Environmental Rights by Constitutional Means

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Among the various legal instruments to address climate change, the constitutionalization of environmental rights has recently become a favourite of policymakers, activists and scholars. This should come as no surprise. In recent decades, dozens of countries have enacted constitutional reforms to legally entrench environmental rights, often enshrined as fundamental human rights and often including future generations among their addressees (see Hayward, 2005; May and Daly, 2009). For instance, the Norwegian Constitution, which includes both a procedural environmental right to be "informed of the state of the natural environment" and a substantive right to "an environment that is conducive to health," also demands that environmental rights "be safeguarded for future generations as well."

While courts have usually deferred the enforcement of such rights to legislatures, some landmark decisions have led to their judicial enforcement. In 1993, the Supreme Court of the Philippines famously granted legal standing to generations yet unborn in Minors Oposa, a case involving the constitutional right to a healthy and sound environment. Similarly, in 1997, the Chilean Supreme Court struck down the government's previous approval of a $350 million logging project in what is commonly referred as the Trillium decision, after finding that it threatened the constitutional right "to live in an environment free from contamination"—a right which the court interpreted as protecting both present and future generations.

Whether environmental rights properly qualify as human rights is a subject of heated debate. No less heated is the debate about whether constitutional protection is an appropriate and legitimate means to realize such rights. When granted constitutional status, environmental rights have superiority over ordinary statutes, can be amended only by cumbersome means, and can be enforced by courts—which are often given powers to review the constitutionality of statutes. Accordingly, as I have argued in more detail elsewhere (González-Ricoy, forth.), constitutionalization seems particularly effective for the protection of environmental rights, in at least three respects.

First, environmental protection typically requires policies that impose short-term pain for long-term gain, such as fuel switching, forestry preservation and carbon taxes. It is thus particularly vulnerable to political short-sightedness and

time inconsistency. Similar to someone who postpones a dental appointment the day before, governments are often tempted, for electoral or other reasons, to put off environmental reforms until the next term, thus passing the buck of unmitigated climate change to others in the future. Constitutionalization takes the final authority on environmental matters away from elected officials. It also increases the costs faced by present and future policymakers should they fail to provide adequate environmental protection for present and future citizens, thus contributing to overcome problems of short-termism and time inconsistency.

Second, given that environmental safety is largely a common good, its protection is especially prone to coordination failures, both among contemporaries and between non-overlapping generations. For example, public bodies and private companies may be more reluctant to reduce their carbon emissions if they suspect that others in the present or in the future will not do their share, thus free-riding on their effort. Constitutionalization can help to prevent such coordination failures by creating legally enforceable and hard-to-amend goals toward which private and public actors may converge.

Third, given the severe uncertainties surrounding climate change, doubts about the depth and breadth of its effects are not infrequent among ordinary citizens, who sometimes treat this issue with open indifference. Constitutionalization offers to alleviate this problem by exploiting the well-known value- and belief-shaping effect of the law. By granting environmental rights the highest legal status, on a par with other fundamental rights and freedoms, it signals the perils of climate change and the importance of policies addressing them, thus helping to shape citizens' values and beliefs on environmental matters. Moreover, since protecting such rights is likely to entail present costs, such signalling is credible.

Constitutionalizing environmental rights is not without difficulties, however. Indeed, critics have casted doubts on their legal enforceability. For one thing, causation in environmental cases is particularly difficult to establish accurately enough to assign liability. For another, courts are often ill-equipped, in comparison with legislatures, to balance the complex technological and economic considerations involved in environmental trade-offs.

Legitimacy problems are no less worrisome. When judicial review is employed, democratic worries arise. For then, constitutional environmental rights are not only enforceable by unelected and unaccountable judges. Ironically, they may also be enforced against officials elected by the same citizens whose rights are purportedly being protected.

It is also ironic that, when future individuals are included among their addressees, environmental rights are enshrined by a legal text that their future holders will not have consented to, and will not easily be able to amend. As Gosseries (2008) has put it, given that constitutions are by definition difficult to amend, constitutionalization is a double-edged sword. It can protect future individuals while at the same time threatening their generational sovereignty—i.e. their ability to live under laws of their own choosing.

These problems have no easy solutions. We may want to forgo accountability and sovereignty in return for environmental protection, given how high the

stakes are. (Assuming, of course, that courts are generally better than elected officials at making environmental decisions.) Or we may want to stick to these principles, while claiming that constitutionalization need not undermine them if done right. Here are some suggestions of how this could happen at the adoption, formulation and enforcement stages respectively.

First, suppose environmental rights are constitutionally adopted through a deliberative process in which well-informed citizens vigorously engage and reach a broad consensus. Judicial review and constitutional rigidity may then appear less like a constraint on citizens present and future, and more like a constraint on elected officials—who may be tempted to deviate from citizens' environmental commitments later on. Admittedly, this does not eliminate legitimacy worries entirely. Yet this scenario points to conditions under which the adoption of constitutional environmental rights could become less worrisome—i.e. scientifically rigorous deliberation, extensive citizen involvement, and broad consensus.

Second, when environmental rights are formulated abstractly, as general principles rather than precise rules, courts have more discretion to interpret them. While this makes courts more powerful, making the democratic worry mentioned above more acute, such abstract formulation has an important intergenerational advantage. For it also makes it easier for courts, as scientific and moral changes occur over time, to adjust their understanding of environmental rights to fit an evolving society. The intergenerational sovereignty concern raised by inherited constitutional provisions becomes less daunting as a result.

Third, when enforceable by courts with the power to invalidate statutes, constitutional environmental rights do certainly raise legitimacy worries. They lead to the judicialization of what many see as a political problem—one that should accordingly be addressed politically rather than judicially. A less worrisome alternative is offered by weak forms of judicial review, as found in New Zealand or the UK. For they grant courts with powers to review statutes, while leaving legislatures with the final authority. Since these courts can publicly flag the unconstitutionality of statutes, or even initiate a fast-track legislative procedure to motivate the legislature to remedy potential incompatibilities, they are far from toothless. They can still deliver, albeit perhaps less forcefully, the three benefits mentioned above—namely, overcoming short-termism and time inconsistency in policymaking, enabling coordination among public and private actors, and shaping citizens' values and beliefs—while leaving the final say with officials elected by, and accountable to, the rightful holders of environmental rights.

In short, while constitutionalization raises both promises and concerns, the devil is in the details. A careful examination of the alternative ways in which environmental rights can be constitutionally adopted, phrased and enforced is needed to adequately assess both their potential and their limitations in a domain where action, constitutional or otherwise, is so badly needed.

References

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