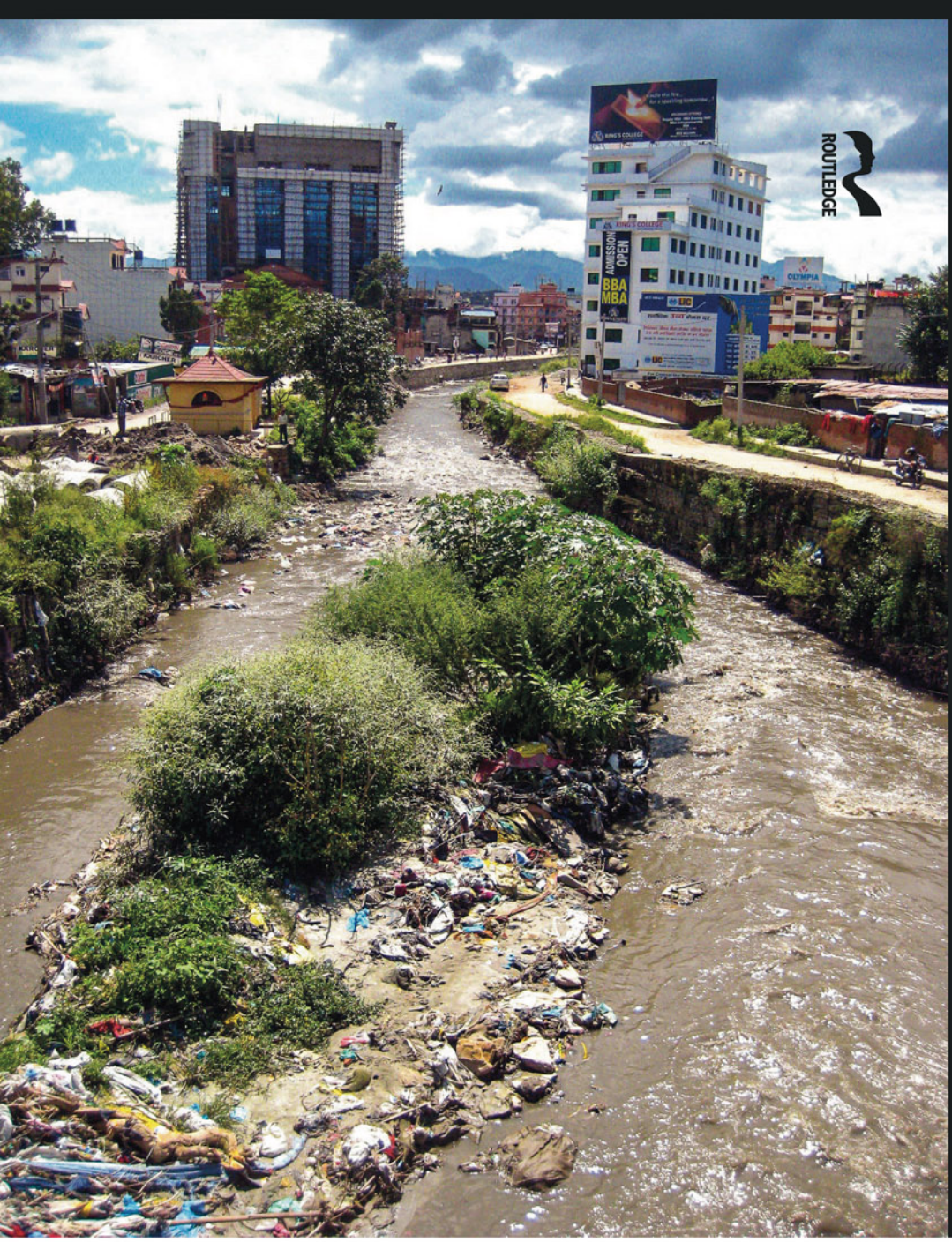

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THE GLOBAL EMERGENCE OF CONSTITUTIONAL ENVIRONMENTAL RIGHTS

Joshua C. Gellers

The Global Emergence of Constitutional Environmental Rights

Over the past 40 years, countries throughout the world have similarly adopted human rights related to environmental governance and protection in national constitutions. Interestingly, these countries vary widely in terms of geography, politics, history, resources, and wealth. This raises the question: why do some countries have constitutional environmental rights while others do not? Bringing together theory from law, political science, and sociology, a global statistical analysis, and a comparative study of constitutional design in South Asia, Gellers presents a comprehensive response to this important question. Moving beyond normative debates and anecdotal developments in case law, as well as efforts to describe and categorize such rights around the world, this book provides a systematic analysis of the expansion of environmental rights using social science methods and theory. The resulting theoretical framework and empirical evidence offer new insights into how domestic and international factors interact during the constitution drafting process to produce new law that is both locally relevant and globally resonant. Scholars, practitioners, and students of law, political science, and sociology interested in understanding how institutions cope with complex problems like environmental degradation and human rights violations will find this book to be essential reading.

Joshua C. Gellers is an Assistant Professor of Political Science at the University of North Florida and Fulbright Scholar to Sri Lanka. His work focuses on environmental rights and sustainable development. His articles have appeared in *International Environmental Agreements*, *Journal of Human Rights and the Environment*, and *Transnational Environmental Law*.

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To my parents,
Paul and Gayle,
who gave me the world and the courage to improve it.


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Abbreviations

AISLS	American Institute for Sri Lankan Studies
AL	agricultural land
ASEAN	Association of Southeast Asian Nations
CEA	Central Environmental Authority
CL	civil liberties
DAC	Development Assistance Committee
EFL	Environmental Foundation Limited
EIA	environmental impact assessment
EIS	environmental impact statement
EM	ecological modernization
ENGO	environmental non-governmental organization
EPL	Environmental Protection License
ES	English School
FDI	foreign direct investment
FECOFUN	Federation of Community Forestry Users, Nepal
GDP	gross domestic product
GDPpc	gross domestic product per capita
GNI	gross national income
HRC	Human Rights Council
HRL	human rights legacy
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICDC	Interim Constitution Drafting Committee
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSI	international civil society influence
IGO	inter-governmental organization
ILO 169	International Labor Organization Convention Number 169
INGO	international non-governmental organization
IR	international relations
IRB	Institutional Review Board
IUCN-Nepal	International Union for Conservation of Nature, Nepal

LA	land area
LD	level of democracy
MDG	Millennium Development Goal
MI	monetary incentives
MNC	multinational corporation
NBA	net bilateral aid
NEA	National Environmental Act
NGO	non-governmental organization
NRD	natural resource dependency
NRPP	Natural Resource People's Parliament
NRR	total natural resource rents
OAS	Organization of American States
ODA	net official development assistance
PD	population density
POP	population
PR	political rights
PRC	Public Representations Committee
RC	regime characteristics
RD	regional diffusion
SAC	South Asian constitution
SIAS	Southasia Institute of Advanced Studies
TAN	transnational advocacy network
UDHR	Universal Declaration of Human Rights
UIA	Union of International Associations
UNECE	United Nations Economic Commission for Europe

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Chapter 1

Constitutions, the environment, and human rights

The heavy monsoon air assaulted my travel-worn body right as I stepped onto the tarmac at Tribhuvan International Airport in Kathmandu, Nepal. It was nearly 10 pm. I shuffled through customs half asleep, alert only enough to notice the modest size of the terminal, the anachronistic use of wood paneling, and my inability to tap into a wireless network on my cellphone. After collecting my checked luggage I headed outside, where a taxi hired by my hotel waited to receive me. The airport seemed an island of light amidst the sea of darkness filling the Nepalese night. A soft rain began to trickle down from the illimitable skies.

