



# Constitutional Environmental Law:

Giving Force to  
Fundamental  
Principles  
in Africa,

2nd Edition

Constitutional Environmental Law:  
Giving Force to Fundamental  
Principles in Africa

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Giving Force to Fundamental Principles in Africa*  
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**ATTACHMENT:**  
    **CD-ROM With Complete Constitutions of African States**

## 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 underutilized in Africa. Practically all constitutions of African states include substantive provisions that ensure either a “right to a healthy environment” or a “right to life,” which often is held to imply a right to a healthy environment in which to live that life. Opening courts to citizens to enforce their constitutional rights strengthens the judiciary, empowers civil society, and fosters an atmosphere of environmental accountability.

This publication explores how constitutional provisions of African states can be used to create real, enforceable environmental rights. African states have varying 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 publication highlights relevant provisions from the constitutions of 52 African countries (excluding the territories of the Canary Islands, the Madeira Islands, Reunion, Somaliland, and Western Sahara)—namely, those 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 recently concluded, ongoing, and proposed constitutional reforms in various African countries—such as Kenya, Liberia, Sierra Leone, Sudan, and Swaziland—this publication examines the opportunities that such provisions present for improving environmental governance, addressing issues of environmental and participatory rights, and ensuring implementation and enforcement.



Part I 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. Part II surveys the constitutional right to a healthy environment in Africa, and highlights cases from African countries and elsewhere that illustrate how these constitutional provisions may be given force. Part III similarly explores how courts in countries around the world have applied and extended the constitutional right to a healthy environment and how similar provisions in constitutions of African states could be used to protect environmental values. Part IV examines various constitutional procedural rights, such as access to justice through the doctrine of standing, that are essential to effective environmental protection. Part V presents some final thoughts on realizing the promise of constitutional environmental protections.

The CD-ROM attached to this publication includes the full text of the various constitutions of African states.

## 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 growing trend of constitutionalism (emphasizing the constitution as a source of binding legal obligations and rights), courts worldwide increasingly are giving force to substantive constitutional provisions.

A nation's constitution is more than an organic act establishing governmental authorities and competencies.<sup>1</sup> A constitution can also guarantee 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 heightened environmental awareness in recent decades, the environment has become more of a 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 this right. 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 substantive individual rights have not always been directly enforceable by citizens, and even now do not always create an affirmative right. However, the consistent and nearly universal trend is toward giving force to these provisions. Constitutional provisions may be used *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 citizens' rights to life and a healthy environment).

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1. See, e.g., Carl Bruch et al., *Legislative Representation and the Environment in African Constitutions*, 21 PACE ENVTL. L. REV. 119, 119-20 (2003) (identifying various roles that constitutions play in the environmental context, including: establishing governmental frameworks; defining the relationship between national and subnational authorities; providing a broad mandate to enact environmental legislation; and prescribing the terms by which legislators represent their constituencies with respect to environmental and natural resource issues).

Constitutional rights can be particularly valuable in environmental protection for many reasons. First, the frequently incomplete nature of environmental legislative and regulatory regimes means that constitutional environmental provisions are highly relevant. Even countries with advanced environmental protection systems find that their laws do not always address all environmental concerns; and this problem is more pronounced in countries that are still developing environmental laws and regulations. In both situations, constitutional environmental provisions can provide a “safety net” for resolving environmental problems that existing legislative and regulatory frameworks do not address.

Second, government agencies often view environmental concerns as secondary to other priorities, such as economic development. By referring to the environmental protections enshrined in the constitution, advocates can elevate environmental cases to the level of constitutional cases involving fundamental human rights.<sup>2</sup> Constitutional entrenchment of environmental priorities also provides a firm basis for environmental protection that is less susceptible to changing political trends. As a result, environmental values are more likely to endure, as constitutional reform usually is time-consuming, complicated, and usually requires super-majority approval. Often, such reform 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 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 legal standing to bring suit 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 coun-

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

tries, 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 in such countries may find 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 powerful tool, at that—for advocates seeking to strengthen environmental protection in a wide range of cultures and legal traditions.

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

The differing 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 nonsecular 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). In addition, legal systems based on the French civil law tradition differ from those of Spanish or Portuguese origin; and these civil law systems vary from country to country, just as common law or Islamic systems vary. Despite the differences, striking agreement exists among the differing 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).

Many of the differences between common law and civil law traditions can be traced to each nation's own historical experiences with judges.<sup>3</sup> In pre-Revolutionary France, judges tended to interpret the law in favor of the aristocracy; in England, the judges were comparatively more independent. Thus, when the new American and French constitutions were

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

drafted in the 18th century, civil law and common law countries took different paths.<sup>4</sup>

Civil law traditions—drawn from continental Europe, and the Napoleonic Code in particular—disfavor judge-made law because judges, unlike legislators, do not represent popular will, and are not elected nor accountable to the populace. Consequently, civil law systems generally eschew uncodified principles, such as nuisance, that have provided opportunities for judicial gap-filling in common law nations. In most civil law systems, only those actions or procedures explicitly provided in 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, many common law traditions—originally based on the British legal system—emphasize basic principles, which judges then apply to the facts of a particular case. These basic principles may be derived from legislation, but are often uncodified and manifest themselves through a body of “case law” interpreting and applying the principles. (In fact, although the United Kingdom has a wealth of statutes, it has no written constitution.) This flexibility has enabled common law countries to pursue environmental protection without amending their constitutions, which were drafted long before protecting the environment became a concern. In some cases, these effects have been quite creative. In the United States, the large body of federal environmental law rests upon the U.S. Constitution’s Commerce Clause, empowering the federal government to regulate matters affecting interstate commerce.<sup>5</sup> To ensure pre-

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4. *Id.* at 15-16.

5. *E.g.*, *Hodel v. Virginia Mining & Reclamation Ass’n*, 452 U.S. 264, 282 n.21, 11 ELR 20569 (1981) (holding that the U.S. Congress can regulate sources of air pollution); *United States 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. NL Indus., Inc.*, 936 F. Supp. 545, 563, 27 ELR 20130 (S.D. Ill. 1996) (holding that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) regulates activities substantially affecting interstate commerce and is therefore within Congress’ Commerce Clause power); *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003) (holding that the regulation of certain interstate species under the Endangered Species Act is a constitutional exercise of the Commerce Clause power). The precise scope of congressional authority to enact environmental

dictability 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 power stands in stark contrast to the traditional civil law perspective that judges should only apply the law, not interpret or create law.<sup>6</sup>

At the same time, civil and common law traditions have begun to merge in some respects. For instance, most scholars of civil law, as well as judges and legislators, recognize that it is impossible to write a code that will provide for all eventualities. Consequently, civil law advocates and judges increasingly look to previous judicial decisions (from their country and abroad) for “persuasive authority” when considering novel legal issues. Similarly, common law jurisdictions have been codifying an impressive volume of laws and regulations. For example, stacking all the books of the U.S. Code (the official compilation of U.S. laws) would yield a pile three meters tall, and the U.S. Code of Federal Regulations would top six meters, with probably more provisions than any civil law system, now or ever. As a matter of fact, U.S. environmental law is par-

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protections under the Commerce Clause remains undelineated. *See, e.g.,* Solid Waste Agency of N. Cook County v. Corps of Eng’rs, 531 U.S. 159, 31 ELR 20382 (2001) (holding that “isolated,” intrastate, non-navigable bodies of water unconnected to navigable waterways lie beyond the government’s regulatory authority under the Clean Water Act and noting that a contrary finding would raise “significant Constitutional and federalism questions”). On February 21, 2006, the U.S. Supreme Court heard oral arguments in *United States v. Rapanos*, 547 U.S. \_\_ (2006) (No. 04-1034), and *Carabell v. Corps of Eng’rs*, 547 U.S. \_\_ (2006) (No. 04-1384) (challenging Congress’ constitutional power to regulate wetlands that do not directly abut and have a hydrological connection with navigable waterways). The treaty-making power delegated to the president under Article II, §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 (U.S. CONST. art. IV, §3, cl. 2) also provides a basis for regulating the public lands. *Kleppe v. New Mexico*, 426 U.S. 529, 6 ELR 20545 (1976) (upholding the Wild Free-Roaming Horses and Burros Act). Still, most U.S. federal environmental laws and regulations rely on the Commerce Clause.

6. Nevertheless, there remains a healthy debate about the degree to which common law judges should merely “apply” the law, as opposed to “interpreting” or “creating” law. Whether a judge has in any particular instance created new law, or merely applied existing law, is a characterization that can vary from one observer to the next.

ticularly susceptible to the trend toward codification, as the law seeks more specificity regarding emission limits, risk analysis, and required technologies. Similarly, environmental laws and regulations in the common law countries of Africa 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 codes rather than the traditions. In this respect, Islamic traditions resemble civil law traditions, with the emphasis on applying the codified law. However, in applying the provisions, Islamic courts will consider how other courts have interpreted the provisions, in a manner more akin to common law traditions. Further, in recent years, national statutes, including environmental laws, have supplemented the basic Islamic legal codes. 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>7</sup> environmental protection has, to date, had a lower legal profile in Islamic jurisdictions, as discussed in Part II.

### *B. The Rise of Constitutionalism*

Constitutionalism emphasizes the primacy of the constitution as a source of legal rights and obligations, and empowers advocates and courts to look to the constitution as a positive source of law.<sup>8</sup> Most constitutions

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7. See Al-Hafiz B.A. Masri, *Islam and Ecology*, in ISLAM AND ECOLOGY 1, 3 (Fazlun M. Kahlid ed., 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 HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 285 (Alan E. Boyle & Michael R. Anderson eds., 1998) [hereinafter BOYLE & ANDERSON].
  8. For a variety of African perspectives on constitutionalism, see ISSA G. SHIVJI (ED.), STATE AND CONSTITUTIONALISM: AN AFRICAN DEBATE ON DEMOCRACY (1991) (particularly H.W.O. Okoth-Ogendo, *Constitutions Without*

include a set of fundamental rights, frequently termed the Bill of Rights, to be enjoyed by all citizens.<sup>9</sup> While these provisions appear to confer objective rights upon the population, courts have held that the rights are not self-executing, thus requiring implementing legislation to set the scope of the rights and the means for exercising them. Under these circumstances, citizens are sometimes unable to realize their fundamental rights if the government fails to enact implementing legislation or enacts legislation that is 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 (for whom legislation championed by the majority runs the real risk of infringing on their rights).<sup>10</sup>

In common law systems, the constitution is the “fundamental and paramount law of the nation.”<sup>11</sup> As a result, looking to the constitution as a source of fundamental rights and obligations is well-established in common law jurisdictions. However, some African common law countries have only recently incorporated binding rights into their constitutions. For example, before 1984, Tanzania’s Constitution enumerated the “rights” in the Preamble, and as a result most commentators believed 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 toward constitutionalism.<sup>12</sup> As a result, the hierarchy of laws in most na-

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*Constitutionalism: Reflections on an African Political Paradox* (ch. 1); Issa G. Shivji, *State and Constitutionalism: A New Democratic Perspective* (ch. 2); and Mahmood Mamdani, *Social Movements and Constitutionalism in the African Context* (ch. 16).

9. Cf. MERRYMAN, *supra* note 3, 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.”).
10. See, e.g., Gary C. Bryner, *Constitutionalism and the Politics of Rights*, in *CONSTITUTIONALISM AND RIGHTS* 7, 8 (Gary C. Bryner & Noel B. Reynolds eds., 1987) (“Constitutionalism has at its roots the idea of protecting minorities from majoritarian actions . . . .”); MERRYMAN, *supra* note 3, at 96.
11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
12. MERRYMAN, *supra* note 3, at 24, 136 (“The movement toward Constitutionalism in the civil law tradition can be seen as a logical reaction against



tions now begins with the constitution and is followed by statutes, regulations, and custom. Civil law countries have also 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>13</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>14</sup> Prof. John Henry Merryman observed:

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>15</sup>

In some African countries, however, judicial review—particularly of legislative acts—remains elusive. For example, Cameroon's Constitution provides that either the legislature or one-third of the members of Parliament may refer a matter to a constitutional court; however, citizens (currently) are unable to vindicate their constitutional rights because the constitution does not explicitly empower them to appeal to the constitutional court. The trend toward constitutionalism is changing this situation around Africa, as civil law countries such as Niger increasingly al-

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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.

13. MERRYMAN, *supra* note 3, at 141.

14. *See id.* at 24.

15. *Id.*

low citizens to invoke their constitutional rights in court.<sup>16</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 have been incorporated into many constitutions. In a few cases, countries such as Mozambique have invoked constitutional provisions to justify the promulgation of environmental laws. However, the general 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 faced with a matter of first impression in its own country, a court will often look to cases from other countries. While such precedents are nonbinding, they provide guidance, or “persuasive precedent,” to show how other judges have addressed the issue at hand. For instance, when considering the issue of standing in the case of *Christopher Mtikila v. Attorney General*,<sup>17</sup> the Tanzanian High Court surveyed standing cases from Canada, England, India, Nigeria, 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*.<sup>18</sup> 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

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

17. Civ. Case No. 5 of 1993 (High Court, Dodoma, Jan. 1, 1993) (unreported).

18. Case No. 1672/95 (Transkei Supreme Court, June 27, 1996), reprinted in 1 COMPENDIUM OF JUDICIAL DECISIONS ON MATTERS RELATED TO ENVIRONMENT: NATIONAL DECISIONS 91 (1998).

Zimbabwe, as well as the European Court of Human Rights.<sup>19</sup>

Thus, when courts (particularly common law courts) first interpret constitutional rights that may be termed “fundamental,” “basic,” or “human” rights, they are 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 in Africa may look favorably on the cases discussed in this publication, and consider applying these principles to cases in their own country.

#### *D. Additional Constitutional Considerations*

Some countries have comparatively concise constitutions, while others have much more detailed and lengthy ones. The more modern constitutions tend to be longer, as they frequently incorporate some new provisions, beyond the various constitutional rights and obligations that other countries have incorporated in the past. In this way, national constitutional law borrows from and builds on the constitutional law and experiences of other countries. Although the 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 traditionally not self-executing. While constitutions could serve as a defense against governmental overreaching, legislation frequently was required to implement constitutional provisions and to empower a person to invoke its protections affirmatively. With the rise of constitutionalism globally, courts increasingly view constitutions as independent sources 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

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19. Christine Mulundika v. People, 1995/SCZ/245 (Nov. 21, 1995) (unreported), available at <http://www.zamlii.ac.zm/include/search-gen.php?id=1137> (last visited May 4, 2006); see also Derrick Chitala v. The Attorney-General, 1995/SCZ/14 (unreported) (on file with authors).

conventions (such as the Aarhus Convention, discussed briefly in Part IV, below), and place them on a par with, or even above, domestic law. Binding on all Organization of African Unity (OAU) Member states, the African Charter of Human and Peoples' Rights guarantees that "[a]ll peoples shall have the right to a generally satisfactory environment favorable to their development."<sup>20</sup>

While nations regularly sign and ratify international conventions, passage of domestic legislation and its implementation often lags behind. By establishing conventions as part of a nation's law, constitutions can effectively render conventions self-executing and thereby provide yet another tool for environmental advocates. When implementing legislation is lacking, 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 an international agreement.

