

# THE CONCEPTUAL CONTOURS OF ENVIRONMENTAL CONSTITUTIONALISM

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## I. INTRODUCTION

With respect to its theory and conceptual architecture, “environmental constitutionalism” has received scant attention to date. Commentators are only just starting to direct their analytical and descriptive focus to this evolving concept. Generally speaking, environmental constitutionalism is associated mostly with debates surrounding the protection of environmental rights and the way constitutions the world over employ a rights-based approach to augment environmental care.<sup>1</sup> Yet, environmental constitutionalism is a broader concept that stretches beyond but includes and is often based on the rights-based approach. As a socio-legal and political project that seeks to transform environmental governance to the extent that it provides improved environmental protection, environmental constitutionalism additionally employs a wide range of other constructs and features typical of the broader constitutional paradigm and the environmental governance movement. These include, among others, the rule of law, the separation of powers, the principle of legality, aspirational fundamental values such as human dignity and equality, and various principles derived from soft law such as sustainable development.

The time is arguably ripe to commence more deliberately with an enquiry into the conceptual contours of environmental constitutionalism from a normative point of view. While it would be impossible to propose any convincing and systemized normative analysis of environmental constitutionalism in a succinct way that respects the space limitations of this special issue of the *Widener Law Review*, I do hope to take some tentative steps towards such a normative enquiry that could hopefully be expanded in the future. In doing so, and as a point of departure, the paper commences in Part II with an analysis of existing views on environmental constitutionalism, including a brief search for the rationale behind this concept. Part III elaborates on, what I believe, is the conceptual fulcrum around which environmental constitutionalism revolves, namely the concepts of constitutions and constitutionalism. Based on the foregoing analysis, Part IV proposes a consolidated description of “environmental constitutionalism.”

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<sup>1</sup> See, e.g., DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* 117-18 (2012); see generally JAMES R. MAY & ERIN DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM* (2015).

## II. ENVIRONMENTAL CONSTITUTIONALISM

As far as I have been able to establish from a survey of English texts, there exists neither a universally endorsed definition nor a cogent theoretical or normative treatment of the concept “environmental constitutionalism.” Approaching it from various angles (regulatory, comparative and empirically-evaluative) some authors, however, have paid cursory attention to the issue.<sup>2</sup> Douglas Kysar, for example, generally describes environmental constitutionalism as the “constitutionalization of environmental protection,” and elsewhere as “the constitutionaliz[ation] of environmental law,” which, he admits, remains largely a symbolic exercise in the regulatory scheme of things because constitutional provisions are usually weakly enforced and vaguely specified.<sup>3</sup> While David Boyd similarly seems to view environmental constitutionalism as a transformative process that provides constitutional environmental protection, his empirical-evaluative analysis leads him to conclude more optimistically that: “[w]hile no nation has yet achieved the holy grail of ecological sustainability . . . constitutional protection of the environment can be a powerful and potentially transformative step toward that elusive goal.”<sup>4</sup> James May and Erin Daly take a comparative approach and explain that:

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.<sup>5</sup>

They admit that while it is difficult to determine exactly the conceptual and theoretical content, as well as the many different forms and components of environmental constitutionalism, “[T]he constant is that environmental constitutionalism exists in just about every nook and cranny on the globe, with growing significance.”<sup>6</sup>

If anything, these broadly stated descriptions ask us to look for the rationale behind environmental constitutionalism, which arguably lies locked up in the past. Environmental constitutionalism most probably originated from the failures of “ordinary” (mostly pollution and conservation oriented)

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<sup>2</sup> Commentators seem to accept the inevitable need for environmental constitutionalism, but they often stop short of delving deeper into the theory of this concept. For example, while Gareau highlights the need of a global environmental constitutionalist order, he does not detail the meaning of environmental constitutionalism in the global context. Brian J. Gareau, *Global Environmental Constitutionalism*, 40 B.C. ENVTL. AFF. L. REV. 403, 408 (2013).

<sup>3</sup> DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* 229, 231 (2010).

<sup>4</sup> BOYD, *supra* note 1, at 3.

<sup>5</sup> MAY & DALY, *supra* note 1, at 3.

