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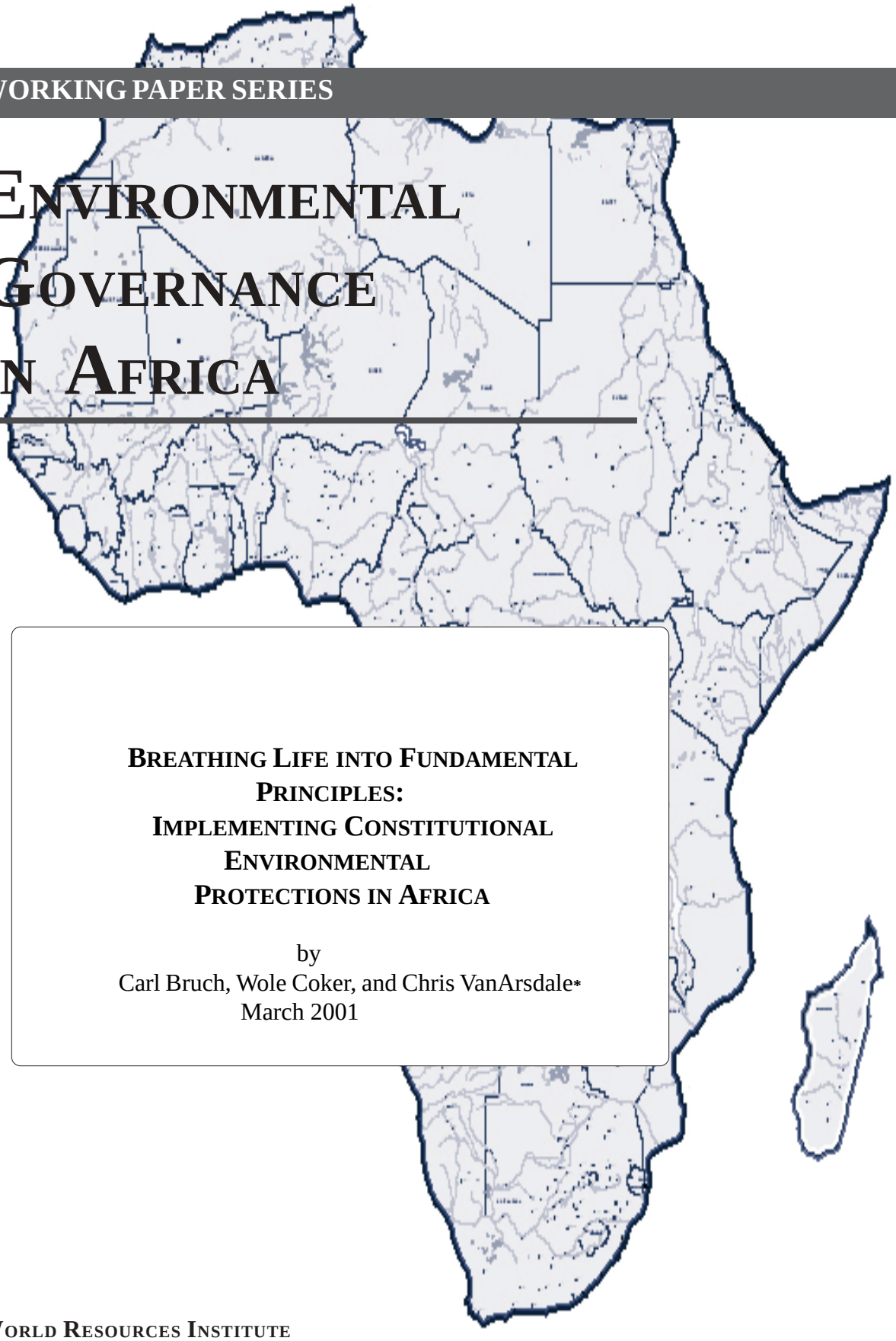

BREATHING LIFE INTO FUNDAMENTAL PRINCIPLES: IMPLEMENTING CONSTITUTIONAL ENVIRONMENTAL PROTECTIONS IN AFRICA

by
Carl Bruch, Wole Coker, and Chris VanArsdale*
March 2001

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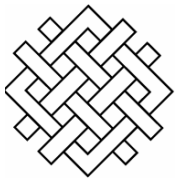

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BREATHING LIFE INTO FUNDAMENTAL PRINCIPLES:

IMPLEMENTING CONSTITUTIONAL ENVIRONMENTAL PROTECTIONS IN AFRICA

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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 (sic.) progress in all its dimensions . . ..

– Preamble, Constitution of Algeria (1996)

INTRODUCTION

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

This article explores how African constitutional provisions can be utilized to create real and enforceable environmental rights. African countries have common law, civil law, and Islamic legal traditions, as well as some hybrid systems. Nevertheless, these legal systems share many common underlying principles and values, particularly regarding the fundamental human rights embodied in their respective constitutions. This article highlights relevant provisions from the constitutions of 53 African countries[2] – 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 constitutional reform processes currently underway in various African countries – such as Kenya, Tanzania, and the Democratic Republic of Congo (DRC and formerly Zaire) – this article examines the opportunities that such provisions present for improving environmental governance.

Section I of this article discusses general considerations, including the nature of constitutions and constitutional law, how the different legal traditions in Africa could affect environmental protection, and the persuasive authority of cases from other jurisdictions in Africa and elsewhere in the world. Section II surveys the constitutional right to a healthy environment in Africa, and provides cases from African countries and elsewhere that illustrate how these

[2] Excluding the territories of the Canary Islands, the Madeira Islands, Reunion, and West Sahara

constitutional provisions may be given force. Section III similarly explores how advocates and judges may be able to apply and extend the constitutional right to life to include a right to healthy environment. Section IV presents some final thoughts realizing the promise of constitutional environmental protections.

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

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

Constitutional provisions can greatly strengthen the ability of advocates to use the law to protect *environmental* rights in a number of ways. First, they can expand the scope of environmental legislative and regulatory regimes that are often insufficiently elaborated to provide comprehensive protection. Even countries with advanced environmental protection systems find that their laws do not address all environmental concerns; and this problem is more pronounced in countries that are still in the process of developing environmental laws and regulations. Constitutional environmental provisions can provide a "safety net" for resolving environmental problems that existing legislative and regulatory frameworks do not address.

Second, constitutional provisions can raise the relative status of environmental rights, which otherwise are often viewed as secondary to other priorities, such as economic development. By referring to the environmental protections enshrined directly in the constitution, advocates can elevate environmental cases to the level of constitutional cases addressing fundamental human rights.[3] Also, constitutional entrenchment of environmental priorities provides a firm basis for environmental protection that is less susceptible to the political airs of the day. As a result, environmental values are more likely to endure since constitutional reform is usually time-consuming, complicated, and requires super-majority

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

approval. Often, this implies not only a different approach to resolution of these cases, but also appeals to a different or higher authority, such as a country's constitutional court or supreme court.

Finally, constitutions are frequently the source of the procedural rights that are necessary for environmental and other citizen organizations to pursue their advocacy work. Giving force to constitutional provisions that guarantee freedom of association, access to information, public participation, and judicial standing is particularly important in ensuring that peoples' substantive rights to life and a healthy environment are protected. These procedural rights promote the transparency, participation, and accountability that form the cornerstones of environmental governance.[4]

The presence or absence of a particular provision in a country's constitution is not in itself dispositive of the strength of the environmental right. In some countries, such as the U.S., where explicit environmental provisions are not stated in the text of the constitution, the courts have upheld the creation of a strong legal regime for environmental protection, on the basis that the constitution implies the existence of such rights. Equally, other countries whose constitutions contain express environmental guarantees may fail to implement legally or practically enforce these provisions. Nevertheless, constitutional environmental protections can provide an additional tool–and a potentially powerful tool, at that – for advocates seeking to protect the environment in a wide range of contexts and legal traditions.

Implications of Different Legal Traditions

The different legal traditions of African nations have influenced the development of constitutional environmental provisions and will likely influence their implementation in each country. Approximately one half of all African countries follow civil law traditions derived from European civil codes, one third common law traditions derived from British rule, and the remainder employ legal systems derived in large part from Islamic traditions (These numbers are approximate, since many countries have legal traditions that are mixtures of more than one of these as well as pre-colonial traditions). It should be noted that legal systems based on the French civil-law tradition differ from those of Spanish or Portuguese origin, and that civil- law systems vary from country to country, just as common law or Islamic systems vary. Despite the various differences within and among traditions, there is striking agreement among them on the right to life, and environmental provisions are widespread in both common and civil law traditions (although rarely found in countries influenced by Islamic legal traditions).

Historically, the central difference between civil and common law systems has lain in the relative scope they give to judicial interpretation as opposed to written codification. Civil law traditions – drawn from continental Europe, and the Napoleonic Code in particular – disfavor judge-made law for historical reasons and because judges are neither popularly elected nor accountable like the legislature. Consequently, civil law systems generally eschew uncodified principles, such as nuisance, that have provided opportunities for judicial gap-filling in common

[4] Carl E. Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 01 (2001).

law nations. In most civil law systems, only those actions or procedures explicitly provided for by law are allowed, so legislation is much more important and specific than in common law systems. Thus, civil law nations generally seek to enumerate all rights and responsibilities in legal codes and constitutions.[5]

In contrast, common law traditions – originally based on the British legal system – emphasize basic principles, which are then applied to the facts of a particular case. These basic principles can be derived from legislation, but are often uncodified and manifest themselves through a body of "case law" interpreting and applying the principles. (Indeed, although the United Kingdom has a wealth of statutes, it has no written constitution.) This flexibility has enabled common law countries to protect the environment without amending their constitutions, which were drafted long before the environment became a concern. In some cases, this evolution of interpretation has been quite creative: the large body of U.S. federal environmental law rests upon the Commerce Clause, empowering the federal government to regulate matters affecting interstate commerce.[6] To ensure predictability and equal application of the law, judges are bound by earlier similar decisions (the doctrine of *stare decisis*), leading to a large body of judge-made law that complements the statutory and regulatory norms. This is in striking contrast to the traditional civil law perspective that judges should only apply the law, not interpret or create it.[7]

At the same time, civil and common law traditions are starting to merge in some respects. For instance, most scholars of civil law, as well as judges and legislators, recognize that it is impossible to write a code that will provide for all eventualities. Consequently, civil law advocates and judges increasingly look to previous judicial decisions (from their country and abroad) for "persuasive authority" when considering novel legal issues. Similarly, common law jurisdictions have been codifying an impressive volume of laws and regulations. For example, stacking all the books of the United States Code (the official compilation of U.S. laws) would yield a pile three meters tall, and the U.S. Code of Federal Regulations would top six meters,

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[5] Many of the differences between common and civil law traditions can be traced to the different historical experiences with judges.[5] In pre-Revolutionary France, judges tended to interpret the law in favor of the aristocracy; in England, the judges were comparatively more independent. Thus, when the new American and French constitutions were drafted in the Eighteenth Century, civil law and common law countries took different paths (See JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION (2d ed., 1985).

