

## Environmental rights as elements of a bill of rights

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The Committee has heard on several occasions about the distinction between civil and political rights (CPRs) and economic, social, and cultural (ESC) rights. These are sometimes referred to as first- and second-generation rights respectively. This terminology has expanded in recent years with the advent of third-generation rights. This is generally used to refer to another category of rights that is somewhat less individual and more *collective*, usually collective cultural environmental or environmental rights. Classifying these as third-generation highlights that they are somewhat different to ESC rights, which are still generally conceived of as being *individual* in focus, with people experiencing individualised and specific deprivations. Third-generation rights are seen as generally being harmed or violated *collectively* rather than individually. Environmental rights have been mentioned by many stakeholders as something that the Committee might consider recommending for inclusion in a Northern Ireland Bill of Rights. In this short paper, I highlight the history of these rights; canvass some examples of their inclusion within constitutions and bills of rights; and note several ways in which including these rights in a bill of rights might be approached.

### I. The history of environmental rights

Environmental rights first began to appear in human rights discourse in the 1960s, and made their way into constitutions and bills of rights starting in the 1970s.<sup>1</sup> This means that they postdate most of the major international human rights agreements, and they cannot be found in the UN Declaration or the International Covenants, or expressly in the ECHR.<sup>2</sup> Some regional charters of rights do include them,<sup>3</sup> and the EU Charter of Fundamental Rights, written much later, has an environmental protection guarantee, though framed more as a

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<sup>1</sup> David R Boyd, *The Environmental Rights Revolution* (UBC Press, 2012) 12

<sup>2</sup> See below, however, for the Dutch courts' interpretation of the ECHR as including such rights.

<sup>3</sup> See for example, the African Charter on Human and Peoples' Rights (1986), and the American Convention on Human Rights (1978). The UN Convention on the Rights of the Child (1989) mentioned the environment and its protection in several contexts, including its role in assuring child welfare and the need to educate children on the importance of the environment.

duty than a right.<sup>4</sup> The (non-legally-binding) Declaration of the United Nations Conference on the Human Environment (or Stockholm Declaration) of 1972 did recognise these right in its first two principles:

‘Principle 1

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a 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. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Principle 2

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

From the late 1970s, rights of this sort began to appear in constitutions and bills of rights, and they were common—as can be seen from some of the examples below—in post-soviet constitutions in the early 1990s. Many constitutions drafted in the 2000s included such rights.<sup>5</sup> Ecuador even recognised Nature itself as a bearer of rights to be maintained and restored in its Constitution of 2008, as well as a right to a healthy environment for its people.<sup>6</sup>

## **II. Examples of environmental rights**

Many countries have environmental rights included in bills of rights or constitutions. However, as always when dealing with comparative examples, we must bear in mind the very significant differences that might exist in the legal context of these places: they may have very different legal systems with a very different effect of constitutional rights protections.

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<sup>4</sup> Article 37 of the Charter reads: ‘A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.’

<sup>5</sup> See Boyd (n 1) 18.

<sup>6</sup> See Article 10, Articles 71-74, and Article 66.27.

### Common law systems: South Africa and (maybe) Ireland

Very few common law bills of rights—those which make the most ready comparators for Northern Ireland—include environmental rights. There are no such rights in the Human Rights Act, the Canadian Charter of Rights and Freedoms, the New Zealand Bill of Rights or the Victoria Charter of Rights and Responsibilities. Part of the reason for this is that the drive to include these rights is a somewhat newer phenomenon, but there is also, perhaps, reservations about their inclusion, as they are somewhat different from the kinds of rights we have traditionally recognised.

The exception is the Constitution of the Republic of South Africa 1996, which includes innovative environmental rights in its Bill of Rights. S 24 of the Constitution provides that 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
  - iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.’

There has been some academic criticism of the judicial use of s 24, with the suggestion that it has been ‘impoverished’, with the relationship between parts a and b unclear, and a further lack of clarity in the relationship between the rights and South Africa’s major environmental protection statute.<sup>7</sup> There has, however, been few opportunities for the Constitutional Court to clarify the meaning of the clause,<sup>8</sup> and cases relating to the topic have tended to be

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<sup>7</sup> See Stefan Theil, ‘The Problem with the Normative Content of Section 24 of the Constitution of South Africa’ (2019) 37(2) *Nordic Journal of Human Rights* 105; Anél du Plessis, ‘The promise of ‘well-being’ in Section 24 of the Constitution of South Africa’ (2018) 34(2) *South African Journal of Human Rights*.

