

# INTERNATIONAL OBLIGATIONS CALLING FOR CONSTITUTIONAL PROTECTION OF THE RIGHT TO A HEALTHY ENVIRONMENT – AN ICELANDIC PERSPECTIVE

SNJÓLAUG ÁRNADÓTTIR\*

*The international recognition of a universal right to a healthy environment is reaching its pinnacle. At least 156 States have recognised this right through the adoption of international treaties and 161 States have recognised it through their endorsement of UN General Assembly Resolution 76/300. While codified in several regional agreements, the right is not binding on all States through treaty law. The European Convention on Human Rights makes no explicit reference to the environment which might lead to the conclusion that States Parties are under no obligation to implement a right to a healthy environment into their domestic legal systems. However, the jurisprudence of the European Court of Human Rights indicates that this right may be a precondition to the enjoyment of other rights safeguarded by the Convention. Furthermore, it may be becoming universally binding as a standalone right under customary international law. This article concludes that various international obligations require States to ensure an explicit or implicit right to a healthy environment and that such a right should enjoy constitutional status. It explains that elements of the right may be implicitly embedded in constitutions even if they have no environmental provisions, as is the case of the Icelandic constitution. However, that is not an appropriate implementation of the standalone right to a healthy environment.*

## 1 INTRODUCTION

Environmental constitutionalism has developed swiftly over past decades.<sup>1</sup> There was no mention of the environment in early human rights instruments, such as the 1948 Universal Declaration of Human Rights,<sup>2</sup> or constitutions from that time.<sup>3</sup> However, this has changed with increased understanding of the importance of a healthy environment as a precondition for the enjoyment of other human rights and with the realisation that environmental rights can be made more operational by framing them as human rights.<sup>4</sup> The link between environmental protection and anthropocentric interests was clearly established in the 1990s<sup>5</sup>

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\* Assistant Professor at Reykjavik University (Iceland).

<sup>1</sup> For a thorough discussion on environmental constitutionalism see James R May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press 2014); and Louis J Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart 2016).

<sup>2</sup> UNGA, 'Universal Declaration of Human Rights' (10 December 1948) UN Doc A/RES/217 (III) A.

<sup>3</sup> UNGA, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (24 December 2012) UN Doc A/HRC/22/43, para 7.

<sup>4</sup> See Alan E Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18(3) *Fordham Environmental Law Review* 471.

<sup>5</sup> UN Doc A/HRC/22/43 (n 3) para 9.

and environmental rights have now unequivocally entered the sphere of human rights. Indeed, the entry of environmental norms into human rights law is fitting due to the interdependence between environmental protection and human rights.<sup>6</sup> Environmental rights can be procedural and substantive, and a majority of constitutional provisions concerning the environment are rights-based and anthropocentric. Growing awareness of the interconnection between human rights and the environment has led to the greening of pre-existing human rights, e.g. the right to life and private life, and to the emergence of a new explicit right to a clean, 'healthy, safe, satisfactory or sustainable' environment.<sup>7</sup>

States' constitutions increasingly recognise an explicit and implicit right to a healthy environment. Environmental constitutionalism is flourishing, partly due to the growing recognition of the right to a healthy environment in regional treaties, protocols and case law. The right has not become universally binding through treaty law and that has allowed several States to refrain from implementing it into their domestic legal systems. For example, there is no explicit reference to a right to a healthy environment in the European Convention on Human Rights (ECHR)<sup>8</sup> and so Iceland, a State Party, has deemed justified not to ensure such a right in its domestic legal system. However, this may be changing as the right to a healthy environment becomes enshrined in other rights already safeguarded by the Convention and/or universally binding as a standalone right under customary international law. The European Court of Human Rights (ECtHR) has already indicated that provisions of the ECHR entail certain environmental safeguards and the Grand Chamber is expected to specifically address the right to a healthy environment in three upcoming judgments. Furthermore, the United Nations General Assembly (UNGA) recently adopted a resolution confirming the existence of a universal right to a healthy environment, both as an independent right and as an inherent precondition for the enjoyment of other human rights.<sup>9</sup> This resolution might be seen merely as soft law, a non-binding declaration. On the other hand, it might reflect *opinio juris* which, in combination with widespread state practice, can demonstrate the emergence of a new rule of customary international law binding for all States.

This article explores whether there are international obligations requiring States to ensure an explicit or implicit right to a healthy environment and whether such obligations demand constitutional status. Chapter 2 provides an overview of the evolution and definition of the right to a healthy environment. Chapter 3 examines relevant international obligations, including international and regional conventions, as well as potential customary international law. Chapter 4 explains why it may be necessary to implement these international obligations at the constitutional level and discusses different types of provisions. Chapter 5 shifts the focus to Iceland and considers whether an implicit right to a healthy environment can be derived from certain provisions or unwritten norms of the Icelandic Constitution. It also considers recent proposals for a new constitutional provision safeguarding the right to a healthy environment. The objective of the article is twofold; first, to assess the status of the

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<sup>6</sup> UN Doc A/HRC/22/43 (n 3) para 10.

<sup>7</sup> *ibid* para 11.

<sup>8</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

<sup>9</sup> UNGA, 'The human right to a clean, healthy and sustainable environment' (28 July 2022) UN Doc A/RES/76/300, paras 1 and 2.

universal right to a healthy environment and the need for implementation of that right. Second, to inform the ongoing debate concerning the need for an environmental provision in the Icelandic Constitution.

## 2 EVOLUTION AND DEFINITION OF THE RIGHT TO A HEALTHY ENVIRONMENT

The right to a healthy environment can be traced back to the 1972 Stockholm Declaration.<sup>10</sup> The UNGA decided to convene the Stockholm Conference due to ‘the continuing and accelerating impairment of the quality of the human environment’ and its impacts on ‘the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries’.<sup>11</sup> The Declaration establishes most of the general principles of international environmental law and lays the foundation for the human right to a healthy environment. It is anthropocentric and fleshes out the inherent link between economic growth, pollution and prosperity for mankind.<sup>12</sup> It explicitly states 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.<sup>13</sup>

This right continued to evolve and in 1990, the General Assembly declared that ‘all individuals are entitled to live in an environment adequate for their health and well-being’.<sup>14</sup> It is not as explicitly referenced in the Rio Declaration of 1992,<sup>15</sup> which stipulates only that human beings are ‘entitled to a healthy and productive life in harmony with nature’.<sup>16</sup>

International support for the right to a healthy environment has grown in recent decades. Several international and regional treaties now codify the right, as detailed in chapter 3.1. Moreover, non-governmental organisations and the States most heavily impacted by the adverse effects of climate change, such as the Maldives, have pushed for the recognition of a universal right to a healthy environment.<sup>17</sup> This movement has relied heavily on the work of the two Special Rapporteurs for Human Rights and the Environment, John Knox and David Boyd, advocating for UN recognition of the right to a healthy environment due to the greening of basic human rights such as the rights to life, health, food, water,

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<sup>10</sup> UN Conference on the Human Environment, ‘Stockholm Declaration on the Human Environment’ (concluded 16 June 1972, adopted by the UNGA 15 December 1972) see UN Docs A/RES/27/2994, A/RES/27/2995 and A/RES/22/2996 (Stockholm Declaration).

<sup>11</sup> UNGA, ‘Problems of the human environment’ (3 December 1968) UN Doc A/RES/23/2398.

<sup>12</sup> See particularly the Preamble, paras 2-6.

<sup>13</sup> Stockholm Declaration (n 10) principle 1.

<sup>14</sup> UNGA, ‘Need to ensure a healthy environment for the well-being of individuals’ (14 December 1990) UN Doc A/RES/45/94.

<sup>15</sup> See Alan E Boyle, Catherine Redgwell, and Patricia W Birnie, *Birnie, Boyle & Redgwell’s International Law and the Environment* (Oxford University Press 2021) 286; and UN Doc A/HRC/22/43 (n 3) para 14.

<sup>16</sup> Principle 1 of the Rio Declaration on Environment and Development (13 June 1992) 31 ILM 874.

<sup>17</sup> UN News, ‘UN General Assembly declares access to clean and healthy environment a universal human right’ (UN News, 28 July 2022) <<https://news.un.org/en/story/2022/07/1123482>> accessed 1 October 2023.

housing, culture, development, property, home and private life.<sup>18</sup> The efforts have culminated in two monumental resolutions affirming the right to a healthy environment: a resolution by the UN Human Rights Council (UNHRC), dated 8 October 2021,<sup>19</sup> and a UNGA resolution from 28 July 2022.<sup>20</sup> These resolutions ‘recognize the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights’.<sup>21</sup> They note that ‘the right to a clean, healthy and sustainable environment is related to other rights and existing international law’.<sup>22</sup> Paragraphs 1 of both resolutions confirm that the right to a healthy environment is a self-standing right; the recognition of this ‘as a human right’ underpins its independence while paragraph 2 emphasises the importance of a healthy environment for the enjoyment of other human rights. Paragraphs 3 of both resolutions specify that the right calls for ‘the full implementation of the multilateral environmental agreements under the principles of international environmental law’<sup>23</sup> and urge States to adopt policies and cooperate to secure this right for all.<sup>24</sup> These resolutions represent a remarkable step forward in the development of this universal right and are expected to prove useful in future environmental and climate litigation cases.<sup>25</sup>

These developments have been followed by further notable actions on the international arena. In particular, on 27 September 2022, the Council of Europe urged its 46 States Parties to ‘reflect on the nature, content and implications of the right to a clean, healthy and sustainable environment and, on that basis, actively consider recognising at the national level this right as a human right that is important for the enjoyment of human rights and is related to other rights and existing international law’.<sup>26</sup> This recommendation is put forth as a response to ‘the increased recognition of some form of the right to a clean, healthy and sustainable environment in, *inter alia*, international instruments, including regional human rights instruments, and national constitutions, legislation and policies’.<sup>27</sup> It thus underlines the growing number of international and domestic (including constitutional) law recognising the right to a healthy environment and affirms the need for implementation of the international obligations into national laws and/or constitutions. More recently, on 16-17 May 2023, the Heads of State and Government of the Council of Europe referred to the right to a healthy environment in Appendix V to the Reykjavik Declaration.<sup>28</sup> Here, States Parties to the Council of Europe noted ‘the increased recognition of the right to a clean,

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<sup>18</sup> European Parliament, ‘At a Glance: A universal right to a healthy environment’ (2021) <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/698846/EPRS\\_ATA\(2021\)698846\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/698846/EPRS_ATA(2021)698846_EN.pdf)> accessed 1 October 2023; see Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (19 July 2018) UN Doc A/73/188.

