

BOOK REVIEW:
GLOBAL ENVIRONMENTAL CONSTITUTIONALISM

James R. May and Erin Daly
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Constitutional environmental protection is not a new phenomenon. One view is that the first reference to environmental protection can be traced to the Romanian Constitution of 1866.¹ Today, the clearest expression of constitutional environmental protection is generally accepted to manifest itself through human, and more particularly, through environmental rights. Josh Gellers indicates that the first environmental right that found its way into a constitution was in 1974 when Yugoslavia adopted such a right.² Significantly, this date corresponds with the 1972 *Stockholm Declaration of the United Nations Conference on the Human Environment*³, which is considered the first global regulatory impetus that sparked the exponential growth of international, regional and national environmental law regimes, including their rights-related aspects. The Preamble of the Declaration stated in its first paragraph, rather progressively for that time (but notably in masculinist anthropocentric terms): 'Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself'. David Boyd, a pioneer studying the phenomenon of constitutional environmental protection, recently estimated that three quarters of the world's constitutions (150 out of 193) include explicit references to environmental rights and/or environmental responsibilities.⁴ This is a surprisingly large number if one considers that the right to a clean or healthy environment is one of the few

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¹ Zachary Elkins, Tom Ginsburg and James Melton 'Comparative Constitutions Project Characteristics of National Constitutions' 2014 version 2.0, available at <http://comparativeconstitutionsproject.org/ccp2015/download-data/>.

² Joshua Gellers 'Explaining the Emergence of Constitutional Environmental Rights: A Global Quantitative Analysis' 2015 6(1) *Journal of Human Rights and the Environment* 75-97.

³ 11 ILM 1416 (1972).

⁴ David Boyd 'Constitutions, Human Rights, and the Environment: National Approaches' in Anna Grear and Louis Kotzé (eds) *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015) 171-175.

rights widely recognized in modern constitutions that have no roots in the so-called International Bill of Rights (a collection of foundational UN documents and treaties on human rights). As a juridically and moral-ethically elevated expression of constitutionalism through rights, environmental protection today has the possibility of assuming greater status, and hopefully a higher level of regulatory priority and care within the protective realm of legal systems worldwide. As well, the prominence of rights-based environmental protection has now gained universal prominence at the strategically important global political level with the establishment of the United Nations Special Rapporteur on Human Rights and the Environment, Professor John Knox.

In tandem with the normative development and spread of environmental rights the world over, scholars have been searching for a common, rigorous, analytically grounded framework within which to situate, and to critically interrogate, constitutional environmental protection. The term that has emerged (and that continues to mature) for this framework, is *environmental constitutionalism*. The term itself is much wider than environmental rights, which as a category of constitutional environmental protection, forms part of the more encompassing environmental constitutionalism paradigm. Thus, in addition to environmental rights, constitutional aspects such as the rule of law, separation of powers, judicial independence, democracy, and constitutional supremacy, are now part and parcel of the wide focus of environmental constitutionalism's analytical scope.⁵

James May and Erin Daly, both distinguished professors at Delaware Law School at Widener University in the USA, have over the past decade established themselves as luminaries and leading scholars in the field of environmental constitutionalism. Enriched with a strong comparative constitutionalism perspective, their work focuses predominantly on environmental rights in various national jurisdictions around the world, but also more broadly on some of the other aspects of environmental constitutionalism outlined above. As an environmental law scholar with significant practical experience, May is, among others, Director of the Global Environmental and Natural Resources Law Institute and Co-director of the Environmental Law Centre at Delaware Law School, Widener University. He has litigated more than 200 public interest environmental claims. Daly is regarded globally as a foremost constitutional law expert, and her work more specifically focuses on comparative constitutional law and transitional justice. Combining their specialist respective skills, these scholars have over the years managed to initiate, direct, sustain, and to significantly deepen the environmental constitutionalism debate and analytical agenda. Their widely cited publications that focus on environmental constitutionalism are too numerous to list here, but the essence of the scholarship that has been offered by this burgeoning body of work has recently culminated in what could be considered the most important publication on environmental constitutionalism since David Boyd's *The Environmental Rights Revolution* (UBC

⁵ See generally, Louis Kotzé *Global Environmental Constitutionalism in the Anthropocene* (Hart, Oxford, 2016).

Press, 2012). Published in 2015 by Cambridge University Press, their book, entitled *Global Environmental Constitutionalism*, uses a comparative law approach to survey the trends in constitutional protection for environmental rights around the world and examines the challenges to and opportunities for judicial enforcement of those rights in a multitude of jurisdictions.

The book is divided into three parts: Part I, Evolution and Existence of Environmental Constitutionalism; Part II, Vindication and Practices in Environmental Constitutionalism; and Part III, Emergence and Future of Environmental Constitutionalism. Part I comprises two chapters that provide the theoretical and contextual foundation of the book. Chapter One, *The Nature of Environmental Constitutionalism*, broadly explores what constitutionalism means, what its value is in the environmental context, what its limitations and possibilities are, and what the place of rights is in the constitutionalism paradigm. Chapter Two, *Textualizing Environmental Constitutionalism*, focuses more specifically on the issue of rights, the likelihood of constitutions providing environmental rights, and the different manifestations of environmental rights which, they argue, reach well beyond the axiomatic 'right to a healthy environment' formulation. The value of this introductory inquiry especially is its significant addition to the nascent conceptual interrogation of environmental constitutionalism. It succeeds in mapping and critically evaluating environmental constitutionalism, including its rights-related aspects.

Departing from Part I's theoretical and conceptual analysis, Part II, chapters Three, Four and Five, turns to the practical aspects of environmental constitutionalism. The analysis focuses on the adjudication of environmental rights, the enforcement of environmental rights, and appropriate remedies. Specific issues that are discussed include, among others: obstacles in environmental rights adjudication, justiciability, standing, procedural rules challenges, defences and limitations, state obligations and enforcement challenges. This part especially succeeds by drawing on good practice examples from various jurisdictions that explicate and guide the actual enforcement and adjudication of environmental rights.

The final part of the book turns the analytical focus to emerging manifestations and applications of environmental constitutionalism. Chapter six focuses on the right to water as an environmental right. Chapters Seven, Eight and Nine then grapple with subnational (local, provincial, federal) environmental constitutionalism; procedural environmental rights; and more controversially, the emergence of contentious forms of environmental constitutionalism such as the rights of nature, the public trust doctrine, climate change and environmental sustainability. I found this final re-imaginary part thought provoking, especially to the extent that it pries open axiomatic epistemic closures that continue to shut out alternative, but not altogether unrealistic, modes of thinking about environmental constitutionalism.

In sum, May and Daly, two remarkable thought-leaders in the field, have provided us with a landmark publication that is so much more than a comprehensive textbook focusing on environmental rights. Together with Boyd's influential body of work, *Global Environmental Constitutionalism* completes the Northern American-based scholarly treatise on environmental

constitutionalism. It is a remarkable piece of work that offers a wide audience essential information on and analysis of the global emergence of environmental rights within the environmental constitutionalism paradigm. This book is an indispensable and highly relevant resource for everyone interested in environmental constitutionalism. I can recommend it unconditionally.