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

Conceptualising Environmental Rights as Human Rights

1 It is not the “raving” of some “inner-city lunatic” to state what is surely, as Australia burns, obvious: that environmental harm can cause human harm, and in doing so, is highly likely to adversely impact upon human rights.

2 Such a claim is neither novel nor “woke”. The symbiotic relationship between environmental protection and human rights has been recognised internationally since at least 1972, when the Stockholm Declaration declared that a healthy environment is essential to “the enjoyment of basic human rights and the right to life itself”.³

3 Nevertheless, our exploitation of nature for benefit, principally financial, has continued since at least our mastery of fire. It has become so pernicious and so pervasive that it is now an existential threat.⁴ The climate crisis of the Anthropocene age is upon us.

4 The 2019 report of the Intergovernmental Panel on Climate Change (“IPCC Report”) describes the predicted trajectory of the environmental catastrophe that we will face over the next century. For example, under the various scenarios considered by the IPCC, including those in which emissions are significantly reduced, by 2050 low-lying megacities and small islands are projected to experience extreme high sea level events annually.⁵ Historically, these events occurred once a century.

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

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


Such disasters will create large groups of displaced people, destroy infrastructure, and compromise our food supply. This will directly compromise the most basic of human rights of those affected, including the right to self-determination, the right to life, the right to food and water, the right to housing and shelter, and the right to security.\(^6\)

The IPCC Report also highlights the destructive impact that the warming of the oceans will have on ecosystems; threatening food security, income, and livelihoods. For example, scientists predict that if current fishing practices continue, all commercially targeted fish species will “suffer population collapse by 2048”.\(^7\) That is less than 30 years from now.

Destruction of the natural environment will have a particularly devastating effect on those indigenous communities who rely on natural resources for subsistence and cultural identity,\(^8\) preventing these groups from exercising their rights to practice and maintain their culture. The IPCC Report concluded that the detrimental impacts of marine warming will cause “potentially rapid and irreversible loss of culture and local knowledge and Indigenous knowledge, and negative impacts on traditional diets and food security, aesthetic aspects, and marine recreational activities”.\(^9\) Ocean ecosystem loss will undermine the ocean’s “role in cultural, recreational, and intrinsic values important for human identity and well-being”.\(^10\)

Air pollution is already undermining our human rights. In 2005 the European Court of Human Rights determined the case of Fedeyeva v Russia.\(^11\) The applicant alleged that the operation of a steel plant in close proximity to her home endangered her health and well-being, in contravention of Art 8 of the

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European Convention on Human Rights. Article 8 protects the right to private and family life. The Court accepted that the levels of toxic elements in the air caused by the operation of the plant, which had considerably exceeded safe levels over a long period of time, either caused or increased the applicant’s vulnerability to illness. The Court found that although Art 8 “is not violated every time environmental deterioration occurs”, the adverse effects of the environmental pollution in this case “reached a level sufficient to bring it within the scope of Article 8”.  

The Court held that the state had a positive obligation to take steps to prevent interference with her rights. The state was ordered to pay the applicant EUR 6,000 in damages, in addition to of her legal costs. The case is an early illustration of the ‘greening’ of human rights.

9 In light of the climate crisis that we currently face, should environmental rights be viewed through the prism of human rights? Would this give the former more force? More social acceptability? More political leverage?

10 The rhetoric of human rights offers a pre-existing, accepted framework from which to pursue environmental goals. Human rights are recognised in many treaties, constitutions, and statutes, and have a number of international, regional, and domestic institutions and frameworks in place to enforce them. A rights centred approach to environmental protection is arguably more able to leverage the inherent anthropocentrism of our legal system in a manner that results in tangible positive environmental outcomes. Put another way, environmental protection based on the established language of human rights is “more likely to be accepted in the current political climate” than arguments asserting rights possessed by nature in its own right.

11 A human rights conceptualisation of environmental protection has been criticised as being too anthropocentric, rather than ecocentric. This is because it posits the impact of environmental harm on humans, rather than flora and

12 Fadeyeva v Russia, 55723/00, § 52, ECHR 2005-IV [68], [88].
fauna, as its central focal point. The concern is that such an approach fails to recognise the value and importance of natural ecosystems beyond their use or benefit to humans; it posits a reduction of nature to no more than an “inanimate machine existing to serve human needs.”

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

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”. All communities and public authorities are obliged to protect this right.