<sup>19</sup> Human Rights Council, ‘The human right to a clean, healthy and sustainable environment’ (8 October 2021) UN Doc A/HRC/RES/48/13.

<sup>20</sup> UN Doc A/RES/76/300 (n 9).

<sup>21</sup> UN Doc A/HRC/RES/48/13 (n 19) para 1 and UN Doc A/RES/76/300 (n 9) para 1.

<sup>22</sup> UN Doc A/RES/76/300 (n 9), para 2 and UN Doc A/HRC/RES/48/13 (n 19) para 2.

<sup>23</sup> UN Doc A/RES/76/300 (n 9) para 3 and UN Doc A/HRC/RES/48/13 (n 19) para 3.

<sup>24</sup> UN Doc A/RES/76/300 (n 9) para 4 and UN Doc A/HRC/RES/48/13 (n 19) para 4.

<sup>25</sup> European Parliament (n 18).

<sup>26</sup> Council of Europe, ‘Recommendation CM/Rec(2022)20 of the Committee of Ministers to member States on human rights and the protection of the environment’ (27 September 2022) article 1.

<sup>27</sup> *ibid* preamble.

<sup>28</sup> ‘Reykjavik Declaration: United around our values’, Reykjavik Summit, 4th Summit of Heads of State and Government of the Council of Europe (16-17 May 2023).

healthy and sustainable environment in, *inter alia*, international instruments, regional human rights instruments, national constitutions, legislation and policies’ and ‘the extensive case-law and practice on environment and human rights developed by the European Court of Human Rights and the European Committee of Social Rights’. In that context, they committed ‘to actively consider recognising at the national level this right as a human right that is important for the enjoyment of human rights and is related to other rights and existing international law’.<sup>29</sup>

There is no single definition of the right to a clean, healthy or sustainable environment. The lack of definitions and difficulties involved when invoking the right in concrete situations may reduce its practical significance,<sup>30</sup> although the recent resolutions give reason for optimism.<sup>31</sup> There is some difference in the terminology adopted in different instruments. Terms like ‘safe’, ‘suitable’, and ‘adequate’ entail a rather anthropocentric approach because they imply a reference to human well-being. However, the words ‘clean’, ‘healthy’ and ‘non-polluted’ suggest that the state of the environment should be assessed more objectively.<sup>32</sup> The word ‘safe’ was omitted from the UNHRC resolution last minute due to concerns over potential state responsibility.<sup>33</sup> The right to a healthy environment, as referred to in this article, generally relates to access to clean air, clean water, decent food and sanitation, as well as a stable climate, healthy biodiversity and healthy ecosystems.<sup>34</sup> The aforementioned resolutions make clear that it is both an independent right and closely related to other human rights; an implicit precondition for the enjoyment of other rights such as the right to life. Recognition of the right to a healthy environment in connection to other human rights essentially entails the ‘greening’ of human rights, a process that has long been underway.<sup>35</sup> In contrast, the explicit recognition of an independent right to a healthy environment could be ‘truly revolutionary’, particularly if it involves an individual human right.<sup>36</sup>

### 3 INTERNATIONAL LAW ON THE RIGHT TO A HEALTHY ENVIRONMENT

The right to a healthy environment is explicitly recognised in numerous international instruments. It is codified in several regional human rights treaties as well as the Aarhus Convention<sup>37</sup> but not explicitly mentioned in the ECHR. However, the right to a healthy

<sup>29</sup> Reykjavík Declaration (n 28) Appendix V: The Council of Europe and the environment, ii.

<sup>30</sup> Ke Tang and Otto Spijkers, ‘The Human Right to a Clean, Healthy and Sustainable Environment’ (2022) 6 Chinese Journal of Environmental Law 87, 103; Amirouche Debichie, ‘The Third Generation of Human Rights: The Right to A Healthy Environment’ (2021) 4(3) Economics and Sustainable Development Review 413.

<sup>31</sup> Tang and Spijkers (n 30) 105.

<sup>32</sup> *ibid* 103.

<sup>33</sup> *ibid* 102.

<sup>34</sup> UN Human Rights Council, ‘Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (8 January 2019) UN Doc A/HRC/40/55 para 17. See also David R Boyd, ‘The Implicit Constitutional Right to Live in a Healthy Environment’ (2011) 20(2) RECIEL 171, 171.

<sup>35</sup> Tang and Spijkers (n 30) 88; James McClymonds, ‘The Human Right to a Healthy Environment: An International Legal Perspective’ (1992) 37(4) The New York Law School Law Review 583; Sumudu Atapattu, ‘The Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law’ (2002) 16(1) Tulane Environmental Law Journal 65.

<sup>36</sup> Tang and Spijkers (n 30) 88.

<sup>37</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

environment has been read into international treaties even without any explicit reference to the environment<sup>38</sup> and is, to some extent, implicitly incorporated into the ECHR. Furthermore, the growing state practice recognising a right to a healthy environment may suggest that the right has become binding on all States under customary international law. This chapter will first explain how the right to a healthy environment appears in international and regional human rights treaties and then assess whether it has entered the corpus of customary international law.

### 3.1 HUMAN RIGHTS TREATIES

This section gives an overview of the most relevant treaties. It pays special attention to the ECHR and the jurisprudence of the ECtHR as that is particularly relevant for deciphering the human rights obligations of Iceland.

#### 3.1[a] UN Treaties

Several international human rights treaties allude to a right to a healthy environment. Most of these treaties, as well as the Universal Declaration on Human Rights, predate the developments that led to the creation of this right and therefore, do not clearly articulate a right to a healthy environment. Nonetheless, certain provisions indicate that a right to a healthy environment underpins other human rights. For example, the 1966 International Covenant on Economic, Social and Cultural Rights ensures the right to the highest attainable standard of physical and mental health, and obliges States Parties to take steps to improve all aspects of environmental and industrial hygiene.<sup>39</sup> Similarly, the 1989 Convention on the Rights of the Child provides that States Parties shall combat disease and malnutrition *inter alia* by providing adequate nutritious foods and clean drinking water with consideration for the dangers and risks of environmental pollution.<sup>40</sup> Moreover, decisions of human rights treaty bodies of the UN and case law of regional courts and commissions, demonstrate that the deterioration of the environment threatens the enjoyment of various human rights, such as the right to life, health and nutrition.<sup>41</sup>

The UN regime on climate change can also be seen as a human rights treaty regime. Its primary objective is environmental protection, i.e., adaptation and mitigation of climate change, and it has a strong anthropocentric focus. Principle 3(1) of the UN Framework Convention on Climate Change (UNFCCC)<sup>42</sup> stipulates that the climate system shall be protected ‘for the benefit of present and future generations of humankind’ and the Paris Agreement strikes a similar cord, noting that ‘climate change is a common concern of humankind’.<sup>43</sup> The preamble of the Paris Agreement also makes clear that efforts to combat

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<sup>38</sup> Boyd, ‘The Implicit Constitutional Right to Live in a Healthy Environment’ (n 34) 178.

<sup>39</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, Art 12.

<sup>40</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Art 24.

<sup>41</sup> See UN Doc A/HRC/22/43 (n 3) para 34.

<sup>42</sup> United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

<sup>43</sup> See the preamble of Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/L.9/Rev/1.

climate change serve the purpose of preventing hunger due to the ‘vulnerabilities of food production systems to the adverse impacts of climate change’. It urges States Parties to ‘consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity’ when addressing climate change and affirms the need for public participation, access to information and cooperation in the implementation of the Agreement.<sup>44</sup> All of this makes the UNFCCC and the Paris Agreement environmental human rights treaties with the overarching objective of ensuring the right to a healthy environment. The supreme court of Brazil recently endorsed this view.<sup>45</sup>

### 3.1 [b] *Regional Treaties*

Numerous regional treaties entail references to a healthy environment. The 1998 Aarhus Convention states, in its preamble that ‘every person has the right to live in an environment adequate to his or her health and well-being’. Article 1 of the convention prescribes ‘the right of every person of present and future generations to live in an environment adequate to his or her health and well-being’. Similarly, article 24 of the 1981 African Charter on Human and Peoples’ Rights states that ‘all peoples shall have the right to a general satisfactory environment favorable to their development’.<sup>46</sup> The 2004 Arab Charter on Human Rights provides that ‘every person has the right [...] to a healthy environment’<sup>47</sup> and the Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights stipulates that ‘everyone shall have the right to live in a healthy environment’.<sup>48</sup> The Association of Southeast Asian Nations Human Rights Declaration affords individuals ‘a right to an adequate standard of living, including the right to a safe, clean and sustainable environment’.<sup>49</sup> Additionally, the Escazú Agreement from 2018, which resembles the Aarhus Convention but is applicable in Latin America and the Caribbean, refers to ‘the protection of the right of every person of present and future generations to live in a healthy environment’.<sup>50</sup> These are examples of explicit provisions establishing a right to a healthy environment but regional courts and commissions have found that environmental degradation can impact the enjoyment of well-established human rights such as the right to

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<sup>44</sup> *ibid.*

<sup>45</sup> *PSB et al v Brazil* (on Climate Fund) (Federal Supreme Court of Brazil) (30 June 2022) unofficial English translation, para 17 <<http://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/>> accessed 1 October 2023.

