

# The Environmental Rights Revolution

A Global Study of Constitutions,  
Human Rights, and the Environment

..... David R. Boyd



**UBC Press** · Vancouver · Toronto

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This book is dedicated to all of the citizens, lawyers, politicians, civil servants, judges, and organizations around the world who have contributed not only to fostering recognition of the right to a healthy environment in constitutions, laws, and court decisions, but also, more importantly, to ensuring that this vital human right is fulfilled through clean air, fresh water, fertile soil, and vibrant biodiversity.

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# Contents

List of Tables and Figures / xi

Acknowledgments / xv

List of Abbreviations / xvii

## PART 1: THE EMERGENCE AND EVOLUTION OF A NEW HUMAN RIGHT

- 1 Constitutions, Human Rights, and the Environment:  
The Context / 3
- 2 The Right to a Healthy Environment: Framing the Issues / 20
- 3 The Prevalence and Enforceability of Environmental Provisions  
in National Constitutions / 45
- 4 The Influence of International Law / 78

## PART 2: THE CONSTITUTIONAL RIGHT TO A HEALTHY ENVIRONMENT IN PRACTICE

- 5 A Framework for Assessing the Legal Influence of the Right to a  
Healthy Environment / 117
- 6 Latin America and the Caribbean / 124
- 7 Africa / 149
- 8 Asia / 164

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9 Eastern Europe / 193

10 Western Europe / 214

PART 3: EVALUATING THE IMPACTS OF ENVIRONMENTAL  
PROVISIONS IN CONSTITUTIONS

11 Lessons Learned: Practical Experiences with the Right to a Healthy  
Environment / 233

12 Do Environmental Provisions in Constitutions Influence  
Environmental Performance? / 253

13 An Idea Whose Time Has Come / 278

APPENDICES

Appendix 1. Research Methods / 292

Appendix 2. Online Database: All Current Environmental Provisions  
from National Constitutions / *see page 299*

Notes / 300

References / 351

Index / 422

.....

## Tables and Figures

### TABLES

- 3.1 Year that environmental provisions were first included in national constitutions / 50
- 3.2 Types of environmental protection provisions in national constitutions / 53
- 3.3 Year that the right to a healthy environment was first included in national constitutions / 63
- 6.1 Factors influencing the extent of the environmental rights revolution in Latin America / 144
- 6.A Constitutional influence on environmental legislation and litigation in Latin America and the Caribbean / 147
- 7.1 Factors influencing the extent of the environmental rights revolution in Africa / 158
- 7.A Constitutional influence on environmental legislation and litigation in Africa / 161
- 8.1 Factors influencing the extent of the environmental rights revolution in Asia / 188
- 8.A Constitutional influence on environmental legislation and litigation in Asia / 191
- 9.1 Factors influencing the extent of the environmental rights revolution in Eastern Europe / 206
- 9.A Constitutional influence on environmental legislation and litigation in Eastern Europe / 211
- 10.1 Factors influencing the extent of the environmental rights revolution in Western Europe / 227

- 10.A Constitutional influence on environmental legislation and litigation in Western Europe / 229
- 12.1 Constitutional provisions and ecological footprints / 260
- 12.2 Indicators used in SFU's environmental comparison of OECD nations / 261
- 12.3 Constitutions and the environmental performance of OECD nations / 262
- 12.4 Indicators in the Conference Board of Canada's environmental rankings / 264
- 12.5 Constitutions and the Conference Board of Canada's environmental rankings / 265
- 12.6 Constitutions and ratification of international environmental laws / 267
- 12.7 Constitutions and changes in nitrogen oxide emissions / 269
- 12.8 Constitutions and changes in sulphur dioxide emissions / 271
- 12.9 Constitutions and changes in greenhouse gas emissions (GHG) / 273

## FIGURES

- 3.1 Map of nations with environmental protection provisions in their constitutions / 48
- 3.2 Map of nations recognizing the constitutional right to a healthy environment / 61
- 3.3 Prevalence of environmental protection provisions in national constitutions / 76
- 4.1 Map of nations recognizing the right to a healthy environment / 93
- 5.1 From constitution to environmental outcome via legislation: A simplified sequence / 118
- 5.2 From constitution to environmental outcome via litigation: A simplified sequence / 119
- 6.1 Constitutional influence on environmental legislation and litigation in Latin America and the Caribbean / 125
- 7.1 Constitutional influence on environmental legislation and litigation in Africa / 151

- 8.1 Constitutional influence on environmental legislation and litigation in Asia / 166
- 9.1 Constitutional influence on environmental legislation and litigation in Eastern Europe / 195
- 10.1 Constitutional influence on environmental legislation and litigation in Western Europe / 216
- 11.1 Overall constitutional influence on environmental legislation and litigation / 236
- 12.1 Constitutions and ecological footprints: Global / 259

## ..... Acknowledgments

I would like to thank Natasha Affolder, Will Amos, Carl Bruch, Anna Cederstav, Lynda Collins, Peter Dauvergne, Hadi Dowlatabadi, May du Monceau, Mark Haddock, Kathryn Harrison, Brad Hornick, Jim May, Karin Mickelson, Paul Richardson, Terre Satterfield, Dinah Shelton, John Swaigen, and Hugh Wilkins for generously sharing their time, knowledge, and wisdom at various stages of this project. I also would like to thank the Trudeau Foundation, the Social Sciences and Humanities Research Council, Tim and Ann O’Riordan, the Walter and Duncan Gordon Foundation, and the University of British Columbia for financial support. As usual, the staff at UBC Press, especially Randy Schmidt, Ann Macklem, and Peter Milroy, were a delight to work with.

