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Beyond the Formalistic Design of ‘Rights’ and ‘Directives’: Framing Environmental Constitutionalism as a Collaborative Model

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Abstract

Environmental constitutionalism refers to the growing constitutional recognition of the environment. Given the diverse designs of constitutional environmental provisions across the world, environmental constitutionalism is construed broadly to reflect both rights and non-rights provisions related to environmental protection. The constitutional entrenchment of environmental rights is the most common expression of environmental constitutionalism. Yet, such a purely rights-based approach ignores the distinctive constitutional design formulated as non-rights directive principles. Central to this debate is the perceived appropriateness, or inappropriateness, of treatment by courts of directive principles as if they are judicially enforceable rights. By exploring the limitations of this twofold division of environmental constitutionalism into conventional rights and directive principles, this article argues that such an approach positions the enforcement of environmental constitutionalism into the binaries of courts *versus* legislatures. However, environmental constitutionalism should be repositioned towards a collaborative model, the achievement of which requires interactive dynamics among the legislature, the executive, and the judiciary. Through a relational perception of separation of powers, this article offers an innovative understanding of environmental constitutionalism by integrating environmental governance with the values of constitutional collaboration, within which shared responsibility for enforcement is placed among the separated powers.

Keywords: Environmental constitutionalism; Environmental rights; Directive principles; Collaborative constitutionalism

1. Introduction

Over the last half century, there has been a global trend of entrenching environmental protection into national constitutions. Such a trend of constitutionalizing the environment is termed ‘environmental constitutionalism’.¹ In this environmental

¹ L.J. Kotzé, ‘The Conceptual Contours of Environmental Constitutionalism’ (2015) 21(2) *Widener Law Review*, pp. 187–200, at 187; D.A. Kysar, ‘Global Environmental Constitutionalism: Getting There from Here’ (2012) 1(1) *Transnational Environmental Law*, pp. 83–94; E. Daly & J.R. May, ‘*Robinson Township v. Pennsylvania*: A Model for Environmental Constitutionalism’ (2015) 21(2) *Widener Law Review*, pp. 151–70; B. Hudson, ‘Structural Environmental Constitutionalism’ (2015) 21(2) *Widener*

constitutional transformation, the rights-focused approach to the environment, or environmental rights, enjoy increasing popularity.² Environmental rights, according to Boyd, manifest ‘the emergence and evolution of a new human right’.³ He further observes that ‘[n]o other human right has achieved such a broad level of constitutional recognition in such a short period of time’.⁴

Constitutions are increasingly becoming ‘a legal avenue of choice to entrench environmental rights’.⁵ Environmental rights entrenched in constitutions are not limited to the explicit substantive right to a healthy environment, which recently has gained international recognition as an independent human right.⁶ Rather, the constitutionalized environmental rights are manifested in a variety of types, including procedural environmental rights, the rights of nature, as well as judicial identification of embedded environmental rights from the constitutional rights to life or health.⁷ As such, the rights-focused approach to the environment, with its various types, has been elevated to the constitutional level, inviting a more active role from courts to give effect. Environmental constitutionalism, thus, is often understood as rights-based.

Although the academic discussion has centred mainly on the specific trend of rights-focused environmental constitutionalism to date,⁸ to write into national constitutions a particular form of environmental rights, including the widely recognized right to a healthy environment, is not ‘the only game in town’.⁹ The constitutionalization of different types of environmental right cannot fully represent the constitutional approach to the environment adopted worldwide. There are

Law Review, pp. 201–16; R. O’Gorman, ‘Environmental Constitutionalism: A Comparative Study’ (2017) 6(3) *Transnational Environmental Law*, pp. 435–62; D. Amirante & S. Bagni (eds), *Environmental Constitutionalism in the Anthropocene: Values, Principles and Actions* (Routledge, 2022).

² L.J. Kotzé, ‘Human Rights and the Environment through an Environmental Constitutionalism Lens’, in A. Grear & L.J. Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015), pp. 145–69, at 146; J.C. Gellers, *The Global Emergence of Constitutional Environmental Rights* (Routledge, 2017).

³ D.R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2012), p. 1.

⁴ *Ibid.*, p. 76.

⁵ Kotzé, n. 2 above, p. 146.

⁶ The right to a healthy environment, or the right to a clean, healthy and sustainable environment in full, was recognized as an independent human right by the United Nations (UN) Human Rights Council (HRC) in Oct. 2021 and by the UN General Assembly (UNGA) in July 2022: UN HRC, ‘The Human Right to a Clean, Healthy and Sustainable Environment’, 18 Oct. 2021, UN Doc. A/HRC/RES/48/13; and UNGA, ‘The Human Right to a Clean, Healthy and Sustainable Environment’, 26 July 2022, UN Doc. A/76/L.75.

⁷ J.R. May & E. Daly, ‘Human Rights Developments in Global Environmental Constitutionalism’, in M. Faure (ed.), *Elgar Encyclopedia of Environmental Law* (Edward Elgar, 2019), pp. 93–109, at 94; E. Daly & J.R. May, ‘Learning from Constitutional Environmental Rights’, in J.H. Knox & R. Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), pp. 42–58; T. Hayward, *Constitutional Environmental Rights* (Oxford University Press, 2004).

⁸ O’Gorman, n. 1 above, pp. 437–8; Boyd, n. 3 above; May & Daly, n. 7 above; Daly & May, n. 7 above; Hayward, n. 7 above.

⁹ K. Woods, *Human Rights and Environmental Sustainability* (Edward Elgar, 2010), p. 8.

various environmental constitutional provisions other than rights.¹⁰ Among non-rights provisions, those that create binding legal obligations upon the state to protect the environment are particularly worthy of attention. Weis terms such provisions as ‘directive principles’.¹¹ According to her, ‘directive principles’ refer to *non-rights environmental values* entrenched in constitutions articulating ‘obligations that provide direction to the state’ in governing environmental matters, which are not designed to be enforced by direct judicial means.¹² An example is the Constitution of Switzerland, providing that ‘[t]he Confederation shall legislate on the protection of the population and its natural environment against damage or nuisance . . . It shall ensure that such damage or nuisance is avoided’.¹³

In this way, a twofold division of environmental constitutionalism is identified: conventional ‘rights’ provisions and provisions embodying ‘directive principles’.¹⁴ Such a twofold division is by no means comprehensive; yet, it highlights the key characteristics of environmental constitutionalism as well as the central debate within current scholarship. In particular, it is hotly debated which form is the mainstream form of environmental constitutionalism and, more importantly, which branch is better positioned to give force to constitutional environmental provisions. In specific terms, Weis criticizes the rights-based approach to environmental constitutionalism as ‘misguided’.¹⁵ Focusing on the importance of the distinct constitutional design of ‘directive principles’, she views as inappropriate ways in which to translate non-rights environmental directive principles into judicially enforceable rights.¹⁶ For example, the Constitution of Andorra,¹⁷ which explicitly provides the state’s obligation to protect the environment, has been categorized by Boyd as the ‘rights-focused’ approach. Disagreeing with such an approach, Weis questions Boyd’s survey of 147 national constitutions that have enshrined environmental rights,¹⁸ and criticizes Boyd as ‘an unqualified optimist’.¹⁹ Although Daly and May are more ‘modest’ in

¹⁰ L.K. Weis, ‘Environmental Constitutionalism: Aspiration or Transformation?’ (2018) 16(3) *International Journal of Constitutional Law*, pp. 836–70, at 838; L.J. Kotzé, ‘Environmental Constitutionalism’, *Essential Readings in Environmental Law*, IUCN Academy of Environmental Law, available at: <https://www.iucnael.org/en/documents/1275-environmental-constitutionalism>.

¹¹ Weis, n. 10 above, p. 846.

¹² *Ibid.*

¹³ Constitution of Switzerland 1999, Art. 74(1)–(2), available at: <https://www.fedlex.admin.ch/eli/cc/1999/404/en>.

¹⁴ Weis, n. 10 above, p. 836.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, p. 841.

¹⁷ Art. 31 of the Constitution of Andorra states: ‘The State has the task of ensuring the rational use of the social and of all the natural resources, so as to guarantee a befitting quality of life for all and, for the sake of the coming generations, to restore and maintain a reasonable ecological balance in the atmosphere, water and land, as well as to protect the autochthonous flora and fauna’.