<sup>46</sup> African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

<sup>47</sup> Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), reprinted in 12 *Int’l Hum Rts Rep* 893 (2005), Art 38.

<sup>48</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (adopted 14 November 1988, entered into force 16 November 1999) 28 *ILM* 156, Art 11.

<sup>49</sup> ASEAN Human Rights Declaration (adopted November 18, 2012), para 28 (f) <<https://asean.org/asean-human-rights-declaration/>> accessed 1 October 2023.

<sup>50</sup> Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) C.N.196.2018.TREATIES-XXVII.18, Art 1.

life, right to health, property, home and privacy, even in the absence of explicit environmental provisions.<sup>51</sup>

### 3.1 [c] *European Convention on Human Rights*

The ECHR does not include provisions explicitly relating to a right to a healthy environment. However, it shall be interpreted in light of the circumstances existing at the time of application. This evolutive interpretation is necessary to ensure the effective protection of human rights<sup>52</sup> and has led to the classification of the ECHR as a living instrument.<sup>53</sup> It allows for the convention to be applied to issues not specifically anticipated at the time of its adoption, insofar as they impact basic human rights. One example is environmental harm and the unprecedented environmental degradation caused by climate change. There have been discussions about the adoption of an annex to the ECHR on environmental protection but such proposals have been rejected due to the rapid development of case law in the field.<sup>54</sup> Indeed, the jurisprudence of the ECtHR indicates that the convention already incorporates a right to a healthy environment, at least insofar as it relates to the enjoyment of other human rights explicitly protected therein.

The environmental jurisprudence of the ECtHR has developed quickly over the past three decades. The first case indirectly addressing a right to healthy environment was the *López Ostra v Spain* case of 1994, where the court found that Spain had violated article 8(1) ECHR<sup>55</sup> by failing to sufficiently consider the impacts of a waste treatment plant on local residents.<sup>56</sup> Four years later, in *Guerra v Italy*, the ECtHR found that article 8 was applicable due to the emissions of toxic fumes at a distance of approximately one kilometre from the applicants' homes.<sup>57</sup> The court went on to note that article 8 would, in such cases, not only protect individuals from arbitrary interference from the government but that it could also impose positive obligations on States.<sup>58</sup> This meant that States could be held liable for failure to take measures to protect against environmental degradation impacting the right to private and family life. In the *Kyrtatos v Greece* case of 2003, the court referred to its established

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<sup>51</sup> UN Doc A/HRC/22/43 (n 3) para 24. See e.g., African Commission on Human and Peoples' Rights, communication No 155/96 *Social and Economic Rights Action Center v Nigeria (Ogoniland Case)*, decision, para 67; *Önerildiz v Turkey* App no 48939/99 (ECtHR, 30 November 2004) para 118; Inter-American Commission on Human Rights, report on the situation of human rights in Ecuador, document OEA/Ser.L/V/II.96 doc 10 rev 1; European Committee of Social Rights, complaint No 30/2005 *Marangopoulos Foundation for Human Rights v Greece* para 221; *Saramaka People v Suriname*, Series C No 172, (Inter-American Court of Human Rights, 28 November 2007) paras 95, 158; *Indigenous Community of Yakye Axa v Paraguay*, Series C No 125 (Inter-American Court of Human Rights, 17 June 2005) para 143, 156; Inter-American Commission on Human Rights, *Maya Indigenous Community of the Toledo District v Belize*, case 12.053, report no 40/04, document OEA/Ser.L/V/II.122, doc 5 rev 1, para 153; *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005) para 134; *Taşkın and others v Turkey* App no 46117/99 (ECtHR, 10 November 2004) para 126; *López Ostra v Spain* App no 16798/90 (ECtHR, 9 December 1994) para 58.

<sup>52</sup> *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 35; *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) para 31.

<sup>53</sup> *Tyrer v United Kingdom* (n 52) para 31.

<sup>54</sup> Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(3) *The European Journal of International Law* 615.

<sup>55</sup> The provision establishes a right to respect for an individual's private and family life, home and correspondence.

<sup>56</sup> *López Ostra v Spain* (n 51) para 58.

<sup>57</sup> *Guerra and others v Italy* App no 14967/89 (ECtHR, 19 February 1998) para 57.

<sup>58</sup> *ibid* para 58.



jurisprudence confirming that ‘severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health’.<sup>59</sup> The majority concluded that for environmental pollution to constitute a violation of article 8, there had to be harmful impacts on an individual’s rights and not merely a ‘general deterioration of the environment’ and that this threshold was not met in that case.<sup>60</sup> Still, in a partly dissenting opinion judge Zagrebelsky found that the adverse impacts on birds and other wildlife did affect the applicant’s rights under article 8 of the ECHR because the fauna had previously made the area exceptionally enjoyable.<sup>61</sup>

Similar cases have also involved article 2 ECHR concerning the right to life. The ECtHR confirmed a violation article 2 ECHR in the case of *Budayeva and Others v Russia* in 2008 after Russian authorities failed to protect the lives of people killed in mudslides that devastated the town of Tyrnauz.<sup>62</sup> Here the court confirmed that the environmental considerations relevant under article 8 ECHR could also be relied on under article 2 ECHR.<sup>63</sup> *Taskin and others v Turkey* addressed alleged violations of articles 2, 6 and 8 ECHR. This case concerned a decision by a Supreme Administrative Court which had concluded that ‘the use of sodium cyanide in the mine represented a threat to the environment and the right to life of the neighbouring population, and that the safety measures which the company had undertaken to implement did not suffice to eliminate the risks involved in such an activity’.<sup>64</sup> The applicant claimed that the decision to authorise a gold mine to use a cyanidation process and failure to abide by decisions of administrative courts amounted to a violation of the right to life, under article 2 ECHR. However, the court found it unnecessary to address this application specifically as it had already found a violation under article 8 ECHR.<sup>65</sup> In *Tatar and Tatar v Romania* of 2009, the ECtHR found that Romania had failed to prevent an environmental disaster due to the use of sodium cyanide in a goldmine. The case concerned the right to home and private life as well as the right to life but was decided under article 8.<sup>66</sup> The Court confirmed that article 8 could be relevant in environmental cases regardless of whether the pollution was directly caused by the State or due to inadequate safeguards.<sup>67</sup> The Court went on to explain that the overriding positive obligation in relation to environmental matters was to enact legislation and take administrative measures to effectively prevent damage to the environment and human health.<sup>68</sup> Finally, it confirmed that the obligation to take measures to respect the parties’ right to home and private live extended, more generally, to the protection of a healthy environment.<sup>69</sup>

The ECtHR elaborated on the positive obligations of States in the *Fadeyeva v Russia* case of 2007. It found a violation of article 8 ECHR because the State involved had not

<sup>59</sup> *Kyrtatos v Greece* App no 4166/98 (ECtHR, 22 May 2003) para 52.

<sup>60</sup> *ibid* paras 52-53.

<sup>61</sup> *ibid* partly dissenting opinion of Judge Zagrebelsky.

<sup>62</sup> *Budayeva and Others v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008) paras 158-160.

<sup>63</sup> *ibid* para 133.

<sup>64</sup> *Taskin and others v Turkey* (n 51) para 112.

<sup>65</sup> *ibid* paras 126, 139-140.

<sup>66</sup> *Tatar and Tatar v Romania* App no 67021/01 (ECtHR, 27 January 2009) para 71.

<sup>67</sup> *ibid* para 87.

<sup>68</sup> *ibid* para 88.

