Constitutions can play a central role in responding to environmental challenges, such as pollution, biodiversity loss, lack of drinking water, and climate change. The vast majority of people on earth live under constitutional systems that protect the environment or recognize environmental rights. Such environmental constitutionalism, however, falls short without effective implementation by policy makers, advocates, and jurists. Implementing Environmental Constitutionalism: Current Global Challenges explains and explores this “implementation gap.” This collection is both broad and deep. While some of the essays analyze crosscutting themes, such as climate change and the need for rule of law that affects the implementation of environmental constitutionalism throughout the world, others delve deeply into geographically contextual experiences for lessons about how constitutional environmental law can be more effectively implemented. This volume informs global conversations about whether and how environmental constitutionalism can be made more effective to protect the natural environment.

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They are the co-editors of the Encyclopedia of Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography.
Implementing Environmental Constitutionalism

CURRENT GLOBAL CHALLENGES

Edited by

ERIN DALY
Widener University Delaware Law School

JAMES R. MAY
Widener University Delaware Law School
We dedicate this book
to all those who seek to
implement environmental and human rights
for present and future generations.
Having a law is one thing, ensuring its implementation is quite another.
– Miglani v. State of Uttarakhand & others,
High Court of Uttarakhand at Nainital, India, 2017
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Foreword

Filling the Implementation Gap in Environmental Constitutionalism

In this book, Professors Daly and May collect thoughtful works from some of the world's most esteemed scholars on implementing environmental constitutionalism. It is an indispensable resource for lawyers, judges, law professors, and others striving to make laws protecting the planet's environment and its inhabitants more effective. It shows how the work we do matters.

There has perhaps never been a more important time for the law to mean what it says and say what it means. Academic resources like this are essential to distributing cross-cultural and transnational knowledge from one audience to the next in a way that contributes to a collective understanding of how constitutional environmental provisions can and should be implemented to realize their full potential.

Two things are certain. Our natural environment is currently being threatened to the breaking point as “normal” forms of pollution and waste despoil our waters, our land, and our air, reduce global forest coverage to a fraction of its former size, and contribute to the loss of biodiversity around the world – all compounded by the existential peril of climatic change that will impair not only the way we live, but our very ability to survive as a species. In response, the world’s legal systems have been busy enacting a library of laws, affirming rights, and imposing obligations on governments and the private sector that aim to protect us from our own worst impulses: there are now more than 500 international treaties and nearly 100 constitutional provisions that explicitly or implicitly grant a human right to a clean and safe environment.

Among the most important innovations in response to global environmental conditions is in fact the emergence of environmental constitutionalism – that is, the incorporation of environmental rights, duties, principles, tools, and procedures in national and sub-national constitutions. Around the globe, countries are entrenching environmental values in their constitutions, and courts are increasingly
vindicating environmental rights to protect species, forests, oceans, rivers, and the communities where people live.

One of the fundamental ways to advance implementation of environmental laws is to share knowledge and experience, through both traditional forms of communication (like this publication) and new networks of individuals and institutions that can learn from one another. This book is an essential part of the global conversation about the role of environmental constitutionalism because it focuses on how these laws are being applied in the real world, with rich analyses of the systemic obstacles to implementation, along with some important examples of success stories, even in unlikely places. As a result of this transnational sharing of information and experiences, we are increasingly aware of the workings of laws in other jurisdictions that have the potential to inform and influence our understanding of our own laws.

This is true both horizontally and vertically. Horizontally across the geopolitical spectrum, we are learning more and more about what is going on in other countries and legal systems, and how legislatures are enacting and administrative agencies and courts are implementing laws to protect the environment. This is happening most forcefully at the constitutional level, where we are seeing increasingly capacious and detailed provisions to seal national commitments to environmental protection over time across the generations and against the short-term political interests of the elected branches of government. At the same time, courts with constitutional jurisdiction, whether specialized or not, are increasingly accepting the responsibility to enforce these provisions, as they would any other constitutionally protected human right or set of obligations.

Vertically, too, we see dialogue between environmental constitutionalism and legal efforts both above and below. To some extent these national developments are a reflection and perhaps a reaction to a growing body of international accords aimed at protecting the environment. The most conspicuous and recent international agreement is the 2015 Paris Accord on Climate Change, a worldwide commitment to truly reduce global warming. Of course, there is ample margin for more progress in advancing human rights to a healthy environment, including current efforts from a variety of sources to urge the United Nations to adopt a third international covenant, which would complement the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic, and Cultural Rights. In particular, at this moment, a new Global Pact for the Environment is being shepherded, with leadership from France, through the United Nations process. This proposal to the UN will bring greater coherence to international environmental laws, and set out clear obligations for states and individuals to protect the environment, which national legal experts will be charged with enforcing. In particular, the draft Global Pact would assert that “Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and
In a demonstration of environmental constitutionalism’s influence, this provision echoes the provisions of constitutions around the world that protect the environment as a human and ecological right. The global imprimatur would ensure that no one is left out of the circle of protections, regardless of where they live, and would provide an environmentally sensitive prod to domestic judges applying the environmental rule of law, when implementing their own national regulatory and constitutional provisions and laws designed to safeguard the natural environment.

