

The Prospects of Constitutional Environmental Rights for the new Hungarian Constitution

**The Right to a Healthy Environment
and the Representation of
Future Generations' Interests
in the new Hungarian Constitution**
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Purposes

This presentation examines the extent to which courts around the world have been receptive to constitutionally embedded environmental rights provisions. It then explains these results and suggests ways to neutralize judicial resistance to these emerging constitutional rights.

See, James R. May & Erin Daly, *Vindicating Fundamental Environmental Rights Worldwide*, 11 Ore. Rev. Intl. L. 365-440 (2010)

See, James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 Pace Env'tl. L. Rev. 113-172 (2006).

Caveat: Cognitive Conundrums

- Scope: In isolation, fundamental environmental rights are irrelevant to most endeavors; but in association with other rights, they're relevant to almost all endeavors
- Where to draw constitutional lines?

Six Parts

- Background: Whether to Constitute Environmental Rights
- How Countries have Manifested Constitutional Environmental Rights (CERs)
- Judicial Receptivity to CERs
- Challenges explained and examined for constitutional reformation in Hungary
- Ditto for Opportunities
- Discussion

I. Background:

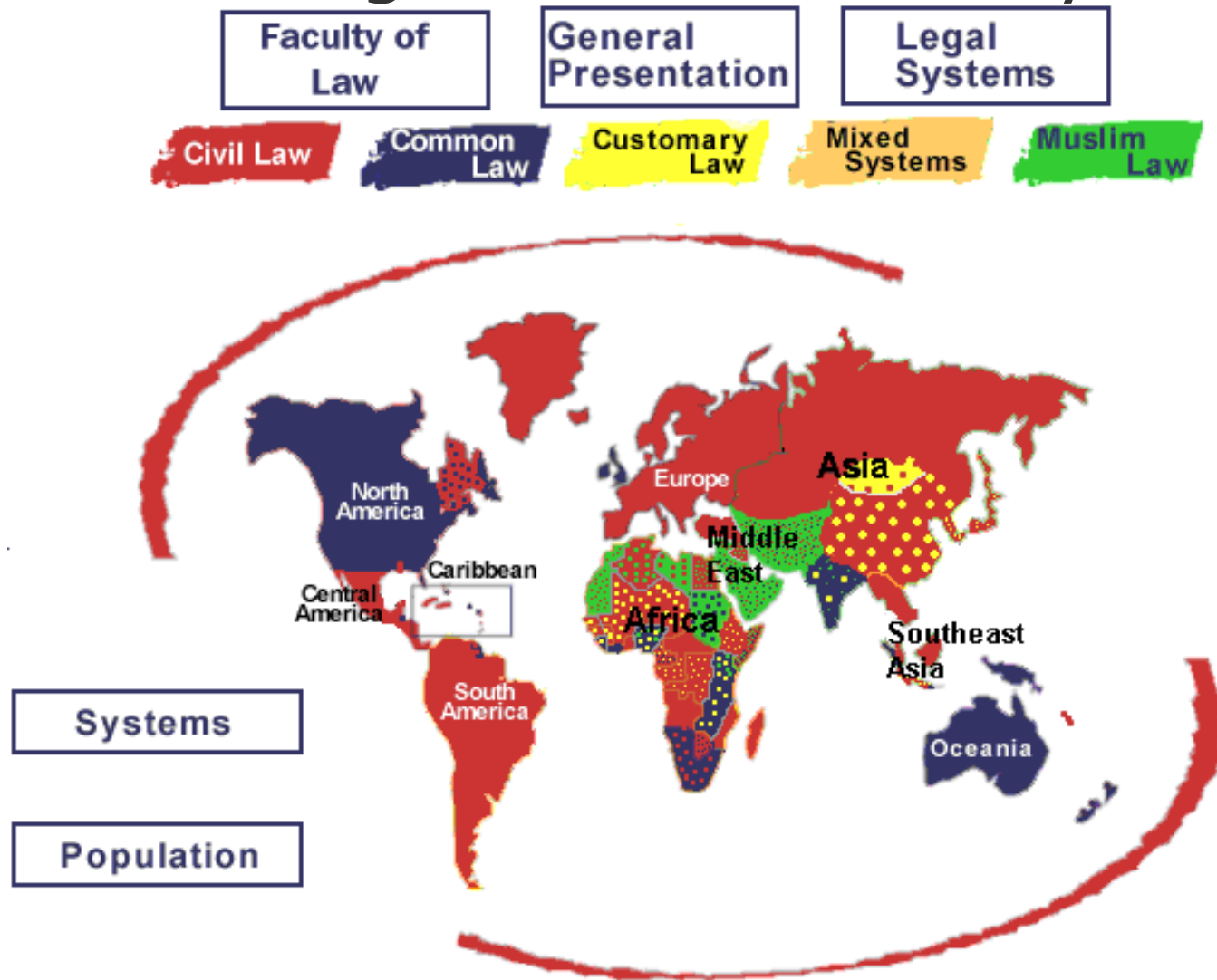
Whether to Constitute a Fundamental Human Right to a Quality Environment

