“GREENING” NZBORA:

SHOULD NEW ZEALAND RECOGNISE A HUMAN RIGHT TO A HEALTHY ENVIRONMENT?

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A dissertation submitted in partial fulfilment of the requirements of the degree of Bachelor of Laws (with Honours) at the University of Otago – Te Whare Wānanga o Otāgo

October 2020

Acknowledgements

To my wonderful supervisor, Ceri Warnock, for your guidance, invaluable insight and support throughout this year. I would not have been able to achieve this without you.

To Mum and Dad, for your constant love and support. Thank you for everything you have done for me.

Finally, to all of my incredible friends for making the last five years the best yet.

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Introduction

> "There has been an unprecedented increase in legal claims for both human rights and environmental goods. Never before have so many people raised so many demands relating to such a wide range of environmental and human matters. And never before have legal remedies stood so squarely in the centre of wider social movements for human and environmental protection".[1]

Protecting the natural environment is fundamental to our quality of life and survival.[2] We depend on the natural environment and all of its resources for our basic needs including food, water, energy and air.[3] Ironically it is human activity which is placing such an immense strain on our fragile ecosystems that the environment's ability to sustain present and future generations can no longer be taken for granted.[4] Over the last 20 years there has been a rapidly growing international movement to connect the strong developments in human rights law with the escalating global environmental crisis. At first, existing human rights were judicially reinterpreted to apply to environmental degradation, followed by the development of a new substantive right to a healthy environment within many national constitutions to safeguard against environmental degradation.[5]

Many commentators were initially sceptical of the development of a right to a healthy environment because crafting a substantive right is complex, encompassing challenges of conceptual and definitional uncertainty.[6] Moreover, the right fundamentally looked like an attempt to turn a quintessentially political question into a legal one. But that scepticism has since been tempered by an awareness of the right's significant value in those countries that have recognised it.[7] There are now 149 countries who recognise the right to a healthy

[1] Michael Anderson "Human Rights Approaches to Environmental Protection: An Overview" in Alan Boyle and Michael Anderson (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1998) 1 at 1.
[2] Stephen Schneider "The Greenhouse Effect: Science and Policy" (1989) 243 Science 771 at 778.
[3] David Boyd *The Environmental Rights Revolution* (UBC Press, Vancouver, 2011) at 10.
[4] Millennium Board *Living Beyond Our Means: Natural Assets and Human Well-Being* (Millennium Ecosystem Assessment, Washington, 2005) at 5.
[5] James May and Erin Daly "Vindicating Fundamental Environmental Rights Worldwide" (2009) 11 Or Rev Int'l L 365 at 367.
[6] Alan Boyle "Human Rights and the Environment: Where Next?" (2012) 23(3) Eur J Int Law 613 at 627.
[7] At 627.

environment in some form – no other human right has attained such a broad level of constitutional recognition in such a short period of time.[8]

New Zealand law does not contain a right to a healthy environment despite the immense increase in references to the right in national constitutions overseas. While there is a plethora of environmental protection laws in New Zealand, environmental degradation continues apace suggesting that traditional legal methods are failing.[9] By way of illustration, a recent study found that New Zealand's greenhouse gas emissions increased by 64 percent between 1990 and 2015 even though mitigating measures were in place under the Climate Change Response Act 2002 (CCRA).[10]

A more comprehensive legal and political response is required to enhance New Zealand's environmental protection regime.[11] The right to a healthy environment is increasingly perceived to be a solution to the deficiencies in our environmental law.[12] When applied by courts overseas the right has helped to provide a safety net to protect against gaps in the law and created opportunities for better access to justice.[13] The "limitation on domestic political decisions" that human rights effectuate is critical in protecting the environment.[14]

Considering the significant relationship between environmental protection and human rights developed in the law overseas, this dissertation will argue that a human right to a healthy environment should be recognised in New Zealand law. This argument will be developed across four chapters. The first chapter will outline the relationship between environmental protection and human rights, illustrating two ways this relationship has been conceived in domestic law overseas. The chapter will conclude that a specific right to a healthy environment

[8] Catherine Iorns Magallanes, Professor Victoria University of Wellington "Using Human Rights Law to Protect New Zealand's Natural Environment" (TEDx Talks, Tauranga, 30 October 2015).
[9] Ceri Warnock "Human Rights and the Environment" in Margaret Beddgood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, New Zealand, 2017) 893 at 943.
[10] Parliamentary Commissioner for the Environment *Stepping Stones to Paris and Beyond: Climate Change, Progress and Predictability* (Parliamentary Commissioner for the Environment, 2017) at 4.
[11] Sir Geoffrey Palmer, QC "Environmental Responsibility and Democracy for the Future: Limits, Pathways and Actions" (Keynote Presentation to ECO Conference, Stoke Hall, Nelson, 26, August, 2017).
[12] Warnock, above n 9, at 944.
[13] Report of the Special Rapporteur on the *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* XXXVII UN Doc A/HRC/37/59 (24 January 2018) at [13].
[14] Dinah Shelton "Human Rights and the Environment: What Specific Environmental Rights Have Been Recognised?" (2006) 35 Denv J Int'l L & Pol'y 129 at 163.

is the preferred approach for New Zealand. The second chapter will examine whether there is sufficient momentum in New Zealand's legal and political landscape to advocate recognition of the right in the law.

The third chapter will explore the highly contested theoretical underpinnings and parameters of the right to determine whether these matters surmount the right's introduction. This chapter will also consider how the right could look in the New Zealand legal landscape, advocating for recognition through inclusion in the New Zealand Bill of Rights Act 1990 (NZBORA). The improved environmental outcomes experienced in those countries who have recognised the right are considered in the fourth chapter. This chapter also highlights the importance of recognition in the context of New Zealand environmental law.

Constructing these arguments necessitated researching an array of sources from different jurisdictions and areas of the law – highlighting the main issues in the context of New Zealand. By way of caveat, this dissertation does not purport to consider every single matter relevant to the relationship between environmental protection and human rights. Nor will it make a detailed argument for a constitutionally entrenched right to a healthy environment.

Chapter I: The Relationship Between Human Rights Law and Environmental Protection

The last four decades have seen an increased awareness of the existence and consequences of environmental degradation and resource depletion that is occurring on an unprecedented scale.[15] There is global consensus that the effects of human settlement and industrialisation have caused significant regional and global environmental changes. There have been a multitude of legal agreements and initiatives introduced on every scale to address the global environmental crisis. Among these myriad responses are national constitutions and international instruments which recognise the right to a healthy environment.[16] Public recognition of environmental damage and the inadequacy of states responses prompted constitutional change and recourse to the powerful language of human rights.[17]

A. Why Take a Rights-Based Approach?

Why should environmental protection be approached through human rights law? There are several possible answers.[18] A human rights perspective directly addresses environmental impacts on the life and health of individuals rather than on other states or the environment more generally. It may secure higher standards of environmental quality based on the obligation of states to take measures to control environmental harm affecting humans.[19] Above all, it promotes the rule of law – with the government becoming directly accountable for failure to regulate and control environmental harm including that which is caused by corporations – and for facilitating access to justice and enforcing environmental laws and judicial decisions.[20]

Many environmental problems intersect with human rights – the body of literature on the human rights dynamic of environmental justice is constantly expanding. The inclusion of an "environmental dimension in human rights debate has become necessary, protection of the environment will benefit from established machinery, whereas human rights will be enhanced

[15] David Grinlinton "The Context of Environment Law" in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (Thomson Reuters, Wellington, 2015) 25 at 29.
[16] Boyd, above n 3, at 12.
[17] At 3.
[18] Boyle, above n 6, at 613.
[19] At 613.
[20] At 613.

by the inclusion of new interpretive elements".[21] The broadening of economic and social rights to embrace elements of the public interest in environmental protection supports the idea that there should be a rights-based approach to the environment.[22]

B. Development of a Rights-Based Approach

The environment and human rights are not two areas of the law we would traditionally assimilate. The right to a healthy environment cannot be found in the pioneering human rights instruments such as the Universal Declaration of Human Rights (UDHR),[23] International Covenant on Civil and Political Rights (ICCPR)[24] and International Covenant on Economic, Social and Cultural Rights (ICESCR).[25] The absence of environmental rights was because the magnitude and adverse consequences of environmental degradation were not sufficiently advanced when these instruments were drafted to warrant inclusion.[26]

The Stockholm Declaration 1972 provided the first formal recognition of the links between human rights and environmental protection.[27] The first principle seems to have intended to express support for the right to a healthy environment:

> Man has the fundamental right to freedom, quality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations.

The Hague Declaration on the Environment 1989 further expressed a fundamental duty to preserve the ecosystem and the right to live in dignity in a viable global environment.[28] The United Nations ("UN") General Assembly recognised that a better and healthier environment

[21] Grinlinton, above n 15, at 46.
[22] Boyle, above n 6, at 614.
[23] Universal Declaration of Human Rights A/RES/217(III) (1948) [UDHR].
[24] International Convenant on Civil and Political Rights 999 UNTS 171 ((opened for signature 16 December 1966, entered into force 23 March 1976) – ratified by New Zealand on 28 December 1978) [ICCPR].
[25] International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 ((opened for signature 16 December 1966, entered into force 3 January 1976) – ratified by New Zealand on 28 March 1979) [ICESCR].
[26] Boyd, above n 3, at 12.
[27] Stockholm Declaration on the Human Environment A/CONF.48/14/Rev.1 (1973) (Stockholm Declaration).
[28] Susan Glazebrook "Human Rights and the Environment" (2009) 40 VUWLR 293 at 299.

can contribute to the full enjoyment of human rights by all.[29] The use of human rights to achieve environmental ends was also emphasised in the Rio Declaration 1992 which promoted access to information and public participation regarding environmental protection.[30]

While substantial progress appeared to have been made, the UN has never come so close to recognising the relationship between human rights and environmental protection again.[31] When endorsing the concept of 'sustainable development' at the Conference on Environment and Development the UN avoided mentioning human rights. The UN's position became unequivocal after the Human Rights Commission refused to adopt the Draft Declaration on Human Rights and the Environment, which included the right to a "secure, healthy and ecologically sound environment".[32]

Despite the lack of explicit support from the UN, the confluence of human rights and environmental protection has nevertheless proceeded at the domestic level. The relationship may be conceived in two ways: (1) environmental protection may be cast as a means of fulfilling existing human rights – since a degraded environment may contribute directly to infringements of the rights to life, health and livelihood – and (2) that there is an inalienable right to a healthy environment.[33]

C. Mobilizing Human Rights

On the surface, rights do not have much to say about the environment.[34] While true that no global human rights agreement explicitly includes a right to a healthy environment, in the last two decades many human rights bodies have interpreted universally recognised rights – such as the right to life and health – to require states to take steps to protect the environment on which the enjoyment of such rights depends.[35] The health of the environment is viewed as

[29] Rebecca Bratspies "Do We Need a Human Right to a Healthy Environment" (2015) 13(1) Santa Clara L Rev 31 at 58.
[30] Rio Declaration on Environment and Development A/CONF.151/26 (1992) (Rio Declaration).
[31] John Knox "Constructing the Human Right to a Healthy Environment" (2020) 16 Annu Rev Law Soc Sci (forthcoming) 24 at 24.5.
[32] At 24.5.
[33] Anderson, above n 1, at 3.
[34] John Knox "The Protection of Human Rights and the Environment are Mutually Reinforcing" (14 July 2015) Open Democracy <https://www.opendemocracy.net/en/openglobalrights-openpage/greening-human-rights/>.
[35] Knox, above n 34.

either a precondition to the exercise of the right or as inextricably intertwined with the enjoyment of these rights. It has been argued that existing rights, if fully realized, are so robust in themselves that proposals for new environmental rights are at best superfluous.[36]

1. Approach in Practice

The reinterpretation approach has gained traction in those countries who do not recognise a right to a healthy environment and has resulted in a rapid "greening" of human rights. There are claimants that have successfully argued that environmental harm interferes with the full enjoyment of human rights and that states have failed to meet their obligations to protect against such interference.[37] The first case to employ this technique was *Lopez Ostra v Spain*.[38] The European Court of Human Rights determined that pollution preventing the claimant from living in her home interfered with her right to private and family life, protected by article 8 of the European Convention.[39]

In *Fadeyeva v Russia*, the claimant sought resettlement in an environmentally safe area that was not affected by high levels of pollution emanating from a local steel plant.[40] The European Court of Human Rights ruled that the claimant's right to private and family life under article 8 of the European Convention had been violated.[41] The Supreme Court of India has formulated the most expansive interpretation of the right to life – maintaining this encompasses quality of life issues.[42] That case, *M.C. Mehta v Union of India* concerned pollution of the Ganga River which supplies water to roughly 40 percent of the population.[43]

The ruling in *Urgenda v The Netherlands* was the first in the world in which claimant's established that the Government had a legal duty to prevent dangerous climate change.[44] On the basis of the European Convention, the Dutch Supreme Court determined that the

[36] Anderson, above n 1, at 4.
[37] Knox, above n 31, at 24.5.
[38] *Lopez Ostra v Spain* A/303-C [1994] ECHR 46.
[39] Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature on 4 November 1950, entered into force 3 September 1953) [European Convention].
[40] *Fadeyeva v Russia* [2005] App. No. 55723/00 ECHR 376.
[41] At [24].
[42] *M.C. Mehta v Union of India* [1987] 4 SCC 463.
[43] Kelly Alley "Legal Activism and Pollution Prevention" (2009) 21 Georget Environ Law Rev 793 at 799.
[44] *Urgenda Foundation v The Netherlands* [2020] C/09/456689 HAZA 13-1396.

Government has a positive obligation to take measures to prevent dangerous climate change and reduce their greenhouse gas emissions by at least 25 percent by the end of 2020 (compared to 1990 levels).[45] The ruling required the Government to take immediate effective action on climate change to comply with articles 2 and 8 of the European Convention, which protect the right to life and private and family life.[46]

2. United Nation's Approach

In view of these developments in the common law, the UN Human Rights Council established a new mandate for an independent expert to study the human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment.[47] The independent expert issued a series of reports mapping how human rights bodies have applied human rights norms to environmental degradation.[48] There was widespread agreement among the UN member states that environmental degradation may interfere with human rights, and that states have obligations relating to environmental protection based on their existing commitments under international human rights law.[49]

The UN Commission on Human Rights and the Environment recognised that these developments reflect the interrelationship between approaches to guaranteeing human rights and environmental protection.[50] The Commission further recognised the role of environmental protection as a pre-condition for the effective of enjoyment of other human rights.[51]

The Human Rights Council renewed the mandate of the independent expert in 2015 and changed the official title to 'Special Rapporteur'. The Council requested that in addition to continuing to clarify the human rights obligations related to the environment, the new focus of the mandate would include assisting those working to put these principles into effective

[45] At [31].
[46] At [23].
[47] Gulnara Iskakova *Report of the Human Rights Council on its Nineteenth Session* A/HRC/19/2 (2012) at 34.
[48] Report of the Special Rapporteur on the *Human Rights Obligations Relating to Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* LXXIV A/74/161 (15 July 2019) and Report of the Special Rapporteur on the *Right to a Healthy Environment: Good Practices* XLIII A/HRC/43/53 (30 December 2019).
[49] Knox, above n 34.
[50] Glazebrook, above n 28, at 299.
[51] At 300.

operation.[52] Accordingly, the Special Rapporteur prepared 'Framework Principles on Human Rights and the Environment' which establish obligations that states should take into account in setting standards for the protection of human rights and the environment, as defined by human rights tribunals and other international bodies.[53]

D. Specific Right to a Healthy Environment

There are many countries that have recognised the importance of environmental protection by incorporating a human right to a healthy environment into their national law.[54] The average number of rights in a constitution has more than doubled since the second world war.[55] But the right to a healthy environment has done more than simply ride the wave – it has been the most popular new right.[56] There are now 149 countries that recognise the right to a healthy environment in some form, in their constitution or through regional treaty law.[57] Some countries have gone a step further and included a whole range of substantive and procedural environmental rights in their constitutions.[58]

1. Development of the Right

The first suggestion that there should be a specific human right to a healthy environment was possibly made by Rachel Carson in 1962: "a much neglected problem of the right of a citizen to be secure in his own home against the intrusion of poisons applied by other persons, this ought to be one of the basic human rights".[59] The number of nations incorporating environmental provisions in their constitutions accelerated during the 1990's led by nations in Africa and Eastern Europe.[60] The peak year for incorporation of environmental rights into

[52] Knox, above n 34.
[53] Report of the Special Rapporteur on the *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* XXXVII UN Doc A/HRC/37/59 (24 January 2018) at [8].
[54] Boyd, above n 3, at 47.
[55] Knox, above n 31, at 24.5.
[56] At 24.5.
[57] Magallanes, above n 8.
[58] See the French Charter for the Environment 2004.
[59] Boyd, above n 3, at 13.
[60] David Boyd *The Status of Constitutional Protection for the Environment in Other Nations* (David Suzuki Foundation, Paper No. 4, 2013) at 6.

national constitutions was 1992, with 18 new provisions in that year alone.[61] This year was also a peak in terms of global attention to environmental challenges marked by the Rio Earth Summit.

