigation to advance climate policy. Because of the cross-cutting nature of the issue of climate change, it is not uncommon for national and local authorities to develop broad policy strategies and action plans. It is difficult, however, to subject broad policy strategies and programs to constitutional review; constitutional review usually calls for specificity in how the right to environment has been violated. Furthermore, courts are usually careful to avoid over-reaching into the executive's decision-making domain by dictating the specifics of national climate change policies.

Notwithstanding the limitations, the Philippines continues to be at the cutting-edge of environmental constitutionalism. On 22 September 2015, Greenpeace and the Philippine Rural Reconstruction Movement, together with other non-profit groups and typhoon survivors, submitted a petition to the Philippines' Commission on Human Rights (PCHR) alleging violations of rights protections as a result of extreme weather events linked to climate change, to which the respondents' business activities contributed.[56] The

[54] Ibid.
[55] Ibid.
[56] Specifically, the petition calls for the Carbon Majors to account for breaches of the rights to life, food, water, sanitation, adequate housing, and self-determination. It also alleges that the Carbon Majors have breached the right of Filipinos to development, particularly marginalized and disadvantaged groups that are especially vulnerable to the effects of climate change; Petition Requesting for Investigation of the

respondents refer to the petitioners as the 'Carbon Majors', which are 47 coal, oil, gas and cement transnational corporations, including Chevron, Exxon, Shell and BHP Billiton. They are amongst the 90 firms that have been identified as being responsible for nearly two-thirds of global greenhouse gas emissions since the start of the industrial age.[57] This petition has global significance.[58] It is the first legal petition framing climate change as a human rights issue to be submitted to a national human rights institution. It is also the first climate petition to implicate private actors in alleged human rights abuses, and the fact that the PCHR decided to proceed with the inquiry is in and of itself ground-breaking.[59] A national inquiry was also commenced, which is notable because national inquiries are rarely convened in the Philippines, and only then for matters of great importance for the country and its citizens.[60] At the time of writing, the PCHR had announced the general conclusions from its four-year inquiry at COP25 (United Nations Climate Change Conference, Madrid, Spain).[61] The PCHR found that, based on the evidence, the Carbon Majors could be found legally and morally liable for human rights violations resulting from climate change. The Commission also found that relevant criminal intent may exist to hold companies accountable under civil and criminal laws, in light of certain circumstances involving obstruction, willful obfuscation and climate denial.[62] The PCHR's final report is

Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change <http://www.greenpeace.org/seasia/ph/PageFiles/735291/Petitioners-and-Annexes/CC-HR-Petition.pdf> accessed 03 September 2018, 7-8.

[57] Ibid, 23-25.

[58] For discussion, see Annalisa Savaresi, Iona Cismas and Jacques Hartmann, 'The Philippines Human Rights Commission and the "Carbon Majors" Petition' <https://www.ejiltalk.org/the-philippines-human-rights-commission-and-the-carbon-majors-petition/> accessed 30 December 2017.

[59] Annalisa Savaresi, Ioana Cismas and Jacques Hartmann, 'The Philippines Human Rights Commission and the 'Carbon Majors' Petition' (22 December 2017) <https://www.ejiltalk.org/the-philippines-human-rights-commission-and-the-carbon-majors-petition/> accessed 15 June 2019.

[60] Ping Manongdo, 'Landmark human rights case against world's biggest fossil fuel firms pushes on' (13 December 2016) <http://www.eco-business.com/news/landmark-human-rights-case-against-worlds-biggest-fossil-fuel-firms-pushes-on/> accessed 30 December 2017.

[61] Centre for International Environmental Law, 'Groundbreaking Inquiry in Philippines Links Carbon Majors to Human Rights Impacts of Climate Change, Calls for Greater Accountability' (9 December 2019) <https://www.ciel.org/news/groundbreaking-inquiry-in-philippines-links-carbon-majors-to-human-rights-impacts-of-climate-change-calls-for-greater-accountability/> accessed 26 January 2020.

[62] Greenpeace International, 'Greenpeace reactive on Philippine Commission on Human Rights' announcement' (9 December 2019) <https://www.greenpeace.org/international/press-release/27847/greenpeace-reactive-on-philippine-commission-on-human-rights-announcement/> accessed 26 January 2020.

expected to be published in 2020.[63]

E. CONCLUSION

This chapter provides a sweeping overview of some broad trends and developments in Asian environmental constitutionalism. It is necessarily under-inclusive, as the body of literature on environmental rights is vast and the field of environmental constitutionalism extremely dynamic. As mentioned at the outset, there has been an environmental rights revolution. We might even speak of the right to a clean or healthy environment being only the first stage in this process, with the next stage being the possible advancement of rights of nature.[64] In Asia, environmental rights are found in nearly every constitution but they have not been the basis of much judicial lawmaking. However, climate change presents a challenge that might ignite the use of constitutions to advance environmental rights. This chapter has provided some analysis of the potential for rights-based climate litigation in Asia, an issue that has attracted the attention of academics, judges, and development agencies alike.[65] Following the findings of the Carbon Majors case, and similar litigation being considered elsewhere in Asia, this is a space worth watching.

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[63] Isabella Kaminski, 'Carbon Majors Can Be Held Liable for Human Rights Violations, Philippines Commission Rules' (9 December 2019) <https://www.climateliabilitynews.org/2019/12/09/philippines-human-rights-climate-change-2/> accessed 26 January 2020.

[64] 'Rights of nature' recognize the intrinsic right of nature to exist and flourish, as opposed to being treated as property to which human beings have rights. Ecuador is the first country in the world to recognize rights of nature in its constitution. For discussion, see for example, Susana Borras, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) Transnational Environmental Law 113; J Jaria, '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 2014).

[65] On 26-27 February 2018, for example, the Lahore High Court hosted the Asia Pacific Colloquium on Climate Change: Using Constitutions to Advance Environmental Rights and Achieve Climate Justice. This event was co-sponsored by the Asian Development Bank, the UNEP, the World Commission on Environmental Law and the Global Judges Institute on the Environment <http://www.ajne.org/event/asia-pacific-judicial-colloquium-climate-change#quicktabs-event_tabs=1> accessed 15 February 2018.