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THE EVOLUTION OF ENVIRONMENTAL CONSTITUTIONALISM: RIGHTS OF NATURE, CLIMATE LITIGATION, AND THE LIMITS OF SUSTAINABLE DEVELOPMENT

Vanshika Agarwal¹

ABSTRACT

In the span of four decades the right to a healthy environment has travelled from the margins of constitutional text to the centre of constitutional litigation. This article traces that journey across three phases. The first is textual: more than 150 constitutions now contain some environmental provision, and courts in India, Colombia, and elsewhere have read such a right into older documents that never mentioned it. The second is the extension of legal personality to rivers, forests, and ecosystems, a development that began in Ecuador and New Zealand and reached the Indian High Courts in 2017. The third, and now dominant, is climate litigation against governments, in which the Dutch, German, Pakistani, and Strasbourg courts have converted a diffuse environmental right into an enforceable obligation to reduce emissions. Drawing on *Urgenda*, *Neubauer*, *Leghari*, *KlimaSeniorinnen*, *Juliana*, *Held*, and *M.K. Ranjitsinh*, the article argues that environmental constitutionalism has succeeded in reframing environmental harm as a rights violation but remains unresolved on two questions: how courts should reconcile the right with the equally constitutional imperative of development, and who may speak for nature when nature is the litigant.

Keywords: environmental constitutionalism; right to a healthy environment; rights of nature; climate litigation; sustainable development; intergenerational equity

INTRODUCTION

The Portuguese Constitution of 1976 was among the first in the world to declare that everyone has "the right to a healthy and ecologically balanced human living environment."² At the time the provision was regarded as aspirational, a statement of values rather than a source of enforceable obligation. Half a century later, a Grand Chamber of the European Court of Human Rights has held that a state's failure to adopt adequate climate targets violates the right to private

¹ The author is a LLM candidate at Durham University.

² Constituição da República Portuguesa [Constitution] art. 66 (Port.).

and family life,³ the Supreme Court of India has recognised a fundamental right to be free from the adverse effects of climate change,⁴ and a river in New Zealand has been declared a legal person with rights and liabilities of its own.⁵ The transformation is remarkable, and it has happened largely through litigation rather than through amendment.

This article examines that transformation as a matter of comparative constitutional doctrine. It proceeds in four parts. Part II describes the recognition of the environmental right itself, whether by express text or by judicial interpretation. Part III considers the more radical step of granting legal personality to natural entities. Part IV analyses climate litigation against governments, which is now the principal arena in which environmental constitutional rights are tested. Part V turns to the unresolved tension between environmental protection and the constitutional commitment to development, a tension that is felt most acutely in the Global South. The conclusion offers an assessment of what has been achieved and what remains contested.

RECOGNISING THE RIGHT

A. Express Text

The environmental right appears in constitutions in three broad forms. Some, like Portugal, South Africa, and Kenya, frame it as an individual right. Section 24 of the South African Constitution provides that everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures.⁶ Others, like India, frame it as a directive to the state and a duty of the citizen. Article 48A directs the state to protect and improve the environment, and Article 51A(g) makes it a fundamental duty of every citizen to do the same.⁷ A third group, exemplified by Ecuador and Bolivia, goes beyond the human-centred frame altogether and confers rights on nature itself.⁸

³ *Verein KlimaSeniorinnen Schweiz v. Switzerland*, App. No. 53600/20 (Eur. Ct. H.R. Apr. 9, 2024) (Grand Chamber).

⁴ *M.K. Ranjitsinh v. Union of India*, 2024 SCC OnLine SC 570.

⁵ *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, s 14 (N.Z.).

⁶ S. Afr. Const., 1996, § 24.

⁷ India Const. arts. 48A, 51A(g).

⁸ Constitución de la República del Ecuador [Constitution] arts. 71–74 (Ecuador).

The distinction between these forms has mattered less than one might expect. In South Africa, section 24 was given substantive content in *Fuel Retailers*, where the Constitutional Court held that environmental authorities must consider the socio-economic impact of a proposed development and that sustainable development is a constitutional principle that integrates environmental, social, and economic considerations rather than subordinating one to another.⁹ More recently, in *Earthlife Africa*, the High Court held that the Minister was obliged to consider the climate change impacts of a proposed coal-fired power station before granting environmental authorisation, even though no statute expressly required it, because section 24 and the National Environmental Management Act together demanded it.¹⁰

Kenya's 2010 Constitution illustrates how an express right can be coupled with express procedure. Article 42 confers the right to a clean and healthy environment, Article 70 permits any person who alleges that the right has been or is likely to be infringed to apply to court without the need to show personal loss, and Article 69 imposes obligations on the state including a target of ten per cent tree cover.¹¹ The National Environment Tribunal relied on this framework in *Save Lamu* to set aside the licence for a coal-fired power plant on the ground that the environmental impact assessment had been conducted without meaningful public participation and without adequate consideration of climate impacts.¹² The Kenyan text removes at the outset the standing obstacles that have consumed so much judicial energy elsewhere, and its experience suggests that constitutional drafters who wish the environmental right to be litigated should say so.

