The right to a healthy environment has been a mainstay of environmental legal scholarship ever since the 1972 *Stockholm Declaration on the Human Environment* declared, in principle 1, that “[m]an 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.”¹

Over the last forty years, a voluminous literature has developed around the status of this right in international and comparative law, its definition and conceptualization, and its potential for contributing to environmental protection and justice.²

Some of this scholarship includes a measure of scepticism about the prospects for recognizing this right at the global level and its concrete implications for ameliorating environmen-

---


tal problems. By and large however, most scholars view the right to a healthy environment as
an emerging global right whose further recognition could play a critical role in strengthening
environmental laws and policies and addressing important environmental challenges. Over
the years, a number of environmental activists, experts, and lawyers have been equally enthusi-
astic about the right to a healthy environment, as most recently evidenced by (unsuccessful)
advocacy efforts seeking its recognition at the Rio+20 Conference in June 2012. Moreover,
in July 2012, the UN Human Rights Council appointed an independent expert to prepare a
study on “human rights obligations related to the enjoyment of a safe, clean, healthy and
sustainable environment,” reflecting not only enduring global interest in this right, but also
serving as a reminder that much of the debate, at least internationally, may not have advanced
very far in the last forty years.

Given this extensive and somewhat repetitive literature, one might be tempted to question
what a new book on the right to a healthy environment could contribute to environmental
legal scholarship. Although it returns to some well-trodden academic ground, David Boyd’s
*The Environmental Rights Revolution* nonetheless succeeds in breathing new life into the study
of this right. As I argue below, Boyd’s book forms an indispensable and influential addi-
tion to this literature not only due to the strength and comprehensiveness of its comparative

---


4 Collins’s optimistic assessment is a good example of the prevailing scholarly view: “In the long run, universal acceptance of the right to environment may provide helpful guidance for the formulation of environmental law and policy worldwide, creating increased momentum in the drive towards sustainable development and environmental protection. … A robust and justiciable right to environment would also respond to this pressing human need by providing access to redress through the international human rights machinery. In short, the right to environment is an important and desirable addition to the toolkit of human rights advocates, policy makers and jurists, and has become a reality in international and European law.” (Lynda Collins, “Are We There Yet? The Right to Environment in International and European Law” (2007) 3:2 JSDLP 119 at 153).

5 See, e.g. *Review of Further Developments in Fields With Which the Sub-Commission has Been Concerned, Human Rights and the Environment, Final Report prepared by Mrs Fatma Zohra Ksentini, Special Rapporteur*, UNECOSOC, 46th Sess, UN Doc E/CN.4/Sub.2/1994/9, (1994) (“The Special Rapporteur remains convinced that providing the various agents and beneficiaries of this evolving right with the legal framework and means of expression, communication, participation and action will reinforce the channels for dialogue, discussion and cooperation nationally, regionally and internationally, thereby making it possible to define the mutually agreed component of this right as well as its harmonious application, in conformity with the universally recognized fundamental principles of human rights.” at para 5).


legal analysis, but also because of the important empirical questions it seeks to answer as well as raises for future research. Indeed, by conducting the first serious and systematic empirical study of the environmental implications of the right to a healthy environment, Boyd has moved this field beyond the speculative and abstract arguments typical of earlier scholarship.\(^9\)

*The Environmental Rights Revolution* is comprised of two substantive parts. Part I of the book returns to some familiar debates in the literature on the right to a healthy environment—reviewing key arguments on the nature and promise of this right and analysing its status in both comparative constitutional law and international law. Without a doubt, this part marks out Boyd as a supporter rather than a critic of the notion of a right to a healthy environment and its prospective role in environmental law and governance. Among other advantages, Boyd affirms that such a right may support the adoption and implementation of stronger environmental laws; ensure that environmental issues receive greater consideration in governmental decision making; provide the legal means for holding governments accountable for their environmental performance; strengthen access to environmental democracy and justice; and educate the public about environmental issues.\(^10\) By addressing the main criticisms of this right, Boyd rebuts concerns that the right to a healthy environment may be unjusticiable or unenforceable; may be unable to address the underlying economic, social, and political factors that make environmental damage more likely; and may divert attention from other human rights or other means of protecting the environment.\(^11\) In either supporting or defending the right to a healthy environment, his basic reasoning is the same: like other human rights, the right to a healthy environment possesses potent legal and extralegal effects, must and can be refined through interpretation and application, and has its usual share of detractors. While Boyd endorses the case for the right to a healthy environment at the outset of his book, he nonetheless recognizes that resolving disagreements around the potential advantages and disadvantages of constitutionalizing the right to healthy environment requires empirical analysis,\(^12\) to which he returns in Part II.

