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Reconstituting the Constitution

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Part 10
Protecting Future Generations

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One of the most critical challenges facing the international community is to ensure that humanity exercises prudent stewardship of the environment – both locally and globally – and lives within the biophysical limits of the planet. If we fail, the consequences for future generations will be severe. Indeed, there is the risk of inflicting large-scale and irreversible damage to key biophysical systems, thereby seriously undermining the wellbeing of people for many generations to come. But how can we ensure that global public goods, such as the oceans and atmosphere, are properly valued and cared for? And how can we ensure that environmental values are respected and that the interests of future generations are adequately protected? After all, neither the environment nor future generations have voting rights. Within the democratic world, they are entirely dependent on the goodwill of current generations of voters. Is this goodwill sufficient? If not, is there a case for endeavouring to protect the environment and future generations through constitutional means and, if so, how effective are such measures likely to be?

In the closing chapters of this volume, a distinguished jurist (Justice Susan Glazebrook) and three young New Zealanders (Rayhan Langdana, Tama Potaka and Kate Stone) offer reflections on how best to protect the environment and future generations, as well as wider issues of citizenship and constitutional reform, with particular reference to New Zealand. In Chap. 25, Justice Glazebrook reviews international and domestic endeavours to recognise the importance of the environment, and considers the role that constitutional environmental rights can play in ensuring the protection of the environment. More specifically, she assesses how a constitutional environmental right might be most effectively formulated. In so doing she evaluates the arguments for and against including an environmental right within a nation's constitution, the appropriate formulation of such a provision (including whether it should be framed as a "right" and whether it should be procedural or substantive in nature), and whether any such provision should also include reference to future generations and biological diversity. Her argument, in short, is that constitutional environmental protections of a substantive nature are important and justified, and that if New Zealand were to promulgate a written constitution, such protections should be included within its scope.

In Chap. 26 Rayhan Langdana, the youngest of the contributors to this volume, addresses some of the key constitutional challenges facing New Zealand, in particular whether the country should become a republic, whether separate Māori representation should be retained, whether the current system of proportional representation should be reformed, and whether there is a case for separate youth representation in Parliament. He argues for a mix of change and continuity. On the one hand, he favours retaining the current Māori seats in Parliament on the grounds that this will help to protect New Zealand's Māori heritage and culture. On the other hand, he favours New Zealand becoming a republic, and recommends changes to the current electoral system, including reserved seats for young persons (that is, 18–22 year olds).

Tama Potaka, in Chap. 27, provides a Māori perspective on New Zealand's constitutional future. A key focus of attention is the constitutional status of the Treaty of Waitangi, especially the controversial question of whether the Treaty should be enshrined into supreme law and/or entrenched in some way. Potaka highlights the difficulties associated with formally codifying the Treaty and suggests various alternative approaches for giving expression to the intentions and values embodied in the Treaty. In the second part of the chapter, Potaka explores how tikanga (that is, Māori customs and traditions) might be optimised through constitutional reform. He considers, for instance, how tikanga might influence the interpretation of the common law and be embodied more fully within the policy process, especially the legislative process. He acknowledges, in this context, the controversial nature of some of his proposals but urges readers to venture with him in his constitutional "dreaming" and be willing to explore new possibilities and alternative futures.

Finally, Kate Stone, in Chap. 28, addresses the process of creating a "reconstituted" constitution. Lamenting the limited civic participation in contemporary liberal democracies like New Zealand, she provides a vigorous defence of "deliberative" democracy and its associated institutional arrangements. In this regard, she urges greater use of the various new information communication technologies (ITC) that are now available, as mechanisms for civic engagement and participation. Equally, she makes a passionate plea for a stronger focus on intergenerational justice and protecting the interests of future generations. In her view, the process of constitutional reform must engage the marginalised, foster a stronger, more vibrant notion of citizenship, and address the huge environmental issues that face humanity, not least the problem of human-induced climate change. Stone's ideals and dreams are undoubtedly worthy; realising them, however, will be challenging. Yet in the interests of justice and sustainability – social as well as environmental – we must strive to do so.

