17. Protecting Biodiversity with the Right to a Healthy Environment: Lessons from Climate Change Litigation

Samvel Varvastian

This is a draft chapter. The final version is available in *Research Handbook on Climate Change and Biodiversity Law* edited by Phillipa McCormack and Richard Caddell, published in 2024, Edward Elgar Publishing Ltd, https://doi.org/10.4337/9781800370296.

Samvel Varvastian, 'Protecting biodiversity with the right to a healthy environment: Lessons from climate change litigation' in Phillipa C. McCormack and Richard Caddell (eds), *Research Handbook on Climate Change and Biodiversity Law* (Edward Elgar Publishing, 2024), pp. 373-392, https://doi.org/10.4337/9781800370296.00026

17. Protecting Biodiversity with the Right to a Healthy Environment: Lessons from Climate Change Litigation

Samvel Varvastian

1. INTRODUCTION

In May 2019, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) published its first Assessment Report, which revealed staggering global declines in biodiversity and extinction of many land and marine species and ecosystems.[1] The Assessment Report identified a range of direct drivers of this global biodiversity loss, including land- and sea-use changes, direct exploitation of organisms, climate change, pollution, and invasive alien species.[2] These direct drivers are the result of underlying anthropogenic factors, such as human population dynamics and consumption patterns, trade, governance, conflicts, and epidemics.[3] Despite the different nature of these anthropogenic factors, they are all underpinned by societal values and behaviours,[4] and their destructive environmental impacts are responsible not only for biodiversity loss, but also for climate change and other forms of environmental harm.[5]

Global biodiversity loss has already been identified as a potential threat to human rights. For example, in his report presented to the 34th session of the UN Human Rights Council, the first Special Rapporteur on human rights and the environment John Knox stressed the critical importance of biodiversity to a range of human rights, including the rights to life, health, food and water, an adequate standard of living, and non-discrimination.[6] This report was followed by a policy brief drafted by the second Special Rapporteur on human rights and the environment, David Boyd, in 2021, who called for human rights-based approaches to conserving biodiversity.[7] Indeed, although biodiversity is already protected by a network of specialised national, regional, and international legal instruments,[8] it is largely absent from

[1] S Díaz and others, *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES Secretariat 2019) 25.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] See Hans-Otto Pörtner and others, *Scientific Outcome of the IPBES-IPCC Co-sponsored Workshop on Biodiversity and Climate Change* (IPBES Secretariat, 2021).
[6] *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, A/HRC/34/49 (2017).
[7] David R Boyd and Stephanie Keene, 'Human rights-based approaches to conserving biodiversity: equitable, effective and imperative' <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/policy-briefing-1.pdf>.
[8] Notably, the 1973 US Endangered Species Act, the 1992 EU Habitats Directive, the 1992 Convention on Biological Diversity. For a discussion on legal instruments protecting biodiversity and their interrelationship see Arie Trouwborst, 'International Nature Conservation Law and the Adaptation of Biodiversity to Climate Change: A Mismatch?' (2009) 21 *Journal of Environmental Law* 419 and Richard Caddell, 'Inter-treaty Cooperation, Biodiversity Conservation and the Trade in Endangered Species' (2013) 22 *Review of European, Comparative and International Environmental Law* 264.

those legal instruments that enshrine fundamental human rights. Hence, only a handful of constitutions explicitly mention biodiversity,[9] while international and regional human rights treaties do not refer to biodiversity at all. Because of this, individuals, and non-governmental organisations (NGOs) who seek to protect biodiversity on legal grounds, usually rely on environmental impact assessment legislation or endangered species legislation,[10] rather than constitutions or human rights treaties. Is, then, the growing recognition of biodiversity loss as human rights concern a proverbial voice crying out in the wilderness, unable to utilise any instruments of highest hierarchical value to protect not only nature itself, but also human communities that depend on it? Not quite.

Despite the absence of any explicit references to biodiversity in human rights treaties and its near absence from constitutions, there is a nearly universally recognised right that can play a pivotal role in the legal protection of biodiversity: the right to a healthy environment. This right has already been invoked in litigation concerning various environmental harms before national courts and treaty bodies across the globe. However, invoking this right when litigating such a global and complex environmental problem as biodiversity loss may pose certain difficulties. It is therefore necessary to analyse the prospects of such claims, considering the obstacles that the application of the right to a healthy environment may encounter.

To explore the instrumentality of the right to a healthy environment in biodiversity protection, this Chapter analyses three case studies in Colombia, Nepal, and Norway. In these three cases, the claimants invoked a constitutionally recognised right to a healthy environment when they challenged the respective governments' action or inaction with regard to climate change, and where the courts considered the impacts on biodiversity. Because the number of cases where the right to a healthy environment was considered in the context of both climate change *and* biodiversity loss is exceptionally small, the three discussed cases may well be the only (or among the very few) relevant cases that can shed light on the instrumentality of this right when dealing with the intersection between climate change and biodiversity loss. Admittedly, these three cases have emerged from jurisdictions that represent a wide diversity of biomes, and different levels of development, national wealth, and capacity to fund conservation activities. While lessons from these three individual cases may be specific to their facts, the differences between the cases allow us to identify more general lessons, that ought to be of interest to practitioners and researchers well beyond the case study jurisdictions. This is particularly relevant given the fact that the existing literature on climate change litigation has so far largely ignored the 'rights-focused' intersection between climate change and biodiversity loss. The Chapter argues that the interpretation of the right to a healthy environment by courts in the three respective cases offers a valuable insight into the application of this right when

[9] These include the constitutions of Bangladesh, Bhutan, Bolivia, Dominican Republic, Ecuador, Finland, Hungary, Kenya, Kosovo, Maldives, Nepal, Somalia, South Sudan, Sudan, Thailand, Vietnam, and Zambia; see <https://www.constituteproject.org/>.

[10] For example, there is a long tradition of litigating biodiversity cases in the US under the Endangered Species Act, including the renowned case of *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), in which the US Supreme Court articulated the three-part test for federal standing under Article III of the US Constitution.

dealing with the intersection between biodiversity loss and climate change, as courts are already tackling this intersection in various ways.

2. THE RIGHT TO A HEALTHY ENVIRONMENT

Recognition of the fact that environmental degradation can affect a range of rights is, of course, not new. The gradual convergence between concerns over human rights and environmental protection has been growing since the adoption of the 1972 United Nations Stockholm Declaration that recognised the link between the environment and human rights.[11] This gradual convergence has become known as the 'greening of rights.'[12] The right to a healthy environment that emerged in this process appears particularly well-suited for demanding governmental action with regard to biodiversity for three important reasons.

