THE ENVIRONMENT IS ALL RIGHTS: HUMAN RIGHTS, CONSTITUTIONAL RIGHTS AND ENVIRONMENTAL RIGHTS

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The relationship between human rights and environmental rights is increasingly recognised in international and comparative law. This article explores that connection by examining the international environmental rights regime and the approaches taken at a domestic level in various countries to constitutionalising environmental protection. It compares these approaches to that in Australia. It finds that Australian law compares poorly to elsewhere. No express constitutional provision imposing obligations on government to protect the environment or empowering litigants to compel state action exists, and the potential for drawing further constitutional implications appears distant. As the climate emergency escalates, renewed focus on the link between environmental harm and human harm is required, and law and policymakers in Australia are encouraged to build on existing law in developing broader environmental rights protection.

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I Introduction

In 1983, the High Court of Australia held that Commonwealth legislation preventing the proposed construction of a hydro-electric dam on the World Heritage listed Gordon River in Tasmania was valid.[1] Recognised now as 'one of the most significant conservation victories in Australian history',[2] *Commonwealth v Tasmania* ('*Tasmanian Dam Case*') put an end to the politically contentious project and marked the resolution of several years of heated debate in the State and across the country.[3] The case also illustrated Australia's indirect approach to environmental rights protection. Undoubtedly significant to the burgeoning environmental movement in Australia,[4] the decision did not rest on environmental grounds at all. As the Court made clear in an 'unusual' statement preceding the judgment,[5] the Court was 'in no way concerned with the question whether it is desirable or undesirable, either on the whole or from any particular point of view, that the construction of the dam should proceed'.[6] Rather, the 'strictly legal questions'[7] before the Court were focused entirely on the scope of Commonwealth power. Once that issue had been resolved, the inexorable mechanical force of s 109 of the *Constitution* ensured that Commonwealth legislation would prevail over its Tasmanian equivalent to the extent of any inconsistency.

Environmental protection was not central to the resolution of the *Tasmanian Dam Case* because environmental protection is not a subject of federal legislative power and no right to a healthy environment is enshrined in the *Constitution*.[8] Australia increasingly stands apart in this regard. According to the

[1] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

[2] Andrew Macintosh, 'The Tasmanian Dam Case and the "Green Commonwealth" Hypothesis' in Michael Coper, Heather Roberts and James Stellios (eds), *The Tasmanian Dam Case 30 Years On: An Enduring Legacy* (Federation Press, 2017) 149, 149. See also Jack Waterford, 'No Dam in the Wilderness: Emotions Running Hot near Dam Site', *The Canberra Times* (Canberra, 2 July 1983) 1.

[3] See Gareth Evans, 'The Background Politics of the Tasmanian Dam Case' in Michael Coper, Heather Roberts and James Stellios (eds), *The Tasmanian Dam Case 30 Years On: An Enduring Legacy* (Federation Press, 2017) 11.

[4] See, eg, Paddy Manning, *Inside the Greens: The Origins and Future of the Party, the People and the Politics* (Black Inc, 2019) ch 2.

[5] Michael Coper, Heather Roberts and James Stellios, 'Introduction' in Michael Coper, Heather Roberts and James Stellios (eds), *The Tasmanian Dam Case 30 Years On: An Enduring Legacy* (Federation Press, 2017) 1, 5.

[6] *Tasmanian Dam Case* (n 1) 58.

[7] Ibid.

[8] George Williams, 'Human Rights and the Tasmanian Dam Case' in Michael Coper, Heather Roberts and James Stellios (eds), *The Tasmanian Dam Case 30 Years On: An Enduring Legacy* (Federation Press, 2017) 129, 130–1.

Comparative Constitutions Project, 159 national constitutions around the globe include provisions relating to the protection of the environment, either in their preamble or operative articles.[9]

Constitutional protection of environmental rights is predicated on the understanding that environmental harm 'can and does adversely affect the enjoyment of a broad range of human rights'.[10] This position is not novel. The interdependent relationship between environmental protection and human rights has been recognised in international law since at least 1972, when the 'watershed'[11] *Report of the United Nations Conference on the Human Environment* ('*Stockholm Declaration*') declared that a healthy environment is essential to 'the enjoyment of basic human rights … [and] the right to life itself'.[12]

Almost 50 years after the *Stockholm Declaration*, the symbiotic relationship between environmental protection and human rights is of increasing concern. In 2016, the *United Nations Framework Convention on Climate Change* ('*Paris Agreement*'), dealing with greenhouse gas emissions mitigation, adaptation, and finance, called upon states 'when taking action to address climate change, [to] respect, promote and consider their respective obligations on human rights'.[13] Yet environmental harm continues apace. Three recent reports of the Intergovernmental Panel on Climate Change ('IPCC') describe the predicted trajectory of the environmental catastrophe that the world will confront over

[9] Comparative Constitutions Project, *Constitute* (Web Page, 5 March 2020) archived at <https://perma.cc/9AMN-5C8P>.

[10] 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/22/43 (24 December 2012) 12 [34] ('*Report of the Independent Expert*'). See also Human Rights Council, *Human Rights and the Environment*, HRC Res 16/11, UN Doc A/HRC/RES/16/11 (12 April 2011, adopted 24 March 2011) 2.

[11] Sumudu Atapattu, 'International Environmental Law and Soft Law: A New Direction or a Contradiction?' in Cecilia M Bailliet (ed), *Non-State Actors, Soft Law and Protective Regimes: From the Margins* (Cambridge University Press, 2012) 200, 208.

[12] *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1973, adopted 16 June 1972) 3 [1] ('*Stockholm Declaration*'). See also Meg Good, 'Implementing the Human Right to Water in Australia' (2011) 30(2) *University of Tasmania Law Review* 107, 117–18.

[13] *Paris Agreement under the United Nations Framework Convention on Climate Change*, open for signature 22 April 2016, [2016] ATS 24 (entered into force on 4 November 2016) Preamble para 12 ('*Paris Agreement*'). See also Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113(4) *American Journal of International Law* 679, 722; Sumudu Atapattu, 'The Right to a Healthy Environment and Climate Change: Mismatch or Harmony?' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) 252.

the next century.[14] 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.[15] Historically, these events occurred only once a century.[16] Such disasters will create large groups of displaced people, destroy infrastructure, and weaken food supply, directly compromising 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.[17] The IPCC's *Special Report on the Ocean and Cryosphere in a Changing Climate* also highlights the destructive impact that the warming of the oceans will have on ecosystems: threatening food security, income and livelihoods.[18] Scientists predict, for instance, 'that if current fishing practices continue, all commercially targeted fish species will suffer population collapses by 2048'.[19]

Destruction of the natural environment will have a particularly devastating effect on Indigenous communities who rely on natural resources for subsistence and cultural identity.[20] The IPCC's *Special Report on the Ocean and Cryosphere in a Changing Climate* 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'.[21] Ocean ecosystem loss will undermine the 'ocean's role in cultural, recreational,

[14] Intergovernmental Panel on Climate Change, 'Summary for Policymakers' in *Global Warming of 1.5°C* (Report, 2018); Intergovernmental Panel on Climate Change, 'Summary for Policymakers' in *Climate Change and Land: An IPCC Special Report on Climate Change, Desertification, Land Degredation, Sustainable Land Management, Food Security, and Greenhouse Gas Fluxes in Terrestrial Ecosystems* (Report, 2019); Intergovernmental Panel on Climate Change, 'Summary for Policymakers' in *Special Report on the Ocean and Cryosphere in a Changing Climate* (Report, 2019) ('*IPCC Special Report on the Ocean and Cryosphere*').

[15] *IPCC Special Report on the Ocean and Cryosphere* (n 14) 20, 28.

[16] Ibid.

[17] International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption* (International Bar Association, 2014) 43. See also Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012).

[18] *IPCC Special Report on the Ocean and Cryosphere* (n 14) 26.

[19] David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012) 11 ('*Environmental Rights Revolution*').

[20] United Nations Environment Programme, *Environmental Rule of Law: First Global Report* (Report, January 2019) 12 ('*Environmental Rule of Law*'). See generally Randall S Abate and Elizabeth Ann Kronk (eds), *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, 2013).

[21] *IPCC Special Report on the Ocean and Cryosphere* (n 14) 26.

and intrinsic values important for human identity and well-being'.[22] Climate change is already affecting Indigenous communities far away from the ocean. Extreme heat and inadequate water security in Australia's centre may displace many Indigenous peoples from their country.[23]

A healthy environment is 'necessary for the full enjoyment of a vast range of human rights',[24] but environmental harm has become so pernicious and so pervasive that it is now an existential threat to human life.[25] This article explores the relationship between human rights, constitutional rights and environmental rights with the aim of understanding the scope and standard of environmental rights protection at international, comparative and domestic law. Such an understanding may prompt renewed focus on the link between environmental harm and human harm, and encourage law and policymakers in Australia to build on existing law in developing broader environmental rights protection.

The article is divided into several substantive parts. Part II outlines the international environmental rights regime and the various approaches taken at the domestic level to constitutionalise environmental protection. As this Part demonstrates, environmental rights may be a recent phenomenon, but they have gathered significant momentum over the last few decades.[26] Indeed, despite limited express mention in the early global human rights treaties, a multitude of instruments negotiated after the 1970s form the basis for considerable international protection. At the domestic level, many states have followed this lead. States have adopted a wide variety of approaches to constitutionalising environmental protection, ranging from express or implied constitutional rights to constitutionally mandated directive principles. Whether such protection is effective is another question.

[22] Ibid.

[23] See, eg, Lorena Allam and Nick Evershed, 'Too Hot for Humans? First Nations People Fear Becoming Australia's First Climate Refugees', *The Guardian* (online, 18 December 2019) <https://www.theguardian.com/australia-news/2019/dec/18/too-hot-for-humans-first-nations-people-fear-becoming-australias-first-climate-refugees>, archived at <https://perma.cc/W8WM-TB6D>.

[24] Human Rights Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/37/59 (24 January 2018) 1 [2] ('*Report of the Special Rapporteur*'). See also, John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018).

[25] Human Rights Council, *Climate Change and Poverty: Report of the Special Rapporteur on Extreme Poverty and Human Rights*, UN Doc A/HRC/41/39 (17 July 2019) 2 [1]–[2]. See also Louis J Kotzé, 'International Environmental Law and the Anthropocene's Energy Dilemma' (2019) 36(5) *Environmental and Planning Law Journal* 437, 444.

[26] Roderic O'Gorman, 'Environmental Constitutionalism: A Comparative Study' (2017) 6(3) *Transnational Environmental Law* 435, 436.

Part III turns to the situation in Australia. It explores whether and to what extent environmental rights are protected at the federal and state and territory levels. While a wealth of statutory and regulatory protection exists, the analysis in this Part is limited to a constitutional and human rights framework rather than the entire architecture of environmental protection. At this level, the position in Australia compares poorly to that elsewhere. This conclusion is demonstrated through a typology that assesses three different ways that environmental rights might be constructed in Australia. They are:

1 express or implied environmental rights drawn from international law;

2 extension or inference from the text and structure of the *Constitution*; and

3 extension or inference from existing human rights protected outside the *Constitution*.

Although Part III finds that there is no express constitutional provision imposing obligations on the government to protect the environment or empowering citizens and litigants to compel state action, and moreover, that the potential for drawing out constitutional implications appears increasingly remote, the typology demonstrates a model for conceptualising environmental rights in Australia. In a brief Part IV, the future of constitutional environmental rights protection is considered.

Before commencing it is necessary to address the framing of this article. Scholars have criticised approaches that conceive of environmental protection through the prism of human rights. As many commentators have noted, traditional human rights accounts have negatively affected environmental protection,[27] and there is a risk that an anthropocentric approach will continue to posit the impact of environmental harm on humans, rather than the environment itself, as its focal point.[28] The concern is that such an approach results in law and policymakers, not to mention industry, failing to recognise the value and importance of natural ecosystems beyond their use or benefit to humans; the environment is reduced to no more than an 'inanimate machine existing to serve human needs'.[29]

[27] Conor Gearty, 'Do Human Rights Help or Hinder Environmental Protection?' (2010) 1(1) *Journal of Human Rights and the Environment* 7, 7–9.