I also owe an infinite debt to Margot and Meredith for their enthusiastic encouragement, love, and patience during the seemingly endless process of researching and writing this book.



## ..... Abbreviations

CNG	Compressed Natural Gas
COHRE	Centre on Housing Rights and Evictions
DNA	deoxyribonucleic acid
ENGO	Environmental Non-governmental Organization
EPIC	Environmental Provisions in Constitutions
ECHR	European Court of Human Rights
GDP	gross domestic product
GHG	greenhouse gas
GMO	genetically modified organism
IACHR	Inter-American Commission on Human Rights
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
ICJ	International Court of Justice
ICSID	International Center for the Settlement of Investment Disputes
IUCN	International Union for Conservation of Nature
N/A	not available
NGO	Non-governmental Organization
NOx	nitrogen oxides
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
PCB	polychlorinated biphenyl
SFU	Simon Fraser University
SO <sub>2</sub>	sulphur dioxide
UNEP	United Nations Environment Programme
USAID	United States Agency for International Development

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PART 1

The Emergence and Evolution  
of a New Human Right



# 1

## Constitutions, Human Rights, and the Environment: The Context

New wrongs, unimagined by our founding fathers, must generate new rights capable of preventing the recurrence of those wrongs.

– Alan M. Dershowitz, *Rights from Wrongs*

In recent decades, three striking and related developments have taken place around the world – a wave of new and amended constitutions in both emerging and established democracies, the human rights revolution, and growth in the magnitude and awareness of the global environmental crisis. This book examines a concept that is situated at the convergence of these three developments – the constitutional right to live in a healthy environment.

Beginning in the 1970s, public recognition of worldwide environmental degradation and the inadequacy of state responses prompted constitutional changes and recourse to the powerful language of human rights. How widespread is the environmental rights revolution in today's world, and to what extent is it influencing laws, public policies, court decisions, environmental performance, and human well-being? While other books and articles have debated the philosophical pros and cons of the right to a healthy environment, this book breaks new ground in evaluating the extent and impacts of constitutional provisions requiring environmental protection. From Argentina to the Philippines, something remarkable is happening. In communities, legislatures, and courtrooms all around the world, a new human right is blossoming from seeds planted decades ago. The constitutional right to live in a healthy environment represents a tangible embodiment of hope, an aspiration that the destructive, polluting ways of the past can be replaced by cleaner, greener societies in the future. While no nation has yet achieved the holy grail of ecological sustainability, the evidence presented in this book indicates that constitutional protection of the environment can be a powerful and potentially transformative step toward that elusive goal.

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## Constitution Making

Constitutions are where societies establish the values that are to guide political and social discourse for generations to come, and also where those values are protected by incorporating them as constitutional obligations or rights.

– Richard P. Hiskes, *The Human Right to a Green Future*

The first of the three broad developments contributing to the emergence of the constitutional right to a healthy environment is the remarkable shift toward constitutional democracy across the globe in the countries of Eastern Europe, Latin America, and Africa, and also in nations that have long traditions of parliamentary democracy.<sup>1</sup> The tragic legacies of fascism, colonialism, and communism contributed to this unprecedented wave of constitution making.<sup>2</sup> More than half of the world's national constitutions have been written since the mid-1970s, and many more have been substantially overhauled.<sup>3</sup>

A constitution represents the highest or supreme law in a nation, establishing the formal rules that direct and constrain government powers, defining the relationships between government institutions, and protecting individual rights.<sup>4</sup> In the words of a leading constitutional scholar: "A country's constitution is the set of fundamental principles that together describe the organizational framework of the state and the nature, the scope of, and the limitations on the exercise of state authority."<sup>5</sup> In federal nations, such as Canada or the United States, the constitution also allocates power and areas of legislative jurisdiction between the national and subnational governments. Constitutions trump other laws in the event of a conflict between a constitutional provision and another law and are generally more difficult to amend than ordinary laws.<sup>6</sup> The design of a nation's constitution can influence who gets to exercise power and who does not, how laws and policies are created, and who wins and loses in politics.<sup>7</sup> There is also a vital normative role for constitutions, which express the deepest, most cherished values of a society. Thus one court has described a constitution as a "mirror reflecting the national soul."<sup>8</sup>