The wave of environmental constitutional change has been driven by the ongoing process of constitutional modernization, strong public pressure and in some cases forceful political leadership.[62] By way of illustration, the President of France, Jacques Chirac, worked tirelessly to secure the Charter for the Environment 2004. The first regional treaty to include an environmental right was the 1986 African Charter on Human and People's Rights.[63] But the Additional Protocol to the American Convention on Human Rights was the first to include the specific substantive right to live in a healthy environment.[64]

The Aarhus Convention was adopted by the UN Economic Commission for Europe in 1998.[65] This Convention introduced procedural environmental rights into law by providing the rights of access to environmental information and to public participation in environmental decision-making. The state guarantees procedural rights in order to contribute to the protection of the right to a healthy environment.[66] Presently, environmental rights in national constitutions take both forms.[67] For the most part, the constitutional right to a healthy environment is treated as an enforceable right unless the constitution itself clearly states that it is strictly a guiding principle or requires enabling legislation in order to be implemented.[68]

[61] At 6.
[62] At 6.
[63] African Charter on Human and People's Rights 1520 UNTS 217 (opened for signature 1 June 1981, entered into force 21 October 1986) [African Charter], art 24.
[64] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights OAS A-52 (opened for signature, 16 November1999, not yet entered into force) [San Salvador Protocol], art 11.
[65] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 2161 UNTS 447 (opened for signature 25 June 1998 entered into force 30 October 2001) [Aarhus Convention].
[66] Aarhus Convention, art 1.
[67] See for example the Constitution of Norway 1814, art 110(b) (substantive right) and Constitution of Czech Republic 1993, art 35 (procedural right).
[68] See for example the Spanish Constitution 1978, art 45 (guiding principle) and Constitution of the Czech Republic 1993, art 35 (enabling legislation).

There are 46 UN member states whose constitutions do not include environmental protections.[69] Further, there is also a striking difference between common law and civil law nations in the extent to which they incorporate environmental provisions into their constitutions. Some commentators assert that environmentalism is a western conception, though it is the western nations (United Kingdom, Canada and New Zealand) where constitutional recognition of the value of environmental protection lags.[70] This lack of recognition reflects caution regarding social and economic rights.[71] Other UN member states who have not recognised the right are small island states that may lack the capacity for recognition rather than opposing it.

2. International Recognition

The UN have not shown any inclination to recognise a specific human right to a healthy environment in treaty law. While there is some mention of environmental issues in existing human rights instruments, it has been attached to particular issues. To illustrate, the environment is considered with regard to hygiene in the ICESCR.[72] The Special Rapporteur has called on the UN to formally recognise the right and is presently working on defining its substantive content.[73] A resolution at the UN Human Rights Council is scheduled to be proposed by a coalition of countries this year, which could then be replicated at the UN General Assembly – as was done with the right to water a decade ago.[74]

E. Suggested Approach for New Zealand

The relationship between human rights and environmental protection has not been recognised in New Zealand law.[75] Therefore, the central question of this dissertation is whether New Zealand law should recognise this relationship? And how recognition could occur? This

[69] Boyd, above n 3, at 49.
[70] At 51.
[71] At 51.
[72] Glazebrook, above n 28, at 294.
[73] Dina Townsend "WEBINAR: Law at the Intersection of Human Rights and the Environment" (26 April 2020) The Global Network for Human Rights and the Environment < https://gnhre.org/2020/04/26/webinar-on-law-at-the-intersection-of-human-rights-and-the-environment/>.
[74] At 73.
[75] Glazebrook, above n 28, 294.

chapter has outlined two different pathways which are available to New Zealand to recognise the relationship between human rights and environmental protection: (1) mobilizing existing human rights and (2) the specific right to a healthy environment. Accordingly, the following section of this chapter seeks to determine which is the better pathway for New Zealand to follow.

1. Analysis of Literature

Studies indicate that legislation (specific right) is more effective than litigation (mobilizing existing human rights) in achieving environmental protection.[76] While the legislature have the ability to be proactive, the courts can only respond to litigation brought before them. Furthermore, legislation can tackle all instances of a problem compared with the ad hoc nature of litigation. The problem with mobilizing existing rights is that it does not elevate the environment to the condition of a fundamental right. A specific right to a healthy environment will validate environmental protection in a way that the patchwork of human rights will not.[77] The suggestion that an express right is not necessary because adequate protection can be deduced from existing human rights is ultimately not very credible since environmental protection is not a primary aim of those rights.[78]

The issue of an environment of a certain quality is complicated by temporal and geographic elements absent from other existing human rights. The nature of environmental harm means there may be a temporal lag between the action causing harm to the environment, and then harm to the person. To illustrate, the right to life requires a risk that is actual or imminent, and that the claimant has been personally affected.[79] Such qualifications can be difficult to make out in the context of environmental harm because that harm is not typically imminent and evidence of environmental harm can be difficult to obtain.[80]

[76] Boyd, above n 3, at 235.
[77] Townsend, above n 73.
[78] OC-23/18 *The Environment and Human Rights* (Advisory Opinion) (2017) Inter-Am Ct HR (Series A) No 23.
[79] Glazebrook, above n 28, at 314.
[80] At 314.

2. Court's Position

The constitutional human rights protected in New Zealand law were drawn from the ICCPR and are contained in the NZBORA. While, the NZBORA affirms the right to life under s 8 which provides "no one shall be deprived of life except on such grounds as are established by law and consistent with the principles of fundamental justice", it does not affirm other rights that have been mobilized by courts overseas – such as the rights to health and private family life.

The courts have shown no inclination toward greening the right to life. The High Court in *Lawson v Housing New Zealand* strongly doubted that the right to life included things necessary to sustain quality of life.[81] The court's interpretation can be understood to exclude a healthy environment. The New Zealand Human Rights Commission endorsed the Court's approach at the Asia Pacific Forum on Human Rights. It affirmed that the right to life is not directed to the quality of life the person enjoys rather it is directed at actions which produce fatality and anything short of this will not engage the right.[82]

3. Legal Context

Another concern about deriving environmental protection from existing human rights is that this conception depends on the right case coming before the court in the first instance and the court's willingness to interpret the right expansively.[83] The courts may be less inclined to expand the qualifications of NZBORA rights because New Zealand has effective constitutional arrangements and the courts are unwilling to encroach upon the legislature. While the High Court in *Thomson v Minister for Climate Change Issues* did not consider that climate change was a "no go area",[84] it was not prepared to rule on matters requiring it to weigh public policy that were more appropriately addressed by the elected community.[85]

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[81] *Lawson v Housing New Zealand* [1997] 2 NZLR 474 at [81].
[82] *Human Rights and the Environment Reference Paper* (The Asia Pacific Forum on National Human Rights Institutions, September 2007) at 145.
[83] Tim Hayward *Constitutional Environmental Rights* (Oxford University Press, Oxford, 2004) at 75.
[84] *Thomson v Minister for Climate Change Issues* [2017] NZHC 733 at [133].
[85] At [133].

This notion of the nature and extent of judicial power is a leading issue in constitutional debate.[86] The court have indicated their inclination to ensure the basic enjoyment of human rights in New Zealand regardless of the legal and constitutional forms in which they appear.[87] But New Zealand's constitution does not have the status of supreme law and laws which are inconsistent with constitutional principles cannot be struck down by the courts.[88] Presented with the right case, there is no certainty that the courts will expand the ambit of an NZBORA rights or that their decision would not be overturned by future legislation.

4. Conclusion

The court's wariness and indicative position on mobilizing existing rights suggests that the pathway New Zealand should take is recognising a specific right to a healthy environment. Moreover, the magnitude of environmental degradation demands an immediate response.[89] The recognition of a specific right will engender more expedient outcomes then mobilizing existing human rights in New Zealand. Recently, proceedings were filed against the New Zealand Government in respect of breaches of the Treaty of Waitangi (TOW) and the NZBORA, consequent of failure to mitigate environmental harm.[90] The court's decision will be of particular relevance to the argument advanced in this dissertation regarding mobilizing existing human rights.

[86] Geoffrey Palmer "The New Zealand Constitution and the Power of the Courts" (2006) 15(2) TLCP 551 at 553.
[87] *Simpson v Attorney-General* (Baigent's Case) [1994] 3 NZLR 667 at 702.
[88] Susan Glazebrook "New Zealand: Country Report on Human Rights" (2009) 40 VULWR 57 at 58.
[89] United Nations "The UN Intergovernmental Panel on Climate Change" (15 September 2020) Climate Change < https://www.un.org/en/sections/issues-depth/climate-change/>.
[90] Emmeline Rushbrook and Hannah Bain "Climate Change Litigation – Expect the Unexpected" (10 March 2020) Russell McVeagh < https://www.russellmcveagh.com/insights/march-2020/climate-change-litigation-expect-the-unexpected>.

Chapter II: Momentum for Recognition in New Zealand

The previous chapter established that the most effective pathway for recognising the relationship between environmental protection and human rights in New Zealand is through recognition of a right to a healthy environment in the law. Consequently, chapter two will demonstrate that there is sufficient environmental, legal and political momentum for environmental protection in New Zealand to advocate inclusion of the right to a healthy environment in the law. Such a chapter is required because any right to a healthy environment should support environmental law and not be incompatible or inconsistent with its underlying policy.[91]

A. Environmental Protection Law

The New Zealand Government has traditionally responded to environmental challenges with regulations to address specific pollution and conservation issues.[92] These measures have often been reactive rather than demonstrating a forward looking response to the underlying social, economic and political causes of such problems.[93] However, traditional sectoral and thematic approaches to environmental problems are becoming obsolete.[94] The Government has become far more receptive to the essentiality of "reinventing our policies and governance systems to foster stewardship as our future as humans in collaboration with the biosphere".[95]

Substantial reform of New Zealand's environmental protection regime – in particular the Resource Management Act 1991 (RMA) – has been undertaken over the past few years. Council's must now have regard to emissions reductions plans under the CCRA when making policy statements and plans.[96] A set of standards were introduced to prescribe requirements for engaging in activities that pose risks to freshwater ecosystems.[97]

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[91] Glazebrook, above n 28, at 318.
[92] Grinlinton, above n 15, at 27.
[93] At 28.
[94] At 30.
[95] United Nations Environment Programme *21 Issues for the 21st Century: Results of the UNEP Foresight Process on Emerging Environmental Issues* (United Nations Environment Programme, Nairobi, 2012) at 2.
[96] Ministry for the Environment *Overview of the Changes Introduced by the Resource Management Amendment Act 2020* (Ministry for the Environment Factsheet, INFO 952 , June 2020) at 2.
[97] Resource Management (National Environmental Standards for Freshwater) Regulations 2020.

The prohibition of offshore oil and gas exploration under the Crown Minerals (Petroleum) Amendment Act 2018 demonstrates a transition away from fossil fuels and towards affordable renewable energy. Such changes emphasise a clear policy direction in New Zealand's legal landscape that environmental protection should be enhanced – the new favoured response to environmental degradation that – "every little bit will help".[98]

1. RMA

The RMA is the main piece of legislation in New Zealand which sets out how we should manage our environment. Various existing environmental protection laws were brought together under the RMA so they could work in a more integrated way. The RMA contains certain environmental protections which indicate constitutional environmental protections should be incorporated in New Zealand law.[99]

The overarching objective of the RMA is to promote "sustainable management" of natural and physical resources.[100] The objective of sustainable management is tied to sustainable development under the RMA, which in turn has been associated with the right to a healthy environment. The most influential expression of sustainable development was in the Rio Declaration 1992 which recognised that "humans are at the centre of concerns for sustainable development and they are entitled to a healthy and productive life in harmony with nature".[101] This focus on sustainable development came about because of a failure to reach consensus on the inclusion of a clause on the right to a healthy environment.[102]

The objective of sustainable management is informed by various principles contained in ss 6 to 8 of the RMA. A healthy environment underpins these principles with terms such as "natural character" and "protection" used. The principles are considered to confer greater weight to

[98] Glazebrook, above n 28, at 321.
[99] Elizabeth MacPherson and Natalie Baird "A Constitution for Aotearoa New Zealand Submission" (University of Canterbury, 2017) at 5.
[100] Resource Management Act 1991, s 5.
[101] Rio Declaration on Environment and Development A/CONF.151/26 (1992) (Rio Declaration), principle 1.
[102] Glazebrook, above n 28, at 297.

sustainable management then to economic matters.[103] The definition of environment in s 2(1) recognises that as humans we value the environment on our own terms including for its "amenity values". This conception of the environment supports the idea of a 'human' right to a healthy environment. By referring to people and communities as well as social and cultural matters an anthropocentric component is clearly envisaged in a sustainable management approach.[104]

Section 17 establishes a legal duty to avoid, mitigate or remedy adverse effects on the environment. The activity in question must be regulated and controlled pursuant to the RMA.[105] This duty is not enforceable and merely indicates that enforcement order mechanisms are available.[106] Nevertheless, s 17 could be interpreted to support recognition of the right to a healthy environment because it advocates our responsibility for the environment.

While aspects of the RMA seemingly support environmental protection, it is not a 'conservation' statute. A choice must often be made between environmental preservation and economic well-being. The effectiveness of the RMA seems to have been greatest where community aspirations are more easily reconciled with extractive interests.[107] Therefore, environmental outcomes under the RMA have not met the objective of sustainable management in many cases.[108]

While there is clear policy for environmental protection in the RMA – this objective has not always been achieved in practice. The right could serve as an interpretive tool to bolster environmental protection when weighed against competing objectives such as economic well-being. A right to a healthy environment may facilitate individualised justice when environmental harm occurs and legal recourse is not available under the RMA.[109]

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[103] Ministry for the Environment *Improving Our Resource Management System* (Ministry for the Environment, February 2013) at 20.
[104] Grant Hewison "The Resource Management Act 1991" in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (Thomson Reuters, Wellington, 2015) 533 at 545.
[105] *Powelliphanta Augustus Inc v Solid Energy Ltd* (2007) 13 ELRNZ 200 (HC) at [61].
[106] *Marlborough District Council v New Zealand Rail Limited* [1995] NZRMA 357 (PT) at 16.
[107] Environmental Defence Society *Evaluating the Environmental Outcomes of the RMA* (Environmental Defence Society, June 2016) at 6.
[108] At 6.
[109] See Chapter IV, E.

