Environmental Policy and Law 53 (2023) 99–110
DOI 10.3233/EPL-219058
IOS Press

The Human Right to Sustainable Environment: The Conceptual Framework

The Judiciary: Breathing Life into the Human Right to Life

Nicholas A. Robinson*

Executive Governor, International Council of Environmental Law, Kerlin Professor of Environmental Law Emeritus, at the Elisabeth Haub School of Law of Pace University in New York, USA

Abstract. The UN General Assembly (UNGA) recognized the human right to the environment on July 28, 2022 (resolution. 76/300). It came as a sequel to the Human Rights Council (HRC) resolution (48/13) of October 8, 2021 on the identical theme. The right is the foundation for all other human rights and for the UN Sustainable Development Goals 2030 (SDGs 2030). Most States have recognized the right in national constitutions and law. While international tribunals can be expected to clarify and enforce the human right to the environment, it is the national and sub-national courts where the right will be invoked and enforced. These national legal proceedings have begun. They face significant opposition by vested interests, as well as the inertia favoring business as usual. A case study examining the initial decisions in the State of New York (USA) illustrates the character of opposition to observing the right to the environment. Ultimately, procedural "due process of law" will combine with the substantive "human right to the environment" to build needed rigor into laws mandating stewardship of the nature and human wellbeing.

Keywords: Human right to the environment, national courts, rule of law, procedural due process of law, environmental litigation

1. Introduction

When the United Nations General Assembly (UNGA) adopted its landmark Resolution A/76/300 on the July 28, 2022, entitled "The Human right to a clean, healthy and sustainable environment,"[1] it launched a new Human Rights framework. It did more than simply reaffirming the UN Human Rights Commission, which had paved the way the year before by adopting HRC resolution 48/13 of the October 8, 2021.[2] Without a single "no" vote,[3] the General Assembly effectively recognized that all human rights, and policies, such as the Sustainable Development Goals (SDGs) so, are built upon the foundation of the Human Right to the Environment (HRE)[4].

*Corresponding author. E-mail: nrobinson@law.pace.edu.

1 UNGA (2022), The human right to a clean, healthy and sustainable environment, *Resolution adopted by the General Assembly on 28 July 2022*; UNGA Res. A/RES/76/300 (01 August, 2022); available at: Resolutions of the 76th Session - UN General Assembly

2 Human Rights Council (2021), The human right to a clean, healthy and sustainable environment, *Resolution adopted by the Human Rights Council on 8 October 2021*, HRC Res. A/HRC/RES/48/13, (18 October, 2021); available at: G2128950.pdf (un.org)

3 This point was cited in the last preambular paragraph for the UN Resolution A/76/300; see, UNGA (2022), *The human right to a clean, healthy and sustainable environment: draft resolution*, UNGA Seventy-sixth session, UNGA Res. A/76/L.75 (22 July, 2022); available at: The human right to a clean, healthy and sustainable environment : (un.org)

4 Moderated by EPL's Editor-in-Chief, Prof. Dr. Bharat Desai, EPL hosted two global webinars on this landmark event entitled "The Human Right to a Clean, Healthy, ad Sustainable Environment": (i) Part -II: December 09, 2022; EPL Webinar | Environmental Policy and Law; available at: https://environmentalpolicyandlaw.com/epl-webinar-december-2022.html; and (ii) Part -I: September 20, 2022; EPL Webinar | Environmental Policy and Law; available at: https://environmentalpolicyandlaw.com/epl-webinar-september-2022.html.

Resolution A/76/300 has finally merged the 1948 UN Universal Declaration of Human Rights with the 1972 UN Stockholm Declaration on the Human Environment. Just as the SDGs are interdependent, so to environmental protection, development, culture, civil and political, social and economic rights are inextricably connected, and depend on the health of the natural environment. There is no sustainability without providing stewardship for the biosphere and the natural systems. This awareness comes at the proverbial eleventh hour. Consensus of nations favoring adoption of the landmark Resolution A/76/300 coalesced because of the unpreceded environmental crises of climate change, biological diversity loss, and escalating pollution of the planet. When the United Nations Environment Programme (UNEP) described this triple threat to human civilization, it called upon all States to "make peace with nature."[5] As UN Secretary General Antonio Guterres put it: "We are losing our suicidal war against nature. Our two-century-long experiment with burning fossil fuels, destroying forests, wilderness and oceans and degrading the land has caused a biosphere catastrophe."[6]

The HRE affirms the right to life itself. The corollary is that when humans protect nature, they are also securing human health and wellbeing. How can the General Assembly's consensus about this "rights based" approach operate to end humanity's war on nature, on itself? One tried and true answer is to strengthen the courts in every country, to enforce, and breathe legal life into this most fundamental of the Human Rights. Courts already have had remarkable success in enforcing other human rights, and environmental laws. There is a reasonable expectation that the role of the judiciary will be transformative, helping people and their governments to observe the Human Right to the Environment as they strive to attain the SDGs.

2. Role of the Judiciary

This article explores the roles that the judicial institutions especially at the national level may play in implementing the universal HRE. Of course, these courts apply laws and legal norms adopted within the jurisdictions that they serve. When they do so, it also gives content to the international norm. This well illustrates the *dédoublement fonctionnel* function of national authorities that work in the service of both national and international laws.[7] National courts increasingly acknowledge their roles in applying international environmental legal obligations through their decisions interpreting national law. Like environmental scientists, judges increasingly understand that pollution transcends boarders and ecosystems transect the biosphere. Climate change impacts strike locally, while being generated globally. Many judicial decisions reflect this understanding.[8]

Recognizing that HRE cases increasingly enter the courts, judges in the world are sharing their knowledge and experiences. The Global Judicial Institute on the Environment (GJIE), an independent association of judges launched in 2016 with the assistance of the World Commission on Environmental Law of the International Union for the Conservation of Nature (IUCN) and the UN Environment Programme (UNEP), is building judicial capacity for serving this function.[9] Not all countries have judicial institutes to provide continuing judicial education of judges and court personnel. There is no inter-governmental international service to assist courts. GJIE is a network by judges for judges, filling this gap in international cooperation. Many courts do not yet comprehend their roles in addressing claims arising under the Human Right to the environment. This article is an early attempt to identify challenges courts will confront as pleas for relief arise.

