# 1

# Framing Environmental Human Rights in the Anthropocene

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## 1.1 Introduction

One of the defining characteristics of the Anthropocene, characterised by a new and destructive human–nature relationship, is that for the first time in humanity's history, the access to a clean and healthy environment is uncertain for large groups of persons and ecosystems. This transformational shift in humankind's relationship to nature was the catalyst for a debate between scholars, policy-makers and environmental and human rights activists on whether there is a right to the environment and who would be the right and duty holders. To the extent that the intrinsic value and agency of nature is recognised, there is also the related question of the rights of nature, or the right of the environment not to suffer the effects of the Anthropocene.

What are environmental rights? The categories of human rights (see Table 1.1), environmental human rights (see Table 1.2) and the rights of nature (Villavicencio Calzadilla & Kotzé, 2018) are to greater and lesser degrees well recognised today. But what are the tensions and debates that underlie the nature and context of environmental rights, their necessity, feasibility, and use in international and national law and policy? And what are the drivers of this new category of rights?

The chapter addresses these debates in three sections. First, it defines environmental rights and discusses the types of actors and related rights that the concept incudes and cautions that using the Anthropocene as an explanatory and historical context is problematic for rights and justice debates. Second, the chapter considers the merit of recognising this new category of rights and the arguments related to the ambiguity, redundancy, enforceability and so on of these rights. Third, the chapter points to the evidence and drivers of, and inhibitors to the incorporation of environmental rights into international and national policy and law.



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Table 1.1. *Chronological list of the main treaties related to international human rights*

| Name of instrument | Date |
|---|---|
| 1. International Convention on the Elimination of All Forms of Racial Discrimination | 1965 |
| 2. International Covenant on Civil and Political Rights | 1966 |
| 3. International Covenant on Economic, Social and Cultural Rights | 1966 |
| 4. Optional Protocol to the International Covenant on Civil and Political Rights | 1966 |
| 5. Convention on the Elimination of All Forms of Discrimination against Women | 1979 |
| 6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment | 1984 |
| 7. Convention on the Rights of the Child | 1989 |
| 8. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty | 1989 |
| 9. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families | 1990 |
| 10. Optional Protocol to the Convention on the Elimination of Discrimination against Women | 1999 |
| 11. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict | 2000 |
| 12. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography | 2000 |
| 13. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment | 2002 |
| 14. International Convention for the Protection of All Persons from Enforced Disappearance | 2006 |
| 15. Convention on the Rights of Persons with Disabilities | 2006 |
| 16. Optional Protocol to the Convention on the Rights of Persons with Disabilities | 2006 |
| 17. Optional Protocol to the Covenant on Economic, Social and Cultural Rights | 2008 |
| 18. Optional Protocol to the Convention on the Rights of the Child on a communications procedure | 2011 |

The chapter concludes that despite legal and political objections, environmental rights are increasingly recognised at both international and national scales as a new category of rights, largely driven by a greater concern for the environment and environmental justice.

## 1.2 Environmental Rights in the Context of the Anthropocene

What are environmental rights and how are they related to human rights and to the rights of nature? Is the Anthropocene a good explanatory context for environmental rights? Environmental rights include the rights of humans and of nature and provide a rights-based response (Ensor & Hoddy, 2021) to the environmental degradation caused by human activity (Rockström et al., 2009). Environmental rights create

Table 1.2. *Environmental rights and duties of states: The framework principles of human rights and the environment (Knox, 2018)*

1. Ensure a safe, clean, healthy, and sustainable environment to respect, protect, and fulfil human rights.
2. Respect, protect, and fulfil human rights to ensure a safe, clean, healthy, and sustainable environment.
3. Prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy, and sustainable environment.
4. Provide a safe and enabling environment in which individuals, groups, and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation, and violence.
5. Respect and protect the rights to freedom of expression, association, and peaceful assembly in relation to environmental matters.
6. Provide for education and public awareness on environmental matters.
7. Provide public access to environmental information by collecting and disseminating information and by providing affordable, effective, and timely access to information to any person upon request.
8. Avoid undertaking or authorising actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.
9. Provide for and facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making process.
10. Provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.
11. Establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect, and fulfil human rights.
12. Ensure the effective enforcement of their environmental standards against public and private actors.
13. Cooperate with each other to establish, maintain, and enforce effective international legal frameworks to prevent, reduce, and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.
14. Take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, considering their needs, risks, and capacities.
15. Ensure that they comply with their obligations to indigenous peoples and members of traditional communities, including by:
    a. Recognising and protecting their rights to the lands, territories, and resources that they have traditionally owned, occupied or used.
    b. Consulting with them and obtaining their free, prior, and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories, or resources.
    c. Respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories, and resources.
    d. Ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories, or resources.
16. Respect, protect, and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development.

