



Essential Readings in Environmental Law
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ENVIRONMENTAL CONSTITUTIONALISM

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Overview of Key Scholarship

1. Bosselmann, K., *Im Namen der Natur: Der Weg zum ökologischen Rechtsstaat* (In the name of Nature: the Road to an Ecological *Rechtsstaat*) (Scherz, 1992).
2. Boyd, D., *The Environmental Rights Revolution: A Global Study of Constitutionalism, Human Rights and the Environment* (UBC Press, 2012).
3. May, J. and E. Daly *Global Environmental Constitutionalism* (Cambridge University Press, 2014).
4. Jasanoff, S., “A World of Experts: Science and Global Environmental Constitutionalism” 2013 40(4) *Boston College Environmental Affairs Law Review* 439-452.
5. Kim, R. E., and K. Bosselmann “International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements” 2013 2(2) *Transnational Environmental Law* 285-309.
6. Kotzé, L.J., “Arguing Global Environmental Constitutionalism” 2012 1(1) *Transnational Environmental Law* 199-233.
7. Grear, A., and L. J. Kotzé (eds) *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015).
8. Hudson, B., “Structural Environmental Constitutionalism” 2015(21) *Widener Law Review* (forthcoming). Also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463964.

Background

Constitutional environmental protection is not a new phenomenon. It has been part of constitutional systems for more than a hundred years, and of the environmental and constitutional law discourse for at least 40 years. During this time, environmental protection has been connected with constitutional phenomena such as rights, democracy, separation of powers, the rule of law and the constitutional state, among others. Environmental constitutionalism as a concept is, however, an entirely new

term of art that has only emerged in the last 3 years. Even though the discourse surrounding it is gathering pace, environmental constitutionalism still hovers at the periphery of conceptual clarity. Despite some recent nascent conceptual developments, a more comprehensive systemised theory of it is only now starting to emerge. This is also why the sources in this list of key scholarship are comparatively few. The common narrative that is emerging among the views of authors in this list could be summarised as follows: there is a discernable trend towards the constitutionalisation of environmental care that would enable one to identify the emergence of a specialised focused form of constitutionalism that is solely concerned with environmental matters. Since the Stockholm Conference in 1972, many states have adopted environmental protection provisions in their domestic constitutions. Today three quarters of the world's constitutions contain references to environmental provisions. Calling the world's governments to action, the World Conservation Strategy recognized as far back as 1980 that

“[I]deally, a commitment to conserve ... living resources should be incorporated in the constitution” that should entrench “the obligation of the state to conserve living resources and the systems of which they are part, the rights of citizens to a stable and diversified environment, and the corresponding obligations of citizens to such an environment.”¹

There is little disagreement today:

“... about the importance of making some form of provision for environmental protection at the constitutional level, even if in the form of a state duty or objective rather than necessarily as a fundamental individual right. This is now indeed widely recognized. Globally, more than a hundred countries have constitutional environmental provisions of some kind; no recently promulgated constitution omits these, and many older constitutions are being amended to include them.”²

This deliberate re-orientation of environmental protection towards and through constitutionalism suggests that a form of “specialised constitutionalism”³ exists which focuses specifically on the human-environment interface and which constitutes a particularly focused and specialised sub-division of the broader constitutionalism paradigm; i.e., environmental constitutionalism.

In addition to fundamental human rights (since environmental constitutionalism casts a net reaching far wider than only rights), environmental awareness and broader environmental protection responsibilities are increasingly being articulated through constitutions and elevated to a higher constitutional level. Popular non-rights based means by which to constitutionalize environmental care include, for example, providing for and safeguarding sustainable development and its associated principles in a constitution as guiding principles, peremptory obligations or ideals; and by delineating specific state and non-state functions and duties with respect to environmental protection through directive principles or principles of state policy that work to galvanize, or to compel, legislative and executive activities to protect the environment. In this sense, environmental constitutionalism could be understood as having formally descriptive and substantively constitutional characteristics that usually go hand in hand. Whereas the former has to do with establishing the state architecture, its powers and functions in relation to environmental governance, the

latter concerns the provision of substantive higher order or apex norms such as rights that provide certain elevated guarantees related to the environment.

