Sustainability Constitutionalism: Adopting National Perspectives on Sustainability

Rhett Martin
University of Southern Queensland

The development of environmental constitutional rights has provided important legal advances in procedure, standing, enforcement and remedies for matters concerning environmental protection and conservation. The constitutional textualization of environmental norms represents a significant development in both constitutional and environmental law, as well as providing a powerful impetus for cross-disciplinary research. These developments have not been mirrored to the same extent with sustainability thresholds and practices. Just as environmental rights are a legitimate avenue for constitutional protection, this article argues a similar position should accord to sustainability rights in constitutions by constitutional textualization of sustainability standards and thresholds. Achieving this constitutional recognition ensures sustainability has a national agenda for a sustainable future.

Keywords: sustainability, constitutions, sustainable development, criteria and indicators of sustainability

INTRODUCTION

The sustainability of nations has become a topic of international importance.[1] This article discusses sustainability clauses in constitutions, and why they are important. While developments in environmental constitutionalism (EC) have become pervasive, and are well entrenched in literature,[2] this is not reflected in sustainability constitutionalism (SC), which cannot, by definition, be seen as the same thing as EC. SC refers to the inclusion of sustainability principles and objectives into the laws and systems pertaining to constitutions. Sustainability inherently requires a balance between economic, social and environmental elements and, by definition, includes sustainable development as a necessary outcome of this balance objective. This contrasts with environmental constitutionalism which takes one element, (the environment), as the predominant theme, although this may also encompass sustainability in some contexts. SC is not yet as sufficiently recognised as broadly as environmental constitutionalism (in an academic sense), although this is starting to change.[3]

Sustainability is an amorphous subject, although amenable to definition in a sectoral or structural context, it is less clear when viewed nationally in a global context. As an example, we naturally want a sustainable society, but what exactly does that mean in a national context? SC is not yet a recognised legal norm,[4] although much of what is considered here highlights a capacity for it to become one. We want a sustainable world, but the path toward sustainability objectives is multifaceted and complex. This article considers a national approach to reaching sustainability objectives based on appropriate constitutional provisions. What drives constitutional change, what is an appropriate sustainability provision in a constitution, and how do we describe the justiciability of a constitutional provision for sustainability?

The 2030 Agenda for Sustainable Development describes sustainability's role as one to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable and inclusive institutions at all levels.'[5] The 2030 Agenda incorporates the UN's 17 Sustainable Development Goals (SDGs) which advance climate change adaptability, clean water, air and soil, poverty reduction, gender equity, and respecting sovereignty with human dignity. This article argues that these aims are best delivered by focusing on sustainable development and intergenerational equity as the predominant themes for constitutional inclusion. The focus is also on the justiciability of provisions that provide for a balance between economic growth and ecological protection. Constitutional textualization of sustainable development and intergenerational equity aligns with existing commitments and aims adopted into international agreements,[6] laws of nations,[7] corporate visions,[8] and industry-based building codes.[9] Since sustainability is so entrenched at different levels, it makes sense to extend this reach to constitutions, enabling a national program of sustainable development and recognition of intergenerational equity. A national approach will also help control business sustainability which adopts a 'green' agenda as part of corporate social responsibility.[10]

Many countries include constitutional sustainability provisions.[11] As an example, Switzerland's constitution contains a section headed, 'Sustainable Development,' and states; 'The Confederation and the Cantons shall endeavour to achieve a balanced and sustainable relationship between nature and its capacity to renew itself and the demands placed on it by the population.'[12] Switzerland has embraced the idea of a 'balance' between nature and the human population. Sustainability as a legal and political construct is now embraced at local, state and national levels.[13] Section 2 considers examples of countries that have adopted sustainability constitutionalism and considers what influences a country to adopt sustainability constitutionalism.

WHICH COUNTRIES HAVE SUSTAINABILITY CLAUSES IN THEIR CONSTITUTIONS?

Some countries have included sustainable development in their constitutions. Albania, for example, refers to the state, and 'aims to supplement private initiative and responsibility with rational exploitation of forests, waters, pastures and other natural resources based on the principle of sustainable development.[14] The inclusion of 'rational' is an attempt at some prescription and suggests something conducted in accordance with reason and clear thought.[15] Thus, a measure to address sustainable development that has excessive cost may be seen as not within 'reason.' In this context, the inclusion of 'rational' does have a practical appeal. As an example, it is rational to incur a short-term cost to potentially achieve a long-term benefit, but it is not rational to incur a massive short-term cost for a problematic or illusory long-term gain.

Belgium's constitution refers to a commitment to 'pursue the objectives of sustainable development in its social, economic and environmental aspects.'[16] This construction implies a need to balance all of these elements when addressing sustainable development. A general commitment to 'pursue the objectives of sustainable development,' suggests the need to consider each element in conjunction with the others. As an example, legislation dealing with environmental approvals for mining would need to take account of social and environmental impacts in conjunction with economic benefits. Any exercise of power that focused purely on economic outcomes, (without consideration of social and environmental impacts) could potentially be challenged. Finding the 'balance' becomes a key element of legislation, something lacking in legislation that purports to provide for sustainable management of a natural resource.[17]

Columbia requires policymakers to 'plan the handling and use of natural resources in order to guarantee their sustainable development…'[18] The inclusion of a 'plan' (in conjunction with sustainable development) arguably implies the need to balance economic (costs) with environmental factors. A plan requires consideration of future outcomes and seeks optimal results through careful preparation. The juxtaposition of 'guarantee' with a requirement to plan suggests that the planning be taken with a high degree of care to ensure the sustainable development objective. Thus, legislation that does not provide a requisite degree of 'planning' might be challenged on the basis of failing to plan for a particular outcome.

Seychelle's constitution requires the state to 'ensure a sustainable socio-economic development of Seychelles by a judicious use and management of the resources of Seychelles.'[19] This example requires development to proceed judiciously- which means that, under a general definition, exercising good discriminating judgment is wise and sensible.[20] To 'ensure' such an outcome implies the need to plan ahead in the judicious management of Seychelle's natural resources. The reference to 'judicious use and management' provides a higher degree of prescriptive guidance than most constitutions that have a sustainable development clause. Even this level of prescription may not give rise to a justifiable right, which is an issue discussed later.