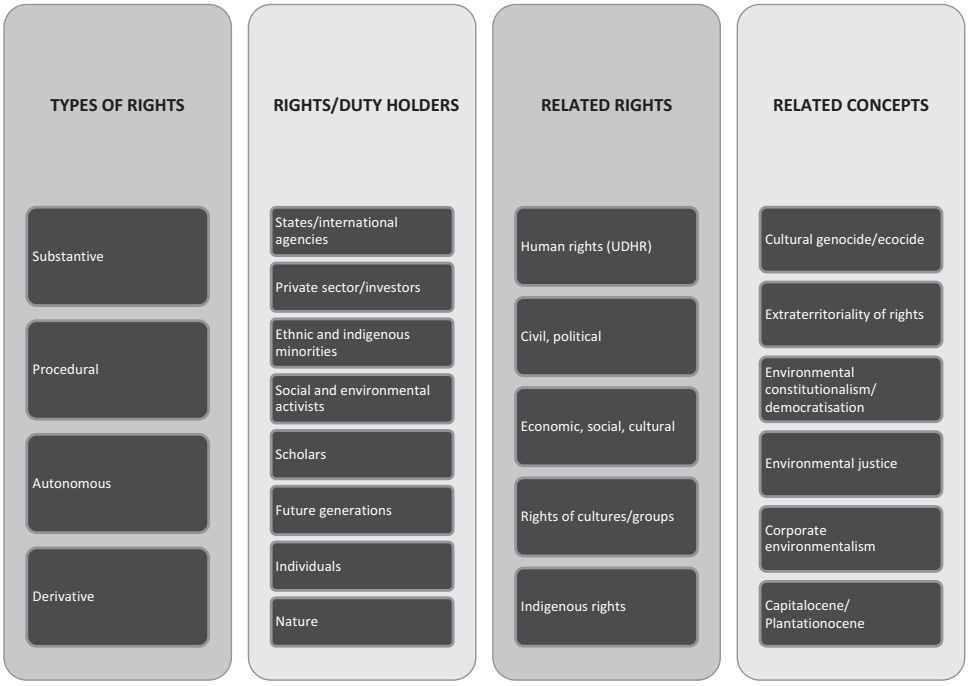


Figure 1.1 Elements of environmental rights in the Anthropocene

relationships of rights and duties between individuals but also between groups, including for example postcolonial states and indigenous communities, present and future generations etc., and are reflected to some degree in international regional and national legal instruments and policy (Rodríguez-Rivera, 2018). Environmental rights include the autonomous right to the environment as well a derivative right from existing human rights (see Figure 1.1). Specifically, environmental rights include three groups of rights: the substantive right of human beings to the environment (anthropocentric approach); the substantive rights of the environment (ecocentric approach, based on the intrinsic value and agency of the environment (Redgwell, 1996)); and the procedural rights (Hemming et al., 2019) that guarantee environmental rights, including for example access to justice, to information, and participation in decision-making and management in environment-related issues (Rodriguez-Rivera, 2001).

From an anthropocentric and derivative perspective, many rights that are part of international human rights already relate to the environment and benefit from the qualities that these rights have. Human rights are universal (applicable equally to all persons), inalienable (cannot be taken away except by due legal process), indivisible, and interdependent. A clean and healthy environment is needed to guarantee most of

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these rights. The international human rights law comprises the 1948 Universal Declaration of Human Rights (UDHR), together with the 1966 International Covenant for Civil and Political Rights, and the 1966 International Covenant for Economic, Social and Cultural Rights. The international framework of human rights includes several other human rights (see Table 1.1).

What constitutes environmental rights and do they differ from human rights? The debates around environmental rights have had an exponential increase over the last fifty years (Boyle, 1996, 2012; Weston, 2012; Weston & Bollier, 2013a, 2013b). Part of the environmental rights debate is the issue of whether there is merit in recognising a separate and substantive right to the environment, beyond the human rights already recognised under international law. Environmental rights are often framed within environmental justice (Pellegrini et al., 2020) and ethics discourses, particularly as they relate to environmental stewardship for future generations, and from this perspective merit their own legal categorisation. Creating legal rights and duties around stewardship is also the context for debates on ecocide (the destruction and loss of ecosystems) and cultural genocide (environmental degradation undermining of the way of life and livelihood of a particular ethnic group) (Raftopoulos & Morley, 2020).

