

# THE NEW "PUBLIC"

## The Globalization of Public Participation

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# CONSTITUTIONAL PROCEDURAL RIGHTS: ENHANCING CIVIL SOCIETY'S ROLE IN GOOD GOVERNANCE

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There has been a growing recognition that procedural rights are effective legal and policy tools through which the civil society can protect and uphold substantive rights. Found in international agreements, national constitutions, and laws, these procedural rights include: the right to obtain information; the ability to participate in projects, policy discussions, and in some cases legislation; and the right to seek redress when procedural or substantive rights have been violated.

This chapter focuses on the procedural rights enshrined in national constitutions that protect and guarantee the rights of individuals to have access to information, participate in decisions, and obtain access to justice in order to uphold their substantive rights. We briefly consider the right to a healthy environment and the right to life, substantive rights found in many constitutions, which may be strengthened through procedural rights. In this chapter, procedural rights are considered in the particular context of the environment, but in most cases these rights can also be extended to the social and economic pillars of sustainable development.

Different legal regimes vary in their interpretation and implementation of procedural rights. Historically, common law countries have been more aggressive in protecting individuals. The existence of an independent judiciary with the ability to review and pass judgement on acts by the executive and legislative branches allows a respect for individual rights. Civil law countries, on the other hand, have traditionally de-emphasized the judicial and citizen ability to enforce laws. Under civil law it is much more difficult for the judiciary and citizens to review and influence executive and legislative actions.

This chapter will analyze procedural constitutional provisions, focusing on experiences in Africa but also drawing upon the experiences of other regions. Therefore, while this chapter explores how African constitutional provisions in particular can be utilized to create

real, enforceable rights, it also examines the broader implications of fundamental human rights to public involvement as they have been enshrined in national constitutions around the world.

Constitutional provisions offer broad and powerful tools for protecting the environment and ensuring people's voice in sustainable development. However, to date these tools have gone largely underutilized. Almost all African constitutions include substantive provisions that ensure either a right to a healthy environment or a right to life, the latter of which is often held to imply a right to a healthy environment in which to live that life. These substantive rights are enforceable through procedural rights—which include access to information, public participation, and access to justice. Procedural rights open up courts to citizens to enforce their constitutional rights, which strengthens the judiciary, empowers civil society, and fosters an atmosphere of environmental accountability in the legislative and executive branches.

This chapter highlights relevant provisions from the constitutions of 53 African countries (excluding the territories of the Canary Islands, the Madeira Islands, Reunion, and Western Sahara). In addition, given the ongoing and proposed constitutional reforms in various African countries, this chapter examines the opportunities that such provisions present for improving governance, addressing issues of participatory rights, and ensuring implementation and enforcement of these rights.

Section I of this chapter discusses general considerations, including the nature of constitutions and constitutional law, how the different legal traditions in Africa affect the interpretation and application of procedural rights, and the persuasive authority of cases from other jurisdictions in Africa and elsewhere in the world. Section II briefly summarizes the constitutional right to a healthy environment and the right to life. Section III examines various constitutional procedural rights, such as freedom of association, access to information, public participation, and access to justice. Section IV presents some final thoughts on realizing the promise of procedural rights and other constitutional provisions, and using these tools to effect economic, social, and environmental change to a more sustainable world.

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## I. GENERAL CONSIDERATIONS IN GIVING FORCE TO CONSTITUTIONAL PROTECTIONS

As many nations around the world develop detailed laws, regulations, standards, and guidelines to govern environmental and human rights violations, it is worth considering what is gained by resorting to constitutional provisions to promote sustainable development and good governance. Many countries have issued broad statements or declarations of commitments to further access to information, public participation, and access to justice. However, these assertions are often undermined in practice. Procedural rights can be strengthened and broadened through constitutional provisions ensuring the free flow of information and timely access to courts. With the growing trend of constitutionalism, which emphasizes the constitution as a source of binding legal obligations and rights, courts increasingly give force to substantive constitutional provisions, thus ensuring citizens' rights.

A nation's constitution is more than an organic act establishing governmental authorities and competencies: the constitution also guarantees citizens basic fundamental human rights. These rights, such as the right to life, the right to redress, and increasingly the right to a clean and healthy environment, are often substantive in nature but are usually enforceable through procedural rights also recognized in the constitution.

Constitutional provisions that enumerate individual rights have not always been directly enforceable by citizens and even now do not always create an affirmative right. However, the consistent trend is toward giving force to these provisions. Constitutional provisions may be used both *defensively* to protect against actions that violate a citizen's constitutional rights (such as a government's unconstitutional interference with an organization or voluntary association); and *affirmatively* to compel the government to ensure certain constitutional rights (such as requiring an agency to provide information).

Procedural and substantive constitutional rights can be valuable for many reasons in environmental protection, sustainable development, and good governance. First, the frequently incomplete or imprecise nature of legislative and regulatory regimes governing sustainable development strengthens the relevance of procedural rights and constitutional principles and provisions. In these situations, constitutional provisions can provide a safety net for resolving problems that existing legislative and regulatory frameworks do not address.

Second, many environmental and procedural concerns are often viewed as secondary to other priorities, such as economic development. By referring to the environmental and procedural rights enshrined directly in

the constitution, advocates can elevate environmental and sustainable development cases to the level of constitutional cases involving fundamental human rights.<sup>1</sup> Constitutional entrenchment of procedural rights also provides a firm basis for public involvement in environmental and sustainable development issues that is less susceptible to the political airs of the day. As a result, citizens' values are more likely to endure, as constitutional reform usually is time-consuming, complicated, and requires super-majority approval. Also, cases involving constitutional questions are often appealed to a higher authority, such as a country's constitutional court or supreme court.

Finally, procedural rights enable citizens to protect substantive constitutional rights, such as the right to a healthy environment, and to pursue their advocacy work more effectively. This chapter explores these procedural right provisions and how they have been applied in practice. Giving force to constitutional provisions that guarantee freedom of association, access to information, public participation, and access to justice (including legal standing), is particularly important in ensuring that peoples' substantive rights are protected. These procedural rights promote the transparency, participation, and accountability that form the cornerstones of good governance.

The effectiveness of procedural rights depends on a variety of factors. The presence or absence of a particular provision in a country's constitution is not in itself dispositive of the strength of the right. In some countries, express constitutional provisions may be honored more in their breach than in their adherence, while in countries lacking comparable constitutional provisions courts may imply constitutional rights, even in the absence of a textual provision. Nevertheless, constitutional environmental protections can be tools—and potentially powerful tools—for advocates seeking to strengthen environmental protection and promote sustainable development in a wide range of contexts and legal traditions.

### A. IMPLICATIONS OF DIFFERENT LEGAL TRADITIONS

African countries have different legal traditions: namely, common law, civil law, and Islamic law, as well as some hybrid systems. Nevertheless, these legal systems share many common underlying principles and values, particularly the fundamental human rights that are embodied in their respective constitutions.

The different legal traditions of African nations have influenced the development of constitutional provisions relating to procedural rights throughout the continent

<sup>1</sup> See, e.g., Godber W. Tumushabe, *Environmental Governance, Political Change and Constitutional Development in Uganda*, in GOVERNING THE ENVIRONMENT: POLITICAL CHANGE AND NATURAL RESOURCES MANAGEMENT IN EASTERN AND SOUTHERN AFRICA 63, 78 (H.W.O. Okoth-Ogendo & Godber W. Tumushabe eds., 1999).

and will likely influence their implementation in each country. In Africa, approximately one-half of the nations have civil law traditions derived from European civil codes, one-third have common law traditions derived from British rule, and the remaining have primarily non-secular Islamic traditions.<sup>2</sup> In addition, legal systems based on the French civil law tradition differ from those of Spanish or Portuguese origin, and these civil law systems vary from country to country, just as common law or Islamic systems differ. Despite the differences, striking agreement exists among the different legal traditions on procedural rights and certain substantive rights (namely the right to life).

Many of the differences between common and civil law traditions can be traced to each nation's historical experience with judges.<sup>3</sup> In pre-Revolutionary France, judges tended to interpret the law in favor of the aristocracy; in England, the judges were comparatively more fair. Thus, when the new American and French constitutions were drafted in the 18<sup>th</sup> century, civil law and common law countries took different paths with respect to the powers of the judiciary.<sup>4</sup>

Civil law traditions, drawn from continental Europe and the Napoleonic Code in particular, disfavor judge-made law because judges, unlike the legislature, are not elected or accountable to the populace. Consequently, civil law systems generally eschew uncodified principles, such as nuisance, that have provided opportunities for judicial gap-filling in common law nations. In most civil law systems, only those actions or procedures explicitly provided for by law are allowed, so legislation is much more important and specific than in common law systems. Thus, civil law nations generally seek to enumerate all the rights and responsibilities in legal codes and constitutions.

In contrast, common law traditions, originally based on the British legal system, emphasize basic principles, which are then applied to the facts of a particular case. These basic principles may be derived from legislation but are often uncodified and manifest themselves through a body of case law interpreting and applying the principles. To ensure predictability and equal application of the law, judges are bound by earlier similar decisions (the doctrine of *stare decisis*), leading to a large body of judge-made law that complements the statutory and regulatory norms. This process stands in stark contrast to the traditional civil law perspective that judges should only apply the law, not interpret or create law.<sup>5</sup>

<sup>2</sup> These numbers are approximate, since many countries have legal traditions that are mixtures of more than one of these, as well as pre-colonial traditions.

<sup>3</sup> For a good review contrasting civil and common law traditions, see JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed. 1985).

<sup>4</sup> *Id.* at 15-16.

<sup>5</sup> Nevertheless, there remains a vibrant debate in common law nations about the degree to which judges should merely apply the law.

In modern times, civil and common law traditions have begun to merge in some respects. For instance, most scholars of civil law, as well as judges and legislators, recognize that it is impossible to write a code that will provide for all eventualities. Consequently, civil law advocates and judges increasingly look to previous judicial decisions (from their country and abroad) for persuasive authority when considering novel legal issues. Similarly, common law jurisdictions have been codifying a large volume of laws and regulations. Stacking all the books of the United States Code (the official compilation of U.S. laws) would yield a pile three meters tall, and the U.S. Code of Federal Regulations would top six meters, with probably more provisions than any civil law system, now or ever. Curiously, in Africa, environmental laws and regulations in common law countries are often longer and more detailed than comparable codes in civil law countries.

