Environmental Law and Constitutional and Public Law

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1 Introduction

Environmental law in its modern form does not necessarily sit firmly within traditional ideals of ‘public/private’ understandings of law. Historically it might be said that environmental law (at least in common law jurisdictions) was primarily ‘private’ in the sense that those seeking to facilitate what we would today brand environmental protection were, in the absence of regulatory initiatives, forced to rely on private law actions such as nuisance and trespass. Today, however, it seems trite to observe that modern environmental law is increasingly regulatory: regulatory, in the sense that environmental norms increasingly take the form of explicit control, directing and guiding mechanisms. The onset of the administrative state and its rapid expansion throughout the twentieth century resulted in a host of regulatory controls aimed at protecting human health and the environment. Though these regulatory initiatives initially took the form of traditional public and administrative law controls, benefitting from the backing of the executive apparatus as a means of securing compliance, more recent developments suggest that regulatory initiatives are anchored not only in the confines of the state but increasingly also from non-state agents and entities. What is more, across this ‘administrative spectrum’, the
regulatory tools available include a wide range of mechanisms which cannot any longer be described as exclusively ‘public’ in any traditional understanding.¹

Having said that, a central domain of modern environmental law remains that of the state and environmental law is, by its nature, ‘public’. This is so even where ‘regulatory’ controls and initiatives are developed, implemented, and enforced through non-state mechanisms. Consequently, and uncontroversially, the administrative state remains an important background, arbiter, and controlling influence behind modern environmental law. Against this background of shifting patterns of ‘public/private’ this chapter considers the relationship between environmental law and public and constitutional law (which is here broadly understood to include constitutional norms and administrative law as well as provisions of rights). This will be done through an examination of what the chapter calls ‘points of interactions’ between public and constitutional law and environmental law. In doing so, it will be shown that public and constitutional law remain a central influence on modern environmental law and that the points of interaction are found throughout the ‘life cycle’ of environmental law. From the development of policy to the drafting of legislative initiatives and to the administration, implementation, and enforcement of environmental law, public and constitutional law exerts an important influence on the form, content, and application of environmental law. The chapter

also highlights how environmental law can, at times, act as a central driver behind public and constitutional law reforms more generally and administrative reforms specifically. The chapter thus suggests that the relationship between environmental law and public and constitutional law is a symbiotic one with multiple points of interaction, one which plays out at several stages and at several different levels, perhaps even to the extent that it begs the questions whether it is at all possible to separate modern environmental law from the confines and reach of public and constitutional law. In addition, the actual workings of this relationship can be seen as both facilitative and restrictive and often for different reasons. That is, on the one hand, the ways in which frames of public and constitutional law facilitate and provide ‘spaces’ for environmental law to emerge and, on the other, the ways in which frames of public law and constitutional law place restrictions on the ability of environmental law to achieve its objectives. Often these interactions are multifaceted, variable, and complex.

Before embarking on the analysis a couple of qualifications must be made. First, in relation to the facilitative/restrictive understanding, a point of caution must be made. Conceptualizing the functions of public and constitutional law as disabling to the role of environmental law should not be taken to mean that the core function of environmental law is necessarily that of absolute environmental protection and any hindrance to this is a negative attribute of public and constitutional law. Taking this approach would be a simplification of both systems of law. In other words, the extent to which environmental law succeeds in meeting its statutory purposes does not necessarily stand or fall with the extent to which public and constitutional law exert a strong disabling influence or not. Moreover, though it may disappoint some, as a body of law, environmental law is arguably best understood as exhibiting several, yet
potentially conflicting, purposes at the same time. Approaching environmental law exclusively from the instrumental point of view of its purpose being that of securing absolute environmental protection, is a basis which is simply not borne out by any reasonable reading of the law. That is to say, while environmental protection is central to most of what we would identify as environmental law, it is not necessarily the exclusive nor unqualified purpose of the law.

Likewise, caution should be taken in the attempt to distil generally applicable points from the broad analysis put forward here. The main reason for this is that the terms ‘public law’ and ‘constitutional law’ will have different meanings and will entail different rules and concepts, depending on which jurisdiction one approaches it from. This point is perhaps best appreciated considering the significant differences and variations in the meaning of ‘administrative law’ and the extent to which it has developed over the years in many continental European countries where it remains a well-established, fully fledged legal subject and discipline with specific and separate systems of rules, tribunals, ombudsmen, administrative appeal procedures, often taught separately from constitutional law. This is, at least to some degree, in contrast to the developments in many common law countries where administrative law often remains a subset of ‘public law’—a term which often encompasses constitutional rules as well. Thus, the exact configurations and workings of public law and constitutional law will vary from jurisdiction to jurisdiction.

Finally, an important way in which these differences manifest themselves, which necessarily impacts on environmental law, is in the way in which the law (and thereby also environmental law) is, first, drafted by law-makers (more about this below) and, secondly, implemented and applied by administrative agencies and tribunals and
courts. This necessarily entails significant variations in the ways in which the different points of interactions discussed below emerge across jurisdictions.

