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# Sustainability and Global Environmental Constitutionalism

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# Sustainability and Global Environmental Constitutionalism

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## 1. Introduction

At first blush, the relationship between sustainability and environmental constitutionalism seems strained if not strange. Environmental sustainability represents a there-and-then perspective that promotes the idea that present lives in being should consume natural resources at a rate and in a way so as to preserve comparable opportunities for future generations; in other words, the Native American proverb that “We do not inherit the Earth from our ancestors: we borrow it from our children.”<sup>1029</sup>

‘Sustainability’<sup>1030</sup> has witnessed an astonishing pattern of development. Since the concept was first promoted as a single-sentence principle of international law at the Stockholm Conference in 1972, it is now a common if not ubiquitous feature in legal expressions at the international, national and subnational levels, culminating in 17 Sustainable Development Goals the United Nations (UN) established in 2015, to achieve by 2030.<sup>1031</sup>

Sustainability is a central feature in international and domestic relations. It has long served as a principle of international environmental law, including as an interpretive principle in international accords<sup>1032</sup> and with international tribunals resolving environmental disputes.<sup>1033</sup>

1029 This proverb, along with some close variants, is attributed to several sources, including Chief Seattle, Antoine de St. Exupery, Jane Goodall, Ralph Waldo Emerson and David Bower, among others. See Giga Quotes. Earth. <[http://www.giga-usa.com/quotes/topics/earth\\_t001.htm](http://www.giga-usa.com/quotes/topics/earth_t001.htm)>

1030 This essay treats ‘sustainability’ and ‘sustainable development’ as synonyms.

1031 See generally, May, James R. & Kelly, J. Patrick, *The Environment and International Society: Issues, Concepts, and Context*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* (Shawkat Alam, Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury and Erika J. Techera, Eds, Oxford, 2012).

1032 See, e.g., R.K.L. Panjabi. *The Earth Summit at Rio: Politics, Economics, and the Environment*. New England: Northeastern Univ. Press, 1997, 17 (describing how the Earth Summit in Rio led to a new global consciousness of sustainability in treaty making).

1033 See Roslyn Higgins, *Natural Resources in the Case Law of the International Court*, in *International Law and Sustainable Development* 87, 111 (Alan Boyle & David Freestone, eds., 1999) (using the International Court of Justice to highlight environmental sustainability in international courts and other arenas).

Environmental constitutionalism, on the other hand, for the most part, addresses the here and now, the challenges that human beings and the environment face on a daily basis, including access to environmental dignity and quality, natural resources, fresh water, and to information, participation and justice in pressing environmental matters, in the ways explored elsewhere<sup>1034</sup> and throughout this book.<sup>1035</sup>

Much like sustainability, environmental constitutionalism has taken on a life of its own, and is now a common feature in most national constitutional systems. The vast majority of the nations in the world have national constitutions that address environmental matters.<sup>1036</sup> About

one-half of the world's constitutions guarantee a substantive right to a clean or quality or healthy environment explicitly or implicitly, and about half of those also guarantee procedural rights to information, participation or access to justice in environmental matters. Nearly 70 constitutions specify that individuals have responsibilities or duties to protect the environment and others include directive principles of state policy.<sup>1037</sup> Other constitutions address specific environmental endowments including water, flora, and fauna, while others define the environment in certain ways, including as a public trust.<sup>1038</sup> Moreover, some state constitutions in federal systems – including Germany, Brazil, and the United States – include environmental