In contrast to both common law and civil law traditions, Islamic legal traditions draw their norms from the Qur'an and the *fiqh* (Islamic jurisprudence).<sup>6</sup> The *fiqh* refers to consensus of Muslim scholars (*ijma'a*), legal precedent (*qiyas*), custom, and other secondary sources. Islamic legal codes clarify and crystallize these traditions, and the courts enforce the codes rather than the traditions. In this respect, Islamic traditions resemble civil law traditions, with the emphasis on applying the codified law. However, in applying the provisions, Islamic courts will consider how other courts have interpreted the provisions, in a manner more akin to common law traditions. Further, in recent years, national statutes, including environmental laws, have supplemented the Islamic base. As a result, these countries now have a unique mixture of inherited colonial law, post-independence constitutional law, Islamic public and private law, and in some cases, a rich body of traditional laws and custom.

## B. THE RISE OF CONSTITUTIONALISM

Constitutionalism emphasizes the primacy of the constitution as a source of legal rights and obligations and empowers advocates and courts to look to the constitution as a positive source of law.<sup>7</sup> Most constitutions

<sup>6</sup> See Martin Lau, *Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 285, 286 (Alan E. Boyle & Michael R. Anderson eds., 1998) (noting that approximately 500 verses of the Qur'an refer to the relationship between people and the environment). Although the environment has a significant role in the Qur'an, to date it has had a lower legal profile in Islamic jurisdictions.

<sup>7</sup> For a variety of African perspectives on constitutionalism, see STATE AND CONSTITUTIONALISM: AN AFRICAN DEBATE ON DEMOCRACY (Issa G. Shivji ed. 1991) (particularly H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox* (ch. 1); Issa G. Shivji, *State and Constitutionalism: A New Democratic Perspective* (ch. 2); and Mahmood Mamdani, *Social Movements and Constitutionalism in the African Context* (ch. 16)).

include a set of fundamental rights, frequently termed the Bill of Rights, to be enjoyed by all citizens.<sup>8</sup> While these provisions appear to confer objective rights upon the population, courts often held that the rights were not self-executing and required implementing legislation to set the scope of the rights and the means for exercising them. With such interpretations, citizens were unable to realize their fundamental rights if the government failed to enact implementing legislation or enacted legislation that was very restrictive. With the rise of constitutionalism globally, courts increasingly view the constitution as an independent source of substantive law and rights, enforceable even (or particularly) in the absence of implementing legislation. In this process, courts have recognized that a constitution guarantees certain inalienable rights to each person, especially for those people in the minority (where legislation by the majority runs the risk of infringing on their rights).<sup>9</sup>

In common law systems, the constitution is the "fundamental and paramount law of the nation."<sup>10</sup> Looking to the constitution as a source of fundamental rights and obligations is well-established in most common law jurisdictions. However, some African common law countries have only recently incorporated binding rights into their constitutions. For example, before 1984, Tanzania's Constitution enumerated the rights in the preamble to the constitution, and as a result most commentators held that they had no legal force.

Traditionally, civil law systems maintain only three sources of law for a judge to apply: legislative statutes, administrative regulations, and custom. With the trend towards constitutionalism, however, the hierarchy of laws in most nations begins with the constitution and is followed by statutes, regulations, and custom.<sup>11</sup> Civil law countries have also developed mechanisms, including constitutional courts, for reviewing the constitutionality of legislative and administrative acts.

With the primacy of the constitution, judicial review of legislative acts (determining whether a particular legislative act is void because it conflicts with the constitution) starts to blur the line between judicial and legislative authority.<sup>12</sup> Professor Merryman observed:

<sup>8</sup> Cf. MERRYMAN, *supra* note 3, at 95-96.

<sup>9</sup> See, e.g., Gary C. Bryner, *Constitutionalism and the Politics of Rights*, in CONSTITUTIONALISM AND RIGHTS 7, 8 (Gary C. Bryner & Noel B. Reynolds eds., 1987) ("Constitutionalism has at its roots the idea of protecting minorities from majoritarian actions . . ."); MERRYMAN, *supra* note 3, at 96.

<sup>10</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>11</sup> MERRYMAN, *supra* note 3, at 24, 136 ("The movement toward constitutionalism in the civil law tradition can be seen as a logical reaction against the extremes of a secular, positivistic view of the state"); see also Victor LeVine, *The Fall and Rise of Constitutionalism in West Africa*, J. MOD. AFR. STUD. (June 1997).

<sup>12</sup> See MERRYMAN, *supra* note 3, at 24.

The power of judicial review of the constitutionality of legislative action has long existed in Mexico and most other Latin American [civil law] nations (though it is not always aggressively exercised). And since World War II, judicial review in one form or another, has appeared or reappeared in Austria, France, Germany, Italy, Yugoslavia, and Spain.<sup>13</sup>

In some African countries, however, judicial review, particularly of legislative acts, remains elusive. For example, Cameroon's Constitution provides that either the legislature or one-third of the members of parliament may refer a matter to a constitutional court, but citizens on their own are currently unable to vindicate their constitutional rights because the constitution does not explicitly empower them to appeal to the constitutional court. The trend of constitutionalism is changing this situation around Africa as civil law countries, such as Niger, increasingly allow citizens to invoke their constitutional rights in court.<sup>14</sup>

#### C. APPLICABILITY OF EXPERIENCES FROM OTHER JURISDICTIONS

Despite the increase of constitutional norms in Africa, most nations have yet to interpret or apply such norms, due in part to how recently these provisions were incorporated into constitutions. In a few cases, countries such as Mozambique have invoked constitutional provisions to justify the promulgation of environmental laws. However, the significant absence of African court cases interpreting these provisions suggests that it could be productive to consider how courts in other countries implement constitutional protections.

When faced with a matter of first impression in its own country, a court will often look to cases from other countries. While such precedents are non-binding, they provide guidance, or persuasive precedent, for judges. For instance, when the Zambian Supreme Court held that a statute requiring permits for a peaceful assembly was unconstitutional, the court favorably cited decisions from England, Ghana, India, Nigeria, Tanzania, the United States, and Zimbabwe, as well as the European

<sup>13</sup> *Id.*

<sup>14</sup> E.g., Arrêt No. 96-07/Ch. Cons. (July 21, 1996) (Constitutional Chamber decision allowing political parties to challenge the dissolution of the Independent National Electoral Commission and replacing it with another, but upholding the government's action on the basis of a 1960 decree); see also *Syndicat National des Enseignants du Niger v. Préfet Président de la Communauté Urbaine de Niamey*, Ordonnance de Référé No. 005/Pt/ch/adm/CS (Dec. 10, 1998) (right to demonstrate).

Court of Human Rights.<sup>15</sup> Thus, when courts, particularly common law courts, first interpret constitutional rights that may be termed “fundamental” or “human” rights, they frequently consider how other jurisdictions have interpreted or applied similar provisions.

#### D. ADDITIONAL CONSTITUTIONAL CONSIDERATIONS

Modern constitutions tend to be longer, as they frequently incorporate new provisions in addition to the various constitutional rights and obligations that other countries have enumerated. In this way, constitutional law borrows from and builds on the constitutions and experiences of other countries. Nonetheless, although longer, more detailed constitutions are increasingly likely to include explicit provisions that clarify the scope of the enumerated rights, most countries still rely on legislation to spell out the precise nature of the rights and obligations.

Within the existing framework of enforceable constitutional law, constitutions can provide an avenue for developing, implementing, and enforcing substantive principles implicitly or indirectly. First, in addition to providing substantive protections, such as a right of access to information, constitutions can explicitly elevate the status of international agreements and place them on a par with or above domestic law. The African Charter of Human and Peoples’ Rights, which is binding on all Organisation of African Union (OAU) members, guarantees that “[e]very individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts violating his/her fundamental rights . . . .”<sup>16</sup> When implementing national legislation is lacking, environmental advocates could rely on constitutional provisions that incorporate guarantees such as this enshrined in the African Charter and other international agreements.

Second, constitutions can provide for unenumerated penumbral rights. Penumbral rights are rights that are not specifically mentioned in the constitution but that are consistent with its principles and existing rights. For example, Article 29 of Eritrea’s Constitution provides that “[t]he rights enumerated in this Chapter shall not preclude other rights which ensue from the spirit of this

Constitution and the principles of a society based on social justice, democracy and the rule of law.”<sup>17</sup>

Penumbral rights can enable courts to incorporate emerging fundamental human rights without requiring the court to develop a tortured interpretation of an existing constitutional provision.<sup>18</sup> Thus, for example, the 1972 Stockholm Declaration,<sup>19</sup> the 1992 Rio Declaration,<sup>20</sup> and the impressive body of international environmental conventions and practice since the early 1970s argues strongly for a fundamental human right to a healthy environment and the incorporation of this right into constitutional jurisprudence.

#### II. SUMMARY: RIGHT TO A HEALTHY ENVIRONMENT AND RIGHT TO LIFE<sup>21</sup>

The right to a healthy environment and the right to life are the two substantive constitutional rights most frequently referred to in relation to environmental cases and issues. These rights or constitutional environmental provisions are generally one of three types: (1) fundamental rights and duties, (2) general constitutional rights and duties, or (3) vague rights and duties. Most African constitutions granting an environmental right to a healthy environment and imposing environmental duties do not place them in a constitutional section designated “fundamental,” but the rights and duties nevertheless assume that status through their language and constitutional nature. Right to life clauses, on the other hand, are typically represented in constitutions as fundamental rights.

<sup>17</sup>Article 32 of Algeria’s Constitution is more general, implying penumbral rights from unenumerated fundamental rights: “The fundamental liberties and the Rights of Man and of the citizen are guaranteed.” Similarly, Article 1 of Gabon’s Constitution provides that “[t]he Gabonese Republic recognizes and guarantees the inviolable and imprescriptible rights of Man, which obligatorily constrain public powers.”

<sup>18</sup>For example, in the United States, the Ninth Amendment to the Constitution provides that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Courts have interpreted this provision to include a variety of unenumerated constitutionally protected rights, notably the right to reproductive choice. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (establishing a “right of privacy,” particularly regarding access to contraception for married couples); see also *id.* (Goldberg, J., concurring) (asserting that whether a putative right is a penumbral constitutional right is to be determined by “look[ing] to the ‘traditions and [collective] conscience of our people’ to determine whether a principle is ‘so rooted [there] as to be ranked as fundamental.’”); *Roe v. Wade*, 410 U.S. 113 (1973) (establishing a penumbral right to choose an abortion within the penumbral privacy right). The right to a healthy environment, however, was never incorporated as a penumbral constitutional right in the United States.

<sup>19</sup>Declaration of the United Nations Conference on the Human Environment, done at Stockholm, Sweden on June 16, 1972, U.N. ESCOR, U.N. Doc. A/CONF.48/5, 11 I.L.M. 1416 (1972).

<sup>20</sup>Rio Declaration on Environment and Development, done at Rio de Janeiro on June 14, 1992, 31 I.L.M. 874 (1972).

