

# The Environment is All Rights? Human Rights, Constitutional Rights and Environmental Rights<sup>i</sup>

## Conceptualising Environmental Rights as Human Rights

- 1 Environmental damage can cause harm in a manner that adversely impact upon human rights. Such a claim is neither novel nor, as some Australian politicians have claimed, “woke”. The symbiotic relationship between environmental protection and human rights has been recognised internationally since at least 1972, when the *Stockholm Declaration* stated that a healthy environment is essential to “the enjoyment of basic human rights and the right to life itself”.<sup>ii</sup> More recently, the Paris Agreement called upon states “when taking action to address climate change, [to] respect, promote and consider their respective obligations on human rights”.<sup>iii</sup>
- 2 Against this, however, our exploitation of nature for benefit, principally financial, has continued to accelerate since at least our mastery of fire. It has become so pernicious and so pervasive that it is now an existential threat.<sup>iv</sup> The climate crisis of the Anthropocene age has arrived.
- 3 The 2021 *Sixth Assessment 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. Under the various scenarios considered by the IPCC, including those in which emissions are significantly reduced, by 2050 so-called ‘natural’ disasters (floods, bushfires, polar vortexes, drought and sea level rises) will create large groups of displaced people, destroy infrastructure, and devastate 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.<sup>v</sup>
- 4 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 legal force? More social acceptability? More political currency?

- 5 Substantive environmental obligations recognised by international law are rooted in the adoption of legal and institutional frameworks that seek to avoid environmental harm that has an impact on human rights.<sup>vi</sup> The rhetoric of human rights offers a pre-existing accepted framework from which to pursue environmental goals. Human rights are recognised in treaties, constitutions, and statutes, and have a number of international, regional, and domestic institutions and frameworks in place to assist in their enforcement.<sup>vii</sup>
- 6 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.<sup>viii</sup>
- 7 A human rights conceptualisation of environmental protection has, however, been criticised as being too anthropocentric. Not sufficiently ecocentric. This is because it posits the impact of environmental harm on humans, rather than on flora and fauna, as its central focal point.<sup>ix</sup> The concern is that such an approach fails to recognise the value and importance of natural ecosystems beyond their use or benefit to humans;<sup>x</sup> it reduces nature to something “existing to serve human needs”.<sup>xi</sup>
- 8 It is for this reason that in some countries legal protections that are directed to the impact of environmental harm on humans have been redirected towards the impact on nature itself.
- 9 The Bolivian Constitution therefore provides a right to a “healthy, protected and balanced environment”, and allows *any person* to take legal action in defence of environmental rights.<sup>xii</sup> Similarly, the 2008 Ecuadorian Constitution refers to ‘Pacha Mama’ (a 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”.<sup>xiii</sup> All communities and public authorities are obliged to protect this right.<sup>xiv</sup>

- 10 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.<sup>xv</sup> And in India legal rights have been directly conferred upon significant rivers and natural systems.<sup>xvi</sup> In 2017, the High Court of Uttarakhand declared that the Rivers Ganges and Yamuna were legal persons “with all corresponding rights, duties and liabilities of a living person”.<sup>xvii</sup>

## **Human Rights Based Environmental Protections**

- 11 The 2013 UN *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy And Sustainable Environment* (“UN Independent Expert Report”)<sup>xviii</sup> has recognised that, at the very least, international human rights law imposes procedural obligations on States that facilitate 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.<sup>xix</sup>
- 12 Procedural rights are essential to the enforcement of substantive environmental rights.<sup>xx</sup> 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.<sup>xxi</sup>
- 13 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*,<sup>xxii</sup> and the *Universal Declaration of Human Rights*.<sup>xxiii</sup> 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.