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

[7] Nevertheless, there remains a healthy debate about the degree to which judges should merely apply the law, as opposed to interpreting or creating law.

probably more provisions than any civil law system, now or ever. As a matter of fact, U.S. environmental law is particularly susceptible to the trend toward codification, as the law seeks more specificity regarding emission limits, risk analysis, and required technologies. And in Africa, environmental laws and regulations in common law countries are often longer and more detailed than comparable codes in civil law countries.

In contrast to both common law and civil law traditions, Islamic legal traditions draw their norms from the *shari'ah* (the sacred law) and the *fiqh* (Islamic jurisprudence). The shari'ah includes the Qur'an and related sources, and the fiqh refers to consensus of Muslim scholars (*ijma'a*), legal precedent (*qiyas*), custom, and other secondary sources. Islamic legal codes clarify and crystallize these traditions, and the courts enforce the code rather than the tradition. In this respect, Islamic traditions resemble civil law traditions, with the emphasis on applying the codified law. However, in applying the provisions, Islamic courts will consider how other courts have interpreted the provisions, in a manner more akin to common law traditions. Further, in recent years, national statutes (including environmental laws) have supplemented the Islamic base. As a result, these countries now have a unique mixture of inherited colonial law, post-independence constitutional law, Islamic public and private law, and in some cases, a rich body of traditional laws and custom. Although the environment has a significant role in the Qur'an,[8] it has to date had a lower legal profile in Islamic countries, as discussed in Section II.

The Rise of Constitutionalism

The doctrine of 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.[9] Most constitutions include a set of fundamental rights to be enjoyed by all citizens, frequently termed the Bill of Rights.[10] While these provisions appear to confer objective rights to its citizens, courts often held that the rights were not self-executing, but that they required implementing legislation to set the scope of the rights and the means for exercising them. This meant that citizens were unable to realize their fundamental rights if the government failed to enact implementing legislation or enacted legislation that was very restrictive.

Increasingly, however, courts worldwide are interpreting, applying, and enforcing constitutional provisions. In this process, courts have recognized that the constitution guarantees

[8] *See* Al-Hafiz B.A. Masri, *Islam and Ecology*, *in* FAZLUN M. KAHLID, ISLAM AND ECOLOGY 1, 3 (1992) (noting that approximately 500 verses in the Qur'an refer to the relationship between people and the environment); *see also* Martin Lau, *Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan*, *in* ALAN E. BOYLE & MICHAEL R. ANDERSON, EDS., HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 285 (1998) (describing the).

[9] 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 Constitutionalism: Reflections on African Politiical 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)).

[10] Cf. MERRYMAN, CIVIL LAW TRADITION, at 95-96 ("European and Latin American constitutions have come to be the medium for the statement of fundamental individual rights, including property rights, guarantees of the right to engage in economic activity, and the like").

certain inalienable rights to each and every person, especially for those people in the minority (where legislation by the majority runs the real risk of infringing on their rights).[11]

In common law systems, the constitution is the "fundamental and paramount law of the nation."[12] As a result, looking to the constitution as a source of fundamental rights and obligations is well-established in common law jurisdictions, taken as a whole. However, some African common law countries have only recently incorporated binding rights into their constitutions. For example, before 1984, Tanzania's constitution enumerated the "rights" in the preamble to the constitution, and as a result most commentators held that they had no legal force.

Traditionally, in civil law systems, there are three – and only three – sources of law for a judge to apply: legislative statutes, administrative regulations, and custom (in order of descending importance). The recent trend toward constitutionalism has also been felt in these countries, however.[13] As a result, in most countries, the hierarchy of laws is now: constitution, statutes, regulations, and custom. Additionally, civil law countries have developed mechanisms – including constitutional courts – for reviewing the constitutionality of legislative and administrative acts; thereby moving "a long way toward the ideal of what civil lawyers call the *Rechtstaat*: a system of government in which the acts of agencies and officials of all kinds are subject to the principle of legality, and in which procedures are available to interested parties to test the legality of government action and to have an appropriate remedy when the act in question fails to pass the test."[14]

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.[15] Merryman observed that "[t]he 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".[16]

However, in some African countries, judicial review – particularly of legislative acts – remains elusive. For example, Cameroon's constitution provides that either the legislature or one-third of the members of parliament may refer a matter to a constitutional court, but citizens (currently) are unable to vindicate their constitutional rights because the constitution does not explicitly empower them to appeal to the constitutional court. Constitutionalism is changing this

[11] Although the United Kingdom (the historical source and inspiration of common law systems) does not have a constitution, this statement applies to the vast majority of the other common law systems. *See*, e.g., Gary C. Bryner, *Constitutionalism and the Politics of Rights*, *in* GARY C. BRYNER & NOEL B. REYNOLDS, EDS., CONSTITUTIONALISM AND RIGHTS 7, 7 (1987) ("Constitutionalism has at its roots the idea of protecting minorities from majoritarian actions . . ."); MERRYMAN, CIVIL LAW TRADITION, at 96.

[12] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[13] MERRYMAN, CIVIL LAW TRADITION, at 24, 136 ("The movement toward constitutionalism in the civil law tradition can be seen as a logical reaction against the extremes of a secular, positivistic view of the state."); *see also* Victor LeVine, *The Fall and Rise of Constitutionalism in West Africa*, J. MOD. AFR. STUD. (June 1997).

[14] MERRYMAN, CIVIL LAW TRADITION, at 141.

[15] *See id.*, at 24.

[16] *Id.*

situation around Africa, as civil law countries such as Niger increasingly allow citizens to invoke their constitutional rights in court.[17]

Applicability of Experiences from Other Jurisdictions

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

When a court considers an issue for the first time in its own country, it will often look to cases from other countries. While such precedents are non-binding, they provide guidance, or "persuasive precedent," for how other learned judges have addressed the issue at hand. For instance, when considering the issue of standing in the case of *Christopher Mtikila v. Attorney General*, the Tanzanian High Court considered standing cases from Nigeria, England, Canada, India, and Pakistan before deciding to grant standing to a public-interest plaintiff.[18] 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*[19]). When the Zambian Supreme Court held that a statute requiring permits for a peaceful assembly was unconstitutional, the court favorably cited decisions from England, Ghana, India, Nigeria, Tanzania, the United States, and Zimbabwe, as well as the European Court of Human Rights.[20]

Thus, it appears that when courts (particularly common law courts) first interpret constitutional rights that may be termed "fundamental," "basic," or "human" rights, they are very likely to consider how other jurisdictions have interpreted or applied similar provisions. Given the fundamental nature of the rights to life and to a healthy environment, courts may find the cases discussed in this article – and the principles they imply – relevant to their particular national circumstances.

Additional Constitutional Considerations

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

[18] Christopher Mtikila v. Attorney General, Civ. Case. No. 5 of 1993 (High Court, Dodoma, 1993).

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

[20] Christine Mulundika v. The People, 1995/SCZ/245 (Nov. 21, 1995) (unreported), *available at* http://lii.zamnet.zm:8000/courts/supreme/full/95scz25.htm (visited Oct. 27, 1999); ("the Rules of the Supreme Count of England . . . apply to supply any cassus omissus in our own rules of practice and procedure").

Some countries have comparatively short constitutions, while others have much more detailed and lengthy ones. The more modern constitutions tend to be longer, as they incorporate the various constitutional rights and obligations that other countries have incorporated, as well as frequently adding some new provisions. In this way, national constitutional law borrows from and builds on the constitutional law and experiences of other countries. While longer and more detailed constitutions are more likely to include explicit provisions that clarify the scope of the enumerated rights, most countries still rely on legislation to spell out the precise nature of the rights and obligations.

In many countries, particularly civil law countries, constitutional rights were not traditionally self-executing. While the constitution could serve as a defense against governmental overreaching, legislation frequently was required to implement the constitutional provision and empower a person to affirmatively invoke the protections. With the rise of constitutionalism globally, courts increasingly view the constitution as an independent source of substantive law and rights, enforceable even (or particularly) in the absence of implementing legislation.

Within the existing framework of enforceable constitutional law, constitutions can provide an avenue for developing, implementing, and enforcing environmental protections implicitly or indirectly. In addition to providing substantive protections – such as "everyone has a right to a healthy environment" – constitutions can explicitly elevate the status of international agreements, including environmental and human rights conventions (such as the Aarhus Convention[21]), and place them on a par with or above domestic law. Binding on all OAU member states, the African Charter of Human and Peoples' Rights guarantees that, "[a]ll peoples shall have the right to a generally satisfactory environment favorable to their development."[22] While nations regularly sign and ratify international conventions, development of domestic legislation and implementation often lags. By establishing conventions as part of the law of the land, constitutions can effectively render conventions to be more self-executing and provide another tool for environmental advocates. Environmental advocates in both government and civil society could seek to implement the protections through legal practice, relying on the applicable constitutional provisions to incorporate the substantive provisions of the international agreement when implementing legislation is lacking.