<sup>69</sup> *ibid* para 107.

struck ‘a fair balance between the interests of the community and the applicant’s effective enjoyment of her right to respect for her home and her private life’ when licensing the operation of a heavily polluting plant.<sup>70</sup> The State had designated a safety zone near the plant where no one should live but it failed to properly implement this legislation and provide the applicant with an effective solution to help her relocate.<sup>71</sup> More recently, in 2011, the court summarised its case-law relating to article 8 and environmental harm, concluding that no provision of the ECHR ensures environmental protection as such and that article 8 will not be activated unless the harm in question exceeds the general hazards inherent to life in modern cities. Yet, there may be a violation of article 8 if the environmental harm reaches the level of causing considerable impairment of the enjoyment of the rights to home, private or family life. This depends *inter alia* on ‘the intensity and duration of the nuisance and its physical or mental effects on the individual’s health or quality of life’.<sup>72</sup> This particular case involved the operation of two factories causing major industrial pollution and the State’s efforts to limit their impacts on the applicants’ rights under article 8. The court confirmed that the State had a broad margin of appreciation and that it would not be obliged to provide ‘free new housing at the State’s expense’ as the ‘complaints could also be remedied by duly addressing the environmental hazards’.<sup>73</sup>

More environmental cases are currently pending before the ECtHR Grand Chamber. In particular, three cases involve the impact of climate change on the enjoyment of human rights safeguarded by the ECHR and have the potential to significantly impact the future application of the convention. The first of these cases is *Carême v France* which involves a complaint by an individual and former mayor of a municipality in France who alleges that France’s failure to take sufficient steps to abate climate change amounts to a violation of articles 2 and 8 ECHR.<sup>74</sup> The second climate case before the Grand Chamber is *Verein KlimaSeniorinnen Schweiz et al v Switzerland*, which involves a Swiss climate organization whose members include older women and four additional women between the ages of 78 and 89. The applicants claim that the Swiss government is contributing to global warming, causing, among other things, heat waves that are having negative impacts on their health and living conditions.<sup>75</sup> The third case is *Duarte Agostinho et al v Portugal et al*, involving a complaint by Portuguese youth regarding the emission of greenhouse gases by 33 States Parties to the ECHR. The case links the UN climate regime to the ECHR, alleging that the lack of adequate measures to combat the adverse effects of climate change constitutes a violation of the ECHR.<sup>76</sup> It is particularly noteworthy that in preparation for hearing the case, the Grand Chamber *proprio motu* asked the parties to clarify the potential relevance of article 3 ECHR concerning the prohibition of inhuman or degrading treatment.<sup>77</sup> The environmental jurisprudence of the ECtHR has, until now, not involved this provision so the court’s decision to assess the relevance of article 3 constitutes an important development. These

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<sup>70</sup> *Fadeyeva v Russia* (n 51) para 134.

<sup>71</sup> *ibid* para 133.

<sup>72</sup> *Dubetska and others v Ukraine* App no 30499/03 (ECtHR, 10 February 2011) para 105.

<sup>73</sup> *ibid* para 150.

<sup>74</sup> *Carême v France* App no 7189/21 (pending before the ECtHR).

<sup>75</sup> *Verein KlimaSeniorinnen Schweiz et al v Switzerland* App no 53600/20 (pending before the ECtHR).

<sup>76</sup> *Duarte Agostinho et al v Portugal et al* App no 39371/20 (pending before the ECtHR).

<sup>77</sup> *Duarte Agostinho et al v Portugal et al* App no 39371/20, request no 39371/20 (Communicated on 13 November 2020, published on 30 November 2020).

decisions are expected to be very impactful, partly because jurisdiction has been relinquished to the Grand Chamber. The hearings have taken place in all three cases. Several other climate cases are pending before the ECtHR but hearings have been postponed until after the Grand Chamber hands down its judgments in these three cases.

National courts have also contributed to the greening of ECHR provisions and have linked the underlying right to a healthy environment to climate change. For example, in the *Urgenda Foundation v Netherlands* judgment of 2018, the Hague Court of Appeal referenced reports of the Intergovernmental Panel on Climate Change, the Paris Agreement and decisions by the Conference of the Parties to the UN Framework Convention on Climate Change before arriving at the conclusion that the Netherlands had violated its obligations under articles 2 and 8 ECHR due to insufficient climate action.<sup>78</sup> More recently, in the *Neubauer et al v Germany* case of 2021, the Federal Constitutional Court of Germany found that Germany was obliged to reduce greenhouse gas emissions to achieve the objective of the Paris Agreement and to satisfy constitutional provisions concerning the right to human dignity, the right to life and physical integrity, and the State's obligation to protect the natural foundations of life for future generations. The relevant constitutional provisions were interpreted *inter alia* by reference to the ECHR and its jurisprudence.<sup>79</sup>

### 3.2 CUSTOMARY INTERNATIONAL LAW OBLIGING STATES TO ENSURE THE RIGHT TO A HEALTHY ENVIRONMENT?

The treaties discussed above do not establish a universal right to a healthy environment. The UN Special Rapporteur on Human Rights and the Environment asserted in 2019 that although the right to a healthy environment had been recognised by most States through constitutional law, domestic legislation and various treaties, it had 'not yet been recognized as such at the global level'.<sup>80</sup> This was true in 2019 but historic milestones have been reached since, most notably the resolutions of the UNHRC and the UNGA. The Special Rapporteur has referred to the former as a 'historic resolution recognizing, for the first time at the global level, the human right to a clean, healthy and sustainable environment', effecting 'a turning point in the evolution of human rights'.<sup>81</sup> The subsequent UNGA resolution further established this right and did so through a channel widely known for demonstrating state practice and *opinio juris*. Consequently, the universal right to a healthy environment may be entering the corpus of customary international law. This section will discuss the requirements for a right to achieve a customary international law status and the recent developments to determine whether the relevant requirements are satisfied in the case of the right to a healthy environment.

<sup>78</sup> *Urgenda Foundation v Netherlands*, case no 200.178.245/01 (Hague Court of Appeal 9 October 2018) unofficial translation, paras 5-12, 15 and 73 <[https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20181009\\_2015-HAZA-C0900456689\\_decision-4.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf)> accessed 1 October 2023.

<sup>79</sup> *Neubauer et al v Germany* (Federal Constitutional Court 29 April 2021) summary and case documents <<http://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/>> accessed 1 October 2023.

<sup>80</sup> UN Doc A/HRC/40/55 (n 34) Summary.

<sup>81</sup> 'The Right to a Clean, Healthy and Sustainable Environment: Non-Toxic Environment, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment' (12 January 2022) UN Doc A/HRC/49/53 paras 1, 47-49, 54, 62, 64, 77, and 89(i).

### 3.2[a] Requirements for Customary International Law

The requirements for customary international law are state practice and *opinio juris*.<sup>82</sup> A rule will not become binding on States as customary international law without widespread and uniform state practice<sup>83</sup> and the belief that such practice is binding as law.<sup>84</sup> The International Court of Justice (ICJ) does not seem to place a heavy emphasis on evidencing *opinio juris* when evaluating whether a rule has entered the corpus of customary international law.<sup>85</sup> State practice is arguably the more important requirement of the two. After all, the distinction between state practice and *opinio juris* can be ambiguous and the latter can be derived from general practice, e.g. the conclusion of treaties,<sup>86</sup> or from positive evidence demonstrating the presence of *opinio juris*.<sup>87</sup>

Resolutions by international organisations often reflect *opinio juris*.<sup>88</sup> This is particularly true of UNGA resolutions.<sup>89</sup> In the *Nuclear Weapons Advisory Opinion*, the ICJ found that even if UNGA resolutions are not binding, they can ‘sometimes have normative value [and] in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*’.<sup>90</sup> These resolutions can actually play a twofold role in the creation of customary international law, serving as means to identify *opinio juris* and to synchronize state practice. *Opinio juris* can, according to Sir Hersch Lauterpacht, be derived from uniform actions of States, such as that expressed in joint resolutions, except when that is clearly not their intention.<sup>91</sup> This is why the support behind each resolution is relevant when determining its impact. According to the ILA’s *London Statement of Principles Applicable to the Formation of General Customary International Law*, ‘[r]esolutions accepted [by States] unanimously or almost unanimously, and which evidence a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by the mere fact of their adoption’.<sup>92</sup>

The following factors are relevant when assessing whether state practice reflects custom: duration, repetition, consistency and generality. The practice of codifying a right to a healthy environment in international instruments or constitutions dates back approximately forty years when Portugal adopted an environmental provision in its constitution in 1976<sup>93</sup> while the African Charter, with its reference to a healthy environment, dates back to 1981. The practice has been repeated in different declarations and instruments, by a growing

<sup>82</sup> See David Patariaia, *International Law: Text, Cases and Materials* (Routledge 2021) 66-68.

<sup>83</sup> See, e.g., *Asylum (Colombia/Peru)* (Judgment) [1950] ICJ Rep 266, 277; *Right of Passage over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 6, 40.

<sup>84</sup> See *North Sea Continental Shelf (Federal Republic of Germany/Netherlands) (Federal Republic of Germany/Denmark)* (Judgment) [1969] ICJ Rep 3, 44.

<sup>85</sup> Philippe Sands and Jacqueline Peel with Adriana Fabra and Ruth MacKenzie, *Principles of International Environmental Law, Fourth Edition* (Cambridge University Press 2018) 122 referring to the *Advisory Opinion on the Legality of the Use of Nuclear Weapons* and the *Pulp Mills* case.

<sup>86</sup> Sands and Peel (n 85) 122.

<sup>87</sup> Ian Brownlie, *Principles of Public International Law* (Clarendon Press 1998) 7-11.

<sup>88</sup> Jan Klabbers, *International Law, Third Edition* (Cambridge University Press 2021) 32.

<sup>89</sup> See, e.g., *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 132, para 188.

<sup>90</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 70.

<sup>91</sup> See Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens 1958) 380.

<sup>92</sup> ILA Committee on Formation of Customary (General) International Law, ‘London Statement of Principles Applicable to the Formation of General Customary International Law’ (2000) 61, para 32.

<sup>93</sup> UN Doc A/HRC/22/43 (n 3) para 12.

number of States, demonstrating repetition. The consistency and generality also seem to be increasing because the reference to a healthy environment has steadily grown over the past decades and a big majority of States now supports the notion of a human right to a healthy environment. Indeed, there may have been regional differences for some time due to the absence of an environmental provision in the ECHR but that is arguably diminishing as more European States adopt constitutional provisions codifying the right to a healthy environment.