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1034 See generally, James R. May & Erin Daly, *Global Environmental Constitutionalism* (Cambridge Press 2015); James R. May & Erin Daly, *Environmental Constitutionalism: A Research Compendium* (Edward Elgar 2016); Symposium on Global Environmental Constitutionalism: An Introduction and Overview, 21 *Widener L. Rev.* 139 (2015); Kotze, Louis J. The Conceptual Contours of Environmental Constitutionalism, 21 *Widener L. Rev.* 187 (2015); James R. May & Erin Daly, *Robinson Township v. Pennsylvania: A Model for Environmental Constitutionalism*, 21 *Widener L. Rev.* 151 (2015); Erin Daly & James R. May, *Comparative Environmental Constitutionalism*, *Jindal Global Law Review* (Special issue on Environmental Law and Governance – Indian and International Perspectives) (2015); *Constitutional Directions in Procedural Environmental Rights*, 28 *Jrnl. Evtl. L. & Lit.* 101 (2014); James R. May & Erin Daly, *Environmental Rights and Liabilities*, 3 *Eur. J. Env. Lia.* 75 (2012); James R. May & Erin Daly, *New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide*, *IUCN Academy of Environmental Law E-Journal*, vol. 1, 2011, posted Feb. 22, 2011. See also, Boyd, David R. *The Right to a Healthy Environment: Revitalizing Canada's Constitution*. UBC Press, 2012: 65. See also Hiskes, Richard P. *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*. Cambridge University Press 2008; Hayward, Tim. *Constitutional Environmental Rights*. Oxford University Press, 2005.

1035 See generally, *Global Environmental Constitutionalism*.

1036 See generally, James R. May & Erin Daly, *Global Environmental Constitutionalism* (Cambridge Press 2015); James R. May & Erin Daly, *Environmental Constitutionalism: A Research Compendium* (Edward Elgar 2016); Symposium on Global Environmental Constitutionalism: An Introduction and Overview, 21 *Widener L. Rev.* 139 (2015); James R. May & Erin Daly, *Robinson Township v. Pennsylvania: A Model for Environmental Constitutionalism*, 21 *Widener L. Rev.* 151 (2015); Erin Daly & James R. May, *Comparative Environmental Constitutionalism*, *Jindal Global Law Review* (Special issue on Environmental Law and Governance – Indian and International Perspectives) (2015); *Constitutional Directions in Procedural Environmental Rights*, 28 *Jrnl. Evtl. L. & Lit.* 101 (2014); James R. May & Erin Daly, *Environmental Rights and Liabilities*, 3 *Eur. J. Env. Lia.* 75 (2012); James R. May & Erin Daly, *New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide*, *IUCN Academy of Environmental Law E-Journal*, vol. 1, 2011, posted Feb. 22, 2011. See also, Boyd, David R. *The Right to a Healthy Environment: Revitalizing Canada's Constitution*. UBC Press, 2012: 65. See also Hiskes, Richard P. *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*. Cambridge University Press 2008; Hayward, Tim. *Constitutional Environmental Rights*. Oxford University Press, 2005.

1037 See e.g. Benin Constitution Art 27: "Every person has the right to a healthy, satisfying, and lasting environment, and has the duty to defend it." Cameroon Constitution, Art. 55: "Everyone is obliged to preserve nature and prevent damages, as well as to be careful with removing natural riches." India Constitution, Art. 51A(g): "It shall be the duty of every citizen of India ... to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures."

1038 *Global Environmental Constitutionalism*, Chs. 7-10.



provisions, some of which are even more elaborate than their counterparts at the national level.<sup>1039</sup>

Sustainability and environmental constitutionalism share a past, present and future. Like sustainability, environmental constitutionalism was arguably born at the Stockholm Conference in 1972, and has experienced a comparable if not divergent growth pattern.<sup>1040</sup> Surprisingly, sustainability has infiltrated constitutionalism around the globe. Presently, more than three-dozen countries incorporate sustainability in their constitutions by advancing 'sustainable development,' the interests of 'future generations,' or some combination of these themes.<sup>1041</sup> These include Belgium ("pursue the objectives of sustainable development in its social, economic and environmental aspects"); Dominican Republic ("nonrenewable natural resources, can only be explored and exploited by individuals, under sustainable environmental criteria . . ." and provides for the protection of the environment "for the benefit of the present

and future generations ..."); France ("Care must be taken to safeguard the environment along with other fundamental interests of the Nation. In order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardize the ability of future generations and other peoples to meet their own needs ..."); Nepal ("provision shall be made for the protection of the forest, vegetation and biodiversity, its sustainable use and for equitable distribution of the benefit derived from it"); and, Uganda ("Parliament shall, by law, provide for measures intended—to manage the environment for sustainable development"). These constitutional provisions help bridge the gap left by international and domestic laws, even given the array of sustainability provisions already in existence.<sup>1042</sup>