2 Policy and Law-Making in the Administrative State

The earliest point of interaction between public and constitutional law and environmental law plays out, at a very general level, to the extent that any entity of government or indeed any polity or society seeks to promulgate norms of environmental protection in the form of regulation. Where such regulation is developed, this will very likely have to take place within what we ordinarily perceive as being the confines of the ‘state’ and thereby also be governed by the rules, and administrative and legislative restrictions in public and constitutional law to which a state is ordinarily subject. Environmental regulation, as with most other types of regulation, is to a large degree a product of state intervention and, by its very nature, from the powers and authorities afforded the state by a given constitutional system. From this perspective it does not much matter what form the environmental regulation ends up taking (be it by way of conventional regulatory techniques or economic, market-based instruments) nor who will be charged with the actual application and implementation (be it administrative agencies or private actors); the underlying policy and the law itself will be formed and shaped from the confines of the state and

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thereby by the rules and restrictions which public and constitutional law place on the state.

Examples of this include requirements that policy decisions and documents be subject to specific democratic decision-making procedures and public consultations as well as meeting the requirements of transparency and natural justice, relating to, for example, legitimacy concerns.³ Basic public and constitutional law duties, for example such as requirements pertaining to fairness, thus apply with equal force in the context of environmental law policy and decision-making, with the potential to shape the content and form of that decision-making.⁴ Similarly, requirements relating to, for example, screening of policy initiatives and legislation on grounds of cost/benefit assessments, as well as other types of impact assessments, apply to environmental law and policy initiatives. Bills of the UK Parliament as well as pieces of secondary legislation—including those relating to the environment—are thus subject to specific impacts assessment, establishing the cost and benefits of each legislative initiative, allowing law-makers to make a more fully informed decision. Similar requirements are in place in the United States where cost/benefit analysis of rule-making and regulatory actions is mandated by presidential orders.⁵ These requirements are evidently not exclusive nor unique to environmental law and policy but apply to all areas of policy and law-making except for where there might be

³ e.g. R (on the application of Greenpeace) v Secretary of State for Trade and Industry [2007] EWHC 311.

⁴ e.g. Edwards v Environment Agency [2006] EWCA Civ 877.

⁵ e.g. Executive Order 12,191 (1981) and Executive Order 12,866 (1993).
specific exemptions carved out (e.g. in the areas of national defence and public procurement).

On a yet more general level, an important point of interaction between environmental law and public and constitutional law plays out against the impact which the constitutive form of the state has on the implementation of legislation. This is, for example, the case where a so-called dualist system of the state serves to significantly shape the way in which international environmental law is implemented in the domestic state. This point of interaction is important in the context of environmental law exactly because much of domestic environmental law is strongly related to, at one level or the other, an international environmental norm/rule. Consequently, in a dualist system where an international obligation only gives rise to domestic legal obligations where it is explicitly recognized as doing so, for example through parliamentary and legislative endorsement, the vast and important body of international environmental law will often remain of little domestic significance. This is in contrast to the situation in a so-called monist system where international treaty obligations have automatic domestic effect. In other words, the constitutional and public law regime of a given state serves to significantly regulate the manner in which the domestic system is able to interact with international environmental law obligations.  

See e.g. discussions on the relevance of the Aarhus Convention and the decisions by its Compliance Committee in Walton v Scottish Ministers [2012] UKSC 44 [100] and Venn v Secretary of State for Communities and Local Government [2013] EWHC 3546 (Admin) [36].
3 Constitutional Environmental Norms

As already noted, one of the basic points at which public and constitutional law interacts with environmental law is by giving force to such norms through basic means of law-making and administrative decisions. Most commonly this is done through the recognition of the desire to regulate activities and harms posing a risk to human health and the environment. The authority afforded a state to act in the context of environmental risks is, from time to time, explicitly provided for on the constitutional level.\(^7\) These provisions vary extensively from creating a specific obligation on the state to protect the environment (as in the case of the Constitution of Poland)\(^8\) to more vague expressions of such duties (as in the case of the Constitution of the Netherlands)\(^9\) to simply providing a basis for the state’s authority to promulgate environmental protection provisions (as in the case of Italy).\(^10\)

The functions served by constitutional environmental provisions are several. First, the explicit recognition of environmental norms at the constitutional level serves to highlight the relative importance attached to the issue and the need to address environmental risks in modern societies. This is particularly so where a constitution is

\(^7\) The most recent list of countries including environmental provisions, relating to the environment is found in Annex C and D of J. May and E. Daly, *Global Environmental Constitutionalism* (Cambridge: Cambridge University Press, 2015).

\(^8\) Chapter 2, Article 74(2).

\(^9\) Chapter 1, Article 21.

\(^10\) Part II, Title V, Article 117(s).
taken as expressing and reflecting the core norms of a given polity. On this reading, the constitutional endorsement of environmental norms is arguably more than just an enabling background. It becomes a reflection of the priorities and values of a given society. That is, the importance of environmental regulation is recognized and afforded constitutional footing in order to underline its significance. But, as evidenced by McAdams, the expressive functions of law are multiple. In addition to the constitutional norms mirroring and expressing societal values, the constitutional provision potentially also act as a normative driver and not just a reflection of societal priorities. On this reading, a constitutionally enshrined environmental norm/rule potentially has the added advantage of spurring on and advancing societal concerns about the environment. Although the extent to which a constitutional environmental provision serves as an expressive reflection of existing norms or as an attempt to develop such norms (a form of norm-entrepreneur) is not always easy to establish, it seems entirely plausible that the real function of a constitutional environmental provision will be a combination of the two.