Part I also delves into the legal status of the right to a healthy environment in constitutions around the world as well as in the full range of international legal sources. This sort of investigation has been done before,\(^13\) but Boyd’s analysis stands out as being much more comprehensive and precise than most previous scholarship in this area. By his count, ninety-two constitutions include a substantive right to a healthy environment and thirty include procedural environmental rights in some form. To his credit, Boyd goes to great lengths to differentiate between different types of rights that are merely preambular and those that are (or may be) enforceable. He also provides an analysis of when new constitutional environmental rights provisions were enacted: the story that emerges from this analysis is that from the 1970s until the early 1990s, constitutional environmental rights were included in close to half of the world’s constitutions—a remarkably rapid rate of global adoption that no previous (new)

---

\(^9\) In fact, previous scholars have expressed doubts about the very possibility of empirical analysis on the right to a healthy environment. See, e.g. Tim Hayward, *Constitutional Environmental Rights* (Oxford: Oxford University Press, 2005) at 162-63 and 182.

\(^10\) Boyd, *supra* note 8 at 28-33.

\(^11\) *Ibid* at 33-43.

\(^12\) *Ibid* at 44.

\(^13\) See sources cited at *supra* note 2.
human right has matched.\textsuperscript{14} Boyd's analysis on where things stand in international law is thorough and expectedly positive. By cobbling together an assortment of constitutional provisions and rulings, domestic legislation, regional treaties and cases, and international soft law declarations, Boyd seeks to build the case that the right to a healthy environment is clearly headed in the direction of being recognized as a rule of customary international law or a general principle of law (if, as he suggests, it has not already achieved either status).\textsuperscript{15}

While Boyd is surely right about the overall trends, it is hard not to notice how his obvious enthusiasm for his topic may sometimes colour his analysis. His treatment of the Constitution of Andorra provides an illuminating example. Included in the list of ninety-two constitutions cited above, it is also identified by Boyd as one of six constitutions that include an "ambiguous" reference to the right to a healthy environment. In fact, the constitutional provision at issue does not seem to be ambiguous at all in that it clearly does not recognize a right to a healthy environment. It reads as follows:

The State has the task of ensuring the rational use of the soil 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.\textsuperscript{16}

Boyd treats this provision as ambiguous because of a 1996 ruling by Andorra's Constitutional Court in which it is treated as including a fundamental right.\textsuperscript{17} On this basis, Boyd concludes that this provision provides an "explicit" recognition of the right to a healthy environment.\textsuperscript{18} A more modest perspective might instead question whether a single judicial decision can provide sufficient grounds to substantiate this sort of claim and perhaps draw further distinctions between constitutional and interpretative forms of recognition. Unfortunately, the thresholds for what counts as an explicit recognition are not discussed or provided in Boyd's appendix on research methods.\textsuperscript{19}

This sort of interpretative quibbling aside, the most interesting questions of Boyd's analysis relate to the processes that explain how and why these rights have spread to so many countries in so little time. Boyd does provide some brief thoughts on the matter, referring generally to some of the key processes involved in the transnational transmission of norms and providing a few concrete examples. He thus concludes that "[t]he diffusion or migration of the idea of incorporating environmental protection into constitutions can be attributed to the processes of transplantation, convergence, harmonization, integration, and elite networking, and to the dedicated efforts of legislators, judges, lawyers, academics, non-governmental organizations, and international organizations."\textsuperscript{20}

\begin{flushleft}
\textsuperscript{14} Boyd, supra note 8 at 76-77. \\
\textsuperscript{15} Ibid at 113. \\
\textsuperscript{16} Constitution of the Principality of Andorra, 1993 at art 31 (Boyd, supra note 8, Appendix 2, at 6). \\
\textsuperscript{17} Boyd, supra note 8 at 225. \\
\textsuperscript{18} Ibid at 76. \\
\textsuperscript{19} Ibid at 292-94. \\
\textsuperscript{20} Ibid at 112. 
\end{flushleft}
While Boyd’s reflections are a useful starting point, the issue of how the right to a healthy environment has spread to legal systems around the world deserves further exploration. Processes of normative diffusion are not only interesting in and of themselves, but they can also provide insights on the ability of a norm to eventually influence politics and policies at the national level. Existing research in international law and comparative public policy has provided three main perspectives on the concept of diffusion, each of which would predict different fates for the right to a healthy environment. To begin with, the global emergence of the right to a healthy environment may actually be reflective of a change in values among law makers world-wide, amounting to a form of social policy learning that could eventually lead to a paradigmatic shift in policy making.21 Alternatively, the spread of the right to a healthy environment may result from mere signalling exercises and may therefore be unlikely to reflect or induce any changes in the ideas or practices of government officials.22 This would be consistent with similar findings in relation to other human rights, where scholars have noted that state commitments to human rights may not always translate into changed practices, a phenomenon referred to as decoupling.23 A final, related possibility is that these same initially shallow commitments could nonetheless be deepened through a number of mechanisms, such as domestic mobilization, institutionalization, or argumentative rationality.24