<sup>6</sup> *Id.* at 9.

laws to provide the requisite level of environmental protection that was initially envisaged by the fathers of environmental law. In the same way that a crying child who bumps his toe would instinctively run to his mother, in desperate times, regulators and legislators alike seem to seek refuge in the familiar, the constant, and the trusted. Constitutions and constitutionalism have been around since the 17th Century,<sup>7</sup> thus providing a familiar language and the logical “go to” solution for environmental regulators in times of ecological upheaval and regulatory uncertainty. With the relative gains in global governance that the constitutional entrenchment of the rule of law, procedures for judicial review, and the human rights movement have led to through national, regional, and international constitutional instruments,<sup>8</sup> it has gradually become apparent that the constitutionalization of environmental law could be equally useful in providing a higher level of environmental protection and a solution for regulatory deficits. Many states, for example, have adopted environmental protection provisions in their domestic constitutions since the Stockholm Conference in 1972.<sup>9</sup> In his seminal work, David Boyd estimates that today three quarters of the world’s constitutions (147 out of 193) contain references to environmental rights and responsibilities.<sup>10</sup> An intuitive conclusion is therefore that environmental constitutionalism is an increasingly popular (and possibly desperate) regulatory attempt to improve environmental protection through the familiar lens of constitutionalism.

### III. CONSTITUTIONS AND CONSTITUTIONALISM

In an effort to work towards a clearer conceptual understanding of environmental constitutionalism and to later be able to propose a description thereof, the following section proceeds with an investigation of what the terms “constitutions” and “constitutionalism” mean in generic terms. It would be important to bear in mind, as a caveat to what follows, that constitutional language and the meaning attributed to constitutional concepts vary because they exist in different contexts and in accordance with local histories, prevailing socio-economic and political circumstances, dominant ideologies and the composition of society. As Francois Venter suggests, dogmatic exactitude regarding the details of 21st Century constitutionalism is not at hand and to pin down its meaning to the satisfaction of all is impossible.<sup>11</sup> That would also be true for environmental constitutionalism.

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<sup>7</sup> Francois Venter, *Die Staat, Staatsreg en Globalisering* 3 TYDSKRIF VIR DIE SUID-AFRIKAANSE REG 412, 416 (2008).

<sup>8</sup> A process that commenced with the creation of the Universal Declaration of Human Rights in 1948. See Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 13-15 (2002).

<sup>9</sup> See Erin Daly, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process*, 17 INT’L J. PEACE STUD. 71, 71 (2012).

<sup>10</sup> BOYD, *supra* note 1, at 47.

<sup>11</sup> See generally, Francois Venter, *Konstitusionalisme in Suid-Afrika*, 11 LITNET AKADEMIES 91, 91-92 (2014), available at [http://www.litnet.co.za/assets/pdf/joernaaluitgawe\\_11\\_2/11\\_2\\_Venter.pdf](http://www.litnet.co.za/assets/pdf/joernaaluitgawe_11_2/11_2_Venter.pdf).

While there may be other descriptions, the term “constitution” could simplistically mean two things. First, it refers to a “higher” law in a country (mostly, although not always, in written form)<sup>12</sup> that has the purpose of steering and constraining the state, its governance processes (including law-making, conflict resolution and law enforcement), and its agents of governance.<sup>13</sup> More specifically, a constitution provides for certain basic constitutive rules that determine how other rules are created, interpreted, changed and enforced;<sup>14</sup> and it seeks to regulate the vertical interaction between the state and its subjects and the horizontal interaction between the subjects *inter se*. By organizing and setting out the order and organization of the state and of political life, a constitution thus establishes and legitimizes, defines and organizes the main organs of government, how they are constituted, and their power.<sup>15</sup> This has been described as a constitution in the “thin” sense to the extent that it constitutes and regulates the state.<sup>16</sup>

The second meaning attributed to constitutions applies less ubiquitously, since it is based on the expressive and symbolic rather than the functional characteristics of constitutions. This meaning refers to constitutions in the “thick” sense, to the extent that they are conceived of as being self-confident assertions of the collective will;<sup>17</sup> they are value-laden and exude numerous characteristics that could legitimize, dignify and improve a legal order;<sup>18</sup> and they “express the deepest, most cherished values of a society.”<sup>19</sup> Constitutions in the thick sense are closer to constitutionalism than they are to constitutions in the thin sense, notably because they relate to a constitution being constitutional, i.e., also providing certain higher-order, protective guarantees.<sup>20</sup> Thus, in addition to constituting in the thin sense, thick constitutions seek to guarantee a “good” and protective legal order through the entrenchment into a supreme norm that transcends all other types of law of fundamental human rights; the rule of law; the separation of powers; the limitation and control of