In this light, it is perhaps not surprising that the addition of environmental norms to constitutional documents is a relatively recent phenomenon. Importantly, however, where such recognition takes place, it provides not only for an enabling environment in the sense that it facilitates executive or administrative authority to


13 See n. 7.
develop environmental regulation. It also provides a constitutional background to which judicial institutions and civil societies at large can have recourse and upon which they come to rely in their attempt to understand, interpret, and develop specific environmental law mechanisms (to the extent such mandates are justiciable). Where this is the case, the enabling function of a constitution comes to play a much more significant role as it acts not merely as a catalyst for executive action but importantly also as an interpretive background, giving force to subsequent and secondary rules and administrative actions.

An example of this is where the constitutional provision takes the form of an explicit right. Providing for constitutional environmental rights is exceedingly popular and a recent examination suggests that nearly 100 constitutions across the globe contain some form of environmental right.\(^\text{14}\) As with the general environmental mandates found in some constitutions, environmental rights provisions vary significantly. Typically the rights can be conceptualized as being either substantive or procedural (though in reality that distinction often breaks down). Substantive rights to the environment will often be prefixed by reference to the environment being ‘healthy’, ‘sustainable’, ‘favourable’, or similar qualifications. Examples include the right to an ‘ecologically balanced environment’ in the Brazilian Constitution,\(^\text{15}\) the right to ‘an environment that is conducive to health’ found in the Norwegian Constitution,\(^\text{16}\) and the Spanish Constitution’s right to ‘enjoy an environment suitable

\(^\text{14}\) May and Daly, \textit{Global Environmental Constitutionalism}, at 4.

\(^\text{15}\) Title VII, Chapter 6, Article 225.

\(^\text{16}\) Article 110b.
for the development of the person’. Again, the exact meaning of such prefixes of ‘healthy’ and ‘sustainable’ is not always clear. On the one hand, they can be seen as qualifying the content of the right, making it contingent upon certain specific circumstances though in reality there is little to suggest that the prefixes make much by way of material difference to the content of the right.

Procedural rights will often include rights to access to information, participation and independent review of environmental decisions, as well as rights in connection with specifically mandated procedures (such as environmental assessments). Examples include Article 35(2) in the Constitution of the Czech Republic, allowing for the entitlement to ‘timely and complete information about the state of the environment’, the constitution of Brazil affording ‘any citizens . . . standing to bring a popular action’ in environmental matters, and the Constitution of Finland which provides for a right to ‘the possibility to influence’ environmental decisions.

Where the explicit recognition of a right is lacking in a constitution, rights can from time to time be facilitated through the development of such norms by way of judicial fiat. The active engagement with environmental rights by the Indian judiciary is a striking example of the ways in which so-called ‘derivative rights’ can be developed even where there is no explicit reference to environmental rights in the constitution. The case-law of the Supreme Court of India thus represent one of the

17 Article 45(1).
18 Article 35(2) Charter of Fundamental Rights.
19 Title II, Chapter I, Article 5, para. 73.
20 Constitution of Finland, Chapter 2, s. 20.
21 May and Daly, Global Environmental Constitutionalism, at 118–19.
earliest recognitions of environmental rights through the expansive interpretation of other, related rights, such as the right to life.\textsuperscript{22}

Whilst the commentary surrounding constitutionally enshrined environmental rights has been mostly positive, the expression of environmental norms in the form of rights has potentially limiting features as well. One important limiting feature is that these rights arguably run the risk of significantly simplifying the complex issues involved in environmental decision-making.\textsuperscript{23} In other words, it might be called into question whether constitutional provisions are at all an appropriate outlet for environmental norms.\textsuperscript{24} A central point in this line of argument is that knowledge and understanding of environmental problems and potential solutions are likely to never be complete nor absolute and one way to accommodate this ‘moving knowledge frontier’ is to maintain regulatory and administrative flexibility.\textsuperscript{25} To the extent that constitutional environmental provisions entrench and restrict regulatory manoeuvrability, there is a risk that such provisions end up doing more harm than good. Linked to this is the claim that the constitutionalization of environmental provisions will result in a ‘cluttering’ of constitutional norms, trivializing the relative

\textsuperscript{22} Subhash Kumar v State of Bihar No. 1991 A.I.R. 420, 1991 SCR.


importance of constitutional norms. Though such claims may run contrary to the points made above, and seem an affront to those relying on and supporting the implementation of constitutional environmental provisions, sceptics may well point out that the relative merit of constitutional environmental provisions dwarfs compared to that of other more traditional types of rights such as civil and political rights.

