

Providing Adequate Environmental Protection under the Constitution of Sri Lanka: An Agenda for Reform

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Abstract

The numerous ecological challenges faced by countries across the world have revived a discourse within theories of justice about the adequacy of domestic law to combat the global climate crisis. As a state in the global south, largely dependent on climate-sensitive sectors such as agriculture and fishing, this discourse is particularly relevant to Sri Lanka. This article evaluates Sri Lanka's efforts at advancing environmental justice from the perspective of constitutional law. The qualitative research undertaken suggests two things. Firstly, that the existing constitutional provisions and soft-law obligations are inadequate to resolve the complex problems posed by environmental degradation. Secondly, that the Sri Lankan courts have played a laudable role in re-defining and expanding the frontiers of environmental justice despite being constrained by narrow constitutional provisions and doctrinal constraints stemming on account of being a dualist nation. The article emphasises that any future attempt at constitutional reform should look beyond the conventional understanding of environmental protection and advocate for a more durable means of achieving environmental justice. It is proposed that a constitutional acknowledgement of climate change issues and the elevation of environmental care to the status of a higher legal norm would be a decisive step in this direction.

Key words: *Climate Change, Environmental Constitutionalism, Environmental Justice, Judicial Activism, Right to Environment*

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Introduction

Climate change and environmental degradation present perhaps the most profound challenges ever to have confronted human social, political, and economic systems.¹ It intensifies poverty, exacerbates economic and social inequality, and poses significant obstacles to development.

Against this backdrop, ‘environmental constitutionalism’ is emerging as an increasingly popular (and possibly desperate) regulatory attempt to improve environmental protection.² Environmental constitutionalism embodies the recognition that the environment is a subject worthy of protection in constitutional texts and for vindication by constitutional courts.³

This paper aims to use the burgeoning environmental constitutionalism discourse as a platform to explore whether Sri Lanka’s constitutional landscape affords adequate protection for the environment. Accordingly, the paper begins in Part III by outlining the constitutional framework on environmental protection in Sri Lanka. Part IV examines Sri Lanka’s international environmental

¹ John S Dryzek, Richard B Norgaard and David Schlosberg, ‘Climate Change and Society: Approaches and Responses’ in John S. Dryzek, Richard B. Norgaard and David Schlosber (eds), *The Oxford Handbook of Climate Change and Society* (OUP 2018).

² Loise J Kotzé, ‘The Conceptual Contours of Environmental Constitutionalism’ (2015) 21 *Weidner Law Review* 187.

³ James R May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press 2015) 1.

obligations and its constitutional status in the country. In Part V of the paper, the author evaluates several emblematic cases that came before the Superior Courts of Sri Lanka to understand the status of judicial protection of environmental norms. Part VI of the paper introduces environmental constitutionalism and highlights its normative and practical value for Sri Lanka. The paper concludes by making some observations and recommendations regarding the future of environmental justice in Sri Lanka.

Methodology

This study is an analytical as well as a comparative study. The author has thus employed a qualitative method that involves the study of primary and secondary sources. While primary sources such as constitutional provisions, international conventions, and case law authorities form the analytical basis of this paper, cross-jurisdictional referencing between Sri Lanka, South Africa, Norway, and France forms the comparative basis. The paper also includes expert opinions drawn from secondary sources such as textbooks, journal articles, reports, policy briefs and newspaper articles. All collected data, both primary and secondary, is used to validate claims, formulate findings, and draw conclusions.

The Constitutional Framework relating to Environmental Protection in Sri Lanka

Sri Lanka's constitutional history is speckled with

piecemeal reform. Although environmental stewardship has an age-old place in Sri Lankan history,⁴ the first two constitutions that successively governed Sri Lanka since independence did not contain specific provisions on environmental protection.⁵

The present Sri Lankan Constitution was enacted in 1978.⁶ The pantheon of rights recognised in Chapter III of the 1978 Constitution is limited to civil and political rights. Economic and social rights are not included in this Chapter, and the Constitution does not provide for the right to life or the right to a healthy environment. Following the Indian and Irish Constitution model,⁷ economic, social and cultural interests are relegated to the status of obligations of the State under Chapter VI of the Constitution titled 'Directive Principles of State Policy.' Chapter VI contains some references to the environment.