5 UNEP (2021), "*Making Peace with Nature: A scientific blueprint to tackle the climate, biodiversity and pollution emergencies*", A Synthesis Report, 18 February, 2021; available at: https://wedocs.unep.org/xmlui/bitstream/handle /20.500.11822/34948/MPN.pdf

6 Antonio Guterres (2021), '*We are losing our suicidal war against nature*', UN Secretary-General tells Biodiversity Summit, urging bold actions towards sustainable future (SG/SM/20959, 11 October 2021); https://www.un.org/ press/en/2021/sgsm20959.doc.html

7 Antonio Cassese (1990), "Remarks on Scelle's Theory of 'Role Splitting'(*dedoublement fonctionnel*) in International Law," 1 *Eur. Jr. of Int. Law*, p. 210.

8 For instance, the decision of the Supreme Court of Hawaii, invoking the constitutional right to the environment, in *In The Matter of Hawai'i Public Light Company*, (March 13, 2003) decision at https://aboutblaw.com/66T, and concurring opinion at https://aboutblaw.com/66Sr. Also see, https://blogs.law.columbia.edu/climatechange/2022/02/23/in-a-first-for-climate-nuisance-claims-a-hawaii-state-court-allowed-honolulu-to-proceed-with-its-case-against-fossil-fuel-companies.html

9 IUCN WCEL, *Global Judicial Institute on the Environment Task Force*; available at: IUCN WCEL Global Judicial Institute on the Environment Task Force | IUCN

3. The Human Rights to the Environment

Recognizing the HRE is a landmark normative step for international public law, both in the fields of human right law and environmental law. Will State practice reflect the rhetoric of the UNGA resolution A/76/300? Pessimists might say the worsening ambient environmental conditions, afflicting a growing world population, will overwhelm societies, and frustrate implementation of the right to the environment. As this article is written, 4 million children in Pakistan still live without safe water after the devasting floods of 2022 in 1/3 of that nation. Acid rain still pollutes pervasively, unabated. Biodiversity losses escalate. States are well behind their efforts to attain the SDGs 13, 14, and 15.[10] The Courts are under resourced and administrative agencies in the executive branch of government often resist judicial review of their actions.

From the more optimistic, and yet also a realistic perspective, recognition of the HRE has the capacity to galvanize anew the national action and international cooperation to realize the SDGs. The progressive attainment of SDGs will require investments of time and effort beyond the target of 2030, but momentum has begun and can be sustained. Scholars have described the readily available steps that States can take to attain each of the SDGs.[11] Enforcing the HRE, as issues arise under each SDG, will be essential to human endeavors to attain the SDGs.

The optimistic approach is confirmed by the ancient roots of basic rights, such as due process of law. The freedoms enshrined in the Bill of Rights constituting with the rule of law are the province of the courts, and emerge from the Magna Carta of 1215.[12] The environmental rule of law has its origins in the Forest Charter of 1217, which Magna Carta produced.[13] The HRE is today considered to be an element of due process of law.[14] Thus, claims to enforce the Right to the Environment arise also as claims to secure due process of law. When claims are asserted by persons in environmental justice settings, they also arise as claims for the right to equal protection of the law. Similarly, if a local government acts to prevent a person asserting the right to the environment may have human rights claims under rights to freedom of speech and freedom of assembly. As the UNGA resolution A/76/300 declares, the right to the environment is related to other legal rights.

The Human Right "to a clean, healthy and sustainable environment" is already being implemented. The General Assembly recognized that this right is related to other rights and international law, and that the vast majority of States have already incorporated the right to a clean, healthy and sustainable environment into their national laws.[15] However, in most countries this basic right it not yet being enforced in courts. The General Assembly urged international organizations, commercial enterprisers and all relevant stakeholders to share best practices and further build capacity "to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all."

Among the stakeholders that are already at work for progressively seeing to the implementation of the SDGs are the lawyers and judges around the world, and the law students, professors, and court administrators across all nations. There are best practices to share, and the GJIE is doing so. It is lawyers bringing claims to the courts that human rights are enforced and reforms adopted to see to their implementation. Historically, courts have

10 See, Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development, *available at:* https://unstats.un.org/sdgs/indicators/indicators-list.html

11 Narinder Kakar, Nicholas A. Robinson, and Vesselin Popovski (2022), *Fulfilling the Sustainable Development Goals: On A Quest for a Sustainable World*, Routledge. It provides five pragmatic measures that are ready to be put in place currently to progress attainment of each SDG.

12 Historical Society of the NY Courts: "Eight hundred years ago (June 19, 1215), England's most powerful feudal barons gathered at Runnymede, on the banks of the river Thames to force King John to formally recognize their traditional legal rights by signing a charter known as Magna Carta. Divided into 63 chapters, Magna Carta established the crucial principle that the "law of the land" existed independently of the monarchy, and that the king was subject to it. The charter also recognized the rights of the barons to trial by jury, due process and habeas corpus;" see, https://history.nycourts.gov/about_period/magna-carta.html

13 Nicholas A. Robinson (2014), "The Charter of the Forest: Evolving Human Rights in Nature," in Daniel Barstow Magraw, *et. al,* (Eds.), Magna Carta and the Rule of Law (2014); available at: https://digitalcommons.pace.edu/lawfaculty/990.html. Not unlike many former British colonies, as provided under the NYS Bill of Rights Article I, Section 14, the common law, as received from England and until repealed, continues as the law of New York, and this includes Magna Carta.

