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RESEARCH REPORT

# **Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa**

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**CONSTITUTIONAL ENVIRONMENTAL LAW:**

**GIVING FORCE TO FUNDAMENTAL  
PRINCIPLES IN AFRICA**

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*Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*

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**Table 1:** African Constitutional Rights to Environment, Life, and Process

**Table 2:** Illustrating the Temporal Evolution of African Constitutional Environmental Provisions

**Table 3:** African Constitutional Environmental Duties and Rights

## ***Executive Summary***

*“The Constitution is above everything. It is the fundamental law which guarantees individual and collective rights and liberties, protects the principle of people’s free choice and confers legitimacy to the exercise of powers. It allows the assurance of legal protection and control of the actions of the public authorities in a society wherein prevails the law and man’s progress in all its dimensions . . . .”*

- preamble, Constitution of Algeria (1996)

Constitutional provisions offer broad and powerful tools for protecting the environment, but to date these tools have gone largely unutilized in Africa. Practically all African constitutions include substantive provisions that ensure either a “right to healthy a environment” or a “right to life,” which often is held to imply a right to a healthy environment in which to live that life. Additionally, the process of opening courts to citizens to enforce their constitutional rights strengthens the judiciary, empowers civil society, and fosters an atmosphere of environmental accountability.

This research report explores how African constitutional provisions can be utilized to create real, enforceable environmental rights. African countries do 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 fundamental human rights that are embodied in their respective constitutions.

This report highlights relevant provisions from the constitutions of 53 African countries (excluding the territories of the Canary Islands, the Madeira Islands, Reunion, and West Sahara) – provisions that may be used to protect the environment – as well as cases from around the world that illustrate opportunities for implementing constitutional environmental rights. Additionally, given the ongoing constitutional reforms in various African countries – such as Kenya, Tanzania, and Zaire/DRC – this report examines the opportunities that such provisions present for improving environmental governance, addressing issues of environmental and participatory rights, and ensuring implementation and enforcement.

Section I of this report discusses general considerations, including the nature of constitutions and constitutional law, how the different legal traditions in Africa could affect environmental protection, and the persuasive authority of cases from other jurisdictions in Africa and elsewhere in the world. Section II surveys the constitutional right to a healthy environment in Africa, and provides cases from African countries and elsewhere that illustrate how these constitutional provisions may be given force. Section III similarly explores how advocates and judges can apply and extend the constitutional right to life to include the right to a healthy environment. Section IV examines various constitutional procedural rights that are essential to effective environmental protection. Section V presents some final thoughts realizing the promise of constitutional environmental protections.

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

Given the many existing and developing environmental laws, regulations and standards throughout Africa, it is worth considering what is gained by resorting to constitutional provisions to protect the environment. With the trend of constitutionalism (emphasizing the constitution as a source of binding legal obligations and rights), described in subsection B, courts are increasingly giving force to substantive constitutional provisions.

A nation's constitution is more than an organic act establishing governmental authorities and competencies: the constitution also guarantees to its citizens basic fundamental human rights such as the right to life, the right to justice, and increasingly the right to a clean and healthy environment. With increasing environmental awareness in recent decades, the environment has become a higher political priority, and many constitutions now expressly guarantee a "right to a healthy environment," as well as the procedural rights necessary to implement and enforce those rights. Similarly, courts around the world have interpreted the near-universal provision of "right to life" to implicate the right to a healthy environment in which to live that life.

Constitutional provisions that enumerate the substantive rights of citizens have not always been directly enforceable by citizens, and even now do not always create an affirmative right. However, the consistent and increasingly universal trend is toward giving force to these provisions. Constitutional provisions may be used both *defensively* or *restrictively*, to protect against actions that violate citizens' constitutional rights (such as a government's unconstitutional interference with an association); and *affirmatively*, to compel the government to ensure certain constitutional rights (such as closing polluting businesses that impair the rights to life and healthy environment). Constitutional rights can be particularly valuable in environmental protection for many reasons.

First, the frequently incomplete nature of environmental legislative and regulatory regimes make the constitutional environmental provisions relevant. Even countries with advanced environmental protection systems find that their laws do not address all environmental concerns; and this problem is more pronounced in countries that are still developing environmental laws and regulations. In both of these situations, constitutional environmental provisions can provide a "safety net" for resolving environmental problems that existing legislative and regulatory frameworks do not address.

Second, environmental concerns often are viewed as secondary to other priorities, such as economic development. By referring to the environmental protections enshrined directly in the constitution, advocates can elevate environmental cases to the level of constitutional

cases on fundamental human rights.<sup>1</sup> Also, constitutional entrenchment of environmental priorities provides a firm basis for environmental protection that is less susceptible to the political winds of the day. As a result, environmental values are more likely to endure as constitutional reform usually is time-consuming, complicated, and requires super-majority approval. Often, this implies not only a different approach to resolution of these cases, but also appeals to a different or higher authority, such as a country's constitutional court or supreme court.

Finally, constitutions frequently are the source of the procedural rights that are necessary for environmental and other citizen organizations to pursue their advocacy work. Giving force to constitutional provisions that guarantee freedom of association, access to information, public participation, and judicial standing is particularly important in ensuring that peoples' substantive rights to life and a healthy environment are protected. These procedural rights promote the transparency, participation, and accountability that form the cornerstones of environmental governance.

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 countries lacking comparable constitutional provisions may provide strong protections through their laws and regulations, or courts may implicit constitutional rights, even in the absence of a textual provision. For example, the United States has no comparable constitutional provision protecting the environment, yet it has developed one of the most advanced environmental protection systems. Nevertheless, constitutional environmental protections can provide yet another tool – and a potentially powerful tool, at that – for advocates seeking to protect the environment in a wide range of contexts and legal traditions.

### **A. Implications of Different Legal Traditions**

The different legal traditions of African nations have influenced the development of constitutional environmental provisions 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 (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). It should be noted that legal systems based on the French civil law tradition differ from those of Spanish or Portuguese origin, and that civil law systems vary from country to country, just as common law or Islamic systems vary. Despite the various differences, there is striking agreement among the different legal traditions on the right to life and on procedural rights, and environmental provisions are widespread in both common and civil law traditions (with only a few in Islamic traditions).

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

Many of the differences between common and civil law traditions can be traced to the different historical experiences with judges.<sup>2</sup> In pre-Revolutionary France, judges tended to interpret the law in favor of the aristocracy; in England, the judges were comparatively more independent. Thus, when the new American and French constitutions were drafted in the 17<sup>th</sup> and 18<sup>th</sup> centuries, civil law and common law countries took different paths.<sup>3</sup>

Civil law traditions – drawn from continental Europe, and the Napoleonic Code in particular – disfavor judge-made law for historical reasons and because judges are not representative of popular will, elected, or accountable like the legislature. 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 can be derived from legislation, but are often uncodified and manifest themselves through a body of “case law” interpreting and applying the principles. [In fact, although the United Kingdom has a wealth of statutes, it has no written constitution.] This flexibility has enabled common law countries to protect the environment without amending their constitutions, which were drafted long before the environment became a concern. In some cases, this has been quite creative: the large body of U.S. federal environmental law rests upon the Commerce Clause, empowering the federal government to regulate matters affecting interstate commerce.<sup>4</sup> 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 is in stark contrast to the traditional civil law perspective that judges should only apply the law, not interpret or create law.<sup>5</sup>

At the same time, civil and common law traditions are starting 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

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

<sup>3</sup> *Id.*, at 15-16.

<sup>4</sup> E.g., *Hodel v. Virginia Mining and Reclamation Association*, 452 U.S. 264, 282 n. 21 (1981) (holding that Congress can regulate sources of air pollution); *U.S. v. Conservation Chem Co.*, 1985 U.S. Dist. LEXIS 23059 at \*23 (W.D. Mo. Jan. 29, 1985) (“Congress’ power to regulate commerce is plenary and repeated decisions have upheld federal environmental regulation of states under the Commerce Clause.”); *United States v. N.L. Industries*, No. 91-578-JLF (S.D. Ill. Aug. 22, 1996) (holding that the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) regulates activities substantially affecting interstate commerce and is therefore within Congress’s Commerce Clause power). The treaty-making power delegated to the President under Article II, section 2, when read in conjunction with the Supremacy Clause of Article VI, also provides a constitutional basis for environmental regulations that implement environmental treaties. *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding the regulations implementing the Migratory Bird Treaty of 1916). The Property Clause (art. IV, sec. 3, cl. 2) also provides a basis for regulating the public lands. *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (upholding the Wild Free-Roaming Horses and Burros Act). Still, most U.S. federal environmental laws and regulations rely on the Commerce Clause.

<sup>5</sup> Nevertheless, there remains a healthy debate about the degree to which judges should merely apply the law, as opposed to interpreting or creating law.

“persuasive authority” when considering novel legal issues. Similarly, common law jurisdictions have been codifying an impressive volume of laws and regulations. For example, 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, probably more provisions than any civil law system, now or ever. As a matter of fact, U.S. environmental law is particularly susceptible to the trend toward codification, as the law seeks more specificity regarding emission limits, risk analysis, and required technologies. And 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 *shari’ah* (the sacred law) and the *fiqh* (Islamic jurisprudence). The *shari’ah* includes the Qur’an and related sources, and 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 code rather than the tradition. 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. Although the environment has a significant role in the Qur’an,<sup>6</sup> it has to date had a lower legal profile in Islamic jurisdictions, as discussed in Section II.

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<sup>6</sup> See Al-Hafiz B.A. Masri, *Islam and Ecology*, in Fazlun M. Kahlid, *Islam and Ecology* 1, 3 (1992) (noting that approximately 500 verses in the Qur’an refer to the relationship between people and the environment); see also Martin Lau, *Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan*, in ALAN E. BOYLE & MICHAEL R. ANDERSON, EDS., *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION* 285 (1998).

## B. The Rise of Constitutionalism

As obvious as it may seem, 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. Most constitutions include a set of fundamental rights to be enjoyed by all citizens, frequently termed the Bill of Rights.<sup>7</sup> While these provisions appear to confer objective rights to its citizens, courts often held that the rights were not self-executing, but that they required implementing legislation to set the scope of the rights and the means for exercising them. This meant that citizens were unable to realize their fundamental rights if the government failed to enact implementing legislation or enacted legislation that was very restrictive.

Increasingly, however, courts worldwide are interpreting, applying, and enforcing constitutional provisions. In this process, courts have recognized that the constitution guarantees certain inalienable rights to each and every person, especially for those people in the minority (where legislation by the majority runs the real risk of infringing on their rights).<sup>8</sup>

In common law systems, the constitution is the “fundamental and paramount law of the nation.”<sup>9</sup> As a result, looking to the constitution as a source of fundamental rights and obligations is well-established in common law jurisdictions, taken as a whole. However, some African common law countries only recently have 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, in civil law systems, there are three – and only three – sources of law for a judge to apply: legislative statutes, administrative regulations, and custom. The recent trend, however, has been towards constitutionalism.<sup>10</sup> As a result, in most countries, the hierarchy of laws is now: constitution, statutes, regulations, and custom. Additionally, civil law countries have developed mechanisms – including constitutional courts – for reviewing the constitutionality of legislative and administrative acts, thereby moving “a long way toward the ideal of what civil lawyers call the *Rechtstaat*: a system of government in which the acts of agencies and officials of all kinds are subject to the principle of legality, and in which procedures are available to interested parties to test the legality of government action and to have an appropriate remedy when the act in question fails to pass the test.”<sup>11</sup>

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:

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<sup>7</sup> C.f. MERRYMAN, CIVIL LAW TRADITION, at 95-96 (“European and Latin American constitutions have come to be the medium for the statement of fundamental individual rights, including property rights, guarantees of the right to engage in economic activity, and the like.”).

<sup>8</sup> See, e.g., Gary C. Bryner, *Constitutionalism and the Politics of Rights*, in GARY C. BRYNER & NOEL B. REYNOLDS, EDS., CONSTITUTIONALISM AND RIGHTS 7, 7 (1987) (“Constitutionalism has at its roots the idea of protecting minorities from majoritarian actions . . .”); MERRYMAN, CIVIL LAW TRADITION, at 96.

<sup>9</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>10</sup> MERRYMAN, CIVIL LAW TRADITION, 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>11</sup> MERRYMAN, CIVIL LAW TRADITION, at 141.

<sup>12</sup> See *id.*, 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>

However, in some African countries, 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 (currently) are unable to vindicate their constitutional rights because the constitution does not explicitly empower them to appeal to the constitutional court. 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 increasing prevalence of constitutional environmental norms in Africa, most countries 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 near-total absence of African court cases interpreting these provisions suggests that it could be productive to consider how courts in other countries implement constitutional environmental protections.

When a court considers an issue for the first time in its own country, it will often look to cases from other countries. While such precedents are non-binding, they provide guidance, or “persuasive precedent,” for how other learned judges have addressed the issue at hand. For instance, when considering the issue of standing in the case of *Christopher Mtikila v. Attorney General* (discussed in Section IV), the Tanzanian High Court considered standing cases from Nigeria, England, Canada, India, and Pakistan before deciding to grant standing to a public-interest plaintiff. Similarly, in establishing standing for environmental organizations, courts in South Africa have considered cases from other countries (e.g., *Wildlife Society of Southern Africa v. Minister of Environmental Affairs & Tourism*, discussed in Section IV). 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 Court of Human Rights.<sup>15</sup>

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

<sup>14</sup> *E.g.*, Arrêt No. 96-07/Ch. Cons. (Jul. 21, 1996) (Constitutional Chamber decision allowing political parties to challenge the dissolving 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).

<sup>15</sup> *Christine Mulundika v. The People*, 1995/SCZ/245 (Nov. 21, 1995) (unreported), available at <http://lii.zamnet.zm:8000/courts/supreme/full/95scz25.htm> (visited Oct. 27, 1999); see also *Derrick Chitala v. The Attorney-General*, 1995/SCZ/14 (unreported), available at <http://lii.zamnet.zm:8000/courts/supreme/full/95scz14.htm> (visited Oct. 27, 1999) (“the Rules of the Supreme Court of England . . . apply to supply any *cassus omissus* in our own rules of practice and procedure”).

Thus, it appears that when courts (particularly common law courts) first interpret constitutional rights that may be termed “fundamental,” “basic,” or “human” rights, they are very likely to consider how other jurisdictions have interpreted or applied similar provisions. Given the fundamental nature of the rights to life and to a healthy environment, courts may look favorably on the cases discussed in this report, and consider applying these principles to cases in their own country.

#### **D. Additional Constitutional Considerations**

Some countries have comparatively short constitutions, while others have much more detailed and lengthy ones. The more modern constitutions tend to be longer, as they incorporate the various constitutional rights and obligations that other countries have incorporated, as well as frequently adding some new provisions. In this way, national constitutional law borrows from and builds on the constitutional law and experiences of other countries. While longer, more detailed constitutions are more 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.

In many countries, particularly civil law countries, constitutional rights were not traditionally self-executing. While the constitution could serve as a defense against governmental overreaching, legislation frequently was required in order to implement the constitutional provision and to empower a person to affirmatively invoke the protections. 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.

Within the existing framework of enforceable constitutional law, constitutions can provide an avenue for developing, implementing, and enforcing environmental protections implicitly or indirectly. In addition to providing substantive protections – such as “everyone has a right to a healthy environment” – constitutions can explicitly elevate the status of international agreements, including environmental and human rights conventions (such as the Aarhus Convention, discussed briefly in Section IV, below), and place them on a par with or above domestic law. Binding on all OAU member states, the African Charter of Human and Peoples’ Rights guarantees that “All peoples shall have the right to a generally satisfactory environment favorable to their development.”<sup>16</sup> While nations regularly sign and ratify international conventions, development of domestic legislation and implementation often lags. By establishing conventions as part of the law of the land, constitutions can effectively render conventions more self-executing and provide another tool for environmental advocates. Environmental advocates in both government and civil society could seek to implement the protections through legal practice, relying on the applicable constitutional provisions incorporating the substantive provisions of the international agreement when implementing legislation is lacking.

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<sup>16</sup> Organization of African Unity, Banjul Charter on Human and Peoples’ Rights, done June 27, 1981, *reprinted in* 21 I.L.M. 58, art. 24.

A second way that constitutions enable the development, implementation, and enforcement of environmental rights is by explicitly or implicitly providing for unenumerated “penumbral” rights. Penumbral rights are rights that are not explicitly mentioned in the constitution, but are consistent with its principles and existing rights. For example, Article 29 of Eritrea’s Constitution provides that “The 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.” Article 32 of Algeria’s Constitution is more general, implying penumbral rights: “The fundamental liberties and the Rights of Man and of the citizen are guaranteed.” Similarly, Article 1 of Gabon’s Constitution provides that “The Gabonese Republic recognizes and guarantees the inviolable and imprescriptible rights of Man, which obligatorily constrain public powers.”

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. For example, in the United States, courts have interpreted the Ninth Amendment to the Constitution<sup>17</sup> to include a variety of unenumerated constitutionally protected rights, notably the right to reproductive choice.<sup>18</sup> In these cases, the Supreme Court has gone beyond interpreting the scope of existing constitutional provisions to firmly establish “noninterpretive” judicial review: in determining the scope of constitutional (i.e., fundamental) rights, the court has used the Ninth Amendment to incorporate principles from natural law, common law, and consensus morality.<sup>19</sup> In the early 1970s, many U.S. environmental advocates argued that the right to a healthy environment was protected under the Constitution.<sup>20</sup> The development of a large body of U.S. statutory environmental law and the then still-nascent international status of environment as a human right meant that the U.S. Supreme Court never had a serious opportunity to incorporate the right to a healthy environment as a penumbral constitutional right. Now, however, the 1972 Stockholm Declaration, the 1992 Rio Declaration, 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 its incorporation into constitutional jurisprudence.

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<sup>17</sup> “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

<sup>18</sup> *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (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).

<sup>19</sup> *See, e.g.*, GERALD GUNTHER, *CONSTITUTIONAL LAW* 517 (12<sup>th</sup> ed. 1991) (citing the concern of Professor Lupu about “the spread of ‘intellectual hemophilia,’ an ailment that accompanies excessive inbreeding of ideas.”).