Firstly, under Article 27(14) the State is required to

⁴ The famous proclamation by King Parakramabahu the Great in (1153-1186 AD) that '*Let not allow a single drop of water falling as rain flow into the sea without being used for the benefit of mankind*' is considered as one of earliest policy statements on environmental protection in Sri Lanka.

⁵ The failure to address environmental protection can be attributed to the socio-political context of the documents' creation; Joshua C Gellers, 'Environmental Constitutionalism in South Asia: Analyzing the Experiences of Nepal and Sri Lanka' (2015) 4 (02) *Transnational Environmental Law* 395. See further, H.S.D. Mendis, *Environmental Protection through Judicial Review in Sri Lanka: A Comparative Analysis with India and United Kingdom* (Unpublished Thesis). Available at <http://ir.kdu.ac.lk/handle/345/4279> (Accessed on 01.08.2021)

⁶ The Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

⁷ Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka* (2nd edn, Stamford Lake Publication 2013) 38-39.

protect, preserve and improve the environment for the benefit of the community. Secondly, under Article 28(f) every person in Sri Lanka is imposed with a corresponding duty to protect nature and conserve its riches. Chapter VI also enshrines several other aspects of social justice, including the equitable distribution among all citizens of the material resources of the community and the social product, so as to best to sub-serve the common good.⁸ Article 29 of the Constitution states explicitly that these principles do not confer or impose legal rights or obligations and are not justiciable. They are merely intended to guide the State to establish just and free society and are objectives that the State is pledged to fulfil.⁹ The fundamental shortcoming with such policy statements, is that citizens who are aggrieved by environmental degradation have no means of seeking a remedy.

However, as will be elaborated below, on several occasions, the apex courts have breathed life into environmental conservation by holding that the fundamental rights guaranteed under the Constitution must be read together with the Directive Principles of State Policy. Therefore, the Directive Principles have assumed greater significance than what was contemplated by the drafters of the Constitution.

Following the ratification of the 1978 Constitution, an

⁸ The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art 27(2)(e).

⁹ Ibid, art 27(1)

unsuccessful attempt was made to enact a new constitution in 2000. Like its predecessor, the 2000 Draft Constitution did not prominently feature environmental concerns.

Sri Lanka's most recent attempt at constitutional reform came in 2016. The parliament of Sri Lanka convened as a 'Constitutional Assembly' and divided itself into sub-committees to make recommendations on various substantive areas. The 'Sub-Committee on Fundamental Rights' presented five types of collective rights, including the right to environment. Under these proposals, citizens entitled to right to a healthy environment which is not harmful to health and well-being and that can sustain all forms of life. The right to have the environment protected through reasonable legislative and other measures, and the right to benefit equally from natural resources. The State was required to hold such resources in trust for present and future generations.¹⁰ Although these proposals sought to usher in a new wave of democratisation, the government was unable to deliver on its promise of a new constitution.

Sri Lanka's International Environmental Obligations and its Constitutional Status

Sri Lanka's first international recognition of the right to a healthy environment came with adopting the Stockholm

¹⁰ The Constitutional Assembly of Sri Lanka, *Report of the Sub-Committee Proposals for Fundamental Rights* (2016) 12-13.

Declaration of the United Nations Conference on the Human Environment during the global Eco-Summit in 1972.¹¹ Two decades after adopting the Stockholm Declaration, Sri Lanka adopted the Rio Declaration on Environment and Development¹² at the United Nations Conference on Environment and Development. Although the Rio Declaration fell short of mentioning human rights explicitly, it recognised that ‘human beings are at the centre of concerns for sustainable development’ and acknowledged that ‘they are entitled to a healthy and productive life in harmony with nature.’¹³

Sri Lanka also became a party to the United Nations Framework Convention on Climate Change (UNFCCC)¹⁴ in 1992 and a signatory to the Kyoto Protocol in 2002.¹⁵ While the UNFCCC encourages industrialised countries to stabilise greenhouse gas emissions, the Protocol sets out binding commitments for its reduction.

In addition to the above, Sri Lanka is a signatory to several other multilateral environmental agreements such

¹¹ UN General Assembly, Declaration of the United Nations Conference on the Human Environment (adopted 15 December 1972) UNGA /RES/2994, Principle 1.

¹² UN General Assembly, Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874.

