Introduction

Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation . . . the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.

Juan Antonio Oposa et al. v. *The Honorable Fulgencio S. Factoran, Jr.*[1]

So it was that in *Oposa* v. *Factoran, Jr.* the Court stated that the right to a balanced and healthful ecology need not even be written in the Constitution for it is assumed, like other civil and political rights guaranteed in the Bill of Rights, to exist from the inception of mankind and it is an issue of transcendental importance with intergenerational implications.

Metropolitan Manila Development Authority v. *Concerned Residents of Manila Bay*[2]

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 constitutional courts worldwide.[3] This book explores the evolution, deployment,

[1] *Juan Antonio Oposa et al. v. The Honorable Fulgencio S. Factoran, Jr.*, G.R. No. 101083, 224 S.C.R.A. 792 (Supreme Court of Philippines, July 30, 1993), reprinted in 33 I.L.M. 173, 187 (1994) [hereinafter *Minors Oposa*].

[2] *Metropolitan Manila Development Authority* v. *Concerned Residents of Manila Bay*. G.R. Nos. 171947–48 (Supreme Court of Philippines, December 18, 2008) [hereinafter *Manila Bay*].

[3] See generally, May, James R. and Erin Daly. "Global Constitutional Environmental Rights." In *Routledge Handbook of International Environmental Law*, by Shawkat Alam, Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury and Erika J. Techera (eds.). Routledge, 2012; May, James R. and Erin Daly. "Vindicating Fundamental Environmental Rights Worldwide." *Oregon Review of International Law* 11 (2009): 365–439; May, James R. and Erin Daly. "New Directors in Earth

and potential of environmental constitutionalism at national and subnational levels around the world.

Environmental constitutionalism is evolving globally. The constitutions of about three-quarters of nations worldwide address environmental matters in some fashion: some by committing to environmental stewardship, others by recognizing a basic right to a quality environment, and still others by ensuring a right to information, participation, and justice in environmental matters. Dozens of nations and many subnational governments have adopted constitutional guarantees to environmental rights in recent years. Indeed, most people on earth now live under constitutions that protect environmental rights in some way. And environmental constitutionalism continues to emerge and evolve in courts all around the globe, although many constitutionally embedded environmental rights provisions have yet to be energetically engaged. Despite remarkably progressive language in South Africa's constitution, for instance, there have been decidedly few significant decisions from that country's constitutional court interpreting the ample right to environmental well-being.[4] This book explores evolutionary trends, as well as why some forms of environmental constitutionalism have tended to be more consequential than others.

Much has been written about the linkages between human rights and the environment,[5] between human and environmental rights,[6] and whether there

Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide." *IUCN Academy of Environmental Law E-Journal* 1 (2011a); May, James R. and Erin Daly. "Constitutional Environmental Rights Worldwide." In *Principles of Constitutional Environmental Law*, by James R. May (ed.). ABA Publishing, Environmental Law Institute, 2011b; May, James R. "Constituting Fundamental Environmental Rights Worldwide." *Pace Environmental Law Review* 23 (2006): 113.

[4] See *Fuel Retailers Association of South Africa (Pty) Ltd.* v. *Director-General Environmental Management Mpumalanga and Others*. 2007 (10) BCLR 1059 (CC) (South Africa Constitutional Court, June 7, 2007), available at www.saflii.org/za/cases/ZACC/2007/13.html. See generally, Kotzé, Louis J. and Anél du Plessis. "Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa." *Journal of Court Innovation* 3 (2010): 157.

[5] See generally, Shelton, Dinah. "Human Rights and the Environment." *Yearbook of International Environmental Law* 13 (2002): 199; Kravchenko, Svitlana and John E. Bonine. *Human Rights and the Environment: Cases, Law and Policy*. Carolina Academic Press, 2008.