A full understanding of the factors and conditions conducive to the transnational diffusion of the right to a healthy environment would also be helpful in one other important respect. It would provide scholars (as well as advocates) with the means to develop hypotheses about the countries and contexts that provide more or less hospitable settings for its constitutional recognition. While these issues are largely outside the scope of Boyd’s book, his analysis provides at least one fascinating empirical puzzle that calls for further theorization and empirical analysis. On numerous occasions, he suggests that common-law nations evince a certain “resistance” to the recognition of a constitutional right to a healthy environment. Boyd hazards, as many others have, that this “may be a consequence of the historical and/or continuing influence of the British and American legal systems.”25 Future research in this area should seek to develop hypotheses not only relating to the influence of the type of legal system on the prevalence of the right to a healthy environment, but also accounting for the many other factors that would need to be examined, such as the common political structures or shared legacies of colonial rule of these countries. This analysis would also need to explain the different experience of two important outliers, South Africa and India, which are at the forefront of the constitutional protection of the right to a healthy environment.

25 Boyd, supra note 8 at 60. See ibid at 127 (noting that Guyana does not recognize the right to a healthy environment and that this may be due to its common-law legal system).
Part II of *The Environmental Rights Revolution* stands out as its most original and ambitious component, addressing the influence of constitutional environmental rights on environmental law and performance in countries around the world. Most of the chapters in this part provide a comprehensive legal analysis of whether and how the right to a healthy environment has been implemented or applied through legislation and litigation in over one hundred countries. The analysis proceeds on a country-by-country basis in a series of chapters that address broader regional patterns in Latin America and the Caribbean, Africa, Asia, Eastern Europe, and Western Europe. It is hard to do justice to Boyd’s painstaking and wide-ranging review of laws and cases in countries across such a broad spectrum of countries and legal systems. His herculean efforts in this regard constitute a valuable contribution to comparative legal scholarship on the right to a healthy environment and set the table for future in-depth case studies focusing on particular countries, regions or cross-cutting themes.

Boyd’s meticulous examination of the legal status of the right to a healthy environment in close to a hundred countries provides powerful evidence of its salience to legal systems around the world. The evidence takes the form of examples of laws and cases where the right to a healthy environment has been invoked or applied and contributed to improved political or judicial outcomes for the environment. His review of legal developments in Latin America presents a useful illustration of the sort of arguments that he develops. As far as legislation in this region is concerned, Boyd uncovers that sixteen of eighteen countries have framework environmental laws that refer to the right to a healthy environment. Reviewing existing accounts of the development of environmental law and policy in these countries, Boyd argues that “constitutional recognition of the right to a healthy environment has acted as an impetus to enact stronger, more comprehensive environmental laws.” While this conclusion requires further in-depth empirical research, it does suggest that the right to a healthy environment may hold real influence as a “policy paradigm.”

With respect to litigation in Latin America, Boyd finds that the right to a healthy environment has been pleaded in thirteen of eighteen countries and has been extensively cited by courts in the region. Among other successes, he highlights a 2008 Supreme Court decision in Argentina that delivered a resounding victory for plaintiffs alleging that their right to a healthy environment was being violated by extensive pollution in the Matanza-Riachuelo River. The decision resulted in an order compelling the government to clean up and restore the river and served as the impetus for a large World Bank loan for this very purpose. Highlighting this sort of judicial victory may show that the right to a healthy environment has the capacity to provide individuals with an important new tool for defending the environment and their well-being. On the other hand, the broad scope of this review prevents Boyd from demonstrating that similar outcomes would not have been possible through reliance on other legal means. It is striking that most of the cases cited by Boyd rely on the constitutional right to a healthy environment along with other existing concepts and doctrines in environmental law. As Boyd himself admits, “judicial systems in Latin America have pioneered the use of simplified and expedited legal procedures” that “have provided citizens and ENGOs with an unprecedented

---

26 *Ibid* at 125.


opportunity to employ the judicial system in pursuit of the right to healthy environment."

One wonders which of the two innovations is more important for protecting individuals from environmental harm through litigation—improvements in procedural access to justice or the constitutional protection of the right to a healthy environment.