B. Implied Rights: The Indian Model

India's contribution to environmental constitutionalism lies in reading an enforceable right out of a text that provides only a directive. The Supreme Court began the process in *Rural Litigation and Entitlement Kendra*, in which it ordered the closure of limestone quarries in the Doon Valley,¹³ and completed it in *Subhash Kumar v. State of Bihar*, where it held that the right to life under Article 21 includes the right to enjoyment of pollution-free water and air.¹⁴ The *M.C. Mehta* litigation supplied the doctrinal apparatus, including absolute liability for

⁹ *Fuel Retailers Ass'n of S. Afr. v. Director-General: Env'tl. Mgmt., Mpumalanga* 2007 (6) SA 4 (CC) ¶¶ 44–58.

¹⁰ *Earthlife Africa Johannesburg v. Minister of Env'tl. Affairs* 2017 (2) All SA 519 (GP) ¶¶ 88–91.

¹¹ Constitution art. 42, 69, 70 (2010) (Kenya).

¹² *Save Lamu v. National Env'tl. Mgmt. Auth.*, Tribunal Appeal No. 196 of 2016 (Nat'l Env't Trib. June 26, 2019) (Kenya).

¹³ *Rural Litig. & Entitlement Kendra v. State of U.P.*, (1985) 2 SCC 431.

¹⁴ *Subhash Kumar v. State of Bihar*, (1991) 1 SCC 598, ¶ 7.

hazardous enterprises,¹⁵ and *Vellore Citizens' Welfare Forum* imported the precautionary principle and the polluter pays principle as part of Indian law.¹⁶ The public trust doctrine followed in *M.C. Mehta v. Kamal Nath*, where the Court held that the state holds natural resources in trust for the public and may not alienate them for private use.¹⁷

The Indian model has been influential in South Asia. The Supreme Court of Pakistan adopted the same reasoning in *Shehla Zia*, reading the right to a clean environment into the right to life,¹⁸ and the Supreme Court of Nepal and the courts of Bangladesh and Sri Lanka have followed similar paths. What these decisions share is a technique: the right to life is treated as a repository into which the court pours whatever is necessary for a dignified existence, and the environment is found to be among those necessities. The technique is powerful but it carries a cost. Because the right is judicially created, its content is whatever the court says it is, and the court in turn becomes the primary environmental regulator. The Indian Supreme Court's decades-long supervision of Delhi's air quality and vehicular emissions, conducted through continuing mandamus, is the clearest illustration of both the potential and the institutional strain of that role.¹⁹

C. The International Layer

In July 2022 the United Nations General Assembly recognised the right to a clean, healthy and sustainable environment as a human right.²⁰ The resolution is not binding, but its adoption by 161 votes with no votes against has made it difficult for national courts to treat the right as a purely domestic invention. In May 2025 the International Court of Justice delivered an advisory opinion on the obligations of states in respect of climate change, concluding that states have obligations under treaty and customary law to prevent significant harm to the climate system and that a breach may give rise to state responsibility.²¹ The opinion is likely to be cited by domestic courts as confirming that climate obligations are legal rather than merely political in character.

¹⁵ *M.C. Mehta v. Union of India* (Oleum Gas Leak), (1987) 1 SCC 395.

¹⁶ *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 SCC 647, ¶¶ 11–14.

¹⁷ *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388, ¶¶ 25–35.

¹⁸ *Shehla Zia v. WAPDA*, PLD 1994 SC 693 (Pak.).

¹⁹ *M.C. Mehta v. Union of India* (Vehicular Pollution), (1998) 6 SCC 60; see also *M.C. Mehta v. Union of India*, (2002) 4 SCC 356 (mandating conversion of buses to compressed natural gas).

²⁰ G.A. Res. 76/300 (July 28, 2022).

²¹ *Obligations of States in Respect of Climate Change*, Advisory Opinion (I.C.J. July 23, 2025).