The appreciation of a new category of rights has been gradual, with rights of human beings to the environment gaining international recognition after first-generation civil and political rights and second-generation economic, social, and cultural rights (Marks, 1980). Many of the principles are obligations of states protected under existing human rights instruments or recognised in judicial rulings of human rights tribunals. Yet generally their inclusion in national policy is still limited (Mavrommati et al., 2020), and environmental human rights are not part of an internationally binding legal framework. In 2018, the UN Special Rapporteur on Human Rights outlined the most generally accepted principles or obligations of states related to human rights and the environment (see Table 1.2). These include the duty of states to provide for a safe and healthy environment and the procedural safeguards to guarantee individuals' and indigenous groups' environmental rights, including for example education, freedom of expression, participation in decision-making etc.

Should environmental rights be framed within the context of the Anthropocene? The Anthropocene is an apt historical, but inaccurate normative context for today's debates around environmental rights. The debate on the best descriptive and explanatory context for environmental issues around the Anthropocene is not irrelevant to the law. Indeed, the debate can help to remove the marginal importance given to environmental justice and global inequality in environmental debates (Nixon, 2016). However, using the Anthropocene as the explanatory context of

environmental rights may wrongly attribute the ecological problem to humanity's action at large and thus mask the differentiated rights and responsibilities of those affected by ecological crises.

Although not a new geological epoch according to geoscience (Bauer & Ellis, 2018), the Anthropocene is an era when human influence on the earth and earth systems contributed to serious and in some cases irreparable environmental degradation (Rockström et al., 2009). In search of a solution, scholars called for and contributed to studies on global environmental governance, polycentric coordination of groups, networks, and institutions (Galaz et al., 2012). Scholars used complex social–ecological systems thinking, to discover the (in)equity and (un)sustainability of existing human–environment interactions (Leach et al., 2018). Environmental scholarship also provided clarity on what human beings needed to do to live within the social and planetary boundaries (Leach, Raworth & Rockström, 2013).

There are two problems with framing the environmental rights problem in terms of the Anthropocene. First, the Anthropocene nomenclature places victims and culprits in the same moral space and masks the problem of universalist approaches to ecological crises. The present crisis rather is caused by some humans, the minority (Williams & Montes, 2017). By associating all humanity with the environmental crisis, the Anthropocene as a context for environmental rights fails to differentiate between social actors (Sayre, 2012); ignoring the varied responsibilities, liabilities, and impacts of different groups of human beings, and the institutionalised forms of inequality they create in environmental transformations (Bauer & Ellis, 2018).

Second, arguably the present ecological crisis is not due to the "anthro" or human–environment relationship that has existed for millennia but rather to Western political and economic systems that entrench unfair systems of allocation of environmental goods and services (Scobie, 2020). Thus, some scholars suggest that the Anthropocene should be replaced with more accurate concepts like the *capitalocene* (Davis et al., 2019) or *plantationocene* (Murphy & Schroering, 2020). Linking the Anthropocene to human rights places equal legal obligations on all societies rather than focusing on reforming the affluent Western societies that created and benefit from the more destructive, exploitative, imperialist, capitalist-related socio-historical processes that have dominated global systems and human–environment interactions over recent centuries. It is problematic to approach environmental degradation, and the use of natural resources like water etc. from depoliticised and uncritical perspectives (Davis & Schaeffer, 2019). This is changing, however, particularly in the Global South, where environmental activism includes calls for social justice to reduce systemic inequities also through the rule of law (Peel & Lin, 2019).

### 1.3 Environmental Rights: Necessity and Feasibility

Is it feasible and necessary to establish a new set of rights to the environment? Why has there been such contestation (Alston, 1982) among legal scholars about the existence of substantive and procedural rights to the environment, with some even denying the feasibility of creating or recognising this new category of rights? There have been five main objections to formalising environmental rights: ambiguity, redundancy, enforceability, anthropocentric bias, and the potential of new rights weakening existing rights frameworks.