Chapter 25
Keeping It Clean and Green: The Case for Constitutional Environmental Protection Rights

Susan Glazebrook

25.1 Introduction

The national identity of Aotearoa/New Zealand is inextricably linked to the environment.[1] We live close to and in a situation of much natural beauty and identify ourselves with and by that natural beauty.[2] New Zealand's national icons of the kiwi, silver fern and koru all come from New Zealand's unique biological world. Moreover, New Zealand's environment is not only important for New Zealand's growing reputation as an eco-tourist destination, but also for its economy more generally.[3] The national tourism branding exercise of "100%

Justice Susan Glazebrook is Judge of the New Zealand Court of Appeal. This paper incorporates aspects of my earlier paper, "Human Rights and the Environment" (2009) 1 VUWLR 293. My thanks to Natasha Caldwell for her invaluable assistance in the research for and writing of this paper. Any errors remain my own. The views expressed are also my own and not necessarily those of the Court of Appeal.

[1] Landscape and National Identity is one of the research strands at the Centre for Research on National Identity at the University of Otago: http://www.otago.ac.nz/crni/research/projectdisc.html. It must be noted that in this paper I use the term "environment" to refer to the natural environment. Thus, it is an environment that encompasses all living and non-living things occurring naturally on Earth or some region thereof.

[2] Macdonald (2000), pp. 85–86 and her discussion of New Zealanders' view of themselves as "natural." For a discussion of the special relationship that Māori and others in New Zealand have with the New Zealand landscape see Temple (2000), pp. 98–101.

[3] James (2010) makes the argument that the ecosystem services that the physical environment provides can be seen as underpinning and enhancing GDP growth. Therefore he argues that, like other elements of infrastructure, the environment needs to be stewarded, maintained and kept in good working order.

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Pure"[4] is based on New Zealand's landscape (and seascape), while New Zealand's land-based primary production industries, such as farming, forestry and horticulture, are also reliant on the protection and management of New Zealand's environment and biological systems.[5] The preservation and protection of the environment is thus vital for both New Zealand's economic and spiritual health.

Protection of the environment has also become a key issue internationally, starting with the Stockholm Declaration,[6] which is widely regarded as heralding the beginning of modern environmental law.[7] Principle One of the Stockholm Declaration states that all human beings have the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and wellbeing, and that they bear a solemn responsibility to protect and improve the environment for present and future generations.[8] Later declarations have confirmed the importance of the global environment, although the environment has become coupled with development in the concept of sustainable development.[9] The International Court of Justice, in its opinion *Legality of the Threat or*

[4] The brand is now over 10 years old. It was launched in 1999 as part of New Zealand's first destination global tourism marketing campaign and concentrates on establishing and building an awareness of New Zealand as a holiday destination with a focus on its outdoor life and landscapes. See generally, http://www.newzealand.com/travel/trade/marketing-toolbox. Bertram (2010), p. 5 recently outlined that in 2009 the value of international tourism expenditure would have been approximately $9.3 billion (I note that I am not to be taken as commenting either way on the mining debate). The brand has not, however, met with unqualified enthusiasm. For instance, see the criticism of the concept in Manhire (2000), who says at p. 79 that the "100% Pure" brand is "the falsest account to date of what we are. It is certainly not true environmentally. But worse, it's not true of us as a people. We are mixed."

[5] www.biodiversity.govt.nz/picture/biodiversity/why.html.

[6] The Stockholm Declaration arose out of the Stockholm Conference, which was organised in response to emerging international concern after several environmental disasters, including the grounding of the oil tanker Torrey Canyon off the coasts of France, England and Belgium. The Conference was notable for its inclusiveness of both developing and developed countries. See: Kiss and Shelton (2007), pp. 34–35.

[7] The Asia Pacific Forum of National Human Rights Institutions (2007b), p. 13. Hill et al. (2004), p. 375 and Shelton (1992).

[8] Declaration of the United Nations Conference on the Human Environment (UN Doc A/Con/48/14Rev.1 1973). Principle one was not, however, acknowledged at the time to be an expression of international customary law – see Handl (2001), p. 307. See also United Nations (1987).