- 14 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.<sup>xxiv</sup> This participation improves the quality and the legitimacy of executive decision-making.<sup>xxv</sup> These rights also impose obligations on government to consider environmental interests and to undertake certain actions when planning or proposing activities that may impact the environment. Over 131 countries have constitutional provisions relating to the right to public participation.<sup>xxvi</sup>
- 15 But soft law instruments like the *Rio Declaration* do not impose direct obligations on states. The *Aarhus Convention*, for example, only imposes legal obligations on its 47 contracting parties.
- 16 Nonetheless, owing to the general absence of global specific environmental protection in legally binding treaties, such instruments have made a significant contribution to the growth of international environmental law. 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 has drawn on the *Aarhus Convention* and the *Rio Declaration* to hold that states must make available information concerning environmental risks.
- 17 In *Zia v WAPDA*, 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 any express environmental rights, the Court considered that the *Rio Declaration* should “serve as a great binding force”, and applied the 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 plant.
- 18 However, while the procedural human rights obligations of states are reasonably well established with respect to environmental protections, the

same cannot be said when it comes to substantive environmental human rights.

## **Environmental Rights as Constitutional Rights**

- 19 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?
- 20 Many countries have included explicit environmental rights in their constitutions. Alternatively, such rights are implied upon the interpretation of human rights already contained in a constitution. As at January 2019, 150 countries have constitutionally recognised environmental protections.<sup>xxvii</sup>
- 21 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 accepted.<sup>xxviii</sup>
- 22 Unlike ordinary statutory regulation, constitutional protection has the benefit of longevity. Constitutions tend to endure beyond political cycles.<sup>xxix</sup>
- 23 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, amplified and reinforced.<sup>xxx</sup> This is important because environmental decision-making is inherently polycentric in nature, often trying to balance a range of competing priorities and interests, including economic interests.<sup>xxxi</sup> The perceived significance of breaching a constitutionally protected environmental right is far greater than transgression of other statutory rights.<sup>xxxii</sup> In addition, the existence of constitutional environmental rights has a tendency to act as a powerful incentive to develop sound environmental policy.<sup>xxxiii</sup>

## **Express Constitutional Environmental Rights**

- 24 Notwithstanding the lacuna in the Australian Constitution,<sup>xxxiv</sup> 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.”<sup>xxxv</sup>
- 25 The Constitution of the Ukraine enshrines a right to an environment that is “safe for life and health”.<sup>xxxvi</sup> Hungary,<sup>xxxvii</sup> Turkey,<sup>xxxviii</sup> Indonesia,<sup>xxxix</sup> and Nicaragua<sup>xl</sup> entrench a right to a “healthy” environment, while South Africa specifies “an environment that is not harmful to...health or wellbeing”.<sup>xli</sup> South Korea uses the adjectival descriptor of “pleasant”.<sup>xlii</sup> Some constitutions, including those of Kenya,<sup>xliii</sup> Bolivia,<sup>xliv</sup> South Sudan,<sup>xlv</sup> and South Africa,<sup>xlvi</sup> explicitly extend substantive intergenerational rights.
- 26 Other constitutional environmental rights are prescriptive. In Bhutan and Kenya, for example, the government is obliged to maintain a specified percentage of tree cover across the country (in Bhutan, 60% and in Kenya, 10%).<sup>xlvii</sup>
- 27 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,<sup>xlviii</sup> the Dominican Republic,<sup>xlix</sup> and Eritrea.<sup>l</sup>
- 28 These enshrined constitutional rights have been the subject of litigation. In the landmark decision of *Minors Oposa v Factoran*, the Supreme Court of the Philippines applied s 16 of Art II of the *Constitution of the Republic of the Philippines 1987* (the right of the people to a balanced and healthful ecology) 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”.<sup>li</sup> 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:<sup>lii</sup>

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.