First, this right offers a comprehensive framework for addressing global environmental threats and their impacts on humans and other living organisms. For instance, the right to a healthy environment can encompass such substantive elements as safe climate, clean air, healthy and sustainably produced food, access to safe water and adequate sanitation, non-toxic living environment, and healthy ecosystems and biodiversity.[13] The fact that the right to a healthy environment covers the elements that may not be covered by other human rights (for example, the rights to life, health, or property) puts it into a unique position to deal with environmental harms of a diffuse and cumulative nature. This particular role of the right to a healthy environment was acknowledged by the Inter-American Court of Human Rights (IACtHR) in its 2017 Advisory Opinion.[14] Emphasising the 'interdependence and indivisibility of human rights and environmental protection',[15] the Court stressed that:

> As an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right.[16]

---

[11] See UN General Assembly, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, A/CONF.48/14/Rev.1, Declaration of the United Nations Conference on the Human Environment, Chapter I.
[12] Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613.
[13] UN Human Rights Council, A/HRC/43/53, 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) 8-18.
[14] The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/18, Inter-Am. Ct. H.R., (ser. A) No. 23 (15 November, 2017).
[15] See paras 47 and 54-57.
[16] Para 62.

Second, by focusing on the protection of a healthy environment, be it a safe climate, good air quality, or healthy ecosystems, the right to a healthy environment automatically becomes a prerequisite for other rights, since the full enjoyment of all human rights depends on a favourable environment.[17] This is especially true for vulnerable and disadvantaged groups, including 'Indigenous peoples, children, women, people living in extreme poverty, minorities, and people with disabilities', as well as 'communities that, essentially, depend economically or for their survival on environmental resources from the marine environment, forested areas and river basins, or run a special risk of being affected owing to their geographical location, such as coastal and small island communities.'[18] In other words, the right to a healthy environment is 'double-edged' because it simultaneously protects both humans and non-human organisms, thus being indispensable for preserving biodiversity.

Third, as a result of the unique nature of the right to a healthy environment, the global value of this right will ultimately increase proportionately with the ever-growing recognition of this right. Indeed, the right to a healthy environment is globally recognised, albeit this recognition is still rather fragmented. For example, until recently, the right to a healthy environment has not been recognised at the international level,[19] which led the UN Special Rapporteur on human rights and the environment to call for the international recognition of this right.[20] The push towards this international recognition culminated in October 2021, when during its 48th session, the UN Human Rights Council adopted Resolution 48/13, recognising, for the first time, the 'the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights'[21] as well as encouraging States 'to adopt policies for the enjoyment of [this right], including with respect to biodiversity and ecosystems.'[22] Notably, though, this recognition is only the first of many steps that are needed to make the right to a healthy environment fully functional and enforceable at the international level. For this to happen, the right to a healthy environment needs to have its scope clearly

[17] Para 64. Hence, the IACtHR referred to various categories of rights that may become endangered by environmental degradation:

> The Court considers that the rights that are particularly vulnerable to environmental impact include the rights to life, personal integrity, private life, health, water, food, housing, participation in cultural life, property, and the right to not be forcibly displaced. Without prejudice to the foregoing, according to Article 29 of the Convention, other rights are also vulnerable and their violation may affect the rights to life, liberty and security of the individual, and infringe on the obligation of all persons to conduct themselves fraternally, such as the right to peace, because displacements caused by environmental deterioration frequently unleash violent conflicts between the displaced population and the population settled on the territory to which it is displaced. Some of these conflicts are massive and thus extremely grave (para 66).

[18] Para 67.

[19] See Sumudu Atapattu, 'Environmental Rights and International Human Rights Covenants: What Standards are Relevant?' in Stephen J Turner and others (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019), 21-22, discussing the protection offered by treaty bodies.

[20] See Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/73/188) (2018). See also John H Knox, 'The Global Pact for the Environment: At the Crossroads of Human Rights and the Environment' (2019) 28 *Review of European, Comparative and International Environmental Law* 40; John H Knox, 'Constructing the Human Right to a Healthy Environment' (2020) 16 *Annual Review of Law and Social Science* 79.

[21] Resolution adopted by the Human Rights Council on 8 October 2021, A/HRC/RES/48/13, The Human Right to a Clean, Healthy and Sustainable Environment, para 1.

[22] Para 4(c). See also Resolution adopted by the UN General Assembly on 28 July 2022 on the human right to a clean, healthy and sustainable environment, A/RES/76/300 (1 August 2022).

defined and, subsequently, to be enshrined into a binding international human rights treaty overseen by an international court or treaty body.

At the same time, the right to a healthy environment has long been explicitly recognised in the regional African[23] and the Inter-American[24] human rights protection systems,[25] with the abovementioned IACtHR 2017 Advisory Opinion arguably being the most influential interpretation of this right at the regional level so far.[26] In contrast, there is no self-standing right to a healthy environment in the European human rights protection system under the European Convention on Human Rights (ECHR).[27] In its absence, the right to respect for private life under Article 8 of the ECHR[28] has been most frequently used in cases concerning environmental harms before the European Court of Human Rights (ECtHR).[29] Indeed, in one of the most prominent 'environmental' cases arising under Article 8, *Hatton and others* v. *the United Kingdom*, the ECtHR confirmed that while '[t]here is no explicit right in the Convention to a clean and quiet environment …, where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8.'[30] It must be observed, though, that there are various conditions that need to be satisfied in order to trigger the application of Article 8 in cases concerning environmental harms.[31]

The truly global recognition of the right to a healthy environment has occurred at the national level.[32] The constitutions of more than 100 states – including over 35 African states,