<sup>20</sup> *E.g.*, Harry W. Pettigrew, *A Constitutional Right of Freedom from Ecocide*, 2 ENVTL. L. 1 (1971); Hanks & Hanks, *The Right to a Habitable Environment*, in N. DORSEN, ED., *THE RIGHTS OF AMERICANS* 152 (1971); Ronald E. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L.J. 203 (1974); Philip Soper, *The Constitutional Framework of Environmental Law*, in ERICA L. DOLGIN & THOMAS G.P. GUILBERT, EDs., *FEDERAL ENVIRONMENTAL LAW* 20-125 (1974) for more recent analysis, see ZYGMUNT J.B. PLATER, ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 357-65 (1992); WILLIAM H. RODGERS JR., *ENVIRONMENTAL LAW* (2d ed. 1994).



## II. THE RIGHT TO A HEALTHY ENVIRONMENT

African nations figure prominently among nations worldwide in incorporating environmental provisions into their constitutions, if not necessarily in their application.<sup>21</sup> In fact, at least 32 countries in Africa (approximately two-thirds) have some constitutional provisions ensuring the right to a healthy environment. This number is likely to increase, as the draft constitution for the Democratic Republic of Congo includes environmental provisions, and other countries (such as Kenya) are contemplating similar provisions. After analyzing textual constitutional provisions in nonsecular (based entirely or in part on Islamic law), civil law, and common law jurisdictions, this section examines ways in which environmental advocates and courts have given life and force to the provisions.

### A. Islam and Environmental Rights

Some have argued that because all major religions incorporate principles relating to the environment and imposing a duty to protect it, there are no differences between the rights-based approaches to a clean environment in secular and Islamic countries.<sup>22</sup> While the Qur'an is conspicuously silent on a human right to a clean environment, the large body of Islamic environmental ethics stress the duty of the individual Muslim to care for the natural environment.<sup>23</sup> This duty is closely connected to the belief that the earth is the creation of Allah, and therefore both the individual and the state must take responsibility for Allah's creation as part of their religious and ethical obligations.<sup>24</sup>

Nevertheless, the constitutions of most nonsecular African countries – Algeria, Egypt, Mauritania, Morocco, Libya, and Tunisia – do not contain environmental provisions. Sudan is an interesting exception to this general trend: Article 13 of Sudan's 1998 constitution sets forth environmental principles for the state to achieve. Though it remains to be seen how Sudan's courts and government will interpret, implement, and enforce this provision, this recent development bodes well for the development and application of constitutional environmental rights in other nonsecular African nations.

Notwithstanding the lack of constitutional right-to-environment provisions in nonsecular countries, legal theories and judicial mechanisms exist that could guarantee environmental rights of citizens without needing to incorporate other approaches to protection and enforcement. Discussing Pakistan's mixed Islamic and common law system, Martin Lau concludes:

[R]ather than trying to find Islamic equivalents to secular human rights, Pakistan's judiciary has reduced Islamic law in the context of public interest litigation to a basic right to justice in its widest form. The recognition of a basic human right in

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<sup>21</sup> For a pre-Rio survey of countries with constitutional rights to a healthy environment, see EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTER-GENERATIONAL EQUITY app. B (1989).

<sup>22</sup> Martin Lau, *Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in The Islamic Republic of Pakistan*, in ALAN E. BOYLE & MICHAEL R. ANDERSON, EDS., HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 285-86 (1996).

<sup>23</sup> *Id.* at 293.

<sup>24</sup> *See id.* at 286.

Islamic law has repercussions in the field of Pakistan's environmental law. General ethical principles on conservation and environmental protection can be interpreted both in the light of the secular fundamental right to life and the Islamic right to justice. The concept of Islamic justice enables the aggrieved party to approach the court, whereas the right to life empowers the court to give relief. As a result, Pakistan's judiciary has not only begun to take an active interest in environmental protection but has also successfully refuted the widely accepted argument that Islamic law and individual rights are irreconcilable.<sup>25</sup>

Most African nonsecular countries have a comparable constitutional right to life, which could be interpreted in a similar way. This is discussed in-depth in section III.

## **B. Civil and Common Law Jurisdictions**

With the exception of Sudan, countries with constitutional environmental provisions have either a civil law or common law tradition. In Africa, approximately one-half of the nations have legal systems based entirely or in part on civil law, and almost two-thirds of these civil law jurisdictions have constitutional environmental provisions. Approximately one-third of African nations have common law systems, and of these roughly half have constitutional environmental provisions. As civil and common law nations do not differ substantially in the text of their constitutional environmental provisions, to the extent they have such protections, provisions from civil and common law jurisdictions will be analyzed together.

### **1. Generally**

At least 32 African countries have express environmental provisions in their constitutions (see Table 1). The more recently adopted or amended constitutions tend to contain an environmental provision in cognizance of growing environmental awareness. Table 2 highlights this trend, and shows that African constitutions that were last amended before 1989 generally lack explicit environmental provisions, and most African constitutions that were last amended after 1992 generally have environmental provisions.<sup>26</sup> Sudan, a nonsecular country, offers the clearest example of this constitutional trend: its 1985 transitional constitution did not address the environment, but Article 13 of the 1998 constitution enjoined the State to “promote public health, encourage sports and *protect the natural environment, its purity and its natural balance, to ensure safe, sustainable development for the benefit of future generations.*”

It should be noted that not all constitutions adopted or amended after 1989 have incorporated environmental provisions. For example, Rwanda and Sierra Leone both adopted new constitutions in 1991 that are silent on environmental rights and duties. Since these constitutions were adopted at the early stages of the surge of environmental awareness, this exclusion might be merely a lack of awareness rather than an intentional oversight. This view is strengthened by

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<sup>25</sup> *Id.* at 302.

<sup>26</sup> For more on the African trend toward recognizing the right of individuals to a clean and healthy environment and the state's duty to protect and conserve the environment and natural resources, see Bondi D. Ogolla, *Environmental law in Africa: Status and Trends*, INT'L BUS. LAW. 412-14 (Oct. 1995).

Zaire's recent constitutional history: Zaire's constitution adopted July 5, 1990 was silent on environmental rights and duties, but Article 53 of its 1998 draft constitution sets forth environmental rights and duties for citizens and the state.

Of the constitutional environmental provisions that exist in Africa, most of them are generalized rights: the right to a "healthy environment," "unpolluted environment," "ecological balance," and so forth. Some countries also have paid special attention to issues of particular importance for them, and have included constitutional provisions to address specific environmental issues. These include Benin (arts. 28 and 29 – toxic and foreign waste), Chad (art. 48 – toxic or polluting wastes), Congo (arts. 47 and 48 – toxic, polluting, or radioactive wastes), Niger (art. 81 – toxic wastes), South Africa (art. 24 – right of future generations), Tanzania (art. 27 – natural resources), Togo (art. 83 – parks, reserves, and forests), Uganda (art. 21 – water management; art. 27 – pollution, parks, and biodiversity), and Zambia (preamble – future generations). Congo's detailed provisions on hazardous wastes incorporate the "polluter-pays principle" by explicitly providing for compensation for environmental damage. As discussed below, many of these issues have been addressed by courts outside of Africa interpreting their own generalized rights to a healthy environment. As these countries' experience shows, these specific provisions can help to ensure that particular issues are addressed.

## **2. *The Character of the Rights***

The text and character of constitutional environmental provisions generally are one of three types: (1) fundamental rights and duties, (2) general constitutional rights and duties, and (3) vague rights and duties.

Some African constitutions include environmental rights and duties in chapters titled "fundamental." There is little doubt that these provisions are binding and enforceable: the legislative intent is clear about the fundamental nature of the enumerated right. Other rights historically designated "fundamental" include the rights to life, liberty, and freedom of expression. Countries with a fundamental constitutional right to a healthy environment include Angola (in Part II of the constitution, titled "Fundamental Rights and Duties"), Cape Verde, Congo, Mozambique, and Chad.

Most African constitutions granting environmental rights and imposing environmental duties do not locate them in constitutional sections designated "fundamental," but the rights and duties nevertheless assume that status through their language and constitutional nature. In these cases, use of certain declaratory words (such as "shall") indicates the binding and enforceable nature of the rights and duties. For example, Article 41 of Togo's constitution states that everyone shall have the right to clean environment" and also imposes a duty on the state to "oversee the protection of the environment." The preeminent status of constitutional provisions in the hierarchy of legal sources reinforces the significance of these constitutional environmental protections.

Finally, some African countries have constitutional environmental provisions whose status is less clear. These include provisions typically contained in a constitutional chapter titled "National Objectives" or "Directive Principles," contained in the preamble of the constitution, or whose wording is vague.

Constitutional chapters on “National Objectives and Directive Principles” or “Declaration of Principles of State Policies” are effectively the same, containing objectives and principles deemed to be fundamental in governing the country and to be applied in making and implementing laws.<sup>27</sup> Some commentators assert that the main purpose of these principles and objectives is to inspire legislation, rather than to confer enforceable rights.<sup>28</sup> Though these provisions serve as principles and objectives for policy and some constitutions declare them unenforceable (and they thus at first appear to be unenforceable),<sup>29</sup> the growing judicial trend has favored the enforceability of these provisions as binding rights.

For example, recent Indian Supreme Court decisions have reversed earlier decisions that directive principles were not enforceable, and the court now holds that legislation triggered by directive principles falls within the purview by the Fundamental Rights Chapter of the Constitution.<sup>30</sup> The recent decisions have adopted a less rigid approach to enforceability. For example, in *Sachidanand Pande v. State of West Bengal*,<sup>31</sup> the petitioner contended that the government’s decision to allot land from a zoological garden for the construction of a luxury hotel would result in serious environmental degradation and sought the court’s intervention. In denying the petition, the Supreme Court stated that in light of all the facts, the proposed garden hotel would actually improve the ecology of the disputed land. However, the court also noted that whenever ecological concerns are brought before it, it is bound to keep Article 48A of the Indian Constitution in mind:

[W]hen the Court is called upon to give effect to the directive principles, the fundamental duty of the court is not to shrug its shoulders and say that priorities are a matter of policy and so it is matter for the policy making authority . . . in appropriate cases the court may go further but how much further must depend on the circumstances of the case. The court may always give necessary directions.

The court in *Kinkri Devi v. Himachal Pradesh* was even more explicit in applying a directive principle: due to the severity of the environmental damage at issue in a mining case, the court was “left with no alternative but to intervene effectively by issuing appropriate writs, orders and directions . . . .”<sup>32</sup>

Several other countries also view these constitutional principles and objectives as enforceable. In *Juan Antonio Oposa v. Factorian*,<sup>33</sup> the petitioners claimed that the Philippines’ natural forest cover was being destroyed at an alarming rate and asserted their constitutional right to a “balanced and healthful ecology” under Article 16 of the Philippine Constitution. Regarding

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<sup>27</sup> See Michael R. Anderson, *Individual Rights to Environmental Protection in India*, in ALAN E. BOYLE & MICHAEL R. ANDERSON, EDS., HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 199, 213-14. (1996).

<sup>28</sup> *E.g., id.* at 213.

<sup>29</sup> For example, Article 9(2) of Tanzania’s constitution requiring the government to ensure the sound use and preservation of the country’s natural resources is in Part II, which is unenforceable according to Article 7(2) (although Article 27 imposing a duty on the government to protect the country’s natural resources is in Part III, which is enforceable). Similarly, Article 48-A of India’s constitution does not appear to be directly justiciable. Its legal effect is governed by article 37, which provides that although the principles “shall not be enforced by any court”, they “are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

<sup>30</sup> *State of Madras v. Champakam Dorairajan*, 1951 A.I.R. (S.C.) 226 (1951).

<sup>31</sup> *Sachidanand Pande v. State of West Bengal*, 1987 A.I.R. (S.C.) 1109 (1987).

<sup>32</sup> *Kinkri Devi v. Himachal Pradesh*, 1988 A.I.R. (Himachal Pradesh) 4 (1988).

<sup>33</sup> *Juan Antonio Oposa v. Fulgencio S. Factoran*, G.R. No. 101083 (Supreme Court of the Philippines Aug. 9, 1993).

the fundamental right to a healthful ecology, the Philippine Supreme Court enforced the petitioners' rights stating, "[t]he fact that it was included under the Declaration of Principles and State Policies and not under the Bill of Rights did not make it any less important." The Court reasoned that a basic human right such as the right to a healthy environment need not be written in the constitution, and the fact that it is mentioned explicitly in the fundamental charter highlights its continuing importance and imposes upon the state a solemn obligation to protect and advance that right. Similarly, in *Ecological Network v. Secretary of Environment and Resources*,<sup>34</sup> the plaintiffs also relied on Article 16 to bring a taxpayers' suit seeking to cancel existing and future timber licenses. The Supreme Court again held that the plaintiffs had enforceable constitutional rights and declared the timber licenses invalid.

Nepal's Supreme Court has taken a different approach regarding the enforceability of constitutional principles and objectives, but arrived at the same conclusion. The court has reasoned that though the principles and objectives may be facially unenforceable,<sup>35</sup> a disregard or breach of this provision makes it enforceable. In *Prakash Mani Sharma v. Ministers of*

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<sup>34</sup> *Ecological Network v. Secretary of Environment and Resources* (Supreme Court of the Philippines, unreported July 1993), reprinted in Firsty Husbani et al., *Environmental Law in Asia: An Overview of Indonesia and some of its Neighbors*, 1 *INDONESIAN J. ENVTL. L.* 51, 70 (1996).

<sup>35</sup> Article 24(1) of Nepal's Constitution reads, "The principles and policies contained in this part shall not be enforceable by any court."

*Council*,<sup>36</sup> the petitioner, relying on the Directive Principles in the Constitution of Nepal,<sup>37</sup> sought a writ of mandamus from the Supreme Court to prevent a construction project on public lands adjacent to Rani Pokhari (“Queen’s Pond”), a pond with historical, cultural, and environmental significance. Despite arguments by the respondent that these principles and policies are not enforceable by any court, the Supreme Court determined that it is the duty of all (including the Executive and Legislature) to abide by these directives and principles, and where they are contravened the Court will make the appropriate order and give these provisions meaningful effect. Similarly, in *Yogi Narhari Nath v. Ministry of Education*,<sup>38</sup> the Nepali government granted a 50-year lease to a private party for construction of a medical college on forest land adjacent to the Chitwan National Wildlife Reserve. In voiding the lease, the Supreme Court held that though the Directive Principles and State Policies are not directly enforceable, the court will hold the government accountable for any decisions or actions that go against these provisions. Thus, in Nepal, the directive principles appear to grant a cause of action to prevent governmental action that harms the environment, and thereby violates their duties under the directive principles.<sup>39</sup> The question of whether the principles can be used to compel governmental action to affirmatively protect the environment remains unaddressed.

This dynamic evolution in the enforceability of these provisions, which may have seemed unenforceable earlier, strengthens the tools available to citizens and courts seeking to apply these rights to protect the environment. This trend is particularly relevant to African countries with environmental protections contained in constitutional sections on principles, objectives, or the preamble: Cameroon, Eritrea, Ghana, Mali, Namibia, Seychelles, Tanzania, and Zambia. For example, Article 10 (in the section on principles and objectives) of Eritrea’s constitution includes the right of citizens to a “livelihood in a sustainable manner” and the duty of the state “to create the right conditions for securing the participation of the people to safeguard the environment.” Under the trend toward judicial application of constitutional environmental principles and objectives, these provisions would be binding and enforceable.

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<sup>36</sup> Prakash Mani Sharma v. Ministers of Council, Writ Nos. 2961 and 2052.

<sup>37</sup> The relevant constitutional provisions are: Article 24(2), which reads, “The principles and policies contained in this part shall be fundamental to the activities and governance of the State and shall be implemented in stages through laws within the limits of the resources and the means available to the country.”, and Article 26(4), which provides, “The state shall give priority to the protection of the environment and also to the prevention of its further damage due to physical development activities by increasing the awareness of the general public about environmental cleanliness, and the State shall also make arrangements for the protection of the rare wildlife, the forests and the vegetation.”

<sup>38</sup> Yogi Narhari Nath v. Ministry of Education, 1 Ne. Ka. Pa. 2053 (1996) 33.

<sup>39</sup> See also *Nepal Supreme Court Rules for the Environment*, E-LAW UPDATE 3 (Summer 1999) (describing a June 1999 case in which environmental advocates obtained a court order to cease illegal road construction that threatened cultural and religious sites along a river, as well as an order requiring the government to protect cultural sites when it developed a park).

### **C. Applying the Constitutional Right to a Healthy Environment**

Although most African nations have constitutional environmental provisions, there is a marked dearth of cases interpreting and applying them. This may be due to the novelty of the subject matter of these provisions, a lack of public interest environmental litigation, a lack of judicial familiarity with public interest litigation, and the failure of governments to set up the machinery to implement their constitutional duties. To illustrate possible ways to give force to these constitutional protections, this subsection surveys various ways that judiciaries around the world have interpreted and applied the right to a healthy environment and the duty to protect it.

In addition to providing the legal basis for cases enforcing environmental protections, constitutional provisions can expressly enable legislatures to enact environmental laws to implement the protections (e.g., Central African Republic Constitution, art. 58.1). For example, in Mozambique, the government relied on its constitutional environmental provision to provide the authority for a new framework environmental law. In *Laguna Lake Development Authority v. Court of Appeals*, the Philippine Supreme Court upheld the authority of a government agency attached to the Department of Environment to issue cease and desist orders against a city that was illegally dumping garbage.<sup>40</sup> In dismissing the challenge to the authority's police and regulatory powers to regulate the dumping, the court relied on the constitutional right to a "balanced and healthful environment" and the right to health to uphold the authority's charter and amendatory laws.

#### **1. Right to a Healthy Environment**

In *Minister of Health and Welfare v. Woodcarb (Pty) Ltd.*, a South African court upheld the standing of the Minister of Health and Welfare to seek an order requiring a saw mill to cease emission of noxious gases.<sup>41</sup> In granting standing, the court recognized the Minister's administrative responsibilities, as well as the right to seek redress for actions that infringed citizens' right to "an environment which is not detrimental to health and well-being" under the interim South African Constitution. The court held that the defendant's unlicensed emission illegally interfered with the neighbors' constitutional right to a healthy environment.