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<sup>12</sup> See, e.g., Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 853-54 (1962). The United Kingdom is the famous example of a constitutional democracy without a written constitution: “[T]he United Kingdom has a difficult and *sui generis* constitution, deriving from a tortuous sedimentation of common law, acts and conventional usage, partly legal and partly extra-legal . . .” *Id.* at 853.

<sup>13</sup> Daniel Bodansky, *Is There an International Environmental Constitution?*, 16 IND. J. GLOBAL LEGAL STUD. 565, 571 (2009) (stating that constitutions tends to “regulate governmental rather than private actors”).

<sup>14</sup> *Id.* at 567.

<sup>15</sup> See Michael H. Allen, *Globalization and Peremptory Norms in International Law: from Westphalian to Global Constitutionalism?*, 41 INT’L POL. 341, 342 (2004).

<sup>16</sup> Antje Wiener, *Editorial: Evolving Norms of Constitutionalism*, 9 EUR. L.J. 1, 5 n.19 (2003).

<sup>17</sup> *Id.*; Brun-Otto Bryde, *International Democratic Constitutionalism*, in TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY 103, 104-05 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005).

<sup>18</sup> Anne Peters, *The Constitutionalist Reconstruction of International Law: Pros and Cons* 3-4 (Nat’l Ctr. of Competence in Research, Working Paper No. 2006/01, 2006), available at <http://phase1.nccr-trade.org/images/stories/publications/IP1/Pro%20and%20con%20constitutionalization%20final.pdf>.

<sup>19</sup> BOYD, *supra* note 1, at 4.

<sup>20</sup> See Sartori, *supra* note 12, at 855.

state power and measures to ensure accountability; opportunities for participative governance and civil society representation; and legality in the context of the *Rechtsstaat* notion (or what the Germans would refer to as *Rechtsgebundenheit*, indicating that law provides the foundation and limits for all actions of the state).<sup>21</sup> In other words, thick constitutions contain fundamental substantive rules such as those on human rights; a hierarchical structure where some rules are superior to others; rules that are mandatorily applicable and of a non-consensual nature; rules that reflect the process values regarding participation, transparency and the separation of powers; and rules that are entrenched and thus difficult to amend.<sup>22</sup>

Mostly, thin and thick constitutions co-exist, and their features could be difficult to distinguish. Moreover, in the eyes of the global polity that increasingly demands human rights protection, observance of the rule of law and some form of constitutional democracy, only having a thin constitution is arguably not sufficient. The latter point is poignantly exemplified by Western interference (unfortunately often by way of the coercive use of force) in the political and legal orders of rogue states especially in Africa (Libya) and the Middle East (Afghanistan). Because constitutions in the thin sense do not all necessarily denote “favorable emotive properties,”<sup>23</sup> as the range of earlier constitutions that kept the apartheid South African state alive suggests,<sup>24</sup> it is also necessary for them to be thick, as it were. To this end, constitutions should ideally not only create the architecture of the state and governance, but they must also be constitutional to the extent that they seek to improve a legal and political order.

Examples of thick constitutions are those of countries following a great war (Germany, for example), or of countries that have transitioned from oppressive regimes to constitutional democracies (for example, South Africa), where a constitution emerges “as a symbolic marker of a great transition in the political life of a nation.”<sup>25</sup> In Germany’s case, the Constitution (or Basic Law) has become a symbol of an entire nation’s complete break with and loathing of a national socialist past.<sup>26</sup> In South Africa, likewise, the Constitution is a symbol of the country’s ideological and *de iure* break from its oppressive apartheid past and its new-found commitment to transformation within the

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<sup>21</sup> Douglas M. Johnston, *World Constitutionalism in the Theory of International Law*, in TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY, *supra* note 17, at 3, 16-18.

<sup>22</sup> Bodansky, *supra* note 13, at 567-68, 571.

<sup>23</sup> Sartori, *supra* note 12, at 855.