Some scholars view the trend toward constitutionalism as a predominantly positive evolution in governance. Constitutions, and particularly rights, provide guiding principles for all branches of government in the discharging of their duties.<sup>9</sup> Constitutions implement the rule of law, creating predictability

and security in the relationship between government and people.<sup>10</sup> According to Tamanaha, “Everyone is better off, no matter where they live and who they are, if government officials operate within a legal framework ... in the sense of abiding by the legal framework and in the sense that there are limits on law-making power.”<sup>11</sup>

The most common critique of constitutionalism is that the emphasis on rights and the empowerment of courts (through the process of judicial review) undermines democracy.<sup>12</sup> In order to ensure that governments act within the limits set forth in a constitution, the judicial branch is generally given the power to review legislation and other government actions and enforce individual rights. This results in a phenomenon labelled the judicialization of politics, which refers to “the infusion of judicial decision-making and of court-like procedures into political arenas where they did not previously reside.”<sup>13</sup> Drivers of this phenomenon include constitutional recognition of rights, a dramatic rise in recourse to courts by interest groups, the public perception of courts as expert and principled while politicians are corrupt and incompetent, and increasing judicial activism (that is, a willingness on the part of judges to substitute their own policy solutions for those of democratically elected governments).<sup>14</sup>

More than eighty nations have enacted constitutional reforms that transfer some degree of power from democratically elected institutions to judiciaries.<sup>15</sup> Giving courts the power to strike down legislation and administrative acts has been described as one of the most significant political developments in democratic nations in recent decades.<sup>16</sup> As Stotzky observed: “The tidal wave of democratization that has spread across the globe in the past three decades is remarkable for its underlying dependence on the rule of law and the role of the courts.”<sup>17</sup>

According to its supporters, judicial review is a fundamental aspect of constitutional democracy because it provides protection for vulnerable groups and individuals against the potential tyranny of majority rule. Courts are empowered to be guardians of both human rights and the constitution itself. In the words of Sunstein: “Without judicial review, constitutions tend to be worth little more than the paper on which they are written. They become mere words, or public relations documents, rather than instruments which confer genuine rights.”<sup>18</sup>

On the other hand, it is a paradox of constitutional democracies that unelected “courts sit in judgment on the decisions made by the elected representatives of the people.”<sup>19</sup> Critics of judicial review argue that reliance on

judges tends to undermine democracy, diminish accountability, and distort public debate.<sup>20</sup> Tate and Vallinder warn that the global expansion of judicial power is a negative development because it is “likely to weaken majoritarian democratic institutions and sustain the rule of privileged and unrepresentative elites, shutting out those who should be represented in a democratic state from effective access to policy-making processes or to effective, responsive administration.”<sup>21</sup> According to Waldron, open elections and decision making by majority rule are more likely to safeguard democracy, human rights, and the rule of law than judicial review.<sup>22</sup>

The persuasive rebuttal from defenders of constitutional democracy is that judicial power can be and is used creatively, not to block democracy but to energize it and make it more deliberative.<sup>23</sup> Experience in many nations demonstrates that this is the case. For example, Hogg and Bushell describe the back-and-forth process between governments and courts in Canada on issues of political and civil liberties and Aboriginal rights as a constructive dialogue.<sup>24</sup> As well, in the majority of nations, judicial power is used in a relatively cautious fashion because of conservative legal cultures, respect for the separation of powers, and particular national circumstances, such as institutional weakness (e.g., lack of tenure for judges).<sup>25</sup>

Critics of constitutionalism also point out the failure to acknowledge the role of private as opposed to public power, which is viewed as a serious flaw in an era dominated by multinational corporations; the lack of consideration accorded to other sites of constitutional law production in an era of globalization, when economic and trade considerations may outweigh constitutional commitments to public welfare; and the exaggeration of the instrumental capacities of rights-based constitutionalism (because law is subjective and litigation may produce unintended and counterproductive consequences).<sup>26</sup> Hirschl argues that constitutionalization of rights is motivated not by “politicians’ genuine commitment to progressive notions of social justice or to an elevated vision of human rights” but rather by “attempts to maintain the social and political status quo and to block attempts to seriously challenge it through democratic politics.”<sup>27</sup> Some researchers believe that constitutions are “legalistic window dressing,” extraneous to what governments do, and serve largely as public relations exercises aimed at domestic or international audiences to improve a nation’s image.<sup>28</sup>

Overall, the impacts of a particular constitution will depend on a suite of legal, social, cultural, economic, and political factors that vary from nation to nation. This book will demonstrate that in the environmental context,

constitutional provisions requiring environmental protection appear to provide a range of benefits, including stronger laws, enhanced public participation, and improved environmental performance.

## The Rights Revolution

There is a human rights revolution, with the freedom explosion that is taking place all over the world.