14 UNEP (2019), *Environmental Rule of Law: First Global Report*, Chapter 4, section 4.2; available at: Environmental Rule of Law: First Global Report | UNEP - UN Environment Programme

15 UNGA (2022), n.1.

been essential to ensuring that human rights are observed. Although there are important regional human rights tribunals, as in Europe and Meso-America,[16] it is the national and sub-national courts and tribunals that ensure observance of the substantive and procedural guarantees of human rights.

There is wide international consensus on the procedures that court are expected to oversee and enforce. In the environmental context, Principle 10 of the Declaration of Rio de Janeiro on Environment and Development[17] was adopted by the "Earth Summit" in 1992, because national courts had already proven the value and affirmed the due process of law foundations for the practices that Rio endorsed. Principle 10 provides that "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."[18]

The Rio Declaration also endorsed the national practice of environmental impact assessment, or EIA, in Principle 17. Virtually all nations have enacted EIA laws and EIA procedures conform to Rio Principle 10, and are available as a legal tool to ensure that each governmental decisions subject to an EIA can make a contribution to attaining the relevant SDGs. Principle 17 provides that: " Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."[19] In each nation, it is the courts that enforce the procedural and substantive aspects of EIA. The International Court of Justice has ruled that States have the obligation under customary international law to conduct EIA.[20]

These aspects of the Rio Declaration are essential to fulfilling a State's obligations under the Human Right to the environment. There are principles that a court can apply is matters involving more specific issues under the Human Right to the Environment. Consider, for example, the right to water. This right is widely acknowledged in national law, and in international law. The right to water is an essential component of the right to life itself. It provides the juridical basis for SDG 6. Judges gathered at the 8th World Water Forum in Brasilia in 2018 prepared the ten principles of the Brasilia Declaration of Judges on Water Justice.[21] These ten principles delineate norms for adjudicating water justice cases.

The environmental rule of law is the over-all rubric through which these dimensions of the right to the environment can be discerned and applied. UNEP Issued the first global report on the Environmental Rule of Law in 2019.[22] A congruent pattern of environmental adjudications from courts around the world is emerging, providing a jurisprudence about the Human Right to the Environment. Courts in South Asia, especially the Supreme Courts of India and Pakistan, have been in the forefront of interpreting the right to the environment in context.

When the United Nations General Assembly took note of the widespread acknowledgement of the right to the environment in July of 2022, a consensus was possible because many States already had recognized "the right to a clean, healthy, and sustainable environment as a human right." Several Human Rights Rapporteurs has submitted their extensive analysis to the UN Human Rights Commission in Geneva, Switzerland, and had demonstrated that the "vast majority" of nations have already recognized the right to a clean and healthy environment in that

16 The European Court of Human Rights and the Inter-American court of Human Rights.

17 James R. May and Erin Daly (2017), Judicial Handbook on Environmental Constitutionalism; available at: http://works.bepress.com/james_may/100/.pdf

18 Principle 10 is embodied in several treaties, including the Aarhus and Escazu agreements, and in other soft-law declarations. See, The Global Development Research Centre, *The Rio Summit's Principle 10 and its Implications*, (10 March, 2022); available at: https://www.gdrc.org/decision/principle-10.html

19 Principle 17 should be read also together with all the other Rio principles, as its assessment objectives can advance the rule of law and the other Rio principles, as well as the relevant SDGs. See, UNCED, *Rio Declaration on Environment and Development*, A/CONF/151/26 (14 June, 1992); http://www.un-documents.net/rio-dec.html

20 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (2006) 46 *ILM* 1025, *available at* https://icj-cij.org/case/135.html

21 IUCN (2018), *Brasilia Declaration of Judges on Water Justice*, (18-23 March, 2018); available at: https://www2.ecolex.org/server2neu.php/libcat/docs/LI/MON-093474.pdf

22 UNEP (2019), n. 14

national constitutions and laws.[23] The decisions in South Asia were well understood. Legal scholars also have acknowledged are critiqued these rulings around the world. Professors James May and Erin Daly have prepared a comparative law guide to judicial decisions applying environmental rights.[24]

While it is tremendously instructive to examine the body of advanced judicial decisions, it may be equally important to look at the larger problem: how can jurisdictions, whose courts have not yet applied the right to the environment, build their capacity to do so? This will come only gradually, unless efforts to "scale up" as the UN General Assembly has recommended. The GJIE is available as a vehicle for scaling up, however scant resources have been allocated to do so as yet. Meanwhile, private commercial interests and State enterprises involved in natural resource exploitation, or operating polluting facilities, are vested interests that often oppose judicial Human Rights adjudication. Moreover, executive agencies may not wish to have judicial review of their conduct. More prosaically, most judges have not been educated about Human Rights law or environmental law.

It is instructive, therefore, to examine the issues that confront a jurisdiction that has never had the Human Right to the environment. This is the situation in a significant number of nations, and also political subdivisions within countries. How does a jurisdiction go about building the capacity for its courts to apply the Human Right to the Environment? Examining an empirical process may be instructive.

