1

Introduction: A Brief History of Environmental Rights and the Development of Standards

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1.1 INTRODUCTION

Environmental law and human rights law have developed rapidly in recent decades. Human rights in the contemporary sense have developed in theory and in practice since the Universal Declaration of Human Rights (UDHR) 1948.[1] Environmental law has been a relative latecomer, but since 1972, triggered by the United Nations Conference on Human Rights and the Environment (UNCHE),[2] has developed exponentially. Both fields have largely developed independently and therefore lawyers in these respective areas have generally operated separately from one another. For example experts on issues such as the right to a fair trial and the right to be free from torture exercise a different range of knowledge and skills to those focussing their attention on issues such as climate change, waste management and pollution control. However, it has long been recognised that there are aspects of human rights and environmental law that overlap.[3] This has been evident in the way that the right to life and the right to health can be negatively affected through the pollution of air and drinking water, for example.[4] Also the civil and political rights that entitle people to engage meaningfully in decision-making processes can be of crucial importance in protecting the environment. It is from these broad connections that much of the theory and practice relating to 'environmental rights' has emerged.

[1] Universal Declaration of Human Rights (1948) GA Res 217, UN GAOR, 3rd Sess, UN Doc A/810 (1948).

[2] Report of the United Nations Conference on the Human Environment (New York, 1973) UN Doc A/Conf.48/14/Rev.1 (1972), adopted in GA Res 2997 UN GAOR, 27th Sess, Supp No 30 at UN Doc A/8901 (1972) (UNCHE).

[3] See for example Louis B Sohn, 'The Stockholm Declaration on the Human Environment' (1973) 14 Harv Int'l L J 423, 451–55.

[4] See Stephen J Turner, *A Global Environmental Right* (Earthscan by Routledge 2014) Chapter 2 (*The State of Degradation of the Planet's Environment, the Impact upon Human Rights and the Current Status of the Development of Environmental Rights*).

The development of the discourse, drafting and practice relating to those human rights used for environmental protection has not been an uncontested journey.[5] One of the questions raised has been whether the rights that were being created for the protection of the environment could be effective as legal mechanisms owing to the fact that they were often drafted in extremely vague terms.[6] Another argument was whether human rights are appropriate legal mechanisms to be used for the protection of the environment, when other legal tools are available which could possibly be more effective.[7] While recent decades have shown that there is definitely a role for environmental rights to play, there are still questions relating to their content and the manner in which they should be used.

It is certainly true that many environmental rights are expressed in broad terms. The type of language that is used in human rights treaties and constitutions will often confer on rights holders the right to live in an environment that is, for example, 'healthy', 'safe' or 'clean'.[8] Such terminology places an obligation upon states to realise certain objectives but often leaves judges, lawyers and citizens wondering precisely what is meant by them.[9] Similarly, in terms of civil and political rights, the rights to information, to participate in decision-making and to have access to justice relating to environmental issues leave many questions relating to the precise levels of disclosure, involvement and remedy that citizens are entitled to.

It is here that this book positions itself as it seeks to explore the standards of environmental protection that have emerged within the field of environmental rights. It does this from a number of perspectives. Each of the chapters considers the law itself that is provided for under a particular regime, or in the cases of the right to water, free prior and informed consent (FPIC), multilateral environmental agreements (MEA) and the rights of nature, from the perspective of those type of rights that have emerged through a number of different regimes. It then considers the extent to which specific standards of environmental protection have emerged as a result of that law. Such standards can manifest themselves in a variety of different ways. For example, some constitutionally granted rights have very strong

[5] Sohn (n 3); see generally Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996); Donald K Anton and Dinah L Shelton, *Environmental Protection and Human Rights* (CUP 2011) 131–50; also Stephen J Turner, *A Substantive Environmental Right* (Kluwer Law International, 2009) 45–72.

[6] Sionaidh Douglas-Scott, 'Environmental Rights: Taking the Environment Seriously', in Conor Gearty and Adam Tomkins (eds), *Understanding Human Rights* (Mansell 1996) 424.