<sup>24</sup> To be sure, the apartheid constitutions fulfilled only a very distinct thin function and ordered the polity. In other words, the apartheid constitutions were “merely” constitutions (in the thin sense); they were not constitutional (in the thick sense), as the post-apartheid constitution is.

<sup>25</sup> Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 778 (1997) (emphasis omitted).

<sup>26</sup> *Id.* at 778; see also Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1307, 1312 (2008).

parameters of a constitutional democracy.<sup>27</sup> In sum, then, constitutions in the thick sense, mostly but possibly not always, herald “new beginnings,” where an idyllic “after” stands in stark contrast with a terrible “before.” Constitutions also serve to create a good legal order as described above, even though some acknowledge that constitutionalism is not always only good.<sup>28</sup> While it is not the purpose of this paper to weigh the merits and shortcomings of constitutionalism, it is worth noting that constitutionalism has been criticized for being too Western-oriented; for being too dependent on the contested notion of democracy; for the disproportional power that is afforded to courts to strengthen judicial review functions; for its failure to acknowledge the role of non-state actors as important contributors to work towards a common (constitutional) governance goal; and for often being disingenuous by attempting to “window dress.”<sup>29</sup>

Nevertheless, given the premium that is placed on constitutions the world over, and the many positive advances that have been made in terms of creating constitutional democracies with all that goes with that impulse, it would appear on balance as if constitutionalism has been and continues to be a generally positive evolution in governance. To be sure, because of the promise of goodness it seems to hold and its legitimizing effect, the allure of constitutionalism seems to have gripped other areas of law and socio-legal-political projects as well. For example, the gradual movement towards constitutionalism is evident not only in the environmental context but also in the regional and public international law domain, where the constitutionalization of international law and regional law (notably in the European Union)<sup>30</sup> has become a flourishing scholarly enterprise.<sup>31</sup> The argument that there has been a gradual shift in focus of the world order from state sovereignty (espoused by constitutions in the thin sense) to a value-driven and individualistic approach (constitutions in the thick sense) further emphasizes that there is an increasing turn towards the promise of constitutionalism.<sup>32</sup>

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<sup>27</sup> See Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L L. 47, 58-62 (2004).

<sup>28</sup> *Id.* at 58-62.

<sup>29</sup> See BOYD, *supra* note 1, at 5-6 (for a summary).

<sup>30</sup> See, e.g., Jürgen Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 23 EUR. J. INT'L L. 335, 336 (2012).

<sup>31</sup> Among the many publications, see *Foreword* to TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM ix, x (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004); *Foreword* to TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY, *supra* note 17, at ix, x-xi; see generally Jürgen Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft?*, 38 KRITISCHE JUSTIZ 222 (2005); ANDREAS FISCHER-LESCANO, GLOBALVERFASSUNG: DIE GELTUNGSBEGRÜNDUNG DER MENSCHENRECHTE (Velbrück Wissenschaft, 2005); ALFRED VERDROSS, DIE VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT, v-vi (Springer, 1926).

<sup>32</sup> Venter, *supra* note 7, at 414. Because a constitution is different from constitutionalism, it is possible to have a constitution without constitutionalism, or to have constitutionalism without a constitution. Bodansky, *supra* note 13, at 568-69.

## IV. ENVIRONMENTAL CONSTITUTIONALISM?

I realize that this brief exposition does not do the burgeoning and important constitutional discourse any justice. But if this could be considered an acceptable abbreviated and simplistic understanding of constitutions and constitutionalism for our present purposes, what then is environmental constitutionalism?