¹³ *Ibid*, Principle 1

¹⁴ UN General Assembly, United Nations Framework Convention on Climate Change (adopted 20 January 1994) A/RES/48/189.

¹⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997) 2303 UNTS 148, 37 ILM 22.

as the Convention on Biological Diversity,¹⁶ the Ramsar Convention on Wetlands,¹⁷ the Vienna Convention for the Protection of the Ozone Layer¹⁸ and the Montreal Protocol on Substances that Deplete the Ozone Layer.¹⁹

In April 2016, Sri Lanka marked its commitment to strengthening the global response to climate change and sustainable development by signing the Paris Climate Agreement.²⁰ The Paris Agreement commits parties to adopt strategies to reduce greenhouse gas emissions and limit the global temperature increase.

Although Sri Lanka appears to have an exemplary record of ratification of international environmental treaties, it is widely accepted that domestic implementation is weak.²¹

The 1978 Constitution is also relatively silent on the relationship between treaty obligations and domestic law. While Article 27(15) obligates the State to foster respect

¹⁶ Convention on Biological Diversity (adopted 10 June 1992, entered into force 29 December 1993) 1760 UNTS 79, 143; 31 ILM 818.

¹⁷ Convention on Wetlands of International Importance especially as Waterfowl Habitat (adopted 2 February 1971).

¹⁸ Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 323; 26 ILM 1529.

¹⁹ Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 32 ILM 874.

²⁰ Conference of the parties, Adoption of the Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc. FCCC/CP/2015/L.9/Rev/1.

²¹ Deepika Udagama, 'The Politics of Domestic Implementation of International Human Rights Law' (2015) 16 Asia Pacific Journal on Human Rights and the Law, 104; Only a few statutes such as, the National Environmental Act No. 47 of 1980 endorse the environmental norms developed in treaties.

for international law and treaty obligations in dealings among nations, Article 33(2)(h) confers power on the President of Sri Lanka to ratify international customs and norms as long as they are not inconsistent with the Constitution or any written law of Sri Lanka.²² Accordingly, constitutional scholars have maintained that, in light of the acceptance of the doctrine of the sovereignty of Parliament, treaties have no legal status unless directly transformed through enabling legislation.²³ A five-judge bench of the Supreme Court also acquiesced to this dualist view in the case of *Nallaratnam Singarasa v. Attorney General*.²⁴

In the absence of enabling legislation, the treaties mentioned above and soft-law obligations, therefore, have only a persuasive value on Sri Lanka's legal system.

Judicial Activism concerning issues of environmental justice

Influenced by the activist approach taken by the Supreme

²² Rushana Nanayakkara and Wardani Karunaratne, 'Multilateral Environmental Agreements and the Sri Lankan Legal System' in Mario Gomes (ed), *Judges and Environmental Law: A Handbook for the Sri Lankan Judiciary* (Environmental Foundation Limited 2009); The only exception to this dualist view is found in Article 157 which makes economic treaties, usually investment treaties, part of domestic law when passed by a two-thirds vote of Parliament.

²³ JAL Cooray, *Constitutional and Administrative Law of Sri Lanka* (Sumathi Publishers 1995) 237-238.

²⁴ [2013] 1 Sri LR 245.

Court of India during the 1980s,²⁵ Sri Lankan courts have demonstrated great intellectual rigour in overcoming obstacles placed in the path of achieving environmental justice.

One of the celebrated judgements concerning environmental protection in Sri Lanka is *Bulankulame v. The Secretary, Ministry of Industrial Development and Others*,²⁶ popularly referred to as the *Eppawela* case. The case concerned a joint venture agreement between the Sri Lankan government and a leading overseas mining company to mine phosphate deposits located at *Eppawela* in the North Central Province. The Petitioners, who stood to lose their livelihood and place of residence as a result of this mining project, claimed that there was an imminent infringement of their fundamental rights to equal treatment under the law, the right to engage in a lawful occupation and the right to choose one's place of residence. The court took note of the concept of 'sustainable development' as developed by the Stockholm²⁷ and Rio Declarations²⁸ on the Environment to hold that '*Human beings are at the centre of concerns for sustainable development and are entitled to a healthy*

²⁵ Naazima Kamardeen, 'The honeymoon is over: an assessment of judicial activism in environmental cases in Sri Lanka' (2016) 6(1) *Jindal Global Law Review* 73.