[7] Alan Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in Boyle and Anderson (eds), (n 4) 54; Günther Handl, 'Human Rights and Protection of the Environment' in Eide, Krause and Rosas (eds) *Economic, Social and Cultural Rights* (2nd revised edn, Martinus Nijhoff Publishers 2001) 303, 327.

[8] See Turner (n 5) 44–48; David R Boyd, *The Environmental Rights Revolution – A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012) 47.

[9] John Lee, 'The Underlying Legal Theory to Support a Well Defined Human Right to a Healthy Environment' (2000) 25 Colum J Envtl L 283, 339.

relationships with national legislation that sets specific standards; in other instances the judiciary may take on the role of developing standards, and sometimes agencies that are autonomous or quasi-autonomous of the state are relied upon for the creation and development of associated standards. In certain instances, national constitutions expressly provide for specific standards or expressly create an obligation that requires standards to be developed; sometimes international institutions such as the World Health Organisation and the United Nations play key roles in the development and determination of so called 'international standards' that are then used by tribunals as the standard applicable under a particular regime.

As well as considering the different types of standards that are emerging, the book also considers those factors that affect their development or recognition. As such it considers the extent to which standards are desirable or even possible in certain contexts. Therefore, it analyses those instances where human rights regimes have been reluctant to associate very specific standards with environmental rights and why in many cases this can be founded on logic and pragmatism.[10] Where precise standards of protection are emerging, it is often the case that they are in nascent stages of development. From this perspective, the book seeks to provide guidance on the possible ways that such standards can be further developed and the options that are available to states and the international community to do this.

To pave the way for the analyses carried out in this book, this opening chapter sets out the historical context from which all of the other chapters can be viewed. It maps the history of environmental rights, and in doing so highlights how each of the chapters in this book have a place in telling the story of the development of standards within the field. As well as mapping the history of the philosophical and legislative developments that have shaped environmental rights, this chapter also considers the instrumental role that the United Nations has played and continues to play in the development of human rights that are used for the protection of the environment.

1.2 EARLY SCHOLARLY CONCEPTIONS OF ENVIRONMENTAL RIGHTS

The earliest conceptions of environmental rights are difficult to ascribe. However some authorities refer to Aldo Leopold, who identified a relationship between ethics and nature at a time when human rights as we now think of them were still in their infancy. In 1949 he stated that

[10] See for example the discussions in this volume by Karen Morrow relating to the European Convention of Human Rights (Chapter 3) and Áine Ryall relating to the Aarhus Convention (Chapter 6).

> the extension of ethics to this third element in human environment is, if I read the evidence correctly, an evolutionary possibility and an ecological necessity … the land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.[11]

It was not, however, until the 1960s and 1970s that specific conceptions of environmental rights began to emerge. In 1962, the scientist and pioneer in the field of advocacy for environmental protection, Rachel Carson, argued that the US Constitution's Bill of Rights should contain a provision that guarantees citizens freedom from lethal poisons.[12] In 1972, Christopher Stone put forward the argument that natural objects such as trees could have rights.[13] Subsequently, in 1974, the Nobel Prize-winning human rights lawyer, René Cassin, observed that over the previous twenty years the notion of an environmental right had emerged.[14] And in 1976, Professor W. P. Gormley asserted the existence of a new human right that guaranteed a 'minimum decent environment'.[15]

These early conceptions of the possibilities of extending human rights protection to environmental issues created fertile ground for thought, understanding and discussion from which more tangible developments in the law have emerged.