*A. Thin Environmental Constitutionalism*

First, in further pursuit of the thin-thick metaphor, it is possible to understand environmental constitutionalism in a functional way as a means to determine, at the highest possible level, the ordering, composition and architecture of environmental governance. This would include, among other things, the means and procedures to establish environmental governance powers and environmental governance institutions, including the power of environmental authorities themselves when they make decisions that affect the environment (for example, their power to evaluate and decide on a license to mine); establishing and steering law-making, conflict resolution and law enforcement processes of the state insofar as they relate to environmental matters; determining the roles and responsibilities of all the public and private actors involved in environmental governance; and regulating the vertical interaction between the state and its subjects and the horizontal interaction between the subjects as far as the environment is concerned. There are many domestic examples of thin environmental constitutions, but I rely for our present purposes on the South African Constitution. The Founding Provisions in Chapter 1 provide that South Africa is “one, sovereign democratic state.”<sup>33</sup> Chapter 3 sets out procedures that must facilitate good, co-operative (environmental) governance between the national, provincial and local spheres of government and all the line-function departments in each sphere.<sup>34</sup> The functions and responsibilities, as well as the powers of the president, parliament, the national executive, the provinces and local authorities, are clearly regulated in Chapters 4-7.<sup>35</sup> Chapter 8 provides the all-important provisions related to the role of the courts, their functions and independence, as well as the broader issues related to the administration of justice.<sup>36</sup> Schedule 4 specifically designates the environment as a functional area of concurrent national and provincial legislative competence,<sup>37</sup> while Schedule 5 sets out a range of environmental services that are the functional area of local legislative competence.<sup>38</sup> Section 195 provides for an elaborated

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<sup>33</sup> S. AFR. CONST., ch. 1, 1996 (English text of the Constitution of 1996 as adopted on May 1996 and amended on 11 Oct. 1996 by the Assembly).

<sup>34</sup> *Id.* at ch. 3.

<sup>35</sup> *Id.* at chs. 4-7.

<sup>36</sup> *Id.* at ch. 8.

<sup>37</sup> *Id.* at sched 4.

<sup>38</sup> *Id.* at sched. 5.

set of basic values and principles governing the public administration.<sup>39</sup> Clearly, all of these are provisions that constitute, establish, legitimize and guide the day-to-day governance of environmental matters in South Africa, and whereas the country (like countries elsewhere in the world) has no single all-encompassing environmental constitution, its Constitution contains various elements that aim to do what a thin environmental constitution would typically aim to do.

To determine the existence of a thin *global* environmental constitution or the prevalence of thin constitutional elements in some or other global constitutional arrangement(s) is more complicated because there is no single general global constitution in orthodox terms that applies to the entire global order. The example most cited as a likely candidate is the United Nations Charter, but even here deep uncertainty prevails amongst commentators as to its thin constitutional properties and universal application.<sup>40</sup> As far as the environment is concerned, Daniel Bodansky concludes that at best numerous multilateral environmental agreements have a constitutional dimension in the thin sense to the extent that they establish institutional and other arrangements for ongoing systems of governance grouped around certain issues such as climate change, biodiversity protection and so forth.<sup>41</sup> Other possible candidates that have thin constitutional qualities are arguably the collection of international environmental soft law principles, including the polluter pays principle, the precautionary principle, the principle of common but differentiated responsibilities, and the principle of sustainable development. Yet, while these principles cut across the various treaties and their regimes, they are rather weak and vague and they do not present a core value system for the international community that creates fundamental substantive rules. At best, they only “serve to structure international discourse on environmental problems.”<sup>42</sup> Elements of a thin global environmental constitution are thus scattered across the environmental treaty and soft law scene, but they are probably not sufficiently universally constitutive, systemized or superior to act as a systemized global environmental constitution in the thin sense. While the absence of a global environmental constitution is probably also related to the continued absence of a world environment organization (despite many calls in support of creating such an organization),<sup>43</sup> the question of whether such an organization and a concomitant global environmental constitution should be established or not must not be over-emphasized. For the same reason that the

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<sup>39</sup> S. AFR. CONST., ch. 10 § 195(1).

<sup>40</sup> See JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 23 (Oxford Univ. Press 2009); see generally Oliver Diggelmann & Tilmann Altwicker, *Is there Something Like a Constitution of International Law?: A Critical Analysis of the Debate on World Constitutionalism*, 68 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 623 (2008).

<sup>41</sup> Bodansky, *supra* note 13, at 574.

<sup>42</sup> *Id.* at 580.

<sup>43</sup> See, e.g., *A WORLD ENVIRONMENT ORGANIZATION: SOLUTION OR THREAT FOR EFFECTIVE INTERNATIONAL ENVIRONMENTAL GOVERNANCE?* (Frank Biermann & Steffen Bauer eds., 2005).

international community or national states do not have separate constitutions exclusively committed to single elements in the expansive regulatory repertoire such as trade, taxation, transportation and so forth, one cannot expect that the environment will receive any special treatment in this respect. Moreover, there seems to be ample provision for environment-related thin constitutional elements that collectively create the architecture of environmental governance in the national (as determined by the South African example) and the global sphere.

