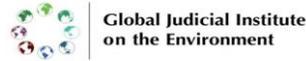




LAHORE HIGH COURT



**ASIA PACIFIC JUDICIAL COLLOQUIUM ON CLIMATE CHANGE:
USING CONSTITUTIONS TO ADVANCE ENVIRONMENTAL RIGHTS AND ACHIEVE CLIMATE JUSTICE**

BACKGROUND NOTE

This background note details Colloquium planning and partnership, objectives, approach, intended outcomes, materials overview, synopsis, case summaries, and graphics.

COLLOQUIUM PLANNING AND PARTNERSHIP

Hosted by the Lahore High Court in Pakistan. Co-sponsored by and organized in partnership with the Punjab Judicial Academy (PJA), the United Nations Environment Programme (UN Environment), the Asian Development Bank (ADB), the Asian Judges Network on Environment (AJNE), the Raoul Wallenberg Institute (RWI), the World Commission on Environmental Law (WCEL), the Global Judicial Institute on the Environment (GJIE), the UN Special Rapporteur on Human Rights and the Environment, and Widener University Delaware Law School (USA).

OBJECTIVE

The objective of the colloquium is to assist and build capacity of judges in Asia Pacific in applying environmental constitutionalism to achieve climate justice and advance human dignity. The judicial colloquium will assemble senior judges from across Asia Pacific and other legal stakeholders (Government, prosecutors, civil society, academicians) to discuss the role of the judiciary in advancing environmental rights and climate justice.

As is detailed in the *Global Judicial Handbook of Environmental Constitutionalism* (James R. May and Erin Daly, *United Nations Environment*, 2nd Ed.) and the associated *Companion to Global Judicial Handbook of Environmental Constitutionalism* (Erin Daly and James R. May, *United Nations Environment*) produced for this meeting, about 100 national constitutions guarantee environmental rights in some form, ranging from explicit substantive rights to a clean, beneficial or healthy environment, to implicit rights to life, dignity or health, to procedural rights, such as the rights to access to justice, public participation, and environmental

information. Many subnational constitutions are following suit. Courts are increasingly engaging these provisions in resolving environmental disputes, including those involving climate change.

APPROACH

Day one will be a plenary session for all participants (approximately 250-300 people). Day two will then move into a more targeted workshop for up to 100 selected participants with roundtable and working group sessions. Topics to be discussed include:

1. Trends in global environmental constitutionalism and climate litigation;
2. The link between constitutionalism, climate change and human rights;
3. The role of judges in recognizing environmental rights and advancing climate justice, considering such issues as separation of powers, standing to sue, environmental rule of law, and the relationship between environmental and other rights;
4. Interpretation and application of environmental rights provisions in international, regional, and constitutional law, with attention to how the various layers interrelate with and complement one another; and
5. Remedies and enforcement including, inter alia, the judicial role in coordinating with other branches of government.

The Colloquium is part of a larger programme under the leadership of the UN Special Rapporteur on Human Rights and the Environment, Professor John H. Knox, and supported by the United Nations Environment Programme (UN Environment) to enhance judicial capacity in environmental constitutionalism, identify gaps and opportunities, and support judges worldwide. It also takes place within the framework of ongoing technical assistance by the Asian Development Bank on supporting judges in Asia-Pacific, under the Asian Judges Network on Environment (AJNE), to develop judicial capacity for adjudicating climate change and sustainable development issues. Additionally, the Colloquium is an innovative collaboration initiated by partners at Widener University Delaware Law School (USA) and North-West University (South Africa) in conjunction with the New Frontiers in Environmental Constitutionalism conference held in South Africa in 2016, and further developed by the IUCN World Commission on Environmental Law and the Global Judicial Institute for the Environment at the Colloquium on Human Rights and the Environment in Brazil in 2017.

INTENDED OUTCOMES

The intended outcomes are as follows:

1. Enhance the capacity of participating judges and legal stakeholders to implement constitutionally-entrenched environmental rights by considering pleading, standing, standards of judicial review, interpretation, and remedies in constitutional environmental rights cases, so that they can be more effectively enforced in the pursuit of climate justice.
2. Provide materials to contribute to and be used in national judicial training institutes or organisations, and facilitate conversations about good practices in implementing environmental constitutionalism and advancing climate justice.

MATERIALS OVERVIEW

This Colloquium, and the materials that animate it, are designed to help judges navigate through these complex issues to achieve environmental, climate, and social justice.

First, the *Handbook* invites analysis and discussion of the issues judges face when they encounter claims of constitutional environmental and human rights. The Sessions of the Colloquium roughly follow the logic of the Handbook, which has eight chapters, each addressing subjects that jurists are likely to consider when hearing claims involving constitutional environmental provisions. It includes chapters on (1) the roles of the judiciary in resolving claims sounding in environmental constitutionalism, including climate change; (2) how environmental constitutionalism is exhibited at the national and subnational levels around the globe, including substantive, procedural and other provisions; (3) issues that affect whether constitutionally-recognized environmental rights are justiciable, including standing, causes of action, timing and defenses, and presumptions about enforceability; (4) the adjudication, interpretation, and application of constitutional environmental claims, including textual interpretation, especially of provisions that purport to guarantee a fundamental right to an adequate environment; (5) judicial remedies for violations of constitutional environmental rights; (6) the interplay between constitutionally-incorporated dignity rights and environmental constitutionalism; (7) the role of environmental constitutionalism in advancing climate justice; and (8) the particular and sometimes peculiar challenges and opportunities that environmental constitutionalism presents jurists.

Second, the *Companion to the Handbook* includes primary sources that illustrate how jurists and others have implemented environmental constitutionalism. It collects about 30 landmark cases from all regions of the world (edited for this Colloquium) and summaries of other cases, the most recent report of the UN Special Rapporteur for the Human Rights and the Environment, examples of substantive and procedural environmental rights, an infographic that details environmental constitutionalism at work in Asia Pacific, as well as a selective list of cases and bibliography. Participants will also have access in digital form to the presentations, UN Environment's publications on climate change, and other relevant materials.

SYNOPSIS OF ENVIRONMENTAL CONSTITUTIONALISM AND CLIMATE JUSTICE

Environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights, and environmental law. It embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by courts worldwide. It also reflects innovative constitutional mechanisms for advancing environmental and human rights, and achieving climate justice.