In sum it could be said that environmental constitutionalism is part of the larger constitutional paradigm, both as an evolving scholarly discipline and analytical perspective and as a socio-political and legal transformation project in a normative sense. By acting as a method of constitutionally entrenching environmental law and protection at a more enduring or “higher” constitutional level, environmental constitutionalism embodies a transformative approach that relies on constitutions to provide for the architecture of environmental governance (also referred to as “thin” environmental constitutionalism), whereupon it then acts to improve environmental protection through various constitutional features such as fundamental rights and duties, principles of environmental governance, the rule of law, and enduring aspirational values (also referred to as “thick” environmental constitutionalism).⁴

It is important to recognize that while the generic objectives of environmental constitutionalism would be similar for all the countries and regions of the world, the specific content, design, elements and reach of environmental constitutionalism would differ from country to country and in different regions because of the different histories, prevailing socio-political, environmental and economic conditions of the different respective cultures, as well as reflecting the immensely divergent legal cultures of a kaleidoscopic world. The young, but growing, environmental constitutionalism paradigm invites students and scholars alike to more actively engage with this important apex regulatory phenomenon, both at the analytical and normative levels, especially with a view to strengthening the institutions of environmental law and governance. The following works are leading examples of such preliminary engagements with environmental constitutionalism.

1. Written by one of the most influential environmental law scholars of our time, **K. Bosselmann**’s *Im Namen der Natur*, is one of the earliest conceptual accounts of environmental constitutionalism. This is also one of Bosselmann’s earliest works and while it is written in German, Bosselmann has further explored many of the ideas introduced by it in later (mostly English) works. In the book, Bosselmann makes a case for the creation of an ecological *Rechtsstaat* as counter measure to the anthropocentrism that pervades our legal, economic, social, political and ethical systems. He argues that the design and orientation of laws, the state and state constitutions have always been geared towards promoting unlimited human development with little respect for ecological limits. The constitutional significance of this fact is that state and legal traditions indicate the closely intertwined relationship between environmental destruction and the extent to which the state has been willing and able to secure and expand the neo-liberal exploitation of Earth and its resources through the best-known regulatory instruments at its disposal: the constitution and secondary laws. It is in this context that Bosselmann makes the case for a wholesale ecologically re-oriented constitutional, political, ethical, legal and state system alongside the principle of the ecological *Rechtsstaat*. His conception of the ecological *Rechtsstaat* provides a comprehensive and very useful cognitive framework for thinking about the importance and potential of environmental constitutionalism.

2. **D. Boyd**'s seminal work, *The Environmental Rights Revolution*, is a global comparative study of constitutions, human rights and the environment and was the first comprehensive mapping of environmental human rights in constitutions the world over, including an innovative appraisal and description of the impact of these rights. While it does not offer a conceptual treatment of environmental constitutionalism as such, the book does reflect on the advantages of a constitutional approach to environmental protection (with a specific focus on rights) which it deems to include: constitutions as the supreme law direct and constrain government powers; protect individual rights; allocate and regulate power between different authorities; implement the rule of law; and express the deepest, most cherished values of a society, which collectively work to provide a range of environmental benefits, including stronger laws, enhanced public participation, and improved environmental performance. Following an almost exhaustive empirical analysis, Boyd concludes that there is a consistent correlation between constitutional environmental protection and superior environmental performance which explains why 150 national constitutions today include environmental protection provisions such as a government duty to protect the environment; an individual right to a healthy environment; an individual duty to protect the environment; and procedural environmental rights.
3. **J. May** and **E. Daly**'s *Global Environmental Constitutionalism* is one of the most comprehensive accounts of environmental constitutionalism to date. While it does not aim to offer a normative argument for environmental constitutionalism, it does provide a comprehensive analysis of current trends in environmental constitutionalism in many of the world's constitutions by predominantly focusing (like **Boyd**) on their environmental human rights provisions and judicial interpretative trends. Implicitly acknowledging the juridical superiority and perceived regulatory advantages of constitutionalism, their thesis is that the environment has become a proper subject that warrants protection by constitutions all over the world. This phenomenon is called environmental constitutionalism, which "represents the confluence of constitutional law, international law, human rights, and environmental law." Their rights-based conception of environmental constitutionalism includes as its basic elements: substantive individual environmental rights to a quality environment; other substantive environmental rights; mostly state, but often also individual, environmental duties and responsibilities; and procedural constitutional environmental rights. A particular useful feature of this work is the detailed analysis of the role of domestic courts in jurisdictions the world over, in giving flesh to and enforcing environmental constitutionalism.
4. In *A World of Experts*, **S. Jasanoff** takes a rather unconventional approach to the topic of environmental constitutionalism by arguing for a broad based and more deliberate involvement of experts in environmental decision-making. She believes that under conditions of conflict and uncertainty, forging a new constitutional consensus is a monumental task. If we hope to address climate change through a new global constitutionalism, we must challenge current approaches to assessing the costs, benefits, and uncertainties of environmental regulation, and arrive at an international consensus regarding those approaches. In doing so, input from experts in a variety of fields should be sought. An example of this approach is the Intergovernmental Panel on Climate Change's inclusive and democratic process