<sup>8</sup> An exception is *Fuel Retailers Association of South Africa v Director General of Environmental Management Mpumalanga* [2007] ZACC 13, where the Court affirmed that the section does provide for an individual right to a healthy environment and undergirds environmental protection legislation.

resolved on narrower administrative law grounds or to settle before judgment.<sup>9</sup> Several High Court cases have affirmed that the section places positive obligations on the state to protect people from environmental degradation.<sup>10</sup>

The Irish Constitution does not have any express environmental protection. In 2020, the Irish Supreme Court was asked to consider whether there existed an implied or derived constitutional right to a healthy environment.<sup>11</sup> In the end the Court declined to find such a right as the plaintiff—an NGO set up to advance environmental interests—was not capable of benefitting from such a right as a non-human person, and so had no standing to make this claim. The Court also commented that a right to a healthy environment was too vague to be recognised as a constitutional right. However, the Court did not rule out that a right somewhat like this might be recognised on a future occasion: there ‘may well be cases, which are environmental in nature, where constitutional rights and obligations may be engaged’. Clarke CJ, writing for the Court, said:

‘I would not rule out the possibility that the interplay of existing constitutional rights with the constitutional values to be found in the constitutional text and other provisions, such as those to be found in Art. 10 and also the right to property and the special position of the home, might give rise to specific obligations on the part of the State in particular circumstances. Exactly how any such rights or obligations should be characterised and how the boundaries of such rights and obligations might be defined is a matter to be addressed in cases where they truly arise and have the potential to affect the result.’<sup>12</sup>

The Court has not yet been presented with such a case.

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<sup>9</sup> *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) (8 March 2017) is an example of both; the case was resolved on a narrow administrative point, avoiding the environmental rights issues, and a subsequent case on that issue was settled out of court.

<sup>10</sup> See Thiel (n 7) 110.

<sup>11</sup> *Friends of the Irish Environment v The Government of Ireland*[2020] IESC 49.

<sup>12</sup> *Ibid* para [8.14];[8.17].

### European examples<sup>13</sup>

Bearing in mind the different legal systems that operate throughout Europe, it may also be instructive to highlight a few examples of environmental rights protected in European constitutions and bills of rights. There are in fact many such examples, with many different approaches. While most countries incorporate these rights into the bill of rights of their constitutional structure, a dedicated Charter for the Environment was added to France's constitutional structure in 2004.<sup>14</sup> In general, we see two main approaches to inclusion of such rights: as rights, or as duties on/guarantees from the state.

An example of the first category can be found in the Constitution of Spain of 1978, which provides in s 45: 'Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it.' Similarly, Article 72 of the Constitution of Slovenia 1991 provides: 'Everyone has the right in accordance with the law to a healthy living environment.' The Constitution of Slovakia of 1992 provides in Article 44 that '1. Everyone has the right to a favorable environment.' The Constitution of Serbia of 2006 provides in Article 74 that 'Everyone shall have the right to healthy environment and the right to timely and full information about the state of environment.' The Constitution of Portugal of 1976 provides that: 'Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it.' The Constitution of Norway provides, in Article 112: 'Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved.' The French Charter provides, in Art 1, that: 'Each person has the right to live in a balanced environment which shows due respect for health.' This is not an exhaustive list.

Examples of the second category can be found in Article 53 of the Constitution of Estonia of 1992: 'Everyone has a duty to preserve the human and natural environment and to compensate for damage caused to the environment by him or her. The procedure for compensation shall be provided by law.' The Constitution of Lithuania of 1992 provides, in

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<sup>13</sup> Examples and translations in this paper are taken from The Constitute Project; see [www.constituteproject.org](http://www.constituteproject.org).

<sup>14</sup> Christian Dadomo, 'The "constitutionalisation" of French environmental law under the 2004 Environmental Charter' in Daly et al. (eds.) *New Frontiers in Environmental Constitutionalism* (2017, UN Environmental Programme).

Article 53, that ‘The State and each person must protect the environment from harmful influences.’ The Constitution of the Netherlands says, in Article 21, ‘It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.’ This is, again, not an exhaustive list.

Obviously many constitutions, including some of those mentioned above, combine these approaches by using the language of both rights and duties. For example, s 20 of the Constitution of Finland 1999 reads: ‘Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone. The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment.’

Finally, the French approach should be noted, wherein a dedicated Charter for the Environment was added to the constitutional structure in 2004, providing for a variety of environmental rights and duties.