[28] 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.

[29] Sam Adelman, 'Epistemologies of Mastery' in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015) 9, 11.

Framing environmental protection through the lens of human rights necessarily shapes law and policymakers' understanding of the environment and its relationship with and to humanity.[30] It may lead to the prioritisation of certain goals (such as industry) over others (such as environmental protection). However, conceiving environmental harm in the language of human rights also carries the potential to realise significant value. 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.[31] A rights-based approach mandates a normative starting point for regulation and litigation.[32] It focuses attention on considerations of justice and fairness, including the impact of environmental harm on vulnerable populations. It may empower individuals and communities affected by environmental harm to leverage existing laws to pursue environmental goals.[33] A rights-based approach to environmental protection is also 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.[34]

It also does not preclude ecocentric approaches. In some states, 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. Bolivia has conferred legal rights and personhood to Mother Earth, who can be represented by humans in court.[35] The *Bolivian Constitution* provides a right to a 'healthy, protected, and balanced environment', and allows any person to take

[30] Marie-Catherine Petersmann, 'Narcissus' Reflection in the Lake: Untold Narratives in Environmental Law beyond the Anthropocentric Frame' (2018) 30(2) *Journal of Environmental Law* 235, 236. On framing, see Anna Grear and Julia Dehm, 'Frames and Contestations: Environment, Climate Change and the Construction of In/Justice' (2020) 11(1) *Journal of Human Rights and the Environment* 1.

[31] Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37, 40.

[32] Peel and Lin (n 13) 722.

[33] Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(3) *European Journal of International Law* 613, 625.

[34] Good (n 12) 118–19.

[35] *Ley de Derechos de la Madre Tierra* [*Law of the Rights of Mother Earth*] (Bolivia) Law No 71 of 21 December 2010, arts 5–6.

legal action in defence of environmental rights.[36] 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'.[37] All communities and public authorities are obliged to protect this right.[38] Similar approaches have been adopted in specific cases in Aotearoa New Zealand[39] and India.[40] These examples illustrate the vitality and diversity of rights-based approaches.

II Human Rights-Based Environmental Protections

A *International Environmental Rights*

The three most significant international human rights instruments do not clearly enshrine a right to a safe, clean, healthy and sustainable environment. None of the *Universal Declaration of Human Rights* ('*UDHR*'),[41] the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[42] or the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*'),[43] expressly include or recognise the relationship between environmental harm and human rights. While this silence is not because the drafters considered the environment insignificant or were not conscious of the fact that environmental harm can affect human wellbeing, it is clear that they did not 'foresee the enormity

[36] *Constitución Política del Estado* [Political Constitution of the State] (Bolivia) 7 February 2009, arts 33–4 ('*Bolivian Constitution*'). Unless otherwise specified, all translations of constitutions referred to in this article are by the Comparative Constitutions Project (n 9).

[37] *Constitutión de la República del Ecuador* [Constitution of the Republic of Ecuador] (Ecuador) 2008, art 71 ('*Ecuadorian Constitution*').

[38] Ibid arts 11, 71.

[39] *Te Urewera Act 2014* (NZ) s 11. See also Jacinta Ruru, 'Te Urewera Act 2014' [2014] (October) *Māori Law Review* 16, 16; Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Maori Law* (UBC Press, 2016) 98.

[40] *Salim v State of Uttarakhand* (High Court of Uttarakhand, India, Sharma J, 20 March 2017) [19]. Note, however, that this decision was overruled by the Supreme Court of India: Rita Brara, 'Courting Nature: Advances in Indian Jurisprudence' [2017] (6) *Rachel Carson Center Perspectives* 31, 35. See also 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.

[41] *Universal Declaration of Human Rights*, UN Doc A/810 (10 December 1948) ('*UDHR*').

[42] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

[43] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*'). States Parties commit to improving 'all aspects of environmental and industrial hygiene': at art 12.

of … ecological degradation'.[44] Perhaps many people did not; the global environmental movement emerged in the 1960s, following the drafting of these principal instruments.[45]

Reflecting this genealogy, substantive environmental rights are explicitly recognised in several regional international human rights treaties as well as a range of global instruments relating to specific groups of people negotiated after this date. For instance, art 14(2)(h) of the *Convention on the Elimination of All Forms of Discrimination against Women* ('*CEDAW*') commits States Parties to ensure that women have the right to 'enjoy adequate living conditions, particularly in relation to … sanitation … and water supply'.[46] Similarly, art 24(2)(c) of the *Convention on the Rights of the Child* ('*CRC*') requires States Parties to consider the 'dangers and risks of environmental pollution' in securing the right of the child to the enjoyment of the highest attainable standard of health.[47] An explicit link between the environment and human health is also present in several regional treaties. Article 24 of the *African Charter on Human and Peoples Rights* provides that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'.[48] Further, art 11(1) of the 1988 *Protocol of San Salvador* recognises 'the right to live in a healthy environment and to have access to basic public services'.[49] In art 11(2), the Protocol imposes obligations on States Parties to 'promote the protection, preservation, and improvement of the environment'.[50] Global protection is 'modest',[51] but the combination of these provisions may 'indirectly suggest' that some minimum standard of environmental protection is a foundational human right.[52]

[44] Kerry Kennedy Cuomo, 'Human Rights and the Environment: Common Ground' (1993) 18(1) *Yale Journal of International Law* 227, 227.

[45] '*Report of the Independent Expert*', UN Doc A/HRC/22/43 (n 10) 4 [7]–[9].

[46] *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 14(2)(h) ('*CEDAW*').

[47] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 24(2)(c) ('*CRC*').

[48] *African Charter on Human and Peoples Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 24.

[49] *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights: Protocol of San Salvador*, opened for signature 17 November 1988, 69 OAS No A-52 (entered into force 16 November 1999) art 11(1) ('*Protocol of San Salvador*').

[50] Note, however, that because a right to a healthy environment is not mentioned in the *Protocol of San Salvador* (n 49) art 19(6), citizens are not able to bring a standalone case alleging a violation of this right.

[51] Gearty (n 27) 19.

[52] Boyd, *Environmental Rights Revolution* (n 19) 81.

The absence of express specific environmental rights protection at the global level has not inhibited treaty bodies from drawing out a range of substantive and procedural rights capable of protecting environmental interests as necessary implications from the text of existing instruments. Indeed, as John Knox, the former Special Rapporteur on Human Rights and the Environment, has explained, international actors have 'applied human rights law to environmental issues by "greening" existing human rights',[53] such that '[e]xplicit recognition of the human right to a healthy environment thus turned out to be unnecessary for the application of human rights norms to environmental issues'.[54] For instance, the United Nations Committee on Economic, Social and Cultural Rights ('CESCR') has explained that art 12 of the *ICESCR*, which guarantees the right to the highest attainable standard of physical and mental health, 'is not confined to the right to health care', but encompasses 'a wide range of socio-economic factors that promote conditions in which people can lead a healthy life', including 'a healthy environment'.[55] Similarly, in *General Comment No 36*, the Human Rights Committee declared that '[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'.[56] In order to fulfil their obligation to respect and ensure the right to life, States Parties must therefore 'preserve the environment and protect it against harm, pollution and climate change caused by public and private actors'.[57]

Regional human rights courts have also uncovered implications that impose obligations on states to ensure some level of environmental protection. In 2005, for example, the European Court of Human Rights considered a claim that the operation of a steel plant in close proximity to the applicant's home endangered her health and wellbeing, in contravention of art 8 of the *European Convention*

[53] *Report of the Special Rapporteur*, UN Doc A/HRC/37/59 (n 24) 4 [12].

[54] Ibid 4 [13]. See also Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, UN Doc A/HRC/10/61 (15 January 2009) 7 [18] ('*Relationship between Climate Change and Human Rights*').

[55] Committee on Economic, Social and Cultural Rights, *General Comment No 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/2000/4 (11 August 2000) 2 [4], 5 [15] ('*General Comment No 14*').

[56] Human Rights Committee, *General Comment No 36: Article 6 (Right to Life)*, UN Doc CCPR/C/GC/36 (3 September 2019) 13 [62] ('*General Comment No 36*').

[57] Ibid. See also Human Rights Committee, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No 2728/2016*, UN Doc CCPR/C/127/D/2728/2016 (24 September 2020) 9–10 [9.4]–[9.5].

on Human Rights ('*ECHR*'),[58] which protects the right to private and family life. In *Fadeyeva v Russia* ('*Fadeyeva*'),[59] 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',[60] the adverse effects of the environmental pollution in this case 'reached a level sufficient to bring it within the scope of Article 8'.[61] The Court held that the State had a positive obligation to take steps to prevent interference with her rights and ordered the State to pay the applicant EUR6,000 in damages, in addition to her legal costs.[62]

The lack of a clear textual basis for the protection of the environment can make it difficult for courts to intervene, however. Two years earlier in *Kyrtatos v Greece* ('*Kyrtatos*'), the European Court of Human Rights considered a similar question.[63] The applicants alleged that the illegal draining of a wetland to facilitate urban development adjacent to their property had destroyed the 'scenic beauty' of the area and had caused considerable environmental pollution in violation of art 8 of the *ECHR*.[64] Dismissing these submissions, the Court explained that while severe environmental pollution may affect a person's private and family life, it is necessary to demonstrate 'the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment'.[65] This is because '[n]either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such'.[66]

The decision in *Fadeyeva* and the reasoning in *Kyrtatos* demonstrate the interrelated nature of environmental harm and human rights. As these cases suggest, there is an 'undeniable relationship'[67] between environmental protection

[58] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8 ('*ECHR*').

[59] (European Court of Human Rights, First Section, Application No 55723/00, 30 November 2005) ('*Fadeyeva*').

[60] Ibid 16 [68].

[61] Ibid 21 [88].

[62] Ibid 35–6.

[63] [2003] VI Eur Court HR 257 ('*Kyrtatos*').

[64] Ibid 268 [51].

[65] Ibid 268 [52].

[66] Ibid.

[67] *State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights (Advisory*

and the realisation of human rights such as the right to 'life, health, food, water and development'.[68] However, the lack of express environmental rights in the *ECHR* means that the obligation on states is not to protect the environment per se, but to protect people from 'significantly harmful environmental impacts'.[69]

Over the last two decades, the Inter-American Court of Human Rights has developed a more holistic approach to the relationship between human rights and environmental rights. In several cases in the mid-2000s, the Court noted that environmental protection is particularly critical for the realisation of Indigenous peoples' human rights as a consequence of their distinctive relationship to land.[70] In 2009, the Court broadened that understanding by recognising a more general 'undeniable link between the protection of the environment and the enjoyment of other human rights'.[71] In 2018, the Court went further. In an advisory opinion, the Court held that the right to a healthy environment is encompassed by art 26 of the *American Convention on Human Rights* ('*ACHR*'),[72] which requires States Parties to progressively achieve the full realisation of economic, social and cultural rights.[73] In reaching this finding, the Court emphasised that the right to a healthy environment 'constitutes a universal value that is owed to both present and future generations' and is 'a fundamental right for the existence of humankind'.[74] Significantly, the Court found that the right to a healthy environment is 'an autonomous right'.[75] As the Court explained, this means that

Opinion) (Inter-American Court of Human Rights, Series A No 23, 15 November 2017) 21 [47] ('*State Obligations in Relation to the Environment*').

68 *Report of the Special Rapporteur*, UN Doc A/HRC/37/59 (n 24) 2 [2].

69 Alan Boyle, 'Human Rights or Environmental Rights?: A Reassessment' (2007) 18(3) *Fordham Environmental Law Review* 471, 489.

70 See, eg, *Yakye Axa Indigenous Community v Paraguay (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 125, 17 June 2005) [137]; *Sawhoyamaxa Indigenous Community v Paraguay (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 146, 29 March 2006) [118]; *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 172, 28 November 2007) [121]–[122].

71 *Kawas-Fernández v Honduras (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 196, 3 April 2009) [148].

72 *American Convention on Human Rights: 'Pact of San José, Costa Rica'*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) ('*ACHR*').