Once inside the cab, I felt my fatigue quickly dissolve as a flicker of curiosity ignited my attention. The taxi driver expertly navigated rough roads and tortuous alleyways with a kind of certainty that stood in stunning contrast to my complete sense of alienation. I knew where I was geographically speaking, but that knowledge failed to register any concrete meaning in my present state. I turned my gaze out the passenger window.

The only bits of country accessible to my visual field were those elements crudely illuminated by the yellow headlights of our car. As we zoomed along the dampened streets, panic crept its way up my throat until it formed a knot at the back of my mouth. The external world rendered cognizable only by the small golden spheres constantly being chased by the taxi elicited terror, then disbelief. Multi-story buildings gaped like the skeletal remains of faces blown out by indiscriminant aerial bombing campaigns. Trash and rubble commingled in random elevated patches along the roadways. Feral dogs in search of a late supper zipped up and down saturated heaps of garbage. Upon beholding these unexpected sights I was forced to recall why I had ventured nearly 8,000 miles to this unique country in the first place—because Nepal had recently added environmental rights to its national constitution. Clearly the gulf separating law and practice remained vast, but I didn't fly to this pivotal pocket of Asia in order to lambaste a developing country for its inability to implement environmental law. I was here to understand why a growing chorus of states echoed a preference for enacting constitutional environmental rights.

Introduction

Over the past four decades, countries throughout the world have adopted human rights pertaining to environmental protection and governance in their respective national constitutions. Such legal provisions are collectively known as "constitutional environmental rights." Interestingly, states with constitutional environmental rights appear to have little else in common; they vary widely in terms of their geographic location, history, human and natural resources, political system, size, and wealth. At the same time, environmental rights do not (yet) enjoy universal recognition among governing charters across the globe. This observation poses an empirical puzzle for social scientists—*Why do some countries have constitutional environmental rights while others do not?*

I argue that the phenomenon identified above has occurred as a result of international norms that *constrain* constitution drafting processes, compelling states to adopt human rights related to the natural environment, and *constitute* state identities, socializing countries to treat environmental protection as a proper domain of state authority and view environmental quality as fundamentally related to human rights. I also contend that the global emergence of constitutional environmental rights is not driven by individual state calculations regarding opportunities to enhance power or material wealth. The mixed-methods study contained within this book rigorously tests the validity of these two arguments.

But before proceeding to examine the reasons why environmental rights have increasingly found a home in national constitutions across the world, it helps to first understand why these rights are important and how this book contributes to existing knowledge on the subject. To begin, how are environmental rights distinct from other institutional mechanisms intended to address environmental problems? The worldwide spread of environmental rights represents an important development worthy of empirical examination for reasons related to morality, legitimacy, authority, and identity. First, by raising the prerogative of environmental protection to the level of importance afforded human rights, states assign universal *moral* significance to the task of safeguarding the environment. This formal reconceptualization of the human–environment relationship suggests that environmental rights are fundamental to the wellbeing of citizens, marking a significant shift in constitutional design and legal thinking. Second, constitutional environmental rights add new *legitimacy* and urgency to the cause of environmental protection. By linking the environment to human rights, environmentalists gain the clout of institutions and resources central to the international human rights movement (Nickel 1993, p.283), potentially resulting in a greater capacity to mobilize support for the resolution of environmental problems. Third, placing environmental rights within a constitution imbues them with the highest level of legal *authority*

available in a society governed by the rule of law (Gravelle 1997, p.635). Incorporating environmental rights into constitutional frameworks avoids placing the onus for environmental protection solely on legislative bodies whose decisions may hinge on a narrow majority, and makes removal of such provisions politically cumbersome (Brandl & Bungert 1992, p.4). Finally, once these rights are formally adopted, they become woven into the fabric of a state's national *identity*. Constitutional entrenchment of environmental rights "results in the identification of environmental protection with expressions of national pride and character" (Brandl & Bungert 1992, pp.4–5).

To be sure, the adoption of constitutional environmental rights may produce lasting effects related to the project of environmental governance. Although in general constitutions have a relatively short shelf life (Elkins et al. 2009, p.1), previous iterations may serve as benchmarks for later versions, constraining the decisions of future drafters (Osiatynski 1994). In the near term, constitutional environmental rights may raise the bar for domestic environmental governance and amplify popular expectations about the state's capacity to safeguard the environment, making it difficult for political leaders to rescind such ambitions later. In short, the act of situating environmental rights within a constitution enhances their institutional "stickiness," leaving a legacy that may influence reform efforts in the future.

At the same time, one should remain cautious when speculating about the utility of constitutional rights in general. Laws on the books do not necessarily translate to laws in action. The very act of drafting a constitution carries such normative weight that "it is invoked by regimes that make no pretense of submitting to constitutional control" (Ginsburg 2003, p.9). Therefore, while evaluating the efficacy of constitutional environmental rights remains a work in progress (e.g., Boyd 2012; Gellers & Jeffords 2015; Jeffords 2016; Jeffords & Minkler 2016), it stands to reason that environmental rights represent important legal tools that may hold significant promise for addressing issues occupying the nexus between human rights and the environment.

So how does this book augment the current understanding about constitutional environmental rights? This text complements the impressive body of mainly descriptive scholarship on constitutional environmental rights through its application of social science methods to empirical inquiries and its explication of an interdisciplinary approach to explaining the emergence of these provisions. In particular, it presents the first global statistical analysis that systematically tests different theories that may explain why countries adopt constitutional environmental rights. Drawing on political science, sociology, and law, it also provides the first theoretical framework designed to sketch out the mechanisms through which constitutional environmental rights have expanded throughout the international system. In

addition, this study offers the first social scientific account of the development of constitutional environmental rights in Nepal and Sri Lanka, contributing a rare comparative study to the "relatively unexplored area" (Khilnani et al. 2013, p.2) of South Asian constitutions (SACs).

The remainder of this introductory chapter proceeds as follows. First, I define environmental rights. Second, I discuss the three forms in which environmental rights appear in legal institutions. Third, I trace the history of environmental rights as they developed through human rights institutions at the international level. Fourth, I examine regional developments associated with environmental rights. Fifth, I describe the development of constitutional environmental rights at the national level. Sixth, I review two of the main controversies surrounding constitutional environmental rights. Finally, I outline the structure and content of the remainder of the book.

Definitions and purpose

"Environmental rights" can be defined in different ways depending on the object or entity to which they apply. To whom are these rights to be bestowed? Environmental rights can be construed as rights held by the environment itself to protect against harm caused by an external force. Ecuador's 2008 constitution includes an entire chapter devoted to these so-called "rights of nature." In particular, Article 71 states: "Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes" (Ecuador Const., tit. II, ch. 7, art. 71 (2008)). However, environmental rights are more commonly understood to mean "the reformulation and expansion of existing human rights and duties in the context of environmental protection" (Shelton 1991, p.117). This definition characterizes such legal provisions as explicitly human centered. The question regarding whether environmental rights should include rights of the environment itself or refer exclusively to rights held by humans remains a subject of considerable debate (e.g., Taylor 1997; Bruckerhoff 2008). I return to this issue later in the chapter.