<sup>15</sup>*Christine Mulundika v. People*, 1995/SCZ/245 (Nov. 21, 1995) (unreported), available at <http://zamlil.zamnet.zm/courts/supreme/full/95scz25.htm> (last visited June 24, 2002); see also *Derrick Chitala v. The Attorney-General*, 1995/SCZ/14 (unreported), available at [zamlil.zamnet.zm/courts/supreme/full/95scz14.htm](http://zamlil.zamnet.zm/courts/supreme/full/95scz14.htm) (last visited June 24, 2002) (“the Rules of the Supreme Court of England . . . apply to supply any *cassus omissus* in our own rules of practice and procedure”).

<sup>16</sup>African Charter on Human and Peoples’ Rights, art. 7(1)(a), done on June 26, 1981, entered into force Oct. 21, 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 59 [hereinafter African Charter].

The potential breadth of a generalized right to a healthy environment or right to life can be both a strength and a weakness. It should not be an impediment to application or enforcement, and may in fact be used to strengthen the tools available to the citizenry and courts seeking to apply these rights to protect the environment. The constitutional right to a healthy environment has been applied and interpreted in both common and civil law jurisdictions in Asia, Europe, and Latin America, and frequently implicates well-accepted environmental principles and mechanisms, such as environmental impact assessment, the precautionary principle, and the polluter-pays principle.

Often, the constitutional right to life is the sole basis for a court's decision to extend protection or prevent damage to an environmental resource. When a nation lacks both an express constitutional right to a healthy environment and comprehensive environmental statutory and regulatory systems, or alternatively lacks adequate remedies under those systems, the constitutional right to life becomes all the more important. The right to life has often been interpreted to imply a right to a healthy environment that sustains life or contributes to the quality of life. Accordingly, the right to life can protect the environment in which people live and the environmental resources upon which people depend.

Constitutional environmental provisions also impose duties to protect the environment, either through explicitly imposing a duty on the state and other parties or by implicitly granting a right to a healthy environment. Although the legal effect of such constitutionally provided duties is unclear, courts occasionally have relied upon the fundamental duties to interpret ambiguous statutes.<sup>22</sup> In countries with limited budgets and a priority on development, the courts' foresight and creativity are necessary to give meaning to these environmental protections.

In two cases, the Indian Supreme Court found that in order for the constitutional provision imposing a duty upon citizens to achieve real significance, the court needed to interpret the provision as extending correlative duties to the government, media, and educational system.<sup>23</sup> The court opined that imposing a constitutional duty on ordinary citizens to protect the environment is in vain if the citizens are not knowledgeable about the subject matter. African judiciaries will need to be at least as creative in order to give practical effect to their constitutional environmental provisions. Court decisions such as these have broad implications for the importance and

effectiveness of public participation, access to information, and access to justice.

### III. PROCEDURAL RIGHTS

In addition to providing substantive rights to life and a healthy environment, virtually all African constitutions provide procedural rights that can be indispensable in implementing and enforcing those substantive rights. These procedural rights provide civil society with the mechanisms for learning about actions that may affect them, participating in governmental decisionmaking processes, and holding the government accountable for its actions, as well as enabling civil society to come together to exercise these procedural rights for advocacy purposes.

The procedural rights discussed in this section fall generally into three categories: (1) public participation in decisionmaking (which includes freedom of association), (2) access to information, and (3) access to justice (including recognition of *locus standi* and explicit recognition of public interest litigation). Other rights, such as the freedoms of opinion, expression, and the press, can be relevant to advocacy and governance, and merit further investigation.

#### A. PUBLIC PARTICIPATION IN DECISIONMAKING

One emerging procedural right is the right of the public to participate in government decisions. Not only do regional and international agreements, such as the Rio Declaration, the Aarhus Convention, and the ISP, provide for public participation in decisionmaking processes,<sup>24</sup> but a small though increasing number of national constitutions have also incorporated similar provisions. The right of public participation can take many forms: the right to know about pending government decisions; public hearings; the opportunity to present written or oral comments and evidence; the requirement that government consider citizen comments; and the

<sup>21</sup> See generally Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVT'L. L. 131, 146-58, 175 (2001).

<sup>22</sup> *Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai*, A.I.R. 1976 S.C. 1455, 1465 (India).

<sup>23</sup> *M.C. Mehta v. Union of India*, A.I.R. 1988 S.C. 1115, 1126-27 (India); *M.C. Mehta v. Union of India*, S.C. of India Writ Petition (Civil) No. 860 of 1991.

<sup>24</sup> See Rio Declaration, *supra* note 20, prin. 10; UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, arts. 6, 7, 8, adopted at Aarhus, Denmark on June 25, 1998, entered into force Oct. 30, 2001, ECE/CEP/43 [hereinafter Aarhus Convention] (respectively relating to public participation in specific projects or activities; programs, plans, and policies; and general rules and regulations); Organization of American States Inter-American Council for Integral Development, Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development, Policy Recommendations 2, 3, CIDEI/RES. 98 (V-O/00), OEA/Ser.W/II.5/CIDI/doc.25/00 (Apr. 20, 2000), adopting Organization of American States, Unit for Sustainable Development and Environment, Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (1999) [hereinafter ISP].

opportunity to present petitions, complaints, or grievances to administrative authorities.

The constitutions of Cape Verde<sup>25</sup> and Gambia<sup>26</sup> allow citizens to petition “public authorities” or “the Executive” to protect their rights and, in the case of Cape Verde, to protest abuse of power. These provisions differ from the access to justice provisions discussed below in that they provide for an administrative process to register grievances. Eritrea has a similar right to petition, but also recognizes an explicit “right to be heard respectfully by the administrative officials concerned” and provides for “due administrative redress” for anyone “whose rights or interests are interfered with or threatened.”<sup>27</sup>

Liberia and South Africa recognize broad rights of public participation. South Africa’s constitution also provides for public access to and participation in the National Assembly,<sup>28</sup> the National Council,<sup>29</sup> and provincial legislatures.<sup>30</sup> Article 7 of Liberia’s constitution requires “all government and private enterprises” to

manage the national economy and the natural resources of Liberia in such manner as shall ensure the maximum feasible participation of Liberian citizens under conditions of equality as to advance the general welfare of the Liberian people and the economic development of Liberia as a whole.

While this sort of provision is very broad, it can provide an entry point for advancing public participation in environmental and humanitarian matters. In South Africa, land owners and environmental advocates opposing a coal mining license successfully argued that they had a constitutional right to be heard.<sup>31</sup> South Africa’s Supreme Court of Appeals held that when an applica-

tion for a mining license is made, “interested parties should at least be notified of the application and be given an opportunity to raise their objections in writing. If necessary, a more formal procedure can then be initiated.”<sup>32</sup> In reaching this decision, the court noted that “[o]ur constitution, by including environmental rights as fundamental, justifiable human rights, by necessary implication requires that environment considerations be accorded appropriate recognition and respect in the administrative processes in our country.”<sup>33</sup>

One of the most powerful tools of public participation is the ability of the public to initiate or approve legislation. Many U.S. states have constitutional provisions that enable citizens to prepare draft legislation that the general public adopts or rejects through a popular referendum, and most states similarly require that the legislature refer proposed amendments to the state constitution to the ballot box for voter approval.<sup>34</sup> This ballot initiative/referendum process has been used to pass legislation protecting wetlands in Florida, prohibiting cyanide open pit mining in Montana, and empowering individuals to bring citizen suits that seek to enforce water pollution laws in California.<sup>35</sup>

In the Netherlands, courts have held that a substantive constitutional right to a healthy environment necessarily includes the procedural rights of access to information and participation in decisions that could affect the environment. As a result, courts have applied a strict standard of review for public participation in environmental cases.<sup>36</sup> For example, a Dutch court voided a license for a nuclear power plant, when there had been insufficient public participation in the decisionmaking process leading up to the issuance of the license.<sup>37</sup>

Similarly, the Constitutional Court of Slovenia invalidated a long-term development plan, which provided for quarrying operations near a village that would impact the quality of life. The government had presented the draft changes to the development plan at only one public hearing, and that was at the regional center; even then, not all the relevant material was made available. The court invalidated the long-term plan because the

<sup>25</sup> CAPE VERDE CONST. art. 57 (“Every citizen shall have the right to present, in writing, individually or collectively, to the public authorities, petitions, complaints or claims for the protection of his rights or against illegalities or abuse of power in accordance with the law.”).

<sup>26</sup> GAMBIA CONST. art. 25(f) (establishing the “freedom to petition the Executive for redress of grievances...”).

<sup>27</sup> ERITREA CONST. art. 24.

<sup>28</sup> SOUTH AFRICA CONST. art. 69(d) (“The National Council of Provinces or any of its committees may ... receive petitions, representations or submissions from any interested persons or institutions”). For a general review of ways to develop South African public participation in environmental decisionmaking, see ANGELA ANDREWS, PUBLIC PARTICIPATION AND THE LAW (1999).

<sup>29</sup> SOUTH AFRICA CONST. art. 72 (“The National Council of Provinces must: (a) facilitate public involvement in the legislature and other processes of the Council and its committees; and (b) conduct its business in an open manner, and hold its sittings and those of its committees, in public ...”).

<sup>30</sup> *Id.* art. 118 (“A provincial legislature must ... facilitate public involvement in the legislative and other processes of the legislature and its committees ...”).

<sup>31</sup> Director: Mineral Development v. Save the Vaal Environment, Case No. 133.98 (Supreme Court of Appeal of South Africa, Mar. 12, 1999).

<sup>32</sup> *Id.* para. 20.

<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION (1989); THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1989).

<sup>35</sup> See, e.g., Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE §§ 25249.5-25249.13 (West 1991 & Supp. 1999); see also DAVID D. SCHMIDT, GREEN POLITICS: ENVIRONMENTAL INITIATIVES ON STATE AND LOCAL BALLOTS IN 1990 15 (1990).

<sup>36</sup> Jonathan Verschuuren, The Constitutional Right to Environmental Protection, available at [till.kub.nl/data/topic/envartcult.htm](http://till.kub.nl/data/topic/envartcult.htm) (last visited Aug. 1, 2002).

<sup>37</sup> Council of State (May 29, 1992), 1992 MILIEU EN RECHT 477 (cited in DAVID D. SCHMIDT, GREEN POLITICS: ENVIRONMENTAL INITIATIVES ON STATE AND LOCAL BALLOTS IN 1990, 15, n.13 (1990)).

government had violated the villagers' right to participate in a planning process that could affect their quality of life.<sup>38</sup>

In both of these cases the decisions rely on the constitutional right to a healthy environment. One of the few cases to interpret a constitutional right to participate is the Peruvian case *Sociedad Peruana de Derecho Ambiental v. Ministerio de Energía y Minas*,<sup>39</sup> which relied on the public's constitutional right to participate as well as the right of access to information. As these cases illustrate, the public right to participate in the legislative process, as well as the administrative processes of developing and applying regulations, is still emerging, and only subsequent practice will clarify the scope of these rights.