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

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

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

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

**Human Rights Based Environmental Protections**

Substantive environmental obligations recognised by international law are rooted in the adoption of legal and institutional frameworks that seek to avoid environmental harm which has an impact on human rights.


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

Procedural rights are essential to the enforcement of substantive environmental rights. The seminal rights instrument, the Convention for the Protection of Human Rights and Fundamental Freedoms, protects procedural environmental rights such as the right to freedom of expression, the right to freedom of assembly and association, and the right to an effective remedy.

In addition, there is the right to information which is important because without it there can be no meaningful participation in environmental decision-making. The right to information is recognised in many environmental treaties and instruments, most notably Europe’s 1998 Aarhus Convention, and the Universal Declaration on Human Rights. It is so fundamental that it has been incorporated into the national law of many countries. Freestanding domestic freedom of information laws are common, and some countries, such as New Zealand and Mexico, are constitutionally enshrined.

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The right to public participation is another important procedural environmental right. It enables stakeholders to be involved in environmental decision-making by, for example, being entitled to make submissions, ask questions, and attend public meetings. This participation improves the quality and legitimacy of decision-making. Over 131 countries have constitutional provisions relating to the right to public participation.

Significantly, the UN Independent Expert Report found that the procedural human rights obligations of states are relatively established with respect to environmental protections. But when it comes to substantive human rights obligations offering environmental protection, the same cannot be said. And even in relation to procedural rights there are issues of implementation and enforcement.

Environmental Rights as Constitutional Rights

Does the domestic constitutional law of states offer a solution? That is, are rights that are either expressly or impliedly directed to the protection of the environment which are afforded constitutional status able to achieve better environmental outcomes?

Many countries have included explicit environmental rights in their constitutions. Alternatively, such rights are implied through the construction of human rights already contained in a constitution. A third approach is to include constitutional policy directives mandating specific environmental outcomes.

While there remains no international treaty which contains a right to a clean and healthy environment, as at January 2019, 150 countries have constitutionally recognised environmental protections.

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Domestic constitutional protection of environmental rights has distinct advantages over international protection beyond those of enforcement, because such protections are likely to be more locally adapted, and therefore, more readily perceived as acceptable.\(^{42}\) This is important because environmental rights are often required to be balanced against other rights, such as economic rights.\(^{43}\)

Unlike ordinary statutory regulation, constitutional protection has the benefit of longevity. Constitutions tend to endure beyond political cycles.\(^{44}\)

Constitutional recognition of environmental rights also has powerful normative and symbolic value. By framing environmental harm as a violation of fundamental constitutional rights, the legal legitimacy of these rights is augmented and reinforced.\(^{45}\) This is important because environmental decision-making is polycentric in nature, often trying to balance competing priorities.\(^{46}\) The perceived significance of breaching a constitutionally protected environmental right is far greater than other statutory rights.\(^{47}\) Moreover, the existence of constitutional environmental rights is a powerful incentive to develop sound environmental policy.\(^{48}\)

Nationally entrenched environmental rights are also a necessary adjunct to international law given the principle of customary law that states have permanent sovereignty over natural resources within their territory.\(^{49}\) This significantly limits the extent to which international law can provide environmental redress to individuals against the state.


Express Constitutional Recognition of Environmental Rights

30 Notwithstanding the lacuna in the Australian Constitution, the existence of express constitutional environmental rights is increasingly common. In fact, “almost every constitution adopted or revised since 1970, either states the principle that an environment of a specified quality constitutes a human right or imposes environmental duties on the state.”

31 The Constitution of the Ukraine enshrines a right to an environment that is “safe for life and health”. Hungary, Turkey, Indonesia, and Nicaragua entrench a right to a “healthy” environment, while South Africa specifies “an environment that is not harmful to…health or wellbeing”. South Korea uses the adjectival descriptor of “pleasant”, and the Philippines guarantees a “balanced and healthful ecology in accord with the rhythm and harmony of nature”. In Chile, the right is to an environment “free from contamination”. Some constitutions, including those of Kenya, Bolivia, South Sudan, and South Africa, explicitly extend substantive rights to future generations. Whereas other constitutional environmental rights are prescriptive. In Bhutan and Kenya, for example, the government is obliged to maintain a specified

53 The Fundamental Law of Hungary 2011, Art XXI.
54 Constitution of the Republic of Turkey 1982, Art 56.
56 Constitution of Nicaragua 1987, Art 60.
58 Constitution of the Republic of Korea 1987 (South Korea), Art 35.
59 The Constitution of the Republic of the Philippines 1987, ss 15 and 16 of Art II.
61 Constitution of Kenya 2010, Ch 42.
63 The Transitional Constitution of the Republic of South Sudan 2011, Art 41(3).
64 The Constitution of the Republic of South Africa 1996, s 24(b).
percentage of tree cover across the country (in Bhutan, 60% and in Kenya, 10%).

