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What Could New York State's Proposed Environmental Rights Amendment Achieve?

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The Adirondacks, NY (Source: Colin Hughes)

In April 2019, both houses of the New York legislature voted to add a new section to New York's constitutional Bill of Rights declaring: "ENVIRONMENTAL RIGHTS: EACH PERSON SHALL HAVE A RIGHT TO CLEAN AIR AND WATER, AND A HEALTHFUL ENVIRONMENT" (capitalization in original). If the amendment is passed by both houses again in the 2021-2022 legislative session, voters will have the final word on its adoption in a state-wide referendum. This could happen as early as November 2021. According to the bill's very brief official justification, constitutionalizing a right to the environment is warranted by "recent water contamination and ongoing concerns about air quality" in the state and "intends to ensure that clean air and water are treated as fundamental rights for New Yorkers".

Inserting an environmental right into New York's constitution sparked heated debates ahead of a 2017 referendum giving New Yorkers the opportunity to convene a Constitutional Convention, which is the other way to amend the state constitution. The New York State Bar Association's Environmental and Energy Law Section published a detailed analysis and recommended the adoption of a constitutional environmental right. It advised that such a right should include a governmental public trust duty, expressly reference the interests of future generations, and be made self-executing against all state government bodies (but not against private parties). In November 2017, the referendum to call a Constitutional Convention overwhelmingly failed; non-environmental issues dominated the debate. The State Assembly passed bills adopting the environmental amendment in 2017 and 2018, but they got nowhere in the Senate until the Democrats took over control of the Senate in 2019.

So far, the constitutions of six other states protect environmental rights: Hawaii, Illinois, Massachusetts, Montana, Pennsylvania, and Rhode Island. Of those, the provisions of Hawaii, Montana and Pennsylvania have been ruled enforceable by their respective state courts. In announcing last year's first passage of the bill, Senator David Carlucci said: "The legislation would encourage sound green decision-making and help prevent harmful environmental actions". This blog aims to be a starting point to assess the amendment's potential impacts by looking at New York's experience with other positive fundamental rights in its constitution, and the experience of other states with strong environmental protections in their constitutions.

Fundamental Rights and Environmental Protection in New York

State constitutions are easier to amend than the federal constitution and thereby reflect changes in values more readily. In many ways New York's constitution offers more protection than its federal counterpart: it encompasses positive rights in addition to negative rights, a concept towards which the federal constitution and government have traditionally been opposed, both on the national level and the international (human rights) scene. Positive rights provide citizens with a right to certain government actions or benefits, instead of merely guaranteeing protection against government action or interference. New York's constitutional provisions on welfare and education and their construction by the courts recognize that to be able to exercise their rights and freedoms, citizens must have access to certain things, such as education. The same could be said of an environment that can sustain human life. New York's provision for positive rights together with its ambitious new climate change goals thus seem to set it up for success in the realm of constitutional environmental protection.

Citizen Suits and Access to Courts

Increasing opportunities for citizen enforcement of environmental laws seems to be the most likely impact of the new amendment. Existing environmental protections in Article XIV of the State Constitution have only been partially successful. Its Section 1, prescribing that the Forest Preserve is to be kept "forever wild", has been celebrated for successfully protecting New York's forests, especially the Adirondacks. This success is largely attributed to Section 1's direct enforceability by citizens. On the other hand, Article XIV Section 4, the so-called Conservation Bill of Rights, has not been nearly as effective. Among other things, it requires the legislature to include adequate provision for the abatement of air and water pollution. Although Section 5 states that violations of Section 4 "may be restrained at the suit of the people", courts have ruled that a failure to protect property owners from environmental hazards does not constitute deprivation of a protected property right. They based these findings on the discretion inherent in the wording of Section 5 and the discretion further given to state and local officials by New York's primary environmental statute, the Environmental Conservation Law (ECL) as well as local regulations. *Leland v. Moran*, 80 F. App'x 133 (2d Cir. 2003).

Unlike many federal environmental statutes such as the Clean Water Act, Clean Air Act or Endangered Species Act, New York's ECL does not provide for citizen suits. The last legislative attempt to insert such a right into the ECL failed in 2017. However, actions by New York administrative agencies can be challenged under Article 78 of the Civil Practice Law & Rules. If the new right is interpreted to be self-executing and to provide for a

direct right of action, it might be able to fill a gap in cases where environmental harm occurs independently of agency action. For example, Professor Nicholas A. Robinson of Pace University has argued that a constitutional right would have enabled the citizens of Hoosick Falls – whose efforts supported the proposed amendment – to petition the courts instead of having to wait for more than two years for agencies to react to the PFOA pollution of its waters by a privately-held factory.