---

[23] African Charter on Human and Peoples' Rights, Banjul, January 19, 1982, OAU Doc. CAB/LEG/67/3 rev. 5, Article 24 ('All peoples shall have the right to a general satisfactory environment favorable to their development').
[24] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, San Salvador, November 17, 1988, Article 11: 1) Everyone shall have the right to live in a healthy environment and to have access to basic public services; 2) The States Parties shall promote the protection, preservation, and improvement of the environment.
[25] See Louis J Kotzé and Evadne Grant, 'Environmental Rights in the Global South' in Philippe Cullet and Sujith Koonan (eds), *Research Handbook on Law, Environment and the Global South* (Edward Elgar 2019) 86, 92-95.
[26] For a discussion of the 2017 Advisory Opinion see Christopher Campbell-Duruflé and Sumudu Anopama Atapattu, 'The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law' (2018) 8 *Climate Law* 321.
[27] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), 4 November 1950, ETS 5.
[28] Article 8(1): Everyone has the right to respect for his private and family life, his home and his correspondence.
[29] See Karen Morrow, 'The ECHR, Environment-Based Human Rights Claims and the Search for Standards' in Turner (n 19) 43.
[30] *Hatton and others* v. *the United Kingdom* [GC] Application no. 36022/97, (judgment of 8 July 2003), para 96. Similarly, in one its earlier prominent environmental cases, *López Ostra* v. *Spain*, the Court held that 'Article 8 could include a right to protection from severe environmental pollution, since such a problem might "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".' (*López Ostra* v. *Spain* (judgment of 9 December 1994), Series A no. 303-C, pp. 54-55, para 51).
[31] See Samvel Varvastian, 'The Advent of International Human Rights Law in Climate Change Litigation' (2021) 38 *Wisconsin International Law Journal* 369, 389-392.
[32] There is a rich body of scholarship on environmental constitutionalism. See, for example: David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (University of British Columbia Press 2012); David R Boyd, 'Constitutions, Human Rights, and the Environment: National Approaches' in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar 2015), 170-199; James R May and Erin Daly (eds), *Global Environmental Constitutionalism* (Cambridge University Press 2015); David R Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment', in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press 2018), 17-41.

at least 15 states in the Asia-Pacific, over 30 states in Latin America and the Caribbean, as well as the majority of European states – recognise the right to a healthy environment.[33] Furthermore, even the absence of formal constitutional recognition of this right does not preclude national courts in some countries from deriving the right to a healthy environment from other recognised constitutional rights. Perhaps the most prominent examples of this trend are the South Asian countries India and Pakistan, where courts have derived the right to a healthy environment from the rights to life and to dignity when dealing with cases concerning environmental degradation and pollution.[34] For example, since the mid-1980s, Indian courts have been interpreting the right to life under Article 21 of the Constitution as requiring certain environmental standards, and in *Virendra Gaur* v. *State of Haryana*, the Supreme Court of India held that because a healthy environment is a prerequisite for enjoying the right to life, environmental pollution can indeed violate Article 21.[35] Deriving the unwritten right to a healthy environment from constitutionally protected rights to life and to dignity under Articles 9 and 14 of the Constitution of Pakistan, the Supreme Court of Pakistan reached a similar conclusion in *Shehla Zia* v. *WAPDA*.[36]

However, not all courts have been willing to recognise an 'unwritten' constitutional right to a healthy environment or to derive it from other rights that are already recognised. One notable example is *Friends of the Irish Environment CLG* v. *Ireland*, which concerned the legality of the national GHG emissions reduction plan. In that decision, the Supreme Court of Ireland declined to recognise the unwritten (or derived) right to a healthy environment because, arguably, such a right either does not go beyond the already recognised rights to life and to health or lacks 'a sufficient general definition … about the sort of parameters within which it is to operate.'[37]

Furthermore, even if the right to a healthy environment is explicitly recognised, its application can be limited, as demonstrated by the example of climate change litigation in Norway, discussed in the next Section.

3. CASE STUDIES

[33] See UN General Assembly, A/HRC/43/53, 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).

[34] It is worth noting that these cases were made possible by the prevalence of public-interest litigation in these jurisdictions and the broad standing to bring cases of benefit to humanity: see further Waqqas Ahmad Mir, 'From Shehla Zia to Asghar Leghari: Pronouncing Unwritten Rights is More Complex than a Celebratory Tale', in Jolene Lin and Douglas Kysar (eds) *Climate Change Litigation in the Asia Pacific* (Cambridge University Press, 2020), 261-293.

[35] *Virendra Gaur* v. *State of Haryana*, Appeal (civil) 9151 of 1994.

[36] *Shehla Zia* v. *WAPDA*, [1994] PLD 693 SC (holding that a person cannot be said to live with dignity if this life is below bare necessity of proper food, clothing, shelter, education, healthcare, clean atmosphere and unpolluted environment).

[37] *Friends of the Irish Environment CLG* v. *Government of Ireland, Ireland and the Attorney General* [2020] No: 205/19 (Supreme Court, 31 July, 2020), paras 8.9-8.11. See further Victoria Adelmant, Phillip Alston and Matthey Blainey, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) 13 *Journal of Human Rights Practice* 1.

The right to a healthy environment is frequently raised in human rights-based climate change litigation. In fact, the interpretation of this right has been one of the key elements of rights-based climate cases in Asia and Latin America, as well as a prominent feature in litigation before European national courts. However, while all these cases can be used to illustrate the global development of the right to a healthy environment and its application in the context of climate change, there are three cases that offer a particularly valuable experience of analysing the application of this right in the context of both climate change *and* biodiversity loss. These three cases are: *Future Generations* v. *Ministry of Environment*, concerning the Colombian government's failure to address deforestation in the Amazon rainforest; *Greenpeace Nordic Association* v. *Ministry of Petroleum and Energy*, concerning licences for oil drilling in the Artic issued by the Norwegian government; and *Shrestha* v. *Prime Minister*, concerning the absence of comprehensive climate change legislation in Nepal. The Chapter will now turn to discuss the application of the right to a healthy environment in each of these three cases.

3.1 *Future Generations* v. *Ministry of Environment and Others* ('*Future Generations*')

The Colombian case of *Future Generations*[38] was initiated by a group of young people who brought a challenge against state and local authorities, targeting one of the most pressing environmental problems in the region – deforestation in the Colombian Amazon – through the lens of climate change. Deforestation contributes to global warming, as it reduces the availability of carbon sinks, thus leading to greater greenhouse gas ('GHG') emissions.[39] In fact, according to Colombia's national inventory of GHGs, the forestry sector is the major producer of GHG emissions in the country, with deforestation being responsible for 98% of these emissions.[40] Furthermore, deforestation in the Amazon rainforest negatively affects the country's ecosystems by disrupting hydrological cycles and the ability of soils to absorb the rainwater, as well as by disrupting the supply of water to the cities in the Andean mountains.[41] However, the Colombian government was not fulfilling its 2015 commitments to reduce the rate of deforestation in the country – on the contrary, the rate of deforestation actually increased.[42]

The claimants maintained that the lack of action to address deforestation violated their constitutional rights, including the right to a healthy environment,[43] and asked the court to order the defendants to adopt a range of measures to reduce deforestation.[44] The claim was brought as a 'tutela' action (*acción de tutela)*, a special legal procedure under Article 86 of the Colombian

[38] *Future Generations* v. *Ministry of Environment and Others* (High Court of Bogota, 2018).
[39] Ibid 5. See also Yue Li, 'Deforestation-induced Climate Change Reduces Carbon Storage in Remaining Tropical Forests' (2022) 13 *Nature Communications* 1964.
[40] *Future Generations* (n 38) 5.
[41] Ibid.
[42] Ibid 3-4.
[43] The 1991 Constitution of Colombia (with Amendments through 2015), Article 79:
> Every individual has the right to enjoy a healthy environment. The law will guarantee the community's participation in the decisions that may affect it.
> It is the duty of the State to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the achievement of these ends.

