JOINING THE AOTEAROA NEW ZEALAND CONSTITUTIONAL DEBATE: CONSTITUTIONAL ENVIRONMENTAL RIGHTS IN A FUTURE CONSTITUTION

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In 2013, the Constitutional Advisory Panel invited New Zealanders to think about our vision of what New Zealand should look like in the future and to consider how our constitutional arrangements would support that vision. In response, New Zealanders have suggested the inclusion of an environmental protection regime in our future constitutional landscape. The author supports this prevailing opinion. This paper will use the experiences gained from international and regional human rights and environmental law treaties and other countries' constitutions to explore the best model to achieve that goal. This comparative law analysis will identify the key theoretical and legal issues that must be addressed by Parliament to ensure the successful implementation and enforcement of an environmental protection regime through the courts. While international developments are important, any environmental constitutional framework must reflect New Zealand's unique and distinctive history, environment, people, and cultural values. With this in mind, this paper will tentatively canvass a new environmental constitutional framework and lay foundations for further legal research and public debate.

En 2013, le Comité Consultatif Constitutionnel néo-zélandais a invité la population à lui faire connaître la vision qu'elle avait de ce que la Nouvelle-Zélande devrait ou pourrait être dans un proche avenir et de proposer les modifications constitutionnelles qui selon elle seraient de nature à répondre aux objectifs souhaités. Majoritairement, la population néo-zélandaise a demandé que soient édictées un ensemble de dispositions constitutionnelles pour poser de nouvelles règles organisant un meilleur régime de protection de l'environnement. L'auteur

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qui fait sienne cette suggestion, rappelle quelles sont les expériences d'ores et déjà menées dans d'autres pays qui tendent à répondre à pareil objectif.

I INTRODUCTION

Since the late 20th century, there has been growing global recognition that damage to the natural environment threatens the quality of life for present and future generations.[1] William Cronon has observed that the process of ecological change as the concomitant of human activity is longstanding and well understood, but rarely has it occurred with as much "dramatic sadness" and "conscious intention" as in 19th century New Zealand.[2] New Zealanders' concern for the environment's future was a focal point in the latest nationwide constitutional dialogue.

In 2013, the Constitutional Advisory Panel (the Panel) invited New Zealanders to consider a vision of what New Zealand might look like in the future and to deliberate about how the constitutional arrangements would support such a vision. The preservation and protection of New Zealand's natural environment was a strong theme across the public response. Some submitters proposed affirming human rights to a clean and healthy environment and/or affirming the rights of nature itself. As will be discussed, the author endorses both approaches, working in conjunction with each other, as a constitutional tool for environmental protection.

This article will undertake a comparative law analysis surveying the theoretical approaches and practical experiences of environmental protection law at the international, regional and national levels. A comparative approach is essential in environmental law because environmental protection is a global issue and legislators often choose to draw on the experiences of other countries' environmental protection regimes. Part I examines the theoretical framework for environmental protection. Part II explores experiences gained overseas to identify the key legal issues that must be addressed by New Zealand's Parliament to ensure the successful enforcement of an environmental protection regime through the Courts. Part III cautiously canvasses a new environmental constitutional framework that reflects New Zealand's unique and distinctive history, environment

1 Ronald Engel and Brendan Mackey "The Earth Charter, Covenants, and Earth Jurisprudence" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 313 at 313 and Neil Popović "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment" (1995) 27 Colum Hum Rts L Rev 487.

2 William Cronon "Foreword" in Herbert Guthrie-Smith *Tutira: The Story of a New Zealand Sheep Station* (Random House, Auckland, 1999).

and cultural values. Of course, the final content of any constitutional arrangement will require further legal research and full public deliberation.

II IS ENVIRONMENTAL PROTECTION THAT IMPORTANT?

Scientists warn that we must recognise that the natural environment is fundamentally vital to humanity's quality of life and survival.[3] We depend on the environment and all of its resources for our basic needs, including food, water, energy and air.[4] Human activity is placing such an immense strain on the planet's fragile ecosystems that the Earth's ability to sustain present and future generations can no longer be taken for granted.[5] For those who are still not convinced of the impact of environmental degradation on the well-being of humans and nature, consider the following data:

(1) Worldwide, 13 million deaths (23 percent of all deaths) could be prevented each year by making our environment healthier.[6]
(2) Biological diversity is disappearing more rapidly than at any time since the extinction of the dinosaurs 65 million years ago.[7] Globally, biodiversity loss and damage to ecosystems is estimated to cost trillions of dollars every year.[8]

New Zealand's environmental track record has not always lived up to our "clean and green" image.[9] There has been significant environmental damage since the late 1700s. 32 percent of indigenous land and freshwater bird species and 18 percent of

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3 Stephen Schneider "The Greenhouse Effect: Science and Policy" (1989) 243 Science 771.

4 David Boyd *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, Vancouver, 2012) at 10.

5 *Living Beyond Our Means: Natural Assets and Human Well-being* (World Resources Institute, Washington, 2005) at 3.

6 Glen McLeod and Peter Newman "Climate Change Law and the Real World" in Wayne Gumley and Trevor Deya-Winterbottom (eds) *Climate Change Law: Comparative, Contractual & Regulatory Considerations* (Thomas Reuter, Sydney, 2009) 40 at 45.

7 E Chivian and A Bernstein (eds) *Sustaining Life: How Human Health Depends on Biodiversity* (Oxford University Press, Oxford, 2008).

8 *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature Synthesis Report* (United Nations Environment Programme, Nairobi, 2010).

9 Derek Seymour "New Zealand a great place to live? Yeah Right" *Stuff* (online ed, Auckland, 23 January 2013) and Nikki Preston "Clean, green image of New Zealand 'fantastical'" *The New Zealand Herald* (online ed, Auckland, 19 November 2012).

seabird species have become extinct following human settlement.[10] While the concerted effort of government and the community over recent decades has led to some improvements, 1,000 indigenous species of New Zealand flora and fauna are currently under threat. This data illustrates that, while New Zealand's environmental quality usually compares favourably with other countries, the deterioration in our environment from 1800 to today has nonetheless been profound. If New Zealand is dedicated to maintaining its "clean and green" image, an effective legal, political and social response is required to enhance our environmental protection regime. Notably, the Panel recorded strong public support for an environmental protection regime in any future constitution.

III THE PANEL'S REPORT

New Zealanders have recently been engaged in a nationwide conversation about our constitutional framework. One of the substantive matters for consideration was whether or not to include an appropriate mechanism for environment protection.[11]

The preservation and protection of New Zealand's natural environment was a recurring theme across the conversation. Options suggested by submitters included:[12]

(a) Affirming the rights of nature itself, for example by placing obligations on the State and citizens to protect Mother Nature (the ecocentric approach);
(b) Affirming a human right to a clean and healthy environment (the anthropocentric approach); and
(c) Referring to environmental protection as part of a right to intergenerational equity.

The author supports the incorporation of a constitutional environmental protection regime. Environmental law, a field covering a vast range of topics, interacts with many competing interests: theoretical, legal, scientific, economic development, cultural and social attitudes.[13] It is beyond this article's scope to address all of those interests, particularly how those interests should be balanced

10 *New Zealand Biodiversity Strategy* (Department of Conservation and Ministry for the Environment, Wellington, 2000) at 4.

11 *Consideration of Constitutional Issues: Terms of Reference* (Constitutional Advisory Panel, Terms of Reference, May 2012) at [11].

12 *New Zealand's Constitution: A Report on a Conversation* (Constitutional Advisory Panel, November 2013) at 51, 90 and 94.

13 Ernst Brandl and Hartwin Bungert "Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad" (1992) 16 Harv Envtl L Rev 1 at 4.

against each other. This article will focus on the key theoretical and legal issues that must be addressed by Parliament to ensure the successful enforcement of a constitutional environmental protection regime through the Courts. Modern developments in environmental law illustrate that ensuring the enforceability of any environmental protection regime is more important in addressing environmental issues than the mere creation of new laws.[14]

IV A THEORETICAL FRAMEWORK FOR ENVIRONMENTAL PROTECTION: CONCEPTUALISING HUMANITY'S RELATIONSHIP WITH NATURE

Scholars believe environmental law was first developed to serve only human interests and thus ignored the interests of nature.[15] For example, Principles One and Two of the 1972 Stockholm Declaration on the Human Environment, the first global instrument focusing on human interactions with nature, suggest that human benefit is the primary reason for respecting nature:

> The natural resources of the Earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

This exclusive focus on human interests was consolidated 20 years later at the 1992 United Nations (UN) Conference on Environment and Development (Earth Summit) when the participating States declared: "*human beings are at the centre of concerns* for sustainable development."[16] This human-centred approach to environmental protection is known as the anthropocentric approach.[17]

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14 Domenico Amirante "Environmental Courts in Comparative Perspectives: Preliminary Reflections on the National Green Tribunal in India" (2012) 29 Pace L Rev 441 at 443.

15 Paul Gormley "The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: the Expansion of Human Rights Norms" (1999) 3 Geo Int'l Env L Rev 85 and Susan Emmenegger and Axel Tschentscher "Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law" (1994) 6 Geo Int'l Envtl L Rev 545 at 550-555.

16 Marc Pallemaerts "The Future of Environmental Regulation: International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process" (1996) 15 J L & Com 623 at 642.

17 Nicolas de Sadeleer *Environmental Principles: From Practical Slogans to Legal Rules* (Oxford University Press, Oxford, 2002) at 277.

A An Anthropocentric Approach: Humans have Rights

An anthropocentric approach, in its strictest form, conceptualises humanity's relationship with nature according to nature's aesthetic, economic or social value to human beings.[18] This approach is influenced by Locke's theory of property. According to Locke, unused natural resources (such as land) have little or no value.[19] Berry observes that the anthropocentric approach:[20]

> … is a perspective centred exclusively on the human needs and finds other modes to be inferior. This attitude results in unlimited plunder and exploitation of other life forms. Other life forms are given no intrinsic value of their own: *they only have value through their use by the human* …

Doubts have been raised about whether environmental protection can always be effectively addressed within the anthropocentric framework.[21] Environmental violations invariably involve other species' interests. Anthropocentric guidelines, solely focused on human rights, cannot deal with such issues. The following factual scenario demonstrates the anthropocentric approach's limitation with regard to environmental degradation:

> The Waikato River is home to at least 19 types of native fish.[22] The large catchment area of the River is fertile farmland where intensive agriculture is present. The mismanagement of fertiliser application and effluent disposal practices in dairy farming is a major cause of the River's increased nitrogen level.[23] Increasing nitrogen levels can stimulate the growth of algae, damage aquatic life and contribute

18 William Aitken "Human Rights in an Ecological Era" (1992) 1 Envtl Values 191 at 196 and Tim Hayward "Ecological Thoughts: An Introduction" (Polity Press, Cambridge, 1995) at 58-62.

19 Keith Hirokawa "Some Pragmatic Observations about Critical Critique in Environmental Law" (2002) 21 Stan Envtl LJ 225 at 233-235.

20 Jules Cashford "Dedication to Thomas Berry" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 3 at 3.

21 Prudence Taylor "From Environmental to Ecological Human Rights: A New Dynamic in International Law?" (1998) 10 Geo Int'l L Rev 309 at 351-352.

