

# GLOBAL ENVIRONMENTAL CONSTITUTIONALISM

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## ABSTRACT

This article supports the perspective that environmental constitutionalism is a global and foundational subject. Considering the novelty and thin base of this only emerging field of inquiry, it aims for making some suggestions for formulating the purpose and scope of environmental constitutionalism in a global range. Moreover, considering that the very nature of environmental rights is more fundamental than classic human rights, the mindset and methodology applied to the studies of constitutionalism all over the world must change its basis from anthropocentrism to an ecocentrism, by incorporating sustainability as a constitutional principle. In this way, the first steps towards a global environmental constitutionalism are being taken in the last few years. But the subject is still challenging.

**Keywords:** Global Environmental constitutionalism. Principle of sustainability. Ecocentrism.

## 1 THE RISE OF GLOBAL CONSTITUTIONALISM

Over the last decade there has been an outburst of literature on global constitutionalism. Written mostly by international lawyers (but less so environmental lawyers), this literature suggests a degree of harmonious development among the world's national constitutions that could facilitate a constitutionalisation of international law and governance.<sup>1</sup> Broadly speaking, the thesis is that the increasing interdependence of nation states has created a certain "constitutionalisation of international organisations"<sup>2</sup> and a degree of uniform constitutionalist principles such as human rights, state responsibility, and *ius cogens* or *erga omnes* norms. This implies a transnational way to think about institutional arrangements that traditionally have been conceived in a strictly national manner. Examples include the 'rule of law' and 'separation of powers', but also 'civil society' and possibly 'democracy' and 'constitution'.

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To this end, global constitutionalism can be described as a new way of thinking or ‘mindset’<sup>3</sup> around international law and governance. Instead of viewing states as sole creators of international law and governance, the focus is on normative principles and institutional arrangements that are both, national and transnational in character. This makes it possible to see the relationship between international law and domestic law in less dichotomic and more correlated terms<sup>4</sup> and develop new areas of study as, for example, international constitutional law<sup>5</sup>. Effectively, the conversation about constitutional ideas and principles shifts from the national to the comparative and from the international to the global. This kind of constitutional conversation is commonly, but not always<sup>6</sup>, referred to as global constitutionalism.

“Constitutionalism”<sup>7</sup> itself is associated with the study of fundamental norms and institutional arrangements through which political and legal decisions are made. Typically, they involve basic ideas related to the rule of law, justice, human rights and democracy and do not have an exclusive national identity. Although they are more institutionalized at national than at international level, they are in no way confined to states. Essentially, they are of global or transnational nature.<sup>8</sup> This is the main reason why constitutionalism has a global dimension to it. It is the study of constitutional norms, policies and practices in and beyond the state.

We can, therefore, conceive global constitutionalism as the study and advocacy of constitutional ideas that present themselves at international and national levels. In other words, public international law is one area of research, domestic law another, and ideally international and comparative legal research inform each other.

An example of this approach is the study of human rights. They first appeared in national jurisdictions, particularly in the United States and France. Their origins, however, are in the intellectual culture of the 18<sup>th</sup> century Age of the Enlightenment which spread throughout Europe and the world and eventually led to the Universal Declaration of Human Rights, a document of international law. It would be conceptually flawed to study human rights in *either* a national or international context. Their very nature as unalienable fundamental rights (to which a person is inherently entitled simply because she or he is a human being) constitutes their universal character.

In the same vein, we can think of the environment as a universal concern. Arguably, the environment is even more fundamental than human rights as it represents the natural conditions of all life including human beings.

Both, the protection of human rights and the protection of the environment are constitutionally relevant precisely because of their fundamental importance. Environmental protection has constitutional status in most, although not all<sup>9</sup>, states. If we accept that the 21<sup>st</sup> century will be defined by its success or failure of protecting human rights and the environment<sup>10</sup>, then global environmental constitutionalism<sup>11</sup>, like global constitutionalism in general, becomes a matter

of great urgency.

The remainder of this article identifies some of the building-blocks for defining purpose and scope of global environmental constitutionalism. These building blocks include the constitutional character of international environmental law (II.), environmental rights (III.), sustainability (IV.) and global environmental governance (V.).