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

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

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

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

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.

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

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68 The Constitution of Eritrea (1997), Arts 8(2) and (3).
70 Juan Antonio Oposa v The Hon Fulgencio S Factoran, Jr (1993) (GR No 101083, 224 SCRA 792) at 8. See also Metropolitan Manila Development Authority v Concerned Residents of Manila Bay (2008) (GR Nos 171947-171948) per Davide JR.
Matanza-Riachuelo River. In a series of decisions relying on Art 41 of the Constitution, the Supreme Court of Argentina ordered the government to conduct an environmental assessment and to create and implement an educational program about wastewater, establish a comprehensive restoration and remediation plan, and ordered specific action, including scheduled inspections, the closure and clean-up of illegal dumps, and the improvement of sewerage treatment and stormwater discharge systems, with ongoing oversight by the Argentinian Federal Court of First Instance.

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

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

71 Mendoza Beatriz Silva v State of Argentina regarding damages suffered (injuries resulting from the environmental contamination of the Matanza-RiachueloRiver), M 1569 XL (8 July 2008) (Supreme Court of Argentina).
73 The Constitution of Kenya 2010, Ch 42.
providing rights to life and dignity, the Colombian Constitution provides that “every individual has the right to enjoy a healthy environment.” Twenty-five plaintiffs filed a complaint in the Court against the Colombian government, Colombian municipalities, and various corporations alleging that climate change, in combination with the government’s failure to ensure compliance with a target of net zero deforestation in the Colombian Amazon by 2020 (as agreed under the Paris Agreement and National Development Plan 2014-2018), threatened their fundamental rights and the rights of future generations. The Court upheld their complaint stating that “the increasing deterioration of the environment is a serious attack on current and future life and on other fundamental rights.” 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.

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

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

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77 Constitución Política de Colombia 1991, Ch II Art 11.
78 Constitución Política de Colombia 1991, Ch II Arts 21 and 51.
79 Constitución Política de Colombia 1991, Ch III Art 78.
81 Future Generations v Ministry of the Environment STC4360-2018 (4 May 2018) at 13 (Supreme Court of Colombia).
82 Future Generations v Ministry of the Environment STC4360-2018 (4 May 2018) (Supreme Court of Colombia).
nations, which are more likely to rely on the exploitation of natural resources and the development of primary industries for economic improvement.\textsuperscript{86} These countries tend to have newer constitutions, many having gained independence since the 1970s or having suffered political instability leading to the adoption of new constitutions or significant amendments to existing constitutions.\textsuperscript{87} These constitutions have tended to be more comprehensive in relation to human rights and environmental rights.\textsuperscript{88} Third, countries with stable political systems are less likely to have environmental protections included in their constitutions.\textsuperscript{89}

**Implied Constitutional Environmental Rights**

In countries with constitutionally enshrined human rights but no express environmental rights, superior courts have sometimes interpreted these rights to include environmental rights.\textsuperscript{90} for example, the right to life;\textsuperscript{91} the right to health;\textsuperscript{92} the right to food and water;\textsuperscript{93} and the right to dignity.\textsuperscript{94}

In 1995, proceedings were commenced in the Supreme Court of Nepal by citizens and non-government organisations challenging the operation of a marble factory in the Godavari forest on the basis that it had caused


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

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


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

41 Similarly, courts in India have construed the constitutional right to life to include a right to a healthy environment.\textsuperscript{97} Courts in Costa Rica,\textsuperscript{98} Bangladesh,\textsuperscript{99} and Pakistan\textsuperscript{100} have also held that a right to a healthy environment is necessary to ensure that the right to life is fully enjoyed.\textsuperscript{101}

42 By contrast, courts in the United States have rejected the argument that constitutional rights to life or liberty provide an implied right to a clean environment.\textsuperscript{102}

Constitutionally Mandated Environmental Protections

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


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


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

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

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


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

But aside from their vague and indeterminate content, these provisions are usually unenforceable. Courts in the Netherlands and Greece have therefore refused to recognise actionable substantive environmental rights from constitutional provisions requiring sound environmental policy.