22 "What lives in the Waikato River" Waikato Regional Council <www.waikatoregion.govt.nz>.

23 Aaron Leaman and Elton Smallman "Waikato River in 'Serious Decline'" *Stuff* (online ed, New Zealand, 9 August 2013).

to toxic algal blooms.[24] The rapid growth of toxic algal blooms in the River had previously led to public health and drinking water issues.[25]

The usefulness of the anthropocentric approach is limited by legal and social constraints. First, in terms of legal limitations, the anthropocentric approach focuses on the people affected by environmental degradation rather than the fact of degradation.[26] The River and its aquatic life have no rights to remedy the pollution problem. The pollution can only be remedied when an individual can prove the pollution affects his or her human rights, for example the right to health. When accepted human rights standards have not been violated, an environmental human rights claim is precluded, thus leaving environmental degradation unremedied. In other words, remedies for environmental degradation are entirely contingent on the violation of a *human* right, which is often factually difficult to establish in a court of law. Additionally, even where environmental human rights have been violated, a court's remedial powers exclusively benefit the claimant. The legal relief awarded will only take into account the claimant's injury. No relief may be ordered to address the environmental harm to the River and the aquatic life.[27]

Second, in terms of social limitations, the success of an environmental human rights claim depends on someone who is competent and willing for legal standing to be established. There are several social and economic factors that preclude a claimant whose rights have been affected from bringing a proceeding to vindicate his or her rights. The claimant could themselves be the polluter. He or she may be economically dependent on the neighbouring polluting farmers,[28] or might live in poverty, and thus cannot afford to bring a legal proceeding. To ameliorate the "poverty problem", some countries have allowed public interest litigation, recognising non-government organisations' (NGOs) standing to vindicate environmental human rights on behalf of the poor.[29] However, the success of this

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24 Bill Vant *Trends in River Water Quality in the Waikato Region 1993-2012* (Waikato Regional Council, Technical Report 20, August 2013).

25 *The Health of the Waikato River and Catchment Information for the Guardians Establishment Committee* (Environment Waikato, Waikato, March 2008) at 33.

26 Neil Popović "Pursuing Environmental Justice with International Human Rights and State Constitutions" (1996) 15 Stanford Envtl LJ 338 at 345.

27 See generally Christopher Stone "Should Trees Have Standing? - Towards Legal Rights for Natural Objects" (1972) 45 Southern California L Rev 450.

28 See *People ex Ricks Water Co v Elk River Mill & Lumber Co* (1895) 107 Cal 221.

29 See generally *Dhungel v Godawari Marble Industry* WP35/1992 (SC Nepal October 31, 1995).

mechanism presupposes that the poor are able to communicate their grievance to NGOs, which is often not the case.

The above shortcomings could be addressed if the River and the aquatic life had their own legal rights, namely:

(1) Their own legal standing to remedy the pollution problem;
(2) Harm to the River and the aquatic life itself (independent of the harm to environmental human rights) would trigger the court's remedial powers. Historically, environmental litigation has confirmed that minimal financial resources are required to factually prove that an individual or a company is discharging toxic waste into a river. On the other hand, it is extremely difficult to prove that such dumping did or will increase the incidence of harm (such as cancer) to humans;[30] and
(3) The court's remedial powers would directly benefit the River and the aquatic life through rehabilitation orders.

This example supports the view that the environment itself ought to be protected. The anthropocentric approach misses the mark.[31] In order to address this issue, scholars have advocated for the ecocentric approach: that is, nature itself ought to have legal rights.

B An Ecocentric Approach: Humans and Nature have Rights

Professor Stone popularised the ecocentric approach.[32] This approach shifts the modern western ideology of dominating, controlling and using the Earth solely for the benefit of humanity to the creation of a new human governance system that mutually enhances the relationship between humans and all other members of the Earth community.[33]

The ecocentric approach is based on the understanding that all life forms have equal worth independent of their value to human interests and that they should be

30 James May and Erin Daly "Vindicating Fundamental Environmental Rights Worldwide" (2009) 11 Or Rev Int'l L 365 at 411.

31 Marc Pallemaerts "International Environmental Law from Stockholm to Rio: Back to the Future?" in Philip Sands (ed) *Greening International Law* (Earthscan, London, 1994) 1.

32 Stone, above n 27. See also *Sierra Club v Morton* (1972) 405 US 727 (SC) at 742-754.

33 Cormac Cullinan "A History of Wild Law" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 12 at 12 and Linda Sheehan "Earth Day Revisited: Building a Body of Earth Law for the Next Forty Years" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 236 at 237 and 242.

recognised and protected as rights-holders alongside humans.[34] Hosken insists that "rights" originate from existence itself, not from humans, which means that rights cannot belong exclusively to humans. The Earth is the primary law-giver, not the human legal system.[35] Thus, rights are not for humans to award or withhold from other beings on Earth.[36] Every component of the Earth community has three rights: the right to exist (such as freedom from disturbance during reproductive and migratory cycles), the right to a basic standard of well-being (such as a ban on destroying habitats through the pollution of rivers), and the right to fulfil its role in the ever-renewing processes of the Earth community (such as creating the right conditions for bees to pollinate).[37] The rights of each being are limited by the right of other beings to the extent necessary to maintain the integrity, balance and health of the communities within which it exists.[38]

Human acts that infringe the rights of other beings violate the fundamental relationship of interdependence that constitutes the Earth community (the Great Jurisprudence) and are consequently "unlawful".[39] Human governance systems must:[40]

(1) Determine the lawfulness of human conduct by whether the conduct strengthens or weakens the relationships that constitute the Earth community, which includes the predator-prey relationship;
(2) Maintain a dynamic balance between the rights of humans and those of other members of the Earth community on the basis of what is best for Earth as a whole (such as prohibiting humans from deliberately destroying the functionality of major ecosystems); and

34 Stone, above n 27, at 456. See also Joshua Bruckerhoff "Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights" (2007) 86 Tex L Rev 615 at 618.

35 Liz Hosken "Reflections on an Inter-cultural Journey into Earth Jurisprudence" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 25 at 25-26.

36 Cashford, above n 20, at 8.

37 At 9-10.

38 Cullinan, above n 33, at 13.

39 Sheehan, above n 33, at 242.

40 Ian Mason "One in All: Principles and Characteristics of Earth Jurisprudence" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 36 at 36-40.

(3) Recognise all members of the Earth community as subjects before the law, with the right to the protection of the law through an effective remedy for human acts that violate their fundamental rights.

Humans, as stewards of nature, must ensure a legal arrangement that allows both humans and other members of the Earth community to thrive.[41] Scholars critical of the ecocentric approach have complained that no human can effectively judge nature's needs.[42] Stone's response was that natural objects can communicate their needs to us in ways that are sufficiently clear. For example, the guardian of a smog-endangered stand of pines could claim with confidence that his or her client wanted the smog stopped.[43] With the advance of science and technology, humanity can judge with increasing accuracy whether a natural object's well-being is being detrimentally affected.

An ecocentric approach offers two practical benefits:

(1) It shifts the burden of proof in legal proceeding.[44] An individual or corporation seeking to alter or destroy any aspect of nature would have to justify why this action should be permitted, instead of those wishing to prevent destruction having to prove why nature should be conserved.
(2) It influences the decision-making process. Stone notes that natural objects have typically counted for little in their own right, both in law and in popular movements.[45] Even where special measures have been taken to conserve nature, the dominant motive has been to conserve nature for the utilitarian benefit of humankind.[46] For example, New Zealand's Resource Management Act 1991 (the RMA) is primarily aimed at the management of the environment for human interests, "managing the use, development and protection of natural and physical resources in a way, or at a rate which enables people and communities to provide for their economic well-being

41 Carolyn Merchant *The Death of Nature: Women, Ecology and the Scientific Revolution* (Harper and Row, San Francisco, 1980) at 246-252.

42 Joe Schwartz "The Rights of Nature and the Death of God" (1989) 97 Public Interest 3 and 7.

43 Stone above n 27, at 471.

44 Cullinan, above n 33, at 21.

45 Stone, above n 27, at 463.

46 Begonia Filgueria and Ian Mason "Wild Law: Is there any Evidence of Earth Jurisprudence in Existing Law?" in Peter Burdon (ed) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (Wakefield Press, South Australia, 2011) 192 at 196.

> and for their health and safety…".[47] Describing nature in the "right" terms will influence and even steer our policy and decision-making process. A society that speaks of the "legal rights of nature" would be more inclined to enact environmentally friendly laws.[48]

In reflection of Stone's view that all elements of nature have equal value, international and domestic environmental law instruments have increasingly recognised the intrinsic value of nature and the interconnectedness of humans and nature. For example, the World Charter for Nature 1982 proclaims that "every form of life is unique, warranting respect regardless of its worth to man … the continued existence of all forms of life shall not be compromised".[49] Despite the fact that the RMA's primary aim is to further human interests, it notably also recognises the "intrinsic value of ecosystems".[50] The 2008 Ecuadorian Constitution goes even further by granting inalienable substantive rights to nature, as well as committing the State and citizens to live in harmony with nature.[51] Such provisions reflect the idea of the Earth as a community of subjects enjoying equality before the law. In April 2009, the UN General Assembly adopted a resolution proposed by Bolivia proclaiming 22 April as "International Mother Earth Day".[52] Bolivian President Evo Morales expressed the hope that, just as the 20th century has been called the century of human rights, the 21st century will be known as the century of the rights of Mother Earth.[53] These developments have arguably changed the debate from whether or not it is theoretically possible to recognise rights for nature to whether or not doing so would be legally effective.

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47 Resource Management Act 1991, s 5. See also Filgueria and Mason, above n 46, at 197 and Sheehan, above n 33, at 236 and 239.

48 Stone, above n 27, at 488-49. See also Catherine Redgwell "Life, the Universe and Everything: A Critique of Anthropocentric Rights" in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 71 at 84-85 and Michael Anderson "Human Rights Approaches to Environmental Protection: An Overview" in Alan Boyle and Michael Anderson (ed) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 1 at 15.

49 World Charter for Nature, A/RES/37/7, 28 October 1982.

50 Resource Management Act 1991, s 7. See generally *West Coast Environment Network v West Coast Regional Council and Buller Council* [2013] NZ Environment Court 47 at [319] and [320] and Stephanie Curran "The Preservation of the Intrinsic: Ecosystem Valuation in New Zealand" (2005) 9 NZJEL 51 at 52.

51 Ecuadorian Constitution, Art 71 and Cullinan, above n 33, at 21.

52 *International Mother Earth Day* A/RES/63/278.

53 UN GA/10823 Sixty-Third General Assembly Plenary 80th Meeting 22 April 2009.

C Reconciling the Anthropocentric and Ecocentric Approaches

Scholars have questioned whether the anthropocentric and ecocentric approaches can co-exist. Professor Shelton eloquently described the distinctions between the two approaches in the following way:[54]

> Some theorists [anthropocentric] suggest that environmental issues belong within the human rights category, because the goal of environmental protection is to enhance the quality of human life. Even environmental protection is often for the purpose of enabling human schemes to continue and is not for the protection of nature for its own sake. Opponents [ecocentric] argue, however, that human beings are merely one element of the complex global ecosystem, which should be preserved for its own sake and not for what the Earth can do for humans. Under this approach, human rights are subsumed under the primary objective of protecting nature as a whole.