[6] See, e.g., Gormley, Paul W. *Human Rights and the Environment: The Need for International Cooperation*. Sijthoff, 1976; Thorme, Melissa. "Establishing Environment as a Human Right." *Denver Journal of International Law and Policy* 19 (1991): 301; Merrills, J.G. "Environmental Protection and Human Rights: Conceptual Aspects." In *Human Rights Approaches to Environmental Protection*, by Alan E. Boyle and Michael R. Anderson (eds.). Clarendon Press, 1996 (reconciling environmental and human rights).

is a fundamental right to a quality environment.[7] There is a growing corpus of scholarship about embodying environmental rights constitutionally,[8] and the emergence of such rights in the global order of environmental law.[9] The discussion about environmental rights also internalizes related concepts of intergenerational equity and the precautionary principle.[10] What distinguishes this book from other works is that it deploys principles of comparative constitutionalism to examine whether, and the extent to which, global environmental constitutionalism is occurring, and why. It is intended to serve as a comprehensive guide to, and examination of, current trends in environmental constitutionalism, rather than as a normative argument for environmental constitutionalism as a human or other right, or necessarily as an exponent of environmental protection in particular contexts. It is not an exegesis that contends that environmental constitutionalism does or should predominate over other legal regimes, including environmental human rights or international and domestic environmental laws. It does not argue *ipse dixit* that environmental constitutionalism suffices for achieving the dual purposes of advancing environmental protection and promoting human rights. Instead, it demonstrates that environmental constitutionalism is an important and complementary tool for advancing these aims. Moreover, we do not seek to litigate

[7] See generally, Turner, Stephen J. *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-makers Towards the Environment*. Kluwer Law International, 2008; Bruch, Carl, Wole Coker, and Chris VanArsdale. *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*., 2nd edn. Environmental Law Institute Research Report, 2007; Hayward, Tim. *Constitutional Environmental Rights*. Oxford University Press, 2005: 12–13; Pallemaerts, Marc. "The Human Right to a Healthy Environment as a Substantive Right." In *Human Rights and the Environment: Compendium of Instruments and Other International Texts on Individual and Collective Rights Relating to the Environment in the International and European Framework*, by Maguelonne DéJeant-Pons and Marc Pallemaerts, 11–12, Council of Europe, 2002. (discussing the extent to which international law recognizes the existence of a substantive individual right to a healthy environment).

[8] See, e.g., Brandl, Ernest and Hartwin Bungert. "Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad." *Harvard Environmental Law Review* 16 (1992); Shelton, Dinah. "Human Rights, Environmental Rights, and the Right to Environment." *Stanford Journal of International Law* 28 (1991): 103 [hereinafter Shelton I]; Symposium. "Earth Rights and Responsibilities: Human Rights and Environmental Protection." *Yale Journal of International Law* 18 (1993): 215–411; Sax, Joseph L. "The Search for Environmental Rights." *Journal of Land Use and International Law* 93 (1990); *cf*. Fernandez, José L. "State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?" *Harvard Environmental Law Review* 17 (1993): 333 (objecting to enforcement of constitutional environmental rights).

[9] Yang, Tseming and Robert V. Percival "The Emergence of Global Environmental Law." *Ecology Law Quarterly* 36 (2009).

[10] Hiskes, Richard P. *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*. Cambridge University Press, 2008.

the *exact* number of constitutional provisions to enshrine a substantive, procedural, or other environmental right at the national or subnational level. There is no question that the number of such provisions is substantial and ever expanding. For example, and as examined in Chapter 2, in the mid-1990s there were about 50 constitutional provisions globally that had explicitly recognized a fundamental right to a quality environment. By 2004, one of the authors of this book reported that this number had grown to around 60. By 2008, we noted the number had increased to at least 65. By 2009, another study placed the number at 70. By 2011, our number had climbed again to about 75. And in 2012, yet another study placed the figure at about 95, including countries that impose a duty on the *government* to provide or protect a quality environment, in addition to those that guarantee an *individual* right to a quality environment. In this book, Appendix A lists 76 countries that explicitly recognize an individual right to a quality environment. It does not include countries that are *considering* whether to adopt explicit provisions, or countries that arguably have done so *implicitly* or as a constitutional function of *incorporating* other legal paradigms. Nor does it include countries that impose duties on the state to uphold environmental rights. We include these in Appendix C. Nor does Appendix A include duties imposed on individuals to protect the environment, which we list in Appendix B. Appendices D–G delineate hundreds of other manifestations of environmental constitutionalism. The exact figures are subject to both the influence of events and divergence in categorization, and will remain dynamic. The constant is that environmental constitutionalism exists in just about every nook and cranny on the globe, with growing significance.