On the issue of the relationship between environmental rights and other types of human rights, a further point of interaction emerges if one considers the restrictions which human rights in general place on statutory and executive responses. Like any other area of law and regulation, the drafting and administrative application of environmental law are subject to restrictions found in the requirements to respect fundamental rights as these are propagated in constitutions and instruments of international law. Regulatory environmental initiatives will thus have to be developed and implemented with the need to respect fundamental rights of, for example property, due process, and those of indigenous communities, in mind. Within the jurisprudence of international human rights tribunals a subset of decisions are thus emerging, highlighting the potential restrictions which human rights norms place on government responses and regulatory initiatives (and thereby also on environmental law). These include decisions establishing that governments will have to ensure the


27 Pedersen, ‘Climate Change and Human Rights’.
rights of particular groups are taken into account when embarking on projects and initiatives, impacting on the livelihood of these groups.28

Out of all of the points of interactions between environmental law and public and constitutional law this is arguably the one which has the strongest potential to limit the scope and application of environmental law. This is particularly so considering the regulatory challenges faced by climate change. A simplistically effective way to regulate climate change would, for example, be to hold individuals responsible for personal emissions of greenhouse gases through the allocation of individual quotas. Doing so, however, would necessarily have the potential to significantly infringe on individual autonomy and on human rights which give express force to such norms. Similarly, and to the frustration of some, international climate change responses are necessarily constrained by existing norms and rules of public international law ultimately restricting the effectiveness of the system (much like in the example mentioned above about dual/monist state systems). This restriction is both functional and institutional. For example, one of the more prominent constraints on the ability of international community to adopt a binding and effective international regime is that of sovereignty and lack of willingness (up to a recent point anyway) among particular states. Similarly, the institutional framework under the UNFCCC in which the main

28 Inter-American Court of Human Rights, *Case of the Saramaka People v Suriname*, Judgment of 12 August 2008. Series C no. 185. See also Inter-American Court of Human Rights, *Maya Indigenous Community of the Toledo District v Belize*, Case 12.053, Report no. 40/04, OEA/SerL/V/II.122 Doc 5 rev 1 at 727 (2004), where the IACHR found Belize to have violated the right to property under the American Declaration of the Rights and Duties of Man of the Maya People by granting extensive logging and oil extraction concessions without prior and proper consultations.
international responses to climate change have been drawn up has been heavily
criticized for not being conducive to the adoption of effective responses on account of
its size and unwieldiness. Such restraints are arguably a feature of the ability of
existing structures of, in this case, public international law to restrict the development
of new and novel environmental law systems.

4 The Inevitable Locality of Environmental Constitutional Rules

An important point in the context of constitutional environmental rules is that, while
the increase in the ‘constitutionalization’ of environmental provisions forms part of a
wider trend, suggesting that a consensus among states is perhaps emerging about the
relevance of such norms, it must be borne in mind that each constitutional provision
will have to be interpreted and understood in its domestic context. This is important,
first, because it may well entail specific and practical restrictions on the scope, form,
and content of each provision which is not forthcoming by merely reading the
relevant provisions. In other words, the meaning of a constitutional provision is
necessarily defined by the domestic constitutional and legal cultures in which it
operates and it cannot readily be assumed that terminology like a ‘healthy’ or
‘sustainable’ environment and references to mandates of ‘environmental regulation’
necessarily mean the same across jurisdictions.\(^29\) Second, a useful way to

\(^{29}\) C. Warnock and O. W. Pedersen, ‘Environmental Adjudication: Mapping the Spectrum
Identifying the Fulcrum’ (2017) Public Law 643, noting that comparative analyses of
environmental law often serve to highlight the complexity of the systems at hand.
conceptualize this point further is by considering that constitutions can be seen as putting forward a narrative, or story, of the particular state’s political and constitutional history as well as its values and aspirations.³⁰ Nowhere is this more emblematic than in countries where such narratives are given force through entrenched constitutions; where the constitutional provisions and ‘preambular . . . fairy tales’, give force to historical and national identities and values.³¹ Again, the expressive or norm-creating function of constitutional environmental rules necessarily becomes a ‘local’ expression, embodying the particular local traditions.

A further note of caution ought to be struck when it comes to constitutionally entrenched environmental rights. First, notwithstanding the rising popularity of such rights, judicial engagement with these rights has often been lacking behind their positive enactment. In other words, there is a dearth of judicial doctrine, engaging with the interpretation, scope, form, and content of constitutional environmental rights.³² This may well be explained by reference to delayed effect and the argument that the relative novelty of these rights means that they take time to bed into constitutional doctrine and jurisprudence. Some constitutional provisions are ‘unlikely to achieve iconic status immediately’.³³ But an important aspect is likely also that the issues engaged with in the context of environmental rights often touch upon issues


³¹ Ibid.


which courts have historically seen as non-justiciable or, in the least, have been hesitant to involve themselves with.\textsuperscript{34} In engaging with environmental rights claims, some courts have thus found that such provisions are either in need of further executive action in order to gain any meaningful content or that they do not give rise to enforceable rights in and of themselves (i.e. the provisions are not ‘self-executing’).\textsuperscript{35} Where this is the case, there is in reality very little to distinguish the provisions framed in the vocabulary of rights from the general ‘enabling’ provisions.

5 ‘Non-Constitutional’ Points of Interaction

The argument that constitutional provisions offer rich and explicit points of interaction between environmental law and regulation does not of course mean that in the absence of such provisions there is no scope for other points of interaction. If this was the case, countries with no explicit environmental mandate in their constitution (like the United States) or indeed those countries with no single codified constitution (like New Zealand and the United Kingdom) would not be able to develop extensive environmental provisions. This is evidently not the case as witnessed by the extensive amount of environmental controls and regulations in place in these countries. Instead, in these jurisdictions, the enabling function is provided for not necessarily on the

\textsuperscript{34} R. Lee, ‘Resources, Rights and Environmental Regulation’ (2005) 32(1)\textit{Journal of Law and Society} 111.