#### Dutch ECHR climate cases

The European Convention on Human Rights (ECHR) does not have any express environmental rights protections. However, in December 2019, the Supreme Court of the Netherlands found that Articles 2 and 8 of the ECHR—the right to life and the right to respect for private and family life—together placed a duty of care on the Dutch government to protect the environment, which it has not met.<sup>15</sup> It ordered a reduction of Greenhouse gas emissions of 25% below 1990 levels the end of 2020. In May 2021, a District Court in the Hague found that Royal Dutch Shell has failed to meet its obligations to preserve rights and ordered a reduction in its emissions in line with the Paris Climate Accord.<sup>16</sup> Shell will appeal this ruling.<sup>17</sup> These

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<sup>15</sup> *The State of the Netherlands v Urgenda* 19/00135, available at [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113\\_2015-HAZA-C0900456689\\_judgment.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf).

<sup>16</sup> *Milieudefensie v Royal Dutch Shell* C/09/571932 / HA ZA 19-379 available at [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526\\_8918\\_judgment-2.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf).

<sup>17</sup> See <https://www.theguardian.com/environment/2021/jul/20/oil-giant-shell-set-to-appeal-ruling-on-carbon-emissions>.

judgments are, to my knowledge at least, the most sweeping judicial rulings on climate change and human rights given anywhere.<sup>18</sup>

### **III. Types of environmental rights**

There are many ways in which environmental rights could be included in a bill of rights and I will briefly canvass several here.

#### Healthy environments/standards rights

This core type of environmental protection, stressing a right to live in an environment that is ‘healthy’,<sup>19</sup> ‘balanced’<sup>20</sup>, ‘favorable’<sup>21</sup> etc. We have seen several examples of this above.

#### Duties or obligations on the state

Instead of or as well as this rights-based model, some constitutions or bills of rights place environmental duties on the state and/or the people. Again, this has been exemplified above.

#### Information rights

Access to environmental information is at the core of environmental rights protections, and it is hard for people to exercise any other environmental rights unless there is suitable information available to them. This right is often found in various pieces of domestic environmental legislation all over the world and notably as one of the three core pillars of the Aarhus Convention, a major international environmental agreement. Some countries codify such a right in a constitution or bill of rights. For example, Poland, Serbia and others have environmental information rights alongside other protections. Article 112 of the Constitution of Norway—having protected the right to an environment conducive to health—continues: ‘In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to be informed of the state of the natural environment and of the effects of any encroachments on nature that are planned or commenced.’ Article 7 of the French Charter

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<sup>18</sup> See also *Demanda Generaciones Futuras v. Minambiente* STC4360-2018, where the Supreme Court of Columbia order the government to make a plan to halt deforestation of the Amazon and plan for its restoration to vindicate the environmental rights of the young plaintiffs.

<sup>19</sup> See e.g. Constitution of Finland.

<sup>20</sup> See e.g. the French Charter.

<sup>21</sup> See e.g. Constitution of Slovakia.

provides: ‘Each person has the right, in the conditions and to the extent provided for by law, to have access to any information pertaining to the environment in the possession of public bodies and to participate in the public decision-making process likely to affect the environment.’

### Participation rights

Central to environmental rights is the right to participate in environmental decision-making, to make submissions on these issues and have them regarded in advance of decisions being taken. Again, this is at the heart of the Aarhus Convention, where decision makers must give an opportunity for those affected by decisions to engage with them. Some countries place this in a bill of rights or constitutional framework.<sup>22</sup>

### Access to justice rights

Part of having environmental rights is the ability to exercise these rights judicially. The Aarhus Convention grants access to justice where participation and information rights have been denied. More broadly, however, it can be difficult for individuals or groups to take substantive environmental cases as, in many legal systems, your rights must be personally and particularly affected by a decision or measure for you to be allowed to take a case against it. These rules of ‘standing’ pose problems in environmental matters, as often all people are *generally* affected by an environmental matter, but perhaps no one is *particularly* or *discretely* affected, and so it can be difficult to establish standing. Some bills of rights and constitutions include some element of access to justice and the courts on environmental matters. For example, the bill of rights might clarify that in respect of certain environmental rights issues there is an *actio popularis*, where anyone can take a case on behalf of the general public. The Constitution of Portugal provides for this in Article 52.

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<sup>22</sup> See e.g. Article 66 of the Constitution of Portugal, and the French Charter for the Environment.