The potential breadth of a generalized "right to a healthy environment" should not be an impediment to application or enforcement. As the following cases illustrate, this constitutional right 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.

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<sup>40</sup> *Laguna Lake Development Authority v. Court of Appeals*, G.R. No. 110120 (Supreme Court of the Philippines, 3<sup>rd</sup> Div., Mar. 16, 1994).

<sup>41</sup> *Minister of Health and Welfare v. Woodcarb (Pty) Ltd.*, 3 S.A. 155 (N) (1996) (discussed in Elmene Bray, *Locus Standi: Its Development in South African Environmental Law*, in OKOTH-OGENDO & TUMUSHABE, GOVERNING THE ENVIRONMENT 123, 145-46).

Of the many countries that have interpreted constitutional environmental provisions, India has the most experience.<sup>42</sup> The environmental provisions of the Indian Constitution – Articles 48A (protection of the environment) and 51A (fundamental duties) – are both principles of state policy. Though the application of these principles have been interwoven with the separate right-to-life provision, the scope of these environmental rights and duties have been interpreted and applied in different circumstances. One application of this right, illustrated by *L.K. Koolwal v. Rajasthan*, is that the constitutional rights to health, sanitation, and environmental preservation could be violated by poor sanitation resulting in a “slow poisoning” of the residents, without any more specific allegations of injury.<sup>43</sup> Furthermore, in *Rural Litigation and Entitlement Kendra v. Uttar Pradesh*, the right to a “healthy environment” was invoked even though no direct link with human health had been demonstrated in the case at hand.<sup>44</sup> The petitioner alleged that unauthorized mining in the Dehra Dun area adversely affected the ecology and resulted in environmental damage. Without establishing harm to human health, the Supreme Court upheld the right to live in a healthy environment and issued an order to cease mining operations, notwithstanding the significant investments of money and time by the mining company. According to this thread of interpretation, protection of this right arises when ongoing behavior is damaging or is likely to damage the environment, regardless of an effect on human health.

Other Indian cases emphasize that the right to a healthy environment relates principally to pollution rather than health. According to this interpretation, the guarantee of “pollution[-]free air and water” referred to by the Indian Supreme Court,<sup>45</sup> does not contemplate an environment completely free from pollution since the judgment directs the state “to take effective steps to protect” the right, rather than placing an absolute duty on the state to ensure air and water that is absolutely free from pollution.<sup>46</sup>

A third view in India views the right as an entitlement to “ecological balance.” Issuing the Order in *Rural Litigation and Entitlement Kendra*, the Supreme Court stated:

The consequence of this Order made by us would be that the lessees of lime-stone quarries which have been directed to be closed down permanently under this Order . . . would be thrown out of business in which they have invested large sums of money and expended considerable time and effort. This would undoubtedly cause hardship to them, *but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance.*<sup>47</sup>

Similarly, in *T. Damodhar Rao v. Municipal Corp of Hyderabad*, it was stated that consideration of physical and biological data is “the legitimate duty of the Courts . . . to forbid all action of the State and the citizen from upsetting the environmental balance.”<sup>48</sup> In all three approaches, the

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<sup>42</sup> See generally Martin Lau, *The Scope and the Limits of Environmental Law in India*, 4 REV. EUR. COMMUNITY & INT’L ENVTL. L. 15 (1995).

<sup>43</sup> *L.K. Koolwal v. Rajasthan*, 1988 A.I.R. (Raj.) 2 (High Court of Rajasthan, 1988).

<sup>44</sup> *Rural Litigation and Entitlement Kendra v. Uttar Pradesh*, 1985 A.I.R. (S.C.) 652, 656 (1985); 1988 A.I.R. (S.C.) 2187 (1988).

<sup>45</sup> *Charan Lal Sahu v. Union of India*, 1990 A.I.R. (S.C.) 1480 (1990).

<sup>46</sup> See Anderson, *Individual Rights to Environmental Protection in India*, at 217.

<sup>47</sup> *Rural Litigation and Entitlement Kendra v. Uttar Pradesh*, 1985 A.I.R. (S.C.) 652, 656 (1985); 1988 A.I.R. (S.C.) 2187 (1988).

<sup>48</sup> *T. Damodhar Rao v. Municipal Corp of Hyderabad*, 1987 A.I.R. (A.P.) 171, 181 (1987).

Indian Supreme Court has found that the right to a healthy environment necessarily includes the freedom from air and water pollution.<sup>49</sup>

European courts, primarily civil law, have interpreted and applied the constitutional right to a healthy environment in a range of contexts.<sup>50</sup> In apparently the first decision by an Eastern European court to apply a constitutional right to a healthy environment, the Constitutional Court of Hungary struck down amendments to the law on agricultural cooperatives in the *Protected Forest Case*.<sup>51</sup> The amendments sought to designate previously protected areas as land that could be privately owned. The court held that the amendments violated the constitutional rights to a healthy environment and to the “highest possible level of physical and spiritual health.” The court further stated that the level of environmental protection must be high according to objective standards, and once the state has accorded a certain level of environmental protection, it cannot thereafter withdraw that protection. After the Hungarian case, the Constitutional Court of Slovenia ruled in 1996 that citizens and environmental NGOs have standing to sue based on the constitutional right to a healthy environment as provided by Article 72 of Slovenia’s Constitution.<sup>52</sup> In this case, an environmental NGO and 25 individuals challenged the constitutionality and legality of a development plan near Lake Bled. The Court held that “any individual persons have the interest to prevent actions damaging the environment, and that this [interest] is not limited only to the environment close to the place where they live or only for prevention of a minimal damage . . . .”<sup>53</sup>

Courts in other countries also have applied the constitutional right to a healthy environment. In a watershed decision delivered in the *Eurogold* case, Turkey’s High Court ruled that Eurogold’s mine violated the provisions of Articles 17 and 56 of Turkey’s amended constitution, which protect the fundamental rights to life and a “healthy, intact environment.”<sup>54</sup> In addition to being a precedent on the enforceability of the constitutional rights to life and healthy environment, this case had the impact of broadening environmental issues in Turkey from the realm of science and technology to the realm of basic human rights.

Similarly, a number of civil law countries in Latin America also have given life to their constitutional right to a healthy environment.<sup>55</sup> In the Ecuadorian case of *Fundacion Natura v. Petro Ecuador*, the constitutional court upheld a civil verdict that the defendant’s trade in leaded fuel violated a ban on leaded fuel placed by Congress, and thus violated the plaintiffs’ constitutionally

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<sup>49</sup> See Anderson, *Individual Rights to Environmental Protection in India*, at 218.

<sup>50</sup> For an authoritative review, see MICHAEL BOTHE, *THE RIGHT TO A HEALTHY ENVIRONMENT IN THE EUROPEAN UNION* (forthcoming 2000); see also José Lebre de Freitas, *A Acção Popular ao Serviço do Ambiente*, 1 *REVISTA DE DEREITO AMBIENTAL* 36 (1996).

<sup>51</sup> “Protected Forests Case,” Magyar Közlöny Case No. 1994/No.55, p. 1919 (Hungarian Constitutional Court, 1994); see also Stephen Stec, *Ecological Rights Advancing the Rule of Law in Eastern Europe*, 13 *J. ENVTL. L. & LITIG.* 275, 320-21 (1998).

<sup>52</sup> *Drustvo Ekologov Slovenije*, Case No. U-I-30/95-26 (Constitutional Court of Slovenia, Jan. 15, 1996); see also Milada Mirkovic, *Legal and Institutional Framework and Practices for Public Participation*, in *DOORS TO DEMOCRACY: CURRENT TRENDS AND PRACTICES IN PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING IN CENTRAL AND EASTERN EUROPE* 377, 396 n.10 (1998).

<sup>53</sup> See Mirkovic, n. 10.

<sup>54</sup> The *Eurogold* decision was delivered in Ankara on May 22, 1997. See <http://www.sierraclub.org/sierra/199711/humanrights.html> (visited Nov. 1, 1999).

<sup>55</sup> See Adriana F. Aguilar, *Enforcing the Right to a Healthy Environment in Latin America*, 3 *REV. EUR. COMMUNITY & INT’L ENVTL. L.* 215 (1994).

guaranteed right to a healthy environment.<sup>56</sup> Similarly, in *Arco Iris v. Instituto Ecuatoriano de Minería*, Ecuador's Constitutional Court held that "environmental degradation in Podocarpus National Park is a threat to the environmental human right of the inhabitants of the provinces of Loja and Zamora Chinchipe to have an area which ensures the natural and continuous provision of water, air humidity, oxygenation and recreation."<sup>57</sup>

In the *Trillium* case, Chile's Supreme Court voided a timber license where the government approved an environmental impact assessment without sufficient evidence to support the conclusion that the project was environmentally viable and without incorporating the conditions proposed by different specialized agencies.<sup>58</sup> The Court held that by acting in such an arbitrary and illegal way, the government violated the rights of all Chileans – and not just those who would be affected locally – to live in an environment free of contamination.

In *Fundación Fauna Marina v. Ministerio de la Producción de la Provincia de la Buenos Aires*, an Argentine court voided a permit to capture a number of dolphins and killer whales, stating that it was first necessary to conduct an environmental impact assessment.<sup>59</sup> The judge relied on Article 41 of Argentina's national constitution (recognizing the right to a clean environment and establishing a correlative duty to protect the environment), and Article 28 of the Buenos Aires provincial constitution, which requires authorities to control the environmental impacts of any activity that could damage the environment. The court held that the way to ensure the general constitutional environmental rights and duties found in these constitutions was by imposing an obligation to execute an environmental impact assessment before issuing a permit. And in Peru, the citizens' constitutional right to a healthy environment was at issue when a barge was dumping petroleum residues into a lake that served as a source of drinking water, causing severe environmental damage and rendering the water unpotable. Finding for the plaintiffs, the judge ordered the barge owner to halt the pollution by using a filter or other technology, or else to leave the lake. The judge also ordered the government to conduct an environmental impact assessment of the effects on the lake.<sup>60</sup>

In Costa Rica, the NGO Justicia Para la Naturaleza (JPN) filed suit against Geest Caribbean Ltd., a transnational banana company, claiming that Geest's illegal clearcutting of approximately 700 hectares of forest (including nesting habitat for the endangered green macaw) near the Tortuguero National Park violated the constitutional right to a healthy environment.<sup>61</sup> In this groundbreaking constitutional environmental case, a Costa Rican court for the first time sought to apply natural resource damage assessment techniques to value the loss of biodiversity and ecosystem values. In doing so, the court considered cases from other countries interpreting the right to a healthy environment, as well as economic valuation methodologies; the court also

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<sup>56</sup> *Fundación Natura v. Petro Ecuador de la Provincia de Buenos Aires*, Case No. 221-98-RA (Constitutional Court 1998), upholding *Fundación Natura v. Petro Ecuador*, Case No. 1314 (11<sup>th</sup> Civil Court, Pichinca, Apr. 15, 1998).

<sup>57</sup> *Arco Iris v. Instituto Ecuatoriano de Minería*, Case No. 224/90, Judgment No. 054-93-CP (Constitutional Court of Ecuador).

<sup>58</sup> "Judicial Power," Supreme Court Decision No. 2.732-96 (Supreme Court of Chile, March 19, 1997), unofficial English translation available at <http://www.elaw.org/cases/Chile/trilliumenglish.htm> (the case is popularly referred to as "Trillium," the defendant logging company).

<sup>59</sup> *Fundación Fauna Marina v. Ministerio de la Producción de la Provincia de la Buenos Aires* (Federal Court No. 11, Mar del Plata, Civil and Commercial Secretariat, May 8, 1996).

<sup>60</sup> See *Judge Orders Barge to Stop Polluting*, E-LAW UPDATE (Spring 1995), available at [http://www.igc.apc.org/elaw/update\\_spring\\_1995.html](http://www.igc.apc.org/elaw/update_spring_1995.html) (visited Nov. 1, 1999).

<sup>61</sup> For a description of this case, see E-LAW UPDATE 2 (Spring 1999) and E-LAW IMPACT: VALUING BIODIVERSITY IN COSTA RICA (1999).

appointed an interdisciplinary working group of experts to make recommendations on the issue of valuation. Ultimately, the parties settled the case, with Geest agreeing to pay approximately US\$1,500 per hectare deforested and the fees for the experts.

In *Pedro Flores v. Corporación del Cobre, Codelco, Division Salvador*, the Supreme Court of Chile applied Articles 19 (right to live in unpolluted environment) and 20 (legal action to enforce art. 19) of Chile's constitution to enjoin a mining company from further depositing copper tailing wastes onto Chilean beaches, a practice that had destroyed all traces of marine life in the area.<sup>62</sup> In *Proterra v. Ferroaleaciones San Ramon S.A.*, the Peruvian Supreme Court held that the constitutional right to a healthy environment belongs to the whole community, and allowed an *accion de amparo* to protect the citizens' constitutional rights even though the plaintiffs had suffered no direct damages themselves.<sup>63</sup> Finally, Brazilian courts have applied their constitutional right to a healthy environment (found in Article 225) in a variety of pollution-related cases.<sup>64</sup>

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<sup>62</sup> *Pedro Flores v. Corporación del Cobre, Codelco, Division Salvador*, ROL.12.753.FS.641 (Supreme Court of Chile, 1988).

<sup>63</sup> *Proterra v. Ferroaleaciones San Ramon S.A.*, Judgment No. 1156-90 (Supreme Court of Peru, Nov. 19, 1992).

<sup>64</sup> *E.g.*, Ação Civil Pública (Industrial Waste) (Anicuns, Sept. 10, 1992); Ação Civil Pública (Air Pollution) (Naviraí, May 12, 1993) (Fauser de Oliveira Maia, J.); Ação Civil Pública (Garimpo) (Goiás, Sept. 23, 1991) (Luiz Eduardo de Sousa, J.); Ação Civil Pública (Pollution from Steel Manufacturing) (Cubatão, Aug. 13, 1993) (Roberto Maia Filho, J.). All these cases are reported in 0 REVISTA DE DEREITO AMBIENTAL 177-218 (1995). *See also* Edesio Fernandez, *Constitutional Environmental Rights in Brazil*, in BOYLE & ANDERSON, HUMAN RIGHTS APPROACHES.

## 2. *Environmental Duties*

Constitutional environmental provisions also impose duties to protect the environment, sometimes through explicitly imposing a duty on the state and other parties and sometimes through 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>65</sup>

The constitutional duty to protect (or not to harm) the environment can be borne by the government and its organs, individuals, legal persons, or some combination of these parties. In some cases, constitutional environmental duties explicitly addressed to citizens have been expanded to apply also to the state. For example, in *L.K. Koolwal v. Rajasthan*, an Indian court ruled that the fundamental duty to protect the environment in Article 51A(g) extended not only to citizens, but also to instrumentalities of the state.<sup>66</sup> As a result, the court held that by virtue of Article 51A(g)'s duty, citizens have the right to petition the court to enforce the constitutional duty of the state. The application of constitutional environmental rights and duties to the state is fairly straightforward. The more difficult question is whether constitutional environmental duties and rights operate only between governmental bodies and private persons ("vertical" operation), or whether it also operates between private legal persons, so that one citizen could invoke the provision against another legal or natural person ("horizontal" operation).<sup>67</sup>

In developing economies, the public sector is often relatively large, and high courts have interpreted the term "state" broadly to extend to local authorities, bodies created by statute, government-owned industrial enterprises, and any entity acting as an instrumentality or agency of the government.<sup>68</sup> Where ownership of most natural resources is vested in the state and most major industries are owned and controlled by the government, breaches of constitutional environmental rights (and duties) are usually by the state, and "vertical" operation of constitutional rights and duties enables citizens to address many environmental problems. In recent years, however, the erosion of government control and the subsequent or imminent privatization of the vast public sector has led to the adoption of the more progressive "horizontal" operation of constitutional rights clauses, whereby private citizens, corporations, and other legal persons are legally liable for their actions that breach these rights.<sup>69</sup>

Courts can be crucial in bringing the constitutional environmental rights and duties to life, particularly where the legislature does not promulgate the necessary legislation detailing the scope of the rights or the executive branch fails to establish or effectively apply the administrative machinery necessary to execute these constitutional provisions. In countries with limited budgets and a priority on development, the courts' foresight and creativity is necessary to give meaning to these environmental protections.

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<sup>65</sup> *Mumbai Kamgar Sabha v. Abdulbhai*, 1976 A.I.R. (S.C.) 1455 (1976).

<sup>66</sup> *L.K. Koolwal v. Rajasthan*, 1988 A.I.R. (Raj.) 2 (High Court of Rajasthan, 1988). Article 51A(g) of India's constitution provides that it "shall be the duty of every citizen . . . to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures."

<sup>67</sup> See generally Jan Glazewski, *Environmental Rights and the New South African Constitution*, in ALAN E. BOYLE & MICHAEL R. ANDERSON, EDs., *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION* 188 (1996).

<sup>68</sup> E.g., *Raman Dayaram Shetty v. International Airport Authority of India*, 1979 A.I.R. (S.C.) 1628 (1979).

<sup>69</sup> See, e.g., *M.C. Mehta v. Shriram Food and Fertilizer Industries*, 1987 A.I.R. (S.C.) 1026 (1987) (in a case arising from a gas leak, the Supreme Court held that Article 32, which provides for writs against the state for any breach of fundamental rights, also applies to private parties).

Two Indian cases illustrate this point. In *M.C. Mehta v. Union of India (Tanneries)*,<sup>70</sup> the petitioner sought to prevent a nuisance by tanneries and soap factories that were polluting the Ganges River. The Supreme Court observed that the pollution of the river was a serious public nuisance and the pollution so widespread that the water could not be used for either drinking or bathing. Issuing its order, the court held that

[H]aving regard to the need for protecting and improving the environment which is considered a fundamental duty under the Constitution, it is the duty of the Central Government to direct all educational institutions to teach at least one hour a week lessons relating to the protection and improvement of the natural environment including forests, lakes, rivers and wild life in the first ten classes.