4. The Case Study of New York State

The State of New York has the largest court system of any of the State in the United States of America. It also has a well-developed body of environmental laws, which not infrequently was seen to be in conflict with civil rights or real estate property rights. In balancing competing interests, environment could be incrementally polluted to accommodate economic claims. New York lacked legal recognition of the Human Right to the Environment, which could serve to integrate and harmonize legitimate and intersecting social interests, as is seen in the framework of the SDGs. In 2022, New York's Bill of Rights was amended to include the Right to the Environment. It is instructive to see what issues emerged as this State's courts first begin to consider how to apply this right. New York's laws and courts function largely independent of federal law in the USA.

On election day in 2021 New York's voters added Section 19 to the State's Constitutional Bill of Rights. They reaffirmed a human birthright to clean air, clean water and a healthful environment. New York's Constitutional Bill of Rights now guarantees the liberty that "Each person shall have a right to clean air and water, and a healthful environment."[25] New York's legislature had previously concurred, recognizing that these rights are "elemental." The New York Bar Association held a continuing legal education program to take stock of the new "Green amendment" to the State's Constitution on January 25, 2022. The maiden lecture on this right to the environment, entitled, "*A New Era In Environmental Jurisprudence,*" was the first commentary on these new rights.[26] Eleven months later Judge John J. Ark of the Supreme Court in Monroe County cited this lecture in the first two judicial decisions applying New York's newly minted Bill of Rights provision.[27] A key part of capacity building is equipping the bar and bench with knowledge about what the Human Right to the Environment encompasses. Bar associations have a civic duty to their courts and the Human Right to the Environment.

23 UNGA (2022), n. 1, the final preambular clause of the resolution (A/76/300.

24 James May and Erin Daly (2019), *Compendium of Global Environmental Constitutionalism: Selected Cases and Materials*, Second Edition. UNEP; available at: apo-nid232266.pdf

25 New York Constitution Bill of Rights, Article I, Section 19. (in force since January 1, 2022). Colloquially known as the "Green Amendment," voters accepted the right to the environment by a 2 to 1 margin, with 2,129,051 votes in favor of the amendment; see New York State Constitution, available at: https://dos.ny.gov/system/files/documents/2022/01/Constitution-January-1-2022.pdf

26 Prof. Nicholas A. Robinson, Elisabeth Haub School of Law at Pace University, Lecture Presentation at the N.Y.S. Bar Association Annual Meeting before the Environment and Energy Law Section (25 January, 2022); available at: https://digitalcommons.pace.edu/lawfaculty/1205.html

27 *Fresh Air for the Eastside v. State*, 2022 N.Y. Misc. LEXIS 8394, 2022 NY Slip. Op 34429 (Sup. Ct. Monroe County, Dec 20, 2022). *Fresh Air for the Eastside, Inc.Vs. The State of New York, New York State Department of Environmental Conservation, The City of New York, Waste Management of New York, L.L.C;* Judgement of 20 December 2022 at p.10; available at: Fresh Air for the Eastside, Inc. v State of New York (justia.com) as well as the companion case of *Fresh Air for the Eastside v. Town of Perinton*, No. E2021008617 (Sup. Ct., Monroe County, Dec. 8, 2022).

In the first year under the new Bill of Rights provision, there are now four lawsuits pending in New York courts. The progress of these cases, and any new cases, is being monitored by librarians, faculty and students at The Elisabeth Haub School of Law at Pace University maintains an *Environmental Right Repository,* on line, with the principal pleadings, decisions on motions, and eventually all judicial decisions as they arrive.[28] This *Repository* also provides references to analogous rulings in other US States that provide rights to the environment in their constitutions, as well as to decisions in other jurisdictions around the world. Albany Law School is also providing analysis of the new Bill of Rights.[29] There are new roles of law schools to serve the courts and the Human Right to the Environment.

Although the right to the environment is new to New York jurisprudence, for many years other common law countries are enforcing this right, as are other courts around the world. Not least is that the Human Right to the environment is now also in the domain of human rights commissions and the legal counsel's offices for literally all state agencies. Just as due process of law is everyone's concern, so too the environmental rule of law, both embodied in the same NY Constitutional Bill of Rights. These lawyers, like the State's judges, have never has occasion to study the human right to the environment.

4.1. The Environmental Justice Interface

It remains to be seen how New York Courts ultimately will construe the constitutional guarantee to a clean and healthy environment. Because the human health and ambient environmental situations are comparable around the world, and the duties established by environmental statutes are similar world-wide, it is likely that rulings by New York courts will be akin to judicial decisions elsewhere applying environmental rights. Like other provisions in the Bill of Rights (such as freedom of speech or freedom of religion), the Constitution expressly prohibits government from trampling on the peoples' rights, now also for a clean and healthy environment.

Two other States in the USA have comparable constitutional guarantees of environmental rights, Montana and Pennsylvania, and the guarantees in Hawai'i are very similar.[30] The Pennsylvania Supreme Court ruled in 2013, these fundamental rights "are inherent in man's nature" and preserved rather than created by the Pennsylvania Constitution."[31] The Pennsylvania Court held that government's ignorance about its actions harming a person's environmental rights "does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action."[32] The courts make clear that executive branch authorities are constitutionally required to study and know the rights guarantees to the people by the Constitutional Human Right to the Environment.

Furthermore, since this right to the clean and healthful environment is a fundamental Human Right, upon which all other Human Rights depend, the State's human rights officials also have a duty to uphold environmental rights.[33] These Human Rights officials have had no education about environmental rights or legal norms, and

28 See, Pace University, *New York's Environmental Right Repository*, Article 1: Section 19; available at: https://nygreen.pace.edu/.