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 those 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 "[t]he rights enumerated in this Chapter shall not preclude other rights which ensue from the spirit of this Constitution and the principles of a society based on social justice, democracy and the rule of law."<sup>21</sup> Article 32 of Algeria's Constitution is more general, implying penumbral rights from unenumerated "fundamental" rights: "The fundamental human and citizen's rights and liberties are guaranteed."<sup>22</sup> Similarly, Article 1 of Gabon's Constitution provides that "[t]he Gabonese Republic recognizes and guarantees the inviolable and imprescriptible rights of Man, which obligatorily constrain public powers."<sup>23</sup>

Penumbral rights can enable courts to incorporate emerging fundamental human rights without requiring the court to develop a tortured in-

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20. African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986), art. 24.

21. CONST. art. 29 (1996) (Eritrea).

22. CONST. art. 32 (1996) (Algeria).

23. CONST. art. 1 (1991) (Gabon).

terpretation of an existing constitutional provision. In the United States, courts have interpreted the Ninth Amendment to the Constitution<sup>24</sup> to include a variety of unenumerated constitutionally protected rights, notably the right to reproductive choice.<sup>25</sup> In these cases, the Supreme Court has gone beyond interpreting the scope of existing constitutional provisions to establish firmly “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>26</sup>

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24. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.
  25. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (establishing a “right of privacy,” particularly regarding access to contraception for married couples); *see also id.* (Goldberg, J., concurring) (asserting that whether a putative right is a penumbral constitutional right is to be determined by “look[ing] to the ‘traditions and [collective] conscience of our people’ to determine whether a principle is ‘so rooted [there] as to be ranked as fundamental’”); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a penumbral right to choose an abortion within the penumbral privacy right).
  26. *See, e.g.*, GERALD GUNTHER, *CONSTITUTIONAL LAW* 517 n.10 (12th ed. 1991) (citing the concern of Prof. Ira C. Lupu about “the spread of ‘intellectual hemophilia,’ an ailment that accompanies excessive inbreeding of ideas”).

## 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>27</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 the 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 part examines ways in which environmental advocates and courts have given life and force to such provisions.

### *A. Islam and Environmental Rights*

Legal theorists have argued that because all major religions incorporate principles relating to the environment and imposing a duty to protect it, no differences exist between the rights-based approaches to a clean environment in secular and Islamic countries.<sup>28</sup> While the Qur'an is silent on a human right to a clean environment, the large body of Islamic environmental ethics stresses the duty of the individual Muslim to care for the natural environment.<sup>29</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>30</sup>

Nevertheless, the constitutions of most nonsecular African countries—Algeria, Egypt, Libya, Mauritania, Morocco, and Tunisia—do not contain environmental provisions. Sudan is the only exception to this general trend: Article 13 of Sudan's 1998 Constitution sets forth environmen-

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27. For an early 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).

28. Lau, *supra* note 7, at 285-86.

29. *Id.* at 286. See generally Abubaker A. Bagader et al., *Environmental Protection in Islam*, IUCN ENVTL. POL'Y & L. PAPER NO. 20 REV. (IUCN The World Conservation Union 1994); Richard Foltz, *Is there an Islamic Environmentalism?*, 22 ENVTL. ETHICS 63 (2000).

30. See Lau, *supra* note 7, at 286.

tal principles. Although it remains to be seen how Sudan's courts and government will interpret, implement, and enforce this provision, this development bodes well for the potential 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 even absent incorporation of other approaches to protection and enforcement. For example, discussing Pakistan's mixed Islamic and common law system, Martin Lau concludes:

Rather 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 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>31</sup>

Most African nonsecular countries have a comparable constitutional right to life, which could be interpreted in a similar way. This approach is explored in Part 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 one-half have constitutional environmental provisions. As civil and common law nations do not differ substantially in the text of their

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31. *Id.* at 301-02.

constitutional environmental provisions, to the extent they have such protections, provisions from civil and common law jurisdictions will be analyzed together.

### 1. Overview

At least 37 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 constitutions of African states that were last amended before 1989 generally lack explicit environmental provisions, and most constitutions of African states that were last amended after 1992 generally have environmental provisions.<sup>32</sup> Sudan, a nonsecular country, offers a clear example of this constitutional trend. Its transitional 1985 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.*”<sup>33</sup>

Not all constitutions adopted or amended after 1989 have incorporated environmental provisions. Sierra Leone’s new constitution, adopted in 1991, and Morocco’s new constitution, adopted in 1996, are both silent on environmental rights and duties. Additionally, Algeria and Guinea-Bissau amended their constitutions in 1996 but did not take that opportunity to establish constitutional environmental provisions. Other recent constitutional amendments do, however, demonstrate the broader trend toward constitutionalism. For example, this trend is reflected in the Democratic Republic of the Congo’s recent constitutional history. Zaire’s Constitution adopted July 5, 1990, was silent on environmental rights and duties, but Article 53 of the Democratic Republic of the Congo’s 2003 Constitution sets forth environmental rights and duties for citizens and the state.<sup>34</sup>

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32. 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, Oct. 1995, at 9, 412-18.

33. CONST. art. 13 (1998) (Sudan).

34. Article 53 states: “Toute personne a droit à un environnement sain et propice à son épanouissement intégral. Elle a le devoir de le défendre. L’Etat veille à la protection de l’environnement et à la santé des populations.” CONST. art. 53 (2003) (Congo).



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 have also paid special attention to problems of particular importance for them and have included constitutional provisions to address specific environmental issues. They include Benin (Articles 28 and 29—toxic and foreign waste), Chad (Article 48—toxic or polluting wastes), Congo (Articles 36 and 37—toxic, polluting, or radioactive wastes), Democratic Republic of the Congo (Articles 54 and 55—toxic, polluting, or radioactive wastes), Niger (Article 27—toxic wastes), South Africa (Article 24—right of future generations), Tanzania (Article 27—natural resources), Uganda (Article 21—water management; Article 27—pollution, parks, and biodiversity), and Zambia (Preamble—future generations). The detailed provisions on hazardous wastes in the constitutions of both the Congo (Article 36) and the Democratic Republic of the Congo (Article 54) 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, illustrating the utility of specific provisions in helping 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; or (3) vague rights and duties contained in directive principles or statements of state policy. Some constitutions of African states include environmental rights and duties in chapters titled “fundamental.” These provisions are undoubtedly 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 whose constitution contains a fundamental constitutional right to a healthy environment include Angola (Article 24), Cape Verde (Article 72), Central African Republic (Article 9), Chad (Article 47), Congo (Article 46), Democratic Republic of the Congo (Article 24), Mozambique (Article 72), and Rwanda (Article 49).

Most constitutions of African states providing for environmental rights and imposing environmental duties do not set them forth in constitutional sections designated “fundamental,” but the rights and duties nevertheless assume that status through their language and constitutional nature. In these cases, the use of certain declaratory words (such as the mandatory “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 [a] clean environment” and also imposes a duty on the state to “oversee the protection of the environment.”<sup>35</sup> Similarly, Article 27 of Benin’s Constitution provides that “every person has the right to a healthy, satisfying and lasting environment” and imposes a duty on the state to “watch over the protection of the environment.”<sup>36</sup> The preeminent status of constitutional provisions in the hierarchy of sources of law 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 located in a constitutional chapter entitled “National Objectives” or “Directive Principles,” found in the Preamble of the constitution, or, alternatively, in vaguely worded sections of the text.

The constitutions of Mali and Seychelles contain in their respective Preambles statements of commitment to the protection of the environment. However, both constitutions also include provisions guaranteeing citizens the right to live in a healthy environment in chapters entitled “Rights and Freedoms” or “Rights and Duties.”<sup>37</sup> Thus they incorporate clear statements of a binding and enforceable constitutional right. The constitutions of Cameroon and Comores also include environmental provisions in their Preambles. Although environmental provisions do not appear elsewhere in the body of these two constitutions, both do include provisions affirming that the Preamble holds a status equal to the rest of the constitution. The Preamble to the Comores Constitution specifies that it is “an integral part of the Constitution,”<sup>38</sup> and Article 65 of the Cameroon Constitution provides that “the preamble shall be part and

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35. CONST. art. 41 (1980, revised 1992, 2002) (Togo).

36. CONST. art. 27 (1990) (Benin).

37. See Article 15 of the Constitution of Mali and Article 34 of the Constitution of Seychelles.

38. CONST. pmb. (2001) (Comores).

parcel of this constitution.”<sup>39</sup> Thus it can be inferred that environmental rights set forth in the Preamble are of the same binding and enforceable nature as those contained in the body of the constitution.

The constitutions of Eritrea, Ethiopia, Ghana, Lesotho, Namibia, Nigeria, Sierra Leone, Tanzania, Uganda, and Zambia all contain environmental provisions, but they are in sections entitled “National Objectives” or “Directive Principles of State Policy.” 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>40</sup> Some commentators assert that the main purpose of these principles and objectives is to inspire legislation, rather than to confer enforceable rights.<sup>41</sup> However, the distinction between fundamental rights and policy statements is not always clear-cut. Many commentators have argued that constitutional statements of state policy principles are the “flipside” of fundamental rights since they impose enforceable obligations on a state.<sup>42</sup> The constitutionalization of environmental principles serves as an authoritative statement that the interests they represent are deserving of special protection. In fact, the constitutions of Uganda<sup>43</sup> and Ethiopia<sup>44</sup> incorporate both a fundamental right to a healthy environment and a constitutional declara-

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39. CONST. art. 65 (1972) (Cameroon).

40. See Michael R. Anderson, *Individual Rights to Environmental Protection in India*, in BOYLE & ANDERSON, *supra* note 7, at 199, 213-14 [hereinafter *Individual Rights*].

41. *E.g.*, *id.* at 213.

42. See TIM HAYWARD, *CONSTITUTIONAL ENVIRONMENTAL RIGHTS* (Oxford Univ. Press 2005).

43. Uganda’s Constitution includes detailed environmental provisions but locates these provisions in a section entitled “National Objectives and Directive Principles of State Policy.” However, in Chapter 4, entitled “Protection and Formation of Fundamental and Other Human Rights and Freedoms,” Article 39 provides that “[e]very Ugandan has a right to a clean and healthy environment.” CONST. art. 39, ch. 4 (1995, revised 2005) (Uganda).

44. Article 44 of Chapter 3 of the Constitution of Ethiopia, entitled “Fundamental Rights and Freedoms,” provides: “All persons have the right to a clean and healthy environment.” CONST. art. 44, ch. 3 (1994) (Ethiopia). Chapter 10 of the Constitution is entitled “National Policy Principles and Objectives” and contains Article 92, which provides that “the Government shall endeavor to ensure that all Ethiopians live in a clean and healthy environment,” and imposes on the government and citizens “the duty to protect the environment.” CONST. art. 92, ch. 10 (1994) (Ethiopia).

tion of environmental objectives, indicating that individual rights and state policy objectives can be complementary.

Of the 10 constitutions of African states that situate environmental provisions in constitutional chapters on “National Objectives” or “Principles of State Policies,” only those of Lesotho, Tanzania, and Zambia specify that such provisions are not judicially enforceable. Article 25 of Lesotho’s Constitution states: “The principles contained in this Chapter shall form part of the public policy of Lesotho. These principles shall not be enforceable by any court but . . . shall guide the authorities . . . in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realization of these principles.”<sup>45</sup> Similarly, 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, and Article 7(2) of Tanzania’s Constitution states that the provisions of Part II which are labeled “Directive Principles of State Policy” are “not enforceable by any court.” There is a separate provision in Tanzania’s Constitution—Article 27—that imposes on every person “the duty to protect the natural resources of the United Republic.”<sup>46</sup> Because Article 27 does not fall within Part II, it may not be covered by Article 7(2) (and thus enforceable), but the provision does not explicitly provide that the duty to protect also includes the ability to invoke the provision as a substantive environmental right or means to enforce. Article 111 of the Constitution of Zambia states that “the Directive Principles of State Policy set out in this Part shall not be justiciable and shall not thereby, by themselves, despite being referred to as rights in certain instances, be legally enforceable in any court, tribunal or administrative institution or entity.”<sup>47</sup>

The growing judicial trend with respect to these provisions has favored their enforceability 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 of the Fundamental Rights Chapter of the Indian Constitution.<sup>48</sup> These decisions have adopted a less rigid approach to enforceability. For instance, in *Sachida-*

45. CONST. art. 25 (1993) (Lesotho).

46. CONST. pt. II, art. 9(2) (1993), pt. II, art. 7(2) (1977), and pt. I, art. 27 (1993) (Tanzania).

47. CONST. art. 111 (1991) (Zambia).

48. *State of Madras v. Champakam Dorairajan*, 1951 A.I.R. S.C. 226.

*nand Pandey v. State of West Bengal*,<sup>49</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 Indian Supreme Court stated that in light of all the facts, the proposed garden hotel would actually improve the ecology of the disputed land. More importantly, 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:

When the Court is called upon to give effect to the Directive Principle and the fundamental duty, 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.<sup>50</sup>

The court in *Kinkri Devi v. Himachal Pradesh*<sup>51</sup> 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>52</sup>

Several other countries also view these constitutional principles and objectives as enforceable. In *Juan Antonio Oposa v. Factoran*,<sup>53</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.<sup>54</sup> Regarding the fundamental right to a healthful ecology, the Supreme Court of the Philippines enforced the petitioners' rights, stating, "the 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."<sup>55</sup> 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

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49. A.I.R. 1987 S.C. 1109.

50. *Id.* at 1110.

51. A.I.R. 1988 H.P. 4.

52. *Id.*

53. G.R. No. 101083 (S.C. Aug. 9, 1993).

54. *Id.*

55. *Id.*

that it is mentioned explicitly in the fundamental national 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 & Resources*,<sup>56</sup> the plaintiffs also relied on Article 16 to bring a taxpayers' suit seeking to cancel existing and future timber licenses. The Supreme Court of the Philippines 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 although the principles and objectives may be facially unenforceable,<sup>57</sup> this provision can be enforced if it is disregarded or violated. In *Prakash Mani Sharma v. Ministers of Council*,<sup>58</sup> the petitioner, relying on the Directive Principles in the Constitution of Nepal,<sup>59</sup> sought a writ of mandamus from Nepal's 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.<sup>60</sup> Despite arguments by the respondent that these principles and policies are not enforceable by any court, Nepal's Supreme Court determined that it is the duty of all (including the executive and legislature) to abide by

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56. (S.C. July 1993, unreported), reprinted in Firsty Husbani et al., *Environmental Law in Asia: An Overview of Indonesia and Some of Its Neighbors*, 1 *INDON. J. ENVTL. L.* 51, 70 (1996).