Comparative constitutionalism plays an important role in analyzing and contextualizing environmental constitutionalism's emerging influence. Comparative constitutionalism – that is, the practice by constitutional courts of comparing and contrasting texts, contexts, and outcomes elsewhere – is a growing field. Indeed, while this has been called a "founding moment,"[11] it is probably more accurate to call it a *renaissance* in the discipline and the methodologies of comparative constitutional law, propelled by two principal factors. The first is the increasing number of constitutional democracies around the world in the past 40 years, with most new constitutions incorporating extensive catalogues of individual and social rights, including environmental rights. The second is the worldwide growth in independent judiciaries, or at least courts that have jurisdiction to hear constitutional questions.

[11] Fontana, David. "Refined Comparativism in Constitutional Law." *UCLA Law Review* 49 (2001): 539.

Indeed, many constitutional courts take seriously Justice Kennedy's reminder that "persons in every generation can invoke [constitutional] principles in their own search for greater freedom."[12] With more courts engaging in constitutional review, and issuing more opinions, the import of comparative constitutionalism grows. For instance, while Israel, 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 rights.

But comparative constitutionalism may have other appeal as well. As the societies around the world evolve at an ever-faster rate, courts are increasingly faced with problems of first impression, problems that are answerable less by recourse to each country's own history and constitutional origins than to contemporary experience and reason. A single nation's own past practice is unlikely to guide a court's judgment with regard to diminishing privacy, or the threat of terrorism, or, especially, to the challenges of environmental degradation and climate change. These challenges must be answered by reference to the best practices among nations. And the development of the internet – with ready access in multiple languages to primary and secondary jurisprudential sources from around the world – has facilitated this research.

Theorists see a number of other overlapping benefits in comparative constitutional methodologies: former President of the Israeli Supreme Court Aharon Barak argues that looking to other constitutional cultures "expands judicial thinking"[13] while Vicki Jackson argues that looking abroad can produce better law at home by enhancing "one's capacity for self-reflection."[14] In particular, Jackson says, seeing differences in other constitutional cultures reveals the "false necessities" in our own system and, further, encourages us to develop "what are the normatively preferable best practices."[15] To these we add that comparative constitutional methodologies can help fill in gaps when a nation's own history and experience do not resolve the question; this is particularly likely to be useful when courts confront challenges of the modern world that constitution-drafters of even a previous generation might not have anticipated.

Comparative constitutionalism is of such unquestioned utility that neither scholars nor judges typically see the need to justify it. Within the United

[12] *Lawrence* v. *Texas*, 539 U.S. 558 (2003).
[13] Barak, A. "Response to the Judge as Comparatist: Comparison in Public Law." *Tulane Law Review* 80 (2005): 195, 197; see also Jackson, V.C. "Methodological Challenges in Comparative Constitutional Law." *Penn State International Law Review* 28 (2009): 319.
[14] Jackson, "Methodological Challenges," 320. [15] *Ibid.*, 321.

States, the debate rages both on and off the bench, but it is a mostly rhetorical debate:[16] since its inception, the Supreme Court has looked to the experience or law of other nations for insight and guidance, and all the members of the current Supreme Court have done so, including those most vociferously against the practice.[17] The concerns raised in the American debate – that it threatens American sovereignty and superiority in constitutional matters,[18] or that it allows for cherry-picking,[19] or that it evinces an implicit progressive bias – seem largely unproblematic elsewhere. It is widely accepted that comparative constitutionalism contributes to the development of a body of best practices.

Comparative constitutionalism is particularly appropriate in the field of environmental protection and governance. Since environmental law, like human rights law, emerged at the international level, there is no inherent incompatibility between the environmental norms of a nation and those of the global community. Developing the former, therefore, may well benefit from attention to the latter, and vice versa. Because each nation is now implementing a common set of environmental principles and values derived from international agreements and conventions, comparisons among national experiences are likely to reveal relevant and valuable lessons. While each nation's particular environmental problems are distinctive – because they concern unique ecosystems put at risk by particular concatenations of political, economic, and cultural threats – the need to balance environmental protection against development is common to all parts of the globe.