– Martin Luther King Jr., “Remaining Awake through a Great Revolution,” Washington, DC, 31 March 1968

The second broad development that spurred the emergence of the right to a healthy environment is the rights revolution – at both the national and international levels. The “rights revolution” refers to the sustained, developmental process that has produced new rights or expanded existing rights, resulting in unprecedented recognition and protection of these rights and extension of rights to previously “right-less” groups.<sup>29</sup> Because of the prominent role of courts in this process, the rights revolution is closely tied to constitutionalism and the judicialization of politics. The rights revolution is attributed to a mixture of top-down and bottom-up factors. The top-down factors include constitutional guarantees of human rights, judicial independence, the leadership of individual judges, and government support for rights advocacy. The bottom-up factors that enable strategic rights advocacy include human rights organizations, rights advocacy lawyers, reliable funding sources, and rising rights consciousness and discourse in popular culture. These latter factors are described as the institutional support structure for advocacy and litigation.<sup>30</sup> Most of the initial rights revolution scholarship focused on the United States.<sup>31</sup> More recently, the concept has been applied in India, Canada, Great Britain, Costa Rica, and other nations.<sup>32</sup>

Human rights recognition and protection have grown immensely since the Second World War.<sup>33</sup> The proliferation of international human rights instruments began in 1945 with the UN Charter, which established the rules governing the structure and operations of the United Nations. The Charter explicitly sought “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person.”<sup>34</sup> The entrenchment of human rights advanced in 1948 with the *Universal Declaration of Human Rights* and in 1966

with the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.<sup>35</sup> Human rights have continued to expand in breadth and depth at the global, regional, national, and subnational levels.<sup>36</sup>

Scholars wax eloquent about the importance of human rights. McHugh wrote that “the most dynamic legal concept of the twentieth and twenty-first centuries has been the idea of rights.”<sup>37</sup> Henkin praised human rights as “the idea of our time.”<sup>38</sup> Former UN secretary-general Boutros Boutros-Ghali described rights as the “common language of humanity.”<sup>39</sup> According to Mahoney, “The modern human rights movement has been, and continues to be, an astonishing moral phenomenon ... [reflecting a] remarkable development in human consciousness.”<sup>40</sup>

Rights represent reasonable minimum demands upon society that are rooted in moral values and thus place compelling principles on the side of the person asserting a right.<sup>41</sup> As Ignatieff wrote, “Rights are not just instruments of the law, they are expressions of our moral identity as a people.”<sup>42</sup> Because rights provide recognition for society’s most cherished values, such as dignity, equality, and respect, the language of rights has considerable symbolic force and can be a source of political power. The power of rights discourse is demonstrated by the considerable progress achieved in some battles about justice, including those against racism and the oppression of women.<sup>43</sup> However, one of the key messages of the modern human rights movement is that moral rights are not adequate and must be supplemented with enforceable legal rights to make them meaningful. Legal rights are said to empower rights holders to control the behaviour of others, and are famously described as “trumps” by Dworkin.<sup>44</sup> Shapiro argues that “rights review almost always places courts on the side of the less politically powerful,” protecting minority interests against majority tyranny and fecklessness.<sup>45</sup>

Not everyone has been seduced by the siren song of the rights revolution. It can be argued that rights are inherently undemocratic to the extent that they constrain governments from enforcing the preferences of the majority (as discussed earlier).<sup>46</sup> Human rights are criticized for being individualistic, disregarding duties to others and the interests of the broader community.<sup>47</sup> Despite their purported universality, the Western conception of human rights has been criticized as a form of cultural imperialism. Rights can be divisive when there are conflicts between deeply held values (as in the ongoing abortion debate that pits the rights of women against the rights of the fetus).<sup>48</sup> Glendon called for more thought to be given to “whether a particular issue



is best conceptualized as a right; the relation a given right should have to other rights and interests; the responsibilities, if any, that should be correlative with a given right; the social cost of rights; and what effects a given right can be expected to have on the setting of conditions for the durable protection of freedom and human dignity.<sup>49</sup> Other criticisms take aim at the processes used to create rights, particularly when rights are established or enlarged through court decisions. For example, Bork argues that creating rights through judicial interpretation is “heresy” because the role of judges is to interpret law, not make law.<sup>50</sup>

Critics also argue that the focus on rights obscures underlying societal problems and their root causes. Capitalism and globalization, with their emphasis on free trade and market-based solutions, are accused of contributing to the erosion of human rights.<sup>51</sup> States are responsible for respecting, protecting, and fulfilling human rights, but critics argue the power of states is declining relative to international institutions (e.g., the World Trade Organization) and transnational corporations. For example, Baxi questions whether the right to food can be reconciled with a global agribusiness industry dominated by a handful of large corporations.<sup>52</sup>

Perhaps the most trenchant critique is that the unprecedented global diffusion of rights on paper is not matched by global respect for rights in practice. Violations of human rights remain commonplace, even in wealthy Western nations. As Falk observes, “The achievements in human rights over the course of the last fifty years are extraordinary, but the obstacles to full realization seem as insurmountable as ever.”<sup>53</sup> The right to a healthy environment reflects these broader debates, as the evidence provided in this book will demonstrate that the right has contributed to environmental progress, yet ecological sustainability remains a distant goal.

## The Global Environmental Crisis

Now is our last chance to get the future right.