A second way that constitutions enable the development, implementation, and enforcement of environmental rights is by explicitly or implicitly providing for unenumerated "penumbral" rights. Penumbral rights are rights that are not explicitly mentioned in the constitution, but are consistent with its principles and existing rights. For example, Article 29 of Eritrea's Constitution provides that: "The rights enumerated in this Chapter shall not preclude other rights which ensue from the spirit of this Constitution and the principles of a society based on social justice, democracy and the rule of law." Article 32 of Algeria's Constitution implies penumbral rights more generally: "The fundamental liberties and the Rights of Man and of the citizen are guaranteed." Similarly, Article 1 of Gabon's Constitution provides that "The

[21] United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, opened for signature in Aarhus, Denmark, June 25 1998.

[22] Organization of African Unity, Banjul Charter on Human and Peoples' Rights, done June 27, 1981, *reprinted in* 21 I.L.M. 58, art. 24.

Gabonese Republic recognizes and guarantees the inviolable and imprescriptible rights of Man, which obligatorily constrain public powers."

Penumbral rights can enable courts to incorporate emerging fundamental human rights without requiring the court to develop a tortuous interpretation of an existing constitutional provision. For example, in the United States, courts have interpreted the Ninth Amendment to the Constitution[23] to include a variety of unenumerated constitutionally protected rights, notably the right to reproductive choice.[24] In these cases, the Supreme Court has gone beyond interpreting the scope of existing constitutional provisions to firmly establish "noninterpretive" judicial review: in determining the scope of constitutional (i.e., fundamental) rights, the court has used the Ninth Amendment to incorporate principles from natural law, common law, and consensus morality.[25] In the early 1970s, many U.S. environmental advocates argued that the right to a healthy environment was protected under the Constitution.[26] The development of a large body of U.S. statutory environmental law and the then still-nascent international status of environment as a human right meant that the U.S. Supreme Court never had a serious opportunity to incorporate the right to a healthy environment as a penumbral constitutional right. Now, however, the 1972 Stockholm Declaration, the 1992 Rio Declaration, and the impressive body of international environmental conventions and practice since the early 1970s argues strongly for a fundamental human right to a healthy environment – and its incorporation into constitutional jurisprudence.

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[23] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[24] E.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing a "right of privacy," particularly regarding access to contraception for married couples); see also *id.* (Goldberg, J., concurring) (asserting that whether a putative right is a penumbral constitutional right is to be determined by "look[ing] to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] as to be ranked as fundamental.'"); Roe v. Wade, 410 U.S. 113 (1973) (establishing a penumbral right to choose an abortion within the penumbral privacy right).

[25] *See*, e.g., GERALD GUNTHER, CONSTITUTIONAL LAW 517 (12th ed. 1991) (citing the concern of Professor Lupu about "the spread of 'intellectual hemophilia,' an ailment that accompanies excessive inbreeding of ideas").

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

II. THE RIGHT TO A HEALTHY ENVIRONMENT

African nations figure prominently among nations worldwide in incorporating environmental provisions into their constitutions, if not necessarily in their application.[27] In fact, at least 32 countries in Africa (approximately two thirds) have some constitutional provisions ensuring the right to a healthy environment (see Table 1). The more recently adopted or amended constitutions tend to contain an environmental provision, a tendency that reflects growing environmental awareness. Table 2 highlights this trend, and shows that African constitutions that were last amended before 1989 generally lack explicit environmental provisions, while most African constitutions that were last amended after 1992 generally include them.[28] Sudan offers the clearest example of this constitutional trend: its 1985 transitional constitution did not address the environment, but Article 13 of the 1998 constitution enjoined the State to "promote public health, encourage sports and *protect the natural environment, its purity and its natural balance, to ensure safe, sustainable development for the benefit of future generations.*" The number of constitutions with environmental provisions is likely to increase, as the draft constitution for the Democratic Republic of Congo includes them, and other countries (such as Kenya) are also contemplating introducing such provisions.

It should be noted that not all constitutions adopted or amended after 1989 have incorporated environmental provisions. For example, Rwanda and Sierra Leone both adopted new constitutions in 1991 that are silent on environmental rights and duties. Since these constitutions were adopted at the early stages of the current upsurge in environmental concern, this exclusion might be merely a lack of awareness rather than an intentional oversight. This view is strengthened by DRC's recent constitutional history: the constitution adopted July 5, 1990 was silent on environmental rights and duties, but article 53 of its 1998 draft constitution sets forth environmental rights and duties for citizens and the state.

After analyzing textual constitutional provisions in Islamic-influenced, civil law, and common law jurisdictions, this section examines ways in which environmental advocates and courts have given life and force to the provisions.

Islam and Environmental Rights

Some have argued that because all major religions incorporate principles relating to the environment and imposing a duty to protect it, there are no differences between the rights-based approaches to a clean environment in secular and Islamic countries.[29] While the Qur'an is conspicuously silent on a human right to a clean environment, the large body of Islamic

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

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

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

environmental ethics stress the duty of the individual Muslim to care for the natural environment.[30] 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.[31]

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

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

> [R]ather than trying to find Islamic equivalents to secular human rights, Pakistan's judiciary has reduced Islamic law in the context of public interest litigation to a basic right to justice in its widest form. The recognition of a basic human right in 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.[32]

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

Civil and Common Law Jurisdictions

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

[30] *Id.* at 293.
[31] *See id*. at 286.
[32] *Id*. at 302.

Most of the constitutional environmental provisions that exist in Africa take the form of generalized rights: the right to a "healthy environment," "unpolluted environment," "ecological balance," and so forth. Some countries have also included constitutional provisions to address specific environmental issues of particular importance for them. These include Benin (Arts. 28 and 29 – toxic and foreign waste), Chad (Art. 48 – toxic or polluting wastes), Congo (Arts. 47 and 48 – toxic, polluting, or radioactive wastes), Niger (art. 81 – toxic wastes), South Africa (Art. 24 – right of future generations), Tanzania (Art. 27 – natural resources), Togo (Art. 83 – parks, reserves, and forests), and Uganda (Art. 21 – water management; art. 27 – pollution, parks, and biodiversity). Congo's detailed provisions on hazardous wastes incorporate the "polluter-pays principle" by explicitly providing for compensation for environmental damage. As discussed below, courts outside Africa have applied these generalized rights to a healthy environment to address a wide range of specific environmental issues.

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

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

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

Finally, some African countries have constitutional environmental provisions that have unclear status. These include provisions typically contained in a constitutional chapter titled "National Objectives" or "Directive Principles," contained in the preamble of the constitution, or where the wording is vague. Such chapters are effectively the same, setting out objectives and principles deemed to be fundamental in governing the country and to be applied in making and implementing laws.[33] Countries where environmental provisions are contained in such chapters include: Cameroon, Eritrea, Ghana, Mali, Namibia, Seychelles, Tanzania, and Zambia. For example, Article 10 (in the section on principles and objectives) of Eritrea's constitution includes the right of citizens to a "livelihood in a sustainable manner" and the duty of the state

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

"to create the right conditions for securing the participation of the people to safeguard the environment."

Some commentators assert that the main purpose of these principles and objectives is to inspire legislation, rather than to confer enforceable rights.[34] Though these provisions serve as principles and objectives for policy and some constitutions declare them unenforceable,[35] prompting some to argue that these provisions do not create enforceable rights or impose enforceable duties, the growing judicial trend has favored the enforceability of these provisions as binding rights worldwide.

For example, recent Indian Supreme Court decisions have reversed earlier decisions, which established 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 Constitution.[36] The recent decisions have adopted a more flexible approach to enforceability. For example, in *Sachidanand Pande v. State of West Bengal*,[37] the petitioner contended that the government's decision to allot land from a zoological garden for the construction of a luxury hotel would result in serious environmental degradation and sought the court's intervention. In denying the petition, the Supreme Court stated that in light of all the facts, the proposed garden hotel would actually improve the ecology of the disputed land. However, the court also noted that whenever ecological concerns are brought before it, it is bound to keep Article 48A of the Indian Constitution in mind:

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

The court in *Kinkri Devi v. Himachal Pradesh* was even more explicit in applying a directive principle: due to the severity of the environmental damage at issue in a mining case, the court was "left with no alternative but to intervene effectively by issuing appropriate writs, orders and directions . . .."[38]

Several other countries also view these constitutional principles and objectives as enforceable. In *Juan Antonio Oposa v. Factorian*,[39] the petitioners claimed that the Philippines' natural forest cover was being destroyed at an alarming rate and asserted their constitutional

[34] E.g., *id.* at 213.

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

[36] State of Madras v. Champakam Dorairajan, 1951 A.I.R. (S.C.) 226 (1951).

[37] Sachidanand Pande v. State of West Bengal, 1987 A.I.R. (S.C.) 1109 (1987).

[38] Kinkri Devi v. Himachal Pradesh, 1988 A.I.R. (Himachal Pradesh) 4 (1988).

[39] Juan Antonio Oposa v. Fulgencio S. Factoran, G.R. No. 101083 (Supreme Court of the Philippines Aug. 9, 1993).

right to a "balanced and healthful ecology" under Article 16 of the Philippine Constitution. Regarding the fundamental right to a healthful ecology, the Philippine Supreme Court enforced the petitioners' rights stating, "[t]he fact that it was included under the Declaration of Principles and State Policies and not under the Bill of Rights did not make it any less important." The Court reasoned that a basic human right such as the right to a healthy environment need not be written in the constitution, and the fact that it is mentioned explicitly in the fundamental charter highlights its continuing importance and imposes upon the state a solemn obligation to protect and advance that right. Similarly, in *Ecological Network v. Secretary of Environment and Resources*,[40] the plaintiffs also relied on Article 16 to bring a taxpayers' suit seeking to cancel existing and future timber licenses. The Supreme Court again held that the plaintiffs had enforceable constitutional rights and declared the timber licenses invalid.