2. Climate Change

The CCRA contains the legal framework which enables New Zealand to meet international climate change obligations. The CCRA was amended in 2008 to encompass the New Zealand Emissions Trading Scheme (NZ ETS), which is New Zealand's primary mechanism for reducing domestic emissions.[110] The effectiveness of the NZ ETS has been tainted by the exclusion of sectors of the economy which are difficult to accommodate – in particular agriculture.[111] Challenges emanating from the NZ ETS have consumed attention which could have been placed on other climate change combative policies, including the right to a healthy environment.[112]

The Climate Change Response (Zero Carbon) Act 2019 provides the legislative mechanism through which New Zealand's commitment to the Paris Agreement is given statutory force. The Government has set an ambitious target of 50 percent reduction in New Zealand greenhouse gas emissions from 1990 levels by 2050.[113] Though biogenic methane from agriculture and waste is exempt from this target (which accounts for over 40 percent of New Zealand's emissions).[114] While the CCRA requires the setting of budgets to meet the 2050 target, these budgets are merely permissive considerations for decision-making under any other legislation.[115] They are not legally binding on any sector of the economy or indeed the Government.[116]

While currently there are deficiencies in the law, there is a clear desire for a comprehensive climate change response – Rt Hon Jacinda Arden recognising that "climate change is our

[110] Climate Change Response (Emissions Trading) Amendment Act 2008.
[111] Charlie Mitchell "Confused? Why Not Understanding the Emissions Trading Scheme is the Point" (21February 2020) Stuff < https://www.stuff.co.nz/environment/climate-news/119665441/if-youre-confused-you-understand-why-not-understanding-the-emissions-trading-scheme-is-the-point>.
[112] Ceri Warnock "Global Atmospheric Pollution: Climate Change and Ozone" in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (Thomson Reuters, Wellington, 2015) 789 at 829.
[113] Climate Change Response (Zero Carbon) Amendment Act 2019, s 5Q.
[114] Eloise Gibson "NZ Rated Insufficient on Climate Action Again" (5 August 2020) Stuff <https://www.stuff.co.nz/environment/climate-news/122341331/nz-rated-insufficient-on-climate-action-again>.
[115] Climate Change Response Act 2002, s 5ZN.
[116] Section 5ZM.

generation's nuclear free moment".[117] The right to a healthy environment could be utilised to remedy such deficiencies in our law. By way of illustration, the Supreme Court's decision in *Urgenda v The Netherlands* was premised on the Government's violation of human rights, in their failing to take appropriate action to meet emissions reduction targets. The right's recognition would enable similar claims to be made in New Zealand.

B. International Treaty Law

There are references made to environmental rights in several international treaties ratified by New Zealand, that protect the rights of particular groups. These include the Convention on the Rights of Persons with Disabilities (CRPD),[118] the Convention on the Rights of the Child (CRC),[119] and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[120] While international treaties are not binding in domestic law, the Government's practice is to ensure that domestic law is compatible with international treaty obligations where possible before ratifying a particular treaty.[121]

The CRPD guarantees disabled people rights of access to clean water services.[122] The CRC provides states will take appropriate measures to combat disease and malnutrition... through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental protection.[123] Moreover, the education of the child shall be directed to the development of respect for the natural environment.[124] The CRC Committee has identified that environmental degradation is a pressing human rights challenge which has

[117] Russel Norman "Environmental Policy Performance of the Arden Government Ahead of Election 2020" (25 August 2020) Greenpeace New Zealand <https://www.greenpeace.org/new-zealand/story/election-2020-ardern-government-environmental-report/>.
[118] Convention on the Rights of Persons with Disabilities 2015 UNTS 3 ((opened for signature 30 March 2007, entered into force 3 May 2008) – ratified by New Zealand on 25 September 2008) [CRPD].
[119] Convention on the Rights of the Child 1577 UNTS 3 ((opened for signature 20 November 1989, entered into force 2 September 1990) – ratified by New Zealand on 6 April 1993) [CRC].
[120] Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 ((opened for signature 18 December 1979, entered into force 3 September 1981) – ratified by New Zealand on 10 January 1985) [CEDAW].
[121] New Zealand Parliament "Parliament's Role in International Treaties" (17 April 2019) New Zealand Parliament <https://www.parliament.nz/en/visit-and-learn/how-parliament-works/fact-sheets/parliament-s-role-in-international-treaties/>.
[122] CRPD, art 28(2)(a).
[123] CRC, art 24(2)(c).
[124] Article 24(2)(e).

an impact on children's lives today and in the future. Furthermore, while environmental harm affects people at any age, children are particularly vulnerable due to their evolving development and status within society.[125]

The CEDAW provides women with the right to sanitation and water supply.[126] The relationship between environmental degradation and human rights protection has been further integrated into the understanding of traditional human rights by the CEDAW Committee. Therefore, the full implementation of all human rights under CEDAW can also be obstructed by general environmental degradation and natural resource scarcity.[127]

The inclusion of a right to a healthy environment would enable New Zealand to fully realise its existing treaty obligations – giving effect to the linkages between the environment and human rights recognised pursuant to the CRPD, CRC and CEDAW.

C. Public View

New Zealand's environment, and how it is managed, are frequently the subject of public debate.[128] The relationship and connection that New Zealander's have with the environment goes well beyond the goods and services that we receive from it. The natural environment is both our home and identity – it is the foundation of our national culture and tradition.[129] A fundamental principle in local government and environmental management is public participation in decision-making.[130] This concept is founded on the idea of sustainable

[125] Committee on the Rights of the Child *Children's Rights and the Environment* (Report of the 2016 Day of General Discussion, May 2017) at 4.
[126] CEDAW, art 14(2)(h).
[127] Office of the United Nations High Commissioner for Human Rights *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (Individual Report on the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Report No. 4, December 2013) at 19.
[128] Kenneth Hughey, Ross Cullen and Geoffrey Kerr "A Decade of Public Perceptions on the New Zealand Environment: A Focus on Water and its Management" (Lincoln University, 2011) at 1.
[129] Ministry for the Environment and Statistics New Zealand *Environment Aotearoa 2019* (Ministry for the Environment, New Zealand's Environmental Reporting Series, 2019) at 6.
[130] Resource Management Act 1991, schedule 1.

decision-making in that better decisions will ensue by involving those who are affected by a particular decision in the process.[131]

When asked how important conservation of the environment is compared to other issues such as health and education, the majority of New Zealander's said that conservation is of equal importance.[132] There is widespread concern that the law is not adequately protecting the environment. The Ministry for the Environment produced Environment Aotearoa in 2019 – a consultation report which provides a health check on the state of our environment, identifying that it is under pressure in many places. New Zealand has one of the highest species extinction rates in the world with almost two thirds of rare ecosystems under threat of collapse.[133] There were nine priority areas identified in the report highlighting the impacts on everything from biodiversity to water pollution.[134]

The inclusion of a right to a healthy environment would create impetus for stronger environmental protection laws and policies to address the public concern regarding the environment – how the right could achieve improved environmental outcomes will be considered in greater detail in chapter four.

1. Constitutional Advisory Panel Report

The Government established the Constitutional Advisory Panel in 2011 to support the consideration of constitutional issues by reporting on an understanding of New Zealander's perspectives on our constitutional arrangements, topical issues and areas where reform should be undertaken.[135] The report records a range of perspectives from its conversation with New

[131] Ceri Warnock and Maree Baker-Galloway *Focus on Resource Management Law* (1st ed, Lexis Nexis, Wellington, 2015) at 14.
[132] Department of Conservation *Attitudes to Conservation* (Department of Conservation, National Survey, October 2011) at 3.
[133] Ministry for the Environment "New Report Signals Nine Top Environmental Issues Facing New Zealand" (18 April 2019) Ministry for the Environment <https://www.mfe.govt.nz/news-events/new-report-signals-nine-top-environmental-issues-facing-new-zealand>.
[134] Ministry for the Environment, above n 113.
[135] Ministry of Justice "Constitutional Advisory Panel" Ministry of Justice (16 August 2020) < https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/constitutional-advisory-panel/>.

Zealander's about our constitution and advice about what to do next.[136] One of the substantive matters for consideration was whether or not to include an appropriate mechanism for environmental protection in the constitution.

The preservation and protection of the environment was a strong theme across the public's response. There were submitters who took a rights-based approach and suggested that NZBORA should be amended to reflect environmental goals. The suggested options included:[137]

a. Affirming rights of the environment itself, for example by placing obligations on the state and citizens to protect Papatuanuku, Mother Earth, Mother Nature or the biosphere;
b. Affirming a human right to a clean and healthy environment;
c. Referring to environmental protection as part of a right to intergenerational equity.

The recommendation of the Panel to the New Zealand Government was to explore in greater detail the options for amending NZBORA to improve its effectiveness, including adding environmental rights to ensure Parliament will be required to consider whether decisions and legislation affect and fulfil those rights.[138] The New Zealand environment forms part of submitter's core identity and they wished to see it recognised at all levels of policy and decision-making.[139]

D. Māori Worldview

A common theme in discourse on environmental protection law in New Zealand is the Māori perspective of the environment. The environment is an integral component of both Māori culture and identity – all parts of the environment are infused with mauri (life force) and

[136] Constitutional Advisory Panel *New Zealand's Constitution A Report on a Conversation* (Ministry of Justice, 2013).
[137] At 51.
[138] At 17.
[139] At 51.

connected by whakapapa.[140] Therefore, no understanding of environmental law would be complete or even possible without recognition of Māori culture and tradition.[141]

1. Māori Conception of the Environment

Māori recognise that along with the privileges the environment provides comes the responsibility to care for the environment and maintain it for future generations.[142] This commitment is expressed as kaitiakitanga which refers to the practice of guardianship and environmental management.[143] The kaitiaki manage the environment for the benefit of future generations. These obligations are mandatory and an inability to fulfil them results in a diminution of mana.[144] Kaitiakitanga is connected to the concept of whanaungatanga which is often described as kinship. Whanaungatanga refers to being a part of a larger whole of the collective.[145] Māori express whanaungatanga with their surroundings in the form of relationships.

The TOW is the foundation of the relationship between the Crown, Māori and the natural environment. The customary interests and values of Māori people in the resources of the environment were acknowledged in the formation of article two of the TOW in a limited sense.[146] The reception of the common law doctrine of customary title to land and resources has been uneven, but it is now accepted that such rights are enforceable except to the extent which they have been displaced by legislation.[147] These rights are of particular importance in the area of environmental protection and in the allocation and management of resources.

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[140] Blair Gordon "Treaty of Waitangi and Māori Issues in Environmental Law" in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (Thomson Reuters, Wellington, 2015) 319 at 331.
[141] At 321.
[142] Ministry for the Environment "Maori Relationships with the Environment" (5 September 2020) Ministry for the Environment <https://www.mfe.govt.nz/publications/environmental-reporting/environment-aotearoa-2015-our-new-reporting-approach/m%C4%81ori>.
[143] Resource Management Act 1991, s 2 definition of "kaitiakitanga".
[144] Ministry for the Environment, above n 142.
[145] Toni Love "Incorporating Maori Approaches to Ecosystem Management in Marine Management" (July 2018) Māori Law Review <http://maorilawreview.co.nz/2018/07/incorporating-maori-approaches-to-ecosystem-management-in-marine-management/>.
[146] Gordon, above n 140, at 332.
[147] Grinlinton, above n 15, at 48.

2. Legal Recognition of Tikanga

New Zealand has increasingly recognised the relationship between Māori and the natural environment.[148] There are customary elements such as kaitiakitanga and rahui which are expressly recognised in the RMA.[149] Similar concepts underly the increasingly frequent recognition of tikanga Māori in statutes of general application. One of the purposes of the Environment Act 1986 ensures that a "full and balanced account is taken in the management of natural and physical resources of the principles of the TOW".[150] The principles of the TOW are part of the essential backdrop against which decision-making by the Parliamentary Commission for the Environment must occur.

The first confirmation that tikanga is part of New Zealand common law was in *Takamore v Clarke*.[151] The case involved the burial of a man in accordance with tikanga. The majority of the Supreme Court identified that the person appointed as a personal representative has the common law duty to attend the body's disposal.[152] The Court held while tikanga does not displace New Zealand's common law, where there is a dispute personal representatives have a duty to take into account the views of those close to the deceased including cultural and customary practices such as burial customs.[153] The Court's decision suggests that where relevant greater weight may be afforded to tikanga in our law.[154]

3. Conclusion

The growing recognition of Māori views in New Zealand law points toward inclusion of a right to a healthy environment in the law. The degradation of our environment can weaken the connection Māori have with the environment with profound consequences for individual and social well-being.[155] A right to a healthy environment would reinforce the development of a

[148] Ministry for the Environment, above n 142.
[149] Resource Management Act 1991, ss 6(e) and 7(a).
[150] Gordon, above n 140, at 342.
[151] *Takamore v Clarke* [2012] NZSC 116.
[152] At [154].
[153] At [156].
[154] At [9].
[155] Ministry for the Environment, above n 142.

legal approach to the environment which is better aligned with the Māori view and obligations to the environment as kaitiaki.[156]

E. Environmental Personhood

The term 'environmental personhood' is a concept which designates certain environmental objects the status of a legal person.[157] This approach emerged from evolution of a legal focus in pursuit of protection of nature. The concept attained support in *Sierra Club v Morton US*, where Justice Douglas dissented in response to ecological concerns that "environmental objects should be granted legal personhood".[158] This ecocentric view provides that humans have a responsibility to behave as caretakers and guardians of the environment because humans possess the will and power to destroy nature, whereas nature does not have such a will to deliberately prioritise its own interests over others.

1. Te Urewera Forest and Whanganui River

The Government granted legal personhood to Te Urewera Forest – an area that had previously been a National Park.[159] This decision was an innovative part of the Tuhoe TOW settlement and made New Zealand a world leader with regard to environmental personhood. The Government established a Board "to act on behalf and in the name of Te Urewera".[160] More recently, the Whanganui River was granted legal personhood with rights which can be judicially enforced by appointed guardians.[161] The Government's decision acknowledges decades of protest by the Whanganui iwi against the exploitation and degradation of the River, and advocacy for its recognition as their ancestor.[162]

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[156] Letter From Lawyers for Climate Action to James Shaw (Minister for Climate Change), Andrew Little (Minister of Justice) and David Parker (Attorney-General) Regarding Proposal to Amend the New Zealand Bill of Rights Act 1990 by Recognising the Right to a Sustainable Environment (25 November 2019) at [38].
[157] Christopher Stone "Should Trees Have Standing" (1972) 45 South Calif Law Rev 450 at 456.
[158] *Sierra Club v Morton* 405 U.S. 727 (1972) at [745].
[159] Te Urewera Act 2014, s 11.
[160] Section 16.
[161] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14.
[162] Simon Day "If The Hills Could Sue: Jacinta Ruru on Legal Personality and a Māori Worldview" (27 November 2017) The Spinoff < https://thespinoff.co.nz/atea/atea-otago/27-11-2017/if-the-hills-could-sue-jacinta-ruru-on-legal-personality-and-a-maori-worldview/>.

The recognition of legal personhood of nature reflects a more pluralist way of thinking about our property based legal system and the intrinsic value of our environment. While the rights of nature and humans are distinct, they are interlinked to the extent that they show an increasing environmental ethic and legal direction that supports environmental protection. The decision to grant legal personhood to Te Urewea Forest and the Whanganui River emulate the Government's receptiveness to new ways of conceptualising the relationship between humans and the environment, which indicates it may support recognition of a right to a healthy environment in our law.

Chapter III: Theoretical Challenges and Envisaging the Right in New Zealand

The UN Environmental Programme (UNEP) have termed the right to a healthy environment a "debated concept".[163] This conception is accurate because many issues lie at the centre of environmental protection and human rights. A right poses theoretical problems such as anthropocentricity. There are also deeper issues of legal architecture to be resolved. The previous chapter established there is sufficient momentum to recognise a right to a healthy environment in New Zealand law. Therefore, chapter three will navigate the right's implementation, focusing on the main challenges which could surmount the right's introduction.