## 2 THE CONSTITUTIONAL CHARACTER OF INTERNATIONAL ENVIRONMENTAL LAW

Current international environmental law includes a plethora of global treaties, covenants and documents. From the creation of the United Nations in 1945 under the United Nations Charter to the UN Declaration on the Rights of Indigenous Peoples in 2007 or a new Climate Agreement expected to be adopted in December 2015, numerous documents and associated institutions of governance have been developed in response to what today is perceived as the global ecological crisis. So does the system of international environmental law amount to what could be called an “international environmental constitution”<sup>12</sup>?

In his contribution to a book entitled *Towards World Constitutionalism*<sup>13</sup>, Alexandre Kiss explored the constitutional character of international environmental law and concluded that an “environmental constitution” in the “usual sense of the term” cannot be deduced.<sup>14</sup> There is neither a global instrument nor an independent global institution overarching the whole area and “even environmental protection is integrated into a vast complex: sustainable development”.<sup>15</sup> He pointed out that a major issue in constitutionalising environmental law is the constantly changing degree of scientific knowledge requiring international environmental law to be sufficiently flexible and adaptable.<sup>16</sup> Kiss considered the lack of a defined overall objective as the ultimate reason for the constitutional weakness and fragility of international environmental law.

Daniel Bodansky uses the differentiation between “thin” and “thick” to explain that international environmental agreements and their associated systems of governance can be seen as thin or weak forms of environmental constitutions.<sup>17</sup> They may be constitutions in the thin sense because they establish ongoing (global) governance to address specific issues via the creation of institutions, the specification of rules that guide and constrain the institutions and the entrenchment of those rules through amendment procedures. Constitutions in the thick sense would require institutions that function independently from states with a decision-making and norm-setting capacity. Typically, what happens is that a treaty will contain the required governance arrangement, describe the basic institutions and decision making procedures of the regime, but then the majority of norms and regulations created by that governing body will be captured in protocols, annexes or schedules, attached to the treaty which are easier to amend.<sup>18</sup> In this

way international environmental agreements do not constrain the institutional entities they create.

Bodansky rules out multilateral environmental agreements possessing global constitutional nature, describing them as “still very much state-driven”<sup>19</sup> (such as those addressing climate change, ozone depletion, hazardous chemicals, or endangered species). Furthermore, states generally retain the right of exit, meaning they can withdraw from a treaty. The dominance of states is only rudimentally challenged by non-State actors with their limited role in standard setting and the compliance process.<sup>20</sup>

Nor does Bodansky consider that international environmental law as a whole constitutes a global constitution. While noting a number of characteristic features which distinguish it from classical international law, such as widespread use of the framework convention and protocol approach, rapid amendment procedures, a distinctive system of treaty bodies and non-compliance procedures, Bodansky asserts that these distinctive features of international environmental law “do not amount to a constitution in any meaningful sense of the term”.<sup>21</sup> They do not establish secondary rules about how international environmental law is developed and enforced. To the contrary, the concept of a constitution is undermined by some prominent features of international environmental law, such as the use of politically-oriented non-compliance procedures. Instead of creating a cohesive system of unified law, “the distinctive mechanisms of international environmental law represent a toolbox that states can use when addressing a variety of new problems”.<sup>22</sup>

If treaties can, at best, be seen as constitutive elements, perhaps a more promising candidate to fill the role of an international environmental constitution is the body of general principles of international environmental law. To this end, Bodansky considers the duty to prevent transboundary harm, the polluter pays principle, the precautionary principle, the principle of common but differentiated responsibility, and the principle of sustainable development to conclude that these general principles do not represent a core value system for the international community, or if they do it is a weak and vague system. The reason is that there are too many meanings and uses of the principles for them to form a coherent and distinct concept. Associated with this is the lacking coherence of global environmental governance. There are, at present, no institutions independent enough to function with their own mandate, for example, a mandate of guardianship or trusteeship, or in an elevated norm-defining role.

Both, Bodansky and Kiss see the absence of a coherent concept or sufficiently defined overarching goal as the main reason for the lacking constitutional quality of international environmental law. Positively speaking, the possibility of a global environmental constitution depends on normative coherence and institutional strength to guide and coordinate states behaviour.