- 29 Similarly, in 2004 citizens sued the national and provincial government, the city of Buenos Aires, and 44 industrial facilities, in relation to pollution of a river.<sup>liii</sup> 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, to create and implement an educational program about wastewater, to establish a comprehensive restoration and remediation plan. It 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.<sup>liv</sup>
- 30 In 2012 the Lake Turkana Community Trust relied on their constitutional right to a “clean and healthy environment”<sup>lv</sup> when they sued the Kenyan government in the Kenyan Environment and Land Court to obtain information about hydroelectricity purchase agreements entered into with Ethiopia. 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.<sup>lvi</sup> The Court ordered that the government disclose all information relevant to the agreements.<sup>lvii</sup>
- 31 Constitutional rights are increasingly play a prominent role in climate change litigation seeking the enforcement of international agreements, such as the Paris Agreement, to review the adequacy of a state’s nationally determined contribution.<sup>lviii</sup>
- 32 In addition to providing rights to life<sup>lix</sup> and dignity,<sup>lx</sup> the Colombian Constitution provides that “every individual has the right to enjoy a healthy environment.”<sup>lxi</sup> Twenty-five plaintiffs filed a complaint in the Colombian Supreme 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, threatened their fundamental rights and the rights of future generations.<sup>lxii</sup> In 2018 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”.<sup>lxiii</sup> 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.<sup>lxiv</sup>

## **Implied Constitutional Environmental Rights**

- 33 In countries with constitutionally enshrined human rights, but no express environmental rights, superior courts have on occasion interpreted these rights to include environmental rights,<sup>lxv</sup> such as: the right to life,<sup>lxvi</sup> the right to health;<sup>lxvii</sup> the right to food and water;<sup>lxviii</sup> and the right to dignity.<sup>lxix</sup>
- 34 Courts in India have construed the constitutional right to life to include a right to a healthy environment.<sup>lxx</sup> Courts in Costa Rica,<sup>lxxi</sup> Bangladesh,<sup>lxxii</sup> and Pakistan<sup>lxxiii</sup> have also held that a right to a healthy environment is necessary to ensure that the right to life is fully enjoyed.<sup>lxxiv</sup>
- 35 The Netherlands Supreme Court has held that environmental protection is intimately connected to the right to life. In the landmark decision in *Urgenda* the Court considered an appeal by the Dutch government against a lower court ruling that had determined that the government had not enacted appropriate measures to avert climate change. The Supreme Court upheld the lower court's ruling that the government had to meet an emissions goal of 25% reduction from 1990 levels by 2020. It found that the right to life and the right to respect 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”.

- 36 *Urgenda* was very recently applied and followed in *Milieudefensie v Royal Dutch Shell*, where the Hague District Court ordered Royal Dutch Shell and the Shell group to reduce its scope 1, 2, and 3 carbon dioxide emissions by 45% (compared to 2019 levels) by 2030, having regard to the Paris Agreement targets. The Court held that the benefits of making the order outweighed the negative impacts on Royal Dutch Shell's commercial interests and did not impose overly onerous limits on the Shell group when measured against the risks posed by climate change.
- 37 By contrast, in *Neubauer v Germany*, the German Federal Constitutional Court held in 2021, that the provisions of the Federal Climate Change Act governing national targets to reduce greenhouse gas emissions by at least 55% by 2030 relative to 1990 levels, but with no mandated target beyond this date, did not breach Art 1 (principle of human dignity), Art 2(2) (the right to life and physical integrity), or Art 14(1) (the right to property) of the constitutional Basic Law. Although the state's duty of protection under Art 2(2) included the obligation to protect life and health (including that of future generations) from the impacts of climate change, the Court held that the legislature had a broad discretion as to how to fulfill this duty and the claimants (a youth group) had failed to demonstrate that the legislature had exceeded its decision-making power by adopting targets set out in the Paris Agreement.
- 38 The right to life and the right to family life are not the only human rights in which courts have uncovered implied environmental rights.
- 39 In 2007, the Hong Kong Special Administrative 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. Although the Court dismissed the claim on the basis that it was for the government, rather than the judiciary, to determine policy, the Court acknowledged that it was "arguable" that Art 12 "imposes some sort of duty on state authorities to combat air pollution".