[44] *Future Generations* 3-4.

Constitution that allows every individual to bring a fundamental constitutional rights claim before any national court in Colombia. For its part, the intervenor Public Ministry requested the Court to declare the Colombian Amazon as being subject of rights (*sujeto de derechos*) 'entitled to protection, conservation, maintenance and restoration by the State and its territories'.[45]

The High Court of Bogota ruled that a *tutela* claim can be made with regard to collective rights only when the collective rights of the claimants are gravely and immediately affected.[46] In its analysis, the Court considered a range of factors, including the vital role that the Amazon rainforest plays in maintaining the global climate and the importance of reducing deforestation to mitigate climate change, as well as the fact that the Colombian government has committed to reducing deforestation as part of its climate change obligations and the fact that in spite of these commitments, deforestation in the Colombian Amazon actually increased.[47] Despite taking all these points into consideration, the High Court held that the collective right to enjoy a healthy environment should be claimed via the *actio popularis* mechanism under Article 88 of the Colombian Constitution.[48] In other words, the High Court remained unpersuaded that the claimants were individually affected by deforestation and its contribution to climate change. The claimants appealed to the Supreme Court of Colombia.[49]

The Supreme Court endorsed the position of the High Court that a *tutela* claim can proceed to protect collective rights only in exceptional circumstances, most notably, when a violation of collective rights also violates fundamental rights.[50] The Supreme Court declared that in this case a *tutela* clam can proceed, because the violation of the right to a healthy environment inevitably affects fundamental rights, namely, the rights to life, health and access to water.[51] What is more, the Supreme Court extended the application of the right to a healthy environment beyond the present generation and, indeed, beyond humans, because without a healthy environment, 'the subjects of rights and the sentient beings in general' could not survive, let alone be able to defend these rights for themselves and for future generations.[52] The Supreme Court therefore held that the concern over fundamental rights was sufficient to allow a *tutela* claim.[53]

As for the interpretation of the substantive elements of the right to a healthy environment, the Supreme Court based its assessment on both moral and legal grounds. Given the deteriorating conditions of ecosystems and the increasingly frequent occurrence of extreme weather events driven by human activities, the Supreme Court considered environmental

[45] Ibid 7. The Public Ministry (*Ministerio Público*) is a governmental body comprised of state Attorney General, ombudsman, and prosecutor, as constituted under Article 118 of the Constitution of Colombia.
[46] Ibid 11.
[47] Ibid 12-17.
[48] Ibid 17. Article 88 of the Colombian constitution allows *actio popularis* 'for the protection of collective rights and interests related to the [environment] without barring appropriate individual action'.
[49] *Future Generations* v. *Ministry of Environment and Others*, STC4360-2018 (Supreme Court of Colombia, 2018).
[50] Ibid 10-11.
[51] Ibid 12-13.
[52] Ibid.
[53] Ibid 14.

protection as one of the moral precepts of the constitutional state,[54] based on the ethical duty of solidarity with other species and the intrinsic value of nature itself.[55] Without proper protection, natural resources would be gradually depleted, leaving future generations without the means of enjoying these resources in the same way as their ancestors did.[56] For its part, ethical solidarity requires sharing benefits and obligations fairly and justly between current and future generations, and between humans and non-humans,[57] where the former are part of the latter.[58]

Furthermore, the Court was convinced that the right to a healthy environment under Article 79 along with other provisions on national and international law created the legal grounds for action.[59] Referring to the post-1992 case law of the Colombian Constitutional Court,[60] which recognised that environmental problems are a matter of survival, the Supreme Court observed that the Colombian Constitution could well be considered a 'green', or 'ecological' constitution, since it elevated environmental protection to the level of fundamental constitutional rights.[61] Indeed, in its case law, the Constitutional Court had held that environmental rights are both fundamental and collective, since environmental protection itself is a constitutional value that is of both fundamental and collective nature.[62]

With that in mind, the Supreme Court considered the severity of the potential violation of fundamental rights resulting from the impacts of deforestation.[63] The Court recognised that deforestation in the Amazon causes 'grave and imminent harm to children, adolescents, and adults' – both the claimants and everyone living in the country, as well as future generations – in the short, medium and long term.[64] Because deforestation results in greater GHG emissions, which harm the ecosystems and disrupts water resource, the Supreme Court also considered important the localised negative impacts of deforestation, namely its threat to biodiversity.[65]

The Supreme Court based its assessment of the impacts of deforestation on fundamental rights on three principles of environmental law: the precautionary principle, the principle of intergenerational equity, and the principle of solidarity.[66] The projected temperature increase in Colombia, the harm to biodiversity, water contamination and droughts – all attributed to increasing GHG emissions resulting from deforestation in the Colombian Amazon – were deemed sufficient to demonstrate irreversibility and scientific certainty and to trigger the

[54] Ibid 15-18.
[55] Ibid 19.
[56] Ibid 20.
[57] See, for example, Borna Jalsenjak 'Principle of Solidarity' in Samuel Idowu and others (eds) *Encyclopedia of Sustainable Management* (Springer 2020) 1; Catherine E Amiot and Brock Bastian, 'Solidarity with Animals: Assessing a Relevant Dimension of Social Identification with Animals' (2017) 12 *PLoS ONE* e0168184.
[58] *Future Generations* (n 49) 20-21.
[59] Ibid 26.
[60] The current Constitution was adopted in 1991 and the Constitutional Court first interpreted it in the context of environmental degradation in 1992.
[61] *Future Generations* (n 49) 27-29.
[62] Ibid 29-30.
[63] Ibid. 33.
[64] Ibid 34.
[65] Ibid 35.
[66] Ibid.

application of the precautionary principle.[67] Similarly, deforestation violated the principle of intergenerational equity, since the projected temperature increase would occur all the way into the second half of this century, thus affecting infants and future generations.[68] For its part, the principle of solidarity,

> is determined by the duty and co-responsibility of the Colombian state to stop the causes of the GHG emissions from the abrupt forest reduction in the Amazon, thus, it is imperative to adopt immediate mitigation measures, protecting the right to environmental wellbeing, both of the claimants, and of the other people who inhabit and share the territory of the Amazon, not only nationals, but also foreigners, together with all inhabitants of the globe, including ecosystems and living beings.[69]

