

Cambridge University Press
978-1-107-16518-2 — Implementing Environmental Constitutionalism
Edited by Erin Daly, James R. May
Frontmatter
[More Information](#)

IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM

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.

Erin Daly is Professor of Law at Widener University Delaware Law School. She serves as the Director of the Global Network for Human Rights and the Environment, as the US National Correspondent for the Centre international de droit comparé de l'environnement (CIDCE), and as the Vice President for Institutional Development at the UNIFA in Haiti. She is the author of *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (2013) and, along with James R. May, is the co-founder of the Dignity Rights Project and coauthor or coeditor of *Judicial Handbook on Environmental Constitutionalism* (2nd edn 2018), *New Frontiers in Global Environmental Constitutionalism* (2017), *Global Environmental Constitutionalism* (CUP 2015), and *Environmental Constitutionalism* (2014).

James R. May is Distinguished Professor of Law at Widener University Delaware Law School and former Chief Sustainability Officer at Widener University, Pennsylvania. May is a Fellow of the American College of Environmental Lawyers and a Member of Phi Kappa Phi. May is the editor of *Principles of Constitutional Environmental Law* (2013), and coeditor of *Shale Gas and the Future of Energy* (2016) and *Standards of Environmental Constitutionalism* (CUP forthcoming). Along with Erin Daly, he is coauthor or coeditor of a multitude of works on environmental constitutionalism, codirector of the Dignity Rights Project, codirector of the Environmental Rights Institute at Delaware Law School, and consultant on environmental constitutionalism and dignity rights.

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

Cambridge University Press
978-1-107-16518-2 — Implementing Environmental Constitutionalism
Edited by Erin Daly , James R. May
Frontmatter
[More Information](#)

Cambridge University Press
978-1-107-16518-2 — Implementing Environmental Constitutionalism
Edited by Erin Daly , James R. May
Frontmatter
[More Information](#)

Implementing Environmental Constitutionalism

CURRENT GLOBAL CHALLENGES

Edited by

ERIN DALY

Widener University Delaware Law School

JAMES R. MAY

Widener University Delaware Law School



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-107-16518-2 — Implementing Environmental Constitutionalism
Edited by Erin Daly, James R. May
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi - 110025, India
79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107165182
DOI: 10.1017/9781316691588

© Cambridge University Press 2018

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2018

Printed in the United States of America by Sheridan Books, Inc.

A catalogue record for this publication is available from the British Library

ISBN 978-1-107-16518-2 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press
978-1-107-16518-2 — Implementing Environmental Constitutionalism
Edited by Erin Daly , James R. May
Frontmatter
[More Information](#)

*We dedicate this book
to all those who seek to
implement environmental and human rights
for present and future generations.*

Cambridge University Press
978-1-107-16518-2 — Implementing Environmental Constitutionalism
Edited by Erin Daly , James R. May
Frontmatter
[More Information](#)

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

Contents

<i>List of Figures</i>	<i>page</i> ix
<i>List of Tables</i>	xi
<i>List of Contributors</i>	xiii
<i>Foreword: Filling the Implementation Gap in Environmental Constitutionalism</i>	xix
Justice Antonio Herman Benjamin	
Introduction: Implementing Environmental Constitutionalism	1
Erin Daly and James R. May	
PART I THEMES AND STRUCTURES OF ENVIRONMENTAL CONSTITUTIONALISM	
1 Six Constitutional Elements for Implementing Environmental Constitutionalism in the Anthropocene	13
Louis J. Kotzé	
2 Implementing Substantive Constitutional Environmental Rights: A Quantitative Assessment of Current Practices Using Benchmark Rankings	34
Chris Jeffords and Joshua C. Gellers	
3 Implementing Constitutional Environmental Rights in the Amazon Rainforest	59
Maria Antonia Tigre	
4 Climate Change and Environmental Constitutionalism: A Reflection on Domestic Challenges and Possibilities	84
Ademola Oluborode Jegede	