After identifying the intended referent of the environmental rights, it is important to understand the role of various state and non-state actors in securing these rights. Governments, either at the national or international level, as the main guarantors of rights, are said to possess negative or positive duties to the party being protected. For instance, "governments have negative duties to refrain from actions that generate large risks of damage to human life and health" while they "also have a duty to protect inhabitants of their territories against environmental risks generated by either governmental or private agencies" (Nickel 1993, p.286). In addition, depending on the version of the right articulated, individuals and organizations may similarly "have a duty to refrain from activities that generate

unacceptable levels of environmental risk" and, in situations resulting in environmental harm, "a duty to restore the environment and compensate victims" (Nickel 1993, p.286). However, environmental rights signal more than responsibilities; they may also denote certain freedoms. For individuals or groups, environmental rights explicitly or implicitly entail a freedom *from* environmental damage while some specific environmental rights directly recognize a freedom *to* obtain justice for environmental wrongs committed. The particular phrasing used in the construction of environmental rights thus indicates who or what is to be protected, by whom, and to what end.

What purpose do environmental rights serve? First, environmental rights seek to unite and advance the protection of human rights and the environment through formal legal means. Neither objective can be fully attained through the pursuit of the other; protecting the environment does not necessarily lead to the fulfillment of human rights obligations, and safeguarding human rights may not produce positive environmental outcomes. Yet, in order to survive, humanity requires an environment conducive to its continued existence. One cannot enjoy the most fundamental human right, the right to life, if the environment in which one lives suffers degradation that seriously imperils human health (Atapattu 2002, p.69). In order to "protect human life, our environmental life support system must be maintained and protected" (Thorme 1991, p.301). Environmental rights thus provide tools through which the goals of safeguarding both human rights and the environment may be pursued simultaneously. Second, environmental rights offer legal mechanisms that enable individuals and groups to redress environmental grievances. In particular, this relatively new set of rights may help vulnerable populations achieve social justice. As "the worst victims of environmental harm tend also to be those with the least political clout" (Dommen 1998, p.3), environmental rights may bolster the ability of poor, marginalized groups to gain access to the legal system in order to pursue corrective, restorative, and compensatory outcomes that bring society closer to a just order. Some preliminary analyses suggest that procedural environmental rights, for example, may increase the likelihood of achieving environmental justice outcomes (Gellers & Jeffords 2015).

Forms of environmental rights

Environmental rights generally appear in one of three forms—procedural, substantive, or solidarity rights. Procedural environmental rights refer to legal provisions that "promote the transparency, participation, and accountability that form the cornerstones of environmental governance" (Bruch et al. 2001, p.135). Such rights guarantee "(1) freedom of association, (2) access to information, (3) public participation in

decision-making, and (4) access to justice" in environmental matters (Bruch et al. 2001, p.176).[1] Procedural environmental rights can serve as a means of achieving objectives related to the environment or as an end unto themselves through the promotion of discourse and democracy (May 2013, p.28). According to Boyd (2012), 28 countries have constitutions that feature procedural environmental rights.[2] As an example, Albania's constitution guarantees citizens "the right to be informed about the status of the environment and its protection" (Albania Const., ch. IV, art. 56 (2012)). Observers have characterized these rights as among the most important recent developments in human rights law (Boyle 2012) and synonymous with the very concept of environmental rights (Atapattu 2002, p.72).

Substantive environmental rights refer to rights within the corpus of international human rights law that may apply when environmental problems animate human rights concerns. Relevant substantive rights that may intersect with environmental issues include "the right to life, the right to health, the right to an adequate standard of living, and the right to privacy" (Atapattu 2002, p.96).[3] For example, some writers argue that a good environment is necessary to enjoy the right to life, for "without the environment, no life is possible" (Rehbinder & Loperena 2001, p.283). Utilizing existing human rights to pursue the protection of environmental rights may prove more effective than relying on procedural environmental rights alone. As one scholar explains, "even if procedural or participatory rights are fully realized, and perfectly distributed throughout civil society, it is entirely possible that a participatory and accountable polity may opt for short-term influence rather than long-term environmental protection" (Anderson 1996, p.10). Increasing the opportunity for public debate and engagement does not necessarily mean pro-environmental outcomes will materialize.

Solidarity environmental rights establish a specific right relating to the environment that, unlike other forms of rights that states may ensure on their own, mandate global participation for successful enforcement. Solidarity rights are labeled as such because they speak to the idea that a broad community of actors and universal cooperation is required to "[attain] a livable world" (Hassan 1983, p.54). Solidarity rights draw intellectual inspiration from "the post-World War II anti-colonial revolutions that introduced the principles of self-determination and nondiscrimination" (McClymonds 1992, p.591). Other solidarity rights include the right to development and the right to peace. These rights are often considered "third generation" rights within the genealogy of international human rights (Marks 1981). Since 1976, Portugal's constitution has included a solidarity environmental right constructed using language common to these kinds of provisions: "Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it" (Portugal Const., tit. III, ch. II, art. 66(1) (1976)). While environmental

rights have become prevalent across the globe in recent decades, experiences from within the United States suggest that some courts have difficulty "with the idea of conferring constitutional status on environmental rights" (Howard 1996, pp.405–406). Such rights have not been readily interpreted to possess the innate legal force commensurate with existing fundamental rights, and the ultimate viability of expressing environmental rights in solidarity form is a topic that has aroused considerable debate.[4] However, judicial receptivity to environmental rights at the state level within the U.S. has begun to shift as of late, as evidenced by the decision in the *Robinson Township*[5] case, in which the Pennsylvania Supreme Court declared unconstitutional parts of an oil and gas law that conflicted with the state's obligations under the Environmental Rights Amendment to its constitution (Dernbach et al. 2015).

International developments

In order to accurately describe the development of environmental rights at the international level, it is imperative to first discuss the trajectory of international human rights and how environmental rights evolved through the process of an ongoing global discourse on human rights.

International and regional human rights

While the historical roots of human rights can be traced back to ancient Greece and Rome with the concept of natural law, the modern understanding of human rights arrived on the international stage at the conclusion of World War II. The ascendance and ultimate demise of Nazi Germany forced international actors to confront issues of global morality and the proper role of the international community in protecting minorities and other vulnerable groups. The world came to recognize that the domestic laws and policies of nation-states could not escape judgment under the banner of moral relativism; some norms of behavior must apply universally to all members of international society. Following the conclusion of World War II, the international community coalesced around the idea that "[c]ertain actions are wrong, no matter what; human beings are entitled to simple respect at least" (Weston 1984, p.261).

Thus began the emergence of a global recognition of the need to protect human rights. Seizing upon this moment in history, states formed the United Nations, pledging to strive for "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (UN Charter, ch. 1, art. 1, § 3 (1945)). In 1948, these ambitions became formally codified in the Universal Declaration of Human Rights (UDHR). With language clearly inspired by the atrocious acts committed during World War II, the UDHR

stipulated that "it is essential … that human rights should be protected by the rule of law" (Universal Declaration of Human Rights). In addition, the UDHR included rights corresponding to what would later become known as the three generations of human rights (Marks 1981; Weston 1984, pp.264–267).