[9] The Rio Declaration was developed at the United Nations Conference on Environment and Development in Rio de Janeiro in 1992. This marked the twentieth anniversary of the Stockholm Conference. Principle one of the Rio Declaration states that human beings are at the centre of concerns for sustainable development and that they are entitled to a healthy and productive life "in harmony with nature". See also World Summit on Sustainable Development, Johannesburg Declaration on Sustainable Development A/CONF.199/20 (4 September 2002) (Johannesburg Declaration). Poverty eradication and the need to protect and manage natural resources "for economic and social development" were overarching objectives: Johannesburg Declaration at [11]. While the eradication of poverty is clearly a laudable goal, the assumption in the Johannesburg Declaration seems to be that the environment is only there for (proper) human use.

Use of Nuclear Weapons,[10] recognised the importance of the environment in rather poetic terms, stating:

> The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.[11]

The growing international recognition of the importance of the environment is also evidenced by the multitude of treaties that now deal with the environment. There have been over 350 multilateral treaties since 1972 that deal with aspects of the environment and more than 1,000 bilateral ones.[12] Environmental issues such as threats to biological diversity,[13] global warming, sea-level rise and climate change[14] are clearly currently on the international agenda and the United Nations Secretary-General recently recognised the pressing need to address the increasing

[10] *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226. The Court was not talking about a general human right to the environment. It was talking about the obligation of States to ensure that activities, within their jurisdiction and control, respect the environment of other States. The ICJ has also recognised the concept of sustainable development in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7.

[11] At [29].

[12] Rodriguez-Rivera (2001), p. 6. Treaty numbers are correct as at 2001. In the main, however, these treaties are regulatory and are not couched in terms of human rights. Examples of the types of environmental conventions to which New Zealand is a party and that might be thought to be of particular relevance to New Zealand are: United Nations Convention on Biological Diversity (concluded at Rio de Janiero on 5 June 1992, entered into force on 29 December 1993); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (opened for signature on 22 March 1989, and entered into force on 5 May 1992); Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted March 1973, entered into force on 1 July 1975); Convention on the Conservation of Migratory Species of Wild Animals (adopted on 23 June 1979, entered into force 1 November 1983); Convention for the Conservation of Southern Bluefin Tuna (signed at 10 May 1993, entered into force 20 May 1994); Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (adopted 24 November 1986, entered into force 22 August 1990).

[13] United Nations Environment Programme (2010), p. 5.

[14] United Nations Environment Programme (2009); Arndt et al. (2010). For discussion outlining the view on climate change post the Copenhagen Climate Change Conference in 2009 see generally, Standertskjöld (2010); Climitaco (2010). This issue is capable of generating strong feelings. In New Zealand, the country's state-owned weather and atmospheric research body is being taken to court in a challenge over the accuracy of its data used to calculate global warming. The New Zealand Climate Science Coalition has lodged papers with the High Court asking the Court to invalidate the official temperatures record of the National Institute of Water and Atmospheric Research: <http://www.stuff.co.nz/national/4026330/Niwa-sued-over-data-accuracy>. In response, New Zealand's scientific experts have expressed concern that scientific journals rather than the courts are the appropriate forum for such scientific debate. See: <http://www.sciencemediacentre.co.nz/2010/08/16/journals-not-court-is-place-for-scientific-debate-experts>.

environmental degradation of the planet as the "moral challenge of our generation".[15]

In light of the importance of the environment to New Zealand and the increasing global awareness of the importance of environmental protection, this paper explores the role that constitutional environmental rights can play in facilitating the protection of the environment[16] and analyses how a constitutional environmental right could be effectively formulated, were New Zealand to have a written constitution.[17]

25.2 Why Include an Environmental Right Within a National Constitution?

There are a number of reasons why an environmental protection provision should be included in any constitution. Two have already been discussed: the importance of the environment to New Zealand, both economically and to the self image of its people; and the increasing global concerns about environmental degradation.

Given the importance of the environment to New Zealand and also, as discussed further below, the spiritual and cultural connection to the land of its indigenous people, it would be odd if there was not some recognition of the environment in any written constitution. As recognised by Professor Charlotte MacDonald:

[15] Ban Ki-moon cited in Aldred (2007).

[16] In the appendix, I examine how constitutional environmental protection rights have operated in other jurisdictions.