viii	<i>Contents</i>	
5	Natural Resources, Power Sharing, and Peacebuilding in Postconflict Constitutions	100
	Carl Bruch, Aleksandra Egorova, Katie Meehan, and Yousef Bugaighis	
	PART II GEOGRAPHIES OF IMPLEMENTATION	
6	Implementing Environmental Constitutionalism in Brazil	129
	Marcelo Buzaglo Dantas	
7	Implementing Environmental Constitutionalism in Colombia: Tensions between Public Policy and Decisions of the Constitutional Court	143
	Ana Lucía Maya-Aguirre	
8	Judicial Implementation of Environmental Constitutionalism in France: A Fertile Ground from the Charter of the Environment	159
	Jochen H. Sohnle	
9	Challenges and Opportunities in Implementing Environmental Constitutionalism in Nigeria	180
	Ngozi Finette Stewart	
10	The Procedural Right of Access to Information as a Means of Implementing Environmental Constitutionalism in South Africa	193
	Melanie Murcott	
11	Listening to the Silence: Implementing Constitutional Environmentalism in the United States	209
	Irma S. Russell	
	<i>Index</i>	225

Figures

2.1	EPI and GDP by year	<i>page</i> 43
2.2	EPI and ROL by year	44
2.3	EPI and age by year	45

Cambridge University Press
978-1-107-16518-2 — Implementing Environmental Constitutionalism
Edited by Erin Daly , James R. May
Frontmatter
[More Information](#)

Tables

2.1 Repeated cross-section regression results by year	<i>page</i> 47
2.2 Top twenty countries ranked from more (most) effort to less effort	50
2.3 Bottom twenty countries ranked from less (least) effort to more effort	52
2.4 Relative rankings of OECD countries: More (most) effort to less effort	54

Cambridge University Press
978-1-107-16518-2 — Implementing Environmental Constitutionalism
Edited by Erin Daly , James R. May
Frontmatter
[More Information](#)

Contributors

Justice Antonio Herman Benjamin is a Justice of the National High Court of Brazil (STJ) since 2006. He was previously a career Assistant Attorney General of the State of São Paulo (1982-2006), where he headed the Environmental Protection Division for several years, and a law professor at the Catholic University of Brasília. Justice Benjamin was the founding President of Law for a Green Planet Institute (Instituto “O Direito por um Planeta”), the leading academic environmental law organization in the country, which publishes the Brazilian Environmental Law Review (Thomson Reuters), the oldest of its kind in Latin America. He is a former President of the Brazilian Fulbright Alumni Association, member of the UN Secretary-General’s Legal Expert Group on Crimes Against the Environment, and, before his appointment to the STJ, a decade-long Councilor of the Brazilian Environmental Council (CONAMA). He is both President of the Brazilian Environmental Forum of Judges (FONAMA) and the Environmental Committee of the Summit of Chief Justices of Ibero-America. At the international level, he served as Co-chair of INECE – The International Network for Environmental Compliance and Enforcement. Currently, he is Chair of the IUCN World Commission on Environmental Law – WCEL, Secretary-General of UN Environment’s International Advisory Council for Environmental Justice, and directs the Global Judicial Institute on the Environment. Justice Benjamin is the author and co-author of more than ten books and dozens of articles on environmental law and other legal subjects.

Carl Bruch directs International Programs at the Environmental Law Institute (ELI). His work focuses on environmental governance, disasters, conflict, and peacebuilding. He has helped countries and organizations throughout Africa, the Americas, Asia, and Europe develop and strengthen their environmental laws, improve institutions, and build capacity. Since 2007, Carl has been a leader in a global effort to establish a new multidisciplinary field of environmental peacebuilding (www.environmentalpeacebuilding.org). He is an adjunct professor with American University School of International Service, where he teaches a master’s-level

course on environmental peacebuilding. He has also served as a scholar in residence at Widener University Delaware Law School.

Yousef Bugaighis is a corporate associate based in the Middle East offices of Blake, Cassels & Graydon LLP. He received his JD from the American University Washington College of Law and is a former law clerk at the Environmental Law Institute. Yousef is a member of the Bars of the District of Columbia and New York.