Climate justice promotes policies, practices and jurisprudence that do not disproportionately burden the world's most vulnerable people. Climate justice falls at the vertex of international, regional, national and the common law, basic notions of human and environmental rights, and human dignity. Environmental constitutionalism can help to advance climate justice in at least two ways. First, a handful of countries address climate change expressly into their constitutions, such as the Dominican Republic, Ecuador and Tunisia. Second, a growing contingent of courts – such as those in Pakistan, the Netherlands, and the United States – have recognized that governmental action or failure to act on climate change can abridge a right to a healthy climate as implied by an express constitutional right to life, dignity or due process, or an emerging right to a healthy environment.

Constitutional recognition of environmental rights and principles offers one way to engage environmental and climate challenges that can be more effective than other juridical approaches. It can engage multiple interdependent types and generations of rights indivisibly and synergistically, including rights to life and to dignity, as well as rights to health, food, water, shelter, and the right to a quality environment. Moreover, it can encompass civic rights including rights of expression, association, petition, information, and

participation -- all of which can find explicit constitutional protection in a single harmonious charter. It can protect local concerns -- such as food security, access to clean water, air pollution, and deforestation -- and global concerns like biodiversity and climate change. Environmental constitutionalism encompasses elements of both human rights and environmental protection in ways that are inter-related, interdependent, and indivisible.

Countries that have adopted environmental constitutionalism have been shown to have smaller per capita ecological footprints and higher performance on several indicators of environmental indicators, and be more likely to ratify international environmental agreements. There is also some evidence that environmental constitutionalism promotes domestic environmental laws, regulations and norms, although these often reflect the culmination of domestic, regional and international environmental measures.

Environmental Protection in Constitutional Texts

As with every other aspect of constitutional rule of law, each country adopts a unique approach to environmental protection. Some countries incorporate the full panoply of environmental constitutional provisions, while others eschew it entirely. Most fall somewhere in between. The variety of provisions, aiming to protect different aspects of the environment with a range of scaffolding and enforcement mechanisms, attests to the growth of environmental constitutionalism throughout the world in number and prominence.

Environmental constitutionalism is variable and broad, containing within it substantive rights, procedural rights, directive policies, reciprocal duties, or combinations of these and other attributes. About one-half of the countries of the world expressly or impliedly recognize a substantive constitutional right to a quality environment. About the same number impart a corresponding duty on individuals to protect the environment. Some provisions are quite specific, such as those that provide for rights of nature or rights to potable water or other natural resources. Some are more ephemeral, recognizing trust responsibilities over natural resources or toward future generations, or addressing related subjects like sustainability or climate change. Some recognize environmental stewardship as a matter of national policy. A few incorporate numerical outcomes, such as maintaining a percentage of prescribed tree cover, such as in Bhutan (60 percent) and Kenya (10 percent).

There is also an uptick in provisions that are designed to afford special process rights in environmental matters. Environmental procedural rights normally involve requirements for environmental assessment, access to information, or rights to petition or participate. Such rights help to keep countervailing substantive rights vital: a constitutional guarantee to a beneficial environment is more likely to take root when stakeholders have the right to receive free and timely information, to participate in deliberations, and to challenge environmental decision making in courts and tribunals. Procedural environmental constitutionalism is also important in its own right, and can be as or more efficacious than substantive environmental rights, particularly where judicial approaches are more open to procedural remedies.

Environmental constitutionalism is growing at the subnational level too, filling gaps in federal systems. Most prominently in states in the Americas in general and in Brazil in particular, subnational governments around the globe have constitutionalized substantive and procedural environmental rights, environmental duties, and sustainable development for present and future generations, often with much more specificity and potential enforceability than what is provided in national constitutions. Subnational constitutional environmental rights can be especially effective in countries that have yet to recognize environmental rights at the federal level.

The Role of Judges in Enforcing Environmental Constitutionalism

Judges are increasingly finding themselves on the front lines of environmental constitutionalism, faced with difficult decisions often of first impression and often implicating several layers of legal regimes and multiple interrelated claims. Issues invoking environmental constitutionalism can be among the more complex that judges engage. Even so, judges around the world are issuing consequential decisions to advance environmental, climate, and social justice claims with more frequency, and sometimes in ways that are truly breathtaking in breadth and depth. This correlates to a worldwide growth in courts with jurisdiction to hear constitutional questions and to protect constitutional rights.

With more courts engaging in constitutional review and issuing more opinions, the import of comparative constitutionalism grows. For instance, while France, South Africa, and Colombia have radically different histories, each has constitutional courts addressing the multivariate challenges of balancing public and private power, of interpreting entrenched constitutional texts, and of maintaining institutional legitimacy while ensuring the progressive development of environmental rights.

And, indeed, judges are becoming increasingly aware of their critical role in protecting the environment and those who live in it, including especially those most vulnerable to climate change. As Justice Syed Mansoor Ali Shah wrote in a climate justice case earlier this year, "[A] judge today must be conscious and alive to the beauty and magnificence of nature, the interconnectedness of life systems on this planet and the interdependence of ecosystems." With similar fervor, Judge Ann Aiken of the District Court of Oregon wrote in another climate justice case (quoting another American judge): "The current state of affairs ... reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits [T]he modern judiciary has enfeebled itself to the point that law enforcement can rarely be accomplished by taking environmental predators to court. ... The third branch can, and should, take another long and careful look at the barriers to litigation created by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches of government." Likewise, the Supreme Tribunal of Justice of Argentina has also recognized how changing environmental conditions have expanded the proper scope of judicial authority: "Thus, the responsibility of the judge and the judiciary has evolved, as the concept of harm has become more ample, to include, for example, what are called "generational harms" -- that is, those harms that, due to their magnitude, cannot be repaired within a single generation, but whose effects will impact generations of the future." Judges around the world are taking seriously their authority -- and their corresponding obligations -- to act in the face of irreversible climate and environmental degradation and the social injustice that such changes are sure to bring.