²⁶ [2000] 3 Sri LR 243.

²⁷ UN General Assembly, United Nations Conference on the Human Environment (adopted 15 December 1972) UNGA/RES/2994.

²⁸ UN Commission on Human Rights, Human Rights and the environment (adopted 9 March 1994) E/CN.4/RES/1994/65.

*and productive life in harmony with nature.*²⁹ Drawing inspiration from Principle 10 of the Rio declaration, the court also emphasised the importance of providing access to information on environmental issues. Justice Amerasinghe, delivering judgment for a unanimous bench of the Supreme Court, declared: *Admittedly, the principles set out in the Stockholm, and Rio De Janeiro Declarations are not legally binding in the sense in which an Act of our Parliament would be. It may be regarded, merely as “soft law.” Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by superior courts of record and by the Supreme Court in particular in their decisions.*³⁰ Although Sri Lanka has been traditionally dualist in nature, this *dictum* set the tone for the reception of principles of international environmental law - whether treaty or soft law - into domestic law with great ease.

Another case in point that expanded the right to equality to include the right to a clean environment was *Watte Gedera Wijebanda v. Conservator General of Forests*.³¹ In this case, the Petitioner claimed an infringement of his right to equality after being refused a permit for quarry mining of silica quartz in a site located less than a mile from the Girithale Minneriya National Reserve, close to

²⁹ *Bulankulame v The Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri LR 243, 274 (Amerasinghe J.).

³⁰ *Ibid*, 274-275.

³¹ [2009] 1 Sri LR 337.

the Sigiriya archaeological area. Justice Thilakawardena delivering the unanimous judgment of the court, declared that: *'Even if environmental rights are not specifically alluded to under the fundamental rights chapter of the Constitution, the right to clean environment and the principles of equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of Article 12(1) of the Constitution.'*³²

Two other notable judicial pronouncements in which the Supreme Court upheld environmental justice are *Environmental Foundation Limited v. Urban Development Authority (Galle Face Green case)*³³ and *Environmental Foundation Limited v. Mahaweli Development Authority*.³⁴ The Petitioner in both these cases was a non-profit organisation that has a long-standing record of initiating fundamental rights claims seeking environmental justice.

The basis of the claim in the first case was the refusal of the Urban Development Authority to disclose information about the purported handing over of the *Galle Face Green*, a historic public promenade in Colombo, to a private company for management. Acting in the public interest, the Petitioners maintained that the refusal to disclose the information amounted to an arbitrary exercise of power and an infringement of the freedom of expression.

³² *Watte Gedera Wijebanda v Conservator General of Forests* [2009] 1 Sri LR 337, 356 (Thilakawardena J.).

³³ [2009] 1 Sri LR 123.

³⁴ [2010] 1 Sri LR 1.

Holding in favour of the Petitioner, Justice S.N. Silva, ruled that the suppression of information required by the Petitioner is an infringement of the Petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution. Reinforcing the importance of access to information on environmental issues, His Lordship added that '*Article 14(1)(a), to be meaningful and effective, should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain.*'³⁵

The basis of the second claim was that the respondent, *Mahaweli* Authority, was acting illegally by alienating lands situated within environmentally sensitive and protected areas by way of permits and by granting permission for the construction of houses. Relying on applicable legislation and regulations, the Petitioner alleged that the respondent Authority was acting in violation of Article 12(1) of the Constitution. Upholding the Petitioner's claim, the court opined that the powers vested with the respondent Authority could only be used to further the purposes for which such Authority has been established, which included, among other things, the conservation of the environment within any designated area.

A more recent case which adds to the growing body of jurisprudence on environmental protection is *Ravindra*

³⁵ *Environmental Foundation Limited v Urban Development Authority* [2009] 1 Sri LR 123, 130.