1.3 LEGAL DEVELOPMENTS IN THE FIELD OF ENVIRONMENTAL RIGHTS

The earliest global international human rights treaties that provided the potential bases for the protection of the environment are the International Covenant on Civil and Political Rights (ICCPR)[16] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[17] These were established in the mid 1960s, and as such predate most early conversations about environmental rights. However, contained within them are the rights to life,[18] health[19] and an adequate standard of

[11] Aldo Leopold, *A Sand County Almanac – and Sketches Here and There* (OUP 1949) 203–04.
[12] Rachel Carson, *Silent Spring* (Penguin Books – Houghton Mifflin 1962) 29.
[13] Christopher Stone, *Should Trees Have Standing – Towards Legal Rights for Natural Objects* (William Kaufman 1972).
[14] René Cassin, 'Les Droits de L'Homme' in IV Recueil des Cours (Sitjhoff 1974) at 327 states 'Dans les vingt dernière années est née la notion du droit á l'environment, impossible à classer purement et simplement comme droit politique ou économique et dont il vous sera sûrement parlé'.
[15] WP Gormley, *Human Rights and the Environment: The Need for International Cooperation* (Sitjhoff 1976) 1.
[16] 16 December 1966, in force 23 March 1976, Annex to UNGA Res 2200 (XXI), 6 ILM 368 (1967) (ICCPR).
[17] 16 December 1966, in force 3 January 1976, Annex to UNGA Res 2200 (XXI), 6 ILM 360 (1967) (ICESCR).
[18] ICCPR (n 16) art 6.
[19] ICESCR (n 17) art 12.

living,[20] all of which have a relationship with the quality of the environment. It is here that the analysis in this book begins.

In Chapter 2 Sumudu Atapattu explores the instances where those particular rights have subsequently been developed or interpreted to encompass environmental protection. This has meant considering relevant complaints heard by the UN Human Rights Committee[21] and the UN Committee on Economic, Social and Cultural Rights,[22] and the effect of the Concluding Observations that these committees have made in their oversight roles. It also considers the way that 'General Comments' along with state reports have provided an evolutionary understanding of specific rights. Within this analysis, Prof. Atapattu considers the extent to which 'standards' can be said to have emerged, if at all.

In 1972, the United Nations Conference on the Human Environment was held in Stockholm. This was the first time that such a conference had been convened and is regarded by many lawyers as the starting point of contemporary international environmental law. The outcome was the 'Stockholm Declaration' that contained a set of principles.[23] Principle 1 stated that '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'.[24] While the Stockholm Declaration represented 'soft law', and the language used fell short of declaring the existence of a fundamental environmental right per se, its authority and influence resonated with governments and the international community. One of the ways that it influenced governments was through the manner in which they proceeded to consider the rights and obligations included in their national constitutions.

Indeed, from then on many states, when amending their national constitutions decided to include provisions relating to environmental protection.[25] The first country to do so was Portugal in 1974, following its peaceful revolution.[26] The environmental provisions of the Portuguese constitution are now extensive, which means that they are of particular interest in an analysis to determine the relationship that they have with standards. Additionally, as Portugal is a member of the European Union (EU), analysis can reveal interesting insights into the relationship between those national standards that relate to EU law and those which can be

[20] ibid art 11.
[21] One of the functions of the UN Human Rights Committee is to hear complaints related to alleged violations of the ICCPR.
[22] One of the functions of the UN Committee on Economic, Social and Cultural Rights is to hear complaints related to alleged violations of the ICESCR.
[23] UNCHE (n 2).
[24] ibid.
[25] See generally Boyd (n 5); also James R May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2015).
[26] The Constitution of the Republic of Portugal (2005, 7th Revision).

linked directly to provisions found in the constitution. Alexandra Arágao explores these issues in depth in Chapter 11.

While many countries have integrated environmental provisions into their national constitutions, the lack of such a provision did not necessarily constrain states from using constitutional rights for the purposes of environmental protection. India to this day does not have a specific actionable environmental provision within its national constitution.[27] However, its right to life provision has been relied upon for the protection of the environment and is now interpreted as incorporating a right to a healthy environment.[28] In the early 1980s lawyers began relying on the right to life in the Indian constitution for the protection of the environment.[29] This led to a significant number of cases and a proactive stance from the judiciary, which has used its authority to order government departments in a range of different types of measures to take action to protect the environment.[30] Gitanjali Gill in Chapter 10 focuses on the way that this tradition has now developed through the function of the National Green Tribunal (NGT) and the relationship that this has with the development of environmental standards.