Similarly, in *M.C. Mehta v. Union of India*, the petitioner contended that if citizens were to fulfill their duties to protect the environment as required by Article 51A(g) of the constitution, then the people needed to be better educated about the environment.<sup>71</sup> The application sought to move the Supreme Court to issue directions to cinema halls, radio stations, and schools to disseminate information on the environment and to educate citizens. Granting the petition, the Supreme Court ordered

- (a) the State Governments and Union Territories, to make it a prerequisite to licensing for all cinema halls to show slides dealing with environmental issues ;
- (b) the Ministry of Information and Broadcasting to start producing short films dealing with the environment and pollution;
- (c) all radio stations to broadcast interesting programs on the environment; and
- (d) the University Grants Commission to require universities to prescribe a course on the environment.

In both of these cases, the Indian Supreme Court found that in order for the constitutional provision imposing a citizen duty to achieve real significance, it needed to interpret the provision as extending corollary duties on the government, the media, and the educational system. It found that imposing a constitutional duty on ordinary citizens to protect the environment is in vain if there is no knowledge of the subject matter. African judiciaries will need to be at least as creative in order to give practical effect to their constitutional environmental provisions.

To elucidate the provisions for African constitutional environmental rights and duties among states and citizens, and who can enforce them, Table 3 illustrates the distribution of rights and duties for each country. Although most grant constitutional environmental rights to citizens, few nations explicitly impose a duty on citizens to protect the environment, and fewer impose that duty on public interest groups. Nevertheless, the usefulness of such citizen and group duties cannot be overstated. Where such duties exist, private citizens and groups are constitutionally bound to protect the environment and, at least theoretically, could be held liable for a breach of this duty. This liability between private citizens is the closest that countries have come to explicit constitutional codification of the “horizontal” operation of fundamental rights clauses, although the duty may be implied in the constitutional environmental rights granted to citizens. The most

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<sup>70</sup> *M.C. Mehta v. Union of India*, 1988 A.I.R. (S.C.) 1115 (1988).

<sup>71</sup> *M.C. Mehta v. Union of India*, S.C. of India Writ Petition (Civil) No. 860 of 1991.

comprehensive provisions are those of Burkina Faso, Cape Verde, and South Africa. These provisions grant individuals the right to a healthy environment, impose a duty to protect this right on the state, and impose a duty on citizens to protect the environment (thereby allowing individuals to enforce this duty against each other).

Courts in the Netherlands have consistently applied the environmental rights in Article 21 of the Constitution<sup>72</sup> to require decisionmakers to have a sound reason for setting aside environmental interests.<sup>73</sup> Although the text of the provision imposes an obligation on the “authorities” to “protect and improve the environment,” courts have extended the obligations to private parties. For example, in the case of *Benckiser*, the Dutch government sought to require the defendant to remove hazardous, polluting materials that the defendant had dumped at several sites in the country.<sup>74</sup> The court held for the government, noting that the defendant’s acts were essentially “tortious” to the state due to the government’s constitutional responsibility to protect the environment. As discussed in Section IV below, Dutch courts have also held that the constitutional environmental right requires particular procedural protections.

The “Public Trust Doctrine” requires the government to preserve and protect certain resources that the government holds in trust for the public. The doctrine dates back to the Institutes of Justinian (530 A.D.), which restated Roman Law: “By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea.”<sup>75</sup> In the centuries since then, both civil law and common law countries have incorporated these principles, and remnants can be found in African constitutions. For example, Part XIII of Uganda’s constitutional National Objectives and Directive Principles of State Policy provides that “[t]he State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda.” And while the binding nature of these principles remains unclear, at the very least it suggests that there is a constitutional basis for the public trust doctrine in Uganda.

Traditionally, courts applied the public trust doctrine to waters and similar common resources, and generally limited the power of the government to significantly alter nature of the public resource for the benefit of an individual party. Professor Joseph Sax, the pre-eminent author on public trust, observed that the doctrine imposes three duties on governments: (1) the property subject to the trust must be used only for trust purposes; (2) the property should never be sold, even for fair cash; and (3) property must be maintained for particular types of uses.<sup>76</sup> Thus, courts

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<sup>72</sup> “It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.”

<sup>73</sup> See Jonathan Verschuuren, *The Constitutional Right to Environmental Protection*, n.12, available at <<http://till.kub.nl/data/topic/envartcult.html>> (visited July 2, 1999) (“the decision to allow an airport to let aircraft take off and land earlier than usual was quashed because the governmental body did not make clear why transportation interests should prevail over environmental interests (Council of State 31 Januar[y] 1991, *Kort geding* 1991-181); environmental interests must under circumstances be given more weight than economical interests, this can lead to a decision to cut down an old tree being quashed (Council of State 18 July 1991, *Administratieve beslissingen* 1991-591); since it is clear that executing the plans of the local government will, contrary to its own policy, restrict the habitat of the salamander, the plans are declared illegal by the Council of State (verdict of 22 April 1991, *Administratieve beslissingen* 1991-592).”).

<sup>74</sup> *Benckiser*, 1989 MILIEU EN RECHT 258 (Netherlands Supreme Court, Apr. 14, 1989) (cited in *id.*).

<sup>75</sup> THE INSTITUTES OF JUSTINIAN 2.1.1 (T. Cooper trans. & ed. 1841).

<sup>76</sup> Joseph Sax, *The Public Trust Doctrine in Natural Resources Law*, 68 MICH. L. REV. 471, 473 (1970); see also Michael Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573 (1989).

have applied the public trust doctrine to invalidate conflicting legislation,<sup>77</sup> to limit alteration of public resources,<sup>78</sup> to require express legislative action,<sup>79</sup> and to identify public rights of resource access and use. In addition to air, water, and shores, U.S. commentators have argued for the application of the public trust to wildlife and public lands,<sup>80</sup> something courts have done in Kenya and India.

Many of the state constitutions in the United States have incorporated the public trust doctrine, as well as other environmental provisions.<sup>81</sup> Although the application of state constitutional environmental provisions has been infrequent, courts in at least five states have used them to review state action.<sup>82</sup> For example, in *Montana Environmental Information Center v. Department of Environmental Quality*, the Montana Supreme Court held that environmental groups could challenge the constitutionality of a state statute that exempts certain water discharges from nondegradation review.<sup>83</sup> Because the right to a clean and healthful environment was a fundamental right under the state constitution, the court utilized strict scrutiny when reviewing the state action, namely granting an exploration license to a gold mining operation. The Court noted that the challenged state action would pass muster only if the state could establish a compelling interest and that its action is “closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State’s objective.”<sup>84</sup> The Court also held that because the constitutional right to a clean and healthy environment was anticipatory and preventative, and not just prohibitive, that the groups did not have to demonstrate a threat to public health or water quality standards – the degradation of high-quality waters was sufficient.

Supreme Courts in India and Pakistan have used the public trust doctrine to protect the environment, even in the absence of plaintiffs.<sup>85</sup> In *M.C. Mehta v. Kamal Nath*, the Supreme Court took notice of a newspaper article reporting on efforts to divert the flow of a river to protect a motel from flooding, a diversion that could cause serious environmental degradation.<sup>86</sup> The Court held that the government had violated the public trust by leasing the environmentally sensitive riparian forest land to the company (which was owned by the family of a former Minister for Environment and Forests). The Court cancelled the lease and ordered the land restored to its original condition.

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<sup>77</sup> *E.g.*, *Priewe v. Wisconsin State Land & Improvement Co.*, 93 Wis. 534, 67 N.W. 918 (1896) (invalidating legislation authorizing the drainage of a lake for development purposes).

<sup>78</sup> *E.g.*, *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892) (rescinding conveyance of the bed of Lake Michigan to a private party).

<sup>79</sup> *E.g.*, *Gould v. Greylock Reservation Commission*, 350 Mass. 410, 215 N.E.2d 114 (1996) (requiring legislative action before a state park could be used for private and specific public uses).

<sup>80</sup> *E.g.*, Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 J. ENVTL. L. & LITIG. 107 (1986); Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980).

<sup>81</sup> See generally Matthew T. Kirsch, *Upholding the Public Trust in State Constitutions*, 46 Duke L.J. 1169 (1997); Neil A.F. Popovi, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338, 355 (1996) (noting 31 state constitutions with environmental or natural resource references).

<sup>82</sup> See *id.*

<sup>83</sup> *Montana Environmental Information Center v. Department of Environmental Quality*, No. 97-455 (Mont., Oct. 20, 1999).

<sup>84</sup> *Id.* at 17.

<sup>85</sup> The Pakistani public trust cases are discussed below, in section III.B.3: In re: Human Rights Case (Environmental Pollution in Balochistan), Human Rights Case No. 31-K/92(Q), P.L.D. 1994 SUPREME COURT 102 (1992); General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khwra, *Khelum v. The Director, Industries and Mineral Development, Punjab Lahore*, Human Rights Case No. 120 of 1993, 1994 S.C.M.R. 2061 (1994).

<sup>86</sup> *M.C. Mehta v. Kamal Nath*, 1 S.C.C. 388 (Supreme Court of India, 1977); see also T.N. Godavarman *Thirumulpad v. Union of India*, 2 S.C.C. 267 (1997).

Kenya has incorporated the public trust doctrine as part of its common law, applying it in *Abdikadir Sheikh Hassan v. Kenya Wildlife Service* to review a public authority's exercise of statutory powers.<sup>87</sup> In this case, the plaintiffs sought to restrain the Kenya Wildlife Service from moving endangered hirola antelope from its natural habitat to Tsavo National Park, notwithstanding the KWS's express statutory mandate to protect the animals. The Court held that the KWS "would be acting outside its powers if it were to move any animals or plants away from their natural habitat without the express consent of those entitled to the fruits of the earth on which the animals live."

And in Australia, the public trust doctrine has been applied to protect public rights in tidal waters, seashores, and national parks. In *Willoughby City Council v. Minister*, a court held that leasing a state recreation area for "reception areas and tea rooms" was a private function and violated the public trust.<sup>88</sup> The court noted that national parks were held in trust for the enjoyment and benefit of Australian citizens, including future generations, and that the government had a duty to preserve the parks in their natural state.

### **3. Development of the Right to a Healthy Environment in Africa**

Increasingly, courts around the world are giving force to constitutional environmental protections. In many cases, courts have applied the provisions where an environmentally destructive activity directly threatened people's health and life (e.g., *Koolwal*, *Eurogold*, and *Fundacion Natura*). Additionally, courts have extended the protections to purely environmental values, including aesthetic and spiritual values (e.g., *Kendra* and *Fundación Fauna Marina*). In these cases, citizens and environmental groups have enforced their rights against infringement by both governmental authorities (e.g., *Protected Forest Case* and *Kamal Nath*) and private industries (e.g., *Tanneries Case* and *Pedro Flores*).

Although approximately two-thirds of the African nations have constitutional environmental provisions, few courts so far have applied these provisions. Nevertheless, as discussed above, courts often consider how other nations have interpreted similar provisions, particularly when it comes to fundamental human rights, such as the right to a healthy environment.

The cases discussed in this section arise from constitutional provisions with a wide range of formulations. Nevertheless, all the cases emphasize the fundamental nature of a right to a healthy environment. In fact, even in countries where the environmental provision is found in the preamble or a section on state principles, which is usually held to be unenforceable, courts frequently give force to the environmental rights. Thus, Supreme Courts in India, Nepal, and the Philippines have held that these constitutional environmental provisions entail rights enforceable by citizens and environmental groups.

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<sup>87</sup>*Abdikadir Sheikh Hassan v. Kenya Wildlife Service*, Civil Case No. 2959 of 1996 (High Court of Kenya at Nairobi, Aug. 29, 1996); see also *Niaz Mohammed Jan Mohammed v. Commissioner of Lands*, Civil Suit No. 423 of 1996 (High Court of Kenya at Mombasa, Oct. 9, 1996) (holding that the state could not condemn private land to build a road and then allocate left-over portions to other private individuals); *Commissioner of Lands v. Coastal Aquaculture Ltd.*, Civil Appeal No. 252 of 1996 (Court of Appeal at Nairobi, June 27, 1997) (holding that a notice of intent to acquire coastal land did not adequately specify the public body for which the land was being acquired).

<sup>88</sup> *Willoughby City Council v. Minister*, 78 L.G.E.R. 19 (1992).

To be certain, cultural differences could limit the extent to which non-African cases interpreting and applying the constitutional right to a healthy environment may be applied in Africa. For example, areas denoted “protected” without human habitation (excluding wildlife reserves) are more of a Western phenomenon, as there are few expanses of African land that are uninhabited. The African reality might be to utilize a similar philosophy but apply it to the protection and preservation of the environment of pastoralists, fishermen, hunters, and gatherers.

In applying the right to a healthy environment, African courts could apply a contextual approach that takes into consideration the various local factors. These factors could include the fragility of the particular habitat sought to be protected, the availability of physical and biological data relating to the environment, the severity of impact on the environment, or the propensity of the state to ignore a constitutional duty imposed upon it. Unavoidably, the court must address the impending conflict between the strong desire for economic development and the duty to protect the environment and the rights of the citizens.

Nevertheless, most of the right-to-a-healthy-environment cases arise in developing countries in Latin America and Asia, countries which face similar resource constraints and cultural contexts (including a strong relationship to the land). Additionally, the cases come from similar legal systems, as both civil law and common law countries have applied constitutional environmental norms. Considering the growing incorporation of environmental norms into constitutions, the rapid development of international environmental law, and the frequent reliance on international norms and standards, constitutions provide a profound opportunity for African environmental advocates to realize their fundamental right to a healthy environment.

### III. THE RIGHT TO LIFE

While many African constitutions contain provisions specifically granting citizens a right to a healthy environment and empowering the government to protect the environment, not all African constitutions contain such provisions, and their usefulness as a legal tool for protecting environmental and natural resources, or health, as it is affected by environmental conditions, may be limited to specific contexts. However, though largely untested in Africa, an additional constitutional approach to environmental protection can be found in the right-to-life provisions that are contained in the constitutions of all African nations. Considering the universal presence of these provisions, the right to life could constitute a pan-African mechanism to allow citizens to protect the environment.

Typically, African constitutional right-to-life provisions establish that citizens have a fundamental right to “life,” sometimes articulated as a right not to be arbitrarily deprived of life. What does it mean to possess a right to “life”? Certainly, a death sentence without trial or other due process resulting in execution would violate this right. But can the scope of these right-to-life provisions be expanded to include a right to the means necessary for supporting life? For example, since air and water are necessary to sustain life, does the right to life necessarily imply a right to clean air and water? How far might courts go in expanding the scope of this fundamental right in the context of environmental protection, and, equally important, who may petition courts to vindicate the right? Because few African courts have had occasion to address these questions, this section provides examples of how courts around the world have interpreted similar constitutional right-to-life provisions in the context of environmental protection. We first examine the language used in the African constitutional right-to-life provisions and then turn to a discussion of the right to life as interpreted in courts around the world.

#### A. The Text of Right-To-Life Provisions

All of the fifty-three African nations examined in this paper establish that citizens have a fundamental right to life. (See Appendix A). Some nations, such as Cote d’Ivoire and Djibouti, while not directly guaranteeing the right to life, do so indirectly by stating adherence to the 1948 Universal Declaration of Human Rights, which provides that “[e]veryone has the *right to life*, liberty, and the security of person.”<sup>89</sup>

There is a remarkable diversity of constructions of the constitutional right to life, but most explicitly recognize the “right to life.” For example, a number of constitutions simply state: “Every person has the right to life,” (Ethiopia), or “[t]he life...of every citizen shall be protected by law,” (Angola). Others, for example, provide: “Human life and the physical and moral integrity of persons shall be inviolable” (Cape Verde). Still others, for example, assert: “No person shall be deprived of life without due process of law” (Eritrea). A number of constitutions protect the “human person” as “sacred” without explicitly mentioning the right to life. Described as “fundamental,” “sacred,” “inalienable,” and “inviolable,” the right to life is one of the most powerful civil rights in Africa. Related constitutional rights that may be invoked include those relating to health, personal or physical integrity, human dignity, and security of the person.

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<sup>89</sup> Universal Declaration of Human Rights (UDHR), (adopted by the U.N. General Assembly, Dec. 10, 1948) U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), art. 3 (emphasis added).

While the specific provisions may use somewhat different language, they share a fundamental concern for protecting human “life,” however that may be defined. Because few African courts have addressed the meaning and scope of these provisions in the context of environmental protection, it is not yet possible to determine whether the different constitutional constructions will lead to different interpretations of the scope of the provisions. For example, is there a meaningful difference in scope between the wording, “every person has a right to life” (Ethiopia), and the wording, “every individual is assured of the inviolability of his person” (Madagascar)? This is a question that will only be answered as courts decide particular cases, and the answer is likely to hinge more on the disposition (*vis-à-vis* environmental protection) of the particular court interpreting the provision and the facts of the case than on the provision’s linguistic structure.

Another potential issue concerning African courts’ application of these provisions to the environmental context is the extent to which the right to life may be limited to circumstances in which there are direct and dramatic consequences for specific people. For example, courts may more readily invoke the right to life when toxic industrial discharges actually kill or otherwise harm people. But will the right also extend to halting low-level contamination of the environment, or to protecting biodiversity, for example, where the nexus with individual human life is more attenuated? This too is a question more likely to hinge on the disposition of courts with respect to environmental protection and on the success of arguments marshaled for or against a wider scope, than on the inherent meaning of the words in the right-to-life provisions.

These questions have been addressed, in varying degrees, by courts in other countries, many of which have recognized that a constitutional right to life includes the right to a clean and healthy environment in which to live that life, and have enforced the right to prevent environmental damage, particularly (but not exclusively) environmental damage that harms or could harm human health.<sup>90</sup> The following discussion surveys cases in which courts have interpreted the right to life to include the protection of environmental resources.

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<sup>90</sup> African constitutions containing both a right to life and a right to “health” include those of Algeria, Burkina Faso, Comoros, Gabon, Ghana, Guinea, Guinea-Bissau, Madagascar, and Togo.