The chapter will conclude by envisaging how the right could look in New Zealand's current legal and political landscape. Though an entrenched right would place environmental protection beyond the reach of political majorities in legislative bodies,[164] it would require overhaul of New Zealand's constitutional arrangements.[165] Therefore, in reality the most feasible way of recognising the right in New Zealand will be through inclusion of the right in the NZBORA. While the argument for an entrenched Bill of Rights is beyond the scope of this dissertation, some advantages of an entrenched constitutional right will be discussed.

A. Criteria of a Human Right

There are many varying definitions of human rights.[166] Cranston wrote that a human right by definition "is a universal moral right, something which all men everywhere at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human".[167] A more recent definition is provided by Cullet who states that all human rights "represent universal

[163] United Nations Environmental Programme "High Level Expert Meeting on the Future of Human Rights and the Environment: Moving the Global Agenda Forward" (4 September 2020) United Nations Environmental Programme <www.unep.org>.
[164] Hayward, above n 83, at 89.
[165] Andrew Geddis "Parliamentary Government in New Zealand: Lines of Continuity and Moments of Change" (2016) 14(1) Int J Const Law 99 at 118.
[166] Boyd, above n 3 at 20.
[167] Maurice Cranston *What Are Human Rights* (Taplinger Publishing, New York City, 1973) at 40.

claims necessary to ensure that every person can enjoy a decent quality of life that are part of the core moral codes common to all societies".[168] These definitions share three central features: (1) rights are universal meaning they are widely agreed upon and held by all (2) rights have a moral basis indicating that they exist whether or not a particular nation or legal system recognises them and (3) the basic intent of rights is to ensure dignity of all human beings.

Therefore, does the right to a healthy environment meet the criteria of a human right? The majority of scholars have answered that question in the affirmative.[169] Birnie and Boyle contended that constitutional recognition of the right would "distinguish the vital character of the environment as a basic condition of life which is indispensable to the promotion of human dignity and welfare and to the fulfilment of other rights".[170] However, there are a handful of experts who have reservations on this point.[171] Miller wrote that "clean air, like other welfare aspirations is best understood as a goal" rather than a right.[172] It seems inaccurate to describe a healthy environment as a mere goal or objective given the vital importance of clean air and freshwater to human well-being and dignity.[173] Boyd advocates that the right to a healthy environment possesses the essential characteristics of all human rights.[174]

1. Three Generations of Human Rights

The human rights framework is said to be underpinned by three generations of rights: the right to freedom of the first generation, social rights of the second generation and collective rights of the third generation.[175] The right to a healthy environment is often referred to as a third generation right.[176] Third generation rights are controversial because no global human rights

[168] Philippe Cullet "Definition of an Environmental Right in a Human Right's Context" (1995) 1 NQHR 25 at 26.
[169] Boyd, above n 3, at 21.
[170] Patricia Birnie and Alan Boyle *International Law and the Environment* (2nd ed, Oxford University Press, Oxford, 2002) at 255.
[171] Boyd, above n 3, at 21.
[172] Christopher Miller *Law in Environmental Decision Making: National European and International Perspectives* (Oxford University Press, Oxford, 1998) at 92.
[173] Boyd, above n 3, at 21.
[174] At 21.
[175] Spasimir Domaradzki, Margaryta Khvostova and David Pupovac "Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse" (2019) 20 Hum Rights Rev 423 at 425.
[176] Kristen Davies "The Declaration on Human Rights and Climate Change: A New Legal Tool For Global Policy Change" (2017) 8(2) J Hum Rts & Env't 217 at 231.

treaty recognises them in the same way as the other generations of rights.[177] They are described as one of the responses of the international community to changing circumstances and needs. Therefore, they are deemed 'second class' compared to more fundamental human rights because of their aspirational nature.

However, the distinction between generations of human rights may not be helpful or even valid.[178] A more integrated approach advocated by scholars views all human rights as interrelated and interdependent, and not subject to hierarchical classification.[179] The Vienna Declaration on Human Rights provides support for this perspective affirming that "the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".[180]

B. Anthropocentricity

The right to a healthy environment is pervaded by tension between the concepts of anthropocentricity and ecocentrism. The anthropocentric formulation of the right stems from the foundation of human rights law – the environment is treated as a life sustaining good which should be added to all other material conditions of human welfare.[181] The Stockholm Declaration 1972 emulates the anthropocentric conception of the environment providing that human benefit is the primary reason for respecting nature.[182] On the other hand, the ecocentric formulation provides that the environment places limitations on freedoms – acknowledging the intrinsic value of the environment while simultaneously seeking to preserve ecological integrity.[183]

The majority of existing environmental rights have an anthropocentric focus. These rights emphasise the utility of the environment for the benefit of human health and well-being. For example, the South African Constitution provides that "everyone has the right to an

[177] Boyd, above n 3, at 22.
[178] At 22.
[179] Malcom Rogge "Human Rights, Human Development and the Right to a Healthy Environment: An Analytical Framework" (2001) 22(1) Canadian Journal of Development Studies 33 at 37.
[180] Vienna Declaration and Programme of Action A/CONF.157/23 (1993) (Vienna Declaration), art 5.
[181] Louis Kotze "Rethinking Human Rights and the Environment in the Anthropocene" (2014) 1(3) Anthr Rev 252 at 258.
[182] Stockholm Declaration, principles 1 and 2.
[183] Kotze, above n 181, at 258.

environment that is not harmful to their health or well-being".[184] There are few exceptions to this more general trend. A more ecocentric objective can be found in the constitutions of Ecuador and Bolivia which grant the environment the right to "exist, persist and maintain and regenerate its vital cycles, structure, functions and processes in evolution".[185] This right-formulation is the first of its kind at the constitutional level and is exemplary of one of the possible manifestations that an ecocentric right may take.

There are commentators who have expressed doubt about whether the environment is best served by enhancing the rights of humans – particularly in view of how it often seems to be the human pursuit of their rights and interests which causes environmental damage in the first instance.[186] The central concern with an anthropocentric formulation of the right is that environmental harm must affect human well-being before it can be invoked. Therefore, the right cannot be used on behalf of the environment or to prevent threats to ecological processes.[187] Another concern is that legal relief awarded will only account for the individual claimant's injury.[188] The issue is whether these matters constitute an objection to the right to a healthy environment from an environmental perspective?

Hayward argues there is no single version of the anthropocentric objection that is well founded and decisive enough as an objection to environmental human rights.[189] The human right to a healthy environment provides a link to interests and motivations, and thus to actual practices in a way that more abstract notions of a right of environment do not.[190] Moreover, even if an ecocentric approach was pursued its success would depend on the political and legal resources available to individuals bringing the proceedings. Such resources are likely to be enhanced by an anthropocentric right which can be mobilised for similar purposes.[191]

There is good reason to believe that once the right to a healthy environment is established, practical jurisprudence and wider social norms will develop to support a less immediately

[184] Constitution of the Republic of South Africa 1996, s 24.
[185] Constitution of the Republic of Ecuador 2008, art 71 and Bolivia Constitution 2009, art 33.
[186] Hayward, above n 83, at 27.
[187] Dinah Shelton "Human Rights and the Environment: Problems and Possibilities" (2008) 38 EPL 41 at 45.
[188] Neil Popovic "Pursuing Environmental Justice with International Human Rights and State Constitutions" (1996) 15 Stanf Environ Law J 338 at 345.
[189] Hayward, above n 83, at 35.
[190] At 35.
[191] At 35.

anthropocentric aim.[192] Significantly, the right does not preclude other approaches to environmental protection and might serve to support them or enhance their potentiality for success.[193]

C. Positive and Negative Rights

The distinction drawn by legal theorists between negative and positive rights is widely accepted. While a negative right forbids others from acting against the right holder, a positive right obligates others to act with respect to the right holder.[194] Therefore, a positive right is a claim to something and a negative right is a call for the prohibition of some action. The right to a healthy environment may entail a range of more specific obligations of positive and negative types. By way of illustration, there could be a positive duty on the state to establish regulations for environmental quality. This duty could also be negative in the case where the state allows a polluting activity to proceed.[195]

1. Enforceability

The constitutional right to a healthy environment must be self-executing in order to be enforceable – it must confer a right of action on individuals.[196] The right's enforceability will be influenced by whether it is negative or positive.[197] The courts are generally more likely to consider the right to be self-executing when it imposes negative obligations on the state.[198] Though a negative environmental right on its own has not been endorsed because the legal strength of the right will be limited. The scope of the right will be negated and enabling

[192] Catherine Redgwell and Michael Bowman *International Law and the Conservation of Biological Diversity* (Kluwer Law International, London, 1996) at 87.
[193] See Chapter II.
[194] Ran Hirschl "Negative Rights vs Positive Entitlements" A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order" (2000) 22 Hum Rights Q 1060 at 1071.
[195] Hayward, above n 83, at 89.
[196] At 95.
[197] Boyd, above n 3, at 72.
[198] Jose Fernandez "State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question" (1993) 17 Harv Envtl L Rev 333 at 350.

legislation will be required to define the parameters of the right. Both are important caveats on the state's duties and obligations.[199]

These caveats are why a number of constitutions which possess the right impose negative and positive obligations on the state. The South African Constitution contains both negative and positive duties.[200] Subsection (a) is formulated as a negative obligation providing that "everyone has the right to an environment that is not harmful to their health or well-being". While subsection (b) is a more directive principle that creates positive duties on the state to protect the environment for present and future generations stating that "everyone has the right to have the environment protected for the benefit of present and future generations, through reasonable legislative measures". Therefore, the right should encompass a negative and positive duty on the state.

2. Progressive Realisation Principle

However, the concern with a positive right to a healthy environment is that the state may be unable to effectuate it due to resource constraints.[201] The progressive realisation principle may be one way to surmount this issue. The principle is set out in the ICESCR and provides that the state must take steps to the maximum of its available resources with a view to achieving progressively the full realisation of the right.[202] New Zealand has traditionally relied on progressive realisation of rights under the ICESCR through public policy and decision-making.[203] Therefore, extension of the progressive realisation principle to the right could be feasible in New Zealand.

A lack of resources cannot justify inaction or postponement of measures to implement these rights. The minimum core principle was introduced by the ICESCR Committee and requires

[199] Christopher Jeffords *Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions (*The Human Rights Institute, Connecticut, 2011) at 12.
[200] Constitution of the Republic of South Africa 1996, s 24.
[201] Boyd, above n 3, at 23.
[202] ICESCR, art 2(1).
[203] Margaret Wilson, Judy McGregor and Sylvia Bell "The Impact of Economic and Social Human Rights in New Zealand Case Law" (2015) 21(1) Aust J Hum Rights 143 at 143.

the satisfaction of at the very least minimum essential levels of the right.[204] The promise of the minimum core principle is to give the notion of progressive realisation a clear direction and to evaluate the steps states have taken toward the progressive realisation of particular rights. The progressive realisation principle – reinforced by the minimum core principle – validates the capability of a right to a healthy environment encompassing a positive duty.

D. Individual and Collective Rights

The right to a healthy environment appears to transcend the conventional binary classification of rights whereby the right holder is an individual or a collective.[205] The right is collective due to the shared nature of our interactions and experiences with the environment,[206] but it is also individualistic because there will always be some environmental harms which affect a particular individual rather than a collective.[207] Some commentators maintain that an individualistic conception of the right is inappropriate in the environmental area.[208]

The European Court of Human Rights has generally adopted an individualistic approach to environmental rights, as opposed to viewing the environment as a public good which effects the collective well-being of groups of people in a particular location.[209] The issue with the Court's approach is that environmental problems are generally not directly the result of individual actions but of complex collective practices, and to change these problems government action more akin to that required for the provision of social rights may be necessary.[210] Though difficulties may be encountered in New Zealand because the constitutional rights currently recognised in the law are inherently individualistic.

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[204] The World Bank "Minimum Core Obligations of Socio-Economic Rights" (26 January 2018) The World Bank <https://www.worldbank.org/en/about/legal/publication/minimum-core-obligations-of-socioeconomic-rights>.
[205] Boyd, above n 3, at 25.
[206] Bridget Lewis *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer, New York, 2018) at 104.
[207] Hayward, above n 83, at 75.
[208] Glazebrook, above n 28, at 319.
[209] Carmen Gonzalez "Environmental Justice, Human Rights and the Global South" (2015) 13 Santa Clara L Rev 151 at 183.
[210] Hayward, above n 83, at 82.

The relationship between the environment and individual rights established by the Stockholm Declaration 1972 constitutes recognition of a right to a healthy environment which is inextricably linked, both individually and collectively, to universally recognised fundamental human rights standards and principles.[211] The fact the right would be available to individuals does not mean that claims premised on the right would necessarily be individualistic.[212]

The South African Constitution provides an example of a dual individual and collective right to a healthy environment. Section 24 establishes that "everyone has the right to an environment that is not harmful to their health and well-being" (individual) and "to have the environment protected for the benefit of present and future generations" (collective).[213] Similarly, the Constitution of the Dominican Republic provides that "every person has the right both individually and collectively, to live in a healthy, ecologically balanced and suitable environment".[214] These examples highlight the capability of the right to protect both collective groups and individuals.

1. Intergenerational Rights

The right gives rise to further complex questions beyond the traditional debate concerning individual and collective rights. The majority of human rights violations affect identifiable victims, whereas environmental harm effects not only those currently living but future generations as well. Weiss argues that the present generation has a direct responsibility to protect and preserve the environment for future generations and that this notion should be incorporated into the right.[215] This conception means it would be possible for certain agents to initiate legal action on behalf of future generations.

The International Court of Justice has recognised that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including

[211] 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 TELJ 65 at 81.
[212] Hayward, above n 83, at 75.
[213] Constitution of the Republic of South Africa 1996, s 24.
[214] Dominican Republic Constitution 2015, art 67.
[215] Brown Weiss "In Fairness to Future Generations" (1990) 32(3) Environment Washington 6 at 9.

generations unborn".[216] This notion of intergenerational justice is also supported by the concept of the commons since the environment is nobody's property and the use made of it is common to all.[217] The support for intergenerational equality would suggest the right must protect collectives, but does not rule out protection of individuals too.

The incorporation of intergenerational equality in the right to a healthy environment raises complex issues which are outside the scope of this dissertation. Future research will need to consider the time period that future generations will cover, what level of responsibility will be owed and the appropriate balance to be struck between present and future generations rights.

E. Substantive and Procedural Rights

The constitutions of many countries specifically address the environment, but few embody a substantive right to a healthy environment.[218] The majority of constitutions reflect procedural rights, such as the general duty for the government to consider environmental impacts or to allow public comment concerning projects which significantly affect the environment.[219] Procedural environmental rights are participatory rights in that they formally empower citizens to demand information pertaining to the environment and participate in environmental decision-making. On the other hand, substantive rights provide assurance to all persons that they can enjoy environmental conditions that meet minimum requirements, by creating corresponding obligations on the state.

The development of procedural environmental rights was given impetus by the Aarhus Convention. This Convention contains the rights to information, participation in decision-making and access to justice which it expressly affirms are aimed at securing the right to a healthy environment.[220] The focus on procedural rights has been based in part on political caution arising from concern that efforts to guarantee and enforce substantive rights may be

[216] Elisabeth Lambert *The Environment and Human Rights* (Introductory Report to the High Level Conference Environmental Protection and Human Rights, Steering Committee for Human Rights, 27 February 2020) at 3.
[217] At 20.
[218] James May "Constituting Fundamental Environmental Rights Worldwide" (2006) 23(1) Pace Environ Law Rev 113 at 113.
[219] At 114.
[220] Aarhus Convention, art 4, 6 and 9.

unsuccessful.[221] Substantive rights shift power to the judiciary and are therefore politically contentious. The uncertain boundaries of substantive environmental rights force the courts onto a tightrope when seeking to enforce them – if the court read the right too narrowly it may damage the environment, but if the court over enforce the right it may unduly limit development and economic progress.