Gunawardena Kariyawasam v. Central Environmental Authority,³⁶ better known as the *Chunnakam Power Plant* Case. In this case, the key contention of the Petitioner was that the thermal power plant operated by the Northern Power Company in the Chunnakam area of the Jaffna peninsula polluted the groundwater, making it unfit for human consumption. Keeping up with the judicial trend established in the *Eppawela* case, the Supreme Court extended the scope of the fundamental rights chapter to include specific environmental rights through the right to equality. The court declared that *'when Article 12(1) is read in the light of Article 27(14) of the Constitution, it vests in the citizens of Sri Lanka a fundamental right to be free from unlawful, arbitrary or unreasonable executive or administrative acts or omissions which cause or permit the pollution or degradation of the environment.'*³⁷ The court further observed that *'access to clean water is a necessity of life'* and is inherent in Article 27(2)(c) of the Constitution which declares that the State must ensure to all citizens *'an adequate standard of living'*. In reaching these conclusions, Justice Prasanna Jayawardena noted that *'The Directive Principles of State Policy are not wasted ink in the pages of the Constitution. They are a living set of guidelines which the State and its agencies should give effect to.'*³⁸

By declaring that it is of *'vital importance'* that the

³⁶ SCFR 141/2015, SC Minutes 04 April 2019.

³⁷ *Ravindra Gunawardena Kariyawasam v Central Environmental Authority* SCFR 141/2015, SC Minutes 04 April 2019, 52 (Prasanna Jayawardena J.).

³⁸ *Ibid*, 49

relevant statutory authorities give ‘the public an opportunity to make their comments and, where required, be heard, prior to the grant of approval for the implementation of a project,’ the court also re-affirmed the applicability of the principle on ensuring public participation recognised in Principle 10 of the Rio Declaration.

When the impact of climate change is keenly felt in Sri Lanka due to extended droughts, life-threatening rain, landslides, and a looming water crisis, the court's determination is an encouraging sign.³⁹ Not only did it clarify three substantive aspects of environmental rights, it is also probably one of the first times that the court made an explicit declaration on the right of ‘access to clean water.’⁴⁰ The judgement also suggests that state entities and private entities who flout the law with impunity can and will be held accountable for the damage they cause to the environment.⁴¹

The above survey of case law indicates that, notwithstanding the limited scope of the fundamental rights provisions in the Constitution, over the years, the Sri Lankan judiciary has creatively used them to develop a rich body of jurisprudence, which has defined social

³⁹ Dinesha Samararatne, ‘Chunnakam Power Plant case: Court recognises right to be free from ‘degradation of the environment’ (*Daily FT*, 29 July 2019) <<http://www.ft.lk/columns/Chunnakam-Power-Plant-case--Court-recognises-right-to-be-free-from--degradation-of-the-environment-/4-682834>> accessed 24th April 2021.

⁴⁰ *Ibid*

⁴¹ *Ibid*

justice and human rights in the development process and the context of environmental degradation.⁴² In particular, through expanding the scope of the right to equality, the courts have recognised several substantive and procedural rights that are not explicitly recognised in the Constitution. In some cases, the courts have also utilised the doctrine of public trust in affirming the duty of all three branches of the State to hold natural resources in trusteeship for the use and enjoyment of the present generation and for the present generation the use of future generations.

The role of judges has been facilitated by public interest litigation driven mainly by public-spirited non-governmental organisations, litigating either in their capacity or as legal counsel for affected peoples.⁴³ In effect, the conventional rules of *locus standi*, which requires a petitioner to show that he or she was materially and directly affected, have also been relaxed.⁴⁴

Although the Sri Lankan judiciary appears to have moved away from its usual conservatism and utilised several tools in developing a large body of jurisprudence dealing with and defining issues of environmental justice, it is pertinent to bear in mind that judicial activism reflects the composition, nature and outlook of the bench at any given

⁴² Camena Guneratne, 'Using Constitutional Provisions to Advance Environmental Justice – Some Reflections on Sri Lanka, 11/2 Law', (2015) Environment and Development Journal 72 <<http://www.lead-journal.org/content/15072.pdf>> accessed 23rd April 2021.

⁴³ Ibid

⁴⁴ Ibid

time, and that in a system where judges are appointed, not elected, one cannot guarantee consistency and uniformity in judicial style.⁴⁵

Consequently, the question remains whether judicial activism alone could grapple with the complex problems posed by environmental degradation and climate change.

The value of environmental constitutionalism

A constitution is typically recognised as the paramount law under which all public power is exercised. Many of the ground rules concerning how governments are formed, their powers, and rights of the citizens are the available information in a written constitution.⁴⁶ According to Hans Kelsen's hierarchical model of law, the constitution (referred to as the basic norm or *Grundnorm*) lies at the heart of the legal system; the validity of all legal norms is ultimately derived from it. On a much deeper level, constitutions are also recognised as norm-setting instruments that reflect society's most cherished values.