Nepal's Supreme Court has taken a different approach regarding the enforceability of constitutional principles and objectives, but arrived at a similar result. The court reasoned that though the principles and objectives may be facially unenforceable,[41] a disregard or breach of their provisions makes them enforceable. In *Prakash Mani Sharma v. Ministers of Council*,[42] the petitioner, relying on the Directive Principles in the Constitution of Nepal,[43] sought a writ of mandamus from the Supreme Court to prevent a construction project on public lands adjacent to Rani Pokhari ("Queen's Pond"), a pond with historical, cultural, and environmental significance. Despite arguments by the respondent that these principles and policies are not enforceable by any court, the Supreme Court determined that it is the duty of all (including the Executive and Legislature) to abide by these directives and principles, and where they are contravened the Court will make the appropriate order and give these provisions meaningful effect. Similarly, in *Yogi Narhari Nath v. Ministry of Education*,[44] the Nepali government granted a 50-year lease to a private party for construction of a medical college on forest land adjacent to the Chitwan National Wildlife Reserve. In voiding the lease, the Supreme Court held that though the Directive Principles and State Policies were not directly enforceable, the court would hold the government accountable for any decisions or actions that went against these provisions. Thus, in Nepal, the directive principles appear to grant a cause of action to prevent governmental action that harms the environment, and thereby violates its duties under the directive principles.[45] The

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

[41] Article 24(1) of Nepal's Constitution reads, "The principles and policies contained in this part shall not be enforceable by any court."

[42] Prakash Mani Sharma v. Ministers of Council, Writ Nos. 2961 and 2052.

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

[44] Yogi Narhari Nath v. Ministry of Education, 1 Ne. Ka. Pa. 2053 (1996) 33.

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

question of whether the principles can be used to compel governmental action to affirmatively protect the environment remains unaddressed.

Overall, the dynamic evolution in the enforceability of these provisions, which may have seemed unenforceable earlier, strengthens the tools available to citizens and courts seeking to apply these rights to protect the environment. This trend is particularly relevant to the African countries with environmental protections contained in constitutional sections on principles, objectives, or the preamble.

Applying the Constitutional Right to a Healthy Environment

Constitutional rights and duties can be given force variously through legislative, executive, and judicial actions. Constitutional provisions can expressly enable legislatures to enact environmental laws to implement the protections (e.g., Central African Republic Constitution, art. 58.1). For example, in Mozambique, the government relied on its constitutional environmental provision to provide the authority for a new framework environmental law. In *Laguna Lake Development Authority v. Court of Appeals*, the Philippine Supreme Court upheld the authority of a government agency attached to the Department of Environment to issue cease and desist orders against a city that was illegally dumping garbage.[46] In dismissing the challenge to the police's authority 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.

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

Right to a Healthy Environment

In *Minister of Health and Welfare v. Woodcarb (Pty) Ltd.*, a South African court upheld the standing of the Minister of Health and Welfare to seek an order requiring a saw mill to cease emission of noxious gases.[47] 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. This case

[46] Laguna Lake Development Authority v. Court of Appeals, G.R. No. 110120 (Supreme Court of the Philippines, 3rd Div., Mar. 16, 1994).

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

constitutes one of the very few instances where an African court has applied an explicit constitutional environmental provision.

The potential breadth of a generalized "right to a healthy environment" need not be an impediment to application or enforcement. As the following cases illustrate, this constitutional right has been applied and interpreted in both common and civil law jurisdictions in Asia, Europe, and Latin America, and frequently implicates well-accepted environmental principles and mechanisms, such as environmental impact assessment, the precautionary principle, and the polluter-pays principle.

Of the many countries that have interpreted constitutional environmental provisions, India has the most experience.[48] The environmental provisions of the Indian Constitution – Articles 48A (protection of the environment) and 51A (fundamental duties) – are both principles of state policy. Though the application of these principles have been interwoven with the separate right-to-life provision, the scope of these environmental rights and duties have been interpreted and applied in different circumstances. One application of this right, illustrated by *L.K. Koolwal v. Rajasthan*, is that the constitutional rights to health, sanitation, and environmental preservation could be violated by poor sanitation resulting in a "slow poisoning" of the residents, without any more specific allegations of injury.[49] Furthermore, in *Rural Litigation and Entitlement Kendra v. Uttar Pradesh*, the right to a "healthy environment" was invoked even though no direct link with human health had been demonstrated in the case at hand.[50] The petitioner alleged that unauthorized mining in the Dehra Dun area adversely affected the ecology and resulted in environmental damage. Without establishing harm to human health, the Supreme Court upheld the right to live in a healthy environment and issued an order compelling the cessation of mining operations, notwithstanding the significant investments of money and time by the mining company. According to this thread of interpretation, protection of this right arises when ongoing behavior is damaging or is likely to damage the environment, regardless of an effect on human health.

Other Indian cases emphasize that the right to a healthy environment relates principally to pollution rather than health. According to this interpretation, the guarantee of "pollution[-]free air and water" referred to by the Indian Supreme Court,[51] does not contemplate an environment completely free from pollution since the judgment directs the state "to take effective steps to protect" the right, rather than placing an absolute duty on the state to ensure air and water that is absolutely free from pollution.[52]

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

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[48] *See generally* Martin Lau, *The Scope and the Limits of Environmental Law in India*, 4 REV. EUR. COMMUNITY & INT'L ENVTL. L. 15 (1995).
[49] L.K. Koolwal v. Rajasthan, 1988 A.I.R. (Raj.) 2 (High Court of Rajasthan, 1988).
[50] Rural Litigation and Entitlement Kendra v. Uttar Pradesh, 1985 A.I.R. (S.C.) 652, 656 (1985); 1988 A.I.R. (S.C.) 2187 (1988).
[51] Charan Lal Sahu v. Union of India, 1990 A.I.R. (S.C.) 1480 (1990).
[52] *See* Anderson, *Individual Rights to Environmental Protection in India*, at 217.

The consequence of this Order made by us would be that the lessees of lime-stone quarries which have been directed to be closed down permanently under this Order . . . would be thrown out of business in which they have invested large sums of money and expended considerable time and effort. This would undoubtedly cause hardship to them, *but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance*.[53]

Similarly, in *T. Damodhar Rao v. Municipal Corp of Hyderabad*, it was stated that consideration of physical and biological data is "the legitimate duty of the Courts . . . to forbid all action of the State and the citizen from upsetting the environmental balance."[54] In all three approaches, the Indian Supreme Court has found that the right to a healthy environment necessarily includes the freedom from air and water pollution.[55]

European courts, which primarily employ civil law, have interpreted and applied the constitutional right to a healthy environment in a range of contexts.[56] In what appears to be the first decision by an Eastern European court to apply a constitutional right to a healthy environment, the Constitutional Court of Hungary struck down amendments to the law on agricultural cooperatives in the *Protected Forest Case*.[57] The amendments sought to designate previously protected areas as land that could be privately owned. The court held that the amendments violated the constitutional rights to a healthy environment and to the "highest possible level of physical and spiritual health." The court further stated that the level of environmental protection had to be high according to objective standards, and that once the state had accorded a certain level of environmental protection, it could not thereafter withdraw that protection. After the Hungarian case, the Constitutional Court of Slovenia ruled in 1996 that citizens and environmental nongovernmental organizations (NGOs) had standing to sue based on the constitutional right to a healthy environment as provided by Article 72 of Slovenia's Constitution.[58] 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 . . .."[59]

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[53] Rural Litigation and Entitlement Kendra v. Uttar Pradesh, 1985 A.I.R. (S.C.) 652, 656 (1985); 1988 A.I.R. (S.C.) 2187 (1988).
[54] T. Damodhar Rao v. Municipal Corp of Hyperabad, 1987 A.I.R. (A.P.) 171, 181 (1987).
[55] *See* Anderson, *Individual Rights to Environmental Protection in India*, at 218.
[56] For an authoritative review, see MICHAEL BOTHE, THE RIGHT TO A HEALTHY ENVIRONMENT IN THE EUROPEAN UNION (forthcoming 2000); see also José Lebre de Freitas, *A Acção Popular ao Serviço do Ambiente*, 1 REVISTA DE DEREITO AMBIENTAL 36 (1996).
[57] "Protected Forests Case," Magyar Közlöny Case No. 1994/No.55, p. 1919 (Hungarian Constitutional Court, 1994); *see also* Stephen Stec, *Ecological Rights Advancing the Rule of Law in Eastern Europe*, 13 J. ENVTL. L. & LITIG. 275, 320-21 (1998).
[58] Drustvo Ekologov Slovenije, Case No. U-I-30/95-26 (Constitutional Court of Slovenia, Jan. 15, 1996); *see also* Milada Mirkovic, *Legal and Institutional Framework and Practices for Public Participation*, in DOORS TO DEMOCRACY: CURRENT TRENDS AND PRACTICES IN PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING IN CENTRAL AND EASTERN EUROPE 377, 396 n.10 (1998).
[59] *See* Mirkovic, n. 10.

Courts in other countries also have applied the constitutional right to a healthy environment. In a watershed decision delivered in the *Eurogold* case, Turkey's High Court ruled that Eurogold's mine violated the provisions of Articles 17 and 56 of Turkey's amended constitution, which protect the fundamental rights to life and a "healthy, intact environment."[60] In addition to being a precedent on the enforceability of the constitutional rights to life and healthy environment, this case had the impact of broadening environmental issues in Turkey from the realm of science and technology to the realm of basic human rights.

Similarly, a number of civil law countries in Latin America also have given life to their constitutional right to a healthy environment.[61] In the Ecuadorian case of *Fundacion Natura v. Petro Ecuador*, the Constitutional Court upheld a civil verdict that the defendant's trade in leaded fuel violated a ban on leaded fuel placed by Congress, and thus violated the plaintiffs' constitutionally guaranteed right to a healthy environment.[62] Similarly, in *Arco Iris v. Instituto Ecuatoriano de Minería*, Ecuador's Constitutional Court held that "environmental degradation in Podocarpus National Park is a threat to the environmental human right of the inhabitants of the provinces of Loja and Zamora Chinchipe to have an area which ensures the natural and continuous provision of water, air humidity, oxygenation and recreation."[63]

In the *Trillium* case, Chile's Supreme Court voided a timber license where the government approved an environmental impact assessment without sufficient evidence to support the conclusion that the project was environmentally viable and without incorporating the conditions proposed by different specialized agencies.[64] The Court held that by acting in such an arbitrary and illegal way, the government had violated the rights of all Chileans – and not just those who would be affected locally – to live in an environment free of contamination.