First generation rights appear in Articles 2–21 of the UDHR. This generation of rights consists of civil and political rights, such as the freedom of speech and the right to vote, which mandate government non-interference in citizen participation in governing activities. These rights owe an intellectual debt to the French and American revolutions, which sought to secure human rights through freedom from governmental intrusion. Second generation rights appear in Articles 22–27. These rights consist of economic and social rights, such as the right to a living wage and fair working conditions, which require active government involvement. This generation of rights came about as a result of "social upheavals … arising from abuses of the rights of the first generation" and found philosophical substantiation in "socialist and Marxist writings" (Marks 1981, p.438). The distinction between first and second generation rights is similar to the discussion of negative and positive duties in that first generation rights reflect a freedom from government influence, whereas second generation rights seek the enjoyment of certain freedoms that require government intervention (Nickel 1993). Finally, third generation rights are intimated in Article 28, which asserts that "everyone is entitled to a social and international order in which the rights set forth in this Declaration can be fully realized" (Universal Declaration of Human Rights). This last group of rights grew out of "major planetary concerns which, although they were always present and sometimes felt acutely in the past, have taken on a renewed urgency at a time when the legislative process in the field of human rights is particularly receptive" (Marks 1981, pp.440–441). Third generation rights are "unique in that the world community … owes a moral, and now a legal, duty to safeguard the continued existence of mankind and the quality of life, as a recognized rubric of international public policy" (Gormley 1990, p.105). Such rights differ from first and second generation rights in that they "may be both *invoked against* the State and *demanded* of it" (Vasak, as cited in Marks 1981, p.441). Third generation rights include the right to "environment, development, peace, the common heritage, communication, and humanitarian assistance" (McClymonds 1992, pp.591–592).

The first two generations of human rights gained additional explication in 1966, when the United Nations General Assembly approved both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[6] The ICCPR addresses the need to protect first generation rights such as the right to life, the right to liberty and security of person, and the

right to freedom of religion. In addition, the agreement calls for the protection of rights not included in the UDHR, such as the right of all peoples to self-determination, and establishes a Human Rights Committee composed of 18 elected experts charged with monitoring compliance. The ICESCR enumerates second generation rights such as the right to safe and healthy working conditions, the right to form trade unions, and the right to education. However, unlike the ICCPR, the ICESCR does not feature language advocating for immediate implementation of its provisions, urging instead that states actively pursue full protection of the rights contained within the treaty to the extent possible given the resources available.

During the time that international human rights began to gain global recognition, two regional human rights systems emerged in Europe and the Americas. Created upon agreement among members of the Council of Europe in 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) represents an early regional effort to provide for the protection of human rights. Based on a draft of the ICCPR, the European Convention stands as "the most advanced and successful international experiment in the field [of human rights]" (Weston 1984, p.277). The European Convention also produced two significant regional human rights institutions—the European Commission of Human Rights and the European Court of Human Rights.

Two years prior to the arrival of the European Convention, the Ninth Pan-American Conference adopted the American Declaration on the Rights and Duties of Man and established the Organization of American States (OAS). In 1959, provisions for the protection of human rights within the OAS system obtained institutional support with the creation of the Inter-American Commission on Human Rights (IACHR). A decade later, the American Convention on Human Rights (American Convention) was adopted at the Inter-American Specialized Conference on Human Rights, charging the IACHR with implementing the convention and establishing the Inter-American Court of Human Rights. The American Convention, likely influenced by European developments in the area of human rights, entered into force in 1978.

While none of these international or regional agreements deals explicitly with environmental rights, these innovations may have provided a legal backdrop for future consideration of issues at the intersection of human rights and environmental protection. In his seminal article on the subject, Sax (1990) argues that environmental rights may be extrapolated from both first generation (negative) and second generation (positive) rights. First generation rights such as those guaranteeing the right to participate in democratic institutions could be utilized to expand public involvement in environmental governance. Second generation rights requiring government intervention are also a natural source of inspiration for providing a certain level of environmental quality to citizens of a state. While Sax seems

to favor the approach taken by second generation rights (e.g., requiring government action) and analogizes the protection of environmental rights to a welfare-state ideology, he acknowledges the important role played by first generation rights (mainly procedural rights such as the right to information and the right to participate in decision-making) in guiding the search for environmental rights and promoting good democratic values.

Churchill (1996) infers the presence of environmental rights in treaties such as the ICCPR, European Convention, and American Convention by exploring the logical connections between substantive rights and environmental protection. For instance, he reasons that the right to life holds certain promise as an avenue for the protection of environmental rights despite the paucity of successful attempts (at the time of writing) to make such a claim. Another substantive premise for evincing environmental rights, Churchill argues, may originate from the right to be free from interference with one's home and property. While all three treaties listed above contain some provision dealing with this particular right, cases pertaining to this issue have only been brought under the European Convention, mainly on the issue of noise pollution. Yet, at least in the European context, jurists have construed noise pollution as more directly relevant to the right to respect for privacy and family life, or as a kind of environmental pollution that infringes upon individual wellbeing (Pedersen 2008).

In addition to discussing the application of the right to freedom of information to environmental causes, Churchill (1996) also describes the potential for safeguarding environmental rights in the ICESCR, European Social Charter, and American Convention through creative interpretation of the rights to a decent working environment, decent living conditions, and health. He concludes by noting that derivative rights related to environmental protection have been invoked only infrequently, "therefore [reinforcing] the doubts about the usefulness of human rights treaties as a means of protecting the environment" (Churchill 1996, p.108).

International environmental rights

Since their emergence in the 1970s, environmental rights have become entrenched in various legal documents at different levels of governance. At the international level, the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) represents the first major instrument of international law to assert a connection between human rights and environmental protection.[7] The agreement states, "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself" (Stockholm Declaration). Principle 1 of the Stockholm Declaration more closely approximates the human–environment relationship in terms of fundamental rights while also placing

the onus on man to preserve the environment: "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" (Stockholm Declaration). The particular phrasing used in the Stockholm Declaration establishes an environmental right as a derivative of the broader "right to life." However, despite the deliberate use of fundamental rights language, Principle 1 does not formally proclaim a separate solidarity right such as the right to a healthy environment. Instead, the statement suggests that a healthy environment is "necessary to enjoy other basic human rights" (Atapattu 2002, p.74).

The 1982 World Charter for Nature (Charter) followed on the heels of the Stockholm Declaration. The Charter not only sets forth procedural environmental rights,[8] but it also stands "unique in that it is the first, and so far the only, of its kind which recognizes the rights of nature, distinct from the rights of human beings" (Atapattu 2002, p.75). Thus, the Charter remains the sole, widely endorsed international legal document espousing an eco-centric perspective on environmental rights.

In 1992 the international community again emphasized the inextricable link between humans and the environment in which they exist with the Rio Declaration on Environment and Development (Rio Declaration), the centerpiece of international environmental law at the United Nations Conference on Environment and Development. While not couching environmental rights explicitly in the language of fundamental rights, the agreement promoted the idea that human beings "are entitled to a healthy and productive life in harmony with nature" (Rio Declaration). In addition, the Rio Declaration recognized third generation rights such as the right to development and procedural environmental rights.[9]

Finally, after initially being appointed Special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1990 and releasing three progress reports, Ms. Fatma Zohra Ksentini submitted her final report on human rights and the environment in 1994. Although not an international agreement, the Ksentini Final Report has provided an influential voice in the global dialogue on human rights and the environment. In particular, the Draft Declaration of Principles on Human Rights and the Environment (Draft Declaration) that accompanies her written report has earned widespread praise among legal scholars (e.g., Popović 1996a). Many of the principles in the Draft Declaration directly recognize procedural and fundamental environmental rights.[10]

While Ksentini intended for the Draft Declaration to "serve as a basis for the United Nations to adopt a set of norms consolidating the right to a satisfactory environment" (Dommen 1998, p.33), her recommendations have not galvanized support in the international arena for a global treaty

on environmental rights. Still, her work remains at the forefront of scholarly debates about the legal basis for the protection of environmental rights.[11] More generally, analysts continue to argue over the degree of legal authority vested in this and other documents that seek to codify environmental rights at the international level.[12]

The effort to enact environmental rights at the international level enjoyed renewed interest in March 2012, when the UN Human Rights Council (HRC) passed Resolution 19/10. This resolution established a three-year mandate to study human rights obligations related to the environment, identify best practices in this area, and develop recommendations for working toward the achievement of the Millennium Development Goals (MDGs), especially Goal 7 ("Ensure Environmental Sustainability"). Four months later, the HRC appointed John Knox, a law professor at Wake Forest University School of Law, as the inaugural Independent Expert on Human Rights and the Environment. In March 2015, the HRC reemphasized its commitment to environmental rights by naming Professor Knox Special Rapporteur and extending the mandate another three years.[13] During Knox's tenure as Independent Expert and Special Rapporteur he has participated in numerous consultations, conducted country visits to Costa Rica and France, produced three major reports focused on scoping, mapping, and identifying good practices in the implementation of environmental rights, and launched a website, the Environmental Rights Database,[14] designed to disseminate good practices in the use of human rights to protect the environment. The explicit shift from initially studying the nature and extent of environmental rights to formulating practical ways of realizing these rights signals the UN system's maturing commitment to further developing this relatively new area within international human rights law.