‘constitutional’ level but through means of traditional primary legislation (leaving aside the argument that such Acts of Parliament are in themselves ‘constitutional’ documents). In Britain for example, the Environment Act 1995 represent a prime example of the enabling function of public law in the form of primary, non-constitutional legislation.\(^3^6\) Not only does the Act exemplify the facilitative nature of public law mechanisms, it also represents an example of the way in which environmental law initiatives are ‘legitimized’ through processes of public law. Environmental regulation is here explicitly provided for and thereby endorsed and supported by way of an Act of Parliament. In the absence of this parliamentary endorsement, the statutory framework would not be possible. A few examples will highlight this point.

First, the Environment Act 1995 contains several provisions which, akin to the constitutional provisions discussed above, permit or require relevant public authorities to adopt certain environmental measures. In doing so, the Act affords the state the all-important authority to enact and administer environmental law. Part II thus creates a system for the designation of contaminated land,\(^3^7\) instructing local authorities to take certain measures in the attempt to regulate the risks arising from contamination and Part IV requires the Secretary of State to produce air quality plans with a view to

\(^{36}\) In the context of the UK Constitution it may thus nevertheless be possible to construe certain environmental statutes as ‘constitutional’ notwithstanding their status as ‘ordinary’ acts of Parliament. See e.g. A. McHarg, ‘Climate Change Constitutionalism? Lessons from the United Kingdom’ (2011) 2 Climate Law 469.

\(^{37}\) Environment Act 1995, inserting Part IIA in the Environmental Protection Act 1990. See also the contribution by E. Lees in this volume.
lower emissions.\textsuperscript{38} Perhaps an even stronger example of this enabling function is found in section 1 of the Act which creates the Environment Agency as the primary regulator for the environment in England (as an amalgamation of existing agencies) with the statutory purpose of protecting and enhancing the environment.\textsuperscript{39} Again, this statutory creation of an administrative agency serves an important public and constitutional law purpose of legitimizing an agency’s (in this case, the Environment Agency’s), administrative powers. In the absence of these explicit statutory powers, the agency would, from a public law perspective, be prevented from undertaking any regulatory activities. Similar examples abound across various jurisdictions, including that of the United States in which the federal Environmental Protection Agency (EPA) was formed in 1972 through presidential decree. At this level, the enabling and legitimizing function of public and constitutional law consequently facilitates not just environmental law and regulation itself but also the administrative apparatus charged with having to implement and enforce the law (within the confines allowed by constitutional and public law).

Like the constitutional provisions, the primary ‘non-constitutional’ legislation providing for administrative agencies, enabling administrative rule-making and decision-making, does not always offer exact details on the scope and extent of these statutory duties. The upshot of this is that the administrative agencies necessarily enjoy a high degree of discretion in exercising and executing their duties. In fact, there may well be reason to believe that the discretionary latitude enjoyed by administrative agencies is a particularly prominent feature of modern environmental

\textsuperscript{38} \textit{Environment Act 1990}, Part V.

\textsuperscript{39} Ibid., ss. 1 and 4.
law. This is particularly so considering the very nature of environmental law. As noted above, one feature of environmental law is the fact that the object of regulation (the environment) and our knowledge thereof changes rapidly. The epistemological basis of the law is often lacking in certainty and is instead significantly shaped by scientific assumptions and cost-benefit analyses. For this reason, it makes good sense for law-makers to afford regulatory discretion to expert agencies who are then charged not just with implementing legislative mandates and the enforcement thereof but also with actual rule-making and development of the law. This discretion necessarily emerges in different shades and may take the form of a specific delegation, requiring the administrative agency to take concrete yet non-specific measures, or it may emerge as a result of a lack of explicit statutory instructions. Importantly for the present analysis, the exercise of discretion is typically governed by ‘traditional’ rules of public and administrative law (in the form of Wednesbury controls—as in the United Kingdom—or ‘arbitrary, capricious, or manifestly contrary to the statute’ standards as in the United States). This point highlights the multifaceted nature of the interaction between public and constitutional law and environmental law. The administrative discretion enjoyed by an administrative agency charged with statutory environmental responsibilities flows directly from the enabling function of public and constitutional law as mandated through constitutional rules or primary and/or secondary statutory norms. At the same time, this discretion is confined by the norms and rules found in public and constitutional law, seeking to restrain

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administrative agencies from reaching decisions which are manifestly unjust, arbitrary, procedurally flawed, or irrational/unreasonable.

The upshot of this is that the application and administration of environmental law is, once again, given force and shaped through doctrines and rules of public, constitutional, and administrative law. This is important for present purposes as the exact confines and content of the rules of environmental law will be shaped by rules strictly originating from outside the discipline of environmental law—in this case, rules emerging from traditional norms of public and administrative law. Examples of this include courts applying the above mentioned public law doctrines to environmental disputes in part on the basis that the environmental questions raised by a given case do not merit the development of environmentally-specific doctrines and/or special consideration. Instead, traditional public law doctrines are maintained as a means of engaging with environmental adjudication. Examples include Smyth in which the Court of Appeal rather emphatically rejected the claimant’s argument that environmental cases ought to be subjected to a higher level of judicial scrutiny than ordinarily afforded other administrative law cases.41 On this reading, the ‘traditional’ rules and doctrines found in public and administrative law serve as an interpretative background against which environmental law must be contextualized.