LEGAL PERSONALITY FOR NATURE

A. Origins

The idea that natural objects might have standing was proposed by Christopher Stone in 1972 and endorsed by Justice Douglas in dissent in *Sierra Club v. Morton*, but it remained an academic curiosity for a generation.²² It became constitutional law in Ecuador in 2008, when Article 71 declared that nature, or Pacha Mama, "has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles."²³ The provision was applied by the Provincial Court of Loja in the *Vilcabamba River* case, which ordered a provincial government to remedy damage caused by road construction, and more significantly by the Constitutional Court in *Los Cedros*, which held that mining concessions in a protected cloud forest violated the rights of nature and applied the precautionary principle in nature's favour.²⁴

B. The River Cases

The most widely discussed personality cases concern rivers. New Zealand's Te Awa Tupua Act of 2017, the product of a treaty settlement with the Whanganui iwi, declares the river to be "an indivisible and living whole" with the rights, powers, duties, and liabilities of a legal person, and creates an office, Te Pou Tupua, comprising one Crown and one iwi appointee, to act as the river's human face.²⁵ The Act is legislative rather than judicial and rests on an indigenous cosmology in which the river and the people are inseparable. It has been cited around the world, though rarely with attention to the fact that its guardianship structure was the product of a negotiated settlement rather than a doctrinal innovation.

The Colombian Constitutional Court arrived at a similar result by adjudication in the *Atrato River* case, holding that the river, its basin, and its tributaries were an entity subject to rights, and ordering the state and the affected communities to establish a joint guardianship.²⁶ The Court grounded the decision in what it called biocultural rights, the idea that the environmental

²² *Sierra Club v. Morton*, 405 U.S. 727, 741–43 (1972) (Douglas, J., dissenting); Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972).

²³ Constitución de la República del Ecuador art. 71.

²⁴ Corte Constitucional [Constitutional Court] Nov. 10, 2021, Sentencia No. 1149-19-JP/21 (Los Cedros) (Ecuador).

²⁵ Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, ss 12–14, 18–20 (N.Z.).

²⁶ Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 2016, Sentencia T-622/16 (Colom.).

right of indigenous and Afro-Colombian communities cannot be separated from the river on which their culture depends. The Supreme Court of Justice of Colombia extended the reasoning to the Colombian Amazon in 2018, in a case brought by young plaintiffs, and ordered the government to formulate an action plan against deforestation.²⁷

India's encounter with the doctrine was briefer and less successful. In March 2017 the Uttarakhand High Court declared the Ganga and Yamuna rivers to be living entities with the status of legal persons, and appointed state officials as their guardians in *loco parentis*.²⁸ The Supreme Court stayed the order within months, on the State's petition, which argued among other things that the rivers flowed through several states and that a legal person might be sued for flood damage.²⁹ The episode illustrates a structural weakness in the judicial route to personality. Where personality is conferred by legislation following negotiation, as in New Zealand, the guardianship arrangements, the scope of liability, and the relationship to other authorities are worked out in advance. Where a court confers it in a single order, none of these questions is answered, and the order becomes vulnerable to precisely the practical objections that were raised in *Mohd. Salim*.

C. Assessment

Legal personality for nature has captured the imagination in a way that few doctrinal innovations do, but its constitutional value should be assessed soberly. Its principal advantage is procedural: it resolves the problem of standing by making the entity itself the claimant. Its principal disadvantage is that it does not tell a court how to weigh the interests of the river against the interests of the people who depend on it for irrigation, transport, or hydroelectricity. Those questions are ultimately resolved by the same proportionality reasoning that applies to any other right, and there is a respectable argument that a robust human right to a healthy environment, coupled with liberal standing rules, achieves the same result without the conceptual difficulty of asking who speaks for a river.

²⁷ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ., abril 5, 2018, STC4360-2018 (Colom.).

²⁸ *Mohd. Salim v. State of Uttarakhand*, 2017 SCC OnLine Utt 367.

²⁹ *State of Uttarakhand v. Mohd. Salim*, Special Leave Petition (Civil) No. 16879 of 2017 (S.C. July 7, 2017) (stay order).