Regional developments

In addition to the international legal sources described above, there are two major regional instruments that pertain to human rights and environmental protection.[15] The 1981 African Charter on Human and Peoples' Rights (African Charter) has earned acclaim for its status as "the first binding instrument, albeit regional, to explicitly endorse the fundamental right to a clean environment" (Atapattu 2002, p.87). The main provision of interest, Article 24, specifically states that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development" (African Charter). However, the African Charter lacks a definitive articulation of obligations states have when implementing the agreement, and thus it falls somewhere between conventional international law and a declaration in terms of its actual legal authority (Hodkova 1991, p.76).

The 1988 Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador) represents another significant regional instrument that includes environmental rights. Article 11 of the Protocol of San Salvador deals explicitly with environmental rights: "(1) Everyone shall have the right to live in a healthy environment and to have access to basic public services. (2) The State Parties shall promote the protection, preservation and improvement of the environment" (Protocol of San Salvador). This formulation of environmental rights provides for both a solidarity environmental right and a public policy statement mandating a positive duty to be carried out by participating states. Interestingly, the environmental right is qualified by the addition of the phrase "to live," which serves to link the provision to the broader substantive right to life. However, implementation of this regional environmental right is frustrated by the fact that Article 19(6) of the Protocol does not permit individual claimants to bring cases directly to the Inter-American Court of Human Rights on the basis of an alleged violation of one's environmental rights.

If the experiences from these regional agreements offer any indication, such progressive attempts to establish environmental rights at the regional level will likely have little impact in domestic legal systems. Despite efforts to insert third generation environmental rights into these regional agreements, these provisions have been utilized sparingly, if at all.[16] One scholar speculates that few cases from Africa and Latin America have invoked these rights because "there are other preoccupations and priorities when utilizing human rights treaties than protecting the environment" (Churchill 1996, p.108). Regardless of the reason these rights go under-utilized, regional instruments have proven thus far no more viable as effective legal mechanisms for the protection of environmental rights than have international agreements with similar provisions.[17]

Despite the infrequent use of regional treaties in cases involving the protection of environmental rights at the domestic level, regional human rights bodies continue to address issues pertaining to human rights and the environment. The IACHR has been quite active on this front. For example, the IACHR has emphasized in a report on human rights in Ecuador that "[c]onditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being" (IACHR 1997).[18] Again, the language used in this report, while suggestive, does not firmly establish a constitutional environmental right, but instead locates an environmental right under the banner of the more universal "right to life and human dignity." Still, while not a binding legal document, this IACHR report and others dealing with environmental rights contribute to a growing cognizance within the region that environmental quality, especially when it impacts human health, falls within the ambit of human rights.

Developments at the state level

When enshrined in national constitutions, environmental rights provisions most often appear phrased as fundamental rights or statements of public policy (Brandl & Bungert 1992). Fundamental rights grant "individual[s] a subjective, or personal, guarantee" to the basic conditions necessary to live a dignified life (Brandl & Bungert 1992, p.9). Unlike statements of public policy, fundamental rights "enjoy the highest level of legal norms, are less subject to political whims, and tend to be better understood by both the polity and citizenry" (May 2005, p.118). Therefore, a fundamental *environmental* right invokes a state's guarantee of the highest legal order assuring an individual of his or her protection from environmental harm.[19] Of those countries that have addressed the environment in their constitutions, a subset has promulgated an environmental right of the fundamental variety, and even fewer have been found to be directly enforceable in domestic legal systems.[20] However, analyzing data from Brazil, Colombia, Costa Rica, Europe, and India, Boyd (2012, p.241) finds that "the majority of lawsuits based on the constitutional right to a healthy environment are successful."

Second, states may include environmental rights in their respective constitutions in the form of a statement of public policy. Such constitutional pronouncements feature "directives and guidelines for governmental action or objective state goals" (Brandl & Bungert 1992, p.16). Statements of public policy typically involve "mandates to the legislature obligating the legislature to regulate specific areas" or "guidelines for the state which address not only the legislature, but also the judicial and executive branches of government" (Brandl & Bungert 1992, p.17). However, statements of public policy wield less legal authority than constitutional environmental rights. In particular, these provisions "are not enforceable by citizens who are aggrieved by environmental degradation" (May 2005, p.116), thus limiting their potential efficacy as a tool for addressing environmental grievances. For instance, China's constitution contains a statement of public policy regarding the state's role in safeguarding the environment: "The state protects and improves the living environment and the ecological environment, and prevents and controls pollution and other public hazards" (Xianfa, ch. I, art. 26 (1982)). Importantly, this article appears in the "General Principles" chapter of the constitution as opposed to the following chapter on "The Fundamental Rights and Duties of Citizens," indicating that the statement does not possess the legal authority normally accorded to human rights.

To clarify, while constitutional environmental rights phrased as fundamental rights confer personal, often enforceable rights that individuals may utilize to bring a complaint of an environmental nature to court, statements of public policy describe guidelines for governmental action but they are not individually enforceable. In terms of characterizing the

practical implications of constitutional environmental rights, the exact language used in national constitutions "falls somewhere along a continuum between the subjective fundamental right at one extreme, and the objective statement of public policy at the other" (Brandl & Bungert 1992, p.18). A textual analysis of 142 national constitutions demonstrates that no two environmental rights provisions are worded exactly the same and younger constitutions tend to have a stronger legal framework for the protection of environmental rights (Jeffords 2011). Thus, the potential usefulness of a given constitutional environmental right varies according to its textual construction.

The extent to which constitutions across the world contain environmental rights remains an unsettled empirical inquiry. The quest to produce a universally accepted catalog of all existing constitutional environmental rights has proven elusive because of important differences regarding how these rights are constructed (e.g., a healthy environment versus a safe environment), where they are located within constitutions (e.g., fundamental rights chapter versus the preamble), whether or not limiting language is present (e.g., right may not be claimed in court versus it is directly enforceable), and what types (e.g., procedural versus solidarity) should be included in the count. However, despite these complications, scholars have endeavored to capture the pervasiveness of these rights. Jeffords (2011) finds that 60 national constitutions feature a direct right to the environment. Boyd (2012) concludes that 86 countries have similarly enacted a constitutional environmental right of the solidarity sort. May and Daly (2015) observe that 75 states possess constitutional environmental rights. While the U.S. Constitution does not contain any environmental rights provisions,[21] eight states have enshrined such rights within their respective constitutions.[22]

Direct articulations of environmental rights found within domestic constitutions constitute only one way in which states have sought to protect the human rights of individuals or groups exposed to environmental harms. Other states have found environmental rights through creative judicial interpretation of existing fundamental rights. In India, for example, justices of the Supreme Court have ruled that a "right to a wholesome environment" exists under the fundamental right to life guaranteed by Article 21 of the Indian Constitution.[23] While fundamental environmental rights and public policy statements appear in a significant number of constitutions, only a dozen or so states have located an environmental right under the umbrella of broader constitutional rights, implying the existence of "derivative" environmental rights (May & Daly 2015, p.109).[24]

To summarize, there are two main ways in which fundamental environmental rights have been integrated into domestic constitutional law with the explicit purpose of protecting the rights of individuals or groups where environmental issues are concerned—constitutional environmental rights

and environmental rights found by judges to exist under fundamental rights.[25] The first type is present in the form of a potentially functional, though not necessarily self-executing,[26] right within a given constitution, whereas the second type is actively established by judges seeking to expand the purview of existing rights relating to citizens and their natural surroundings. Some examples will no doubt prove illustrative.