Somalia's constitution states, 'Land shall be held, used and managed in an equitable, efficient, productive, and sustainable manner.'[21] Inclusion of 'judicious', 'equitable' and efficient,' arguably implies multifaceted decision-making around land use that potentially includes control over cost, normative decision-making around what ought to be done, and planning to produce the sustainable development of land. The limitation to land, obviously a ubiquitous resource, is possibly an unnecessary restriction if a comprehensive encompassing of sustainable development is sought. This inclusion is still an advance over some countries, like Australia, that have no sustainable development clause.

The forgone examples highlight some prescriptions in sustainable development clauses that require a range of factors to take careful planning into account and include a balance of constituent elements of sustainable development and the exercise of discretion that implies control over cost and social and environmental impact.

A probable outcome of such provisions will be increased use of environmental and social impact assessment in natural resource management and recognition of how one element of sustainable development impacts other elements. In this context, the need for balance in decision-making potentially means all legislation will require 'certification' that balance has been properly accounted for. What is unclear is whether any of these examples, to name a few, provide a justifiable right to enforce a sustainable development outcome. The issue of justiciability is considered further in part 3 herein.

SUSTAINABLE DEVELOPMENT AND INTERGENERATIONAL EQUITY IN CONSTITUTIONS

Constitutions set out the structural role and powers of government, including limitations on those powers.[22] There is no impediment for a constitution to extend to a range of powers to reflect modern needs, including pressing environmental needs. As stated by Isaacs J in *The Commonwealth v Kreglinger and Furnau Ltd*, constitutions are, 'made not for a single occasion, but for the continued life of the community.'[23] In that context, a constitution is a dynamic document, in the sense that it is incompatible with a 'static constitutional balance.'[24] This might be seen in conflict with the idea of constitutional stability and the rule of law as a stabilising force. However, given the constitution operates within a changing and potentially volatile political environment, it seems appropriate to reaffirm that 'stability cannot be an absolute value.'[25] Thus, while a constitution is meant to be a stabilising force in the context of the structures of government, it should not be seen as unchangeable, or unresponsive to pressing social, economic and ecologically based needs. Ecological needs may not readily be associated with constitutional law, but there is no reason, historically or legally, to disassociate the needs of the environment from constitutional law.[26] The real question is how the needs of the environment are reflected in constitutional provisions. This article argues sustainability provisions are a valid constitutional inclusion based on ecological imperatives as a result of a growing list of unsustainable social, economic and ecological practices.

This article uses Australia as an example of an advanced democratic country that has no sustainability provision in its national constitution. The Australian constitution sets out the full list of powers the Federal government can legislate on.[27] A question arises upon whether this list of powers, in Australia or any nation's constitution, should incorporate sustainability provisions. In answering that question, it is relevant to consider what is meant by constitutionalism, which primarily refers to the exercise of government authority determined by a constitution, in order to avoid arbitrary government, with some focus on limitations on power.[28] This article argues that a constitution has a role in focusing on inherent limitations

on power, not only in a legal sense, but in a more generic and physical sense- what is physically possible within a biosphere or a country's biocapacity. Limitation based on biocapacity is relevant to sustainable development, which inherently recognises the limits of the physical world. This is quite distinct from a legal limitation, such as one placed on individual or group rights against government, such as free expression and equality and due process of law. A constitution may contain express limitations on the scope of authority, something commonly associated with constitutional law. What is less commonly accepted is the idea that a constitution can recognise the inherent limitations within the physical world, such as a nation's biocapacity.

A legal head of power contained in a constitution may have significant implications for environmental law. An example is the external affairs power in the Australian constitution.[29] The external affairs power has been interpreted to allow the exercise of federal power over the environment, even though it is not expressly listed as a head of power in the Constitution. The core reasoning behind a succession of High Court judgements validating federal power over the environment is Australia's entry into international agreements, including those supporting sustainable development.[30] A federal environmental law, if challenged on the basis that it does not come under an express head of power, could be validated under the external affairs power if it was connected to an international agreement, and was of genuine international concern.[31] Since Australia is party to treaties relating to sustainable development,[32] it follows that the sustainable development obligation arising under these treaties could fall under the external affairs power and be valid. Consequentially, exercising federal authority over sustainable development is within Australian federal constitutional power by virtue of the external affairs power. Despite this, it is still open for federal legislation over sustainable development to be challenged. For example, the enabling act to make an obligation under an international agreement may be challenged, or the matter may be contested on the basis that it is not a matter of genuine international concern. To avoid this possibility, a head of powers in the constitution on sustainable development and intergenerational equity could make the exercise of federal power over sustainable development less open to challenge.

What are the practical benefits of a constitutional sustainable development clause? Such a clause creates a legal focus on the need to find a balance between unchecked economic development and ecological protection and gives constitutional recognition of limits of economic growth. A clause could mean constitutions are now recognising the limits to growth and biocapacity. Laws could potentially be challenged if they do not address balance between economic growth and ecological protection. Individuals and corporations may now have standing to address this issue in court. A sustainable development clause could be highly impactful over natural resource management aligned with human rights and the environment,[33] and influential in policies and legislation balancing the rate of extraction of the resource with regeneration, and if regeneration is not possible, the availability of an alternate resource option.[34]

Despite the foregoing benefits a sustainable development clause raises a number of legitimate questions about practical application. Constitutional provisions on sustainable development may increase regulatory costs, and cause constraints on important economic development. It is also necessary to ask whether constitutional inclusion is the most practical medium for legal change. A sustainable development outcome may be advanced by other means, for example, principles of ecologically sustainable development have already been incorporated into Australian state and federal natural resource and conservation legislation.[35] Recognising the limits to the growth of a country within a constitution is relatively new ground for constitutional reform.[36] However, limitations over economic growth programs are not the same as recognition of limitations from biocapacity. For a state to consider such an inclusion there would be an inevitable political backlash from business interests. However, the best response to this type of reaction is to simply highlight that business cannot operate without a healthy environment and that, 'the conservation of natural resources is the fundamental problem. Unless we solve that problem it will avail us little to solve all others.'[37]

