

Making the Environment Alright: Human Rights, Constitutional Rights, and Environmental Rights¹

Conceptualising Environmental Rights as Human Rights

- 1 It is not the “raving” of some “inner-city lunatic”² to state what is surely, as Australia burns, obvious: that environmental harm can cause human harm, and in doing so, is highly likely to adversely impact upon human rights.
- 2 Such a claim is neither novel nor “woke”. The symbiotic relationship between environmental protection and human rights has been recognised internationally since at least 1972, when the *Stockholm Declaration* declared that a healthy environment is essential to “the enjoyment of basic human rights and the right to life itself”.³
- 3 Nevertheless, our exploitation of nature for benefit, principally financial, has continued since at least our mastery of fire. It has become so pernicious and so pervasive that it is now an existential threat.⁴ The climate crisis of the Anthropocene age is upon us.
- 4 The 2019 report of the Intergovernmental Panel on Climate Change (“IPCC Report”) describes the predicted trajectory of the environmental catastrophe that we will face over the next century. For example, under the various scenarios considered by the IPCC, including those in which emissions are significantly reduced, by 2050 low-lying megacities and small islands are projected to experience extreme high sea level events annually.⁵ Historically, these events occurred once a century.

¹ I acknowledge and thank Ms Ellen Woffenden for her considerable assistance in the preparation of this paper. All mistakes are, of course, my own.

² The Hon Michael McCormack, Deputy Prime Minister, 11 November 2019.

³ Meg Good, ‘Implementing the Human Right to Water in Australia’ (2011) 30 *University of Tasmania Law Review* 107, 117-118; *Report of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972, UN Doc A/CONF.48/14/REV.1 (16 June 1972), 3.

⁴ Louis J Kotzé, ‘International Environmental law and the Anthropocene’s Energy Dilemma’ (2019) 36 *Environmental and Planning Law Journal* 437.

⁵ Intergovernmental Panel on Climate Change, *The Ocean and Cryosphere in a Changing Climate: Summary for Policy Makers* (24 September 2019), 23-24.

- 5 Such disasters will create large groups of displaced people, destroy infrastructure, and compromise our food supply. This will directly compromise the most basic of human rights of those affected, including the right to self-determination, the right to life, the right to food and water, the right to housing and shelter, and the right to security.⁶
- 6 The IPCC Report also highlights the destructive impact that the warming of the oceans will have on ecosystems; threatening food security, income, and livelihoods. For example, scientists predict that if current fishing practices continue, all commercially targeted fish species will “suffer population collapse by 2048”.⁷ That is less than 30 years from now.
- 7 Destruction of the natural environment will have a particularly devastating effect on those indigenous communities who rely on natural resources for subsistence and cultural identity,⁸ preventing these groups from exercising their rights to practice and maintain their culture. The IPCC Report concluded that the detrimental impacts of marine warming will cause “potentially rapid and irreversible loss of culture and local knowledge and Indigenous knowledge, and negative impacts on traditional diets and food security, aesthetic aspects, and marine recreational activities”.⁹ Ocean ecosystem loss will undermine the ocean’s “role in cultural, recreational, and intrinsic values important for human identity and well-being”.¹⁰
- 8 Air pollution is already undermining our human rights. In 2005 the European Court of Human Rights determined the case of *Fedeyeva v Russia*.¹¹ The applicant alleged that the operation of a steel plant in close proximity to her home endangered her health and well-being, in contravention of Art 8 of the

⁶ International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption*, Climate Change Justice and Human Rights Task Force Report (July 2014), 43.

⁷ David R Boyd, *The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012) 11.

⁸ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 12.

⁹ Intergovernmental Panel on Climate Change, *The Ocean and Cyrosphere in a Changing Climate: Summary for Policy Makers* (24 September 2019), 31.

¹⁰ Intergovernmental Panel on Climate Change, *The Ocean and Cyrosphere in a Changing Climate: Summary for Policy Makers* (24 September 2019), 30.

¹¹ *Fedeyeva v Russia*, 55723/00, § 52, ECHR 2005-IV; United Nations Environment Program, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 194.

European Convention on Human Rights. Article 8 protects the right to private and family life. The Court accepted that the levels of toxic elements in the air caused by the operation of the plant, which had considerably exceeded safe levels over a long period of time, either caused or increased the applicant's vulnerability to illness. The Court found that although Art 8 "is not violated every time environmental deterioration occurs", the adverse effects of the environmental pollution in this case "reached a level sufficient to bring it within the scope of Article 8".¹² The Court held that the state had a positive obligation to take steps to prevent interference with her rights. The state was ordered to pay the applicant EUR 6,000 in damages, in addition to of her legal costs. The case is an early illustration of the 'greening' of human rights.

- 9 In light of the climate crisis that we currently face, should environmental rights be viewed through the prism of human rights? Would this give the former more force? More social acceptability? More political leverage?
- 10 The rhetoric of human rights offers a pre-existing, accepted framework from which to pursue environmental goals. Human rights are recognised in many treaties, constitutions, and statutes, and have a number of international, regional, and domestic institutions and frameworks in place to enforce them.¹³ A rights centred approach to environmental protection is arguably more able to leverage the inherent anthropocentrism of our legal system in a manner that results in tangible positive environmental outcomes. Put another way, environmental protection based on the established language of human rights is "more likely to be accepted in the current political climate" than arguments asserting rights possessed by nature in its own right.¹⁴
- 11 A human rights conceptualisation of environmental protection has been criticised as being too anthropocentric, rather than ecocentric. This is because it posits the impact of environmental harm on humans, rather than flora and

¹² *Fadeyeva v Russia*, 55723/00, § 52, ECHR 2005-IV [68], [88].

¹³ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 141.