Nevertheless, constitutional policy directives can assist in establishing environmental norms that can meaningfully influence the development of improved environmental policy and the creation of tangible enforceable rights.

For example, in India, Art 48A of the Constitution provides that the State “shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country”. This provision is drafted as a Directive Principle of State Policy which “shall not be enforceable by any court”. However, the Supreme Court of India has held that environmental protection is a necessary element of rights that do enjoy constitutional protection and is therefore enforceable.

The willingness of that Court to expand the scope of constitutional protection has not gone without criticism, with some commentators arguing that it has led to an institutional imbalance whereby the judiciary is relied upon to remedy the failure of the government to develop and implement policy. The Court was.

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

**The Efficacy of Constitutional Environmental Protections**

48 Although there has been an increase in the quantity of environmental laws in the last five decades, the UN Environment Programme has found that with respect to their efficacy, “government implementation and enforcement is irregular, incomplete, and ineffective”.111

49 Constitutional environmental rights alone are insufficient to achieve sound environmental outcomes: good policy, political will, adequate resourcing, and the development of supporting institutional frameworks is also required.112 Countries that have strong constitutional environmental rights protection do not necessarily enjoy strong environmental protection. For example, India was ranked 177 out of 180 countries on the Yale Centre for Environmental Law and Policy’s 2018 Environmental Performance Index (“EPI”). Bangladesh and Nepal were ranked 179 and 176 out of 180, respectively.113 Conversely, countries such as the United Kingdom and Iceland, which have no constitutionally entrenched environmental rights, have been recognised as having good environmental records (ranked 6 and 11 respectively out of 180 in 2018).114


Nevertheless, research has demonstrated that constitutional environmental rights can lead to beneficial environmental outcomes, especially in relation to the enactment of legislation directed at protecting the environment. A 2012 study found that 78 out of 92 countries which provide for a constitutional right to live in a healthy environment enacted domestic legislation to give effect to this right.\textsuperscript{115} Based on 2008 data, the study found that 116 countries with constitutional environmental rights had a materially smaller ecological footprint than 34 countries with no such rights.\textsuperscript{116} Similarly, a 2016 study found that the presence of constitutional environmental rights led to better scores on the EPI.\textsuperscript{117} The authors of that study suggest that constitutional environmental protection creates policy incentives to enact laws targeted at specific environmental issues.\textsuperscript{118}

For example, Argentina’s Constitution provides a right to a “balanced, healthful environment”, which has encouraged the promulgation of a plethora of environmental laws.\textsuperscript{119}

The proper drafting of constitutional environmental rights is important to maximise their beneficial operation. If the rights are ambiguous, their content uncertain or vague, or if they are not sufficiently adapted to local conditions, enforcement is likely to be more difficult.\textsuperscript{120} The greater the equivocation, the greater the need for court intervention. Courts will be understandably cautious in enforcing vague environmental rights, especially those that are constitutionally entrenched (either explicitly or implicitly). Thus the Supreme

\textsuperscript{116} Chris Jeffords and Lanse Minkler, ‘Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes’ (2016) 69(2) Kyklos 294, 300. Note, however, the limited scope of the ‘ecological footprint’ measure, which does not include measures for environmental health, ocean health, and other factors that can cause variation between nations.
\textsuperscript{120} United Nations Environment Programme, Environmental Rule of Law First Global Report (January 2019), 3.
Court of Nepal held that it was inappropriate to issue a writ of mandamus requiring a defendant to comply with a constitutional duty giving effect to the right to life, when it could not be inferred that the duty encompassed environmental degradation.\textsuperscript{121}

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

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

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.\textsuperscript{126} 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.\textsuperscript{127} Many constitutional environmental rights lie dormant by reason of economic, political, and financial inertia.\textsuperscript{128}

56 For example, South Africa’s Constitution guarantees a right to a clean environment, and provides for open standing and access to the Constitutional Court of South Africa, but that Court has yet to enforce that right.\textsuperscript{129} Notwithstanding Brazil’s strong stated environmental rights, environmental protection is secondary to economic demands.\textsuperscript{130}

57 Finally, environmental rights may not be enforced because the resources needed to do so are not available. The cost of vindicating environmental rights is often high. Extensive remediation by multiple entities (both public and private) may be required. Court supervision of such remediation may be necessary.\textsuperscript{131}