In *Fundación Fauna Marina v. Ministerio de la Producción de la Provincia de Buenos Aires*, an Argentine court voided a permit to capture a number of dolphins and killer whales, stating that it was first necessary to conduct an environmental impact assessment.[65] 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, requiring authorities to control the environmental impacts of any activity that could damage the environment. The court held that the way to ensure general constitutional environmental rights and duties stated in these constitutions was by imposing an obligation to execute an environmental impact assessment before issuing a permit.

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

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

[62] Fundación Natura v. Petro Ecuador, Case No. 221-98-RA (Constitutional Court 1998), upholding Fundación Natura v. Petro Ecuador, Case No. 1314 (11th Civil Court, Pichincga, Apr. 15, 1998).

[63] Arco Iris v. Instituto Ecuatoriano de Minería, Case No. 224/90, Judgment No. 054-93-CP (Constitutional Court of Ecuador).

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

[65] Fundación Fauna Marina v. Ministerio de la Producción de la Provincia de Buenos Aires (Federal Court No. 11, Mar del Plata, Civil and Commercial Secretariat, May 8, 1996).

And, in Peru, the citizens' constitutional right to a healthy environment was held to be at issue in a case filed to stop a barge from dumping petroleum residues into a lake that served as a source of drinking water, an action which had caused severe environmental damage and 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 environmental impact assessment of the effects on the lake.[66]

In Costa Rica, the NGO Justicia Para la Naturaleza (JPN) filed suit against Geest Caribbean Ltd., a transnational banana company, claiming that Geest's illegal clearcutting of approximately 700 hectares of forest (including nesting habitat for the endangered green macaw) near the Tortuguero National Park violated the constitutional right to a healthy environment.[67] In this groundbreaking constitutional environmental case, a Costa Rican court for the first time sought to apply natural resource damage assessment techniques to gauge 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 and the fees for the experts.

In *Pedro Flores v. Corporación del Cobre, Codelco, Division Salvador*, the Supreme Court of Chile applied Articles 19 (right to live in unpolluted environment) and 20 (legal action to enforce art. 19) of Chile's constitution to enjoin a mining company from further depositing copper tailing wastes onto Chilean beaches, a practice that had destroyed all traces of marine life along the beach.[68] In *Proterra v. Ferroaleaciones San Ramon S.A.*, the Peruvian Supreme Court held that the constitutional right to a healthy environment belongs to the whole community, and allowed an *accion de amparo* to protect the citizens' constitutional rights even though the plaintiffs had suffered no direct damages themselves.[69] Finally, Brazilian courts have applied their constitutional right to a healthy environment (found in Article 225) in a variety of pollution-related cases.[70]

Environmental Duties

Constitutional environmental provisions also impose duties to protect the environment, sometimes by explicitly imposing such a duty on the state and other parties and sometimes by implicitly granting a right to a healthy environment. Although the legal effect of such

[66] *See Judge Orders Barge to Stop Polluting*, E-LAW UPDATE (Spring 1995), available at http://www.igc.apc.org/elaw/update_spring_1995.html (visited Nov. 1, 1999).
[67] For a description of this case, see E-LAW UPDATE 2 (Spring 1999) and E-LAW IMPACT: VALUING BIODIVERSITY IN COSTA RICA (1999).
[68] Pedro Flores v. Corporación del Cobre, Codelco, Division Salvador, ROL.12.753.FS.641 (Supreme Court of Chile, 1988).
[69] Proterra v. Ferroaleaciones San Ramon S.A., Judgment No. 1156-90 (Supreme Court of Peru, Nov. 19, 1992).
[70] *E.g.*, Ação Civil Pública (Industrial Waste) (Anicuns, Sept. 10, 1992); Ação Civil Pública (Air Pollution) (Naviraí, May 12, 1993) (Fauser de Oliveira Maia, J); Ação Civil Pública (Garimpo) (Goiás, Sept. 23, 1991) (Luiz Eduardo de Sousa, J); Ação Civil Pública (Pollution from Steel Manufacturing) (Cubatão, Aug. 13, 1993) (Roberto Maia Filho, J). All these cases are reported in 0 REVISTA DE DEREITO AMBIENTAL 177-218 (1995). *See also* Edesio Fernandez, *Constitutional Environmental Rights in Brazil*, *in* BOYLE & ANDERSON, HUMAN RIGHTS APPROACHES.

constitutionally provided duties is unclear, courts occasionally have relied upon the fundamental duties to interpret ambiguous statutes.[71]

The constitutional duty to protect, or not to harm, the environment can be borne by the government and its organs, individuals, legal persons, or some combination of these parties. In some cases, constitutional environmental duties explicitly addressed to citizens have been expanded to apply to the state also. For example, in *L.K. Koolwal v. Rajasthan*, an Indian court ruled that the fundamental duty to protect the environment in Article 51A(g) extended not only to citizens, but also to instrumentalities of the state.[72] As a result, the court held that by virtue of Article 51A(g) citizens have the right to petition the court to enforce the constitutional duty of the state. The application of constitutional environmental rights and duties to the state is fairly straightforward. The more difficult question is whether constitutional environmental duties and rights operate only between governmental bodies and private persons ("vertical" operation), or whether it also operates between private legal persons, so that one citizen could invoke the provision against another legal or natural person ("horizontal" operation).[73]

In developing economies, the public sector is often relatively large, and high courts have interpreted the term "state" broadly to extend to local authorities, bodies created by statute, government-owned industrial enterprises, and any entity acting as an instrumentality or agency of the government.[74] Where ownership of most natural resources is vested in the state and most major industries are owned and controlled by the government, breaches of constitutional environmental rights (and duties) are usually by the state, and "vertical" operation of constitutional rights and duties enables citizens to address many environmental problems. In recent years, however, the erosion of government control and the subsequent or imminent privatization of the vast public sector has led to the adoption of the more inclusive and flexible "horizontal" operation of constitutional rights clauses, whereby private citizens, corporations, and other legal persons are legally liable for their actions that breach these rights.[75]

Courts can be crucial in bringing constitutional environmental duties to life, particularly where the legislature does not promulgate the necessary legislation detailing their scope or the executive branch fails to establish or effectively apply the administrative machinery necessary to implement them. 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)*,[76] the petitioner sought to prevent a nuisance by tanneries and soap factories that were polluting the

[71] Mumbai Kamgar Sabha v. Abdulbhai, 1976 A.I.R. (S.C.) 1455 (1976).
[72] L.K. Koolwal v. Rajasthan, 1988 A.I.R. (Raj.) 2 (High Court of Rajasthan, 1988). Article 51A(g) of India's constitution provides that it "shall be the duty of every citizen . . . to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures."
[73] *See generally* Jan Glazewski, *Environmental Rights and the New South African Constitution*, *in* ALAN E. BOYLE & MICHAEL R. ANDERSON, EDS., HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 188 (1996).
[74] E.g., Raman Dayaram Shetty v. International Airport Authority of India, 1979 A.I.R. (S.C.) 1628 (1979).
[75] *See*, e.g., M.C. Mehta v. Shriram Food and Fertilizer Industries, 1987 A.I.R. (S.C.) 1026 (1987) (in a case arising from a gas leak, the Supreme Court held that Article 32, which provides for writs against the state for any breach of fundamental rights, also applies to private parties).
[76] M.C. Mehta v. Union of India, 1988 A.I.R. (S.C.) 1115 (1988).

Ganges River. The Supreme Court observed that the pollution of the river was a serious public nuisance and the pollution was so widespread that the water could not be used for either drinking or bathing. Issuing its order, the court held that:

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

Similarly, in *M.C. Mehta v. Union of India*, the petitioner contended that if citizens were to fulfill their duties to protect the environment as required by Article 51A(g) of the constitution, then the people needed to be better educated about the environment.[77] The application sought to move the Supreme Court to issue directions to cinema halls, radio stations, and schools to disseminate information on the environment and to educate citizens. Granting the petition, the Supreme Court ordered

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

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

Table 3 illustrates the distribution of constitutional environmental rights and duties in African countries, showing to whom they are assigned and who can enforce them. Although most nations grant constitutional environmental rights to citizens, few explicitly impose a duty on citizens to protect the environment, and fewer impose that duty on public interest groups. Nevertheless, the usefulness of such citizen and group duties cannot be overstated. Where such duties exist, private citizens and groups are constitutionally bound to protect the environment and, at least theoretically, could be held liable for a breach of this duty. This liability between private citizens is the closest that countries have come to explicit constitutional codification of the "horizontal" operation of fundamental rights clauses, although the duty may be implied in the constitutional environmental rights granted to citizens. The most comprehensive provisions are those of Burkina Faso, Cape Verde, and South Africa. These provisions grant individuals the right to a healthy environment, impose a duty to protect this right on the state, and impose a duty

[77] M.C. Mehta v. Union of India, S.C. of India Writ Petition (Civil) No. 860 of 1991.

on citizens to protect the environment (thereby allowing individuals to enforce this duty against each other).

Constitutions can impose environmental duties on state organs, as well as private parties. For example, courts in the Netherlands have consistently applied the environmental rights in Article 21 of the Constitution[78] to require decision-makers to have a sound reason for setting aside environmental interests.[79] Although the text of the provision imposes an obligation on the "authorities" to "protect and improve the environment," courts have extended the obligations to private parties. For example, in the case of *Benckiser*, the Dutch government sought to require the defendant to remove hazardous, polluting materials that the defendant had dumped at several sites in the country.[80] The court held for the government, noting that the defendant's acts were essentially "tortious" to the state due to the government's constitutional responsibility to protect the environment.

Another means by which constitutions impose environmental duties on the state is through provisions that embody the "Public Trust Doctrine," which require the government to preserve and protect certain resources that it 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."[81] In the centuries since then, both civil law and common law countries have incorporated these principles, and remnants can be found in African constitutions. For example, Part XIII of Uganda's constitutional National Objectives and Directive Principles of State Policy provides that "[t]he State shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda." And while the binding nature of these principles remains unclear, at the very least it suggests that there is a constitutional basis for the public trust doctrine in Uganda.

Traditionally, courts applied the public trust doctrine to waters and similar common resources, and generally limited the power of the government to significantly alter nature of the public resource for the benefit of an individual party. Joseph Sax, the pre-eminent author on public trust, observed that the doctrine imposes three duties on governments: (1) the property subject to the trust must be used only for trust purposes; (2) the property should never be sold, even for fair cash; and (3) the property must be maintained for particular types of uses.[82] Thus,

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[78] "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment."

