



Environmental constitutionalism in the global south: A comparative study between Big C and Small C constitutions

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Abstract

Environmental constitutionalism is an emerging legal field that emphasizes the integration of environmental rights into a country's constitutional framework. In dualist states like Bangladesh, where state has obligations to incorporate international frameworks into domestic law, constitutional recognition of environmental rights becomes essential. Without such constitutional safeguards, environmental rights are often deprioritized in governmental policies, budgets and agendas despite their critical role in sustainable development. This study examines environmental constitutionalism from a South Asian perspective, focusing on both the "Big C" (formal constitutional provisions) and "Small C" (case law and by-laws) approaches to environmental protection. A comparative analysis of various countries in the region will be conducted, with a particular emphasis on Bangladesh. The study aims to assess how constitutional frameworks can better prioritize environmental rights, ensuring both legal and practical commitments to sustainable development in line with international standards.

Keywords: Environmental constitutionalism, Big C, Small C

Introduction

Each nation faces unique environmental challenges due to specific ecosystems and local threats, but all share the common need to balance environmental protection with development. In recent decades, more than a dozen states significantly amended their constitutional provisions to include substantive environmental rights. These countries include Bolivia and Ecuador, which are progressive in ensuring environmental rights. In addition, Armenia, France, Hungary, Montenegro, Serbia, and Turkmenistan from the European region have also made considerable progress in this area. From Africa, Egypt, Guinea, Kenya, Madagascar, Rwanda, South Sudan, and Sudan have developed eco-constitutional provisions. In Asia, the countries include the Maldives, Myanmar and Nepal.

Environmental constitutionalism is the integration of environmental protection principles and rights into constitutional frameworks. It involves embedding provisions related to the environment within formal constitutions (Big C) and interpreting these provisions through judicial decisions, legislative practices, and societal norms (Small c). By fostering sustainable development and preserving ecological well-being for equally the present and the upcoming generations, this strategy seeks to guarantee that environmental rights are acknowledged, upheld, and enforced at the highest legal level.

In the early 1970s, Environmental rights started to emerged, when Christopher Stone's influential essay, "Should Trees Have Standing?" was published in 1972^[1]. Stone argued that natural objects like trees and rivers should have legal rights, similar to how corporations and states do, with lawyers representing them. This radical idea challenged the traditional human-centered view of rights and sparked debates on including environmental care in constitutional law. Therefore, environmental constitutionalism encompasses both the Right to Environment as well as the Right of Environment. The right to environment is anthropocentric, focusing on environmental protection from perspective of human rights. In contrast, the right of

environment adopts an eco-centric approach, recognizing the environment's inherent rights to be protected for its own sake, instead of human interests. This means acknowledging that flora, fauna and other non-human elements also deserve protection and consideration for their right to life and well-being. However, as both concept developed for the protection of environment thus these two views sometimes can overlap.

1. Theoretical framework: Big C vs Small C

The 'big-C' constitution refers to the Constitution itself or formal and written document that explicitly outlines the fundamental laws, principles, and organization of a state. This 'constitutional instrument' or 'constitutional charter' provides a clear, codified framework for governance.

However, The 'small-c' constitution refers to the fundamental structure or organization of a state, encompassing the informal, unwritten conventions, judicial decisions, traditions, and practices that guide how a state operates. This form of constitution evolves organically over time, shaped by historical events, cultural practices, and societal norms. In countries like the United Kingdom, the small-c constitution is deeply embedded in the common law tradition. Courts play a crucial role in interpreting and developing constitutional principles through judicial decisions, which become part of the constitutional framework.

2. Environmental constitutionalism in Big C constitution

According to the constitution, the South African government must take action to ensure the use of natural resources and development in a way that is ecologically sustainable, all the while fostering legitimate economic and social progress^[2]. Section 24(b) of the South African Constitution provides that "everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other

measures that prevent pollution and ecological degradation [and] promote conservation”.