¹⁸ Boyd, n. 3 above, pp. 47–50 (cited by Weis, n. 10 above, p. 841). It is perhaps worth mentioning that Boyd counted that there were 110 national constitutions explicitly entrenching the ‘right to a healthy environment’ as of 2022. See further in D.R. Boyd, ‘The Human Right to a Clean, Healthy and Sustainable Environment: A Catalyst for Accelerated Action to Achieve the Sustainable Development Goals’, 10 Aug. 2022, UN Doc. A/77/284, paras 24–6.

¹⁹ Weis, n. 10 above, p. 841.

privileging ‘rights’ in environmental constitutionalism discourse, counting the number of constitutions with environmental rights as 76,²⁰ Weis argues that ‘[a]pproximately 140 of the estimated 147 national constitutions that contain environmental provisions of some kind (or 95 percent) contain directive principles’.²¹ In other words, Weis believes that the most common form of environmental constitutionalism consists of directive principles rather than rights provisions.²²

Irrespective of the mainstream form that environmental constitutionalism takes – rights provisions or directive principles – the controversies surrounding the categorization of environmental constitutionalism reveal that courts’ treatment of constitutional directive principles as if they were judicially enforceable rights remains highly contentious. On the one hand, an engaged judiciary is deemed to be essential for environmental constitutionalism to achieve its potential – courts are necessary to preserve fairness in the political process and judges are the ‘ultimate vanguards’ of rights.²³ This can happen even when national constitutions lack explicit environmental rights, in which case other constitutionally entrenched rights, such as the right to life, are invoked for environmental purposes.²⁴ Judicial support in interpreting current human rights with environmental dimensions, or the greening of human rights, is regarded as implied constitutional recognition of environmental rights.²⁵ Often, these constitutional human rights are read ‘in tandem with directive principles aimed at promoting environmental policy to embody substantive environmental rights’.²⁶ Accordingly, such judicial receptivity to constitutional environmental directives could make environmental constitutionalism still rights-based in the absence of explicit environmental rights.

²⁰ E. Daly & J.R. May, ‘Comparative Environmental Constitutionalism’ (2015) 6(1) *Jindal Global Law Review*, pp. 9–30, at 10 (cited by Weis, n. 10 above, p. 841).

²¹ Weis, n. 10 above, p. 848. Weis notes that the exact number remains unclear because of the lack of agreement on the definitions and classification of directive principles.

²² *Ibid.*

²³ J.R. May & E. Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2015), pp. 87–8; J.C. Gellers & C. Jeffords, ‘Procedural Environmental Rights and Environmental Justice: Assessing the Impact of Environmental Constitutionalism’, 18 Aug. 2015, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2646739.

²⁴ A relevant example is how the ‘right to life’ entrenched in the Indian Constitution is frequently cited by the Supreme Court of India to achieve environmental protection. For the practice of the Indian Supreme Court using constitutional rights to enforce non-rights constitutional environmental provisions, as well as its critical analysis, see G. Sahu, ‘Implications of Indian Supreme Court’s Innovations for Environmental Jurisprudence’ (2008) 4(1) *Law, Environment and Development Journal*, pp. 1–19; L. Bhullar, ‘Environmental Constitutionalism and Duties of Individuals in India’ (2022) 34(3) *Journal of Environmental Law*, pp. 399–418; S. Dam & V. Tewary, ‘Polluting Environment, Polluting Constitution: Is a “Polluted” Constitution Worse than a Polluted Environment?’ (2005) 17(3) *Journal of Environmental Law*, pp. 383–93.

²⁵ J.R. May, ‘The Case for Environmental Human Rights: Recognition, Implementation and Outcomes’ (2021) 42(3) *Cardozo Law Review*, pp. 983–1037, at 995; J.R. May & E. Daly, ‘Judicial Handbook on Environmental Constitutionalism’, United Nations Environmental Programme 2017, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5035388.

²⁶ J.R. May & E. Daly, ‘Vindicating Fundamental Environmental Rights Worldwide’ (2009) 11(2) *Oregon Review of International Law*, pp. 365–439, at 399.

This aligns with the tradition of treating rights as the central feature to frame environmental constitutionalism. Treating ‘rights’ as the essential core for conceptualizing environmental constitutionalism has its origin from the definition of May and Daly of environmental constitutionalism: ‘the recognition that the environment is a proper subject for protection in constitutional texts and *for vindication by constitutional courts worldwide*’.²⁷ This definition understands ‘constitutionalism’ as defining the task of courts, and highlights the value of environmental rights, as well as judicial adjudication in this regard,²⁸ which, according to Bookman, demonstrates the deployment by May and Daly of “environmental constitutionalism” as a descriptive term for environmental rights’.²⁹ Meanwhile, framing ‘rights’ as the central feature of environmental constitutionalism arguably will produce more transformative environmental effect, given the nature of ‘absolutes and universals’ of the human rights discourse.³⁰ According to May, when constitutionalizing environmental norms, policy-related provisions are neither enforceable nor substantive as they aim only to guide decision-making.³¹ Instead, fundamental environmental rights are more powerful by granting individuals ‘an inalienable human right to a healthy environment’.³² Furthermore, a rights-based approach to environmental constitutionalism, by offering protection for individuals against ‘the tyranny of the majority people’, can have anti-majoritarian advantages when decisions made by the legislative majority tilt towards exploitation.³³ This anti-majoritarian feature of rights is particularly relevant given that constitutions are often ‘the product of a conclusive reform advocated by the political or popular majority’.³⁴ In this way, a rights-based approach to conceptualizing environmental constitutionalism enjoys substantial normative power.

On the other hand, ‘by ignoring straightforward features of constitutional design that prohibit, expressly or implicitly, the direct judicial enforcement of environmental constitutional obligations’, the courts’ engagement in constitutional directive principles is criticized as ‘impermissible forms of judicial activism’.³⁵ It inadequately captures the constitutional environmental design that is intentionally formulated with a ‘non-rights’ language.³⁶ According to Weis, if constitution framers could enshrine environmental values through the rights language that likewise specify the state’s legal

²⁷ May & Daly, n. 23 above, p. 1 (emphasis added).

²⁸ *Ibid.*, pp. 55–272.

²⁹ S. Bookman, ‘Demystifying Environmental Constitutionalism’ (2024) 54(1) *Environmental Law*, pp. 1–77, at 19.

³⁰ S. Humphreys, ‘Competing Claims, Human Rights and Climate Harms’, in S. Humphreys (ed.), *Human Rights and Climate Change* (Cambridge University Press, 2010), pp. 37–68, at 39.

³¹ J.R. May, ‘Constituting Fundamental Environmental Rights Worldwide’ (2005) 23(1) *Pace Environmental Law Review*, pp. 113–82, at 116.

³² *Ibid.*

³³ May & Daly, n. 23 above, p. 38.

³⁴ *Ibid.*

³⁵ Weis, n. 10 above, p. 836.

³⁶ *Ibid.*, p. 838.

obligations, then why opt for directive principles?³⁷ Judicial enforcement of directive principles as if they are rights provisions is further argued to lead to non-rights constitutional environmental values being treated as ‘peripheral’ within the environmental constitutionalism scholarship.³⁸ By highlighting the necessity to take constitutional design seriously, Weis argues that environmental constitutionalism, with its distinct feature of directive principles, is not designed to be judicially enforceable but should be given effect through ‘allocating institutional responsibility for defining fundamental social values and the legal norms that they require to the political branches’, predominantly through directed legislation.³⁹

Weis’ arguments for a prominent legislative role in enforcing constitutionally entrenched environmental directive principles lie mainly in the following aspects. Firstly, courts lack the institutional competence to address environmental issues, which are polycentric and subject to disagreement in nature.⁴⁰ Put differently, complicated and contentious environmental problems, often involved in scientific uncertainties, require ‘programmatic, comprehensive, and coordinated solutions’ for which courts are poorly situated as a result of rights adjudication in one-off disputes.⁴¹ Secondly, legislatures are better situated to tackle directive principles of environmental values that are ‘moral-disagreement-, information-, or resource-sensitive’.⁴² The trade-offs of different values – particularly uncertain facts, competing considerations of common interests, and large-scale social impacts with regard to the environment, all of which are argued to be ‘properly political matters’⁴³ – give competence to political institutions, rather than courts, to make environmental decisions. Political branches, the legislative branch in particular, are deemed to have greater accountability, greater expertise and greater flexibility in giving effect to constitutionally entrenched environmental values.⁴⁴ This also addresses the democratic legitimacy concern of courts in adjudicating environmental problems in the constitutional scheme.

This article examines the academic debate surrounding the rights-based approach and the design-focused perspective of environmental constitutionalism manifested as

³⁷ L.K. Weis, ‘Constitutional Directive Principles’ (2017) 37(4) *Oxford Journal of Legal Studies*, pp. 916–45, at 930.