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

[80] Benckiser, 1989 MILIEU EN RECHT 258 (Netherlands Supreme Court, Apr. 14, 1989) (cited in *id*).

[81] THE INSTITUTES OF JUSTINIAN 2.1.1 (T. Cooper trans. & ed. 1841).

[82] Joseph Sax, *The Public Trust Doctrine in Natural Resources Law*, 68 MICH. L. REV. 471, 473 (1970); *see also*

courts have applied the public trust doctrine to invalidate conflicting legislation,[83] to limit alteration of public resources,[84] to require express legislative action,[85] and to identify public rights of resource access and use. In addition to air, water, and shores, U.S. commentators have argued for the application of the public trust to wildlife and public lands,[86] something courts have done in Kenya and India.

Many of the state constitutions in the United States have incorporated the public trust doctrine, as well as other environmental provisions.[87] Although the application of state constitutional environmental provisions has been infrequent, courts in at least five states have used them to review state action.[88] For example, in *Montana Environmental Information Center v. Department of Environmental Quality*, the Montana Supreme Court held that environmental groups could challenge the constitutionality of a state statue that exempts certain water discharges from nondegradation review.[89]. Pointing to the fact that the right to a clean and healthful environment is a fundamental right under the state constitution, the court employed strict scrutiny in its review of the state action, namely granting an exploration license to a gold mining operation. The Court noted that the challenged state action would pass muster only if the state could establish a compelling interest and that its action was "closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective."[90] The Court also held that because the constitutional right to a clean and healthy environment was anticipatory and preventative, and not just prohibitive, that the groups did not have to demonstrate a threat to public health or water quality standards – the degradation of high-quality waters was sufficient.

Supreme Courts in India and Pakistan have used the public trust doctrine to protect the environment, even in the absence of plaintiffs.[91] In *M.C. Mehta v. Kamal Nath*, the Supreme Court took notice of a newspaper article reporting on efforts to divert the flow of a river to

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Michael Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573 (1989).

[83] E.g., Priewe v. Wisconsin State Land & Improvement Co., 93 Wis. 534, 67 N.W. 918 (1896) (invalidating legislation authorizing the drainage of a lake for development purposes).

[84] E.g., Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892) (rescinding conveyance of the bed of Lake Michigan to a private party).

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

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

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

[88] *See id.*

[89] Montana Environmental Information Center v. Department of Environmental Quality, No. 97-455 (Mont., Oct. 20, 1999).

[90] *Id.* at 17.

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

protect a motel from flooding, a diversion that could cause serious environmental degradation.[92] The Court held that the government had violated the public trust by leasing the environmentally sensitive riparian forest land to the company (which was owned by the family of a former Minister for Environment and Forests). The Court cancelled the lease and ordered the land restored to its original condition.

Kenya has incorporated the public trust doctrine as part of its common law, applying it in *Abdikadir Sheikh Hassan v. Kenya Wildlife Service* to review a public authority's exercise of statutory powers.[93] In this case, the plaintiffs sought to restrain the Kenya Wildlife Service from moving endangered hirola antelope from its natural habitat to Tsavo National Park, notwithstanding the KWS's express statutory mandate to protect the animals. The Court held that the KWS "would be acting outside its powers if it were to move any animals or plants away from their natural habitat without the express consent of those entitled to the fruits of the earth on which the animals live."

And in Australia, the public trust doctrine has been applied to protect public rights in tidal waters, seashores, and national parks. In *Willoughby City Council v. Minister*, a court held that leasing a state recreation area for "reception areas and tea rooms" was a private function and violated the public trust.[94] The court noted that national parks were held in trust for the enjoyment and benefit of Australian citizens, including future generations, and that the government had a duty to preserve the parks in their natural state.

Development of the Right to a Healthy Environment in Africa

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

Although approximately two-thirds of the African nations have constitutional environmental provisions, few courts so far have applied these provisions. Nevertheless, as discussed above, courts often consider how other nations have interpreted similar provisions,

[92] M.C. Mehta v. Kamal Nath, 1 S.C.C. 388 (Supreme Court of India, 1977); *see also* T.N. Godhavarman Thirumulpad v. Union of India, 2 S.C.C. 267 (1997).

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

[94] Willoughby City Council v. Minister, 78 L.G.E.R. 19 (1992).

particularly when it comes to fundamental human rights, such as the right to a healthy environment.

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

To be sure, differences in sociocultural, demographic, or financial circumstances may limit the extent to which non-African cases interpreting and applying the constitutional right to a healthy environment can be applied in Africa. For example, areas designated "protected" without human habitation (excluding wildlife reserves) is largely a Western phenomenon, as there are few expanses of African land that are uninhabited. The African reality might be to utilize a similar philosophy but apply it to the protection and preservation of the environment of pastoralists, fishermen, hunters, and gatherers.

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

Nevertheless, most of the right-to-a-healthy-environment cases arise in developing countries in Latin America and Asia, countries which face similar resource constraints and cultural contexts (including a strong relationship to the land). Additionally, the cases come from similar legal systems, as both civil law and common law countries have applied constitutional environmental norms. Given that (1) environmental norms are increasingly being incorporated into Africa's constitutions, that (2) there is a worldwide trend for courts to give practical application to such norms, and that (3) courts frequently look to international practice, as they approach emerging areas of law-making and interpretation, it is clear that constitutions have a great potential role to play in helping African environmental advocates protect the fundamental right to a healthy environment.

III. THE RIGHT TO LIFE

While many African constitutions contain provisions specifically granting citizens a right to a healthy environment and empowering the government to protect the environment, not all do so, and the usefulness of these provisions for protecting environmental and natural resources, or health, as it is affected by environmental conditions, may be limited to specific contexts. However, an additional constitutional approach to environmental protection can be found in the right-to-life provisions contained in the constitutions of all African nations. Though largely untested in Africa, because right-to-life provisions are so widespread, they have the potential to constitute a pan-African mechanism for citizens to protect the environment.

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

The Text of Right-To-Life Provisions

All of the fifty-three African nations examined in this paper guarantee a fundamental right to life for all citizens. (*See* Table 1). Some nations, such as Cote d'Ivoire and Djibouti, while not directly guaranteeing the right to life, do so indirectly by stating adherence to the 1948 Universal Declaration of Human Rights, which provides that "[e]veryone has the *right to life*, liberty, and the security of person."[95]

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

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

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

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

These questions have been addressed, in varying degrees, by courts in other countries, many of which have recognized that a constitutional right to life includes the right to a clean and healthy environment in which to live that life, and have enforced the right to prevent environmental damage, particularly (but not exclusively) environmental damage that harms or could harm human health.[96] The following discussion surveys cases in which courts have interpreted the right to life to include the protection of environmental resources.

Cases Interpreting the Right to Life

Tanzania

Tanzania appears to be the first African nation in which courts have addressed the scope of constitutional right-to-life provisions in the context of environmental protection. Article 14 of Tanzania's constitution provides that "Everyone has the right to exist and to receive from the society protection for his life, in accordance with the law." In *Joseph D. Kessy v. Dar es Salaam City Council* and *Festo Balegele v. Dar es Salaam City Council*, the High Court of Tanzania at Dar es Salaam interpreted Article 14 expansively.[97]

[96] African constitutions containing both a right to life and a right to "health" include those of Algeria, Burkina Faso, Comoros, Gabon, Ghana, Guinea, Guinea-Bissau, Madagascar, and Togo.

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

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

India

India has generated by far the largest body of jurisprudence regarding the environmental aspects of the constitutional right to life. India's constitution contains provisions protecting both human health (Art. 47) and the natural environment (Arts. 48 and 51), in addition to extending a fundamental right to life (Art. 21). Notwithstanding these other provisions relating to health and environment, India's Article 21 is often invoked to protect environmental resources. The Article states: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Procedurally, most of the Article 21 cases protecting the environment are brought in the Supreme Court pursuant to Article 32, which grants citizens standing to sue directly in the Indian Supreme Court for violations of constitutional rights.[98]

Indian courts have interpreted the scope of the constitutional right to life expansively, as forbidding all actions of both state and citizen that disturb "the environmental balance."[99] The courts have found violations of the right to life in a variety of factual contexts. In *T. Damodhar Rao v. Municipal Corp., Hyderabad*, for example, the court found that a city's failure to protect an area designated as "recreational" space from residential development violated the right to life.[100] 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.

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

[99] T. Damodhar Rao v. Municipal Corp of Hyperabad, 1987 A.I.R. (A.P.) 171 (Andhra Pradesh High Court, 1987).

[100] *Id.*

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

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

In *L.K. Koolwal v. Rajasthan*, the Indian Supreme Court found that a city had violated residents' right to life by failing to implement adequate sanitation measures.[101] The court held that maintenance of health, preservation of sanitation, and environmental protection fall within the purview of Article 21's right to life. The court found the problem of sanitation to be "very acute in Jaipur City, . . . creating hazard to the life of the citizens," and ordered the municipality "to remove the dirt, filth etc. within a period of six months and clean the entire Jaipur City."

In *Vellore Citizens Welfare Reform v. Union of India*, the Indian Supreme Court found that tanneries in the state of Tamil Nadu had violated citizens' right to life by discharging untreated effluents into agricultural areas and local drinking water supplies.[102] The discharges had made thousands of hectares of agricultural land unfit for cultivation and had severely polluted the local drinking water. In granting the petitioners' requested relief, the Court invoked the "precautionary principle," the "polluter-pays principle," and sustainable development as components of the Article 21 environmental protections. The Court defined the precautionary principle to mean that (1) the state must anticipate, prevent, and attack the causes of environmental degradation; (2) lack of scientific certainty should not be used as a reason for postponing measures to prevent pollution; and (3) the onus of proof is on the polluter to show that his or her actions are environmentally benign. The polluter-pays principle was defined to mean that "polluting industries are 'absolutely' liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water . . . [and] liability for harm . . . extends not only to compensate victims of pollution but also the cost of restoring the environmental degradation". Applying these principles to the facts of the case, the court

[101] L.K. Koolwal v. Rajasthan, 1988 A.I.R. (Raj.) 2 (High Court of Rajasthan, 1988).
[102] Vellore Citizens Welfare Reform v. Union of India, 1996 A.I.R. (S.C.) 2715 (1996).

ordered more than 900 tanneries operating in Tamil Nadu to "compensate the affected persons and also pay the cost of restoring the damaged ecology."