Sustainability and environmental constitutionalism also share a future in advancing environmental, social and economic equity in a variety of contexts, including dignity,<sup>1043</sup> human rights,<sup>1044</sup> climate change, access to and

1039 *ibid.*, Ch. 8.

1040 *ibid.*

1041 See May and Daly, *Global Environmental Constitutionalism* (Cambridge, 2015), Appendix E and associated text May, James R. and Daly, Erin, *Global Environmental Constitutionalism* (2015, Cambridge) (denoting role of sustainability in the development of international and national law, and analyzing constitutional provisions that embed sustainability from around the world); May, James R. 'The North American Symposium on the Judiciary and Environmental Law: Constituting Fundamental Environmental Rights Worldwide.' *Pace Environmental Law Review* 23 (2005/2006): 113, Appendix B (listing countries that have constitutionally entrenched environmental policies as a governing principles, some including sustainability).

1042 Ansari, Lekha Laxman and Abdul Haseeb. "The interface between TRIPS and CBD: efforts towards harmonization." *Journal of International Trade Law and Policy* 11 (2012): 108-132.

1043 Daly & May, *Bridging Environmental and Dignity Rights*, 7.2 *JHRE* 160 (2016).

1044 See Knox J, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/28/61 (3 February 2015) at 11-12.

1045 May, James R. "Of Development, daVinci and Domestic Legislation: The Prospects for Sustainable Development in Asia and its Untapped Potential in the United States." *Widener Law Symposium Journal* 3 (1998): 197

availability of fresh water,<sup>1045</sup> shale gas development,<sup>1046</sup> corporate practices, and higher education.<sup>1047</sup>

This chapter examines the extent to which countries have incorporated sustainability constitutionally. Part One provides a brief taxonomy of sustainability in constitutionalism, and surveys provisions from the three-dozen or so countries that constitutionally incorporate sustainability and related concepts. Part Two discusses the potential that sustainability in constitutionalism has for advancing positive environmental outcomes.

## 2. The Taxonomy of Sustainability Constitutionalism

The concept of sustainability recently entered its fifth decade. In 1972, the Stockholm Declaration on the Human Environment was the first international instrument to recognize a principle of sustainability.<sup>1048</sup> Fifteen years later, the World Commission on Environment and Development released its pioneering study, *Our Common Future*,<sup>1049</sup> which defines 'sustainable development' as

'development . . . that . . . meets the needs of the present without compromising the ability of future generations to meet their own needs.'<sup>1050</sup>

In 1992, the Earth Summit's Rio Declaration provided that sustainable development must 'respect the interests of all and protect the integrity of the global environmental and developmental system.'<sup>1051</sup> The Rio Declaration's blueprint document, Agenda 21, provides that "integration of environment and development concerns . . . will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future."<sup>1052</sup> Parties at the Earth Summit's 20th anniversary in 2012 (Rio +20) released a follow-up document, *The Future We Want*, which underscored the import of sustainability to promote peace and prosperity, and alleviate poverty.<sup>1053</sup>

Most recently in September 2015, more than 190 nations of the UN General Assembly issued the 2030 Agenda for Sustainable Development, which describes sustainability's role as one to "Promote peaceful and inclusive societies for sustainable development, provide

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1046 Dernbach, John C., and May, James R., *Shale Gas and the Future of Energy: Law and Policy for Sustainability* (2016, Edward Elgar) (suggesting laws and policies needed to ensure that shale gas development fosters transition to sustainability). Available at <http://www.e-elgar.com/shop/shale-gas-and-the-future-of-energy>.