¹⁴ Meg Good, 'Implementing the Human Right to Water in Australia' (2011) 30 *University of Tasmania Law Review* 107, 118-119.

fauna, as its central focal point.¹⁵ The concern is that such an approach fails to recognise the value and importance of natural ecosystems beyond their use or benefit to humans;¹⁶ it posits a reduction of nature to no more than an “inanimate machine existing to serve human needs”.¹⁷

12 Accordingly, in some countries, legal protections that are directed to the impact of environmental harm on humans have been redirected towards the impact of environmental harm on nature itself. For example, Bolivia has conferred legal rights and personhood to Mother Earth, who can be represented by humans in court.¹⁸ The Bolivian Constitution provides a right to a “healthy, protected and balanced environment”, and allows *any person* to take legal action in defence of environmental rights.¹⁹

13 Similarly, the 2008 Ecuadorian Constitution refers to ‘Pacha Mama’ (the deified representation of nature), and confers upon it a “right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes”.²⁰ All communities and public authorities are obliged to protect this right.²¹

14 In New Zealand, Te Urewera, a national park, has been declared to be a legal entity with legal rights able to be exercised by a board on its behalf.²²

15 So too in India with respect to significant rivers and natural systems.²³ In 2017, the High Court of Uttarakhand declared that the Rivers Ganges and

¹⁵ Made Adhitya Anggriawan Wisadha and Grita Anindarini Widyaningsih, ‘Human Rights and the Environmental Protection: The Naïveté in Environmental Culture’ (2018) 2(1) *Udayana Journal of Law and Culture* 73, 74.

¹⁶ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 12, 141.

¹⁷ Sam Adelman, ‘Epistemologies of Mastery’ in Anna Grear and Louis Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015) 13 cited in Louis J Kotzé, ‘International Environmental law and the Anthropocene’s Energy Dilemma’ (2019) 36 *Environmental and Planning Law Journal* 437, 442.

¹⁸ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 12, 141-142; *Law 071 of the Plurinational State* (Bolivia Law of the Rights of Mother Earth, 2010).

¹⁹ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019) 142; *Constitución Política del Estado 2009*, Arts 33-34.

²⁰ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019) 142; *República del Ecuador Constitución de 2008*, Art 71.

²¹ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019) 142; *República del Ecuador Constitución de 2008*, Arts 71, 11.

²² United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 142.

Yamuna were legal persons “with all corresponding rights, duties and liabilities of a living person”.²⁴ The declaration was based on the Court’s determination that the rivers were “sacred and revered” to Hindus,²⁵ and therefore, that they were “central to the existence of half the Indian population and their health and well being”.²⁶

- 16 The decision was, however, overturned by the Supreme Court on appeal, which held that the declaration interfered with the rights of other provinces and nations because the rivers extended beyond the borders of Uttarakhand (the Ganges flowing into Bangladesh), and moreover, that it was inappropriate in a secular society.²⁷ The Supreme Court also accepted the State of Uttarakhand’s submission that the ruling gave rise to uncertain and complex legal issues because the consequences of granting legal rights to a river were not clearly defined.²⁸ Who would be responsible for providing compensation in the event of a flood?²⁹

Human Rights Based Environmental Protections

- 17 Substantive environmental obligations recognised by international law are rooted in the adoption of legal and institutional frameworks that seek to avoid environmental harm which has an impact on human rights.³⁰
- 18 The 2013 UN *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy And*

²³ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 142.

²⁴ *Mohd. Salim v. State of Uttarkhand and Others* Writ Petition (PIL)No. 126 of 2014, December 5 2016, [19] (Uttarakhand High Court, India).

²⁵ *Mohd. Salim v. State of Uttarkhand and Others* Writ Petition (PIL)No. 126 of 2014, December 5 2016, [11] (Uttarakhand High Court, India).

²⁶ *Mohd. Salim v. State of Uttarkhand and Others* Writ Petition (PIL)No. 126 of 2014, December 5 2016, [17] (Uttarakhand High Court, India).

²⁷ Rita Brara, ‘Courting Nature: Advances in Indian Jurisprudence’ in Anna Leah Tabios Hillebrecht and María Valeria Berros (eds), *Can Nature Have Rights? Legal and Political Insights* (Rachel Carson Centre for Environment and Society, 2017) 31, 35; Erin L O’Donnell and Julia Talbot-Jones, ‘Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India’ (2018) 23(1) *Ecology and Society* 7, 11-12.

²⁸ Lidia Canno Pecharroman, ‘Rights of Nature: Rivers that can Stand in Court’ (2018) 7(1) *Resources* 13, 21.

²⁹ Rita Brara, ‘Courting Nature: Advances in Indian Jurisprudence’ in Anna Leah Tabios Hillebrecht and María Valeria Berros (eds), *Can Nature Have Rights? Legal and Political Insights* (Rachel Carson Centre for Environment and Society, 2017) 31, 35.

³⁰ John H Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy And Sustainable Environment*, UN Doc A/HRC/25/53 (30 December 2013) [49].

Sustainable Environment (“UN Independent Expert Report”)³¹ has recognised that, at the very least, international human rights law imposes procedural obligations on States in relation to environmental protection. Such procedural obligations include a duty to assess environmental impacts; to publicise information relevant to environmental decision-making; to facilitate public participation in environmental decision-making; and to provide access to justice to seek redress for harm.³²

- 19 Procedural rights are essential to the enforcement of substantive environmental rights.³³ The seminal rights instrument, the *Convention for the Protection of Human Rights and Fundamental Freedoms*, protects procedural environmental rights such as the right to freedom of expression, the right to freedom of assembly and association, and the right to an effective remedy.³⁴
- 20 In addition, there is the right to information which is important because without it there can be no meaningful participation in environmental decision-making. The right to information is recognised in many environmental treaties and instruments, most notably Europe’s 1998 *Aarhus Convention*,³⁵ and the *Universal Declaration of Human Rights*.³⁶ It is so fundamental that it has been incorporated into the national law of many countries. Freestanding domestic freedom of information laws are common, and some countries, such as New Zealand and Mexico, are constitutionally enshrined.

³¹ John H Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy And Sustainable Environment*, UN Doc A/HRC/25/53 (30 December 2013) [29].

³² See, for example, *Report of the United Nations Conference on Environment And Development, Rio De Janeiro, 3-14 June 1992*, UN Doc A/CONF.151/26/REV.1(VOL.I) (14 June 1992) Annex 1 Principle 10 (“Rio Declaration”); *Universal Declaration on Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), Arts 8, 19, 20, 21; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Arts 2, 19, 22; *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, (“Aarhus Convention”); *Judicial Handbook on Environmental Constitutionalism* (March 2017), 16.

³³ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 1.

³⁴ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 146.

³⁵ *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*.

³⁶ *Universal Declaration on Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), Art 19.

- 21 The right to public participation is another important procedural environmental right. It enables stakeholders to be involved in environmental decision-making by, for example, being entitled to make submissions, ask questions, and attend public meetings.³⁷ This participation improves the quality and legitimacy of decision-making.³⁸ Over 131 countries have constitutional provisions relating to the right to public participation.³⁹
- 22 Significantly, the UN Independent Expert Report found that the procedural human rights obligations of states are relatively established with respect to environmental protections. But when it comes to substantive human rights obligations offering environmental protection, the same cannot be said. And even in relation to procedural rights there are issues of implementation and enforcement.