Article XI Section 9 of the Constitution of Hawaii stipulates that "any person may enforce this right against any party, public or private, through appropriate legal proceedings". Hawaii's Supreme Court has held that this environmental right is of self-executing nature. It is legally enforceable without the need for any additional legislation to that effect, offering a private right of action to citizens. *Cty. of Hawaii v. Ala Loop Homeowners*, 235 P.3d 1103 (Haw. 2010). Conferring a protected property interest in a clean and healthful environment, it also makes limiting participation of nonprofits in agency proceedings a violation of the nonprofits' due process rights. *In re Application of Maui Elec. Co., Ltd.*, 408 P.3d 1 (Haw. 2017). In New York, there is a presumption in favor of the self-executing nature of constitutional provisions, especially if they confer a right to citizens. *Brown v. State of New York*, 674 N.E.2d 1129 (N.Y. 1996). With the environmental amendment explicitly framed to confer a right, there is a good chance that it would be held self-executing. However, the amendment does not address directly address enforceability and the ECL and local zoning laws continue to provide officials with discretion to decide whether and how to enforce environmental laws and regulations. It is uncertain what a court would make of the new environmental right under these circumstances.

Judicial Interference in Environmental Policymaking

Critics of the amendment warn that it could shift environmental policy powers away from the legislative and executive branches to the courts. Some argue that the uncertainty of the courts' interpretation of the rather short amendment could also stymie economic activity and investments. To assess these risks, we turn to New York's experience with education and welfare, two other positive fundamental rights.

In interpreting the Social Welfare provision of Article XVII Section 1 of the State Constitution, New York's highest court, its Court of Appeals, is highly deferential to the legislature. It will only interfere if the State arbitrarily withholds benefits from certain groups on the basis of criteria unrelated to need (*Tucker v. Toia*, 371 N.E.2d 449 (N.Y. 1977)) or fails to set any standards (*McCain v. Koch*, 511 N.E.2d 62 (N.Y. 1987); *Mixon v. Grinker*, 88 N.Y.2d 907, 911 (1996)). In *McCain*, the court stated that, as soon as regulations that set minimal standards exist, "what remains are questions of compliance and enforcement" (511 N.E.2d at 67), which is precisely the role of the judiciary. The difference between this and the envisaged environmental right is of course that the constitutional social welfare provision explicitly guarantees broad legislative discretion by stating that "the aid, care and support of the needy […] shall be provided by the state and by such of its subdivisions, *and in such manner and by such means, as the legislature may from time to time determine*" (emphasis added).

Article XI Section 1, which requires that "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" is interpreted to imply a right to a "sound basic education" by ensuring "minimal acceptable facilities and services". *Bd. Of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 368 (N.Y. 1982). The courts in the *Campaign for Fiscal Equity* cases had no problem interpreting what constitutes that floor of a sound basic education – a term just as vague as "healthful environment". However, the State has discretion in how it achieves that floor, even when remedying a violation. *Campaign for Fiscal Equity, Inc. v. State of New York,* 861 N.E.2d 50 (N.Y. 2006); *Campaign for Fiscal Equity, Inc. v. State of New York*, 801 N.E.2d 326 (N.Y. 2003).

To claim a violation of the right to a sound basic education, one must prove two things: the deprivation of such an education and causes attributable to the State. *New York Civ. Liberties Union v. State of New York,* 824 N.E.2d 947 (N.Y. 2005). The right is thus only enforceable against the State – however, unlike the new environmental amendment, the constitution confers the task to maintain a public education system expressly on the State and not on private institutions. There is no similar language in the new environmental right, nor any provision against whom to direct enforcement, as some other constitutions have. While the final interpretation lies with the courts, it is not unreasonable to assume that enforcement can be directed against private parties, who, after all, are the largest sources of pollution.

In Pennsylvania, courts have applied the state's detailed constitutional provision as a barrier against legislation running counter to the state's obligations as trustee of its natural resources. Thus, the Supreme Court in 2013 struck down legislation that overrode local prohibitions on hydraulic fracturing in *Robinson Township v. Commonwealth,* 83 A.3d 901 (Pa. 2013) and reaffirmed and even extended its position in 2017 in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017). Although these cases are widely celebrated in the environmental rights community, their findings are not directly applicable to New York, since Pennsylvania's constitution, unlike New York's proposed provision, explicitly names the state a trustee of its natural resources.

Conclusion

All of this is in line with what one would expect of fundamental rights: they are created to guarantee a floor of protection while respecting the principle of separation of powers through concepts such as legislative prerogative and executive discretion. While New York precedent makes a displacement of environmental decision-making powers to the judiciary unlikely, the proposal will likely lead to increased citizen suits on environmental questions. Whether these can be directed against private parties is not clear. In light of the surprising brevity of the current proposal and its accompanying justification, much uncertainty over how exactly the courts will construe a new fundamental right remains. It is also unclear how exactly the new right will play out in the complex future challenges posed by climate change, especially if there are conflicting environmental values, such as wind turbines that reduce fossil fuel use but kill birds. Notwithstanding these shortcomings and the uncertainties about the amendment's interpretation, it could strengthen citizens' hands in securing environmental protection through the courts. In light of the long line of cases that have tried and failed to get federal courts to recognize an implied right to a healthful environment under different provisions of the federal Bill of Rights, culminating only recently in *Juliana v. United States*, 947 F.3d 1159 (9th Cir.

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2020), the importance of the more flexible and positive rights oriented state constitutions should not be underestimated.

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