[17] I am not to be taken as advocating that there should be a written constitution. Nor am I to be taken as expressing any general view on the form any such written constitution should take if there were to be one, including questions of entrenchment and/or whether it should or should not contain a Bill of Rights. In particular, I express no view on whether there should be judicial review of legislation or the form any such review should take: that is, whether it should be a power to strike down or a "dialogue" or declaratory model. A strong form of a dialogue model can be seen in the Canadian Charter of Rights and Freedoms 1982 which enabled many decisions that were formerly within the exclusive authority of Parliament and provincial legislatures to become subject to judicial review: see generally, Sharpe et al. (2002). The Human Rights Act 1998 in the United Kingdom provides a weaker form of the model: see generally Hoffman and Rowe (2009). In New Zealand, the Regulatory Responsibility Taskforce has recommended in its review of the Regulatory Responsibility Bill, originally introduced into Parliament in 2007, that a new role should be provided for the Courts to make declarations of incompatibility with the specified principles of the Bill, but otherwise any power to make injunctive or compensatory orders on the basis of the Bill's specified principles should be explicitly excluded. This also appears to incorporate a weaker model of the dialogue approach. The original Bill had its first reading on 27 June 2007 and the Select Committee report was released on 30 May 2008. On 30 September 2009 the Regulatory Responsibility Taskforce presented a new draft Regulatory Responsibility Bill and an accompanying report to Hon Bill English, Minister of Finance and Hon Rodney Hide, Minister for Regulatory Reform. The government is currently seeking submissions on the new draft Bill.

> In the past, we have been fairly cavalier in our attitude towards the natural environment, extracting a great deal of its wealth. Latterly we are developing a different attitude but we may look to a constitution to include a relationship with the species, and the beaches, rivers, lakes and mountains we take as our own and ours to guard.[18]

Further, the lack of an environmental constitutional provision, were New Zealand to promulgate a written constitution, would be out of line with the position internationally. No recently promulgated constitution has omitted reference to environmental principles and many older constitutions have been amended to include them.[19] Globally, by 2005, approximately 60% of all States had constitutional provisions protecting the environment.[20]

These figures are unsurprising. Despite the increasing international recognition of the right to a quality environment (or to sustainable development),[21] it is clear that constitutional environmental rights have a distinct role to play in the advancement of environmental protection. One significant benefit of constitutional environmental rights is that they can be tailored to a local context. As outlined by Anderson, national rights are capable of immediate enforcement in court and are more likely to be caught up in the everyday business of environmental management, while international rights exist mainly as aspirations, instruments of general supervision and ultimate safety nets.[22]

More generally, in light of the importance of the environment both nationally and internationally, a key reason put forward for a constitutional environmental protection provision is the influential nature of such a provision once it is encompassed in a national constitution. Not only does such a provision enable the aim of environmental protection to achieve the highest rank among legal norms,[23] including an environmental provision within a constitution can also compel the enactment of further environmental legislation.[24] Furthermore, it has been argued

[18] MacDonald (2000), p. 86.

[19] Hayward (2000), p. 558.

[20] Asia Pacific Forum of National Human Rights Institutions (2007a), p. 187 (Annex 3). Out of 193 national constitutions, 109 recognised some right to a clean and healthy environment and/or the State's obligation to prevent environmental harm.

[21] See generally, Glazebrook (2009), Taylor (1998) and Shelton (1991).

[22] Anderson (1996), p. 18.

[23] Brandl and Bungert (1992), p. 92.

[24] Hayward (2000), p. 566. This is not intended to be any comment on the adequacy or otherwise of New Zealand's current environmental legislation, including the Resource Management Act 1991 (the RMA). Indeed, the RMA contains as its guiding principles many of the provisions one might expect to find in any detailed constitutional environmental protection provision. For instance, Section 6 mandates that matters of national importance must be taken into account in the decision-making process. Some of the matters of national importance include: the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development; the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development; the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna; the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga. Section 7 provides that all

that the constitutional implementation of environmental goals can increase judicial awareness of environmental issues and stimulate "a more environmentally appreciative application and evolution of legal concepts by the judiciary."[25]

The benefits of constitutional environmental rights can, however, be seen to extend beyond the influence that such rights may have on the legislative and judicial spheres. Another important function of the constitutional implementation of environmental goals has been identified as the important role such provisions can play in raising public awareness of environmental issues, given that the public tends to be more familiar with constitutional provisions rather than specific statutory laws.[26] The role that constitutional environmental rights can play in guiding public discourse and behaviour is thus another way in which such rights can operate to enhance environmental protection.