Environmental Rights as Constitutional Rights

- 23 Does the domestic constitutional law of states offer a solution? That is, are rights that are either expressly or impliedly directed to the protection of the environment which are afforded constitutional status able to achieve better environmental outcomes?
- 24 Many countries have included explicit environmental rights in their constitutions. Alternatively, such rights are implied through the construction of human rights already contained in a constitution. A third approach is to include constitutional policy directives mandating specific environmental outcomes.
- 25 While there remains no international treaty which contains a right to a clean and healthy environment,⁴⁰ as at January 2019, 150 countries have constitutionally recognised environmental protections.⁴¹

³⁷ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 83.

³⁸ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 83.

³⁹ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 118.

⁴⁰ Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (United Nations Environment Programme, 2005), 30.

⁴¹ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019) viii.

- 26 Domestic constitutional protection of environmental rights has distinct advantages over international protection beyond those of enforcement, because such protections are likely to be more locally adapted, and therefore, more readily perceived as acceptable.⁴² This is important because environmental rights are often required to be balanced against other rights, such as economic rights.⁴³
- 27 Unlike ordinary statutory regulation, constitutional protection has the benefit of longevity. Constitutions tend to endure beyond political cycles.⁴⁴
- 28 Constitutional recognition of environmental rights also has powerful normative and symbolic value. By framing environmental harm as a violation of fundamental constitutional rights, the legal legitimacy of these rights is augmented and reinforced.⁴⁵ This is important because environmental decision-making is polycentric in nature, often trying to balance competing priorities.⁴⁶ The perceived significance of breaching a constitutionally protected environmental right is far greater than other statutory rights.⁴⁷ Moreover, the existence of constitutional environmental rights is a powerful incentive to develop sound environmental policy.⁴⁸
- 29 Nationally entrenched environmental rights are also a necessary adjunct to international law given the principle of customary law that states have permanent sovereignty over natural resources within their territory.⁴⁹ This significantly limits the extent to which international law can provide environmental redress to individuals against the state.

⁴² United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017) 10.

⁴³ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 4-5.

⁴⁴ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 12.

⁴⁵ David R Boyd, *The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012), 8.

⁴⁶ Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294, 294.

⁴⁷ Meg Good, 'Implementing the Human Right to Water in Australia' (2011) 30 *University of Tasmania Law Review* 107, 119.

⁴⁸ Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294, 295.

⁴⁹ Louis J Kotzé, 'International Environmental law and the Anthropocene's Energy Dilemma' (2019) 36 *Environmental and Planning Law Journal* 437, 454.

Express Constitutional Recognition of Environmental Rights

- 30 Notwithstanding the lacuna in the Australian Constitution,⁵⁰ the existence of express constitutional environmental rights is increasingly common. In fact, “almost every constitution adopted or revised since 1970, either states the principle that an environment of a specified quality constitutes a human right or imposes environmental duties on the state.”⁵¹
- 31 The Constitution of the Ukraine enshrines a right to an environment that is “safe for life and health”.⁵² Hungary,⁵³ Turkey,⁵⁴ Indonesia,⁵⁵ and Nicaragua⁵⁶ entrench a right to a “healthy” environment, while South Africa specifies “an environment that is not harmful to...health or wellbeing”.⁵⁷ South Korea uses the adjectival descriptor of “pleasant”,⁵⁸ and the Philippines guarantees a “balanced and healthful ecology in accord with the rhythm and harmony of nature”.⁵⁹ In Chile, the right is to an environment “free from contamination”.⁶⁰ Some constitutions, including those of Kenya,⁶¹ Bolivia,⁶² South Sudan,⁶³ and South Africa,⁶⁴ explicitly extend substantive rights to future generations. Whereas other constitutional environmental rights are prescriptive. In Bhutan and Kenya, for example, the government is obliged to maintain a specified

⁵⁰ Section 100 of the Australian Constitution protects economic, and not environmental, interests with respect to water. See Rachel Pepper, ‘The Constitutionalisation of Water Rights: Solution or Levee?’, (2011) 26.2 *Australian Environment Review* 34.

⁵¹ Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (United Nations Environment Programme, 2005), 30.

⁵² Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (United Nations Environment Programme, 2005), 30; *Constitution of Ukraine 1996*, Art 50.

⁵³ *The Fundamental Law of Hungary 2011*, Art XXI.

⁵⁴ *Constitution of the Republic of Turkey 1982*, Art 56.

⁵⁵ *Constitution of the Republic of Indonesia 1945*, Art 28(H)(1).

⁵⁶ *Constitution of Nicaragua 1987*, Art 60.

⁵⁷ *The Constitution of the Republic of South Africa 1996*, Art 24(a).

⁵⁸ *Constitution of the Republic of Korea 1987 (South Korea)*, Art 35.

⁵⁹ *The Constitution of the Republic of the Philippines 1987*, ss 15 and 16 of Art II.

⁶⁰ Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (United Nations Environment Programme, 2005), 30; *Political Constitution of the Republic of Chile 1980*, Art 19(8).

⁶¹ *Constitution of Kenya 2010*, Ch 42.

⁶² *Constitución Política del Estado 2009*, Art 33.

⁶³ *The Transitional Constitution of the Republic of South Sudan 2011*, Art 41(3).

⁶⁴ *The Constitution of the Republic of South Africa 1996*, s 24(b).

percentage of tree cover across the country (in Bhutan, 60% and in Kenya, 10%).⁶⁵

32 And in some countries constitutional environmental rights have been construed as including a duty to ensure that natural resources are responsibly managed. The sustainable use of resources is formulated as a duty of the state in the constitutions of Bolivia,⁶⁶ the Dominican Republic,⁶⁷ and Eritrea.⁶⁸

33 By way of illustration, s 16 of Art II of the *Constitution of the Republic of the Philippines 1987* provides that:

The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

In *Minors Oposa v Factoran* the Supreme Court of the Philippines applied Art II to recognise the right of one generation (who were minors) to bring a class action on behalf of “generations yet unborn” (invoking the principle of intergenerational equity) to “ensure the protection of that right [to a sound environment] for generations to come”.⁶⁹ In granting the petition for a writ of certiorari, the Court described the right to a “balanced and healthful ecology” afforded by Art II as a “fundamental legal right” and that:⁷⁰

Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation...the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.