If the controversy within the United States has any salutary value, it is to offer reminders of the potential misuses of comparative constitutionalism. Judges should not feel bound by approach or the outcome in a foreign case because the constitutional court's obligation is, of course, to interpret and apply its nation's own constitution.[20] And judges should be especially cautious in order to avoid misreading or failing to contextualize decisions of a peer court. But

[16] See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 200 (2005) (statement of Sen. Jon Kyl, Member, S. Comm. on the Judiciary) [hereinafter "Roberts Confirmation Hearing"]: "It's an American Constitution, not a European or an African or an Asian one. And its meaning, it seems to me, by definition, cannot be determined by reference to foreign law. I also think it would put us on a dangerous path by trying to pick and choose among those foreign laws that we liked or didn't like." See also, e.g., Fontana, David. "The Rise and Fall of Comparative Constitutional Law in the Postwar Era," *Yale Journal of International Law* 36(1) (2011); Jackson, Vicki C. *Constitutional Engagement in a Transnational Era*. Oxford University Press, 2010.

[17] http://dianemarieamann.com/2013/07/08/justice-scalia-cites-foreign-law

[18] See Roberts Confirmation Hearing.

[19] *Roper* v. *Simmons*, 543 U.S. 551 (2005).

[20] "This Court should not impose foreign moods, fads, or fashions on Americans." See http://dianemarieamann.com/2013/07/08/justice-scalia-cites-foreign-law

most courts intuitively avoid this mistake and require little guidance. Moreover, we note here that the task of the jurist differs fundamentally from the task of those who seek to comment on, understand, and elucidate judicial opinions. Because the law takes into account judicial reasoning, it is important to know what sources influenced or inspired the judge; whether he or she borrowed from foreign or international sources or relied exclusively on domestic experience determines how the opinion is interpreted and applied in later cases and affects its expressive significance. It is, for that reason, especially important for the court to understand the nature and the character of the foreign or international source.[21] The borrowing jurist must pay particular attention to the reasoning of the foreign opinion to ensure that he or she is appropriating it fairly and accurately. By contrast, when scholars survey global jurisprudence, the very fact that a judicial opinion has construed a constitutional environmental provision or applied it in a particular way is itself worthy of note, whether or not the reasoning is particularly persuasive.

The evidence is that the trend in global environmental constitutionalism is positive and powerful, given the increasing attention that constitutions are giving to environmental rights and the growth of constitutional jurisprudence generally in all regions of the world. And the ambit of constitutional law is growing too. The cases address both collective and individual rights and emanate from common law, civil law, and mixed traditions. They concern all aspects of the environment – air, water, and soil – and many forms of environmental degradation: pollution, clear-cutting, exploitation of natural resources, over-use and over-development, as well as recklessness and simple negligence of the rights of others and of the environment. And they seamlessly implicate civil and political rights as well as social, economic, and cultural rights at both textual and subtextual levels: while some cases discussed in this book vindicate an explicit right to a quality environment, other cases demonstrate that the right can be inferred from the rights to life, health, dignity, property, family, cultural integrity, and even the right against cruel and unusual punishment. Indeed, courts are incorporating into their national jurisprudence

[21] There is an abundant and growing literature on how courts should engage in comparative work. See, e.g., Hirshl, Ran. "The Question of Case Selection in Comparative Constitutional Law," *American Journal of Comparative Law* 53 (2005): 125; Jackson, "Methodological Challenges," 319; Fontana, "Refined Comparativism"; Saunders, Cheryl. "The Use and Misuse of Comparative Constitutional Law," *Indiana Journal of Global Legal Studies* 13 (2006): 37; Frankenberg, Günter. "Comparing Constitutions: Ideas, Ideals, and Ideology – toward a layered narrative." *International Journal of Constitutional Law* 4 (2006): 439; Annus, Taavi. "Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments," *Duke Journal of Comparative and International Law* 14 (2004): 301.

international norms – thereby contributing to the hardening of otherwise soft international law. And because the cases come from every region of the world including cases from both developed and developing countries, environmental constitutionalism has given rise to borrowing from national and transnational common law and other general principles of environmental law, some of which have been codified at the national level, while others remain subject to development and elucidation by constitutional courts.

While comparative constitutionalism is a legitimate 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. Throughout this book, we examine in detail the arguments that favor and disfavor adjudication of environmental claims in domestic constitutional fora; we suggest at this juncture simply that national courts are better suited to implement the norms that have been articulated at the international level, given their ability to translate those universal values into the local vernaculars and to do so with authority and impact. National courts offer each country the opportunity to determine for itself the appropriate balance of development and sustainability, the ways in which the nation will mitigate or adapt to climate change, the means it will use to protect the environment for the benefit of mankind or for nature itself, and the particular ways it will balance the often competing needs of present and future generations. 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. 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.