73 *State Obligations in Relation to the Environment* (n 67) [57].

74 Ibid [59].

75 Ibid [62].

> the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right.[76]

In 2020, the Court first considered the scope of the right to a healthy environment in a contentious case. In *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina*, the Court confirmed that environmental harm can negatively affect other human rights and reiterated that certain groups in vulnerable situations may be particularly at risk.[77] In this case, the Court held that Argentina's failure to prevent and protect the Indigenous applicants from years of illegal logging, introduced livestock and fencing, caused environmental degradation and violated their 'interrelated rights to take part in cultural life in relation to cultural identity, and to a healthy environment, adequate food, and water' as protected under the *ACHR*.[78]

International actors considering the interdependent nature of human rights and environmental protection have also identified a range of procedural environmental rights drawn from the *UDHR*, *ICCPR*, and other instruments.[79] Procedural rights are essential to the enforcement of substantive environmental rights. Such rights can 'promote the transparency, participation, and accountability that form the cornerstones of environmental governance',[80] and may 'facilitate the practice of ecological citizenship'.[81] One key instrument is the 1992 *Rio Declaration*. The *Rio Declaration* encompasses a range of key environmental principles, including the need for environmental impact assessments and

[76] Ibid.

[77] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 400, 6 February 2020) [209].

[78] Ibid [255]–[266], [289].

[79] 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: Mapping Report*, UN Doc A/HRC/25/53 (30 December 2013) 8 [29]; *UDHR*, UN Doc A/810 (n 41) arts 8, 19–21; *ICCPR* (n 42) arts 2, 19, 22.

[80] Carl Bruch, Wole Coker and Chris VanArsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (Environmental Law Institute, 2nd ed, 2007) 2.

[81] Robyn Eckersley, 'Greening Liberal Democracy: The Rights Discourse Revisited' in Brian Doherty and Marius de Geus (eds), *Democracy and Green Political Thought: Sustainability, Rights and Citizenship* (Routledge, 1996) 212, 230.

participatory rights, the precautionary principle, and the polluter pays principle.[82] The 1998 *Aarhus Convention* is another valuable instrument, guaranteeing key procedural rights relevant to the environmental context, including right of access to information, public participation in decision-making, and access to justice to seek redress for environmental harm.[83] These rights do not simply improve the quality and legitimacy of decision-making, but impose obligations on governments to consider environmental interests and undertake certain actions when planning or proposing activities that may impact the environment.[84]

Soft law instruments like the *Rio Declaration* do not impose direct obligations on states.[85] Similarly, the *Aarhus Convention* may only impose legal obligations on its 47 contracting parties.[86] Nonetheless, owing to the general absence of global, specific, textual environmental protection in legally binding treaties, these and other instruments have developed and articulated important environmental values and principles, making a 'remarkable' contribution to the growth of international environmental law.[87] Soft law instruments can influence legislative and constitutional drafting, as well as judicial decisions at both international and domestic levels. The European Court of Human Rights, for instance, has drawn on the *Aarhus Convention* and the *Rio Declaration* to hold that states must make available to those affected, information concerning environmental risks.[88] Similarly, in *Zia v WAPDA* ('*Zia*'),[89] the Supreme Court of Pakistan considered a challenge to the construction of a high voltage grid station in a residential area of Islamabad. Although the *Pakistani Constitution* does not contain express environmental rights, the Court considered that the *Rio Declaration* should 'serve as a great binding force',[90] and applied the

[82] *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol 1) (14 June 1992) annex I principles 10, 15–16 ('*Rio Declaration*').

[83] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) art 1 ('*Aarhus Convention*').

[84] Eckersley (n 81) 230. See generally Bruch, Coker and VanArsdale (n 80) ch 4.

[85] For analysis in the environmental context, see Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1990) 12(2) *Michigan Journal of International Law* 420.

[86] *Aarhus Covention* (n 83) art 3; 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters', *United Nations Treaty Collection* (Web Page, 27 September 2020) archived at <https://perma.cc/S39N-N9DS>.

[87] Atapattu (n 11) 200.

[88] *Taşkın v Turkey* [2004] X Eur Court HR 179, 201–2 [98]–[99], 206 [119].

[89] (1994) 46 Pakistan Legal Decisions 693 ('*Zia*'), cited in Parvez Hassan and Azim Azfar, 'Securing Environmental Rights through Public Interest Litigation in South Asia' (2004) 22(3) *Virginia Environmental Law Journal* 215, 236.

[90] *Zia* (n 89) 710 (Akhtar J for the Court); Hassan and Azfar (n 89) 238.

precautionary principle to stay construction of the grid station until research could identify the nature and extent of the environmental threat posed by radiation that would be emitted by the power plants.[91] As this decision suggests, environmental rights do not need to be explicitly enshrined in the text of a state constitution to be effective.

B *Constitutional Environmental Rights*

The importance attached to the environment in the international sphere is reflected at the domestic level. In fact, protection is pervasive. While the precise number of states that constitutionally protect environmental rights is 'somewhat difficult to determine' because of uncertainties created by the 'language, positioning, and framing of constitutional provisions',[92] almost 160 national constitutions across the world include substantive or procedural provisions relating to the protection of the environment.[93] This is an increase from 147 national constitutions less than 10 years ago.[94]

Unsurprisingly, states have adopted many diverse approaches to constitutionalising environmental rights. Professors James May and Erin Daly observe that some states enshrine a right to a particular standard of healthy environment, or impose duties on individuals or the state to protect the environment, while others recognise environmental protection as a matter of national or state policy.[95] In some cases, states may recognise specific substantive rights such as sustainability, climate change, or the right to water, or they may entrench procedural rights in the environmental context.[96] Of course, these approaches are not exclusive; some states 'do all of these things, while others do none of them. Most fall somewhere in between."[97]

Abstracting out from this discussion reveals that there are three primary approaches to constitutionalising environmental protection. First, some states incorporate explicit rights relating to environmental protection that may be justiciable or not. Second, other states may not specifically protect the

[91] *Zia* (n 89) 710–11; Hassan and Azfar (n 89) 238–9.

[92] Tim Hayward, *Constitutional Environmental Rights* (Oxford University Press, 2005) 22.

[93] Comparative Constitutions Project (n 9).

[94] Boyd, *Environmental Rights Revolution* (n 19) 76. See also Erin Daly, 'Constitutional Protection for Environmental Rights: The Benefits of Environmental Process' (2012) 17(2) *International Journal of Peace Studies* 71; O'Gorman (n 26).

[95] James R May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2015) 56.

[96] Ibid.

[97] Ibid.

environment but municipal courts may have adopted similar interpretative approaches to that of the European Court of Human Rights in *Fadeyeva*,[98] and uncovered an implied right to a healthy environment as necessary to fulfil certain specific human rights. The third, and in fact 'most prevalent way of entrenching environmental constitutional obligations', is via constitutional directive principles that impose a duty on government.[99] As Professor Tarunabh Khaitan has explained, constitutional directives are telic norms that impose a moral obligation on the political branches of the state to adopt measures to immediately endeavour to reach the directed goal and to fully realise that goal at some later date.[100] These principles are largely, though perhaps not entirely, non-justiciable.

1 *Express Constitutional Recognition*

Many states expressly recognise and protect environmental rights in their national constitution. Three factors generally account for such protection. First, environmental rights are typically contained in constitutions which have been drafted after 1970, correlating with an era when environmental issues became more globally recognised.[101] Indeed, as Professors Dinah Shelton and Alexandre Kiss note, '[a]lmost 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 upon the state'.[102] Second, states with constitutional environmental rights tend to include more comprehensive economic and social rights protections.[103] Third, states are more likely to adopt constitutional environmental rights through acculturation or emulation, following states that share common historical, legal, cultural or geographic connections.[104]

[98] *Fadeyeva* (n 59) [88].

[99] Lael K Weis, 'Environmental Constitutionalism: Aspiration or Transformation?' (2018) 16(3) *International Journal of Constitutional Law* 836, 852 ('*Environmental Constitutionalism*'); Boyd, *Environmental Rights Revolution* (n 19) 52. See also O'Gorman (n 26) 440.

[100] Tarunabh Khaitan, 'Constitutional Directives: Morally-Committed Political Constitutionalism' (2019) 82(4) *Modern Law Review* 603, 610 ('Constitutional Directives'). See generally Tarunabh Khaitan, 'Directive Principles and the Expressive Accommodation of Ideological Dissenters' (2018) 16(2) *International Journal of Constitutional Law* 389.

[101] See Boyd, *Environmental Rights Revolution* (n 19) 47.

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

[103] Boyd, *Environmental Rights Revolution* (n 19) 7.

[104] See Chris Jeffords and Joshua C Gellers, 'Constitutionalizing Environmental Rights: A Practical Guide' (2017) 9(1) *Journal of Human Rights Practice* 136, 138 ('Constitutionalizing Environmental Rights'); O'Gorman (n 26) 448.

Constitutional recognition occurs in different textual forms. The *Ukrainian Constitution* enshrines a right to an environment that is 'safe for life and health'.[105] Hungary,[106] Turkey,[107] Indonesia,[108] and Nicaragua[109] entrench a right to a 'healthy' environment, while South Africa specifies 'an environment that is not harmful to … health or wellbeing'.[110] South Korea uses the adjectival descriptor of 'pleasant',[111] and the Philippines guarantees a 'balanced and healthful ecology in accord with the rhythm and harmony of nature'.[112] In Chile, the right is to an environment 'free from contamination'.[113] In the Dominican Republic, climate change is expressly considered. The *Dominican Constitution* notes that

> [t]he formulation and execution, through the law, of 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, is [a] priority of the State.[114]

Some constitutions, including those of Kenya,[115] Bolivia,[116] South Sudan,[117] and South Africa,[118] explicitly extend substantive rights to future generations. In Bhutan and Kenya, the government is also obliged to maintain a specified percentage of tree cover across the country (60% in Bhutan and 10% in Kenya).[119]

Not all of these provisions are justiciable.[120] As noted below, constitutionally recognised environmental protections may be addressed to the political

105 *Konstytutsiya Ukrayiny* [Constitution of Ukraine 1996] art 50 ('*Ukrainian Constitution*').

106 *Magyarország Alaptörvénye* [Fundamental Law of Hungary 2011] art XXI.

107 *Türkiye Cumhuriyeti Anayasasi* [Constitution of the Republic of Turkey 1982] art 56.

108 *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* [Constitution of the Republic of Indonesia 1945] art 28H(1).

109 *Constitución Política de la República de Nicaragua* [Constitution of Nicaragua 1987] art 60.

110 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 24(a) ('*South African Constitution*').

111 *Daehanmingug Heonbeob* [Constitution of the Republic of Korea 1987] art 35.

112 *Constitution of the Republic of the Philippines 1987* art II s 16 ('*Philippine Constitution*').

113 *Constitución Política de la República de Chile de 1980* [Political Constitution of the Republic of Chile 1980] art 19(8).

114 *Constitución de la República Dominicana* [Constitution of the Dominican Republic 2015] art 194 ('*Dominican Constitution*').

115 *Constitution of Kenya 2010* art 42 ('*Kenyan Constitution*').

116 *Bolivian Constitution* (n 36) art 33.

117 *Transitional Constitution of the Republic of South Sudan 2011* art 41(3).

118 *South African Constitution* (n 110) s 24(b).

119 *Constitution of the Kingdom of Bhutan 2008* art 5(3); *Kenyan Constitution* (n 115) art 69(1)(b).

120 See Weis, 'Environmental Constitutionalism' (n 99) 846–7.

branches rather than the judiciary. Nonetheless, in some states, courts have drawn on express constitutional recognition in adjudicating environmental claims. In several states, for example, constitutionally enshrined 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,[121] the Dominican Republic,[122] Eritrea,[123] and the Philippines.[124] Section 16 of art II of the *Philippine Constitution* 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.'[125]

In the seminal case of *Oposa v Factoran* ('*Oposa*'), 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'.[126] 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 explained that:

> 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.[127]

Similarly, in 2004 Argentinian citizens sued their national and provincial government, the city of Buenos Aires, and 44 industrial facilities in relation to pollution of the Matanza-Riachuelo River.[128] In a series of decisions relying on

[121] *Bolivian Constitution* (n 36) art 342.