In terms of justiciable (e.g., legally actionable) constitutional environmental rights, Angola's constitution presents a suitable example: "Everyone has the right to live in a healthy and unpolluted environment and the duty to defend and preserve it" (Angola Const., ch. II, § I, art. 39(1)). This environmental right appears in Part II of the Constitution, "Fundamental Rights and Duties," and is followed by both a statement of public policy regarding the environment and the stipulation that acts contrary to the state goal of conservation are punishable by law. With regards to environmental rights interpreted by judges to fall under the larger scheme of fundamental rights, India serves as a prime exemplar. In *Subhash Kumar*, the Court held that Article 21 of the Indian constitution, which guarantees the right to life, "includes the right of enjoyment of pollution-free water and air for full enjoyment of life."[27] Both of these examples serve to highlight instances in which environmental rights have been included among the corpus of rights at the state level, providing individuals and groups with legitimate legal avenues for pursuing litigation involving humans and the environment they inhabit.

The year 1974 marked the first time in history that a country adopted a constitutional environmental right. Entrenched in the Constitution of the Socialist Federal Republic of Yugoslavia, this provision read:

> Working people and citizens, organizations of associated labour, sociopolitical communities, local communities and other self-managing organizations and communities shall have the right and duty to assure conditions for the conservation and improvement of the natural and man-made values of the human environment, and to prevent or eliminate harmful consequences of air, soil, water or noise pollution and the link, which endanger these values and imperil the health and lives of people.
>
> (SFR Yugo. Const., pt. two, ch. I, § 11, art. 87 (1974))

While the percentage of national constitutions featuring provisions related to environmental protection has grown steadily since the 1850s (Ginsburg 2009), the number of states with constitutional environmental rights in particular has expanded dramatically since that watershed moment in 1974 (see Figure 1.1).

Interestingly, the majority of countries with constitutional environmental rights are found in developing countries (May 2005), specifically those

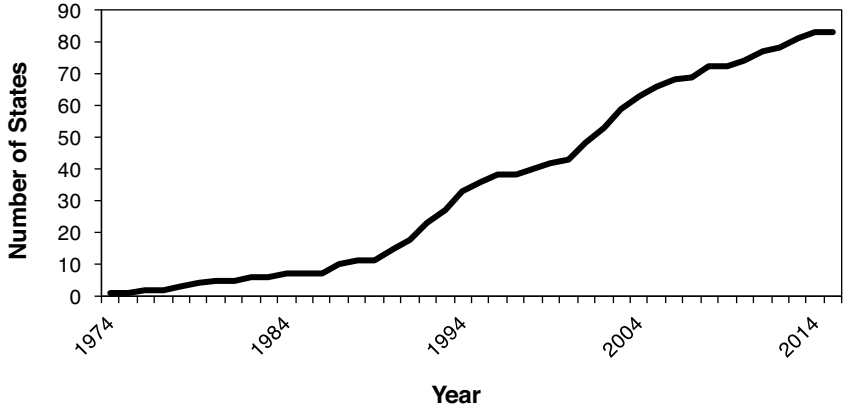

Figure 1.1 Number of states with constitutional environmental rights, 1974–2015

in Europe and Central Asia, Latin America and the Caribbean, and Sub-Saharan Africa (Gellers 2012, p.529).[28] Developing countries, some argue, seem less likely to adopt constitutional environmental rights due to the numerous social, political, and economic problems they face that might take precedence over environmental concerns (Brandl & Bungert 1992, p.84). Especially in the case of post-communist states, the various development issues encountered may cause leaders to concentrate efforts on solving economic problems, effectively diminishing the political will to address environmental problems (Bándi 1992, p.442). However, as the map below indicates (Figure 1.2), constitutional environmental rights are found not only in developing states, but in virtually every continent around the world.

Controversies

This section addresses two main controversies in the literature on environmental rights: (1) how should environmental rights be phrased? and (2) is a human rights approach to environmental protection intrinsically anthropocentric (e.g., human centered)? First, in terms of phrasing environmental rights, constitutions throughout the world display a broad array of linguistic variations, from the common "right to a healthy environment" (Chad Const., tit. II, ch. 1, art. 47 (1996))[29] to the rarer and ambiguously qualified "right to a favourable environment" (Slovak Const., pt. two, ch. six, art. 44, § 1 (2001)) to the uncommon and holistically oriented "[a]ll persons are entitled to an ecologically balanced environment" (Brazil Const., tit. VIII, ch. VI, art. 225 (1988)), with many shades in

Figure 1.2 Current global distribution of countries with constitutional environmental rights

Note: Dark gray denotes countries with constitutional environmental rights.

between. However, the linguistic form that an environmental right takes in a constitution has important ramifications for those who may seek to invoke the right.[30]

On this note, scholars seem to agree that the phrasing of an environmental right should reflect an emphasis on human health, but they diverge on the precise language that should be employed to achieve this end. For instance, one writer advocates in favor of the right to a *safe* environment, arguing that "a narrow formulation focusing exclusively on human health and safety has the best chance of gaining acceptance as a genuine human right" (Nickel 1993, p.284). Another analyst asserts that "[w]ith regard to the parameters of the right, it is submitted that the right to a *healthy* environment provides the better formulation" (Atapattu 2002, p.111). Whereas a safe environment refers more directly to an established level of acceptable risk to human health, a healthy environment is more ambiguous while potentially allowing claimants to benefit from greater flexibility. As a proponent of the right to a healthy environment explains, "[c]laimants need only establish that the activity in question resulted in creating an unhealthy environment for him/her to live in. They do not need to establish damage to their health or well-being at that point" (Atapattu 2002, p.111). Thus, while scholars disagree about the proper linguistic phrasing, they agree that the way in which an environmental right is articulated may have important implications for those seeking protection under the law.

Variation in phrasing may reflect local interpretations of international norms and affect the likelihood of implementation. For instance, phrasing the provision in terms of a right to a safe environment may help potential victims of severe polluting activities by providing a right that is broad enough at the international level to afford individual states the ability to interpret the right according to national regulatory standards. Ultimately, the environmental legacies (Gravelle 1997, p.633), regional influences (Go 2003), and legal traditions (Bruch et al. 2001, p.135) of different states may impact their decision to support one particular formulation of an environmental right over another. The precise language used to enshrine an environmental right in a state constitution may generally reflect the trend toward enactment of environmental rights at the international level while textual differences may speak to the demands and experiences of the domestic context.[31]

Second, some scholars argue that human rights approaches to environmental protection are inherently anthropocentric while others assert that environmental rights, by virtue of their broad formulations, apply to human and non-human entities alike. Similar to the previous controversy, the linguistic form in which the environmental right appears can affect its application. For instance, when written as the right to a safe environment, environmental rights espouse a firmly anthropocentric character, as safety is likely to be defined in terms of risk levels pertinent to humans. It stands to reason, then, that the right to a safe environment "does not speak directly to issues such as biodiversity, the claims of animals, conservation, or sustainable development" (Nickel 1993, p.283). In general, analysts seem to recognize that the endeavor to codify environmental rights is inevitably anthropocentric to some degree (Redgwell 1996, p.86). Yet, this has not stopped others from contending that a creative reinterpretation of law must occur in order to address environmental problems of global scale, and environmental rights in particular must transcend their exclusive focus on humans by extending protection to all relevant ecological beings (Grant et al. 2013, pp.963–964).