The principle of solidarity played a particularly important role in the Supreme Court's analysis, including consideration of the 2016 decision of the Constitutional Court, recognising the rights of the Atrato river and emphasising the interdependence between a healthy environment, the rights of nature, and the rights of human communities.[70]

In light of these considerations, the Supreme Court agreed with the claimants that the defendant authorities had failed to stop deforestation.[71] Consequently, following the example of the abovementioned decision regarding the Atrato river, the Supreme Court declared the Amazon rainforest the subject of rights, 'entitled to protection, conservation, maintenance and restoration by the State and the territorial agencies.'[72] The Supreme Court, therefore, granted the application, ordering the defendant agencies to formulate a short, medium, and long term action plan and to take related measures for counteracting deforestation in the Colombian Amazon and tackling the impacts of climate change.[73]

3.2 *Greenpeace Nordic Association and Nature and Youth* v. *Ministry of Petroleum and Energy* ('*Greenpeace Nordic*')

Unlike *Future Generations*, the Norwegian case of *Greenpeace Nordic*[74] was much narrower in scope. In *Greenpeace Nordic*, the claimants challenged the 2016 governmental decree that awarded 10 licences for the production of petroleum on the Norwegian continental shelf.[75] While on the face of it the claimants challenged a permit, the essence of the claim was much more complex, because it also concerned potential emissions abroad caused by the burning of fossil fuels that would be produced as a result of the contested decree and then exported.[76] The

[67] Ibid 35-37.
[68] Ibid 37.
[69] Ibid.
[70] Pp 40-41; see further Philipp Wesche, 'Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision' (2021) 33 *Journal of Environmental Law* 531.
[71] *Future Generations* (n 49) 41-45.
[72] Ibid 45.
[73] Ibid 48-49.
[74] *Greenpeace Nordic Association and Nature and Youth* v. *Ministry of Petroleum and Energy*, 16-166674TVI-OTIR/06 (Oslo district court, January 4, 2018).
[75] Para 1.1.
[76] Paras 1.2-1.4 and 3.1.

claimants alleged a violation of the right to a healthy environment under Article 112 of the Norwegian Constitution,[77] because the government arguably did not consider this right when issuing the contested decree.

The Oslo District Court's analysis of the applicability and interpretation of the right to a healthy environment under Article 112 focused on two questions – whether Article 112 is a rights provision[78] and, if so, what its parameters and relevance were in the present case.[79] With regard to the first question, the Court deemed it obvious from the preparatory works of the legislation that Article 112 is a rights provision.[80] With regard to the second question, the Court agreed with both parties that Article 112 covers both traditional environmental harms and climate change.[81] A more complex question, however, was the threshold for triggering Article 112, because as a rights provision, it cannot be invoked in the case of every encroachment that has a negative impact on the environment, unless such a negative impact exceeds a certain threshold.[82]

Acknowledging the international obligations to reduce GHG emissions within Norwegian territories, the Court considered that the right to a healthy environment is not applicable in the context of emissions abroad from Norway's exported oil and gas.[83] The key factors that determined the Court's conclusion on this was alleged uncertainty about the level of emissions that would result from the contested decree and the fact that in any case they would cause 'only an extremely marginal increase of total Norwegian emissions'.[84] The Court was satisfied that the Norwegian government had been sufficiently involved in a range of measures that mitigate both climate change and local environmental harms resulting from petroleum production activities on the continental shelf.[85] Therefore, the Court concluded that the contested decree did not violate the right to a healthy environment because 'the risk of both (traditional) environmental harm and climate deterioration as a result of [it] is limited, and remedial measures are sufficient.'[86]

The claimants appealed. The Borgarting Court of Appeal upheld the District Court's finding that Article 112 is a rights provision,[87] and that its interpretation requires strict

---

[77] The Constitution of Norway of 1814 (with Amendments through 2016), Article 112:

> Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.
>
> In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to be informed of the state of the natural environment and of the effects of any encroachments on nature that are planned or commenced.
>
> The State authorities shall issue further provisions for the implementation of these principles.

[78] Para 5.2.1.
[79] Para 5.2.2.
[80] Para 5.2.1.
[81] Ibid.
[82] Ibid.
[83] Para 5.2.2
[84] Para 5.2.3.
[85] Para 5.2.4.
[86] Para 5.2.7.
[87] *Greenpeace Nordic Association and Nature and Youth* v. *Ministry of Petroleum and Energy*, 18-060499ASD-BORG/03 (Borgarting Court of Appeal, January 23, 2020), para 2.2.

adherence to the separation of powers, as 'decisions in cases involving fundamental environmental issues often entail political balancing and prioritisation'.[88] The Court considered it paramount to strike the proper balance between these considerations, as the case concerned 'Norway's most important industry from a socio-economic perspective – the petroleum activities – and what many will believe is the most important environmental challenge the world is facing – climate change.'[89] Given the complexity of finding an appropriate balance, and the significance of the two elements in conflict, the Court concluded that the right to a healthy environment under Article 112 of the Constitution ought to be justiciable:

> [T]he courts must be able to set a limit as well for a political majority when the matter involves protecting constitutionally established values. The environment is fundamental in the broadest sense for humans' living conditions, and when compared with other rights the courts have been assigned to protect, it does not seem unnatural to understand Article 112 to mean that in this area as well, the courts must be able to set a limit on the Government's actions.[90]

However, like the District Court, the Court of Appeal faced difficulties in assessing the parameters of this constitutional right. The Court of Appeal upheld the District Court's conclusion that the right can only be violated when the environmental harm passes a certain threshold, with the severity of the harm being 'the key criterion, based on the significance for human health and the productive capacity and diversity of the natural environment'.[91] However, the Court of Appeal held that such environmental harm does not necessarily need to materialise and as long as there is a sufficient risk, the right to a healthy environment can be violated.[92] Still, the threshold for harm should be relatively high.[93] In other words, the relevance of Article 112 to challenged GHG emissions should be interpreted not 'in isolation' but rather in the context of their 'total effect on the climate' and how these emissions are included in Norway's total emissions.[94] Consequently, the Court agreed with the claimants on two key issues: that GHG emissions from combustion after export are relevant in assessing impacts on a constitutional right and that the constitutional right to a healthy environment could be relevant when considering decisions in Norway that cause harm abroad, as long as these decisions also cause harms in Norway.[95]