[122] *Dominican Constitution* (n 114) art 194.

[123] *Constitution of Eritrea 1997* arts 8(2)–(3).

[124] *Philippine Constitution* (n 112) art II s 16.

[125] Ibid.

[126] 224 Supreme Court Reports Annotated 792 (Davide J) ('*Oposa*').

[127] Ibid. See also *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* (Supreme Court of the Philippines, GR Nos 171947–48, 18 December 2008) ('*MMDA*').

[128] *Mendoza v State of Argentina*, Argentinian Supreme Court of Justice, Case No M 1569 XL, 8 July 2008 [tr Michael Posner, 'Translation of the Original Version in Spanish', *ESCR-Net* (Web Document) <https://www.escr-net.org/sites/default/files/Sentencia_CSJN_2008_english.pdf>, archived at <https://perma.cc/9LJK-R7V3>] ('*Mendoza*'). See also Lucas G Christel and Ricardo A Gutiérrez, 'Making Rights Come Alive: Environmental Rights and Modes of Participation in Argentina' (2017) 26(3) *Journal of Environment and Development* 322, 335.

art 41 of the *Argentinian Constitution*, the Supreme Court of Argentina ordered the government to conduct an environmental assessment, establish a comprehensive restoration and remediation plan and inform the public about measures taken; they also 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.[129]

Courts in Kenya have also protected express constitutional environmental rights. From 2006, the Kenyan government entered into a series of agreements to purchase hydroelectricity from Ethiopia.[130] 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. The Friends of Lake Turkana Trust sued the Kenyan government seeking information about the purchase agreements. Drawing on the constitutional right to a 'clean and healthy environment',[131] the Court held that the government had an 'obligation to the [communities] to ensure that the resources of Lake Turkana are sustainably managed[,] utilized and conserved', as well as a duty to take precautions to prevent environmental harm.[132] 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.[133]

Constitutional rights play a significant role in litigation seeking enforcement of climate change regulation. This can be particularly effective in seeking to enforce international agreements, such as the *Paris Agreement* which provides no mechanism to review the adequacy of parties' nationally determined contributions.[134] It appears that human rights may be increasing in relevance in this regard. Writing in 2019, Dr Annalisa Savaresi and Juan Auz drew attention to a 'tidal surge in climate change litigation' drawing or based on human rights law, and identified 29 climate cases argued either solely on human rights grounds or on the basis of human rights and other grounds.[135]

129 *Mendoza* (n 128) 12–14. See also Christel and Gutiérrez (n 128) 335–8.

130 *Friends of Lake Turkana Trust v A-G* (Environment and Land Court, Kenya, Nyamweya J, 19 May 2014) ('*Friends of Lake Turkana Trust*').

131 *Kenyan Constitution* (n 115) art 42.

132 *Friends of Lake Turkana Trust* (n 130) 17 (Nyamweya J).

133 Ibid 21.

134 Peel and Lin (n 13) 699.

135 Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9(3) *Climate Law* 244, 245–6. On climate change litigation's 'rights turn', see generally Peel and Osofsky (n 31).

One successful claim was recently determined in Colombia. In 2018, the Colombian Supreme Court of Justice ordered government action to address environmental degradation.[136] In addition to recognising the right to life[137] and dignity,[138] the *Colombian Constitution* provides that every individual has the 'right to enjoy a healthy environment'.[139] 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 the Colombian National Development Plan 2014–18), threatened their fundamental rights and the rights of future generations.[140] The Court upheld their complaint declaring that '[t]he increasing deterioration of the environment is a serious attack on current and future life and on other fundamental rights'.[141] 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.[142]

2 *Implied Constitutional Protection*

Human rights and environmental rights are interdependent and interrelated. Reflecting this relationship, treaty bodies and regional human rights courts at the international level have interpreted certain human rights to encompass or include specific environmental rights. This has also occurred at the domestic level. In states with constitutionally enshrined human rights but no express

136 *Future Generations v Ministry of the Environment* (Supreme Court of Colombia, STC4360-2018, 4 April 2015) [tr 'Climate Change and Future Generations Lawsuit in Colombia: Key Excerpts from the Supreme Court's Decision', *Dejusticia* (Web Document, 13 April 2008) <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/>, archived at <https://perma.cc/FNL5-B28T>] ('*Future Generations*').

137 *Constitución Política de Colombia 1991* [Political Constitution of Colombia] art 11 ('*Colombian Constitution*').

138 Ibid arts 21, 51.

139 Ibid art 79.

140 *Future Generations* (n 136) 1–5. See also Ximena Sierra Camargo, 'The Ecocentric Turn of Environmental Justice in Colombia' (2019) 30(2) *King's Law Journal* 224, 227.

141 *Future Generations* (n 136) 13.

142 Ibid 45.

environmental rights, superior courts have at times interpreted these rights to include environmental rights.[143]

Environmental rights are often implied as necessary to fulfil the right to life. Writing in 2012, Associate Professor David Boyd notes that in at least 20 nations 'where the constitution did not include explicit environmental rights, supreme or constitutional courts have ruled that the right to life includes an implicit right to a healthy environment'.[144] India has perhaps gone the furthest. The *Indian Constitution* does not expressly provide for a right to a healthy environment but it does recognise several other human rights, including the right to life and liberty.[145] Drawing on this protection, courts in India have 'fostered an extensive and innovative jurisprudence on environmental rights'.[146] This development was first raised in the 1985 case of *Rural Litigation and Entitlement Kendra Dehradun v State of Uttar Pradesh*,[147] where the Supreme Court considered a challenge to the operation of limestone quarries alleged to affect natural springs in the area. In noting the need to balance 'environmental disturbance … against the need of lime stone quarrying for industrial purposes in the country',[148] the Court referenced the 'right of the people to live in [a] healthy environment with minimal disturbance of ecological balance'.[149] Several years later, in *Charan Lal Sahu v Union of India*, the Supreme Court confirmed that the right to life encompasses the 'right to [a] healthy environment free from hazardous pollutants'.[150] This position was affirmed in *Subhash Kumar v State of Bihar* ('*Subhash Kumar*').[151] In *Subhash Kumar*, the Supreme Court heard a challenge against two iron and steel companies accused of discharging slurry waste into the Ganges River, degrading its quality and causing health risks. Although the Court dismissed the challenge for lack of standing, it observed that

143 See Ben Boer, 'Environmental Law and Human Rights in the Asia-Pacific' in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press, 2015) 135, 166–7. See generally May and Daly (n 95) ch 1.

144 David R Boyd, 'The Constitutional Right to a Healthy Environment' (2012) 54(4) *Environment: Science and Policy for Sustainable Development* 3, 13. See also Boyd, *Environmental Rights Revolution* (n 19) 82.

145 *Constitution of India 1949* (India) art 21 ('*Indian Constitution*').

146 Michael R Anderson, 'Individual Rights to Environmental Protection in India' in Alan E Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1996) 199, 199. See also Lavanya Rajamani, 'The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?' (2007) 16(3) *Review of European Community and International Environmental Law* 274; Hayward (n 92) 206.

147 (1985) 3 SCR 169.

148 Ibid 175 (Bhagwati J for the Court).

149 Ibid 179–80.

150 (1990) 1 SCC 613, 653 [41] (Mukharji CJ) ('*Charan Lal Sahu*').

151 (1991) 1 SCR 5.

the '[r]ight to live is a fundamental right under Art 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life'.[152]

Courts in Nepal have also drawn on the right to life to uncover environmental rights. In 1995, proceedings were commenced in the Supreme Court of Nepal by a non-government organisation challenging the operation of a marble factory in the Godavari Forest on the basis that it had caused environmental degradation to the forest and the surrounding environment.[153] Considering that 'a clean and healthy environment is an essential element for our survival', the Court held that the constitutional protection of the right to life 'encompasses the right to a clean and healthy environment'.[154] The Court therefore issued a directive to the Parliament to pass legislation to protect the Godavari environment, including its air, water, and people.[155]

Similar jurisprudence has emerged from Pakistan. In 2015, the Lahore High Court held that the government's failure to address climate change infringed the petitioner's rights to life, dignity, privacy, and property as guaranteed in the *Pakistani Constitution*.[156] Drawing upon a broad understanding of the right to life as including the 'right to a healthy and clean environment',[157] the Court declared that climate change is a 'defining challenge of our time'.[158] The Court established a Climate Change Commission to monitor and implement necessary changes to safeguard the fundamental rights of the State's citizens.[159]

Most recently, the Netherlands Supreme Court has found that environmental protection is intimately connected to the right to life. In *State of the Netherlands v Urgenda Foundation*,[160] the Supreme Court considered an appeal by the Dutch government against a lower court ruling that had held the government

[152] Ibid 13–14 (Singh J for the Court).

[153] *Dhungel v Godavari Marble Industries* (Supreme Court of Nepal, WP 35/1992, 31 October 1995) ('*Dhungel*'). See generally Surya P Subedi, 'Access to Environmental Justice in a Politically Unstable Environment: A Case Study of Nepal' in Andrew Harding (ed), *Access to Environmental Justice: A Comparative Study* (Martinus Nijhoff, 2007) 157, 167–73.

[154] *Dhungel* (n 153) (Aryal J), quoted in Subedi (n 153) 169.

[155] *Dhungel* (n 153) (Aryal J), quoted in Subedi (n 153) 172–3.

[156] *Ashgar Leghari v Federation of Pakistan* (Lahore High Court, WP No 25501/2015, Order Sheet, 4 September 2015) 6 [8] (Shah CJ).

[157] Ibid 5 [7].

[158] Ibid 5 [6].

[159] Ibid 6–7 [8]. For a further discussion of this case, see Peel and Osofsky (n 31) 52–5.

[160] *Netherlands v Urgenda Foundation* (Supreme Court of the Netherlands, No 19/00135, 20 December 2019) [tr 'Landmark Decision by Dutch Supreme Court', *Urgenda* (Web Document) <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> archived at <https://perma.cc/VA98-WFQV>] ('*Urgenda Foundation*').

had not enacted appropriate measures to avert climate change. Dismissing the government's submission that a legal obligation to meet a specific target would inhibit its flexibility to determine the most appropriate steps to reduce emissions, the Supreme Court upheld the lower court's ruling that the government must meet an emissions goal of 25% reduction from 1990 levels by 2020. The Supreme Court held that the right to life and the right to respect for private and family life guaranteed under arts 2 and 8 of the *ECHR* 'entail the positive obligation for the Dutch State to take reasonable and appropriate measures to protect the residents of the Netherlands from the serious risk of a dangerous climate change, that would threaten the lives and wellbeing of many people in the Netherlands'.[161]

The right to life and the right to family life are not the only human rights in which courts have uncovered implied environmental rights. In 2007, the Hong Kong Special Administrative Region Court of First Instance heard a challenge alleging that the government had failed to enact adequate measures to combat air pollution in violation of the constitutionally protected right to life and the right to health protected under art 12 of the *ICESCR*.[162] Although the Court dismissed the claim on the basis that it is for the government rather than the judiciary to determine policy,[163] the Court acknowledged that it is 'arguable' that art 12 'imposes some sort of duty on state authorities to combat air pollution'.[164] Similarly, in Israel, the Supreme Court has established that the right to water is implicit within the right to dignity, which is guaranteed in the *Basic Law: Human Dignity and Liberty* (Israel).[165]

Not all courts have accepted these arguments. Federal courts in the United States since the 1970s have consistently rejected submissions that the *United States Constitution* implicitly encompasses environmental rights. In *Tanner v*

[161] Katherine Dunn, 'Climate Change Litigation Enters a New Era as Court Rules That Emissions Reduction Is a Human Right' *Fortune* (Web Page, 21 December 2019) <https://fortune.com/2019/12/20/climate-change-litigation-human-rights-netherlands/>, archived at <https://perma.cc/39AF-RMDJ>. See also John Schwartz, 'In "Strongest" Climate Ruling Yet, Dutch Court Orders Leaders to Take Action', *The New York Times* (online, 20 December 2019) <https://www.nytimes.com/2019/12/20/climate/netherlands-climate-lawsuit.html>, archived at <https://perma.cc/3B5N-U4M2>.