The dominant rationale for environmental protection is the main difference between the two approaches. These rationales are not always in conflict, since environmental harms often go hand in hand with human rights abuses.[55] Conflict arises when the rationales do not coincide (such as economic development and ecological protection) or when environmental harm does not affect human rights (such as where environmental degradation occurs before public health is compromised).[56] The ecocentric approach addresses those conflicts by maintaining balance in the ecosystem rather than tipping the scale in favour of humans.[57] Whether that balance is acceptable is ultimately a political question that must be addressed by the New Zealand public. There are competing rights in every field of law, but it should be recognised that both approaches ultimately contribute to a shared objective: environmental protection. For this reason, the author endorses both approaches. Working alongside each other, both can combine to achieve their shared objective.

Having addressed the theoretical approaches to environmental protection, Part II of this paper explores experiences overseas to identify the key legal issues (in

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54 Dinah Shelton "Human Rights, Environmental Rights, and the Right to Environment" (1991) 28 Stan J Int'l L 103 at 104-105.

55 Tim Hayward *Constitutional Environmental Rights* (Oxford University Press, Oxford, 2005) at 34 and Fatma Ksentini *Human Rights and the Environment from Environmental Law to the Right to a Satisfactory Environment: Legal Foundations* E/CN.4/Sub.2/1994/9 at [248], [251] and [252].

56 Redgwell, above n 48, at 87 and Shelton, above n 54, at 117.

57 Filgueria and Mason, above n 46, at 200.

relation to the anthropocentric and ecocentric approaches) that must be addressed by Parliament to ensure the successful enforcement of an environmental protection regime through the Courts.

V SETTING THE SCENE

When undertaking a human rights approach to resolving environmental claims, an environmental human rights claim will only succeed upon satisfying four conditions:[58]

(1) The party who brought the claim has standing to sue;
(2) The existence of environmental degradation (such as discharge of hazardous pollutants);
(3) The State's action or omission results in or contributes to that environmental degradation (such as granting permits to emit air pollutants or failure to prevent ecosystem destruction). In limited circumstances, a claim may be brought against a non-State actor (such as a corporation or individual) for such degradation; and
(4) Environmental degradation violates an accepted human right that the State had an obligation to safeguard.

The next section of this article ascertains how overseas countries have approached issues (1), (3) and (4) above. These issues are essential to establishing an effective regime for environmental protection.

VI A LEGAL FRAMEWORK FOR ENVIRONMENTAL PROTECTION

A Standing Requirement

Standing is the first issue in any litigation. Standing is the set of legal rules (imposed by legislation or court practices) that determine who can initiate a lawsuit or participate in a court proceeding.[59] Laws on standing vary enormously among

58 Linda Malone and Scott Pasternak *Defending the Environment Civil Strategy Strategies to Enforce International Environmental Law* (Island Press, Washington, 2006) at 10.

59 Derek Nolan (ed) *Environmental and Resource Management Law* (online looseleaf ed, LexisNexis) at [19.2].

jurisdictions, and are often inconsistent and unpredictable.[60] Standing rules range from extremely narrow to very open.[61]

In Europe, some countries have adopted restrictive standing rules.[62] For example, in Austria, to appeal a government's decision, NGOs must have been in existence for at least three years, have a written mission to protect the environment, and must have participated in the initial government hearing to have standing. For individuals to have standing, they must show government action will directly impact them (or their property) economically and/or physically, or impede their substantive rights.[63]

In most Commonwealth jurisdictions, including New Zealand, in order to bring a civil action, the complainant has to have a "sufficient interest" in the matter which the court is being asked to hear.[64] This test requires the complainant to show impairment of a right (such as the right to life) resulting from environmental degradation, or that the claimant has a sufficient interest (such as geographical vicinity or economic vulnerability to the proceeding's outcome) in the proceeding, to be granted standing.[65] This test has been subject to criticism. In 1985 and 1995, the Australian Law Reform Commission found that Australia's "'sufficient interest' test can be overly dependent on subjective value judgements. This can make the legal proceeding appear unfair, inefficient and ineffective. The current law on standing is therefore a door-keeper the courts do not need as protection and litigants cannot afford."[66] These comments are equally valid in the New Zealand environmental law context.[67]

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60 Svitlana Kravchenko and John Bonine *Human Rights and the Environment: Cases, Law, and Policy* (Carolina Academic Press, 2008).

61 P Vera, R Masson and L Kramer *Summary Report on the Inventory of EU Member States' Measures on Access to Justice in Environmental Matters* (European Commission, Brussels, September 2007).

62 Anna Sherlock and Francoise Jarvis "The European Convention on Human Rights and the Environment" (1994) 24 European L Rev 15.

63 Catherine Pring and George Pring *Greening Justice Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, Washington, 2009) at 37.

64 *Laws of New Zealand* Resource Management (online ed) at [258] and Nolan, above n 71, [19.7].

65 Nolan, above 59, at [19.8]-[19.11].

66 Australian Law Reform Commission *Standing in Public Interest Litigation* (ALRC Report No 27, 1985) and Australian Law Reform Commission *Beyond the Doorkeeper - Standing to Sue for Public Remedies* (ALRC Report No 78, 1995).

67 Nolan, above n 59, at [19.8]-[19.11]. See *Transit New Zealand v Auckland Regional Council* NZ Environment Court Auckland A91/2000, 17 June 2000 for a restrictive approach. Contrast

In Asia, Africa and parts of the Americas, countries have abandoned the traditional "sufficient interest" requirement. The focus has shifted from who is bringing the proceeding to whether there has been a breach of statutory duty. The advantage of this approach is that it gives opportunities to NGOs and civil society at large to address environmental degradation before the courts where the aggrieved persons are financially or socially disadvantaged or difficult to identify. In Trinidad and Tobago, "any individual or group of individuals expressing a general interest in the environment or a specific concern with respect to the alleged violation of environmental law" is deemed to have standing to bring an action against the offender alleging a violation of the Environmental Management Act 2000 (Trinidad and Tobago).[68] In Chile and India, any person can lodge a claim where there has been environmental degradation without needing to prove that he or she had a direct connection to such damage.[69] In the Philippines, the Supreme Court Rules of Procedures for Environmental Cases explicitly identify future generations as having standing to sue.[70] This rule also expressly grants any Filipino citizen permission to sue in the interest of protecting the environment, on the basis that humans are stewards of nature.[71] In effect, it is the environment which is vindicated in any such action.

Upon meeting the standing requirement, the claimant must prove his or her rights have been harmed by the environmental degradation. Environmental protection and human rights are distinct fields of law.[72] The objective of

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Meadow 3 Ltd v Queenstown Lakes District Council NZ Environment Court Christchurch C1/2008, 16 January 2008 for a liberal approach.

68 Environmental Management Act 2000 (Trinidad and Tobago), s 69.

69 Barry Hill, Steven Wolfson and Nicholas Targ "Human Rights and the Environment: A Synopsis and Some Predictions" (2003) 16 Geo Int'l Envtl L Rev 359 at 388, *Comunidad de Chañaral v Codeco División el Saldor* (1988) Chilean Supreme Court and *S P Gupta v Union of India* (1982) AIR SC 149.

70 Supreme Court Rules of Procedures for Environmental Cases 2010, s 5. See generally *Minors Oposa v Factoran* GR No 101083 224 SCRA 792 (SC July 30, 1993) (Philippine) at 794.

71 Supreme Court Rules of Procedures for Environmental Cases 2010, s 5. See generally "Annotation to the Rules of Procedure for Environmental Cases" <www.lawphil.net>.

72 *Promotion and Protection of Human Rights Science and Environment* E/CN.4/2002/WP.7 at [10] and Ole Pedersen "European Environmental Human Rights and Environmental Rights: A Long Time Coming?" (2008) 21 Geo Int'l Envtl L Rev 73 at 73.

environmental law is to conserve and protect the environment itself.[73] It does not focus on the impact of environmental degradation on the human community.[74] Consequently, at the start of the 20th century, human rights law has been developed to address environmental degradation on human beings.[75] This development ("environmental human rights") can be separated into two stages.[76] At first, existing human rights were judicially reinterpreted to apply to environmental degradation. This was followed by the development of a new human right to safeguard against environmental degradation.

B Reinterpreting Existing Human Rights to Address Environmental Concerns

At the international, regional and national levels, human rights instruments drafted in the early 20th century do not contain provisions explicitly addressing environmental protection. When these instruments were adopted, the drafters did not foresee the enormity of ecological degradation and the consequent necessity for human rights norms to encompass environmental considerations.[77] Nonetheless, international bodies and domestic courts have begun to recognise the critical connection between environmental degradation and the sustenance of the rights under these instruments through the reinterpretation of existing rights, including: the right to life, health,[78] water,[79] an adequate standard of living,[80] privacy, food,[81]

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73 Richard Lazarus "Restoring What Environmental about Environmental Law in the Supreme Court" (2000) 47 UCLA L Rev 703 and Robin Churchill "Environmental Rights in Existing Human Rights Treaties" in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 89 at 108.

74 Popović, above n 26, at 339-340 and 345. See also *Kyrtatos v Greece* (2003) ECHR 2003-VI at [52].

75 *Promotion and Protection of Human Rights: Science and Environment* E/CN.4/2004/87 at [21]-[23].

76 See generally May and Daly, above n 30, at 367-368 for a history of the environmental human right development at the international, regional and national level.

77 Svitlana Kravchencko "Environmental Rights in International Law: Explicitly Recognised or Creatively Interpreted?" (2012) 7 Fla A & M U Lev 163 at 166.

78 *Human Rights and the Environment as Part of Sustainable Development* E/CN.4/2005/96 at 14-15 and *Manual on Human Rights and the Environment* (Council of Europe Publishing, Strasbourg, 2012) at 9 and 117-121.

79 UNCESCR *General Comment 15: The Right to Water* UN Doc E/C.12/2002/11 (20 January, 2003) at 2 and 3 and Human Rights Council Resolution A/HRC/15/L.24, 24 September 2010 "Human Rights and Access to Safe Drinking Water and Sanitation".

80 UNCESCR General Comment No 12 E/C.12/1999/5 (12 May 1999).

development, information,[82] and so on. Due to the extensive jurisprudence on the reinterpretation approach, not all cases will be discussed in this paper.[83] Instead, the following analysis will draw out the key legal principles articulated by different courts and commissions in linking the environment with the right to life. This right has been chosen because the right to life is incorporated into the New Zealand Bill of Rights Act 1990 (NZBORA), and is therefore relevant to the New Zealand context.

The right to life is affirmed in the International Convention on Civil and Political Rights 1966 (ICCPR),[84] the European Convention on Human Rights 1950 (European Convention),[85] the African Charter Human and Peoples Rights 1981 (African Charter)[86] and the Inter-American Convention on Human Rights 1969 (American Convention).[87] All of these instruments are concerned with civil and political rights.[88] These instruments predate the widespread international concern with environmental degradation which arose in the late 1970s, as reflected in the 1972 UN Conference on the Human Environment, and later in the 1992 Earth Summit, the 2002 World Summit on Sustainable Development and the 2012 UN Conference on Sustainable Development.[89] In light of this background, questions can be raised about this right's usefulness in addressing environmental concerns.