34 Similarly, in 2004 citizens sued the national and provincial government, the city of Buenos Aires, and 44 industrial facilities in relation to pollution of the

⁶⁵ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 1.

⁶⁶ *Constitución Política del Estado 2009*, Art 342.

⁶⁷ *Constitution of the Dominican Republic* (2015), Art 194.

⁶⁸ *The Constitution of Eritrea* (1997), Arts 8(2) and (3).

⁶⁹ *Juan Antonio Oposa v The Hon Fulgencio S Factoran, Jr* (1993) (GR No 101083, 224 SCRA 792) per Davide JR. See also *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* (2008) (GR Nos 171947-171948).

⁷⁰ *Juan Antonio Oposa v The Hon Fulgencio S Factoran, Jr* (1993) (GR No 101083, 224 SCRA 792) at 8. See also *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* (2008) (GR Nos 171947-171948) per Davide JR.

Matanza-Riachuelo River.⁷¹ In a series of decisions relying on Art 41 of the Constitution, the Supreme Court of Argentina ordered the government to conduct an environmental assessment and to create and implement an educational program about wastewater, establish a comprehensive restoration and remediation plan, and ordered specific action, including scheduled inspections, the closure and clean-up of illegal dumps, and the improvement of sewerage treatment and stormwater discharge systems, with ongoing oversight by the Argentinian Federal Court of First Instance.⁷²

35 In 2012 in the Kenyan Environment and Land Court plaintiffs relied on their constitutional right to a “clean and healthy environment”.⁷³ From 2006 a series of agreements had been entered into by the Kenyan government to purchase hydroelectricity from Ethiopia. Of concern was whether the development of dams in Ethiopia would reduce water flow into Lake Turkana in Kenya, a lake that supports several indigenous communities and is also a World Heritage site.⁷⁴ The Lake Turkana Community Trust sued the Kenyan government seeking information about the purchase agreements. The Court held that the government had an “obligation to the [communities] to ensure that that the resources of Lake Turkana are sustainably managed, utilized and conserved”, as well as to a duty to take precautions to prevent environmental harm.⁷⁵ The Court ordered that the government disclose all information relevant to the agreements, and to take all steps necessary to ensure that they fulfilled the identified constitutional obligation of responsible resource management.⁷⁶

36 And more recently, in 2018, the Colombian Supreme Court ordered government action to address environmental degradation. In addition to

⁷¹ *Mendoza Beatriz Silva v State of Argentina regarding damages suffered (injuries resulting from the environmental contamination of the Matanza-Riachuelo River)*, M 1569 XL (8 July 2008) (Supreme Court of Argentina).

⁷² *Juzgado Federal de Primera Instancia de Quilmes*, and see *Constitution of the Argentine Nation 1853*, Art 41; Chris Jeffords and Lanse Minkler, ‘Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes’ (2016) 69(2) *Kyklos* 294, 295.

⁷³ *The Constitution of Kenya 2010*, Ch 42.

⁷⁴ *Lake Turkana Community Trust v Attorney-General, Republic of Kenya*, No 825 of 2012 [2014] eKLR (19 May 2014) (Environment and Land Court, Kenya); United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 200.

⁷⁵ *Lake Turkana Community Trust v Attorney-General, Republic of Kenya*, No. 825 of 2012 [2014] eKLR (19 May 2014) 17 (Environment and Land Court, Kenya).

⁷⁶ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 200.

providing rights to life⁷⁷ and dignity,⁷⁸ the Colombian Constitution provides that “every individual has the right to enjoy a healthy environment.”⁷⁹ Twenty-five plaintiffs filed a complaint in the Court against the Colombian government, Colombian municipalities, and various corporations alleging that climate change, in combination with the government’s failure to ensure compliance with a target of net zero deforestation in the Colombian Amazon by 2020 (as agreed under the Paris Agreement and National Development Plan 2014-2018), threatened their fundamental rights and the rights of future generations.⁸⁰ The Court upheld their complaint stating that “the increasing deterioration of the environment is a serious attack on current and future life and on other fundamental rights”.⁸¹ It ordered the federal government to formulate a plan to mitigate the rate of deforestation in the Amazon, to adopt measures aimed at reducing greenhouse gas emissions, and to implement climate change adaptation strategies at all levels of government.⁸²

37 There are, however, very few national constitutions which explicitly address climate change.⁸³ The Constitution of the Dominican Republic is a rare exception. It provides for a “plan of territorial ordering that assures the efficient and sustainable use of the natural resources of the Nation, in accordance with the need of adaptation to climate change”.⁸⁴

38 A number of factors have been identified that make a country more or less likely to have environmental rights enshrined in their constitution. First, they are typically contained in constitutions which have been created post 1970 (which correlates with an era when environmental issues became more globally recognised).⁸⁵ Second, the countries tend to be less developed

⁷⁷ *Constitución Política de Colombia 1991*, Ch II Art 11.

⁷⁸ *Constitución Política de Colombia 1991*, Ch II Arts 21 and 51.

⁷⁹ *Constitución Política de Colombia 1991*, Ch III Art 78.

⁸⁰ *Future Generations v Ministry of the Environment* STC4360-2018 (4 May 2018) (Supreme Court of Colombia).

⁸¹ *Future Generations v Ministry of the Environment* STC4360-2018 (4 May 2018) at 13 (Supreme Court of Colombia).

⁸² *Future Generations v Ministry of the Environment* STC4360-2018 (4 May 2018) (Supreme Court of Colombia).

⁸³ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 86.

⁸⁴ *Constitution of the Dominican Republic* (2015), Art 194.

⁸⁵ David R Boyd, *The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012), 47.

nations, which are more likely to rely on the exploitation of natural resources and the development of primary industries for economic improvement.⁸⁶ These countries tend to have newer constitutions, many having gained independence since the 1970s or having suffered political instability leading to the adoption of new constitutions or significant amendments to existing constitutions.⁸⁷ These constitutions have tended to be more comprehensive in relation to human rights and environmental rights.⁸⁸ Third, countries with stable political systems are less likely to have environmental protections included in their constitutions.⁸⁹

Implied Constitutional Environmental Rights

- 39 In countries with constitutionally enshrined human rights but no express environmental rights, superior courts have sometimes interpreted these rights to include environmental rights:⁹⁰ for example, the right to life;⁹¹ the right to health;⁹² the right to food and water;⁹³ and the right to dignity.⁹⁴
- 40 In 1995, proceedings were commenced in the Supreme Court of Nepal by citizens and non-government organisations challenging the operation of a marble factory in the Godavari forest on the basis that it had caused

⁸⁶ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019) 12.