– Ronald Wright, *A Short History of Progress*

The emergence of a global environmental crisis in the latter half of the twentieth century is the third factor spurring the development of the right to a healthy environment. Although concerns about human impacts on Nature date back centuries, widespread public awareness of global environmental

problems emerged in the 1960s. The awakening was triggered by the publication of Rachel Carson's *Silent Spring* and by a series of high-profile ecological disasters, including the *Torrey Canyon* oil spill off the coast of England, the so-called death of Lake Erie, and the burning of the Cuyahoga River.<sup>54</sup> Humans' technological prowess, consumptive appetite, and global economy have made us a geological force, leading some scientists to conclude that the Holocene epoch has ended and we have entered the "Anthropocene."<sup>55</sup> There are close to 7 billion people living on the Earth today, with the population expected to reach 9 billion by the middle of this century.<sup>56</sup> Agriculture, transportation, housing, industry, consumer goods, and day-to-day human activities are placing an unprecedented level of pressure on the natural systems of the planet. The web of life, upon which our own future depends, is jeopardized by the interrelated problems of climate change, extinction, and toxic pollution.<sup>57</sup>

Climate change is among the most daunting environmental challenges ever confronted by humanity and may be the paramount threat to public health in the twenty-first century.<sup>58</sup> The burning of fossil fuels has pushed levels of carbon dioxide in the atmosphere to the highest levels in at least 650,000 years. Agriculture, deforestation, and livestock are also major contributors to climate change.<sup>59</sup> Human emissions of greenhouse gases are changing the climate in ways that are causing not only warmer temperatures, but also more frequent and intense heat waves, storms, and other extreme weather events; melting ice in the Arctic, Greenland, and the Antarctic; disappearing glaciers, melting permafrost, rising sea levels, disruptive floods, acidification of the oceans, droughts, and extinctions.<sup>60</sup> Forests are increasingly vulnerable to pests, disease, and wildfire, causing economic disruption and social dislocation in forest-dependent communities. Scientists are concerned that abrupt, unpredictable climate shifts could occur.<sup>61</sup> Climate change already causes an estimated 150,000 deaths and 5 million illnesses per year.<sup>62</sup> The World Health Organization projects a doubling of these figures by 2030.<sup>63</sup> Tens of millions of people may be displaced from their homes by flooding, spawning an unprecedented wave of environmental refugees. More than a billion people may face chronic water shortages as precipitation patterns change and water supplies stored in glaciers and snowpacks decline.

Biological diversity – the richness of life measured at the species, ecosystem, and genetic levels – is disappearing more rapidly than at any time since the extinction of the dinosaurs 65 million years ago.<sup>64</sup> Scientists estimate that species are going extinct at a rate that is one hundred to one thousand

times faster than normal and fear that the pace of extinctions will accelerate in the decades ahead.<sup>65</sup> The Living Planet Index, created by several different institutions including the Zoological Society of London and the World Wildlife Fund, tracks populations of more than twenty-five hundred vertebrate species – mammals, birds, fish, amphibians, and reptiles – living in terrestrial, marine, and freshwater ecosystems. Between 1970 and 2007, the Living Planet Index fell 30 percent, suggesting that we are degrading natural ecosystems at a rate unprecedented in human history.<sup>66</sup> The United Nations' Millennium Ecosystem Assessment, a comprehensive analysis of the state of life on Earth prepared by more than thirteen hundred experts, concluded: "Human activity is putting such strain on the natural functions of the Earth that the ability of the planet's ecosystems to sustain future generations can no longer be taken for granted."<sup>67</sup> At least 60 percent of the world's natural resources and life-supporting ecosystems are in decline. Despite the fact that oceans cover close to three-quarters of the Earth's surface, marine ecosystems are among the most depleted on the planet. Populations of large predatory fishes – bluefin tuna, swordfish, and sharks – have declined by more than 90 percent.<sup>68</sup> Some scientists predict that if current fishing practices continue, all commercially targeted fish species will suffer population collapses by 2048.<sup>69</sup> As a result, the oceans will be unable to contribute to feeding a growing human population, and marine ecosystems will suffer a severe decrease in their ability to resist diseases, cope with invasive species, filter pollutants, and rebound from stresses.<sup>70</sup> Globally, biodiversity loss and damage to ecosystems is estimated to cost humanity trillions of dollars every year.<sup>71</sup>

Toxic industrial and agricultural chemicals now contaminate every ecosystem in the world. Humans are exposed to hundreds, if not thousands, of hazardous substances through air, food, water, and consumer products. Tests examining the blood and urine of Americans, Canadians, and Europeans find heavy metals, pesticides, flame retardants, stain repellants, and PCBs.<sup>72</sup> Even the umbilical cord blood of newborn infants in the United States contains over two hundred industrial chemicals.<sup>73</sup> These findings illustrate the fundamental connection between humans and the environment. Total releases of toxic chemicals into the environment by large industries in the United States and Canada alone are measured in the tens of billions of kilograms annually.<sup>74</sup> Agricultural runoff, urban runoff, small and medium-sized businesses, and motor vehicles release billions of additional kilograms of toxic substances. Exposure to these environmental hazards is a major cause of death and disease. According to the World Health Organization,

approximately one-quarter of the burden of disease globally is attributable to environmental factors.<sup>75</sup> Exposure to environmental contaminants can cause cancer; increase the risk of birth defects; damage the respiratory, cardiovascular, reproductive, hormonal, immune, and nervous systems; and contribute to Parkinson's, Alzheimer's, and other neurodegenerative diseases.<sup>76</sup> Children are particularly vulnerable.<sup>77</sup>