First, legal critics suggest that the environmental rights are too nebulous (Thorme, 1990) and expansive in scope to be recognised as a separate category of rights. The environment includes all the earth's spheres: the biosphere, the atmosphere, the hydrosphere, and lithosphere (uppermost section of the planet's crust). Are they all to be included in the rights of individuals? Furthermore, the right to the environment encompasses hard-to-identify-and-enforce qualitative and temporal elements such as: a safe, secure, healthy, adequate, pure, clean, viable, ecologically sound environment, of a minimum quality for a decent, dignified life and human well-being, for present and future generations (Weiss, 1990). This scope and ambiguity, critics argue, may make defining environmental rights impossible, meaningless and may undermine the wider notion of human rights (Boyle, 1996). Other scholars counter that the apparent ambiguity, characteristic of social and economic international human rights, has not detracted from their recognition and enforceability (Rodríguez-Rivera, 2018). In fact, courts have adequately ruled on (Theil, 2020) and clarified the nature and content of the right to the environment (Soyapi, 2019). *The High Court in South Africa in Earthlife Africa Johannesburg* v. *Minister of Environmental Affairs and Others*, for example, held that the constitutional right to human health and well-being was dependent on good environmental conditions (du Plessis, 2018). That ruling introduced environmental human rights dimensions into what before were more routine environmental impact assessment authorisation processes.

The second challenge to formal recognition of environmental rights is that it is redundant to create a separate human right to the environment, because indirectly and already, the right to a healthy environment can be protected through a range of civil and political rights (Orellana, 2018). This challenge is countered, however, by noting that existing human right frameworks were not made to address the unique nature of human–environment interactions and as such contain important gaps on specific environment-related rights such as for example the right to be informed about decisions that may affect an individual or group's enjoyment of the environment (Rodríguez-Rivera, 2018).

The third challenge to environmental rights is that they are not easily enforceable, given their qualitative and temporal elements mentioned above. Yet other human rights already have mechanisms for enforcement that may be applied to environmental rights and, in any case, enforceability should not be a criterion for recognising or denying a substantive right.

Fourth, critics of environmental rights suggest that these rights have an anthropocentric bias that ignores the intrinsic value of nature and the substantive rights of the environment. In practice, however, protecting environmental rights has increased the support for protecting nature (Daly, 2012, 2018). A study on innovations in constitutional adjudication in South America and the Indian subcontinent found that as the range of persons who can bring claims based on environmental human rights expands, courts have had more opportunities to adapt their constitutional doctrines towards protecting the rights of humans and of nature (Daly, 2018). In addition, many ecocentric policies began with an anthropogenic genesis that then developed to recognise and protect the rights of nature, as a recent analysis of Ecuador's trajectory illustrated (Kotzé & Villavicencio Calzadilla, 2017). In 2008 Ecuador and in 2010 Bolivia (Villavicencio Calzadilla & Kotzé, 2018) recognised the rights of nature in their constitutions or domestic laws. In 2014 New Zealand, also with years of recognition of the environmental rights of first nations, recognised the legal personality of one of its rivers (Boyd, 2018).

The fifth critique to expanding human rights to include environmental human rights is that the focus on the latter weakens the global efforts to consolidate already recognised human rights. For example, efforts to recognise and enforce environmental rights may take resources away from legal, social, and economic initiatives that already exist guarantee other human rights, such as the rights of women or children in some societies. As with the rebuttal on enforceability, this may be countered by emphasising that the need to consolidate existing rights cannot a priori block an evaluation of new rights that may have their own merit.

## 1.4 Environmental Rights in International Law Today

Have environmental rights become part of international and national environmental and international human rights law? Are these rights part of regional or national jurisprudence?

Traditionally, international human rights law did not explicitly include environmental rights. Environmental rights were not mentioned in the 1948 United Nations Universal Declaration of Human Rights (UN UDHR). Yet although the human right to environment is not yet treaty law (Handl, 1992; Rodriguez-Rivera,

2001), over the last thirty years, there is evidence of a revolution of "environmental rights" (Boyd, 2011; Gellers, 2017), with the right progressively being included in declarations of states, in national laws and constitutions (May & Daly, 2015) and in judicial rulings of regional and national courts. In an increasing number of cases before the courts in the Global North and the Global South (Recio, 2018) the claimants link constitutional rights and human rights to alleged violations of environmental rights (Peel & Lin, 2019). In addition to international human rights law, international environmental law includes principles that indirectly protect environmental rights. They include the principle of sovereignty of states over their natural resources; the responsibility not to cause transboundary harm or harm in areas beyond national jurisdiction; the principles of preventative action, of cooperation, of sustainable development, and the equitable sharing of resources (Reynolds, 2019); the polluter pays principle and the principle of common but differentiated responsibility among states on environmental issues etc. (Sands & Peel, 2012). The rights of indigenous peoples to traditional lands and their resources also protect environmental rights.