[162] *Clean Air Foundation Ltd v Hong Kong Special Administrative Region* [2007] HKCU 1265, [16] (Hartmann J) ('*Clean Air Foundation*').

[163] Ibid [43].

[164] Ibid [19].

[165] *Abu Massad v Water Commissioner* (Supreme Court of Israel, Civil Appeal No 9535/06, 5 June 2011) [23] (Procaccia J). See also Sharmila L Murthy, Mark Williams and Elisha Baskin, 'The Human Right to Water in Israel: A Case Study of the Unrecognised Bedouin Villages in the Negev' (2013) 46(1) *Israel Law Review* 25.

Armco Steel Corporation,[166] for example, the United States District Court for the Southern District of Texas dismissed a claim that exposure to air pollution caused by petroleum refineries violated the right to life under the Fifth and Fourteenth Amendments, and the protections of the Ninth Amendment, which provides that 'the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people'. The Court held that recognising the right to a healthy environment under the Ninth Amendment would violate the separation of powers,[167] and rejected claims under the Fifth and Fourteenth Amendments as not applying to the actions of private individuals.[168] Although this finding may suggest some scope for its operation in relation to public actors, the Court cautioned that constitutional litigation was 'ill-suited' to dealing with environmental protections.[169] Nonetheless, as Janelle Eurick has suggested, the right to a healthy environment has been uncovered in 'constitutional provisions that guarantee citizens the right to life using similar or identical language to that of the Fifth and Fourteenth Amendments of the United States Constitution'.[170]

More recent decisions have foreshadowed this development. In *Stop H-3 Association v Dole*, for instance, the Ninth Circuit of the United States Court of Appeals recognised the relationship between environmental protection and the equal protection clause.[171] The Court noted that:

> We agree that it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment. Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources.[172]

The Court avoided considering this question directly, but in 2016 the United States District Court of Oregon found a connection. In *Juliana v United States*, the Court held that the Fifth Amendment encompasses 'the right to a climate system capable of sustaining human life'.[173] Although that decision was subsequently overturned by the Ninth Circuit for lack of standing, the Court

166 340 F Supp 532 (SD Tex, 1972) ('*Tanner*'). See also Janelle P Eurick, 'The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection through State and Federal Constitutions' (2001) 11(2) *International Legal Perspectives* 185, 212–13.

167 *Tanner* (n 166) 535 (Noel J).

168 Ibid 535–6.

169 Ibid 536.

170 Eurick (n 166) 214.

171 870 F 2d 1419, 1430 (Pregerson J for the Court) (9th Cir, 1989).

172 Ibid.

173 217 F Supp 3d 1224, 1250 (Aiken J) (D Or, 2016).

recognised that the plaintiffs presented 'compelling evidence' that failure to act may 'hasten an environmental apocalypse'.[174]

3 *Constitutional Directives*

The third approach that states may adopt to constitutionally recognise environmental interests is through constitutional directives.[175] Just like express or implied constitutional rights, constitutional directives 'place binding constitutional obligations on the state'.[176] Unlike constitutional rights, however, the obligations imposed by constitutional directives are addressed to the political branches of the state, rather than the judiciary. As Daly explains, they are designed 'to galvanize … legislative activity to protect the environment'.[177] Although many legal scholars focus on judicially enforceable rights provisions, constitutional directives are '[t]he most common form of constitutional provision related to environmental protection'.[178]

Many states diverse in legal culture and constitutional history have adopted this approach. In some cases, constitutional directives are clearly obligatory. For example, the *Gambian Constitution* provides that the State 'shall pursue a policy of … protecting the environment of the nation for posterity'.[179] Similarly, the Swedish *Instrument of Government Act* outlines that '[t]he public institutions shall promote sustainable development leading to a good environment for present and future generations'.[180] In other cases, these directives appear non-obligatory. Dr Lael Weis identifies provisions that are declaratory in character, meaning that they designate certain values and policies as having fundamental status, but they do not create constitutional obligations with respect to those values or policies.[181] Weis suggests that s 61(2) of the *Timor Leste Constitution* is an example of this form. That provision provides that '[t]he State shall recognise the need to preserve … natural resources'. Another example is art 33 of the *Qatari Constitution*, which stipulates that 'the State endeavours to protect the environment and its natural balance, to achieve comprehensive and sustainable

[174] *Juliana v United States*, 947 F 3d 1159, 1164 (Hurwitz J for Murguia and Hurwitz JJ) (9th Cir, 2020).

[175] See generally Weis, 'Environmental Constitutionalism' (n 99).

[176] Lael K Weis, 'Constitutional Directive Principles' (2017) 37(4) *Oxford Journal of Legal Studies* 916, 920.

[177] Daly (n 94) 71.

[178] Boyd, *Environmental Rights Revolution* (n 19) 52. See also Weis, 'Environmental Constitutionalism' (n 99) 848.

[179] *Constitution of the Second Republic of the Gambia* (1996) s 215(4)(d).

[180] *Instrument of Government Act* (Sweden) 1974, art 2.

[181] Weis, 'Environmental Constitutionalism' (n 99) 843.

development for all generations'. While these 'constitutional statements of value'[182] record the significance citizens of East Timor and Qatar place on the environment, it is not clear what, if any, direct legal duties they impose on the State. Nonetheless, as Khaitan notes, even if broadly worded or not explicitly addressed to the state, these directives carry normative weight.[183]

That normative weight is directed to the political organs of the State. Reflecting this, courts in the Netherlands and Greece have refused to recognise actionable substantive environmental rights from 'constitutional provisions requiring sound environmental policy'.[184] In some cases, however, constitutional directives can assist in establishing environmental norms that can meaningfully influence the development of improved environmental policy and the creation of tangible enforceable rights.[185] For instance, art 48A of the *Indian Constitution* provides that the State 'shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'. This provision is a Directive Principle of State Policy. Article 37 of the Constitution states that such principles 'shall not be enforceable by any court, but … are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'.[186] Notwithstanding this express prohibition on judicial enforcement, the Supreme Court of India has drawn on art 48A as an adjunct in clarifying the scope and content of the right to life.[187]

The willingness of that Court to expand the scope of constitutional protection has not gone without criticism. Some commentators have argued 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,[188] while others have criticised the Court for failing to provide 'a coherent or principled

[182] Weis, 'Constitutional Directive Principles' (n 176) 920.

[183] Khaitan, 'Constitutional Directives' (n 100) 623–31. See also Louis J Kotzé, 'Arguing Global Environmental Constitutionalism' (2012) 1(1) *Transnational Environmental Law* 199, 207, where Kotzé argues that that constitutionalising environmental rights establishes ethical and moral obligations with respect to the environment.

[184] James R May and Erin Daly, *Judicial Handbook on Environmental Constitutionalism* (United Nations Environment Program, 2017) 177 ('*Judicial Handbook*').

[185] See David R Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (2011) 20(2) *Review of European Community and International Environmental Law* 171, 173–4.

[186] *Indian Constitution* (n 145) art 37.

[187] See, eg, *Charan Lal Sahu* (n 150) 713 [137] (Singh J). See also Anderson (n 146) 216; Rajamani (n 146) 277.

[188] 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.

approach to directive principles'.[189] Yet what is clear is that the constitutional directive has played a role in developing environmental protections in India.

4 *Efficacy of Constitutional Protections*

The preceding discussion illustrates both the prevalence of constitutional environmental rights protection and its diversity in operation. It does not reveal whether constitutionalising environmental rights is effective or is more likely to lead to positive environmental outcomes. In fact, despite an increasing effort at empirically assessing this question, methodological difficulties remain.[190] As Shelton acknowledges, while constitutional protection may have 'halted some environmental deterioration in some countries … causality is difficult to demonstrate'.[191] Those challenges affect the assessment of both justiciable rights and constitutional directives. May and Emeritus Professor Patrick Kelly note that '[w]hile many judicial opinions mention constitutionally embedded rights … surprisingly few have reached the merits and implemented constitutionally enshrined environmental rights provisions'.[192] Similarly, the United Nations Environment Programme has found that although there has been an increase in the quantity of environmental laws in the last five decades, 'government implementation and enforcement is irregular, incomplete, and ineffective'.[193]

Constitutionalising environmental rights can lead to beneficial environmental outcomes. Enshrining environmental rights in a state's foundational instrument can have powerful normative and symbolic value. As scholars have suggested, framing environmental harm as a violation of fundamental constitutional rights may augment and reinforce the social and legal legitimacy of these rights.[194] This is important because environmental decision-making is 'paradigmatically' polycentric in nature,[195] and environmental interests may need to be balanced against other rights and interests. Constitutional protection may also act as a powerful incentive to develop sound environmental policy,

189 Weis, 'Environmental Constitutionalism' (n 99) 851.

190 Hayward (n 92) 162–3.

191 Dinah Shelton, 'The Links between International Human Rights Guarantees and Environmental Protection' (Unpublished Paper, The University of Chicago, 2004) cited in Boyd, *Environmental Rights Revolution* (n 19) 14.

192 James R May and J Patrick Kelly, 'The Environment and International Society: Issues, Concepts and Context' in Shawkat Alam et al (eds), *Routledge Handbook of International Environmental Law* (Routledge, 2013) 13, 23.

193 *Environmental Rule of Law* (n 20) 2–3.

194 See Boyd, *Environmental Rights Revolution* (n 19) 8–9; Good (n 12) 119.

195 Weis, 'Environmental Constitutionalism' (n 99) 853.

especially in relation to the enactment of legislation directed at protecting the environment.

Empirical research supports these claims. 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.[196] That legislation appeared to be effective. Based on 2008 data, the study found that 116 countries with constitutional protection had a materially smaller ecological footprint than 34 countries with no such rights.[197] More targeted studies have found similar results. In a series of studies, Associate Professor Chris Jeffords and his co-authors have demonstrated several positive correlations between constitutional protection and environmental outcomes.[198] Jeffords and Associate Professor Lanse Minkler have found that the presence of constitutional environmental rights led to better scores on the Yale Center for Environmental Law and Policy's Environmental Performance Index ('EPI').[199] Associate Professor Joshua Gellers and Jeffords have observed that states with constitutionalised procedural rights are more likely than other states to facilitate environmental justice by improving access to information and thereby allowing citizens to challenge environmental harm.[200] They have also found that the combination of substantive and procedural constitutional protections is positively correlated with access to improved urban and rural water sources and sanitation facilities.[201] As Jeffords and Minkler caution, however, these positive trends 'do not

196 Boyd, *Environmental Rights Revolution* (n 19) 251–2, discussed in Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294, 299–300.

197 Boyd, *Environmental Rights Revolution* (n 19) 258–9. Note, however, that the 'ecological footprint' measure has been criticised because it does not include measures for environmental health, ocean health, and other factors that can cause variation between nations.

198 Jeffords and Gellers, 'Constitutionalizing Environmental Rights' (n 104); Jeffords and Minkler (n 196); Joshua C Gellers and Chris Jeffords, 'Toward Environmental Democracy? Procedural Environmental Rights and Environmental Justice' (2018) 18(1) *Global Environmental Politics* 99 ('Toward Environmental Democracy?'); Joshua Gellers and Christopher Jeffords, 'Procedural Environmental Rights and Environmental Justice: Assessing the Impact of Environmental Constitutionalism' (Working Paper No 25, Human Rights Institute, University of Connecticut, August 2015) ('Procedural Environmental Rights and Environmental Justice'); Christopher Jeffords, 'On the Temporal Effects of Static Constitutional Environmental Rights Provisions on Access to Improved Sanitation Facilities and Water Sources' (2016) 7(1) *Journal of Human Rights and the Environment* 74.