### *B. Thick Environmental Constitutionalism*

Second, environmental constitutionalism must also be understood in the thick sense. Having thin constitutional arrangements that determine the architecture and institutional functions of environmental governance is evidently crucial, but given the urgent need to also create the constitutional parameters and constructs that must provide guarantees of comprehensive protection, facilitate better environmental protection, and improve environmental governance, having thick environmental constitutional elements incorporated into any regulatory order would be paramount.<sup>44</sup> Thus, environmental constitutionalism in the thick sense could provide, among other things, for a rights-based approach to environmental governance, including a right to a healthy environment and rights of nature, as well as incidental political and socio-economic rights and rights that facilitate participative, representative and transparent environmental governance. This type of environmental constitutionalism could also provide for directive principles or principles of state policy that work to galvanize though not compel legislative activity to protect the environment.<sup>45</sup> It could provide for the rule of law and the separation of powers, as well as provisions that explicitly uphold the supremacy of a constitution. In addition, it could provide for aspirational values that should permeate a society such as human dignity, equality and possibly even ecological sustainability.

Today there is no global instrument that contains all of the characteristics that are necessary to render it a global environmental constitution in the thick sense, although some have mooted the possibility of the Earth Charter and the World Charter for Nature as candidates for such a thick global environmental

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<sup>44</sup> Ruhl cites the United States Constitution as an example of a constitution that has a bad record of “non-constitutionalism” in environmental policy, with the result that the “United States Constitution has been irrelevant to establishing environmental law in [the] USA.” J.B. Ruhl, *Constitutional Law*, in 1 ENVIRONMENTAL LAWS AND THEIR ENFORCEMENT § 2 (A. Dan Tarlock ed., 2009), available at <http://www.eolss.net/Sample-Chapters/C04/E4-21-02.pdf>. One should not, however, ignore the important constitutional enactments of environmental protection at state level throughout the country.

<sup>45</sup> Daly, *supra* note 9, at 71. The German Constitution’s provisions on the environment are examples in this respect.

constitution.<sup>46</sup> A supra-national instrument that sees to the protection of procedural guarantees is best exemplified by the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), 1998. The Aarhus Convention coincidentally embodies the right “to live in an environment adequate [to] health and well-being,”<sup>47</sup> but in addition, provides a whole set of procedural guarantees to facilitate inclusive and participative environmental governance. It is generally believed that this Convention continues to strengthen procedural environmental rights,<sup>48</sup> including, for instance, by allowing communications to be brought before its Compliance Committee by one or more members of the public concerning any party’s compliance with the Convention.<sup>49</sup> Also, regionally, some human rights instruments provide enforceable and often justiciable environmental rights as an expression of environmental constitutionalism in the thick sense. These include: the American Convention on Human Rights, 1969 with its San Salvador Protocol of 1988; the Asian Human Rights Charter, 1998; the Arab Charter on Human Rights, 2004; and the African Union’s African (Banjul) Charter on Human and Peoples’ Rights, 1981.<sup>50</sup>

Examples of thick environmental constitutional elements are most evident, however, at the domestic level, with the majority of domestic constitutions providing for environmental rights. In terms of regions, these are as follows: Africa, 32; Asia, 14; Europe, 28; Latin America, 16; and the Caribbean, 2.<sup>51</sup> Some countries have recently even gone so far as to provide rights to nature.<sup>52</sup> The South African Constitution is a domestic example of a broadly-conceived thick environmental constitutionalist approach that incorporates, through its environmental right,<sup>53</sup> the specific objectives of inter-generational equity and sustainable development. The right clearly elevates environmental protection

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<sup>46</sup> See, e.g., Klaus Bosselmann, *Outlook: The Earth Charter—A Model Constitution for the World?*, in *THE EARTH CHARTER: A FRAMEWORK FOR GLOBAL GOVERNANCE* 239, 241, 243 (Klaus Bosselmann & Ronald Engel eds., 2010).

<sup>47</sup> Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 *COLO. J. INT’L ENVTL. L. & POL’Y* 1, 8 (2007). The Aarhus Convention is applicable to EU and non-EU states (if the latter countries ratify it) and its impact could thus be much broader than in the EU region alone. *Id.* at 7-8.