57. Article 24(1) of Nepal's Constitution reads: "The principles and policies contained in this part shall not be enforceable by any courts." *CONST. art. 24(1)* (1993) (Nepal).

58. Writ Nos. 2961 and 2052.

59. The relevant constitutional provisions are in 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." *CONST. art. 24(2)*; 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.

*Id.* art. 26(4).

60. E-mail from Prakash Mani Sharma, Pro Public, to Carl Bruch, Environmental Law Institute (July 15, 1999).

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>61</sup> the Nepali government illegally 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 Nepali Supreme Court ruled that although the Directive Principles and State Policies are not directly enforceable, the court will hold the government accountable for any decisions or actions that violate 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 the duties of the individual and state under the Directive Principles.<sup>62</sup> The question of whether the principles can be used to compel governmental action to affirmatively protect the environment remains unaddressed.

The dynamic evolution in the enforceability of these provisions, which may have seemed previously unenforceable, strengthens the tools available to the 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 and objectives, or alternatively in the Preamble. For example, Article 10 of Eritrea's Constitution, in a section on principles and objectives, 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."<sup>63</sup> Under the trend toward judicial application of constitutional environmental principles and objectives, these provisions would be binding and enforceable.

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

Although most African nations have constitutional environmental provisions, few cases have interpreted or applied them. The marked dearth of

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61. 1 Ne. Ka. Pa. 2053 (1996) 33.

62. See also *Nepal Supreme Court Rules for the Environment*, E-LAW UPDATE, Summer 1999, at 3 (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).

63. CONST. art. 10 (1996) (Eritrea).

such cases may be due to the novelty of the subject matter of these provisions, a lack of litigation by environmental advocacy groups, a lack of judicial familiarity with public interest litigation, or 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, and discusses how environmental legislation has been used in Africa to implement constitutional environmental rights.

### 1. Right to a Healthy Environment

The constitutionalization of environmental rights signals the “trumping” status of environmental concerns in relation to lesser obligations of the state and provides a means for citizens and their associations to challenge the state when it fails to meet its obligations. Notwithstanding the constitutional status of environmental rights, some commentators argue that environmental protection is inherently better suited to policy goals and concerted government-directed action than by rights-based instruments and individual claims in courts. However, 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 includes well-accepted environmental principles and mechanisms, such as environmental impact assessment (EIA), the precautionary principle, and the “polluter-pays” principle.

Of the many countries that have interpreted constitutional environmental provisions, India has the most experience.<sup>64</sup> The environmental provisions of the Indian Constitution, specifically Articles 48A (protection of the environment) and 51A (fundamental duties), both express principles of state policy. Though the application of these principles has been interwoven with the separate right to life provision, the scope of these environmental rights and duties has been interpreted and applied in three different circumstances: (1) where the cumulative effects of environmental conditions are detrimental to human health; (2) where the right to a healthy envi-

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64. See generally Martin Lau, *The Scope and the Limits of Environmental Law in India*, 4 REV. EUR. COMMUNITY & INT'L ENVTL. L. 15 (1995).



ronment implies a right to pollution-free air and water; and (3) where the right to a healthy environment relates principally to ecological balance. The diversity and breadth of the cases applying India's constitutional right to a healthy environment make the Indian jurisprudence particularly relevant to the African context, where the factual circumstances and formulation of the constitutional right vary widely.

The first application of the environmental provisions of the Indian Constitution, illustrated by *L.K. Koolwal v. Rajasthan*,<sup>65</sup> 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>66</sup>

The second line of Indian cases emphasizes 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>67</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 completely free from pollution.<sup>68</sup>

The third formulation of environmental rights in India views them as an entitlement to "ecological balance." In *Rural Litigation & Entitlement Kendra v. Uttar Pradesh*,<sup>69</sup> the Indian Supreme Court invoked the right to a "healthy environment" even though no direct link with human health had been demonstrated in the case at hand. 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 Indian Supreme Court upheld "the right of the people to live in [a] healthy environment with minimal disturbance of ecological balance" and issued an order to cease mining operations.<sup>70</sup> 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.

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65. A.I.R. 1988 Raj. 2 (Raj. H.C.).

66. *Id.*

67. Charan Lal Sahu v. Union of India, A.I.R. 1990 S.C. 1480.

68. See *Individual Rights*, *supra* note 40, at 218.

69. A.I.R. 1985 S.C. 652, 656; A.I.R. 1988 S.C. 2187.

70. *Id.* at 656; *id.* at 2187.

European courts, primarily applying civil law, have also interpreted and enforced the constitutional right to a healthy environment in a range of contexts.<sup>71</sup> In the *Protected Forests Case*,<sup>72</sup> the Constitutional Court of Hungary struck down amendments to the law on agricultural cooperatives. 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.”<sup>73</sup> 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. In a watershed decision delivered in the *Eurogold*<sup>74</sup> 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.” In addition to establishing a precedent on the enforceability of the constitutional rights to life and healthy environment, this case had the effect of broadening environmental issues in Turkey from the fields of science and technology to the realm of basic human rights.

Similarly, a number of civil law countries in Latin America also have enforced constitutional rights to a healthy environment.<sup>75</sup> In *Fundacion Natura v. Petro Ecuador*,<sup>76</sup> the Constitutional Court of Ecuador upheld a civil verdict that the defendant’s trade in leaded fuel violated a

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71. For an authoritative review, see MICHAEL BOTHE, *THE RIGHT TO A HEALTHY ENVIRONMENT IN THE EUROPEAN UNION* (2000); Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experience Abroad*, 16 HARV. ENVTL. L. REV. 1 (1992) (discussing constitutional environmental law in Western Europe and Brazil). See also José Lebre de Freitas, *A Acção Popular ao serviço do ambiente*, 1 REVISTA DE DEREITO AMBIENTAL 36 (1996).

72. 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).

73. See Stec, *supra* note 72, at 321 (author’s translation).

74. The *Eurogold* decision was delivered in Ankara on May 22, 1997. See <http://www.sierraclub.org/sierra/199711/humanrights.asp> (last visited May 2, 2006).

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

76. Case No. 221-98-RA (Constitutional Court 1998), upholding *Fundación Natura v. Petro Ecuador*, Case No. 1314 (11th Civil Court, Pichinca, Apr. 15, 1998).

congressional ban on leaded fuel, and thus violated the plaintiffs' constitutionally guaranteed right to a healthy environment. Similarly, in *Arco Iris v. Instituto Ecuatoriano de Minería*,<sup>77</sup> 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>78</sup>

In the *Trillium*<sup>79</sup> case, Chile's Supreme Court voided a timber license where the government approved an EIA without sufficient evidence to support the conclusion that the project was environmentally viable and without incorporating the conditions proposed by different specialized agencies. 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 Costa Rica, the nongovernmental organization (NGO) Justicia Para la Naturaleza (JPN) filed suit against Geest Caribbean Ltd., a transnational banana company, claiming that Geest's illegal clear-cutting 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>80</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 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, as well as expert fees.

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77. Case No. 224/90, Judgment No. 054-93-CP (Constitutional Court of Ecuador) (author's translations).

78. *Id.*

79. "Judicial Power," Supreme Court Decision No. 2.732-96 (Supreme Court of Chile, Mar. 19, 1997), Spanish version available at <http://www.elaw.org/resources/text.asp?ID=156> (last visited May 4, 2006) (the case is popularly referred to as "Trillium," the defendant logging company).

80. For a description of this case, see E-LAW UPDATE, Spring 1999, at 2 and E-LAW IMPACT: VALUING BIODIVERSITY IN COSTA RICA (1999).

In *Pedro Flores v. Corporación del Cobre, Codelco, Division Salvador*,<sup>81</sup> the Supreme Court of Chile applied Articles 19 (right to live in unpolluted environment) and 20 (legal action to enforce Article 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. In *Proterra v. Ferroaleaciones San Ramón S.A.*,<sup>82</sup> the Peruvian Supreme Court held that the constitutional right to a healthy environment belongs to the whole community, and allowed an *acción de amparo* to protect the citizens' constitutional rights even though the plaintiffs had suffered no direct damages themselves.

## 2. Environmental Duties

Constitutional environmental provisions also impose duties to protect the environment. In some instances, as in Article 20 of Nigeria's Constitution, this duty is imposed on the state and other parties explicitly. Article 20 provides: "The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria."<sup>83</sup> Sometimes, however, the duty to protect the environment is only implicit in the constitutional right to a healthy environment. Although the legal effect of such constitutionally provided duties is unclear, courts occasionally have relied upon these fundamental duties to interpret ambiguous statutes.<sup>84</sup>

The constitutional duty to protect, or not harm, the environment can be imposed upon 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. In *L.K. Koolwal*,<sup>85</sup> 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. As a result, the

81. ROL.12.753.FS.641 (Supreme Court of Chile, 1988).

82. Judgment No. 1156-90 (Supreme Court of Peru, Nov. 19, 1992).

83. CONST. art. 20 (1999) (Nigeria).

84. *Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai*, 1976 A.I.R. S.C. 1455, 1465 (India).

85. A.I.R. 1988 Raj. at 4. 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."

court held that by virtue of the duty in Article 51A(g), citizens have the right to petition the court to require the state to carry out the constitution. 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 these rights and duties also operate between private legal persons, so that one citizen could invoke the provision against another natural or legal person (“horizontal” operation),<sup>86</sup> such as a polluting company.

In developing economies, the public sector is often relatively large compared to the private sector, 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>87</sup> Where ownership of most natural resources is vested in the state and most major industries are owned and controlled by the government, violations of constitutional environmental rights and duties are frequently committed 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 (in many cases, military) 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>88</sup>

For more details on constitutional provisions creating environmental rights and duties among states and citizens and who can enforce them, Table 3 illustrates the distribution of rights and duties for each African state. Although most nations grant constitutional environmental rights to citizens, only a few explicitly impose a duty on citizens to protect the environment, and fewer yet impose that duty on public interest or non-gov-

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86. See generally Jan Glazewski, *Environmental Rights and the New South African Constitution*, in BOYLE & ANDERSON, *supra* note 7, at 177, 188.

87. E.g., *Ramana Dayaram Shetty v. International Airport Auth. of India*, A.I.R. 1979 S.C. 1628, 1647 (India).

88. See, e.g., *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1086, 1089-90 (India) (in a case arising from a gas leak, the Indian Supreme Court held that Article 32, which provides for writs against the state to require enforcement of fundamental rights, also empowers the courts to fashion remedies designed to compensate private parties for violations of those rights).

ernmental advocacy 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 potential liability of private citizens is the closest to explicit constitutional codification of the “horizontal” operation of fundamental rights clauses, although the duty may be implied from the constitutional environmental rights otherwise granted to citizens. The most comprehensive provisions of this sort are found in the constitutions of Burkina Faso, Cape Verde, Congo, Democratic Republic of the Congo, Rwanda, Seychelles, South Africa, and Tanzania. 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 as well as against the state.

For example, Article 30 of the Constitution of Tanzania provides that “[a]ny person alleging that any provision in this Part of this Chapter [Part III] or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court.”<sup>89</sup> Article 27, establishing that “[e]very person has the duty to protect the natural resources of the United Republic,”<sup>90</sup> falls within Part III of the constitution. As a result, the duty to protect natural resources is enforceable by “any person” against “any person,” including another legal or natural person.

Additionally, many constitutions of African states contain innovative provisions framing the duty of the state to protect the environment borne by the state. For example, Article 24 of the South African Constitution endows citizens with the right “to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”<sup>91</sup> Article 72 of the Constitution of Cape Verde stipulates that “to guarantee the right to the environment, it is in-

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89. CONST. art. 30 (1993) (Tanzania).

90. *Id.* art. 27.

91. CONST. art. 24 (1996) (South Africa).

cumbent on the public powers . . . to promote environmental education, the respect for the value of the environment, and the fight against desertification and the effects of drought.”<sup>92</sup>

Courts can be crucial in giving life to the constitutional environmental rights and duties, particularly where the national legislature has not enacted legislation necessary to detail the scope of these rights, or where the executive branch has failed 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.

Two Indian cases illustrate this point. In *M.C. Mehta v. Union of India (Tanneries)*,<sup>93</sup> the petitioner sought to halt the pollution of the Ganges River by tanneries and soap factories. The Supreme Court of India 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. The court’s order held:

Having regard to . . . the need for protecting and improving the natural environment which is considered to be one of the fundamental duties under the Constitution . . . it is the duty of the Central Government to direct all the educational institutions . . . to teach at least one hour in 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.<sup>94</sup>

Similarly, in *M.C. Mehta v. Union of India*,<sup>95</sup> 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. The application sought to move the Indian 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 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;

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92. CONST. art. 72 (1992) (Cape Verde).

93. A.I.R. 1988 S.C. 1115, 1126-27 (India).

94. *Id.* at 1127.

95. S.C. of India Writ Petition (Civil) No. 860 of 1991.

- (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.<sup>96</sup>

In each of these two cases, the Indian Supreme Court found that in order for the constitutional provision imposing a duty upon citizens to achieve real significance, the court needed to interpret the provision as extending correlative duties to the government, media, and educational system. The court opined that imposing a constitutional duty on ordinary citizens to protect the environment is in vain if the citizens are not knowledgeable about the subject matter. Judiciaries in African countries will need to be at least as creative if they are to give practical effect to their countries' constitutional environmental provisions.

Another tool courts have used to give force to constitutional environmental rights and duties is the obligation to conduct an EIA. In *Fundación Fauna Marina v. Ministerio de la Producción de la Provincia de la Buenos Aires*,<sup>97</sup> 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. 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 it could enforce the general constitutional environmental rights and duties found in these constitutions by imposing an obligation to conduct an EIA before issuing a permit. In Peru, the citizens' constitutional right to a healthy environment was at issue when a barge dumped petroleum residue into a lake that served as a source of drinking water and caused severe environmental damage that rendered 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 EIA of the effects on the lake.<sup>98</sup>

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96. *Id.*

97. Federal Court No. 11, Mar del Plata, Civil and Commercial Secretariat, May 8, 1996

98. *See Judge Orders Barge to Stop Polluting*, E-LAW UPDATE, Spring 1995.



Yet another tool, 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>99</sup> In the centuries since, civil law and common law countries alike have incorporated these principles, and remnants can be found in the constitutions of African states. 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.”<sup>100</sup> While the binding nature of these principles remains unclear, at the very least, they suggest a constitutional basis for the public trust doctrine in Uganda.