If this is a fair summary, then the search for coherence and strength defines

the goal of global environmental constitutionalism. A mere collection of important ideas and principles would not meet such a goal. Nor would constitutional elements such as procedural environmental rights and access to judicial review<sup>23</sup> in themselves say very much about actual constitutionalization. While they may be indicative, the overall purpose of global environmental constitutionalism goes further. It can be described as an analysis and advocacy of environmental values, principles and rights that are sufficiently coherent and enduring to form a constitution<sup>24</sup>. As mentioned earlier, such a purpose is best served through researching both, international and national developments of environmental law and governance.

### 3 CONSTITUTIONALIZING ENVIRONMENTAL RIGHTS

A constitution is a value-laden concept, usually encapsulating the idea of democracy, the separation of powers, the protection of human rights, and certain social security guarantees.<sup>25</sup> Human rights, in particular, define the core of how a political community should function. For the prospects of environmental constitutionalism human rights and their relationship to the environment are, therefore, of great importance.

Many international environmental agreements highlight the linkages between human rights and the environment. They are visible, for example, in the Stockholm Declaration, the World Conservation Strategy, UN World Charter for Nature, Caring for the Earth, United Nations Framework Convention of Climate Change (UNFCCC), 1992 Rio Declaration, Agenda 21, UN Millennium Declaration, Johannesburg Declaration or the Rio+20 outcome document “The Future We Want”.

At the time of the 1972 Stockholm Declaration, only a handful of national constitutions addressed environmental issues.<sup>26</sup> Today, some 125 constitutions incorporate environmental norms, 107 are in developing countries compared to 18 in developed countries.<sup>27</sup> About 92 constitutions explicitly recognise the right to a healthy or decent environment.<sup>28</sup> No other human right has achieved such a broad level of constitutional recognition in such a short period of time.<sup>29</sup>

However, a human right to a healthy environment is only one form towards constitutionalizing the environment. Some 97 constitutions contain obligations for the national government to prevent harm from the environment and 56 constitutions recognize a responsibility of citizens or residents to protect the environment.<sup>30</sup>

Clearly, there is a world-wide trend towards constitutionalizing environmental rights and responsibilities with respect to the environment. But will it make a real difference? This is not easy to answer and there is not only the issue of enforcement. In general terms, the omnipresence of free market ideology has certainly undermined efficiency and enforceability of environmental rights, but there are also genuine law enforcement issues. For example, the legal cultures in Latin America are markedly different from European legal culture with its

emphasis on actual enforceability of constitutional rights. Therefore, Mother Earth rights (as in Bolivia and Ecuador) are not *per se* superior to human rights and state obligations (as in Germany) if they lack enforceability. Fundamentally, we need to consider how constitutional rights – as a socio-legal construct – reflect ecological requirements. This raises the issue of anthropocentrism vs. ecocentrism.

Environmental rights typically refer to access to, and use of, the environment, but can also be understood to imply ecocentrism. Alan Boyle rightly observes that “environmental rights do not fit neatly into any category of human rights”<sup>31</sup> to then ask: “Has the time come to talk directly about environmental rights – in other words a right to have the environment itself protected? Should we transcend the anthropocentric in favour of the ecocentric?”<sup>32</sup> Like most commentators, Boyle uses the term environmental rights generically to capture the environmental dimension of human rights.<sup>33</sup>

Trying to conceptualize this dimension should be an urgent pursuit of environmental constitutionalism. After all, anthropocentric reductionism has been one of the main reasons for the ongoing failure of environmental law and governance to respond to the ecological crisis.<sup>34</sup> How could the anthropocentricity of Western human rights and constitutions be transformed to ecologically sound legal principles and rights? I have always argued that such a transformation is needed<sup>35</sup> and while ecocentrism, rights of nature and Earth law are still largely confined to jurisprudential theory, there is a growing perception, even among governments, that law and governance need to be grounded in non-anthropocentric environmental ethics. Promoting this shift and working towards such a constitutional moment could be an ambition of global environmental constitutionalism.