Implementation Challenges

Adjudicating environmental constitutionalism can be complex and riddled with obstacles. Most provisions require significant judicial interpretation, the most momentous of which is providing a principled definition of 'environment,' which is not always defined. Does it include all soil, water, and air? All flora and fauna? Or is it more limited? Does it include the built environment? And orbiting around these questions are others that courts must determine: how much protection is required? Who can protect it? What constitutes a violation? And who is responsible for making things better -- among other things. Indeed, 'environment' can be virtually limitless, affecting human lives, dignity, health, housing, access to food and water, and livelihood, and so on.

The adjectival examination is just as daunting. While there may be daylight between an environment that is “beneficial,” or “adequate,” or “healthful,” or “quality,” jurists are often at pains to describe it. Nor is the scope of the right delimited or defined. Consequently, it is usually left to the courts to determine what it means for the environment to achieve these ends and by whose perspective and how those qualities should be measured.

Identifying appropriate constitutional parties is another challenge. As is so often the case, people who are already vulnerable to human rights abuses are made even more vulnerable by environmental degradation: those who are less likely to be politically protected and who have fewer resources to protect themselves – including women, poor people, ethnic minorities, and children – are most likely to be subject to this panoply of environmentally-generated human rights abuses. They have fewer options to avoid the effects of climate change, and fewer means with which to combat them. When land erodes or ceases to be fertile, they move to cities, where their communities are diminished and where they may or may not find employment, shelter, and services and where they are more likely to find themselves physically and psychologically in danger. If they have no cities to move to, like the former residents of the Cataret Islands, they become ‘climate refugees’, sometimes for generations. The challenges for indigenous populations can be especially daunting, particularly insofar as their values and cultural practices may be ill-recognized and undervalued by the dominant cultures. People experience environmental degradation and climate change in kaleidoscopic ways that inter-relate, overlap, compound the burdens, and constantly mutate with changing conditions.

As courts follow the terms of the constitutional text and structure, they must stay attuned to the particular ways in which claimants are affected by environmental harms. In some countries, standing is limited, in others it deliberately extends to any person (whether individually aggrieved or not), while in others still, the constitution is silent or ambiguous as to the proper scope of the right to claim constitutional rights. In a few -- but a growing number of countries -- the right extends to nature itself. On the other side, the question of identifying proper defendants may turn on the proper definition of the right but this is further complicated because it implicates questions of sovereignty, immunity, extra-territoriality, and the horizontal application of constitutional rights.

Identifying the appropriate constitutional remedy can be problematic, too. Remedying constitutional violations involving environmental matters, however, invariably presents difficult and far-reaching policy choices that resist judicial resolution because simply financial compensation cannot repair the damage. Environmental cases can be multi-faceted with many inter-dependent and often moving parts, and with both short- and long-term consequences for the environment and for the humans who live, or will live, in it. In a rare environmental case, damages can be an effective remedy but in most cases even damages can be hard to quantify – do they include medical care and if so for whom and for how long? In most cases, however, the payment of money will not remedy the environmental despoliation or the loss of biodiversity, and the task of returning the environmental conditions to their prior state – to make the environment “whole” as it were – is nearly impossible to define and implement. Courts are increasingly requiring administrative agencies to take responsibility, but this too requires ongoing judicial oversight and management. Moreover, courts need to be sensitive to the unintended consequences of environmental amelioration, such as when the setting aside of land for environmental purposes results in the removal of the local population, or when the closure of a polluting industry reduces employment opportunities and the local economy suffers.

Adjudicating environmental constitutionalism can also invert the normal expectations relating to the roles of public and private parties. Whereas traditional constitutional rights litigation pits the private individual

against the public authority, environmental litigation often pits members of the public against a private entity (thus invoking the principle of the horizontal application of constitutional rights and obligations). Moreover, in many of these cases, private individuals are asserting public rights, whereas the government (through lenient regulation and licensing) is facilitating private gain.

In addition, once plaintiffs have effectively invoked judicial authority, the burdens of enforcement can be enormous. Courts are keenly aware of the limitations of their own power—of the fact —namely, that courts have no particular resource other than their own legitimacy to ensure respect for or compliance with judicial orders. Eloquent exposition alone cannot change a societal structure that does not recognize the rule of law, for example, or that values development and economic progress at least as much as environmental protection. And yet, remarkably and courageously, courts have chosen to engage because they realize that, through coordination with other parts of government and in dialogue with both the public and private sectors, they can play a pivotal role in securing environmental rights.

The breadth of these provisions, which is typical for environmental rights generally, leaves wide berth for the spectrum of judicial engagement, ranging from vindication and management to indecision, abstention, and even cynicism. The complexities are not simply matters of definition. Rather, they inhere in the nature of environmental rights, especially at the constitutional level. Vindicating environmental rights presents even more fundamental questions of policy choices. The problem is one of proportion requiring careful balancing. The judgment of how to balance the competing claims is one that may typically be done politically and not judicially. But of course, staying out of the fray has substantive consequences that sustain the continued deterioration of the environment: as judges are increasingly recognizing, where there is no judicial resolution, the harm may be irremediable.

Using a Global Comparative Perspective

While comparative constitutionalism is an effective means for evaluating the emergence of global environmental constitutionalism, it is not without its limitations. First, because the jurisprudence is global, describing and respecting the integrity of localization can be challenging. Although most countries adhere to international declarations and conventions affirming their commitment to environmental protection, one country might do so by treating environmental protection as a public good, while another might prefer to use the revenues produced from private exploitation of natural resources for education or social security. Localization of environmental protection is particularly important for several additional reasons, too. It is undoubtedly true that although some environmental problems transcend national borders, most are rooted in local spaces, whether a bay, a forest, or a particular part of a mountaintop. And the manifestations of environmental degradation are experienced by the local residents, as loss of access to nature, deterioration of health, food and water insecurity, and so on. Moreover, the particular political, historical and ethnological challenges are locally unique. Likewise, the solutions are most likely to be implemented locally. Actors who are politically accountable should take responsibility for choices made.

The ability to implement environmental values in a local context also helps to avoid some of the most contentious charges made against international environmental law. Judiciaries in countries that resist the global environmental ethos can move more slowly or not at all, while others can push the boundaries of international law into new and uncharted territories, as, for instance, Ecuador and Bolivia have done in protecting the rights of nature, and as countries in Southeast Asia have done in explicitly encouraging environmental rights litigation and in tying environmental protection to the protection of life and human dignity. These are complex policy choices that are best made at the national level by institutions that are operating within the local society, familiar with local conditions, and accountable within the local political

climate. And courts, more than the tribunals and commissions that operate regionally and internationally, are more accessible to the local population and more able to effectively enforce their orders against local officials.