Marcelo Buzaglo Dantas is an environmental law attorney and professor in Brazil with more than twenty years of experience in the field. He received an LLM and an SJD in diffuse and collective rights, both from the Pontifical Catholic University of São Paulo. He has been a scholar in residence of the environmental law program at Pace University School of Law and a scholar in residence at Widener University Delaware Law School. He has a postdoctorate in environmental law, transnationality, and sustainability from the University of the Itajaí Valley (UNIVALI). He is a visiting professor at the University of Alicante in Spain, where he has been lecturing since 2012 and at Widener University Delaware Law School. He is author, organizer, and coordinator of almost thirty books and approximately one hundred articles published in books and journals in Brazil and abroad. A former chair of the environmental law committee of the Brazilian Bar Association, Santa Catarina section, for two mandates (2007–2009, and 2010–2012), he has been a member of the Commission on Environmental Law of the Brazilian Lawyers Institute (IAB) since 2010. In the same year, Marcelo became a member of the prestigious board of the Boticario Group Foundation for Nature Protection.

Aleksandra Egorova is a research assistant at OEF Research, a Colorado think tank working on issues of peace, security, and governance. Prior to joining OEF Research, Aleksandra worked in the Sustainability and External Relations department at Newmont Mining, as a visiting researcher at the Environmental Law Institute, and as a research assistant at the Environment, Food, and Conflict Lab at the University of Denver. Aleksandra holds an MA in international studies with concentrations in environment and peacebuilding from the Josef Korbel School of International Studies, University of Denver.

Joshua C. Gellers is an assistant professor in the Department of Political Science and Public Administration at the University of North Florida, research fellow of the Earth System Governance Project, and Fulbright Scholar to Sri Lanka. His research focuses on environmental politics in the developing world, with an emphasis on environmental rights and development finance. Joshua's work has appeared in *Critical Discourse Studies*, *International Environmental Agreements*, *Journal of Environmental Law and Litigation*, *Journal of Human Rights and the Environment*, *Journal of Human Rights Practice*, *Review of Policy Research*, *Sustainability Science*, and *Transnational Environmental Law*. He runs Enviro Rights Map, a free Google Maps-based website that catalogs constitutional environmental rights throughout the world. Joshua is the author of *The Global Emergence of Constitutional*

List of Contributors

xv

Environmental Rights (2017). He holds a BA in political science from the University of Florida, an MA in climate and society from Columbia University, and an MA and PhD in political science from the University of California, Irvine. He has also served as a scholar in residence at Widener University Delaware Law School.

Chris Jeffords is an assistant professor in the Department of Economics at the Indiana University of Pennsylvania, affiliate faculty member of the Economic and Social Rights Group at the Human Rights Institute at the University of Connecticut, and member of the Global Network for the Study of Human Rights and the Environment. Chris's areas of expertise are applied microeconomics, environmental economics, and environmental human rights. He has published articles in *KYKLOS*, *Empirical Economics*, *International Journal of Energy Economics and Policy*, *Economics Bulletin*, *Water Resources Management*, *Review of Social Economy*, *Human Rights Quarterly*, *Journal of Human Rights and the Environment*, and *Journal of Human Rights Practice*, among others. Chris has also published various chapters in edited volumes and has contributed to the United Nations report on implementing environmental rights. He received PhD and MS degrees in agricultural and resource economics from the University of Connecticut, an MA in economics and an advanced graduate certificate in economic forecasting, both from the State University of New York at Albany, and an undergraduate degree in business economics from Hofstra University. He has also served as a scholar in residence at Widener University Delaware Law School.

Ademola Oluborode Jegede (PhD) is a senior lecturer in the Department of Public Law, University of Venda, Thohoyandou, South Africa. He holds degrees from Obafemi Awolowo University Ile-Ife, University of Ibadan and the Centre for Human Rights, Faculty of Law, University of Pretoria. He has been a research visitor to the Centre for International Environmental Law, United States, and Human Rights Institute at Abo Akademi, Finland. His research focuses on the interface of climate change with human rights of vulnerable groups and general international human rights law. Ademola is author of *The Climate Change Regulatory Framework and Indigenous Peoples' Lands in Africa: Human Rights Implications*, Pretoria University Law Press, 2016.