- 40 Similarly, in Israel, the Supreme Court has established that the right to water is implicit within the right to dignity, guaranteed in the Basic Law.
- 41 By contrast, courts in the United States has largely rejected arguments that constitutional rights to life or liberty provide an implied right to a clean environment.<sup>lxxv</sup>

## **The Efficacy of Constitutional Environmental Protections**

- 42 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”.<sup>lxxvi</sup>
- 43 Constitutional environmental rights alone are insufficient to achieve sound environmental outcomes: good policy, political will, adequate resourcing, and the development of supporting institutional frameworks are also required.<sup>lxxvii</sup>
- 44 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.<sup>lxxviii</sup> 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).<sup>lxxix</sup>
- 45 Nevertheless, research has demonstrated that constitutionally recognised environmental rights can lead to beneficial environmental outcomes, especially in relation to the enactment of legislation directed to the protection of 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.<sup>lxxx</sup> The study also found that countries with constitutional environmental rights had a materially smaller ecological footprint than countries with no such rights.<sup>lxxxi</sup> And a 2016 study

found that the presence of constitutional environmental rights led to better scores on the Environmental Performance Index.<sup>lxxxii</sup>

- 46 The proper drafting of constitutional environmental rights is, however, 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.<sup>lxxxiii</sup> The greater the equivocation, the greater the need for court intervention. Courts have been understandably cautious in enforcing inchoate environmental rights, especially those that are constitutionally entrenched.
- 47 Further, absent appropriate enforcement mechanisms, the policy incentives created by constitutional environmental rights will be undermined. Without broad or open standing to enforce rights, constitutional protection becomes somewhat arbitrary and discretionary.<sup>lxxxiv</sup> 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 the environmental right.<sup>lxxxv</sup> Yet the effects of environmental harm on communities and populations are more often than not indirect.<sup>lxxxvi</sup>
- 48 Many constitutions are silent on how environmental rights are enforceable. Only 22 out of 140 nations state how the constitutional environmental rights enshrined in their constitution are to be enforced. Such uncertainty is apt to discourage vindication of such rights by litigation.<sup>lxxxvii</sup>
- 49 Even where liberal standing rules exist and enforcement mechanisms are clear, proceedings may not be commenced and court orders may be ignored. Relevant government departments are often under-resourced and lacking in accountability, particularly in developing countries.<sup>lxxxviii</sup> Without a culture of compliance and transparency, and the political will to prioritise and implement environmental protections, even the most robust environmental rights may prove pyrrhic.<sup>lxxxix</sup> Moreover, extensive remediation by multiple entities (both public and private) may be required. Court supervision of such remediation may be necessary.<sup>xc</sup>

50 Too often constitutional environmental rights lie dormant due to economic, political, and financial inertia.<sup>xcii</sup> Thus notwithstanding that 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, that Court has yet to enforce that right.<sup>xcii</sup>

## **Environmental Rights Within the Australian Constitutional Framework**

### **Federal**

51 There are no environmental rights either explicitly or implicitly protected under the Commonwealth Constitution. Section 100 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 a right enforceable by individuals.<sup>xciii</sup>

52 While a range of procedural and perhaps substantive environmental rights might fall under the rubric of the implied freedom of political communication (see, for example, the decision in *Brown v Tasmania* (2017) 261 CLR 328), its potential scope is narrow.

53 Professor George Williams somewhat courageously suggests that there is the potential for further rights to be implied in the Constitution. But even assuming that this were to occur - which in my view is doubtful, especially any species of substantive environmental rights - implied rights are limited in significant ways. First, they are typically restricted to negative rights, that is, a right affording protection from an exercise of governmental power.<sup>xciv</sup> Second, they are unlikely to offer any protection from environmental harm caused by the acts of private entities such as corporations.<sup>xcv</sup>

54 Finally, as is statistically demonstrated, the creation of new rights by constitutional amendment is not easy - only 18% of all constitutional referenda have been successful.<sup>xcvi</sup>

55 Given these limitations, the scope for constitutional environmental protection in Australia at a Commonwealth level is, in my view, almost non-existent.