## **B. Cases Interpreting the Right to Life**

### **1. Tanzania**

Tanzania appears to be the first African nation in which courts have addressed the scope of constitutional right-to-life provisions in the context of environmental protection. Article 14 of Tanzania's constitution provides that "Everyone has the right to exist and to receive from the society protection for his life, in accordance with the law." In *Joseph D. Kessy v. Dar es Salaam City Council* and *Festo Balegele v. Dar es Salaam City Council*, the High Court of Tanzania at Dar es Salaam interpreted Article 14 expansively.<sup>91</sup>

In *Kessy*, citizens of Tabata, a suburb of Dar es Salaam, brought suit against the City Council of Dar es Salaam, seeking to enjoin the city from operating a garbage dump that created severe air pollution in nearby neighborhoods. The foul smells and air pollution had caused respiratory problems in area residents, particularly in children, pregnant women, and the elderly. The citizens won a judgment in 1988 in which the court ordered the City Council to cease using the Tabata area for dumping garbage and to construct a dumping ground where it would pose no threat to the health of nearby residents. The City Council subsequently sought several extensions to comply with the court's order, effectively extending the time for compliance until August 1991. In this action, the City Council sought another extension of time to comply with the 1988 order. The court noted that the air pollution created by the garbage dump endangered the health and lives of nearby residents, and consequently that the operation of the dump violated Article 14. Thus, the High Court denied the City Council's petition for an extension.

### **2. India**

Outside of Africa, India has generated by far the largest body of jurisprudence regarding the environmental aspects of the constitutional right to life. India's constitution contains provisions protecting both human health (art. 47) and the natural environment (arts. 48 and 51), in addition to extending a fundamental right to life (art. 21). Notwithstanding these other provisions relating to health and environment, India's Article 21 is often invoked to protect environmental resources. Article 21 states: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Procedurally, most of the Article 21 cases protecting the environment are brought in the Supreme Court pursuant to Article 32, which grants citizens standing to sue directly in the Indian Supreme Court for violations of constitutional rights.<sup>92</sup>

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<sup>91</sup> *Joseph D. Kessy v. Dar es Salaam City Council*, Civil Case No. 29 of 1988 (High Court of Tanzania of Dar es Salaam, Sept. 9, 1991); *Festo Balegele v. Dar es Salaam City Council*, Misc. Civil Case No. 90 (High Court of Tanzania of Dar es Salaam, 1991). The cases are quite similar, with *Kessy* brought by the residents of Tabata and *Balegele* brought by the residents of Kunduchi, two suburbs of Dar es Salaam who were suing the city to cease illegal dumping in their regions.

<sup>92</sup> Barriers to standing in public interest cases are generally few in Indian courts. Under Article 32 of the Indian constitution a petition to vindicate a constitutional right "is maintainable at the instance of affected persons or even by a group of social workers or journalists." See *Subhash Kumar v. State of Bihar*, 1991 A.I.R. (S.C.) 420 (1988). Thus, a petitioner need not even be directly affected, but may sue on behalf of an affected person. Such standing is limited, however, to persons "genuinely interested in the protection of society on behalf of the community. Public interest litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge or enmity." *Id.* Indian courts are also competent to initiate, *sua sponte*, a proceeding to vindicate citizens' rights. In *M.C. Mehta v. Kamal Nath* (1997), for example, the Supreme Court itself initiated a proceeding against developers who sought to build in an ecologically sensitive area.

Indian courts have interpreted the scope of the constitutional right to life expansively to forbid all actions of both state and citizen that disturb “the environmental balance.”<sup>93</sup> The courts have found violations of the right to life in a variety of factual contexts. In *T. Damodhar Rao v. Municipal Corp., Hyderabad*, for example, the court found that a city’s failure to protect an area designated as “recreational” space from residential development violated the right to life.<sup>94</sup> The issue before the court was whether the Life Insurance Corporation of India and the Income-Tax Department of Hyderabad could legally use land owned by them in a recreational zone within the city limits of Hyderabad for residential purposes, contrary to the city’s development plan. The city’s development plan restricted land use in certain areas, and the area in question had been designated for recreational use, not residential use.

The court held that the Hyderabad development plan prohibited respondents from using the land for any other purpose except recreational uses. It also found that the state government, the municipal corporation of Hyderabad, and the Hyderabad Urban Development Authority were obligated to implement and enforce the development plan. As an additional, independent ground for the holdings, the court held that the attempt of the Life Insurance Corporation of India and the Income-Tax Department to build houses in the designated recreational area was contrary to the Indian Constitution’s Article 21 right to life. The court stated that Article 21

embraces the protection and preservation of nature’s gifts without which life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation of Art. 21 of the Constitution. . . . It therefore becomes the legitimate duty of the Courts as the enforcing organs of Constitutional objectives to forbid all action of the State and the citizen from upsetting the environmental balance. In this case, the very purpose of preparing and publishing the developmental plan is to maintain such an environmental balance.

In *L.K. Koolwal v. Rajasthan*, the Indian Supreme Court found that a city had violated residents’ right to life by failing to implement adequate sanitation measures.<sup>95</sup> The court held that maintenance of health, preservation of sanitation, and environmental protection fall within the purview of Article 21’s right to life. The court found the problem of sanitation to be “very acute in Jaipur City, . . . creating hazard to the life of the citizens,” and ordered the municipality “to remove the dirt, filth etc. within a period of six months and clean the entire Jaipur City.”

In *Vellore Citizens Welfare Reform v. Union of India*, the Indian Supreme Court found that tanneries in the state of Tamil Nadu had violated citizens’ right to life by discharging untreated effluents into agricultural areas and local drinking water supplies.<sup>96</sup> The discharges had made thousands of hectares of agricultural land unfit for cultivation and had severely polluted the local drinking water. In granting the petitioners’ requested relief, the Court invoked the “precautionary principle,” the “polluter-pays principle,” and sustainable development as components of the Article 21 environmental protections. The Court defined the precautionary principle to mean that

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<sup>93</sup> *T. Damodhar Rao v. Municipal Corp of Hyderabad*, 1987 A.I.R. (A.P.) 171 (Andhra Pradesh High Court, 1987).

<sup>94</sup> *Id.*

<sup>95</sup> *L.K. Koolwal v. Rajasthan*, 1988 A.I.R. (Raj.) 2 (High Court of Rajasthan, 1988).

<sup>96</sup> *Vellore Citizens Welfare Reform v. Union of India*, 1996 A.I.R. (S.C.) 2715 (1996).

(1) the state must anticipate, prevent, and attack the causes of environmental degradation; (2) lack of scientific certainty should not be used as a reason for postponing measures to prevent pollution; and (3) the onus of proof is on the polluter to show that his or her actions are environmentally benign. The polluter-pays principle was defined to mean that

polluting industries are ‘absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water . . . [and] liability for harm . . . extends not only to compensate victims of pollution but also the cost of restoring the environmental degradation.

Applying these principles to the facts of the case, the court ordered more than 900 tanneries operating in Tamil Nadu to “compensate the affected persons and also pay the cost of restoring the damaged ecology.”

In *Indian Council for Enviro-Legal Action v. Union of India*, the Supreme Court found that the national government’s failure to control an industry’s release of toxic chemicals violated citizens’ right to life.<sup>97</sup> The plaintiff-petitioner brought this action to stop and remedy pollution caused by several chemical industrial plants in the village of Bichhri in Rajasthan. The defendant-respondents operated chemical plants producing highly toxic chemicals, such as sulfuric acid, without permits and discharged pollutants into aquifers and to the soil. The defendants had failed to obey several previous court orders directing them to control the discharge of toxic materials. Using the constitutional right to life, the court ordered the appropriate governmental regulatory agency to impose controls on the industry, carry out remedial measures, and charge the industry for the cost of cleanup.

### **3. Pakistan, Bangladesh, and Nepal**

Following India, the courts of Pakistan, Bangladesh, and Nepal also have interpreted constitutional right-to-life provisions expansively to include environmental protection. The constitutions of all three countries share nearly identical right-to-life provisions, stating: “No person shall be deprived of life or liberty save in accordance with law.”<sup>98</sup> In addition, all three countries share liberal rules with regard to standing (discussed in Section IV, below).

The courts of all three countries have invoked the right to life in a variety of factual contexts. In *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khwra, Khelum v. The Director, Industries and Mineral Development, Punjab Lahore*, the Supreme Court of Pakistan found that mining companies had violated the right to life of citizens residing near mining operations by polluting local drinking water supplies.<sup>99</sup> Invoking the right to life, the court found that “where

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<sup>97</sup> *Indian Council for Enviro-Legal Action v. Union of India*, 3 S.C.C. 212 (1996). Other Indian right-to-life cases implicating environmental protection include: *Francis Corralie v. Union Territory of Delhi*, 1981 A.I.R. (S.C.) 746 (1981); *Bandhua Mukti Moreha v. Union of India*, 1984 A.I.R. (S.C.) 802 (1984); *Olga Tellis v. Bombay Municipal Corp.*, 1986 A.I.R. (S.C.) 180 (1986); *Vincent v. Union of India*, 1987 A.I.R. (S.C.) 990 (1987); *Vikram Deo Singh v. State of Bihar*, 1988 A.I.R. (S.C.) 1782 (1988); *Virendra Gaur v. State of Haryana*, 1995 A.I.R. (S.C.) 577 (1995); *F.B. Taraporawala v. Bayer India Ltd.*, 6 S.C.C. 58 (1996); *Chhetriya Pardushan Mukdi Sangharsh Samiti v. State of Uttar Pradesh*, 1996 A.I.R. (S.C.) 2060 (1996).

<sup>98</sup> PAKISTAN CONST., art. 9; BANGLADESH CONST., art. 32; NEPAL CONST., art. 11(1).

<sup>99</sup> *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khwra, Khelum v. The Director, Industries and Mineral Development, Punjab Lahore*, Human Rights Case No. 120 of 1993, 1994 S.C.M.R. 2061 (1994).

access to water is scarce, difficult or limited, the right to have water free from pollution and contamination is a right to life itself. This does not mean that persons residing in other parts of the country where water is available in abundance do not have such right. The right to have unpolluted water is the right of every person wherever he lives.” The court ordered the mining companies to take specific measures to prevent pollution of the drinking water, including changing the location of its operations. The court also appointed a commission with powers of inspection to monitor implementation of the court’s orders and the ability to order further measures to ensure the area’s drinking water remained unpolluted. The government agencies concerned also were ordered not to grant any new mining licenses or to renew old ones without leave of court.

In the case *In re: Human Rights Case (Environmental Pollution in Balochistan)*, the Pakistani Supreme Court itself initiated a proceeding against industries seeking to dump radioactive waste in a coastal area.<sup>100</sup> The court found that the dumping could “create environmental hazard and pollution” in violation of the constitutional right to life. The court ordered the Chief Secretary of Balochistan to investigate the matter and report to the court. After receiving a report detailing the identity of entities to which land allotments were made in the coastal area in question, the court ordered that with respect to any allotment of land, the full identity of the applicant and other information shall be supplied to the Court, and any lease or allotment contract must specify that the land may not be used for dumping waste.

In *Shehla Zia and others v. WAPDA*, the Pakistani Supreme Court found that the constitutional right to life is broad enough to include “protection from being exposed to the hazards of electromagnetic field or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations.”<sup>101</sup> The petitioners, citizens opposing the construction of a power grid station near the residential area in which they lived (in Islamabad), wrote a letter to the Supreme Court seeking to enjoin construction of the grid station on grounds that it violated the constitutional right to life. The citizens argued that the presence of high-voltage transmission lines would pose a serious health hazard to the residents of the area.

While noting that the right to life could encompass protection from the hazards of electromagnetic fields, it did not enjoin construction of the power grid station. Rather, the court ordered further investigation into whether the potential harms of the project could be mitigated. The court found that the United Nations’ Rio Declaration on Environment and Development, though not ratified by Pakistan, has persuasive value, noting that “if there are threats of serious damage, effective measures should be taken to control it and it should not be postponed merely on the ground that scientific research and studies are uncertain and not conclusive.” The Court further noted, however, that “a method should be devised to strike balance between economic progress and prosperity and to minimize possible hazards. In fact, a policy of sustainable development should be adopted.” The court ordered that a commission study the construction plan and report whether the grid station has “any likelihood of any hazard or adverse effect on the health of the residents,” and whether there are ways to minimize any potential harm. The court also ordered that the government authority responsible for constructing the grid station must in the

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<sup>100</sup> *In re: Human Rights Case (Environmental Pollution in Balochistan)*, Human Rights Case No. 31-K/92(Q), P.L.D. 1994 SUPREME COURT 102 (1992); see also Martin Lau, *Case Study: Public Interest Litigation in Pakistan*, 3 REV. EUR. COMMUNITY & INT’L ENVTL. L. 268 (1994).

<sup>101</sup> *Shehla Zia v. WAPDA*, Human Rights Case No. 15-K of 1992, P.L.D. 1994 SUPREME COURT 693 (1992).

future make public the plans for construction of grid stations or power lines and afford an opportunity for the public to comment or make objections.

In *Mohiuddin Farooque v. Bangladesh*, the court found that the right to life includes a right to be free from “man-made hazards of life,” including contaminated food.<sup>102</sup> The petitioner, the Secretary-General of the Bangladesh Environmental Lawyers Association, filed suit seeking to halt the importation of certain imported milk powder that was found to contain radiation levels above the acceptable limit. The petitioner argued that the failure of government officials to send back the imported milk powder in question was injurious to human health and violated the fundamental right to life. The court found that citizens have a:

natural right to the enjoyment of healthy life and a longevity up to normal expectation of life of an ordinary human being. Enjoyment of a healthy life and normal expectation of longevity is threatened by disease, natural calamities and human actions . . . Natural right of a man to live free from all the man-made hazards of life has been guaranteed under [constitutional right-to-life provisions]. We are, therefore, of the view that right to life . . . not only means protection of life and limbs necessary for full enjoyment of life but also includes, amongst others, protection of health and normal longevity for an ordinary human being.

Because the contaminated food “is a potential danger to the health of the people ultimately affecting their life and longevity,” the court ordered the respondent government agencies to develop better testing and sampling techniques to prevent the importation of contaminated food.

In *LEADERS, Inc. v. Godawari Marble Industries*, Nepal’s Supreme Court held that a marble mining operation contaminating the water supplies and the soil violated nearby residents’ constitutional right to life.<sup>103</sup> The petitioners alleged that Godawari Marble Industries had caused serious environmental degradation to the Godawari forest and its surroundings. The industries’ activities also had contaminated nearby water bodies, soil, and air to the detriment of local inhabitants, members of the petitioner’s organization, and laborers in the mining industry. The court noted that “[Life] is threatened in [a] polluted environment . . .” and “[i]t is the legitimate right of an individual to be free from [a] polluted environment.” The court reasoned that “Since [a] clean and healthy environment is an indispensable part of a human life, the right to [a] clean, healthy environment is undoubtedly embedded within the Right to Life.” The court ordered the government ministries to “enact necessary legislation for protection of air, water, sound and environment and to take action for protection of the environment of [the] Godawari area.”

#### **4. Colombia, Ecuador, and Costa Rica**

The civil law jurisdictions of Colombia, Ecuador, and Costa Rica all have applied a constitutional right to life in the context of environmental protection. In many cases, Latin American litigants use an “amparo,” which is a form of legal action or proceeding the purpose of which is to guarantee constitutional rights, other than the right of physical freedom covered by the writ of habeas corpus.

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<sup>102</sup> *Mohiuddin Farooque v. Bangladesh*, Civil App. No. 24 of 1995, 17 B.L.D. 1 (1997), 1 B.L.C. (A.D.) 189 (1996) (High Court Division, Special Original Jurisdiction, July 1, 1996).

<sup>103</sup> *LEADERS, Inc. v. Godawari Marble Industries* (Supreme Court Nepal, Oct. 31, 1995).

Colombian courts have applied their constitutional right to life<sup>104</sup> in a variety of factual contexts, expansively interpreting it and holding that environmental protection must be understood as an extension of the rights of physical integrity and personal security. In *Victor Ramon Castrillon Vega v. Federacion Nacional de Algodoneros y Corporacion Autonoma Regional del Cesar (COPROCESAR)*, the Supreme Court of Colombia found that an industry's release of toxic fumes from an open pit endangered the health and life of nearby residents and therefore violated their constitutional rights to health and life.<sup>105</sup> The court ordered the respondent industry to remove the waste and safely dispose of it, to pay for the costs of safely moving and disposing of the waste, and to pay past and future medical expenses of those who fell ill as a result of the illegal waste.

FUNDEPUBLICO, a Colombian NGO, has brought many cases to protect Colombians' constitutional right to health and life. In *FUNDEPUBLICO v. SOCOPAV, Ltda.*, FUNDEPUBLICO filed an action requesting relocation of an asphalt plant located in an urban area.<sup>106</sup> The Constitutional Court granted the petition, holding in part that pollution emanating from the plant threatened the right to life. The court held that the right to live in a healthy environment is a basic human right, and that environmental protection was an extension of the constitutional right to life. In *FUNDEPUBLICO v. Compania Maritima de Transporte Croatia Line y Comar S.A.*, a Colombian court found that the rights to life and health were violated by the respondents' importation of toxic waste into Colombia, and the court ordered the companies to remove 575 drums of toxic industrial waste.<sup>107</sup> In *Organización Indígena de Antioquia v. Corporación Nacional de Desarrollo del Chocó*, the Constitutional Court held that the constitutional rights to life, work, property, and cultural integrity had been infringed upon by an illegal clear-cut, ordering the regional authority to restore the area and to develop a reliable estimate of the economic damages that the indigenous people living in the area had suffered.<sup>108</sup> Other right-to-life cases brought by FUNDEPUBLICO have addressed tannery wastes, unsanitary waste dumps, and a highly polluting asphalt factory.<sup>109</sup>

In the Ecuadorian case *Fundación Natura v. Petro Ecuador*, an Ecuadorian environmental law NGO brought suit against a corporation for illegally cutting trees on indigenous lands and against the government agency for its failure to take care of the lands and protect the indigenous community.<sup>110</sup> The court ordered the agency to assess the damage and to compensate the community, and held that the community could sue the corporation once the assessment was completed. The court also passed a general prohibition making "illegal" any activity that diminishes or harms the area that was the subject of this litigation.