1047 Dernbach

1048 "Stockholm Declaration on the Human Environment." 11 ILM 1416. 1972.

1049 World Commission on Environment and Development. *Our Common Future*. New York: Oxford Univ. Press, 1987.

1050 *ibid* at para. 8.

1051 "Rio Declaration on Environment and Development." 31 ILM 874. 1992.

1052 UN Conference on Environment and Development, Annex II. "Agenda 21: A Programme for Action for Sustainable Development." UN Doc A./Conf. 151/26. August 12, 1992. ('Agenda 21').

1053 UN Conference on Sustainable Development. 'The Future We Want, A/CONF.216/L.1\*.' June 20-22, 2012.



access to justice for all and build effective, accountable and inclusive institutions at all levels.”<sup>1054</sup> Effective January 1, 2016, the 2030 Agenda incorporates the UN’s 17 Sustainable Development Goals (SDGs), including reflecting human dignity; adapting to climate change; ensuring clean water, air and soil; reducing poverty; promoting gender equity; and respecting sovereignty, among other ambitious objectives, by 2030.<sup>1055</sup>

Resort to sustainability as a governing norm has grown exponentially since the Earth Summit.<sup>1056</sup> Since then, sustainability has been regularly acknowledged by international accords,<sup>1057</sup> by the laws and regulations of nations,<sup>1058</sup> in local building codes,<sup>1059</sup> and in corporate mission statements and practices worldwide,<sup>1060</sup> as well as by some courts,<sup>1061</sup> although not in the United States.<sup>1062</sup>

Sustainability has also found footing in a growing number of national constitutions, either by advancing ‘sustainable development,’ ‘future generations,’ or some variation of these themes, outlined below.

### A. ‘Sustainable Development’

Nearly 20 countries expressly recognize a constitutional goal of ‘sustainability’ or ‘sustainable development’, though most of these are in sections of the constitutions or written in language that indicates that they are not amenable to judicial enforcement.<sup>1063</sup> For example, Albania’s constitution proclaims that the state “aims to supplement private initiative and responsibility with: Rational exploitation of forests, waters, pastures and other natural resources on the basis of the principle of sustainable development.” Belgium’s

1054 See generally, <[www.ceres.org](http://www.ceres.org)> (detailing corporate sustainability practices worldwide).

1055 See <<https://sustainabledevelopment.un.org/topics>> (last visited September 6, 2016).

1056 Dernbach, John C. *Agenda for a Sustainable America*. Washington, D.C: ELI Press, Environmental Law Institute, 2009, 2-3.

1057 See, e.g., R.K.L. Panjabi. *The Earth Summit at Rio: Politics, Economics, and the Environment*. New England: Northeastern Univ. Press, 1997, 17 (describing how the Earth Summit in Rio led to a new global consciousness of sustainability in treaty making).

1058 See, e.g., Nelson, Antria. ‘Steering Sustainability: What, When, and Why’, in A. Nelson (ed.) *Steering Sustainability in an Urbanizing World: Policy Practice and Performance*. Ashgate Publishing Inc., 2007, 1, 2-3 (explaining the national policy and reform considerations behind urban sustainability); May, James R. ‘The North American Symposium on the Judiciary and Environmental Law: Constituting Fundamental Environmental Rights Worldwide.’ *Pace Environmental Law Review* 23 (2005/2006): 113, Appendix B (listing countries that have constitutionally entrenched environmental policies as a governing principles, some including sustainability).

1059 See, e.g., MacLaren, V. et al. “Engaging Local Communities in Environmental Protection with Competitiveness: Community Advisory Panels in Canada and the United States.” In *Sustainability, Civil Society and International Governance*, by J.J. Kirton and Peter Hajnal. Aldershot: Ashgate Publishing, 2006, 31, 36. (examining examples of Community Advisory Panels in the United States and Canada and how they affect sustainability in the communities).