## State

- 56 The State constitutions are similarly bereft. Although States may amend their constitutions by ordinary legislation, such amendment is rare.<sup>xcvii</sup> And what the State Parliament giveth; the State Parliament can taketh away.
- 57 Having said this, Victoria, Queensland, and the Australian Capital Territory (“ACT”) have enacted 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, the *Human Rights Act 2019* (“Queensland HR Act”).
- 58 All three enactments relevantly provide for a right to life,<sup>xcviii</sup> the right to take part in public life,<sup>xcix</sup> the right to peaceful assembly and association,<sup>c</sup> and for the protection of families and children.<sup>ci</sup> These are rights which could more than arguably be construed to include environmental rights, as has occurred overseas.
- 59 Furthermore, the rights included in the three enactments include procedural rights necessary for 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.
- 60 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.<sup>cii</sup>
- 61 Substantively, however, these Acts afford little by way of enforceable stand alone rights. At best, a “declaration of incompatibility” may be obtained but such a declaration has no impact on the validity of the law.
- 62 It is perhaps for this reason that only two declarations of incompatibility have been made: one under the ACT; and one in Victoria.<sup>ciii</sup>
- 63 Despite their significant 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.<sup>civ</sup>

64 Given that environmental rights are increasingly being perceived overseas as an aspect of basic human rights such as the right to life, it is likely that the necessity to protect the environment will fall for consideration under these enactments sooner rather than later.

65 It is in this context that in *Waratah Coal Pty Ltd v Youth Verdict Ltd* Kingham P in the Queensland Land Court refused Waratah Coal's application to strike out a number of objections to its Galilee Coal Project based on the application of the Qld Human Rights Act.

### **The Future of Constitutional Environmental Rights**

66 In summary, 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.<sup>cv</sup>

67 In the absence of an ability to entrench constitutional environmental rights in Australia, there is arguably scope for State bills of rights to implicitly provide a measure of environmental protection.

68 As our climate emergency escalates, having an ever more direct and immediate deleterious impact on the very things 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.

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

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<sup>i</sup> This paper has subsequently formed the basis of a more lengthy article of the same title co-authored with Harry Hobbs published in (2020) 44 *Melbourne Law Review* 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.