Despite the foregoing arguments, sustainable development has a practical and logical appeal, as it makes sense to live sustainably within our means, including within the limits of biocapacity, which, itself, represents a potential economic saving from costs associated with economic overreach.[38] However, the 'cost' of living within our means may only be a short-term impediment to using sustainable development

in a constitution. Sustainability may come at a short-term cost, such as when pollution control technology is used, which is ameliorated over time. Should cost consequences of sustainable development be considered as an issue to oppose a sustainable development clause in a constitution? The short answer taken in this article is an emphatic 'no'. Why? Whilst it is beyond the scope of this article to engage in an econometric cost benefit analysis into the effects of a sustainable development provision, it is worthwhile to quote Barwick CJ referring to the Australian federal Constitution in 1975.

> *…No specific power over the economy is given to the Commonwealth. Such control as it exercises on that behalf must be effected by indirection through taxation, including customs and excise, banking, including the activities of the Reserve Bank and the budget, whether it is in surplus or in deficit.*[39]

Whilst sustainable development may create a short-term cost to the economy, the Australian Federal Government has sufficient control over monetary and fiscal policy to address this cost at a national level. Therefore, it is unnecessary, and arguably, unhelpful to address a regulatory cost aspect in this context because it would be dealt with as part of the government's budgetary process. Being too preoccupied with cost aspects has the potential to derail the intent of why the provision is included in the first place. The cost aspect is not ignored by the author, just assumed as being dealt with at a national level by the government.

Another potential problem with having a sustainable development provision in a constitution is the risk of increased litigation creating a drag on the courts and ultimately, on the economy. In part, the extent of this potential risk depends on the way a sustainable development clause is drafted. Including a general provision on sustainable development in a constitution is unlikely to give rise to a justiciable right if it is limited to a constitutional preamble as an aspirational statement. A provision likely to create a justiciable right is a specific head of power over sustainable development. Such a provision could give rise to litigation where government legislation is considered to be against the spirit and letter of the provision. Sustainable development, by definition, requires a balance between social, economic and ecological outcomes. Balance is problematic in this context as it is mostly undefined and does not mean equal weighting between its constituent elements. Sustainable development inherently requires a circumstantial balance which is usually not an equal weighting of these elements. Instead, it is a proportionate distribution of weighting according to what is justified in each case. A constitutional provision on sustainable development might steer clear of referencing how this balance is achieved. Any prescription on the nature of balance in this context is arguably best left up to enacting legislation and judicial interpretation in each case. Too much prescription risks problems in interpretation and this may open up a litigation risk. This still leaves the issue of litigation risk arising from laws not respecting limits to growth and biocapacity. It is not possible to definitively address this issue because the extent of litigation risk is a hypothetical issue.

WIDENING THE SCOPE OF CONSTITUTIONAL CLAUSES

How wide could a sustainable development clause in a constitution be?[40] It is not necessary to recast here the debate over constitutional structure, which is beyond the scope of this article. Instead, this article poses a simple question – should a constitution contain mechanisms to address sustainable development and the biocapacity of a nation? A constitution is not designed to be a collection of 'hot' topic ideas that satisfy the whims of the political elites, or even sacred causes of environmental groups. It is clear a constitution is associated with key structures for governance with federations, the relationship between state and federal jurisdictions. While the categories of potential inclusions are not closed, a constitution is not a place to test policy. Thus, to include sustainability provisions into a constitution requires justification that it is more than 'mere policy' and is so seminal that constitutional inclusion is justified. This article argues that sustainable development is a seminal concern of government worthy of textualization in a constitution. Why? The analysis relies on recognition of the importance of sustainable development in a modern democratic state. If we are to assume that constitutional design is about upholding democratic principles and providing stability to the state protecting human rights and social justice, then a natural extension of all

of these things is sustainable development.[41] The purpose of this article is not to test the truth of this proposition, rather it is to suggest sustainable development is a self-evident objective of government, already adopted by many nations in their constitutions (section 2), and worthy of adoption by developed democracies (like Australia) in their Constitution. The question is not about its worth as a constitutional inclusion, it is about how prescriptive such an inclusion should be.

Sustainable development and intergenerational equity impliedly reference long-term precautionary risk management, protection of biological diversity, public involvement in decision making and market-based mechanisms to address conservation and sustainability-based challenges.[42] Of course, it is more than this in a definitional sense, but these areas are highlighted herein as naturally arising from sustainable development in its implementation. Despite these worthy objectives, is there an argument against constitutional inclusion? A nation may not wish to create a constitutional provision that is seen as a constraint on growth, or otherwise create an unnecessary check over 'normal' legislative function. What is normal to many nations might include legislation aligned with economic growth, a functioning democracy, protection of human rights and fiscal responsibility, amongst other predominant themes. Therefore, the idea of putting sustainability provisions into a constitution might be seen as inhibiting some major policy aims of an incumbent government. The question becomes how to fashion an appropriate provision to include sustainable development without impinging on legitimate government activity. It is necessary to consider a balance between key sustainability themes and 'normal government function' that includes economic growth, without compromising ecological protection. In other words, the issue of constitutional sustainability clauses relates to how far a government is prepared to recognise sustainable development that balances economic growth with ecological protection as something more than merely an aspirational statement of good intent. Alternatively, how far government is prepared to recognise some constraints over economic growth in order to ensure viable ecological protection. A relevant assumption here is a democratic government will more likely accept some constraint over economic growth to respond to public demand for greater ecological protection. Therefore, the following discussion is based on what might be acceptable to a government that is democratic and prepared to recognise the importance of sustainable development. The following considers whether other provisions can be added to sustainable development and intergenerational equity, as suitable constitutional inclusions.