CLIMATE LITIGATION AGAINST GOVERNMENTS

A. The Dutch Precedent

Urgenda Foundation v. State of the Netherlands changed the field.³⁰ The Dutch Supreme Court held that Articles 2 and 8 of the European Convention imposed a positive obligation on the state to take measures against the real and immediate threat of climate change, and that the state's target of a 20 per cent reduction in emissions by 2020 fell below the minimum consistent with that obligation. The Court ordered a reduction of at least 25 per cent relative to 1990 levels. Two features of the reasoning have been widely adopted. The first is the rejection of the argument that the Netherlands' contribution to global emissions was too small to matter: each state, the Court held, is responsible for its share.³¹ The second is the treatment of the scientific consensus, as expressed through the Intergovernmental Panel on Climate Change, as establishing the content of the obligation, so that the state could not adopt a target below the range the science identified without a compelling justification. The decision has been followed, with variations, in Ireland, where the Supreme Court quashed the national mitigation plan for lack of the specificity the statute required,³² and in Belgium, where the Brussels Court of Appeal ordered the federal and regional governments to achieve a 55 per cent reduction by 2030.³³ What unites these cases is a refusal to accept that the political character of climate policy places its adequacy beyond judicial assessment.

B. Germany: Intergenerational Freedom

The German Federal Constitutional Court's decision in *Neubauer* took a different constitutional route to a similar destination.³⁴ The complainants challenged the Federal Climate Change Act, which set reduction targets to 2030 but left the path thereafter undefined. The Court held that the Act violated the fundamental freedoms of the young complainants, not because the targets to 2030 were inadequate but because the Act offloaded the burden of emissions reduction on to the period after 2030, when the remaining carbon budget would require drastic restrictions

³⁰ HR 20 december 2019, NJ 2020, 41 m.nt. J. Spier (*Urgenda Foundation v. State of the Netherlands*) (Neth.), ECLI:NL:HR:2019:2007.

³¹ *Id.* ¶¶ 5.7.1–5.7.9.

³² *Friends of the Irish Env't v. Government of Ireland* [2020] IESC 49 (Ir.).

³³ Cour d'appel [CA] [Court of Appeal] Bruxelles, Nov. 30, 2023, 2021/AR/1589 (*VZW Klimaatzaak v. Kingdom of Belgium*) (Belg.).

³⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 (Ger.).

on every kind of freedom. The Court derived this from Article 20a of the Basic Law, which obliges the state to protect the natural foundations of life "mindful also of its responsibility toward future generations," read together with the principle of proportionality.³⁵ The concept of intertemporal freedom, that the exercise of freedom today must not consume the freedom of tomorrow, is the most original contribution of the decision and has been cited well beyond Germany.

C. Pakistan and India

In *Leghari v. Federation of Pakistan*, the Lahore High Court held that the government's failure to implement its own climate policy violated the fundamental rights to life and dignity, and established a Climate Change Commission to supervise implementation.³⁶ The decision is notable for its explicit invocation of climate justice and for its recognition that the petitioner, a farmer, was suffering present harm rather than merely anticipating future harm.

The Indian Supreme Court's decision in *M.K. Ranjitsinh* arrived in an unusual posture.³⁷ The case concerned the Great Indian Bustard, a critically endangered bird killed by collision with power lines in Rajasthan and Gujarat, and the Court had earlier ordered that all lines in the bird's habitat be placed underground. On the government's application, the Court modified that order, reasoning that the transition to solar energy, which the lines served, was itself necessary to address climate change. In doing so the Court declared that Articles 14 and 21 encompass a right against the adverse effects of climate change, and that the state must balance the protection of a species against the imperative of decarbonisation.³⁸ The decision is thus simultaneously a recognition of the climate right and an application of it against a conservation measure, a combination that captures the field's central tension in a single judgment.

D. Strasbourg and the Limits of Standing

KlimaSeniorinnen is the first decision of an international human rights court to find a state liable for inadequate climate action.³⁹ The Grand Chamber held that Article 8 encompasses a right to effective protection from the serious adverse effects of climate change, that Switzerland

³⁵ *Id.* ¶¶ 182–98, 243–48.

³⁶ *Leghari v. Federation of Pakistan*, W.P. No. 25501/2015 (Lahore High Ct. Sept. 4, 2015) (Pak.).

³⁷ *M.K. Ranjitsinh v. Union of India*, 2024 SCC OnLine SC 570.

³⁸ *Id.* ¶¶ 19–24, 45–50.

³⁹ *Verein KlimaSeniorinnen Schweiz v. Switzerland*, App. No. 53600/20 (Eur. Ct. H.R. Apr. 9, 2024) (Grand Chamber).

had failed to quantify a national carbon budget or to meet its past targets, and that the association of elderly women had standing to bring the claim. The Court declined, however, to recognise the standing of the individual applicants, holding that they had not shown the high level of individual exposure the Convention requires.⁴⁰ Two companion cases, *Carême v. France* and *Duarte Agostinho v. Portugal*, were dismissed on admissibility grounds, the latter because the applicants had not exhausted domestic remedies in Portugal and could not claim extraterritorial jurisdiction against the other respondent states.⁴¹ The combination of a substantive victory and a procedural narrowing is characteristic of how courts have handled climate claims: the right is recognised, but the door through which it may be asserted is deliberately kept narrow.