Traditionally, courts applied the public trust doctrine to waters and similar common material resources, and generally limited the power of the government to alter significantly the public resource for the benefit of an individual party. Prof. Joseph Sax, the preeminent author on public trust, has observed that the doctrine is generally thought to impose three duties on governments: (1) the property subject to the trust must be used only for public purposes; (2) the property should never be sold, even for fair cash; and (3) the property must be maintained for particular types of uses.<sup>101</sup> Thus, courts have applied the public trust doctrine to invalidate conflicting legislation,<sup>102</sup> to limit alteration of public resources,<sup>103</sup> to re-

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99. THE INSTITUTES OF JUSTINIAN 2.1.1 (Thomas Cooper trans. & ed. 1841).

100. UGANDA CONST. National Objectives and Directive Principles of State Policy XIII, *Protection of Natural Resources*.

101. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1970); see also Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573 (1989) (analyzing the public trust doctrine from a remedies perspective).

102. *E.g.*, *Priewe v. Wisconsin State Land & Improvement Co.*, 67 N.W. 918, 922 (Wis. 1896) (invalidating legislation authorizing the drainage of a lake for development purposes).

103. *E.g.*, *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (rescinding conveyance of the bed of Lake Michigan to a private party).

quire express legislative action,<sup>104</sup> and to identify public rights for resource access and use. In addition to air, water, and shores, U.S. commentators have argued for the application of the public trust doctrine to public lands and the wildlife these lands support,<sup>105</sup> something courts have done in Kenya and India (as discussed below).

Supreme Courts in India and Pakistan have used the public trust doctrine to protect the environment, even in the absence of plaintiffs.<sup>106</sup> In *M.C. Mehta v. Kamal Nath*,<sup>107</sup> the Supreme Court of India 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. The court held that the government had violated the public trust by leasing the environmentally sensitive riparian forest land to the motel 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.

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*,<sup>108</sup> a court held that leasing a state recreation area for “reception areas and tea rooms” was a private function and violated the public trust. The court noted that national parks are held in trust for the enjoyment and benefit of Australian citizens, including future generations, and that the government has a duty to preserve the parks in their natural state.

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104. *E.g.*, *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114, 121-23 (Mass. 1996) (requiring plain and specific legislative authorisation before a state park could be used for activities inconsistent with the original statutory reservation of the land).

105. *E.g.*, Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 J. ENVTL. L. & LITIG. 107, 107-08 (1986); Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 304, 307-15 (1980).

106. The Pakistani public trust cases are discussed *infra*, in Part 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) Khewral, Jhelum v. The Director, Industries and Mineral Development, Punjab Lahore*, Human Rights Case No. 120 of 1993, 1994 S.C.M.R. 2061 (1994).

107. 1997 1 S.C.C. 388 (India); *see also* T.N. Godhavarman Thirumulpad v. Union of India, 2 S.C.C. 267 (1997).

108. (1992) 78 L.G.E.R. 19.

Kenya has incorporated the public trust doctrine as part of its common law, applying it in *Abdikadir Sheikh Hassan v. Kenya Wildlife Service*<sup>109</sup> to review a public agency's exercise of statutory powers. In this case, the plaintiffs sought to restrain the Kenya Wildlife Service from moving endangered hirola antelope from their natural habitat to Tsavo National Park, notwithstanding the Kenya Wildlife Service's (KWS') 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."<sup>110</sup>

### 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, including *Koolwal*, *Eurogold*, and *Fundación Natura*, discussed above, courts have applied constitutional provisions where an environmentally destructive activity directly threatened people's health and life. Additionally, courts have extended the protections to purely environmental values, including aesthetic and spiritual values, such as in *Kendra* and *Fundación Fauna Marina*. In other cases, citizens and environmental groups have enforced their rights against infringement by both governmental authorities, e.g., *Protected Forests* case and *Kamal Nath*, and private industries, e.g., *Tanneries* case and *Pedro Flores*.

Although approximately 70% of all African nations have constitutional environmental provisions, few courts so far have applied them (although they have been increasingly active in interpreting and upholding domestic environmental legislation). South Africa is one country where courts have applied constitutional environmental provisions. In *Minister*

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109. Civil Case No. 2959 of 1996 (H.C.K., Nairobi, Aug. 29, 1996); *see also* Niaz Mohammed Jan Mohammed v. Commissioner of Lands, Civil Suit No. 423 of 1996 (H.C.K., Mombasa, Oct. 9, 1996) (holding that the state could not condemn private land to build a road and then allocate reserve portions to other private individuals); Commissioner of Lands v. Coastal Aquaculture Ltd., Civil Appeal No. 252 of 1996 (C.A.K., 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).

110. *Abdikadir Sheikh Hassan*, Civil Case No. 2959.

*of Health & Welfare v. Woodcarb (Party) Ltd.*,<sup>111</sup> 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. 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.

As other courts in African countries begin to apply constitutional environmental provisions, they may consider how other nations have interpreted similar provisions, particularly with respect to fundamental human rights, such as the right to a healthy environment. The cases discussed in this part arise from constitutional provisions with a variety of formulations. Nevertheless, all of the cases emphasize the fundamental nature of the constitutional right to a healthy environment. In nations where an environmental provision is found in the preamble or a section on state principles, courts frequently give force to the environmental rights. Thus, Supreme Courts in India, Nepal, and the Philippines have held that these constitutional environmental provisions establish rights enforceable by citizens and environmental advocacy groups.

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, "protected" areas, specifically areas without human habitation (excluding wildlife reserves), are more of a Western phenomenon, as there are few expanses of African land that are wholly uninhabited. Courts in African countries might 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, courts in African countries could adopt a contextual approach that takes into consideration various local factors. These factors might 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 envi-

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111. 1995 (2) S.A. 155 (NPD), discussed in Elmene Bray, *Locus Standi: Its Development in South African Environmental Law*, in *GOVERNING THE ENVIRONMENT*, *supra* note 2, at 123, 145-46.

ronment, or the propensity of the state to ignore a constitutional duty imposed upon it. Unavoidably, the courts must address the impending conflict between the strong priority for economic development paired with the duty to protect the environment on one hand and the rights of citizens on the other.

Some of the constitutions of African states that contain environmental provisions do address the tension between economic development and environmental protection. Often balancing of environmental and development concerns is accomplished through policy objectives that emphasize sustainable development and the use of the environment to promote the health, well-being, and quality of life of the people. For example, the Constitution of Ethiopia sets forth “Environmental Objectives.” It provides that “[g]overnment shall endeavor to ensure that all Ethiopians live in a clean and healthy environment,” and state that “[t]he design and implementation of programmes and projects of development shall not damage or destroy the environment.”<sup>112</sup> Similarly, the Namibian Constitution requires the state to adopt measures for the “maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future.”<sup>113</sup>

The tension between economic development and environmental protection is not insurmountable. Most of the right-to-a-healthy-environment cases so far have been brought in developing countries of Asia and Latin America—countries that face resource constraints and cultural contexts similar to those found in Africa, 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 an important opportunity for African environmental advocates to assert their fundamental right to a healthy environment.

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112. CONST. (Ethiopia).

113. CONST. art. 95, ch. 11, §(I) (1978) (Namibia).

#### 4. Legislation Implementing the Right to a Healthy Environment

In addition to providing the legal basis for cases enforcing environmental protections, constitutional provisions can expressly enable legislatures to enact environmental laws that implement these protections, e.g., Central African Republic Constitution Article 58.1. 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*,<sup>114</sup> the Supreme Court of the Philippines 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. 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.

To implement effectively the environmental rights embodied in its constitution, South Africa enacted the National Environment Management Act (NEMA) in 1998, creating a set of environmental principles that prescribe government action for the protection of the environment. NEMA defines sustainable development and requires that the public be actively involved when decisions are made that affect the environment. It also requires the government to examine all environmental impacts before proceeding with any development. NEMA has several provisions dealing with access to information pertaining to the environment and public health, and provides for public participation in environmental decisionmaking.<sup>115</sup> In addition, NEMA's guidelines establish the right of the public to be consulted before the environment can be harmed and require that women and other vulnerable and disadvantaged groups be helped to ensure their involvement in decisions about their environment.

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114. G.R. No. 110120 (Supreme Court of the Philippines, 3d Div., Mar. 16, 1994).

115. In 2000, South Africa also passed The Promotion of Access to Information Act 2000, and The Promotion of Administrative Justice Act 2000, which implement the procedural rights embodied in the South African Constitution. These rights of access to information and access to justice, which are necessary for the implementation and enforcement of the substantive right to a healthy environment, are discussed in Part IV *infra*.

In addition to South Africa, many African countries have adopted framework environmental laws.<sup>116</sup> In many cases, such framework laws implement the right to a healthy environment, whether or not one is expressly provided for in the respective constitution.

Although courts are necessary for the enforcement of constitutional rights and duties, framework environmental laws like NEMA are indispensable for the implementation of constitutional environmental provisions in statewide policies and standards for the protection of the environment.

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116. *See* 1 UNEP, COMPENDIUM OF ENVIRONMENTAL LAWS OF AFRICAN COUNTRIES (1996) and the 1997 and 1998 Supplements; Environmental Management and Co-ordination Act, 1999 (No. 8 of 1999) (Kenya); Environmental Management Act, 2004 (No. 20 of 2004) (Tanzania).

### III. The Right to Life

While many constitutions of African states contain provisions specifically granting citizens the right to a healthy environment and empowering the government to protect the environment, not all 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, although it is largely untested in Africa, another constitutional approach to environmental protection can be found in the right to life provisions contained in the constitutions of all African states. (See Table 1.) Considering the universal presence of these provisions, the right to life could constitute a pan-African mechanism for enabling citizens to protect the environment.

Typically, constitutions of African states 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, because 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 courts in Africa 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 right to life provisions in constitutions of African states 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 52 African nations examined in preparation of this publication provide that citizens have a fundamental right to life. (See Table 1). In addition to constitutional right to life provisions, some nations, such as Burundi and Nigeria, also indirectly guarantee the right to life 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>117</sup>

Although the wording of constitutional right to life provisions is remarkably diverse, most of these provisions explicitly recognize the “right to life.” For example, some constitutions simply state that “[e]very person has the right to life”<sup>118</sup> or “[t]he life . . . of every citizen shall be protected by law.”<sup>119</sup> Another provides that “[h]uman life and the physical and moral integrity of persons shall be inviolable,”<sup>120</sup> while another asserts that “[n]o person shall be deprived of life without due process of law.”<sup>121</sup> 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 pertaining to health, personal or physical integrity, human dignity, and security of the person.

While the specific provisions may use somewhat different language, they all share a fundamental concern for protecting human “life,” however defined. Only a few courts in Africa have addressed the meaning and scope of these provisions in the context of environmental protection. Thus, it is not yet possible to determine whether the different wording of these provisions will lead to different interpretations of the scope of the provisions. For example, is there a meaningful difference in scope between “every person has a right to life” (Ethiopia Article 5) and “every individual is assured of the inviolability of his person” (Madagascar Article 13)? This question will only be answered as courts decide particular cases, and the answer is likely to hinge more on both the disposition, vis-à-vis environmental protection, of the particular court interpreting the provision and the facts of the case rather than on the provision’s terminology.

Another potential issue concerning the application of these provisions by courts in Africa to the environmental context is the extent to which the

117. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. I, Resolutions, at 71, U.N. Doc A/810 (1948) [hereinafter UDHR], art. 3 (emphasis added).

118. CONST. art. 5 (Ethiopia).

119. Article 20 of the Constitution of Angola provides: “The life, freedom, personal integrity, good name and reputation of every citizen shall be protected by law.” CONST. art. 20 (1992) (Angola).

120. CONST. art. 27(1) (Cape Verde).

121. CONST. art. 15(1) (Eritrea).

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 where the nexus with individual human life is more attenuated? This question is also 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 specific words in various right to life provisions.

These questions have been addressed, to varying degrees, by courts in other countries, many of which have not only recognized that a constitutional right to life includes the right to a clean and healthy environment in which to live that life, but also have enforced the right to prevent environmental damage, particularly, but not exclusively, environmental damage that harms or could harm human health.<sup>122</sup> The following discussion surveys cases in which courts have interpreted the right to life to include the protection of environmental resources.

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

#### 1. Africa

Tanzania appears to be the first African nation whose 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 "[e]veryone has the right to exist and to receive from the society protection for his life, in accordance with the law."<sup>123</sup> The decisions in *Joseph D. Kessy v. Dar es Salaam City Council*<sup>124</sup> and *Festo Balegele v.*

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122. Constitutions of African states 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. *See, e.g.*, Table 1 (at the end of this publication).

123. CONST. art. 14 (Tanzania).

124. Civil Case No. 299 of 1988 (High Court of Tanzania at Dar es Salaam, Sept. 9, 1991).

*Dar es Salaam City Council*<sup>125</sup> illustrate the expansive interpretation of Article 14 by the High Court of Tanzania at Dar es Salaam.

In *Kessy*, the City Council of Dar es Salaam sought another extension of time to comply with a 1988 court order enjoining the city from dumping garbage in Tabata, a suburb of Dar es Salaam. The citizens of Tabata brought suit against the council, 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 the garbage 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 denying the city council's petition for an extension, 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.

The Constitution of Nigeria contains provisions ensuring both environmental protection and the right to life. Section 20 of the 1999 Constitution of Nigeria outlines provisions for the state to protect and improve the environment and safeguard the water, air and land, forest, and wildlife in Nigeria. Section 33(1) states that "every person has a right to life and no one shall be deprived intentionally of his life."<sup>126</sup> However, in *Gani Fawehinmi v. Abacha*,<sup>127</sup> the court of appeal relied on the African Charter on Human and People's Rights in its decision upholding the right to a healthy environment. Article 24 of the African Charter establishes the right to a satisfactory environment for development as a fundamental human right. The court in *Gani Fawehinmi* held that although §20 of the Nigerian Constitution is not justiciable due to its status as state policy, a Nigerian citizen can rely on Article 24 of the African Charter on Human

125. Misc. Civil Cause No. 90, 90 (High Court of Tanzania at Dar es Salaam, 1991). *Kessy* and *Balegele* are quite similar: the cases were brought by, respectively, the residents of Tabata and Kunduchi, two suburbs of Dar es Salaam, in an attempt to require the city to cease illegal dumping in their regions.

126. CONST. art. 33(1) (Nigeria).

127. (1996) 9 N.W.L.R. (pt. 475) 710; see also L. Atsegbua, *Environmental Rights, Pipeline Vandalisation and Conflict Resolution in Nigeria*, IELTR 89-92 (2001).

Rights to enforce his environmental rights. The court also explicitly recognized that environmental degradation may constitute a violation of human rights.<sup>128</sup>

## 2. Asia: Common Law

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 (Article 47)<sup>129</sup> and the natural environment (Articles 48 and 51),<sup>130</sup> in addition to extending a fundamental right to life (Article 21). Notwithstanding these other provisions relating to health and environment, Article 21 is often invoked to protect environmental resources. Article 21 states that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."<sup>131</sup> Procedurally, most of the Article 21 cases protecting the environment are brought in the Indian Supreme Court pursuant to Article 32, which grants citizens standing to sue directly in the Indian Supreme Court for violations of constitutional rights.<sup>132</sup>

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." The courts have found violations of the right to life in a variety of factual contexts. In *T. Damodhar Rao v. Special*

128. *Kokoro-Owo v. Lagos State Government*, 6 N.W.L.R. 760, 765 (1995).