Whilst a number of countries already expressly refer to protecting the rights of future generations, usually in conjunction with sustainable development, few go further than this in terms of expressing recognition of other sustainability aims.[43] These countries are clearly prioritising sustainable development and intergenerational equity over potential constraints in economic growth. Long-term environmental precautionary risk management implicitly arises from combining sustainable development with intergenerational equity. With respect to environmental protection, long-term thinking has become arguably more pressing, with the identification of the 'hidden collapse' associated with forest ecology.[44] Hidden collapse posits that a decline in certain environmental indicators in a forest, such as loss of hollow sections within tree trunks suitable for nesting of arboreal species, indicates the likelihood of future collapse, even though a forest may appear intact and viable. While the idea of entrenching long-term thinking is important from a policy perspective, there are problems in defining what is long-term, difficulty in making an express provision on long-term thinking justiciable and establishing when it has been breached. Also, it is probably encompassed within the idea of intergenerational equity, which is recommended for constitutional inclusion.

By contrast, the protection of biological diversity is arguably worthy of express constitutional inclusion. The extent of biodiversity loss is at an unsustainable rate,[45] and providing a constitutional check over this decline is justified based on the extent of this loss.[46] Since many nations are signatories to the Convention on Biological Diversity,[47] and have adopted enabling laws based on the Convention, it is a logical next step to enshrine such commitment at a constitutional level. Such action allows biodiversity protection to be justiciable, with a probable economic benefit as the ultimate example of opportunity cost at a macroeconomic constitutional level.[48] The economic benefits of protecting biodiversity have been found by a large cross-section of economists and scientists to exceed the costs.[49] In short, the opportunity cost of not protecting biodiversity is worth being considered at a constitutional level.

Public involvement in decision-making on matters relating to sustainable development and environmental protection is arguably justified in a democratic society. For example, calling for public comment on proposed natural resource extraction programs provides some element of democratic input in resource management.[50] The issue is whether such rights should be encompassed at a constitutional level, ensuring public rights for such input for all time. This discussion is predicated on a democratic society that allows public participation in decision-making on matters of great national significance. In Australia, the Environmental Protection and Biodiversity Conservation Act (1999) provides for legislative intervention on matters of national environmental significance.[51] Greater public involvement in decision-making on sustainability and the environment is justified when taking account of matters of national significance.

Market-based mechanisms to address conservation and sustainability are probably not suitable for constitutional inclusion. This topic rests more comfortably in a policy/legislative category. Markets for natural capital are increasingly recognised for improving biodiversity protection.[52] The core issue is whether a nation is willing to allow constitutional protection over market mechanisms and democratic processes relating to environmental protection. In the short term, protection of market-based mechanisms is unlikely to arise as a serious topic for constitutional protection, but with increasing pressure on protecting biodiversity, this could change.

The foregoing discussion is designed to introduce other potential express constitutional inclusions. They each arise implicitly from sustainable development and intergenerational equity, but an implicit connection lessens their justiciability. Instead of concentrating on what other express inclusions can be associated with sustainable development and intergenerational equity, the focus is arguably better spent on who can enforce constitutional rights over these topics, who is the appropriate defendant when an identifiable breach arises, and what are the appropriate defences that can be made in answer to a claim. These issues are considered in the next section (part 5).

JUSTICIABILITY OF SUSTAINABILITY PROVISIONS

Is a sustainable development and intergenerational equity clause meant to be a justiciable term?[53] Or to rephrase, how justiciable should a sustainability clause be? Who has the right of enforcement, who is the defendant and when does a claim arise? This article argues a non-justiciable term that is aspirational in intent and meant to recognise the supremacy of parliament, and ensure courts do not get involved, as is not practicable and has no benefit from inclusion.[54] A suitable clause may reflect the prevailing policy on sustainable development and intergenerational equity as an inalienable right, the sustainability equivalent of "all men are created equal,'[55] designed to transcend mere policy changeable at the whim of an incumbent government. Arguably a better option is a recognised head of power alongside other powers relevant to national government, such as defence, external affairs and banking and finance. A sustainable development and intergenerational equity clause designed to be justiciable must have definitional clarity conferring power to make laws, and preferably also conferring a specific obligation or right.[56] That is a right to live in a society where sustainable development is not just aspired to, but actively undertaken as an obligation of all who undertake any form of development. A constitutional clause that grants authority to make laws for sustainable development is likely to be justiciable in terms of the extent of that power and how it is exercised. An example of a justiciable clause that imposes a precise obligation to ensure an outcome or objective is s92 of the Australian Constitution which states '… trade, commerce and intercourse among the States,… shall be absolutely free.'[57] Including an obligation for sustainable development into a list of heads of power means a court would interpret any legislation derived from that power on the basis of whether it is within its ambit.

Standing

A sustainable development and intergenerational equity clause needs to be enforceable. In order for such a clause to be justiciable, a number of legal and procedural issues must be addressed. The first relates to standing; whether a party who brings suit has the right to invoke the court's jurisdiction. Standing normally arises in parties who have been directly injured or suffered loss and limited or excluded for third

parties to make a claim. The issue often comes down to causation, where a plaintiff must prove a causative evidential link between the loss and the claimed breach. Resolving the question of who has standing inevitably requires a balance between the legitimate legal, political and economic agenda of government, and anyone else engaged in development activity and ecological protection against indiscriminate development. The position varies between limiting environmental claims to those initiated by an ombudsman,[58] to the right to vindicate environmental rights by any citizen.[59] Between these extremes are jurisdictions establishing a set of procedural rules dealing with vindication of environmental rights,[60] or limited rights of standing developed at either the constitutional level or placed in legislation.[61] The point of procedural rules or limited forms of standing is a right to bring an action based on certain parameters, such as the right of an 'interested' person to take such action because they are either directly affected or '…have engaged in a series of activities for the protection or conservation of, or research into the environment, at any time in the two years prior to the conduct or the application for the injunction.'[62]