<sup>48</sup> *Id.* at 2.

<sup>49</sup> *Communications from the Public*, UNITED NATIONS ECON. COMM’N FOR EUR., available at <http://www.unece.org/env/pp/pubcom.html> (last visited Apr. 24, 2015).

<sup>50</sup> For these and other provisions of international and regional instruments dealing with human rights, see *The Right to Human Rights Education – A Compilation of Provisions of International and Regional Instruments Dealing with Human Rights*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, available at <http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/Listofcontents.aspx> (last visited Apr. 24, 2015).

<sup>51</sup> BOYD, *supra* note 1, at 62.

<sup>52</sup> See, e.g., CONST. OF ECUADOR, art. 71. Ecuador has embarked on constitutional experiments incorporating a more ecocentric objective into human rights by granting nature a right to exist, persist, maintain and regenerate its vital cycles, structure, functions, and its processes in evolution. *Id.*

<sup>53</sup> S. AFR. CONST., ch. 2 § 24(b), 1996.

to the constitutional level, and it sets out various obligations on government (and the private sector to the extent that the right applies horizontally)<sup>54</sup> to achieve the objectives of the right through legislative and other measures as discussed below. Section 24 of the Bill of Rights provides:

Everyone has the right:

- (a) To an environment that is not harmful to their health or well-being; and
- (b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
  - (i) Prevent pollution and ecological degradation;
  - (ii) Promote conservation; and
  - (iii) Secure ecologically-sustainable development and use of natural resources while promoting justifiable economic and social development.<sup>55</sup>

The idea that thick environmental constitutionalism is primarily based on but could potentially stretch beyond a pure environmental rights-based approach is exemplified by the South African Constitution, which asserts its supremacy and the rule of law by stating that it is “the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”<sup>56</sup> The ambit of its supremacy also covers environmental matters through the protective objectives of the environmental right. Moreover, the Constitution, and indeed the country as a whole, is founded on a set of aspirational but fundamental values that should permeate all of society.<sup>57</sup> While these do not include values that directly or explicitly relate to the environment (such as ecological integrity or ecological sustainable development), they do include incidental values such as human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, as well as the rule of law.<sup>58</sup> Due to their interdependence, adhering to these traditional human rights values, or stating

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<sup>54</sup> For example, Section 7(2) of the Constitution explicitly provides that the duty to respect, protect, promote and fulfill the Bill of Rights applies to the state. *Id.* at ch. 2 § 7(2), 1996. This is confirmed by section 8(1), which provides: “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.” *Id.* at ch. 2 § 8(1). However, section 8(2) then extends this application in that: “A provision of the Bill of Rights binds a *natural or a juristic person* if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” *Id.* at ch. 2 § 8(2) (emphasis added). For a more recent discussion on the horizontal application of the Bill of Rights, see Nick Friedman, *The South African Common Law and the Constitution: Revisiting Horizontality*, 30 S. AFRICAN J. ON HUMAN RIGHTS 63, 68-70 (2014).

<sup>55</sup> S. AFR. CONST., ch. 2 § 24(b).

<sup>56</sup> *Id.* at ch. 1 § 2.

<sup>57</sup> *See id.* at ch. 1 § 1(a)-(d).

<sup>58</sup> *Id.* at ch. 1 § 1(a)-(d).

them as aspirational objectives, which an environmental governance effort should strive towards, could conceivably contribute to promoting environmental protection as well. Conversely, a sound environment that is conducive to health and well-being is crucial for fostering conditions where these values could be realized, enhanced and protected. In the words of John Knox: “[h]uman rights are grounded in respect for fundamental human attributes such as dignity, equality and liberty. The realization of these attributes depends on an environment that allows them to flourish.”<sup>59</sup> This interconnectivity is evident from the various environment-related rights that the Constitution provides, in addition to the environmental right. For example, the right to equality prohibits unfair discrimination and provides that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law.”<sup>60</sup> Section 10 recognizes that “[e]veryone has inherent dignity and the right to have their dignity respected and protected,” while section 11 succinctly states that “[e]veryone has the right to life.”<sup>61</sup> In an environmental context section 27 also provides that “[e]veryone has the right of access to . . . sufficient food and water.”<sup>62</sup> These rights have a direct bearing on the environment, including all sustainability considerations by virtue of their being linked with environmental justice. In addition, alongside these substantive constitutional rights, a number of procedural rights form part of the broader rights-based approach to environmental governance, and they must be used where appropriate to enforce substantive rights-based claims.<sup>63</sup> These include the right to just administrative action, the right of access to information, and clauses relating to the access to courts and the enforcement of rights.<sup>64</sup>