³⁸ Weis, n. 10 above, p. 848.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, p. 855.

⁴¹ *Ibid.*; A.P. Singh, ‘Towards “the Environmental State”: Revelations from a Design-Oriented Enquiry of Environmental Constitutionalism’ (2023) 25(2) *Environmental Law Review*, pp. 120–34.

⁴² Weis, n. 37 above, p. 935.

⁴³ S. Rivers-McCombs, ‘Planning in Wonderland: The RMA, Local Democracy and the Rule of Law’ (2011) 9(1) *New Zealand Journal of Public and International Law*, pp. 43–81, at 59–60.

⁴⁴ In terms of greater accountability, legislatures may be in a better position than courts to respond to environmental values and relevant social needs, which may demand state resources, and consequently go through the complicated and contentious decision-making process of resource allocation and trade-offs of competing interests. Regarding greater expertise, legislatures tend to be better equipped to collect and assess information, especially environmental information involving scientific uncertainty. For greater flexibility, legislation is easier to be updated to react to changing societal values or moral considerations than ‘binding judicial interpretation of constitutional rights provisions’. After all, ‘[l]egislation can be amended, repealed, or replaced without having to rely on onerous constitutional amendment procedures or the uncertain prospect of judicial overruling’. See further in Weis, n. 10 above, p. 859.

directive principles, with each having distinct avenues for enforcement. Engaging with constitutional theories, it seeks to formulate environmental constitutionalism beyond the formalistic design and redirects the debate towards a collaborative model. The discussion is structured as follows. By challenging the debate in the existing literature, Section 2 critically analyzes the limitations of construing environmental constitutionalism in a twofold framework of ‘rights’ and ‘directives’, as well as legal constitutionalism and political constitutionalism involved in the enforcement. Section 3 goes further to stretch out the possibility for environmental constitutionalism to be reframed towards a collaborative model – namely, to situate checks and balances from both courts and political branches within a broader collaborative endeavour towards the singular environmental goal. It highlights how the collaborative model recognizes the distinct institutional role of the three separated powers and their shared responsibility in the implementation of environmental constitutionalism. Section 4 provides concluding remarks on the significance and limitations of a collaborative framework of environmental constitutionalism.

2. Challenging the Current Debate: Limitations of the Twofold Framework of Environmental Constitutionalism

The scholarly controversies surrounding the rights-based approach to judicially transforming environmental directives, and the design-focused approach to allocating institutional environmental obligations to political branches, reflect the following long-standing debate: whether courts, as legal constitutionalists claim, or politicians, as political constitutionalists argue, should play a primary role in implementing constitutional norms.⁴⁵ The perception of constitutionally entrenched environmental norms as social-economic constitutional provisions further adds complexity to the debate on the legal or political way of enforcing environmental constitutionalism. Specifically, since constitutionalizing environmental norms prompts concerns parallel with those linked to the constitutional entrenchment of socio-economic values, environmental constitutionalism is often treated as ‘social values constitutionalism’.⁴⁶ This, accordingly, enables the construction of constitutional environmental provisions as ‘the latest example among other rights-based models of social values constitutionalism that have come to be associated with social and economic rights’.⁴⁷ Hence the rights-based approach to judicially enforcing environmental constitutionalism enjoys a dominant position in the existing literature on environmental constitutionalism.

However, the emphasis on the *formal design* of non-rights constitutional environmental directives is argued to frame environmental constitutionalism as ‘an alternative to the existing, rights-based models of social values constitutionalism’.⁴⁸

⁴⁵ T. Khaitan, ‘Constitutional Directives: Morally Committed Political Constitutionalism’ (2019) 82(4) *The Modern Law Review*, pp. 603–32, at 607.

⁴⁶ Weis, n. 10 above, pp. 856–8.

⁴⁷ *Ibid.*, p. 858.

⁴⁸ *Ibid.*

Weis terms this alternative as ‘the contrajudicative model’,⁴⁹ meaning that constitutional environmental directives ‘are not designed to be given effect by direct judicial enforcement’.⁵⁰ Recognizing constitutional environmental provisions as ‘resource-vesting provisions’, it allocates the institutional responsibility for defining the scope and content of constitutional values and norms ‘that guide resource management policy’ to the political branches.⁵¹ The alternative contrajudicative model emphasizes the prominent role of ‘[p]rogrammatic environmental directed legislation’.⁵² Recognizing this complexity of socio-economic constitutional provisions in the competition between courts and legislatures in constitutional enforcement mechanisms, this section analyzes the limitations of such a twofold division of environmental constitutionalism, especially limitations of giving effect to environmental constitutionalism manifested as non-rights directives through directed legislation.

Firstly, presenting the audience of environmental constitutionalism with the contrajudicative model as an alternative may underestimate the absence of political will in the enforcement of constitutional environmental provisions. While constitutionalizing environmental provisions is a relatively new phenomenon, the legal or political way to enforce socio-economic constitutional provisions has long been explored in literature. Recognizing relevant concerns over the institutional competence and legitimacy for courts in adjudicating polycentric socio-economic issues,⁵³ a ‘weak form’ of judicial review is preferred in the enforcement of social economic rights.⁵⁴ This means that ‘courts point out political failures to fulfill these rights but generally leave the remedy to the discretion of the political branches’.⁵⁵ Weak-form judicial review allows judicial decisions to be ‘explicitly revisable’ and ‘displaced by an ordinary legislative majority’.⁵⁶ In the domain of constitutional socio-economic provisions, weak-form review, or judicial self-restraint, may be perceived as the solution to balance the tension between the ‘courts versus legislatures’ rivalry.⁵⁷ Although judicial review is ‘weak’, such an approach accepts that constitutional socio-economic values and norms

⁴⁹ Ibid.

⁵⁰ Weis, n. 37 above, p. 920.

⁵¹ Weis, n. 10 above, p. 858.

⁵² Ibid., p. 859.

⁵³ J.A. King, ‘Institutional Approaches to Judicial Restraint’ (2008) 28(3) *Oxford Journal of Legal Studies*, pp. 409–41, at 420. According to Jeff King, ‘[i]nstitutional capacity concerns whether there are judicially discoverable and manageable standards for resolving the issue. Polycentric issues, and issues whose resolution requires significant expertise, are commonly regarded as unsuitable for judicial resolution in precisely this way. Institutional legitimacy, in contrast, refers to the normative political legitimacy of the judiciary as an institution for resolving the question. Many issues are said to be best left to politically accountable branches of government, regardless of judicial capacity considerations’.

⁵⁴ M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2008); R. Dixon, ‘The Forms, Functions, and Varieties of Weak(ened) Judicial Review’ (2019) 17(3) *International Journal of Constitutional Law*, pp. 904–30.

⁵⁵ D. Landau, ‘The Reality of Social Rights Enforcement’ (2012) 53(1) *Harvard International Law Journal*, pp. 189–247, at 192.

⁵⁶ A. Kavanagh, ‘What’s So Weak about “Weak-form Review”? The Case of the UK Human Rights Act 1998’ (2015) 13(4) *International Journal of Constitutional Law*, pp. 1008–39, at 1013.

⁵⁷ Tushnet, n. 54 above, p. 163; M. Tushnet, ‘The Relation between Political Constitutionalism and Weak-Form Judicial Review’ (2013) 14(12) *German Law Review*, pp. 2249–63.

are appropriate for the rights-based approach, which still places the judiciary, ‘primarily and ultimately’, as the institution for defining and enforcing social values and their required legal norms in the constitution.⁵⁸ Meanwhile, the contrajudicative model assigns a prominent role to legislatures, which arguably are more capable in the area of contentious decision-making about allocating resources and prioritizing competing social welfare.⁵⁹ This political way of enforcing constitutional environmental directives through enacting directed legislation thus ‘inserts an element of political constitutionalism within legal constitutionalism’.⁶⁰ While the orthodox understandings of environmental constitutionalism view it as legal constitutionalism,⁶¹ Weis also notes the risk of the contrajudicative model collapsing into pure political constitutionalism ‘if courts are *too* deferential – deferring not only to legislative determinations about fundamental social values and the legal norms that they require but to legislative judgments about the scope and content of the legislature’s own constitutional obligations with respect to those social values’.⁶²

As such, unlike the weak-form judicial review, the contrajudicative model gives the political branches a greater role in giving effect to socio-economic constitutional provisions. Yet, this may underestimate the potential systematic failures in legislative and bureaucratic politics in the implementation of socio-economic constitutional provisions. After all, ‘[p]rotecting social and economic rights is expensive’.⁶³ Even if socio-economic values and norms fall within the discretionary area of resource allocation, the reality of limited resources and costly remedies may render the enforcement of social values constitutionalism as an aspiration in the absence of any transformative action. More worryingly, considering the inherent tension between protecting natural resources and promoting social welfare through resource exploitation and economic development,⁶⁴ the purely political enforcement of environmental constitutionalism can turn out to be more disappointing.