Society has responded to the global environmental crisis with initiatives at every scale, from the global to the local. There has been an explosion of bilateral, regional, and global treaties on environmental subjects in the past three decades, with more than one thousand such agreements now in force around the world.<sup>78</sup> International environmental conventions cover all of the environmental issues facing humanity, including, *inter alia*, climate change, ozone depletion, destruction of marine ecosystems, loss of biodiversity, air and water pollution, trade in hazardous substances, trade in endangered species, and persistent organic pollutants. At the national and subnational levels, new institutions have been created and countless laws, regulations, standards, and policies enacted. Among these myriad responses are international instruments and national constitutions that recognize the right to live in a healthy environment.

### The Right to a Healthy Environment

If, as many scholars assert, human rights trace their roots to specific historical wrongs, then it is understandable that the right to a healthy environment is not found in pioneering human rights instruments such as the *Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966), or the *International Covenant on Economic, Social, and Cultural Rights* (1966). Society's awareness of the magnitude, pace, and adverse consequences of environmental degradation was not sufficiently advanced during the era when these agreements were drafted and negotiated to warrant the inclusion of environmental concerns.<sup>79</sup>

The first written suggestion that there should be a specific human right to a healthy environment came from Rachel Carson in 1962:

If the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem.<sup>80</sup>

Similarly, in her final public speech before dying of cancer, Carson testified before President Kennedy's Scientific Advisory Committee, urging it to consider

a much neglected problem, that of the right of the citizen to be secure in his own home against the intrusion of poisons applied by other persons. I speak not as a lawyer but as a biologist and as a human being, but I strongly feel that this is or ought to be one of the basic human rights.<sup>81</sup>

In 1972, the first global eco-summit resulted in the pioneering *Stockholm Declaration*, which formally recognized the right to a healthy environment and the accompanying responsibility (although the agreement is not legally binding):

*Principle 1*

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

*Principle 2*

The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.<sup>82</sup>

While international law plays an important normative role, this book focuses on the right to a healthy environment at the national level, where human rights are largely implemented and enforced. As Hiskes observes, "Any human right, environmental or otherwise, is always operative mainly at the national level in the legal sense, even if morally or politically the language used to characterize it is more universal or at least global in scope."<sup>83</sup>

Almost forty years after the *Stockholm Declaration*, there is an ongoing debate about the right to a healthy environment – its philosophical underpinnings, moral and legal validity, parameters, and potential utility.<sup>84</sup> Supporters argue that the potential benefits of constitutionalizing the right

to a healthy environment include the enactment and enforcement of stronger and more comprehensive environmental laws; a level playing field vis-à-vis other rights; greater government and corporate accountability; protection of vulnerable groups who currently shoulder a disproportionate burden of environmental harms; and increased citizen participation in decisions and actions to protect the environment.<sup>85</sup> Conversely, a vocal minority argues that any prospective advantages are outweighed by problems such as low likelihood of effectiveness; negative implications for democracy; the vague articulation of the right; the excessive focus on individuals; adverse effects on other rights; anthropocentrism; and the creation of false hopes.<sup>86</sup>

To date, however, there is a noteworthy absence of empirical evidence about whether and to what extent the constitutional right to a healthy environment is in fact realizing these anticipated effects, either positive or negative. Hayward, in one of the leading texts on this subject, discounts the possibility of conducting such an assessment because of methodological difficulties.<sup>87</sup> Shelton, another leading scholar in the field of environmental rights, writes that constitutional environmental rights “probably halted some environmental deterioration in some countries, although empirical studies are lacking and causality is difficult to demonstrate.”<sup>88</sup> These evidentiary challenges are not new but are part of a broader discourse about the consequences – both theoretical and real – of law, constitutions, and public policy.