Accordingly, the Court of Appeal considered the impacts of climate change in Norway, as well as the projected GHG emissions resulting from the challenged decree, including from combustion abroad.[96] The Court acknowledged that fulfilment of GHG emissions reduction goals 'requires drastic cuts in emissions … which is directly in opposition to searching for new discoveries [of fossil fuel deposits].'[97] However, the Court gave considerable weight to the fact that GHG emissions in Norway can decrease in other sectors, following 'prioritisations in

[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Para 2.3.
[92] Ibid.
[93] Ibid.
[94] Para 2.4.
[95] Ibid.
[96] Paras 3.1-3.4.
[97] Para 3.2.

climate policy'.[98] Ultimately, it was the latter consideration that determined the Court's position. First, the Court held that 'the actual significance of Norwegian exports of oil and gas for global emissions is … complicated and controversial', because arguably, 'cuts in Norwegian production might quickly be replaced by oil supplied from other countries.'[99] Also, the Court seemed satisfied that even drastic global impacts of climate change would not be an issue for Article 112 assessment as long as these impacts are not 'serious enough' in Norway itself.[100] The Court also referred to climate change adaptation measures in Norway that ameliorate any such impacts.[101] Finally, the Court considered the government's persistent rejection of phasing out Norwegian oil activities as a clear demonstration of the importance of these activities for the Norwegian economy.[102] The Court, therefore, held that the threshold for triggering Article 112 was not exceeded.[103]

The claimants subsequently appealed the decision to the Supreme Court of Norway, but they were unsuccessful in overturning the Court of Appeal decision.[104] The Supreme Court upheld the interpretation of the right to a healthy environment provided by the Court of Appeal and added that Article 112 imposes a duty to refrain from actions that violate the right to a healthy environment.[105] Such an interpretation could have made Article 112 a powerful tool for challenging permits to carry out polluting projects. However, the Supreme Court substantially limited the power of Article 112 by holding that in order for a court to set aside a legislative decision by the government, the latter 'must have grossly disregarded its duties' under the abovementioned Article, thus rendering the threshold 'very high'.[106] Similarly, the Supreme Court considered that Article 112 covers climate change, and could potentially be violated when 'activities abroad that Norwegian authorities have directly influenced or could take measures against cause harm in Norway', including situations when combustion abroad of oil or gas produced in Norway leads to harm in Norway as well.'[107] However, the Supreme Court found no violation of the constitutional right to a healthy environment because the government's decision to open the maritime areas in question did not grossly disregard the duty under Article 112.[108] In support of this conclusion, the Supreme Court referred to a number of factors, including the adoption of carbon pricing, investment in renewable energy and carbon capture and storage technology, the adoption of local environmental harm mitigation measures and GHG emissions reduction targets.[109] The Supreme Court, therefore found no violation of Article 112.

---

[98] Ibid.
[99] Para 3.3.
[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Para 3.5.
[104] *Greenpeace Nordic Association and Nature and Youth* v. *Ministry of Petroleum and Energy*, HR-2020-2472-P, (case no. 20-051052SIV-HRET) (Supreme Court, 22 December, 2020).
[105] Para 143.
[106] Para 142.
[107] Para 149.
[108] Para 157.
[109] Paras 159-163.

3.3 *Shrestha* v. *Prime Minister and Others* ('*Shrestha*')

The Nepali case of *Shrestha*[110] was a direct challenge to national climate policy.[111] In 2017, the claimant – a resident of Kathmandu District – sued numerous governmental agencies, alleging violations of his constitutional rights, including the right to a healthy environment under Article 30,[112] that had resulted from the absence of specific and comprehensive climate change mitigation and adaptation legislation.[113] The claimant outlined numerous climate change-driven problems that communities in Nepal face, including 'an imminent threat to water resources …, changes in drinking water systems and structures, agriculture and forestry, longevity of humans, health and medicines, nature of diseases, and lifecycle, and [novel problems] due to the lack of treatment of epidemics and diseases that might be caused.'[114] While the government had adopted a national climate change policy as early as 2011, this policy had not resulted in any concrete measures due to the absence of comprehensive climate change legislation.[115] Furthermore, the existing framework environmental protection legislation contained no provisions with regard to climate change.[116] Therefore, the claimant applied to the Supreme Court seeking the issue of a writ of mandamus, instructing the government to both adopt comprehensive climate change legislation, and formulate and implement an effective climate change mitigation and adaptation plan.[117]

The Supreme Court acknowledged the universally disruptive nature of climate change, rendering it 'a matter of public concern', since it 'not only affect[s] human lives, but all plants and animal species, their habitats and create[s] an imbalance in ecology and biodiversity'.[118] Because of this, the Court considered that any engagement with climate change should be based on the concept of climate justice, and must give due consideration to the wellbeing of both present and future generations.[119] This, in turn, led the Court to draw the link between these considerations and the affected constitutional rights of the claimants:

> Climate change, exploitation of natural resources and environmental pollution have posed a threat to the existence of ecology and biodiversity. Such threats do not just affect the organisms living today but also cause irreversible damage to nature and pose an imminent threat to several generations ahead. The matter of climate change and threat posed by pollution is directly connected to the well being of citizens who are

[110] *Shrestha* v. *Prime Minister and Others*, Decision no. 10210, Order 074-WO-0283 (2018, Supreme Court, Division Bench).
[111] On the role of climate litigation in South and South-East Asia, see Eales and McCormack, Chapter 16 in this volume.
[112] The Constitution of Nepal of 2015 (with Amendments through 2016), Article 30:
> 1. Each person shall have the right to live in a healthy and clean environment.
> 2. The victim of environmental pollution and degradation shall have the right to be compensated by the pollutant as provided for by law.
> 3. Provided that this Article shall not be deemed to obstruct the making of required legal provisions to strike a balance between environment and development for the use of national development works.

[113] *Shrestha* 3 and 5.
[114] Ibid 4-5.
[115] Ibid 4.
[116] Ibid 5-6.
[117] Ibid 6.
[118] Ibid 11.
[119] Ibid.

> guaranteed with the right to clean environment and conservation under the Constitution. Such kind of threat to present and future generations posed by climate change affects every citizen hence, the matters raised in the current petition are of public concern. Considering the public nature of concerns raised in the present petition, there is a meaningful relation between the issues and the petitioners.[120]

With that in mind, the Court outlined the factors that favoured the adoption of comprehensive climate change legislation and clarified how this step would help secure the abovementioned constitutional rights and the implementation of governmental obligations to address environmental harms. In summary, the Court held that, first, such legislation would cover a range of social and environmental issues related to climate change, namely, biodiversity loss, desertification, promotion of renewable energy, and protection of communities, particularly in areas that are highly vulnerable to the impacts of climate change. Accordingly, such legislation would promote environmental justice. Second, the Court explained that such legislation would facilitate compliance with both international and national environmental protection obligations. Most notably, the Supreme Court referred to Article 51(g) of the Constitution, which requires the state to adopt a policy regarding the preservation of natural resources, development of clean and renewable energy, promotion of awareness about environmental protection, reduction of industrial impacts on the environment, and the adoption of measures aimed at prevention of harmful impacts on the environment, including biodiversity, and mitigation of the risks of natural disasters.