Finally, environmental protection has increasingly been seen as a pre-condition to the enjoyment of internationally guaranteed human rights.[27] This is the case even under the sustainable development approach that couples the environment with development.[28] The right to an environment of quality can effectively be seen as one of the foundation stones on which all other rights depend. Vice-President Weeramantry, in his separate opinion in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,[29] certainly saw the protection of the environment as being very much a question of human rights. He said that it was:

> . . . a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[30]

25.2.1 Form of Provision

Assuming New Zealand does promulgate a written constitution, the arguments for the inclusion of an environmental protection provision appear overwhelming. The

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persons exercising powers and functions under the Act should have regard to matters such as: the intrinsic values of ecosystems; the maintenance and enhancement of the quality of the environment; and any finite characteristics of natural and physical resources. Finally, s 8 provides that when exercising powers and functions under the Act, the principles of the Treaty of Waitangi must be taken into account.

[25] Hayward (2000), p. 566.

[26] Bruckerhoff (2008), p. 4.

[27] Shelton (2002b) pp. 3–4.

[28] Shelton (2002b) p. 6.

[29] *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7. See Taylor (1999) for a full discussion of the case.

[30] See *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, separate opinion of Vice-President Weeramantry at 91-92.

question thus arises as to how such a provision should be formulated. Two distinct methods for inserting an environmental provision into a constitution can be identified. An environmental provision can be framed as a fundamental right or as a statement of public policy (or both).

Accordingly, as outlined by Brandl and Bungert, the first conceptual step that must be considered by those contemplating introducing an environmental protection provision into a constitution is whether an enforceable environmental right must be declared or whether the goal of environmental protection should be included as a policy statement.[31] This decision is one of significance. As noted by the authors, both options serve different functions. While individuals have the ability to enforce fundamental rights, statements of public policy can be seen to delineate State goals that must be considered in the decision-making process.[32] Thus, while it has been recognised that principles of public policy can play a vital role in setting the tone for legislative and executive policy development,[33] it is arguable that phrasing environmental provisions as statements of policy may hinder their enforceability and ultimately their utility.

The second question that requires consideration in the formulation of environmental constitutional provisions is the issue as to how specific the proposed environmental provision would need to be.[34] The right to a healthy environment has been subject to a narrow construction by national courts,[35] and it is important to acknowledge that opposition to the introduction of environment rights into national constitutions is often based on the difficulty of achieving a clear interpretation of phrases such as a "healthy" or "adequate" environment.[36] In light of such concerns, a more detailed provision may operate to promote environmental protection more effectively. For example, as

[31] Brandl and Bungert (1992), p. 86. Even if an environmental protection provision takes the form of a right, it would not necessarily have to be directly enforceable: the ability to enforce could arise through secondary legislation. See also discussion below at footnotes 38, 41 and 50.

[32] Brandl and Bungert (1992). The argument has been made that for an environmental right to have any meaning it must be able to be enforced, see, for example, Cusack (1993), p. 201. The decision of the Supreme Court of the Philippines in *Oposa v Factoran* (1995) 33 I.L.M. 173 in which the Court recognised the enforceability of a constitutional environmental right found within the Declaration of Principles and State Policies section of the constitution does, however, demonstrate that framing an environmental right as a statement of public policy does not necessarily hinder the right's enforceability. This case is discussed more fully in the Appendix.

[33] Hill et al. (2004), p. 381.

[34] Hill et al. (2004), p. 381.

[35] Bruckerhoff (2008), p. 631 notes that the right to a healthy environment has been restricted largely to the protection of human health and it has been largely framed as a right to protect individuals from pollution. For instance, in *Fundepublico v Mayor of Buglagrande* No T-515/92 (2004), the Colombian Constitutional Court relied upon the right to a healthy environment to close a polluting asphalt plant.

[36] Hayward (2000), p. 565.

discussed below, the benefits of including biocentric[37] and biodiversity considerations within constitutional environmental provisions are manifest.

The final consideration outlined by the authors is that it is necessary to determine who should have standing to enforce environmental provisions.[38] Consideration must be given as to whether the power to demand remedies for constitutional breaches should rest with the executive branch, the individual who alleges personal injuries suffered by him or herself or an individual who presents claims on behalf of societal groups or future generations.[39] With regard to this question, it is quite clear that wide standing rights will increase the effectiveness of any constitutional right[40] and the issue of participation rights with regard to the environment is one that quite clearly should be addressed in any constitution.