Freedom of association is a related right that is fundamental for advocacy work and an essential enabling tool of public participation. By forming and participating in nongovernmental organizations (NGOs), individuals can more effectively advocate for their cause.<sup>40</sup> With the support of an organization and corresponding notion of strength in numbers, fears of retaliation can be allayed and people are more likely to take an active role in matters that affect them. By joining with others in an association, citizens can have a stronger say in these matters, as many people speaking with a single, clear voice can be more effective. Similarly, association allows for economies of scale, as financial, technical, and labor costs are shared among the members, enabling them to participate collectively where it would be prohibitively expensive to participate individually. Finally, associations can focus on an issue and draw upon their members as needed, thereby enabling the members' interests to be advanced in ways that would be impossible for individuals to do on their own.

All African nations ensure the constitutional right of their citizens to associate to promote business, personal, or other interests. The provisions of a few countries' constitutions, such as Angola's,<sup>41</sup> suggest that this

right might be limited to professional or trade unions, but this is distinctly a minority position.

The breadth and strength of a constitutional right of association may depend upon national laws that prescribe the terms for its exercise. Approximately one-half of the constitutional provisions grant the right subject to "conditions fixed by law," or a similar claw-back clause (so-named because it claws back some of the rights just granted in the provision), with the overwhelming number of claw-back clauses found in civil law constitutions. While a claw-back clause may diminish the strength of the freedom of association because it explicitly enables legislation to set limits on the right, in practice such limits may not be much more than the reasonable limitations implied in other kinds of provisions.<sup>42</sup>

Notwithstanding the recognized value of and need for the right of association, many African organizations operate with the fear that if they criticize the government they will be deregistered. For example, Zimbabwe had a Private Voluntary Organisations (PVO) Act, which granted the Minister of Public Service, Labour and Social Welfare the power to suspend the entire executive board of an NGO without providing a reason and then to appoint a new executive board until the next election. In 1995, the Minister suspended Sekai Holland, Chairperson of the Association of Women's Clubs, as well as eleven others. The executive board sued the Minister, claiming that the operative section of the PVO Act was unconstitutional and therefore *ultra vires* (outside of the law). Specifically, they alleged that the Act infringed their civil rights without affording them a fair hearing,<sup>43</sup> unconstitutionally infringed their freedom of expression,<sup>44</sup> and unconstitutionally infringed their right to assemble freely and associate with others.<sup>45</sup> Zimbabwe's Supreme Court agreed, holding Section 21 of the PVO Act unconstitutional and reinstating the NGO's executive board.<sup>46</sup>

<sup>38</sup> See Milada Mirkovic & Andrej Klemenc, *Status of Public Participation Practices in Environmental Decisionmaking in Central and Eastern Europe: Slovenia*, available at [www.rec.org/REC/Publications/PPstatus/Slovenia.html](http://www.rec.org/REC/Publications/PPstatus/Slovenia.html) (last visited Aug. 2, 2002).

<sup>39</sup> *Sociedad Peruana de Derecho Ambiental contra Ministerio de Energía y Minas (Habeas Data)*, Expediente No. 1658-95, Dictamen Fiscal No 122-96 (Sala de Derecho Constitucional y Social, June 19, 1996). See generally Jorge Caillaux et al., *Environmental Public Participation the Americas*, in this volume; Marcos Orellana, *Unearthing Governance: Obstacles and Opportunities for Public Participation in Minerals Policy*, in this volume.

<sup>40</sup> See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . .").

<sup>41</sup> ANGOLA CONST. art. 33 ("The People's power Assemblies are the highest organs of the State at each politico-administrative level in the country. The People's Power Assemblies are constituted by elected deputies who shall answer to the people in the exercise of their mandate.")

<sup>42</sup> Cf. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 n.17 (1982) (suggesting that reasonable "limitations on the right of access [to information] that resemble [permitted] 'time, place, and manner' restrictions on protected speech" might be constitutional).

<sup>43</sup> ZIMBABWE CONST. art. 18(9) ("Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.")

<sup>44</sup> *Id.* art. 20(1) ("No person shall be hindered in the enjoyment of his freedom of expression . . .").

<sup>45</sup> *Id.* art. 21(1) ("No person shall be hindered in his freedom of assembly and association . . .").

<sup>46</sup> Reported in Simeon Mawanza, "Supreme Court Saves Zimbabwean NGOs," NETWORK OF SOUTHERN AFRICAN LEGAL AID & LEGAL ADVICE NGOs NEWSLETTER (May 1997).

In addition to explicit provisions, courts have implied the freedom of association from constitutional rights to freedom of speech and peaceable assembly. For instance, the First Amendment to the U.S. Constitution provides for unqualified freedoms of assembly, speech, press, and petition. Relying principally on the first two freedoms, the U.S. Supreme Court has held that the freedom of association is constitutionally protected. The Court has particularly emphasized these constitutional protections in cases where a group advances unpopular ideas and where government constraints could chill the exercise of the right of association. Thus, for instance, civil rights groups did not have to disclose their membership lists, where doing so would substantially restrain the members' exercise of their right to freedom of association.<sup>47</sup>

## B. ACCESS TO INFORMATION

In order for the public to be effective advocates for its causes, access to relevant information is important: civil society needs to know of threats and trends and understand the origins and consequences of these factors. Although access to information is a relatively new norm, 21 African countries already recognize this important right, with 15 explicitly granting citizens the right of access to information generally or specifically held by the state. At least another five countries incorporate access to information through reference to the Universal Declaration of Human Rights or the African Charter on Human and Peoples' Rights,<sup>48</sup> and some countries, such as Kenya, basically repeat or elaborate on the provisions of these conventions.<sup>49</sup>

Congo, South Africa, and Uganda have some of the stronger constitutional provisions on access to information. Section 32(1) of South Africa's 1996 Constitution (within its Bill of Rights) guarantees to all "the right of access to any information held by the state; and ... held by another person and that is required for the exercise or protection of any rights." When read in conjunction with the constitutional rights to a healthy environment<sup>50</sup> and life,<sup>51</sup> Section 32(1) ensures the right to the information necessary for environmental advocacy.

<sup>47</sup> *E.g.*, NAACP v. Alabama *ex rel.* Patterson, *supra* note 40, at 462 (holding that "privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs").

<sup>48</sup> See Universal Declaration of Human Rights, art. 9(1), G.A. Res. 217A, UN GAOR, 3d Sess., UN Doc. A/810 (1948) [hereinafter UDHR] ("Every individual shall have the right to receive information."); African Charter, *supra* note 16, art. 9.

<sup>49</sup> See CONNIE NGONDI-HOUGHTON ET AL., THE STATE OF FREEDOM OF INFORMATION IN KENYA 12-14 (1999).

<sup>50</sup> SOUTH AFRICA CONST. art. 23 ("Everyone has the right to an environment that is not harmful to their health or well-being ...").

<sup>51</sup> *Id.* art. 11 ("Everyone has the right to life.").

Although South Africa has yet to develop jurisprudence interpreting this provision, it has been utilized. For instance, when the Legal Resources Centre (LRC), a South African NGO, sought technical information from the South African Ministry of Environmental Affairs regarding oil refinery processes and releases, the Ministry refused on the grounds that the information was a protected trade secret. The LRC prepared to sue the Ministry under Section 32, and the Ministry and refineries produced the requested information before the case could be filed.

Similar to South Africa's Constitution, Article 27 of the Constitution of Congo provides for access to information held by the government and by private parties:

Freedom of the press and freedom of information shall be guaranteed ... Access to sources of information shall be free. Every citizen shall have the right to information and communication. Activities relative to these domains shall be exercised in total independence, in respect of the law.

Uganda similarly provides for wide access to state-held information, "except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person."<sup>52</sup> In addition, many constitutions specify that national legislation may define the parameters of access to information. As discussed in the context of the right of association, these implementing laws need to be reasonable so as to preserve the meaning of the right. For instance, Section 32(2) of South Africa's Constitution states "legislation ... may provide for reasonable measures to alleviate the administrative and financial burden on the state."

In five countries (Kenya, Nigeria, Sierra Leone, Zambia, and Zimbabwe), citizens have the constitutional *freedom* to receive information free from government interference. A typical provision would guarantee citizens the right to "receive and impart ideas and information without interference."<sup>53</sup> In addition, Article 8 of Senegal's Constitution provides that "everyone has the right to be informed without hindrance from the sources accessible to all." Innovative advocacy may be able to draw out a *right* to receive information from this freedom, but until this theory is tested in court, the extent to which these provisions grant citizens a right to demand state-held information remains unclear.

The Indian Supreme Court has held that a constitutional right of access to information is implicit in the constitutional rights to free speech and expression, as well

<sup>52</sup> UGANDA CONST. art. 41(1).

<sup>53</sup> *E.g.*, NIGERIA CONST. art. 38(1).

as in the right to life.<sup>54</sup> In the 1982 landmark case of *S.P. Gupta v. President of India*, the Supreme Court asserted:

This is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception. The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistent with the requirement of public interests, bearing in mind all the time that disclosure also serves an important aspect of public interest.<sup>55</sup>

Subsequently, in 1988, the Supreme Court held that access to information, or the right-to-know, was a basic public right and essential to developing public participation and democracy.<sup>56</sup> The same year, the High Court of Rajasthan held that the privilege of secrecy only exists in matters of national integrity and defense.<sup>57</sup>

In the United States, access to information is generally governed by the Freedom of Information Act,<sup>58</sup> but the U.S. Supreme Court has also interpreted the constitutional freedoms of speech and the press to include a constitutional right of access to information because these protections all "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."<sup>59</sup> While this right has generally focused on public access to criminal proceed-

ings,<sup>60</sup> some justices have argued for a broader right to information.<sup>61</sup>

Civil law countries, particularly in Latin America but also Spain and Portugal, have applied and interpreted a constitutional right of access to information. These countries often have a process of *habeas data* that provides a mechanism for obtaining access to constitutionally guaranteed information. For example, a Peruvian environmental NGO used *habeas data* to obtain information that the government had previously refused to release. In 1993, an impoundment for mine tailings ruptured, killing eight workers, destroying natural and cultivated forests, and severely polluting a river. Representing a local community, the Peruvian Society for Environmental Defense (SPDA) requested information from the Ministry of Energy and Mines in order to determine who was responsible for the disaster. Specifically, SPDA sought technical documents associated with issuing the original concession, as well as a relevant Ministry report. The Ministry refused these requests, claiming that the documents were confidential. After exhausting the administrative and judicial remedies, SPDA filed a *habeas data* motion with the Supreme Court. The motion was granted and the Ministry was ordered to provide the requested documents.<sup>62</sup>

In addition to national precedents, the international community has increasingly recognized a right of access to environmental information. In dicta, the Inter-American Court of Human Rights has also promoted the "col-

<sup>54</sup> See generally Robert Martin & Estelle Feldman, *Access to Information in Developing Countries*, Transparency International Working Paper, ch. 8 (relating to India), available at [www.transparency.org/working\\_papers/martin-feldman/](http://www.transparency.org/working_papers/martin-feldman/) (last visited Aug. 2, 2002) (discussing the right of access to information which is rooted in the constitutional rights of free speech and expression).