1060 See, e.g., Biagiotti, Isabelle. “Emerging Corporate Actors in Environment and Trade Governance: New Vision and Challenge for Norm-setting Processes.” In *Participation for Sustainability in Trade*, by S. Thoyer and B. Martimort-Asso. Aldershot: Ashgate Publishing, 2007, 121, 122 (describing how global corporations are focusing more on environmental sustainability).

1061 Higgins, Rosalyn. “Natural Resources in the Case Law of the International Court.” In *International Law and Sustainable Development: Past Achievements and Future Challenges*, by Alan Boyle and David Freestone. Oxford: Oxford University Press, 1999, 87, 111 (using the International Court of Justice to highlight environmental sustainability in international courts and other arenas).

1062 May, James R. “Not at All: Environmental Sustainability in the Supreme Court.” *Sustainable Dev. L. & Pol’y* 10 (2009): 20.

1063 See *Global Environmental Constitutionalism*, Ch. 9, Appendix E.

constitution bespeaks a commitment to “pursue the objectives of sustainable development in its social, economic and environmental aspects.” Bolivia’s constitution states that “the Natural assets are of public importance and of strategic character for the sustainable development of the country.” Colombia’s constitution requires policy makers to “plan the handling and use of natural resources in order to guarantee their sustainable development...” Montenegro’s Preamble outlines its “conviction that the state is responsible for the preservation of nature, sound environment, sustainable development, [and] balanced development of all its region.” Nepal’s constitution provides that “provision shall be made for the protection of the forest, vegetation and biodiversity, its sustainable use and for equitable distribution of the benefit derived from it.” The constitution of Seychelles provides that the state will “ensure a sustainable socio-economic development of Seychelles by a judicious use and management of the resources of Seychelles.” Somalia’s constitution provides that “Land shall be held, used and managed in an equitable, efficient, productive, and sustainable manner.” Switzerland’s constitution contains a specific section entitled “Sustainable Development,” which provides that “The Confederation and the Cantons shall endeavor to achieve a balanced and sustainable relationship between nature and its capacity to renew itself and the demands placed on it by the

population.” The Ugandan constitution states that “Parliament shall, by law, provide for measures intended—to manage the environment for sustainable development.” The constitutions of Greece, Mozambique, Poland, Serbia, and Thailand also expressly require that environmental policy be developed in accordance with ‘sustainable development.’

## B. ‘Future Generations’

Sustainability recognizes responsibilities owed to those who follow. The constitutions from about a dozen countries give at least a passing nod to ‘future generations.’<sup>1064</sup> For example, Andorra’s constitution directs policy makers to protect natural resources “for the sake of future generations.” Argentina’s constitution directs the state to manage resources for “a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations...” Armenia’s constitution requires that the state “pursue the environmental security policy for present and future generations.” Brazil’s declares that “The Government and the community have a duty to defend and to preserve the environment for present and future generations.” Ethiopia’s constitution provides that its natural resources are “a sacred trust for the benefit of present and succeeding generations.” Papua New Guinea’s constitution requires the state to hold environmental resources

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1064 See Global Environmental Constitutionalism, Ch. 9, Appendix E.



"in trust for future generations" and "for the benefit of future generations." The constitutions of both Niger and Vanuatu provide for protection of the environment in the "interests of future generations." Germany's constitution expresses "its responsibility toward future generations." Norway's constitution directs that natural resources be "safeguarded for future generations." The constitution of Iran provides for the "preservation of the environment, in which the present as well as the future generations have a right to flourishing social existence." Lesotho's lists a duty of the state to protect the environment "for the benefit of both present and future generations."