The foregoing options for standing, while not definitive of the full extent of the range, does provide parameters in which to assess standing for claims relating to sustainable development and intergenerational equity. A moment's reflection on this type of clause immediately raises a problem relating to standing. Who should have standing is contentious when considering who may be directly affected by something that may not currently produce a loss or directly affect a party. Alternatively, the loss or potential effects from an 'unsustainable' development may arise in the future, thereby raising a difficult causation issue. A possible way forward is to recognise a general right for all individuals to live in a country that undertakes sustainable development, with the extent of enforcement of that right determined in each circumstantial case. A position recognised on environmental matters by the Costa Rican Constitutional Chamber held that 'even though a direct and clear suit for a claimant does not exist…all inhabitants suffer a prejudice in the same proportion as if it were a direct harm,' such that claimant may seek ' to maintain the natural equilibrium of the ecosystem.'[63] This development is an example of the vindication of diffuse rights as a form of Public Interest Litigation (PIL) brought on behalf of those who may not have access or the means to pursue court action.[64]

In order to address standing for sustainable developments and intergenerational equity violations present unique problems for proving damage and causation of that damage arising from the breach. Indeed, the issue is so fraught from a technical legal perspective that it is necessary to recast the potential claim based on prevention of damage and not proof of actual damage. Recasting in this way, the right of standing is, by implication, broadened to recognise the violation of an individual right of one party and represents a violation of the right of all, which arguably goes to the heart of PIL's core values. Standing becomes open to third parties who seek to uphold a fundamental right for sustainable development and/ or intergenerational equity, which does not meet a core requirement of 'balance' between economic development and ecological protection. This posits the idea that in a democratic state where development occurs from diffuse government and private agencies, simply limiting standing to a personal wrong seems both inappropriate and an unnecessary practical limitation. Whether this can extend to actions on behalf of those not yet living or on behalf of nature itself is more problematic, although recognised in some jurisdictions.[65] The position, of course, is made clearer by the appropriate constitutional clause recognising the right of sustainable development and intergenerational equity, possibly augmented by procedural rules of court clarifying how such actions can be brought, and rules pertaining to proof of harm or standards of evidence for establishing unsustainable practices.

The preferred position for standing on sustainable development and intergenerational equity claims is;

a) A constitutional provision allowing rights of standing for an environmental ombudsman, and,
b) Extending to a limitation on standing, based on parties directly affected or who have within a defined period (prior to the claimed breach) been actively involved in the disputed area or project or else in environmental protection,
c) With constitutional recognition of a general right of standing for PIL, subject to procedural rules for each court level within the jurisdiction.[66]

Identifying the Defendant

In constitutional cases, defendants are often state agencies, although private parties are not excluded depending on the constitutional provision. A matter pertaining to sustainable development or intergenerational equity would encompass both state entities and private parties. In theory, there is no impediment for an action invoking a constitutional requirement against an individual or private entity, or for a private entity to be judicially required to conform to constitutional norms. The position may be more complex, where the action complained is against a private entity or individual who may be subject to a licence issued by a local or other level of government. In such a scenario, an action might be against the relevant government and/or department and include the relevant government official, even though the substantive impact may be against the private entity or individual.

Despite the foregoing, sustainable development and intergenerational equity present some ambiguity in identifying the correct defendant. Procedural rules allow for multiple defendants as a matter of course, and the right of parties to join others to defend an action. Identifying the correct defendant becomes difficult when the claim is about denying future generations a right to a clean environment, or identifying how a development is unsustainable. Identifying the unsustainable action and where it occurred may be key to determining the correct defendant. For example, the action of complaint might be on private land and subject to numerous private actors that may identify a number of contingent events, some of which may not have happened yet. Whilst constitutional claims should be available for actions on private land, the question may vary between jurisdictions.

Ultimately the question may be resolved by reference to the terms of the constitutional provision itself. A provision that allows for laws relating to sustainable development and intergenerational equity, who appropriate reference to standing discussed in section 5.1 herein, provides the sufficient to determine whether the plaintiff, in each case, has identified the correct defendant. A head of power relating to sustainable development and intergenerational equity allows for the development of laws that may, by their inherent nature, define who the defendant should be. Ultimately, a court must treat each case on its own individual merits, which includes the extent of power within the constitutional provision, the nature of the legislation created under that head of power and the inherent nature of the act criticised, if not aligned to particular legislation. In each case, the court procedures should allow for additional defendants to be joined, if necessary, and for an action to be dismissed, presumably with costs, if the identified defendant proves to be incorrect or not liable.

The Nature and Timing of a Claim

With respect to sustainable development and intergenerational equity, the nature of a claim is inherently problematic as courts generally won't recognise a claim that is speculative, based on future harm. It is with respect to the question of standing that we are forced to return. It is here that issues connected to precautionary risk management and application of the precautionary principle are relevant.[67] The latter has been subject to frequent judicial review in Australia- as were decisions made regarding environmental and conservation legislation.[68] The point of precautionary decision-making is to act before the risk arises and is not dependent on scientific certainty before such action is taken. In addressing environmental claims, many courts have adopted the precautionary principle, thereby permitting the vindication of rights before the damage is done. It is the seriousness and irreversibility of the threatened harm that warrants the precautionary action permitted by law. The author argues the precautionary principle should be given constitutional status. If this recognition occurs, the right to take precautionary action is guaranteed and helps to resolve some of the more problematic aspects of sustainability provisions in constitutions. The timing of an action can be both after the event, where actual damage has occurred by virtue of the precautionary principle provision, or prior to actual damage, occurring when referring to precautionary actions. The more difficult issues of evidence relating to precautionary risk can play out in the same way that occurs currently in countries like Australia, where decisions upon application of the precautionary principle in judicial review rely on scientific evidence about the extent of the risk. The difference is that the right to act prior to any damage actually occurring is now constitutionally guaranteed.