The processes of conceptualizing, formulating, ratifying, implementing, enforcing, and interpreting environmental rights are inescapably human-directed activities. However, accepting this fact does not necessarily mean that environmental rights borne out of the human rights tradition need forsake the protection of other forms of life. Some observers speculate that certain formulations of environmental rights may have "a fortuitous spill-over effect to non-humans" (Redgwell 1996, p.87). One writer argues that the mutual co-constitution of man and nature, already recognized in international environmental law,[32] negates the charge of anthropocentrism because "it is impossible to separate the interests of mankind from the protection of nature" (Shelton 1991, p.109). Further, even while mankind may be the intended beneficiary of environmental rights, "[a]t the basic level, the goal [of an environmental right] is to guarantee an environment

free from contamination, along with the protection of fauna and flora" (Gormley 1990, p.86).

Environmental rights may also benefit more than just humanity in the long run, as they "may play a useful, but limited role, in the development of an ecological consciousness—one which will foster the adoption of a new environmental ethic" (Taylor 1997, p.311). In this sense, environmental rights developed initially to serve the interests of mankind may promote greater environmental awareness and inculcate in future generations a new set of more holistic environmental values that will ultimately move popular sentiment from anthropocentricism to eco-centrism. Finally, international environmental law has already "breached" the "dam of anthropocentrism," resulting in the development of international norms in which "[a]nimals and nature are unlikely simply to be ignored" (Redgwell 1996, p.87). Therefore, while to a certain extent the enterprise of environmental rights is necessarily anthropocentric, this fact by no means limits the ability of environmental rights to provide protection, directly or indirectly, to the larger ecological system.

Overview of the book

This introductory chapter has elucidated the conceptual and historical foundations of constitutional environmental rights. The remainder of the book pushes current knowledge on the subject further through a discussion of theory and empirics focused on determining the factors that have contributed to the global emergence of environmental rights in national constitutions. Chapter 2 seeks to explain the diffusion of constitutional environmental rights by drawing on insights from international relations (IR) theory, world society theory, and constitutional design theory. I posit that understanding the expansion of constitutional environmental rights offers new evidence regarding the extent to which self-interest or international norms influence state behavior, especially environmental policy-making. The chapter concludes with the presentation of a "world cultural framework of constitutional environmental rights," the first effort to provide an interdisciplinary causal explanation for the proliferation of constitutional environmental rights.

Chapter 3 reports the findings of a global statistical analysis that represents the most comprehensive and theoretically driven attempt to analyze the emergence of constitutional environmental rights to date. Incorporating observations from international relations, sociology, and law, I test several possible explanations for this global trend. I argue that international norms are more important than domestic politics or self-interest in explaining the phenomenon observed. The results largely confirm this hypothesis, but not without adding a layer of complexity to the causal story that motivates the need to employ a more fine-grained analysis designed to tease out the role of contextual factors.

Chapter 4 uses the results of the quantitative analysis to identify a pair of countries, Nepal and Sri Lanka, that share characteristics determined to affect the likelihood of adopting environmental rights, yet experience different constitutional outcomes. Through a qualitative analysis of interviews, and an examination of primary and secondary sources, the comparative case study reveals factors absent from the statistical model that help to explain the apparently divergent paths taken by Nepal and Sri Lanka. The cases support the causal sequence described by the world cultural framework of constitutional environmental rights and strengthen my argument about the importance of norms in the process of adopting environmental rights. This chapter offers the first in-depth comparative assessment chronicling the emergence of environmental rights in the context of designing a national constitution.

Chapter 5 clarifies how the lessons gleaned from the quantitative and qualitative analyses improve our understanding of the emergence of constitutional environmental rights and demonstrate how the journey of environmental rights relates to major questions in international relations. More broadly, I explain how this project has forged new ground in the study of constitutional environmental rights by moving beyond normative debates and anecdotal developments in case law (the first wave of research in this area) and comprehensive efforts to describe and categorize such rights around the world (the second wave of research in this area) into the realm of systematic analyses of the expansion of environmental rights using social science methods and theory. The chapter concludes by offering practical advice regarding the adoption and implementation of environmental rights, and outlining directions for future research.

Conclusion

This introductory chapter has explored the topic of constitutional environmental rights and the puzzle concerning their widespread adoption, reviewed definitions and forms of environmental rights, offered a brief history of developments at the international, regional, and state levels, discussed two areas of controversy surrounding environmental rights, and charted the course through the remainder of this book. The next chapter weaves together elements of IR theory, world society theory, and constitutional design theory in the service of constructing an interdisciplinary theoretical framework for explaining the worldwide expansion of constitutional environmental rights.

Notes

1 For a comprehensive review of litigation involving procedural rights in the environmental rights context, see Shelton (2006, pp.132–163) and May & Daly (2015, pp.251–253).

2 These countries are: Albania, Argentina, Austria, Azerbaijan, Belarus, Bolivia, Brazil, Burkina Faso, Chile, Colombia, Costa Rica, Czech Republic, Ecuador, Ethiopia, France, Georgia, Latvia, Moldova, Montenegro, Norway, Poland, Portugal, Russian Federation, Serbia, Slovak Republic, Thailand, Ukraine, and Venezuela.
3 The right to life has been connected to environmental protection in several domestic legal systems, including Bangladesh, Colombia, Costa Rica, Ecuador, India, Nepal, Pakistan, and Tanzania. See Bruch et al. (2001, pp.164–174).
4 While Gormley (1990) finds promise in conceptualizing environmental rights in terms of solidarity and advocates in favor of merging all three generations of human rights to address environmental protection, Boyle (1996) expresses serious doubts about the utility of defining environmental rights as solidarity rights. See Boyle (1996, p.59).
5 *Robinson Township v. Commonwealth of Pennsylvania*, 83 A.3d 901, 999–1000 (Pa. 2013).
6 The ICESCR and the ICCPR would only enter into force nearly a decade later on January 3, 1976 and March 23, 1976, respectively.
7 Some scholars recognize at least two earlier international actions that contributed to the growing international consideration of the nexus between human rights and environmental protection. Thorme (1991, p.303) contends that "[t]he idea of environment as a human right first emerged in the international arena in 1968 when the General Assembly of the United Nations recognized that technological changes could threaten the fundamental rights of human beings" in a UN General Assembly resolution. Gormley (1990) identifies the Council of Europe's Conservation Year in 1970 as an important precursor to the Stockholm Declaration, albeit with less international participation. See Gormley (1990, p.98).
8 The instrument stipulates, "All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation" (Charter).
9 Specifically, procedural environmental rights were enumerated in Principle 10 of the Rio Declaration: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided" (Rio Declaration).
10 For a list of the principles included in the Ksentini Report, see Gellers (2012, pp.541–543).
11 Compare Atapattu's (2002) general skepticism (e.g., asserting that "the basic premise on which her reports [sic] is based seems flawed" (p.79)) with Popović's (1996a) commendation (e.g., calling the Final Report "a milestone in advancing protection of human rights and the environment" (pp.491–492)).
12 Compare Gormley's (1990) assertion that the 1972 Stockholm Declaration constitutes customary international law, and that "such 'soft law' is evolving into binding customary international norms" (pp.98, 115) with Atapattu's (2002) negative assessment of the bindingness of the Draft Declaration (p.97)

and May's (2005) contention that both the Stockholm and Rio Declarations are unenforceable (p.122).