### 3.2[b] *Current Status*

The practice of recognising the right to a healthy environment has become widespread in the past decade. The right has been reiterated in different fora, read into different treaties and States have taken note of each others' legislation and jurisprudence when implementing this right into domestic settings.<sup>94</sup> This has resulted in a cross-pollination and harmonisation of relevant state practice. For example, in 1976, Portugal made the first ever constitutional reference to a 'right to a healthy and ecologically balanced environment' and by 2012, this phrase had already been repeated in 21 other constitutions.<sup>95</sup> In 2019, the UN Special Rapporteur on Human Rights and the Environment reported that 110 States had implemented the right to a safe, clean, healthy and sustainable environment into their constitutions.<sup>96</sup> Furthermore, 156 States had legally recognised this right through domestic or international obligations.<sup>97</sup> That means that out of the 193 members to the UN, no more than 37 States have refrained from recognising the legal obligation to ensure a right to a healthy environment and this overwhelming state practice may indicate that the remaining States are bound by the same obligation through customary international law. Indeed, there have been no persistent objectors, and the number of States accepting the obligation implicitly through international instruments may be even higher than 156. After all, there are 194 States Parties to the Paris Agreement<sup>98</sup> which implicitly safeguards the human right to a healthy environment.

There is also some evidence of *opinio juris* for customary international law on the right to a healthy environment. Both resolutions were supported by overwhelming majorities but their evidentiary value is somewhat reduced by declarations of individual States. The resolution of the Human Rights Council was adopted with forty-three votes in favour and four abstentions (China, India, Japan, and Russia). The United States was not a member of the Human Rights Council at the time of adoption but issued a statement on 13 October 2021 to clarify its position. It stated 'that there [were] no universally recognized human rights specifically related to the environment' and no basis for the recognition of the "right to a clean, healthy, and sustainable environment", either as an independent right or a right derived from existing rights'. Moreover, the United States did 'not see this resolution as altering the

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<sup>94</sup> See Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (n 34) 178.

<sup>95</sup> *ibid.*

<sup>96</sup> UN Human Rights Council, 'Right to a healthy environment: good practices, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (30 December 2019) UN Doc A/HRC/43/53, para 10.

<sup>97</sup> *ibid* para 13.

<sup>98</sup> UN Climate Change, 'Paris Agreement - Status of Ratification' <<https://unfccc.int/process/the-paris-agreement/status-of-ratification>> accessed 23 November 2022.

content of international law or establishing a precedent in other fora'.<sup>99</sup> China and Russia took similar positions.<sup>100</sup> It was anticipated that the reaction of the international community to the UNHRC resolution would determine whether it turned out to be a 'game changer' in the development of the right to a healthy environment<sup>101</sup> and the following events were significant.

The UNGA resolution on the right to a healthy environment was adopted unanimously, by 161 votes in favour. There were no votes against but eight abstentions (Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Russian Federation, and Syria). This time, the United States voted in favour of the resolution and its altered position may be indicative of the swift developments in the field. However, while a vote in favour of a resolution can often be taken as support of a developing rule of customary international law, certain States (including the United Kingdom, New Zealand and the United States) specified that this was not their intention in regards to the right to a healthy environment.<sup>102</sup> According to the United States:

a right to a clean, healthy, and sustainable environment has not yet been established as a matter of customary international law; treaty law does not yet provide for such a right; and there is no legal relationship between such a right and existing international law. And, in voting 'YES' on this resolution the United States does not recognize any change in the current state of conventional or customary international law.<sup>103</sup>

Perhaps such statements were made because the States in question wanted to prevent the crystallisation of the customary right to a healthy environment but found themselves unable to vote against it because of the overwhelming support from the international community. At any rate, the repeated use of the word 'yet' in the statement of the United States suggests that the right to a healthy environment is in the process of becoming customary international law.

#### 4 CONSTITUTIONAL STATUS OF THE RIGHT TO A HEALTHY ENVIRONMENT

States are obliged to abide by the obligations binding on them under international law. These obligations will be directly applicable in monist States but have to be implemented to take effect in dualist States, such as Iceland. If not adequately implemented, States risk violating international law and incurring state responsibility. Thus, international obligations pertaining

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<sup>99</sup> UN Human Rights Council – 48th Session End-of-Session General Statement of the United States of America, posted 13 October 2021 on the website of the US Mission to International Organizations in Geneva <<https://geneva.usmission.gov/2021/10/13/un-human-rights-council-48th-end-of-session-general-statement/>> accessed 1 October 2023.

<sup>100</sup> Tang and Spijkers (n 30) 101.

<sup>101</sup> *ibid* 89.

<sup>102</sup> See for example statements of the United Kingdom, New Zealand and the United States in UNGA, '97th plenary meeting' (28 July 2022) UN Doc A/76/PV.97 11, 14-15.

<sup>103</sup> United States Mission to the United Nations, 'Explanation of Position on the Right to a Clean, Healthy, and Sustainable Environment Resolution' (28 July 2022) <<https://usun.usmission.gov/explanation-of-position-on-the-right-to-a-clean-healthy-and-sustainable-environment-resolution/>> accessed 1 October 2023.

to the right to a healthy environment must be implemented into domestic law, as emphasised by e.g. UNGA resolution 76/300,<sup>104</sup> UNHRC resolution 48/13,<sup>105</sup> and the UNFCCC.<sup>106</sup> If customary international law imposes a self-standing human right to a healthy environment, then that should be transposed into domestic legal systems. If this right is not guaranteed under customary international law, all treaty obligations must still be implemented, and that extends to treaty obligations implicitly providing for a right to a healthy environment.

The right to a healthy environment is a human right and stands in opposition to various other rights that enjoy constitutional status. Therefore, in order to ensure sufficient implementation of the right to a healthy environment and fulfilment of international obligations, States may be required to give it constitutional status. Moreover, if States fail to properly implement the right to a healthy environment this may influence domestic law because of its supranational character. The following sections will explain the need for constitutional status of the right to a healthy environment, give an overview of different types of constitutional provisions protecting the environment, and discuss how constitutional protection of the right to a healthy environment can derive both from explicit and implicit provisions.

#### 4.1 NEED FOR CONSTITUTIONAL STATUS

Some have suggested that environmental issues are best addressed at the international level due to their transboundary nature. However, international environmental law is notoriously soft, and the lack of enforcement mechanisms in the international legal system make it ineffective in securing necessary environmental rights.<sup>107</sup> As explained by UN High Commissioner for Human Rights, Michelle Bachelet, it is not enough to confirm and recognise the right to a healthy environment. It must also be adequately implemented into domestic law,<sup>108</sup> i.e., to national constitutions lest it be automatically subordinate to other constitutionally protected rights.

Environmental constitutionalism has emerged over the past decades and is based on the notion that environmental protection requires constitutional status.<sup>109</sup> The incorporation of core environmental rights or principles into constitutions has at least five advantages over implementation into general domestic legislation.<sup>110</sup> First, constitutional law takes precedence over regular statutes. Second, a constitutional provision can shape public opinion and behaviour. Third, States are more likely to ensure compliance with constitutions in comparison to other laws. Fourth, environmental provisions in constitutions tend to provide broad substantive protection as opposed to narrow provisions in specific legislation, serving as a basis for various rights. Fifth, this generality of constitutional environmental provisions

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<sup>104</sup> Paragraph 3 stipulates that ‘the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law’.

<sup>105</sup> See paragraph 3.

<sup>106</sup> Article 4(1)(b) requires States to ‘[f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change’.

<sup>107</sup> May and Daly (n 1) 19-20.

<sup>108</sup> UN News (n 17).

<sup>109</sup> Joana Setzer and Délton Winter de Carvalho, ‘Climate litigation to protect the Brazilian Amazon: Establishing a constitutional right to a stable climate’ (2021) 30(2) *RECIEL* 197, 201.

<sup>110</sup> *ibid.*

can be relied upon to fill gaps in domestic legislation.<sup>111</sup> It is particularly important that the right to a healthy environment enjoys constitutional status when conflicts arise with other constitutional rights. This is relevant *inter alia* for the implementation of international obligations under the UN climate regime. In fact, the main benefit of incorporating the right to a healthy environment into constitutions may be that it becomes less susceptible to revision and consequently, more difficult for governments to lower the standard of protection.<sup>112</sup> Furthermore, '[r]ecognition of the right to a healthy environment in national constitutions has raised the profile and importance of environmental protection and provided a basis for the enactment of stronger environmental laws, standards, regulations and policies'.<sup>113</sup>

Most regional human rights treaties have effective enforcement mechanisms and entail supranational rights. This makes it more feasible to pursue environmental protection under international human rights law than international environmental law.<sup>114</sup> The human rights category is immense and increasingly tied to environmental law with increased understanding of the importance of a healthy environment for the enjoyment of other human rights.<sup>115</sup> In *PSB et al v Brazil*, the Brazilian Supreme Court asserted that environmental treaties, such as the Paris Agreement, represent a certain type of human rights treaty and consequently enjoy 'supralegal character' and 'supranational status'.<sup>116</sup> National courts will have varying views on whether, and to what extent, environmental treaties can take precedence over, and influence, the interpretation of national laws. Courts in dualist States such as Iceland may find it difficult to justify giving priority to such provisions without a clear anchor in national legislation, ideally constitutions.

## 4.2 DIFFERENT TYPES OF PROVISIONS

No less than 150 States currently include environmental provisions in their constitutions.<sup>117</sup> These take various shapes but are predominantly anthropocentric and rights-based, establishing for example the obligation on States to ensure a healthy environment, the duty for individuals to protect the environment, the right of access to environmental information and the human right to a sound environment.<sup>118</sup> Environmental rights have been criticised for being 'too uncertain a concept to be of normative value'<sup>119</sup> but that hurdle is overcome

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<sup>111</sup> See Erin Daly and James R May, 'Comparative Environmental Constitutionalism' (2015) 6 *Jindal Global Law Review* 9, 21-22; César Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 *AJIL Unbound* 40.