Procedural rights do not raise similar concerns because there is virtually no danger of over enforcement. The boundaries of procedural environmental rights are clearer and their enforcement more verifiable and easily managed. Therefore, the likelihood of the courts misreading them is lower.[222] The greater clarity associated with procedural rights is why the Hungarian Constitutional Court construed a passage that recognises a right to a healthy environment to confer only procedural rights.[223] Accordingly, many commentators suggest that the focus for the environmental rights movement should be upon establishing procedural rights, creating and legitimising frames within which to debate substantive issues.[224]

The issue of achieving environmental protection in the face of short term economic costs and scientific uncertainty makes reliance on procedural rights alone insufficient to guarantee the substantive outcome of a healthy environment.[225] However, the UN Special Rapporteur on Human Rights and the Environment recognised the inclusion of procedural rights is necessary in order for the substantive right to be effective.[226] A substantive right to a healthy environment should be recognised in New Zealand law, reinforced by associated procedural rights.

F. Legislative Drafting

The most complex challenge posed by the right to a healthy environment is the legislative drafting process. The Philippines Supreme Court has recognised that it is "very difficult to fashion language more comprehensive in scope and generalised than the right to a healthy

[221] Dinah Shelton "Developing Substantive Environmental Rights" (2010) 1 J Hum Rts & Env't 89 at 91.
[222] Erin Daly "Constitutional Protection for Environmental Rights" (2012) 17(2) Int J Peace and Dev Stud 73 at 77.
[223] May, above n 218, at 136.
[224] Warnock, above n 9, at 896.
[225] Shelton, above n 221, at 91.
[226] Report of the Special Rapporteur, above n 13 at [3].

environment".[227] This challenge is exacerbated by the fact there is no coherent legal response across the board – "we are concerned with a right that is conceptually unclear and whose contours are still being formulated".[228]

However, the potential breadth of the right has not been an impediment to recognition overseas. The Irish Court in *Friends of the Irish v Fingal County* maintained that the right is not so "utopian that it can never be captured, and that once concretised into specific duties and obligations its enforcement is entirely practicable".[229] While the right to a healthy environment can be utilised for a wide range of environmental issues, more specific rights and obligations will provide better guidance for those claiming their right has been violated, and for the courts who will have to interpret and determine if that has been the case.

The other problem frequently referred is that it is notoriously difficult to get a clear and unequivocal interpretation of a decent and adequate environment. However, this is not an issue peculiar to environmental rights, many other rights have been developed which were similarly disparaged for vagueness.[230] The approach taken in those countries with the right has been to let the courts develop their own interpretations as they have done for other human rights.[231]

1. Model Right's from Overseas

There is a growing number of authoritative instruments providing environmental rights which New Zealand could look to use as a model. The most common formulation which was articulated in the Brundtland Report is the "right to an environment adequate for health and well-being".[232] Some academics have suggested that if New Zealand were to adopt the right to a healthy environment it should be modelled upon the French Charter for the Environment 2002.[233]

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[227] *Minors Oposa v Factoran* [1993] GR No. 101083 (224 SCRA 792) at [16].
[228] Warnock, above n 9, at 898.
[229] *Friends of the Irish v Fingal County* [2017] No. 344 JR at [292].
[230] Hayward, above n 83, at 95.
[231] At 96.
[232] Gro Harlem Brundtland *Report of the World Commission on Environment and Development: Our Common Future* (World Commission on Economic Development, 20 March 1987) at 286.
[233] Magallanes, above n 8.

The most fundamental article provides that "everyone has the right to live in a balanced environment which shows due respect for health" – which entails a duty to preserve and enhance the environment.[234] There are further articles pertaining to environmental education, training and research, and procedural rights to participate in environmental decision-making.[235] While passing an entire body of environmental rights is not likely to be tenable in the New Zealand context, the right to a healthy environment contained in the Charter would provide an effective guarantee of a healthy environment for current and future generations.[236]

The South African right to a healthy environment has also been popular.[237] The first subsection is formulated as a negative obligation and guarantees a minimum standard of environmental protection that can be inferred from health and well-being. The second subsection is a more directive principle that creates positive duties on the state to protect the environment for present and future generations. This subsection also provides that the right must be implemented by reasonable legislative and other measures.

Palmer and Butler used this right as a model for the environmental right they drafted for NZBORA.[238] The inclusion of an environmental right in South Africa has added considerable momentum to the development of environmental justice. The courts have in most instances reinforced the protective values and objects of the environmental right.[239]

2. Suggested Right for New Zealand

The NZBORA has become a significant source of human rights protection and an important part of New Zealand's constitutional landscape.[240] It became law in 1990 following a period of perceived excessive exercises of government power and a shift in public attitudes towards human rights. Including the right to a healthy environment in NZBORA would embed environmental protection alongside other fundamental rights and freedoms. While not

[234] Charter for the Environment 2004, art 1 and 2.
[235] Articles 8, 9 and 7.
[236] Magallanes, above n 8.
[237] Constitution of the Republic of South Africa 1996, s 24.
[238] Geoffrey Palmer and Andrew Butler *A Constitution for New Zealand* (Victoria University Press, Wellington, 2016) at 69.
[239] Kotze, above n 181, at 311.
[240] Letter From Lawyers for Climate Action, above n 156, at [10].

interfering with parliamentary sovereignty it would mean that it is subject to a framework where legislation would be interpreted consistently with the right where possible,[241] decisions by government agencies that affect the right would need to engage with whether the limit on rights is justified,[242] and new legislation would be vetted for compliance with the right. Therefore, this dissertation will advocate that the right to a healthy environment be appended to the NZBORA.[243]

Palmer and Butler drafted a proposed right to a healthy environment for the NZBORA in 2016.[244] They were later persuaded to revise and strengthen this original draft following consultations with environmental organisations.[245] Palmer and Butler explained that the original right needed to provide less space for economic development to trump environmental values.[246] They revised the original draft in 2018 placing more emphasis on conservation and biodiversity values. Moreover, there is better incorporation of ecological issues and tikanga. Their proposed right to a healthy environment provides that:[247]

(1) Everyone has the right –
    (a) to an environment that is not harmful to their health or well-being; and
    (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
        (i) prevent pollution and ecological degradation;
        (ii) promote conservation and biodiversity;
        (iii) secure ecologically sustainable development of natural resources in a manner that is managed to maintain the equilibrium of the environment;
        (iv) include kaitiakitanga, which is an exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources.

[241] NZBORA 1990, s 6.
[242] Section 5.
[243] Section 7.
[244] Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 69.
[245] Geoffrey Palmer "Can Judges Make a Difference? The Scope for Judicial Decisions on Climate Change in New Zealand Domestic Law" (2018) 49 VUWLR 191 at 205.
[246] At 206.
[247] At 206.

(2) The Commissioner for the Environment may, if the Commissioner considers it appropriate to do so, –

(a) conduct litigation to safeguard the rights contained in this section;

(b) intervene in litigation in which issues relating to those rights are raised.

This draft right to a healthy environment is advocated for recognition in the NZBORA. However, the final content of the right would require further legal research and public deliberation. There are several pertinent issues to environmental litigation that need to be addressed during the drafting process including burden of proof, threshold required for violation and how the court should resolve scientific uncertainty. The right addresses the environment as a public good, in which form it bears little resemblance to the accepted catalogue of civil and political rights contained in the NZBORA.[248] Moreover, the proposed right does not encompass procedural environment rights, though necessary to support the substantive outcome of a healthy environment. These matters are outside the scope of this dissertation but should be considered in future research.

G. Justiciability

The recognition of a right to a healthy environment in the NZBORA does not automatically mean that this right can be successfully invoked in court.[249] There are commentators who are sceptical of the right because fundamentally it looks like an attempt to turn an essentially political question into a legal one.[250] What constitutes a healthy environment is subjective and a value judgement.[251] Policy choices abound in this context – what weight should be given to natural resources exploitation over protection of the environment, or to energy consumption over the risks of climate change?

This perspective has been tempered by awareness of the significant value of the right in countries whose environmental problems are more extreme.[252] The broad aims of the right may require fleshing out in terms of definite environmental standards, but this particular issue is not

[248] Boyle, above n 6, at 628.
[249] Hayward, above n 83, at 94.
[250] Boyle, above n 6, at 627.
[251] At 626.
[252] At 627.

an insurmountable obstacle to justiciability. The fact that environmental rights have been adjudicated hundreds if not thousands of times by national courts around the world is powerful evidence that the right is not necessarily too perceptive a subject to invoke.[253]

1. Standing Requirement

The right to a healthy environment will be ineffective unless there is a broad notion of standing.[254] This concept describes the legal rules which determine who can initiate a lawsuit or participate in a court proceeding. These rules will not be a hindrance in the context of New Zealand because the courts have developed a rather "liberal" approach toward standing.[255] The right in combination with the broad notion of standing could open the floodgates to litigation, entailing unrealistic demands on the courts. However, this conception ignores the reality that litigation is too expensive and inconvenient to ever become a popular past time.[256] The courts may use test cases or class actions to reduce the burden on the court system.

H. Constitutional Protection

The constitution plays an important cultural role in reflecting a societies values and aspirations, and in all of its historical forms it has always been a standard of legitimacy.[257] The constitutional protection of human rights is essential because constitutions represent the highest and strongest laws in domestic legal systems.[258] The constituting of the right to a healthy environment with other basic fundamental rights found in the NZBORA will make it less susceptible to political airs.[259] Consequently there has been a growing trend toward constitutional recognition of the importance of environmental protection.[260]

[253] Knox, above n 31, at 24.9.
[254] May and Daly, above n 5, at 415.
[255] *Great Christchurch Buildings Trust v Church Property Trustees* [2014] NZHC 1182 at [38]
[256] Hayward, above n 83, at 99.
[257] May, above n 218, at 116.
[258] Report of the Special Rapporteur on the *Right to a Healthy Environment Good Practices*, above n 8, at 10.
[259] May, above n 218, at 121.
[260] Boyd, above n 3, at 47.

There are some 125 national constitutions which expressly address environmental norms.[261] The justification for the premise that the right ought to be provided in the constitution is the normative claim that a commitment to human rights principles entails a commitment to enforce them. The appropriate way to enforce them is to enshrine them among the highest imperatives of the state as provided in its constitution, since only these provide sufficiently stringent guarantees of a commitment to their enforcement.[262] The legislative history of the constitution will often provide guidance to the courts about the provision's enforceability.

1. Entrenched Constitution

The proposed right can be appended to the NZBORA and elevated to constitutional status, which has been encouraged. Though the relative strength of constitutional status is a major topic of debate in New Zealand. The constitution is not found in one document, as it has a number of sources including crucial pieces of legislation, several legal documents, common law derived from court decisions and established constitutional practices known as conventions.[263] There is no technical difference between ordinary statutes and law considered constitutional law. New Zealand Parliament can in most cases perform 'constitutional reform' simply by passing new legislation, and thus have the power to change or abolish elements of the constitution. The principle of parliamentary sovereignty trumps the rule of law.

While the NZBORA is constitutional law, it is not superior law and can be overridden by statute which detracts the legal power of the rights contained. NZBORA rights have been overridden on numerous occasions since coming into force.[264] There are only three other countries worldwide who also have an unwritten constitution like New Zealand.[265] Palmer and Butler have advocated for the entrenchment of New Zealand's constitution.[266] The case for and against entrenchment is outside the scope of this dissertation. Nevertheless, a Bill of Rights must be a

[261] Boyd, above n 3, at 49.
[262] Hayward, above n 83, at 67.
[263] Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" (20 November 2017) Department of the Prime Minister and Cabinet <https://dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual/introduction>.
[264] Palmer, above n 11.
[265] Palmer, above n 11.
[266] Palmer, above n 11.

part of a superior law constitution in order to bind law makers and ensure other statutes are made in conformity. This status will ensure accountability when the right is violated.

Chapter IV: The Value of a Right to a Healthy Environment

The paramount objective of recognition of a right to a healthy environment in New Zealand law is to mitigate and reduce the level of harm being inflicted on humans and the environment.[267] The right has resulted in and contributed to a broad range of legal and extra-legal outcomes that have advanced environmental protection in those countries that have recognised the right.[268] The presence and strength of constitutional environmental rights are positively associated with environmental outcomes as measured by the Yale University Environmental Performance Index.[269]

However, despite conceivable progress, there has been ongoing debate regarding the right's potential utility.[270] The concern stems from difficulties in establishing a cause and effect relationship between a constitutional provision and an environmental outcome. Furthermore, the impact of a particular constitution will depend on a suite of legal, social, cultural, economic and political factors which vary from nation to nation.[271] Although, evidence indicates the anticipated benefits are being realised, while the potential drawbacks are not materializing.[272]

This final chapter will analyse whether the right is a mere 'paper tiger' with few practical consequences or a powerful catalyst for accelerating progress toward a healthier environment. Chapter four will outline improved environmental outcomes which could ensue in New Zealand based upon experiences of those countries who have already recognised it. Furthermore, a theoretical analysis of NZBORA specific implications will be provided.

A. Stronger Environmental Protection Laws

There is extensive evidence that constitutional recognition of the right influences the development of stronger national environmental legislation. Boyd identified that the

[267] Boyd, above n 3, at 28.
[268] At 6.
[269] Chris Jeffords and Joshua Gellers "Constitutionalising Environmental Rights: A Practical Guide" (2017) 9 J Hum Rights Pract 136 at 139.
[270] David Boyd "The Constitutional Right to a Healthy Environment" (2012) 54(4) Environment: Science and Policy for Sustainable Development 3 at 5.
[271] Boyd, above n 3, at 6.
[272] Boyd, above n 271, at 6.

environmental laws of 72 out of 98 nations were strengthened after the right gained constitutional status.[273] The right has become a unifying principle in some nations permeating not only national framework law, but the entire body of environmental law and policy. By way of illustration, the Charter for the Environment was expected to heighten the prominence of environmental issues in French law. However, it developed beyond all predictions during the first two years of enforcement.[274] Among nations where no influence on environmental laws could be found are countries whose environmental rights provisions are very recent, for example the Dominican Republic and Jamaica.[275]

However, constitutional recognition is not the only factor contributing to improved environmental laws. Other factors include public pressure, the migration of other legislative approaches and support from agencies such as UNEP and the International Union for Conservation of Nature. The conclusion that constitutions have had a strong influence on national environmental laws is supported by the consistent inclusion in those laws of direct references to the constitution.[276] This understanding is shared by legal experts and organisations including the Organisation for Cooperation and Economic Development and the UN Economic Commission for Europe.[277] Furthermore, the courts appear more likely to defend environmental laws and regulations. For example, the Constitutional Court of Slovenia upheld a tax on water pollution based on the constitutional imperative of environmental protection.[278]

B. Environmentally Consistent Legislation

One important consequence of recognising the right in the NZBORA is that all future legislation would be scrutinised for consistency with the right to a healthy environment. Section 7 of the NZBORA imposes a duty on the Attorney-General to report to Parliament upon the introduction of any bill to the house that in his or her opinion is inconsistent with the NZBORA and cannot be justified in terms of s 5. While these reports have no legal effect, they are intended to raise the visibility of rights issues in the legislative process and impose something

[273] Boyd, above n 3, at 233.
[274] David Marrani "The Second Anniversary of the Constitutionalization of the French Charter for the Environment: Constitutional and Environmental Implications" (2008) 10(1) Environ Law Rev 9 at 25.
[275] Boyd, above n 3, at 234.
[276] Boyd, above n 271, at 6.
[277] Boyd, above n 3, at 234.
[278] *Pavel Ocepek, Breg pri Komendi* Slovenia Constitutional Court Up-344/96 (1999).

of a potential political cost on any elected representatives who support the bill to which it is attached.[279]