13 For more information regarding John Knox's work under the UN Mandate on Human Rights and the Environment, see www.srenvironment.org.

14 See http://environmentalrightsdatabase.org/.

15 Other regional treaties do mention environmental rights, but issues regarding their bindingness and/or jurisprudential impact arguably preclude them from consideration among the most influential regional human rights instruments. Asia does not have a binding regional treaty on environmental rights, but ten members of the Association of Southeast Asian Nations (ASEAN) have signed onto the ASEAN Human Rights Declaration, which includes a "right to a safe, clean and sustainable environment" (ASEAN 2012). The Arab world adopted a binding international treaty, the Arab Charter on Human Rights, that features an environmental right under Article 38: "Every person has the right … to a healthy environment" (Al-Midani & Cabanettes 2006, p.159). However, observers have criticized this human rights treaty on the grounds that, *inter alia*, it lacks an effective enforcement mechanism such as an Arab Court of Human Rights (Al-Midani 2008). Europe has yet to develop a regional treaty that specifically articulates a binding legal obligation to protect solidarity environmental rights, although the 1990 draft Charter on Environmental Rights and Obligations composed by the United Nations Economic Commission for Europe (UNECE) marked a step in that direction by "[affirming] the universal right to an environment adequate for general health and well-being, as well as the responsibility to protect and conserve the environment for present and future generations" (Taylor 1997, p.348). Also see Shelton (2006, p.166).

16 There is at least one notable instance in which a regional instrument was utilized successfully to provide a justiciable environmental right. Under the instruction of the African Commission on Human and Peoples' Rights in *Communication 155/96—The Social and Economic Rights Action Centre and Another v. Nigeria*, Nigerian courts were authorized to recognize Article 24 of the African Charter. Since then Article 24 has been successfully invoked in Nigeria in the case of *Gbemre v. Shell*. See Ebeku (2007).

17 The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), a treaty established among members of UNECE in 1998, entails several procedural environmental rights, but does not go as far as to create a binding commitment to protect individual or group environmental rights at the regional level, instead couching state obligations in the form of a public policy statement.

18 For a fuller discussion of environmental rights in the context of regional human rights bodies, see Hill et al. (2003, pp.379–381).

19 Throughout this book, environmental rights appearing in national constitutions that are phrased as fundamental rights (e.g., solidarity environmental rights) will simply be referred to as "constitutional environmental rights," notwithstanding the other types of environmental rights identified earlier (e.g., procedural and substantive environmental rights). I have elected to focus on solidarity environmental rights due to their pervasiveness among national constitutions, which enables quantitative analysis and greater analytical consistency than would be achievable by comparing environmental rights designed to accomplish different objectives.

20 May surmises that "of the 130 constitutions that address the environment, only about 60 grant individuals what may be fairly characterized as a fundamental right to a 'clean,' 'healthful,' or 'favorable' environment. More importantly, of

these 60, only a handful have earned judicial imprimatur as being enforceable by affected individuals" (May 2005, p.114).

21 From the late 1960s through the late 1980s, several attempts were made to codify environmental rights in the U.S. either by constitutional amendment or statute. However, all such efforts ultimately failed. For a discussion of the history of these efforts, see Brooks (1992, pp.1068–1070).

22 These states are: Alaska, Hawai'i, Illinois, Massachusetts, Montana, Pennsylvania, Rhode Island, and Texas. For a listing of the exact language of the state constitution environmental rights provisions, see Popović (1996b, p.356).

23 These judgments occurred in *Subhashkumar v. State of Bihar*, AIR 1991 SC 420 and in *Attakoya Thangal v. Union of India*, 1990 (1), KLT 580. See Dias (1994, p.246).

24 Boyd (2012) writes that at least 12 countries have undertaken this approach: Bangladesh, Estonia, Guatemala, India, Israel, Italy, Kenya, Nigeria, Pakistan, Sri Lanka, Tanzania, and Uruguay. As will be discussed in Chapter 4, Nepal also falls into this category. It is interesting to note that of those countries listed, only two—Kenya and Nepal—also have constitutional environmental rights.

25 I exclude procedural and substantive environmental rights from consideration as they do not confer upon individuals the same specific kind of protection regarding environmental matters as do constitutional (e.g., solidarity or third generation) environmental rights. There are also too few cases of either to make generalizable claims. In addition, I also exclude statements of public policy because they are primarily focused on the role of the state in achieving certain policy goals as opposed to being articulated as a positive right guaranteeing citizens a certain level of environmental protection.

26 Indeed, few national constitutions contain what might be considered fully self-executing environmental rights provisions. "To be self-executing, either a provision must expressly state that specific parties have a right to enforce the provision or articulate a clear enough standard so that a court has a law to apply" (Hill et al. 2003, pp.391–392). In addition, provisions found in a Bill of Rights or Fundamental Rights section are said to be justiciable, whereas provisions appearing in a Directive Principles section are not. Therefore, as an example, while Afghanistan's constitution features an environmental rights provision, it is located in the preamble, making the right non-justiciable until further action is taken by the Parliament to define the parameters of the right. For an empirical analysis of the justiciability of constitutional environmental rights, see Jeffords (2011).

27 *Subhash Kumar v. State of Bihar* AIR 1991 SC 420/ 1991 (1) SCC 598.

28 The following is a list of current countries with constitutional environmental rights, by World Bank region: *East Asia and Pacific*—East Timor, Fiji, Indonesia, Mongolia, Philippines, South Korea, Vietnam; *Europe and Central Asia*—Armenia, Azerbaijan, Belarus, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Kosovo, Kyrgyz Republic, Latvia, Macedonia, Moldova, Montenegro, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Turkey, Turkmenistan, Ukraine; *Latin America and the Caribbean*—Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guyana, Jamaica, Mexico, Nicaragua, Paraguay, Peru, Venezuela; *Middle East and North Africa*—Egypt, Iraq, Morocco, Tunisia; *South Asia*—Maldives, Nepal; *Sub-Saharan Africa*—Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Central African Republic, Chad, Côte d'Ivoire, Democratic Republic of Congo, Ethiopia, Guinea, Kenya, Mali, Mauritania, Mozambique, Niger, Republic of Congo, São Tomé and Príncipe, Senegal, Seychelles, South Africa, South

Sudan, Sudan, Togo, Uganda, Zimbabwe; *Western Europe*—Belgium, Finland, France, Greece, Norway, Portugal, Spain.

29 This phrasing, or some close variant, appears in the constitutions of at least 33 countries.

30 As Gravelle (1997) argues, even the choice between the right to a *healthy* environment and the right to a *healthful* environment can have important consequences for potential claimants. See Gravelle (1997, p.637).

31 Go's (2003) characterization of the broader phenomenon of globalizing constitutionalism similarly applies to the universalism versus localism dynamic at play with environmental rights: "it is … wracked with divergence as much as convergence, a differentiation in content as much as a homogenization in form" (p.90).

32 The World Charter for Nature states that "[m]ankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients" (Charter).

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