The right to life has traditionally been interpreted as the right to be free from arbitrary deprivation of life by the State (including forced disappearances, extrajudicial executions and other similar threats).[90] It is clear that this right prohibits the State from intentionally or negligently taking life, for example, if the

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81 United Nations Food and Agricultural Organisation Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security (adopted in 2004) <www.fao.org>.

82 *The Right to Freedom of Expression and Opinion* E/CN.4.2004/62.

83 See generally Earth Justice *Environmental Rights Report 2007 Human Rights and the Environment* (Earth Justice, Oakland, 2007).

84 Article 6(1).

85 Article 2.

86 Article 4.

87 Article 4.

88 Churchill, above n 73, at 90.

89 *Promotion and Protection of Human Rights: Science and Environment*, above n 75, at [40].

90 *Osman v United Kingdom* (2000) 29 EHRR 245 at [115]. See generally Stefan Webber "Environmental Information and the European on Human Rights" (1991) 12 Hum Rts LJ 177.

State intentionally caused deaths through environmental degradation, such as polluting a drinking reservoir. What is not clear is whether the right covers *all* environmental harms.[91] First, most environmental harms are not intentionally directed at people. Second, the right to life is traditionally conceived as a negative right "freedom from" rather than a positive right "rights to".[92] Finally, where immediate survival is not threatened, does the right to life encompass quality of life issues? For example, because air and water are necessary to sustain life, does the right to life imply a right to pollution-free air and water? These questions have generated a variety of responses by different governing bodies.

At the international level, the UN Human Rights Committee is the body responsible for hearing complaints concerning the violation of ICCPR rights, as well as overseeing and advising States on the implementation of the ICCPR (the reporting process).[93] The Committee proposes a number of criteria in assessing complaints alleging a breach of the right to life based on environmental harms. These include:[94]

(1) The risk to life must be actual or imminent;
(2) The applicant must be personally affected by the harm;
(3) Environmental contamination with proven long-term health effects may be a sufficient threat, however, in this context, there must be sufficient evidence that harmful quantities of contaminants have reached, or will reach, the human environment; and
(4) A hypothetical risk is insufficient to constitute a violation of the right to life.

Notably, the Committee has taken the view that the right to life does involve States taking positive measures to protect lives.[95] Under the reporting process, the Committee has consistently sought information on measures taken in the

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91 Justine Thornton and Stephen Tromans "Human Rights and Environmental Wrongs: Incorporating the European Convention on Human Rights: Some Thoughts on the Consequences for UK Environmental Law" (1999) 11 J Envtl L 35 at 54.

92 Burns Weston "Human Rights" (1986) 6 Hum Rts Q 257 at 264.

93 First Optional Protocol to the International Covenant on Civil and Political Rights 1966, Article 40.

94 Communication No 35/1978 UN Doc CCPR/C/12/D/35/1978, *E.W v the Netherlands* Communication No 429/1990 UN Doc CCPR/C/47/D/429/1990 and *Aalbersberg v the Netherlands* Communication No 1140/2005 UN Doc CCPR/C/87/D/1440/2005.

95 Churchill, above n 73, at 90 and UN Human Rights Committee *General Comment No 6: The Right to Life* UN Doc HR/GEN/1/Rev1 (1994) at [1] and [5].

environmental field (such as agrarian reforms and the regulation of the transportation and dumping of nuclear waste).[96] McGoldrick points out that there are doubts as to whether the State's positive obligation "is immediate or progressive".[97]

At the regional level, the European Court of Human Rights (ECtHR) and the Inter-American Commission on Human Rights (IACHR) have found that there may be a violation of the right to life based on environmental harms. In 2004, the ECtHR found a breach of the right to life in an environment case, *Öneryildiz v Turkey*, which involved a clear loss of life.[98] The applicant complained that a 1993 methane explosion at an improperly designed and maintained rubbish tip, in which nine members of the applicant's family died, was the result of the Turkish administrative authorities' negligence.[99] According to a 1991 expert report, the rubbish tip did not conform to Turkey's environmental regulations and was therefore causing damage to the environment and posed "[health] risks to humans and animals".[100] The report also warned of the possibility of a methane explosion which would cause "substantial damage" to neighbouring dwellings. Despite having knowledge of this report, administrative authorities took no measures to address the danger.[101] The ECtHR described the danger as real and immediate.[102] In finding there was a violation of the right to life,[103] the Court reiterated that:[104]

> Article 2 (everyone's right to life shall be protected by law) does not solely concern deaths resulting from the use of force by the States but also lays down a *positive obligation on States* to take appropriate steps to safeguard the lives of those within their jurisdiction … this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake …

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96 Dominic McGoldrick *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford University Press, Oxford, 1991) at 329-330.

97 At 330 and 347.

98 *Öneryildiz v Turkey* XII Eur Ct HR 79 (2004).

99 At [18].

100 At [13], [15], [23] and [56].

101 At [15], [16], [29], [33] and [60].

102 At [100]-[101].

103 At [75] and [97]-[115].

104 At [66], [71], [72] and [89]-[96].

> negligent omission on the part of the State authorities come[s] within the ambit of article 2 …

The IACHR has similarly found a violation of the right to life due to environmental pollution (such as contamination of water, soil and air). As stated by the IACHR: "the realisation of the right to life is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation *pose a persistent threat* to human life, the right to life is implicated."[105]

At a national level, the Indian Supreme Court has formulated the most expansive interpretation of the right to life, holding that the right encompasses quality of life issues.[106] This liberal position was due to the fact that the Supreme Court justices were concerned that the Indian Government was not protecting human health and the environment in contravention of the public interest.[107] For example, in *Subhash Kumar v State of Bihar*,[108] the Court held that the right to life includes "the right of enjoyment of pollution free water and air for full enjoyment of life."[109] In *Charan Lal Sahu v Union of India*,[110] in confirming the link between a healthy environment and the realisation of the right to life, the Court held that "it is the duty of the State to take effective steps to *protect* the right to life."[111] In another case *M C Mehta v The Union of India*,[112] leather tanneries located on the Ganga River's bank were polluting the River by discharging untreated wastewater. The water pollution had caused considerable harm to the life of people who used the River (such as water-borne diseases) and also to the River's ecology. The Court

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105 *Yakye Axa v Paraguay* Judgment of 17 June 2005 Series C No 125 at [160]-[167] and *Sawhoyamaxa Indigenous Community v Paraguay* Judgment of 29 March 2006 Series C No 146 at [148]-[151].

106 Lavanya Rajamani "Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability" (2007) 19 J Envtl L 293.

107 Hill, Wolfson and Targ, above n 69, at 482.

108 *Subhash Kumar v State of Bihar* (1991) AIR SC 420.

109 At [1].

110 *Charan Lal Sahu v Union of India* (1990) AIR SC 1480 at [2] and [41].

111 Michael Anderson "Individual Rights to Environmental Protection in India" in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 199 at 217.

112 *M C Mehta v Union of India* [1987] 4 SCC 463.

held that, on the facts, the right to life has greater importance than economic development:[113]

> … a tannery, which cannot set up a treatment plant, cannot be permitted to continue to be in existence for the adverse effect on the public at large which is likely to ensue by the discharging of the trade effluents from the tannery to the river Ganga would be immense and it will outweigh any inconvenience that may be caused to the management and the labour employed by it on account of its closure.

In New Zealand, the rights protected by the NZBORA were drawn from the ICCPR.[114] The NZBORA affirms the right to life in s 8, which states, that "no one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice." Presently, no New Zealand cases have directly addressed the issue of whether the right to life includes an environmental element.[115] A full analysis of whether New Zealand Courts will follow overseas jurisprudence is beyond this article's scope. The author encourages scholars to address this issue in future research. In short, it is the author's view that claimants would face an arduous battle attempting to succeed with such an argument before the New Zealand Courts. First, the NZBORA was drafted to give effect to civil and political rights only.[116] Second, in a 2007 High Court decision, in light of the wording of s 8, the Court strongly doubted that the right to life include "things necessary to [sustain] life".[117] Finally, in response to a 2007 Asia Pacific Forum Human Rights and Environment questionnaire, the New Zealand Human Rights Commission wrote: "s 8 is directed not to the quality of life that a person enjoys … s 8 is aimed at acts (or omissions) that produce fatality; anything short of fatality does not engage s 8."[118] The New Zealand Courts are therefore unlikely to

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113 At 482.

114 Susan Glazebrook "The New Zealand Bill of Rights Act 1990: Its Operation and Effectiveness" (paper represented to the South Australian State Legal Convention, Adelaide, 23-24 July 2004) at [2] and [8].

115 *Human Rights and the Environment: Final Report and Recommendations* (The Asia Pacific Forum of National Human Rights Institutions, September 2007) at 42-44.

116 At 143.

117 *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC) at 494-495. See generally Zoe Brentnall "The Right to Life and Public Authority Liability: The Bill of Rights, Personal Injury and the Accident Compensation Scheme" (2010) 16 Auck U L Rev 110.

118 *Human Rights and the Environment Reference Paper* (The Asia Pacific Forum of National Human Rights Institutions, September 2007) at 145.

follow the Asian jurisprudence that the right to life encompasses quality of life issues, such as a general human right to a healthy environment.

C The Emergence of a New Human Right to Address Environmental Concerns: The Right to a Healthy Environment

At the beginning of the 21st century, scholars advocated for a new environmental human right: the right to a safe, healthy and ecologically-balanced environment.[119] Hayward explained why this new right is necessary in addition to the existing human rights (such as the rights to life):[120]

> The suggestion that an express environmental right is not necessary because remedies can be deduced from existing right of life … is ultimately not very credible, since environmental protection is not a primary aim of [this] right and may not always a derivate aim, or not one strongly enough established to support claims in courts. Another source of concern about deriving environmental rights from [the right to life] instituted for quite different purposes is that … it 'depends on the initiative of the adjudicating body' and requires 'a willingness in the adjudicating body to be assertive and perhaps adventures'.

Atapattu then explained, in detail, the difference between the two approaches:[121]

> The drawback of the [reinterpretation approach] is that the victim has to prove that the environmental issue in question has violated one of his or her human rights. If this link cannot be established, then the action will fail. Thus, for example, a victim of pollution caused by an industrial establishment must prove that, as a result of suffering pollution damage, his or her health has been impaired. It may not be easy to establish this link in every case. On the other hand, the recognition of a distinct human right to a healthy environment would allow a victim to establish that the pollution level in his or her neighbourhood has increased as a result of the industrial establishment and exceeds the permissible level for that particular pollutant. In such a situation, establishing individual injury (which may be long term anyway) is not necessary, as the victim would be in a position to show that the environment in which he or she is living has been polluted by the activity of the industry in question. Establishing that because of the emission of a pollutant above a certain threshold, the environment is no longer healthy to live in, is all that is required. This approach thus

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119 Hayward, above n 65.

