

Global Judicial Handbook on Environmental Constitutionalism

3rd Edition

Reproduction

This publication may be reproduced in whole or in part and in any form for educational and non profit purposes without special permission from the authors or UN Environment, provided that acknowledgement of the source is made; acknowledgment of Cambridge University Press, publisher of May & Daly, Global Environmental Constitutionalism, should also be made. UN Environment will appreciate receiving a copy of any publication that uses this material as a source.

No use of this publication can be made for the resale or for any other commercial purpose whatsoever without the prior permission in writing of UN Environment. Application for such permission with a statement of purpose of the reproduction should be addressed to the Communications Division, of the UN Environment Programme, P.O BOX 30552, Nairobi 00100 Kenya.

The use of information from this document for publicity of advertising is not permitted.

Disclaimer

The contents and views expressed in this publication do not necessarily reflect the views or policies of the UN Environment Programme or its member states. The designations employed and the presentation of materials in this publication do not imply the expression of any opinion whatsoever on the part of UN Environment concerning the legal status of any country, territory or its authorities, or concerning the delimitation of its frontiers and boundaries.

Mention of a commercial company or product in this document does not imply endorsement by UN Environment.

Trademark names and symbols are used in an editorial fashion with no intention or infringement on trademark or copyright laws.

Produced by

Law Division
UN Environment Programme
P.O. Box 30552, Nairobi, Kenya Tel: +254 20 7623365
Email: UNEnvironment-Law-Director@un.org
www.unenvironment.org

Contents

ACKNOWLEDGEMENTS	5
INTRODUCTION	7
CHAPTER 1: ROLE OF THE JUDICIARY IN ENVIRONMENTAL CONSTITUTIONALISM	11
CHAPTER 2: A TAXONOMY OF ENVIRONMENTAL CONSTITUTIONALISM	18
A. Substantive Rights	19
B. Procedural Environmental Rights	21
C. Other Aspects of Environmental Constitutionalism	22
1. Environmental Obligations, Duties and Policies	22
2. Rights to Water	22
3. Rights of Nature	23
4. Sustainability and Public Trust	23
5. Climate Change	24
6. Dignity	25
D. Subnational Environmental Constitutionalism	25
CHAPTER 3: JUSTICIABILITY OF ENVIRONMENTAL CONSTITUTIONALISM	29
A. Presumptions About Justiciability	29
B. Who Can Enforce Constitutional Environmental Rights?	31
C. Who is Responsible?: Identifying the Appropriate Defendant	36
D. Timing: When is the Right Time to File a Claim?	37
E. Justiciability and Process	38
F. Affirmative Defenses	40

CHAPTER 4: ADJUDICATING ENVIRONMENTAL CONSTITUTIONALISM	43
A. Challenges in Adjudicating Environmental Rights	43
1. Interpreting Constitutional Text	43
2. Identifying Breaches	47
B. Four Types of Judicial Interpretation	48
1. Independent Environmental Rights	48
2. Dependent Environmental Rights	51
3. Derivative Environmental Rights	53
4. Dormant Environmental Rights	56
CHAPTER 5: REMEDIES	59
A. State Obligations under the International Law Framework.	59
B. The Range of Remedies	61
1. Preventing Further Environmental Harm.	61
2. Injunctions.	61
3. Damages	68
4. Compliance Orders	69
5. Imprisonment	70
C. Challenges to Enforcement	71
CHAPTER 6: ENVIRONMENTAL DIGNITY RIGHTS	74
A. Dignity Rights	74
B. Dignity and the Environment	75
C. Dignity Rights and Environmental Constitutionalism	76
D. Bringing Dignity Rights into Environmental Constitutionalism	77
1. Defining the cause of action	77
2. Standing	78
3. Remedies	79
CHAPTER 7: ENVIRONMENTAL CONSTITUTIONALISM AND CLIMATE JUSTICE	81
A. Climate Justice	81
B. Express Constitutional Provisions Addressing Climate Change	83
C. Climate Constitutionalism and Justice in the Courts	84
CONCLUSION: JUDICIAL ENGAGEMENT OF ENVIRONMENTAL CONSTITUTIONALISM	88