⁸⁷ David R Boyd, *The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012), 4.

⁸⁸ David R Boyd, *The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012), 7.

⁸⁹ David R Boyd, *The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012), 51.

⁹⁰ See Ben Boer, 'Environmental Law and Human Rights in the Asia-Pacific', Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press, 2015), 166-174 and James May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2014), 17-54.

⁹¹ For example, in India, Costa Rica, Pakistan, and Bangladesh: Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (United Nations Environment Programme, 2005), 8, 66.

⁹² For example, in Hong Kong: United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 175.

⁹³ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 84-85.

⁹⁴ For example, in Peru: United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 87, and in Israel: *Abu Massad v Water Commissioner*, Civil App No 9535-06 (Israel Supreme Court 2011); Erin Daly, 'Constitutional Protection for Environmental Rights: The Benefits of Environmental Process' (2012) 17(2) *International Journal of Peace Studies* 71, 71.

environmental degradation to the forest and the surrounding environment.⁹⁵ The Court held that the constitutional protection of the right to life included the right to a clean and healthy environment. The Court therefore issued a directive to the Parliament to pass legislation to protect the Godavari environment, including its air, water, and people.⁹⁶

- 41 Similarly, courts in India have construed the constitutional right to life to include a right to a healthy environment.⁹⁷ Courts in Costa Rica,⁹⁸ Bangladesh,⁹⁹ and Pakistan¹⁰⁰ have also held that a right to a healthy environment is necessary to ensure that the right to life is fully enjoyed.¹⁰¹
- 42 By contrast, courts in the United States have rejected the argument that constitutional rights to life or liberty provide an implied right to a clean environment.¹⁰²

Constitutionally Mandated Environmental Protections

- 43 Lastly, some constitutions contain policy directives mandating positive environmental outcomes. For example, Art 33 of the Constitution of Qatar provides that “the State endeavours to protect the environment and its natural

⁹⁵ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 141; *Dhungel v Godavari Marble Indus* WP 35/1992 (31 October 1995) (Supreme Court of Nepal).

⁹⁶ *Dhungel v Godavari Marble Indus* WP 35/1992 (31 October 1995) (Supreme Court of Nepal).

⁹⁷ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017) 174; Shubhankar Dam and Vivek Tewary, ‘Polluting Environment, Polluting Constitution: Is a ‘Polluted’ Constitution Worse than a Polluted Environment?’ (2005) 17(3) *Journal of Environmental Law* 383, 38; *Bandhua Mukti Morcha v Union of India*, 3 SCC 161 (Supreme Court of India, 1984); *Subhash Kumar v State of Bihar*, No 1991 AIR 420, 1991 SCR (1) 5 (9 January 1991) (Supreme Court of India).

⁹⁸ *Presidente de la sociedad Marlene SA v Municipalidad de Tibas*, Sala Constitucional de la corte Suprema de justicia, decision no 6918/94 (25 November 1994) (Supreme Court of Justice, Costa Rica).

⁹⁹ See, for example, *Farooque v Bangladesh* 22 BLD (HDC) (2002) 534 (Supreme Court of Bangladesh High Court Division).

¹⁰⁰ See, for example, *In re: Human Rights Case (Environmental Pollution in Balochistan)* PLD 1994 SC 102 (Pakistan Supreme Court, 1992); *West Pakistan Salt Miners v Industries and Mineral Development, Punjab, Lahore* 1994 SCMR 2061 (Pakistan Supreme Court, 1994).

¹⁰¹ In Costa Rica Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (United Nations Environment Programme, 2005) 8, 66.

¹⁰² Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (United Nations Environment Programme, 2005) 176-177; *Tanner v Aarmco Steel Corp*, 340 F Supp 532 (SD Tex, 1972).

balance, to achieve comprehensive and sustainable development for all generations".¹⁰³

- 44 But aside from their vague and indeterminate content, these provisions are usually unenforceable.¹⁰⁴ Courts in the Netherlands and Greece have therefore refused to recognise actionable substantive environmental rights from constitutional provisions requiring sound environmental policy.¹⁰⁵
- 45 Nevertheless, constitutional policy directives can assist in establishing environmental norms that can meaningfully influence the development of improved environmental policy and the creation of tangible enforceable rights.¹⁰⁶
- 46 For example, in India, Art 48A of the Constitution provides that the State "shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country". This provision is drafted as a Directive Principle of State Policy which "shall not be enforceable by any court".¹⁰⁷ However, the Supreme Court of India has held that environmental protection is a necessary element of rights that do enjoy constitutional protection and is therefore enforceable.¹⁰⁸
- 47 The willingness of that Court to expand the scope of constitutional protection has not gone without criticism, with some commentators arguing that it has led to an institutional imbalance whereby the judiciary is relied upon to remedy the failure of the government to develop and implement policy.¹⁰⁹ The Court was

¹⁰³ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 84; *Permanent Constitution of the State of Qatar 2003*.

¹⁰⁴ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 84.

¹⁰⁵ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 176-177.

¹⁰⁶ David R Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (2011) 20(2) *Review of European Community & International Environmental Law* 171, 173.

¹⁰⁷ David R Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (2011) 20(2) *Review of European Community & International Environmental Law* 171, 173; *The Constitution of India 1949*, Art 37.

¹⁰⁸ David R Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (2011) 20(2) *Review of European Community & International Environmental Law* 171, 173-174; *Subhash Kumar v State of Bihar*, AIR 1991 SC 420 (Supreme Court of India); *Virender Gaur v State of Haryana*, (1995) 2 SCC 577 (Supreme Court of India).