According to Bruce Ackerman, a constitutional moment can occur when there are unusually high levels of sustained popular attention to questions of constitutional significance.<sup>36</sup> Such a situation arose during the 1980's in West Germany when the Green movement began to articulate the legal implications of ecocentrism. This culminated in a Government-driven constitutional review (1985-89) to consider a shift from traditional anthropocentrism to an ecocentric value system underlying the German Basic Law (*Grundgesetz*). At its core was the question whether ecological realities require a redefinition of human rights to accept “ecological limitations” and a special obligation of the state to protect the environment “for its own sake” as well as for future generations. The newly established Institute *für Umweltrecht* (Institute for Environmental Law) and *Verein für Umweltrecht* (Association for Environmental Law) proposed to redefine human rights such as the right of liberty, freedom of research and right to property to include ecological limitations. In essence, the use of natural resources would no longer be protected, but only their *sustainable* use, effectively reversing the burden of proof rule. Remarkably, these proposals were supported by the *Bundesrat*, the Upper House of the *Länder*/states and triggered a full review by the Joint Bundetag-Bundesrat Constitutional Commission.<sup>37</sup> In the end, the Commission did not resolve these issues, but called for a wider public dialogue precisely because

they are so important: “The question of either an anthropocentric or ecocentric approach to the constitution is of such fundamental importance, that the Commission did not see itself as mandated to answer it. Instead the Commission calls for a wide expert and public dialogue before considering such a change.”<sup>38</sup>

One step in this direction was the draft constitution of 1991<sup>39</sup> which defined a “socio-ecological market system” and included ecological limitations of human rights and property rights as well as a state obligation to protect the environment for its own sake. While this draft was rejected by the Government, the 1994 and 2002 amendments to the *Grundgesetz* reflected a notable move away from anthropocentrism. Article 20a, for example, established a new state obligation: “Mindful also of its responsibility toward future generations, the State shall protect the natural bases of life (...).” – not just “human” life following engaged parliamentary debate on anthropocentrism vs. ecocentrism.<sup>40</sup> In 2004, a further amendment added “and the animals” to follow the notion of “natural bases of life” in response to uncertainties surrounding the constitutional status of animals<sup>41</sup>.

Like Germany, many other countries had constitutional debates around the question whether environmental protection and ecological sustainability ought to be a fundamental concern and objective. The results of these debates are documented in the works of David Boyd<sup>42</sup>, James May and Erin Daly<sup>43</sup>, and others. However, the international comparison also shows that the process of ‘greening’ of national constitutions and international law is slow, incomplete, sketchy and not following an overarching objective. There is, as yet, no global consensus on the importance of sustainability similarly to constitutionalized values such as human rights, democracy or peace. Likewise, policy objectives tend to focus on economic prosperity and largely ignore its dependence on sustainability.

Promoting an overarching sustainability objective should be at the heart of global environmental constitutionalism. At constitutional level, the question is whether there is a constitutive principle of this nature, either in existing law or in *statu nascendi*.

#### 4 SUSTAINABILITY AS A CONSTITUTIONAL PRINCIPLE

Sustainability is generally understood as fundamental to provide for the future. The idea of sustainability has deep roots in all cultures of the world.<sup>44</sup> The modern concept of sustainable development emerged from the 1972 Report to the Club of Rome “Limits to Growth”<sup>45</sup>. The Report described “sustainable use”, “sustainable yield” and a “sustainable state of global equilibrium” as the means to avoid “overshoot” and “collapse” of the “carrying capacity of the planet”.<sup>46</sup> The term sustainability has been in use since the early 18th Europe when Saxon economist Carl von Carlowitz based the system of forest management on the notion of *nachhaltig* (sustainable) and *Nachhaltigkeit* (sustainability).<sup>47</sup> Ever since, the core meaning of sustainability has been the preservation of natural systems supporting human life.<sup>48</sup>



Understood in this way it also informed the UN Commission on Environment and Development in its 1987 Report “Our Common Future”.<sup>49</sup> According to the Commission, the unity of environment and development should not be seen as a trade-off between economic growth, environmental protection and social justice, but as an aspiration based on the carrying capacity of the planet.<sup>50</sup> The forgotten message of the Brundtland Report is to organize socio-economic development within the limits of natural resources or “planetary boundaries”, as we would say today. States, the UN and corporate organisations have always favoured the convenience of vagueness (“*development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*”<sup>51</sup>) over clarity which would have meant to address the growth paradigm.