<sup>55</sup> *S.P. Gupta v. President of India*, A.I.R. 1982 S.C. 149, 234 (India); see also *Bombay Environmental Action Group v. Pune Cantonment Board*, W.P.2733 of 1986 and Supreme Court Order re Special Leave Petition No. 1191 of 1986 (Bombay High Court, Oct. 7, 1986) (emphasizing access to information for bona fide activists).

<sup>56</sup> *Reliance Petrochemicals v. Indian Express*, (1988) S.C.C. 592.

<sup>57</sup> *L.K. Koolwal v. Rajasthan*, 1988 A.I.R. (Raj.) 2, 4.

<sup>58</sup> 5 U.S.C. § 552 (1994).

<sup>59</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

<sup>60</sup> See generally *id.* at 581 (holding that "[a]bsent an overriding interest articulated in the findings, the trial of a criminal case must be open to the public"); *Globe Newspaper Co. v. Superior Court*, *supra* note 42, 457 U.S. at 604, 607 (in voiding a state law that required the exclusion of the press and public from the courtroom during the testimony of a minor who was allegedly the victim of a sexual offense, the court noted that First Amendment rights seek to "protect the free discussion of governmental affairs;" and thereby "ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government"; the court held that access may only be denied if such a denial is "necessitated by a compelling governmental interest and is narrowly tailored to serve that interest") (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (holding that the press has the right of access to the transcripts of a preliminary hearing in a criminal case).

<sup>61</sup> See, e.g., *Richmond Newspapers*, 448 U.S. at 582-83 (Stevens, J., concurring) (proclaiming this to be a "watershed case" and that "[t]oday, ... for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press ..."); *id.* at 589 (Brennan, J., concurring) (laying out two principles useful in determining the scope of the right of access to information: "First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. (citation omitted) ... Second, the value of access must be measured in specifics.")

<sup>62</sup> *Sociedad Peruana de Derecho Ambiental v. Ministerio de Energía y Minas (Habeas Data)*, *supra* note 39.

lective right to receive any information whatsoever.”<sup>63</sup> The increased international recognition of a right to environmental information further supports a liberal interpretation of constitutional rights to information.

### C. ACCESS TO JUSTICE

Constitutional rights are only meaningful if they are enforceable. Accordingly, the ability of citizens and NGOs to enforce their constitutional rights is critical in ensuring that these rights have practical effect. While the government has the primary responsibility for implementing and enforcing laws, including constitutional rights, the government is often unable or unwilling to act on its own. While the constitutional provisions generally empower citizens to seek recourse from the courts, this empowerment is particularly important when the government fails to protect constitutional rights. Access to justice includes both the power of courts to review government actions and omissions and the right of citizens to appeal to the courts for this review.

More than two-thirds of the African nations provide a constitutional right of access to justice. While most of these provisions are explicit, the constitutions of Benin, Burundi, and Côte d’Ivoire incorporate access to justice by reference to the African Charter of Human and Peoples’ Human Rights, which provides that “[e]very individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts violating his/her fundamental rights ....”<sup>64</sup> Cameroon and Djibouti have similar references that supplement their explicit access to justice provisions.<sup>65</sup>

Many of the access to justice provisions are quite general, guaranteeing citizens the protection of the law.<sup>66</sup> Some constitutions include more explicit protections, occasionally extending to the appeal of any act of the administration.<sup>67</sup> The guaranteed processes and remedies also vary and may include generalized access to the specific rights; the right to present complaints, legal rep-

resentation, and timeliness;<sup>68</sup> and the right to administrative and judicial review of the complained-of act.<sup>69</sup>

In addition, three countries, Seychelles, Uganda, and Zimbabwe, grant their citizens rights that could implicate access to justice. In their constitutions, Seychelles (in Article 27(1)) and Zimbabwe (in Article 18(1)) guarantee their citizens the right to equal protection under the law. Seychelles guarantees public judicial processes, and Uganda requires its citizens to “uphold and defend the Constitution.” While these provisions do not explicitly guarantee access to justice, access may be implied since how can citizens “uphold and defend the Constitution” if they can not seek redress from the courts for constitutional violations?

### 1. Judicial Review

Of the many constitutional access to justice provisions in Africa, some, such as Section 33(3)(a) of South Africa’s constitution, explicitly mention judicial review.<sup>70</sup> For those provisions that do not, they usually assert that the law should be accessible, and that citizens are guaranteed protection of their fundamental rights. In order for citizens to access the courts in order to protect their fundamental rights, a judicial review and remedy power is necessarily implied.

For countries without an explicit access to justice provision in their constitution, judicial review and standing, are often found to be inherent in the substantive constitutional rights to life and to a healthy environment. In general, constitutional provisions ensuring access to judicial or administrative redress for violations of constitutionally guaranteed rights expand upon the long-settled principle of jurisprudence that a right implies a remedy. In *Marbury v. Madison*, the seminal 1803 United States case clarifying the role and powers of the judiciary, Supreme Court Chief Justice John Marshall noted that “[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury, its proper redress.”<sup>71</sup>

This principle is also well-settled in Great Britain,<sup>72</sup> and various civil law jurisdictions have developed a vari-

<sup>63</sup> I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalists (American Convention on Human Rights, arts. 13, 29), Advisory Opinion OC-5/85 of Nov. 13, 1985. Series A No. 5, 100; see also Case 11.230, Inter-Am. C.H.R. 234, OEA/ser.L/V/III.95, doc. 7 rev. (1997); Martin & Feldman, *supra* note 54, ch. 3 (describing the 1995 Johannesburg Principles on access to environmental information).

<sup>64</sup> See African Charter, *supra* note 16, art. 7(1)(a).

<sup>65</sup> CAMEROON CONST. pmb. (“every person has a right to life, to physical and moral integrity and to humane treatment in all circumstances”); DJIBOUTI CONST. art. 10.

<sup>66</sup> E.g., BOTSWANA CONST. art. 3(a).

<sup>67</sup> E.g., CONGO CONST. art. 19 (“Any citizen subject to prejudice by an act of the administration shall have the right to judicial recourse.”).

<sup>68</sup> EQUATORIAL GUINEA CONST. art. 13(i) (“present complaints and petitions to the authorities”).

<sup>69</sup> ERITREA CONST. arts. 24(2), 28(2).

<sup>70</sup> SOUTH AFRICA CONST. art. 33(3)(a) (“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair ... National legislation must be enacted to give effect to these rights, and must provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.”).

<sup>71</sup> *Marbury v. Madison*, *supra* note 10, 5 U.S. at 19-20; for an earlier use of the principle, see James Madison, *The Powers Conferred by the Constitution Further Considered*, The Federalist No. 43 (Jan. 23, 1788) (explaining the provisions of the draft U.S. Constitution).

<sup>72</sup> See *Marbury v. Madison*, *supra* note 10, 5 U.S. at 163 (citing Blackstone’s Commentaries, vol. 3, 23, 109).

ety of legal tools, often dating back to Roman law, to enable citizens to vindicate constitutional and particularly environmental wrongs. Consequently, even if a nation lacks an explicit constitutional provision ensuring access to judicial review, courts can still review and redress violations of constitutional rights.

## 2. Standing

Most African countries guarantee citizens the right to seek legal redress from courts. The legal capacity to sue (*locus standi*) is critical to the effective implementation of environmental and human rights. Whether a person has standing determines whether they are able to go to court and seek to enforce or uphold a constitutional provision. Standing is based on the idea that only people with a legal interest in a matter should be allowed access to the courts. Historically, this ensured that a case would be litigated fairly, that courts would only consider real ("live") cases, and that courts would not be engaged in declaratory or prospective lawmaking. Often, standing to bring suit was limited to those who suffered a direct economic injury, preventing much public interest litigation. In the last three decades, many countries have taken a more expansive view of standing.<sup>73</sup> In many cases, such as in India, standing has effectively been eliminated; any citizen can bring suit to enforce the law, particularly to enforce constitutional protections. Due to the different views that the legal traditions afford courts and citizen-intervenors, common and civil law experiences with standing are discussed separately below.

### a. Standing in Common Law Jurisdictions of Africa

In African common law countries, the doctrine of standing is frequently a mix of constitutional law and common law, borrowing from experiences in the United Kingdom and other common law countries. Generally, common law countries still require that litigants meet the standing requirements, but these requirements have been significantly liberalized. For instance, when constitutions explicitly provide for standing, courts have broadly interpreted the standing requirements to allow standing for citizens and NGOs seeking to protect the environment. Courts have recognized legal interests in aesthetics, recreation, and research, thus enabling public interest advocates to enforce environmental rights in many contexts.

Section 38 of South African's 1997 post-Apartheid Constitution grants standing to a wide range of parties where a right listed in the Bill of Rights has been or is in danger of being infringed. As a result, citizens can bring

suit "in their own interest," "on behalf of another person who cannot act in their own name," "as a member of a group or class of persons," "acting in the public interest," and associations can bring suit to protect the constitutional rights of their members.

In practice, South African courts are beginning to recognize standing for public interest litigants.<sup>74</sup> In *Wildlife Society of Southern Africa v. Minister of Environmental Affairs & Tourism*, the Supreme Court of Transkei, South Africa upheld standing for a nonprofit environmental organization and citizens who sought to restore a coastal conservation zone that was being degraded by illegal settlers.<sup>75</sup> While acknowledging the concern of some that relaxing standing requirements might open the floodgates to vexatious litigation by "cranks and busybodies," the court reasoned that the "exorbitant costs of Supreme Court litigation" would be an impediment to abuse and that there was always the remedy of "an appropriate order of costs."<sup>76</sup> The court concluded that even when an explicit constitutional grant of standing does not apply, but a statute requires the state take actions to protect the environment and the public interest, public interest organizations dedicated to environmental protection should have standing at common law to seek an order from the court compelling the state to comply with the law.