58 Again, South Africa’s Constitution includes a right to water and a requirement that the state “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights”. In \textit{Mazibuko v City of Johannesburg}, the Constitutional Court held that the measure of the state’s compliance with the requirement to achieve progressive realisation of constitutional rights was to be assessed on the reasonableness of its efforts, and not its success.\textsuperscript{132} Perhaps it is for this reason that in 2014 the South African Human Rights Commission reported

\begin{itemize}
\item \textsuperscript{127} United Nations Environment Programme, \textit{Environmental Rule of Law First Global Report} (January 2019), 3.
\item \textsuperscript{128} United Nations Environment Programme, \textit{Judicial Handbook on Environmental Constitutionalism} (March 2017), 177.
\item \textsuperscript{129} United Nations Environment Programme, \textit{Judicial Handbook on Environmental Constitutionalism} (March 2017), 177.
\item \textsuperscript{130} United Nations Environment Programme, \textit{Judicial Handbook on Environmental Constitutionalism} (March 2017), 177.
\item \textsuperscript{131} United Nations Environment Programme, \textit{Judicial Handbook on Environmental Constitutionalism} (March 2017), 7.
\item \textsuperscript{132} \textit{Lindiwe Mazibuko v City of Johannesburg} [2009] 4 SA 1 (Constitutional Court of South Africa).
\end{itemize}
that 11% of households do not have any sanitation,\textsuperscript{133} despite that right being seemingly constitutionally protected.\textsuperscript{134}

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

**Environmental Rights within the Australian Constitutional Framework**

**Federal**

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

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

\textsuperscript{137} Meg Good, ‘Implementing the Human Right to Water in Australia’ (2011) 30 *University of Tasmania Law Review* 107, 121.
Few rights have been implied into the constitution. For example, the freedom of political communication and certain voting rights.\textsuperscript{138}

Prof George Williams optimistically suggests that there is the potential for further rights to be implied in the Constitution. Williams argues that the structures and doctrines inherent in the Constitution - federalism, representative and responsible government, and the separation of powers - “can provide a foundation for the protection of rights”, even when those rights are not apparent on the face of any given provision.\textsuperscript{139}

But even assuming that further rights were to be implied into the Constitution (which is doubtful) implied rights are limited in significant ways. First, they are likely to be restricted to negative rights, that is, a right affording protection from an exercise of governmental power.\textsuperscript{140} Second, they are unlikely to offer any protection from environmental harm caused by the acts of private individuals.\textsuperscript{141}

Finally, the creation of new rights by amendment is not easy: only 18% of all proposed amendments to the Constitution have been successful (eight successful referendums out of 44 proposals).\textsuperscript{142}

Given these limitations, the scope for constitutional environmental protection in Australia at a Commonwealth level is extremely limited.

States

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

\begin{itemize}
\item \textsuperscript{139} George Williams, \textit{Human Rights under the Australian Constitution} (Oxford University Press, 1999), 51.
\item \textsuperscript{140} George Williams, \textit{Human Rights under the Australian Constitution} (Oxford University Press, 1999), 62-63.
\item \textsuperscript{141} George Williams, \textit{Human Rights under the Australian Constitution} (Oxford University Press, 1999), 61.
\item \textsuperscript{142} Peter Hanks, Frances Gordon and Graeme Hill, \textit{Constitutional Law in Australia} (LexisNexis Butterworths, 3\textsuperscript{rd} ed, 2012), 37.
\item \textsuperscript{143} Gerard Carney, \textit{The Constitutional Systems of the Australian States and Territories} (Cambridge University Press, 2006), 29.
\end{itemize}
provisions may be entrenched by manner and form requirements, but the States’ power to do this is usually limited to the entrenchment of laws that relate to the constitution, powers, or procedure of the State Parliament.

Victoria, Queensland, and the Australian Capital Territory (“ACT”) have introduced statutory bills of rights. The ACT enacted the Human Rights Act 2004 (“ACT HR Act”); Victoria, the Charter of Human Rights and Responsibilities 2006 (“the Charter”); and Queensland has recently passed the Human Rights Act 2019 (“Queensland HR Act”), commencing on 1 January 2020.

All three enactments relevantly provide for a right to life, the right to take part in public life, the right to peaceful assembly and association, and for the protection of families and children. These are rights which could arguably be interpreted to include environmental rights, as has occurred overseas.

The rights included in the three enactments do, however, include the procedural rights necessary in the promotion and enforcement of substantive environmental rights, such as the right to take part in public life and the right to assembly and association.