And yet, it seems critical to take advantage of the shared experiences of those who face the similar challenges in other countries. These materials are therefore designed to illustrate the breadth of environmental constitutionalism and to make available to all the learning and experience of others, while allowing judges in each local jurisdiction to choose what will be most useful to them.

SUMMARIES OF SELECTED LANDMARK JUDICIAL DECISIONS

(Chronologically by region; * = edited version included in *Companion to Global Judicial Handbook on Environmental Constitutionalism*)

Asia Pacific

Juan Antonio, Anna Rosario and Jose Alfonso Oposa & Others v. The Honorable Fulgencio S. Factoran, Jr., (Supreme Court of the Philippines, 1993). * *The court recognized the principle of intergenerational justice and granted standing to petitioners, who represented their generation and generations of unborn Filipinos in a petition opposing timber license agreements.*

Virender Gaur and Ors. v State of Haryana and Ors (Supreme Court of India, 1995). *The appellant surrendered 25% of her land to her municipality, which was a condition for her to construct a building. The law required that the surrendered land be reserved for open space for better sanitation and environment. The government granted a 99-year lease and a building was constructed on the site. The court held that the environment had within its ambit hygienic atmosphere and ecological balance. The court found it was the duty of the State to shed its unbridled sovereign power and to forge an ecological balance and hygienic environment. The court observed that article 21 of the constitution protected the right to live as a fundamental right, encompassing the protection and preservation of environment, ecological balance, and freedom from pollution of air and water, sanitation. Therefore, any action causing environmental, ecological, air, or water pollution, etc. violated the right to life.*

Vellore Citizens' Welfare Forum v. Union Of India (Supreme Court of India, 1996). * *This is a public interest case that held, inter alia, that the government's allowance or acquiescence in the decades-long discharge of toxic chemicals into surface and drinking water systems from more than 900 tanneries in the five districts of Tamil Nadu, India, amounted to a violation of constitutional rights to life, among others. The Court issued a wide-ranging remedial plan to install pollution control equipment, close facilities, issue and collect fines, restore affected areas, and exercise administrative and judicial oversight.*

Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor (Supreme Court of Malaysia, 1996). *The case related to procedural fairness and the constitutional rights of a civil servant facing dismissal. The court noted that "life" in the constitution does not refer to mere existence. The court interpreted the "right to life and liberty" under art. 5 of the constitution as "incorporating all those facets that are an integral part of life itself and those matters which go to form the quality of life. It includes the right to live in a reasonably healthy and pollution free environment."*

Dr. Mohiuddin Farooque and another v. Bangladesh (Supreme Court of Bangladesh, 1997). * *In this case, the Supreme Court of Bangladesh upheld the government's implementation of a wide-ranging and*

controversial flood control plan that displaced more than a million people. In so doing, however, and to reflect various constitutional protections – including the “right to life,” – the court directed agencies to “strictly comply” with measures to ensure access to water, protection of ecological and historical resources, and provide just compensation, and to comply with other environmental and land use requirements.

Bulankulama v Secretary, Ministry of Industrial Development (Supreme Court of Sri Lanka, 2000).

Petitioners challenged a mining project that had not yet obtained a feasibility study or development plan. Once obtained, the feasibility study and development plan would be confidential and the Secretary of the Ministry of Industrial Development was required to approve them without unreasonable delay. Mining operations would exhaust all known phosphate reserves. The court held that the government is the trustee of natural resources in Sri Lanka and that the organs of State are guardians to whom the people have committed the care and preservation of the resources of the people. The court considered the agreement must be considered in light of the principles contained in the Rio Declaration, which provides that human beings are at the center of concerns for sustainable development. The court concluded that there was an imminent infringement of the petitioners’ constitutional rights to equal protection before the law (art. 12(1)) and constitutional freedoms to (a) engage in association with others in any lawful occupation, profession, trade, business or enterprise (art. 14(1)(g), and (b) move and choose their residence within Sri Lanka (art. 14(1)(h)).

KM Chinnappa and TN Godavarman v Union of India (Supreme Court of India, 2002). *The lead case dealt with the adverse environmental impact of mining activities on the flora and fauna of the Kudremukh National Park. However, this matter arose from an Interlocutory Application filed by the Amicus Curiae in the main matter. The Amicus submitted that certain laws passed by the State of Karnataka and Uttar Pradesh violated the Wildlife Protection Act, 1972. The Amicus further submitted that despite the court’s orders, mining activities continued in and around the Kudremukh National Park by the Kudremukh Iron Ore Company Ltd. The court held that “intergenerational equity” is part of the constitutional right to life.*

Prakash Mani Sharma v. His Majesty’s Government Cabinet Secretary and Other (Supreme Court of Nepal, 2003). *The petitioner sought to quash a government decision to allow importation and operation of diesel taxis in the Katmandu Valley. The petitioner further sought mandamus orders to protect the environment on the grounds that unfettered importation of diesel vehicles and unrestricted importation of leaded petrol would negatively impact human health as well as Katmandu Valley’s historical, cultural, and archaeological life. The court held that the constitutional right to freedom of personal liberty may only be protected by a healthy environment and that the state has primary responsibility for protecting the right to personal liberty by mitigating environmental pollution as much as possible.*

M.C. Mehta v. Union of India & Others (Supreme Court of India 2004).* *In a previous opinion, the Court came to the conclusion that the mining activities in the vicinity of protected wildlife sanctuaries and tourist resorts are bound to cast serious impact on the local ecology. The Court applied the precautionary principle and principles of sustainable development and ordered a series of remedies including the establishment of a monitoring committee to oversee compliance with administrative orders on a mine to mine basis.*

Santosh Mittal vs State Of Rajasthan And Ors. (The High Court of Judicature for Rajasthan 2004).* *Relying on data from an NGO, the Court found that drinks made locally by PepsiCo and Coca-Cola contained pesticides and other carcinogenic chemicals that were not found in similar drinks made elsewhere. The Court held that plaintiffs’ constitutional right to free expression included the right to receive*

information and therefore ordered the makers of carbonated beverages to indicate clearly on the package the details of its composition & nature and quantity of pesticides and chemicals, if any, present therein.