The right to a healthy environment would become an element of administrative decision making by all government bodies in the same way that current NZBORA rights are given due weight. Therefore, a decision that will impede the right to a healthy environment must be justified.[280] Section 7 has undoubtedly resulted in increased consideration of rights concerns during the legislative process. However, the threat of report has not prevented bills deemed inconsistent with the NZBORA being introduced by the legislature. There have been 37 rights inconsistent bills introduced since the NZBORA was enacted.[281]

Therefore, commentators have come to the conclusion that reports pursuant to the NZBORA function as a behind the scenes influence on social policy choices when legislation is being designed rather than operating as a significant check on public legislative behaviour.[282] By way of illustration, the Attorney-General has issued reports on 72 occasions in New Zealand, while there have only been four equivalent reports issued in the UK and one in Canada.[283] Drafting with rights consistency in mind certainly enables Parliament to weave the right to a healthy environment into the fabric of our law.[284]

1. Declaration of Inconsistency

The New Zealand Bill of Rights Act (Declaration of Inconsistency) Amendment Bill was introduced to Parliament earlier this year. The objective of the Bill is to provide a mechanism for the Executive and House of Representatives to consider and if necessary respond to a declaration of inconsistency made under the NZBORA. Until recently it has been less clear whether the courts can make declarations of inconsistency in respect of other rights affirmed

[279] Andrew Geddis "Rights Scrutiny in New Zealand's Legislative Process" (2016) 4(3) TPLeg 355 at 360.
[280] Letter From Lawyers for Climate Action to James Shaw (Minister for Climate Change), Andrew Little (Minister of Justice) and David Parker (Attorney-General) Regarding Letter in Support of Proposal to Amend NZBORA (25 November 2019) at 2.
[281] Palmer, above n 11.
[282] Geddis, above n 280, at 362.
[283] At 369.
[284] Ross Carter "You Are Always on my Mind: Law Drafting for Human Rights Inconsistency" (2018) 3 Commonwealth Association of Legislative Council The Loophole 35 at 88.

in the NZBORA. This was settled when the Supreme Court in *Attorney-General v Taylor* determined that senior courts have the power to issue a declaration of inconsistency under the NZBORA.[285]

The Bill requires the Attorney-General to report to the House when a declaration of inconsistency is made which will trigger reconsideration of the matter at issue.[286] It does not prescribe the process the House of Representatives must embark on – that is deemed to be a matter properly for Parliament. While a declaration does not elevate the NZBORA to the status of a substantive limit on the legislative power of the Parliament, it does involve the courts in adjudication of NZBORA consistency with legislation. In terms of the right to a healthy environment, providing a formal response to Parliament may strengthen the incentive for individuals to seek declarations of inconsistency.[287]

C. Interpretive Tool

The NZBORA envisages an interpretive role for the courts. Section 6 provides that wherever an enactment can be given a meaning that is consistent with NZBORA that meaning shall be preferred. This instruction provides the court a role in harmonising the statute books with the fundamental idea that all people possess important rights which Parliament should not limit unjustifiably.[288] The inclusion of a right to a healthy environment in NZBORA would require legislation to be interpreted consistently with the right where possible pursuant to s 6. Therefore, the right may also serve to stimulate a more environmentally appreciative application and evolution of legal concepts by the courts.[289]

1. NZBORA ss 4, 5 and 6

Section 6 of the NZBORA protects parliamentary supremacy in terms of s 4 by declaring that inconsistent legislation cannot be invalidated by the courts and prevails over the NZBORA

[285] *Attorney-General v Taylor* [2018] NZSC 104 at [121].
[286] Bill of Rights (Declaration of Inconsistency) Amendment Bill 2020, s 7A.
[287] Andrew Little *Proactive Release – The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill* (Ministry of Justice, 28 May 2020) at 5.
[288] Andrew Geddis and M B Rodriguez Ferrere "Judicial Innovation Under the NZBORA – Lessons for Queensland?" (2016) 35(2) U Queensland L J 251 at 255.
[289] Hayward, above n 83, at 24.

irrespective of when it was enacted. These two provisions of the NZBORA seem to pull in opposite directions.[290] In view of this tension, the courts have taken a generally conservative view of their ability to read statutes consistently with NZBORA, accepting that they will do so whenever the statute can reasonably be given a consistent meaning, but not where a strained interpretation would result.[291] That is not to say that the s 6 interpretive mandate has not had an impact on judicial reasoning. It has repeatedly been used to limit general statutory discretions in a rights-consistent fashion.[292] The idea of seeking rights consistency may enliven the conventional approach and generate interpretive possibilities that would otherwise not be appreciated.[293]

The rights contained in NZBORA are not absolute. Whenever there is a conflict between NZBORA and primary legislation the right in question may be limited under s 5. The limit must be reasonably prescribed by law and demonstrably justified in a free and democratic society. This analysis involves a two stage test, formulated by the court in *R v Hansen:* (1) the objective of the competing provision must be sufficiently important to warrant a rights breach and (2) the means proposed to achieve the objective must be proportionate.[294] While the right would not be a systematic trump card, the court must evaluate it against competing considerations.[295] NZBORA recognition will elevate the importance of the environment in this way.

2. Impact of Greater Weight Conferred on the Environment

Currently, environmental impacts of business and government activities are justified in the name of social and economic development.[296] The environment has become subservient to these demands. Coincidentally, the most developed countries worldwide do not recognise constitutional environmental protections. The importance of economic development compared to the environment was recently illustrated by the introduction of the COVID-19 Recovery

[290] Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2001) 49(4) AJCL 707 at 729.
[291] *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 272.
[292] Andrew Geddis and Bridget Fenton "Which is to be Master? Rights Friendly Statutory Interpretation in New Zealand and the United Kingdom" (2008) 25(3) Ariz J Int'l & Comp L 733 at 750.
[293] Paul Rishworth "Human Rights" (2012) 2 NZ L Rev 321 at 331.
[294] *R v Hansen* [2007] 8 HRNZ 222 at [64].
[295] New Zealand Bill of Rights Act 1990, s 5.
[296] Macpherson and Baird, above n 99, at 9.

(Fast Track Consenting) Act 2020. This Act removes public input from the consenting process, even though this is a central principle of the RMA.[297] Furthermore, the Act does not provide for consideration of the impact of a project on climate change.[298]

There are many environmental laws which constrain the exercise of property rights, recognising that there are circumstances in which the public interest should take precedence over private interests. The courts in other countries have rejected challenges against environmental laws and administrative decisions where claimants have alleged their property rights were violated,[299] referring to the constitutional right to a healthy environment as a compelling rationale that can justify infringement of private property rights.[300] For example, the South African courts have maintained that the government must consider the objectives of environmental protection and economic development interdependently, and refrain from pursuing one at the expense of the other.[301] The constitutional right to a healthy environment should at a minimum ensure a better balance of competing interests than has been the case in the past.[302]

D. Principle of Non-Regression

A theoretical advantage of the right related to environmental law, which is being achieved in practice in some nations is prevention of roll-backs.[303] The general position is that any rule may be repealable at any time because a generation cannot subject a future generation to its law. However, minimising or repealing rules protecting the environment would result in imposing a more degraded environment on future generations, which is why norms protecting the environment should not be eroded once established.[304] The principle of non-regression does not demand that laws and institutions remain unchanged – or even that particular protections

[297] Resource Management Act 1991, schedule 1.
[298] Environment and Conservation Organisations of Aotearoa New Zealand "RMA COVID Bill Being Fast Tracked" (8 September 2020) Environment and Conservation Organisations of Aotearoa New Zealand < http://www.eco.org.nz/>.
[299] Boyd, above n 3, at 243.
[300] *N.V. Hazergras v Flemish Government* Belgium Court (1995).
[301] *Fuel Retailers Association of Southern Africa v Director General* (CCT67/06) [2007] 13 at 68.
[302] Boyd, above n 3, at 244.
[303] At 236.
[304] Michel Prieur "Non Regression in Environmental Law" (2012) 5(2) Surveys and Perspectives Integrating Environment and Society 53 at 53.

remain in place – but it does require overall measures to continue to travel in a normatively positive direction.[305] It is supported by human rights theory in that once a human right is recognised it cannot be restrained or repealed.

The principle of non-regression is already recognised in a number of national constitutions, but it was first established during a referendum in California where a majority of voters refused to suspend a law on climate change and the reduction of greenhouse gas emissions.[306] Ecuador has recognised the principle of non-regression in the field of environmental law.[307] The Brazilian Constitution is underpinned by implicit environmental law principles including non-regression.[308] The French Senate in its contribution to Rio + 20 included the principle of non-regression among its recommendations. The principle was included in the final document which provides "it is critical that we do not backtrack from our commitment to the earth summit".[309]

1. Role of the Right

The constitutional right to a healthy environment has guarded against regression of existing laws under multiple governments.[310] In those countries the right has been supplemented by the principle of non-regression. There are courts who have articulated the principle of non-regression based on the right, that current environmental laws and policies represent a baseline that can be improved upon but not weakened.[311] New Zealand is plagued by significant politicization of environmental law. There are countless elections which have led to significant environmental peaks and troughs, which is why the principle would be beneficial for New Zealand.[312] To illustrate, in view of the upcoming election the National Party proposes to scrap

[305] Greg Severinsen and Raewyn Peart *Reform of the Resource Management System* (Environmental Defence Society and New Zealand Law Foundation, The Next Generation Working Paper, 2018) at 53.
[306] Prieur, above n 305, at 55.
[307] Constitution of the Republic of Ecuador 2008, art 8.
[308] Jose Leite and Marina Venancio "Environmental Protection in Brazil's High Court: Safeguarding the Environment Through a Rule of Law for Nature" (2017) 77 Sequencia Florianopolis 29 at 37.
[309] United Nations *The Future We Want* (Rio 20 + United Nations Conference on Sustainable Development, 2012) at 7.
[310] Boyd, above n 3, at 236.
[311] Belgian Constitutional Court No. 135/2006 and Constitutional Court of Hungry Judgement No. 48/1997.
[312] Revel Pointon and Justine Bell-James "Legal Analysis: The Right to a Healthy Environment in Australia" (2019) 7(2) Griffith Journal of Law and Human Dignity 76 at 85.

the RMA in favour of more "development friendly" legislation.[313] The National Party has also maintained that the new freshwater standards will be "gone by lunchtime" if elected.[314] In contrast, the Labour Party adduced further plans to clean up rivers and lakes through a 'clean water royalty'.[315]

E. Litigation

Why is judicial intervention and innovation important when it comes to the environment? Simply put – preserving the environment is one of the most stressing problems of our time. There is a desire to bring the courts into the picture because environmental protection is an "all hands-on-deck" issue.[316] A right to a healthy environment is important in order to build a multi-levelled workable response to the harm facing our environment. The right provides concerned individuals and communities with a new legal tool effective in addressing environmental harm they may face.[317] Overseas, the right has created the appropriate conditions for courts to begin to play a more prominent role in protecting the environment.[318]

Protecting human rights violations is a legitimate role for the judiciary in a constitutional democracy. What is novel about judicial protection of the right is that the court can impose a positive duty on the state to take preventative or remedial action.[319] In this way judicial protection of the right is distinct from the court's historical role in protecting individuals and their private property from state interference. The courts are protecting a collective public interest which was historically the prerogative of the legislature.

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[313] Radio New Zealand "National Proposes Scrapping of Kiwi Build and RMA if Elected in 2020" (16 December 2019) Radio New Zealand < https://www.rnz.co.nz/news/political/405590/national-proposes-scrapping-of-kiwibuild-and-rma-if-elected-in-2020>.

[314] Radio New Zealand "Freshwater Legislation Gone by Lunchtime if National Elected" (26 August 2020) Radio New Zealand <https://www.rnz.co.nz/news/political/424499/freshwater-legislation-gone-by-lunchtime-if-national-elected>.

[315] Labour Party "Fast Check: The Environment" (8 September 2020) Labour Party <https://www.labour.org.nz/factcheck_the_environment>.

[316] Eloise Gibson "Companies Taking Notice of Climate Suits" (13 February 2019) Newsroom <https://www.newsroom.co.nz/companies-taking-notice-of-climate-suits-international-lawyer>.

[317] Special Rapporteur on Human Rights and the Environment *Regional Consultation on the Relationship Between Human Rights Obligations and Environmental Protection with a Focus on Constitutional Environmental Rights* (UNEP, Johannesburg, 2014) at 21.

[318] Boyd, above n 3, at 243.

[319] At 240.

The influence of the right on jurisprudence appears to be less pervasive than its influence on legislation. However, there have been court decisions on the right to a healthy environment made in 44 of those nations who recognise the right, which is ever increasing in frequency and significance.[320] These decisions provide us with an idea of the types of claims which may come within the right's ambit and the immense value the right could have in New Zealand.

1. Overseas Decisions Illustrating the Value of the Right

The Philippines Supreme Court in *Concerned Citizens of Manila Bay* issued a sweeping decision based on the constitutional right to a healthy environment.[321] The case concerned a group of residents who filed a complaint against several governmental agencies for failing to act to mitigate pollution, and for rehabilitation and protection of Manila Bay. The amount of faecal coliform content measured 60,000, when government regulations prescribed the safe level for bathing and recreation as not exceeding 200. The Supreme Court affirmed the scope of the right maintaining that it is an issue of transcendental importance with intergenerational implications.[322] The Court determined the right had been violated and issued a multi-faceted order which required a wide range of governmental agencies to take coordinated action to rehabilitate Manila Bay, as well as to put in place measures to prevent and control the discharge of additional pollution.[323]

The right to a healthy environment was also utilised in *Future Generations v Ministry of the Environment and Others*.[324] The claimants alleged that the Columbian Government's failure to stop deforestation of the Amazon Rainforest jeopardized their futures and violated their constitutional right to a healthy environment. Deforestation is a key source of greenhouse gas emission driving climate change, which damages ecosystems and water sources and leads to land degradation. On this basis the Columbian Court determined the constitutional right had been violated.[325] The Court ordered that various government agencies come up with action

[320] At 241.
[321] *Metropolitan Manila Development Authority and Others v Concerned Citizens of Manila Bay* (2008) G.R. Nos. 171947-48.
[322] Boyd, above n 3, at 240.
[323] At 240.
[324] *Future Generations v Ministry of the Environment and Others* (2018) STC 4360.
[325] At 15.

plans to combat deforestation. These plans were to be presented to the Court within four months of the judgement.[326]

Mendoza v State of Argentina involved a generation of political leaders who repeatedly promised to clean up the Mantazana-Riachuelo River but took few concrete steps.[327] The proceedings brought by concerned citizens based on the constitutional right to a healthy environment led to strict and detailed court imposed obligations.[328] There were concerns about non-enforcement of previous orders which prompted the Supreme Court to create an independent monitoring body and impose special reporting requirements on the Argentinian Government.[329]

2. Development of Common Law in New Zealand

There is a tendency in the environmental area to bring legal action where government policy is inadequate to combat harm in the hope that decisions will be overturned by the court.[330] Such legal action takes different forms in New Zealand from judicial review to common law tort-based claims.[331] But the scope for improving the environment over and above legislative standards via the courts is limited presently. Environmental legal disputes can encompass a difficult mix of national and international obligations, physical science and evidential uncertainties. While the courts have recognised the significance of environmental harm,[332] there are limited legal bases for a person who is suffering environmental harm to challenge government policy expressed in legislative standards if those standards are inadequate.[333]

The right to a healthy environment may provide a legal basis for individualised justice developed through the common law in New Zealand.[334] The array of litigation targeting