The 1980s also saw significant developments taking place at the regional level. In 1981, the African Charter on Human and Peoples' Rights (ACHPR) was promulgated.[31] This treaty includes a provision that entitles people to live in 'a general satisfactory environment favourable to their development'.[32] Insights related to this article of the ACHPR are provided by Louis Kotzé and Anél du Plessis in Chapter 5, which as well as providing an analysis of the inherent limitations relating to the development of rights-orientated standards in the region, considers the broader issue of some of the different types of standards that can be identified within the field of environmental rights.

In 1988, a significant development took place in South America through the Additional Protocol in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador)[33] which includes a provision for the protection of the environment,[34] that added to the treaty obligations under the American Convention of Human Rights.[35] Until recently, the environmental provision in the Protocol of

[27] The Constitution of India (1950).
[28] ibid art 21.
[29] See generally Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International 2004).
[30] ibid.
[31] African Charter on Human and Peoples' Rights (Banjul) art 4, 27 June 1981, in force 21 October 1986, 21 ILM 59 (1982) (AFCHPR).
[32] ibid art 24.
[33] Additional Protocol to the ACHR on Economic, Social and Cultural Rights (San Salvador) 17 November 1988, in force 16 November 1999; 28 ILM 156 (1989).
[34] Article 11 states that 'everyone shall have the right to live in a healthy environment and to have access to basic public services'. It also states that 'the state parties shall promote the protection, preservation and improvement of the environment'.
[35] American Convention on Human Rights (1969) OAS Treaty Series No 36; 1144 UNTS 123.

San Salvador had not been considered to be actionable. Nevertheless, the right to property and the right to life had in certain cases been successfully argued before the Inter-American Court of Human Rights (IACtHR) to protect aspects of the environment in the context of claims brought by indigenous communities. Evadné Grant in Chapter 4 considers these provisions and provides an analysis of the manner in which judgments assist in our understanding of the standard of environmental protection that they afford to rights holders. She also analyses a 2017 Advisory Opinion in which the IACtHR clarified and extended state obligations relating to the environment under the convention, and in doing so has gone some way to further clarifying the standards of protection that they entail.[36]

By the early 1990s considerable momentum had been achieved at the national and international levels relating to environmental protection. This led to the United Nations Conference on Environment and Development (UNCED), which had a number of outcomes, one of them being the Rio Declaration.[37] Whereas a relatively strong reference to human rights and the environment had been provided in the Stockholm Declaration,[38] the Rio Declaration did not assert that a human right to a certain substantive quality of environment existed; instead it states that 'human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life harmony with nature.'[39] While this appeared to downplay the role that substantive environmental rights might play in future of environmental law and policy,[40] the Rio Declaration made clear that procedural rights should play a major role.[41]

This role was set out in Principle 10, which affirmed that states should ensure that citizens are able to access information, participate in decision-making and access justice in environmental matters.[42] Such participatory rights are now widely accepted to the point that they can possibly be regarded as customary in many regions of the world, even if their acceptance in theory is not always matched by the quality of governmental implementation. Such is the normative acceptance of procedural rights by states that they are also incorporated in numerous MEAs. As MEAs are not designed to act as human rights instruments, this inclusion is a very interesting development and has the potential to provide further valuable insights. In Chapter 8, Lara Ognibene and Angela Kariuki focus on the way that procedural rights within MEAs have developed their own relationship with

[36] The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) in relation to Articles 1.1 and 2 of the American Convention on Human Rights). Advisory Opinion OC-23/17, Inter-Am Ct HR (ser A) No 23 (15 November 2017).

[37] Report of the United Nations Conference on Environment and Development (Rio de Janeiro), 14 June 1992, UN Doc A/CONF 151/5/Rev.1 (UNCED).

[38] UNCHE (n 2).

[39] UNCED (n 37) Principle 1.

