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# Introduction

## *Implementing Environmental Constitutionalism*

*Erin Daly and James R. May*

That we are living in a period of environmental crisis is no longer news. The day-to-day threats of pollution, desertification, deforestation, and the like make finding clean water, harvesting nourishing food, and even breathing clean air more difficult for billions of human beings around the world. In the coming decades (not centuries or millennia), the rest of the world's population, too, will increasingly find ourselves at the mercy of a less stable climate resulting in more severe storms, more frequent droughts, more intense fires, and so on. Because much of the change in the climate and in our natural environment can be controlled by changes in human behavior, the law has tried to manage the relationship between people and the environment. Environmental constitutionalism – the constitutional incorporation of substantive and procedural environment rights, responsibilities, and remedies to protect the natural environment – can be an important means for managing this relationship.

Environmental constitutionalism has blossomed in all regions of the world, emerging from all legal cultures and manifesting in a wide range of ways as a response to the growing awareness of the fragility of our natural environment and the critical need to preserve what we have. This collection of essays by global experts examines theory, text, experience, and jurisprudence in assessing what works and what needs work. It is intended to inform global conversations about whether and how environmental constitutionalism can be made more effective in protecting the natural environment.

If law is to be effective, it must not only establish norms of behavior, but must also enable their implementation in practice. Environmental law has accomplished the first – in more than 500 international agreements, many of the world's constitutions, and in countless laws and regulations and local ordinances around the world. And yet, implementation of these legal standards lags far behind. Social order and humanity suffer accordingly, as Irma Russell remarks here: "a livable environment is a keystone of our social order and the undergirding of human liberty and human



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dignity. It is the foundation without which there would be neither civilization nor property rights." A livable environment and implementation of the law are inextricably intertwined.

International law is notoriously resistant to implementation because of the sovereignty imperative that states hold so dear. As Maria Antonia Tigre writes: "While international law shaped the way for environmental rights to grow, it has proven insufficient to indeed shelter them. As soft law, international environmental law has limited efficacy. There is no independent international environmental rights treaty, and international standards are low and formally nonbinding. Even if most national legal frameworks internalize the rules of international law, a body of law of its own is required to properly safeguard nature." Regional law, as she shows, is only slightly more amenable to implementation.

We believe that constitutionalism plays an essential role in the implementation of environmental norms. Most constitutions address environmental concerns, and hardly any constitution is adopted or meaningfully amended without attention to the environment in one form or another. Approximately half the world's constitutions guarantee a right to a quality environment, including nearly every modern constitution. Some constitutions go where even international law does not tread, such as by establishing enforceable rights of nature, and obligations to address the causes and effects of climate change. Others fine-tune international environmental obligations, such as by establishing sustainable development or public trust as a national prerogative, by requiring a certain degree of forest cover, by protecting biodiversity, and by mandating the use of renewable energy. About two-thirds impose a duty on government and even on private citizens to protect the environment, or identify environmental protection as a matter of national policy. Several dozen constitutions guarantee rights to information, participation, and access to justice in environmental matters. And a growing number of subnational governmental entities (states, provinces, and the like) are now following suit with constitutional protections of their own, often in ways more ambitious and more detailed than at the national level.

Constitutionalism's particular genius is precisely that it is so much more than words on a page. Constitutions are the only instruments of law that typically have corresponding institutions dedicated to their implementation – independent and impartial tribunals that are as concerned with asserting fundamental and enduring national values as with ensuring that the law is applied for the benefit of the people. Other domestic law is accompanied by juridical bodies that have the power to enforce the law, but only constitutional courts (or general courts with constitutional jurisdiction) have the ultimate authority within the nation, backed up by the maximum power to compel compliance and the most legitimacy to make their opinions matter. As Louis Kotzé writes here, "[i]n many countries the rise of constitutionalism evinces not only the human longing for a good legal order, but also the ability of humans to create higher order juridical institutions, however imperfect, that must

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promote the collective good. As such, constitutionalism has much going for it as a normative programme of progressive, superior and good law and governance." Thus, along with the propagation of environmental textualism, we are seeing a growing jurisprudence of constitutional environmental law.