Boyd ends each of his case studies by discussing the reasons that may affect the influence of the constitutional right to a healthy environment in different countries, and the region as a whole. In Latin America, Boyd identifies a host of factors, including the presence of constitutional provisions providing for judicial review; the creation of public institutions dedicated to environmental enforcement and litigation; the existence of an extensive and active network of public interest legal actors; changes in legal culture; and procedural innovations in improving access to justice. As in other chapters, this discussion highlights some of the challenges that come with trying to untangle the independent causal role that the constitutionalization of the right to a healthy environment may play in influencing laws, cases, and outcomes in a country. While Boyd provides illustrations of some of the key factors at play in making the right to a healthy environment more or less effective, further research is required to identify and understand the complex array of necessary and sufficient conditions that may support the emergence of an environmental rights revolution in a given country. Such research should not only assess the role of litigation support structures but also consider the influence of a broad range of variables that may affect processes of political and legal mobilization at the domestic level.

Moreover, Boyd’s necessarily brief review of laws and litigation in these countries does not provide an opportunity to assess the real causal significance of the right to a healthy environment for improving environmental outcomes. There is no doubt that this right is an influential legal concept as reflected in the fact that it has been included in ninety-two constitutions, further implemented in the environmental laws of seventy-seven countries, and been interpreted and applied in the courts of fifty-six countries. The key question that remains is whether and to what extent this right plays a role in shaping environmental outcomes—a question that Boyd seeks to answer in the book’s penultimate chapter. To this end, Boyd undertakes basic quantitative analysis to assess the relationship between two variables—whether a country’s constitution includes a duty to protect the environment and whether it includes a right to healthy environment—and various measures for assessing a country’s environmental performance, including existing composite indices of environmental performance, the ratification of environmental treaties, levels of air pollution, and contributions to climate change. On the whole, Boyd reports that this analysis demonstrates “a consistent relationship between constitutional environmental provisions and superior environmental performance.”

Ibid at 145.

Ibid at 143-46.


Boyd, supra note 8 at 273.
these results do no more than support correlative findings, Boyd suggests that the existence of this relationship requires further empirical analysis involving more advanced techniques of quantitative analysis such as multiple-regression analytical techniques. He also acknowledges that the relationship may operate "in the other direction - a nation with strong environmental policies and broad public support for environmental protection may be more likely to entrench constitutional provisions related to environmental protection."  

Boyd is absolutely correct—further quantitative analysis is indeed required to control for the effect of many other confounding and intervening variables, such as the well-known influence of rising income levels on environmental performance. Quantitative analysis employing multiple regression techniques is essential for capturing the independent causal effect of the constitutional recognition of environmental duties and rights (or lack thereof).

However, further research must do more than this. Of capital importance is the identification and development of the specific causal mechanisms that can provide plausible explanations for the posited relationship between constitutional environmental rights and improved environmental performance. Causal mechanisms provide the key micro-level linkages between independent and dependent variables (or between processes and outcomes) that are critical to understanding causal relationships. It is important to highlight that Boyd's assertions that constitutional environmental rights can shape environmental outcomes through their effects on laws, cases, decision making, and public opinion are not entirely satisfying explanations of the potential relationship between environmental rights and performance identified by his findings. The case of climate policy making provides a useful example. Given the limited role of litigation in setting climate mitigation policies and directing economic activities, arguing that the right to a healthy environment has the ability to drive reductions in GHG emissions requires some theoretical argument about the effects of this right on the social construction of policy making in a range of fields or on decision-making norms prevalent among industrialists and consumers.

Of course, a focus on causal mechanisms raises a whole host of issues in research design and methodology that are increasingly critical as empirical work in legal scholarship grows in importance. Quantitative analysis can make a useful contribution by isolating overall causal trends, patterns, and relationships and are typically used for large-N studies such as the one that Boyd undertakes in this book. Qualitative methods on the other hand are more time and resource intensive and are more useful for the study of micro-level causal mechanisms through which legal phenomena may develop and shape outcomes. Process-tracing, in particular, is

34 Ibid at 276.
well-suited to the study of phenomena that involve equifinality and enables consideration of "the alternative paths through which the outcome could have occurred" as well as "offers the possibility of mapping out one or more potential causal paths that are consistent with the outcome." 39 This would seem rather important since Boyd himself highlights the challenges posed by the many variables that may affect environmental performance. 40 It is not surprising, then, that Boyd's own reflections on future research highlight the need to engage in something that sounds like process-tracing. 41

On the basis of his extensive comparative legal research and quantitative analysis, Boyd's overall conclusion is that "constitutional recognition of the right to a healthy environment should be viewed as a useful additional tool for the societal actors engaged in the process of attempting to transform today's unsustainable societies." 42 It is hard to disagree with this modest claim—Boyd has surely demonstrated that the right to a healthy environment can make a positive difference at the level of a specific lawsuit or legal reform, improving the environment in measurable ways, protecting communities from environmental harm, and providing remedies and sanctions for environmental damages. At the same time, Boyd's analysis cannot tell us whether the right to a healthy environment can truly engender an environmental rights revolution that substantially and durably transforms the prospects for environmental justice and sustainability. In this regard, Boyd's overall conceptualization of the way in which rights influence outcomes may in fact be at fault for this limited appraisal.