As concerns about climate change, water scarcity, the depletion of natural resources, and related phenomena intensify throughout the world, there is a growing recognition of the need for constitutional institutions, provisions, procedures and norms to embrace environmental care and extend constitutionalism the

⁴⁵ Kamardeen (n 25).

⁴⁶ Mark Elliott and Robert Thomas, *Public Law* (Oxford University Press 2020) 18.

environmental domain.⁴⁷

Proponents of this new conception of environmentalism defend their position based on three overarching claims. Firstly, they maintain that constitutionally embodied environmental provisions enable environmental protection to achieve the highest rank (*lex suprema*) among legal norms.⁴⁸ Secondly, they argue that addressing environmental concerns at the constitutional level means that environmental protection need not depend on narrow majorities in legislative bodies. Instead, environmental protection would be more firmly rooted in the legal order because constitutional provisions ordinarily may be altered only according to elaborate procedures.⁴⁹ The third argument is that constitutional provisions provide a normative function that is superior to other domestic legal approaches. As the supreme law of the land, constitutions promote a model character for the citizenry to follow and influence and guide public discourse and behaviour.⁵⁰

Considering the above, it is proposed that Sri Lanka too should advance environmental protection through entrenched constitutional provisions. The elevation of

⁴⁷ Erin Daly, Louis Kotzé, James R May, 'Introduction to Environmental Constitutionalism' in Erin Daly Louis Kotzé, James May and Caiphas Soyap (eds), *New frontiers in Environmental Constitutionalism* (United Nations Environment Programme 2017).

⁴⁸ Ernst Brandl and Hartwin Bungert, 'Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad' (1992) 16 *Harvard Environmental Law Review* 4.

⁴⁹ *Ibid*

⁵⁰ *Ibid*

environmental care to a ‘higher’, more enduring, constitutional status would acknowledge the urgency of the climate crisis and re-affirm the sanctity attached to the environment.

Constitutionalising environmental norms and climate change issues: The way forward

Environmental norms can be ‘constitutionalised’ in various forms. At the weak end of the continuum, the constitution simply gives the legislature authority to enact environmental legislation.⁵¹ As is the case in Sri Lanka, a slight step beyond occurs when the constitution sets out a constitutional policy to protect the environment. A step further is taken where the constitution acts as the guardian and reference point for environment related fundamental rights.⁵²

Constitutionalising the Right to environment

The post-apartheid Constitution of South Africa is a pioneer of this latter trend. The Constitution includes not only a rich, substantive environmental right that speaks to health, well-being, intra and inter-generational equity, conservation, pollution control and ecologically sustainable development,⁵³ and it also contains several

⁵¹ Ibid

⁵² Hong Sik Cho and Ole W Pedersen, ‘Environmental rights and Future Generations’ in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013).

⁵³ The Constitution of South Africa 1996, s 24.

potentially interrelated and mutually reinforcing substantive rights. The Charter for the Environment integrated into the Fifth Republic Constitution of France in 2005 also recognises a gamut of environmental rights. The most fundamental of these is Article 1, which declares that ‘everyone has the right to live in a balanced environment which shows due respect for health.’⁵⁴

An example of a procedural environmental right is found in Article 112 of the Constitution of the Kingdom of Norway 1814, which states that citizens are entitled to information on the state of the natural environment and the effects of any encroachment on nature planned to be carried out. The Environment Charter of the French Constitution also bestows citizens with the right to have access to publicly held information on environmental conditions and the right to participate in public decisions likely to affect the environment.⁵⁵

Keeping abreast with these comparative constitutional design trends, it is proposed that Sri Lanka too should strive towards constitutionalising the right to environment on a stand-alone basis and make it available to all ‘persons’ i.e., both natural and juristic.

The main advantage of the inclusion of a justiciable right to a healthy environment is the possibility for affected parties to seek an effective remedy by holding

The Constitution of South Africa 1996, s 24.
the Environment, art 1.