### Do Constitutional Rights Matter?

There is a longstanding debate about whether, and to what extent, constitutional rights matter.<sup>89</sup> As Congleton asks, “Are constitutions simply symbols of the political time at which they were adopted, or do they systematically affect the course of public policy?”<sup>90</sup> Proponents of constitutional rights argue that laws will become stronger, institutions and norms will evolve, and courts will defend the rights of citizens.<sup>91</sup> There is an implicit faith that constitutions, in tandem with legal systems, will ensure the protection and fulfillment of rights.<sup>92</sup> This faith has come under attack from critics claiming that context is as important as, or more important than, the words on paper, and that on-the-ground results provide an indictment of the failure of constitutional rights to live up to their promises.<sup>93</sup>

Ignatieff argues that the acid test of the worth of constitutional and international human rights is whether they improve peoples’ lives.<sup>94</sup> This is a compelling argument, for otherwise, rights may be mere paper tigers and

their constitutional recognition nothing more than “cheap talk.”<sup>95</sup> Paper tigers and cheap talk could result from the absence of the rule of law; competing social and economic priorities; a lack of resources for implementation and enforcement; or other social, legal, and cultural factors. For example, the constitutions of many communist nations and dictatorships often included extensive lists of human rights that were honoured in the breach, including the right to a healthy environment.<sup>96</sup> Article 67 of the Constitution of the Democratic People’s Republic of Korea guarantees its citizens free speech; freedom of the press; freedom of assembly, demonstration, and association; and the right to form democratic political parties. None of these rights exist in any real sense in North Korea, underlining the fact that the impact of constitutional environmental provisions will depend on the specific culture and politics of an individual nation, institutional factors, the distribution of power between various polities, and the presence and resources of advocacy groups.<sup>97</sup>

The extent to which constitutions matter can be evaluated by either the instrumental or the constitutive approach.<sup>98</sup> The instrumental approach examines measurable or quantifiable effects and outcomes. For example, did the US Supreme Court decision in *Brown v. Board of Education*, striking down the practice of providing separate schools for black and white children, change the social, educational, and economic status of African Americans in concrete ways?<sup>99</sup> In contrast, the constitutive approach characterizes law as having a more pervasive (but more difficult to measure) impact on society through deeper channels, affecting fundamental beliefs, institutions, behaviour, and the legitimacy of authority. Did *Brown v. Board of Education* change American values regarding racism and equality? The constitutive approach suggests that law plays an influential role in shaping politics, economics, and culture. Another way of categorizing the effects of constitutions is by separating legal and extra-legal effects. Legal effects include influencing legislation, public policy, and court decisions, while extra-legal effects include the evolution of public opinion, attitudes, values, and behaviour. This book considers both the legal and extra-legal effects of constitutional provisions requiring environmental protection, but emphasizes the former.

The question of whether constitutions matter has been asked, and at least partially answered, in many different contexts, including Aboriginal rights,<sup>100</sup> economic effects,<sup>101</sup> civil and political rights,<sup>102</sup> the right to health,<sup>103</sup> and other social and economic rights.<sup>104</sup> Arthurs and Arnold assessed the impact of the *Canadian Charter of Rights and Freedoms* some two decades after

that document revolutionized the Canadian legal landscape and found little evidence of positive effects on the status of women, the income gap between rich and poor, or the socio-economic status of Aboriginal people.<sup>105</sup> Hirsch examined the impact of constitutionalization of rights in Canada, Israel, New Zealand, and South Africa on the status of historically disenfranchised groups, finding little improvement in access to education, basic housing, health care, employment, and distribution of wealth.<sup>106</sup> In contrast, Carlson concluded that positive transformative changes have occurred in the recognition and protection of Aboriginal rights because of the recognition of those rights in Canada's 1982 constitution.<sup>107</sup> Montenegro identified a negative correlation between the length of a nation's constitution and per capita income.<sup>108</sup> De Vanssay and Spindler found that political rights have no significant effect on economic growth and economic wealth, whereas economic freedom (a concept that includes protection of property rights) and freedom of contract do have a significant positive effect.<sup>109</sup> Political scientists have examined the effects of constitutions and particular types of civil and political rights as they attempt to discern the influence of institutions on a wide range of outcomes, including environmental protection.<sup>110</sup> Several scholars have reported that protection for civil and political rights is positively correlated with environmental quality.<sup>111</sup> Kinney and Clark found no correlation between the strength of constitutional commitments to protect health and average per capita government expenditures on health care.<sup>112</sup>

Remarkably, none of this literature has been referred to in the ongoing debate about the right to a healthy environment, which continues to be characterized by theoretical rather than empirical observations. In this book, I will harness the approaches and insights of these scholars in an attempt to overcome the challenges inherent in assessing the effects of constitutionalizing the right to a healthy environment.

## Overview

The question at the heart of this book is: Do environmental provisions in constitutions – in particular, the right to live in a healthy environment – matter? Do they have observable legal and extra-legal effects that contribute to improved environmental protection and reduced risks to human health? Part 1 examines the emergence and evolution of the right to a healthy environment at both the national and international levels. Chapter 2 reviews the debates about the nature and scope of the right to a healthy environment as well as the theoretical advantages and disadvantages of constitutional recognition of this right. Chapter 3 examines the extent to which the constitutions



of the 193 member states of the United Nations address environmental issues by asking the following questions:

- How many national constitutions incorporate provisions related to environmental protection?
- How many constitutions explicitly recognize that individuals have a right to a healthy environment?
- What other types of environmental protection provisions are found?
- When were these constitutional provisions enacted?
- Are there limits imposed on the right to a healthy environment? Are these limits similar to, or different from, limits on other constitutional rights?
- Are the environmental protection provisions enshrined in national constitutions enforceable, at least on paper?