On the other hand, there are examples of courts developing special and separate doctrines in response to environmental claims. This is most prominently the case in areas where administrative agencies, as noted above, benefit from explicit delegated authority and are trusted with having to weigh competing yet relevant factors against one another in the attempt to execute their administrative duties. A striking example

41 Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174.
of this is decision-making in the area of development control and planning. Here, courts, for very good reasons, are cautious of second-guessing the exact weighing of decisions made by administrative agencies as long these are, broadly speaking, rational and lawful.\textsuperscript{42} In other words, within particular environmental law contexts, the courts are willing to afford decision-makers a wide scope of discretion on account of the nature of the decision-making and the relevant factors which the decision-maker is obliged to take into account. This is similarly prevalent in cases which involve the scrutiny of administrative decisions which are, in one way or the other, based on scientific assessments or reasoning. In such cases, as with those concerning development control and planning, case-law suggests that courts are willing to afford administrative agencies wide discretion. In \textit{Downs} the Court of Appeal in the United Kingdom consequently found against a claimant, seeking to impugn the regime for pesticides use in the United Kingdom primarily on the grounds that the decision-maker had conducted inadequate risk assessments. In finding against the claimant, the Court specifically held that in a highly technical field as this the hurdle of establishing a ‘manifest error’ was a formidable one.\textsuperscript{43} Similarly in \textit{Levy}, the High Court held that in cases where an agency makes ‘use [of] its specialist and technical expertise to evaluate the applications, to appraise complex scientific and commercial material and

\textsuperscript{42} See e.g. \textit{R. (Jones) v Mansfield DC} [2004] Env. L.R. 21 per Carnwath LJ [61]. Arguing that these decisions ‘require . . . the exercise of judgment, on technical or other planning grounds, and [that] is a function for which the courts are ill-equipped, but which is well-suited to the familiar role of local planning authorities’.

\textsuperscript{43} \textit{Downs v Secretary of State for the Environment, Food and Rural Affairs} [2009] EWCA Civ 664 [76].
then to produce a reasoned decision\textsuperscript{44} ‘the margin of appreciation allowed in this case is substantially greater than that which should be accorded in the average case’.\textsuperscript{45} In other words, while courts will often insist on administrative agencies and regulators providing the court with sufficient evidence and background information, allowing the court to ascertain the rationality and legality of the decision, they are willing to afford environmental decision-makers wide discretion in the recognition that such decisions will often involve the weighing of one piece of scientific evidence against another.\textsuperscript{46} Consequently, courts, up to a point, accept the claim that environmental decision-making, involving scientific and predictive assessments (as many environmental decision inevitably do), ought to benefit from high level of deference and in doing so in part dispense with traditional rules and norms of public and administrative law.

6 Structures of Government

The point made above about the importance of appreciating the local and domestic context of constitutional environmental provisions highlights another significant feature of the relationship between environmental law and public and constitutional law: the fact that the form and content of environmental law will be considerably shaped by domestic structures of government (and governance) as these are

\textsuperscript{44} <IBT>Levy v Environment Agency [2002] EWHC 1663 (Admin)</IBT> [79].

\textsuperscript{45} Ibid., [81].

\textsuperscript{46} e.g. R. (Mott) v Environment Agency [2016] EWCA Civ 564 and Kennecott Copper Corp v EPA F2nd 846 (1972).
manifested in, and given force through, constitutional law more generally. Consequently, the ways in which a state is structured in terms of the basic functions of government, its competences and authority, evidently impact on the form and content of environmental law.

A useful illustration is found in the supra-national structures of the European Union (EU) and the extensive body of environmental law and regulation developed over the years. As a matter of basic constitutional law, the EU can only adopt legislative initiatives in accordance with the competences afforded it by its Member States under the Treaties. While these are extensive, it was not until the Single European Act of 1986 that the EU was afforded explicit competence in the area of environmental law. Prior to this, the constitutional bases of EU environmental initiatives were primarily found in the Treaty provisions, providing for competence of the EU to take steps to further the workings of the common market or the need to protect what was then the Community’s common heritage. Following the expansion of the EU’s scope to adopt environmental measures in the Single European Act, the competences of the EU have been further expanded, through the Lisbon Treaty, specifically to include ‘climate change’ as an area in which the Union can adopt regulatory measures. These competences and structures of government are important not only in the context of who is entitled and/or required to act in specific area but also for the form and content of environmental regulation and law itself.

The EU’s response to climate change as part of its 2030 framework (and the 2020 framework before it) provides a useful example. Through the climate change frameworks and the fact that it has been given explicit competence in the area of

47 Examples include the 1979 Birds Directive (79/409/EEC).
environmental law and climate change, the EU has made an extensive and concerted effort to draw up regulatory responses to climate change. Though the EU has developed a wide range of significant regulatory initiatives, including the emissions trading Directive\textsuperscript{48} and the energy efficiency Directive,\textsuperscript{49} the constitutional foundations of its competences and the constitutional decision-making procedures serve in part to place restrictions on the form of the regulatory measures that the EU can realistically adopt. An important reason behind the development of the emission trading scheme (ETS) was thus that previous attempts by the European Commission to develop a carbon tax had been rebutted by some Member States on the basis that fiscal measures require unanimity.\textsuperscript{50} Similarly, the extensive use of what may seem like trivial components of the 2030 framework (such as legislation on the energy performance of buildings\textsuperscript{51} and design requirements for household lighting fixtures),\textsuperscript{52} further highlights how the institutional design and constitutional allocation competences of the EU arguably drove the Commission to focus on regulatory approaches and standards with which it has developed an extensive familiarity over the years.