Louis J. Kotzé is research professor at the Faculty of Law, North-West University, South Africa; and a visiting professor of environmental law at the University of Lincoln, UK. His research focuses on themes related to global environmental constitutionalism and law and the Anthropocene. His most recent monograph is *Global Environmental Constitutionalism in the Anthropocene* (2016), and two recent edited collections are *Environmental Law and Governance for the Anthropocene* (2017), and *Sustainable Development Goals: Law, Theory and Implementation* (2018 with Duncan French). He is currently a Marie Curie Research Fellow at the University of Lincoln where he will be leading a research project titled: *Global*

Ecological Custodianship: Innovative International Environmental Law for the Anthropocene. He has also served as a scholar in residence at Widener University Delaware Law School.

Ana Lucía Maya-Aguirre is a professor of law at Universidad del Norte de Barranquilla (Colombia), where she also coordinates the Legal Clinic in Environmental Law of the Public Interest and Litigation Group. She is the Regional Director for Latin America of the Global Network for the Study of Human Rights and the Environment (GNHRE). She was scholar in residence at Widener University Delaware Law School, and was a fellow at the Environmental Law Alliance Worldwide (ELAW). She is a co-founder of the Environment and Society Association of Colombia and a member of the Group of Legal Experts of the International Network for Economic, Social and Cultural Rights (ESCR-Net) and The Access Initiative. She has experience in research, supporting communities affected by the Colombian armed conflict and environmental damage. She coordinated the Law and Displacement Network of the Latin American Institute for an Alternative Law and Alternative Society, made up of 14 legal clinics for internally displaced persons in Colombian universities. She has a law degree and a postgraduate diploma in constitutional law from the Universidad Nacional de Colombia, and went on to earn an LLM in Energy and Environment at Tulane University with the support of the J. William Fulbright Scholarship.

Katie Meehan is a policy and planning specialist at the Wilderness Society's Bureau of Land Management Action Center. In this role, she encourages people to participate in land use planning processes and management decisions and seeks to influence national policy on management of our federal public lands. Previously, Katie worked at the National Conference of State Legislatures, where she staffed two tribal working groups, bringing together American Indian tribes with the Department of Energy to discuss policy issues related to the transportation and storage of nuclear waste. Katie volunteered as a law clerk at ELI during her last semester in law school. Katie holds a JD/MPA from Indiana University.

Melanie Murcott is a senior lecturer in the Department of Public Law at the University of Pretoria (South Africa), where she lectures in administrative law and environmental law. She earned her LLB (cum laude) at the University of Cape Town and her LLM (cum laude) in constitutional and administrative law at the University of Pretoria. Her LLM thesis, "The Role of Environmental Justice in Socio-economic Rights Litigation," was published in the South African Law Journal, and she is currently reading toward her doctorate on the topic "Towards a Legal Theory of Transformative Environmental Constitutionalism." Melanie is admitted as an attorney in South Africa and as a solicitor (nonpracticing roll) of the Supreme Court of England and Wales. Prior to joining the academy, she practiced law for a number of years, including at Hogan Lovells, where she was previously a partner and is currently

a consultant. Melanie's current research focuses on the social justice potential of environmental constitutionalism in South Africa and beyond. She has also served as a scholar in residence at Widener University Delaware Law School.

Irma S. Russell is the Edward A. Smith/Missouri Chair in Law, the Constitution, and Society at the University of Missouri–Kansas City, where she teaches environmental law, administrative law, and professional responsibility. Prior to joining UMKC, Irma served as Dean of the University of Montana School of Law and as NELPI professor and director of the National Energy-Environment Law and Policy Institute at the University of Tulsa College of Law. Irma is past chair of the ABA Section of Environment, Energy, and Resources and of the AALS Section of Natural Resources and Energy Law. She has served on the editorial board of *Natural Resources and Energy* and chaired the Professionalism Committee of the ABA Section of Legal Education and Admission to the Bar. She also chaired the following AALS sections: Natural Resources and Energy, Professional Responsibility, and Socio-Economics. In practice, Irma has represented potentially responsible parties, government entities, lenders, and others on issues arising under the Comprehensive Environmental Response, Compensation and Liability Act, National Environmental Policy Act (NEPA), wetlands designation, site mitigation, and other environmental issues. She was founding chair of the Memphis Bar Association Environmental Section and chair of the Tennessee Bar Association Environmental Section. Irma is an elected member of the American Law Institute and the American College of Environmental Lawyers. Irma earned her JD from the University of Kansas. She clerked for the Honorable James K. Logan, US Court of Appeals for the Tenth Circuit, and practiced in Kansas, Missouri, and Tennessee. She has also served as a scholar in residence at Widener University Delaware Law School.