### C. *A Generic Description*

While there may be other descriptions, I suspect that the one offered above helpfully encapsulates what J.B. Ruhl sees as the three basic functions of thick and thin environmental constitutional elements, namely: a) a constitution provides the charter for the fundamental modes of the operation of government, including translating environmental policy into enforceable environmental law through a constitutive framework for government (thin); b) a constitution may act as the guardian and reference point for environment-

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<sup>59</sup> Human Rights Council, Rep. of the Indep. Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy & Sustainable Environment, ¶ 10, U.N. Doc. A/HR/22/43; GAOR, 22d Sess. (Dec. 24, 2012) (by John H. Knox), available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-43\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-43_en.pdf).

<sup>60</sup> S. AFR. CONST., ch. 2 § 9(1).

<sup>61</sup> *Id.* at ch. 2 § 11.

<sup>62</sup> *Id.* at ch. 2 § 27(1)(b).

<sup>63</sup> See Louis J. Kotzé, *The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence*, 7 POTCHEFSTROOM ELEC. L.J. 58, 68 (2004) (S. Afr.).

<sup>64</sup> See S. AFR. CONST., ch. 2 § 32, 33, 34, 38.

related fundamental rights (thick); and c) a constitution provides an opportunity to memorialize environmental social covenants, symbols, and aspirations that are intended to have enduring effects on social norms (thick).<sup>65</sup>

This helpfully leads to the following summary: environmental constitutionalism is part of the larger constitutional paradigm, both as an evolving scholarly discipline and as a socio-political and legal transformation project (the latter being the focus of this paper). By acting as a method of constitutionally entrenching environmental law and protection at a more enduring or higher constitutional level, it embodies a transformative approach that relies on constitutions to provide for the architecture of environmental governance, 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 endearing aspirational values.

It is important to recognize that while its generic objectives 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 different regions because of the different histories, prevailing socio-political, environmental, and economic conditions of the different countries, as well as the immensely divergent legal cultures of a kaleidoscopic world.

## V. CONCLUSION

This piece has attempted to explain that environmental constitutionalism features could come about in various forms including, for example, the thin features that provide for the architecture and operationalization of environmental governance, as well as thick features that include, among others, constitutionally entrenched rights-based provisions and fundamental values and higher order principles. In more descriptive terms, environmental constitutionalism heralds the terrible before and hopefully more idyllic after, whether this occurs by means of an unlikely constitutional moment analogous to the creation of the Universal Declaration of Human Rights in 1948 or, more likely, the gradual permeation of features of environmental constitutionalism into existing domestic and global regulatory arrangements that seek to mediate the human-environment interface.

It is a nebulous and unwieldy concept; yet, it is probably one that people are more inclined to intuitively understand and accept than a concept they are able to describe concisely and systematically its exact normative content and contours. One must also accept that environmental constitutionalism, as a concept, as a socio-legal and political project, and as a transformative means of creating new beginnings for greater environmental care, will neither always have immediate and definite results nor will it ever be complete. Like the liberal constitutionalism paradigm that it is embedded in, environmental

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<sup>65</sup> Ruhl, *supra* note 44, at § 1.

constitutionalism, to quote Douglas Kysar, “should therefore view itself always as a work in progress, asymptotically striving toward an unattainable but undeniable goal of universal recognition and respect.”<sup>66</sup> Most importantly, this ongoing reform project is a crucial part of our myriad efforts to augment environmental care through broader constitutional and more specific environmental law and governance responses. Analytically, environmental constitutionalism provides fertile ground for future exploration, and it has the potential to grow into an autonomous and influential field of enquiry that provides scholars and regulators alike with refreshing regulatory perspectives and options in these times of unprecedented ecological upheaval.

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<sup>66</sup> KYSAR, *supra* note 3, at 245.