### C. 'Sustainable Development' and 'Future Generations'

The strongest embodiment of environmental sustainability would seem to stem from those constitutions that promote sustainable development for the purpose of protecting the interests of future generations. The constitutions from about a dozen and one-half countries contain this sort of hybrid pronouncement.<sup>1065</sup> For example, Albania's constitution bespeaks a "healthy and ecologically adequate environment for the present and future generations." Mozambique's requires the state, "[w]ith a view to guaranteeing the right to the environment within the framework of sustainable development... shall adopt policies aimed at guaranteeing the rational utilization of natural resources

and the safeguarding of their capacity to regenerate, ecological stability and the rights of future generations." France's amended constitution proclaims that "Care must be taken to safeguard the environment along with other fundamental interests of the Nation...In order to ensure sustainable development, choices designed to meet the needs of the present generation should not jeopardize the ability of future generations and other peoples to meet their own needs..." Eritrea's provides for state management of natural resources in a "sustainable manner" for "present and future generations." The constitutions of Namibia and Swaziland provide for the protection of the environment and natural resources "on a sustainable basis" for the benefit of "present and future" citizens and generations. Qatar's provides for protection of the environment "so as to achieve sustainable development for the generations to come." The constitution of South Sudan provides that "Every person shall have the right to have the environment protected for the benefit of present and future generations, through appropriate legislative action and other measures that...secure ecologically sustainable development and use of natural resources..." Uganda's provides that "The State shall promote sustainable development and public awareness of the need to manage land, air and water resources in a balanced and sustainable manner for the present and future generations." In addition, the constitutions of Angola, Bhutan, Georgia, Guyana,



Malawi, Maldives, Sweden, East Timor, and Zambia provide for the “sustainable development” of environmental resources in the interests of “future generations.” One might also include South Africa’s here.

The constitutions of some countries require that specific resources be developed with future generations in mind. For example, the Dominican Republic provides that “nonrenewable natural resources, can only be explored and exploited by individuals, under sustainable environmental criteria...” and provides for the protection of the environment “for the benefit of the present and future generations.” The Dominican Republic is the only country on the planet with a constitution to address sustainability, future generations, and climate change.

### 3. The Potential of Sustainability Constitutionalism

The incorporation of sustainability into domestic constitutions has great potential to advance both sustainability and constitutionalism. Ansari, for one, has examined the relationship among sustainable management, the utilization of the environment, and the constitutional safeguards of environmental rights. He

notes how constitutional provisions help bridge the gap left by international and domestic laws, even given the array of sustainability provisions already in existence.<sup>1066</sup> Even though the vast majority of these provisions create no judicially enforceable rights, they nonetheless affirm national values of environmental sustainability to which courts and others may advert.

The principal strength – and some would say weakness – of ‘sustainability’ is its wide applicability. It can mean many different things in many different contexts. Sustainability principles are shape-shifters, adaptive to most environmental decision making, including water and air quality, species conservation, and national environmental policy in the United States and around the globe.<sup>1067</sup> But when used appropriately, Dernbach posits that sustainability can advance passing along an environment that is as suitable for existence as what was inherited; a promise to future generations of opportunity, wealth, satisfaction, or peace; optimal sustained yields of agriculture, animals or resources; continued employment or employability; or economic development.<sup>1068</sup>

Sustainability constitutionalism can still serve to advance normative objectives in specific ways, even in countries lacking express constitutional incorporation. For

1066 Ansari, Lekha Laxman and Abdul Haseeb. “The interface between TRIPS and CBD: efforts towards harmonization.” *Journal of International Trade Law and Policy* 11 (2012): 108-132.

1067 See generally, *Ibid.* James R. May, *Of Development, daVinci and Domestic Legislation: The Prospects for Sustainable Development in Asia and its Untapped Potential in the United States*, 3 *Widener L. Symp. J.* 197 (1998).