In East Africa, Tanzania has led the way in granting citizens access to the courts to protect the environment. In the case of *Christopher Mtikila v. Attorney General*, the High Court at Dodoma issued a strong opinion in favor of broad standing.<sup>77</sup> The defendant argued that the petitioner needed to "demonstrate a greater personal interest than that of the general public" in order to have standing to challenge various laws relating to assembly and expression.<sup>78</sup> In granting standing, the court considered decisions from Canada, India, Nigeria, Pakistan, and the United Kingdom before concluding that a broad view of standing was "already ... in our own Constitution."<sup>79</sup>

<sup>74</sup> See generally Elmene Bray, *Locus Standi: Its Development in South African Environmental Law*, in GOVERNING THE ENVIRONMENT: POLITICAL CHANGE AND NATURAL RESOURCES MANAGEMENT IN EASTERN AND SOUTHERN AFRICA (H.W.O. Okoth-Ogendo & Godber W. Tumushabe eds., 1999).

<sup>75</sup> *Wildlife Society of Southern Africa v. Minister of Environmental Affairs & Tourism*, Case No. 1672/95 (Transkei Supreme Court, June 27, 1996), reprinted in 1 COMPENDIUM OF JUDICIAL DECISIONS ON MATTERS RELATED TO ENVIRONMENT: NATIONAL DECISIONS 91 (1998).

<sup>76</sup> *Id.* at 92.

<sup>77</sup> *Christopher Mtikila v. Attorney General*, Civ. Case. No. 5 of 1993 (High Court, Dodoma, 1993). Another significant environmental standing case is *Festo Balegele et al. v. Dar es Salaam City Council*, Misc. Civil Cause No. 90 (High Court of Tanzania at Dar es Salaam, 1991) (granting standing to 795 plaintiffs seeking to enjoin a city council and others from disposing of municipal waste in a residential area).

<sup>78</sup> *Id.* at 3.

<sup>79</sup> *Id.* at 13.

<sup>73</sup> For a thorough review of standing, see John E. Bonine, *Standing to Sue: The First Step in Access to Justice* (1999), available at [www.law.mercer.edu/elaw/standingtalk.html](http://www.law.mercer.edu/elaw/standingtalk.html) (last visited Aug. 2, 2002).

In light of Tanzania's socio-economic conditions, including illiteracy and poverty, and history of disempowerment, the court declared that

if there should spring up a public-spirited individual and seek the Court's intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing.<sup>80</sup>

Consequently, the court granted standing to the petitioner, holding that "standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy."<sup>81</sup>

Kenya has had mixed experiences in the area of standing in public interest cases. In *Maina Kamanda v. Nairobi City Council*, a Kenyan High Court recognized standing of two citizens who brought a ratepayer suit alleging the misuse of government funds.<sup>82</sup> However, in *Wangari Maathai v. Kenya Times Media Trust Ltd.* and *Wangari Maathai v. City Council of Nairobi*, Kenyan courts held that environmental plaintiffs did not have standing when they could not prove an injury distinct from that held by the public at large.<sup>83</sup> These cases relied in part on British cases that took a narrow view of standing in public interest cases. These decisions have been widely criticized by Kenyan commentators, and it is likely that Kenyan courts will recognize broader standing in environmental cases. Kenya's 1999 Environmental Management and Co-ordination Act specifically broadens standing in environmental cases.<sup>84</sup> Additionally, there is increasing recognition of public interest environmental standing in common law African countries, particularly in Tanzania and Uganda. Moreover, recent developments in the United Kingdom, discussed below, provide another body of persuasive precedent for recognizing standing in public interest litigation.

<sup>80</sup> *Id.* at 12.

<sup>81</sup> *Id.* at 15.

<sup>82</sup> *Maina Kamanda v. Nairobi City Council*, Civ. Case No. 6153 of 1992 (High Court, Nairobi, Dec. 8, 1992), reprinted in 1 COMPENDIUM OF JUDICIAL DECISIONS ON MATTERS RELATED TO ENVIRONMENT: NATIONAL DECISIONS 78 (1998).

<sup>83</sup> *Wangari Maathai v. Kenya Times Media Trust Ltd.*, Civil Case No. 5403 of 1989 (High Court of Kenya at Nairobi, Dec. 1, 1989) (denying standing to public interest plaintiffs seeking a temporary injunction restraining construction in a municipal park); *Wangari Maathai v. City Council of Nairobi*, Civil Case No. 72 of 1994 (High Court of Kenya at Nairobi, Mar. 17, 1994) (denying standing to public interest plaintiffs seeking to challenge the transfer of development of municipal land).

<sup>84</sup> Environmental Management and Co-ordination Act, 1999, sec. 3(3), (4).

Environmental advocates might find it useful to look to precedents for standing provided by cases in areas other than environmental law. For example, in *Attorney General v. Unity Dow*, the Appeals Court of Botswana took a broad view on standing in a case in which a woman sought to invalidate the Citizenship Act of 1984 which denied citizenship to children of a foreign father but granted citizenship to children of a foreign mother.<sup>85</sup> The Attorney General challenged her standing, asserting that Botswana's Roman-Dutch common law did not incorporate the Roman doctrine of *actio popularis* empowering citizens to sue in the public interest. Relying on Section 18(1) of Botswana's Constitution,<sup>86</sup> the court held she had standing and invalidated the Act.

The court noted that Section 18(1) "gives broad standing rights and should not be whittled down by principles derived from the common law, whether Roman-Dutch, English, or Botswana," and held that a person who has standing due to individualized injury can also "protect the rights of the public."<sup>87</sup>

Similarly, in Zimbabwe, the Supreme Court recognized standing of a human rights organization to challenge the constitutionality of death sentences. The court recognized that the

avowed objects [of the organization] are to uphold basic human rights, including the most fundamental right of all, the right to life. It is intimately concerned with the protection and preservation of the rights and freedoms granted to persons in Zimbabwe by the Constitution ... It would be wrong, therefore, for this Court to fetter itself by pedantically circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves.<sup>88</sup>

The court's decision reflects the trend in African jurisprudence, particularly where fundamental rights are at issue, toward ensuring broad access to courts.

<sup>85</sup> *Attorney General v. Unity Dow*, 1992 L.R.C. (Cons.) 623 (July 2, 1992), cited in Bonine, *supra* note 73. In a poetic twist of fate, Unity Dow later became the first woman to sit on Botswana's High Court.

<sup>86</sup> Section 18(1) provides that "if any person [who] alleges that any of the provisions of sections 3 to 16 of this Constitution, ["Protection of Fundamental Rights and Freedoms of the Individual," [include] the rights to life and association.] has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress."

<sup>87</sup> See Bonine, *supra* note 73, at n.23, citing Michael P. Seng, *In a Conflict Between Equal Rights for Women and Customary Law, the Botswana Court of Appeal Chooses Equality*, 24 U.TOL. L. REV. 578, 658 (1993).

<sup>88</sup> *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, 1993(4) S.A. (Z.S.) 239 (Zimbabwe Supreme Court, June 24, 1993).

### b. *Standing in Common Law Jurisdictions Worldwide*

Outside of Africa, standing is usually granted to public interest advocates seeking to protect the environment even where there is no explicit constitutional grant of standing. In the United Kingdom, the 1997 case of *Regina v. Somerset County Council and ARC Southern Limited ex parte Dixon* represents the continuing British trend toward expansive standing in public interest litigation.<sup>89</sup> In this case, the plaintiff challenged the extension of a quarrying operation, and the county council alleged he lacked standing since he owned no land nor had any other pecuniary interest in the vicinity. Before recognizing standing, the court described the elements of standing for public interest cases:

a "very fair case" on the merits; "the public advantage that the law should be declared" in order to vindicate the rule of law; "purely public grounds" making it unlikely that any peculiarly interested challenger will emerge; a "stranger to the suit ... without any private interest to serve" being properly placed to advance the challenge; and so forth.<sup>90</sup>

The court noted that the nature of public interest litigation requires a liberal interpretation of standing because a person may be well placed to call the attention of the court to an apparent misuse of public power.<sup>91</sup> The court held that the plaintiff was "perfectly entitled as a citizen to be concerned about, and to draw the attention of the court to, what he contends is an illegality in the grant of a planning consent which is bound to have an impact on our natural environment."<sup>92</sup>

In the United States, standing is a combination of constitutional and prudential requirements, supplemented by statutory provisions that facilitate access to the courts.<sup>93</sup> In a series of decisions concluding with the decision in *Lujan v. Defenders of Wildlife*, the Supreme Court held that the U.S. Constitution requires plaintiffs to prove: (1) the plaintiff suffered an actual or imminent

injury that was concrete and particularized; (2) the injury is traceable to an act or omission by the defendant; and (3) the injury is redressable by court action.<sup>94</sup> Additionally, the court has applied a prudential test of whether the plaintiff's asserted interest falls within the "zone of interests" that the statute sought to protect.<sup>95</sup> Finally, most environmental statutes provide an explicit grant of standing to citizens to enforce the statutory provisions.<sup>96</sup>

In the landmark decision *Sierra Club v. Morton*, the Supreme Court recognized the legal interest in recreation, conservation, and aesthetics, thereby establishing the basis for environmental standing.<sup>97</sup> The Court held that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."<sup>98</sup> A short time later, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the Supreme Court granted expansive standing to a group of law students challenging railroad freight rates that could undermine the market for recycled materials.<sup>99</sup> The Court observed that the students' use of "the forests, streams, mountains and other resources ... for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the non-use of recyclable goods brought about by a rate increase on these commodities," and ultimately held that the students established an "attenuated line of causation" sufficient to satisfy the standing requirements.<sup>100</sup> As a general matter, most environmental plaintiffs have met the standing requirements. However, until recently a conservative

<sup>89</sup> *Regina v. Somerset County Council and ARC Southern Ltd. ex parte Dixon*, 75 P & CR 175, [1997] JPL 1030 (Apr. 18, 1997); see also *Regina v. Inspectorate of Pollution, ex parte Greenpeace Ltd.* (No. 2), 4 ALL E.R. (Q.B.) 329, 350h (1994) (upholding standing of Greenpeace, "who, with its particular experience in environmental matters, its access to experts in the relevant realms of science and technology (not to mention the law), is able to mount a carefully selected, focused, relevant and well-argued challenge").

<sup>90</sup> *Regina v. Somerset County Council and ARC Southern Ltd. ex parte Dixon*, 75 P & CR 175, [1997] JPL 1030 (Apr. 18, 1997).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See, e.g., Robert B. June, *Citizen Suits: The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 768 (1994).

<sup>94</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>95</sup> *Allen v. Wright*, 468 U.S. 737, 750-51 (1983).

<sup>96</sup> See Carl E. Bruch, *Where the Twain Shall Meet: Standing and Remedy in Alaska Center for the Environment v. Browner*, 6 DUKE ENVTL. L. & POLY F. 157, 171 n.71 (1996); see also Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994) (especially 16 U.S.C. § 1540(g)).

<sup>97</sup> 405 U.S. 727 (1972).