120 At 12-13 and 175-177.

121 Sumudu Atapattu "The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment under International Law" (2002) 16 Tul Envtl LJ 65 at 99.

circumvents one major problem inherent in the litigation process, namely establishing injury.

The UN Environmental Programme has labelled this new right a "debated" concept.[122] This debate arises from the lack of uniform acceptance of such a right as well as limited enforceability at the regional and national levels.

1 Regional level

There is no regional consensus on the existence of a right to a healthy environment. In 2007, at an Asia and Pacific regional ministerial conference on the environment, the consensus was not to declare the right to a healthy environment. Similarly, the Council of Europe's Committee of Ministers rejected proposals from the European Parliamentary Assembly to add a protocol to the European Convention recognising the right to a healthy environment in 2004 and 2010.[123]

In contrast, other regions of the world have recognised the right to a healthy environment. The African Charter was the first regional human rights instrument to explicitly recognise this right. Article 24 states that "*all people* shall have the right to a general satisfactory environment favourable to their development." Soon after, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988 (Protocol of Salvador) recognised that "everyone shall have the right to live in a healthy environment."[124] The State also has a positive obligation to "promote the protection, preservation, and improvement of the environment."[125]

Scholars have labelled both instruments' ability to provide legal remedies for environmental human rights victims as "weak".[126] The African Commission and

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122 "High Level Expert Meeting on the Future of Human Rights and Environment: Moving the Global Agenda Forward" United Nations Environmental Programme <www.unep.org>.

123 Council of Europe, Parliamentary Assembly, Environment and Human Rights Doc 9791 16 April 2003 and Council of Europe, Parliamentary Assembly (24th sitting) on 27 June 2003, Recommendation 1614 and Council of Europe, Reply adopted by the Committee of Ministers on 41 January 2004 at the 869th meeting of the Ministers' Deputies and Parliamentary Assembly of the Council of Europe 2010 reply to Recommendation 1885: Drafting on Additional Protocol to the European Convention on Human Rights Concerning the Right to a Healthy Environment Doc No 12298 16 June 2010. See also Shelton, above n 54, at 133.

124 Article 11(1).

125 Article 11(2).

126 J Taillant "Environmental Advocacy and the Inter-American Human Rights System" in R Picolotti and J Taillant (eds) *Linking Human Rights and the Environment* (University of Arizona Press, Tucson, 2003) 118.

the IACHR have limited powers. The African Commission can only make non-binding recommendations to State parties.[127] A study of 40 cases, in which the African Commission found human rights violations and issued recommendations, revealed only six cases in which the State complied fully with the recommendations.[128] The Protocol of Salvador does not grant the right of individual petition before the IACHR for violations of the human right to environment.[129] This leaves only the processes of annual State reporting, and the IACHR's non-binding commentary on such reports, as methods of addressing environmental human rights violations.[130] Furthermore, the State's positive obligation is also weakened by other articles in the American Convention. For example, art 1 provides that the State's positive obligation is not immediate. It is to be progressively realised. The rate of progress depends on the State's available resources. Churchill described the effect of art 1 in the following manner:[131]

> If the State lacks the resources to promote a healthy environment, the State needs do nothing. Conversely, if the State has the resources and the human environment can be improved, the State must take some measures. To a considerable extent, therefore, bearing in mind the generally economic conditions prevailing in much of Latin America, article 1 is a recipe for inaction to protect the environment.

The reference to "all people" in the African Charter initially caused confusion as to who can bring a complaint to the African Commission. Scholars have suggested the reference to "all people" only protects a collective right (such as the entire population).[132] In other words, art 24 is not actionable by an individual. It was not until 2000, 19 years after the Charter came into operation, that the African

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127 J Nwobike "The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria" (2005) 1 African J Legal Stud 129 at 145.

128 F Viljoen and L Louw "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004" (2007) 101 Am J Int'l L 1.

129 Article 19(6).

130 Article 19(7).

131 Churchill, above n 73, at 99-100.

132 Richard Kiwanuka "The Meaning of 'People' in the African Charter of Human and Peoples' Rights" (1988) 82 Am J Int'l Law 80 and P Birnie and A Boyle *International Law and the Environment* (2nd ed, Oxford University Press, Oxford, 2002) at 254.

Commission clarified that art 24 encompasses both collective and individual rights.[133]

To date, the African Commission has only issued one major recommendation specifically on the impact of environmental degradation on the human right to environment. In *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, the plaintiffs alleged that companies engaging in oil extraction and pipeline construction violated international environmental law regarding concerns for health, environment and contamination of water, soil and air.[134] The Commission emphasised that, apart from the duty to respect, protect and promote, the State has a positive obligation to fulfil vis-à-vis article 24 and must "take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."[135] The Commission also recognised that Nigeria's economy depended on oil extraction, the income from which will be used to fulfil the State's obligations under the African Charter.[136] The Commission made no clear indication as to how the Nigerian Government should balance economic development with the protection of environmental human rights.[137]

2 National level

Over the past four decades, there has been a growing trend toward constitutional recognition of the importance of environmental protection. At the time of the 1972 Stockholm Declaration, only a handful of constitutions addressed environmental issues.[138] Today, some 125 national constitutions expressly address environmental norms.[139] Out of 164 developing countries, 107 address environmental norms compared to 18 out of 34 developed countries.[140] About 92 constitutions explicitly

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133 *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* ACHPR 155/96, 27 October 2000.

134 At [1]-[9] and [50].

135 At [43]-[53].

136 At [54].

137 Atapattu, above n 121, at 88.

138 Boyd, above n 4, at 47.

139 Hayward, above n 65, at 129.

140 Christopher Jeffords *Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions* (The Human Rights Institute, Connecticut, 2011) at 13.

recognise the right to a healthy environment.[141] No other human right has achieved such a broad level of constitutional recognition in such a short period of time.[142]

Although many constitutions contain the right to a healthy environment, only a few have been held to be enforceable by affected individuals.[143] May and Daly observes that:[144]

> Judicial receptivity to fundamental environmental rights provisions seems to belie predictable patterns. Courts from developed countries have been less receptive to constitutional environmental rights claims than have courts from the developing world.[145]

To further explore the nature of constitutional environmental human rights, this article will ascertain the common factors that influence a constitution's enforceability by affected individuals. Enforceability is an important aspect of environmental protection, as it ensures accountability when rights are violated or responsibilities go unfulfilled.[146] If rights are unenforceable, they may be mere "paper tigers", with their constitutional recognition amounting to nothing more than "cheap talk".[147]

Constitutional theory identifies two types of provisions which can be formulated to ensure environmental protection: a fundamental right and a statement of public policy.[148] Whether a constitutional provision is interpreted as a fundamental right

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141 Boyd, above n 4, at 72.

142 David Law and Mila Versteeg "The Evolution and Ideology of Global Constitutionalism" (2011) 99 California L Rev 1163.

143 James May "Constituting Fundamental Environmental Rights Worldwide" (2006) 23 Pace Envtl L Rev 113 at 114.

144 May and Daly, above n 30, at 407.

145 See generally *Pedro Flores v Corporacion del Cobre, Codelco, Division Salvador & Communidad de Chanaral v Codeco Division el Saldor*, The "Trillium Case" Decision No 2.732-96, Supreme Court, March 19, 1997 (Chile), *Proterra v Ferroaleaciones San Ramon SA* Judgment No 1156-90, Supreme Court Nov 19 (1992) (Peru), *Associacion Para la Proteccion de Medio Ambiente y Educacion Ecologica 18 de Octubre v Aguas Argentinas* SA Federal Appellate Tribunal of La Plata (2003) (Argentina), *Fundacion Natura v Petro Ecuador*, Tribunal of Constitutional Guarantees, Resolution No 230-92-CP, October 15, 1992, Case No 224/90 (Ecuador), *Metro Manila Development Authority v Concerned Residents of Manila Bay* GR Nos 171947-48 (SC Dec 18, 2008) (Philippine) and *Magyar Közlöny* Case No. 1994/No.55 (Hungarian Constitutional Court).

146 Boyd, above n 4, at 71-72.

147 The phrase "cheap talk" was used by Daniel Farber "Rights as Signals" (2002) 31 J Legal Stud 83.

148 Brandl and Bungert, above n 16, at 8.

or a statement of public policy is important for environmental litigation.[149] Statements of public policy are "important goals that guide rather than limit policy action".[150] They are not enforceable by citizens who are aggrieved by environmental degradation.[151] Policymakers who fail to incorporate these statements into actual policy face only potential political repercussions.[152] A fundamental right provision, on the other hand, creates a legal entitlement that "ties policymakers' hands" because it forces them to formulate policies and devote resources for that purpose.[153]

Unfortunately, the distinction between a fundamental right and a statement of public policy is not always clear. No two provisions in the 125 constitutions are worded the same.[154] Apart from non-legal (i.e. social, economic and political) factors, each provision's enforceability ultimately depends on a direct positive interpretation of the provision solely on the language used. Despite this, the provision's enforceability will generally depend on the presence of negative statements, silence as to rights, linguistic choice, legislative history and the placement of the environmental human rights provisions within the constitution.[155]

(a) Negative statements and silence

Negative statements and silence weaken the legal strength of constitutional environmental rights and leave citizens with little recourse to address rights violations. These statements, which either directly negate the scope of environmental rights provisions, or refer the responsibility of the environment to the domains of Parliament (requiring enabling legislation to define its parameters, implementation and enforcement), are important caveats to the state's duties and obligations.[156] Negative statements can be found in several constitutions.[157] For

149 Hayward, above n 65, at 72-74.

150 A Minkler "Economic Rights and Political Decision Making" (2009) 31 Human Rights Quarterly 368 at 381 and Brandl and Bungert, above n 13, at 16.

151 James May (ed) Principles of Constitutional Environmental Law (American Bar Association, Chicago, 2011) at 25.

152 Brandl and Bungert, above n 13, at 32.

153 Minkler, above n 150, at 382.

154 Susan Glazebrook "Human Rights and the Environment" (2009) 40 VUWLR 293 at 294-300.

155 Boyd, above n 4, at 72.

156 Jeffords, above n 140, 12.

157 Carl Bruch, Wole Coker and Chris VanArsdale *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (2nd ed, Environmental Law Institute, 2007) at 19.

example, art 36 of Lesotho's Constitution 1993 (part of the state policy chapter) states:

> Lesotho shall adopt policies designed to protect and enhance the natural environment of Lesotho for the benefit of both present and future generations and shall endeavour to assure to all citizens a sound and safe environment adequate for their health and well-being.

This is preceded by a clause declaring the State's duty to be non-justiciable:[158]

> The principles contained in this Chapter [state policy chapter] shall form part of the public policy of Lesotho. These principles shall not be enforceable by any court …

Thirteen constitutional provisions specify that the right to environment may be invoked only according to specific conditions determined by law. This type of constitutional provision is described as "non-self-executing".[159] For example, South Korea's Constitution expressly requires legislative measures as a prerequisite for citizen enforcement, specifying that: "All citizens shall have the right to a healthy and pleasant environment. The substance of the environmental rights shall be determined by the Act."[160]

Some constitutions contain no provisions explicitly addressing the enforceability issue.[161] For example, Cuba's constitutional provisions are silent as to whether they confer an environmental right.[162] Instead, Cuba's Constitution only imposes a duty on the State to protect the environment.[163] Scholars have argued that such an obligation contains an implicit environmental right.[164] Some courts and states have been sympathetic to such arguments. For example, although Kazakhstan's Constitution does not expressly include an environmental right, the Kazakh Environmental Code contains an expansive articulation of the substantive and procedural aspects of such a right.[165]

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158 Article 25.