- Constitutionalism, Human Rights and the Environment
 - Is there a fundamental right to a quality environment?
 - If so, ought it be constitutionalized, James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 Pace Envtl. L. Rev. 113 (2006).

Shortcomings in Enforcement and Compliance with Existing Legal Structures

- International
 - Universal Declaration of Human Rights
 - Stockholm Convention
 - Rio Declaration
 - Aarhus Convention
- Regional (Inter-American, European and African Human Rights Panels)
- Varied National and Subnational Systems (next slide)

- Existing Constitutional Systems



II. Manifesting Fundamental Environmental Rights

Varieties:

- Policy (about 130). Examples:
 - “The state shall consider fundamental environmental rights in _____”
 - “It shall be the duty of every citizen to protect the environment.”
- Procedural (about 120). Examples:
 - “Every person shall have a right to information and participation in any decision that significantly affects the environment.”
- Substantive (about 60, and the focus here, next slide)

Substantive FERS: Recent Examples

- “Everyone has the right to an Environment that is not harmful to their health or well-being” (South Africa, 1996)
- “All have the right to a humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations” (East Timor, 2002)
- “The State recognizes the right of every person to a healthy, well-preserved and balanced environment (Romania, 2003)
- “A prosperous life and a sound environment for all those residing in this land” (Afghanistan, 2004)
- “The people of the Sudan shall have the right to a clean and diverse environment (Sudan, 2005)
- “Each one has the right to live in a balanced and respectful environment of health (France, 2005)
- “Every Individual has a right to live in a correct environmental atmosphere” (Iraq, 2006)
- Entitlement to “environment and the biological diversity in a balanced and sustainable fashion” (Thailand, 2007)
- All citizens have a “right” to “healthy environment” (Bolivia, 2009)

III. Judicial Receptivity To Substantive Environmental Rights: In General

- To be “enforceable”:
 - Self-Executing
 - Justiciable
 - Actionable

Constitutional Spectralism

First Generation (negative; what the gov't can't do)

- Abridge speech; establish national religion
- Conduct unreasonable search/seizure
- Take private property for public use w/o just comp.

Second Generation (positive; what the gov't must provide)

- Due process (“life, liberty or property”)
- Equal protection

Third Generation (collective; positive and negative)

- Socioeconomic (food, shelter, education, medical care)
- Quality environment?

FER Enforceability Framework

- *Independent* (About 20): Identified as “Right” or such. Presumptively enforceable. About 20.
- *Dependent* (About 20): Identified elsewhere. Enforceable when coupled with other constitutional features, say declarative principles. About 20.
- *Derivative* (about 5): Enforceable as right implicitly encoded in some other right
 - Right to Life
 - Right to Dignity
- Dormant (balance)

Judicial Receptivity Worldwide

- Enforceable:
 - *Independent*:
 - Argentina
 - Chile
 - Colombia
 - Costa Rica
 - Hungary
 - *Dependent*:
 - Philippines
 - *Derivative*:
 - India
 - Pakistan
 - Nepal
 - Bangladesh
- Not Enforceable:
 - Cameroon
 - Hungary
 - Namibia
 - Spain
 - Turkey
 - Uganda
 - Greece, Netherlands & Switzerland (process only)
 - U.S. (null)
- Dormant
 - South Africa
 - Brazil

Case Studies

- Independent
- Dependent
- Derivative



Independent: *Trillium* Case

“right to live in an environment
free from contamination”

Involves "the maintenance
of the original conditions of
natural resources”





Dependent: *Oposa v. Factoran*
(Philippine Forests Case)



Antonio Oposa Jr.