In *Indian Council for Enviro-Legal Action v. Union of India*, the Supreme Court found that the national government's failure to control an industry's release of toxic chemicals violated citizens' right to life.[103] The plaintiff-petitioner brought this action to stop and remedy pollution caused by several chemical industrial plants in the village of Bichhri in Rajasthan. The defendant-respondents operated chemical plants producing highly toxic chemicals, such as sulfuric acid, without permits and discharged pollutants into aquifers and to the soil. The defendants had failed to obey several previous court orders directing them to control the discharge of toxic materials. Using the constitutional right to life, the court ordered the appropriate governmental regulatory agency to impose controls on the industry, carry out remedial measures, and charge the industry for the cost of cleanup.

Pakistan, Bangladesh, and Nepal

Following India, the courts of Pakistan, Bangladesh, and Nepal also have interpreted constitutional right-to-life provisions expansively to include environmental protection. The constitutions of all three countries share nearly identical right-to-life provisions, stating: "No person shall be deprived of life or liberty save in accordance with law."[104]

The courts of all three countries have invoked the right to life in a variety of factual contexts. In *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khwra, Khelum v. The Director, Industries and Mineral Development, Punjab Lahore*, the Supreme Court of Pakistan found that mining companies had violated the right to life of citizens residing near mining operations by polluting local drinking water supplies.[105] Invoking the right to life, the court found that "where access to water is scarce, difficult or limited, the right to have water free from pollution and contamination is a right to life itself. This does not mean that persons residing in other parts of the country where water is available in abundance do not have such right. The right to have unpolluted water is the right of every person wherever he lives." The court ordered the mining companies to take specific measures to prevent the pollution of the drinking water, including changing location of their operations. The court also appointed a commission with powers of inspection to monitor implementation of the court's orders and the ability to order further measures to ensure the area's drinking water remained unpolluted. The government agencies concerned also were ordered not to grant any new mining licenses or to renew old ones without leave of court.

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

[104] PAKISTAN CONST., art. 9; BANGLADESH CONST., art. 32; NEPAL CONST., art. 11(1).

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

In the case *In re: Human Rights Case (Environmental Pollution in Balochistan)*, the Pakistani Supreme Court itself initiated a proceeding against industries seeking to dump radioactive waste in a coastal area.[106] The court found that the dumping could "create environmental hazard and pollution" in violation of the constitutional right to life. The court ordered the Chief Secretary of Balochistan to investigate the matter and report to the court. After receiving a report detailing the identity of entities to which land allotments were made in the coastal area in question, the court ordered that with respect to any allotment of land, the full identity of the applicant and other information must be supplied to the Court, and any lease or allotment contract had to specify that the land could not be used for dumping waste.

In *Shehla Zia and others v. WAPDA*, the Pakistani Supreme Court found that the constitutional right to life is broad enough to include "protection from being exposed to the hazards of electromagnetic field or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations."[107] The petitioners, citizens opposing the construction of a power grid station near the residential area in which they lived (in Islamabad), wrote a letter to the Supreme Court seeking to enjoin construction of the grid station on grounds that it violated the constitutional right to life. The citizens argued that the presence of high-voltage transmission lines would pose a serious health hazard to the residents of the area.

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

In *Mohiuddin Farooque v. Bangladesh*, the court found that the right to life includes a right to be free from "man-made hazards of life," including contaminated food.[108] The petitioner, the Secretary-General of the Bangladesh Environmental Lawyers Association, filed suit seeking to halt the importation of certain milk powder that had been found to contain

[106] In re: Human Rights Case (Environmental Pollution in Balochistan), Human Rights Case No. 31-K/92(Q), P.L.D. 1994 SUPREME COURT 102 (1992); see also Martin Lau, *Case Study: Public Interest Litigation in Pakistan*, 3 REV. EUR. COMMUNITY & INT'L ENVTL. L. 268 (1994).
[107] Shehla Zia v. WAPDA, Human Rights Case No. 15-K of 1992, P.L.D. 1994 SUPREME COURT 693 (1992).
[108] Mohiuddin Farooque v. Bangladesh, Civil App. No. 24 of 1995, 17 B.L.D. 1 (1997), 1 B.L.C. (A.D.) 189 (1996) (High Court Division, Special Original Jurisdiction, July 1, 1996).

radiation levels above the acceptable limit. The petitioner argued that the failure of government officials to send back the imported milk powder in question was injurious to human health and violated the fundamental right to life. The court found that citizens have a:

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

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

In *Leaders, Inc. v. Godawari Marble Industries*, Nepal's Supreme Court held that a marble mining operation contaminating the water supplies and the soil violated nearby residents' constitutional right to life.[109] The petitioners alleged that Godawari Marble Industries had caused serious environmental degradation to the Godawari forest and its surroundings. The industries' activities also had contaminated nearby water bodies, soil, and air to the detriment of local inhabitants, members of the petitioner's organization, and laborers in the mining industry. The court noted that "[Life] is threatened in [a] polluted environment . . ." and "[i]t is the legitimate right of an individual to be free from [a] polluted environment." The court reasoned that "Since [a] clean and healthy environment is an indispensable part of a human life, the right to [a] clean, healthy environment is undoubtedly embedded within the Right to Life." The court ordered the government ministries to "enact necessary legislation for protection of air, water, sound and environment and to take action for protection of the environment of [the] Godawari area."

Colombia, Ecuador, and Costa Rica

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

Colombian courts have applied their constitutional right to life in a variety of factual contexts, expansively interpreting it to hold that environmental protection must be understood as an extension of the rights of physical integrity and personal security[110]. In *Victor Ramon Castrillon Vega v. Federacion Nacional de Algodoneros y Corporacion Autonoma Regional del*

[109] LEADERS, Inc. v. Godawari Marble Industries (Supreme Court Nepal, Oct. 31, 1995).
[110] Article 11 of the Colombian constitution states: "The right to life cannot be denied."

Cesar (COPROCESAR), the Supreme Court of Colombia found that an industry's release of toxic fumes from an open pit endangered the health and life of nearby residents and therefore violated their constitutional rights to health and life.[111] The court ordered the respondent industry to remove the waste and safely dispose of it, to pay for the costs of safely moving and disposing of the waste, and to pay past and future medical expenses of those who fell ill as a result of the illegal waste.

FUNDEPUBLICO, a Colombian NGO, has brought many cases to protect Colombians' constitutional right to health and life. In *FUNDEPUBLICO v. SOCOPAV, Ltda.*, FUNDEPUBLICO filed an action requesting relocation of an asphalt plant located in an urban area.[112] The Constitutional Court granted the petition, holding in part that pollution emanating from the plant threatened the right to life. The court held that the right to live in a healthy environment is a basic human right, and that environmental protection was an extension of the constitutional right to life. In *FUNDEPUBLICO v. Compañía Marítima de Transporte Croatia Line y Comar S.A.*, a Colombian court found that the rights to life and health were violated by the respondents' importation of toxic waste into Colombia, and the court ordered the companies to remove 575 drums of toxic industrial waste. [113] In *Organización Indígena de Antioquia v. Corporación Nacional de Desarrollo del Chocó*, the Constitutional Court held that the constitutional rights to life, work, property, and cultural integrity had been infringed upon by an illegal clear-cut, ordering the regional authority to restore the area and to develop a reliable estimate of the economic damages that the indigenous people living in the area had suffered.[114] Other right-to-life cases brought by FUNDEPUBLICO have addressed tannery wastes, unsanitary waste dumps, and a highly polluting asphalt factory.[115]

In the Ecuadorian case *Fundación Natura v. Petro Ecuador*, an Ecuadorian environmental law NGO brought suit against a corporation for illegally cutting trees on indigenous lands and against the government agency for its failure to take care of the lands and protect the indigenous community.[116] The court ordered the agency to assess the damage and to compensate the community, and held that the community could sue the corporation once the assessment was completed. The court also passed a general prohibition making illegal any activity that diminished or harmed the area that was the subject of this litigation.

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[111] Victor Ramon Castrillon Vega v. Federacion Nacional de Algodoneros y Corporacion Autonoma Regional del Cesar (COPROCESAR), Case No. 4577 (Supreme Court, Chamber of Civil and Agrarian Cassation, Nov. 19, 1997).

[112] FUNDEPUBLICO v. SOCOPAV, Ltda., Case No. T-101, Judgment No. T-415 (Constitutional Court, June 17, 1992).

[113] FUNDEPUBLICO v. Compañía Marítima de Transporte Croatia Line y Comar S.A., Case No. 076 (Superior Court of Santa Marta, Civil Chamber, July 22, 1994).

[114] Organización Indígena de Antioquia v. Corporación Nacional de Desarrollo del Chocó, Case No. T-13636, Judgment No. T-380/93 (Sept. 13, 1993).

[115] For further discussion of these cases, see http://www.fundepublico.org.co/htm/logros.htm (visited Oct. 31, 1999). For another case, not brought by FUNDEPUBLICO, see Augusto Osorno Gil v. Papeles y Cartones S.A., Judgment No. T-579 (Bogotá, Dec. 14, 1993).

[116] Fundación Natura v. Petro, Case No. 221-98-RA (Constitutional Court 1998), upholding Fundación Natura v. Petro Ecuador, Case No. 1314 (11th Civil Court, Pichincga, Apr. 15, 1998).

In the Costa Rican case *Carlos Roberto Mejia Chacón v. Municipalidad de Santa Ana*, the Supreme Court held that a waste disposal site in a small canyon threatened the constitutional right to life of the petitioner, ordered the municipality to stop disposing of waste at the site, and closed the illegal dump.[117] While Costa Rica has an independent constitutional right to a healthy environment (see discussion of the JPN-Geest case, in Section II), it is interesting to note that *Chacón* instead relied on the right to life.