29 Scott Fein and Tyler Otterbein, "New York's New Constitutional Environmental Bill of Rights: Impact and Implications," Albany Law School; available at: New York's New Constitutional Environmental Bill of Rights: Impact and Implications | Albany Law School

30 The Hawaiian provisions, including the rights to due process of law, are well set forth in the decisions above, *In Re Hawai'i Public Light Company*, n. 8.

31 *Robinson Township, Delaware River keeper Network v. Commonwealth,* 83 A. 3d 901(2017), at Pp. 948; The same finding was cited in the leading decision recognizing and enforcing the right to the environment abroad in 1993, by the Supreme Court of the Philippines, *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (30 July, 1993); See, https://lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html. In Pennsylvania, the ruling struck down a state law (applied to legislative action); in The Philippines the ruling invalidated all the nation's forestry permits (applied to executive action).

32 *Id.,* 83 A. 3d 901, at Pp. 952.

33 The NY Bill of Rights in Article I, Section 19, then is to be applied as part of New York's Human Rights Law, which is set forth at Chapter 18 of the Executive Law. See Article 15, Human Rights Law, Section 290, Article 1, providing that the Human Rights Division is charged to uphold that Human Rights of New Yorkers: "The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded and equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its habitants but menaces the institution and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its habitants. See, https://www.nysenate.gov/legislation/laws/EXC/290.html

have yet to acknowledge that their official duties are in any way related to each person's environmental rights. Before 2022, human rights involved issues of civil rights and the discriminatory application of environmental laws. Now, New York's right to the environment underscores, indeed elevates, all environmental justice claims in New York.[34] A government permit that allows environmental harm to persons in disadvantaged communities is legally suspected under New York's Bill of Rights. Beyond environmental agencies, the New York Human Rights Division, and local human rights commissions, have a new legal impetus to bring relief to communities enduring environmental discrimination because of race, color, national origin or income. Suits on behalf of each person denied clean air or clean water or a healthful environment may be directed at governmental human rights officials who fail to act to ensure observance of these Human Rights. The reach of the Human Right to the Environment, anywhere, will surprise many.[35]

4.2. Procedural Aspects of New York's Initial Environmental Rights Rulings

New York's decisions of first impression interpreting Bill of Rights Article I, Section 19, examine legal issues that require close scrutiny. They have no precedents. In the first rulings in New York, Judge John J. Ark independently arrived at determinations under New York law that comparable to those of courts in a state like Pennsylvania. The NY case involves long-standing complaints by persons claiming that their right to healthful environment has been infringed upon the governmentally licensed High Acres landfill in the Town of Perinton. The landfill is regulated and accepts municipal refuse. Neighbors, however, endure impacts that the State's environmental agency has allowed. Denying the motions to dismiss by the NYS Department of Environmental Conservation, the Judged ruled that the Right to the Environment in NY's Bill of Rights was self-executing, and constituted a nondiscretionary duty on the part of all government agencies to fulfill their obligations under the Bill of Rights. Accordingly, plaintiffs could seek the remedy of mandamus. Moreover, plaintiffs had no obligation to exhaust any administrative remedies before seeking judicial relief, and could do so within the six-year statute of limitations for constitutional claims, not the shorter four-month stature of limitations in New York for judicial review of administrative law claims, such as permit violation. Judge Ark also ruled that the standards for judicial review of a constitutional claim are more rigorous than the "arbitrary and capricious" standards for administrative law claims. The burden of proof lies with the government to establish that it is not infringing a constitutionally guaranteed right. This shifts the burden of proof that environmental plaintiffs previously had to meet, to the government defendant. As a corollary to this burden of proof, when the claims come to trial, it will be important to consider whether New York courts will adopt evidentiary maxim known as *in dubio pro natura*. Under this

34 The NYS Department of Environmental Conservation has policies and a modest program on Environmental Justice; see, https://www.dec.ny.gov/lands/333.html. The Legislature has also enacted the Environmental Justice Permitting Bill, S8830, which the New York Governor signed last December 31, 2022, and which is due now to come into force in June, 2023. See, https://www.nysenate.gov/legislation/bills/2021/s8830.html. The Law amends the State Environmental Quality Review Act (SEQRA, Article 8, Environmental Conservation Law) to require all state and local governmental agencies making an environmental assessment under SEQRA to consider whether the proposed action may cause or increase a disproportionate and/or inequitable impact on a disadvantaged community ("DAC"). When an agency prepares an environmental impact statement, it must include a detailed statement defining the disproportionate and/or inequitable effects that the proposed action may have on a DAC. Read together with the Bill of Rights, Article I, Section 19, the agencies have no discretion except to require a full avoidance of any act that infringes each person's right to a clean and water and a healthful environment." The New York Climate Justice Working Group has prepared criteria for identify each DAC. Before the June effective date for the Environmental Justice Permitting Bill, at the NY Governor's request, the Legislature is expected to make as yet unknown amendments to the Environ mental Justice Permitting Bill. Should any of these or other amendments infringe on the environmental rights of persons in an environmental justice community, a court could conceivably face the question of the Bill of Rights potentially nullifying legislative actions that infringe the environmental rights.

