

## JUDGES' REFLECTIONS FOR THE 8TH WORLD WATER FORUM

# Introduction: Environmental Rule of Law and the Critical Role of Courts in Achieving Sustainable Water Resources

by Scott Fulton and Antonio Herman Benjamin

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This year's 8th World Water Forum in Brazil—the largest gathering on this subject, held every three years—will for the first time bring judges and prosecutors together with policymakers from around the world to discuss the precarious state of freshwater resources and the importance of rule of law in achieving water resource objectives. Recognizing this, the Environmental Law Institute (ELI), in collaboration with the Global Judicial Institute for the Environment (GJIE) and the International Union for Conservation of Nature (IUCN) World Commission on Environmental Law, is dedicating this section of this issue of the *Environmental Law Reporter* to marking the symbolic and reflective importance of the role of the judiciary in achieving water justice and ecological sustainability. The Comments we present here—all written by practicing senior judges—speak to the legal and scientific complexity involved in adjudication of water controversies in different jurisdictions, the criticality of rule of law in protecting and maintaining water resources, the central role of the courts in advancing environmental rule of law, and the approaches judges are taking in their effort to fulfill this role.

The concept of “environmental rule of law” draws its meaning from its precursor, the general concept of “rule of law,” which has been defined within the U.N. system as the “principle of governance in which all persons, institutions and entities, public and private, including the State

itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”<sup>1</sup> This definition contains three related strands: the idea that law be consistent with fundamental rights; the notion that law be inclusively developed and fairly effectuated; and the importance of accountability not just on paper, but in practice, such that the law becomes operative through observance of or compliance with it. These strands are best seen as interdependent: when law is consistent with fundamental rights, and is inclusively promulgated and even-handedly implemented, then it will be respected by members of the affected community and observed in their actions and behaviors. Conversely, if the law is neither respected nor observed, then the societal values and objectives reflected in law will prove elusive.

Experience to date in the environmental setting permits a more granular understanding of the conditions necessary for formation of environmental rule of law, as reflected by the consensus declaration contained in the March 2013

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1. Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616 (Aug. 23, 2004).

United Nations Environment Programme (UNEP) Governing Council Decision 27/9.<sup>2</sup> This decision recognized that for environmental rule of law to emerge, key “mutually supporting” governance features need to be in place, “including information disclosure, public participation, implementable and enforceable laws, and implementation and accountability mechanisms including coordination of roles as well as environmental auditing and criminal, civil and administrative enforcement with timely, impartial and independent dispute resolution.”<sup>3</sup>

Along the same lines, the 2016 IUCN World Declaration on the Environmental Rule of Law proclaimed that “[t]he environmental rule of law is understood as the legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically sustainable development in the rule of law. Strengthening the environmental rule of law is the key to the protection, conservation, and restoration of environmental integrity. Without it, environmental governance and the enforcement of rights and obligations may be arbitrary, subjective, and unpredictable.”

While all of the foregoing precepts are critical, there is none more important in advancing environmental rule of law than the role of the judiciary, and this is nowhere more on display than in the water context. Judges ensure that the law vindicates fundamental rights and the public interest pertaining to water resources, serve to safeguard procedural fairness and transparency in water resource decisionmaking, and hold to account those who violate legal obligations pertaining to water resources. Through their decisions, judges breathe life into the law. And because judges are among the most revered of public servants, judicial decisions and pronouncements can be deeply influential in a society’s progression toward sustainable use of water. What judges treat as important through their decisions, a society comes to judge as important.

And water is beyond important; it is essential. We are largely made of water, and life itself depends on it. Water is transcendent, at once both intensely local and, by virtue of hydrogeological connectivity, often regional or transnational in nature. In the best of circumstances, water is a fragile resource, easily degraded or depleted, and highly vulnerable to development undertaken without appropriate regard for water impacts.

But these are not the best of circumstances. Rapid economic development and continued population growth promise to increase pressure on already stressed water resources, and climate change will uniquely impact the distribution, accessibility, and quality of water resources. According to the International Panel on Climate Change (IPCC), climate change is projected to reduce water

resources in many regions, intensifying competition over water among diverse economic sectors and increasing social tensions and conflicts due to water scarcity.<sup>4</sup> Indeed, many, if not most, forecasted climate calamities connect with water resources in some meaningful way.

In short, humanity is rapidly approaching a scenario where risks of irreversible, non-linear and abrupt environmental changes threaten catastrophic consequences to social and economic development.<sup>5</sup> Degradation of water resources due, in particular, to pollution and over-exploitation of surface and underground water resources is already severely affecting biodiversity and ecosystem services and increasing the threats global warming poses to sustainable development.

In view of this, the focus being brought to the environmental rule of law and the role of the courts by the 2018 World Water Forum could not be more timely. In this publication, the judges who have generously participated as authors examine some of the most pressing challenges for the adjudication of water controversies cross-jurisdictionally, from Africa, to the European Union, Latin America, and the United States. From their contributions, a number of trends in judicial engagement and approach emerge, such as:

- **Judicial awareness.** As these Comments indicate, judicial sophistication in understanding environmental phenomena, such as the hydrologic cycle, hydrogeological connectivity, and climate change, is increasingly animating the judicial response to cases involving water resource impacts.
- **Adjudication models for integrated water resource management.** The Comments reflect an effort by courts to overcome the limits of the classical rules of jurisdiction, and to move toward adjudication models that are consistent with an integrated water resource management approach, an approach capable of delivering comprehensive solutions to address threats posed by pollution and overexploitation of hydric ecosystems due to fragmented sectoral policies and competing economic interests.
- **Deployment of new and emerging legal principles.** The authors suggest that in the face of environmental uncertainty and the complexity of the legal system itself—for example in the context of water resources in a changing climate—judges are increasingly deploying a strong precautionary decision making model, as reflected in principles like *in dubio pro natura* and *in dubio pro aqua*, and are also

2. UNEP/GC Dec. 27/9 (Dec. 13, 2015).

3. *Id.* at 5(a).

4. See Rajendra K. Pachauri et al., IPCC, Climate Change 2014: Synthesis Report (Rajendra K. Pachauri & Leo Meyer eds., 2014).

5. See Johan Rockström et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, 14(2) *ECOLGY & SOC'Y* 32 (2009).

reexamining property rights in view of a modern understanding of ecosystem services.

- **The human rights interface.** Finally, the Comments point to the growing convergence between environmental law and human rights law, as courts endeavor to give meaning to the idea of universal access to clean water,<sup>6</sup> and reckon with the relationship between water rights and the enjoyment of all other

fundamental rights, including rights to an adequate standard of living and to a healthy environment.

We hope that this publication will advance understanding of the critical role of the judiciary in meeting the world's water justice and sustainability objectives, and facilitate the important discussions around these topics that will occur at the 8th World Water Forum.

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6. See U.N. Sustainable Development Goal 6, under which the international community has committed to ensuring the availability and sustainable management of water and sanitation for all by 2030, <https://sustainabledevelopment.un.org/sdg6> (last visited Feb. 1, 2018).