

Book Review: James R. May and Erin Daly: Global Environmental Constitutionalism

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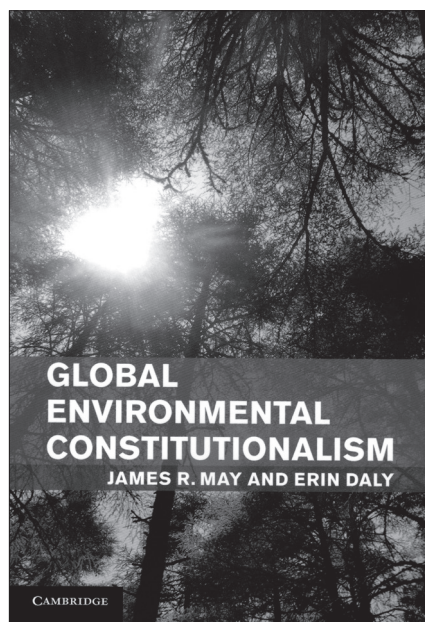
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James R. May and Erin Daly: Global Environmental Constitutionalism

Reviewed by Bruce E. Auerbach

Global Environmental Constitutionalism is a survey of the diverse approaches to constitutionalising environmental rights and obligations in national and subnational constitutions around the world. It is also an analysis of the impact and effectiveness of these different approaches to environmental constitutionalism. As the authors point out, their goal is not make a normative argument for constitutionalising environmental rights, but to write a “comprehensive guide to and examination of current trends in environmental constitutionalism” (3). Their analysis of the varying approaches found in different nations leads to an understanding of the role constitutional protections for the environment can play, and what forms of protection are likely to be most effective.



The authors are systematic in their examination of the different approaches to protecting the environment found in constitutions throughout the world. The work is impressive in its scope. They survey some 140 contemporary constitutions with some form of environmental protection or rights, looking at the advantages and limitations of the different approaches to constitutionalising environmental rights and obligations. The authors’ survey of contemporary environmental provisions does not lend itself to detailed policy recommendations, but rather to general guidelines for enhanced protection for the environment and environmental rights.

One might question the authors’ decision to eschew organising their work around the defence of a particular approach to envi-

ronmental constitutionalism, or perhaps a limited range of approaches. Such a thesis would have been a useful organising tool. Moreover, it is clear from their analysis of the range of provisions contained in the constitutions of different nations that the authors are convinced that some ways of protecting the environment and environmental rights are superior to others. But the authors leave it largely to the reader to put together these conclusions.

In their defence, the history and traditions of different nations differ so much that even if one could develop and defend an ideal model of environmental constitutionalism, this model might well be unacceptable to many nations with different legal traditions. Thus, rather than analysing the question of environmental constitutionalism from the top down, the authors approach it from the bottom up. There is a logic, perhaps even a compelling logic, to this method. But it renders their book somewhat less accessible to the reader – though I would hasten to add, eminently worth the effort.

On balance, May and Daly are more optimistic about the capacity of the judiciary to enforce constitutional environmental rights than some who have written on this subject. For example, in “Environmental rights and future generations,”¹ Hong-Sik Cho and Ole W. Pedersen argue courts have a limited capacity to enforce environmental rights. Instead, they argue that the legislature is generally better able to fashion the trade-offs necessary to develop effective environmental policy.

A limitation of *Global Environmental Constitutionalism* is that the work is likely to feel dated within a relatively short time, as constitutions continue to be amended or rewritten to incorporate different forms of protection for the environment and environmental rights. This is clearly not a failing of the authors, but it does suggest that revised and updated editions will be needed every decade or so.

Indeed, what is striking about May and Daly’s work is the extent to which global environmental constitutionalism is a continually evolving subject. The entire field is less than fifty years old. In the last fifty years, approximately 140 national and sub-national constitutions have been amended or rewritten to include some statement protecting environmental rights. Some of these statements are hortatory, unenforceable in a court of law. Others, however, are statements of individual rights that courts have

understood to be self-enforcing. This is to say that the environmental rights protected by the constitution may be adjudicated in court without the need for additional legislation. Almost all of these provisions date from 1972 or later.

The authors make a strong case that more recent constitutions, and more recent revisions of constitutions, have benefited from lessons drawn from other nations’ efforts to protect the environment through constitutional guarantees of, and protections for, environmental rights. Since later constitution writers often draw on the examples of constitutions adopted in other nations, to the extent that nations learn from evaluating these efforts of other nations to constitutionalise environmental protections – both from their successes and their failures – May and Daly’s work makes an indirect but powerful case for revising a nation’s constitution at regular intervals.

The United States Constitution contains no provisions protecting the environment, nor the rights of persons to a healthy environment (the latter is contained in the constitution of the State of Montana). This is hardly surprising given the era in which the US Constitution was written, and the difficulty of amending that constitution. But one cannot help but wonder what the US Constitution might look like if Jefferson’s view that the Constitution should be rewritten every generation had prevailed over James Madison’s more cautious approach. Would the United States have a modern constitution with protections for the environment and environmental rights, and perhaps for the rights of posterity?

It is also important to note that there is a close relationship between the protection of the environment and intergenerational justice. Indeed, it can be argued that there is no more important obligation to future generations than the preservation of the environment. Because damage to the environment is often cumulative, distant future generations are likely to be benefited even more than proximate generations, by efforts to halt environmental degradation.

On the other hand, environmental justice and intergenerational justice are not interchangeable concepts. Intergenerational justice is at heart anthropocentric. At its base, is the belief that obligations are owed to those *people* who will live in the future. By contrast, some of the most interesting contemporary approaches to environmentalism eschew anthropocentrism, focusing

instead on the environment as a self-contained system. Still, if the concepts do not coincide perfectly, there is a significant area of overlap.

There may be special difficulties in making constitutional protection for intergenerational justice self-enforcing. Unlike the right to a safe and healthy environment – which, while especially important for future generations, is also valuable to the current generation, and thus adjudicable by them as a personal right, it is often unclear who can represent the interests of future generations in pressing more general claims to intergenerational justice. To the extent that the present generation benefits from shifting costs of current policies onto future generations, establishing an effective voice for the rights of future generations is a more complex issue. Still, there is great benefit in considering carefully May and Daly’s *Global Environmental Constitutionalism*, both for those interested in environmental protection and in intergenerational justice.

Notes

1 Cho, Hong-Sik Cho / Ole W. Pedersen (2013): Environmental Rights and Future Generations. In: Tushnet, Mark / Fleiner, Thomas / Saunders, Cheryl (eds.): Routledge Handbook of Constitutional Law. London: Routledge 401-412.

May, James R. / Daly, Erin (2014): *Global Environmental Constitutionalism*. Cambridge: Cambridge University Press. 414 pages. ISBN: 978-1-107-02225-6. Price: £65.