1068 Dernbach, John. *Stumbling Toward Sustainability*. Environmental Law Institute, 2003.



example, laws requiring environmental impact assessments (EIA) come closest to advancing sustainability as a legal prerogative. An EIA is the process whereby an agency evaluates the environmental impacts of a proposed action, determines which impacts are unavoidable, and then provides for planning to avoid, mitigate or compensate for them. In the United States for example, EIAs are required for certain types of federal and state actions. At the federal level, the National Environmental Policy Act (NEPA)<sup>1069</sup> is intended to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.” NEPA has promoted sustainability in wide and vast, if often overlooked, ways.

EIA is not solely a phenomenon at the federal level in the United States as embodied in NEPA. In fact, a half-dozen states – including New York and New Jersey – have adopted what are known as “little NEPAs” to address state agency actions that may affect sustainability. Moreover, federal and pollution control laws – such as the Clean Air Act, Clean

Water Act, and Resource Conservation and Recovery Act – and their state analogues, advance many sustainability goals.

The elasticity of the concept of sustainability can frustrate implementation and enforcement as a legal construct. But because it contains no limiting principle or metrics, its potential application across and even within judicial cultures may be varied and even inconsistent. There is very little jurisprudence applying constitutionally embedded provisions regarding sustainability and related provisions. For example, more than four decades removed from Stockholm, the United States Supreme Court—and no member of it—has yet to recognize or even acknowledge the concept of sustainability. Since Stockholm, the United States Supreme Court has decided more than 4,000 cases, including more than 300 involving environmental matters.<sup>1070</sup> Yet the word “sustainability” appears not at all before the Court in any majority, concurring or dissenting opinion.<sup>1071</sup>

Sustainability stands very little chance of being taken seriously by the current Supreme Court. Sustainability is a guiding principle, not a constitutionally enshrined doctrine, and it is not readily shaped into a traditional legal case

1069 42 U.S.C. § 4321 et seq., ('NEPA').

1070 See Lazarus, Richard J. “Restoring What’s Environmental About Environmental Law in the Supreme Court.” *UCLA L. Rev.* 47 (2000): 703, 708 (estimating the Court decided more than 240 environmental law cases between 1969 and 2000); see also, May, James R. “The Intersection of Constitutional Law and Environmental Litigation.” In *Environmental Litigation: Law and Strategy*, by Cary R. Perlman. ABA, 2009, 359 (number approaching 300); Glicksman, James R. May and Robert L. “Justice Rehnquist and the Dismantling of Environmental Law” *Envtl. L. Rep.* 36 (2006): 10585 (2006) (number approaching 300).

1071 May, James R. “Not at All: Environmental Sustainability in the Supreme Court.” *Sustainable Dev. L. & Pol’y* 10 (2009): 20.

or controversy. No United States law requires or even recognizes sustainability, and the United States has not ratified an international treaty that does so either. Moreover, no member of the Court studied environmental law. None of them has much if any practical experience with environmental law in general, and sustainability in particular. Few Supreme Court justices have held elected political office, and few have regulatory experience that would sensitize them to environmental concerns and the complexities and challenges of sustainability. Indeed, most of the current Court's legal experience has been predominantly on the business or "development" side of the sustainable development equation. Surprisingly, sustainability—even as a governing principle—has not managed to capture the imagination of litigants, who seldom if ever invoke sustainability in pleadings, briefs, and oral arguments.<sup>1072</sup> The experience in the United States is typical: lacking constitutional recognition, sustainability has not yet triggered juridical engagement.

While South Africa's constitution embraced sustainable development in 1996, the

provision has had little practical effect.<sup>1073</sup> Likewise, while Section 225 of the Brazilian constitution requires that governmental policies promote ecologically sustainable development, apex courts there rarely enforce this provision.<sup>1074</sup> On the other hand, sustainability has earned a foothold with some international tribunals.<sup>1075</sup> Yet, these novel provisions hardly seem to register in everyday decision making in environmental matters. Two decades after the end of apartheid, the provision's constitutional or normative status is unclear. Social striation, economic disparity, and despoliation of natural resources in South Africa accentuate the difficulty of breathing life into the concept of sustainable development. As Kotzé reports, the country's Constitutional Court hasn't engaged the provision so as to define what it means, who can enforce it, to whom it applies, what remedies might redress infractions, or what role sustainable development could play in the broader environmental constitutionalism paradigm.<sup>1076</sup> The passing of President Mandela and the rise of corrupt elements in the present government will undoubtedly serve to place additional strain on the