The South African Constitution is a notable instance of a thick ecological constitutional approach. It includes detailed aims like sustainable development, inter-generational equity and elevating environmental safety to the constitutional level. This constitutional mandate has led to significant judicial decisions that reinforce environmental protection, such as the milestone case of *Fuel Retailers Association of Southern Africa v Director-General Environmental Management* [3], which emphasized the need for sustainable development in environmental policymaking.

A healthy environment is vital for achieving and protecting values like dignity, equality, and liberty. John Knox states that human rights depend on an environment that supports these values [4]. The South African Constitution reflects this interconnectivity through various environment-related rights. For example, the right to equality, right to dignity which refers that everyone has inherent dignity that must be respected and right to life under section 11 is explicitly recognized. Furthermore, clause 27 guaranteed the right to enough food and water, which is closely related to environmental justice and sustainability.

Such Green constitutionalism like South Africa requires the state to prevent activities that could harm critical natural assets necessary for the well-being of future people. Courts also have the authority to appoint guardians for future generations who can initiate legal action on their behalf. South Africa's approach combines both positive and negative aspects of environmental rights enforceability, requiring the state to take practical actions to prevent harmful activities and to refrain from such activities itself.

The legal jurisprudence over the environmental rights are expanding with the time flow. The *Oposa Case* is officially known as *Oposa v. Factoran* [5] is a landmark environmental case in the Philippines. It was lodged in 1991 by several minors represented by their parents. This suit was filed against the government officials responsible for issuing timber license agreements that could lead to the devastation of nature and consequently violates the right of a healthy ecology to their children.

The Philippine Supreme Court on this case recognized the minors' right to a healthy environment and held that they as well as the forthcoming generations have a legal standing to sue on behalf of the environment. This ruling empowered the individuals to bring law suits on behalf of nature and them as well if they find anything harmful even if they are not directly impacted. According to Section 16, Article II of the Philippine Constitution, a Writ of *Kalikasan* is a judicial remedy that protects a person's right to "a stable and healthy ecology in accordance with the harmony and rhythm of nature.

Kenya in their 2010 Constitution exemplifies a Big C approach by explicitly recognizing the right to a clean and healthy environment through the Constitution's Article 42 and obligating the state to guarantee the environment's sustainable extraction, use, managing, and conservation. Taking one step further along with allowing citizens to seek court intervention to protect their environmental rights under Article 70 [6], Kenya imposed obligation on people their also. According to Kenya's Constitution, Article 69(2), everyone has an obligation to work with state and other individuals to safeguard the environment, promote ecologically sustainable development. Additionally, the

Constitution mandates Parliament to enact laws that fully implement the environment and natural resource provisions within four years of the Constitution's promulgation, as specified in the Fifth Schedule [7]. Similarly, Article 16 of Guinea's 2010 Constitution securities everyone the right to a sustainable and healthy environment and imposes responsibility on them to safeguard it [8].

Brazil's 1988 Constitution is notable for its comprehensive environmental provisions, which include both rights and duties related to environmental protection under article 225. The Constitution recognizes the right to an ecologically secure nature and mandates the government to reserve and reinstate vital ecological practices. Brazil's approach demonstrates an integrated Big C framework where constitutional provisions are supported by extensive environmental legislation and active judicial enforcement, as seen in cases like *Ministerio Publico v. The Union* [9].

In the South Asian region, Bhutan has undertaken a unique initiative to protect its environment. Protection of the natural resources is one of the four pillars of Bhutan's Gross National Happiness philosophy. As instructed by its constitution, Bhutan maintains 60 percent of its land under forest cover at all times [10]. According to the Constitution, each and every Bhutanese person is a trustee of the environment and natural resources of the country for the benefit of both the current and future generations [11]. It also declares that every citizen has a responsibility to safeguard, conserve, and prevent ecological degradation in all its forms, including pollution. In order to preserve intergenerational justice, maintain sustainable use of natural resources, and uphold the State's sovereign rights over its biological resources, Parliament may pass environmental legislation.

However, the practical implementation of these constitutional provisions often relies on judicial interpretations and legislative actions, reflecting the influence of Small C constitutional elements. The case of *Waweru v. Republic* highlighted the judiciary's role in enforcing constitutional environmental rights [12], demonstrating how Big C and Small C mechanisms can complement each other. Analyzing constitutional provisions and judicial decisions reveals that South Africa, Brazil, Philippines and Kenya recognize environmental rights both directly and indirectly within their constitutions, embedding these rights into other fundamental rights through a hybrid approach of both Big C and Small C.