Advisory Opinion: Whether the Supervision of and Assistance to Public and Private Waste Cleanup and Disposal Organs is Unconstitutional? (Taiwan Constitutional Court 2006).* *This advisory opinion concludes that a law that permits federal authorities to suspend the licensure of non-complying waste disposal companies does not exceed constitutional constraints on legislative power, or unduly infringe upon constitutionally guaranteed rights to work.*

Naewonsa Temple v. Korea Rail Network Authority (Supreme Court of Korea 2006).* *The temple and 3 other plaintiffs challenged the construction of a railroad in an area with historic, spiritual, and ecological significance. The Court summarily rejected the argument that the salamanders whose habitat would presumably be threatened had standing to sue. Interpreting the constitutional right to live in a healthy and sound environment in conjunction with the Framework Act on Environment Policy, the Court found that the environmental impact assessments indicated that there was insufficient possibility that the construction of the tunnel in this case would infringe the environmental benefits of the above appellants.*

Watte Gedera Wijebanda v. Conservator General of Forest (Supreme Court of Sri Lanka, 2007). *The petitioner challenged the government's decision to refuse his application to mine silica quartz. The court held that the right to a clean environment and the principle of inter-generational equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of the equal protection provisions contained in the Constitution of Sri Lanka. Article 12(1) of the constitution provides, "All persons are equal before the law and are entitled to the equal protection of the law."*

Glanrock Estate (P) Ltd. v. The State of Tamil Nadu, (Supreme Court of India, 2010). *This case related to land ownership rights and the vesting of forests in the state. The court held that the doctrine of sustainable development also forms part of article 21 of the constitution. Further, the "precautionary principle" and the "polluter pays principle" flow from the core value in article 21.*

Arnold v Minister Administering the Water Management Act 2000 (High Court of Australia 2010).* *In this case, the High Court rejected a constitutional challenge to the federal government's increased regulation of groundwater extraction, which affected landowners and farmers claimed contravened a constitutional prohibition against the Commonwealth abridging "the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation." Based on reasoning in the Tasmanian Dam and other cases, the High Court held that groundwater does not constitute "waters of rivers" under the constitution.*

Mendaing v. Ramu Nico Management (National Court of Justice for Papua New Guinea, 2011).* *In this case, the National Court of Justice of PNG found that the plaintiffs proved that the defendant's method of disposing of tailings from the Ramu Nickel Mining Project via deep-sea injection near the Basamuk, Madang Province violated National Goal No 4 of the national constitution, which provides that "Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations." The court also held that the plaintiffs had standing to pursue their claims.*

Animal Welfare Board v. A Nagaraja, (Supreme Court of India 2014). *The appeal challenged the legality of bullock cart racing, alleging that it violated the Prevention of Cruelty to Animals Act. The court found that every species has a right to life and security and therefore expanded the meaning of "life" under the*

constitutional right to life to cover animals. It concluded that all animals have the right to dignity and fair treatment.

Resident Marine Mammals v. Reyes (Supreme Court of the Philippines, 2015). *The court permitted standing to petitioners, being stewards of the marine mammals of the Tañon Strait. Standing was granted in accordance with the Rules of Procedure for Environmental Cases (A.M. No. 09-6-8-SC, effective 29 April 2010), which clarify that any Filipino may commence a citizen suit in representation of others, including minors or generations yet unborn, to enforce rights or obligations under environmental laws. The Court cited annotations to the rules, which provide that the rule on standing “collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature.”*

Pro Public v Godavari Marble Industries Pvt. Ltd. and Others (Supreme Court of Nepal 2015).* *In this case, the Court considered whether continued marble mining in an area protected both by the government and by UNESCO because of its ecological, historic, and spiritual significance was consistent with the constitutional commitment to a healthy environment. The Court reviewed the history of international environmental protection, as well as Nepal’s constitutional environmental jurisprudence and found a strong constitutional commitment to environmental justice. It held that the anticipated economic benefits of continued mining were outweighed by the harm it would do to the environment and to the people whose right to live with dignity and freedom required a healthy environment.*

Teitiota v Ministry of Business Innovation and Employment (Supreme Court of New Zealand 2015).* *Application for refugee status for native of Kiribati which is facing steadily rising sea water levels as a result of climate change which, over time, may force the inhabitants of Kiribati to leave their islands. However, the Court found that on the facts of this case, the applicant did not face “serious harm” and that there was no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can.*

Raub Australian Gold Mining v. Hue Shieh Lee (Court of Appeal, Malaysia 2016).* *This is a SLAPP suit, in which a gold mining company sued a community activist for defamation because of statements she had made describing the results of surveys which had indicated a higher than normal prevalence of illness in areas near the gold mining operations. Recognizing the value to society of activists, the Court held that the statements were not defamatory.*

Salim v. State of Uttarakhand (High Court of Uttarakhand at Nainital 2017).* *Following the precedent that a Hindu idol is a juristic entity, the Court in this case held that the Rivers Ganges and Yamuna, worshipped by Hindus, was a juristic person. The Court discussed Hindu practice and belief systems at length and examined the distinction between juristic and natural persons, finding that recognition of an entity as juristic person is for subserving the needs and faith of society which required the rivers be declared legal persons/living person under Articles 48-A and 51A(g) of the Constitution of India. The Court further declared that certain government representatives were to act in loco parentis as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries and also to promote the health and well being of these rivers.*

Miglani v. State of Uttarakhand & others (High Court of Uttarakhand at Nainital 2017).* *Ten days after the Salim case, and under continuous mandamus in this PIL, the Court declared, in its parens patriae jurisdiction, that Rivers, Forests, Lakes, Water Bodies, Air, Glaciers and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology system and have the status of legal persons with all corresponding rights. The Court focused on the importance of nature for the planet and for human*

development, citing a wide variety of literary, spiritual, ecological, as well as domestic and foreign legal sources, and held that the fundamental human rights on which human survival depends are Nature's rights. Skeptical of traditional principles of environmental law (including sustainable development, greening economies, polluter pays, and the precautionary principle), the Court identified certain individuals to act in loco parentis as the human face to protect, conserve and preserve all the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls in the State of Uttarakhand.