1072 Based on a search of cases, briefs and transcripts of the search terms "sustainability," "sustainable development," "ecologically sustainable development," on Westlaw (last searched September 12, 2016), and on the U.S. Supreme Court data base, <<http://www.supremecourtus.gov/>> (last visited September 12, 2016).

1073 See Kotzé, *Arguing Global Environmental Constitutionalism* 2012 1(1) *Transnational Environmental Law* 199-233; Kotzé *Sustainable Development and the Rule of Law for Nature: A Constitutional Reading* in Voight C (ed) *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (CUP, 2013).

1074 E.g., *Associação Nacional do Transporte de Cargas e Logística v. Governador do Estado de São Paulo*, S.T.F., ADPF 234 MC/DF, DJe 06.02.12 (Rel. Min. Marco Aurélio) (Braz.) (case brought by asbestos transporters against a state law on constitutional grounds).

1075 Higgins, Rosalyn. "Natural Resources in the Case Law of the International Court." In *International Law and Sustainable Development: Past Achievements and Future Challenges*, by Alan Boyle and David Freestone. Oxford: Oxford University Press, 1999, 87, 111 (using the International Court of Justice to highlight environmental sustainability in international courts and other arenas).

1076 See Kotzé, *Arguing Global Environmental Constitutionalism* 2012 1(1) *Transnational Environmental Law* 199-233; Kotzé *Sustainable Development and the Rule of Law for Nature: A Constitutional Reading* in Voight C (ed) *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (CUP, 2013).



implementation of cultural, social and economic rights, including environmental constitutionalism, in South Africa. And while Section 225 of the Brazilian constitution requires that governmental policies promote ecologically sustainable development, apex courts there rarely enforce this provision.<sup>1077</sup>

Another leading (by way of lagging) example is the United States Supreme Court. More than four decades removed from Stockholm, the Court—and no member of it—has yet to recognize or even acknowledge the concept of sustainability. Since Stockholm, the U.S. Supreme Court has decided more than 4,000 cases, including more than 300 involving environmental matters.<sup>1078</sup> Yet the word “sustainability” appears not at all before the Court in any majority, concurring or dissenting opinion.<sup>1079</sup>

## 4. Conclusion

Sustainability and environmental constitutionalism emerged at roughly the same time, and have each experienced wide distribution in legal orders throughout the world. About 30 countries have incorporated sustainability constitutionally. The influence that these relatively young provisions will have, remains to be seen, although they hold potential for advancing both concepts and improving environmental outcomes.

1077 E.g., Associação Nacional do Transporte de Cargas e Logística v. Governador do Estado de São Paulo, S.T.F., ADPF 234 MC/DF, DJe 06.02.12 (Rel. Min. Marco Aurélio) (Braz.) (case brought by asbestos transporters against a state law on constitutional grounds).

1078 See Lazarus, Richard J. “Restoring What’s Environmental About Environmental Law in the Supreme Court.” *UCLA L. Rev.* 47 (2000): 703, 708 (estimating the Court decided more than 240 environmental law cases between 1969 and 2000); see also, May, James R. “The Intersection of Constitutional Law and Environmental Litigation.” In *Environmental Litigation: Law and Strategy*, by Cary R. Perlman. ABA, 2009, 359 (number approaching 300); Glicksman, James R. May and Robert L. “Justice Rehnquist and the Dismantling of Environmental Law” *Env’tl. L. Rep.* 36 (2006): 10585 (2006) (number approaching 300).

1079 May, James R. “Not at All: Environmental Sustainability in the Supreme Court.” *Sustainable Dev. L. & Pol’y* 10 (2009): 20.