[40] Dinah L Shelton, 'What Happened in Rio to Human Rights?' (1995) 3(3) YB Int'l Envt'l L 75.

[41] UNCED (n 37) Principle 10.

[42] ibid.

'standards' of environmental protection. This relationship includes the association that specialised standard-setting institutions have with MEAs and the way that they can assist in developing and clarifying the standards of protection applicable.

An aspect of procedural rights that is of particular significance to rural communities in developing countries is the concept of 'free prior and informed consent' (FPIC). This relates to the obligation that states (and in turn non-state actors) have to consult adequately with communities prior to any significant developments that may affect them or their environment. In certain instances, where relocation might occur, it is possible that the consent of communities is necessary; however, in most instances adequate consultation processes are required to pave the way for some form of consensus as to the manner in which the development will take place. Various international instruments have recognised FPIC, and significantly it was given particular recognition in the 2007 UN Declaration on the Rights of Indigenous Peoples.[43] While it is doubtful that FPIC can be regarded as a stand-alone human right, it is grounded in the principles and duties that are derived from both human rights law and multilateral environmental agreements. Jona Razzaque analyses FPIC in Chapter 9 and considers what standards of protection are associated with it and the sources from which they are derived.

Naturally, the history and background to environmental rights have in part been shaped by national and global politics. The end of the Second World War led to the advent of the United Nations and the promulgation of the international human rights covenants which ultimately have influenced this field enormously. Other major events on the national level include the end of the apartheid era in South Africa in 1993, which led to a new national constitution.[44] The new constitution included both a specific environmental right[45] and a right to water.[46] One of the major issues facing South Africa was and continues to be the limited supply and distribution of potable water. This has led to the expression 'water apartheid' owing to the disparities of distribution between traditionally rich and poor or black and white areas.[47] This raises particular questions relating to 'standards' in terms of both the quality and quantity of water that people are entitled to under the constitution. Nathan Cooper analyses these issues in Chapter 13.

While the Rio Declaration appeared to play down the future role of substantive environmental rights, countries continued to adopt them and incorporate them into

[43] Arts 10, 11(2), 19, 28(1), 29(2), 32(2). The UN Declaration on the Rights of Indigenous Peoples adopted by General Assembly Resolution 61/295 (13 September 2007).

[44] Constitution of the Republic of South Africa (10 December 1996).

[45] s 24.

[46] s 27.

[47] See Larry A Swatuk, 'The State and Water Resources Development through the Lens of History: A South African Case Study' (2010) 3 3 Water Alternatives 521; the issue of 'environmental racism' and the maltreatement of vulnerable groups was also highlighted in the 'Ksentini Report', see: UN Commision on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and the Environment, *Final Report of the Special Rapporteur.* UN Doc E/CN.4/Sub.2/1994/9 74 (6 July 1994) paras 86 and 125–36.

their constitutions. One particularly interesting example for the purposes of this volume is that of Argentina, because in adopting an environmental right in its revised constitution of 1994,[48] it also incorporated a provision which required the government to develop minimum standards of environmental protection.[49] This created a special type of environmental right; one which ultimately would be linked to legislation specifying the standards of environmental protection that are required under it. Silvia Nonna explains in Chapter 12 how this right has evolved and the range of different sectors for which associated legislation has been passed. She also analyses the role of the Supreme Court in attempting to give effect to standards of environmental protection.

Meanwhile in Europe the 1990s also bore witness to significant developments within the field of environmental rights. While the European Convention on Human Rights (1950) (ECHR)[50] had not included a provision for the protection of the environment, a number of rights such as the right to life,[51] the right to property[52] and the right to private and family life[53] gradually became grounds upon which aspects of the environment could be protected. The first case in which this type of claim was successfully argued was that of *Lopez Ostra* v. *Spain* (1994).[54] Since then the ECHR has proved fertile territory for such claims, which has led to an interesting body of jurisprudence. As the ECHR is one of the most, if not the most, developed of the regional human rights systems, this is of particular importance in the context of standards of environmental protection. In Chapter 3 Karen Morrow analyses the range of issues that the European Court of Human Rights must take into account in such cases, and as such illustrates the complicated relationship that exists between those treaty provisions that are relied upon and the standards of protection that they ultimately confer.