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<sup>104</sup> Article 11 of the Colombian constitution states: "The right to life cannot be denied."

<sup>105</sup> *Victor Ramon Castrillon Vega v. Federacion Nacional de Algodoneros y Corporacion Autonoma Regional del Cesar (COPROCESAR)*, Case No. 4577 (Supreme Court, Chamber of Civil and Agrarian Cassation, Nov. 19, 1997).

<sup>106</sup> *FUNDEPUBLICO v. SOCOPAV, Ltda.*, Case No. T-101, Judgment No. T-415 (Constitutional Court, June 17, 1992).

<sup>107</sup> *FUNDEPUBLICO v. Compania Maritima de Transporte Croatia Line y Comar S.A.*, Case No. 076 (Superior Court of Santa Marta, Civil Chamber, July 22, 1994).

<sup>108</sup> *Organización Indígena de Antioquia v. Corporación Nacional de Desarrollo del Chocó*, Case No. T-13636, Judgment No. T-380/93 (Sept. 13, 1993).

<sup>109</sup> For further discussion of these cases, see <http://www.fundepUBLICO.org.co/htm/logros.htm> (visited Oct. 31, 1999).

For another case, not brought by FUNDEPUBLICO, see *Augusto Osorno Gil v. Papeles y Cartones S.A.*, Judgment No. T-579 (Bogotá, Dec. 14, 1993).

<sup>110</sup> *Fundación Natura v. Petro Ecuador de la Provincia de Buenos Aires*, Case No. 221-98-RA (Constitutional Court 1998), upholding *Fundación Natura v. Petro Ecuador*, Case No. 1314 (11<sup>th</sup> Civil Court, Pichinga, Apr. 15, 1998).

In the Costa Rican case *Carlos Roberto Mejia Chacón v. Municipalidad de Santa Ana*, the Supreme Court held that a waste disposal site in a small canyon threatened the constitutional right to life of the petitioner, ordered the municipality to stop disposing of waste at the site, and closed the illegal dump.<sup>111</sup> While Costa Rica has an independent constitutional right to a healthy environment (see discussion of the JPN-Geest case, in Section II), it is interesting to note that *Chacón* instead relied on the right to life.

### **C. Advancing African Environmental Protection through the Right to Life**

As seen in these cases, constitutional right-to-life provisions can be strong tools for environmental protection. 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 an express constitutional right to a healthy environment, and lacks comprehensive environmental statutory and regulatory systems (or lacks adequate remedies under those systems), the constitutional right to life becomes all the more important.

The constitutional right-to-life provisions in most African countries are substantially similar to those in the constitutions of other nations that have extensive jurisprudence interpreting the meaning and scope of those provisions. Consequently, the reasoning and rationale relied upon in the courts of these other jurisdictions could provide persuasive authority for similarly expansive interpretations of the right to life.

In those countries that have interpreted the scope of constitutional right-to-life provisions in the context of environmental protection, nearly all have found that the right to life necessarily implies a right to a healthy environment that sustains life or contributes to the quality of life. Accordingly, the right to life protects the environment in which people live and the environmental resources upon which people depend.

Courts have found violations of the right to life in a variety of factual contexts. The release of pollutants that directly affect physical health or the failure of governments to regulate the release of such pollutants is the most common scenario in which courts have found violations of the right to life. Thus, for example, the discharge of toxic substances into agricultural areas and drinking water supplies (*e.g.*, *Vellore*), the release of harmful air contaminants near residential areas (*e.g.*, *Kessey and Vega*), or the dumping of radioactive waste in coastal areas have been found to violate the right to life (*e.g.*, *Balichostan*). In addition, a government's failure to perform regulatory functions that protect health or environment has also been found to violate the right. For example, the failure to implement urban sanitation measures (*e.g.*, *Kessey and L.K. Koolwal*) and the failure to regulate effectively contaminants in imported food violated the right to life (*e.g.*, *Farooque*). Finally, even actions that may not directly affect physical health, but that "disturb the environmental balance" have been found to violate the right to life broadly interpreted. Thus, for example, a government's failure to protect a recreational area or park from development was found to violate the right (*e.g.*, *T. Damodhar Rao*).

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<sup>111</sup> *Carlos Roberto Mejia Chacón v. Municipalidad de Santa Ana*, Judgment No. 3705-93 (Supreme Court, Constitutional Chamber, July 30, 1993).

The remedies available to litigants seeking vindication of a right to life are both injunctive and compensatory in nature: courts have ordered parties to cease polluting activities and to compensate victims for harm done. Courts also have ordered governments to enforce existing regulations, create new regulations, impose penalties on polluters, deny licenses to polluters, or to carry out specific tasks to alleviate an ongoing harm.

However, vital to the vindication of any right, including the right to life, is the ability to bring suit. The jurisdictional rules regarding who may bring suit in which courts can be just as important as the fundamental right itself. In the countries surveyed whose courts have interpreted constitutional right-to-life provisions, liberal standing rules typically apply in cases involving violations of fundamental rights. Access to justice and other procedural rights for enforcing the rights to life and a healthy environment are the subject of the next section.



## IV. PROCEDURAL RIGHTS

In addition to providing a variety of 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 decision-making processes, and holding the government accountable for its actions, as well as enabling civil society to bond together to protect environment through the exercise of these procedural rights.

The rights discussed in this section fall generally into four categories: (1) freedom of association, (2) access to information, (3) public participation in decision-making, and (4) 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 environmental advocacy and governance, and merit further investigation.

### A. Freedom of Association

The freedom of association is fundamental for environmental advocacy. By forming and participating in non-governmental organizations, people can more effectively advocate for environmental protection.<sup>112</sup> With the support of an organization and strength in numbers, any fears of retaliation can be allayed and people are more likely to take an active role in matters that affect them, including natural resource and environmental management. 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 an issue, drawing upon their members as needed, enabling the members' interests to be advanced in ways that would be impossible for individuals to do on their own.

In fact, all of the African nations ensure the right of their citizens to associate to promote their business, personal, or other interests. The provisions of a few countries' constitutions, such as Angola's (art. 33), suggest that this right might be limited to professional or trade unions, but this is the distinct 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 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

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<sup>112</sup> See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . .").

limits on the right, in practice those limits may not be much more than the reasonable limitations implied in other kinds of provisions.<sup>113</sup>

Notwithstanding the recognized value of and need for the right of association, many African organizations operate in 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, and 11 others. The executive board sued the Minister, claiming that the operative section of the PVO Act was unconstitutional and therefore *ultra vires*. Specifically, they alleged that the Act infringed their civil rights without affording them a fair hearing (a violation of Article 18(9) of Zimbabwe's Constitution), unconstitutionally infringed their freedom of expression (Article 20(1) of the Constitution), and unconstitutionally infringed their right to assemble freely and associate with others (Article 21(1) of the Constitution). Zimbabwe's Supreme Court agreed, holding Section 21 of the PVO Act to be unconstitutional and reinstating the NGO's executive board.<sup>114</sup>

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, 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 reprisals were foreseeable,<sup>115</sup> and the courts have granted similar protections for associations litigating political and non-political topics.<sup>116</sup> The right of associations to represent their members in environmental litigation is discussed below, in the context of access to justice and representational standing.

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<sup>113</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>114</sup> Reported in Simeon Mawanza, "Supreme Court Saves Zimbabwean NGOs," NETWORK OF SOUTHERN AFRICAN LEGAL AID & LEGAL ADVICE NGOS NEWSLETTER (May 1997).

<sup>115</sup> E.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (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>116</sup> E.g., *NAACP v. Button*, 371 U.S. 415 (1963) (discussed in section IV.D); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964).

## B. Access to Information

In order for the public to effectively advocate for environmental protection, access to relevant information is important: civil society needs to know of environmental threats and the origins of those threats. Although access to information is a relatively new norm, already 21 African countries have constitutional provisions, 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 ("Every individual shall have the right to receive information."), and some countries such as Kenya basically repeat or elaborate on the provisions of these conventions.<sup>117</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 (sec. 24) and life (sec. 11), this ensures the right to the information necessary for environmental advocacy. Although there is not yet any South African jurisprudence on this provision, it has been utilized. 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. LRC prepared to sue the Ministry under Section 32, and the Ministry and refineries produced the requested information before the case could be filed. In *Van Huyssteen v. Minister of Environmental Affairs & Tourism*, a case interpreting a similar right of access to information in section 23 of South Africa's 1993 Constitution, the court held that trustees to a tract of land adjacent to a lagoon that would be polluted by a proposed steel mill had a right to government-held documents relating to the proposed mill.<sup>118</sup> Although the right of access is not absolute, the court held that access to the documents were necessary for the plaintiffs "in order to exercise their rights."

Like South Africa, Article 27 of the Constitution of Congo provides 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" (art. 41).

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<sup>117</sup> UDHR, art. 9; African Charter on Human and Peoples' Rights, (done at Banjul, June 26, 1981; entered into force, Oct. 21, 1986), O.A.U. Doc. CAB/LEG/67/3 Rev. 5, reproduced in 21 I.L.M. 59 (1982), art. 9; see also CONNIE NGONDI-HOUGHTON ET AL., THE STATE OF FREEDOM OF INFORMATION IN KENYA 12-14 (1999).

<sup>118</sup> *Van Huyssteen v. Minister of Environmental Affairs & Tourism*, 1996 (1) S.A.(C) 283 (Cape Provincial Div., June 28, 1995).

Many constitutions provide that national legislation may define the parameters of access to information. As discussed in the context of right of association, these implementing laws need to be “reasonable” so as to preserve the meaning of the right (e.g., Section 32(2) of South Africa’s Constitution: “legislation . . . may provide for reasonable measures to alleviate the administrative and financial burden on the state.”).

In five countries (Kenya, Nigeria, Sierra Leone, Zambia, 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.” Additionally, Article 8 of Senegal’s Constitution provides that “[e]veryone 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, it remains unclear to what extent these provisions grant citizens a right to demand state-held information.

The Indian Supreme Court has held that there is a constitutional right of access to information implicit in the constitutional rights to free speech and expression, and also in the right to life.<sup>119</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>120</sup>

Subsequently, in 1988, the Supreme Court held that access to information (or “right-to-know”) was a basic public right and essential to developing public participation and democracy.<sup>121</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>122</sup>

In the United States, access to information is generally governed by the statutory Freedom of Information Act,<sup>123</sup> but the U.S. Supreme Court also has 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

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<sup>119</sup> See generally Robert Martin & Estelle Feldman, *Access to Information in Developing Countries*, Transparency International Working Paper, ch. 8 (relating to India), available at <http://www.transparency.de/documents/work-papers/martin-feldman/> (visited October 8, 1999).

<sup>120</sup> *S.P. Gupta v. President of India*, 1982 A.I.R. (S.C.) 149 (1982); 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>121</sup> *Reliance Petrochemicals v. Indian Express*, S.C.C. 592 (1988).

<sup>122</sup> *L.L. Koolwal v. Rajasthan*, 1988 A.I.R. (Raj.) 2 (High Court of Rajasthan, 1988).

<sup>123</sup> 5 United States Code § 552.

relating to the functioning of government.”<sup>124</sup> While this right has generally focused on public access to criminal proceedings,<sup>125</sup> some justices have argued for a broader right to information.<sup>126</sup>

Civil law countries, particularly in Latin America (but also Spain and Portugal), have had some experience in applying and interpreting 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 because it had been designated “confidential.” 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, saying that the documents were confidential. After exhausting the administrative and judicial remedies, SPDA filed a habeas corpus motion with the Supreme Court, which granted the motion and ordered the Ministry to provide the requested documents.<sup>127</sup>

In addition to national precedents, the international community has increasingly recognized a right of access to environmental information. Access to environmental information – broad and affordable access for any party requesting it – has been enshrined in the 1992 Rio Declaration, the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (also known as the Aarhus Convention), and the Inter-American Strategy for the Promotion of Public

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<sup>124</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

<sup>125</sup> E.g., *Richmond Newspapers*, 448 U.S. at 581 (holding that “[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.”); *Globe Newspaper*, 457 U.S. at 604 (in voiding a state law that required the exclusion of the press and public from the courtroom when a minor testified who was allegedly a victim of a sexual offense, the court noted that the rights sought 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 it narrowly tailored to serve that interest”); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (extending the *Richmond Newspapers* access to information to the voir dire process of prospective jurors in a criminal trial); *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>126</sup> See, e.g., *Richmond Newspapers*, 448 U.S. at 583 (Stevens, J., concurring) (proclaiming this to be a “watershed case” and that “Today, . . . 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.*, 448 U.S. at 589 (Brennan, J., concurring) (laying out two principles in applying a broader 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. . . . Second, the value of access must be measured in specifics.”).

<sup>127</sup> *Sociedad Peruana de Derecho Ambiental v. Ministerio de Energía y Minas (Habeas Data)*, Exp. No. 1658-95, Judgment No. 122-96 (June 19, 1996).

Participation in Decision Making for Sustainable Development (ISP).<sup>128</sup> In dicta, the Inter-American Court of Human Rights also has promoted the “collective right to receive any information whatsoever.”<sup>129</sup> This increased international recognition of a right to environmental information argues in favor of a liberal interpretation of constitutional rights to information.

### **C. Public Participation in Decisionmaking**

Another emerging environmental right is the right of the public to participate in government decisions that could affect their environment. The Rio Declaration, the Aarhus Convention, and the ISP all provide for public participation in environmental decisionmaking processes,<sup>130</sup> and a small but increasing number of national constitutions also have incorporated relevant provisions.

The right of public participation can take many forms: the right to know about pending government decisions (including legislative, administrative, and policy decisions), public hearings, the opportunity to present written or oral comments and evidence, the requirement that government consider citizen comments, and the opportunity to present petitions, complaints, or grievances to administrative authorities.

In Cape Verde (art. 57) and the Gambia (art. 25(f)), the constitutions 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. This provision differs from the access to justice provisions discussed below because it provides an administrative process for registering grievances. Eritrea (art. 24) has a similar right to petition, but also provides an explicit “right to be heard respectfully by administrative officials” and “due administrative redress” for anyone “whose rights or interests are interfered with or threatened.”

Liberia and South Africa provide broad rights of public participation. South Africa’s constitution also provides for public access to and participation in the National Assembly (art. 69), the National Council (art. 72), and provincial legislatures (art. 118). Liberia’s constitution (art. 7) requires “all government and private enterprises” to

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<sup>128</sup> Rio Declaration on Environment and Development, done at Rio de Janeiro, Brazil, June 13, 1992, U.N. Doc. A/CONF.151/26 (vol. I) (1992), *reprinted in* 31 I.L.M. 874 (1992); United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done in Aarhus, Denmark, June 25 1998; Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development (draft Policy Framework and Recommendations for Further Action, distributed Sept. 8, 1999 in Mexico City). Rio Principle 10 guarantees that “each individual shall have appropriate access to information concerning the environment that is held by public authorities . . .” Article 4 of the Aarhus Convention ensures broad, affordable access to environmental information with a few limited, explicit exceptions, and no reason needs to be stated in requesting the information. Policy Recommendations 1 and 2 of the ISP address public access to information and the legal framework.

<sup>129</sup> Inter-American Court of Human Rights, Advisory Opinion OC-5/85, Series A, No. 5, para. 30 (Nov. 13, 1985); *see also* Francisco Martorell v. Chile, Case 11.230, Report No. 11/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc 7 rev., at 234 (1997); *see also* Martin & Feldman, *Access to Information*, ch. 3 (describing the 1995 Johannesburg Principles on access to environmental information).

<sup>130</sup> *See* Rio Principle 10; Aarhus Articles 6, 7, and 8 (respectively relating to public participation in specific projects or activities; programs, plans, and policies; and general rules and regulations); draft ISP Policy Recommendations 2 and 3.

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 matters.

One of the most powerful tools of public participation is the ability of the public to initiate or approve legislation. Many states in the United 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 the legislature to refer proposed amendments to the state constitution to the ballot box for voter approval.<sup>131</sup> This ballot initiative/referendum process has been used to pass legislation protecting bears and cougars from inhumane trapping in Oregon, regulating commercial hog operations in Colorado, protecting wetlands in Florida, prohibiting cyanide open pit mining in Montana, and empowering citizens to bring citizen suits to enforce water pollution laws in California.<sup>132</sup>

In the Netherlands, courts have held that a substantive constitutional right to a healthy environment necessarily includes the rights of access to information and to participate 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>133</sup> For example, a Dutch court voided a license for a nuclear power plant, where there had been insufficient public participation in the decisionmaking process leading to the license.<sup>134</sup>

Similarly in Slovenia, the Constitutional Court 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; and even then, not all the relevant material was made available. The court invalidated the long-term plan because the government had violated the villagers' right to participate in a planning process that could affect their quality of life.<sup>135</sup>

Both of these cases relied 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*, discussed above, which relied on the public's constitutional right to participate as well as the right of access to information. The public right to participate in the legislative process – as well as the administrative processes of developing and applying regulations – is still emerging, and subsequent practice will clarify its scope.

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<sup>131</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>132</sup> Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE §§ 25249.5 et seq.; see also DAVID D. SCHMIDT, *GREEN POLITICS: ENVIRONMENTAL INITIATIVES ON STATE AND LOCAL BALLOTS IN 1990* (1990).

<sup>133</sup> Verschuuren, *The Constitutional Right to Environmental Protection*.

<sup>134</sup> Council of State (May 29, 1992), 1992 MILIEU EN RECHT 477 (cited in *id.*, n. 13).

<sup>135</sup> See Milada Mirkovic & Andrej Klemenc, *Status of Public Participation Practices in Environmental Decisionmaking in Central and Eastern Europe: Slovenia*, available at <<http://www.rec.hu/REC/Publications/PPstatus/Slovenia.html>> (visited July 2, 1999).