For example, the Indian Constitution obliges the state to ‘endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country’.⁶⁵ Such a directive is placed in the section ‘Directive Principles of State Policy’ (Part IV), rather than the section ‘Fundamental Rights’ (Part III). The enshrined directives of social values under Part IV of the Indian Constitution are made clear that it is ‘*the duty* of the State to apply ... in making laws’ but that ‘*shall not be enforceable by any court*’.⁶⁶ The environmental directive in the Indian Constitution thus *by design* is explicitly made *judicially unenforceable*. However, Gill argues that because of ‘[t]he ineffectiveness of both political leadership and administrative authorities in

⁵⁸ Weis, n. 10 above, p. 857.

⁵⁹ *Ibid.*, p. 859.

⁶⁰ *Ibid.*, p. 860.

⁶¹ Weis, n. 37 above.

⁶² Weis, n. 10 above, p. 869.

⁶³ Tushnet, n. 54 above, p. 234.

⁶⁴ Weis, n. 10 above, p. 856.

⁶⁵ Constitution of India, 1976, 42nd Amendment, Art. 48A, available at <https://indiankanoon.org/doc/871328>.

⁶⁶ Constitution of India, 1949, Art 37, available at: <https://indiankanoon.org/doc/76375> (emphasis added).

discharging their constitutional role and statutory duties’,⁶⁷ Indian courts, particularly the Supreme Court of India, take an active judicial role in expansively interpreting the Constitution, including interpreting ‘non-enforceable constitutional commitments’ as ‘complementary and supplementary to the enforceable fundamental rights’, such as the fundamental right to life.⁶⁸ May and Daly also argue that framing directives within a ‘rights’ discourse is necessary because of ‘the nature of the right and purpose of judicial intervention into the policy-making authority of the state’.⁶⁹ On this reading, it is exactly the reluctance of the political branches to enforce environmental directives that results in an active role for courts in adjudicating environmental matters and protecting the environment. Despite criticisms of judicial activism in deliberately disregarding the distinctive non-rights contrajudicative constitutional environmental provisions,⁷⁰ the implication, however, seems to be that ‘had the legislature done what the constitution asked it to do, the judiciary would not have acted’.⁷¹ In this vein, framing the contrajudicative model as an alternative to the rights-based approach to enforcing environmental constitutionalism may insufficiently consider the possibility that the enforcement of socio-economic constitutional provisions may fail in many political contexts.

Secondly, focusing on the design of ‘directives’ as opposed to the rights-based approach under the framework of environmental constitutionalism may be too formalistic, ignoring the legal practice operated in various jurisdictions. According to Weis, ‘it is the structural features of a provision – and *not* practical operation – that determines whether it is a directive principle’.⁷² On this reading, directives *by design* are contrajudicative, with the distinct use of non-rights language. However, what determines whether a constitutional provision is a directive or not may rely on both: *structure features* and *practical operation*, and the latter may arguably play a more determining role in reality. As argued by Khaitan, while it is true that satisfying certain structural features is necessary (for example, specifying state obligations by using the word ‘shall’), for a provision to be qualified as a directive – an obligatory normative provision – ‘its contrajudicative character cannot be settled by its structure’.⁷³ In Khaitan’s opinion, ultimately, whether a constitutional provision is a right or a directive is not decided by ‘the structure of the provision containing it’, but by ‘the manner in which the constitutional practice of a jurisdiction treats a provision’.⁷⁴ Therefore, although by design there exist differences between rights and directives, Khaitan’s account of constitutional norms reveals that rights and directives entrenched

⁶⁷ G. Gill, ‘Environmental Constitutionalism in India: Judicial Recognition and Application’, in J. Sohnle (ed.), *Environmental Constitutionalism: What Impact on Legal Systems?* (Peter Lang, 2019), pp. 123–40, at 127.

⁶⁸ *Ibid.*, p. 131.

⁶⁹ May & Daly, n. 23 above, p. 98.

⁷⁰ Weis, n. 10 above, p. 852.

⁷¹ Khaitan, n. 45 above, p. 630.

⁷² Weis, n. 37 above, p. 921.

⁷³ Khaitan, n. 45 above, p. 621.

⁷⁴ *Ibid.*, p. 611.

in constitutions can be translated into each other, depending on the constitutional practice within a given jurisdiction.⁷⁵

In fact, legal practice across jurisdictions has proved Khaitan's observation about the transferability between rights and directives within the environmental context. In addition to the previously discussed translation by Indian courts of the unenforceable directive into an implied enforceable right, examples of the unenforceability of explicit environmental rights also demonstrate how an intended enforceable right has been treated as a non-enforceable directive. In the case of *Greenpeace Nordic Association v. Ministry of Petroleum and Energy (People v. Arctic Oil)*,⁷⁶ the Supreme Court of Norway dismissed the claimant's argument that the right to a healthy environment entrenched in Article 112 of the Norwegian Constitution establishes an enforceable right,⁷⁷ governing the degree of the harm to which the environment could be exposed.⁷⁸ Instead, the Court read the provision containing the right to a healthy environment as 'a form of principle or norm without a corresponding right to assert the principle or norm in court'.⁷⁹ Furthermore, notwithstanding that the environmental right provision is positioned under the 'human rights' heading of the Norwegian Constitution, the Court held that such a location 'is not very helpful in the interpretation' because the right to a healthy environment has not developed into a binding rule under international law.⁸⁰ Simply speaking, the Supreme Court of Norway denied the constitutional right to a healthy environment as a substantive, justiciable right.⁸¹ The practice of the Norwegian jurisdiction thus demonstrates the possibility to read the explicit right to a healthy environment as non-judicially enforceable principles or directives. It might be worth mentioning that in the *People v. Arctic Oil* case, the Norwegian Supreme Court found that Article 112 lays down a legal duty on the government to adopt adequate and necessary measures to protect citizens from environmental and climate harm.⁸² However, judicial review is permitted only when this duty is grossly neglected, which did not occur in this case.⁸³ Without

⁷⁵ Ibid.

⁷⁶ *Greenpeace Nordic Association v. Ministry of Petroleum and Energy*, Case No. 20-051052SIV-HRET, 2020 (Norwegian Supreme Court), available in English at: <https://www.greenpeace.org/static/planet4-norway-stateless/2022/05/d38444b5-annexes.pdf> (*People v. Arctic Oil*).

⁷⁷ Art. 112 of the Norwegian Constitution provides: 'Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well. In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out. The authorities of the state shall take measures for the implementation of these principles'.

⁷⁸ A. Hellner & Y. Epstein, 'Allocation of Institutional Responsibility for Climate Change Mitigation: Judicial Application of Constitutional Environmental Provisions in the European Climate Cases Arctic Oil, Neubauer, and l'Affaire du Siècle' (2023) 35(2) *Journal of Environmental Law*, pp. 207–27, at 212.

⁷⁹ *People v. Arctic Oil*, n. 76 above, para. 88.

⁸⁰ Ibid., para. 92.

⁸¹ Hellner & Epstein, n. 78 above, p. 211.

⁸² C. Voigt, 'The First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics' (2021) 33(3) *Journal of Environmental Law*, pp. 697–710, at 702.

⁸³ Ibid.

clarifying the concept of gross negligence, the Court's deference to the Parliament to the point of maintaining its role in enforcing the Constitution is argued by Voigt as 'the motivation to align the law with the prevailing political preferences for unlimited petroleum exploration extraction and export'.⁸⁴ However, this decision, according to Hellner and Epstein, illustrates the collapse into pure political constitutionalism because the Court defers unduly to legislative discretion.⁸⁵ Irrespective of the debate surrounding the decision, Khaitan seems to be right in that the characterization of a constitutional norm as a directive or a right depends on how the practice of a given jurisdiction treats it, rather than on the structure, content or constitutional text of the norm in question.⁸⁶ Consequently, construing environmental constitutionalism from a structuralist focus on 'rights' and 'directives', and the dichotomy of courts and legislatures in their enforcement, may fail to take into account the legal practice in different jurisdictions that may transfer rights to directives, and vice versa.