<sup>98</sup> *Id.* at 734. Initially, the Court held that the Sierra Club did not have standing in this case because they had not pleaded any injury. The Sierra Club subsequently modified their pleadings to aver recreational and aesthetic injury to their members, and the case proceeded until the developer decided not to construct a ski resort in the national park. Often cited for his dissent in this case, Justice Douglas opined that "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation." *Id.* at 741-42 (Douglas, J., dissenting) (citing Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972)).

<sup>99</sup> 412 U.S. 669 (1973).

<sup>100</sup> *Id.* at 685, 688.

Supreme Court had steadily made it more difficult for environmental plaintiffs to bring suit.<sup>101</sup>

India, Pakistan, and Nepal all share liberal rules with regard to standing, and aggrieved citizens or those claiming to represent their interests may bring suit directly in those countries' high courts and Supreme Courts. The courts in these nations recognize the special nature of public interest litigation, in which the rights of large numbers of people may be at stake. In such cases, the courts do not impose high barriers to standing. Indeed, the courts themselves, *suâ sponte*, occasionally initiate actions to protect fundamental rights.<sup>102</sup>

The courts of India are at the forefront in recognizing standing to vindicate constitutional rights. Moreover, the persuasive influence of Indian cases has been felt throughout South Asia as well as common law countries in Africa. The Indian Supreme Court has paid special attention to advocates seeking to protect the public interest, granting broad standing in these cases.<sup>103</sup> After

<sup>101</sup> For a good critique of the constitutional problems with the restrictive trend that the Supreme Court had taken with regards to standing, see Bonine, *supra* note 73; see also John D. Echeverria & Jon T. Zeidler, *Barely Standing*, ENVTL. F. 21 (July/Aug. 1999) (but also expressing hope that this trend may be about to change).

In the last two years, the Court has retreated from the narrow view of standing held by Justice Scalia. See, e.g., *Friends of the Earth v. Laidlaw Envtl. Serv.*, 145 L. Ed. 2d, No.5 610 (2000) (recognizing the deterrent effect that penalties have on polluters, and thereby holding that an injury is redressable when the only remedy available to citizen plaintiffs under an environmental statute is a monetary penalty that is paid to the government).

Courts in Australia and Canada, in contrast, have been much more liberal in granting standing to citizen groups challenging private and governmental actions that can harm the environment. See Yves Corriveau, *Citizen Rights and Litigation in Environmental Law NGOs as Litigants: Past Experiences and Litigation in Canada*, in ENVIRONMENTAL RIGHTS: LAW, LITIGATION & ACCESS TO JUSTICE 117 (Sven Deimann & Bernard Dyssli eds., 1995); Paul L. Stein, *Citizen Rights and Litigation in Environmental Law: An Antipodean Perspective on Environmental Rights*, in ENVIRONMENTAL RIGHTS: LAW, LITIGATION & ACCESS TO JUSTICE 271, 275-76 (Sven Deimann & Bernard Dyssli eds., 1995) (liberalization of environmental standing in Australia); see also *Australian Conservation Foundation v. Minister for Resources*, 19 A.L.J. 70 (1989) (upholding ACF's standing to challenge licenses for woodchip export, where the organization had a strong concern for forests and had received financial support from the government); *Truth About Motorways Pty Ltd. v. Macquarie Infrastructure Management Ltd.* [2000] HCA 11 (Mar. 9, 2000) (unanimously upholding judicial enforcement by "any person").

<sup>102</sup> E.g., *Gen. Sec'y. v. Pak. Salt Miners Labour Union (CBA) Khewral, Jhelum v. Dir., Indus. and Mineral Dev., Punjab, Lahore, Human Rights Case*. No. 120 of 1993, 1994 P.S.C. 1446, 1452-53.

<sup>103</sup> E.g., *S.P. Gupta v. Union of India*, 1982 A.I.R. (S.C.) 149, 188 (1982) ("If public duties are to be enforced and social collective 'diffused' rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organizations by allowing them to move the Court and act for a general or group interest, even though they may not be directly injured in their own rights."); see also Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L.J. 57 (1994).

deciding that access to the legal system should no longer be limited to "men with long purses,"<sup>104</sup> the Court has been receptive to a wide range of environmental cases involving, for example, efforts to cease harmful pollution of the Ganges River, to prevent air pollution harming the Taj Mahal, and to obtain redress for a chlorine gas leak.<sup>105</sup> Indian decisions have also recognized "epistolary standing," construing a citizen's letter or postcard to the court as a formal complaint, and "journalistic standing," granting standing to journalists suing to redress violations that they investigate.<sup>106</sup>

In Southeast Asia, the Philippines has been at the vanguard in recognizing standing in public interest environmental cases, with the decision in *Juan Antonio Oposa v. Fulgencio S. Factoran, Jr.* as well as other cases.<sup>107</sup> In *Oposa*, the Philippine Supreme Court granted standing to Philippine children to represent themselves and future generations in a class action suit to challenge timber license agreements that were destroying the country's natural forests. The court held that the plaintiffs had the right to sue on behalf of future generations because "every generation has a responsibility to the next to preserve [the] rhythm and harmony for the full enjoyment of a balanced and healthful ecology" of future generations.<sup>108</sup>

In Bangladesh, courts have broadly interpreted the traditional common law requirement that a plaintiff have a "sufficient interest" in a matter. In *Mohiuddin Farooque v. Bangladesh*, the Supreme Court stated:

Any person other than an officious intervenor or a wayfarer without any interest or concern beyond what belongs to any of the 120 million people of the country or a person with an oblique motive, having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from breach of public duty or for violation of some provision of

<sup>104</sup> *S.P. Gupta v. Union of India (the Judges' Transfer Case)*, 1982 A.I.R. (S.C.) 149 (1982), discussed in Bonine, *supra* note 73.

<sup>105</sup> *M.C. Mehta v. Union of India*, 4 S.C.C. 463 (1987); 1988 A.I.R. (S.C.) 1037; 1988 A.I.R. (S.C.) 1115 (pollution of the Ganges); *M.C. Mehta v. Union of India*, 2 S.C.C. 176 (1986); 2 S.C.C. 325 (1986); 1 S.C.C. 395 (1987); *M.C. Mehta v. Union of India (Oleum Gas Leak Case)*, 1987 A.I.R. (S.C.) 965 (1987); 1987 A.I.R. (S.C.) 1086 (1987).

<sup>106</sup> *Hussainara Khatoon Cases*, 1979 A.I.R. (S.C.) 1360 (1979); 1979 A.I.R. (S.C.) 1369 (1979); 1979 A.I.R. (S.C.) 1819 (1979); 1 S.C.C. 91 (1980); 1 S.C.C. 93 (1980); *Fertilizer Corp. Kamgar Union v. Union of India*, 1 S.C.C. 568 (1988); see also *Mahesh R. Desai v. Union of India*, writ petition No. 989 of 1988.

<sup>107</sup> *Juan Antonio Oposa v. Fulgencio S. Factoran, Jr.*, G.R. No. 101083 (Sup. Ct. of the Phil. 1993); see also, Antonio G.M. LaViña, *The Right to a Sound Environment in the Philippines: The Significance of the Minors Oposa Case*, 3 REV. EUR. COMMUNITY & INT'L ENVTL. L. 246 (1994).

<sup>108</sup> *Oposa*, *supra* note 107.

the Constitution or the law and seek enforcement of such public duty ....<sup>109</sup>

The court held that organizations that "have studied and made research" on the disputed issue are "regarded as a person aggrieved to maintain the writ petition."<sup>110</sup>

The cases just reviewed illustrate a strong trend of common law countries toward liberalized standing requirements in public interest litigation, particularly in the area of environmental protection. To be certain, some courts still adhere to a restrictive interpretation. However, the clear modern trend is toward broad access to justice.

### c. *Standing in Civil Law Jurisdictions*

Standing in Latin American countries has in recent years focused more on the rights of individuals to bring suit to protect common interests. Civil law nations in Latin America have developed innovative legal tools that enable practically any citizen to protect the environment. Popular, or diffuse, actions date back to Roman law, when citizens could act in their legal capacity as owners of the public domain. In Argentina, for instance, environmental advocates developed *acciones difusas* ("diffuse actions") to enable citizens to protect the environment. Argentine advocates have used this principle to protect penguins and dolphins and to ban dangerous pesticides.<sup>111</sup>

Similarly, in Colombia, environmental advocates have developed and used *acciones populares* ("popular actions") to protect the environment, as well as other common rights.<sup>112</sup> Environmental groups have used these popular actions to redress illegal tannery operations, to require certain waste be used as fuel in a biomass energy-generating facility, and to remove an unsanitary solid

waste dump.<sup>113</sup> In Brazil, citizens have used popular actions (*ação popular*) to nullify governmental actions that could harm the environment or cultural patrimony, as well as civil environmental actions (*interesses difusos*) to prevent or repair environmental damage.<sup>114</sup>

Other civil law cases, such as the Costa Rican *Chacón*<sup>115</sup> case, have relied on more individualized facts, such as when a complained-of action threatens the plaintiff's ability to live or make a living.<sup>116</sup> In *Chacón*, the court granted standing based on *interesses difusos* and allowed a child to protect individual and societal rights, and went on to suggest that future generations may have standing to sue. In Chile, the Supreme Court found that the constitutional right to a healthy environment overcame standing limitations that originated in the Napoleonic Code, and granted standing to the environmental group CODEF (National Committee for the Defense of the Fauna and Flora) to protect an remote Andean lake.<sup>117</sup> Since then, other Chilean groups have similarly established standing in environmental cases. Similarly, in Guatemala, courts have allowed NGOs to sue under the constitutional right to a healthy environment without showing any personal injury.<sup>118</sup>

European commentators have made similar arguments for broad access to the courts in environmental matters, based on the Roman law doctrine of *actio popularis*.<sup>119</sup> In addition, in a Slovenian case challenging a community development plan, the Supreme Court held that people had standing to bring suit based on their constitutional right to life.<sup>120</sup> Article 72 of the Slovenian

<sup>109</sup> Farooque v. Bangladesh, Civil Appeal No. 24 of 1995, at 37.

<sup>110</sup> *Id.*; see also Flood Action Plan, Writ Petition No. 998 of 1994 (High Court of Bangladesh) (granting standing to the Bangladesh Environmental Lawyers Association (BELA) to seek compensation to people affected by a flood action plan, as BELA was established environmental advocacy organization).