of environmental assessment. She cautions that we must avoid abdicating responsibility in favor of complete reliance on experts, and remind ourselves that expertise—legal or scientific—should be questioned and tested by democratic participation.

5. **R. E. Rakhyun** and **K. Bosselmann** argue in *International Environmental Law in the Anthropocene* that the state of the global environment is deteriorating, despite the expanding body of international environmental law. By drawing on Earth system science and the concept of interlinked planetary boundaries, they argue for a goal-oriented, purposive system of multilateral environmental agreements that could be achieved through a *Grundnorm* that acts as a sort of overarching global constitutional norm giving all international regimes and organizations a shared purpose to which their specific objectives must contribute. Such a clearly agreed goal would provide the legal system with a point of reference for legal reasoning and interpretation, thereby enhancing institutional coherence across Earth's subsystems. They propose that ecological integrity could fulfill the role of such a constitutional *Grundnorm* of international environmental law.
6. In *Arguing Global Environmental Constitutionalism* **L. Kotzé** makes the case for locating environmental considerations in the global constitutionalism paradigm (i.e. not comparative global constitutionalism, but global constitutionalism beyond the state). He argues that the current global environmental law and governance regime has been designed primarily to attend to the worsening ecological crisis. Evidence, however, suggests that the regime is far from achieving its goal and it is failing in its efforts to solve what people perceive to be pervasive global environmental problems. There is little doubt that this regime is in need of urgent reforms and/or re-situation in a decidedly different paradigm. He proposes that global constitutionalism, while no panacea, could contribute to these paradigm-shifting reforms by providing a new perspective through which to view the current deficient global environmental law and governance regime and, in real terms, ameliorating some of the deficiencies of the regime through a normative process of constitutionalization.
7. The recent *Research Handbook on Human Rights and the Environment*, edited by **A. Grear** and **L. Kotzé**, predominantly focuses on human rights and their relationship with the environment. However, it also, mostly implicitly but often explicitly, deals with broader constitutional matters in the context of the environment. Bringing together leading international scholars in the field, this book combines critical and doctrinal scholarship to illuminate some of the challenging tensions in the legal relationships between humans and the environment, and human rights and environment law. Arranged in five parts, the book covers epistemologies, core values and closures, constitutionalisms, universalisms and regionalisms, with a final concluding section exploring major challenges and alternative futures.
8. In *Structural Environmental Constitutionalism*, **B. Hudson** argues that environmental constitutionalism is of increasing importance as both national and subnational governments seek to facilitate environmental protection through constitutional provisions. Most environmental constitutionalism scholarship focuses on textual constitutional provisions protecting fundamental substantive or

procedural citizen rights to a quality environment — what might be termed “fundamental environmental constitutionalism.” Yet another type of environmental constitutionalism is of equal or perhaps even more importance — that is, “structural environmental constitutionalism.” This form of environmental constitutionalism regards the allocation of environmental regulatory authority among levels of government, a particularly salient issue in federal systems of government. This article describes the key attributes of structural environmental constitutionalism, how it manifests, and its implications for constitutional forms of environmental protection across the globe.

¹ World Conservation Strategy, 1980, Section 11.

² Tim Hayward *Constitutional Environmental Rights* (Oxford University Press, 2005 EBook) Chapter 1 page 3/15.

³ Christine Schwöbel “Situating the Debate on Global Constitutionalism” 8(3) 2010 *International Journal of Constitutional Law* 611-635 at 632.

⁴ Louis Kotzé “Human Rights and the Environment through an Environmental Constitutionalism Lens” in Anna Grear and Louis Kotzé (eds) *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015) 145-169 at 163.