35 For example, will the existence of this individual human right provide a basis for enacting criminal laws and sanctions? See, https://www.stopecocide.earth/what-is-ecocide.html. There is significant debate about enacting the crime of "ecocide" at different levels of government. See also, how criminal law already engages fundamental rights in the New South Wales, Australia? Rob White, "Eco-centrism and Criminal Proceedings for Offenses against Environmental Laws," In E. Fisher and B. Preston, An Environmental Court in Action – Function, Doctrine and Process, Chapter 11, at 213 (2022).

principle, when the evidence or equities are equally balanced, "the court is to respect the right to the environment by adopting the finding that is most protective of the environment."[36]

Given that the Bill of Rights now includes the fundamental Human Right to clean air, water and healthful environment, one may be surprised that the NY Governor and state agencies, such as the Department of Environmental Conservation, and also the NY Attorney General and the Department of Law, initially have resisted making any changes in policy and procedure required by Article I, Section 19. Their initial response has been to ignore the new right, or oppose its application to change their traditional roles. Judge John Ark expressed raised this concern in his *Fresh Air for the East Side* decisions. "Whether the Green Amendment will be an important tool to allow communities to safeguard their environment and compel state and local governments to prevent environmental harms is uncertain. Indeed, the vigor of the State's opposition to this lawsuit does not bode well for its enforcement, not bode well for its enforcement of the Green Amendment."

4.3. Responding to the Paradigm Shift

Judge Ark observed that "The regulatory paradigm in existence on December 31, 2021, as of January 1, 2022, has become a matter of constitutional right"[37] One might expect that a local planning board, or bureau chief in the Department of Environmental Conservation, both understaffed and lacking sufficient resources to handle their respective workloads, might resist the paradigm shift. Certainly, the private sector in New York, including real estate developers, did not welcome the likelihood of a paradigm shift, as they lobbied hard against adoption of the Green Amendment in 2021.[38] But that was then. As Prof. Rebecca Bratspies put it: "This changes everything."[39] Nonetheless, State and local agencies, initially appear to be ignoring the implications of the State's Human Right to the Environment.

Judge Ark's opinions delivered at the end of 2022 should arouse all in State government, but they are rulings of a trial court in a county distant from the State capital of Albany, or New York City. The State has filed an appeal, and more than six months will pass before an appeal will be heard. More than two years will likely pass before this or another cases reaches New York's highest court, Only then may the many stakeholders in New York concede that they are bound by the terms of New York's Bill of Rights Article I, Section 19. This delay is likely even though Judge Ark ruled that, "Complying with the Constitution is not optional for a state agency, and is thus nondiscretionary and ministerial." There are inevitable delays and lag times in each jurisdiction before the Human Right to the Environment is vindicated. While courts "scale up" to enforce this Human Right, the crises of environmental degradation continue apace.

Cognizant of these procedural delays in the court systems, it is incumbent on state and local government agencies to exercise their due diligence to determine plan to ensure that they respect each person's environmental Human Rights. To do otherwise is to reject democracy. As Judge Ark put it, "The voters of this State have empowered impacted citizens to bring a Green Amendment case when their right to breath clean air and live in a healthful environment has been violated."

New York's environmental right effectively withholds from each government agency any authority to violate each person's right to clean air and water and healthful environment. When 70% of New York's voters adopted these words, they understood their plain meaning. Legislative sponsors made clear they wish the Green

36 Too often previously, an economic interest would prevail when the equities are equally balanced. See, Oxford References, https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-912;See, Sarena Baldin and Sara de Vido, "The In Dubio Pro Natura Principle: An Attempt of a Comprehensive Reconstruction," *available at* https://www.researchgate.net/publication/366634311_THE_IN_DUBIO_PRO_NATURA_PRINCIPLE_AN_ATTEMPT_OF_A_COMPREHENSIVE_LEGAL_RECONS.html

37 Supreme Court State of New York (2022), n. 27. at p.10

38 See, the references to the expressions of both opposition and support for the "Green Amendment" in Prof. Nicholas A. Robinson Lecture, n. 26.

39 Rebecca Bratspies (2022), "This Changes Everything: New York's Environmental Amendment," Viewpoint, *Environmental Law In New York*, vol. 33, no. 6 (June 2022) at p. 1.

Amendment to concise, akin to expressions of due process or free speech rights.[40] Environmental rights guarantee the right to life, which our era of climate change, biodiversity loss and chemical pollution places in some peril. The birth rights to breathe clean air, have clean water, and live in a healthful environment, are widely regarded as natural rights; this is the right to life which due process of law guarantees.[41] As is amply clear from applications of process of law, courts ascribe more precise meanings to the basic liberties in the Bill of Rights in context of the government's act of trespass.

Objective criteria and methodologies exist to enable the bench and bar, and government officials to respond to the paradigm that the Human Right to the Environment ushers into our civic and government realms. Attention needs to be given to ascertain how to provide concrete meaning to clean air and water and a healthful environment.

First, it fundamental to human rights law that the law can countenance no backsliding from levels of protection currently in place. This is the non-regression principle.[42] It has concrete meaning in the context of environmental law, for example the *non-degradation* of water quality norm that underpins the in the Clean Water Act and New York's water quality standards.[43]

Second, the criteria and procedures of environmental impact assessment (EIA) need to be applied rigorously. In New York EIA is mandated all state agencies and local authorities. They each have the legal obligation to identify and adopt substantive mitigation of adverse effects under the State Environmental Quality Review Act (SEQRA).[44] SEQRA also emphasizes the progressive nature of government's objective, to improve and sustain improved conditions: "The maintenance of a quality environment for the people of this state that at all times is healthful and pleasing to the senses and intellect of man now and in the future is a matter of statewide concern."[45]

The issues that New York courts will struggle to determine to apply the Human Right to the Environment, other jurisdictions are likely to encounter also. Inertia is a powerful force, and governmental frameworks tend to perpetuate past arrangements. Nonetheless, governments cannot degrade level of a person's clean air and water and healthful environmental life. Agencies can be induced to take note of existing conditions, since these facts provide the baseline below which degradation that impacts a person is proscribed. Without assessing the status of the local environment, it is difficult to ascertain how an agency's actions may cause degradation. EIA rules, as provided in SEQRA, already requires this pre-action assessment, but many agencies have ignored this duty. Such avoidance of this legal duty is at the root of many affronts to environmental justice.