As a consequence, tensions between growth and sustainability remained unresolved until today. For environmental law scholars it should be alarming that so little attention has been given to resolving this tension and to focus on the meaning of sustainability. One of the pioneers of environmental law, Staffan Westerlund, went so far as to say that the academic discipline of environmental law over the last thirty years has largely failed: “The core problem lies in achieving and maintaining ecological sustainability as the necessary foundation for sustainable development”.<sup>52</sup> Douglas Fisher, another pioneer of environmental law, recently made a similar observation showing that politicians, administrators and judges operate without a specific “point of commencement”<sup>53</sup>. Rather, they readily employ the general criteria of human well-being, economic prosperity etc. to seek some compromise between the environment and development. According to Fisher, the environment appears as an unknown entity, too abstract and not nearly as well defined as human rights or property rights. As a consequence, soft environmental interests loose against hard economic interests. Fisher concludes with a plea for “processes of legal reasoning which reflect the fundamental *grundnorms* of the system – the rule of law in general and sustainability in the context of environmental governance”.<sup>54</sup>

As mentioned, sustainability has its core in preserving the integrity of ecological systems. In this meaning it has been incorporated in many domestic conservation laws<sup>55</sup> and international environmental law where it first appeared in the 1974 *Great Lakes Water Quality Agreement between Canada and the United States*<sup>56</sup>. Since then some 23 international environmental treaties and agreements refer to ecological integrity as a general objective as, for example, the preamble<sup>57</sup> and Article 7 of the 1992 *Rio Declaration on Environment and Development* (“*States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem*”) or Article 40 of the Rio+20 outcome document *The Future We Want* (“*We call for holistic and integrated approaches to sustainable development that will guide humanity to live in harmony with nature and lead to efforts to restore health and integrity of the Earth’s ecosystem*”). The 2000 *Earth Charter* is in its entirety designed around the concept of ecological integrity. For example, principle 5 urges “*all individuals, organizations, businesses, governments, and transnational institution*” to “[p]rotect and restore the integrity of Earth’s ecological



systems, with special concern for biological diversity and the natural processes that sustain life". Similarly, Article 2 of the 2010 IUCN Draft International Covenant on Environment and Development states: "Nature as a whole and all life forms warrant respect and are to be safeguarded. The integrity of the Earth's ecological systems shall be maintained and where necessary restored." This inclusion is significant because the Draft Covenant is a codification of existing environmental law and intended to be a blueprint for an international framework convention.

Applying the usual standards for the recognition of concepts as international law, it would be possible to say that the repeated and consistent references to ecological integrity amount to an emerging fundamental objective or *grundnorm* of international environmental law.<sup>58</sup>

In short, the argument for sustainability as a constitutional principle in national and international law is strong and deserves further investigation. It should be of central importance to global environmental constitutionalism.

## 5 TOWARDS A GLOBAL ENVIRONMENTAL CONSTITUTION?

The prospect of a global environmental constitution may not be realistic for many years to come. Nor may it be self-evident considering that real action mostly takes place at the local level, i.e. in communities and cities. On the other hand, the health of the entire planet is at stake. This requires global awareness wherever people live and act ("think globally, act locally"). It is worth pondering, therefore, whether global values can be identified and written into some form of a world constitution. It is certainly within the realm of global environmental constitutionalism to take an interest in the possibility of a universal environmental code or constitution.

In the aftermath of the second World War, international law was elevated to a new level.

The United Nations Charter and the Universal Declaration of Human Rights created a unifying framework for the international community built on dignity and equality of all people. In addition to its purpose of settling conflicts, international law now gained a purpose of promoting and reaffirming common values. In this pursuit, the Westphalian state system created the seeds of global civic identity. Somewhere between 1945 and today humanity entered the "planetary phase of civilization".<sup>59</sup> While the notion of a planetary civilization still lacks global polity<sup>60</sup> that could legitimize a global constitution or government, it is possible to identify, at least, some constitutionally relevant values and principles.