We call these emerging phenomena "environmental constitutionalism" to account not only for the textual entrenchment of environmental provisions in constitutions, but also for the ways in which courts enforce those provisions and, ultimately, how environmental consciousness seeps into the public psyche. Environmental constitutionalism is well intentioned: a constitutional right is a commitment by the state to limit its own authority in order to advance a transcendent value. It means well in that it is designed to inject into basic governmental charters improved environmental outcomes for present and future generations. But protecting environmental values can do even more: as Melanie Murcott writes here: "those enacting, interpreting and enforcing it do so with a view to ensuring environmental governance and protection that reinforces and promotes social justice and the equality and dignity of all."

Indeed, there is some evidence of implementation, and this is to be celebrated. There are, in fact, examples too numerous to mention here of environmental victories by thoughtful judges hewing closely to the words of their constitutions and choosing not to abdicate their responsibility toward the environment in their own countries and globally. Applying environmental constitutional provisions, judges in Argentina have spurred the clean-up of a major urban river; judges in the Philippines and Chile have protected old growth forests from clear-cutting; judges in Pakistan have ordered the creation of a climate change agency; judges in the American state of Pennsylvania have protected residents from the environmental ravages of hydrofracking and directed revenues from oil and gas leases toward the public good, while judges in Nigeria protected residents from the harmful effects of gas flaring; and in Ecuador, Colombia, and India, judges have given protection to nature, for its own sake – just to give a few examples of the good that environmental constitutionalism can do.

But it would naïvely elevate hope over experience to think that constitutionalizing environmental values is sufficient to effectively advance environmental protection. Indeed, most constitutional provisions lie dormant and very few, if any, have been fully realized. While some legislative and executive branches have worked to implement environmental constitutionalism, many have done little if anything directly to implement environmental constitutionalism in their countries, and some courts are reluctant to enter into this particular thicket.

This book engages elemental issues in the implementation of environmental constitutionalism. What accounts for the implementation "gap" between the textual right to a healthy environment and its realization? Why are so many courts hesitant to delve into this environmental thicket? What legal and political impediments must be removed so that environmental constitutionalism can fulfill its potential?

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And, importantly, what can we learn from the successes that environmental constitutionalism has wrought?

We believe that better understanding the reasons for this gap can lessen the distance between hope and experience. Thus, this book focuses sharply on the implementation of constitutional environmental rights.

Implementing environmental constitutionalism is beset by a multifaceted set of challenges. It begins with aligning environmental objectives and texts with custom, culture, and constitutional structures. Many constitutions are "green-washed" in the sense that the environmental provisions are beautifully written, but the judicial structure in the country is unlikely to permit their implementation.

A constitutionally recognized right to a healthy environment must also be written in a way that will make it self-executing, rather than requiring the labor and political will of legislative or regulatory implementation.

But even well written, self-executing provisions are not effective unless the courts are available and welcoming to those who would seek to vindicate their rights. Courts animate and implement the guarantees entrenched in constitutions and ensure their continued relevance. What jurists say about their constitutions matters. As Justice Antonio Herman Benjamin has written elsewhere, "Words spoken by judges can indeed encourage destruction or legitimize conservation, endorse speculation or guarantee urban environmental quality, consolidate the errors of the past, repeat them in the present, or enable a sustainable future."[1]

Even when jurisdiction has been established, courts face numerous challenges when they seek to apply and implement constitutional environmental provisions: how to interpret the language, how to identify the breach(es) of duty, and perhaps most dauntingly, how to fashion appropriate remedies.

We hope, in these pages, first to share experiences of innovation and accomplishment – for instance, in the restructuring of environmental constitutionalism in Brazil, in the recognition that Colombia's constitution is an "ecological" one (as well as a social democratic one), in the recent greening of the French constitutional bloc, and of a major environmental human rights case in Nigeria. Some of these innovations are general and have a fortuitous impact on environmental litigation, while in other countries the intent to advance environmental constitutionalism, per se, is express, deliberate, and direct.