In addition, all three statutes provide for the protection of cultural rights, which specifically refer to the right of Aboriginal people to maintain their spiritual, material and economic relationships with the land. An approval granted to an extractive industry where the operation of that industry impinges upon an

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144 *Australia Acts 1986* (Cth), s 6.
146 Human Rights Act 2004 (ACT), s 8; Charter of Human Rights and Responsibilities Act 2006 (Vic), s 9; Human Rights Act 2019 (Qld), s 16.
147 Human Rights Act 2004 (ACT), s 17; Charter of Human Rights and Responsibilities Act 2006 (Vic), s 18; Human Rights Act 2019 (Qld), s 23.
Indigenous person’s spiritual relationship with the subject land might be incompatible with that right.

The Acts contain a directive that all statutory provisions must, so far as possible, be construed in a way that is compatible with human rights.\(^{151}\) But the efficacy of such a directive after the problematic decision in *Momcilovic v The Queen*\(^{152}\) is doubtful.

Substantively these Acts afford little by way of enforceable stand alone rights.

Generally, proposed legislation must be accompanied by a “statement of compatibility” concerning whether or not the bill is compatible with the human rights contained within the States’ respective human rights legislation, which must be considered prior to the bill being passed.\(^{153}\) However, failure to comply with the requirement to provide a statement of compatibility has no consequence for the validity of the law.\(^{154}\)

Moreover, in the Queensland and Victorian legislation there is provision for the Parliament to make an “override declaration” in respect of legislation that it has effect despite any incompatibility with a statutory human right.\(^{155}\) And while in all three States the relevant Supreme Court may make a “declaration of incompatibility” to the effect that a provision cannot be interpreted in a way that is consistent with human rights,\(^{156}\) again this declaration has no impact on the validity of the law.

Where such a declaration is made, the Minister administering the relevant Act (or the Attorney-General in the ACT) must prepare a written response and

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\(^{152}\) (2011) 245 CLR 1 at [37]-[51].

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

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

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

\(^{156}\) Human Rights Act 2004 (ACT), s 32; Charter of Human Rights and Responsibilities Act 2006 (Vic), s 36; Human Rights Act 2019 (Qld), s 53.
table it before Parliament within six months. But only two declarations have been made: one under the ACT HR Act; and one under the Victorian Charter.

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.

The ACT HR Act additionally provides that if a public authority has acted in contravention of those obligations, a person who is, or would be, the victim of such contravention may bring legal proceedings, and are entitled to any relief that the court considers appropriate, except damages. 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.

In Victoria and Queensland, legal proceedings may be brought by a person affected, but only in circumstances where that person is able, independent of the Charter, to seek relief (excluding damages) in respect of the impugned decision or act of the public authority. Thus, the Victorian Charter and the Queensland HR Act extend the available grounds of review in judicial review proceedings to include unlawfulness arising by reason of a breach of s 38(1) of the Charter or s 58 of the Act, but this cannot be the sole basis of the claim.

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


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


Despite their limitations, reviews of the ACT HR Act and Victorian Charter suggest that they have nevertheless had a significant impact in the policy arena, improving decision-making and raising the awareness of human rights within government bodies.\(^\text{165}\)

Given that environmental rights are increasingly being perceived as an aspect of basic human rights such as the right to life, the necessity to protect the environment could perhaps fall for consideration under these Acts sooner rather than later.

**The Future of Constitutional Environmental Rights in Australia and Overseas**

Environmental rights are increasingly being conceived, overseas at least, as an aspect of human rights, with many states affording environmental rights, either directly or indirectly, constitutional protection. Research has demonstrated a material connection between constitutionally enshrined environmental rights and improved environmental outcomes at the domestic level.\(^\text{166}\)

In the absence of an ability to entrench constitutional environmental rights in Australia, there may be scope for State bills of rights to implicitly provide a measure, albeit limited, of environmental protection.

As our climate emergency escalates, that is, as the water gets hotter and the burden on the camel’s back grows even heavier (in this regard see the article by Dr Rebecca Nelson), having an ever more deleterious direct and immediate impact on the very environment that we depend upon for the full enjoyment of our human rights (breathable air, potable water and the ability to feed and shelter ourselves), the necessity to afford meaningful and enduring protection to the environment becomes ever more pressing. If we lack the

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

85 As another politician observed three decades ago:167

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

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

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