What were some of the key moments of global environmental rights policy? Though still a contentious issue at the United Nations and many times ignored in practice (Giunta, 2019), these rights are increasingly being recognised (Marchegiani, Morgera & Parks, 2019). The first world conference on the environment, the 1972 United Nations Conference on the Environment in Stockholm, was an important watershed in the process of acknowledging the link between the environment and human rights. Principle 1 of the outcome Stockholm Declaration 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." However, although the international community has had opportunities since Stockholm, including for example at the 1992 Rio UN Conference on the Environment and Development, states have chosen not to explicitly recognise the human right to the environment as part of their binding obligations under international law (Conca, 2015; Shelton, 1992).

The UN High Commissioner for Human Rights has increasingly focused on environmental human rights, reporting for example on the relationship between human rights and climate change (Knox, 2009), and human rights and the ability of persons to enjoy a safe, clean, and healthy sustainable environment (Knox, 2017). In 2022 the General Assembly, pursuant to the 2018 resolution 72/277, may adopt a political declaration: "Towards a Global Pact for the Environment", on the fiftieth anniversary of the Stockholm Declaration (Knox, 2020). Article 1 of the Global Pact notes the right of persons "to live in an ecologically sound

environment adequate for their health, well-being, dignity, culture and fulfilment". The Global Pact was promoted by more than a hundred environmental and legal experts in June 2017 (Aguila, 2020), in the hope that it would form the basis for the first international environmental human rights treaty, integrating, consolidating, unifying, and entrenching international environmental law's fragmented principles with the more established system of human rights (Knox, 2019; Kotzé & French, 2018). Although the Global Pact is unlikely in the near term to become a treaty, it has diplomatic and political relevance and, like other UN General Assembly resolutions, it may influence operational strategies, programmes, and public and international policy (Caldwell & Weiland, 1996).

At the regional scale, however, there are treaties that recognise environmental human rights. The 1981 African Charter on Human and Peoples' Rights (the Banjul Charter) was the first regional human rights instrument to include a right to an environment for all people, that was "favorable to their development" (Article 24). It is the only international agreement that includes an oversight or review mechanism. In 1988, the Latin American Region followed suit with Article 11 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (the Protocol of San Salvador) that contains the right to "live in a healthy environment" (Organization of American States, 1999). In 2004, the Arab Charter on Human Rights did the same in Article 38 (League of Arab States, 2004). In 2012, the Association of Southeast Asian Nations Human Rights Declaration (Association of Southeast Asian Nations, 2012) recognised the right to a safe, clean, and sustainable environment in Article 28.

Two regional human rights treaties recently recognised procedural environmental rights including the rights to information, participation, and access to justice in environmental matters (Peters, 2018). The 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the Escazú Agreement) came into force in 2021. Though it has been a challenge to enforce (Olmos Giupponi, 2019) this agreement is among of the most advanced in its protection of procedural environmental human rights and is evidence of a growing ecological democracy in that region. The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) of the United Nations Economic Commission for Europe also guarantees procedural rights related to the environment, including the right of access to information and public participation, to allow persons to live in an environment adequate to their well-being.

Regional tribunals are also increasingly interpreting and articulating environmental rights doctrines. Claimants argue inter alia that states fail in their duty to protect the rights of nationals or of nature (Knox, 2020). In *Lopez Ostra* v. *Spain* 1994, for instance, the European Court on Human Rights (ECHR) established the link between an individual's right to private life, family life, and home and the right to live in an environment free from pollution under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).[1] In *Öneryildiz* v. *Turkey* 2004, the ECHR recognised the state's responsibility to create legal frameworks to deter environmental harm. In *Social and Economic Rights Action Centre* v. *Nigeria* 2001, the African Commission on Human and Peoples' Rights recognised the state's duty to guarantee a satisfactory environment and to take measures to prevent pollution and ecological degradation. In *Saramaka People* v. *Suriname* 2007, the Inter-American Court of Human Rights recognised the procedural rights of indigenous communities to free, prior, and informed consent before potentially harmful activities may be conducted on traditional lands. The 2017 Inter-American Court of Human Rights in an advisory opinion (Corte Interamericana de Derechos Humanos, 2017) declared that all humanity had an autonomous right to a healthy environment (Papantoniou, 2018).