Perhaps even more promising from the standpoint of implementation is the activity seen at the sub-national level. To give just a few examples, a growing number of municipalities recognize the rights of nature to protect biodiversity from the adverse effects of deforestation, mining, and other industrialized usages. At the same time, more and more states within federal systems are adopting constitutional provisions for the protection of the environment, although often and sadly they are overlooked, perhaps with the exception of the United States.

Such an evolutionary movement upwards and downwards and across the globe, reflected in this book, is bound to have incremental and aggregate effects in the decisionmaking spectrum, including for judges. These developments are significant in at least three regards. First, they increase individual and collective awareness of the changing environment and the threats that such changes pose. Second, in the aggregate, these laws contribute to the environmental rule of law – an understanding that Nature is entitled to the full protection of law and to a legal system based on fundamental principles of separation of powers, judicial independence and integrity, public participation, prohibition of corruption, and other components of the traditional concept of the rule of law, which apply as much to environmental protection as to any other aspect of law. Third, these efforts reflect a growing awareness in modern society – and not just in the industrialized world – of the relationship between how we live and the environment we live in. In particular, they reflect a conviction that healthy ecosystems and biodiversity should be regarded and implemented as a human right and as a necessary foundation for all other rights.

We all know that the adoption of laws, on its own, is not enough to protect the environment, or to protect humans from the harms to dignity, to health, and to life associated with the most egregious forms of environmental degradation, or to shield the planet from ravages of deforestation, species extinction, climate change, and our worst selves. We need more. We need for those laws to be effectively applied and implemented, particularly by judges – a central mission of the recently established Global Judicial Institute on the Environment. This is the biggest challenge in the realization of human environmental rights, at the constitutional level and otherwise.

Because, as I’ve written elsewhere, “Logical reasoning suggests that if it is the judge’s responsibility to preserve human life, then it must also be up to the judiciary to ensure whatever is necessary to maintain all living beings, ourselves and all others – the foundations of life.”

There is thus a shared responsibility to close the gap between legal scholarship, parliaments, the administration, and judges, so that environmental laws – including constitutional provisions – are not just law in the books, but have real positive effects on our environmental heritage. Judges – including those in my own country, Brazil – are on the front lines of filling the implementation gap: “The judiciary is uniquely equipped to secure public and shared rights, to safeguard individual environmental rights and to hold accountable the authorities whose primary responsibility is to environmental protection.”

Judges should assert their authority to enforce all aspects of the constitution, especially those parts most necessary to secure a dignified life for all citizens. They need to be “protagonists” in order to protect the planet, using the legal tools they have – written laws and jurisprudence to be applied according to their true and ecological purposes. This is not a call to activism, but rather a reminder that judges are charged with the responsibility of implementing the law, even where it is difficult to interpret, uncertain in consequence, politically controversial, and even when it goes against centuries-old traditions of legal thinking and jurisprudence.

The most relevant instrument in the toolkit is the capacity to learn from each other, to understand what works and what doesn’t, and to see how other peoples’ and nations’ experiences can be adapted to our own situations and legal systems. The ecological function of property rights as is recognized in Brazil and other countries, the redrawing of jurisdictional lines and the reshaping of constitutional authority as has been done recently in France, the value of regional cooperation in Amazonia, the uniting of the human rights to life and dignity with environmental protections, as has been done in Pakistan, Nigeria, and elsewhere, the use of new environmental law principles like in dubio pro natura and the propter rem nature of environmental obligations as we see in Latin America – all of these involve innovations and lessons that jurists everywhere should understand to see how they might fit into their own constitutional landscapes. To be sure, as has been noted, “there is ample legal foundation in each nation’s environmental legislation to make such comparisons germane.”

Without implementation, environmental constitutionalism can inspire but not require. And definitely not change or deliver. This book helps us learn from each

2 Antonio Herman Benjamin, “We, the Judges, and the Environment” (2012) 29 Pace Environmental Law Review 582.
other how we can answer the call to advance this most critical cause of our time. And change the way we use law to protect our fragile and unique little planet.

Justice Antonio Herman Benjamin
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