159 Hayward, above n 65, at 96.

160 Article 35(2). See also R Grote "The Republic of Korea: Introductory Note" in R Wolfrum and R Grote (eds) *Constitutions of the Countries of the World* (Oceana Law, New York, 2011) at 14.

161 Bruch, Coker and VanArsdale, above n 157, at 8.

162 May and Daly, above n 30, at 406.

163 Article 27.

164 Boyd, above n 4, at 60, 217-218 and 222.

165 Government of Kazakhstan, Environmental Code, Law No. 212-Z, 9 January 2007.

(b) Language, legislative intent and placement of constitutional provisions

For a constitutional right to be enforceable, the relevant provision must confer a right of action on individuals.[166] This is known as a self-executing provision.[167] For example, the Chilean Constitution prima facie guarantees enforceability, providing that "the action for the protection of fundamental rights shall always lie in the case of article 19, when the right to live in an environment free from contamination has been affected by an illegal act or omission imputable to an authority or specific person."[168]

When a constitutional provision does not explicitly indicate that a right is self-executing, the constitutional text influences how courts will interpret the right's enforceability.[169] Jeffords and Minkler have observed that the strength of the language determines the provision's enforceability vis-à-vis the State.[170] Words and phrases such as (but not limited to) "duty", "shall", "obliged", and "incumbent upon" are generally considered, independently, to be the language of enforceable law. For example, Togo's Constitution provides that "*everyone shall* have the right to a clean environment" and the "State *shall oversee* the protection of the environment."[171] In contrast, words and phrases such as (but not limited to) "must strive to" and "take measures" are generally, independently, considered to be statements of public policy.[172] For example, Finland's constitution states that "public authorities *must strive* to ensure for every citizen the right to a healthy environment."[173] Drafting environmental rights as positive or negative rights will also influence the right's enforceability. Scholars note that the courts are generally more likely to deem a right to environment as self-executing when it imposes negative or prohibitory obligations on the state.[174]

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166 Hayward, above n 65, at 95.

167 Boyd, above n 4, at 73.

168 Article 20.

169 Conor Linehan "UK and Irish Domestic Greenhouse Gas Reduction Targets: Justifiability, Enforceability and Political Context" (2013) 21 Envtl Liability Law Pol'y and Practices 45 at 58.

170 Jeffords, above n 140 and Minkler, above n 150.

171 Article 41.

172 Jeffords, above n 140, at 18-19.

173 Section 14a.

174 Jose Fernandez "State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question" (1993) 17 Harv Envtl L Rev 333 at 375 and Sandra Fredman

The provision's location in a constitution will also influence its enforceability. First, if the environmental right and the state's environmental duties are set out in the constitution's preamble, the right will normally not be enforceable because preambles are generally not considered to be legally binding.[175] For example, Cameroon, Comoros and Mauritania constitutions place the environmental right in their preamble. Foreseeing the unenforceability issue, those constitutions state explicitly that the preamble is an integral part of the constitution.[176] Second, placing the environmental right under the "social, economic and cultural rights" section of the constitution will affect the right's enforceability.[177] For example, the right to environment provision in the Turkish Constitution is located in Part Two, Chapter Three under the heading "Social and Economic Rights and Duties".[178] All provisions under this Part must be evaluated with regard to the economic limit set up by art 65. This restriction of economic feasibility casts doubt on the enforceability of art 56.[179] Another example is the right to environment provision (art 225) in the Brazilian Constitution. Traditional fundamental rights are found in Title II, "Fundamental Rights and Guarantees", under Chapter I "Individual and Collective Rights and Duties", or Chapter II "Social Rights". Unlike these enforceable rights, art 225 is located in Title VII, under the heading "The Social Order". Brandl and Brungert considered that this location confers more of a public policy character on the environment provision, causing the enforceability of art 225 to be very "weak".[180] Finally, an environmental right that is confined to a constitution's directive principles chapter is generally unenforceable.[181] On the other hand, environmental rights provisions located in a constitution's fundamental rights section are likely to be deemed enforceable.[182] For example, the South

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Human Rights Transformed: Positive Rights and Negative Duties (Oxford University Press, Oxford, 2004) at 94-96.

175 Boyd, above n 4, at 58 and Bruch, Coker and VanArsdale, above n 157, at 7.

176 Boyd, above n 4, at 66 and Bruch, Coker and VanArsdale, above n 157, at 17-18.

177 Brandl and Bungert, above n 13, at 67.

178 Article 56.

179 Brandl and Bungert, above n 13, at 72.

180 At 7 and 78.

181 Dejo Olowu "Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees" (2006) 69 Sask L Rev 39 at 59. Contrast *Kinkri Devi v Himachal Pradesh* (1988) AIR HP 4 (India).

182 Bruch, Coker and VanArsdale, above n 157, at 16.

African Constitution is one of the few constitutions which place an environmental right in its "Bill of Rights" section of the Constitution.[183]

Ambiguous language also raises doubts about the content of environmental rights provisions. For example, the Albanian Constitution states that "everyone has the right to be informed about the status of the environment and its protection."[184] Narrowly interpreted, this article could be viewed as a procedural right only: the right to information about the status of the environment's condition. Broadly interpreted, this article could be read as a procedural and substantive right: the right to information and the right to environmental protection.[185] The resolution of this ambiguity will ultimately depend on judicial interpretation of the Constitution.

The legislative history of the constitution will often provide guidance to the courts about the provision's enforceability. The legislative histories of The Netherlands, Greek and Indian Constitutions reveal that the State's duty to protect the environment should be seen as a statement of public policy rather than the establishment of a fundamental right.[186] Similarly, Belgium's legislature did not intend the constitutional right to a healthy environment to be enforceable.[187]

VII LESSONS LEARNED FROM OVERSEAS EXPERIENCES

From the global to the local level, societies have responded to the global environmental crisis with various legal initiatives. Yet, across the board, there is no coherent legal response. The following is a summary of the "best practice" facilitating the environmental protection goal that can be distilled from Part II of this paper:

(1) Constitutional environmental rights provisions are ineffectual unless the legislature or the courts adopt a broad notion of standing.[188]

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183 Article 24. See generally *Minister of Health & Welfare v Woodcarb (Party) Ltd* (1995) SA 155 (NPD).

184 Article 56.

185 Boyd, above n 4, at 60.

186 Brandl and Bungert, above n 13, at 56-60 and Granville Austin *The Indian Constitution: Cornerstone of a Nation* (Clarendon Press, Oxford, 1966) at 75.

187 L Lavrysen and J Theunis "The Right to the Protection of a Healthy Environment in the Belgian Constitution: Retrospect and International Perspective" in Isabelle Larmuseau (ed) *Constitutional Rights to an Ecologically Balanced Environment* (VVOR, Ghent, 2007) 9.

188 May and Daly, above n 30, at 415-416.

(2) There needs to be recognition that existing human rights (such as the right to life) can be violated as a result of environmental harm:

(a) International, regional and national courts have recognised that the right to life does not solely concern deaths resulting from the intentional and immediate use of lethal force by the state.[189] Apart from the Asian jurisprudence, most Courts have not recognised that the right to life encompasses a human right to environment. Scholars have concluded that international and European case law limit environmental harm to the extent that there was a real and immediate risk to human life.[190] Thus, at the present time, a general environmental conservation objective is excluded.[191]

(b) The state has a positive obligation to adopt and implement measures to guarantee the right to life when this is threatened by activities conducted by state and non-state actors.[192]

(3) An independent human right to a healthy environment should be recognised. The advantage of this type of right, compared to the reinterpretation approach, is that the victim only needs to prove that the environment is unhealthy to gain relief. Whereas under the reinterpretation approach, the victim must prove that the environmental issue has affected one of his or her human rights.

(4) There are two main mechanisms for inserting an environmental provision into a constitution: the declaration of fundamental rights and statements of public policy. Only fundamental rights are enforceable in a court of law. The following factors influence the right's enforceability:

(a) The provision should be self-executing, that is, the constitutional provision should make it clear that citizens can directly sue on the basis of the right.
(b) The provision should only be placed in the fundamental rights section of a constitution.

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189 *Human Rights and the Environment Reference Paper*, above n 118, at 54 and 62 and *Manual on Human Rights and the Environment*, above n 78, at 18.

190 *Manual on Human Rights and the Environment*, above n 78, at 36.

191 Sherlock and Jarvis, above n 62, at 17-19.

192 *Human Rights and the Environment Reference Paper*, above n 118, at 54 and 62 and *Manual on Human Rights and the Environment*, above n 78, at 34-41 and 51-54.

(c) The legislative history should expressly declare the right to be enforceable.

(5) Few rights are absolute. Instruments should provide clear guidance as to the appropriate balancing exercise to be undertaken between economic development and environmental protection. In the absence of any guidelines, this balancing exercise will otherwise be decided by judges' subjective values. For example, the Indian Supreme Court in *Mehta* upheld environmental protection despite economic loss. In contrast, the ECtHR has observed that no special status will be accorded to environmental rights in the balancing exercise with development rights.[193]

(6) Courts must have the power to provide legal remedies for breaches of environmental human rights. Thus, the power of the African Commission and the IACHR to make non-binding recommendations should not be replicated.

Based on the above summary, Part III of this paper will formulate a new constitutional environmental framework for Aotearoa New Zealand's future constitution.

VIII A NEW CONSTITUTIONAL ENVIRONMENTAL FRAMEWORK

Submitters to the constitutional review process advocated for a constitutional environmental protection regime through a rights-based approach: affirming the right to a healthy environment, the rights of nature and the right to intergenerational equity. The author agrees with the right-based approach, and proposes to set out five specific recommendations for our future constitutional framework. Where appropriate, the key legal issues that Parliament must consider to ensure the successful enforcement of an environmental protection regime through the Courts will be highlighted.

A First Recommendation: Liberal Standing Requirement

The biggest barrier to enforcing environmental rights is standing.[194] Following the global trend,[195] the standing requirement should be constructed as broadly as

193 *Hatton v United Kingdom* (2003) 37 EHRR 28 at [96]-[104] and [122]-[123].

194 Mary Whittemore "The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments have No Bite" (2011) 20 Pac Rim L & Pol'y J 659 at 666 and 687.