Additional support for the argument that the constitutive and institutional arrangements of the state impact on the form and content of environmental law

\textsuperscript{48} Directive 2003/87/EC.

\textsuperscript{49} Directive 2012/27/EU.


\textsuperscript{51} Directive 2002/91/EC.

\textsuperscript{52} Regulation 244/2009 on ecodesign requirements for non-directional household lamps.
emerges when observing the structures of how environmental law is developed across
different systems of governance. Indeed in federal states (such as the United States
and Australia), much as in between Member States of the EU, environmental laws
will vary significantly from state to state and reflect local practices. Importantly,
under these governing structures, the interplay between state laws and federal
constititutional provisions is often complex and has significant potential to impact on
environmental rules and standards. For example, to what extent does federal law place
restrictions on state environmental law? And to what extent can federally enacted
environmental law pre-empt state law or, on the contrary, to which extent can it serve
to compel the adoption of certain minimum standards? That is, to what extent do
federally enacted provisions operate as either a ‘floor’ or a ‘ceiling’, inducing or
restricting the ability of states to adopt specific measures? To appreciate the potential
for federal law to shape state environmental law consider the situation where federal
law sets certain minimum standards for, for example, air quality, but ultimately leaves
the implementation of this in the hands of state (or indeed local) regulatory
agencies. 53 Or alternatively the situation where federal law mandates general broad
principles and objectives which are then given force through explicit standards
promulgated on state (or local level). The exact configuration of this regime
necessarily has a significant impact on both the institutional and regulatory design,
responding to a specific environmental problem. For example, where a federal statute
operates as a floor, aiming at setting core minimum standards, space emerges for
institutional and regulatory diversification across states (and possibly within states),

53 D. M. Driesen, ‘The Ends and Means of Pollution Control: Toward a Positive Theory of
reflecting local preferences and experiences. On the contrary, federally enacted ‘ceilings’ prevent such regulatory and institutional diversity, as the federal rule remains exclusive.

The scope for significant differences in substantive environmental law within states is not, however, reserved for federal states. Even in the United Kingdom it is increasingly evident that a divergence in environmental law and standards is manifesting itself as a result of the devolution settlements. Across the UK jurisdictions, differences are thus emerging: most notably in the context of organizational arrangements (in Northern Ireland e.g. the Northern Ireland Environment Agency remains a part of the departmental administration whereas the respective environment agencies on England, Wales, and Scotland are all independent non-departmental organizations); differences also emerge in the attempt to facilitate coherence and integration of regulation (with England and Wales taking the lead in integrating and consolidating much of its regulation on industrial pollution in one permitting regime and Scotland aiming to follow); and in the enforcement of environmental law (with regimes for civil sanctions being implemented in England and Wales in order to supplement the criminal law). On the face of it, this divergence may seem troubling. After all, what need could there be for standards to diverge significantly from within relatively aligned parts of a small state? Would it not simply result in citizens in one part of the United Kingdom enjoying better levels of environmental protection than those living in other parts? In contrast, if the earlier discussion about the expressive and normative functions of constitutional norms hold

true, then there presumably is nothing wrong with standards varying from, say, Scotland to Wales, from California to West Virginia or from Victoria to Western Australia. As with constitutional norms, the specific content of the relevant environmental law and regulation can instead be seen as simply representing the relevant preferences of each jurisdiction.

7 The Impact of Environmental Law on Public and Constitutional Law

Having examined the ways in which environmental law is shaped by rules and doctrines of public and constitutional law, it is appropriate to consider the extent to which environmental law in turn has the potential to shape the form and content of public and constitutional law. In doing so, it ought to become evident that environmental law has had significant impacts beyond the confines of its own discipline.

One example of this is the way in which the strong emphasis on public participation and accountability mechanisms of environmental law have found application across public administration more generally. Principles of public involvement and participation are central to environmental law and given force throughout a range of different legal instruments and jurisdictions. In international law, the 1992 Rio Declaration and Agenda 21 have spurred on specific treaty regimes in the form of the 1998 Aarhus Convention on access to environmental information, public participation, and access to justice. Linked to this are the specific regimes for access to environmental information developed in the EU which can be traced back to the mid-1980s and the Union’s Fourth Action Programme on the environment. An
even earlier driver for the move towards citizens’ involvement in environmental
decision-making is arguably found in domestic enactments of environmental
assessment regimes, most notably in the United States in the form of the 1970
National Environmental Policy Act and the 1985 EU Directive on environmental
impact assessment,\(^{55}\) allowing individuals the ability to make representations in
environmental decision-making. Taken together, this trend has, over the years,
resulted in principles of public participation coming to form an integral part of
environmental law. Importantly, however, the importance of access to information
and participation (with the implicit emphasis on enhanced legitimacy and
accountability) has subsequently found footing within public administration more
generally. A constructive example of this is the subsequent enactment of the more
general and broader freedom of information regime in the Freedom of Information
Act 2000 in the United Kingdom. While the relationship between, on the one hand,
long-established rules on access to environmental information and, on the other hand,
a general freedom of information regime is not necessarily strictly linear, it does
suggest that ‘environmental law and regulation has proved to be at the forefront in
articulating principles and precedents that are central to a contemporary constitutional
settlement’.\(^{56}\)