<sup>111</sup> See, e.g., GERMÁN SARMIENTO PALACIO, LAS ACCIONES POPULARES EN EL DERECHO PRIVADO COLOMBIANO 30-31 (1988); Kattan v. Federal State (Secretary of Agriculture) (1983), cited in Bonine, *supra* note 73 (granting standing to challenge a permit to capture endangered dolphins to an environmental advocate who had never seen the dolphins; invalidating the permit); Kattan v. Federal State (Secretary of Agriculture) (2,4,5-T Herbicide Case) (1983) (granting standing to an advocate seeking to ban importation of 2,4,5-T; granting the ban); see also Victor Hugo Morales v. Province of Mendoza (Civil Trial Court No. 4, Mendoza, Oct. 2, 1986).

<sup>112</sup> See, e.g., SARMIENTO PALACIO, *supra* note 111, at 29-32. After exploring the Roman basis for the popular action, Sarmiento discussed similar mechanisms in the civil law countries of Argentina, Brazil, France, Italy, and Spain.

<sup>113</sup> See [www.fundepublico.org.co/html/logros.htm](http://www.fundepublico.org.co/html/logros.htm) (last visited Oct. 31, 1999) (documents on file with authors).

<sup>114</sup> See generally Antonio H.V. Benjamin, *A Proteção do Meio Ambiente Nos Países Menos Desenvolvidos: O Caso da América Latina*, 0 REVISTA DE DIREITO AMBIENTAL 83 (1995); Edesio Fernandes, *Constitutional Environmental Rights in Brazil*, in Boyle & Anderson, *supra* note 6, at 265. The *Revista* also includes a number of court cases that utilize these different legal tools.

<sup>115</sup> Carlos Roberto Mejía Chacón contra el Ministerio de Salud y la Municipalidad de Santa Ana, Sentencia No. 3705-93 (Sala Constitucional de la Corte Suprema de Justicia, San José, Costa Rica, July 20, 1993).

<sup>116</sup> Regarding standing in Costa Rica, see generally Robert S. Barker, *Constitutional Adjudication in Costa Rica: A Latin American Model*, 17 U. MIAMI INTER-AM. L. REV. 249 (1986).

<sup>117</sup> Personal communication from Fernando Dougnac to ELI (1997), regarding the Lake Chungara Case (Supreme Court of Chile).

<sup>118</sup> E.g., *Fundación Defensores de la Naturaleza v. Particular*.

<sup>119</sup> See Verschuuren, *supra* note 36, at n.22 and accompanying text (citing B. Jadot, *Les Procédures Garantissant le Droit à l'Environnement*, in THE RIGHT TO A HEALTHY ENVIRONMENT 149 (Amedeo Postiglione ed., 1986)); P.C.E. van Wijmen, *De Natuurbeschermingswet*, VMR 1988-4, Zwolle 1989, at 166; Martin Fuhr et. al., *Access to Justice: Legal Standing for Environmental Associations in the European Union*, in PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW (David Robinson & John Dunkley eds. 1995).

<sup>120</sup> *Drustvo Ekologov Slovenije*, Case No. U-I-30/95 (Constitutional Court of Slovenia, Jan. 15, 1996).

Constitution states “[e]ach person shall have the right in accordance with statute to a healthy environment in which to live.”

#### 4. Financial Issues

Attorneys’ fees and other litigation costs frequently present a practical impediment to bringing public interest cases. The people most affected by environmental degradation tend to be the poorest and most marginalized. They usually do not have, either individually or collectively, the financial resources to challenge a large corporation or their government, particularly in a potentially long, complicated, and expensive case. In addition, in many jurisdictions there is the real risk that if the suit is unsuccessful, the plaintiffs could be required to pay the fees incurred by the defendant.<sup>121</sup>

A number of African constitutions have sought to address the potential financial barriers to realizing practical access to justice. Typical provisions guarantee that:

- “justice may not be denied for reasons of insufficient financial means,”<sup>122</sup>
- “The law assures to all the right to justice and the insufficiency of resources shall not be an obstacle to it ...,”<sup>123</sup> and
- “The State shall make provision to ensure that justice is not denied for lack of resources.”<sup>124</sup>

In a similar vein, Malawi<sup>125</sup> and Namibia<sup>126</sup> have constitutional provisions for an ombudsman to provide legal assistance, potentially including legal representation, for people whose fundamental rights or freedoms have been infringed.

A few jurisdictions have statutory provisions allowing successful public interest plaintiffs to recover attorneys’ fees and other court costs from the defendant in environmental cases or a percentage “bounty” from the

government in *qui tam* actions.<sup>127</sup> The United States, in particular, enforces these provisions for suits brought to protect the environment or recover money wrongfully taken from the government.<sup>128</sup> In addition, some U.S. state courts have adopted the common law Private Attorney General Doctrine to award reasonable attorneys’ fees and costs in public interest cases. For example, in *Serrano v. Priest*, the California Supreme Court established a three-part inquiry in determining whether to award fees and costs:

- (1) the strength or societal importance of the public policy vindicated by the litigation;
- (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; [and]
- (3) the number of people standing to benefit from the decision.<sup>129</sup>

In this case, the Court upheld the district court’s award of attorneys’ fees to two public interest law firms who successfully challenged a public school financing system that violated the state constitutional provisions ensuring equal protection of the law.

In some African jurisdictions, the courts have similarly afforded special consideration to plaintiffs who raise important matters of public interest.<sup>130</sup> While the need for creative mechanisms for compensating advocates who bring cases in the public interest remains great, many governments will likely remain cautious about encouraging litigation, particularly since much of the litigation is directed at the government.

<sup>121</sup> *E.g.*, Wangari Maathai v. City Council of Nairobi, Civ. Case No. 72 of 1994 (High Court of Kenya, Nairobi, Mar. 17, 1994) (ordering the plaintiffs to pay the court costs of the defendants, where the court denied standing to plaintiffs seeking to protect a green space).

<sup>122</sup> GUINEA-BISSAU CONST. art. 30.

<sup>123</sup> MADAGASCAR CONST. art. 13.

<sup>124</sup> MOZAMBIQUE CONST. art. 100(2).

<sup>125</sup> MALAWI CONST. art. 46(2) (“Any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled ... to make application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require”).

<sup>126</sup> NAMIBIA CONST. art. 25(2) (“Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened ... may approach the Ombudsman to provide them with such legal assistance or advise as they require ...”).

<sup>127</sup> *Qui tam* cases, which are more commonly referred to as whistleblower cases, allow citizens to serve as private attorneys general, and are used to prosecute government fraud. See [www.quitam.com/quitam1.html](http://www.quitam.com/quitam1.html) (last visited Aug. 1, 2002).

<sup>128</sup> *E.g.*, Clean Water Act, 33 U.S.C. § 1365(d) (1994) (providing litigation costs to “any prevailing or substantially prevailing party” that brings a citizen suit to enforce the Clean Water Act). Dating back to 13<sup>th</sup> century England, *qui tam* (“who sues on behalf of the king as well as for himself”) actions constitute a narrower common law version of the citizen suit that includes a bounty to successful plaintiffs. *E.g.*, JAMES T. BLANCH ET AL., CITIZEN SUITS AND QUI TAM ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY (1996).

<sup>129</sup> *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977); see also *Miotke v. City of Spokane*, 678 P.2d 803 (Wash. 1984) (adopting the private attorney general doctrine for awarding attorney fees); *Arnold v. Arizona Dept. of Health Services*, 775 P.2d 521 (Ariz. 1989) (same); *Montanans for the Responsible Use of the School Trust v. Montana*, 989 P.2d 800 (1999) (adopting the *Serrano* test to find that the District Court abused its discretion in denying attorneys’ fees to a public interest litigant protecting school trust lands).

<sup>130</sup> *E.g.*, *D. Derrick Chitala v. The Attorney-General*, 1995/SCZ/14 (unreported) Zambia (holding that although the appeal against a High Court judge who refused to grant leave to bring judicial review proceedings failed, each side should bear its own costs “since [the appeal] raised for the first time a matter of general public importance of this nature”).

## 5. Other Procedural Rights

Access to justice entails a variety of other guarantees, in addition to judicial review, standing, and removing financial barriers. The judicial procedures and the court need to be fair and equitable, frequently a general constitutional guarantee. An opportunity for timely redress of the injury must be available. The decisions of the court should be in writing and publicly accessible. In addition, administrative and legal barriers to access to justice should be removed. Article 9 of the Aarhus Convention and other regional instruments incorporate these various elements into their access to justice provisions, while taking a liberal approach to judicial review and standing. Although these international initiatives are not binding on any African nations, they are illustrative of emerging international legal norms and practice in the area. As a result, African and other courts may look to them when interpreting and applying the often broad and vague constitutional guarantees of access to justice.

### IV. THE WAY FORWARD

Procedural rights are an essential element of good governance, effective advocacy, and sustainable development. The cases discussed in this chapter demonstrate that there are many ways to exercise constitutional rights of public participation, access to information, and access to justice. In many respects, the norms surrounding the implementation of constitutional procedural rights are currently being developed in courts around the world. As the cases in this chapter demonstrate, there is great variation in how procedural rights are invoked and in what contexts they have been most successful.

Many of the examples of implementation of procedural rights cited in this chapter reflect the experiences of African nations. The African experiences, despite (or perhaps because due to) their geographical and cultural contexts, can inform other nations around the world as to what approaches have been effective. In some situations, cases from one country can set an important precedent in another country that might be thousands of miles away. Frequently, the same is true with case examples in this chapter that are environmental in scope.

Different legal traditions create varying conditions for implementing and enforcing procedural rights, but it is interesting to note that in Africa, the common law, civil law, and Islamic law systems all recognize, to some degree, access to information, public participation, and access to justice. This example of commonalities across a continent that is as culturally and politically diverse as Africa indicate that procedural rights have the potential to be successfully integrated into legal regimes around the world.

Some constitutions have particularly strong provisions for certain procedural rights—such as the constitutional commitment of Congo, South Africa, and Uganda to access to information. Such firmly grounded procedural rights can be read in conjunction with other constitutional provisions (e.g., environmental and human rights) to allow particular areas of advocacy to be strengthened significantly.

In giving force to constitutional environmental protections, particularly in cases of first impression, the facts are likely to be critical. Many of the most effective cases emphasize the direct human impacts, as well as the severity of environmental destruction. Thus, where mining operations have directly harmed human health or proposed dumping of radioactive waste could harm human health, courts have readily granted relief.

The trend toward constitutionalism has been critical. Constitutional rights are powerful tools and, once established, they can make courts more willing to uphold protections without necessarily requiring explicit links to constitutional provisions directly related to the matter at hand. For example, in India, initial court cases emphasized the impacts of pollution on human health, then on cultural icons such as the Taj Mahal. More recently, the Indian Supreme Court has extended the right to a healthy environment to require environmental education in schools, as well as environmental public service announcements in cinemas and on the radio. Recognizing these fundamental human rights of access to information, public participation, and access to justices is neither radical nor unprecedented. It is simply a matter of enforcing the highest law of the land, the constitution.