<sup>112</sup> See David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 30.

<sup>113</sup> Navraj Singh Ghaleigh, Joana Setzer, and Asanga Welikala, 'The Complexities of Comparative Climate Constitutionalism' (2022) University of Edinburgh Research Paper Series No 2022/06, 6.

<sup>114</sup> See Michael Anderson, 'Human Rights Approaches: An Overview' in Alan E Boyle and Michael R Anderson, *Human Rights Approaches to Environmental Protection* (Clarendon Press 1998) 1.

<sup>115</sup> See UN Doc A/HRC/22/43 (n 3) para 19, 'the full enjoyment of all human rights depends on a supportive environment'.

<sup>116</sup> *PSB et al v Brazil* (n 45) para 17.

<sup>117</sup> Setzer and de Carvalho (n 109) 201 referring to UNEP, 'Environmental Rule of Law: First Global Report' (2019) <<https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report>> accessed 1 October 2023.

<sup>118</sup> See Setzer and de Carvalho (n 109) 201.

<sup>119</sup> Boyle, 'Human Rights or Environmental Rights? A Reassessment' (n 4) 471.



by tying them to fundamental and actionable human rights.<sup>120</sup> The universal move toward greater environmental protection has resulted in the emergence of a universal right to a healthy environment and the implementation of these growing environmental obligations into national constitutions has resulted in environmental constitutionalism.<sup>121</sup>

At least 110 States have constitutional provisions protecting the right to a healthy environment.<sup>122</sup> Additionally, some States have jurisprudence referring to the right to a healthy environment as a prerequisite to the right to life, giving it implicit constitutional protection.<sup>123</sup> There are some variations in the terminology used, for example, the Costa Rican constitution ensures ‘the right to a healthy and ecologically balanced environment’ and the constitution of Fiji provides for the ‘the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures’.<sup>124</sup> David Boyd has explained that the right to a healthy environment incorporates a negative and a positive right: ‘a negative right to be free from exposure to toxic substances produced by the state or by state-sanctioned activities’ and ‘a positive right to clean air, safe water, and healthy ecosystems, which may require an extensive system of regulation, implementation, and enforcement as well as remediation efforts in polluted areas’.<sup>125</sup>

Many States have adopted other types of environmental provisions relating to the protection of more specific environmental human rights or nature itself. For example, France has incorporated the right to participate in decisions affecting the environment into its constitution<sup>126</sup> and several States, including Albania, Argentina, Azerbaijan, Belarus, Bolivia, Brazil, Czechia, France, Norway, and Ukraine, have given the right of access to environmental information constitutional status.<sup>127</sup> Belgium, Bolivia, Chile, Democratic Republic of the Congo, Cuba, Dominican Republic, Ecuador, Ethiopia, Fiji, France, Kenya, Maldives, Mexico, the Netherlands, Nicaragua, Niger, Paraguay, Slovenia, Solomon Islands, South Africa, Tanzania, Tunisia, and Uruguay are among the States that have constitutional provisions referring to the rights to water and/or sanitation<sup>128</sup> and numerous States also ensure the constitutional right to food.<sup>129</sup> The right to clean air enjoys constitutional status in India and Pakistan due to its inherent link to the right to life.<sup>130</sup> At least eleven States now have specific constitutional provisions dealing with climate change.<sup>131</sup> These are Algeria, Bolivia, Côte d'Ivoire, Cuba, Dominican Republic, Ecuador, Thailand, Tunisia, Venezuela,

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<sup>120</sup> May and Daly (n 1) 26.

<sup>121</sup> Setzer and de Carvalho (n 109) 200 referring to Kotzé (n 1) 145.

<sup>122</sup> UN Doc A/HRC/43/53 (n 96) para 10.

<sup>123</sup> UN Doc A/HRC/40/55 (n 34) para 14, referring to Boyd, ‘The Implicit Constitutional Right to Live in a Healthy Environment’ (n 34) 171-179.

<sup>124</sup> *ibid.* See article 50 of the constitution of Costa Rica and article 40(1) of the constitution of Fiji.

<sup>125</sup> Boyd, *The Environmental Rights Revolution* (n 112) 24.

<sup>126</sup> UN Special Rapporteur on Human Rights and the Environment, ‘Right to a healthy environment: good practices’ (UNEP, 29 May 2020) 17, para 23

<<https://wedocs.unep.org/bitstream/handle/20.500.11822/32450/RHE.pdf?sequence=1&isAllowed=y>> accessed 1 October 2023.

<sup>127</sup> *ibid* 14, para 14.

<sup>128</sup> *ibid* 37, para 82.

<sup>129</sup> *ibid* 33, para 74.

<sup>130</sup> *ibid* 24, para 42.

<sup>131</sup> Singh Ghaleigh, Setzer and Welikala (n 113) 9; see also Setzer and de Carvalho (n 109) 201; and ‘Right to a healthy environment: good practices’ (n 126) 25, para 50.

Viet Nam, and Zambia.<sup>132</sup> Furthermore, the constitutions of Bolivia, Bhutan, Ecuador and Namibia oblige the States to protect wildlife and nature, with references to non-human species and Mother Earth.<sup>133</sup>

#### 4.3 EXPLICIT OR IMPLICIT PROTECTION

A universal right to a healthy environment may result in implicit constitutional protection. The link between a healthy environment and the enjoyment of other human rights has been understood for quite some time<sup>134</sup> and is confirmed e.g. by UNGA resolution 76/300.<sup>135</sup> It has led to the establishment of an implicit right to a healthy environment in relation to specific human rights, as demonstrated by the environmental jurisprudence of the ECtHR.<sup>136</sup> Recent developments have also given increased weight to a self-standing right to a healthy environment, as referred to in article 1 of the UNGA Resolution. Recognition of this international self-standing right can strengthen the right domestically and influence environmental constitutionalism. It can lead to the conclusion that an implicit right to a healthy environment exists even in jurisdictions carrying no explicit constitutional provisions concerning the environment.<sup>137</sup> That means that the right to a healthy environment is not only an implicit foundation of certain other human rights but also an implicit independent right, obligating States to protect the environment and the climate *per se*.<sup>138</sup>

The number of States opting for explicit constitutional protection has increased in recent years with the urgent need for environmental protection.<sup>139</sup> However, an explicit constitutional provision may be unnecessary if an implicit right already exists. This particularly applies to the implicit environmental protection that is related to other human rights. According to Alan Boyle,

[t]here is little to be said in favour of simply codifying the application of the rights to life, private life and property in an environmental context. Making explicit in a declaration or protocol the greening of existing human rights that has already taken place would add nothing and clarify little.<sup>140</sup>

The greening of these and other human rights should result in implicit environmental constitutionalism, and the climate cases currently pending before the ECtHR Grand Chamber will clarify the extent to which obligations to protect the environment can be read

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<sup>132</sup> Singh Ghaleigh, Setzer and Welikala (n 113) 9.

<sup>133</sup> 'Right to a healthy environment: good practices' 44, para 105.

<sup>134</sup> *ibid* para 18.

<sup>135</sup> See article 2.

<sup>136</sup> See chapter 3.1[c].

<sup>137</sup> This right has been read into India's Constitution, see Lovleen Bhullar, 'The Judiciary and the Right to Environment in India: Past, Present and Future' in Shibani Ghosh (ed), *Indian Environmental Law: Key Concepts and Principles* (Orient BlackSwan 2019) 22; Singh Ghaleigh, Setzer and Welikala (n 113) 7; Annalisa Savaresi, 'The UN HRC recognizes the right to a healthy environment and appoints a new Special Rapporteur on Human Rights and Climate Change. What does it all mean?' (*EJIL:Talk*, 12 October 2021) <<https://www.ejiltalk.org/the-un-hrc-recognizes-the-right-to-a-healthy-environment-and-appoints-a-new-special-rapporteur-on-human-rights-and-climate-change-what-does-it-all-mean/>> accessed 1 October 2023.

<sup>138</sup> Singh Ghaleigh, Setzer and Welikala (n 113) 7. See also Elena Cima, 'The right to a healthy environment: Reconceptualizing human rights in the face of climate change' (2022) 31(1) *RECIEL* 38.

<sup>139</sup> UN Doc A/HRC/22/43 (n 3) para 12.

<sup>140</sup> Boyle, 'Human Rights and the Environment: Where Next?' (n 54) 616.

into provisions safeguarding the right to life, the prohibition of degrading treatment, non-discrimination and respect for private and family life, at least in the European context. On the other hand, explicit provisions might be needed to establish more recent trends.

An explicit provision might contribute to the progressive development of environmental constitutionalism. The self-standing human right to a healthy environment is not as firmly established as the right to an environment that is adequate for ensuring the enjoyment of other fundamental rights. It is difficult to derive a self-standing right to a healthy environment from constitutional provisions concerning non-environmental rights and therefore, it might be useful to explicitly implement the right to a healthy environment as an independent right. An explicit provision might also lay the foundation for further developments and more extensive rights. For example, a Brazilian court is currently being asked to recognise a new implicit intergenerational right to a stable climate and the basis for this alleged right is a constitutional provision that expressly establishes the right to an ecologically balanced environment.<sup>141</sup> Courts might be generally more prone to confirm the existence of a right to a stable climate, when they can base their decisions on explicit provisions codifying the right to a healthy environment. Yet, this depends on the unique traditions of each jurisdiction. A United States Court has also been asked to confirm a right to a stable climate in *Juliana v United States* and that claim was not based on an explicit environmental provision. The Oregon District Court Judge found that ‘a climate system capable of sustaining human life is fundamental to a free and ordered society’<sup>142</sup> and consequently, governmental acts harming the climate system could infringe explicit and implicit constitutional rights.<sup>143</sup> Thus, the District Court derived this implicit right from other constitutional rights but only as a precondition for other rights and not as an autonomous human right.