Some of these advances come about when courts accept the responsibility of recognizing the constitutional imperative of environmental protection and, further, the inextricable link between human and environmental rights: in some cases, as in France and South Africa, the text of the constitution leads the way. In other cases, jurists have read an environmental ethos into a constitution that does not do so explicitly: in Colombia, the constitution contains environmental rights, but the court found there the basis for protecting nature in and of itself. In the United States,

[1] Antonio H. Benjamin, "Judges and the Environment" (2012) 29 Pace Environmental Law Journal 582.

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the constitution doesn't even contain an environmental rights provision, and yet one far-sighted district court judge found that constitutional protections for life and liberty could encompass the right to a climate capable of sustaining human life.

But most of the environmental success stories described in these pages are more complex; they result from a collection of actions taken over time by various actors public and private: the decision to constitutionalize environmental rights and/or values, the enactment of legislative and regulatory rules to support the constitutional right, the allocation of national resources to create judicial systems that respect the rule of law, the decision to provide broad standing to plaintiffs to sue in courts of competent jurisdiction, and the private resources that enable individuals to take advantage of all these things.

Thus, our second objective for this volume is to elucidate the challenges of implementation: why are the failures of implementation so persistent? Some of the chapters in this volume focus on the lacunae – the spaces where environmental constitutionalism should have taken place, but has not (yet). Others look more closely at constitutional environmental conditions in specific countries.

The first set of essays engages in a conceptual examination of what it takes to implement environmental constitutionalism. While it is of course precarious to predict or project what makes for effective implementation of environmental constitutionalism as if subject to incantation, these pages reflect various lessons learned.

In "Six Constitutional Elements for Implementing Environmental Constitutionalism in the Anthropocene," Louis J. Kotzé articulates six elements for evaluation, including text, rule of law, separation of powers, the judiciary, constitutional supremacy, environmental democracy, and the incorporation of environmental rights. Using the 1996 *Constitution of the Republic of South Africa* as a case in point, Kotzé concludes that, where these six elements "exist . . . and where they are observed, respected and implemented, chances are one would be able to state in reasonably convincing terms that the objectives of environmental constitutionalism are being achieved to a greater or lesser extent; a situation which bodes well for the implementation of environmental constitutionalism."

Another lesson is that effective implementation correlates to core governmental functions of economic performance and access to justice. In "Implementing Substantive Constitutional Environmental Rights: A Quantitative Assessment of Current Practices Using Benchmark Rankings," Chris Jeffords and Joshua C. Gellers evaluate the relationship between governmental structures and the implementation of substantive environmental rights. Drawing a line between environmental rights and environmental performance, Jeffords and Gellers conclude that implementation is "associated with higher levels of economic productivity and quality legal institutions . . . suggesting that safeguarding environmental rights requires strengthening core state functions."

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Yet another lesson is that environmental constitutionalism can benefit from concerted constitutional implementation efforts among and between countries, and continued vigilance by civil society. Using as her laboratory the most important multinational environmental resource on Earth, Maria Antonia Tigre describes, in "Implementing Constitutional Environmental Rights in the Amazon Rainforest," how countries of the Amazon implement environmental constitutionalism to protect the Amazon rainforest. Tigre writes that "[m]ost of the constitutions in South America are recent, reflecting democracies shaped in the last few decades. As such, the majority was developed while the environmental agenda rose globally, and the interest in the Amazon rainforest rose regionally. Hence, the constitutions of the Amazon countries mostly reflect a concern for nature and include, in one way or another, environmental protection." Despite an intricate web of constitutional protections, Tigre concludes that "implementation is still lacking," and in need of a "legislative boost" and more effective enforcement by executive authority. For example, Tigre notes that "deforestation rates are among the largest within Amazon countries, and government policies often contradict the constitutional provisions that focus on environmental protection." Thus, Tigre issues a call to action: "it is essential that new cases be brought to courts, building on the constitutional principles and the laws that make them effective. Only when jurisprudence improves can a conclusion be made on whether constitutional environmental rights brought real change into the Amazon rainforest."

But, throughout the world, the most wicked problem we face is certainly climate change, so we next turn our attention to the role that environmental constitutionalism can play in addressing it. Constitutionalizing the climate is the focus of Ademola Jegede's "Climate Change and Environmental Constitutionalism: A Reflection on Domestic Challenges and Possibilities." Jegede examines whether and the extent to which constitutionalism can be used to address – however imperfectly – climate challenges. Jegede explains that, despite the dearth of climate-related constitutional provisions and corresponding jurisprudence, environmental constitutionalism is replete with unrealized potential for implementation, either through specific provisions or by invoking other constitutional dimensions, such as using a right to a healthy environment as a basis for greater regulation of greenhouse gases.