129. Article 47 provides: "The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties . . ." CONST. art. 47 (1950) (India).

130. Article 48A provides: "The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country." *Id.* art. 48(A).

131. *Id.* art. 21.

132. Indian courts generally erect few barriers to standing in public interest cases. 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." *Id.* Art. 32. *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.* at 424. Indian courts are also competent to initiate, *sua sponte*, a proceeding to vindicate citizens' rights. In *M.C. Mehta v. Kamal Nath* (discussed *supra*), for example, the Indian Supreme Court itself initiated a proceeding against developers who sought to build in an ecologically sensitive area.

*Officer, Municipal Corp. of Hyderabad*,<sup>133</sup> 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>134</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 its ruling, 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 right to life provision in Article 21 of India's Constitution. 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.<sup>135</sup>

In *Vellore Citizens' Welfare Reform v. Union of India*,<sup>136</sup> the Indian Supreme Court found that tanneries in the state of Tamil Nadu violated citi-

133. A.I.R. 1987 A.P. 171.

134. *Id.* at 181.

135. CONST. art. 21 (India).

136. A.I.R. 1996 S.C. 2715.

zens' right to life by discharging untreated effluents into agricultural areas and local drinking water supplies.<sup>137</sup> The discharges rendered thousands of hectares of agricultural land either partially or totally unfit for cultivation and severely polluted the local drinking water. In granting the petitioners' requested relief, the court relied on the idea of sustainable development, and the "precautionary" and "polluter-pays" principles and considered them integral to an interpretation of the Article 21 constitutional mandate to protect and improve life. The court defined the precautionary principle to mean that (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 court defined the polluter-pays principle 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 the victims of pollution but also the cost of restoring the environmental degradation.<sup>138</sup>

Applying these principles to the facts of the case, the court ordered more than 900 tanneries operating in Tamil Nadu to "compensate[e] the affected persons . . . and also [pay to] restor[e] the damaged environment."<sup>139</sup>

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 that "[n]o person shall be deprived of life or liberty save in accordance with law."<sup>140</sup> In addition, all three countries share liberal rules with regard to standing.<sup>141</sup>

The courts of these three countries have invoked the right to life in a variety of factual contexts. In *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewral, Jhelum v. Director, Industries*

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137. *Id.* at 2716, 2721-22, 2726.

138. *Id.*

139. *Id.*

140. CONST. art. 9 (Pakistan); CONST. art. 32 (Bangladesh); CONST. art. 12(1) (Nepal).

141. *See infra* Part IV.

*and Mineral Development, Punjab, Lahore*,<sup>142</sup> the Supreme Court of Pakistan found an imminent violation of the right to life where citizens' water supplies were in danger of being polluted by nearby mining operations. The court held:

[W]here the 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.<sup>143</sup>

The court ordered the mining companies to take specific measures to prevent pollution of the drinking water, including the relocation of their operations. The court also appointed a commission with both 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. Finally, the government agencies involved were ordered not to grant any new mining licenses or to renew old ones without leave of court.

In the case of *In re Human Rights Case (Environmental Pollution in Balochistan)*,<sup>144</sup> the Supreme Court of Pakistan itself initiated a proceeding against industries seeking to dump radioactive waste in a coastal area. 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 about any allotment of land the full identity of the applicant and other information must be supplied to the court, and that any lease or allotment contract must specify that the land may not be used for dumping waste.

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142. Human Rights Case No. 120 of 1993, 1994 S.C.M.R. 2061.

143. *Id.* at 1446.

144. 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) (discussing the court's ruling in the case).

In *LEADERS, Inc. v. Godawari Marble Industries*,<sup>145</sup> Nepal's Supreme Court held that a marble mining operation contaminating the water supplies and the soil violated nearby residents' constitutional right to life. The petitioners alleged that Godawari Marble Industries had caused serious environmental degradation to the Godawari forest and its surroundings. They further alleged that the industries' activities 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 "[s]ince [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 then 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."<sup>146</sup>

### 3. Latin America: Civil Law

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

Colombian courts have applied their constitutional right to life<sup>147</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. FUNDEPUBBLICO, a Colombian NGO, has brought many cases to protect Colombians' constitutional right to health and life. In *FUNDEPUBBLICO v. SOCOPAV, Ltda.*,<sup>148</sup> the group filed an action requesting relocation of an asphalt

145. (Supreme Court Nepal, Oct. 31, 1995).

146. *Id.*

147. Article 11 of the Colombian Constitution states: "The right to life is inviolate." CONST. art. 11 (1991) (Colombia).

148. Expediente No. T-101, Sentencia No. T-415 (Republica de Colombia, Corte Constitucional, June 17, 1992).



plant located in an urban area. 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 *FUNDEPUBBLICO v. Compañía Marítima de Transporte Croatia Line y Comar S.A.*,<sup>149</sup> 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. In *Organización Indígena de Antioquia v. Corporación Nacional de Desarrollo del Chocó*,<sup>150</sup> 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. Other right to life cases brought by FUNDEPUBBLICO have addressed, for example, tannery wastes, unsanitary waste dumps, and a highly polluting asphalt factory.<sup>151</sup>

In *Fundación Natura v. Petro Ecuador*, an Ecuadorian environmental NGO brought suit against both 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>152</sup> The court ordered the agency to assess the damage and to compensate the community, holding 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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149. Expediente No. 076 (Tribunal Superior del Distrito Judicial de Santa Maria, Colombia, Sala Civil, July 22, 1994).

150. Expediente No. T-13636, Sentencia No. T-380/93 (Republica de Colombia, Corte Constitucional, Sept. 13, 1993).

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

152. Expediente No. 221-98-RA (Constitutional Court 1998) (upholding *Fundación Natura v. Petro Ecuador*, Expediente No. 1314 (11th Civil Court, Pichinca, Apr. 15, 1998)).

In *Carlos Roberto Mejia Chacón v. Municipalidad de Santa Ana*,<sup>153</sup> the Costa Rican 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. Interestingly, the *Chacón* court relied on the right to life and not the right to a healthy environment recognized by the Costa Rican Constitution.

*C. Advancing African Environmental Protection Through the Right to Life*

These cases demonstrate that constitutional right to life provisions can serve as effective tools for strengthening 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 both an express constitutional right to a healthy environment and comprehensive environmental statutory and regulatory systems, or, alternatively, lacks adequate remedies under those systems, the constitutional right to life becomes all the more important.

The 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 of the courts in these other jurisdictions can provide persuasive authority for similarly expansive interpretations of the right to life by African courts.

In countries that have interpreted the constitutional right to life as encompassing environmental protection, nearly all the courts 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, they have found that the right to life protects the environment in which people live and the environmental resources upon which they 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 are the most common scenarios 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

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153. Sentencia No. 3705-93 (Sala Constitucional de la Corte Suprema de Justicia, San Jose, Costa Rica, July 20, 1993).

harmful air contaminants near residential areas (e.g., *Kessey*), or the dumping of radioactive waste in coastal areas (e.g., *Balichostan*) have been found to violate the right to life. In addition, a government's failure to perform regulatory functions that protect health or environment has also been found to violate the right. Government actors failed to implement urban sanitation measures in *Kessey* and *L.K. Koolwal*. 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 has been found to violate the right (e.g., *T. Damodhar Rao*).

Litigants seeking vindication of a right to life can obtain both injunctions and compensation. 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, and carry out specific tasks to alleviate an ongoing harm.

However, the ability to bring suit is vital to vindicating any right, including the right to life. The jurisdictional rules regarding who may bring suit in which courts can be just as important as the fundamental right itself. In the countries whose courts have interpreted constitutional right to life provisions, liberal standing rules typically apply for cases involving alleged 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 part.

## IV. Procedural Rights

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

The rights discussed in this part fall generally into four categories: (1) freedom of association; (2) access to information; (3) public participation in decisionmaking; and (4) access to justice (including recognition of *locus standi* and explicit recognition of public interest litigation). Other rights—such as the freedom of opinion, expression, and the press—can be relevant to environmental advocacy and governance and, thus, merit further investigation.

### *A. Freedom of Association*

Freedom of association is fundamental for environmental advocacy. By forming and participating in NGOs, individuals can come together to more effectively advocate for environmental protection.<sup>154</sup> With the support of an organization and the corresponding strength in numbers, peoples' fears of retaliation can be allayed and they 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; and many people speaking together 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 for them to act on an issue individually. Finally, associations can focus on a particular 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.

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154. *See, e.g., National Ass'n for the Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . .").

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,<sup>155</sup> suggest that this right might be limited to professional or trade unions, but this is distinctly a minority position.

The breadth and strength of a constitutional right of association may depend upon national laws that prescribe the terms for its exercise. Approximately 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 otherwise granted in the provision). The overwhelming number of claw-back clauses are 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 fix limits on the right, in practice those limits may not be much more than the reasonable limitations implied in other kinds of provisions.<sup>156</sup>

Notwithstanding the recognized value of and need for the right of association, many African organizations operate with the fear that they will be deregistered if they criticize the government. For example, Zimbabwe had a Private Voluntary Organisations (PVO) Act, which granted the Minister of Public Service, Labour, and Social Welfare the power to suspend the entire executive board of an NGO without providing a reason and then to appoint a new executive board until the next election. In 1995, the minister suspended Sekai Holland, Chairperson of the Association of Women's Clubs, as well as 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 on their civil rights without affording them a fair hearing,<sup>157</sup> un-

155. Article 33 of the Constitution of Angola provides: "The People's Power Assemblies are the highest organs of the State at each politico-administrative level in the country. The People's Power Assemblies are constituted by elected deputies who shall answer to the people in the exercise of their mandate." CONST. art. 33 (Angola).

156. *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).

157. Article 18(9) of the Constitution of Zimbabwe states: "Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations." CONST. art. 18(9) (1979) (Zimbabwe).

constitutionally infringed on their freedom of expression,<sup>158</sup> and unconstitutionally infringed on their right to assemble freely and associate with others.<sup>159</sup> Zimbabwe's Supreme Court agreed, holding §21 of the PVO Act unconstitutional and reinstating the NGO's executive board.<sup>160</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 U.S. Supreme Court has particularly emphasized these constitutional protections in cases where a group advances unpopular ideas and where government constraints could chill the exercise of the right of association. Thus, for instance, civil rights groups did not have to disclose their membership lists, where doing so would substantially restrain the members' exercise of their right to freedom of association,<sup>161</sup> and the courts have granted similar First Amendment protections for associations litigating political and non-political topics.<sup>162</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.

### *B. Access to Information*

To advocate effectively for environmental protection, the public must have access to relevant information. Civil society needs to know of environmental threats and the sources, and root causes, of those threats. Although access to information is a relatively new norm, already 34 African

158. "No person shall be hindered in his enjoyment of his freedom of expression . . ." *Id.* art. 20(1).

159. "No person shall be hindered in his freedom of assembly and association . . ." *Id.* art. 21(1).

160. Reported in Simeon Mawanza, "Supreme Court Saves Zimbabwean NGOs," NETWORK OF SOUTHERN AFRICAN LEGAL AID & LEGAL ADVICE NGOs NEWSLETTER (1997).

161. *E.g.*, National Ass'n for the Advancement of Colored People v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (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.").

162. *E.g.*, National Ass'n for the Advancement of Colored People v. Button, 371 U.S. 415, 428-29, 437-38 (1963) (discussed *infra* Part IV.D.); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 8 (1964).

countries have constitutional provisions addressing access to information, and 16 explicitly grant citizens the right of access to information held by the state. Some of these countries incorporate access to information through reference to the Universal Declaration of Human Rights or the African Charter on Human and Peoples' Rights.<sup>163</sup>

Cape Verde, Congo, Malawi, South Africa, and Uganda have some of the stronger constitutional provisions on access to information. Section 32(1) of South Africa's 1996 Constitution (within its Bill of Rights) guarantees to all "the right of access to any information held by the state; and . . . held by another person and that is required for the exercise or protection of any rights." When read in conjunction with the constitutional rights to a healthy environment<sup>164</sup> and life,<sup>165</sup> §32(1) ensures the right to the information necessary for environmental advocacy.

Although South Africa has yet to develop jurisprudence interpreting this provision, it has been utilized. For example, 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 §32, and the ministry and refineries produced the requested information before the case could be filed.<sup>166</sup> In *Van Huyssteen v. Minister of Environmental Affairs & Tourism*,<sup>167</sup> a case interpreting a similar right of access to information in §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. Although the right of access is not absolute, the court

163. Article 9 of the Banjul Charter provides: "Every individual shall have the right to receive information" (UDHR, art. 19 (comparable provision)). See also Connie Ngondi-Houghton et al., *THE STATE OF FREEDOM OF INFORMATION IN KENYA* 12-14 (1999).

164. Section 23 of the Constitution of South Africa states: "Everyone has the right to an environment that is not harmful to their health or well-being . . ." CONST. §23 (South Africa).

165. "Everyone has the right to life." *Id.* §11.

166. Personal Communication from LRC, to Carl Bruch, Environmental Law Institute (1999).

167. 1996 (1) S.A.L.R. 283 (C).

held that plaintiffs' access to the documents was required "for the purpose of protecting their rights."<sup>168</sup>

As in South Africa, Article 19 of the Constitution of Congo provides for access to information held by the government and by private parties:

[F]reedom of information and of communication is guaranteed. Censorship is prohibited. Access to sources of information is unencumbered. Every citizen has the right to information and communication. Activities with respect to these domains are exercised in respect of the law.<sup>169</sup>

Although its right of access to information is "subject to any Act of Parliament," Malawi provides that "every person shall have the right of access to all information held by the State or any of its organs at any level of government in so far as such information is required for the exercise of his rights."<sup>170</sup> Uganda similarly provides for wide access to state-held information, "except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person."<sup>171</sup>

Additionally, many constitutions specify that national legislation may define the parameters of access to information. As discussed in the context of the right of association, these implementing laws need to be "reasonable" so as to preserve the meaning of the right. For example, §32(2) of South Africa's Constitution states that "legislation . . . may provide for reasonable measures to alleviate the administrative and financial burden on the state."<sup>172</sup>

In seven countries (Guinea, Kenya, Madagascar, Nigeria, Sierra Leone, Zambia, and Zimbabwe), citizens have the constitutional *freedom* to receive information free from government interference. A typical provision would guarantee citizens the right to "receive and impart ideas and information without interference."<sup>173</sup> 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."<sup>174</sup> Innovative advocacy may

168. *Id.* at 300.