⁵⁵ Ibid: art 7

governments directly accountable for their failure to regulate and control environmental nuisances. It would give a human face to the problem, rather than focusing attention on an abstract entity such as the environment.⁵⁶ It would also give greater weight and prominence to the importance of protecting the environment, contribute to the hardening of otherwise soft-international law and act as a safety net that bridges interstitial gaps left by national law.⁵⁷ Another legal advantage flowing from a constitutional recognition of the right to a healthy environment may prevent the future weakening of environmental laws and policies (commonly referred to as rollbacks).⁵⁸

The substantive right to the environment should be complemented with procedural rights such as the right of access to information concerning the environment, the right of participation in environmental decision-making, and the right of adequate access to judicial and administrative proceedings, including redress and remedy. Such procedural rights are essential in increasing stakeholder involvement in the development processes and in reinforcing public confidence in the system. It would also usher in a culture of transparency and participatory democracy.

⁵⁶ Sumudu Atapattu, *Human rights Approaches to Climate Change: Challenges and Opportunities* (Routledge Research in Environmental Law 2016) 49.

⁵⁷ Erin Daly and James R May, 'Comparative Environmental Constitutionalism' (2015) 6 *Jindal Global Law Review* 9.

⁵⁸ David R Boyd, 'The Constitutional Right to a Healthy Environment' (2012) 54 *Environment: Science and Policy for Sustainable Development* 4.

Despite the attractiveness of the inclusion of a human right to the environment, it is pertinent to acknowledge its drawbacks: environmental issues encompass many species and ecosystems which cannot be accommodated within a human rights framework. By its very nature, a human rights regime can protect only humans.⁵⁹ Sceptics further argue that it is difficult to define a right to the environment. This argument, however, is an overstatement as we are still grappling with the meaning and parameters of established civil and political rights such as torture and discrimination.⁶⁰

Moreover, the practical worth of constitutional environmental rights will only be felt if it is supported by a comprehensive model of judicial review,⁶¹ political will and vibrant civil society advocacy.

Adoption of a new Climate Change Act

In order to provide a clear direction of travel for the constitutional right to environment, Sri Lanka should also adopt a Climate Change Act. Modelled on the United Kingdom's Climate Change Act of 2008, the new statute should enumerate binding environmental performance

⁵⁹ Atapattu (n 56) 49.

⁶⁰ Ibid (n 56) 51

⁶¹ The constitutional remedy for violation of fundamental rights in Sri Lanka lies only against executive or administrative action; Article 80(3) of the 1978 Constitution precludes post-enactment judicial review of legislation on any ground including that of unconstitutionality.

standards which the State is committed to achieve and provide for the establishment of an independent Commission on Climate Change tasked with providing expert, non-partisan advice to the State on meeting its environmental performance targets and in adopting climate-smart policies.⁶² While climate targets will help reduce emission levels, meet Paris commitments and open up channels of international climate finance,⁶³ the establishment of an independent climate commission will ensure that matters concerning the environment are kept beyond the reach of political interests of successive governments and handled by experts in the field.

Conclusion

The foregoing analysis makes it abundantly clear that the existing constitutional framework of Sri Lanka falls short on a number of counts and offers minimal textual guarantees on environmental protection. Notwithstanding these constraints, the study of cases illustrates the profound commitment that courts have shown to resolve complex environmental issues. Expansion of the scope of the fundamental rights chapter to include specific environmental rights through creative interpretations of

⁶² Grantham Research Institute on Climate Change, 'Policy brief: The role and influence of the UK's Committee on Climate Change' (Centre for Climate Change and Economics Policy 2018).

⁶³ Navraj Singh-Ghaleigh and Asanga Welikala, 'Need for a constitutional and statutory framework on the environment and climate change in Sri Lanka' (*Daily FT*, 23 March 2021) <<http://www.ft.lk/opinion/Need-for-a-constitutional-and-statutory-framework-on-the-environment-and-climate-change-in-Sri-Lanka/14-715165>> accessed 1st May 2021.

the Directive Principles and the healthy reception of international environmental norms are indicators of this positive trend.

Nevertheless, as consistency and uniformity in adjudication cannot be guaranteed, law makers must look beyond the conventional understanding of environmental protection and strive towards promoting environmental protection at a more enduring and higher constitutional level. Consequently, the next steps in the constitutional reform agenda should be two-pronged. The first step is to constitutionalise the right to the environment. The second step is to adopt a new Climate Change Act. While the reforms elaborated in this paper would contribute to the creation of a Sri Lankan brand of environmental constitutionalism, it remains to be seen how wielders of power will uphold the spirit of these revisions.