## **D. Access to Justice**

To have meaning, constitutional rights must be enforceable. Accordingly, the ability of citizens and NGOs to enforce their constitutional environmental rights plays a significant role in whether these rights have practical effect. While the government has primary responsibility for implementing and enforcing laws (including constitutional rights), in many cases the government is unable or unwilling to act on its own. While the provisions generally empower citizens to seek recourse from the courts, it 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, as for right-to-life and some of the other procedural provisions, Benin, Burundi, and Côte d'Ivoire incorporate access to justice by reference to the Universal Declaration of Human Rights, which provides, "Every 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 . . ." (art. 7(a)). Cameroon and Djibouti have similar references that supplement their explicit access-to-justice provisions.

Many of the access-to-justice provisions are general, guaranteeing to citizens the "protection of the law" (e.g., Botswana art. 3(a)). Some constitutions provide more explicit protections, sometimes extending to appeal of any "act of the administration" (e.g., Congo art. 19; Liberia art. 26). The guaranteed processes and remedies also vary from generalized "access" to the right to present complaints, legal representation, and timeliness (e.g., Equatorial Guinea art. 13), as well as the right to administrative and/or judicial review of the complained-of act (e.g., Eritrea arts. 24(2) and 28(2)).

Additionally, three countries – Seychelles, Uganda, and Zimbabwe – grant their citizens rights that could implicate access to justice. Seychelles and Zimbabwe 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" (art. 29(g)). While these provisions do not necessarily guarantee access to justice, access may be implied: for instance, how can citizens "uphold and defend the Constitution" if they do not have redress to the courts?

### **1. Judicial Review**

Of the many constitutional access-to-justice provisions in Africa, some explicitly mention judicial review (e.g., art. 33(3)(a) of South Africa's constitution). 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 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, for that matter) is inherent in the substantive constitutional rights to life, to a healthy environment, etc. 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 the seminal 1803 U.S. case clarifying the role and powers of the judiciary – *Marbury v. Madison* – 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>136</sup> The Chief Justice amplified:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

This principle is also well-settled in Great Britain,<sup>137</sup> and a variety of civil law jurisdictions have developed a variety of legal tools, often dating back to Roman law, enabling 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 their citizens the right to seek legal redress before courts. The legal capacity to sue (or *locus standi*) is critical to effective implementation of environmental rights. Whether a person has standing determines whether they are able to go to court and seek to enforce a constitutional environmental provision. Standing is based on the idea that only people with a legal interest in a matter should be allowed access to the courts. This ensured that the case would be litigated fairly, that courts would only consider real (“live”) cases, and that courts would not be engaged in declaratory or prospective law-making. Traditionally, standing was limited to those who could bring suit to people who suffered a direct economic injury, preventing much public interest litigation. In the last three decades, many countries have taken a more expansive view on standing.<sup>138</sup> In many cases, for instance in India, standing has effectively been eliminated: any citizen can bring suit to enforce the law, particularly 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 here.

### **a. Standing in Common Law Jurisdictions • 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 this has been liberalized significantly. When constitutions explicitly

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<sup>136</sup> *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 163 2 L.Ed. 60 (1803); 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>137</sup> See *Marbury v. Madison*, 5 U.S. at 163 (citing Blackstone’s *Commentaries*, vol. 3, pp. 23, 109).

<sup>138</sup> For a thorough review of standing, see John E. Bonine, *Standing to Sue: The First Step in Access to Justice* (1999) available at <http://merlin.law.mercer.edu/elaw/standingtalk.html> (visited July 2, 1999).

provide for standing, courts have broadly interpreted the standing requirements to allow standing for citizens and NGOs seeking to protect the environment, for instance. Courts have recognized legal interests in aesthetics, recreation, and research (among others), and this recognition has enabled public interest advocates to enforce environmental rights in many contexts.

When it enacted its 1997 post-Apartheid constitution, South Africa included Section 38 on “Enforcement of Rights,” which grants standing to a wide range of parties where a right that is listed in the Bill of Rights – which includes the rights to life, a healthy environment, association, and access to information – has been or is in danger of being infringed. As a result, people 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,” or “acting in the public interest,” and associations can bring suit to protect the constitutional rights of its members.

In practice, South African courts are beginning to recognize standing for public interest litigants.<sup>139</sup> In *Van Huyssteen v. Minister of Environmental Affairs & Tourism*, trustees of a natural area challenged a proposed steel mill that would pollute an adjacent lagoon.<sup>140</sup> The South African court upheld the trustees’ standing, because the proposed industrial activity would “pollute or otherwise detrimentally affect the natural beauty and enjoyment associated with being near to the lagoon.” 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>141</sup> While acknowledging the concern of some that relaxing standing requirements might open the floodgates for 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.” The court concluded that where an explicit constitutional grant of standing did not apply, but a statute required the state to take actions to protect the environment and the public interest, public interest organizations dedicated to environmental protection should have standing at common law to apply to the court for an order compelling the state to comply with the law.

In East Africa, Tanzania has had a leading role in granting citizens access to the courts to protect the environment. In *Festo Balegele v. Dar es Salaam City Council*, the High Court of Tanzania at Dar es Salaam recognized standing for 795 plaintiffs suing the Dar city council seeking to enjoin the council and others from dumping municipal waste in a residential area.<sup>142</sup> Two years later, in the case of *Christopher Mtikila v. Attorney General*, the High Court at Dodoma issued a strong opinion in favor of broad standing.<sup>143</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. 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.” In light of

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<sup>139</sup> For a good review of standing in South Africa, see Elmene Bray, *Locus Standi: Its Development in South African Environmental Law*, in OKOTH-OGENDO & TUMUSHABE, GOVERNING THE ENVIRONMENT 123.

<sup>140</sup> *Van Huyssteen v. Minister of Environmental Affairs & Tourism*, 1996 (1) S.A.(C) 283 (Cape Provincial Div., June 28, 1995).

<sup>141</sup> *Wildlife Society of Southern Africa v. Minister of Environmental Affairs & Tourism*, Case No. 1672/95 (Transkei Supreme Court, June 27, 1996), reprinted in COMPENDIUM OF JUDICIAL DECISIONS ON MATTERS RELATED TO ENVIRONMENT: NATIONAL DECISIONS, vol. 1, 91 (1998).

<sup>142</sup> *Festo Balegele v. Dar es Salaam City Council*, Misc. Civ. Cause No. 90 of 1991 (High Court, Dar es Salaam, 1991).

<sup>143</sup> *Christopher Mtikila v. Attorney General*, Civ. Case. No. 5 of 1993 (High Court, Dodoma, 1993).

Tanzania's socio-economic conditions (including illiteracy and poverty) and history of disempowerment, the court asserted 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.

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."

Kenya has had mixed experiences in standing for 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>144</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>145</sup> These decisions have been widely criticized by Kenyan commentators, and the increasing recognition of public interest environmental standing in common law African countries – particularly in Tanzania and Uganda – may portend a broader view of standing in public interest cases in Kenya.

Non-environmental cases can provide strong precedents for standing, which could be used by environmental advocates. Section 18(1) of Botswana's constitution 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," including 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.

In *Attorney General v. Unity Dow*, the court 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>146</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. The court

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<sup>144</sup> *Maina Kamanda v. Nairobi City Council*, Civ. Case No. 6153 of 1992 (High Court, Nairobi, Dec. 8, 1992), reprinted in COMPENDIUM OF JUDICIAL DECISIONS ON MATTERS RELATED TO ENVIRONMENT: NATIONAL DECISIONS, vol. 1, 78 (1998). In two other cases, Kenyan courts have taken a more narrow view of standing, asserting that an undifferentiated interest in the environment is insufficient to grant standing. *Wangari Maathai v. Kenya Times Media Trust*, Civ. Case No. 5403 of 1989 (High Court of Kenya, Nairobi, Dec. 11, 1989); *Wangari Maathai v. City Council of Nairobi*, Civ. Case No. 72 of 1994 (High Court of Kenya, Nairobi, Mar. 17, 1994). These cases relied in part on British cases that took a narrow view of standing in public interest cases. The recent developments in the United Kingdom, discussed below, may portend a seachange in Kenyan public interest litigation, particularly in environmental matters.

<sup>145</sup> *Wangari Maathai v. Kenya Times Media Trust Ltd.*, Civil Case No. 5403 of 1989 (High Court of Kenya at Nairobi, Dec. 11, 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 challenging the transfer and development of municipal lands).

<sup>146</sup> *Unity Dow v. Attorney General*, 1992 L.R.C. (Cons.) 623 (July 2, 1992), cited in Bonine, *Standing to Sue*. In a poetic twist of fate, Unity Dow later became the first woman to sit on Botswana's High 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>147</sup> The court held that she had standing and invalidated the Act.

Outside the environmental context, Nigeria has also gradually outgrown the strict limitations on standing that it had inherited as part of its colonial legacy. Since 1981, there has been a series of Nigerian cases resulting in increasingly broad interpretations of the right of citizens and organizations to bring public interest litigation.<sup>148</sup>

Similarly, in Zimbabwe, the Supreme Court recognized standing of a human rights organization to challenge the constitutionality of death sentences.<sup>149</sup> 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.”

#### 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>150</sup> There, the plaintiff challenged the extension of a quarrying operation, and the county council challenged his standing, arguing that he owned no land or other pecuniary interest in the vicinity. Considering the importance of British precedents in African common law countries, the reasoning in this case is provided in detail. After careful consideration, the court noted that:

- (a) The threshold at the point of the application for leave is set only at the height necessary to prevent abuse. [i.e., the requirement of standing should be minimal, only enough to prevent abuse of legal process]
- (b) To have “no interest whatsoever” is not the same as having no pecuniary or special personal interest. It is to interfere in something with which one has no legitimate concern at all; to be, in other words, a busybody.
- (c) Beyond this point, the question of standing has no materiality at the leave stage.

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<sup>147</sup> See Bonine, *Standing to Sue* (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>148</sup> E.g., *Chief Isagba v. Alege*, 2 N.C.L.R. 424 (1981) (holding that Nigerian taxpayers had a sufficient interest in government observance of constitutional provisions to grant them standing); *Attorney General of Bendel State v. Attorney General of Nigeria*, 3 N.C.L.R. 88 (1987); *Abediran v. Interland Transport Ltd.*, 9 N.W.L.R. 155 (1991).

<sup>149</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).

<sup>150</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.”).

(d) At the substantive hearing “the strength of the applicant's interest is one of the factors to be weighed in the balance”; that is to say that there may well be other factors which properly affect the evaluation of whether the application in the end has a “sufficient interest” to maintain the challenge and – what may be a distinct question – to secure relief in one form rather than another.

The court then proceeded to describe 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.

The court noted that the nature of public interest litigation requires a liberal interpretation of standing, because

Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. If an arguable case of such misuse can be made out on an application for leave, the court’s only concern is to ensure that it is not being done for an ill motive.

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.”

In the United States, standing is a combination of constitutional and prudential requirements, supplemented by statutory provisions that facilitate access to the courts.<sup>151</sup> Through a series of decisions, the Supreme Court has 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>152</sup> The court has also applied a prudential test of whether the plaintiff’s asserted interest falls within the “zone of interests” that the statute sought to protect.<sup>153</sup> Finally, most environmental statutes provide an explicit grant of standing to citizens to enforce their provisions.<sup>154</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

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<sup>151</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>152</sup> E.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>153</sup> E.g., *Allen v. Wright*, 468 U.S. 737, 750-51 (1983).

<sup>154</sup> E.g., Endangered Species Act of 1973, § 11(g), 16 U.S.C. § 1540(g); see Carl E. Bruch, *Where the Twain Shall meet: Standing and Remedy in Alaska Center for the Environment v. Browner*, 6 DUKE ENVTL. L. & POL’Y F. 157, 171 n.71 (cataloguing citizen suit provisions in environmental statutes).

environmental standing.<sup>155</sup> Thus, shortly afterwards, 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>156</sup> The court held that since students' use of "the forests, streams, mountains and other resources . . . for camping, hiking, fishing, and sightseeing . . . was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on these commodities," the students established an "attenuated line of causation" sufficient to satisfy the standing requirements. While most environmental plaintiffs have met the standing requirements, in the last decade a conservative Supreme Court has steadily made it more difficult for environmental plaintiffs to bring suit.<sup>157</sup>

In contrast, courts in Australia and Canada have had some liberal cases granting standing to citizen groups in challenging private and governmental actions that can harm the environment.<sup>158</sup>

India, Pakistan, and Nepal 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 countries 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, *sua sponte*, often initiate actions to protect fundamental rights.<sup>159</sup>

The courts of India are at the forefront in recognizing standing to vindicate constitutional rights, and the persuasive influence of Indian cases has been felt throughout South Asia as well as common law countries in Africa. The Court has paid special attention to advocates seeking to

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<sup>155</sup> *Sierra Club v. Rogers C.B. Morton*, 405 U.S. 727, 734 (1972) ("Aesthetic 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 environmental protection through the judicial process."). 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 believed that "Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation." (citing Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

<sup>156</sup> *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

<sup>157</sup> For a good critique of the constitutional problems with the restrictive trend that the Supreme Court has taken with regards to standing in recent years, see Bonine, *Standing to Sue*; see also John D. Echeverria & Jon T. Zeidler, *Barely Standing*, ENVTL. F., Jul./Aug. 1999, at 21 (but also expressing hope that this trend may be about to change). The Court may be retreating from the narrow view of standing expressed by Justice Scalia. See *Friends of the Earth v. Laidlaw Environmental Services*, U.S. No. 98-822 (Jan. 12, 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).

<sup>158</sup> See Yves Corriveau, *Citizen Rights and Litigation in Environmental Law NGOs as Litigants: Past Experiences and Litigation in Canada*, in SVEN DEIMANN & BERNARD DYSSL, EDS., ENVIRONMENTAL RIGHTS: LAW, LITIGATION & ACCESS TO JUSTICE 139 (1995); Paul L. Stein, *Citizen Rights and Litigation in Environmental Law: An Antipodean Perspective on Environmental Rights*, in DEIMANN & DYSSL, at 271 (liberalization of environmental standing in Australia); see also *Australian Conservation Foundation v. Minister for Resources*, 19 L.A.D. 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).

<sup>159</sup> *E.g.*, General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khwra, Khelum v. The Director, Industries and Mineral Development, Punjab Lahore, Human Rights Case. No. 120 of 1993, 1994 S.C.M.R. 2061 (Supreme Court of Pakistan, July 12, 1994).

protect the public interests, granting broad standing in these cases.<sup>160</sup> After deciding that access to the legal system should no longer be limited to “men with long purses,”<sup>161</sup> the court has been receptive to a wide range of environmental cases: seeking to cease harmful pollution of the Ganges River, prevent air pollution that harmed the Taj Mahal, and obtain redress for a chlorine gas leak.<sup>162</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>163</sup>

In Pakistan, citizens have an explicit constitutional right to sue in the Supreme Court to vindicate constitutional rights, and the Supreme Court has held that in public interest litigation, “the procedural trappings and restrictions, precondition of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the Court.”<sup>164</sup> Similarly, the courts of Nepal and Sri Lanka permit organizations with sufficient interest in the subject matter to sue on behalf of the public interest.<sup>165</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.*, discussed above.<sup>166</sup> Of note here, the Philippine Supreme Court granted standing to Philippine children to represent themselves and future generations in a class 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.

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<sup>160</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 WISC. INT’L L.J. 57 (1994); Bonine, *Standing to Sue* (“The Supreme Court of India has largely abolished restrictions on legal standing in cases that it is willing to recognize as ‘public interest cases.’”; Section III.1 has a good review of standing law in India).

<sup>161</sup> *S.P. Gupta v. Union of India (the Judges’ Transfer Case)*, 1982 A.I.R. (S.C.) 149 (1982) (discussed in Bonine, *Standing to Sue*).

<sup>162</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; *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>163</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>164</sup> *See, e.g.*, *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khwra, Khelum v. The Director, Industries and Mineral Development, Punjab Lahore, Human Rights Case. No. 120 of 1993*, 1994 S.C.M.R. 2061 (Supreme Court of Pakistan, July 12, 1994); *In re: Human Rights Case (Environmental Pollution in Balochistan)*, Human Rights Case No. 31-K/92(Q), P.L.D. 1994 SUPREME COURT 102 (1992) (discussed in section III.B.3); *see also* Lau, *Public Interest Litigation in Pakistan*.

<sup>165</sup> *See* LEADERS, Inc. v. Godawari Marble Industries (Supreme Court of Nepal, Oct. 31, 1995); *Environmental Foundation, Ltd. v. Minister of Public Administration (Sri Lanka)*; *Nawimana Quarry Case* (Supreme Court of Sri Lanka, 1992) (class action on behalf of unrepresented residents of the area, brought under Article 126).

<sup>166</sup> *Juan Antonio Oposa v. Fulgencio S. Factoran, Jr.* G.R. No. 101083 (Supreme Court of the Philippines Aug. 9, 1993); *see also*, Antonio G.M. La Viña, *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).

In Malaysia, the courts have recognized citizens' standing to challenge a large hydroelectric project.<sup>167</sup> In *Kajing Tubek v. Ekran BHD*, the High Court upheld standing for three citizens who challenged a ministerial order exempting a dam from the environmental impact assessment (EIA) process. The court noted that although the plaintiffs were only three of approximately 10,000 people who would be affected (and therefore their injury "was not peculiar or special to the plaintiffs alone"), that "there has never been any unqualified rule of practice that forbids the making of a declaration even when some of the persons interested in the subject of the declaration are not before the court."<sup>168</sup> The court held that the plaintiffs had standing because the project would destroy their homes and land, require them to move, and destroy the forests that were an integral part of their lives. The court then required the government to comply with the EIA law.

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*, discussed above in section III.B.3, the Supreme Court held that:

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 the Constitution or the law and seek enforcement of such public duty . . .<sup>169</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."

The cases just reviewed illustrate a strong trend toward liberalized standing in public interest litigation (particularly for environmental protection) in common law countries. To be certain, some courts still adhere to a restrictive interpretation. However, the clear modern trend is toward 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, dating back to Roman law, that enable practically any citizen to protect the environment. Popular, or diffuse, actions date to Roman law, when citizens could act in their legal capacity as owners of the public domain.

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<sup>167</sup> *Kajing Tubek v. Ekran BHD*, Originating Summons No. 55-21-06-1995 (High Court, Kuala Lumpur, June 19, 1996); see also *Lonhro Ltd. v. Shell Petroleum Co. Ltd.* (No. 2), A.C. 173, 185 (1982).