3. Environmental constitutionalism in Small C constitution

India: Way forward to recognizing environmental rights

Although India do not have explicit constitutional provisions recognizing the right to a healthy environment however India has construed such rights into its Constitution. While the Constitution itself includes directive principles and fundamental duties related to the environment, much of India's environmental jurisprudence has evolved through judicial activism. The Indian judiciary has greened the rights by interpreting the Constitution's Article 21 right to life, which includes the right to a clean, healthy environment, thereby created a de facto constitutional right to environment.

In recent amendment Article 51-A (g), says that “It shall be duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild

life and to have compassion for living creatures.” Moreover under directive principle, Article 51, Article 47, 48 and 48A inserted duty of citizen to safeguard environment. According to Article 48 A of the constitution, the state shall attempt to safeguard the country's forests and wild life overall environment.

Landmark cases of Supreme Court such as in *Maneka Gandhi vs. Union of India* and *M.C. Mehta v. Union of India* have significantly shaped environmental law in India by liberal interpretation of fundamental rights, demonstrating the powerful role of Small C constitutionalism. In *M.C. Mehta v. Kamal Nath*, the Supreme Court ruled that the Public Trust Doctrine is part of the law, ensuring that natural resources are protected and managed for the public's best interests^[13]. In the *Charan Lal Sahu case*, the Supreme Court recognized that the right to life in Article 21 includes the right to a wholesome environment^[14]. Similarly, in the *Bombay Dyeing case*, the Court emphasized that current generations should not exploit resources at the cost of generations yet to come.

Similarly, the Pakistani judiciary has also been proactive in interpreting constitutional provisions to protect the environment. The Lahore High Court's Green Bench has delivered several judgments that reinforce the environmental rights of citizens. In the landmark *Shehla Zia vs. WAPDA case*^[15], the Supreme Court of Pakistan ruled that the right to a clean and healthy environment is part of the Fundamental Right to Life under Article 9 and the Right to Dignity under Article 14 of the Constitution.

Bangladesh perspective: Environmentalism borrowing and transplantation

BELA (Bangladesh Environmental Lawyers Association) started to make the transition to ecological jurisprudence through Public Interest Environmental Litigations (PILs) under Article 102 of the Constitution. The first case in this regard where the right to life, when interpreted broadly, encompasses the right to a healthy and decent environment is *Mohiuddin Farooque v. Bangladesh (Radiated Milk Case)*. Later in *FAP 20 case*, it was claimed that more than a million people would be adversely impacted by the flood control programme (FAP-20) project due to soil erosion, habitat destruction for fish, flora, and fauna, drainage issues, threats to public health, and deterioration of drinking water and sanitation conditions, will lead to ecological imbalance and environmental risks. The petitioner stood before the court on behalf of both present and future generations, advocating for their environmental rights. though court not explicitly but impliedly recognized intergenerational right to environment stating Article 32 of the Constitution guarantees the right to life, which means not just basic survival but also a quality life free from environmental hazards. Following the global trend of greening fundamental rights Bangladesh adopted this idea successfully in our legal system.

Moreover, Bangladesh also approaches nature according to the Doctrine of Public Trust. For the public's benefit, this ideology places a strong emphasis on the necessity of protecting certain natural and cultural resources. Human Rights and Peace for Bangladesh (HRPB) challenged the legitimacy of earth-filling, encroachment, and development along the Turag River's banks in 2016 by filing a writ suit in Bangladesh's High Court Division. The court acknowledged the Turag River as a "living entity" by exercising its *parens*

patriae authority. With this historic verdict, the National River Protection Commission was titled the "guardian" of all rivers, granting the authority to legally represent the interests of the rivers.