199 Jeffords and Minkler (n 196) 318.

200 Gellers and Jeffords, 'Toward Environmental Democracy?' (n 198) 100.

201 Gellers and Jeffords, 'Procedural Environmental Rights and Environmental Justice' (n 198) 10; Jeffords (n 198) 89.

support unqualified constitutionalization of environmental rights without careful deliberation'.[202]

Indeed, there is general agreement that constitutional protection is not in and of itself sufficient.[203] After all, states that have strong constitutional environmental rights protection do not necessarily enjoy strong environmental protection. For instance, India was ranked 177 out of 180 countries on the 2018 EPI, while Bangladesh and Nepal were ranked 179 and 176 respectively.[204] Conversely, states 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 in 2018).[205] As this suggests, constitutional rights may be more effective when complemented by supportive architecture. Good policy, political will, adequate resourcing, and the development of sound institutional frameworks are also required.[206]

Several considerations should be borne in mind, especially in relation to judicially enforceable constitutional environmental rights. First, proper drafting 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. Because of their polycentric nature, courts may be cautious in enforcing vague environmental rights, especially those that are constitutionally entrenched. Second, many constitutions are silent on how environmental rights are enforceable. Even where citizens can initiate claims to have environmental rights enforced, uncertainty may discourage vindication of such rights by litigation.[207] Third, standing rules may also need to be relaxed. Without broad or open standing to enforce rights, constitutional protection becomes arbitrary and discretionary. In countries with restrictive standing rules, access to justice is often limited to individuals who are personally and directly affected by the contravention of an environmental right. The problem, as some commentators have noted, is that the effects of

202 Jeffords and Gellers, 'Constitutionalizing Environmental Rights' (n 104) 143.

203 Jeffords and Minkler (n 196) 294.

204 Zachary A Wendling et al, *2018 Environmental Performance Index* (Yale Center for Environmental Law and Policy, 2018) vii.

205 Ibid.

206 Jeffords and Minkler (n 196) 294, 298. See also Rebecca Schiel, Malcolm Langford and Bruce M Wilson, 'Does It Matter: Constitutionalisation, Democratic Governance, and the Human Right to Water' (2020) 12(2) *Water* 350.

207 See Boyd, *Environmental Rights Revolution* (n 19) 74–5.

environmental harm on communities and populations are often indirect as a result of direct harm to the environment.[208]

Fourth, 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.[209] Without a culture of compliance and transparency, and the political will to prioritise and implement environmental protections, even the most robust environmental rights may ultimately prove pyrrhic. Many constitutional environmental rights lie dormant by reason of political inertia and economic constraints. For example, the *South African Constitution* guarantees a right to a clean environment, and provides for open standing and access to the Constitutional Court of South Africa,[210] but that Court has yet to enforce that right.[211]

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. In South Africa again, the Constitution enshrines 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'.[212] In *Mazibuko v City of Johannesburg*, the Constitutional Court of South Africa held that the measure of the State's compliance with the requirement to achieve progressive realisation was to be assessed on the reasonableness of its efforts, and not its success.[213] Perhaps it is for this reason that in 2014, the South African Human Rights Commission reported that 11% of households do not have any sanitation,[214] despite that right being seemingly constitutionally protected.

[208] See Hadeel Al-Alosi and Mark Hamilton, 'The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context' (2019) 42(4) *University of New South Wales Law Journal* 1460, 1466.

[209] *Environmental Rule of Law* (n 20) 3.

[210] *South African Constitution* (n 110) ss 24, 28.

[211] May and Daly, *Judicial Handbook* (n 184) 177. See also Loretta Feris, 'Constitutional Environmental Rights: An Under-Utilised Resource' (2008) 24(1) *South African Journal on Human Rights* 29.

[212] *South African Constitution* (n 110) s 27.

[213] [2010] ZACC 28, 83–4 [161]–[162] (O'Regan J).

[214] South African Human Rights Commission, *Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014* (Report, 2014) 13.

III Environmental Rights within the Australian Constitutional Framework

A *Federal*

Constitutions across the globe recognise the importance of the environment. Australia is an outlier. The *Constitution* contains few express direct individual or general rights protections and no environmental rights are either explicitly or implicitly protected under the *Constitution*.[215] The Commonwealth Parliament also has no express power to make laws with respect to environmental management or protection. At the time of the Constitutional Convention debates, 'the concept of environmental protection and conservation, and indeed environmental law as a separate discipline, was unknown'.[216] In any event, Professor James Crawford has noted that if the drafters had considered the environment in any meaningful way, it is more likely that they would have 'emphasised the immensity of the continent, [and] the difficulties in "overcoming" it, rather than the fragility of many of its ecosystems or the problems in managing it once it had been "overcome"'.[217]

Notwithstanding the absence of express legislative power, the Commonwealth Parliament enjoys 'significant scope to make laws on environmental matters'.[218] Subject to limitations inherent to each head of power, it can regulate environmental activity through a range of other powers.[219] Most prominent is the external affairs power, which supported the legislation that prevented the damming of the Gordon River in Tasmania in the 1980s.[220] Other important powers that have operated to promote environmental protection include the

[215] See generally George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) ch 4; Justice Rachel Pepper, 'The Constitutionalisation of Water Rights: Solution or Levee?' (2011) 26(2) *Australian Environment Review* 34. Note that s 100 of the *Constitution* refers to the reasonable use of the 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.

[216] Peter Johnston, 'The Constitution and the Environment' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 79, 79.

[217] James Crawford, 'The Constitution' in Tim Bonyhady (ed), *Environmental Protection and Legal Change* (Federation Press, 1992) 1, 2.

[218] Sangeetha Pillai and George Williams, 'Commonwealth Power and Environmental Management: Constitutional Questions Revisited' (2015) 32(5) *Environmental Planning and Law Journal* 395, 408.

[219] Ibid 397. See also James Crawford, 'The Constitution and the Environment' (1991) 13(1) *Sydney Law Review* 11.

[220] *Tasmanian Dam Case* (n 1).

corporations power, the taxation power, and the trade and commerce power.[221] These powers are valuable but any protection they offer is ancillary. They do not allow the Parliament to pass legislation to directly protect or promote environmental interests without a sufficient connection to a constitutional head of power. Nor do they entitle an individual to seek a freestanding remedy for environmental harm. At best, they can provide a legislative power to protect environmental interests where those interests intersect with the subject matter of the head of power.

1 *Rights Drawn from International Law*

The absence of express environmental rights protection in the *Constitution* does not mean that a right to a healthy environment may not exist. Such a right could be drawn from international instruments that Australia has ratified. Although global human rights treaties largely do not expressly cover environmental protection, United Nations treaty bodies have drawn out implied environmental rights from the text of those instruments.[222] As noted above, in *General Comment No 14*, the CESCR explained that the individual right to the highest attainable standard of physical and mental health encompasses an obligation on the state to promote the social determinants of health, including 'a healthy environment'.[223] The Human Rights Committee has similarly noted the interrelationship between environmental protection and the right to life.[224]

Australia is a party to the *ICESCR* and the *ICCPR* and is therefore required by international law to meet its obligations under both Covenants. While States Parties are only required to 'take steps' to achieve the 'progressive realization' of the relevant rights under the *ICESCR*, the CESCR has noted that states must 'move as expeditiously and effectively as possible towards that goal'.[225] Consequently, at international law, Australia must take steps to promote a healthy environment as part of its obligations to meet the right to health. Similarly, under art 2(1) of the *ICCPR*, Australia must 'respect' and 'ensure' all people within its territory and subject to its jurisdiction enjoy the protected rights.[226]

221 Pillai and Williams (n 218) 397.

222 See above Part II(A).

223 *General Comment No 14*, UN Doc E/C.12/2000/4 (n 55) 2 [4].

224 *General Comment No 36*, UN Doc CCPR/C/GC/36 (n 56) 14–15 [62].

225 Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant)*, UN Doc E/1991/23 (14 December 1990) 85 [9].

226 Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 4 [10].

Two challenges exist. First, enforcement is difficult. Australia has not incorporated the *ICESCR* or the *ICCPR* into domestic law so the judiciary cannot consider the specific provisions of the Covenants.[227] Further, while failure to meet obligations under the Covenants ordinarily leaves open the potential of international enforcement, Australia has not signed or ratified the *Optional Protocol* to the *ICESCR*.[228] As such, individuals who claim that their right to a healthy environment has been violated and who have exhausted all available domestic remedies are unable to submit a complaint to the CESCR. The situation is different for the *ICCPR* but enforcement difficulties remain. Australia has ratified the *Optional Protocol* to the *ICCPR*, enabling individuals to submit a written complaint to the United Nations Human Rights Committee.[229] Relying on this avenue, in 2019 a group of Torres Strait Islander people submitted a complaint alleging that Australia's failure to take adequate steps to reduce carbon emissions or pursue adaptation measures on the low-lying islands has violated their rights to life, private and family life, and culture under arts 6, 17 and 27 of the *ICCPR*, respectively.[230] The claim is currently pending, but in August 2020 reports indicated that Australia asked the Committee to dismiss the petition.[231] Australia's submission is telling. Even if the Human Rights Committee finds for the Torres Strait Islander petitioners, there is no legal requirement on Australia to accept its recommendations. Indeed, Remedy Australia, a non-governmental organisation that tracks Australia's compliance with UN decisions,

227 *Kioa v West* (1985) 159 CLR 550, 570–1 (Gibbs CJ).

228 *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 10 December 2008, 48 ILM 256 (entered into force 5 May 2013) art 2; 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *United Nations Treaty Collection* (Web Page, 15 October 2020), archived at <https://perma.cc/GSE7-9R82>.

229 *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2.

230 Kristen Lyons, 'Torres Strait Islanders Ask UN to Hold Australia to Account on Climate "Human Rights Abuses"', *The Conversation* (Web Page, 27 May 2019) <https://theconversation.com/torres-strait-islanders-ask-un-to-hold-australia-to-account-on-climate-human-rights-abuses-117262>, archived at <https://perma.cc/M78S-RDCK>. See generally Miriam Cullen, '"Eaten by the Sea": Human Rights Claims for the Impacts of Climate Change upon Remote Subnational Communities' (2018) 9(2) *Journal of Human Rights and the Environment* 171.

231 Katharine Murphy, 'Australia Asks UN to Dismiss Torres Strait Islanders' Claim Climate Change Affects Their Human Rights', *The Guardian* (online, 14 August 2020) <https://www.theguardian.com/australia-news/2020/aug/14/australia-asks-un-to-dismiss-torres-strait-islanders-claim-climate-change-affects-their-human-rights>, archived at <https://perma.cc/U7LY-QHKB>.

has calculated that Australian breaches identified by the [Human Rights Committee] have been met with an adequate remedy in only 13% of cases.[232]

Second, it is not clear that the recommendations of United Nations treaty bodies would even be considered by the judiciary.[233] In *Maloney v The Queen*, the High Court considered a challenge to s 168B of the *Liquor Act 1992* (Qld), which restricted the possession of alcohol in an Indigenous community.[234] Maloney alleged that the law was racially discriminatory in breach of s 10 of the *Racial Discrimination Act 1975* (Cth) ('*RDA*'). In response, Queensland contended that if the law was racially discriminatory, it was a 'special measure' for the purposes of s 8 of the *RDA* and therefore valid. Maloney disagreed, arguing in part that it could not be a special measure because it was introduced without sufficient consultation of the Bwgcolman (Palm Island) community.[235] The text of the *RDA* and the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*CERD*')[236] do not expressly require consultation with an affected ethnic or racial community.[237] However, pointing to recommendations of the *CERD* Committee, Maloney contended that 'considerable developments in international jurisprudence and international standard-setting' evidenced an evolved position at international law relevant for the construction of the *RDA*.[238]

The Court rejected this claim and downplayed the relevance of extrinsic international legal materials in interpreting Australia's treaty obligations. Chief Justice French considered that the output of international courts or tribunals 'may illuminate the interpretation of [a treaty] provision', but it 'does not mean that Australian courts can adopt "interpretations" which rewrite the

232 Harry Hobbs and George Williams, 'Protecting Religious Freedom in a Human Rights Act' (2019) 93(9) *Australian Law Journal* 721, 723; 'Complaints Upheld against Australia', *Remedy Australia* (Web Page) <https://remedy.org.au/cases/>. See also George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (NewSouth, 4th ed, 2017) 86.