A constitutional provision dealing with sustainable development and intergenerational equity is supported by two core additions; (1) Clarification of standing, and (2) Recognition of the precautionary principle. These additions help to resolve a dilemma that arises from the inherent nature of sustainability, which is about current action for future risk. Some of the trickier procedural rules have still to be clarified and no comment is offered here as this will vary according to the jurisdiction and level of court. It is relevant to note that the Philippino *Rules of Procedure in Environmental Cases* explicitly adopts the precautionary principle as a matter of evidence.[69] These rules also define the type of evidence that may be admissible in environmental matters. With regard to the precautionary principle, procedural rules could also address who carries the burden of proof in such cases and when it arises.

TEXTUALIZING SUSTAINABILITY CONSTITUTIONALISM - TIME FOR CHANGE

Environmental constitutionalism is actively driving constitutional change,[70] however, sustainability constitutionalism is less prevalent. In the last thirty years, economic and social rights have gained widespread acceptance.[71] These developments provide an impetus for greater constitutional recognition of sustainable development. To drive this further, some changes are necessary in risk perceptions. An environmental risk has an immediate resonance because it is potentially perceived as having a short-term and more direct individual impact. Compare that to a sustainability risk that may be explained as 'looming,' but not immediate. The second level relates to its sectoral or product-related popular consciousness. We might read about a product 'running out' but as long as we can still buy it we are less stressed than we could be if we thought about it a bit harder in a long-term context. Creating a sense of urgency on sustainability requires some adjustment to public perception of sustainability. The extent of a functional democratic system, GDP per capita, civil liberties and overall economic position of a country may influence environmental 'consciousness,'[72] although this does not necessarily translate to sustainability consciousness. The question of what drives sustainability consciousness may depend on a multifaceted assessment of factors that include government responsiveness to popular concerns and how it enacts international agreements on sustainable development. Literature on environmental constitutionalism may provide some insight into why a country may textualize sustainability constitutionalism. A country's environmental regulatory framework may indicate its attitude toward sustainability objectives.[73] Perhaps an even stronger motivator is a country's environmental condition.[74] However, a nation's attitude toward sustainable development has a temporal time-related context.[75] This time-related context refers to how the future environmental condition of the country is perceived. If a time factor is relevant in the textualization of sustainability into constitutions then a completely different policy focus may be needed. Perhaps a policy of 'long termism' that goes beyond the immediate needs of the environment.

The foregoing policy shift might also benefit from a campaign focusing on the individual's right to a sustainable environment, combining sustainability directly with the environment and human rights.[76] Since the Stockholm Conference of 1972, many countries have adopted provisions guaranteeing an individual right to a quality environment.[77] However, few directly reference sustainability in the context of a quality environment,[78] although some countries do connect substantive environmental rights with sustainable development.[79] These examples do not explain why some countries may adopt sustainability provisions and others fail to. A recent UNESCO study found developing nations put proportionately more of their research effort into sustainability, compared to wealthier countries.[80] The UNESCO report focused on science-based data output across 56 topics and found (proportionally) that developing countries were publishing the most on these topics. One reason put forward for this focus was developing countries are more reliant on natural resources and are more at risk from climate change, indicating a survival incentive for these countries. This level of research output was not matched by more developed countries, suggesting their relative economic position may act as a disincentive for science-based sustainability research. While not conclusive, the UNESCO report strongly supports the idea that questions of survivability from climate change and related issues are driving the research agenda.

The sustainable development focus since the UNCED in Rio de Janeiro in 1992,[81] the Agenda 21 sustainable development goals,[82] and many related international agreements all support sustainability

constitutionalism. The related impetus to create economic and institutional sustainability also provides support.[83] Where a country has constitutionally enshrined sustainability commitments progress, economic and institutional support for sustainability may ensue.

Consumers are expecting greater action from their government to reach sustainability objectives.[84] Sustainability is becoming a mainstream political issue, demanding a meaningful response from political parties.[85] Grassroots political activism with a bottom-up approach is combined with the top-down approach represented by sustainability constitutionalism. A constitutional provision on sustainable development, aligned with intergenerational equity, ensures these concepts are enshrined as a recognised head of government authority and sends a signal that economic growth can only proceed within biophysical limits. A constitutional provision that aligns these two concepts provides for spatial, temporal and metaphysical thinking about the future needs of society, and accounts for long-term precautionary risk management.

The mantra of economic growth has often exacerbated (rather than ameliorated) social inequality.[86] Recognising sustainability constitutionalism is a potential barrier against the excess of a deregulated market, and provides practical constraints on unsustainable development financing.[87] Uncoupling economic growth and ecological degradation has been theoretically and practically explained by leading national research centres.[88] This decoupling is more likely to emerge in a society that recognises the transition to renewable energy can only come where there is a fundamental change in consumerism, rejection of untrammelled economic growth and excessive energy demand.

Scarcity is becoming endemic. Drivers of scarcity include climate change, decreasing freshwater availability, erosion and overdemand for precious minerals and resources.[89] Constitutional recognition of sustainable development is an implicit recognition that scarcity exists and governments must respond accordingly with a national policy of resilience in adapting to resource availability. Ecologists recognise that certain species that can effectively manage 'disturbance' will evolve more successfully.[90] It is time for a national policy of resilience, at a constitutional level, to address the looming ecological crisis. An example of building resilience into key resource sectors is to ensure genetic diversity and adaptability into agricultural systems. The agricultural sector will face unprecedented growth in demand which requires a nationally focused response in building resilience into productive capacity, avoiding ecological degradation. Unsustainable production and extraction processes may ultimately drive commodity prices up in the short term, which occurred in the economic downturn of 2007-2008 and the spike in commodity prices in 2008, which saw the world's poor face famine.[91] Constitutional recognition of sustainable development may 'hard wire' into national policy the concept of long-term thinking. Nations that implement a policy of sustainable development ultimately benefit poorer nations who, through trade and other connections with such nations, improve their own productive systems in the long term.