¹⁰⁹ Shubhankar Dam and Vivek Tewary, 'Polluting Environment, Polluting Constitution: Is a 'Polluted' Constitution Worse than a Polluted Environment?' (2005) 17(3) *Journal of Environmental Law* 383, 385.

accused of usurping the role of the legislature and exercising legislative authority consequent upon its decision in *Godawarman Thintmulkpad v Union of India*, where a new national forest policy was established in conformity with constitutional principle.¹¹⁰

The Efficacy of Constitutional Environmental Protections

- 48 Although there has been an increase in the quantity of environmental laws in the last five decades, the UN Environment Programme has found that with respect to their efficacy, “government implementation and enforcement is irregular, incomplete, and ineffective”.¹¹¹
- 49 Constitutional environmental rights alone are insufficient to achieve sound environmental outcomes: good policy, political will, adequate resourcing, and the development of supporting institutional frameworks is also required.¹¹² Countries that have strong constitutional environmental rights protection do not necessarily enjoy strong environmental protection. For example, India was ranked 177 out of 180 countries on the Yale Centre for Environmental Law and Policy’s *2018 Environmental Performance Index* (“EPI”). Bangladesh and Nepal were ranked 179 and 176 out of 180, respectively.¹¹³ Conversely, countries such as the United Kingdom and Iceland, which have no constitutionally entrenched environmental rights, have been recognised as having good environmental records (ranked 6 and 11 respectively out of 180 in 2018).¹¹⁴

¹¹⁰ See, for example, *Godawarman Thintmulkpad v Union of India* Writ Petition No 202 of 1995 (12 December 1996) (Supreme Court of India) cited in United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 218.

¹¹¹ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 3.

¹¹² Chris Jeffords and Lanse Minkler, ‘Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes’ (2016) 69(2) *Kyklos* 294, 294, 298.

¹¹³ Z A Wendling, J W Emerson, D C Esty, M A Levy, A de Sherbinin, *et al.* *2018 Environmental Performance Index* (2018) (New Haven, Connecticut: Yale Center for Environmental Law & Policy) available at <<https://epi.yale.edu/>>.

¹¹⁴ Z A Wendling, J W Emerson, D C Esty, M A Levy, A de Sherbinin, *et al.* *2018 Environmental Performance Index* (2018) (New Haven, Connecticut: Yale Center for Environmental Law & Policy) available at <<https://epi.yale.edu/>>; Chris Jeffords and Lanse Minkler, ‘Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes’ (2016) 69(2) *Kyklos* 294, 294.

- 50 Nevertheless, research has demonstrated that constitutional environmental rights can lead to beneficial environmental outcomes, especially in relation to the enactment of legislation directed at protecting the environment. A 2012 study found that 78 out of 92 countries which provide for a constitutional right to live in a healthy environment enacted domestic legislation to give effect to this right.¹¹⁵ Based on 2008 data, the study found that 116 countries with constitutional environmental rights had a materially smaller ecological footprint than 34 countries with no such rights.¹¹⁶ Similarly, a 2016 study found that the presence of constitutional environmental rights led to better scores on the EPI.¹¹⁷ The authors of that study suggest that constitutional environmental protection creates policy incentives to enact laws targeted at specific environmental issues.¹¹⁸
- 51 For example, Argentina’s Constitution provides a right to a “balanced, healthful environment”, which has encouraged the promulgation of a plethora of environmental laws.¹¹⁹
- 52 The proper drafting of constitutional environmental rights is important to maximise their beneficial operation. If the rights are ambiguous, their content uncertain or vague, or if they are not sufficiently adapted to local conditions, enforcement is likely to be more difficult.¹²⁰ The greater the equivocation, the greater the need for court intervention. Courts will be understandably cautious in enforcing vague environmental rights, especially those that are constitutionally entrenched (either explicitly or implicitly). Thus the Supreme

¹¹⁵ Chris Jeffords and Lanse Minkler, ‘Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes’ (2016) 69(2) *Kyklos* 294, 300; David R Boyd, *The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012) 7.

¹¹⁶ Chris Jeffords and Lanse Minkler, ‘Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes’ (2016) 69(2) *Kyklos* 294, 300. Note, however, the limited scope of the ‘ecological footprint’ measure, which does not include measures for environmental health, ocean health, and other factors that can cause variation between nations.

¹¹⁷ Chris Jeffords and Lanse Minkler, ‘Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes’ (2016) 69(2) *Kyklos* 294.

¹¹⁸ Chris Jeffords and Lanse Minkler, ‘Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes’ (2016) 69(2) *Kyklos* 294, 330.

¹¹⁹ *Constitution of the Argentine Nation 1853*, Art 41; Chris Jeffords and Lanse Minkler, ‘Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes’ (2016) 69(2) *Kyklos* 294, 295.

¹²⁰ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 3.

Court of Nepal held that it was inappropriate to issue a writ of mandamus requiring a defendant to comply with a constitutional duty giving effect to the right to life, when it could not be inferred that the duty encompassed environmental degradation.¹²¹

53 Further, absent appropriate enforcement mechanisms, the policy incentives created by constitutional environmental rights will be undermined. Critically what is required is access to that right by way of standing to enforce it. Without broad or open standing to enforce rights, constitutional protection becomes arbitrary and discretionary, not obligatory.¹²² In countries with restrictive standing laws, such as the US, access to justice is often limited to individuals who are personally and directly affected by the contravention of an environmental right.¹²³ However, as the article by Dr Al-Alosi and Mr Hamilton notes, environmental harm often only indirectly affects communities and populations by reason of the harm to the environment itself.¹²⁴

54 Many constitutions are silent on how environmental rights are enforceable. Twenty-two out of 140 nations state how the constitutional environmental rights enshrined in their constitution are to be enforced, including whether citizens can enforce them curially. Such uncertainty is apt to discourage vindication of such rights by litigation.¹²⁵

55 Even where liberal standing rules exist and enforcement mechanisms are clear, actions may still not be commenced and court orders may be ignored. Relevant government departments are often under-resourced and lacking in accountability, particularly in developing countries.¹²⁶ Without a culture of compliance and transparency, and the political will to prioritise and implement

¹²¹ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 224; *Dhungel v Godavari Marble Industries* WP 35/1992 (31 October 1995) at [36].

¹²² United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 132.

¹²³ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 131-132.

¹²⁴ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 132.

¹²⁵ David R Boyd, *The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012), 74-75.

¹²⁶ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 3.

environmental protections, even the most robust environmental rights may ultimately prove pyrrhic.¹²⁷ Many constitutional environmental rights lie dormant by reason of economic, political, and financial inertia.¹²⁸

- 56 For example, South Africa's Constitution guarantees a right to a clean environment, and provides for open standing and access to the Constitutional Court of South Africa, but that Court has yet to enforce that right.¹²⁹ Notwithstanding Brazil's strong stated environmental rights, environmental protection is secondary to economic demands.¹³⁰
- 57 Finally, environmental rights may not be enforced because the resources needed to do so are not available. The cost of vindicating environmental rights is often high. Extensive remediation by multiple entities (both public and private) may be required. Court supervision of such remediation may be necessary.¹³¹
- 58 Again, South Africa's Constitution includes a right to water and a requirement that the state "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights". In *Mazibuko v City of Johannesburg*, the Constitutional Court held that the measure of the state's compliance with the requirement to achieve progressive realisation of constitutional rights was to be assessed on the reasonableness of its efforts, and not its success.¹³² Perhaps it is for this reason that in 2014 the South African Human Rights Commission reported

¹²⁷ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 3.