Chapter 4 offers an overview of the evolution of the right to a healthy environment at the international level. Increasing recognition of this right at the global and regional levels influences national constitutions, legislation, and jurisprudence.<sup>113</sup> For example, the *Stockholm Declaration* is often cited as an inspiration by nations that have included environmental rights and responsibilities in their constitutions.<sup>114</sup> Developments at the national level, in turn, influence the development of the right to a healthy environment internationally.

Part 2 explores the legal consequences of environmental provisions in constitutions, with an emphasis on the right to a healthy environment. Chapter 5 outlines an analytical framework for assessing the impacts of constitutional environmental provisions on legislation and court decisions. Chapters 6 to 10 assess the extent of the constitutional right's influence through a comprehensive examination of environmental laws and court decisions in one hundred nations in Latin America and the Caribbean, Africa, Asia, Eastern Europe, and Western Europe. These chapters also examine the factors responsible for variations in the extent of the rights revolution both within and among the five regions.

Part 3 evaluates the experiences of nations that have entrenched environmental protection in their constitutions. Chapter 11 assesses the extent to which the anticipated advantages and disadvantages of the constitutional right to a healthy environment are being borne out in practice. Chapter 12 presents an empirical comparison of the environmental performance of nations with and without constitutional provisions related to environmental protection. The data sets used in this comparison include the following:

- size of per capita ecological footprints for 150 nations
- rankings of environmental performance among the nations of the Organisation for Economic Co-operation and Development, published by researchers at Simon Fraser University
- rankings of environmental performance among seventeen wealthy industrialized nations, published by the Conference Board of Canada
- ratification of five major international environmental agreements
- progress in reducing greenhouse gas emissions
- trends in reducing sulphur dioxide emissions
- trends in reducing nitrogen oxide emissions.

Chapter 13 summarizes the results of the research, synthesizes the major conclusions, and offers suggestions for future research on constitutional environmental rights.

## Conclusion

The right to live in a healthy environment continues to generate extensive interest at the national, regional, and international levels. Ecuador made headlines around the world in 2008 for adopting a new constitution that grants legal rights directly to Nature.<sup>115</sup> New constitutions incorporating extensive environmental provisions were enacted in Bhutan, Ecuador, the Maldives, and Turkmenistan in 2008; Bolivia in 2009; Kenya and the Dominican Republic in 2010; and Jamaica, Morocco, and South Sudan in 2011. Iceland's new constitution, pending parliamentary approval and possibly a public referendum, also includes strong environmental language. In the United Kingdom, a joint committee of the House of Commons and the House of Lords recently recommended that the right to a healthy environment be included in a proposed UK Bill of Rights.<sup>116</sup> In 2008, the president of the Parliamentary Assembly of the Council of Europe stated: "One of the objectives I have set myself during my term of office is the integration of the right to a healthy environment into the *European Convention on Human Rights*."<sup>117</sup> The president of the Maldives called for immediate negotiations on a comprehensive environmental rights agreement as a key element in addressing the threat to human rights posed by climate change.<sup>118</sup> In 2011, the UN General Assembly began debating a proposed Universal Declaration of the Rights of Mother Earth.

In light of these ongoing developments, it is essential to move beyond philosophical debates about human rights and the environment. The time

has come to begin the difficult process of evaluating the effectiveness of the right to a healthy environment, not through rose-coloured glasses but through an even-handed assessment of factual evidence. The conclusions will be relevant not only for nations that are engaged in implementing constitutional environmental provisions, but also for nations whose constitutions do not yet recognize the fundamental importance of protecting the environment. The results of this research will also contribute to the broader debates about whether law matters, whether constitutions matter, and whether rights are an effective tool in promoting social change.<sup>119</sup> As the world struggles to fulfill its aspirations to protect both human rights and the environment, efforts and resources must be re-directed toward the most effective, efficient, and equitable means of achieving these vital and intimately intertwined goals.



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20 19 18 17 16 15 14 13 12      5 4 3 2 1

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### Library and Archives Canada Cataloguing in Publication

Boyd, David R. (David Richard), 1964-

The environmental rights revolution : a global study of constitutions, human rights, and the environment / David R. Boyd.

(Law and society series, ISSN 1496-4953)

Includes bibliographical references and index.

Also issued in electronic format.

ISBN 978-0-7748-2160-5

1. Environmental law. 2. Constitutional law. 3. Human rights. 4. Environmental ethics. I. Title. II. Series: Law and society series (Vancouver, B.C.)

K3585.B69 2012

344.04'6

C2011-903715-7

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## Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Aid to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada, and with the help of the K.D. Srivastava Fund.

Printed and bound in Canada by Friesens

Set in Giovanni and Scala Sans by Artegraphica Design Co. Ltd.

Copy editor: Audrey McClellan

Proofreader: Francis Chow

Indexer: Patricia Buchanan

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

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