Constitutional recognition of sustainable development and intergenerational equity may drive change to unsustainable practices, increasing environmental litigation. While this represents an argument against these constitutional inclusions, it may have potential benefits. Forestry provides an example where unsustainable practices could be questioned and even stopped through litigation. In Victoria, Australia, public forestry was criticised as unsustainable.[92] It took years of litigation against the public forestry corporation, VicForests, to finally 'encourage' the government to ban public forestry altogether.[93] Prior to the 2024 ban, arguments over the sustainable yield of the public forest resource largely resulted in piecemeal responses by VicForests defending their 'sustainable' forest management policy, including their forest regeneration practices.[94] At the core of this debate was one side (environmentalists and sustainists) arguing forestry harvesting and regeneration practices in Victoria were unsustainable, and VicForests (amongst others) arguing it was sustainable. It is highly likely that VicForests's arguments on its 'successful' regeneration program of harvested sites, as part of its sustainable forest management policy, is factually incorrect, and highly selective in how it was presented.[95] The point is not to determine who is right and who is wrong on the sustainability of VicForests's sustainable forest management policy, but rather to highlight that the sustainability debate that ensued on public forestry in Victoria was driven by political debate. This could have been avoided with a constitutional provision on sustainable development and intergenerational equity. A constitutional provision provides a means to create consistency in the government response from governments of all political persuasions.

Consistency in government responses is necessary in the response to climate change. Environmental problems from climate change are confirmed by recent years being the hottest recorded.[96] Population growth and excessive energy demand mean that climate change is compounding over time, requiring a strong government response. The level of government control and change to infrastructure to deal with climate change requires immense economic, political and social adjustment. Climate change exacerbates other ecological challenges like rampant overconsumption, biodiversity destruction and desertification.[97] A constitutional change does not automatically bring about change but may act as a benchmark by which government and business action is evaluated and held to account. This includes corporations engaging in greenwashing, creating an image of sustainable practices, but in reality masks more destructive activities.[98] Ultimately, the benefit of sustainability constitutionalism is to enshrine protections at a level that is above political partisanship. Sustainability has the potential to be the ultimate topic of bipartisan political accord. There are political parties dedicated to sustainability objectives,[99] that portray themselves as centrist in nature not aligned with other parties. These parties and sustainists want to address new models of investment to advance the green economy.[100] Such models need to take non-market considerations into account, and long-term, low-yield investments are preferred by investors- when given government support, they provide long-term security. Such a change must be accompanied by a government that supports a shift in investments and subsidies from unsustainable fossil fuels to renewable energy. This article argues that all of these changes are supported, if not galvanised, by constitutional recognition of sustainable development and intergenerational equity.

ENDNOTES

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4. A legal norm sets a standard of legal behaviour and may be described as a binding rule that states and sovereign organisations may impose to regulate social behaviour.
5. G. A. Res. 70/1, Transforming our World: the 2030 Agenda for Sustainable Development, at 14 (Sept. 25, 2015)
6. See, for example, 1992 Rio Declaration on Environment and Development, and Program of Action for Sustainable Development (Agenda 21).
7. Environment Protection and Biodivserity Conservation Act 1999 (Cth); Intergovernmental Agreement on the Environment accessible at; chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://faolex.fao.org/docs/pdf/aus13006.pdf
8. See; 14 Sustainable Business Examples, at; https://www.indeed.com/career-advice/career-development/sustainable-businesses-examples
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10. Celine Herweijer, Emma Cox and Louise Scott, 'The evolving nature of the green agenda,' accessible at; chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.pwc.com/gx/en/news-room/assets/analyst-citations/interview-green-agenda-source.pdf
11. This includes; Algeria, Bolivia, Cote d'Ivoire, Cuba, Dominican Republic, Ecuador, Thailand, Tunisia, Venezuela, Vietnam and Zambia.
12. Switzerland Const. Ch. II, 4, art. 73.
13. James R. May, 'Sustainability Constitutionalism,' (2018) Vol. 86 4, *UMKC Law Review,* 855 - 867
14. Albania Const. Part II, Ch. 5, art. 59 (1) (dh)
15. See; https://dictionary.cambridge.org/dictionary/english/rational
16. Belgium Const. Title Ibis, art. 7bis.