Interestingly, in some cases, courts even apply an extraterritorial dimension to environmental rights (Byers, Franks, & Gage, 2017). Specifically, on the question of environmental degradation caused by climate change and the impact on the enjoyment of human rights to life, health, food, housing, water etc., that court stated that countries have the duty to avoid significant environmental harm both within and outside of their jurisdiction (Recio, 2018). Increasing national environmental laws and policy that govern private corporations protect environmental rights, even extraterritorially. The United Kingdom, Australia, France, and the United States require higher standards for transnational supply chains. This may improve procedural and substantive human rights (Nolan, 2018). Reporting and due diligence requirements may include a duty to collaborate with external stakeholders to map, track, and disclose production and supply processes. France's 2017 Duty of Care Act similarly requires some French-based multinationals to give procedural rights and apply a duty of care to cases of violations of human and environmental rights suffered because of the activities of these multinationals, within and outside France (Aczel, 2020).

There has therefore been a progressive incorporation of environmental rights into international declarations and even into regional jurisprudence. Yet, there are no binding treaties to protect substantive environmental rights.

## 1.5 Environmental Rights: National Implementation

What makes states more or less likely to recognise and uphold environmental rights? There are several drivers and inhibitors to national implementation of environmental rights (see Figure 1.2). Among the drivers are the climate litigation movement, the persuasive power of global sustainable development norms, a growing corporate environmentalism, greater state regulation of private and transnational corporations and supply chains, liberal democratic norms, post-conflict environmental governance principles, ethno-environmentalism, greater recognition of indigenous rights, lobbying from rights of nature activists, more favourable political will from policy-makers, environmental-friendly public opinion and more deliberative forms of citizen engagement. Among the inhibitors are the "right to development" and universal welfarism, the lack of political will of national governments, the power of the private sector and international investors in extractive industries to prioritise short-term economic gains, and the fact that states may choose to exercise their sovereignty in ways that manifestly contribute to environmental degradation.

Compliance, enforcement, and the translation of environmental rights into policy is challenging (Grugel & Fontana, 2018). Difficult tensions and contradictions between environmental rights and national development or between "universal