[326] At 45.
[327] *Mendoza Beatriz Silva et al vs State of Argentina* (2008) M 1569 XL.
[328] Boyd, above n 3, at 240.
[329] Kirsti Staveland-Saeter "Litigating the Right to a Healthy Environment' Assessing the Policy Impact of the Mendoza Case" (Master's Thesis, University of Bergen, 2010) at 27.
[330] Palmer, above n 245, at 201.
[331] See for example *Thomson v Minister for Climate Change Issues*, above n 84, and *Smith v Fonterra Co-operative Group Limited* [2020] NZHC 419.
[332] *Thomson v Minister for Climate Change Issues*, above n 84, at [133].
[333] Gibson, above n 317.
[334] Magallanes, above n 8.

persisting governmental inertia with regard to environmental policy could alternatively invoke the right.[335] Previous legal claims against the Government in judicial review and tort have failed, [336] though arguments may be strengthened if future claimants were to draw on the right to a healthy environment to make their claim.[337] A possible test is to consider whether the result of earlier cases would have been different had the right been part of New Zealand law at the time.[338] While the outcome of a particular case cannot be adequately predicted, inactivity in light of clear evidence of environmental threat could attract a constitutional remedy from the courts.[339]

The inclusion of the right in the NZBORA would give the courts more capacity than they now have to adjudicate environmental issues.[340] The right provides a legal yardstick, thereby preventing the courts from acting outside of their parameters or dealing with tensions framed the way intended if there is no mechanism in place.[341] They could in appropriate cases adjudicate on whether the tests provided in the constitution have been met. Furthermore, a greater threat of litigation may encourage environmental decisions to be made after careful deliberation based upon extensive evidence.[342]

F. Education

There is a broader educational role for the right to a healthy environment particularly in fostering a publicly recognised environmental ethic. The right would serve to foster a greater public appreciation of the potential threats to the environment and ultimately to society itself. The ability to adapt to environmental challenges is dependent upon the level of education.[343] There are national laws related to environmental education among the plethora of legislation resulting from the constitutionalization of the right. For example, Brazil and South Korea have

[335] Mark Bracey "New Zealand's Emissions Trading Scheme: An In-depth Examination of the Legislative History" (2017) 21 NZJEL 133 at 135.
[336] See for example *Thomson v Minister for Climate Change Issues*, above n 84, and *Smith v Fonterra Co-operative Group Limited*, above n 332.
[337] Palmer, above n 245, at 207.
[338] At 206.
[339] At 207.
[340] At 210.
[341] Hayward, above n 83, at 14.
[342] Palmer, above n 245, at 201.
[343] Glazebrook, above n 28, at 334.

introduced environmental education legislation.[344] The courts in other countries have ordered governments to develop and implement environmental education programmes.[345]

The Ministry of Education recognise that environmental education, together with sound legislation and responsible action by individuals and communities, are important components of an effective policy framework for protecting and managing the environment. Environmental education is becoming a more prominent focus for education in New Zealand.[346] Environmental education provides a way of helping individuals and societies to resolve fundamental issues relating to the current and future use of our resources. Since there is extensive recognition of the importance of environmental education already in New Zealand, the right to a healthy environment will foster further development and legislation.

[344] Federal Law No. 6,938 1981 and Environmental Education Promotion Act 2008.
[345] Boyd, above n 3, at 244.
[346] Ministry of Education "Guidelines for Environmental Education in New Zealand Schools" (4 March 2015) Ministry of Education <https://nzcurriculum.tki.org.nz/Curriculum-resources/Education-for-sustainability/Tools-and-resources/Guidelines-for-Environmental-Education-in-New-Zealand-Schools>.

Conclusion

UN Special Rapporteur Fatma Ksentini observed that "the law must be based on fundamental values – the fundamental values of this century being human rights and the environment".[347] While the right to a healthy environment is not a 'silver bullet' for solving the environmental crisis, significant environmental outcomes have culminated from its recognition. The right achieves more than emphasising the importance of environmental protection among other competing rights. This framing grounds the environment as a bedrock concern for our law.

The environment is central to New Zealand's identity and accordingly is deserving of recognition at all levels of government decision-making and policy. There is momentum in our law and policy to recognise the right to a healthy environment. Moreover, inclusion of the right in the NZBORA was suggested by New Zealander's in the latest constitutional dialogue.[348] There will undoubtedly be obstacles arising from recognition of the right. The most discernible of these, drafting the right in a clear and precise way so that justiciable standards can be developed. Other matters of contention such as anthropocentricity, the right holder and negative or positive duties, while arduous will not be an impediment to recognition. Palmer and Butler's proposed right to a healthy environment for NZBORA is advocated in this dissertation.

New Zealand's future will be inextricably bound with environmental harm.[349] The challenges this harm poses to the development of public policy is formidable. Therefore, it is only prudent to set out a constitutional marker – the right to a healthy environment – to ensure that New Zealand's standards of environmental protection are enhanced and not reduced.[350] The prospective benefits flowing from the right are particularly important in the current New Zealand legal context. Over and above the protections afforded by NZBORA, the right may provide a legal basis for individualised justice developed through the common law. Moreover, recognition of the right is positively associated with environmental outcomes.

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[347] Fatma Ksentini *Human Rights and the Environment* (UN Economic and Social Council, E/CN.4/Sub.2/1994/9, 6 July 1994) at [257].
[348] Constitutional Advisory Panel, above n 136, at 51.
[349] Palmer, above n 11.
[350] Palmer, above n 11.

During a time of unprecedented climate change, the right to a healthy environment invites another way of thinking about our relationship with the natural world,[351] offering a useful tool for enhancing environmental protection in New Zealand.

[351] Jordan Davis "Should Australia Recognise the Human Right to a Healthy Environment" (22 February 2018) The Conversation <https://theconversation.com/should-australia-recognise-the-human-right-to-a-healthy-environment-92104>.

Bibliography

A. Cases

1. New Zealand

Attorney-General v Taylor [2018] NZSC 104.

Finnigan v New Zealand Rugby Football Union [1985] 2 NZLR 190.

Great Christchurch Buildings Trust v Church Property Trustees [2014] NZHC 1182.

Lawson v Housing New Zealand [1997] 2 NZLR 474.

Marlborough District Council v New Zealand Rail Limited [1995] NZRMA 357 (PT).

Ministry of Transport v Noort [1992] 3 NZLR 260.

Powelliphanta Augustus Inc v Solid Energy Ltd (2007) 13 ELRNZ 200 (HC).

Quilter v Attorney-General 4 HRNZ 170.

R v Hansen [2007] 8 HRNZ 222.

Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667.

Takamore v Clarke [2012] NZSC 116.

Thomson v Minister for Climate Change Issues [2017] NZHC 733.

West Coast ENT Incorporated v Buller Coal Limited [2013] NZSC 87.

2. Overseas

Belgian Constitutional Court No. 135/2006.

Constitutional Court of Hungry Judgement No. 48/1997.

Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others (Case No. 133/98) SCA 9, Supreme Court of Appeal South Africa.

Earth Life Africa Johannesburg v The Minister of Environmental Affairs and Others (Case No. 65662/16).

Fadeyeva v Russia [2005] App. No. 55723/00 ECHR 376.

Friends of the Irish v Fingal County [2017] No. 344 JR.

Fuel Retailers Association of Southern Africa v Director General (CCT67/06) [2007] 13.

Future Generations v Ministry of the Environment and Others (2018) STC 4360.

Lopez Ostra v Spain A/303-C [1994] ECHR 46.

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

Mendoza Beatriz Silva et al vs State of Argentina (2008) M 1569 XL.
Metropolitan Manila Development Authority and Others v Concerned Citizens of Manila Bay (2008) G.R. Nos. 171947-48.
Minors Oposa v Factoran [1993] GR No. 101083 (224 SCRA 792).
N.V. Hazergras v Flemish Government Belgium Court (1995).
Pavel Ocepek, Breg pri Komendi Slovenia Constitutional Court Up-344/96 (1999).
Sierra Club v Morton 405 U.S. 727 (1972).
Urgenda Foundation v The Netherlands [2020] C/09/456689 HAZA 13-1396.

3. International Courts

OC-23/18 *The Environment and Human Rights* (Advisory Opinion) (2017) Inter-Am Ct HR (Series A) No 23.

B. Legislation

1. New Zealand

Bill of Rights (Declaration of Inconsistency) Amendment Bill 2020.
Climate Change Response Act 2002.
Climate Change Response (Emissions Trading) Amendment Act 2008.
Climate Change Response (Zero Carbon) Amendment Act 2019.
Crown Minerals (Petroleum) Amendment Act 2018.
New Zealand Bill of Rights Act 1990.
Resource Management Act 1992.
Resource Management Amendment Act 2020.
Resource Management (National Environment Standards for Freshwater) Regulations 2020.
Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
Te Urewera Act 2014.

2. Overseas

Bolivia Constitution 2009.
Charter for the Environment 2004.
Constitution of the Czech Republic 1993.

Constitution of Norway 1814.
Constitution of the Republic of Ecuador 2008.
Constitution of the Republic of South Africa 1996.
Dominican Republic Constitution 2015.
Environmental Education Promotion Act 2008.
Federal Law No. 6,938 1981.
Spanish Constitution 1978.
United Kingdom Human Rights Act 1998.

3. Treaties

Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 2161 UNTS 447 (opened for signature 25 June 1998 entered into force 30 October 2001) [Aarhus Convention].
Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights OAS A-52 (opened for signature, 16 November1999, not yet entered into force) [San Salvador Protocol].
African Charter on Human and People's Rights 1520 UNTS 217 (opened for signature 1 June 1981, entered into force 21 October 1986) [African Charter].
Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 ((opened for signature 18 December 1979, entered into force 3 September 1981) – ratified by New Zealand on 10 January 1985).
Convention on the Rights of the Child 1577 UNTS 3 ((opened for signature 20 November 1989, entered into force 2 September 1990) – ratified by New Zealand on 6 April 1993).
Convention on the Rights of Persons with Disabilities 2015 UNTS 3 ((opened for signature 30 March 2007, entered into force 3 May 2008) – ratified by New Zealand on 25 September 2008).
Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature on 4 November 1950, entered into force 3 September 1953) [European Convention].
International Convenant on Civil and Political Rights 999 UNTS 171 ((opened for signature 16 December 1966, entered into force 23 March 1976) – ratified by New Zealand on 28 December 1978).

International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 ((opened for signature 16 December 1966, entered into force 3 January 1976) – ratified by New Zealand on 28 March 1979).

C. International Documents and Resolutions

Rio Declaration on Environment and Development A/CONF.151/26 (1992) (Rio Declaration).

Stockholm Declaration on the Human Environment A/CONF.48/14/Rev.1 (1973) (Stockholm Declaration).

Universal Declaration of Human Rights A/RES/217(III) (1948) (UDHR).
Vienna Declaration and Programme of Action A/CONF.157/23 (1993) (Vienna Declaration).

D. Books and Chapters in Books

Michael Anderson "Human Rights Approaches to Environmental Protection: An Overview" in Michael Anderson and Alan Boyle (eds) *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1998) 1.

Patricia Birnie and Alan Boyle *International Law and the Environment* (2nd ed, Oxford University Press, Oxford, 2002).

David Boyd *The Environmental Rights Revolution* (UBC Press, Vancouver, 2011).
Alan Boyle and Michael Anderson *Human Rights Approaches to Environmental Protection* (Clarendon Press, Oxford, 1998).

Maurice Cranston *What Are Human Rights* (Taplinger Publishing, New York City, 1973).
Maguelonne Dejeant-Pons and Marc Pallemaerts *Human Rights and the Environment* (Council of Europe Publishing, Strasbourg, 2002).

Andrew Geddis "The Philosophical Underpinnings of Human Rights" in Beddgood, Gledhill and McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson, Reuters, New Zealand, 2017) 19.

Blair Gordon "Treaty of Waitangi and Maori Issues in Environmental Law" in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (Thomson Reuters, Wellington, 2015) 319.

David Grinlinton "The Context of Environment Law" in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (Thomson Reuters, Wellington, 2015) 25.

Grant Hewison "The Resource Management Act 1991" in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (Thomson Reuters, Wellington, 2015) 533.

Tim Hayward *Constitutional Environmental Rights* (Oxford University Press, Oxford, 2004).
Jack Hodder, Geoffrey Palmer and Ivor Richardson *New Zealand's Constitutional Arrangements: Where Are We Heading?* (New Zealand Law Society, Wellington, 2005).

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

Bridget Lewis *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer, New York, 2018).

Christopher Miller *Law in Environmental Decision Making: National European and International Perspectives* (Oxford University Press, Oxford, 1998).

Geoffrey Palmer and Andrew Butler *A Constitution for New Zealand* (Victoria University Press, Wellington, 2016).

Catherine Redgwell and Michael Bowman *International Law and the Conservation of Biological Diversity* (Kluwer Law International, London, 1996).

Ceri Warnock "Global Atmospheric Pollution: Climate Change and Ozone" in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (Thomson Reuters, Wellington, 2015) 789.

Ceri Warnock "Human Rights and the Environment" in Margaret Beddgood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, New Zealand, 2017) 893.

Ceri Warnock and Maree Baker-Galloway *Focus on Resource Management Law* (1st ed, Lexis Nexis, Wellington, 2015).

E. Journal Articles

Kelly Alley "Legal Activism and Pollution Prevention" (2009) 21 Georget Environ Law Rev 793.

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 TELJ 65.

David Boyd “The Constitutional Right to a Healthy Environment” (2012) 54(4) Environment: Science and Policy for Sustainable Development 3.

Alan Boyle “Human Rights and the Environment: Where Next?” (2012) 23(3) Eur J Int Law 613.

Mark Bracey “New Zealand’s Emissions Trading Scheme: An In-depth Examination of the Legislative History” (2017) 21 NZJEL 133.

Rebecca Bratspies “Do We Need a Human Right to a Healthy Environment” (2015) 13(1) Santa Clara L Rev 31.

Carl Bruch, Wole Coker and Chris Van Arsdale “Constituting Environmental Law: Giving Force to Fundamental Principles in Africa” (2001) 26 Columbia Journal of Environmental Law 131.

Ross Carter “You Are Always on my Mind: Law Drafting for Human Rights Inconsistency” (2018) 3 Commonwealth Association of Legislative Council The Loophole 35.

Erin Daly “Constitutional Protection for Environmental Rights” (2012) 17(2) Int J Peace and Dev Stud 73.

Philippe Cullet “Definition of an Environmental Right in a Human Right’s Context” (1995) 1 NQHR 25.

Kristen Davies “The Declaration on Human Rights and Climate Change: A New Legal Tool For Global Policy Change” (2017) 8(2) J Hum Rts & Env’t 217.

Spasimir Domaradzki, Margaryta Khvostova and David Pupovac “Karel Vasak’s Generations of Rights and the Contemporary Human Rights Discourse” (2019) 20 Hum Rights Rev 423.

Jose Fernandez “State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question” (1993) 17 Harv Envtl L Rev 333.

Stephen Gardbaum “The New Commonwealth Model of Constitutionalism” (2001) 49(4) AJCL 707.

Andrew Geddis and Bridget Fenton “Which is to be Master? Rights Friendly Statutory Interpretation in New Zealand and the United Kingdom” (2008) 25(3) Ariz J Int’l & Comp L 733.

Andrew Geddis and M B Rodriguez Ferrere “Judicial Innovation Under the NZBORA – Lessons for Queensland?” (2016) 35(2) U Queensland L J 251.

Andrew Geddis “Parliamentary Government in New Zealand: Lines of Continuity and Moments of Change” (2016) 14(1) Int J Const Law 99.

Andrew Geddis “Rights Scrutiny in New Zealand’s Legislative Process” (2016) 4(3) TPLeg 355.

Susan Glazebrook “Human Rights and the Environment” (2009) 40 VUWLR 293.

Susan Glazebrook “New Zealand: Country Report on Human Rights” (2009) 40 VULWR 57.

Carmen Gonzalez “Environmental Justice, Human Rights and the Global South” (2015) 13 Santa Clara L Rev 151.