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, and so on. Likewise, the solutions are most likely to be implemented locally. Responsibility for the choices made must be taken by actors who are politically accountable.

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 – namely, those embodied in claims of western hegemony and cultural imperialism. 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 unchartered territories, as, for instance, Ecuador and Bolivia have done in protecting the rights of nature, and many countries have done in explicitly encouraging environmental rights litigation and in tying environmental protection to the protection of life and human dignity.

But while the situs of environmental issues are ordinarily contextually specific, their implications are transcendent, involving almost all aspects of life. National courts, like international summits, have recognized that pollution can affect individual and social health: lack of water can diminish girls' opportunities to attend school; climate change can produce environmental refugees; irresponsible exploitation of natural resources can devastate entire cultures; and, as the water wars of the 1990s in Bolivia suggest, failure to balance environmental and human needs can even threaten rule of law and democratic governance. The Rio+20 United Nations Conference on Sustainable Development recognized the inextricable link between sustainable development and the eradication of poverty. "We therefore acknowledge the need," the outcome document, *The Future We Want*, said, "to further mainstream sustainable development at all levels, integrating economic, social and environmental aspects and recognizing their inter-linkages, so as to achieve sustainable development in all its dimensions."[22] But to recognize the social and economic implications of a problem is to admit that it is primarily a national issue: the causes of environmental degradation are often rooted in national political and economic history and in the choices that have been made at the national level, whether to develop land, to privatize water, to allow mining or clear-cutting, and so on. These are questions of national policy that should be made within each country's unique political and legal culture. Comparative constitutionalism thus allows one to keep an eye on the generality of cases, while appreciating the local context of each.

Another limitation to comparative constitutionalism is that it assumes that different constitutions are legitimately subjects of level comparison. But, as we shall see, comparative constitutionalism assumes the existence of positive law and available case law to a great extent. Every constitution is the result of years

[22] UN Conference on Sustainable Development. "The Future We Want, A/CONF.216/L.1*." June 20–22, 2012, para. 3.

and sometimes generations of customs, traditions, and social structures that are anything but homogenous. They can encapsulate principles that can evade precise exposition, like socialist law, Islamic (and other theocratic) law, and customary (such as indigenous) law. Official translations can be non-existent or inconsistent. And of course oral constitutions passed down through millennia that are common in indigenous traditions are largely out of reach to a study such as this.

The challenges inherent in any comparative approach have particular salience with regard to emerging (and what can be evanescent) ideals like environmental protection. For example, because the legal boundaries of environmental protection are often not well defined, courts engaging constitutional claims may find themselves not only defining the scope of legally enforceable rights but also propounding social values. Values, more than rights, may inform public discourse and infiltrate social consciousness that, in turn, can help to change the behavior of both public and private actors. A court that persistently emphasizes the importance of sustainability and of maintaining a balance with nature will help to inculcate environmental values into the culture: people will demand that public officials act in ways that respect nature, and will do so not only through litigation but in all forms of political discourse and even private activity. As a result, judicial articulation of environmental values may be as instrumental in promoting environmental protection as the legal pronouncements on the scope of the rights asserted.

Comparing the constitutional environmental jurisprudence of countries around the world yields insights into the ways different legal cultures have responded to similar problems. The panoply of cases discussed in these pages illustrates the profound commitment to environmental protection that some courts have shown, and the inexhaustible creativity that they have evidenced in trying to resolve complex, polycentric problems that implicate these diverse interests. Through the comparative project, we can see how, by borrowing and learning from one another, courts are developing a rich and varied set of responses to the challenges of environmental protection through the means of environmental constitutionalism.

Some limitations of the comparative constitutional project partake of both practical and theoretical considerations. We emphasize decisions issued by apex or constitutional courts in certain countries; with few exceptions, we have not analyzed decisions by lower courts in most countries, nor those of green courts or other specialized tribunals because these decisions are less accessible in a medium that can be cite-verified, they are subject to subsequent revision by apex courts, and they are less likely to have a social impact that is as profound. And because we are most interested in the *constitutional*