Another significant development occurred in Europe in 1998 with the signing of the Aarhus Convention, which came into force in 2001.[55] It is a ground-breaking treaty which solely addresses procedural environmental rights, and as such is a far-reaching manifestation of Principle 10 of the Rio Declaration. As well as representing a major development in terms of environmental rights, it has influenced Latin America and the Caribbean region in the adoption of the 2018 Escazú Agremeent which is also dedicated solely to procedural environmental rights.[56] The treaty's

[48] The Constitution of the Argentine Nation (as amended 1994) Seciton 41.
[49] ibid.
[50] European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome) 4 November 1950, in force 3 September 1953; 213 UNTS 221 (ECHR).
[51] art 2.
[52] art 1 of Protocol 1 to the ECHR (Paris, 20 March 1952).
[53] art 8.
[54] 303 Eur Ct HR 38 (1994).
[55] UN ECE Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters (Aarhus) 25 June 1998, in force 30 October 2001. UN Doc ECE/CEP43 ('Aarhus Convention').
[56] UN ECLAC Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, not in force) UNTC C.N.195.2018.TREATIES-XXVII.18 (Escazú Agreement)

Compliance Committee plays a significant part in articulating the expectations that states must comply with in relation to the convention provisions. In Chapter 6 Aine Ryall focuses on the way that the Compliance Committee treats the right of access to justice, and she also considers the crucial interface that the convention has with EU law. The analysis illustrates the way that broad standards are gradually emerging.

This period demonstrates quite starkly the general disparity of living conditions between developed and developing countries. Access to water and sanitation in many parts of the world, but most notably in sub-Saharan Africa, was (and still is) a critical issue. In 2003, the UN issued General Comment No. 15 which states that Art. 11 of the ICESCR[57] could be interpreted to mean that all citizens have a right to water, and it detailed a set of general obligations relating to it.[58] Owen Mcintyre in Chapter 7 maps out the range of other developments that have reinforced the international recognition of that right. He then explains the different standards of protection that can be associated with the right to water and sanitation and the wide range of sources from which they are derived.

In the 2000s a number of other major developments took place in the field of environmental rights. One of them occurred in 2005 when the French Government incorporated its Charter for the Environment (Charter)[59] into the national constitution.[60] One of the most interesting aspects of this development was the way that the government could use a constitutional mechanism whereby the Charter could be deployed to challenge bills or actual legislation. This raises questions relating to the criteria or standards that legislation must comply with if it is to be deemed consistent with the constitution. David Marrani and Stephen Turner consider the use of the Charter for the protection of the environment in Chapter 14.

By the 2000s, as climate change became more prominent as an issue, the relationship that it has with human rights also became part of scholarly debate.[61] In practice, however, although several states have now included mention of climate change within their national constitutions,[62] human rights obligations relating to climate change are in their very early stages of development, and for this reason this volume does not provide an associated analysis relating to possible standards.

Some of the most significant developments that took place during the 2000s within the field of standards in environmental rights have been through national

57 ICESCR (n 17). Article 11(1) recognises 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'.

58 Committee on Economic, Social and Cultural Rights, General Comment No. 15, The Right to Water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2002/11, 26 November 2002.

59 Loi constitutionnelle 2005–205, 1 March 2005 (Loi constitutionnelle relative à la Charte de l'environnement (1)), JORF 2 March 2005, 3697.

60 The Constitution of the Republic of France (4 October 1958).

61 Stephen Humphreys (ed), *Human Rights and Climate Change* (CUP 2009).

62 See Constitution of Tunisia (26 January 2014) art 45; Constitution of the Dominican Republic (13 June 2015) art 194; Constitution of Ecuador (28 September 2008) art 414.