Referring to competing approaches for understanding the influence of rights on change, Boyd suggests at the outset of his book that he favours an instrumental approach over a constitutive one. 43 The instrumental approach, employed by scholars such as Gerald Rosenberg, seeks to specify the links of influence through which rights-based litigation influences political outcomes. According to Rosenberg, this entails, for instance, that "if a Supreme Court decision ordering an end to public segregation was the cause of segregation ending, then one should see lower courts ordering local officials to end segregation, those official acting to end it, the community at large supporting it, and, most important, segregation actually ending." 44 The notion that the right to a healthy environment should be seen as having primarily linear, instrumental effects—as a legal phenomena "that is brought to an already constituted social situation and either does or does not make a difference" 45—is implicit throughout much of The Environmental Rights Revolution.

Conversely, the constitutive approach eschews a positivist approach to the study of law and focuses instead on its extralegal effects in shaping social meanings, relationships, and pro-

39 George & Bennett, supra note 36 at 207.
40 Boyd, supra note 8 at 254.
41 Ibid at 287 (referring to the need to conduct analysis "tracing the steps in the causal chain from constitution to on-the-ground outcomes").
42 Ibid.
43 Ibid at 15 ("This book considers both the legal and extralegal effects of constitutional provisions requiring environmental protection, but emphasizes the former.")
cesses.\textsuperscript{46} This enables us to understand how human rights can be promoted through informal processes and can thereby have effects that extend beyond litigation to support other means of seeking political and social change. As emphasised by Michael McCann, human rights have the ability to generate “rights consciousness” within social movements and provide symbols and discourses that can be deployed by activists as part of their efforts to transform society.\textsuperscript{47} This is critical to processes of legal mobilization, involving “reconstructing legal dimensions of inherited social relations, either by turning official but ignored legal norms against existing practices, by reimagining shared norms in new, transformative ways, or by importing legal norms from some other authoritative source into the context of the dispute.”\textsuperscript{48} As Francesca Polletta has argued in the context of the civil rights movement, legal mobilization employing innovative rights claims can have effects that go well beyond the established, formal legal system to support broader political struggles for change:

Rights claimsmaking inserted enough uncertainty into long-standing relations of domination to give people a sense that change was newly possible, and provided recognition for efforts whose immediate yields were far from clear. The recognition of rights claims and claimants by movement, congregation, and community worked to warrant actions not easily justified in terms of narrowly rational cost-benefit analysis. Rights discourse was effective in pushing organizers to widen their agenda to institutional arenas and aggrieved groups not originally targeted. Rather than narrowing their strategic focus, … an engagement in rights struggles pushed them to enlarge it. Finally, rights claims contributed to a master frame of protest that would go on to animate contemporaneous and subsequent protests.\textsuperscript{49}

Although Boyd occasionally hints that the right to a healthy environment may have some extralegal effects (on public values and opinion),\textsuperscript{50} he leaves its constitutive implications largely unexplored. Yet, if we assume that the causes and drivers of contemporary environmental challenges relate to broader patterns in how our societies, economies, and polities operate, it would seem that the constitutive effects of the right to a healthy environment would be all the more critical to its ability to deliver improved environmental outcomes. A focus on formal laws and institutions cannot capture the full story of how the right to a healthy environment may matter for environmental law, governance, and justice, which requires instead an appreciation of the complex processes through which it may influence the ideas and values of citizens, activists, lawyers, judges, and policy makers, shape social relations, and structure opportunities for environmental legal and political mobilization.

As Boyd himself recognizes, assessing whether or not the right to a healthy environment can live up to the lofty expectations that scholars and activists have been placed on it remains an unfinished project. Nonetheless, \textit{The Environmental Rights Revolution} forms an important,


\textsuperscript{50} See, e.g. Boyd, \textit{supra} note 8 at 244-45.
pioneering effort for understanding the legal influence and broader significance of the right to a healthy environment. As a result, the variety of empirical puzzles and questions that it leaves in its wake should continue to influence research in this field for many years to come.