169. CONST. art. 19 (Congo).

170. CONST. ch. 4, art 37 (Malawi).

171. CONST. ch. 4, art. 41, §1 (Uganda).

172. CONST. §32(2) (South Africa).

173. *E.g.*, CONST. art. 38(1) (Nigeria).

174. CONST. art. 8 (2001) (Senegal).



be able to draw out a *right* to receive information from this freedom but, until this theory is tested in court, the extent to which these provisions grant citizens a right to demand state-held information remains unclear.

The Indian Supreme Court has held that a constitutional right of access to information is implicit in the constitutional rights to free speech and expression, as well as in the right to life.<sup>175</sup> In the 1982 landmark case of *S.P. Gupta v. President of India*,<sup>176</sup> the Indian 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>177</sup>

Subsequently, in 1988, the Indian Supreme Court held that access to information, or the “right to know,” was a basic public right and essential to developing public participation and democracy.<sup>178</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>179</sup>

In the United States, access to information is generally governed by the statutory Freedom of Information Act,<sup>180</sup> but the U.S. Supreme Court has also interpreted the constitutional freedoms of speech and the press to include a constitutional right of access to information because

175. See generally Robert Martin & Estelle Feldman, *Access to Information in Developing Countries* ch. 8 (Transparency International Working Paper) (relating to India), [http://www1.transparency.org/working\\_papers/martin-feldman/index.html#download](http://www1.transparency.org/working_papers/martin-feldman/index.html#download) (last visited May 2, 2006).

176. A.I.R. 1982 S.C. 149.

177. *Id.* at 234; see also *Bombay Env'tl. Action Group v. Pune Cantonment Bd.*, 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).

178. *Reliance Petrochemicals v. Indian Express* (1988) S.C.C. 592.

179. *L.K. Koolwal v. Rajasthan*, A.I.R. 1988 Raj. 2, 4.

180. 5 U.S.C. §552.

these protections all “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”<sup>181</sup> While this right has generally focused on public access to criminal proceedings,<sup>182</sup> some justices have argued for a broader right to information.<sup>183</sup>

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

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181. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

182. *See generally id.* at 581 (holding that “[a]bsent an overriding interest articulated in the findings, the trial of a criminal case must be open to the public.”); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604, 607 (1982) (voiding a state law that required the exclusion of the press and public from the courtroom during the testimony of a minor who was allegedly a victim of a sexual offense, the Court noted that the First Amendment rights seek to “protect the free discussion of governmental affairs” and thereby “ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government;” the Court held that access may only be denied if such a denial is “necessitated by a compelling governmental interest and is narrowly tailored to serve that interest”) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (holding the right of public access to criminal hearings extends to the voir dire process); *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).

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

cial remedies, SPDA filed a habeas data motion with the Peruvian Supreme Court, which granted the motion and ordered the ministry to provide the requested documents.<sup>184</sup>

In addition to national precedents, the international community has increasingly recognized a right of access to environmental information. Broad and affordable access to environmental information 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 Participation in Decision Making for Sustainable Development (ISP).<sup>185</sup> In dicta, the Inter-American Court of Human Rights also has promoted the “collective right to receive any information whatsoever.”<sup>186</sup> The increased international recognition of a right to environmental information further supports a liberal interpretation of constitutional rights to information.

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184. *Sociedad Peruana de Derecho Ambiental v. Ministerio de Energía y Minas (Habeas Data)*, Expediente No. 1658-95, Dictamen Fiscal No. 122-96 (Sala de Derecho Constitucional y Social, June 19, 1996).

185. United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, June 13, 1992, U.N. Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874 (1992); U.N. Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25 1998, U.N. Doc. E/ECE/1366, U.N. Sales No. E/E/R.98.II.E.27 (1999) [hereinafter Aarhus Convention]; Organization of American States Inter-American Council for Integral Development (OAS CIDI), Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development, CIDI/RES. 98 (V-o/00), OEA/Ser.W/II.5, CIDI/doc.25/00 (20 April 2000), adopting Organization of American States, Unit for Sustainable Development and Environment, Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development, December 1999. 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.

186. Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalists* (arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, 100; see also Case 11.230, Inter-Am. C.H.R. 234, OEA/ser.L/V//II.95, doc. 7 rev. (1997); Martin & Feldman, *supra* note 175, ch. 3 (describing the 1995 Johannesburg Principles on access to environmental information).

### *C. Public Participation in Decisionmaking*

Another emerging environmental right is the right of the public to participate in government decisions that could affect the environment. No only do the Rio Declaration, the Aarhus Convention, and the ISP all provide for public participation in environmental decisionmaking processes,<sup>187</sup> but also a small but increasing number of national constitutions have incorporated comparable 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.

The constitutions of Cape Verde,<sup>188</sup> the Democratic Republic of the Congo (Article 27),<sup>189</sup> and Gambia,<sup>190</sup> allow citizens to petition “public authorities” or “the Executive” to protect their rights and, in the case of Cape Verde, to protest abuse of power. These provisions differ from the access to justice provisions discussed below in that they provide for an administrative process to register grievances. Eritrea’s Constitution (Article 24) has a similar right to petition, but also recognizes an explicit “right to be heard respectfully by the administrative officials concerned” and provides for “due administrative redress” for anyone “whose rights or interests are interfered with or threatened.”<sup>191</sup>

Liberia and South Africa provide broad rights of public participation. South Africa’s Constitution also provides for public access to and partici-

187. See Rio Principle 10; Aarhus Convention arts. 6, 7, and 8 (respectively relating to public participation in specific projects or activities; programs, plans, and policies; and general rules and regulations); ISP Policy Recommendations 2 and 3.

188. Article 57 of the Constitution of Cape Verde states: “Every citizen shall have the right to present, in writing, individually or collectively, to the public authorities, petitions, complaints or claims for the protection of his rights or against illegalities or abuse of power in accordance with the law.” CONST. art. 57 (Cape Verde).

189. Article 27 of the Constitution of Democratic Republic of the Congo states (in French): “All Congolese have the right to submit, individually or collectively, a petition to the public authorities and to receive a response within three months. No one can be the object of incrimination, in whatever form, for having taken such an initiative.” CONST. art. 27 (Congo).

190. Article 25(f) of the Constitution of Gambia establishes “freedom to petition the Executive for redress of grievances . . . .” CONST. art. 25(f) (1970) (Gambia).

191. CONST. ch. 3, art. 24 (Eritrea).

pation in the National Assembly,<sup>192</sup> the National Council,<sup>193</sup> and provincial legislatures.<sup>194</sup> Article 7 of Liberia's Constitution requires "all government and private enterprises" to

manage the national economy and the natural resources of Liberia in such manner as shall ensure the maximum feasible participation of Liberian citizens under conditions of equality as to advance the general welfare of the Liberian people and the economic development of Liberia as a whole.<sup>195</sup>

In *Director: Mineral Development v. Save the Vaal Environment*,<sup>196</sup> South Africa's Supreme Court of Appeals held that before a permit is given for mining, the government must be prepared to listen to the views of people concerned about potential environmental impacts. The kind of environmental concerns that can be raised include destruction of plants and animals, pollution, loss of jobs and small businesses, and property values. Governments must ensure that development that meets present needs does not compromise the needs of future generations.

Other African countries such as Burundi, Rwanda, and São Tomé e Príncipe guarantee citizens the right to participate in the direction and development of public affairs, whether directly or through representatives freely chosen. While these sorts of provision are very broad, they 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 U.S. states have constitutional provisions that enable their citizens to prepare draft legislation

192. Section 69(d) of the Constitution of South Africa provides: "The National Council of Provinces or any of its committees may . . . receive petitions, representations or submissions from any interested persons or institutions." CONST. §69(d) (South Africa). For a general review of ways to develop South African public participation in environmental decisionmaking, see Angela Andrews, PUBLIC PARTICIPATION AND THE LAW (1999).

193. Section 72 of the Constitution of South Africa state: "The National Council of Provinces must: (a) facilitate public involvement in the legislature and other processes of the Council and its committees; and (b) conduct its business in an open manner, and hold its sittings and those of its committees, in public . . ." *Id.* art. 72.

194. "A provincial legislature must . . . facilitate public involvement in the legislative and other processes of the legislature and its committees . . ." *id.* ch. 6, tit. 1, §118.

195. CONST. art. 7 (1986) (Liberia).

196. Case No. 133.98 (Supreme Ct. of Appeals of South Africa, Mar. 12, 1999).

that the general public adopts or rejects through a popular referendum, and most states similarly require that the legislature refer proposed amendments to the state constitution to the ballot box for voter approval.<sup>197</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>198</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>199</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 up to the issuance of the license.<sup>200</sup>

Similarly, the Constitutional Court of Slovenia invalidated a long-term development plan, which provided for quarrying operations near a village that would impact the quality of life. The government had presented the draft changes to the development plan at only one public hearing, and that was at the regional center; 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>201</sup>

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197. 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).

198. See, e.g., Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE §§25249.5 to 25249.13 (West 1991 & Supp. 1999) (passed as Proposition 65); see also DAVID D. SCHMIDT, *GREEN POLITICS: ENVIRONMENTAL INITIATIVES ON STATE AND LOCAL BALLOTS IN 1990*, at 15 (1990).

199. Jonathan Verschuuren, *The Constitutional Right to Protection of the Environment in the Netherlands* (on file with authors).

200. Council of State (May 29, 1992), 1992 MILIEU EN RECHT 477, cited in SCHMIDT, *supra* note 197 n.13.

201. See Milada Mirkovic & Andrej Klemenc, *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* (Regional Env'tl. Center for Cent. & E. Eur. Ed., 1998), available at [http://www.rec.org/REC/Publications/PPDoors/CEE/PPDoors\\_CEE.pdf](http://www.rec.org/REC/Publications/PPDoors/CEE/PPDoors_CEE.pdf) (last visited May 1, 2006).

In both of these cases, the decisions rely on the constitutional right to a healthy environment. One of the few cases to interpret a constitutional right to participate is the Peruvian case of *Sociedad Peruana de Derecho Ambiental v. Ministerio de Energía y Minas*,<sup>202</sup> 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 the scope of these rights.

#### *D. Access to Justice*

Constitutional rights are meaningful only if they are enforceable. Accordingly, the ability of citizens and NGOs to enforce their constitutional environmental rights is critical in ensuring that these rights have practical effect. While the government has the primary responsibility for implementing and enforcing laws, including constitutional rights, the government is often unable or unwilling to act on its own. When the government fails to protect constitutional rights, it is important that constitutional provisions generally empower citizens to seek recourse from the courts. 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 three-quarters of African nations provide a constitutional right of access to justice. While most of these provisions are explicit, similar to right to life and other procedural safeguards, the constitutions of Benin, Burundi, Central African Republic, and Côte d'Ivoire incorporate access to justice by reference to the African Charter of Human and People's Rights. The charter provides that "[e]very individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts violating his/her fundamental rights . . . ."<sup>203</sup> Cameroon (Preamble), Djibouti (Preamble), Congo (Article 18), Guinea (Preamble), Mali (Preamble), Niger (Preamble), and Rwanda (Preamble) have similar references that supplement their explicit access to justice provisions.

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202. See *supra* note 184.

203. See Banjul Charter, *supra* note 20, art. 7(1)(a).

Many of the access to justice provisions are quite general, guaranteeing citizens the “protection of the law.”<sup>204</sup> Some constitutions provide more explicit protections, occasionally extending to the appeal of “any act” of the “administration” or the “government.”<sup>205</sup> The guaranteed processes and remedies also vary, ranging from generalized “access” to the specific rights to present complaints, obtain legal representation, and enjoy timeliness,<sup>206</sup> to the right to administrative and judicial review of the complained-of act.<sup>207</sup>

Additionally, four countries, Democratic Republic of the Congo, Seychelles, Uganda, and Zimbabwe, grant their citizens rights that could implicate access to justice. The constitutions of Democratic Republic of the Congo (Article 12), Seychelles (Article 27(1)), and Zimbabwe (Article 18(1)) guarantee their citizens the right to equal protection under the law. Seychelles (Article 29(g)) guarantees public judicial processes, and Uganda requires its citizens to “uphold and defend the Constitution.”<sup>208</sup> 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, such as those found in South Africa and Angola, explicitly mention judicial review.<sup>209</sup> Those that do not men-

204. *E.g.*, CONST. art. 3(a) (1965) (Botswana).

205. *E.g.*, Article 19 of the Constitution of Congo provides: “Any citizen subject to prejudice by an act of the administration shall have the right to judicial recourse.” CONST. art. 19 (Congo). Article 26 of the Constitution of Liberia states: “[A]nyone injured by an act of the Government . . . shall have the right to bring suit for appropriate redress.” CONST. art. 26 (Liberia).

206. *E.g.*, Article 13(i) of the Constitution of Equatorial Guinea enables people to “present complaints and petitions to the authorities.” CONST. art. 13(i) (1991) (Equatorial Guinea).

207. *E.g.*, CONST. ch. III, art. 24, §2, art. 28, §2 (Eritrea).

208. UGANDA CONST. ch. 4, art. 41 (Uganda).

209. See, e.g., §33 of the Constitution of South Africa, which provides:

Everyone has the right to administrative action that is lawful, reasonable and procedurally fair . . . National legislation must be enacted to give effect to these rights, and must provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.



tion judicial review usually assert that the law should be “accessible” and that citizens are guaranteed protection of their fundamental rights. For citizens to access the courts to protect their fundamental rights, judicial review and the power to order a remedy are necessarily implied.

In countries without an explicit access to justice provision in their constitution, judicial review and standing, for that matter, are inherent in the substantive constitutional rights to life and to a healthy environment. In general, constitutional provisions ensuring access to judicial or administrative redress for violations of constitutionally guaranteed rights expand upon the long-settled principle of jurisprudence that “a right implies a remedy.” In *Marbury v. Madison*,<sup>210</sup> the seminal 1803 U.S. case clarifying the role and powers of the judiciary, 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>211</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.<sup>212</sup>

This principle is also well-settled in Great Britain,<sup>213</sup> and various civil law jurisdictions have developed 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.

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CONST. §33(1)-(3) (South Africa). Article 43 of the Constitution of Angola states: “Citizens shall have the right to contest and take legal action against any acts that violate their rights as set out in the present Constitutional Law and other legislation.” CONST. art. 43 (Angola).

210. 5 U.S. (1 Cranch) 137 (1803).

211. *Id.* at 163; for an earlier use of the principle, see THE FEDERALIST No. 43 (James Madison) (explaining the provisions of the draft U.S. Constitution).

212. 5 U.S. at 163 (citing WILLIAM BLACKSTONE, 3 BLACKSTONE’S COMMENTARIES, \*23, \*109).