Thirdly, the current debate on the various ways of enforcing constitutional environmental provisions (via courts or legislatures, that is) distracts scholarly attention away from the most powerful branch: the executive.⁸⁷ Obviously, the rights-based perspective of environmental constitutionalism emphasizes the role of courts in adjudicating constitutional environmental norms. Although in the contrajudicative model constitutional environmental obligations are argued to be allocated to political branches, the focus is the role of the legislature, as directed legislation is the predominant non-judicial means to implement directives. Hence, the role of the executive branch in giving effect to environmental constitutionalism has been largely ignored in this debate. Yet, paying little attention to the executive in constitutional environmental mechanisms is inappropriate, considering the paramount role of the executive branch in addressing environmental problems. A prominent legislative role is argued in the allocation of constitutional environmental obligations – namely, greater accountability, expertise, and flexibility in addressing polycentric and controversial environmental issues.⁸⁸ The executive branch, in contrast, equipped with better expertise and resources, is seen as being more appropriately placed to address complicated, contentious, and constantly developing environmental problems.⁸⁹ Compared with the legislature, which mainly drafts proposed laws and delineates general frameworks, the executive can respond more swiftly, flexibly, and efficiently to environmental issues that are 'highly specialized, time sensitive, socially relevant and complex'.⁹⁰ Moreover, environmental constitutionalism can be a 'technocratic constitutional design'.⁹¹ This is because environmental governance in

⁸⁴ Ibid., p. 708.

⁸⁵ Hellner & Epstein, n. 78 above, p. 226.

⁸⁶ Khaitan, n. 45 above, p. 623.

⁸⁷ A. Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2023), p. 54.

⁸⁸ See n. 44.

⁸⁹ R.B. Stewart, 'The Reformation of American Administrative Law' (1975) 88(8) *Harvard Law Review*, pp. 1667–813.

⁹⁰ H. Shen, 'Environmental Constitutionalism with Chinese Characteristics' (2022) 34(2) *Journal of Environmental Law*, pp. 353–61, at 358.

⁹¹ Bookman, n. 29 above, p. 42.

practice is ‘a mode of technical problem-solving and optimization’, which requires ‘the best available expertise’ in the service of public interest.⁹² Constitutional law in this case performs the role of granting power to experts who are competent to address complicated environmental concerns.⁹³ Accordingly, the primacy of expert management requires the allocation of environmental ‘decision-making authority to the actors and institutions possessing the greatest expertise’, such as the constitutional establishment of ‘specialized environmental agencies’.⁹⁴ From this perspective, environmental constitutionalism recognizes the need for constitutions to stipulate ‘detailed standards which center the role of executive agencies’.⁹⁵ Yet, the role of this ‘most knowledgeable branch’⁹⁶ has been overlooked in the current twofold framework of environmental constitutionalism.

To summarize, a twofold framework of environmental constitutionalism focusing on the formalistic design of ‘rights’ and ‘directives’ has its inherent limitations. It downplays how easily the proposed political enforcement of environmental constitutionalism could collapse, which may exactly provide the reason for courts to intervene. Its over-emphasis on the structural design of environmental constitutionalism also disregards the transferability between ‘rights’ and ‘directives’ in judicial practice. In addition, a twofold conceptual framework of environmental constitutionalism overlooks the importance of the most powerful and knowledgeable branch – the executive – in enforcing constitutional environmental provisions. As a result, reframing the concept of environmental constitutionalism beyond a binary understanding becomes necessary.

3. Reframing Environmental Constitutionalism as a Collaborative Model

The above limitations of construing environmental constitutionalism with an emphasis on the formalistic design of ‘rights’ and ‘directives’ – and, accordingly, the rivalry between courts and legislatures for supremacy ‘at the heart of the constitutional control room’⁹⁷ – demonstrate the necessity to reframe environmental constitutionalism. To do so, we need to answer the question of ‘why environmental constitutionalism’ and look at the rationale behind it. Environmental constitutionalism originated from the failures of ‘ordinary’ laws to provide satisfactory regulatory mechanisms.⁹⁸ Disappointed at the regulatory deficits, environmental scholars turn to highly ranked and time-honoured laws of constitutions as potential solutions for the increasingly imminent environmental crises. Starting with the discussion of constitutional theories and a collaborative perspective on them, this section now explores the possibility of reframing environmental constitutionalism towards a

⁹² Ibid., p. 41.

⁹³ Ibid.

⁹⁴ Ibid., p. 42.

⁹⁵ Ibid., p. 43.

⁹⁶ C.R. Sunstein, ‘The Most Knowledgeable Branch’ (2016) 164(7) *University of Pennsylvania Law Review*, pp. 1607–48, at 1607.

⁹⁷ A. Tomkins, *Public Law* (Oxford University Press, 2003), p. 19.

⁹⁸ Kotzé, n. 1 above, p. 188.

collaborative model under which the separated branches, each with distinct institutional roles, are expected to work together towards the common environmental good.

3.1. *Engaging Environmental Constitutionalism with Collaborative Constitutional Theories*

Essentially, constitutions invoke the fundamental legitimacy of a constitutional order. In the modern tradition of constitutional theories, the doctrine of ‘We the People’ is required to ‘constitute and limit public power’, and to legitimate authority through the formulation of a constitution as ‘the supreme law of the land’.⁹⁹ To build political legitimacy for exercising legal authority, the constitution is perceived as ‘providing the foundation of legal order’.¹⁰⁰ While being ‘a system of “higher-order” law that regulates the processes of “ordinary” lawmaking’,¹⁰¹ constitutions govern legitimate political activities and accordingly acquire legitimacy, which is maintained ‘by virtue of enabling governments to deliver collective good efficiently, effectively and proportionately’.¹⁰² In this regard, instead of the fruitless debate over legal constitutionalism *versus* political constitutionalism, Loughlin’s ‘three conceptions’ perhaps best describe how the constitution functions in a state in the balance between legality and legitimacy: (i) as ‘a framework for continuing political negotiation’ to reflect ‘the importance of political practices and the deliberative role of the legislature’; (ii) as ‘an order of values’ to highlight ‘the moral dimension and promote the judiciary’s role as guardian of constitutional values’; and (iii) as a ‘facilitator of an evolving administrative order’ to underline ‘technical efficacy and the key role of the executive in promoting a governmental agenda’.¹⁰³ By echoing how state powers are allocated and regulated, Loughlin perceives the constitution as an instrument that systematically influences public policy rather than as a symbol of the political time when it was adopted.¹⁰⁴ Therefore, constitutions have a more instrumentalist value that could systematically influence the process of making laws, values, and policies within a state, where all the three separated powers are involved.

When associating the understanding of constitutions with such underlying constitutional theories of constituting and constraining state powers, a collaborative perspective is highlighted. After all, constitutionalism is not simply about how state institutions are separated to limit arbitrary state powers but, as Barber suggests, also

⁹⁹ M. Kumm, ‘The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law’ (2013) 20(2) *Indiana Journal of Global Legal Studies*, pp. 605–28, at 607.

¹⁰⁰ M. Loughlin, ‘What is Constitutionalisation?’, in P. Dober & M. Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010), pp. 47–69, at 50.

¹⁰¹ M. Loughlin, ‘The Silences of Constitutions’ (2018) 16(3) *International Journal of Constitutional Law*, pp. 922–35, at 923.

¹⁰² *Ibid.*, p. 935.

¹⁰³ *Ibid.*, p. 922.

¹⁰⁴ Loughlin’s three conceptions of constitutions address the question put forward by Congleton, which is ‘[a]re constitutions simply symbols of the political time at which they were adopted, or do they systematically affect the course of public policy?’; see further in R.D. Congleton, *Improving Democracy through Constitutional Reform* (Springer, 2003).

about how the constituted power has been established, structured, and regulated to have a positive dimension and advance the wellbeing of its people.¹⁰⁵ According to Kavanagh, collaboration in the constitutional context means ‘a shared commitment by diverse actors to carry out their responsibilities in mutually responsive and respectful ways as part of a joint endeavour oriented towards a common goal’.¹⁰⁶ Viewed from such a collaborative constitutional lens, the three separated branches of government are expected to work together as ‘a joint enterprise’ while the legislature, the executive, and the judiciary each plays a distinct institutional role in the contribution to the joint constitutional effort.¹⁰⁷ That being said, the legislature is required to establish detailed environmental regulatory frameworks and impose environmental duties on administrative authorities. Once legislated, independent courts are expected to interpret relevant environmental laws and adjudicate disputes accordingly. A dedicated executive branch is also needed to implement environmental legislative frameworks and issue concrete environmental-related policies.¹⁰⁸ On this collaborative version of environmental constitutionalism, the separated branches of government ‘do not merely counteract protectively; they also interact productively’.¹⁰⁹

3.2. The Institutional Role of the Executive

Given that the executive branch has been largely overlooked in the current environmental constitutionalism debate, the role of the executive is highlighted within this collaborative model. Recalling the earlier discussion on how the rights-based approach values the role of courts and the contrajudicative model prioritizes the role of legislatures, very little distinguishes environmental constitutionalism manifested as rights or as directives. Indeed, courts may find that rights provisions are not ‘self-executing’, which consequently ‘do not give rise to enforceable rights in and of themselves’.¹¹⁰ This is particularly the case when environmental rights provisions are not found in the ‘bill of rights’ or ‘fundamental rights’ portion of a state’s national constitution.¹¹¹ Even if courts at last decide to engage with environmental rights claims, judicial orders in environmental rights cases are often addressed to the executive, seeking enforcement of a specific manifestation of the constitutionally entrenched environmental right, sometimes in the form of statutes, ‘to gain any meaningful content’.¹¹² Similarly, while the non-judicially enforceable directives are

¹⁰⁵ N.W. Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018), p. 20.