The Court, therefore, concluded that climate change mitigation and adaptation are directly relevant to the right to a healthy environment, and held that the abovementioned factors required the adoption of a 'permanent legal mechanism' that would cover promotion of sustainable development and reforestation, renewable energy, reduction of fossil fuel consumption, assessment of vulnerable areas, compensation for environmental degradation, and so forth.[121] Since the existing environmental protection legislation was inadequate to address these issues, the Supreme Court ordered the government to draft and implement a comprehensive climate change law as soon as possible.[122] Following this order, the Nepali Government adopted the 2019 Environment Protection Act, which outlined the key policy measures to address climate change mitigation and adaptation.[123]

4. DIFFERENT FACTS, GENERAL LESSONS

Several interrelated points emerge from the analysis above.

First, the right to a healthy environment can be used in various types of challenges, ranging from narrow-scope challenges to government permitting processes, to broader challenges to governmental action or inaction with regard to specific sectors (such as deforestation), and even to challenges to overarching policies on climate change. Of course,

[120] Ibid.
[121] Ibid 13-14.
[122] Ibid 14.
[123] The Environment Protection Act 2019, No. 9 (11 October 2019), Chapters 4 and 5.

this fact alone is hardly sufficient to guarantee a successful outcome in litigation. It is therefore crucial to keep in mind that each of the abovementioned types of challenges present their own complexities that claimants are likely to face. For instance, challenges to policy can face a very common obstacle, namely the doctrine of the separation of powers. Indeed, while the claimants in *Future Generations* and *Shrestha* did not encounter this obstacle,[124] their counterparts in other high-profile climate cases challenging climate policy in other countries were less successful, as attested by the dismissal of similar claims in the US[125] and Canada.[126] Still, while the separation of powers has traditionally been used by the governments to challenge the justiciability of climate cases, it has hardly been a barrier to any such cases outside the US and Canada.

As for challenges to permits, the outcome in *Greenpeace Nordic* demonstrates the perils faced by rights claims when confronting the contribution of individual polluting projects to global and diffuse environmental problems. That said, it should be observed that the position adopted by the Norwegian courts may not necessarily reflect the 'mainstream' judicial approaches in contemporary climate change litigation. For example, the market substitution argument, or speaking more broadly, the fundamentally flawed theory that climate change will occur regardless of the defendant's action or inaction,[127] has been rejected by courts in Australia,[128] the Netherlands,[129] the US,[130] and so forth. Nor are courts so easily persuaded that climate change adaptation measures arguably justify the inadequate response to climate change mitigation.[131]

This leads to the second and related point of observation, namely, the scope, or the content, of the right to a healthy environment. Since all three abovementioned cases were based on the *constitutional right* to a healthy environment, the difference between the interpretation of this right by the respective courts is not particularly surprising. For example, with Article 51(g) of the Constitution of Nepal directing the government to pursue various policies related to the conservation, management, and use of natural resources, including biodiversity, renewable, energy, and so forth, the Supreme Court in *Shrestha* was persuaded that the lack of comprehensive climate change legislation violated the right to a healthy environment under Article 30 of the Constitution. However, as mentioned above, it is extremely rare to have explicit references to biodiversity – or to any other areas of environmental concern for that matter – enshrined in constitutions, which makes *Shrestha* quite unique, though not necessarily

[124] Although the government of Nepal invoked the doctrine of the separation of powers to challenge justiciability (ibid 8-9).
[125] Including the famous case of *Juliana* v. *United States*, 947 F.3d 1159 (9th Cir. 2020), in which the Court of Appeals for the Ninth Circuit dismissed constitutional rights claims that challenged the US federal climate policy on redressability grounds.
[126] For example, in *La Rose* v. *Her Majesty the Queen* 2020 FC 1008, the Federal Court dismissed constitutional rights claims that challenged Canada's federal climate policy as non-justiciable and non-redressable.
[127] It is fundamentally flawed because it focuses only on *collective contribution* to the problem and completely ignores *individual responsibility* to deal with it.
[128] See, for example, *Gloucester Resources Limited* v. *Minister for Planning* [2019] NSWLEC 7 (Land and Environment Court of New South Wales, 2019) paras 534-545.
[129] *The State of the Netherlands (Ministry of Infrastructure and the Environment)* v. *Urgenda Foundation*, ECLI:NL:HR:2019:2007 (Supreme Court, 2019) para 5.7.8.
[130] *Massachusetts* v. *Environmental Protection Agency (EPA)*, 549 U.S. 497 (Supreme Court, 2007) at 525-526.
[131] See, for example, *Urgenda* (n 129) para. 7.5.2.

impossible to replicate outside Nepal. After all, specific environmental obligations of the government, while rarely enshrined in constitutions, are typically enshrined in primary or secondary legislation concerning environmental matters. Consequently, such legislation setting national policy on climate change, biodiversity, and so forth, could be used by the courts to a similar effect when interpreting the right to a healthy environment.

Meanwhile, in other countries, constitutions may be less 'detailed' with regard to specific areas of environmental concern, yet the concept of environmental protection may be so deeply entrenched in the fabric of the constitutional traditions that not only does the right to a healthy environment enjoy a broad interpretation by the respective courts, but nature itself is often declared the subject of rights. In other words, in legal systems that follow such a tradition – most notably, countries in Latin America – the right to a healthy environment can blur the distinction between the rights of humans and the rights of nature.[132] Indeed, as noted earlier, one of the claims in *Future Generations* concerned the recognition of the Amazon rainforest as the subject of rights, which the Supreme Court accordingly granted.