Third, courts will fashion tests to guide how cases are to be considered under the Right to the Environment. When applying the right to the environment in context, Judge Ark provided a framework for judicial decision-making: "In adjudicating and applying the Green Amendment, it may be necessary to have a two-prong test: First, did the government action comply with the applicable statute? Second, did the government action violate a person's constitutional 'rights to clean air and water and a healthful environment'?"[46] If failure to adhere to a statutory duty is found, then a court may not need to reach the constitutional claim. In assessing the claim under the bill of rights, with the strict scrutiny appropriate when called upon to preserve the persons' rights, Judge Ark's

40 Even after adoption of the "Green amendment," opposition interests have argued that the words "clean air" and "clean water" and "health" are too vague to be applied. However, these word stake on their meaning from their environmental context in which the rights are invoked. New York courts have settled jurisprudence of construing other rights in New York. See, e.g., *People v. P.J. Video*, 68 N.Y. 296, 301-2, 501 N.E. 2d 556, 559-60 (1985) recalling "New York's long tradition of interpreting our State Constitution to protect individual rights."

41 The court so held in the landmark environmental rights case of *Oposa v. Factoran*, *supra* note 31. New York court decisions have given concrete meaning to the natural right of *due process of law* "4,000 times in the first ten years of the twenty-first century, and over 6,000 times in the decade after that (2010-2020), giving judges a more solid, Constitutionally grounded, and less amorphous platform than 'natural law.'" Albert M. Rosenblatt, "The Rise and Fall of Natural Law in New York, 6, *Judicial Notice*, p. 18 at 23 (2022). NY courts cited natural law in less than 12 decisions.

42 See, Markus Vordermayer-Reimer (2021), "Progressivity and Non-Regression in International Human Rights Law: Going Up on The Escalator," (February 11, 2021); available at: https://www.cambridge.org/core/books/abs/nonregression-in-international-environmental-law/progressivity-and-nonregression-in-international-human-rights-law-going-up-on-the-escalator/2FBC6B7F7626E076E2EB16C171BB447C#.html

43 Section 101, Clean Water Act, 33 USC 1251. The US Environmental Protection Agency views anti-degradation expansively beyond water quality issues. See, US EPA, Key Concepts Module 4: Anti-degradation; *available at* https://www.epa.gov/wqs-tech/key-concepts-module-4-antidegradation.html

44 USA, Environmental Conservation Law, Sec. 8.

45 NY State Environmental Quality Review Act (In force from 1 November, 1978)

46 Supreme Court State of New York (2022), *Fresh Air for the East Side v. State*, n.27. Also found in the Repository at n. 28.

test involves three considerations: (a) any agency's infringement on an environmental right must be justified by a *compelling* state interest (not business as usual, or mere economic advantage); (b) the proposed agency conduct must demonstrate that it is the least intrusive (like the alternatives analysis required under EIA, via SEQRA, or showing over-all the act does not regressive), and (c) the action claimed to be a compelling state interest must still be consistent with the non-degradation and hold harmless the person's environmental human rights (as in equal protection and environmental justice instances). Just plaintiffs will need to assemble substantial evidence that the government is degrading the air and water to their detriment, so defendants will face a daunting task to claim their act is *compelling*. There is not likely to be a large volume of environmental rights cases. If agencies reassessed how they respect each person's environmental rights, litigation could be avoided altogether.

4.4. Executive Branch Obligations

Article IV, Section 3 of the New York's Constitution, obliges the Governor to ensure that the "laws are faithfully executed." The Human Right to the Environment is the most fundamental of laws that must be honored. It is incumbent on the office of the Governor study how to best ensure that all state agencies do not violate each person's right to the environment., There are readily available methodologies to do so. The Governor should take stock of how manufacturing enterprises have learned to comply with environmental laws over the past decades. They created their own environmental management systems, known as EMS.[47] EMS management systems allow any organization,, including a state agency or local authority, to adjust their operations to conform with legal norms for environmental stewardship.[48] Successful manufacturing enterprises also follow the environmental audit processes provided by the International Standards Organization, ISO.[49] The ISO 14000[50] guidance series included provisions for independent audits of companies' environmental compliance procedures. In the course of doing so, they were able to streamline operations, minimize waste streams, and modernize their operations. It is time for government agencies to follow the best practices being used routinely by the private sector.

Throughout the world there are experienced consultancies and training programs for EMS and ISO 14,000. New York's Governor or the executive head of any agency or any local mayor, could employ these services to establish an EMS that aims to ensure that the governmental entity complies with New York's environmental rights.[51] Rather than opposing plaintiffs' asserting their human environmental rights, as the State did before Judge Ark, the Department of Law could counsel state agencies to review their operations to ensure compliance with the Human Rights, including the right to the environment. The Governor could issue an Executive Order that each State agency adopt an appropriate EMS that ensures environmental rights are honored. There is a substantial practice for lawyers and environmental consultants in helping agencies learn to observe each person's environmental rights. It will be faster and more efficient to "scale up" and use EMS and ISO 14,00 to ensure that government observes human rights to the environment, than it will be for a court to oblige the government to do so under an order of mandamus.