An early example of such an attempt was the 1948 *Preliminary Draft of a World Constitution*<sup>61</sup> which was translated into 40 languages. Known also as the "Chicago World Constitution"<sup>62</sup> its first chapter is structured as a "declaration of duties and rights" – not just rights – and contains the following sub-chapter c:

The four elements of life - earth, water, air, energy - are common property of the human race. The management and use of such portions thereof are vested in or assigned to particular ownership, private or corporate or national or regional, of definite or indefinite tenure, of individualist or collectivist economy, shall be subordinated in each and all cases to the inherent interest of the common good.

The concern behind this draft was that international social justice and peace cannot be achieved without giving priority to the common good, in particular the global commons, over private property. Elisabeth Mann Borgese, an early pioneer of international environmental governance,<sup>63</sup> asserts that the *Draft World Constitution* has significantly influenced theory and concepts of international environmental law.<sup>64</sup> Today, we can clearly appreciate the urgency of protecting the global commons (oceans, atmosphere, biosphere) that all people in all nations so fundamentally depend on.<sup>65</sup>

Arguably, no other document has articulated this concern more strongly and more inclusively than the Earth Charter. It had its origins in the global ethics movement that started with the UN Charter, the founding of UNESCO (1946) and IUCN (1948), and the Universal Declaration of Human Rights.<sup>66</sup> With its history and “contributions of literally millions of minds around the world”<sup>67</sup> the Earth Charter is the most inclusive international document to-date to define globally shared values and principles. According to Nicholas Robinson, “the binding principles embodied in the Earth Charter can be and are being applied in courts and are found in virtually all national environmental laws”.<sup>68</sup> Considering further its endorsements by thousands of national and international organisations, including UNESCO and IUCN, and a number of states, and also its general recognition in international law,<sup>69</sup> the Earth Charter meets many of the hallmarks of a model global constitution.<sup>70</sup>

So, quite independently of any prospects towards a global environmental constitution, we do have benchmark documents<sup>71</sup> against which we can measure the progress of global environmental constitutionalism.

## 6 CONCLUSION

This article did not aim for defining or reviewing global environmental constitutionalism. That would be impossible given the novelty and thin base of this only emerging field of inquiry. Rather the article made some suggestions for formulating its purpose and scope.

Like global constitutionalism in general, global environmental constitutionalism requires a certain methodology or mindset, i.e. a transnational approach to constitutional research. More so than ‘classic’ constitutional subjects such as human rights the very nature of its subject makes environmental constitutionalism truly global and foundational. Its subject is nothing less than the preservation of the ecological conditions that all life, including human existence, depends

on. This subject description points to ecocentrism and may not be shared by everyone; some may insist that anthropocentric law is inevitable.

Global environmental constitutionalism must, in any case, address its ethical foundations. After all, Pachamama constitutions in Latin America, eco-constitutional discourses in Europe and the growing Earth jurisprudence movement<sup>72</sup> fundamentally question Western anthropocentrism. Similarly, a truly global perspective should be critical of Eurocentric notions of constitutionalism which still shapes mainstream comparative constitutional studies<sup>73</sup>.

Above all, global environmental constitutionalism should aim for shifting the environment from the periphery to the centre of constitutions - a shift that could be termed "eco-constitutionalism".<sup>74</sup>

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## CONSTITUCIONALISMO AMBIENTAL GLOBAL

### RESUMO

Este artigo defende a perspectiva de que o constitucionalismo ambiental é assunto de interesse global e fundacional. Considerando a originalidade e, conseqüentemente, o suporte teórico rarefeito de um campo de pesquisa emergente, pretende-se fazer algumas sugestões quanto à definição do propósito e da abordagem adequada a um constitucionalismo ambiental de alcance global. Ademais, considerando-se que os direitos ambientais são, por natureza, ainda mais fundamentais do que os direitos humanos clássicos, a concepção e a metodologia aplicadas aos estudos sobre constitucionalismo ao redor do mundo deverão transmutar sua racionalidade de base antropocêntrica para ecocêntrica, por meio da incorporação da sustentabilidade ao rol de princípios constitucionais. Pretende-se, desse modo, contribuir com os primeiros passos dados nos últimos anos na direção do constitucionalismo ambiental global; assunto que permanece instigante.

**Palavras-chave:** Constitucionalismo ambiental global. Princípio da sustentabilidade. Ecocentrismo.

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