Reasons for this may well be found in the fact that, as a legal discipline,
environmental law is a relatively recent origin and may therefore be an altogether
more suitable venue for the testing of significant new means of regulation. There can,


\(^{56}\) \(<\text{IBT}>\) R. Macrory, \textit{Regulation, Enforcement and Governance in Environmental Law}
moreover, be no doubt that novel ideas of and approaches to, in this case, regulation would have found a more receptive and willing audience in the context of the epistemic communities of the environmental law than in more well-established disciplines of law, including public and constitutional law. From its early beginnings in the 1960 and 1970s, the environmental movement inevitably found itself on the fringes of public discourse (no doubt as a result of its willingness to consider and propose new methods and approaches to regulation), making it a useful outlet for novel approaches. These approaches have subsequently had an impact well beyond the relative narrow confines of environmental law and regulation. Other examples of this pattern of ‘testing’ methods of regulation in the subset of environmental law and regulation include, in the United Kingdom, the introduction of a new set of civil sanctions, aimed at affording regulatory agencies a wider range of enforcement options in addition to merely relying on the criminal law.57

Another example of environmental law and regulation having a wider impact beyond the confines of its own discipline is arguably also found in the approach presently taken in many jurisdictions to access to justice. Broadly speaking, historically, only individuals who had suffered loss of private rights were afforded the ability of pursuing their claim in court.58 Over time, and on the back of the public participation developments described above, a significant shift has taken place and

57 Ibid. See also O. W. Pedersen, ‘Environmental Enforcement Undertakings and Possible Implications: Responsive, Smarter or Rent Seeking?’ (2013) 76 Modern Law Review 319.

standing to challenge administrative environmental decisions are now readily afforded environmental groups and organizations as well as citizens, even where these lack pure private interest in a decision (though the rules on standing before the EU courts remain notable exemption to this). An important driver behind this is judicial receptiveness towards accepting claimants from a broader base in environmental law claims. In the important decision *R v HM Inspectorate of Pollution ex parte Greenpeace Ltd (No 2)*, relating to the challenge of administrative authorization of a reprocessing plant in conjunction with a nuclear power plant, standing was thus afforded an organization, representing the wider public. Similarly, in *Edwards*, standing to challenge a decision by the Environment Agency in judicial review was readily afforded to a local resident who lacked a permanent address by reference to him being ‘affected by any adverse impact on the environment’.

Importantly, however, the willingness of courts to entertain the argument that environmental claims justify a wider base of claimants than was traditionally the case, may well be justified by reference to two separate reasons. First, it may simply be that courts appreciate that environmental claims are ‘special’ and that the ‘public good’ nature of some environmental cases entails a need for a wider base of standing. In other words, by their very nature, environmental claims require, on account of a high level of public interest, that standing requirements are relaxed. This is particularly so considering the development in certain jurisdictions of separate regimes for the allocation of costs of judicial environmental cases (following the Aarhus Convention), effectively making it cheaper to bring environmental claims to the courts than other

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59 [1994] 4 All ER 329.

60 *R v (Edwards) v The Environment Agency* [2004] EWHC 736 (Admin) [16].
claims in public law. Another point which may serve to explain (at least in part) the willingness to afford standing to a wider group of claimants in environmental cases is that doing so is justified on grounds of adherence to the rule of law. On this understanding, the significant expansion of the administrative state witnessed in the second half of the twentieth century (in the context of environmental law and in other areas of law and administration) serves as a background against which courts have become increasingly willing to assert their supervisory jurisdiction in order to keep independent controls on the expanding executive and administrative apparatus. Whatever the explanation, there is reason to suggest that in this expansion, environmental law has played an active role—either as a direct cause or as a useful exemplification, providing courts with an administrative and regulatory opportunity.

8 Conclusion

Long before environmental concerns would have been remotely close to register with constitutional drafters and interpreters, Maitland famously observed that ‘there is hardly any department of law which does not, at one time or another, become of constitutional importance’. And so it seems with environmental law. As evidenced by this chapter, the relationship between environmental law and public and constitutional law is multifaceted. From a very general perspective, much of modern environmental law is ‘public’ and ‘administrative’ and would not be in place had it not been for the ability of the state to draw up regulatory mechanisms based on the

authority it enjoys, broadly speaking, from constitutional and public law. On this reading, public and constitutional law is facilitative of environmental law and regulation. However, as suggested in this chapter, public and constitutional law also has the potential to disable what many see as the central feature of environmental law and thereby prevent it from achieving its full potential (notwithstanding that such arguments rest on potential misunderstandings of the law). As if this was not enough, there is also evidence to suggest that the relationship between environmental law and public and constitutional law is not necessarily a ‘one-way’ street. Often environmental law has, at times through serendipity and at other times through direct design, potentially shaped the form and content of modern constitutional and public law. Altogether this suggests that the relationship between, on the one hand, public and constitutional law and, on the other hand, environmental law is multifaceted, complex, and often does not follow a predictable path.