233 See generally Patrick Wall, 'The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15(1) *Melbourne Journal of International Law* 1.

234 (2013) 252 CLR 168 ('*Maloney*').

235 Ibid 255 [234] (Bell J).

236 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 212 (entered into force 4 January 1969).

237 For suggestions as to why this is the case, see Rachel Gear, 'Alcohol Restrictions and Indigenous Australians: The Social and Policy Implications of *Maloney v The Queen*' (2014) 21 *James Cook University Law Review* 41, 49.

238 Joan Monica Maloney, 'Appellant's Submissions', Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 12 [53] ('Appellant's Submissions'). Maloney also drew on comments in *Gerhardy v Brown* (1985) 159 CLR 70, 135 (Brennan J): Maloney, Appellant's Submissions (n 238) 12–13 [51].

incorporated text'.[239] Justice Kiefel held similarly, noting that courts can rely on extraneous materials to aid interpretation only where they 'can be accommodated in the process of construing the domestic statute' and have been agreed to by Australia.[240] Other members of the Court were less accommodating. Justice Hayne held that only material that 'existed at the time the *RDA* was enacted' would be relevant,[241] and Crennan J denied any role to such material. To do otherwise would 'elevate non-binding extraneous materials over the language of the text of an international convention to which States Parties have agreed'.[242] As Bell J warned, the ordinary meaning of the statute 'cannot be supplemented' by additional non-binding criteria.[243] While the Court adopted a more flexible approach to extrinsic international legal materials in a subsequent case,[244] its reluctance to engage with the output of United Nations treaty bodies in *Maloney* suggests that obligations drawn from international human rights treaties that do not expressly incorporate environmental protections may be difficult to sustain environmental rights in Australia.

To avoid these complications, it may be simpler to focus on human rights treaties that expressly encompass environmental rights protection. As noted above, both the *CEDAW* and the *CRC* include specific provisions obligating States Parties — including Australia — to ensure that women and children enjoy some level of environmental protection. Under art 2(1) of the *CRC* and art 3 of the *CEDAW*, Australia must respect, protect and fulfil the rights set forth in each Convention to all women and children in their jurisdiction. Both require that Australia refrain from taking any measures that would violate these rights, take action to ensure that these rights are not inhibited by third parties, and adopt appropriate measures, including legislative, judicial, administrative, and educative action in order to fulfil their legal obligations.[245] Without incorporating the particular language of these Conventions into domestic law,

239 *Maloney* (n 234) 185 [23].

240 Ibid 235 [175].

241 Ibid 199 [61].

242 Ibid 222 [134].

243 Ibid 256 [235].

244 Patrick Wall, 'A Marked Improvement: The High Court of Australia's Approach to Treaty Interpretation in *Macoun v Commissioner of Taxation* [2015] HCA 44' (2016) 17(1) *Melbourne Journal of International Law* 1, 13–14.

245 Committee on the Elimination of Discrimination against Women, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, UN Doc CEDAW/C/GC/28 (16 December 2010) 3 [9], 5 [20], 6 [25]; Committee on the Rights of the Child, *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, Para 6)*, UN Doc CRC/GC/2003/5 (27 November 2003) 1–2 [1].

however, Australian courts may nonetheless continue to find it difficult to apply these rights.

2 *Rights Drawn from the Text and Structure of the* Constitution

Drawing directly from international law is difficult. It is possible that environmental rights could be implied from the text and structure of the *Constitution*.[246] While there are few positive express rights provided for in the document, '[a]n astonishing feature' of the High Court's 'jurisprudence has been the number of rights-related protections it has been able to weave from the yarn of the *Constitution*'.[247] These include rights drawn from the constitutional system of representative and responsible government such as the freedom of political communication,[248] and the right to universal adult suffrage (subject to limited exceptions),[249] as well as certain due process rights drawn from the separation of judicial power.[250]

Judicial consideration could expand our understanding of these principles by potentially grounding substantive or procedural environmental rights. Implications drawn from representative and responsible government appear most fruitful in this regard. In several cases beginning in the early 1990s, the High Court found that the text and structure of the *Constitution* impliedly protects peoples' freedom to communicate on political or governmental matters in order that they may 'exercise a free and informed choice as electors'.[251] That freedom operates to invalidate legislation otherwise within a constitutional head of power that would impermissibly burden the freedom. It also operates to invalidate legislation that would 'deny the electors and their representatives

[246] For a novel approach drawing an 'ecological limitation' to 'restrain Commonwealth or State legislative and executive action burdening Australia's habitability if that action compromises the structural integrity of the Australian constitutional system', see: Constantine Avgoustinos, 'Climate Change and the Australian Constitution: The Case for the Ecological Limitation' (PhD Thesis, The University of New South Wales, 2020) 6.

[247] Williams and Hume (n 215) 2.

[248] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*'); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*').

[249] *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

[250] See generally Williams and Hume (n 215) 365–75; Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31(3) *Sydney Law Review* 411; Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32(2) *Federal Law Review* 205.

[251] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*'). See also *ACTV* (n 248); *Nationwide News* (n 248); *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104; *McGinty v Western Australia* (1996) 186 CLR 140.

information concerning the conduct of the executive branch of government throughout the life of a federal Parliament'.[252]

Several cases on the implied freedom have concerned environmental protection, but environmental management or environmental rights have not formed the basis of any decision. Rather, environmental issues have proven suitable vehicles to explore the scope of the freedom. In *Levy v Victoria*, for instance, the High Court heard a challenge to regulations prohibiting access to duck hunting areas during the hunting season.[253] The plaintiff argued that the regulations prevented him from entering the area to protest the practice of duck hunting and thereby ensure 'that the people of Victoria could form informed political judgments about the position of the Victorian Government on the issues'.[254] The Court dismissed these arguments without exploring the merits of duck hunting or environmental protection more broadly.

More recently in *Brown v Tasmania* ('*Brown*'),[255] the High Court considered whether a Tasmanian law prohibiting persons from engaging in protest activities on and around forestry land and land on which forestry activities were being undertaken,[256] impermissibly burdened the freedom. By 5:2, the Court held that the law was invalid. Each of the five justices that formed the majority in *Brown* recognised the link between environmental issues and political communication. As Kiefel CJ, Bell and Keane JJ acknowledged: '[P]ublic debate about environmental issues generally is relevant to both State and federal politics. Public debate about environmental issues in Tasmania has featured prominently in previous federal campaigns'.[257]

However, the consequences of forestry on ecosystems in Tasmania was not at issue. Central to the decision was whether the purpose of the law was compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and whether it was reasonably appropriate and adapted to advance that objective.[258]

Neither of these cases turned on environmental issues, but a range of procedural and perhaps substantive environmental rights could fall within the protection of the implied freedom. The potential scope is, at this stage, narrow. The Court has been clear that the implied freedom is not an individual freestanding

252 *Lange* (n 251) 561.

253 (1997) 189 CLR 579.

254 Ibid 580.

255 (2017) 261 CLR 328 ('*Brown*').

256 *Workplaces (Protection from Protestors) Act 2014* (Tas).

257 *Brown* (n 255) 347 [34] (Kiefel CJ, Bell and Keane JJ). See also 387 [191] (Gageler J), 399–400 [239]–[240] (Nettle J).

258 Ibid 363–4 [104] (Kiefel CJ, Bell and Keane JJ), 375–6 [156] (Gageler J).

right.[259] It is a limited mechanism that prohibits legislation that interferes with the capacity of electors to make a free and informed choice. Nonetheless, we have seen that international and comparative courts have identified some environmental rights as preconditions to the realisation of recognised human rights, such as the right to life. Could the High Court find that certain environmental protections are 'essential to sustain the system of representative government prescribed by the *Constitution*'[260] or 'necessary to preserve and protect the system of representative and responsible government mandated by the *Constitution*'?[261] In other words, as Chris Bleby, the former Solicitor-General of South Australia has recently asked: 'what does representative and responsible government require?'[262]

Clearly, representative and responsible government requires some level of a healthy environment. It is arguable that, for example, electors cannot exercise a free and informed choice if catastrophic bushfires have destroyed election infrastructure. Could this be extended to find that approval of an industrial project forecasted to contribute significant greenhouse gas emissions, or a manifestly inadequate climate policy and renewable energy legislative regime, would violate the implied freedom? The Dutch Supreme Court has essentially found this in relation to the right to life.[263] However, while representative and responsible government may well be conditioned on the existence of a healthy environment, that connection is likely too remote for an Australian court at present. As the United Nations Office of the High Commissioner of Human Rights has explained, it is 'virtually impossible to disentangle the complex causal relationships' between specific actions (or inactions) and 'a specific climate change-related effect'.[264] It is also 'often impossible' to establish whether climate change is solely attributable to extreme weather events,[265] such as bushfires.

259 *Lange* (n 251) 560.

260 *ACTV* (n 248) 149 (Brennan J).

261 *Comcare v Banerji* (2019) 372 ALR 42, 51 [20] (Kiefel CJ, Bell, Keane and Nettle JJ).

262 CD Bleby, 'Community Interests in Australian Constitutional Law: Thinking beyond Individual Rights' (Conference Paper, South Australian Bar Association Conference, 22 February 2020) 21 (emphasis omitted).

263 *Urgenda Foundation* (n 160).

264 Human Rights Council, *Relationship between Climate Change and Human Rights* (n 54) 23 [70].

265 Ibid. Note, however, that Kent Blore draws attention to a recent decision of the Supreme Court of Victoria which potentially expands the question of causation. In *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441, Kent Blore notes that J Dixon J held that human rights 'may be limited by a [particular] decision, even though a subsequent act or decision … [is] the operative cause of the impact on the human right': Kent Blore, 'Climate Change and Human Rights under the Australian Charters', *Australian Public Law* (Blog Post, 3 April 2020) <https://auspublaw.org/2020/04/climate-change-and-human-rights-under-the-australian-charters/>, archived at <https://perma.cc/HN5P-TXD2>.

It may be different for procedural environmental rights. Procedural environmental rights are generally understood as comprising three sorts of rights: the right to information; the right to participate; and, the right to a judicial remedy.[266] The first of these appears most promising. Accurate information concerning whether Australia is 'meeting, [and] beating' its commitments under the *Paris Agreement*,[267] the expected number of ongoing jobs arising out of mining projects,[268] and the relative costs of climate action (and inaction),[269] all concern political and governmental matters and are necessary for electors to make an informed choice. Consequently, laws that inhibit that access — potentially including freedom of information laws that allow the government to avoid or unreasonably delay providing that access — could be found inconsistent with the implied freedom. This is especially significant in circumstances where the percentage of freedom of information requests refused by government agencies within environment-related portfolios has increased by nearly 50% over the past five years, delays beyond statutory deadlines are common, and costs charged are considerable.[270]

Three complications exist. First, even though these procedural rights could promote environmental interests, their grounding is the capacity of electors to make an informed choice. Environmental protection is only indirect and to the extent necessary to protect the constitutional system of representative and responsible government. Second, any protection is likely to be restricted to negative rights; that is, a right affording protection from an exercise of governmental power rather than a personal right. Finally, they do not apply to private actors. In the example above, access to information on the forecasting of private sector jobs from a particular mining project would be limited to information that the government holds. It would not extend to requiring a private company to

[266] Birgit Peters, 'Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention' (2018) 30(1) *Journal of Environmental Law* 1, 2.

[267] Michael Taylor, 'Australia Confident of "Beating" Paris Climate Deal Targets, Says Minister', *Reuters* (Web Page, 23 April 2018), archived at <https://perma.cc/NP2W-ARUV>.

[268] See, eg, Lisa Cox, 'Adani Jobs Explained: Why There Are New Questions over Carmichael Mine', *The Guardian* (online, 5 June 2019) <https://www.theguardian.com/environment/2019/jun/05/adani-jobs-explained-why-there-are-new-questions-over-carmichael-mine>, archived at <https://perma.cc/RK3D-HQAU>.