213. *Id.*

## 2. Standing

Most African countries guarantee their citizens the right to seek legal redress before courts. The legal capacity to sue (*locus standi*) is critical to the 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. Historically, this requirement ensured that a case would be litigated fairly, that courts would only consider real (live) cases, and that courts would not engage in declaratory, or prospective, lawmaking. Often, standing to bring suit was limited to those who suffered a direct economic injury, preventing much public interest litigation. In the last three decades, many countries have taken a more expansive view on standing.<sup>214</sup> In many cases, such as in India, standing has effectively been eliminated; any citizen can bring suit to enforce the law, particularly constitutional protections. Due to the differing legal traditions about the roles of courts and citizen-intervenors, common and civil law experiences with standing are discussed separately below.

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

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

Article 21 of Cape Verde's Constitution confers standing broadly, as follows: "To all it is conferred, personally or by way of associations in defense of the interests of the cause, the right to promote the prevention,

214. For a thorough review of standing, see JOHN E. BONINE, *STANDING TO SUE: THE FIRST STEP IN ACCESS TO JUSTICE* (1999), available at <http://www.law.mercer.edu/elaw/standingtalk.html>.

cessation, or judicial prosecution of infractions against health, the environment, quality of life, and cultural heritage.”<sup>215</sup>

Similarly, §38, “Enforcement of Rights,” of South Africa’s 1997 post-Apartheid Constitution grants standing to a wide range of parties where a right that is listed in the Bill of Rights, including the rights to life, a healthy environment, association, and access to information, has been or is in danger of being infringed. As a result, citizens can bring suit “in their own interest,” “on behalf of another person who cannot act in their own name,” “as a member of a group or class of persons,” or “acting in the public interest,” and associations can bring suit to protect the constitutional rights of their members.<sup>216</sup>

In practice, South African courts are beginning to recognize standing for public interest litigants.<sup>217</sup> In *Van Huyssteen*, trustees of a natural area challenged a proposed steel mill that would pollute an adjacent lagoon.<sup>218</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.”<sup>219</sup> In *Wildlife Society of Southern Africa*, 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>220</sup> While acknowledging the concern of some observers 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.”<sup>221</sup> The court concluded that when an explicit constitutional grant of standing does not apply, but a statute requires 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 seek an order from the court compelling the state to comply with the law.

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215. CONST. art. 21 (Cape Verde).

216. CONST. §38 (South Africa).

217. See generally Elmene Bray, *Locus Standi: Its Development in South African Environmental Law*, in GOVERNING THE ENVIRONMENT, *supra* note 2, at 123.

218. 1996 (1) S.A.L.R. at 283 (C).

219. *Id.* at 302.

220. Case No. 1672/95.

221. *Id.* at 92.

In East Africa, Tanzania has had a leading role in granting citizens access to the courts to protect the environment based on strong access to justice provisions in its constitution.<sup>222</sup> In *Balegele*,<sup>223</sup> 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. Two years later, in the case of *Christopher Mtikila*, the High Court at Dodoma issued a strong opinion in favor of broad standing.<sup>224</sup> The defendant argued that the petitioner needed to “demonstrate a greater personal interest than that of the general public”<sup>225</sup> 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.”<sup>226</sup> In light of Tanzania’s socio-economic conditions and history, 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.<sup>227</sup>

Consequently, the court granted standing to the petitioner, holding that “standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy.”<sup>228</sup>

Kenya has had mixed experiences in the area of standing in public in-

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222. For example, Article 30 of the Tanzanian Constitution provides:

Any person alleging that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court.

CONST. art. 30 (Tanzania).

223. Misc. Civ. Cause No. 90 of 1991.

224. Civ. Case. No. 5 of 1993.

225. *Id.* at 3.

226. *Id.* at 13.

227. *Id.* at 12.

228. *Id.* at 15.

terest cases. In *Maina Kamanda v. Nairobi City Council*,<sup>229</sup> a Kenyan High Court recognized standing of two citizens who brought a ratepayer suit alleging the misuse of government funds. However, in *Wangari Maathai v. Kenya Times Media Trust Ltd.*<sup>230</sup> and *Wangari Maathai v. City Council of Nairobi*,<sup>231</sup> 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. These decisions relied in part on British cases that took a narrow view of standing in public interest cases. These decisions have been widely criticized by Kenyan commentators. 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. Indeed, were Kenyan courts to decide these cases today they would probably reach a different outcome, particularly in light of the National Environmental Management and Co-ordination Act of 1999 which explicitly provides for *locus standi* (although, this would then be decided on statutory and not constitutional grounds).

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 rights to life and association)] has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.<sup>232</sup>

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229. Civ. Case No. 6153 of 1992 (H.C.K., Nairobi, Dec. 8, 1992), *reprinted in* 1 COMPENDIUM OF JUDICIAL DECISIONS ON MATTERS RELATED TO ENVIRONMENT: NATIONAL DECISIONS 78 (1998).

230. Civ. Case No. 5403 of 1989 (H.C.K., Nairobi, Dec. 11, 1989) (denying standing to public interest plaintiffs seeking temporary injunction restraining construction in municipal park).

231. Civ. Case No. 72 of 1994 (H.C.K., Nairobi, Mar. 17, 1994) (denying standing to public interest plaintiffs challenging the transfer and development of municipal land).

232. CONST. §18(1) (Botswana).

In *Attorney General v. Unity Dow*,<sup>233</sup> the Botswana Appeals 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. 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, however, noted that § 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[n]," and held that a person who has standing due to individualized injury can also "protect the rights of the public."<sup>234</sup> The court held that she had standing and invalidated the Act.

Outside of the environmental context, Nigeria has also gradually outgrown the strict limitations on standing it inherited as part of its colonial legacy. Since 1981, a series of Nigerian cases has resulted in increasingly broad interpretations of the right of citizens and organizations to bring public interest litigation.<sup>235</sup>

Similarly, in Zimbabwe, the Supreme Court recognized standing of a human rights organization to challenge the constitutionality of death sentences.<sup>236</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

233. 1992 L.R.C. (Cons.) 623 (July 2, 1992), cited in BONINE, *supra* note 214. In a poetic twist of fate, Unity Dow later became the first woman to sit on Botswana's High Court.

234. See BONINE, *supra* note 214, at n.23 (citing Michael P. Seng, *In a Conflict Between Equal Rights for Women and Customary Law, the Botswana Court of Appeal Chooses Equality*, 24 U. TOL. L. REV. 578, 658 (1993)).

235. *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.I. 88 (1987) (holding that Bendel State need only indicate a justiciable dispute to have standing to challenge the Constitutional validity of legislation); *Abedirani v. Interland Transport Ltd.*, 9 N.W.L.R. 155 (1991).

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

circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves.<sup>237</sup>

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

#### 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 & ARC Southern Limited ex parte Dixon*<sup>238</sup> represents the continuing British trend toward expansive standing in public interest litigation. Considering the significant influence of British precedent in African common law countries, a detailed analysis of the court's reasoning is undoubtedly useful to environmental protection and enforcement efforts in Africa. In this case, 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. After careful consideration, the court noted that

- (a) [t]he 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) [t]o 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) [b]eyond this point, the question of standing has no materiality at the leave stage; [and]
- (d) [a]t 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

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237. *Id.*

238. 75 P. & C.R. 175, [1997] J.P.L. 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").

the challenge and—what may be a distinct question—to secure relief in one form rather than another.<sup>239</sup>

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.<sup>240</sup>

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

[p]ublic 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.<sup>241</sup>

The court held that the plaintiff was “perfectly entitled as a citizen to be concerned about, and to draw the attention of the court to, what he contends is an illegality in the grant of a planning consent which is bound to have an impact on our natural environment.”<sup>242</sup>

In the United States, standing is based on a combination of constitutional and prudential requirements, supplemented by statutory provisions that facilitate access to the courts.<sup>243</sup> In the landmark decision *Si-*

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239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. 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). For an innovative argument for standing for future generations in the United States, see John E. Davidson, *Tomorrow’s Standing Today: How the Equitable Jurisdiction Clause of Article III, Section 2 Confers Standing upon Future Generations*, 28 COLUM. J. ENVTL. L. 185 (2003).



*erra Club v. Morton*,<sup>244</sup> the U.S. Supreme Court recognized the legal interest in recreation, conservation, and aesthetics, thereby establishing the basis for environmental standing.

In a series of decisions concluding with *Lujan v. Defenders of Wildlife*,<sup>245</sup> the U.S. 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. Additionally, 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>246</sup> Finally, most environmental statutes provide an explicit grant of standing to citizens to enforce their provisions.<sup>247</sup>

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>248</sup>

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244. 405 U.S. 727, 734, 2 ELR 20192 (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 U.S. Supreme 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 recreation and aesthetic injury to their members, and the case proceeded until the developed decided not to construct a ski resort in the national part. Often cited for his dissent in this case, Justice Douglas believed that "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation." *Id.* (citing Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972)).

245. 504 U.S. 555, 560-61, 22 ELR 20913 (1992).

246. *E.g.*, *Allen v. Wright*, 468 U.S. 737, 750-51 (1983).

247. *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 (1996) (cataloguing citizen suit provisions in environmental statutes); *see also* Endangered Species Act of 1973, 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18 (1994) (especially §1540(g)).

248. *See* Yves Corriveau, *Citizen Rights and Litigation in Environmental Law NGOs as Litigants: Past Experiences and Litigation in Canada*, in ENVIRONMENTAL RIGHTS: LAW, LITIGATION & ACCESS TO JUSTICE 139 (Sven Deimann & Bernard Dyssli eds., 1995); Paul L. Stein, *Citizens Rights and Litigation in Environmental Law: An Antipodean Perspective on Environmental Rights*, in *id.* at 271 (liberalization of environmental standing in Australia); *see also* Australian Conservation Found. v. Minister for Resources, 19 L.A.D. 70 (1989) (upholding ACF's standing

India, Nepal, and Pakistan all share liberal rules with regard to standing, and aggrieved citizens or those claiming to represent their interests may bring suit directly in those countries' high courts and Supreme Courts. The courts in these 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>249</sup>

The courts of India are at the forefront in recognizing standing to vindicate constitutional rights. Moreover, the persuasive influence of Indian cases has been felt throughout South Asia as well as common law countries in Africa. The Indian Supreme Court has paid special attention to advocates seeking to protect the public interest, granting broad standing in these cases.<sup>250</sup> After deciding that access to the legal system should no longer be limited to "men with long purses,"<sup>251</sup> the court has been receptive to a wide range of environmental cases involving, for example, efforts to cease harmful pollution of the Ganges River, to prevent air pollution harming the Taj Mahal, and obtain redress for a chlorine gas leak.<sup>252</sup>

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to challenge licenses for woodchip export, where the organization had a strong concern for forests and had received financial support from the government); *Truth About Motorways Pty. Ltd. v. Macquarie Infrastructure Mgmt. Ltd.* [2000] HCA 11 (Mar. 9, 2000) (unanimously upholding judicial enforcement by "any person").

249. *E.g.*, *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewral, Jhelum v. Director, Industries and Mineral Development, Punjab, Lahore, Human Rights Case. No. 120 of 1993, 1994 P.S.C. 1446, 1452-53.*

250. *E.g.*, *S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149, 188:

If public duties are to be enforced and social collective 'diffused' rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organizations by allowing them to move the Court and act for a general or group interest, even though they may not be directly injured in their own rights.

*See also* Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 *Wis. INT'L L.J.* 57 (1994); BONINE, *supra* note 214 ("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. of Bonine's article reviews standing law in India.

251. *S.P. Gupta v. Union of India (the Judges' Transfer Case)*, A.I.R. 1982 S.C. 149, *discussed* in BONINE, *supra* note 214.

252. *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C.C. 463; A.I.R. 1988 S.C. 1037; A.I.R. 1988 S.C. 1115 (pollution of the Ganges); *M.C. Mehta v. Union of India*, A.I.R. 1986 S.C.C. 176; A.I.R. 1986 S.C.C. 325; A.I.R. 1987 S.C.C. 395; *M.C. Mehta v. Union of India (Oleum Gas Leak Case)*, A.I.R. 1987 S.C. 965; A.I.R. 1987 S.C. 1086.

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>253</sup>

To be certain, some courts still adhere to a restrictive interpretation of standing. However, the clear modern trend in common law countries is toward liberalized standing in public interest litigation and broad rights of access to justice.

### c. Standing in Civil Law Jurisdictions

Standing in Latin American countries has in recent years focused more on the rights of individuals to bring suit to protect common interests. Civil law nations in Latin America have developed innovative legal tools that enable practically any citizen to protect the environment. Popular, or diffuse, actions date back to Roman law, when citizens could act in their legal capacity as owners of the public domain. In Argentina, for instance, environmental advocates developed *acciones difusas* (diffuse actions) to enable citizens to protect the environment. Argentine advocates have used this principle to protect penguins and dolphins and ban dangerous pesticides.<sup>254</sup>

Similarly, in Colombia, environmental advocates have developed and used *acciones populares* (popular actions) to protect the environment, as well as other common rights.<sup>255</sup> Environmental groups have used these popular actions to redress illegal tannery operations, to require certain waste to be used as fuel in a biomass energy-generating facility, and to re-

253. *Hussainara Khatoon Cases*, A.I.R. 1979 S.C. 1360; A.I.R. 1979 S.C. 1369; A.I.R. 1979 S.C. 1819; A.I.R. 1980 S.C.C. 91; A.I.R. 1980 S.C.C. 93; *Fertilizer Corp. Kamgar Union v. Union of India*, A.I.R. 1988 S.C.C. 568; *see also* Mahesh R. Desai v. Union of India, Writ Petition No. 989 of 1988.

254. *See, e.g.*, GERMÁN SARMIENTO PALACIO, *LAS ACCIONES POPULARES EN EL DERECHO PRIVADO COLOMBIANO* 30-31 (1988). *Kattan v. Federal State (Secretary of Agriculture)* (1983), *cited in* BONINE, *supra* note 214 (granting standing to challenge a permit to capture endangered dolphins to an environmental advocate who had never seen the dolphins and 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 and granting the ban); *see also* Victor Hugo Morales v. Province of Mendoza (Civil Trial Court No. 4, Mendoza, Oct. 2, 1986).

255. *See, e.g.*, SARMIENTO PALACIO, *supra* note 254 at 29-32. 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.

move an unsanitary solid waste dump. 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>256</sup>

Other civil law cases, such as the Costa Rican *Chacón* case, have relied on more individualized facts, such as when a complained-of action threatens the plaintiff's ability to live or make a living.<sup>257</sup> In *Chacón*, the court granted standing based on *intereses difusos*, allowed a child to protect individual and societal rights together, and went on to suggest that future generations may have standing to sue. In Chile, the Supreme Court found that the constitutional right to a healthy environment overcame standing limitations that originated in the Napoleonic Code, and granted standing to the environmental group, the National Committee for the Defense of the Fauna and Flora (CODEF) to protect a remote Andean lake.<sup>258</sup> Since then, other Chilean 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>259</sup>

European commentators have made similar arguments for broad access to the courts in environmental matters, based on the Roman doctrine of *actio popularis*.<sup>260</sup> Additionally, in a Slovenian case challenging a community development plan, the Slovenian Supreme Court held that people had standing to bring suit based on their constitutional right to life.<sup>261</sup> Ar-

256. See generally Antonio H.V. Benjamin, A Proteção do Meio Ambiente Nos Países Menos Desenvolvidos: O Caso da América Latina, *REVISTA DE DIREITO AMBIENTAL* 83 (1995); Edesio Fernandes, *Constitutional Environmental Rights in Brazil*, in BOYLE & ANDERSON, *supra* note 7, at 265. The Revista also includes a number of court cases that utilize these different legal tools.