<sup>168</sup> *Id.* (quoting *Ibeneweka v. Egbuna*, 1 W.L.R. 219, 226 (1964)).

<sup>169</sup> *Mohiuddin Farooque v. Bangladesh*, Civil App. No. 24 of 1995, 17 B.L.D. 1 (1997), 1 B.L.C. (A.D.) 189 (1996) (High Court Division, Special Original Jurisdiction, July 1, 1996).

In Argentina, environmental advocates developed *acciones difusas* (literally, “diffuse actions”) to enable citizens to protect the environment. Argentine advocates have used this principle to protect penguins and dolphins and ban dangerous pesticides.<sup>170</sup>

Similarly, in Colombia, environmental advocates have developed and used *acciones populares* (literally, “popular actions”) to protect the environment, as well as other common rights.<sup>171</sup> Environmental groups have used these popular actions to redress illegal tannery operations, require certain waste to be used as fuel in a biomass energy-generating facility, and remove an unsanitary solid waste dump.<sup>172</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>173</sup>

Other civil law cases, such as the Costa Rican *Chacón* case (discussed above), 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>174</sup> In *Chacón*, the court granted standing based on *intereses difusos* and allowed a child to protect individual and societal rights together, as well as suggesting 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 a remote Andean lake.<sup>175</sup> Since then, other groups have similarly established standing. And in Guatemala, courts have allowed NGOs to sue under the constitutional right to a healthy environment without showing any personal injury.<sup>176</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>177</sup> Additionally, 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 (art. 72).<sup>178</sup>

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<sup>170</sup> See, e.g., SARMIENTO, ACCIONES POPULARES at 30-31; Kattan v. Federal State (Secretary of Agriculture) (1983) (cited in Bonine, *Standing to Sue*) (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>171</sup> See, e.g., GERMÁN SARMIENTO PALACIO, LAS ACCIONES POPULARES EN EL DERECHO PRIVADO COLOMBIANO (1988). After exploring the Roman basis for the popular action, Sarmiento discusses similar mechanisms in the civil law countries of Argentina, Brazil, France, Italy, and Spain. *Id.* at 29-32.

<sup>172</sup> See <http://www.funpublico.org.co/htm/logros.htm> (visited Oct. 31, 1999).

<sup>173</sup> See generally Antonio H.V. Benjamin, *A Proteção do Meio Ambiente Nos Países Menos Desenvolvidos: O Caso da América Latina*, 0 REVISTA DE DEREITO AMBIENTAL 83 (1995); Edesio Fernandez, *Constitutional Environmental Rights in Brazil*, in BOYLE & ANDERSON, HUMAN RIGHTS APPROACHES. The REVISTA also includes a number of court cases (in Portuguese) that utilize these different legal tools.

<sup>174</sup> Regarding standing in Costa Rica, see generally Robert S. Barker, *Constitutional Adjudication in Costa Rica: A Latin American Model*, 17 *Inter-Am. L. Rev.* 249 (1986).

<sup>175</sup> Lake Chungara Case (Supreme Court of Chile).

<sup>176</sup> E.g., Fundación Defensores de la Naturaleza v. Particular.

<sup>177</sup> See Verschuuren, *The Constitutional Right to Environmental Protection*, n.22 and accompanying text (also citing B. Jadot, *Les procédures Garantissant le Droit à l’Environnement*, in AMEDEO POSTIGLIONE, ED., THE RIGHT TO A HEALTHY ENVIRONMENT 149 (1986); P.C.E. van Wijmen, *De Natuurbeschermingswet*, VMR 1988-4, Zwolle 1989, at 166); Fuhr et al., *Legal Standing for Environmental Associations in the EU*, in DAVID ROBINSON & JOHN DUNKLEY, EDs., PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW (1995).

<sup>178</sup> Drustvo Ekologov Slovenije, Case No. U-I-30/95 (Constitutional Court of Slovenia, Jan. 15, 1996).

### 3. *Financial Issues*

Attorney 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. On top of that, in some jurisdictions there is the real risk that if the suit is unsuccessful, the plaintiffs could be required to pay the fees of the defendant.<sup>179</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” (Guinea-Bissau art. 30);
- “The law assures to all the right to justice and the insufficiency of resources shall not be an obstacle to it . . .” (Madagascar art. 13); and
- “The State shall make provision [sic] to ensure that justice is not denied for lack of resources.” (Mozambique art. 100(2))

In a similar vein, Malawi (art. 46) and Namibia (art. 25(2)) 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 – including the United States (particularly for suits to protect the environment or recover money wrongfully taken from the government)<sup>180</sup> – 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. Additionally, some U.S. state courts have adopted the common law Private Attorney General Doctrine to award reasonable attorney 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]

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<sup>179</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>180</sup> *E.g.*, Clean Water Act, 33 U.S.C. § 1365(d) (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).

(3) the number of people standing to benefit from the decision.<sup>181</sup>

In this case, the Court upheld the District Court's award of attorney 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>182</sup> While the need for creative mechanisms for compensating advocates for bringing cases in the public interest remains great, many governments will probably remain cautious about encouraging litigation, particularly since much of it is directed at the government themselves.

#### **4. 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). There to be an opportunity for timely redress of the injury. The decisions of the court should be in writing and publicly accessible, and administrative and legal barriers to access to justice should be removed. The Aarhus Convention (art. 9) and the ISP incorporate these various elements into their access-to-justice provisions, as well as taking a liberal view toward judicial review and standing. While these international initiatives do not bind any African nations, they are illustrative of emerging international legal norms and practice in the area. As a result, they may be useful for African courts interpreting and applying their often broad and vague constitutional

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<sup>181</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*, 1999 MT 263, No. 98-535 (Mont. 1999), available at <http://www.lawlibrary.state.mt.us/opinions/98-535.htm> (same; adopting the *Serrano* test to find that the District Court abused its discretion in denying attorney fees to a public interest litigant protecting school trust lands).

<sup>182</sup> E.g., *D Derrick Chitala v. The Attorney-General*, 1995/SCZ/14 (unreported) (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").

guarantees of access to justice norms and practice in the area. As a result, they may be useful for African courts interpreting and applying their often broad and vague constitutional guarantees of access to justice.

## V. THE WAY FORWARD

In giving force to constitutional environmental protections, particularly for cases of first impression, the facts likely will prove to be critical. The cases discussed in this report frequently emphasize the direct human impacts, as well as the severity of environmental destruction. Thus, where mining operations have directly harmed human health (e.g., *Eurogold* and *Kendra*) or proposed dumping of radioactive waste could harm human health (e.g., *Balichostan*), courts have readily granted relief. Courts have also ordered illegal municipal waste dumps to close when the fumes and other annoyances harmed the people living nearby (e.g., *Chacón* and *Balegele*).

Once a constitutional right to a healthy environment is established, courts appear more willing to protect the environment without requiring an explicit link to human life or health. 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 at cinemas and on the radio.

In contrast, however, test cases emphasizing aesthetics rather than human health are more likely to be rejected. For example, in the U.S. state of Pennsylvania, the first case brought under a state constitutional right to environment relied upon aesthetics and history more than human health and the environment, and the Pennsylvania Supreme Court ruled that the constitutional provision could not be invoked in part because it was not self-executing.<sup>183</sup>

As environmental awareness has increased worldwide, some courts have reversed earlier decisions and made the constitutional provisions more protective of the environment and human health. Thus, the Pennsylvania Supreme Court subsequently ruled that the constitutional environmental right was self-executing.<sup>184</sup> Similarly, the Supreme Court of Bangladesh reversed an earlier decision to hold that the constitutional right to life included a right to a healthy environment, when implementation of a flood control plan seriously threatened people's lives and livelihood.<sup>185</sup> And the Indian Supreme Court reversed earlier decisions to hold that the constitutional directive principles protecting the environment were binding (e.g., *Champakam Dorairajan*).

Constitutional environmental rights appear in a wide range of countries: civil law and common law traditions, as well as emerging legal norms in Islamic traditions; as well as federal and unitary systems. It is notable that most of the cases are from developing nations, including Nepal and Bangladesh, which are among the poorest 10 nations in the world. In fact, in developing nations that lack comprehensive environmental laws and resources to implement and enforce those laws, basic environmental principles embedded in constitutions are important tools in guaranteeing that everyone has a basic right to a clean and healthy environment.

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<sup>183</sup> *Commonwealth of Pennsylvania v. National Gettysburg Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973) (while five justices refused to enjoin an observation tower from being built near Gettysburg National Military Park, the court split on whether the provision was self-executing).

<sup>184</sup> *E.g.*, *Payne v. Kassab*, 361 A.2d 263, 273 (Pa. 1976), *aff'g Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973) (holding that widening a road to encroach on a commons area violated the public trust and the state constitutional right to a healthy environment).

<sup>185</sup> *Mohiuddin Farooque v. Bangladesh*, 48 D.L.R. 1996 (Supreme Court of Bangladesh, App. Div. (Civ.) 1996).

A few African courts have applied constitutional rights to life (e.g., *Balegele* in Tanzania) and to a healthy environment (e.g., *Woodcarb* in South Africa). However, widespread implementation and enforcement of these rights is still nascent in Africa. As discussed in the context of standing, African courts increasingly recognize the valuable role of public interest litigants in ensuring constitutional rights. In addition to strengthening the capacity of environmental advocates to bring compelling environmental cases, there remains a need in many African nations to educate the judiciary on environmental issues. Additionally, strengthening of an independent judiciary is essential to the realization of constitutional rights.

Even without a particularly sensitized or independent judiciary, environmental advocates around the world have been successful in giving force to constitutional environmental rights and obligations. Faced with compelling facts, judges have required the government to act (or to stop harmful actions) to protect human health and the environment, as well as preventing private actions that infringe on people's right to a clean and healthy environment. As the breadth of successful constitutional environmental cases and jurisdictions cited in this report demonstrates, the trend worldwide is toward enforcing constitutional right to a healthy environment, right to life (including the environmental component), and the procedural rights – such as access to information and standing – necessary to realize the substantive rights. Recognizing these fundamental human rights is neither radical nor unprecedented. It is simply a matter of enforcing the highest law of the land, the constitution.

*Table 1*  
**African Constitutional Rights to Environment, Life, and Process\***

	Environmental Rights	Right to Life	Procedural Rights			
			Association	Information	Participation	Standing
Algeria (1996)		Y	Y			Y
Angola (1992)	Y	Y	Y (I?)			Y
Botswana (1966/1987)		Y	Y	Y (r)		Y
Burkina Faso (1991/1997)	Y	Y	Y	Y		Y
Burundi (1992)	Y	Y	Y (I)	Y (i)		Y (i)
Cameroon (1996)	Y	Y	Y	Y (i)		Y (+ i)
Cape Verde (1992)	Y	Y	Y	Y	Y	Y
Central African Republic (1994/1995)	? <sup>186</sup>	Y	Y (I)			
Chad (1996)	Y	Y	Y (I)			
Comoros (1992)	Y	Y	Y			
Congo (1992)	Y	Y	Y	Y		Y
Côte d'Ivoire (1990/1998)		Y (i)	Y (I)	Y (i)		Y (i)
Djibouti (1977)		Y (i)	Y	Y (i)		Y (+ i)
Egypt (1971/1980)		Y	Y (I)			Y
Equatorial Guinea (1991)	Y	Y	Y			Y
Eritrea (1997)	Y	Y	Y	Y	Y	Y
Ethiopia (1995)	Y	Y	Y (I)			Y
Gabon (1991/1994/1997)	Y	Y	Y (I)			
Gambia (1996)	Y	Y	Y		Y	Y
Ghana (1992/1993)	Y	Y	Y	Y (I)		Y

\* KEY: (I) = provision explicitly provides that the government may prescribe laws for the exercise of the right; (r) = right of access to information is the right to be free from government interference in receiving information; (i) = incorporated by reference to a convention, usually the Universal Declaration of Human Rights or the African Charter on Human and Peoples' Rights.

<sup>186</sup> Article 58: Other matters which are expressly given to it by other articles of the present Constitution are in the domain of the law:

1) regulations relative to the following matters:

- the protection of the environment, the regimes of property [*domanial*], the land [*foncier*], forestry, and mining;

	Environmental Rights	Right to Life	Procedural Rights			
			Association	Information	Participation	Standing
Guinea (1990)	Y	Y	Y			Y
Guinea-Bissau (1991)		Y	Y (l)			Y
Kenya (1969/1992)		Y	Y	Y (r)		
Lesotho (1993)	Y	Y	Y (l)			Y
Liberia (1984/1986)	? <sup>187</sup>	Y	Y		Y	Y
Libya (1969/1991)	? <sup>188</sup>	Y	Y	Y		Y
Madagascar (1992/1995)	Y	Y	Y (l)	Y (l)		Y
Malawi (1994)	Y	Y	Y	Y (l)		Y
Mali (1992)	Y	Y	Y (l)			
Mauritania (1991)		Y	Y (l)			
Mauritius (1968)		Y	Y			
Morocco (1996)		Y (i)	Y			
Mozambique (1990)	Y	Y	Y (l)	Y (l)		Y
Namibia (1990)	Y	Y	Y			Y
Niger (1996)	Y	Y	Y (l)			
Nigeria (1989)	Y	Y	Y	Y (r)		Y
Rwanda (1991)		Y	Y (l)			
São Tomé e Príncipe (1990)	Y	Y	Y			Y
Senegal (1962/1998)		Y	Y (l)	Y (r; l)		Y
Seychelles (1993)	Y	Y	Y			?
Sierra Leone (1991)		Y	Y	Y (r)		
Somalia (1979)	? <sup>189</sup>	Y	Y (l)			
South Africa (1996/1997)	Y	Y	Y	Y (l)	Y	Y
Sudan (1985/1998)	Y <sup>190</sup>	Y <sup>191</sup>	Y (l)	Y (l)		Y

<sup>187</sup> Article 7: The Republic shall, consistent with the principles of individual freedom and social justice enshrined in the Constitution, 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. All government and private enterprises shall be subject to such principles.

<sup>188</sup> Law No. 20, Article 13: Every citizen has the right to benefit from land throughout his life and the lives of his heirs through labor, agriculture and grazing to fulfill his needs within the limitations of his efforts without exploiting others. It is not permissible to deprive him from this right unless he caused the spoiling of the land or misused it.

<sup>189</sup> Article 42: 1) The land, natural marine and land based resources shall be state property.

2) The state shall promulgate a law prescribing the best methods for exploiting such resources.

<sup>190</sup> 1998 Constitution.

<sup>191</sup> *Id.*

	Environmental Rights	Right to Life	Procedural Rights			
			Association	Information	Participation	Standing
Swaziland (1968)		Y	Y			Y
Tanzania (1964/1984)	Y	Y	Y (l)			Y
Togo (1992)	Y	Y	Y (l)	Y (l)		Y
Tunisia (1991)	? <sup>192</sup>	Y	Y (l)			
Uganda (1995)	Y	Y	Y	Y (l)		Y?
Zaire/DRC (1990)	— <sup>193</sup>	Y	Y (l)	Y		Y
Zambia (1991/1996)	Y	Y	Y	Y (r)		Y
Zimbabwe (1979/1985)		Y	Y	Y (r)		Y?

<sup>192</sup> Preamble: In the name of God ... the representatives of the Tunisian people ... Proclaim the will of this people ...

– the most effective means for assuring the prosperity of the nation through economic development of the country and the utilization of its riches for the benefit of the people;

<sup>193</sup> The draft 1998 Constitution has environmental rights and duties.

*Table 2*  
**Illustrating the Temporal Evolution of African Constitutional Environmental Provisions**

<b>Countries</b>	<b>Date of Constitution</b>	<b>Environmental provision</b>
Somalia	1979	—
Sudan*	1985	—
Zimbabwe	1985	—
Botswana	1987 (Amendment)	—
Nigeria	1989	✓
Benin	1990	✓
Guinea	1990	✓
Mozambique	1990	✓
Zaire	1990	—
Namibia	1991	✓
Zambia	1991	✓
Cape Verde	1992	✓
Mali	1992	✓
Togo	1992	✓
Malawi	1994	✓
Ethiopia	1995	✓
Uganda	1995	✓
Chad Republic	1996	✓
Niger	1996	✓
Burkina Faso	1997	✓
Eritrea	1997	✓
Gabon	1997	✓
Sudan*	1998	✓
Zaire/DRC	1998 Draft Constitution	✓

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\* Sudan adopted a new Constitution in 1998, which incorporated environmental provisions (Articles 9 and 13).

*Table 3*  
**African Constitutional Environmental Duties and Rights**

	State Duty	Citizen Duty	NGO Duty	Rights to whom (specific language)
Angola	✓			All citizens
Benin	✓	✓		Every person
Burkina Faso	✓	✓	✓	Every citizen
Burundi	✓			—
Cameroon	✓	✓		Every person/every citizen
Cape Verde	✓	✓	✓	Everyone/associations
Central African R.	✓			—
Chad	✓		✓	Every person
Comoros	✓			—
Congo	✓	✓		Each citizen
Equ. Guinea	✓			State recognizes the right
Eritrea	✓			The people
Ethiopia	✓			All persons
Gabon	✓			To all
Gambia	✓			All citizens
Ghana	✓			Broad rights
Guinea				The people
Guinea-Bissau		✓		Every citizen
Lesotho	✓			All citizens
Liberia	✓			—
Madagascar	✓	✓		Everyone
Malawi	✓			The people
Mali	✓	✓		Every person
Mozambique	✓	✓		All citizens
Namibia	✓			The people
Niger	✓			Each person
Nigeria	✓	✓	✓	—
São Tomé	✓			—
Seychelles	✓	✓		Every person
South Africa	✓	✓	✓	Everyone
Sudan	✓			All future generations
Tanzania	✓			—
Togo	✓			Every person
Uganda	✓	✓		Every Ugandan
Zaire/DRC*	✓	✓		All Congolese
Zambia	✓			Broad rights

\* The 1990 Constitution of Zaire does not have any environmental rights or duties. However, the draft 1998 Constitution of the Democratic Republic of Congo contains these provisions in Articles 53 and 54.