¹⁰⁶ Kavanagh, n. 87 above, p. 5.

¹⁰⁷ Ibid.

¹⁰⁸ J. King, *Judging Social Rights* (Cambridge University Press, 2012), pp. 44–8.

¹⁰⁹ P.S. Hodge, ‘Judicial Law-Making in a Changing Constitution’ (2015) 26(3) *Stellenbosch Law Review*, pp. 471–85, at 474.

¹¹⁰ O.W. Pedersen, ‘Environmental Law and Constitutional and Public Law’, in E. Lees & J.E. Viñuales (eds), *Oxford Handbook of Comparative Environmental Law* (Oxford University Press, 2019), pp. 1073–90, at 1081.

¹¹¹ E.g., Art. 45 of the Spanish Constitution provides: ‘Everyone has the right to enjoy an environment suitable for personal development’, but it is included in Chapter 3 ‘Principles Governing Economic and Social Policy’ of the Constitution, which is not judicially enforceable.

¹¹² Pedersen, n. 110 above.

addressed to the legislature, the executive plays a key role in the implementation of such legislation. In this way, the executive plays a pivotal role in giving effect to environmental constitutionalism.

Furthermore, the executive within the collaborative constitutional order does not merely perform a reactive role to ‘implement’ judicial decisions and ‘execute’ legislative will, which might attract criticism on the ground that the executive in neither case takes primacy in directly enforcing environmental constitutionalism. Rather, under the collaborative model, the executive becomes the ‘dominant branch’ that ‘has the power of initiative: it initiates policy, drives forward the legislative agenda, and determines the key public policies which govern the country’.¹¹³ Vis-à-vis the judiciary, the executive holds the initiative. After all, courts could adjudicate a particular legislative provision only ‘*after* the legislation has been proposed, scrutinized, debated and enacted by the Executive and legislature’ working in coordinated efforts.¹¹⁴ Vis-à-vis the legislature, the initiative role of the executive is associated largely with the distinct institutional virtues it possesses.¹¹⁵ In addition to the institutional features previously discussed – such as flexibility, rapidity, and especially expertise – the executive enjoys ‘a potent form of democratic legitimacy’.¹¹⁶ Kavanagh notes that the electoral linkage between the executive and the populace serves as the core element for the executive’s ‘institutional competence and legitimacy’.¹¹⁷ In this light, by recognizing the importance of the executive in implementing constitutional environmental provisions, a collaborative lens of environmental constitutionalism specifies the shared responsibility among the three divided branches.

Questions may arise regarding the competence and legitimacy of the different branches to tackle environmental issues under this collaborative model of environmental constitutionalism, especially considering the executive’s initiative role. It may be asked which branch is capable of and entitled to address polycentric environmental concerns. The answer here, however, is simple: all three branches have the capacity and legitimacy to do so. This is because the collaborative model recognizes and emphasizes the distinct institutional role of each branch in collectively enforcing constitutional environmental provisions. Constitutional environmental norms, whether they are in the form of ‘rights’ or ‘directives’, tend to exert programmatic social economic influence. To some extent, Weis is correct in arguing for a role for legislatures to play because the legislature, standing as the elected institution, does enjoy the competence and democratic legitimacy to address large-scale environmental problems.¹¹⁸ However, recognition of the legislature’s role does not necessarily mean denying the role of the other branches in implementing environmental constitutionalism. The executive, with distinct institutional features, as

¹¹³ Kavanagh, n. 87 above, p. 124.

¹¹⁴ *Ibid.*, p. 122.

¹¹⁵ *Ibid.*, p. 124.

¹¹⁶ *Ibid.*, p. 125.

¹¹⁷ *Ibid.*, p. 124.

¹¹⁸ See Section 1.

discussed above, is also justified in playing an important role in the same logic. The remaining key question, therefore, lies in the role of courts in the enforcement of constitutional environmental norms.

3.3. *The Institutional Role of Courts*

To explore the role of courts in this recommended collaborative model, we need to understand the essence of environmental constitutionalism. As discussed in Section 2, environmental constitutionalism is more illustrative of socio-economic rights and values as opposed to the traditional civil and political rights. Regarding the enforcement of socio-economic rights, in addition to the previously discussed weak-form judicial review, the dialogue model encourages courts and legislatures to engage in a ‘constitutional dialogue’ to ensure cooperation.¹¹⁹ Admittedly, such a dialogue approach reveals ‘limits to both judicial competence and responsiveness in the process of constitutional rights adjudication’.¹²⁰ Yet, by having the constitutional dialogue, courts are perceived to ‘have a much greater capacity, or even a responsibility’ to ‘counter legislative blockages to the realization of constitutional rights’.¹²¹ Hence, the model of cooperation through conducting a ‘constitutional dialogue’ between the judiciary and the legislature points to a more flexible judicial enforcement approach to ‘confront[ing] political failures in the realization of socioeconomic rights’.¹²² In a similar vein, the collaborative model suggested by this article recognizes the competence and legitimacy of courts in enforcing environmental constitutionalism. That is to say, the collaborative model, like the dialogue model, advocates a much greater judicial role in the constitutional responsibility to implement social values constitutionalism like environmental constitutionalism. The recognition of the judiciary’s capability and responsibility becomes particularly necessary when there appear political failures, either from the legislative or the executive branch, in the enforcement of constitutional socio-economic norms. However, the collaborative model might outweigh the dialogue model because the latter, by encouraging a constitutional dialogue between courts and legislatures to promote cooperation, still raises the question of who should be the ultimate arbiter in this ‘constitutional dialogue’.¹²³ In a sense, the collaborative model is advantageous in avoiding such a question because of its acknowledgement of the institutional role of each branch in the shared responsibility to implement constitutional norms.

With the recognition of a much greater judicial role with distinct institutional features, it becomes necessary to explore how courts are justified in this collaborative model to give effect to environmental constitutionalism. Specifically, in terms of the capacity issue, judicial intervention is justified on the ground that courts have relative

¹¹⁹ R. Dixon, ‘Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited’ (2007) 5(3) *International Journal of Constitutional Law*, pp. 391–418, at 393.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, pp. 391–3.

¹²² *Ibid.*, p. 418.

¹²³ Kavanagh, n. 87 above, p. 76.

institutional advantages in addressing environmental threats and risks compared with political branches like administrative departments.¹²⁴ As environmental problems are often involved with scientific uncertainty, decisions made by administrative departments may be based largely on their limited knowledge and available information.¹²⁵ By contrast, through precautionary and active environmental jurisprudence, courts could not only provide a platform where relevant parties are incentivized to collect environmental information and disclose environmental risks, but also allow the fact, science, and truth related to environmental threats and risks to be contested and discovered in the adversarial judicial proceedings.¹²⁶ In other words, by allowing adversarial dialogues between the involved parties, courts provide a venue to facilitate the disclosure of uncertain environmental threats and risks at large. Similarly, in terms of legitimacy, Kavanagh argues that ‘to criticise the courts for being unelected is to criticise them for possessing the key institutional characteristic which underpins their legitimate role in the constitutional scheme’.¹²⁷ In a well-functioning democracy, judges are not elected exactly because people want ‘independent or “counter-majoritarian judges”’ to check the decisions made by those elected representatives.¹²⁸ After all, the democratically elected legislature can be susceptible to capture by profit-driven enterprises, which also fund their campaigns and influence public opinion on environmental protection. By being more politically insulated, courts are constitutionally empowered to prevent the political branches from being swayed by the short-termism that is present in electoral politics. This is especially necessary for environmental victims, who tend to be from under-represented marginalized communities that are most voiceless in the current political process, including future generations.¹²⁹ The courtroom thus serves as a valuable forum for them to participate in the political process and make their voice heard, ‘complementary to the democratic decision-making’ on environmental issues.¹³⁰ As such, understanding environmental constitutionalism through a collaborative lens not only recognizes the institutional role for courts to participate in implementing constitutional environmental obligations, but also provides grounds for courts to conduct meaningful checks against environmental (in)action by political branches.