ACKNOWLEDGEMENTS

We have a host of people and institutions to thank for ideas, input and encouragement with the 2nd edition of this handbook. We tested a beta version at the inaugural *Judicial Workshop on Environmental Rights*, held at Pretoria University, South Africa, in April 2016, which was sponsored by Widener University Delaware Law School (USA) and North-West University (Potchefstroom, South Africa), with support from the United Nations Environment Programme (UNEP). The workshop had twin goals of providing both practical and theoretical grounding in the implementation of environmental rights and serving as the springboard for the development of these training materials. We had the pleasure of co-chairing the event, with facilitators John Knox, Loretta Feris, Louis Kotzé, Melanie Murcott, and Caiphaz Soyapi, and observers and advisers Arnold Kreilhuber, Angela Kariuki, Cecilia Njenga, and Megan Wentzel. Each contributed to what you see within these pages.

We published the 1st edition of the handbook in advance of *Constitutions, Environment and Human Rights: Practice and Implementation, Regional Judicial Colloquium for Latin America and the Caribbean*, under the auspices of the Federal Senate of Brazil—through the Environment Committee and the Joint Senate and House Permanent Committee on Climate Change, and the Global Judicial Institute for the Environment, Brasilia, Brazil, in May 2017, which benefited from numerous additional hosts, sponsors, planners and participants, including Denise Antolini, Antonio Benjamin, Andrea Brusco, Rodrigo da Costa Sales, Claudia de Windt, Soo-Young Hwang, Aaron Laur, and Lara Ognibene, also reflected in these pages.

The 2nd edition was also sponsored by UNEP and we are especially grateful to Angela Kariuki, Arnold Kreilhuber and Andrew Raine, as well as support from Research Professor Louis Kotzé of the North-West University in Potchefstroom, South Africa (currently visiting at Lincoln University in the UK) and Professor John H. Knox, the former United Nations Special Rapporteur on Human Rights and the Environment. We also thank the Asian Development Bank for its assistance, especially Irum Ahsan. And we are also grateful to John Berger with Cambridge University Press for his support for *Global Environmental Constitutionalism*, from which portions of these materials were adapted. These materials also enjoyed input from Judges Bashir Valley, Brian Preston, and Meredith Wright.

This Third Edition is again made possible by the generosity of UNEP and the coordination and support of Angela Kariuki. We are also grateful to many European scholars who helped us identify critical cases including Sigrid Boysen, Natalia Kobylarz, Louis Kotzé, Gabriela Oanta, Ole Pedersen, Jochen Sohnle, and Stephen Turner.

Lastly, we are grateful for the assistance of Maggie Stewart Adams and Janet Lindenmuth at Widener University Delaware Law School for research and map-making, and to Patricia A. Burns for all manner of support and assistance. For the second edition of the Companion, we are also grateful to Ram Telluri (Delaware Law '17), especially for assistance with the raw materials. We have for the sake of readability omitted internal references, footnotes and endnotes. The reader can find these and much more in May & Daly, *Global Environmental Constitutionalism* (Cambridge 2015), and in the bibliography, which is found in the Compendium.

We hope that you find this to be a useful resource, and invite your comments and suggestions for improvement (jrmay@widener.edu, edaly@widener.edu).

-James R. May & Erin Daly

Introduction



INTRODUCTION

Courts matter. They are essential to the rule of law. Without courts, laws can be disregarded, executive officials left unchecked, and people left without recourse. And the environment and the human connection to it can suffer. Judges stand in the breach. That said, judges can hardly on their own cause wholesale transformation of domestic environmental policy. In many countries, constitutional and apex courts have spoken seldom if at all about environmental constitutionalism. And yet, it is our contention that even these episodic assertions are important because they are indicative of a growing worldwide awareness of the potential of environmental constitutionalism. The mere fact that courts are focusing on the constitutional dimensions of environmental issues makes it more likely that environmental awareness will seep into the cultural consciousness for present and future generations. In environmental constitutionalism, a little goes a long way.