195 Nicholas Robinson "Ensuring Access to Justice through Environmental Courts" (2012) 29 Pace Envtl L Rev 364 at 366.

possible to guarantee open and accessible environmental justice to all New Zealanders. If one cannot get through the courtroom door, there is no access to environmental justice. Inadequate access in turn results in widespread ecological and social harm.[196]

The Philippine Rules of Procedurals for Environmental Cases and South Africa's National Environment Management Act 1998 are good examples of an open standing regime.[197] Any person or entity raising an "environmental issue" (such as alleging violations of statutes relating to environmental laws) should be permitted to bring a court proceeding. The plaintiff will no longer be required to show that they have a "sufficient interest" in the proceeding. Instead, the Court will only focus on whether there has been an environmental harm.[198] Concerns about frivolous, vexatious, or otherwise improper filings can be adequately dealt with under the Court's inherent power to dismiss such claims, as well as its ability to financially penalise the plaintiff through costs.[199]

B Second Recommendation: New Standing Models

In addition to citizen and public interest litigation, two additional standing models are proposed. First, environmental prosecutors (environmentally trained and dedicated public prosecutors), as an alternative to public interest litigation, could bring cases based on complaints from the public or their own initiative, so that individual members of the public do not have to overcome the requirements of standing or bear the expense of litigation. Experiences in South Africa and Ecuador illustrate that many victims lack the financial backing and institutional skills (such as unfamiliarity with legal concepts) required to pursue actions in court.[200] This model has been adopted in Australia through a national network of environmental lawyers funded by the State.[201]

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196 Patricia Kameri-Mbote *Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention* (International Environmental Resource Centre Working Paper No 2005-1, 2005).

197 National Environment Management Act 1998, s 32. See also Jan Glazewski "Environmental Rights and the New South African Constitution" in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 178 at 190.

198 John Bonine *Best Practice - Access to Justice* (World Resource Institute, Washington, 2009) at 2.

199 *Laws of New Zealand* Civil Procedure: High Court at [24], [89] and [379].

200 Anderson, above n 48, at 21.

201 Environmental Defenders Office of New South Wales <www.edonsw.org.au>.

Second, as an alternative to citizen litigation, environmental ombudsmen could accept and investigate complaints from any member of the public. If the complaint is well-founded, the ombudsman would have standing to sue the government on behalf of the citizen. This model has been adopted in Costa Rica, Greece, Hungary and Kenya.[202] In New Zealand, the powers of Ombudsmen are, in general, recommendatory only.[203] For example, the New Zealand environment ombudsman, the Parliamentary Commissioner for the Environment, currently does not have the power to make any binding rulings or reverse decisions made by public authorities.[204] Therefore, in order for this model to be effective the ombudsmen must have sufficient power to hold the government to account.

C Third Recommendation: Affirming a Human Right to Environment

The constitution should declare a substantive environmental right, as well as a statement of public policy guiding State and non-State actors' decision-making processes. To ensure, the environmental provision is judicially enforceable, the provision must be self-executing and placed in the "fundamental rights" section of the constitution. Furthermore, clear and mandatory language should be used to remove any doubt about the right's enforceability.

Constitutional drafters should provide clear and precise definition for the term "right to a healthy environment". Feliciano J in *Minors Oposa v Factoran*, a Philippines Supreme Court case, observed that, "it is in fact very difficult to fashion language more comprehensive in scope and generalised than a human right to [environment]."[205] Concurring with this view, Shelton observes that the phrase "the human right to a healthy environment" is inherently ambiguous, in that the phrase could mean "the environment is safe and healthy for humans" or "the environment itself is safe and healthy bringing within it scope issues of ecology and natural protection".[206] Furthermore, the word "environment" could encompass only the natural environment or extend to man-made environments. A succinct definition would have several benefits. First, it would provide clear guidelines for

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202 Pring and Pring, above n 63, at 38.

203 Mai Chen *Public Law Toolbox: Solving Problems with Government* (LexisNexis, Wellington, 2012) at 690.

204 "Functions and Powers of the Parliamentary Commissioner for the Environment" The Parliamentary Commissioner for the Environment <www.pce.parliament.nz>.

205 *Minors Oposa v Factoran*, above n 70, 201-202.

206 Dinah Shelton *The Links between International Human Rights Guarantees and Environmental Protection* (University of Chicago, Chicago, 2004) at 22.

judges in cases brought before the Courts.[207] Second, it would help businesses and environmentalists understand the extent of their rights and duties. A vague and unclear definition will lead to litigation, and will make it difficult for the public to make plans for their future conduct and activities.[208]

Constitutional drafters should also consider what the environmental right entails. The breadth of claims which can be subsumed under this right appears to be quite limitless. For example, it could include claims relating to the prevention and control of emission of toxic fumes and exhaust from factories and motor vehicles, discharge of chemical effluents, garbage and sewage into rivers, protection from climate change effects and so on.[209]

Parliament should also choose an appropriate judicial forum for enforcing the environmental right. As environmental issues often involve complex scientific evidence, it should be considered whether the general court system or the specialist Environmental Court is best placed to hear claims of alleged violations of environmental rights.

Consideration should also be given to whom the environmental right will apply. Should the right be possessed individually and/or collectively (that is, as a community right)?[210] If the right is possessed by the community, does this mean that no complaint can be made unless the population as a whole is enjoying a less than healthy environment, or could a complaint be made by a particular segment of the population? If the right attaches to communities, the mere fact of violation may be enough to establish a breach. If, on the other hand, the right attaches to individuals, it is more likely that evidence will be required to prove that the violation caused an injury or damage to a particular individual.

In all systems of rights, competing rights are bound to arise. For example, should an environmental right outweigh a development right? How should the environmental right be balanced with the right to life? For example, should a public hospital offering free public health care be built on a site that has some ecological

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207 Kristian Ekeli "Green Constitutions: The Constitutional Protection of Future Generations" (2007) 20 Ratio Juris 378 at 386.

208 Anderson, above n 48, at 11-12.

209 Popović, above n 1, at 514-544.

210 See generally Mark Stallworthy "Whither Environmental Human Rights" (2005) 7 Envt L Rev 12. Contrast J Merrills "Environmental Protection and Human Rights: Conceptual Aspects" in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1996) 71.

importance?[211] Ultimately, each case should be decided on its own facts. However, Parliament should provide guidance as to the relative importance of the environmental right vis-à-vis other constitutional rights. Presently, only few constitutions provide an explicit balancing test defining the relative importance of environmental protection.[212] For example, at least 15 constitutions specifically restrict the use of private property where this could cause environmental damage.[213] Other constitutions, for example Ecuador's Constitution, expressly state that all constitutional rights are interdependent and of equal importance.[214]

Next, it must be determined whether there should be generic and/or specific limitations on the environmental right, as is the case in many constitutions. First, few countries preclude segments of the society from enjoying or utilising environmental rights. One exception is the environmental right in the El Salvador Constitution, which appears to be limited to children.[215] The Philippine Supreme Court Rules of Procedure for Environmental Cases only permit Filipino citizens the right to bring a suit on behalf of nature. If Parliament adopts an eligibility limitation, it should be consistent with international and domestic anti-discrimination human rights laws.[216] Second, 41 constitutions also include provisions that authorise restrictions on all human rights in order to meet the public interest in security, health and/or the exercise of other rights.[217] For example, the South African constitution provides that the "[environmental] right in the Bill of Rights may be limited only … to the extent that the limit is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[218] A public interest limitation is similarly included in s 5 of the NZBORA. Finally, 46 constitutions contain emergency limitation provisions, such

211 *Yogi Narahari Nath v Honourable Prime Minister Girija Prasad Koirale* (1995) 33 NLR (SC Nepal).

212 Brand and Bungert, above n 13, at 92.

213 The countries are: Armenia, Belarus, Chile, Croatia, Czech Republic, Kenya, Mexico, Moldova, Romania, Russia, Slovakia, Slovenia, Thailand, Ukraine, Uzbekistan and Serbia.

214 Article 11(6).

215 Article 34.

216 Human Rights Act 1993, s 21(g).

217 Boyd, above n 4, at 64.

218 Article 36.

as in the case of war.[219] Emergency provisions often allow for the suspension of environmental rights during emergency periods.

Extensive and expensive state investment is required to implement an environmental protection regime. Therefore, Parliament must consider whether an environmental right should be immediately enforceable or subject to the progressive realisation principle. For example, Turkey's Constitution incorporates the progressive realisation principle, providing that: "the State shall fulfil its duties as laid down in the Constitution … within the capacity of its financial resources …".[220] This principle does not obligate the State to fulfill its duties immediately. Instead, the State must strive to fulfill its obligation over time, as it acquires the necessary resources and expertise. The application of this principle has been widely held to mean that the right is unenforceable.[221] However, this orthodox understanding has gradually been eroded by a series of court decisions in many countries.[222] Parliament should also consider whether environmental right should be subject to the minimum core principle.[223] This principle requires the state to provide a minimum quantum of environmental protection in legislative plan and policies.[224]

A number of constitutions impose a positive obligation on the state and non-state actors to undertake positive steps to protect and improve the natural environment. A failure to undertake this positive duty results in liability. For example, the Indian Constitution requires every citizen "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures."[225] The Sri Lankan Constitution mandates that the State: "protect, preserve and improve the environment for the benefit of the community."[226] In accordance with this global trend, state and non-state actors

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219 Boyd, above n 4, at 64.

220 Article 65.

221 Boyd, above n 4, at 23 and 64-65.

222 Fredman, above n 174, at 240 and UN Food and Agriculture Organisation "Justiciability of the Right to Food" in *The Right to Food Guidelines: Information Papers and Case Studies* (FAO, Rome, 2006) 71 at 77.

223 May and Daly, above n 30, at 431.

224 See generally *Mazibuko v Johannesburg* 2009 ZACC 28, Case CCT 39/09 (CC).

225 Article 15A. See generally *Rural Litigation and Entitlement Kendra v Uttar Pradesh* (1985) AIR SC 652 (India).

226 Article 27.

should have a positive obligation to improve the environment. Constitutional obligations should be applied to non-state actors because, in most environmental litigation, a non-state actor's conduct is more likely to be the direct cause of the environmental degradation than a governmental decision to authorise a non-state actors' conduct.[227] Presently, the NZBORA only binds State actors and non-state actors fulfilling public functions.[228] In New Zealand, where there is no statute imposing a duty on state or non-state actors to take or refrain from taking action relating to environmental harm, the Courts have generally been reluctant to hold such duties exist, leaving it to Parliament to impose the appropriate duty.[229] Accordingly, enacting legislation explicitly imposing a positive duty on non-State actors to promote the environment is advisable.

Several pertinent issues to environmental litigation should be addressed during the drafting process. First, which party has the burden of proof in establishing the breach of environmental right? Cases of environmental pollution are notoriously difficult to prove. The primary reason for this is the difficulty in showing that the harm was caused by the particular pollutant.[230] This difficulty could be remedied by shifting the burden of proof. For example, the plaintiff would only have to show a prima facie case that the injury has been caused by the defendant and the onus would then shift to the defendant to show that they are not responsible. The alleged polluter should carry the burden of proof because often only the polluter has access to information capable of corroborating or refuting the applicant's allegation. Second, what is the appropriate threshold for breach? Presently, international courts require environmental harm impacting on human rights to be actual or imminent, as well as substantial. Should the threshold be lowered to a mere possibility of harm? Furthermore, should the defendant be subject to strict liability? Thirdly, how should the judiciary resolve scientific uncertainty as to the activity's environmental harm? To resolve any uncertainty, the Court could apply the precautionary principle. The precautionary principle implies the existence of a social responsibility to protect the public from exposure to harm when scientific

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227 Popović, above n 1, at 584-588 and footnotes 447 and 448. See also *Draft Interim Report of the Secretary-General's Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, E/CN.4/2006/97 (February 2006) at 4.