Muhammad Ayaz v Government of Punjab through its Chief Secretary & Ors (High Court of Lahore, 2017). *The court upheld the Punjab Environmental Protection Agency's decision to seal a steelworks factory that was non-compliant with an environmental protection order (EPO) and was causing air and noise pollution. The court noted that the EPA's legislative authority to take this action was based on the precautionary principle. Cognizant of the growth of jurisprudence on the establishment of environmental justice in Pakistan, the Court considered it necessary to ensure that enforcement mechanism responded swiftly, especially where public safety, public health and the environment must be protected from irreparable harm.*

Ridhima Pandey v Union of India. (Writ Petition in the Supreme Court of India, 2017.) *Applicant seeks directions that the government act to reduce the adverse impacts of climate change in India. The applicant invokes the principle of sustainable development and precautionary principle, as well as inter-generational equity principle and the public trust doctrine.*

Ashgar Leghari v. Federation of Pakistan (Lahore High Court, Pakistan, 2018).* *This case was brought under the Lahore High Court's continuing mandamus jurisdiction, assessing the work of the Climate Change Commission it had established in 2015. The Court reviewed at some length the threats of climate change in Pakistan, considering its effects on water resources as well as forestry, agriculture, among other things but found that the Commission had been the driving force in sensitizing the Governments and other stakeholders regarding gravity and importance of climate change and had accomplished 66% of the goals assigned to it. The Court then dissolved the CCC and established a Standing Committee to act as a link between the Court and the Executive and to render assistance to the government to further implementation.*

Central and South America

Pablo Miguel Fabián Martínez Y Otros (Tribunal Constitucional de Peru, 2006) (La Oroya).* *Plaintiffs living in one of the most polluted cities in the world argued that nearby smelters were contaminating their air and giving them lead poisoning; they sought information about health risks and remedial measures to improve the health of members of the community as well as ongoing monitoring of epidemiological and environmental conditions. The court emphasized the indivisibility and interdependence of all rights including especially rights to health, education, dignified quality of life, and social equality, as well as rights of citizenship and political participation to ensure respect for human dignity, which is the purpose of all human rights. Relying on constitutional law and general principles of international environmental law, the Court ordered a series of remedial measures including the establishment of a medical emergency response system for lead poisoning, the identification of baseline levels of ambient air quality, the conduct of epidemiological and environmental surveys, and provisions for providing the community with adequate access to information about the health and environmental health effects of nearby industries.*

Beatriz Silvia Mendoza and others v. National State of Argentina (Supreme Court of Argentina 2008).* *In a landmark ruling against 44 companies and several governmental agencies at the national, provincial, and municipal levels, the Supreme Court of Argentina developed a multi-pronged action plan to assure the clean up of the Matanza/Riachuelo basin, one of the most polluted urban rivers in the world. The action plan included the provision of information, the control of further industrial pollution, cleaning up existing waste dumps, expanding the water and sanitation infrastructure, providing a federal court with ongoing oversight jurisdiction. The case is particularly important for the fusion of environmental and human rights, and for the elaborate remedial measures ordered by the Court.*

Padilla Gutierrez, Clara Emilia y otros, todos en su condición de vecinos de lugares aledaños al Parque Nacional Marino Las Baulas de Guanacaste c/ SETENA, Secretaria Técnica Nacional Ambiental (Corte Suprema de Justicia de Costa Rica, Sala Constitucional 2008).* *Neighbors near a national park established for the protection of leatherback turtles (as well as many other species, including some protected under international law (CITES, RAMSAR) sought an order requiring the national government to assess the impact of tourism (including construction) on the flora and fauna of the park in an integrated and strategic way that accounts for the cumulative effects on the entire ecosystem, instead of on an individualized basis. Sensitive to the ecological interests, the court canceled all the licenses that had already been issued and suspended all work on the project pending the completion of an appropriate study coordinated with all relevant authorities.*

Domitila Rosario Piche Osorio, conocida por Domitila Rosario Piche Estrada, en contra del Ministro y de la Viceministra del Medio Ambiente y Recursos Naturales, (Sala de lo Constitucional de la Corte Suprema de Justicia, El Salvador, 2010).* *When the environmental ministry failed to respond to a petition requesting information about the technical studies on the basis of which a state of environmental emergency was declared due to heightened levels of lead in the petitioner's district, the Court held that the petitioner had established a violation of her constitutional rights to information and petition, and ordered the government to, within 15 days, issue the issued certification of a biochemical study and within 30 days, issue respond to the request with regard to the evaluation of water pollution and gases in the sewage, rainwater, and building pipes. The court also ordered the government to provide damages for failing to respond in a timely manner to petitioner's request.*

Expediente sobre permisos de mineras a cielo abierto en los sitios de la UNESCO (Superior Tribunal de Justicia de Argentina, 2010).* *Plaintiffs brought an amparo action to seek reversal of a lower court order to grant a permit to allow mining exploration and extraction in an open mine in a UNESCO natural heritage site. Relying on the precautionary principle and other general principles of international environmental law, and with heightened awareness of the historical and natural value of the site, the Court put aside traditional procedural rules, holding that when there is the danger of grave or irreversible "generational harms," the absence of information or scientific certainty can't be used as a reason to delay the adoption of effective means to protect the environment. Moreover, the Court imposed on the defendant the obligation to supply the positive proof that the UNESCO environment was protected. In environmental matters, the court insisted, it is the undeniable role of the judge to participate actively with a view toward vindicating the right to a healthy and uncontaminated environment, as a Fundamental Human Right.*

La Camaronera en la Reserva Ecológica (Corte Constitucional del Ecuador, 2015).* *This was the first major constitutional court case interpreting the rights of nature provision, unique to Ecuador's constitution. The Court held that a judgment below violated due process because it unreasonably ruled in favor of a shrimp farmer's property rights, while ignoring the constitutionally protected rights of nature at the expense of the mangroves. The Court held that the latter provision effected a transformation of the*

juridical order from one in which humans were at the center, to one in which humans live harmoniously in an ecosystem. The rights of nature entail the right to restoration, which implicates recuperation and the rehabilitation of nature's functions, of her vital cycles, her structure, and her evolutionary processes. The court also referred to the human right to live in a healthy and ecologically balanced environment.