This Handbook is designed to provide jurists with an overview of environmental constitutionalism: we address what it is, the peculiar practical and procedural issues it presents, and how courts from around the globe have engaged it. Environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights, and environmental law. It embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide. Environmental constitutionalism offers one way to engage environmental challenges that fall beyond the grasp of other legal constructs. It can be coalescent, merging governmental structures and individual rights approaches to further individual and collective norms and policies. It can be used to protect local concerns -- such as access to fresh food, water or air -- or global concerns like biodiversity and climate change that share elements of both human rights and environmental protection.

Environmental constitutionalism is variable, encompassing substantive rights, procedural rights, directive policies, reciprocal duties, or combinations of these and other qualities. Some aspects are fairly common. For example, about one-half of the countries of the world expressly or impliedly recognize a constitutional right to a quality environment. About the same number impart a corresponding duty on individuals to protect the environment.

Some provisions are quite specific, such as those that provide for rights of nature, or rights to potable water or other natural resources. Some are more ephemeral, recognizing trust responsibilities over natural resources or toward future generations, or addressing related subjects like sustainability or climate change. Some recognize environmental stewardship as a matter of national policy.

While most constitutional provisions addressing environmental concerns are narrative, some incorporate numerical outcomes, such as maintaining a percentage of prescribed tree cover, as in Bhutan (60 percent) and Kenya (10 percent).

There is also an uptick in provisions that are designed to afford special process rights in environmental matters. Environmental procedural rights normally involve requirements for environmental assessment, access to information, or rights to petition or participate. Such rights help to keep countervailing substantive rights vital. A constitutional guarantee to a

beneficial environment may be more likely to take root when stakeholders have the right to receive free and timely information, participate in deliberations, and judicially challenge environmental decisionmaking. Procedural environmental constitutionalism is also important in its own right, and can be as or more efficacious than substantive environmental rights if courts are more comfortable ordering procedural rather than substantive remedies.

Environmental constitutionalism is playing an important role in recognizing the human rights implications of environmental degradation and climate disruption; to that extent, it has the capacity to address the sorts of environmental problems felt most acutely by those often ignored or underserved by existing legal structures. International treaties, principles and custom do little to advance environmental rights at the local and subsidiary level. There is as of yet no global environmental rights treaty. Moreover, multilateral and bi-lateral treaties that address environmental concerns are often of limited if any utility to individuals. And while domestic statutory and regulatory laws affording environmental protection and resource conservation are quite advanced in many nations, these laws seldom aim to advance environmental rights or environmentally-related social rights. In addition, while international human rights regimes most nearly approach the notion that individuals have a fundamental right to a quality environment, they are also often out of reach to individuals who would gain from the recognition of environmental rights at the constitutional level. Environmental constitutionalism can help to bridge the gaps left by these other legal regimes.

Some countries, like Brazil, France, and South Africa, incorporate most or all of environmental constitutionalism, while others eschew it entirely. And, in some countries, it exists almost entirely as a result of judicial action. The variety of provisions, aiming to protect different aspects of the environment with a range of scaffolding and enforcement mechanisms, attests to the growth of environmental constitutionalism throughout the world in number and in relevance.

Environmental constitutionalism is growing at the subnational level too, filling gaps in federal systems. Most prominently by states in the Americas in general, and Brazil in particular, subnational governments around the globe have seen fit to constitutionalize substantive and procedural environmental rights, environmental duties, and sustainable development for present and future generations, often with much more specificity and enforceability than provided in national constitutions. Subnational environmental constitutionalism can

预览已结束，完整报告链接和二维码如下：

https://www.yunbaogao.cn/report/index/report?reportId=5_14216