17. Australian natural resource management legislation, for example, does reference principles of ecological sustainable development but makes no reference to 'balance' between the constituent elements of sustainable development. Balance appears to be left up to discretionary decision making; see for example Sustainable Forests (Timber) Act 2004 (Vic), accessible here; https://www.legislation.vic.gov.au/in-force/acts/sustainable-forests-timber-act-2004/030
18. Colombia Const. Title II Ch. 3, art.346.
19. Seychelles Const. Chapter III, Part 1, art.38 (b).
20. See; https://www.merriam-webster.com/dictionary/judicious
21. Somalia Const. Ch. III, art. 43, § 2.
22. Waluchow, 'Constitutionalism; in *Stanford Encyclopaedia of Philosophy.* <http://plato.standford.edu/constitutionalism.,2001....1.2
23. (1926) 37 CLR 393.
24. *The Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) 159 CLR 1.
25. Peter Franks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia,* (LexisNexis Butterworths, 3rd edition, 2012) p.10.
26. Ole W. Pedersen, 'Environmental Law and Constitutional and Public Law', in Emma Lees, and Jorge E. Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law*, Oxford Handbooks (2019; online edn, Oxford Academic, 2 July 2019), https://doi.org/10.1093/law/9780198790952.003.0047, accessed 8 Jan. 2024.
27. s. 51 Australian Constitution, see; https://www.aph.gov.au/constitution
28. See; Britannica; https://www.britannica.com/topic/constitutionalism
29. s 51 xxix, Australian Constitution.
30. See in particular; Commonwealth v Tasmania (1983) 158 CLT 1 (Tasmanian Dams Case), Koowarta v Bjelke-Petersen (1982) 153 CLR 168 and Queensland v Commonwealth (1989) 167 CLR 232.
31. Koowarta v Bjelke -Petersen (1982) 153 CLR 168.
32. For example, the Agenda 21 – Global Programme of Action for Sustainable Development, and Rio Declaration on Environment and Development.
33. David R. Boyd, *The Environmental Rights Revolution; A Global Study of Constitutions, Human Rights and the Environment,* (UBC Press, 2012).
34. For a case on this issues see; Oposa v. Factoran, G.R. No. 101083, 224 S, C, R, A, (July 30, 1993) (Phil.)
35. See; Intergovernmental Agreement on the Environment, accessible at; chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://faolex.fao.org/docs/pdf/aus13006.pdf
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37. Theodore Roosevelt address to the Deep Waterway Convention, Memphis, Tennessee, October 4th, 1907.
38. Economic overreach refers to uncontrolled economic production without regard to the factors going into how something is produced, i.e. we do not know whether the production of a product meets ethical, sustainable and environmental standards.
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41. Bereket Habte Selassie, 'Framing the State in Times of Transition: Focus on Five Core Values,' (2011)Vol XXV111 No. 1, *Journal of Third World Studies.*
42. These are factors associated with principles of ecologically sustainable development, for example, see s5 (4) Sustainable Forests (Timber) Act 2004 (Vic).
43. See: Andorra Const. Title II, Chapter V, art. 31. ; Argentina Const. Ch. II, § 41; Armenia Const. Ch. 11, art. 48, § 10; Brazil Const. Chapter VI, art. 225; Papua New Guinea Const. Preamble, Nat'l Goal Number 4(1); Niger Const. Title 1l, art. 35; Vanuatu Const. Ch. 2, Part II, art. 7(d); Germany Const. Title II, art. 20(a); Norway Const. Title E, art. 112.; Iran Const. Chapter TV, art. 50; Lesotho Const. Chapter III, art. 36.; Albania Const. Part II, Ch.5, art 59, § 1 (d).; Mozambique Const. Ch. III, art. 117, § 2 (d), France Const. Preamble; Eritrea Const. Ch. II, art. 8, § 3; Namibia Const. Ch. XI art. 95. § 1; Swaziland Const. Ch. XII, art. 210, § 2., Qatar Const. Part 11, art.33., South Sudan Const. Part III, Ch. 1, art. 41, § 3.; Ugandan Const. art. XXVIII, § (i); Angola Const. Title II, Ch. 2, § 1, art. 39(2); Bhutan Const. art. 5, § 1; Georgia Const. Ch. II, art. 37, § 4; Guyana Const. Part II, Title 1, art. 149J, § 2; Malawi Const. Ch. III, art. 13(d)(iii); Maldives Const. Ch. II,

art. 22; Sweden Const. Ch. 1, art. 2; Timor-Leste Const. Title 1I, § 61(1); Dominican Republic Const. Title II, Ch. 1, § IV, art. 67.

44. David B. Lindenmayer & Chloe Sato, 'Hidden collapse is driven by fire and logging in a socioecological forest ecosystem,' (2018) vol. 115 no. 20 PNAS 5181-5186.
45. See; https://www.unep.org/news-and-stories/story/unsustainable-use-nature-threatens-billions
46. Living Plant Report, accessible at; https://livingplanet.panda.org/en-US/
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48. Opportunity cost is the benefit that is foregone that might have been derived from an option other than what was chosen.
49. Economic Benefits of Protecting 30% of Planet's Land and Ocean Outweigh the Costs at Least 5-to-1, National Geographic, WYSS Campaign for Nature; accessible at; https://blog.nationalgeographic.org/2020/07/08/economic-benefits-of-protecting-30-of-planets-land-and-ocean-outweigh-the-costs-at-least-5-to-1/
50. An example is calling for public input in designated areas for public forest harvesting, see the example set by Victorian government when an Allocation Order setting out where public forest harvesting takes place. A discussion of Allocation Orders can be found here; https://www.deeca.vic.gov.au/forestry/forestry-in-victoria/commercial-timber-production-from-public-forests
51. S170B Environment Protection and Biodiversity Conservation Act 1999 (Cth)
52. Natural Capital Markets – an opportunity or a distraction?, accessible at; https://www.zuluecosystems.com/newsroom/nature-capital-markets
53. 'Justiciable' is defined as something that can be determined in court on its merits, as opposed to 'non-justiciable' which recognises the supremacy of parliament and is not meant to be questioned in court.
54. The recent debate in Australia (2023) on a constitutionally guaranteed First Nations Voice was intended to be non-justiciable.
55. A reference to part of the Preamble to the American Declaration of Independence.
56. An example is s51 of the Australian Constitution that sets out all of the powers of the Australian Federal parliament.
57. The Australian Constitution may be accessed here; https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution/chapter4#chapter-04_92
58. Spain.
59. Argentina and Ecuador.
60. Philippines Supreme Court 'Rules of Procedure for Environmental Cases.'
61. See, for example, ss 475 and 487 Environment Protection and Biodiversity Conservation Act 1999 (Cth).
62. S 487 Environment Protection and Biodiversity Conservation Act 1999 (Cth).
63. Decision 1700-03 (Costa Rican Constitutional Chamber).
64. See, for example; Andrea Durbach, Luke McNamara, Simon Rice and Mark Rix; 'Public Interest Litigation: making the case in Australia,' (2013) Sydney Business School Papers, accessible at; chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://ro.uow.edu.au/cgi/viewcontent.cgi?article=1414&context=gsbpapers
65. This right has been recognised in certain Latin American courts. For example, Pedro Flores et al. v Codelco (Chile), 260, Minors Oposa v Factoran G. R. No. 101083, 224 S. C. R. a.792 (1993).
66. This is the preferred model the author recommends for the Australian Constitution.
67. The precautionary principle refers to where there is a risk of serious or irreversible harm to the environment, a lack of full scientific certainty should not prevent precautionary action to remove or limit that harm. This principle has been used in environmental and conservation legislation. For example, s5 Sustainable Forests (Timber) Act 2004 (Vic).
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79. For example, South Africa, Bolivia, South Sudan and Ecuador.
80. UNESCO Science Report 2021, accessible at; https://www.unesco.org/reports/science/2021/en
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