¹²⁴ 陈海嵩, ‘生态环境治理现代化中的国家权力分工——宪法解释的视角’ (2021) 5 《政法论丛》 95–104 (in Chinese) (H. Chen, ‘The Division of State Power in the Modernization of Ecological and Environmental Governance: From the Perspective of Constitutional Interpretation’ (2021) 5 *Journal of Political Science and Law*, pp. 95–104).

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Kavanagh, n. 87 above, p. 49.

¹²⁸ D. Kyritsis, ‘Representation and Waldron’s Objection to Judicial Review’ (2006) 26(4) *Oxford Journal of International Law*, pp. 733–51, at 746; M.E.K. Hall, ‘Judicial Review as a Limit on Government Domination: Reframing, Resolving, and Replacing the (Counter) Majoritarian Difficulty’ (2016) 14(2) *Perspectives on Politics*, pp. 391–409; A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of the Politics* (Yale University Press, 1986); J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).

¹²⁹ D.R. Boyd, ‘Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment’, in Knox & Pejan, n. 7 above, pp. 17–41, at 34.

¹³⁰ Kavanagh, n. 87 above, pp. 49–50.

3.4. A Collaborative Spirit Beyond the Formalistic Constitutional Design

It should be noted that reframing environmental constitutionalism towards a collaborative model is not to deny the separation of powers doctrine, the fundamental constitutional structures to guard against abuses of state powers. Far from it; it is simply to require ‘a relational and collaborative conception of the separation of powers’.¹³¹ After all, if the judiciary is too separated to influence decisions from the political branches, court judgments may be ‘marginalized’, failing to resolve multifaceted environmental problems.¹³² A constructive and collaborative understanding renders a richer and positive account of constitutionalism by paying more attention to the dynamic interaction between the separated branches.¹³³ The collaborative model does not declare which branch seizes the last word in enforcing environmental constitutionalism,¹³⁴ but allows courts and political actors to play each ‘distinct but complementary institutional role’.¹³⁵ In this light, the separated branches are not treated as isolated state organs performing one single function but, instead, as integral components of a collaborative enterprise where each branch performs its own institutional role towards the constitutionally entrenched environmental norms and values.¹³⁶ The legislature, the executive, and the judiciary on this model are part of a joint enterprise for better protection of the environment. Tensions and conflicts between them are no longer ‘a cacophonous power struggle’ but are ‘subsumed within one vision of governance’.¹³⁷ The separation of powers thus is not ‘a static vision of mutually exclusive functions’¹³⁸ but is ‘a dynamic process of engagement’.¹³⁹

Most importantly, the collaborative model recognizes that the interactive dynamics between the divided branches can be peculiar to each jurisdiction. Accordingly, it emphasizes less the labelling of judicial intervention to political commitments in a particular jurisdiction as judicial activism or judicial deference.¹⁴⁰ In fact, it remains controversial regarding the exact meaning of ‘activism’. For example, it is argued that

¹³¹ Ibid., p. 4.

¹³² M. Zhu, ‘Human Rights Approach to Climate Change Litigation and Its Limits’ (translated by J. Gao) (2024) 6 *Chinese Yearbook of Human Rights*, pp. 137–62, at 154; S. Bookman, ‘Uncertainty and Tension in Constitutional Adjudication of Climate Mitigation’ (2025) 26(2) *German Law Journal*, pp. 331–49.

¹³³ Barber, n. 105 above.

¹³⁴ Regarding ‘the last word’, it might be helpful to note that even if the highest court in the land is seen as the ultimate interpreter of the constitution, as in the United States, the political branches can always amend the constitution, hard as that can be.

¹³⁵ Kavanagh, n. 87 above, p. 104.

¹³⁶ M. Salekin, ‘Collaborative Constitutionalism and Courts as Partners in the Joint Enterprise of Governing’ (2023) 34(2) *Dhaka University Law Journal*, pp. 115–31, at 115.

¹³⁷ King, n. 53 above, p. 428.

¹³⁸ Kavanagh, n. 87 above, p. 104.

¹³⁹ K. Malleson, ‘The Rehabilitation of the Separation of Powers in the UK’, in L.E. de Groot-van Leeuwen & W. Rombouts (eds), *Separation of Powers in Theory and Practice: An International Perspective* (Wolf Legal, 2010), pp. 99–122, at 100.

¹⁴⁰ E.g., while the Indian Supreme Court’s interpretation of constitutional directives as derivative environmental rights is criticized as judicial activism, such a practice may be argued as collaborative constitutionalism, with ‘courts as partners in the joint enterprise of governing’: Salekin, n. 136 above. Another example is the judicial application of transformative environmental constitutionalism in South Africa, which is justified in stimulating more responses to both the struggles of vulnerable groups and the

‘activism’, in given jurisdictions, means ‘little more than actually enforcing the law in rights cases’, and ‘activism’ in the United States (US) ‘has become an empty pejorative applied to rulings of which one disapproves’.¹⁴¹ In essence, the collaborative model focuses more on the joint endeavours to transform environmental constitutionalism, encouraging jurisdictions in different contexts to revisit the significance of entrenching environmental protection in national constitutions and develop a collaborative spirit in the implementation of environmental constitutionalism. Although courts are empowered to perform an institutional role in giving effect to environmental constitutionalism, environmental protection cannot be interpreted and implemented in a political vacuum.¹⁴² Political response to unwelcome rulings may have a ‘chilling effect’ on courts’ further decision-making patterns.¹⁴³ Environmental constitutionalism in a given polity cannot be enforced in isolation from considerations of resource allocation, fiscal realities, political interests, and the relationship between the judicial and political branches,¹⁴⁴ all of which can vary across contexts. This contextual sensitivity of environmental constitutionalism thus needs to be highlighted and the collaborative model reflects such a need. Different jurisdictions may develop context-specific methods to decide how collaboration in enforcing environmental constitutionalism is operated among the separated powers.

Furthermore, understanding environmental constitutionalism as a collaborative enterprise that demands concerted efforts from all the separated branches, however, is not to deny but simply to downplay the distinction between environmental rights provisions and constitutional environmental directives. In fact, given the distinct social-cultural background and legal-political system in each country, it is not surprising to have diverse environmental provisions entrenched in different national constitutions, including and well beyond ‘rights’ and ‘directives’. As discussed at the very beginning of this article, a twofold division of environmental constitutionalism into ‘rights’ and ‘directives’ is not exhaustive. For example, although prioritizing the rights-based approach to environmental constitutionalism, Boyd recognizes that constitutional environmental norms are divided into various categories. Apart from substantive and procedural environmental rights, constitutional environmental provisions across the world are designed diversely to include governmental or individual environmental duties, and other environmental protection provisions such as the use of private property and public interest to protect the environment.¹⁴⁵ Even within this twofold division,

continuing deterioration of the earth system in the Anthropocene; see further in M. Murcott, *Transformative Environmental Constitutionalism* (Brill, 2022).

¹⁴¹ H.A. Garcia, K. Klare & L.A. Williams, *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge, 2015), p. 5.

¹⁴² R. Hirschl & E. Rosevear, ‘Constitutional Law Meets Comparative Politics: Socio-economic Rights and Political Realities’, in T. Campbell, K.D. Ewing & A. Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011), pp. 207–28, at 228.

¹⁴³ *Ibid.*, p. 225.

¹⁴⁴ *Ibid.*, p. 228.

¹⁴⁵ D.R. Boyd, ‘The Status of Constitutional Protection for the Environment in Other Nations’, David Suzuki Foundation, Nov. 2013, available at: <https://davidsuzuki.org/science-learning-centre-article/status-constitutional-protection-environment-nations>.

environmental rights provisions take various forms, and constitutional environmental directives may be formulated in various ways to reflect the national particulars.¹⁴⁶ The varying lengths of national constitutions may also be relevant, which in turn affect the intricacies of how the different powers interrelate in a state's legal and governance system. Therefore, constitutional environmental design is deeply contextual.