It is apparent that the considerations discussed above raise a number of issues that need to be explored in further detail. The fundamental question as to whether the goal of environmental protection should be formulated as a right brings to the fore issues such as whether a substantive right to the environment is necessary if procedural and participation rights are included in a constitution; and whether the inclusion of such a right would detract from other constitutional rights. Consideration must also be given as to whether a duty, as well as a right, should be imposed in any environmental protection provision and whether the right should extend to peoples and communities as well as individuals. Moreover, in formulating such a provision it is necessary to explore whether the rights of Māori and future generations should be explicitly protected. Finally, the scope of environmental protection that such a provision should afford also requires examination. I will first set out my general reasons for favouring the inclusion of a right to environmental protection in any written constitution and then discuss the issues set out above in turn.[41]

[37] Biocentrism considers all forms all of life to have intrinsic value. See generally, Emmenegger and Tschentsche (1994), p. 545.

[38] Brandl and Bungert (1992), p. 87. In this regard it may not matter if constitutional rights are not directly enforceable but merely require the enactment of legislation giving participation and enforcement rights.

[39] Brandl and Bungert (1992), p. 87.

[40] I note again, however, that I am not necessarily advocating that constitutional rights should be directly enforceable.

[41] If any written constitution does not contain a Bill of Rights then I am not suggesting that an environmental right would be included in splendid isolation. However, if there is to be an expansion of rights in our New Zealand Bill of Rights Act 1990 (as suggested by Drs Petra and Andrew Butler in their paper for this conference), then in my view an environmental right should also be included. This is particularly the case if a property right is included.

25.2.2 Should the Goal of Environmental Protection Be Formulated as a Right?

In my view, if there were to be a constitutional environmental provision in any written New Zealand constitution, then it should be constituted as a right.[42] A specific right would give greater prominence to the environment[43] and it would help facilitate public discourse and make preservation of the environment a more personal issue by giving it a "human" face.[44] Without relating it back to people, "the environment" can, contrary to the words of the International Court of Justice,[45] seem something of an abstraction. The importance of winning the hearts and minds of people and thus of the role of rhetoric in protecting the environment cannot be overemphasised. Such a right would also provide a focus on the rights of Māori as the indigenous people of New Zealand and recognise the importance of the environment for Māori, culturally, economically and spiritually.[46]

Some argue that formulating any constitutional environmental protection provision as a right would not in fact add to environmental protection measures. At the risk of appearing trite, the immediate response is that every little bit helps. A more considered response would mention the impact that terminology has on human action and the systemic advantages of framing the goal of environmental protection as a right. With regard to the terminology point, there is more likely to be willing compliance with the overall regime if a person considers him or herself as enjoying a right rather than being subjected to regulation. In terms of systemic issues, framing environmental protection as a right also draws it into the more general rights framework, with consequent advantages for environmental protection. The

[42] It may be that, as statements of public policy and rights serve different functions, both should be included in the environmental context.

[43] Professor Stephen Marks suggests that the value of the right to development lies primarily in its rhetorical force – see Marks (2004), p. 156. The United Nations Development Programme (2000) recognises at p. 22 that, since the process of human development often involves great struggle, the empowerment involved in the language of claims can be of great practical importance. Similar comments can be made about any right to the environment.

[44] Australian Human Rights and Equal Opportunity Commission (2008), p. 12.

[45] See the comments in *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 at 241.

[46] See discussion below and in particular principles 13 and 14 of the Draft Principles On Human Rights and the Environment, E/CN.4/Sub.2/1994/9, Annex I (1994); art 25 of the Declaration on the Rights of Indigenous Peoples UN Doc A/RES/61/295 (2 October 2007); International Labour Organisation Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries 1989, 28 ILM 1382 (ILO Convention (No. 169)). Chapter 26 of Agenda 21, the global plan of action relating to sustainable development adopted by the UN Conference on Environment and Development 1992, entitled "Recognizing and Strengthening the Role of Indigenous People and Their Communities" also focuses on participation rights of indigenous peoples.