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- <sup>ii</sup> Meg Good, 'Implementing the Human Right to Water in Australia' (2011) 30 *University of Tasmania Law Review* 107, 117-118; *Report of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972, UN Doc A/CONF.48/14/REV.1 (16 June 1972), 3.
- <sup>iii</sup> *Paris Agreement*, 12 December 2015, UNTS1-54113 (entered into force on 4 November 2016); Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: the Contribution of the Global South' (2019) 113(4) *American Journal of International Law* 679, 722.
- <sup>iv</sup> Louis J Kotzé, 'International Environmental law and the Anthropocene's Energy Dilemma' (2019) 36 *Environmental and Planning Law Journal* 437.
- <sup>v</sup> International Panel on Climate Change, *Climate Change 2021: the Physical Science Basis*, 6<sup>th</sup> Assessment Report, 9 September 2021.
- <sup>vi</sup> John H Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/25/53 (30 December 2013) [49].
- <sup>vii</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 141.
- <sup>viii</sup> Meg Good, 'Implementing the Human Right to Water in Australia' (2011) 30 *University of Tasmania Law Review* 107, 118-119.
- <sup>ix</sup> 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.
- <sup>x</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 12, 141.
- <sup>xi</sup> Sam Adelman, 'Epistemologies of Mastery' in Anna Grear and Louis Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015) 13 cited in Louis J Kotzé, 'International Environmental law and the Anthropocene's Energy Dilemma' (2019) 36 *Environmental and Planning Law Journal* 437, 442.
- <sup>xii</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019) 142; *Constitución Política del Estado 2009*, Arts 33-34.
- <sup>xiii</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019) 142; *República del Ecuador Constitución de 2008*, Art 71.
- <sup>xiv</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019) 142; *República del Ecuador Constitución de 2008*, Arts 71, 11.
- <sup>xv</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 142.
- <sup>xvi</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 142.
- <sup>xvii</sup> *Mohd. Salim v State of Uttarkhand and Others* Writ Petition (PIL)No. 126 of 2014, December 5 2016, [19] (Uttarakhand High Court, India). Subsequently overturned on appeal because, among other things, the declaration interfered with the rights of other states (the Ganges flowed into Bangladesh) and because the consequences of granting legal rights to a river were uncertain. Who is responsible for compensation in the event of a flood.
- <sup>xviii</sup> John H Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy And Sustainable Environment*, UN Doc A/HRC/25/53 (30 December 2013) [29].
- <sup>xix</sup> See, for example, *Report of the United Nations Conference on Environment And Development, Rio De Janeiro, 3-14 June 1992*, UN Doc A/CONF.151/26/REV.1(VOL.I) (14 June 1992) Annex 1 Principle 10 ("Rio Declaration"); *Universal Declaration on Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948), Arts 8, 19, 20, 21; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Arts 2, 19, 22; *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, ("Aarhus Convention"); *Judicial Handbook on Environmental Constitutionalism* (March 2017), 16.
- <sup>xx</sup> United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 1.
- <sup>xxi</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 146.
- <sup>xxii</sup> *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*.
- <sup>xxiii</sup> *Universal Declaration on Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948), Art 19.

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- <sup>xxiv</sup> United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 83.
- <sup>xxv</sup> United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 83.
- <sup>xxvi</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 118.
- <sup>xxvii</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019) viii.
- <sup>xxviii</sup> United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017) 10.
- <sup>xxix</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 12.
- <sup>xxx</sup> David R Boyd, *The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012), 8.
- <sup>xxxi</sup> Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294, 294.
- <sup>xxxii</sup> Meg Good, 'Implementing the Human Right to Water in Australia' (2011) 30 *University of Tasmania Law Review* 107, 119.
- <sup>xxxiii</sup> Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294, 295.
- <sup>xxxiv</sup> Section 100 of the Australian Constitution protects economic, and not environmental, interests with respect to water. See Rachel Pepper, 'The Constitutionalisation of Water Rights: Solution or Levee?', (2011) 26.2 *Australian Environment Review* 34.
- <sup>xxxv</sup> Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (United Nations Environment Programme, 2005), 30.
- <sup>xxxvi</sup> Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (United Nations Environment Programme, 2005), 30; *Constitution of Ukraine 1996*, Art 50.
- <sup>xxxvii</sup> *The Fundamental Law of Hungary 2011*, Art XXI.
- <sup>xxxviii</sup> *Constitution of the Republic of Turkey 1982*, Art 56.
- <sup>xxxix</sup> *Constitution of the Republic of Indonesia 1945*, Art 28(H)(1).
- <sup>xl</sup> *Constitution of Nicaragua 1987*, Art 60.
- <sup>xli</sup> *The Constitution of the Republic of South Africa 1996*, Art 24(a).
- <sup>xlii</sup> *Constitution of the Republic of Korea 1987 (South Korea)*, Art 35.
- <sup>xliii</sup> *Constitution of Kenya 2010*, Ch 42.
- <sup>xliv</sup> *Constitución Política del Estado 2009*, Art 33.
- <sup>xliv</sup> *The Transitional Constitution of the Republic of South Sudan 2011*, Art 41(3).
- <sup>xlvi</sup> *The Constitution of the Republic of South Africa 1996*, s 24(b).
- <sup>xlvii</sup> United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 1.
- <sup>xlviii</sup> *Constitución Política del Estado 2009*, Art 342.
- <sup>xlix</sup> *Constitution of the Dominican Republic* (2015), Art 194.
- <sup>i</sup> *The Constitution of Eritrea* (1997), Arts 8(2) and (3).
- <sup>ii</sup> *Juan Antonio Oposa v The Hon Fulgencio S Factoran, Jr* (1993) (GR No 101083, 224 SCRA 792) per Davide JR. See also *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* (2008) (GR Nos 171947-171948).
- <sup>iii</sup> *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.
- <sup>iiii</sup> *Mendoza Beatriz Silva v State of Argentina regarding damages suffered (injuries resulting from the environmental contamination of the Matanza-Riachuelo River)*, M 1569 XL (8 July 2008) (Supreme Court of Argentina).
- <sup>liv</sup> *Juzgado Federal de Primera Instancia de Quilmes*, and see *Constitution of the Argentine Nation 1853*, Art 41; Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294, 295.
- <sup>lv</sup> *The Constitution of Kenya 2010*, Ch 42.