Legal personhood of nature has been employed in various jurisdictions, including the acknowledgment of constitutional rights of nature by Ecuador, New Zealand's the Whanganui River and the Atrato River in Colombia as legal persons. Ecuador was the first country in the world adopted an eco-centric constitution which formally recognized the notion that nature, including natural entities such as rivers, mountains, and ecosystems has inherent rights that should be protected by law. In 2010, Bolivia followed Ecuador's example by passing the world's first laws granting all nature equal rights to humans, ensuring these rights are respected and protected under the law. This approach views nature as a whole system to be protected, rather than just separate parts like forests, streams, and lakes. The Whanganui River was granted legal status in 2017 in New Zealand by enacting Te Awa Tupua Act^[16]. Ganges and Yamuna Rivers in India were recognized as legal persons by the High Court of Uttarakhand as well^[17]. This recognition came with rights and safeguards for the river, including the right to have guardians appointed to represent it in court. This eco-centric approach to protect of inherent right of nature made a paradigm shift from anthropocentric view of human to exploit nature for it's own interest.

4. A comparative analysis

While Big C constitutions provide a clear, formal basis for environmental rights and duties, the effectiveness of these provisions often depends on the strength of Small c constitutional practices. Judicial activism, public participation, and the political will to enforce environmental laws are crucial for translating constitutional promises into reality. Unlike South Africa, Indian and Bangladeshi constitution as environmental rights directly not ensured, no one can stand before court of its violation. In Bangladesh, Article 18A, a fundamental principle of state policy, lacks judicial enforcement as Article 8(2) declares it "not enforceable." However Article 7 states any provision incompatible with this Constitution shall be void. Here the word 'this constitution' includes fundamental principles also and thus negative enforcement of Article 18A is still open. So any provision which inconsistent with 18A shall be void. Thus Environmental rights, when construed in negative terms, aim to prevent governments from actions that harm environmental quality.

Simply proclaiming the right to a fresh environment is not enough; it must be enforceable. Skeptics of environmental rights argue that constitutional rights lose their worth if they are not enforced or cannot be enforced^[18]. Recognizing the right to a healthy environment in constitutional law makes it enforceable as a fundamental human right, give better and strong protection of rights as such South Africa did. In many countries like India, Bangladesh, Pakistan Small C approach through Environmental judicial activism has played a significant role to develop environmental rights even recognizing nature as separate entity. The court also recognizes the significance of ensuring intergenerational climate justice in addition to the preservation of current generations' human rights.

In countries with a strong tradition of environmental constitutionalism (referred to as “big C” constitutionalism), the right to a healthy environment tends to receive better protection compared to countries without such a tradition (referred to as “small c” countries). As in small C countries, right can not be directly enforced by the citizens, they have to establish their right to standing first by grabbing the tail of fundamental rights. The success of these efforts depends on the political will of the state, which may vary, with some states prioritizing environmental protection while others cite economic challenges or resource constraints as excuses. However, inserting environmental rights into the constitution is not always necessary for effective protection. Bruch highlights that even countries with sophisticated and well-developed environmental protection systems still face gaps in their legal frameworks ^[19]. Constitutionalizing environmental rights can simplify the process of proving legal standing in court, making it more straightforward to address environmental issues legally.

Methodology

This study used a qualitative research method to conduct a comparative study. To do this, the research has taken both primary and secondary data into account. The primary data are relevant legal documents, policies, reports, public documents and research papers. The research mostly relied on online sources like journal articles, websites as secondary sources.

Conclusion

To foster environmental jurisprudence at the domestic level, the practice of borrowing and transplanting constitutional principles is prevalent. However, this process often encounters challenges related to cultural relativism. Despite diverse cultures and ecosystems, the shared impact of climate change unites us in common challenges.

While Environmental constitutionalism alone may not solve all environmental issues, it can significantly enhance efforts to recognize the inherent value of nature. It offers several advantages over non-constitutional methods for environmental protection as it is more durable than non-entrenched rights. As the world rapidly evolves, so do the demands of its people and constitution is the most transparent legitimate mirror of peoples’ will. Specially countries like Bangladesh having constitutional supremacy, the public is more likely to respond to constitutional mandates than to other ordinary legislation. Ultimately, constitutional environmental rights can effectively protect both human rights and biodiversity.

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