## 5 RIGHT TO A HEALTHY ENVIRONMENT IN THE ICELANDIC CONSTITUTION

The Icelandic Constitution carries no explicit right to a healthy environment. This leaves Iceland in a rather small group of States that has yet to give the right to a healthy environment constitutional status. Yet, Iceland is among the States that have recognised the right to a healthy environment through international treaties, namely by ratifying the Aarhus Convention.<sup>144</sup> In order to ensure compliance with that treaty and with the emerging customary international law on the right to a healthy environment, Iceland should adopt an environmental provision in its constitution. The Icelandic Constitution is interpreted in a dynamic manner and Icelandic courts are bound to interpret laws in accordance with international obligations.<sup>145</sup> Therefore, the right to a healthy environment may be implicitly

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<sup>141</sup> Setzer and de Carvalho (n 109) 200, referring to *Institute of Amazonian Studies v Brazil*, 11th Lower Federal Court of Curitiba (5048951-39.2020.4.04.7000), filed 8 October 2020 <[https://climate-laws.org/geographies/brazil/litigation\\_cases/institute-of-amazonian-studies-v-brazil](https://climate-laws.org/geographies/brazil/litigation_cases/institute-of-amazonian-studies-v-brazil)> accessed 1 October 2023.

<sup>142</sup> *Juliana v United States*, 947 F.3d 1159 (9th Cir. 2020), Judge Ann Aiken Order Opinion and Order, 10/11/2016 (Aiken Order) 32, referring to *Juliana v United States*, 217 F Supp 3d 1224 1250 (D Or 2016), rev'd, 947 F3d 1159 (9th Cir 2020).

<sup>143</sup> *ibid.* See also Setzer and de Carvalho (n 109) 202-203.

<sup>144</sup> ‘Right to a healthy environment: good practices’ (n 126) 11.

<sup>145</sup> Davíð Þór Björgvinsson, *Lögskýringar* (JPV útgáfa 2008) 150.

embedded in a constitution frame of protection but only to a limited extent. This chapter will explain the possibility of reading an implicit right to a healthy environment into the Icelandic Constitution and discuss recent parliamentary proposals to expressly implement the right.

## 5.1 IMPLICIT RIGHT TO A HEALTHY ENVIRONMENT

The Icelandic constitution is succinct.<sup>146</sup> However, international treaties dealing with the rights and obligations of individuals have an increasing influence on the interpretation and explanation of human rights provisions in Iceland, even those that have not been implemented into domestic law.<sup>147</sup> In particular, human rights treaties refer to the same rights that the Icelandic constitution is meant to safeguard and these can be used for gap-filling and interpretation.<sup>148</sup> The ECHR was used as a basis for the human rights provisions of the constitution, and various provisions of the convention were incorporated into the constitution by adaptation. Additionally, the ECHR has the status of general law in Iceland. The strong legal impact of the ECHR is also demonstrated by the fact that the human rights provisions of the constitution were interpreted in accordance with the convention before it was enacted in its entirety and before the constitutional provisions were changed to better reflect it.<sup>149</sup>

The purpose of transposing the ECHR into national law has been described as giving the courts authority to protect human rights as much as possible within the framework of established laws. This gives courts a lot of leeway in interpreting the human rights treaty.<sup>150</sup> In practice, Icelandic courts have often been reluctant to apply progressive interpretations of the constitution, but the Supreme Court based one recent decision on an implicit right to be free from association on ECtHR jurisprudence.<sup>151</sup> This precedent may potentially allow Icelandic courts to read the right to a healthy environment into the Icelandic constitution.

An implicit right to a healthy environment could be derived from certain provisions and customary norms of the Icelandic Constitution. It would have to be linked to other constitutional rights, i.e. the right to life, prohibition of degrading treatment and the right to private and family life.

Article 71 implements article 8 ECHR and reads as follows:

1. Everyone shall enjoy the right to respect for their privacy, home and family life.
2. A body search or search of a person, a search of his house or belongings may not be carried out, except according to a court order or a special legal authorization. The same applies to the examination of documents and mailings, telephone calls and other electronic communications, as well as any similar interference with one's private life.

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<sup>146</sup> Gunnar G Schram, *Stjórnskipunarréttur* (Háskólaútgáfan 1999) 461.

<sup>147</sup> Björgvinsson (n 145) 249.

<sup>148</sup> Schram (n 146) 462.

<sup>149</sup> Björgvinsson (n 145) 310-311; Supreme Court of Iceland, case no 120/1989 (9 January 1990) and case no 274/1991 (5 March 1992).

<sup>150</sup> Niclas Berggren, Nils Karlson, and Joakim Nergelius (eds), *Why Constitutions Matter* (Transaction Publishers 2002) 122-123.

<sup>151</sup> Supreme Court of Iceland, Case no. 20/2022, paras 47-50.

3. Notwithstanding the provisions of paragraph 1, respect for privacy, home or family life may be restricted with a special legal authorization if it is absolutely necessary due to the rights of others.<sup>152</sup>

This article does not employ the same terminology as article 8 ECHR but shall be interpreted in accordance with it. Provisions establishing individual human rights are to be interpreted broadly in the Icelandic legal system<sup>153</sup> but Icelandic courts have been criticised for unduly narrowing down the human rights provisions of the constitution.<sup>154</sup> There have not been any judgments confirming the relevance of this provision for environmental protection. However, as previously discussed, the ECtHR has indicated that the obligation to take measures to respect the parties' rights under article 8 ECHR extends to the protection of a healthy environment.<sup>155</sup> While no provision of the ECHR ensures environmental protection as such, article 8 can be activated when environmental harm exceeds generally acceptable levels and causes considerable impairment of the enjoyment of the rights to home, private or family life. The relevant criteria in this assessment include 'the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life'.<sup>156</sup> An example of such a nuisance would be traffic noise that causes sleep disturbances.<sup>157</sup> The climate cases currently pending before the Grand Chamber of the ECtHR will further demonstrate how article 8, and consequently article 71 of the Icelandic Constitution, could impact States' duties to respond to the adverse effects of climate change.

Article 68 of the Icelandic Constitution is also potentially relevant in this context. It implements article 3 ECHR and provides that no one shall be subjected to torture or other inhuman or degrading treatment or punishment. The fact that the Grand Chamber of the ECtHR has requested parties in *Duarte Agostinho et al v Portugal et al* to consider the applicability of article 3 ECHR to this climate case, indicates that it may relate to the right to healthy environment.<sup>158</sup> Moreover, the recent decision of the Federal Constitutional Court in *Neubauer et al v Germany* also suggests that a constitutional provision on the right to human dignity can be interpreted in accordance with article 3 ECHR and entail an obligation to take climate action.<sup>159</sup> Finally, the Icelandic Constitution holds no provision concerning the right to life but this right is enshrined in the constitution as a customary norm. The right to a healthy environment might be implicit in that right, as indicated by the ECtHR decision in *Budayeva and Others v Russia* where Russian authorities violated article 2 ECHR by failing to protect the lives of people killed in mudslides.<sup>160</sup> According to this, the right to a healthy environment may already be implicitly protected under the Icelandic Constitution insofar as it relates to other fundamental rights. However, the self-standing right to a healthy environment needs to be articulated to acquire constitutional status in Iceland.

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<sup>152</sup> Article 71 of the Icelandic Constitution, law no 1944/33.

<sup>153</sup> Björgvinsson (n 145) 169.

<sup>154</sup> Jón Steinar Gunnlaugsson, *Deilt á dómarana* (Almenna bókafélagið 1987) 134.

<sup>155</sup> *Tatar and Tatar v Romania* (n 66) para 107.

<sup>156</sup> *Dubetska and others v Ukraine* (n 72) para 105.

<sup>157</sup> *Deés v Hungary* App no 2345/06 (ECtHR, 9 November 2010).

<sup>158</sup> See *Duarte Agostinho et al v Portugal et al*, request no 39371/20 (n 77).

<sup>159</sup> *Neubauer et al v Germany* (n 79).

<sup>160</sup> *Budayeva and Others v Russia* (n 62).