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- <sup>lvi</sup> *Lake Turkana Community Trust v Attorney-General, Republic of Kenya*, No. 825 of 2012 [2014] eKLR (19 May 2014) 17 (Environment and Land Court, Kenya).
- <sup>lvii</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 200.
- <sup>lviii</sup> Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: the Contribution of the Global South' (2019) 113(4) *American Journal of International Law* 679, 699.
- <sup>lix</sup> *Constitución Política de Colombia 1991*, Ch II Art 11.
- <sup>lx</sup> *Constitución Política de Colombia 1991*, Ch II Arts 21 and 51.
- <sup>lxi</sup> *Constitución Política de Colombia 1991*, Ch III Art 78.
- <sup>lxii</sup> *Future Generations v Ministry of the Environment* STC4360-2018 (4 May 2018) (Supreme Court of Colombia).
- <sup>lxiii</sup> *Future Generations v Ministry of the Environment* STC4360-2018 (4 May 2018) at 13 (Supreme Court of Colombia).
- <sup>lxiv</sup> *Future Generations v Ministry of the Environment* STC4360-2018 (4 May 2018) (Supreme Court of Colombia).
- <sup>lxv</sup> See Ben Boer, 'Environmental Law and Human Rights in the Asia-Pacific', Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press, 2015), 166-174 and James May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2014), 17-54.
- <sup>lxvi</sup> 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.
- <sup>lxvii</sup> For example, in Hong Kong: United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 175.
- <sup>lxviii</sup> United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 84-85.
- <sup>lxix</sup> For example, in Peru: United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 87, and in Israel: *Abu Massad v Water Commissioner*, Civil App No 9535-06 (Israel Supreme Court 2011); Erin Daly, 'Constitutional Protection for Environmental Rights: The Benefits of Environmental Process' (2012) 17(2) *International Journal of Peace Studies* 71, 71.
- <sup>lxx</sup> United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017) 174; Shubhankar Dam and Vivek Tewary, 'Polluting Environment, Polluting Constitution: Is a 'Polluted' Constitution Worse than a Polluted Environment?' (2005) 17(3) *Journal of Environmental Law* 383, 38; *Bandhua Mukti Morcha v Union of India*, 3 SCC 161 (Supreme Court of India, 1984); *Subhash Kumar v State of Bihar*, No 1991 AIR 420, 1991 SCR (1) 5 (9 January 1991) (Supreme Court of India).
- <sup>lxxi</sup> *Presidente de la sociedad Marlene SA v Municipalidad de Tibas*, Sala Constitucional de la corte Supreme de justicia, decision no 6918/94 (25 November 1994) (Supreme Court of Justice, Costa Rica).
- <sup>lxxii</sup> See, for example, *Farooque v Bangladesh* 22 BLD (HDC) (2002) 534 (Supreme Court of Bangladesh High Court Division).
- <sup>lxxiii</sup> See, for example, *In re: Human Rights Case (Environmental Pollution in Balochistan)* PLD 1994 SC 102 (Pakistan Supreme Court, 1992); *West Pakistan Salt Miners v Industries and Mineral Development, Punjab, Lahore* 1994 SCMR 2061 (Pakistan Supreme Court, 1994).
- <sup>lxxiv</sup> In Costa Rica Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (United Nations Environment Programme, 2005) 8, 66.
- <sup>lxxv</sup> Dinah Shelton and Alexandre Kiss, *Judicial Handbook on Environmental Law* (United Nations Environment Programme, 2005) 176-177; *Tanner v Aarmco Steel Corp*, 340 F Supp 532 (SD Tex, 1972).
- <sup>lxxvi</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 3.
- <sup>lxxvii</sup> Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294, 294, 298.
- <sup>lxxviii</sup> Z A Wendling, J W Emerson, D C Esty, M A Levy, A de Sherbinin, et al. *2018 Environmental Performance Index* (2018) (New Haven, Connecticut: Yale Center for Environmental Law & Policy) available at <<https://epi.yale.edu/>>.
- <sup>lxxix</sup> Z A Wendling, J W Emerson, D C Esty, M A Levy, A de Sherbinin, et al. *2018 Environmental Performance Index* (2018) (New Haven, Connecticut: Yale Center for Environmental Law & Policy) available at <<https://epi.yale.edu/>>; Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294, 294.