¹²⁸ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 177.

¹²⁹ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 177.

¹³⁰ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 177.

¹³¹ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 7.

¹³² *Lindiwe Mazibuko v City of Johannesburg* [2009] 4 SA 1 (Constitutional Court of South Africa).

that 11% of households do not have any sanitation,¹³³ despite that right being seemingly constitutionally protected.¹³⁴

59 In summary, with clear drafting, liberal access to justice, and adequate resourcing, constitutional environmental rights can and will improve environmental outcomes. But where some or all of these elements are lacking, constitutional environmental rights can be more a matter of form rather than substance.¹³⁵

Environmental Rights within the Australian Constitutional Framework

Federal

60 There are no environmental rights either explicitly or implicitly protected under the Commonwealth Constitution. In fact, there are very few positive (the right to something) express rights provided for in the Commonwealth Constitution. For example, there is an express right to acquisition of property on just terms (s 51xxxii) and a right to trial by jury for indictable Commonwealth offences (s 80).

61 Section 100 refers to the reasonable use of waters of rivers for conservation or irrigation, but this neither imposes a duty on the Commonwealth to protect these waters nor does it confer any rights enforceable by individuals.¹³⁶ The right to water as a fundamental human right has not been recognised in the Constitution, or in any federal or State legislation.¹³⁷

¹³³ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 220.

¹³⁴ United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 155.

¹³⁵ United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 2.

¹³⁶ Rachel Pepper, 'The Constitutionalisation of Water Rights: Solution or Levee?' (2011) 26(2) *Australian Environment Review* 34.

¹³⁷ ¹³⁷ Meg Good, 'Implementing the Human Right to Water in Australia' (2011) 30 *University of Tasmania Law Review* 107, 121.

- 62 Few rights have been implied into the constitution. For example, the freedom of political communication and certain voting rights.¹³⁸
- 63 Prof George Williams optimistically suggests that there is the potential for further rights to be implied in the Constitution. Williams argues that the structures and doctrines inherent in the Constitution - federalism, representative and responsible government, and the separation of powers - “can provide a foundation for the protection of rights”, even when those rights are not apparent on the face of any given provision.¹³⁹
- 64 But even assuming that further rights were to be implied into the Constitution (which is doubtful) implied rights are limited in significant ways. First, they are likely to be restricted to negative rights, that is, a right affording protection from an exercise of governmental power.¹⁴⁰ Second, they are unlikely to offer any protection from environmental harm caused by the acts of private individuals.¹⁴¹
- 65 Finally, the creation of new rights by amendment is not easy: only 18% of all proposed amendments to the Constitution have been successful (eight successful referendums out of 44 proposals).¹⁴²
- 66 Given these limitations, the scope for constitutional environmental protection in Australia at a Commonwealth level is extremely limited.

States

- 67 The State constitutions are similarly bereft. Although States may amend their constitutions by ordinary legislation, such amendment is rare.¹⁴³ And what the State Parliament giveth; the State Parliament can taketh away. Some

¹³⁸ Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Lawbook Co, 5ed, 2006), 523-529; see *Roach v Electoral Commissioner* (2007) 233 CLR 162 for the implied right to vote.

¹³⁹ George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999), 51.

¹⁴⁰ George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999), 62-63.

¹⁴¹ George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999), 61.

¹⁴² Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 3rd ed, 2012), 37.

¹⁴³ Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006), 29.

provisions may be entrenched by manner and form requirements,¹⁴⁴ but the States' power to do this is usually limited to the entrenchment of laws that relate to the constitution, powers, or procedure of the State Parliament.¹⁴⁵

- 68 Victoria, Queensland, and the Australian Capital Territory ("ACT") have introduced statutory bills of rights. The ACT enacted the *Human Rights Act 2004* ("ACT HR Act"); Victoria, the *Charter of Human Rights and Responsibilities 2006* ("the Charter"); and Queensland has recently passed the *Human Rights Act 2019* ("Queensland HR Act"), commencing on 1 January 2020.
- 69 All three enactments relevantly provide for a right to life,¹⁴⁶ the right to take part in public life,¹⁴⁷ the right to peaceful assembly and association,¹⁴⁸ and for the protection of families and children.¹⁴⁹ These are rights which could arguably be interpreted to include environmental rights, as has occurred overseas.
- 70 The rights included in the three enactments do, however, include the procedural rights necessary in the promotion and enforcement of substantive environmental rights, such as the right to take part in public life and the right to assembly and association.
- 71 In addition, all three statutes provide for the protection of cultural rights, which specifically refer to the right of Aboriginal people to maintain their spiritual, material and economic relationships with the land.¹⁵⁰ An approval granted to an extractive industry where the operation of that industry impinges upon an

¹⁴⁴ *Australia Acts 1986* (Cth), s 6.

¹⁴⁵ *Australia Acts 1986* (Cth), s 6; Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006), 164.

¹⁴⁶ *Human Rights Act 2004* (ACT), s 8; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 9; *Human Rights Act 2019* (Qld), s 16.

¹⁴⁷ *Human Rights Act 2004* (ACT), s 17; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 18; *Human Rights Act 2019* (Qld), s 23.

¹⁴⁸ *Human Rights Act 2004* (ACT), s 15; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 16; *Human Rights Act 2019* (Qld), s 22.

¹⁴⁹ *Human Rights Act 2004* (ACT), s 11; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 17; *Human Rights Act 2019* (Qld), s 26.

¹⁵⁰ *Human Rights Act 2004* (ACT), s 27; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 19; *Human Rights Act 2019* (Qld), ss 27 and 28.

Indigenous person's spiritual relationship with the subject land might be incompatible with that right.