## 5.2 PROPOSALS FOR AN EXPLICIT ENVIRONMENTAL PROVISION

On 4 November 2009, Jóhanna Sigurðardóttir, then Prime Minister of Iceland, submitted a bill proposing that the President of Iceland convenes a consultative constitutional assembly to review the Icelandic Constitution. The appointment of the Constitutional Council was approved by the national parliament on 24 March 2010, and the council was tasked with considering the report of the Constitutional Committee and making proposals for changes to the Icelandic Constitution.<sup>161</sup> The Constitutional Council handed over a proposal for a new constitution on 29 July 2010,<sup>162</sup> and on 20 October 2012, the people agreed in a referendum to adopt a new constitution on the basis of that proposal. The proposal for a new constitution was circulated in parliament on 16 November 2012, but Alþingi rejected the proposal and made no amendments to the existing constitution. This led to the appointment of a constitutional committee which submitted a progress report in June 2014 noting its decision to prioritize four issues, namely the delegation of powers in the interest of international cooperation, national referendums, environmental protection, and national ownership of natural resources.<sup>163</sup> Thus, the constitutional debate continued but now concentrating specifically on these four issues. On 25 August 2016, then Prime Minister Sigurður Ingi Jóhannsson proposed the addition of an environmental provision in the Constitution on the basis of the work of the Constitutional Committee.<sup>164</sup> This proposal was not passed by the majority but Iceland's current Prime Minister, Katrín Jakobsdóttir, continued her efforts and proposed a very similar provision concerning the right to a healthy environment in January 2021.<sup>165</sup>

The draft article from 2021 reads as follows:

1. Iceland's nature is the basis of life in the country. Responsibility for the protection of nature and the environment rests jointly on everyone, and the protection must be based on precautionary and long-term considerations with sustainable development as a guiding principle. There must be efforts to ensure biological diversity and the growth and development of the biosphere.
2. Everyone has the right to a healthy environment. The general public is allowed to move around the country and stay there for legitimate purposes. Nature must be treated well and the interests of landowners and other rights holders must be respected. This shall be prescribed in more detail in public law.
3. The law shall prescribe the public's right to information about the environment and the effect of construction on it, as well as to participate in the preparation of decisions that affect the environment.

The Prime Minister presented her proposal for constitutional reform as a member of parliament and not as the head of government because of lack of support from within her

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<sup>161</sup> Constitutional Council, 'Ítarlegar upplýsingar' (2011) <<http://stjornlagarad.is/upplýsingar/um-stjornlagarad/>> accessed 1 October 2023.

<sup>162</sup> Constitutional Council, 'Um starfið' (2011) <<http://stjornlagarad.is/starfid/>> accessed 1 October 2023.

<sup>163</sup> Alþingi, 'Frumvarp til stjórnarskipunarlagá', legislative parliament 145 2015-2016, document 1577, case no 841.

<sup>164</sup> *ibid* article 1.

<sup>165</sup> Alþingi, 'Frumvarp til stjórnarskipunarlagá', legislative parliament 151 2020-2021, document 787, case no 466.

government. It did not pass through Parliament<sup>166</sup> but the Prime Minister subsequently formed a committee of experts to assess the need for constitutional reform concerning, *inter alia*, human rights. The experts delivered a report on 30 August 2023, which advocated for the adoption of an environmental provision but presented a simplified version of the draft article. Most notably, paragraph 2 concerning the right to a healthy environment was condensed to ‘Everyone shall be guaranteed by law the right to a healthy environment and nature’.<sup>167</sup> This provision is partly based on article 112 of the Norwegian Constitution. Therefore, valuable lessons can be learnt from judicial treatment of that provision. Article 112 of the Norwegian Constitution reads as follows:

1. Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be used on the basis of holistic long-term considerations which will safeguard this right for future generations as well.
2. In order to secure their rights according to the previous paragraph, citizens have the right to information about the state of the natural environment and the effects of planned or ongoing interventions in nature.
3. The government must take measures to implement these principles.

This provision is currently being used to build a climate case before the ECtHR. The *People v Arctic Oil* case involves the government’s decision to issue a new drilling license to Arctic Oil in the Barents Sea and the applicant’s efforts to invalidate the license due to an infringement of the right to a healthy environment as protected by article 112 of the Norwegian Constitution.<sup>168</sup> The case has already been heard in Norway and the Norwegian Court of Appeal suggested that the provision might be operational in the context of climate change. It found that it could extend to harm outside Norwegian jurisdiction and that international agreements, such as the Paris Agreements, could contribute to the clarification of acceptable tolerance limits and adequate measures. Therefore, the alignment of governmental actions with such international obligations could be relevant in an assessment of potential violation of article 112 of the Norwegian Constitution.<sup>169</sup> This decision clearly indicated that the provision could affect the climate-related obligations of governments. However, the Supreme Court of Norway took a narrower view, suggesting that Article 112 is merely a safety valve and that courts should generally defer judgment concerning

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<sup>166</sup> Rúv, ‘Frumvarp ráðherra endastöð stjórnarskrárbreytinga’ (14 June 2021)

<<https://www.ruv.is/frett/2021/06/14/frumvarp-radherra-endastod-stjornarskrarbreytinga>> accessed 1 October 2023.

<sup>167</sup> Róbert R Spanó and Valgerður Sólnes, ‘Greinargerð um hvort þörf sé á breytingum á mannréttindakafli stjórnarskrárinnar’ (30 August 2023), 61 <<https://www.stjornarradid.is/library/03-Verkefni/Stjornskipan-og-Thjodartakn/Stjornarskrarvinna/Greinarger%c3%b0%20um%20mannr%c3%a9ttindakafli%20stj%c3%b3rnarskr%c3%a1rinnar.pdf>> accessed 1 October 2023.

<sup>168</sup> Greenpeace Nordic and Others v Norway (*People v Arctic Oil*) <<http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-v-ministry-of-petroleum-and-energy-ecthr/>> accessed 1 October 2023.

<sup>169</sup> *Greenpeace Nordic Ass'n v Ministry of Petroleum and Energy (People v Arctic Oil)* Borgarting Court of Appeal (judgment, 23 January 2020), case no 18-060499ASD-BORG/03, unofficial translation, 22 <[https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200123\\_HR-2020-846-J\\_judgment.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200123_HR-2020-846-J_judgment.pdf)> accessed 1 October 2023.

appropriate climate action to parliament.<sup>170</sup> If the draft article for the Icelandic Constitution were applied in a manner consistent with the decision of the Norwegian Court of Appeal, that could mean that international agreements, such as the Paris Agreement, could help clarify the acceptable tolerance limits and appropriate measures for compliance with the draft article. However, the Norwegian Supreme Court judgment suggests that the article should be used restrictively and not for judicial review of legislative acts, unless States grossly neglect their obligations to take adequate measures to ensure a healthy environment.

## 6 CONCLUSION

At least 156 States have recognised the right to a healthy environment through the adoption of international treaties and 161 States have recognised it through their endorsement of UNGA resolution 76/300 affirming the right to a healthy environment. Moreover, 194 States are bound by the Paris Agreement which implicitly safeguards the human right to a healthy environment. Clearly an overwhelming majority of States recognise this right and the adoption of these instruments demonstrates widespread and longstanding state practice. The UNHRC and UNGA resolutions show signs of *opinio juris* and the right to a healthy environment seems to be well on its way to becoming binding for all States. If it is indeed a universal right protected under international law, then it should belong in constitutions to enjoy adequate protection against other human rights.

At least 110 States have adopted explicit provisions into their constitutions concerning the right to a healthy environment. Iceland is among those States that have recognised the right internationally but has not implemented it into its constitution despite repeated efforts by members of Parliament and the Constitutional Committee. This does not necessarily mean that the right to a healthy environment enjoys no protection under the Icelandic Constitution because the right is both a fundamental autonomous human right and a precondition inherently linked to the enjoyment of certain other rights.

Iceland provides implicit constitutional protection of the right to a healthy environment because it is interpreted in accordance with the ECHR. Article 71 of the Icelandic Constitution implements article 8 ECHR and the jurisprudence of the ECtHR demonstrates that the right to a healthy environment can be activated when environmental harm significantly impairs the rights of individuals to respect for privacy and family life, home and correspondence under article 8 ECHR. This harm can be in the form of noise or odour impacting an individual's mental or physical health. The right to a healthy environment is also implicit in the right to life, under the jurisprudence of the ECtHR concerning article 2, and consequently also under the customary right to life under the Icelandic Constitution. Three climate cases currently await the decision of the Grand Chamber of the ECtHR and these will shed further light on the extent of the environmental rights embedded in articles 2 and 8 ECHR and address the relevance of article 3 ECHR and article 68 of the Icelandic Constitution concerning the prohibition of torture or other inhuman or degrading treatment or punishment. The Federal Constitutional Court in Germany has already indicated that the

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<sup>170</sup> *Greenpeace Nordic Ass'n v Ministry of Petroleum and Energy (People v Arctic Oil)* Supreme Court of Norway (Judgment, 22 December 2020) HR-2020-2472-P, case no 20-051052SIV-HRET, unofficial translation, see summary and conclusion <[https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20201222\\_HR-2020-846-J\\_judgment.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20201222_HR-2020-846-J_judgment.pdf)> accessed 1 October 2023.



right to human dignity can oblige States to take climate action by reference to an implicit obligation under article 3 ECHR.

The climate cases pending before the Grand Chamber of the ECtHR may significantly increase the implicit protection derived from the ECHR, both directly and through national constitutions interpreted in accordance with the ECHR. However, the implicit protection always relates to other human rights and that will not in itself suffice to guarantee the independent right to a healthy environment. This right can only form part of constitutional law through express incorporation or by the development of a new constitutional norm. Constitutional reform has been high on the agenda of Icelandic politics for the past decade but to no avail. A draft article implementing the right to a healthy environment was last presented before the Parliament in January 2021 but rejected, partly due to the controversial nature of other articles included in the same proposal. The draft article on the right to a healthy environment closely resembled article 112 of the Norwegian Constitution, which currently awaits assessment by the ECtHR. That decision will hopefully inform the continued debate in Iceland concerning the right to a healthy environment and lead to the adoption of an explicit constitutional provision. Until then, Icelandic courts should read an implicit right to a healthy environment into articles 68 and 71 of the constitution and regard it as an inherent precondition of the constitutional right to life.

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