Such a broad interpretation of the right to a healthy environment in some countries is in stark contrast to the situation elsewhere. A typical example of the latter is Norway, where one of the key questions addressed by the respective courts in *Greenpeace Nordic* was whether the right to a healthy environment under Article 112 is a 'rights' provision. Given the courts' questioning of the very 'rights' nature of this right, it is perhaps of little surprise that they ultimately limited the application of Article 112 to cases where the government 'grossly disregarded' its duties. It thus seems that the explicit recognition of the right to a healthy environment does not automatically render this right more instrumental than in countries where this right is not explicitly recognised. Hence, for example, the absence of this right from the Constitutions of India and Pakistan has not precluded the respective courts from interpreting its 'derived' version as imposing broad obligations on the respective governments in various types of claims.[133] But again, such an approach is not universal and as seen in the Supreme Court of Ireland's treatment of the right to a healthy environment in *Friends of the Irish Environment*, some courts may decline to recognise this right altogether. In other words, the regional variations of the right to a healthy environment range from altogether unrecognised or narrowly interpreted variation of this right in Europe to an explicitly recognised or at least derived, but either way, widely applicable in the context of environment degradation variation in South Asia, to a particularly broad interpretation of this right, blurring with the rights of nature, in Latin America.

Accordingly, the third point is what the narrow or the broad interpretation of the scope of the right to a healthy environment means for the protection of biodiversity, climate, or any other elements of the environment. This question is more complex, as it depends on what falls within the scope of this right – as enshrined or interpreted in each jurisdiction. At one end of

[132] As mentioned in Section 2, this blurring was also observed by the IACtHR in its 2017 Advisory Opinion (see para 62). At a national level, see for example, the Constitution of Ecuador of 2008 (with Amendments through 2021), Title II, Chapter 7 (Rights of Nature), the Constitution of Bolivia of 2009, Article 33 (Environmental Rights), the Constitution of the Dominican Republic of 2015, Article 67 (Protection of the Environment).
[133] Samvel Varvastian, *Human Rights Approaches to Planetary Crises: From Climate Change to Plastic Pollution* (Routledge, 2024), https://doi.org/10.4324/9781003436133.

the spectrum is the right to a healthy environment, which may be recognised as protecting at least some elements of the environment, but with limited ability to challenge the threats to them – in other words, the *Greenpeace Nordic* scenario. In such a scenario, the right to a healthy environment would most likely be triggered only in very rare circumstances, for example, in a rather unrealistic situation where there is no environmental impact assessment prior to granting a permit to produce petroleum. Or, if the challenge was not against an individual permit, but rather Norway's petroleum production sector as a whole, thus concerning much greater GHG emissions – in other words, a broad-scope claim like the one in *Future Generations*. But that could still be insufficient because the government could once again successfully argue that it took adequate measures to offset the harm. Nevertheless, the very fact that the Norwegian courts held that the government must consider the right to a healthy environment in its activities (or lack of action) in Norway and abroad suggests that this right could be successfully used in future litigation concerning climate change, biodiversity loss, and other environmental harm. In other words, the narrow interpretation of the right to a healthy environment does not necessarily deprive this right of its 'teeth'.

At the other end of the spectrum is the right to a healthy environment that transcends the boundary between the rights of humans and the rights of nature, as seen in *Future Generations*. As such, the scope of such a broadly construed right can potentially be limitless concerning the range of the values it protects and the obligations it imposes. On the face of it, such a broad interpretation could be extremely useful, particularly when applied to protect wildlife and ecosystems, since they would be recognised as having intrinsic value. Alluring as it may be, however, such a broad interpretation can also cause certain problems, mainly by diluting the contours of this right and thus reducing the potential transferrable value of any successful cases that are brought under it. Indeed, such a broad interpretation would hardly satisfy the courts in those countries where the rights of nature are not recognised and given the fact that most countries do not recognise them, the transferrable value of such an interpretation would arguably be very low, if any.

In other words, just like with region- or even country-specific variations of the right to a healthy environment, different elements of this right seem to be emerging piecemeal from litigation, with tangible progress on certain specific issues yet with little development in other areas. Of course, such a fragmented approach can also be explained given, for example, the unique circumstances of different countries in terms of conservation capacity, development, geographical location, as well as specific challenges to local biodiversity. These differences can dictate the need for a specific interpretation of this right's content, for example, by focusing on certain elements such as the protection of forests as in *Future Generations*, access to clean water as in the ground-breaking case of *Leghari* v. *Pakistan*,[134] and so forth. However, in the absence of a universally accepted definition of this right, there is a certain risk that in some

[134] *Asghar Leghari* v. *Federation of Pakistan and Others* W.P. No. 25501/2015 (Lahore High Court, 2018). In *Leghari*, the Lahore High Court derived the right to a healthy environment from the constitutionally protected rights to life and to dignity and ordered the government of Pakistan to take comprehensive measures to implement the national climate change policy: see further Eales and McCormack, Chapter 16 in this volume.

countries, the level of protection offered by this right can fall below the bare minimum and thus prove to be of little if any practical value.

These considerations reveal the importance of having the content of the right to a healthy environment defined at the international level and, accordingly, the importance of the recent developments in the international recognition of this right discussed in Section 2. That said, it must also be kept in mind that the *real* protection offered by the right to a healthy environment – as opposed to the one on paper – ultimately depends on a range of factors, some of which are not even related to the scope of this right. Implementation of court decisions is probably one of the most salient factors. Once again, *Future Generations* can serve as a good – though on this occasion, sad – example. One year after the Supreme Court declared the Amazon rainforest the subject of rights and ordered the Colombian government to take measures against deforestation, the claimants had to return to the court to seek further action, because the government failed to implement the order.[135] The latter development provides yet another reminder of the sad reality that success at the litigation stage does not necessarily lead to any decisive improvement in the real world. But implementation problems are, of course, not unique to the right to a healthy environment.[136] As for the right itself, despite the differences in its interpretation and application, it has already proven to be at the very least a useful legal tool for protecting biodiversity in the context of governmental action or inaction regarding climate change.

5. CONCLUDING REMARKS

With no light at the end of the tunnel for the climate and biodiversity crises, every legal avenue counts. The right to a healthy environment is one such legal tool and its transnational recognition is gaining momentum. The three cases analysed substantively in this Chapter tell three different stories of the interpretation and application of constitutionally recognised right to a healthy environment. These differences resulted from the different types of claims, but perhaps more importantly, from the different interpretations of the scope of the right to a healthy environment by the respective courts. While these different interpretations reveal a fragmented approach to this right, the fact that despite these differences the courts in three countries with different legal systems interpreted this right as imposing climate and biodiversity protection obligations on the governments confirms that this right can be successfully used to tackle the most pressing environmental problems of our time.

[135] See <https://www.dejusticia.org/en/the-colombian-government-has-failed-to-fulfill-the-supreme-courts-landmark-order-to-protect-the-amazon/>.

[136] See, for example, Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 493; Dia Anagnostou and Alina Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter' (2014) 25 *European Journal of International Law* 205.