5. "Scaling up" to Embrace Environmental Human Rights

New York's halting and troubled response to its voters adopting their right to the environment illustrates comparable problems other jurisdictions have and will encounter. Campaigning to secure adoption of the "Green Amendment" in New York took more than 15 years. There is an ambitious campaign to secure such rights other

47 US EPA, Environment Management Systems: Law and Executive Orders, see, https://www.epa.gov/ems/laws-regulations/laws-and-executive-orders.html

48 US Fed Centre, Environment Management Systems, see, https://www.fedcenter.gov/programs/ems.html

49 International Standard organization (ISO), Environment Management Standards; See, https://www.iso.org/standards.html

50 International Standard organization (ISO), *ISO 14001 and related standards*; available at: https://www.iso.org/iso-14001-environmental-management.html

51 The World Environment Center has long facilitated major corporations to develop environmental compliance and stewardship tools and systems. See https://www.wec.org/about.html. Also see, the World Business Council for Sustainable Development; available at: https://www.wbcsd.org/about.html

states in the USA.[52] In many other countries, courts are implementing environmental rights. Where the courts have yet to implement the right to the environment fully, challenges like those in New York abound.

The UN General Assembly was on firm ground in calling for all stakeholder to cooperate to scale up implementation of the Human Right to the Environment. Given the triple perils of climate disruption and biodiversity losses and ubiquitous chemical pollution, human society does not have the leisure of delay. Business as usual is not the *status quo*, it is **regression**. Failure across any and all sectors to adapt and embrace the Human Right to the Environment places the life and liberty and property of each person in jeopardy. Slow reforms themselves are insufficient, in light of the destruction of wild fires, floods, droughts and heat waves on land and under ocean waters. "Scaling up" requires systemic and profound change.

Notwithstanding all their problems, courts are the one authority that can oblige the public and private sectors alike to respect the right to life, and give forceful impetus to implement the SDGs, including the national commitments to abate greenhouse gases as agreed under SDG 13 and the 1992 UN Framework Convention Climate Change and the 2015 Paris Agreements. While nations agree on these objectives, there and will be many disagreements about how to do so, and courts are a better place to civil unrest and conflict. Governments should not fear the disputes that invoking the Human Right to the Environment will engender. Those struggles are in the end sustainable. In fact, civil strife and conflict, like resort to war, are inherently incompatible with sustainability, as the States agreed in the 1992 Rio Declaration.

Those who govern while life and liberty and property are lost to environmental disruption will face an uncertain future. Many New Yorkers who vote for the "Green Amendment: were voting for the hope that government could and would stop the slide downward into chemical contamination of their water and food, or into a "silent spring" with birds and wild animals and plants disappearing, or into a maelstrom of more extreme weather events. Many voters doubtless considered it a "crime" that their shared environment is being harmed by economic interests and temporizing, insufficient government regulation. This malaise also gives rise to demands that a crime of ecocide actually be established.

Courts exist in every nation. Each is distinctive and integral to each nation's sovereignty and legal characteristics. Asking these diverse national courts to apply a university Human Right to the Environment is not intended to homogenize them into an international mode. Quite the contrary, unless the national characteristics of each judicial system are supported, the rulings of these courts will not take root, and blossom. Courts – and the laws they apply – reflect the organic growth of each culture and community. While courts – like parliaments and governments, may and do disagree about other Human Rights, whether civil and political, or social and economic, they are generally united about valuing Earth's Biosphere. The HRE is more than a common concern of States. It is a shared value of all persons. Its norms exist in every religious, and in ethical systems.[53] It is found in ecological civilization. Each court will interpret and apply the HRE in accord strictly with its own legal principle and procedures. This should be expected and accepted.

In the end, as courts incrementally require EIA to secure environmental rights in each narrow case before them, they are inviting scientists to describe the extant ecological conditions in objective ways so that they can sustain the essential natural systems and there functions. Whenever person complains that her or his water is polluted and a government authority has not abated the pollution, a court can enforce the right to clean water for that individual. In so doing, as government's remediation benefits the entire community of life. Because the natural systems of the Biosphere are everywhere, at once global and local, courts will make decisions based on sustaining their local environment. As they do so, their accumulated decisions will benefit the biosphere as a whole.

This pattern of individualized international cooperation has been demonstrated in the Montreal Protocol under the Vienna Convention for the Protection of the Stratospheric Ozone Layer. State have learned to coordinate their combined responses to a common problem, despite the differences in national administrative systems and governance. This illustrates intergovernmental action to respect the right to life. It is administered in each sovereign state individually, but with mutual and a common benefit.

52 Maya K. Van Rossum (2022), *The Green Amendment: The People's Fight for a Clean, health and Sustainable Environment*, 2d. edition; see also, Green Amendments for the Generations; available at: https://forthegenerations.org/blog/2022/11/01/maya-van-rossum-publishes-second-edition-of-the-green-amendment-the-peoples-fight-for-a-clean-safe-and-healthy-environment.html

53 For instance, The Earth Charter, (June, 2000); available at: https://earthcharter.org/read-the-earth-charter.html

6. Conclusion

The Courts do not need any international treaty. They already exist and have the confidence of their governments. They can benefit from capacity building, but those endeavors are always within and respecting their national confines. When court systems collapse because of civil strife, they must be rebuilt.

It should not matter, amidst this global ecological crisis, whether the courts are independent or instructed. When they function as instructed courts, then the instructing authority needs to articulate the environmental norms and procedures like EIA or pollution abatement, that the courts are to apply. In the end it is in the interests of each State with an instructed judiciary to ensure local water or air is clean, they ecological systems do not collapse, that flooding is averted, that hazardous waste are abated. Seen in this light, instructed judiciaries are in the end also fulfilling the expectations of the Human Right to the Environment.

The promise of the UNGA resolution (A/76/300) is that in each of the UN Member States, the HRE will be invoked to halt the description of humanity's home, the shared Biosphere on Earth. Courts will be essential in this Anthropocene epoch as they will be called upon to adjudicated peace with the planet, one case at a time. The HRE will be their shining lodestar.