Finally, a collaborative model challenges the assumption that environmental constitutionalism manifested as 'rights' indicates a legal constitutionalist approach, and 'directives' a dominantly political one. Constitutional mechanisms in different jurisdictions are complicated and, more importantly, most countries in the world adopt a combination of legal and political constitutionalism, 'fall[ing] at varying points on a continuum between the two extremes of pure political constitutionalism and pure judicial [legal] constitutionalism'.¹⁴⁷ For example, the Netherlands, as a liberal democracy with no constitutional judicial review, depends more on political branches and less on judicial mechanisms compared to the US.¹⁴⁸ The Constitution of the Netherlands has not entrenched any rights provisions to a healthy environment, but included only general duties 'to keep the country habitable and improve the environment'.¹⁴⁹ Hence, there is no ground on which to build justiciable legal rights and obligations. Despite this, in the landmark *Urgenda* case, the Dutch Supreme Court ruled that Article 2 (the right to life) and Article 8 (the right to private life, home and correspondence) of the European Convention on Human Rights (ECHR),¹⁵⁰ 'which enjoy constitutional status and direct enforceability in the Dutch system',¹⁵¹ place on the state 'direct legal obligations' to take positive measures to reduce greenhouse gas emissions.¹⁵² This judgment expands possibilities for future strategic climate litigation on human rights grounds,¹⁵³ which may

¹⁴⁶ E.g., although Weis observes that environmental directives refer to non-rights constitutional environmental provisions articulating 'obligations that provide direction to the state', and are often associated with the use of the word 'shall', it is argued that environmental provisions in the Constitution of the People's Republic of China also take the form of 'directives'. Without the use of 'shall', the state's obligations to protect the environment are clearly stipulated and the branch for implementing these obligations is explicitly pointed out. It is argued that to allocate the highest executive branch, rather than the legislature or the judiciary, with the constitutional environmental obligations reflects the particular characteristics of China's Party-state regime: Shen, n. 90 above, p. 361.

¹⁴⁷ A.H.Y. Chen, 'Constitutions and Constitutionalism: China', in D.S. Law (ed.), *Constitutionalism in Context* (Cambridge University Press, 2022), pp. 61–86, at 79.

¹⁴⁸ M. De Visser, 'Non-Judicial Constitutional Interpretation: The Netherlands', in Law, n. 147 above, pp. 216–35, at 228.

¹⁴⁹ Constitution of the Kingdom of the Netherlands, 2023, Art. 21, available at: <https://open.overheid.nl/documenten/ronl-faa96875fef77af167a9133bd3625c0e9b45fa89/pdf>.

¹⁵⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: <http://www.echr.coe.int/pages/home.aspx?p=basictexts>.

¹⁵¹ C. Eckes, J. Nedevska & J. Setzer, 'Separation of Powers', in M. Wewerinke-Singh & S. Mead (eds), *The Cambridge Handbook on Climate Litigation* (Cambridge University Press, 2025), pp. 145–68, at 161.

¹⁵² *The State of the Netherlands v. Urgenda Foundation*, The Hague Court of Appeal, 200.178.245/01, 9 Oct. 2018, English translation available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>.

¹⁵³ R. Mooney, 'The Urgenda Case: Human Rights Obligations to Reduce Carbon Emissions', *Oxford Human Rights Hub*, 29 Jan. 2020, available at: <https://ohrh.law.ox.ac.uk/the-urgenda-case-human-rights-obligations-to-reduce-carbon-emissions>.

serve as a milestone for relating climate change or the environment to the rights-based approach. Meanwhile, in addition to liberal democracies adopting mixed legal and political constitutionalism, there may also exist states having environmental constitutionalism without being committed to liberal democratic constitutionalism, such as China.¹⁵⁴ Hence, if the constitutional design of environmental provisions is really to be taken seriously, environmental constitutionalism should not be narrowly framed from the ‘rights’ and ‘directives’ perspectives and, consequently, the traditional legal and political constitutionalist approaches within the liberal democratic context.

4. Conclusion

This article has demonstrated how the current academic debate on the formalistic design of environmental constitutionalism presents a binary choice between ‘courts *versus* legislatures’ or ‘legal *versus* political constitutionalism’. Moreover, it squeezes environmental constitutionalism as an issue around judicial (over/under)reach under the separation of powers doctrine. By addressing limitations of construing environmental constitutionalism in such binary language, the article explores the possibility of reframing environmental constitutionalism towards a collaborative model. Doing so requires a re-examination of the purpose of granting constitutional status to environmental protection. As a collaborative model, environmental constitutionalism is perceived as recognizing that a healthy environment becomes a constitutional matter, which ‘provides a legitimization and justificatory foundation for environmental care in a society and its law and governance system’.¹⁵⁵ From this perspective, environmental constitutionalism, especially using directives, should be conceptualized beyond the formalistic design. Environmental constitutionalism should be more about mapping the architecture of environmental governance at the highest constitutional level, which could exert systematic influence upon the divided state institutions towards the achievement of constitutionally entrenched environmental protection. Good constitutional governance, as Bobbitt provides, ‘encourages collaboration ... among the various constitutional institutions and actors, and thereby enhances its own stability’.¹⁵⁶ A collaborative model therefore enables environmental constitutionalism to be viewed as good constitutional governance of the environment.

The proposal for a collaborative model of environmental constitutionalism is original. When the existing literature links environmental constitutionalism with constitutional theories surrounding the separation of powers, the collaborative model argued by this article provides a revised perspective on the separation of powers

¹⁵⁴ E.L. Wang, ‘Environmental Constitutionalism in China: A Constitution without Constitutionalism?’ (2024) 36(2) *Journal of Environmental Law*, pp. 187–202, at 187.

¹⁵⁵ L.J. Kotzé, ‘Six Constitutional Elements for Implementing Environmental Constitutionalism in the Anthropocene’, in E. Daly & J.R. May (eds), *Implementing Environmental Constitutionalism: Current Global Challenges* (Cambridge University Press, 2018), pp. 13–33, at 18.

¹⁵⁶ P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1982), p. 182.

doctrine, in which the institutional roles of all three branches are highlighted. The legislature, the executive, and the judiciary all enjoy institutional competence and legitimacy, as well as undertake shared responsibility, in the enforcement of constitutional environmental provisions. In particular, with regard to the role of courts in giving effect to environmental constitutionalism, recalling the aforementioned debate on the appropriateness of judicial treatment of constitutional environmental directives as if they are directly enforceable rights, the collaborative model not only values an independent judiciary as a separate power in checking political environmental decisions but also emphasizes the importance of a responsible judiciary. This provides theoretical grounds for courts to robustly adjudicate environmental constitutionalism. Furthermore, the dynamic interaction among the separated powers in the process of achieving good environmental governance, as required by this collaborative model, will prevent the potential political marginalization of responsible judicial environmental decisions, at least in theory.

This theoretical framework of conceptualizing environmental constitutionalism as a collaborative model has significant practical implications. Instead of intensifying a polarization of theoretical debate on the structural design of ‘rights’ and ‘directives’, the collaborative model reminds constitutional drafters, reformers, and policymakers that the fundamental purpose of writing environmental protection into national constitutions is to achieve good environmental governance in a spirit of constitutional collaboration. When drafting and revising constitutional environmental provisions, the formalistic design of ‘rights’ and ‘directives’ in shaping constitutional mechanisms should not be exaggerated. Rather, the context in which environmental constitutionalism is enforced merits attention. In addition, decision-makers from all branches of the government should recognize their shared responsibility to implement environmental constitutionalism, respect each distinct but compatible institutional role, and work in the joint endeavour to promote good environmental governance under the constitution.

The collaborative model may also have limitations. For example, as all the divided governmental branches are entitled to enforce constitutional environmental provisions, there may be diffusion of responsibility or political gridlock. There may also be institutional conflicts or tensions if each branch fails to ‘mind the institutional gaps’,¹⁵⁷ as such gaps under this collaborative model can be blurred. Nevertheless, this article offers an innovative understanding of environmental constitutionalism, going beyond the narrow focus on competition for constitutional supremacy by integrating environmental governance with the spirit of a collaborative constitutional scheme. Ultimately, the article directs the current scholarly analysis of environmental constitutionalism towards a new approach, setting the stage for further investigation into this mysterious concept that witnesses the convergence of human rights and constitutional theories in the advancement of an environmental ideal.

¹⁵⁷ G. Appleby, V. MacDonnell & E. Synot, ‘The Pervasive Constitution: The Constitution Outside of the Courts’ (2020) 48(4) *Federal Law Review*, pp. 437–54, at 447.

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