[269] See, eg, Brett Worthington, 'Climate Change Costings a Cause for Concern as Coalition Ups Its Attack on Labor's Commitments', *ABC News* (Web Page, 19 April 2019) <https://www.abc.net.au/news/2019-04-18/federal-election-bill-shorten-thumb-wrestling-scott-morrison/11029810>, archived at <https://perma.cc/FTB4-RMLN>.

[270] Australian Conservation Foundation, *Access Denied: How Australia's Freedom of Information Regime is Failing Our Environment* (Report, 15 January 2021) 2.

disclose that information. Given these limitations, the scope for constitutional environmental protection in Australia at a Commonwealth level remains limited.

B *States and Territories*

The situation may be different at the state and territory level. No state constitution or territory self-government Act contains environmental rights, but three jurisdictions have enacted a statutory charter of rights which could form the basis for such protection. While the *Human Rights Act 2004* (ACT) ('*ACT HRA*'), *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*'), and the *Human Rights Act 2019* (Qld) ('*Queensland HRA*'), do not expressly protect the environment, creative judicial (and political) evolution could develop along these lines.[271]

The *ACT HRA*, *Queensland HRA* and *Victorian Charter* protect a number of key rights. These include the right to life,[272] the right to take part in public life,[273] the right to peaceful assembly and association,[274] and the protection of families and children.[275] As noted in Part II, international human rights tribunals and treaty bodies, as well as municipal courts in comparative states, have uncovered implied environmental rights as necessary to fulfil these obligations. It is not a stretch to consider that a similar evolutionary approach to statutory interpretation could be adopted in Victoria, Queensland or the Australian Capital Territory ('ACT'). Other opportunities may also present themselves. All three statutes provide for the protection of cultural rights, which specifically refer to the right of Aboriginal and Torres Strait Islander peoples to maintain their spiritual, material and economic relationships with the land.[276] An approval granted to an extractive industry where the operation of that industry

[271] On whether a human rights claim could be pursued under the *Human Rights Act 2019* (Qld), see Justine Bell-James and Briana Collins, 'Queensland's *Human Rights Act*: A New Frontier for Australian Climate Change Litigation?' (2020) 43(1) *University of New South Wales Law Journal* 3. For clear analysis exploring all three statutory charters, see Blore (n 265). Note also that in *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33, Kingham P refused Waratah Coal's application to strike out a number of objections to its Galilee Coal Project that rely on the *Queensland HRA* (n 272). President Kingham found that the Land Court has jurisdiction to consider objections made pursuant to the Act.

[272] *Human Rights Act 2004* (ACT) s 9 ('*ACT HRA*'); *Human Rights Act 2019* (Qld) s 16 ('*Queensland HRA*'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 9 ('*Victorian Charter*').

[273] *ACT HRA* (n 272) s 17; *Queensland HRA* (n 272) s 23; *Victorian Charter* (n 272) s 18.

[274] *ACT HRA* (n 272) s 15; *Queensland HRA* (n 272) s 22; *Victorian Charter* (n 272) s 16.

[275] *ACT HRA* (n 272) s 11; *Queensland HRA* (n 272) s 26; *Victorian Charter* (n 272) s 17.

[276] *ACT HRA* (n 272) s 27; *Queensland HRA* (n 272) ss 27, 28; *Victorian Charter* (n 272) s 19.

impinges upon an Indigenous person's spiritual relationship with the subject land may be incompatible with that right.[277] Each Act also protects a range of procedural rights necessary in the promotion and enforcement of substantive environmental rights.[278]

Once again, complications exist. As part of the 'new Commonwealth model of constitutionalism',[279] these Acts do not impose firm constitutional limits on legislative power. Rather, they invite political actors to engage in rights discourse by reviewing proposed laws for compatibility with human rights, justifying any limitations, and overriding judicial decisions through ordinary lawmaking processes.[280] For this reason, these Acts afford little by way of substantive enforceable stand-alone rights. 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 human rights legislation.[281] That statement must be considered prior to the bill being passed.[282] Failure to comply with the requirement to provide a statement of compatibility has no consequence for the validity of the law.[283] Moreover, under the *Victorian Charter* and *Queensland HRA* there is provision for the Parliament to make an 'override declaration' in respect of legislation, so that it has effect despite any incompatibility with a statutory human right.[284] Further, while in all three jurisdictions 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,[285] this declaration has no impact on the validity of the law.[286] Where such a declaration is made, the Minister administering the relevant Act (or the Attorney-General in the ACT) must prepare a written response

277 For a further discussion on the scope and depth of an Indigenous person or group's connection with land, see *Northern Territory v Griffiths* (2019) 364 ALR 208.

278 See, eg, *ACT HRA* (n 272) s 21; *Queensland HRA* (n 272) s 31; *Victorian Charter* (n 272) s 24, which provide for the right to a fair hearing.

279 Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013) 1.

280 See generally Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016) ch 11; Janet L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69(1) *Modern Law Review* 7; Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-Making' (2007) 33(1) *Monash University Law Review* 9.

281 *ACT HRA* (n 272) s 37; *Queensland HRA* (n 272) s 38; *Victorian Charter* (n 272) s 28.

282 *ACT HRA* (n 272) s 38; *Queensland HRA* (n 272) s 39; *Victorian Charter* (n 272) s 30.

283 *ACT HRA* (n 272) s 39; *Queensland HRA* (n 272) s 42; *Victorian Charter* (n 272) s 29.

284 *Queensland HRA* (n 272) ss 43–4; *Victorian Charter* (n 272) s 31.

285 *ACT HRA* (n 272) s 32(2); *Queensland HRA* (n 272) s 53(2); *Victorian Charter* (n 272) s 36(2).

286 *ACT HRA* (n 272) s 32(3); *Queensland HRA* (n 272) s 54; *Victorian Charter* (n 272) s 36(5).

and table it before Parliament within six months.[287] Only two declarations have ever been made: one under the *ACT HRA* and the other under the *Victorian Charter*.[288]

Each Act also inhibits litigants' ability to seek standalone remedies. 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.[289] 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 Acts, to seek relief (excluding damages) in respect of the impugned decision or act of the public authority.[290] Thus, the *Victorian Charter* and the *Queensland HRA* 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.[291] The *ACT HRA* is more expansive. It 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.[292] 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.[293]

These apparent limitations make sense given that the judiciary is not the major focus of each Act; they are directed to the political branch of government. Significantly, reviews of the *ACT HRA* and *Victorian Charter* suggest that they have had a meaningful impact in the policy arena, improving decision-making

287 *ACT HRA* (n 272) s 33(3); *Queensland HRA* (n 272) s 56(1)(b); *Victorian Charter* (n 272) s 37.

288 The declarations were made in *R v Momcilovic* (2010) 25 VR 436 and *Re Application for Bail by Islam* (2010) 4 ACTLR 235.

289 *ACT HRA* (n 272) s 40B(1); *Queensland HRA* (n 272) s 58(1); *Victorian Charter* (n 272) s 38(1).

290 *Queensland HRA* (n 272) s 59; *Victorian Charter* (n 272) s 39.

291 Explanatory Memorandum, Human Rights Bill 2018 (Qld) 7–8. See generally Jack Maxwell, 'The Obligations of Public Authorities under the Victorian Charter of Human Rights and Responsibilities', *Australian Public Law* (Blog Post, 9 February 2016) <https://auspublaw.org/2016/02/the-obligations-of-public-authorities-under-the-victorian-charter-of-human-rights-and-responsibilities/>, archived at <https://perma.cc/Z2LC-HHNP>.

292 *ACT HRA* (n 272) s 40C.

293 George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland?: Lessons from Recent Australian Experience' (2016) 41(2) *Alternative Law Journal* 81, 83.

and raising the awareness of human rights within government bodies.[294] Nonetheless, it is not clear to what extent policymakers are considering environmental rights as preconditions to the effective realisation of the rights protected in each Act. Given that environmental rights are increasingly being perceived as an aspect of basic human rights around the globe, the necessity to protect the environment should be considered by scrutiny committees, parliamentary drafters and public entities.

IV The Future of Constitutional Environmental Rights in Australia

In 2008, at a dinner marking the 25th anniversary of the *Tasmanian Dam Case*, Prime Minister Bob Hawke reflected on the relationship between environmental protection and human rights and issued this challenge to the audience: 'The Gordon-below-Franklin … was, of course, a major issue. But, relatively speaking, it pales into insignificance, against the massive challenge that we as a world are facing now. The very question of survivability is at stake'.[295]

Internationally, although environmental law may be a 'relatively new field', it has experienced 'a remarkable growth'.[296] Today there are thousands of multilateral and bilateral environmental agreements addressing environmental problems,[297] and environmental rights are increasingly conceived as a key foundational precondition of human rights. This recognition is almost universal. Over 80% of the world's states explicitly protect environmental rights in their constitution, either directly or indirectly.[298] Although there are challenges in identifying causality, research has nevertheless demonstrated a material

[294] See, eg, Victorian Equal Opportunity and Human Rights Commission, *2017 Report on the Operation of the Charter of Human Rights and Responsibilities* (Report, August 2018) 26–7; Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33(1) *University of New South Wales Law Journal* 136, 141–5.

[295] Bob Hawke, 'Address for the 25th Anniversary of the Franklin River Decision' (Speech, Hobart, 1 July 2008) 12:32–12:53 <https://www.abc.net.au/reslib/200807/r267725_1121525.mp3>, archived at <https://perma.cc/QDM3-FVS8>.

[296] Daniel Bodansky, Jutta Brunnée, and Ellen Hey, 'International Environmental Law: Mapping the Field' in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2008) 2, 2–3.

[297] See Ronald B Mitchell, 'IEA Project Contents', *International Environmental Agreements (IEA) Database Project* (Web Page) <https://iea.uoregon.edu/iea-project-contents>, archived at <https://perma.cc/V2AS-UH54>.

[298] See above nn 92–4 and accompanying text.

connection between constitutionally enshrined environmental rights and improved environmental outcomes at the domestic level.[299]

Domestically, by contrast, the Australian legal landscape is rather barren and the response to the challenge laid down by Hawke has been somewhat mute. Neither the Commonwealth, state or territory constitutions, nor any self-government Act, guarantees environmental rights. While parliaments enact legislation to protect environmental interests, there is often limited ability for individuals or communities affected by decisions to directly challenge government action on that basis. This situation is unlikely to change in the near future. The potential for implied rights to be drawn from the text and structure of the *Constitution* appears remote, and the creation of new rights through constitutional amendment is equally fraught.[300]

In the absence of an ability to entrench constitutional environmental rights at the Commonwealth level, there may be scope for state and territory bills of rights to implicitly provide a measure, albeit qualified, of environmental protection. Limitations persist, however, and such protection is not judicially enforceable. Constitutional amendment at the state and territory level may assist, but such amendment is rare,[301] and if not entrenched by manner and form provisions, any protection can be amended or abolished by ordinary legislation.[302]

Australian law is presently ill-suited to the times. As our climate emergency rapidly escalates, having an ever more direct and immediate deleterious impact on the very environment that we depend upon for the full enjoyment of our human rights, the necessity to afford meaningful and enduring protection to the environment becomes ever more pressing.[303] As another politician observed over three decades ago:

> 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. … [T]he evidence is there. The damage is being done. … 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

[299] See above Part II(B)(4).

[300] See generally Harry Hobbs and Andrew Trotter, 'The Constitutional Conventions and Constitutional Change: Making Sense of Multiple Intentions' (2017) 38(1) *Adelaide Law Review* 49. There have only been 8 successful referendums out of 44 proposals: at 49.

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

[302] *McCawley v The King* [1920] AC 691, 714 (Lord Birkenhead LC for the Court) (Privy Council).

[303] Gearty (n 27) 21. See also Rebecca Nelson, 'Breaking Backs and Boiling Frogs: Warnings from a Dialogue between Federal Water Law and Environmental Law' (2019) 42(4) *University of New South Wales Law Journal* 1179.

> destruction of forests and the accumulation of greenhouse gases. … [T]he 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.[304]

The remarks made by Prime Minister Margaret Thatcher are as apposite today as they were in 1989.

[304] Margaret Thatcher, 'Speech to United Nations General Assembly' (Speech, United Nations, 8 November 1989).