T-622 of 2016 (Corte Constitucional de Colombia 2016). *In this tutela action brought by the social justice organization Tierra Digna, the Court held that Colombia's ecological constitution gave the Rio Atrato – the nation's largest river and one of its most important ecosystems integral to the indigenous communities -- juridically cognizable rights. Ordering the government to create a national mining and energy policy that would protect the river and riverine inhabitants, the Court explained that "The importance of the biological and cultural diversity of the nation for future generations and the survival of our natural and cultural wealth imposes on the state the obligation to adopt public policies for the conservation, preservation and compensation that take into account the interdependence of biological and cultural diversity." This, the Court said, means that "justice must go beyond human beings to permit nature to be the subject of rights." The Court explained the necessity of taking "a further step in its jurisprudence toward the constitutional protection of one of our most important sources of biodiversity: the Atrato River" – resting on constitutional environmental provisions and the Court's own ample constitutional environmental jurisprudence.*

Africa

Gbemre v Shell Petroleum Development Company Nigeria Limited and Others (Federal High Court, Nigeria 2005). * *An intermediate level court held that the petroleum developers' flaring of 'waste' natural gas in the Niger Delta without the preparation of an environmental impact statement abridged the community plaintiffs' constitutionally guaranteed right to dignity. In observing that flaring activities contributes to climate change, the court held: "the inherent jurisdiction to grant leave to the applicants to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and moreover, that these constitutionally guaranteed rights inevitably include the right to a clean, poison-free, pollution-free healthy environment." Accordingly, the court issued an injunction, which, unfortunately, was not enforced.*

Earthlife Africa Johannesburg v Minister of Environmental Affairs (High Court of South Africa, Gauteng Division 2017). * *An ENGO appealed the issuance of a permit to build a large coal-fired power station without having considered the climate change impacts. The Court considered the regulations and the environmental management act in light of the constitutional environmental provision and under international law. The Court held that even in the absence of an express obligation to consider climate change, the ministry is nonetheless required to consider all the relevant issues and this includes climate change and to do so before, and not after, the permit is issued.*

Europe

Lopez Ostra v. Spain, (European Court of Human Rights, First Section 1994). *Mrs. Gregoria López Ostra brought an action before the European Court of Human Rights against the Government of Spain Lorca (Murcia) for allowing tanneries located near the house that she shared with her husband and two daughters in Lorca to pollute to the extent that it adversely affected their health and well-being, in*

violation of Article 8 of the European Convention of Human Rights, which provides that “everyone has the right to respect for his private and family life, his home and his correspondence.” The ECHR agreed, and ordered the state to pay four million pesetas for damage and 1.5 million pesetas for costs and expenses.

Fadeyeva v. Russia (European Court of Human Rights, First Section 2005).* *The European Court of Human Rights found that the Russian Federation’s operation of a steel plant near the complainant’s home endangered her health and well-being in violation of Article 8 of the European Convention on Human Rights, which provides: “Everyone has the right to respect for his private and family life, his home, and his correspondence [except in] accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” Accordingly, the court ordered the Russian Federation to pay plaintiff for damages.*

United States

Juliana v. United States (United States Federal District Court for the District of Oregon 2016).* *In this case, the court held that the plaintiffs had a legally cognizable cause of action in to assert that the U.S. government’s collective actions and inactions concerning greenhouse gas emissions deprived them of a “right to a stable climate” under the Due Process Clause of the 5th Amendment. The U.S. government found this decision so problematic that it took the extraordinary step of asking the 9th Circuit Court of Appeals take the case away from the lower court, and dismiss it without further proceedings. Oral argument occurred in December 2017. A ruling from the appellate court is pending.*

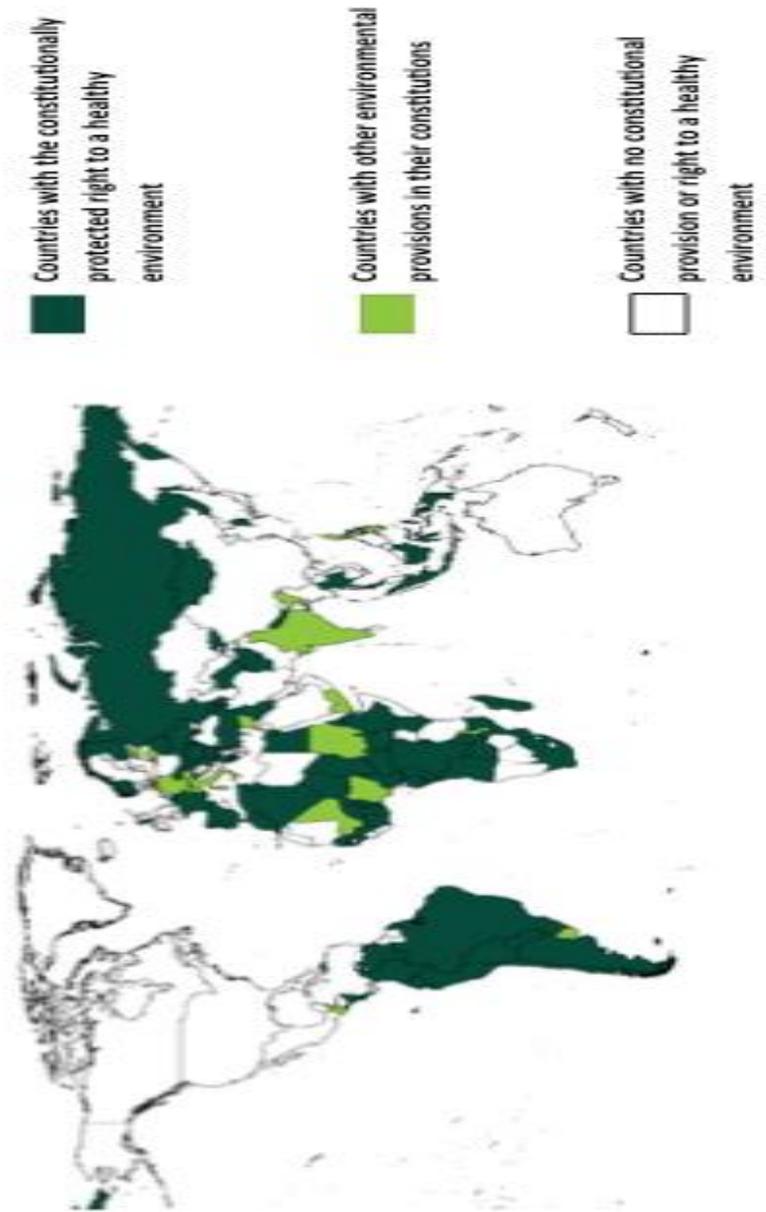
Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, 161 A.3d 911 (Supreme Court of Pennsylvania 2017).* *In this case, the Pennsylvania Supreme Court held (4-1-1) that a state constitutional provision (The Environmental Rights Amendment of 1971) providing that “The people have a right to clean air, pure water, and ... values of the environment” is self-executing and enforceable. Moreover, the same constitutional provision impels the state government and its local agents as “trustee,” to manage state lands in public trust, including use of proceeds from the leasing of lands for oil and gas development.*