257. Regarding standing in Costa Rica, see generally Robert S. Barker, *Constitutional Adjudication in Costa Rica: A Latin American Model*, 17 U. MIAMI INT. AM. L. REV. 249 (1986).

258. Personal Communication from Fernando Dougnac, to Environmental Law Institute (1997) regarding the Lake Chungará Case (Supreme Court of Chile).

259. E.g., *Fundación Defensores de la Naturaleza v. Particular*.

260. See Verschuuren, *supra* note 199, at n.22, and accompanying text (citing B. Jadot, *Les Procédures Garantissant le Droit à l'Environnement*, in *THE RIGHT TO A HEALTHY ENVIRONMENT* 149 (Amedeo Postiglione ed., 1986)); P.C.E. van Wijmen, *De Natuurbeschermingswet*, VMR 1988-4, Zwolle 1989, at 166; Martin Fuhr et al., *Access to Justice: Legal Standing for Environmental Associations in the European Union*, in *PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW* (David Robinson & John Dunkley eds., 1995).

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

article 72 of the Slovenian Constitution states that “[e]ach person shall have the right in accordance with statute to a healthy environment in which to live.” 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>262</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>263</sup>

### 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 many 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>264</sup>

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

- “justice may not be denied for reasons of insufficient financial means”<sup>265</sup>;

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262. *Id.*; 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).

263. See *Drustvo Ekologov Slovenije*, Case No. U-I-30/95.

264. *E.g.*, Wangari Maathai v. City Council of Nairobi, Civ. Case No. 72 of 1994 (H.C.K., 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).

265. CONST. art. 30 (Guinea-Bissau).

- “[t]he law assures to all the right to justice and the insufficiency of resources shall not be an obstacle to it . . . ”<sup>266</sup>;
- “[t]he State shall make provision [sic] to ensure that justice is not denied for lack of resources”<sup>267</sup>; and
- “[e]very citizen has the right of resorting to the courts against acts which violate his rights recognized by the Constitution and by the law, justice not being deniable for insufficiency of economic means.”<sup>268</sup>

In a similar vein, Malawi<sup>269</sup> and Namibia<sup>270</sup> have constitutional provisions for an ombudsman to provide legal assistance, potentially including legal representation, for people whose fundamental rights or freedoms have been infringed.

A few jurisdictions have statutory provisions allowing successful public interest plaintiffs to recover attorneys fees and other court costs from the defendant in environmental cases or a percentage “bounty” from the government in *qui tam* actions. The United States, in particular, enforces these provisions for suits brought to protect the environment or recover money wrongfully taken from the government.<sup>271</sup> 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

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266. CONST. art. 13 (Madagascar).

267. CONST. art. 100(2) (Mozambique).

268. CONST. art. 19 (São Tomé e Príncipe).

269. Article 46(2) of the Constitution of Malawi states: “Any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled . . . to make application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advice as he or she may reasonable require.” CONST. art. 46(2) (Malawi).

270. Article 25(2) of the Constitution of Namibia provides: “Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened . . . may approach the Ombudsman to provide them with such legal assistance or advice as they require . . . ” CONST. art. 25(2) (Namibia).

271. *E.g.*, Clean Water Act, 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607 (providing litigation costs to “any prevailing or substantially prevailing party” that brings a citizen suit to enforce the Clean Water Act). Dating back to 13th 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).

cases. In *Serrano v. Priest*,<sup>272</sup> the California Supreme Court established a three-part test in determining whether to award fees and costs:

1. (the strength or societal importance of the public policy vindicated by the litigation;
2. (the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; [and]
3. (the number of people standing to benefit from the decision).<sup>273</sup>

In this case, the court upheld the trial court's award of attorneys fees to two public interest law firms that 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>274</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 governments 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 courts themselves need to be fair and equitable, frequently a general constitutional guarantee. An opportunity for timely redress of the injury must be available. The decisions of the court should be in writing and publicly accessible. Additionally, all administrative and legal barriers to access to justice should be removed. Article 9 of the Aarhus Convention and the ISP incorporate these various elements into their access to justice provisions, while taking a liberal approach to judi-

272. 569 P.2d 1303 (Cal. 1977).

273. *Id.* at 1314; *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 Dep't of Health Servs.*, 775 P.2d 521 (Ariz. 1989) (same); *Montanans for the Responsible Use of the School Trust v. Montana*, 989 P.2d 800 (1999) (adopting the *Serrano* test to find that the district court abused its discretion in denying attorney fees to a public interest litigant protecting school trust lands).

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

cial review and standing. Although these international initiatives are not binding on African nations, they do illustrate emerging international legal norms and practice in the area. As a result, they may prove useful when African courts interpret and apply their nations' often broad and vague constitutional guarantees of access to justice.





## V. The Way Forward

In giving force to constitutional environmental protections, particularly in cases of first impression, the facts are likely to be critical. The court decisions discussed in this publication frequently emphasize the direct human impacts, as well as the severity of environmental destruction. Thus, where mining operations have directly harmed human health, such as in *Eurogold* and *Kendra*, or proposed dumping of radioactive waste could harm human health, as in *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, as in the *Chacón* and *Balegele* cases.

Once a constitutional right to a healthy environment is established, courts appear to be 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. And the Indian Supreme Court has extended the right to a healthy environment to require environmental education in schools, as well as environmental public service announcements in cinemas and on the radio.

In contrast, however, test cases emphasizing aesthetics rather than human health are more likely to be rejected. For example, in Pennsylvania, the first case brought under a state constitutional right to a clean 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>275</sup>

Nonetheless, as environmental awareness has increased worldwide, some courts have reversed earlier decisions and made constitutional provisions more protective of the environment and human health. In fact, the

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275. *Commonwealth of Pennsylvania v. National Gettysburg Tower, Inc.*, 311 A.2d 588 (Pa. 1973) (refusing to enjoin the construction of an observation tower near Gettysburg National Military Park, the court split on whether the constitutional provision was self-executing). For a thorough review of Pennsylvania's constitutional provision and the cases interpreting it, see John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I An Interpretive Framework for Article I, Section 27*, 103 DICK. L. REV. 693 (1999); John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II Environmental Rights and Public Trust*, 104 DICK. L. REV. 97 (1999).

Pennsylvania Supreme Court subsequently ruled that the constitutional environmental right was self-executing.<sup>276</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 citizens' lives and livelihoods.<sup>277</sup> The Indian Supreme Court also reversed earlier decisions, holding that the constitutional directive principles protecting the environment were binding, e.g., *Champakam Dorairajan*.

Constitutional environmental rights appear in a wide range of countries with diverse legal traditions and institutional frameworks. They can be found in both federal and unitary systems and are recognized in civil law and common law traditions, as well as in emerging legal norms in Islamic traditions. This is true both within Africa as well as around the world. The prevalence of these constitutional provisions is significant. They ensure that people have an enforceable right to a healthy environment. They compel government agencies to protect the environment. Constitutional provisions include both substantive aspects (such as a right to a healthy environment or right to life), as well as procedural aspects (such as access to information, public participation, and standing).

While some courts have been interpreting and applying constitutional environmental provisions, it is only recently (especially following the revision of constitutions after the 1992 Earth Summit in Rio to incorporate environmental rights) that many courts have started to apply such provisions. Most of the cases come from developing nations, including Bangladesh and Nepal, 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.

A few African courts have applied constitutional rights to life, such as in the *Balegele* decision in Tanzania and the *Gani Fawehinmi* decision in

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276. E.g., *Payne v. Kassab*, 361 A.2d 263, 273 (Pa. 1976), *aff'd*, *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).

277. *Dr. Mohiuddin Farooque v. Bangladesh*, 48 D.L.R. 1996 (Supreme Court of Bangladesh, App. Div. (Civ.)).

Nigeria, and to a healthy environment, as in the *Woodcarb* case in South Africa. However, widespread implementation and enforcement of these rights is still nascent in Africa. As discussed earlier on 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, many African nations also need to educate the judiciary on environmental issues. Strengthening of an independent judiciary constitutes an essential step toward the realization of constitutional rights and environmental protection.

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 that governments act to protect human health and the environment (or stop harmful acts), as well as preventing private actions that infringe on people's right to a clean and healthy environment. As the many successful constitutional environmental cases and jurisdictions cited in this publication demonstrate, the worldwide trend is toward providing and enforcing the constitutional right to a healthy environment, right to life (including the environmental component), and the procedural rights—such as access to information and standing—that are necessary to realize other 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**

**Rights to Environment, Life, and Fair Process in Constitutions of African States<sup>1</sup>**

Country and Date of Constitution	Environmental Rights	Right to Life	Procedural Rights			
			Association	Information	Participation	Standing
Algeria (1996)		Y	Y			Y
Angola (1992)	Y	Y	Y (l?)			Y
Benin (1990)	Y	Y	Y			Y
Botswana (1966/1987)		Y	Y	Y (r)		Y
Burkina Faso (1991/2002)	Y	Y	Y	Y		Y
Burundi (2004, provisional)	Y	Y	Y (l)	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 (1994/2004)	Y	Y	Y (l)			Y (i)
Chad (1996)	Y	Y	Y (l)			
Comoros (2001)	Y	Y	Y			
Congo, Democratic Republic of (2003)	Y	Y	Y	Y (l)	Y	Y
Congo, Republic of (2002)	Y	Y	Y	Y		Y

1. KEY: (l) = 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 Aarhus Convention, the Universal Declaration of Human Rights, or the African Charter on Human and Peoples' Rights. Thus, Y(i) means that the constitution guarantees the particular right through incorporation while Y(+i) indicates that the right is guaranteed explicitly by the constitution and also through incorporation. Where there is a "?" the text is ambiguous.

Table 1 (cont'd)

Country and Date of Constitution	Environmental Rights	Right to Life	Procedural Rights			
			Association	Information	Participation	Standing
Côte d'Ivoire (2000)	Y	Y	Y	Y		Y
Djibouti (1977)		Y (i)	Y	Y (i)		Y (+ i)
Egypt (1971/1980)		Y	Y (l)			Y
Equatorial Guinea (1996)	Y	Y	Y			Y
Eritrea (1997)	Y	Y	Y	Y	Y	Y
Ethiopia (1995)	Y	Y	Y (l)	Y		Y
Gabon (1991/1994/1997)	Y	Y	Y (l)			
Gambia (1996)	Y	Y	Y		Y	Y
Ghana (1992/1993)	Y	Y	Y	Y (l)		Y
Guinea (1990/2001)	Y	Y	Y	Y		Y
Guinea-Bissau (1984/1996)		Y	Y	Y		Y
Kenya (1969/1998)		Y	Y	Y (r)		
Lesotho (1993)	Y	Y	Y (l)			Y
Liberia (1984/1986)	? <sup>2</sup>	Y	Y		Y	Y
Libya (1969/1991)	? <sup>3</sup>	Y	Y	Y		Y
Madagascar (1992/1995)	Y	Y	Y (l)	Y (l)		Y
Malawi (1994)	Y	Y	Y	Y (l)		Y

2. 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.
3. 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.

Table 1 (cont'd)

Country and Date of Constitution	Environmental Rights	Right to Life	Procedural Rights			
			Association	Information	Participation	Standing
Mali (1992)	Y	Y	Y (l)			Y (i)
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 (1999)	Y	Y	Y (l)			Y (i)
Nigeria (1999)	Y	Y	Y	Y (r)		Y
Rwanda (2003)	Y	Y	Y (l)	Y		Y
São Tomé e Príncipe (1990)	Y	Y	Y		Y	Y
Senegal (2001)	Y	Y	Y (l)	Y (r, l)		Y
Seychelles (1993)	Y	Y	Y	Y (l)		?
Sierra Leone (1991)		Y	Y	Y (l, r)		
South Africa (1996/1997)	Y	Y	Y	Y (l)	Y	Y
Sudan (1985/1998)	Y <sup>4</sup>	Y <sup>5</sup>	Y (l)	Y (l)		Y
Swaziland (1968)		Y	Y			Y
Tanzania (1977/1995)	Y	Y	Y (l)	Y (l, r)		Y
Togo (1992)	Y	Y	Y (l)	Y (l)		Y
Tunisia (1991)	? <sup>6</sup>	Y	Y (l)			
Uganda (1995)	Y	Y	Y	Y (l)		Y?
Zambia (1991/1996)	Y	Y	Y	Y (r)		Y
Zimbabwe (1979/1985)		Y	Y	Y (r)		Y?

4. CONST. (1998) (Sudan).

5. *Id.*

6. In Preamble: "In the name of God . . . the representatives of the Tunisian people . . . [p]roclaim the will of this people . . ." *Id.* pmbl.



**Table 2****Chronology of Environmental Provisions in Constitutions of African States**

<b>Countries</b>	<b>Date of Constitution</b>	<b>Environmental Provision</b>
Somalia	1979	—
Sudan <sup>7</sup>	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	✓
Nigeria	1999	✓
Côte d'Ivoire	2000	✓
Comoros <sup>8</sup>	2001	✓
Senegal	2001	✓
Republic of Congo	2002	✓
Democratic Republic of Congo	2003	✓
Rwanda	2004	✓
Burundi	2004	✓

7. Sudan adopted a new constitution in 1998, which incorporated environmental provisions (Articles 9 and 13).
8. Right to a healthy environment is contained in the Preamble, which is specified to be an integral part of the constitution.

**Table 3****Environmental Duties and Rights in Constitutions of African States**

	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 Republic	✓			—
Chad	✓			Every person
Comoros	✓			—
Congo, Democratic Republic of	✓	✓	✓	Each person
Congo, Republic of	✓	✓		Each citizen
Côte d'Ivoire	✓	✓	✓	To all
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	✓			—
Rwanda	✓	✓	✓	Each citizen
São Tomé	✓			—
Senegal	✓			All citizens
Seychelles	✓	✓		Every person

**Table 3 (cont'd)**

	State Duty	Citizen Duty	NGO Duty	Rights to whom (specific language)
South Africa	✓	✓	✓	Everyone
Sudan	✓			All future generations
Tanzania	✓	✓		—
Togo	✓			Every person
Uganda	✓	✓		Every Ugandan
Zambia	✓			For all

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