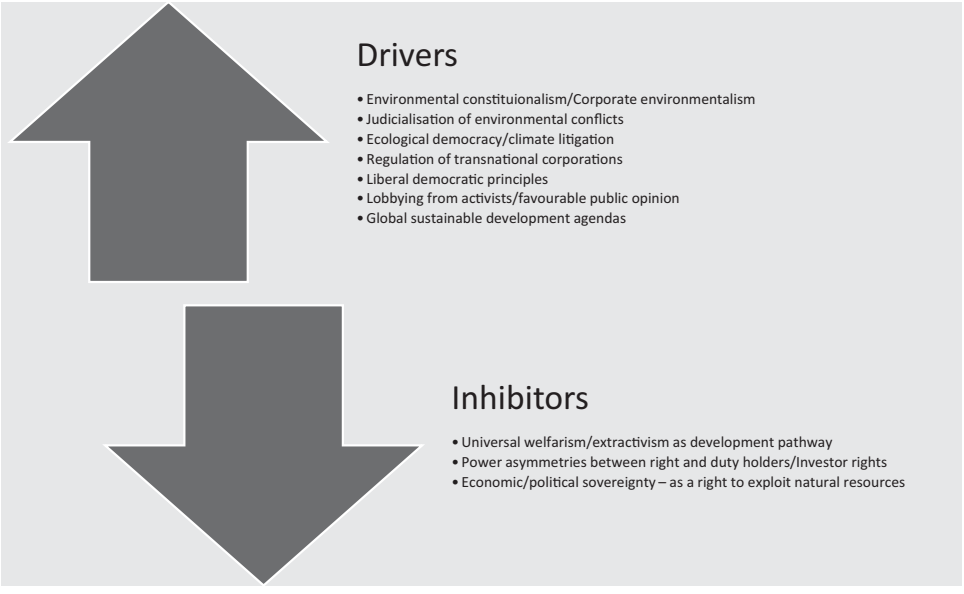


Figure 1.2 Environmental rights: Drivers and inhibitors

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welfarism“ and ethno-environmental concerns remain. The decision to recognise environmental rights is inherently political (Alston, 2017), and states in the exercise of their sovereignty may argue that environmental rights contrast with development priorities. In 2019, in response to the international outcry over Brazil's failure to rapidly contain the devasting Amazon fires and adequately regulate the use of the Amazon by the cattle industry, the government of Brazil strongly objected to what it saw as the international community's political interference in a sovereign state's internal environmental policy (Raftopoulos & Morley, 2020). In Africa, some of the courts were slow to advance legal doctrines on environmental rights as they sought to balance urgent local development priorities and environmental protection (Soyapi, 2019). Similarly, in India courts supporting government-led infrastructure and urban development projects were reticent to hold the state to account for expropriation of land that displaced communities or destroyed traditional uses of the land (Sinha, 2019). Ecuador, even after guaranteeing constitutional rights of Nature, launched large-scale mining projects in the Quimsacocha wetlands, paradoxically framing mining as an activity to safeguard national development (Valladares & Boelens, 2019).

Some scholars suggest that liberal democracies are more likely to favour “ecological democracy“ and democratic environmental governance (Barry, 2001) and thus recognise environmental rights like the right to food and water, rights to access to information, to environmental security etc. (Baber & Bartlett, 2019; Gellers & Jeffords, 2018). However, established democracies like the United States and the United Kingdom largely refuse to incorporate an autonomous right to the environment into their domestic law. Notably in 2010, together with 41 other states, these two states abstained from voting on a UN General Assembly resolution that would recognise the right to water and sanitation (Knox, 2020). In contrast, non-democratic states are gradually incorporating environmental rights. China's civil law, for example, now requires contracts to contribute to conservation and environmental protection (Zhai & Chang, 2019). Environmental rights are also becoming more relevant in conflict and post-conflict zones and are part of peacebuilding processes and post-conflict assessments (Weir, McQuillan, & Francis 2019). In Latin America, the rise of new-left governments that challenged neoliberal development paradigms also coincided with increased recognition of environmental, indigenous, and cultural rights. Even countries with poor human rights records have begun to recognise constitutional environmental rights, often with pressure from international norms and activists, lawyers, bureaucrats, judges etc. (Bruch et al., 2018; Gellers, 2017).

Environmental constitutionalism, or the trend towards including environmental rights in national constitutions (Gellers & Jeffords, 2018), is greater where there is

favourable political leadership, public engagement on rights and environmental issues, a constitutional ideology supportive of environmental rights, and in those states that have a tradition of upholding other economic, social, and cultural rights (May & Daly, 2015). States are influenced by other states, international organisations, and environmental activists to incorporate environmental rights through learning and emulation, together with persuasion and acculturation of related norms, including the global 2030 Sustainable Development Agenda. For example, organisations like the International Labor Organization may encourage higher national environmental standards for workers (Marchegiani, Morgera, & Parks, 2019). On the other hand, powerful international investors (Pellegrini et al., 2020; Scobie, 2020), the private sector, government programmes (Raftopoulos & Morley, 2020), and even present generations may limit ambition on environmental rights if the recognition of these rights restricts their pecuniary interests, prompting some scholars to suggest anti-age discrimination framing into laws related to the adverse health effects of environmental degradation on different age groups (Kaya, 2019). However, more inclusive and deliberative forms of citizen engagement in national politics are opening pathways towards environmental constitutionalism by incorporating traditionally unrepresented voices in environmental decision-making, including individuals, marginalised groups, ethnic minorities, indigenous communities (Hemming et al., 2019), nature, children (Makuch, Zaman and Aczel, 2019) and representatives for future generations (Mavrommati et al., 2020).

Human rights policy entrepreneurs, non-governmental groups and activists have been instrumental in building public appreciation for environmental rights. In Europe, civil society progressively shaped the discourse around access to justice in the lead-up to the Aarhus Convention, particularly through policy entrepreneurialism and litigation. Thus, rights that were initially designed to help Eastern Europeans achieve environmental democracy later shaped the legal opportunity structures for all of Europe more generally (Vanhala, 2018). By capitalising on crisis movements, leveraging political and public support; by identifying national values that are related to environmental protection (O'Gorman, 2017) and by their critique (particularly activists from South America and Australia) of what they consider to be hegemonic and postcolonial environmental policy, activists increase the visibility of environmental rights (Fitz-Henry, 2020).