In conjunction with the challenges of the changing climate, many countries are beset by violence and aggression, and, as the African proverb says, when elephants fight, it is the grass that loses. And yet, as Carl Bruch, Aleksandra Egorova, Katie Meehan, and Yousef Bugaighis show in "Natural Resources, Power Sharing, and Peacebuilding in Postconflict Constitutions," we see a surprising degree of implementation of constitutional environmentalism after political or military conflict. This chapter explains how new constitutions in forty-nine of fifty-six nations emerging from major armed conflict from 1990 to 2015 address power sharing over natural resources. As they write, their research "lays the groundwork for a deeper

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comparison of cases, institutional frameworks, and implementation contexts, as well as for future analysis of the role of natural resources in the functioning and formulation of broader powersharing structures."

In Part II, our authors focus on environmental constitutional developments in specific countries that offer particularly important lessons for understanding the implementation gap in environmental constitutionalism more generally.

We begin in Latin America where despite some of the world's most innovative and energetic approaches to environmental constitutionalism, the implementation gap is still too great. Marcelo Buzaglo Dantas, from Brazil, shows that when core state functions lag, perhaps even state of the art environmental constitutionalism does too. In "Implementing Environmental Constitutionalism in Brazil," he explains the phenomenal development of environmental constitutionalism in Brazil, whose 1988 constitution incorporated arguably the most sophisticated environmental protection, policy, and procedural provisions in the world at both national and subnational levels. Yet Dantas concludes that "environmental constitutionalism is not as effective as it could be in Brazil. Although many cases have been brought to different courts all over the country and decisions that represent a real commitment to environmental protection have been issued, enforcement is still not as effective as it should be." He identifies several contributing factors, including that "it is very difficult to control pollution and degradation in such a large country and to protect natural resources from economic development." To improve implementation, he concludes, "the best approach may be to make people aware of its importance, rather than leaving environmental protection to the judicial system . . . [p]revention and education may be the tonic, rather than just regulation and restrictions."

Next, Ana Lucía Maya-Aguirre examines how the Colombian Constitutional Court has implemented environmental constitutionalism, including by creating arenas for effective participation (including "popular consultations" on mining development), effectuating rules established in the constitution (including those promoting human dignity as they relate to environmental rights), recognizing novel causes of action (including rights of nature and future generations), and enforcing orders to protect the environment (including from extraction). Maya-Aguirre shows how through these decisions, the Court has reinterpreted and extended the right to a healthy environment as a right, a foundational principle, and an obligation of the State, expanding the place of environmentalism within the Colombian constitutional system. Maya's systemization of these judicial decisions, however, shows that they are in tension with the dominant public policy of the Government which adheres to the traditional resource-based economic model of development.

We then turn to France which has, in recent years, seen a phenomenal broadening and deepening of environmental constitutionalism. As Jochen H. Sohnle explains in "Judicial Implementation of Environmental Constitutionalism in France: A Fertile Ground from the Charter of the Environment," the 2005 Charter of the Environment both reflected a growing desire for legal protections for the

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environment and galvanized a set of procedural and structural innovations that would pave the way for much greater judicial receptivity to environmental constitutionalism than had ever been possible in France before. Sohnle first explains the genesis of the Charter of the Environment, calling its layers of substantive and procedural rights a "model in the field of environmental constitutionalism." He then details how a multilayered judicial system serves as the primary tool for implementing the Charter, including two forms of constitutional review (procedural and substantive), and how a court that does not specialize in constitutional issues (the Conseil d'État) nevertheless may play a crucial role in both implementing and restraining the Charter. As he explains, "[i]t is through these different court-oriented prisms that substantive environmental issues such as the right to a healthy environment, to compensation for environmental harm, and to public information and participation are addressed in French environmental constitutionalism."