E. The American Exception

The United States remains the principal jurisdiction in which climate claims against the federal government have failed on justiciability grounds. In *Juliana v. United States*, the Ninth Circuit accepted that the plaintiffs had shown injury and that the government had contributed to it, but held that the remedy sought, a court-supervised plan to phase out fossil fuels, was beyond the power of an Article III court to grant.⁴² The state courts have been more receptive. In *Held v. Montana*, the Montana Supreme Court affirmed a trial judgment that a statute prohibiting state agencies from considering greenhouse gas emissions in environmental review violated the state constitution's guarantee of a "clean and healthful environment."⁴³ The contrast between *Juliana* and *Held* is not a contrast between judicial philosophies so much as between constitutional texts: Montana has an express environmental right and the United States does not.

DEVELOPMENT, PROPORTIONALITY, AND THE GLOBAL SOUTH

The environmental right is never asserted in a vacuum. It competes with the right to livelihood, the state's obligation to provide electricity and infrastructure, and in many constitutions an express commitment to economic development. The Indian Supreme Court has confronted this most directly. In the *Narmada* litigation, it declined to halt the Sardar Sarovar dam, reasoning that the displacement of tribal communities could be addressed through rehabilitation while the

⁴⁰ *Id.* ¶¶ 487–88, 526–35.

⁴¹ *Duarte Agostinho v. Portugal*, App. No. 39371/20 (Eur. Ct. H.R. Apr. 9, 2024) (Grand Chamber).

⁴² *Juliana v. United States*, 947 F.3d 1159, 1169–75 (9th Cir. 2020).

⁴³ *Held v. State*, 2024 MT 312, 560 P.3d 1235 (Mont. 2024).

benefits of irrigation and power to millions could not be forgone.⁴⁴ In *Ranjitsinh* it modified its own conservation order in favour of solar transmission. Neither decision is obviously wrong, but neither offers a method that can be applied to the next case. What is missing from Indian doctrine, and from much of the Global South jurisprudence, is a structured proportionality analysis that takes the environmental right as a constitutional baseline rather than as one interest among many to be balanced at large.

The South African formulation in *Fuel Retailers* is more promising in this respect. By treating sustainable development as a principle that integrates rather than subordinates, the Constitutional Court required decision-makers to demonstrate that environmental, social, and economic factors had each been considered and reconciled, and it made the failure to do so a ground of review.⁴⁵ The German approach in *Neubauer* offers a different discipline: a carbon budget, once quantified, is a hard constraint, and the question for the court is whether the state's plan is consistent with it rather than whether the plan is wise. Both models limit judicial discretion in a way that the open-ended balancing of *Narmada* does not, and both are therefore better suited to the institutional position of a court.

CONCLUSION

Environmental constitutionalism has achieved something that would have seemed improbable in 1976. It has converted environmental harm from a matter of policy into a matter of right, and it has done so in constitutional systems with widely differing texts and traditions. The climate cases of the last decade have gone further, converting a diffuse right into a specific obligation to reduce emissions by a quantified amount within a stated period. Courts have shown considerable creativity in finding the tools to do this, whether through positive obligations under the Convention, the intertemporal reading of fundamental freedoms, or the expansive interpretation of the right to life.

Two questions remain unresolved. The first concerns method. The environmental right will always compete with other constitutional goods, and the field lacks an agreed technique for resolving that competition. The German carbon-budget approach and the South African integration approach both offer structure; the Indian approach, for all its historic contribution, does not. The second concerns voice. Rights of nature answer the question of standing by

⁴⁴ *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664, ¶¶ 229–52.

⁴⁵ *Fuel Retailers*, 2007 (6) SA 4 (CC) ¶¶ 57–61.

making the ecosystem the claimant, but they leave open who decides what the ecosystem wants, and the New Zealand experience suggests that the answer lies in institutional design negotiated in advance rather than in judicial declaration. A constitutional right to a healthy environment, held by human beings and enforced through generous standing and structured proportionality review, may in the end prove the more durable instrument. What is no longer in doubt is that the environment has become a constitutional subject, and that the courts, for better and worse, have made it so.