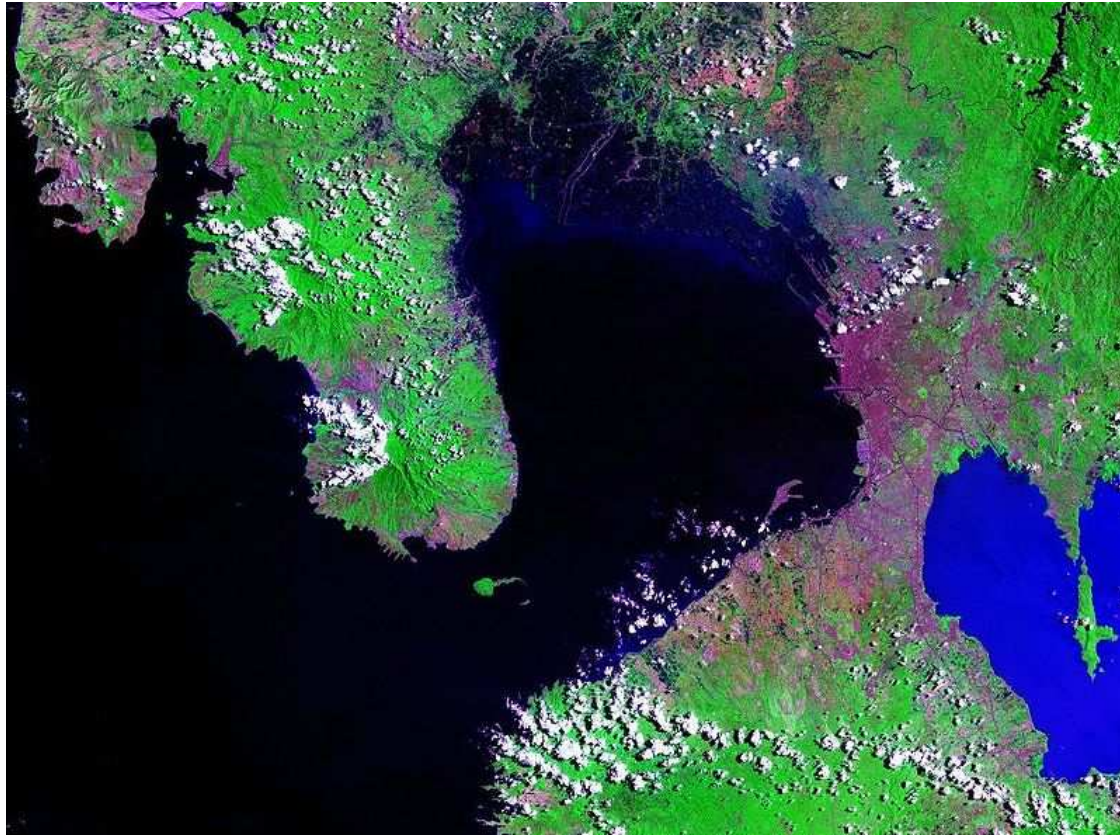


Dependent: *Oposa v. Factoran* (1994)

“...[T]he right to a balanced and healthful ecology ... [is not] less important than any of the civil and political Rights ...

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 Governments and constitutions.

[T]hese basic rights need not even be written in the Constitution for they are assumed to exist from the Inception of humankind.”



Land Development Around Manila Bay

captured by NASA's Shuttle Radar Topography Mission



Metropolitan Develop. Corp. v. Concerned Residents of Manila Bay (2008): “[Right to a healthy environment] exist[s] from the inception of mankind and it is an issue of transcendental importance with intergenerational implications”



Derivative: *M.C. Mehta v. Union of India; Subhash Kumar v. State of Bihar (Ganges River Cases)*

“Closure of tanneries may bring unemployment [and] loss of revenue, but life, health and ecology have greater importance to the people.”



Hungarian Interpretation

- Substantive Right?
- Procedural Right?

IV. Challenges

- Conceptual Conundrums
 - Objectivism: “Environment”; “Life”; “Health”
 - Adjectivism: “Quality”; “Healthy”; “Productive”
- Pragmatic Considerations
 - Actors: Who can sue, whom?
 - Defenses and Limitations?
- Remedies
 - Fashioning
 - Enforcing

V. Opportunities

- Constitutional Culture
- Enabling Constitutional Litigation
- Tolerance Toward Judicial Reform
- Constitutional Feedback

Discussion: The Prospects of Constitutional Environmental Rights for the new Hungarian Constitution