Next, we turn our attention to Africa, where we see examples in implementation that contrast as much as the nature of the countries themselves. First, from Nigeria, a country not known for its commitment to environmental protection and whose constitution does not contain an enforceable right to a healthy environment, we see how a deeper understanding of the relationship between a clean environment and the enjoyment of other human rights can spur environmental constitutionalism. Ngozi Finette Stewart shows in "Challenges and Opportunities for the Implementation of Environmental Constitutionalism in Nigeria" the potential for implementing environmental constitutionalism by "harmonious construction" – wherein some courts have construed fundamental rights to life and dignity to incorporate a right to a healthy environment – and by easing judicial roadblocks to public interest litigation: "Thus, as much as it is desirable to have an express enforceable right to a clean environment in the Nigerian Constitution, environmental constitutionalism is not elusive in Nigeria. Opportunities abound. What is required is a more environmentally jurisprudential judiciary . . . and the promotion of effective awareness among the Nigerian citizenry; otherwise victims of environmental degradation would remain at the mercy of poorly enforced (and sometimes, fundamentally flawed) environmental protection statutes."

By contrast, Melanie Murcott takes us to South Africa, where she sounds a note of caution and concern over the unintended consequences of what might be thought of as the overproceduralization of substantive environmental rights. In "The Procedural Right of Access to Information as a Means of Implementing Environmental Constitutionalism in South Africa," Murcott argues that the availability of procedural rights in environmental matters suppresses the pursuit of substantive environmental rights: "An over-reliance on procedural rights in environmental litigation, often detached from the environmental issues at stake, seems to have stultified the development of substantive environmental rights jurisprudence . . . . In this way environmental constitutionalism is weakened – a body of case law emerges focused on procedural rights disconnected from the environmental issues at stake."

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Thus, Murcott concludes that "environmental constitutionalism in South Africa is often implemented through the use of procedural rights in a narrow sense, rather than seeing the substantive environmental right and procedural rights as mutually reinforcing and interrelated." She argues further "that the implementation of environmental constitutionalism stands to be strengthened and to better contribute towards South Africa's project of transformative constitutionalism (as it should), when used in conjunction with relevant substantive rights and values. This is so because when procedural rights are invoked in conjunction with substantive rights, the environmental harms at stake, and the social injustices they cause, come into focus."

Last, Irma S. Russell imagines the environmental potential of the notably silent constitution of the United States. In "Listening to the Silence: Implementing Constitutional Environmentalism in the United States," Russell explains how in the absence of explicit environmental rights, the Due Process Clause of the US Constitution might nonetheless be construed to incorporate a right to a healthy environment: "The capacity of a constitutional democracy in the United States and the Constitution to adapt to changing conditions and societal norms is crucial to the ability of the sustainability of the legal system. The silence of the Constitution is not necessarily a conclusive determinative of the absence of a fundamental right [but instead] can be interpreted to afford an unenumerated fundamental right to a healthy environment in general, including to a climate system capable of sustaining human life and liberty for current and future generations." This chapter sounds in imaginative yearning for an environmental constitutionalism whose seeds have yet to germinate.

While these pages champion the victories in the most and the least likely places, none of these contributors have illusions that the promises of environmental constitutionalism have been fulfilled. So what accounts for the lag in enforcement between adoption of constitutional language and effective rigorous and robust implementation? Is it an overreliance on proceduralization, as in South Africa? A failure of regional cooperation, as in Amazonia? Or perhaps there are systemic obstacles that can overwhelm an underresourced and fragile judicial system, as most judicial systems are: the absence of indicia of rule of law generally will certainly hamper environmental rule of law, and as happens when political crises erupt – how and how much are environmental concerns taken into consideration in the aftermath of violent conflict? And, for sure, the unimaginable threat posed by climate change will challenge even the most ecologically minded judiciaries. And, finally, what can we do in the countries, like the United States, whose constitutions do not explicitly speak to the protection of the environment, either as a foundational value, a directive of state policy, a governmental power, or an individual or collective right? Are there nonetheless avenues that courts can take that will lead to the constitutionalization of environmental interests? And how can these steps be adopted even in countries whose constitutions do speak to the environment?

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Collectively, the essays in this volume show that there is no single answer. But there are lessons to be learned from experiences throughout the world.

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