Ran Hirschl “Negative Rights vs Positive Entitlements” A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order” (2000) 22 Hum Rights Q 1060.

Chris Jeffords and Joshua Gellers “Constitutionalising Environmental Rights: A Practical Guide” (2017) 9 J Hum Rights Pract 136.

Jose Leite and Marina Venancio “Environmental Protection in Brazil’s High Court: Safeguarding the Environment Through a Rule of Law for Nature” (2017) 77 Sequencia Florianopolis 29.

John Knox “Constructing the Human Right to a Healthy Environment” (2020) 16 Annu Rev Law Soc Sci (forthcoming) 24.

Louis Kotze “Rethinking Human Rights and the Environment in the Anthropocene” (2014) 1(3) Anthr Rev 252.

Louis Kotze “The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical Reflection” (2007) 16(3) RECIEL 298.

David Marrani “The Second Anniversary of the Constitutionalization of the French Charter for the Environment: Constitutional and Environmental Implications” (2008) 10(1) Environ Law Rev 9.

James May “Constituting Fundamental Environmental Rights Worldwide” (2006) 23(1) Pace Environ Law Rev 113.

James May and Erin Daly “Vindicating Fundamental Environmental Rights Worldwide” (2009) 11 Or Rev Int’l L 365.

Geoffrey Palmer “Can Judges Make a Difference? The Scope for Judicial Decisions on Climate Change in New Zealand Domestic Law” (2018) 49 VUWLR 191.

Geoffrey Palmer “The New Zealand Constitution and the Power of the Courts” (2006) 15(2) TLCP 551.

Revel Pointon and Justine Bell-James “Legal Analysis: The Right to a Healthy Environment in Australia” (2019) 7(2) Griffith Journal of Law and Human Dignity 76.

Neil Popovic “Pursuing Environmental Justice with International Human Rights and State Constitutions” (1996) 15 Stanf Environ Law J 338.

Michel Prieur “Non Regression in Environmental Law” (2012) 5(2) Surveys and Perspectives Integrating Environment and Society 53.

Paul Rishworth “Human Rights” (2012) 2 NZ L Rev 321.

Malcom Rogge “Human Rights, Human Development and the Right to a Healthy Environment: An Analytical Framework” (2001) 22(1) Canadian Journal of Development Studies 33.

Stephen Schneider “The Greenhouse Effect: Science and Policy” (1989) 243 Science 771.

Dinah Shelton “Developing Substantive Environmental Rights” (2010) 1 J Hum Rts & Env’t 89.

Dinah Shelton “Human Rights and the Environment: Problems and Possibilities” (2008) 38 EPL 41.

Dinah Shelton “Human Rights and the Environment: What Specific Environmental Rights Have Been Recognised?” (2006) 35 Denv J Int’l L & Pol’y 129.

Christopher Stone “Should Trees Have Standing” (1972) 45 South Calif Law Rev 450.
Brown Weiss “In Fairness to Future Generations” (1990) 32(3) Environment Washington 6.

Margaret Wilson, Judy McGregor and Sylvia Bell “The Impact of Economic and Social Human Rights in New Zealand Case Law” (2015) 21(1) Aust J Hum Rights 143.

F. New Zealand Government Papers and Reports

Constitutional Advisory Panel *New Zealand’s Constitution A Report on a Conversation* (Ministry of Justice, 2013).

Department of Conservation *Attitudes to Conservation* (Department of Conservation, National Survey, October 2011).

Andrew Little *Proactive Release – The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill* (Ministry of Justice, 28 May 2020).

Ministry for the Environment *Environmental Attitudes Baseline* (Ministry for the Environment, 2018).

Ministry for the Environment *Improving Our Resource Management System* (Ministry for the Environment, February 2013).

Ministry for the Environment *National Climate Change Risk Assessment for New Zealand* (Ministry for the Environment, August 2020).

Ministry for the Environment *Overview of the Changes Introduced by the Resource Management Amendment Act 2020* (Ministry for the Environment Factsheet, INFO 952 , June 2020).

Ministry for the Environment and Statistics New Zealand *Environment Aotearoa 2019* (Ministry for the Environment, New Zealand's Environmental Reporting Series, 2019).

Parliamentary Commissioner for the Environment *Stepping Stones to Paris and Beyond: Climate Change, Progress and Predictability* (Parliamentary Commissioner for the Environment, 2017).

G. United Nations Papers and Reports

Gulnara Iskakova *Report of the Human Rights Council on its Nineteenth Session* A/HRC/19/2 (2012).

Fatma Ksentini *Human Rights and the Environment* (UN Economic and Social Council, E/CN.4/Sub.2/1994/9, 6 July 1994).

Office of the United Nations High Commissioner for Human Rights *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (Individual Report on the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Report No. 4, December 2013).

Report of the Special Rapporteur on the *Human Rights Obligations Relating to Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* LXXIV A/74/161 (15 July 2019).

Report of the Special Rapporteur on the *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* XXXVII UN Doc A/HRC/37/59 (24 January 2018).

Report of the Special Rapporteur on the *Right to a Healthy Environment: Good Practices* XLIII A/HRC/43/53 (30 December 2019).

Special Rapporteur on Human Rights and the Environment *Regional Consultation on the Relationship Between Human Rights Obligations and Environmental Protection with a Focus on Constitutional Environmental Rights* (UNEP, Johannesburg, 2014).

United Nations *The Future We Want* (Rio 20 + United Nations Conference on Sustainable Development, 2012).

United Nations Environmental Programme *Healthy Planet, Healthy People* (Cambridge University Press, Global Environment Outlook GEO-6 Assessment Report, 2019).

United Nations Environment Programme *21 Issues for the 21st Century: Results of the UNEP Foresight Process on Emerging Environmental Issues* (United Nations Environment Programme, Nairobi, 2012).

H. Other Papers and Reports

David Boyd *The Status of Constitutional Protection for the Environment in Other Nations* (David Suzuki Foundation, Paper No. 4, 2013).

Gro Harlem Brundtland *Report of the World Commission on Environment and Development: Our Common Future* (World Commission on Economic Development, 20 March 1987).

Environmental Defence Society *Evaluating the Environmental Outcomes of the RMA* (Environmental Defence Society, June 2016).

Human Rights and the Environment Reference Paper (The Asia Pacific Forum on National Human Rights Institutions, September 2007).

International Institute for Environment and Development *Environment and Human Rights: A New Approach to Sustainable Development* (World Summit on Sustainable Development, Opinion, May 2001).

Elisabeth Lambert *The Environment and Human Rights* (Introductory Report to the High Level Conference Environmental Protection and Human Rights, Steering Committee for Human Rights, 27 February 2020).

Stephen Marks *Human Rights: A Brief Introduction* (Working Paper, Harvard School of Public Health, 2014).

Millennium Board *Living Beyond Our Means: Natural Assets and Human Well-Being* (Millennium Ecosystem Assessment, Washington, 2005).

Royal Society *Human Health Impacts of Climate Change for New Zealand* (Royal Society, Evidence Summary, October 2017).

Greg Severinsen and Raewyn Peart *Reform of the Resource Management System* (Environmental Defence Society and New Zealand Law Foundation, The Next Generation Working Paper, 2018).

Helen Winkelmann, Susan Glazebrook and Ellen France *Climate Change and the Law* (Asia Pacific Judicial Colloquium, Singapore, 2019).

I. Theses and Research Papers

Kyle Burns "Constitutions and the Environment: Comparative Approaches to Environmental Protection and the Struggle to Translate Rights into Enforcement" (University of Virginia School of Law, 2017).

Kenneth Hughey, Ross Cullen and Geoffrey Kerr "A Decade of Public Perceptions on the New Zealand Environment: A Focus on Water and its Management" (Lincoln University, 2011).

BoHao (Steven) Li "Joining the Aotearoa New Zealand Constitutional Debate: Constitutional Environmental Rights in a Future Constitution" (LLM Research Paper, Victoria University of Wellington, 2013).

Elizabeth MacPherson and Natalie Baird "A Constitution for Aotearoa New Zealand Submission" (University of Canterbury, 2017).

Kirsti Staveland-Saeter "Litigating the Right to a Healthy Environment' Assessing the Policy Impact of the Mendoza Case" (Master's Thesis, University of Bergen, 2010).

J. Internet Resources

Business and Human Rights Resource Centre "*Fadeyeva v Russia*" (30 August 2020) Business and Human Rights Resource Centre < https://www.business-humanrights.org/en/latest-news/fadeyeva-v-russia-re-severstal-smelter/>.

Simon Day “If The Hills Could Sue: Jacinta Ruru on Legal Personality and a Maori Worldview” (27 November 2017) The Spinoff < https://thespinoff.co.nz/atea/atea-otago/27-11-2017/if-the-hills-could-sue-jacinta-ruru-on-legal-personality-and-a-maori-worldview/>.

Jordan Davis “Should Australia Recognise the Human Right to a Healthy Environment” (22 February 2018) The Conversation <https://theconversation.com/should-australia-recognise-the-human-right-to-a-healthy-environment-92104>.

Environment and Conservation Organisations of Aotearoa New Zealand “RMA COVID Bill Being Fast Tracked” (8 September 2020) Environment and Conservation Organisations of Aotearoa New Zealand < http://www.eco.org.nz/>.

Environment Foundation “Climate Change Response Act 2002” (18 April 2018) Environment Guide < http://www.environmentguide.org.nz/issues/climate-change/domestic-law/climate-change-response-act-2002/>.

Eloise Gibson “Companies Taking Notice of Climate Suits” (13 February 2019) Newsroom <https://www.newsroom.co.nz/companies-taking-notice-of-climate-suits-international-lawyer>.

Eloise Gibson “NZ Rated Insufficient on Climate Action Again” (5 August 2020) Stuff <https://www.stuff.co.nz/environment/climate-news/122341331/nz-rated-insufficient-on-climate-action-again>.

Fiona Harvey “Humans Damaging Planet Faster Than it Can Recover, UN Finds” (19 May 2016) The Guardian <https://www.theguardian.com/environment/2016/may/19/humans-damaging-the-environment-faster-than-it-can-recover-report-finds>.

Kenneth Keith “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government” (20 November 2017) Department of the Prime Minister and Cabinet <https://dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual/introduction>.

John Knox “The Protection of Human Rights and the Environment are Mutually Reinforcing” (14 July 2015) Open Democracy <https://www.opendemocracy.net/en/openglobalrights-openpage/greening-human-rights/>.

Toni Love “Incorporating Maori Approaches to Ecosystem Management in Marine Management” (July 2018) Maori Law Review <http://maorilawreview.co.nz/2018/07/incorporating-maori-approaches-to-ecosystem-management-in-marine-management/>.

Labour Party “Fast Check: The Environment” (8 September 2020) Labour Party <https://www.labour.org.nz/factcheck_the_environment>.

Charlie Mitchell “Confused? Why Not Understanding the Emissions Trading Scheme is the Point” (21February 2020) Stuff < https://www.stuff.co.nz/environment/climate-news/119665441/if-youre-confused-you-understand-why-not-understanding-the-emissions-trading-scheme-is-the-point>.

Charlie Mitchell “Environment Aotearoa: Government Stocktake Describes New Zealand Environment on the Brink” (18 April 2019) Stuff New Zealand < https://www.stuff.co.nz/environment/112104189/environment-aotearoa-government-stocktake-describes-new-zealand-environment-on-the-brink>.

Ministry of Education “Guidelines for Environmental Education in New Zealand Schools” (4 March 2015) Ministry of Education <https://nzcurriculum.tki.org.nz/Curriculum-resources/Education-for-sustainability/Tools-and-resources/Guidelines-for-Environmental-Education-in-New-Zealand-Schools>.

Ministry for the Environment “Environment Aotearoa 2019 Summary” (3 September 2020) Ministry for the Environment < https://www.mfe.govt.nz/Environment-Aotearoa-2019-Summary>.

Ministry for the Environment “Maori Relationships with the Environment” (5 September 2020) Ministry for the Environment <https://www.mfe.govt.nz/publications/environmental-reporting/environment-aotearoa-2015-our-new-reporting-approach/m%C4%81ori>.

Ministry for the Environment “New Report Signals Nine Top Environmental Issues Facing New Zealand” (18 April 2019) Ministry for the Environment <https://www.mfe.govt.nz/news-events/new-report-signals-nine-top-environmental-issues-facing-new-zealand>.

Ministry of Justice “Constitutional Advisory Panel” Ministry of Justice (16 August 2020) < https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/constitutional-advisory-panel/>.

Russel Norman “Environmental Policy Performance of the Arden Government Ahead of Election 2020” (25 August 2020) Greenpeace New Zealand <https://www.greenpeace.org/new-zealand/story/election-2020-ardern-government-environmental-report/>.

New Zealand Parliament “Parliament’s Role in International Treaties” (17 April 2019) New Zealand Parliament <https://www.parliament.nz/en/visit-and-learn/how-parliament-works/fact-sheets/parliament-s-role-in-international-treaties/>.

Eleanor Roy “Decades of Denial: Major Report Finds New Zealand’s Environment is in Serious Trouble” (18 April 2019) The Guardian <

https://www.theguardian.com/world/2019/apr/18/decades-of-denial-major-report-finds-new-zealands-environment-is-in-serious-trouble>.

Emmeline Rushbrook and Hannah Bain "Climate Change Litigation – Expect the Unexpected"(10 March 2020) Russell McVeagh < https://www.russellmcveagh.com/insights/march-2020/climate-change-litigation-expect-the-unexpected>.

Radio New Zealand "Freshwater Legislation Gone by Lunchtime if National Elected" (26 August 2020) Radio New Zealand <https://www.rnz.co.nz/news/political/424499/freshwater-legislation-gone-by-lunchtime-if-national-elected>.

Radio New Zealand "National Proposes Scrapping of Kiwi Build and RMA if Elected in 2020" (16 December 2019) Radio New Zealand < https://www.rnz.co.nz/news/political/405590/national-proposes-scrapping-of-kiwibuild-and-rma-if-elected-in-2020>.

Scoop Politics "New Zealanders Open to Doing More to Tackle Climate Change" (27 March 2019) Scoop Politics <https://www.scoop.co.nz/stories/PO1903/S00277/new-zealanders-open-to-doing-more-to-tackle-climate-change.htm>.

Dina Townsend "WEBINAR: Law at the Intersection of Human Rights and the Environment" (26 April 2020) The Global Network for Human Rights and the Environment < https://gnhre.org/2020/04/26/webinar-on-law-at-the-intersection-of-human-rights-and-the-environment/>.

The World Bank "Minimum Core Obligations of Socio-Economic Rights" (26 January 2018) The World Bank <https://www.worldbank.org/en/about/legal/publication/minimum-core-obligations-of-socioeconomic-rights>.

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

K. Speeches

John Knox, Special Rapporteur on Human Rights and the Environment "The Human Right to a Healthy Environment" (Spring Creek Project, Bedrock Lecture, YouTube, 5 June 2018).

Catherine Iorns Magallanes, Professor Victoria University of Wellington "Using Human Rights Law to Protect New Zealand's Natural Environment" (TEDx Talks, Tauranga, 30 October 2015).

Sir Geoffrey Palmer, QC "Environmental Responsibility and Democracy for the Future: Limits, Pathways and Actions" (Keynote Presentation to ECO Conference, Stoke Hall, Nelson, 26, August, 2017).

L. Letters

Letter From Lawyers for Climate Action to James Shaw (Minister for Climate Change), Andrew Little (Minister of Justice) and David Parker (Attorney-General) Regarding Proposal to Amend the New Zealand Bill of Rights Act 1990 by Recognising the Right to a Sustainable Environment (25 November 2019).

Letter From Lawyers for Climate Action to James Shaw (Minister for Climate Change), Andrew Little (Minister of Justice) and David Parker (Attorney-General) Regarding Letter in Support of Proposal to Amend NZBORA (25 November 2019).