In these new political trends, socially constructed environmental targets are more likely to be based on ethical values and to prioritise basic human needs and the human and environmental health of present and future generations (Mavrommati et al., 2020). There have also been cases where civil society and indigenous groups contributed to environmental rights by creating sustainability

standards and certification programmes, designed to mitigate the negative externalities of extractives for the local communities (Meadows, Annandale, & Ota, 2019). In the Niger delta, local non-governmental organisations (NGOs) tried to help indigenous peoples forced to relocate from their traditional lands to build coalitions of networks to demand participation and transparency in environmental decision-making and to challenge the pollution and destruction of agricultural land, drinking water, rivers, forests etc. (Denedo, Thomson, & Yonekura, 2019), although even after a favourable high court decision, the government did not enact necessary legislation to protect local communities (Faturoti, Agbaitoro, & Onya, 2019).

In some cases, the climate change movement has also indirectly favoured environmental rights since environmental rights are increasingly part of climate change rights-based litigation before courts in Europe and in Latin America (Recio, 2018). Much of the climate litigation against the large transnational carbon emitters, part of the Carbon Majors Petition (Abate, 2019), is premised on global action to obtain justice for climate victims (International Bar Association, 2014). In the US, however, climate litigation rarely (just about 5 percent of the time) references rights violations (Peel & Lin, 2019). By contrast, in 2019 the Supreme Court of the Netherlands decided that the state breached its obligations under Articles 2 and 8 of the European Convention on Human Rights (human right to life and family) by not implementing policies to reduce carbon emissions by the end of 2020 to at least 25 percent of 1990 levels (*Netherlands* v. *Urgenda Foundation* 2019), opening the door for similar rights-based litigation at the national level in other European states.

There is also a growing trend towards environmental rights norms emerging through the private sector. There are hopeful and positive examples of companies applying human rights' due diligence in supply chains, identifying human rights impacts, and taking action to respond and track, monitor and report on their actions that have environmental impacts (Smit et al., 2020). Yet state oversight of the private sector on matters of environmental rights is still inadequate both in developing and developed states. In many developing states, even where institutional and legal frameworks exist, states struggle with in-transparent systems, limited oversight, and limited involvement by citizens in environmental management (Okewu et al., 2018). In Ghana, local communities still suffered environmental degradation, even after large extractive industries made environmental human rights commitments (Idemudia, Kwakyewah, & Muthuri, 2020). The Canadian government's 2015 investigation into the Volkswagen diesel emissions fraud case was a good example of the challenges faced even by developed states' oversight committees to bring the corporate sector to justice.

In that instance, Volkswagen was found to be fraudulently reporting on emission reductions in automobiles (Fitzgerald & Spencer, 2020).

## 1.6 Conclusion

This chapter has examined some of the key debates around environmental rights. It has defined environmental rights, examined the types of actors involved in promoting these rights, the nature of environmental rights and their relationships with international human rights and environmental law. The chapter examined some of the scholarly arguments that support or oppose the recognition of environmental rights as a new set of constitutional rights. It argued that concepts like the Anthropocene and the right to development may inhibit the development of environmental rights: in the first case because the Anthropocene concept ignores environmental justice considerations and usually attributes responsibility for environmental crises to humankind more generally rather than to more recent Western exploitative human–nature relations; and in the latter because states juxtapose environmental protection with the need to exploit their natural resources for their own development. Implementing environmental rights continues to be a challenge for most states. The underlying tensions between the neoliberal model of growth, human rights, and the rights of nature, give developing countries with extractive industries in particular the unenviable task to find new, equitable, and just ways to build a socio-natural order that protects the environment while lifting their populations out of poverty (Lalander & Lembke, 2018).

While some environmental rights can be derived from existing rights, there is not an internationally legally binding treaty that recognises the human right to the environment, much less the rights of nature, as standalone rights under international law. Yet, there have been encouraging trends in developed and developing, democratic and undemocratic states towards addressing environmental rights through environmental constitutionalism. There is also evidence of environmental democratisation, with heretofore disenfranchised groups such as indigenous communities and future generations gaining procedural environmental rights. This trend towards a greater willingness to recognise environmental rights is clear in regional human rights treaties, in the decisions of regional and national courts, and in UN Declarations. This trend augers a positive future for environmental rights within international law.

### Notes

1 Article 8, Right to respect for private and family life: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is

necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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