In Re Application of Maui Electric Company (Sierra Club v. Public Utility Commission of Hawai’i) (Supreme Court of Hawai’i 2017).* *In this case, the Supreme Court of Hawai’i held that the Hawai’i constitution’s explicit right to a healthy environment is a protectable property interest under the Due Process Clause of the Hawai’i constitution. Accordingly, the Court held that Petitioner-Sierra Club is entitled to a due process hearing to challenge the Public Utility Commission’s grant of a Power Purchase Agreement to continue to combust fossil fuels that it claims does not comport with the state’s statutory goal to convert to 100 percent renewable energy by 2045. The Court also held that Sierra Club possesses constitutional standing to challenge the permit because the injury of its members is fairly traceable to greenhouse gas emissions.*

MAPPING ENVIRONMENTAL CONSTITUTIONALISM

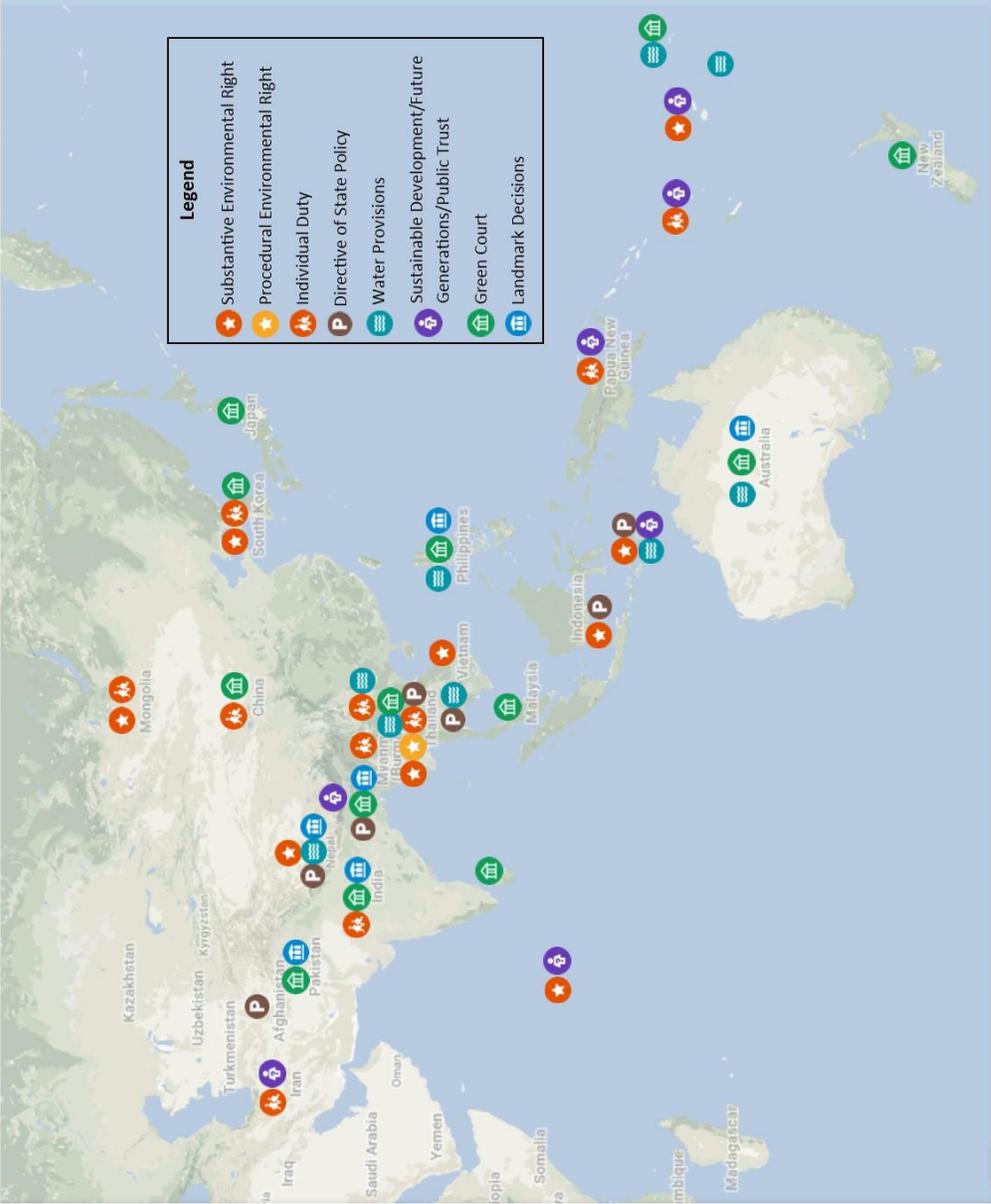
A. Countries with Explicit Environmental Rights in National Constitutions (2017)

Countries with environmental provisions in their national constitutions (2017)



Source: UN Environment and EUI, *Environmental Rule of Law* (Forthcoming 2018)

B. Environmental Constitutionalism in Asia Pacific (2017)



Source: Erin Daly and James R. May, Copyright © All Rights Reserved (2018)