Jochen H. Sohnle is a full professor at the University of Lorraine, Law Faculty of Nancy (France). His work, which is conducted in several languages (French, English, German, and Spanish), is focused on international, French, and comparative environmental law; water law; and law of natural resources. He is also specializing in law of cross-border cooperation between local authorities and comparative law of public authorities. On an ongoing basis, he gives additional lectures at the Strasbourg Law Faculty (LLM Program, Environmental Law) and at Sciences-Po Paris, Nancy Campus (Trilingual European Program). Jochen has held occasional lectures on international, European, French, and comparative environmental law in Canada, the United States, Haiti, Germany, Spain, and Russia and was a full-time fellow at the Pace Global Center for Environmental Legal Studies, Pace Law School, New York (January–August 2015). In January 2015, he was scholar in residence at the Widener University Delaware Law School. Currently, Jochen is president of the French Association of Environmental Law (Regional Division for Eastern France) and member of the IUCN World Commission on Environmental Law.

He sits on the Advisory Board of the French Water Basin Agency Rhine-Meuse Rivers and on the Expert Board of the French Water Academy (created by the French Ministry of Environment and the Water Basin Agencies).

Ngozi Finette Stewart has a bias for international environmental law and ethics. She has published papers in her core areas of research, including biodiversity conservation, environmental regulation, coastal management, food security and climate change, and ecological integrity. She has also participated in short-term trainings related to environmental policy, global environmental management, sustainable cities, protected areas management, international water law and law of aquifers, waste management and ecosystem services, and international environmental governance. She has been a key participant in United Nations working groups on human rights and the environment, as well as a member of the technical review committee under the International Union for the Conservation of Nature. She is a member of a number of professional bodies, including the IUCN (Ethics Specialist Committee) and the Earth Law Alliance. She is currently the environmental policy research fellow at the United Nations University Institute for Natural Resources in Africa, Accra, Ghana, and an associate professor at the University of Benin, Nigeria.

Maria Antonia Tigre is a senior attorney at the Environment Program of the Cyrus R. Vance Center for International Justice. She provides pro bono legal services to nongovernmental organizations across the globe, especially in issues related to protected areas and the interface between human rights and the environment. She is the author of *Regional Cooperation in Amazonia: A Comparative Environmental Law Analysis* (2017). She has also authored articles and book chapters, including 'Cooperation for Climate Mitigation in Amazonia: Brazil's Emerging Role as a Regional Leader,' published by *Transnational Environmental Law* (CUP). Maria has worked with environmental law firms, infrastructure companies, and international nongovernmental organizations, including the World Resources Institute. Maria is currently an SJD candidate at the Elisabeth Haub School of Law at Pace University, writing about the Global Pact for the Environment. She holds a double LL.M. from the Elisabeth Haub School of Law at Pace University (Environmental Law and Comparative Legal Studies), from where she graduated magna cum laude. Maria was a scholar in residence at Widener University Delaware Law School and Maurice A. Dean Law School at Hofstra University. She received her LL.B. from the Pontifícia Universidade Católica of Rio de Janeiro, Brazil.

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

fulfilment.”¹ 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.

¹ Global Pact for the Environment, Art. 1, available at <http://pactenvironment.org/>.

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."²

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."³ 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."⁴

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.

³ Benjamin de Zavala and others, "An Institute for Enhancing Effective Environmental Adjudication" (2010) 3 Journal of Court Innovation 2.

⁴ Ibid, 5.

Cambridge University Press
978-1-107-16518-2 — Implementing Environmental Constitutionalism
Edited by Erin Daly , James R. May
Frontmatter
[More Information](#)

Foreword

xxiii

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
National High Court of Brazil (STJ)
Global Judicial Institute of the Environment

Cambridge University Press
978-1-107-16518-2 — Implementing Environmental Constitutionalism
Edited by Erin Daly , James R. May
Frontmatter
[More Information](#)
