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Introduction to Environmental Constitutionalism

Erin Daly

Louis Kotze, *North-West University (South Africa)*

James R. May



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Environmental constitutionalism examines the development, implementation and effectiveness of incorporating environmental rights, procedures, and policies into constitutions around the globe. Through alchemy of international engagement, constitutional reform, legislative implementation, and jurisprudential vindication – informed by legal scholars and civil society change agents – environmental constitutionalism is undeniably an influential and growing field of law and public policy with potential to advance and improve environmental outcomes in ways that only outright constitutionalism can.

Environmental constitutionalism's emergence is nothing short of astonishing. Arguably owing its genesis to the 1948 Universal Declaration on Human Rights, and 1966's twin international covenants on Civil and Political and Economic, Social and Cultural Rights, it entered the lexicon at 1972's Stockholm Convention on the Human Environment, which is widely considered to be the global impetus that sparked the exponential growth of international, regional and national environmental law regimes, including their rights-related aspects. It included the following intertwining of human and environmental rights:

In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.²²

While it is difficult to determine exactly when the first environmental provision of any kind was incorporated into a constitution²³ the current wave began on the heels of Stockholm.²⁴ From there, constitutional incorporation was slow but steady through the 1970's and 1980's, persistent in the 1990's, and pervasive ever since. Now, about

22 Declaration of the United Nations Conference on the Human Environment, 1972 Preamble, para 1. See also its Principle 1.

23 One estimation is that this occurred in 1866 in the Romanian Constitution Zachary Elkins, Tom Ginsburg and James Melton "Comparative Constitutions Project Characteristics of National Constitutions" 2014 version 2.0, available at <http://comparativeconstitutionsproject.org/ccp2015/download-data/>. The first of the modern constitutional environmental provisions is seen in the state constitution of Pennsylvania, whose Environmental Rights Amendment was adopted by statewide referendum in 1971, the year before the Stockholm Convention.

24 Joshua Gellers "Explaining the Emergence of Constitutional Environmental Rights: A Global Quantitative Analysis" 2015 6(1) Journal of Human Rights and the Environment 75-97.


one-half of all constitutions on the planet expressly or implicitly recognize a right to the environment as a fundamental right. About a third of those also contain procedural environmental rights provisions explicitly asserting rights to information, participation, and access to justice in environmental matters. Some provisions are common – such as those expressly recognizing a right to a beneficial or healthful environment – while others are less so, such as those recognizing the rights of nature, requiring environmental education, advancing sustainability, or incorporating human dignity as essential to environmental protection. Whether or not countries are intentionally copying each other, they are aware of the currents that are bringing environmental constitutionalism to all parts of the world.

In some constitutions, the environmental provisions are directive principles of public policy, encouraging governments to care for the environment, while some constitutions insist that the government owns environmental resources in trust for the benefit of the people and must care for them accordingly for present and future generations; others still guarantee environmental rights as in indivisible aspect alongside other rights, such as the right to free expression, the right to vote, the right to education, the right to dignity, or the right to life. This rights-based approach signals a shift from the conventional understanding of environmental protection which has primarily happened at the international level of multi-lateral treaties on pollution, biodiversity, climate change, and so on, or by domestic statutes that seek to secure clean water or air, for instance.

From modest beginnings, environmental constitutionalism has become a common if not constant consideration at international conferences, constitutional conventions, and academic symposia, and in courtrooms, boardrooms, and classrooms. It stands on the shoulders of countless conversations and contributors. Whether there is a human right to a healthy environment, and if so, how that notion ought to be reflected in international instruments and national and subnational constitutions and laws has been fertile field for thought. A robust body of scholarship exists that tracks trends in environmental constitutionalism, advocates for constitutional incorporation of substantive and procedural environmental rights, identifies correlations to related concepts like human rights and human dignity, contextualizes it to challenges such as climate change, and acknowledges its potential as a saving grace in the Age of the Anthropocene.

The growing recognition of the need for constitutional institutions, provisions and processes to embrace environmental care and to extend constitutionalism into the environmental domain confirms the entrenchment of global environmental constitutionalism, in all its aspects and throughout the world. While some have called





for “a wider range of options [and] a new paradigm”²⁵ in this respect, others suggest that in addition to legitimate and accountable government, judicial review, democracy, and respect for human rights, “the constitutionalism of the future” must as a result of contemporary threats and challenges, embrace notions such as human solidarity for the preservation of the planet and its resources and equitable principles in the allocation of scarce resources within and among people and countries.²⁶ Thus, the need to consider where environmental constitutionalism is headed next – that is, its new frontiers.

Focusing on “new frontiers” represents a certain audacity of both descriptive and normative dimensions. For a discipline so young – the first wave of scholarly engagements with the topic having appeared within the last 10 years – the invitation to explore new frontiers signals that knowledge and understanding in this field are developing quickly, with continual transnational conversations taking place within and across communities of scholars and practitioners. But it also calls upon contributors to reckon creatively and seriously with the challenges of environmental constitutionalism: how should constitutional provisions be written so as to maximize their effectiveness? What is the relationship between environmental rights and other constitutional rights? How can environmental rights be used to protect human interests as well as environmental interests? And, perhaps most importantly, how can courts be encouraged to take up the challenge of vindicating constitutional environmental rights? These difficult and urgent questions are materializing against the backdrop of the Anthropocene, when humans are facing unprecedented environmental threats, but also have more resources than ever before to combat those threats. The promise, and challenge, of environmental constitutionalism is to make those guarantees matter. This collection invites scholars to explore how to do that.

One of the hallmarks of environmental constitutionalism is that it has always been part of a transnational conversation – countries look to each other in developing their constitutional texts and as their courts seek to interpret and apply them. Indeed, constitutional environmental drafters, interpreters, and scholars are in a continual dialogue, learning from each other and adapting norms and practices evolved in one place to their unique local conditions. It is thus entirely apt to bring together some of the leading voices in this global dialogue and to present those contributions in the form of this book for others to consider and adapt to their own thinking.

25 Brain Gareau “Global Environmental Constitutionalism” 2013 40(4) Boston College Environmental Affairs Law Review 403-408 at 408.

26 Bertrand Ramcharan “Constitutionalism in an Age of Globalisation and Global Threats” in Morly Frishman and Sam Muller (eds) *The Dynamics of Constitutionalism in the Age of Globalisation* (Hague Academic Press, 2010) 18-19.

We are therefore delighted to present the contributions to this volume, the fruits of a stimulating symposium that took place in 2016 at the North-West University in Potchefstroom, South Africa. The symposium was a joint collaboration between the Faculty of Law, North-West University; Widener University, Delaware Law School; the United Nations Special Rapporteur on Human Rights and the Environment; the Konrad Adenauer Foundation; and the United Nations Environment Programme. We hope that you find this volume to be helpful in contributing to the conversation about new frontiers in environmental constitutionalism.