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- <sup>lxxx</sup> Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294, 300; David R Boyd, *The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012) 7.
- <sup>lxxxi</sup> 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.
- <sup>lxxxii</sup> Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294.
- <sup>lxxxiii</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 3.
- <sup>lxxxiv</sup> United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 132.
- <sup>lxxxv</sup> United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 131-132.
- <sup>lxxxvi</sup> United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 132.
- <sup>lxxxvii</sup> David R Boyd, *The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012), 74-75.
- <sup>lxxxviii</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 3.
- <sup>lxxxix</sup> United Nations Environment Programme, *Environmental Rule of Law First Global Report* (January 2019), 3.
- <sup>xc</sup> United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 7.
- <sup>xc<sup>i</sup></sup> United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 177.
- <sup>xc<sup>ii</sup></sup> United Nations Environment Programme, *Judicial Handbook on Environmental Constitutionalism* (March 2017), 177.
- <sup>xc<sup>iii</sup></sup> Rachel Pepper, 'The Constitutionalisation of Water Rights: Solution or Levee?' (2011) 26(2) *Australian Environment Review* 34.
- <sup>xc<sup>iv</sup></sup> George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999), 62-63.
- <sup>xc<sup>v</sup></sup> George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999), 61.
- <sup>xc<sup>vi</sup></sup> Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2012), 37.
- <sup>xc<sup>vii</sup></sup> Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006), 29.
- <sup>xc<sup>viii</sup></sup> *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.
- <sup>xc<sup>ix</sup></sup> *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.
- <sup>c</sup> *Human Rights Act 2004* (ACT), s 15; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 16; *Human Rights Act 2019* (Qld), s 22.
- <sup>ci</sup> *Human Rights Act 2004* (ACT), s 11; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 17; *Human Rights Act 2019* (Qld), s 26.
- <sup>c<sup>ii</sup></sup> *Human Rights Act 2004* (ACT), s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32; *Human Rights Act 2019* (Qld), s 48.
- <sup>c<sup>iii</sup></sup> The declarations were made in *R v Momcilovic* [2010] VSCA 50 and *In the matter of an application for bail by Islam* [2010] ACTSC 147; George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland? Lessons from Recent Australian Experience' (2016) 41(2) *Alternative Law Journal* 81, 82.
- <sup>c<sup>iv</sup></sup> George Williams and Daniel Reynolds, 'A Human Rights Act for Queensland? Lessons from Recent Australian Experience' (2016) 41(2) *Alternative Law Journal* 81, 82.
- <sup>c<sup>v</sup></sup> See Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294 and David R Boyd, *The Environmental Rights Evolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012).