228 NZBORA 1990, s 3. See generally *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 (HC).

229 *Human Rights and the Environment: Final Report and Recommendations*, above n 115, at 42-44.

230 Martyn Day "Shifting the Environmental Balance" in David Robinson and John Dunkley (eds) *Public Interest Perspectives in Environmental Law* (Wiley Chancery, London, 1995) at 298.

investigation has found a plausible risk.[231] Furthermore, where there is doubt about the existence or nature of the environmental harm, that doubt should be construed in favour of the victim.[232] Finally, remedies should be available for breaches of environmental rights.

D Fourth Recommendation: Affirming Intergenerational Equity

The right to a healthy environment should refer to intergenerational equity. Scholars have defined environmental rights to include a concern for future generations.[233] The present generation has the ability to harm the conditions of nature that the future generations will inherit and, because of this, present generations have a direct responsibility to protect and preserve the environment for future generations.[234] The intergenerational equity principle is progressively being recognised in many constitutional environmental rights provisions.[235]

Since future generations have no means of protecting themselves from serious risks of harm brought about by the present generation, it should be possible for certain agents to initiate legal action on their behalf. A system of self-appointed guardians for court approval on an *ad hoc* basis, or guardians authorised by an independent government agency (such as the Parliamentary Commissioner for the Environment) in advance so there is a designated guardian in place *ex ante*, could both be appropriate governance models.

The Colombian Constitutional Court has declared that "the protection of the environment is a compromise between the present and future generations".[236] To address the competing interests of the present and future generations, Parliament should consider the following issues. First, what period of time will "future

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231 See generally Marco Martuzzi and Joel Tickner (eds) *The Precautionary Principle: Protecting Public Health, the Environment and the Future of Our Children* (World Health Organisation, Copenhagen, 2004).

232 For example Philippine Supreme Court Rules of Procedures for Environmental Cases 2010, Rule 20.

233 R Hiskes *The Human Right to a Green Future* (Cambridge University Press, Cambridge, 2009) and John Rawls *A Theory of Justice* (Oxford University Press, Oxford, 1999).

234 E Padilla "Intergenerational Equity and Sustainability" (2002) 41 Ecological Economics 69. Contrast W Beckerman Robert Solow "Sustainability: An Economist's Perspective" in Robert Dorfman and Nancy Dorfman (eds) *Economic of the Environment: Selected Readings* (3rd ed, Norton, New York, 1993) 179.

235 For example, Eritrea Constitution, article 10(3) and Qatar Constitution, article 33.

236 *Fundepúblico v Mayor of Bugalagrande* Corte Constitucional Expendiente T-101, June 1992 (Colombia).

generations" cover? Second, what is the level of responsibility owed to future generations? State and non-State actors should be responsible for actions that could lead to the irreversible damage of ecosystems crucial for meeting future generations' basic physiological needs. They should also be responsible for actions causing reversible harm to the ecosystems that can only be rectified at a very high cost. As the Brundtland Report stressed, "the development that meets the needs of the present [cannot] compromise the ability of future generations to meet their own needs".[237] Thirdly, which resources must be protected for the benefit of future generations? For example, should only critical resources be protected? Critical resources are those necessary to meet basic physiological needs, such as water and soil, which are essential for food production. Finally, what is the appropriate balance between present generations' right to development and future generations' right to environment? For example, some activities which pose threats of serious and irreversible future environmental harm might produce significant short-term economic benefits. Ultimately, this balancing exercise depends on the extent to which both voters and politicians are willing to make short-term sacrifices for the sake of the long-term interests of succeeding generations, especially where the long-term benefits of environmental protection lack evidential certainty.[238]

E Final Recommendation: Affirming Rights of Nature

Nature ought to have independent legal rights. This ecocentric approach aligns with kaitiakitanga Māori, which provides a framework that treats the environment as an entity in its own right, over which humanity has a guardianship role. Precedents for nature having an independent legal standing already exist in New Zealand.

The Tūtohu Whakatupua agreement between Whanganui iwi and the Crown, and the Te Urewera – Tūhoe Bill, provide for the statutory recognition of the Whanganui River and Te Urewera as a legal entity with standing in its own right.[239] The Tūtohu Whakatupua agreement allows for the appointment of a guardian body (Te Pou Tupua) to represent the Whanganui River's interests and act on its

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237 World Commission on Environment and Development *Our Common Future* UN Doc A/42/47 (11 December 1987).

238 Gregory Kavka and Warren Virginia "Political Representation for Future Generations" in R Elliot and A Gare (eds) *Environmental Philosophy* (University of Queensland Press, St Lucia, 1982) 21 at 28.

239 *Whanganui Iwi and the Crown Tūtohu Whakatupua* (Agreement, part of the Whanganui River Settlement, 30 August 2012) at [2.1]-[2.9]. At [2.7] and Te Urewera – Tūhoe Bill, Part 5.

behalf.[240] This agreement has been heralded as a sign that the Government no longer sees nature as an exploitable resource, but views nature with more ecocentric values.[241] In recognising that nature has rights, Parliament should consider the following issues.

Like future generations, nature cannot defend itself in a courtroom and is dependent upon a member of the public to protect its interests. Guardians could be appointed on an *ad hoc* or *ex ante* basis. For example, Ecuador's constitution provides that "every person, people, community or nationality will be able to demand the recognition of rights for nature before the public bodies."[242] When guardians are appointed on an *ad hoc* basis, any individual or community should be able defend nature's rights. The court should not focus on whether the guardian has a "sufficient interest" in the matter, as the guardian is a vehicle through which nature can vindicate its constitutional rights.

What rights should nature have? Few examples of the content of nature's rights can be found in international and domestic documents. The World Charter for Nature 1982, art 2 states: "the genetic viability on the earth shall not be compromised; the population levels of all life forms, wild and domesticated, *must be at least sufficient for their survival*, and to this end necessary habitats shall be safeguarded." Ecuador's Constitution, art 71 states that: "nature has the inalienable right to *exist, persist, regenerate, and be respected*."[243] In the Tūtohu Whakatupua agreement, the guardian has the function to protect the river's *environmental health and wellbeing*.[244] A further issue is whether, as a right holder, humanity can sue nature for any liabilities it causes. For example, could the neighbouring farms sue the Waikato River for flood damages?

Environmental protection is not an all-or-nothing matter. A completely unharmed nature cannot be the key objective, since humanity cannot entirely eliminate hazards created by civilisation. Having recognised nature has rights, an Ecuadorian Provincial Court Judge warned that such recognition would require "the reconsideration of many human activities [for] which environmental cost is

240 At [2.8.2].

241 Alison Fairbrother "New Zealand's Whanganui River Gains a Legal Voice" *The Huffington Post* (online ed, New York, 18 September 2012).

242 Article 71. See generally Michelle Bassi "La Naturaleza O Pacha mama de Ecuador: What Doctrine Should Grant Trees Standing?" (2009) 11 Oregon R Int'l L 461.

243 Whittemore, above n 194, at 660.

244 *Whanganui Iwi and the Crown Tūtohu Whakatupua*, above n 276, at [2.20.1].

[currently] too high".[245] Thus, based on the ecocentric approach, Parliament must strike the appropriate balance between the constitutional rights of nature and human beings. For example, should nature's rights trump the human right to economic development where that development will or is likely to cause irreparable damage to the environment? Ultimately, the "appropriate" balance is a complex policy-based social-benefit problem: how much development is society willing to forgo in order to protect the environment?[246]

State and non-State actors engaging in environmentally harmful activities should be responsible for the protection, preservation and rehabilitation of the environment.[247] This approach has been employed in other jurisdictions. For example, Ecuador's Constitution states: "nature has the right to be restored. In cases of severe or permanent environmental impact, including those caused by the exploitation of non-renewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences."[248]

Ecuador's Constitution also contains many specific provisions devoted to nature's rights. First, it mandates that uncertainties regarding the interpretation of environmental law be resolved in nature's favour.[249] Second, it incorporates the precautionary principle, that is, "in case of doubt about the environmental impact stemming from a deed or omission, even if there is no scientific evidence of the damage, the State shall adopt effective and timely measures of protection."[250] Thirdly, it reverses the legal burden of proof so that those accused of causing environmental harm must prove their actions caused no such harm.[251] Constitutional drafters should assess whether similar provisions are suitable for our future constitutional framework.

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245 Juicio No: 11121-2011-0010 (Accíon de Proteccíon) and Joel Colón-Ríos "Notes on the Theory and Practice of the Rights of Nature: The Case of the Vilcabamba River" (unpublished paper) at 14. See also Oficio No 0626-2011 J22GPP, 20 May 2011.

246 Mark Sagoff *The Economy of the Earth* (Cambridge University Press, Cambridge, 1988) at 197 and Atapattu, above n 121, at 117-125.

247 For example *KM Chinnappa v Union of India* AIR 2003 SC 724.

248 Article 72.

249 Article 401.

250 Article 396.

251 Article 397(1). See also Erin Daly "The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature" (2012) 21 REICEL 63 at 64.

IX CONCLUSION

The Panel asked people to share their aspirations for Aotearoa New Zealand and how they want New Zealand to be governed in the future. The author submits that the environment, as part of New Zealand's core identity, should be recognised at all levels of policy planning and decision-making. The constitutional values that should direct and govern State and non-State actors' actions are: the right of present and future generations to an environment of certain quality, intergenerational respect for all natural things, and the recognition of nature as a right holder. Until these values are taken into account both environmental and human rights will be denied in New Zealand.

UN Special Rapporteur Ksentini once observed that "law must be based on values, the fundamental values of this century being *human rights and the environment*."[252] The author respectfully amends this statement to the following "law must be based on values, the fundamental values of this century being *human rights and the rights of nature*." A human rights-based approach to environmental protection is ineffective in isolation because human rights law is about the well-being of humans and thus is only indirectly concerned with the environment. Environmental protection law must directly take into account the rights of nature. Respecting, maintaining and improving human and environmental rights gives "man the best opportunities for living in harmony with nature". As the Brundtland Report stressed, "a sound environment is the prerequisite to attaining the sustainable development goal."[253]

Constitutionally enshrining rights to nature itself and a human right to a clean and healthy environment is an inherently complex task. To ensure the successful design, implementation and enforcement of these rights, Parliament must address the following seven legal issues: standing, justiciability, the scope and content of the rights, managing competing interests (in particular, the appropriate balance between nature and human rights),[254] remedies, and enforcement tools. An effective constitutional environmental protection regime must also be accompanied by changes in interdependent and indivisible cultural, economic, social and political systems.[255] The author acknowledges that constitutional rights are not the silver bullet for solving today's environmental crisis. Rights to humanity and nature

252 Ksentini, above n 55, at [257].

253 *Our Common Future*, above n 237, at 14, 19 and 48.

254 Ksentini, above n 55, at [252].

255 Whittemore, above n 194, at 662-665 and 671-681.

are merely one, small component of Aotearoa New Zealand's efforts in ensuring that humanity and the wider Earth community successfully thrive together in the coming years.