- 72 The Acts contain a directive that all statutory provisions must, so far as possible, be construed in a way that is compatible with human rights.¹⁵¹ But the efficacy of such a directive after the problematic decision in *Momcilovic v The Queen*¹⁵² is doubtful.
- 73 Substantively these Acts afford little by way of enforceable stand alone rights.
- 74 Generally, proposed legislation must be accompanied by a "statement of compatibility" concerning whether or not the bill is compatible with the human rights contained within the States' respective human rights legislation, which must be considered prior to the bill being passed.¹⁵³ However, failure to comply with the requirement to provide a statement of compatibility has no consequence for the validity of the law.¹⁵⁴
- 75 Moreover, in the Queensland and Victorian legislation there is provision for the Parliament to make an "override declaration" in respect of legislation that it has effect despite any incompatibility with a statutory human right.¹⁵⁵ And while in all three States the relevant Supreme Court may make a "declaration of incompatibility" to the effect that a provision cannot be interpreted in a way that is consistent with human rights,¹⁵⁶ again this declaration has no impact on the validity of the law.
- 76 Where such a declaration is made, the Minister administering the relevant Act (or the Attorney-General in the ACT) must prepare a written response and

¹⁵¹ *Human Rights Act 2004* (ACT), s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32; *Human Rights Act 2019* (Qld), s 48.

¹⁵² (2011) 245 CLR 1 at [37]-[51].

¹⁵³ *Human Rights Act 2004* (ACT), ss 37 and 38; *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 28, 30; *Human Rights Act 2019* (Qld), s 38.

¹⁵⁴ *Human Rights Act 2004* (ACT), s 39; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 29; *Human Rights Act 2019* (Qld), s 42.

¹⁵⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31; *Human Rights Act 2019* (Qld), s 44.

¹⁵⁶ *Human Rights Act 2004* (ACT), s 32; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36; *Human Rights Act 2019* (Qld), s 53.

table it before Parliament within six months.¹⁵⁷ But only two declarations have been made: one under the ACT HR Act; and one under the Victorian Charter.¹⁵⁸

- 77 All three statutes contain provisions with relevantly similar wording which imposes two obligations on public authorities. First, a public authority must not act incompatibly with human rights, and second, a public authority must not fail to give proper consideration to a relevant human right when making a decision or taking an action.¹⁵⁹
- 78 The ACT HR Act additionally provides that if a public authority has acted in contravention of those obligations, a person who is, or would be, the victim of such contravention may bring legal proceedings, and are entitled to any relief that the court considers appropriate, except damages.¹⁶⁰ Notwithstanding this entitlement, there have been few cases, and fewer still successful cases, brought in reliance on the freestanding cause of action created by the Act.¹⁶¹
- 79 In Victoria and Queensland, legal proceedings may be brought by a person affected, but only in circumstances where that person is able, independent of the Charter, to seek relief (excluding damages¹⁶²) in respect of the impugned decision or act of the public authority.¹⁶³ Thus, the Victorian Charter and the Queensland HR Act extend the available grounds of review in judicial review proceedings to include unlawfulness arising by reason of a breach of s 38(1) of the Charter or s 58 of the Act, but this cannot be the sole basis of the claim.¹⁶⁴

¹⁵⁷ *Human Rights Act 2004* (ACT), s 33; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 37; *Human Rights Act 2019* (Qld), s 56.

¹⁵⁸ The declarations were made in *R v Momcilovic* [2010] VSCA 50 and *In the matter of an application for bail by Islam* [2010] ACTSC 147; George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland? Lessons from Recent Australian Experience' (2016) 41(2) *Alternative Law Journal* 81, 82.

¹⁵⁹ *Human Rights Act 2004* (ACT), s 40B, *Human Rights Act 2019* (Qld), s 58, and *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38.

¹⁶⁰ *Human Rights Act 2004* (ACT), ss 40B and 40C.

¹⁶¹ George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland? Lessons learned from recent Australian experience' (2016) 41(2) *Alternative Law Journal* 81, 83.

¹⁶² *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39(4), *Human Rights Act 2019* (Qld), s 59(3).

¹⁶³ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39, *Human Rights Act 2019* (Qld), s 59.

¹⁶⁴ Explanatory Memorandum, *Human Rights Bill 2018* (Qld), 7-8 and Jack Maxwell, 'The obligations of public authorities under the Victorian Charter of Human Rights and Responsibilities', *AUSPUBLAW* (9 February 2016).

- 80 Despite their limitations, reviews of the ACT HR Act and Victorian Charter suggest that they have nevertheless had a significant impact in the policy arena, improving decision-making and raising the awareness of human rights within government bodies.¹⁶⁵
- 81 Given that environmental rights are increasingly being perceived as an aspect of basic human rights such as the right to life, the necessity to protect the environment could perhaps fall for consideration under these Acts sooner rather than later.

The Future of Constitutional Environmental Rights in Australia and Overseas

- 82 Environmental rights are increasingly being conceived, overseas at least, as an aspect of human rights, with many states affording environmental rights, either directly or indirectly, constitutional protection. Research has demonstrated a material connection between constitutionally enshrined environmental rights and improved environmental outcomes at the domestic level.¹⁶⁶
- 83 In the absence of an ability to entrench constitutional environmental rights in Australia, there may be scope for State bills of rights to implicitly provide a measure, albeit limited, of environmental protection.
- 84 As our climate emergency escalates, that is, as the water gets hotter and the burden on the camel's back grows even heavier (in this regard see the article by Dr Rebecca Nelson), having an ever more deleterious direct and immediate impact on the very environment that we depend upon for the full enjoyment of our human rights (breathable air, potable water and the ability to feed and shelter ourselves), the necessity to afford meaningful and enduring protection to the environment becomes ever more pressing. If we lack the

¹⁶⁵ George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland? Lessons from Recent Australian Experience' (2016) 41(2) *Alternative Law Journal* 81, 82.

¹⁶⁶ See Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294 and David R Boyd, *The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012).

collective will to protect the environment for its own sake, then we must conceive environmental rights as an essential aspect of human rights.

85 As another politician observed three decades ago:¹⁶⁷

What we are now doing to the world, by degrading the land surfaces, by polluting the waters and by adding greenhouse gases to the air at an unprecedented rate – all this is new in the experience of the earth...Whole areas of our planet could be subject to drought and starvation if the pattern of rains and monsoons were to change as a result of the destruction of forests and the accumulation of greenhouse gases...the evidence is there. The damage is being done...the environmental challenge which confronts the whole world demands an equivalent response from the whole world. Every country will be affected and no one can opt out.

86 The Hon Margaret Thatcher, Prime Minister, was no “inner-city greenie”,¹⁶⁸ but her remarks are as apposite today as they were in 1989.

¹⁶⁷ The Hon Margaret Thatcher, ‘Speech to United Nations General Assembly (Global Environment)’ (New York, 8 November 1989).

¹⁶⁸ The Hon Michael McCormack, Deputy Prime Minister, 11 November 2019.