Advancing African Environmental Protection through the Right to Life

As these cases demonstrate, constitutional right-to-life provisions can be strong tools for environmental protection. Often, the constitutional right to life is the sole basis for a court's decision to extend protection or prevent damage to an environmental resource. When a nation lacks an express constitutional right to a healthy environment, and lacks comprehensive environmental statutory and regulatory systems (or lacks adequate remedies under those systems), the constitutional right to life becomes all the more important.

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

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

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

[117] Carlos Roberto Mejia Chacón v. Municipalidad de Santa Ana, Judgment No. 3705-93 (Supreme Court, Constitutional Chamber, July 30, 1993).

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

IV. THE WAY FORWARD

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

Once a constitutional right to a healthy environment has been established, courts appear more willing to protect the environment without requiring an explicit link to human life or health. For example, in India, initial court cases emphasized the impacts of pollution on human health, then on cultural icons such as the Taj Mahal. More recently, the Indian Supreme Court has extended the right to a healthy environment to require environmental education in schools, as well as environmental public service announcements at cinema and on the radio.

In contrast, however, test cases emphasizing aesthetics rather than human health are more likely to be rejected. For example, in the U.S. state of Pennsylvania, the first case brought under a state constitutional right to 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.[118]

As environmental awareness has increased worldwide, some courts have reversed earlier decisions and interpreted constitutional provisions as establishing broader protections for the environment and human health. Thus, the Pennsylvania Supreme Court subsequently ruled that the constitutional environmental right was self-executing.[119] 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 it was called upon to rule on the implementation of a flood control plan that seriously threatened people's life and livelihood.[120] And the Indian Supreme Court reversed earlier decisions to hold that the constitutional directive principles protecting the environment were binding (e.g., *Champakam Dorairajan*).

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[118] Commonwealth of Pennsylvania v. National Gettysburg Tower, Inc., 454 Pa. 193, 311 A.2d 588 (1973) (while five justices refused to enjoin an observation tower from being built near Gettysburg National Military Park, the court split on whether the provision was self-executing). For a thorough review of Pennsylvania's constitutional provisions and accompanying cases, see John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part I – An Interpretive Framework for Article 1, 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 the Public Trust,* 104 DICK L. REV. 97 (1999).

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

[120] Mohiuddin Farooque v. Bangladesh, 48 D.L.R. 1996 (Supreme Court of Bangladesh, App. Div. (Civ.) 1996).

Constitutional environmental rights appear in a wide range of countries: they feature within those with federal and unitary systems of government and within those using civil law and common law traditions, and they are emerging in those countries heavily influenced by Islamic law. It is notable that most of the cases reviewed above are from developing nations (including Nepal and Bangladesh, which are among the poorest 10 nations in the world). In fact, in developing nations that lack comprehensive environmental laws and resources to implement and enforce those laws, basic environmental principles embedded in constitutions are of particular importance in guaranteeing that all citizens have a basic right to a clean and healthy environment.

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

Yet, even without a particularly sensitized or independent judiciary, environmental advocates around the world have been successful in giving force to constitutional environmental rights and obligations. Faced with compelling facts, judges have required the government to act (or to stop harmful actions) to protect human health and the environment, as well as preventing private actions that infringe on people's right to a clean and healthy environment. As the breadth of the successful constitutional environmental cases cited in this article and the wide range of jurisdictions within which they have been fought demonstrates, the trend worldwide is toward of enforcing constitutional right to a healthy environment and an environmental interpretation of the right to life. Recognizing these fundamental human rights is neither radical nor unprecedented. It is simply a matter of enforcing the highest law of the land, the constitution.

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

	Environmental Rights	Right to Life
Algeria (1996)		Y
Angola (1992)	Y	Y
Benin (1990)	Y	Y
Botswana (1966/1987)		Y
Burkina Faso (1991/1997)	Y	Y
Burundi (1992)	Y	Y
Cameroon (1996)	Y	Y
Cape Verde (1992)	Y	Y
Central African Republic (1994/1995)	?[121]	Y
Chad (1996)	Y	Y
Comoros (1992)	Y	Y
Congo (1992)	Y	Y
Côte d'Ivoire (1990/1998)		Y (i)
Djibouti (1977)		Y (i)
Egypt (1971/1980)		Y
Equatorial Guinea (1991)	Y	Y
Eritrea (1997)	Y	Y
Ethiopia (1995)	Y	Y
Gabon (1991/1994/1997)	Y	Y
Gambia (1996)	Y	Y
Ghana (1992/1993)	Y	Y
Guinea (1990)	Y	Y
Guinea-Bissau (1991)		Y
Kenya (1969/1992)		Y
Lesotho (1993)	Y	Y
Liberia (1984/1986)	?[122]	Y

* 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 Universal Declaration of Human Rights or the African Charter on Human and Peoples' Rights.

[121] Article 58: Other matters which are expressly given to it by other articles of the present Constitution are in the domain of the law:
1) regulations relative to the following matters:
-- the protection of the environment, the regimes of property [*domanial*], the land [*foncier*], forestry, and mining;

Libya (1969/1991)	?[123]	Y
Madagascar (1992/1995)	Y	Y
Malawi (1994)	Y	Y
Mali (1992)	Y	Y
Mauritania (1991)		Y
Mauritius (1968)		Y
Morocco (1996)		Y (i)
Mozambique (1990)	Y	Y
Namibia (1990)	Y	Y
Niger (1996)	Y	Y
Nigeria (1989)	Y	Y
Rwanda (1991)		Y
São Tomé e Príncipe (1990)	Y	Y
Senegal (1962/1998)		Y
Seychelles (1993)	Y	Y
Sierra Leone (1991)		Y
Somalia (1979)	?[124]	Y
South Africa (1996/1997)	Y	Y
Sudan (1985/1998)	Y[125]	Y[126]
Swaziland (1968)		Y
Tanzania (1964/1984)	Y	Y
Togo (1992)	Y	Y
Tunisia (1991)	?[127]	Y
Uganda (1995)	Y	Y
Zaire/DRC (1990)	—[128]	Y
Zambia (1991/1996)	Y	Y
Zimbabwe (1979/1985)		Y

[122] 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.

[123] 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.

[124] Article 42: 1) The land, natural marine and land based resources shall be state property.
2) The state shall promulgate a law prescribing the best methods for exploiting such resources.

[125] 1998 Constitution.

[126] *Id.*

[127] Preamble: In the name of God ... the representatives of the Tunisian people ... Proclaim the will of this people ... – the most effective means for assuring the prosperity of the nation through economic development of the country and the utilization of its riches for the benefit of the people.

[128] The draft 1998 Constitution has environmental rights and duties.

Table 2
Illustrating the Temporal Evolution of African Constitutional Environmental Provisions

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

Table 3
African Constitutional Environmental Duties and Rights

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

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

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Environmental Governance in Africa Working Paper Series

The *Environmental Governance in Africa* Working Paper Series presents position papers, works in progress, and literature reviews on emerging environmental governance issues of relevance to Sub-Saharan Africa. The series is designed to circulate ongoing policy research and analysis that derives from and complements the Environmental Accountability in Africa (EAA) initiative of WRI's Institutions and Governance Program (IGP). Our target audience is the small group of researchers and activists directly involved with EAA. The authors and editors welcome questions and comments from readers. The series aims to stimulate discussion and dialogue on worldwide issues at the intersection of environment, democracy and governance, while providing constructive feedback to IGP and the authors. For more information about IGP and EAA please visit http://www.wri.org/governance.

EAA seeks to foster development of the essential legal and institutional infrastructure for effective, replicable and sustainable environmental governance. This overarching goal is supported by three specific objectives:

- To influence the character of ongoing World Bank, U.N. and other donor-driven African government decentralization efforts to ensure that rights, responsibilities, capacities, and accountabilities are consistent with sound environmental management;

- To promote national-level administrative, legislative, and judicial reforms necessary to accomplish environmentally sound decentralizations and to enable public interest groups to hold governments and private actors accountable for their environmental management performance; and

- To develop regional networks of independent policy research and advocacy groups that are effective in promoting and utilizing the above reforms in the interests of improved environmental management.

EAA achieves these objectives through three inter-related efforts: 1) Decentralization, Accountability, and the Environment, 2) Environmental Procedural Rights, and 3) Non-Governmental Organization Capacity-Building.

The Decentralization, Accountability and the Environment effort aims to identify and promote policies and laws essential for effective, efficient, and equitable decentralization, including those establishing accountable representative authorities for local communities in participatory natural resource management; laws specifying the distribution of decision-making powers over nature among state authorities, civil, and private bodies; laws assuring just recourse; and laws ensuring an enabling environment for civil action. Through informed analysis, the effort aims to influence national-level policy-makers to develop environmentally sound decentralization policies and an enabling environment for civic action concerning environmental policy and its implementation. It reaches this audience directly and through the international financial and donor organizations, environmental policy research institutions, and international and local non-governmental organizations involved in environmental policy matters. This effort supports research on existing

decentralization policies and on the enabling environment for civic action. To further these goals it conducts research jointly with independent policy-focused institutions, the preliminary results of which are presented in this series.

The Environmental Procedural Rights component of the EAA initiative is designed to establish and strengthen an enabling environment for citizens and advocacy organizations both to enforce their constitutional rights to a clean environment and to meet their constitutional responsibilities to ensure sound environmental management. This environment includes fundamental civil liberties, such as freedom of association and expression, and basic rights, including access to information, justice, and decision-making in environmental matters. This component works at three levels. At the national level in pilot countries, the initiative supports the work of local policy groups to improve the law and practice of environmental procedural rights. At the regional level, the initiative supports networks of local organizations to promote legally-binding regional environmental governance instruments, similar to the European Aarhus Convention, that provide for procedural rights irrespective of citizenship and place of residence. At the global level, this component supports African involvement in a coalition of organizations to collaborate on the establishment of international environmental governance norms and on ensuring compliance by governments and private corporations.

The Non-Governmental Organization Capacity-Building component of the EAA initiative aims to strengthen a select group of independent policy research and environmental advocacy groups and their networks. This group includes, for example, the Lawyers' Environmental Action Team (LEAT) in Tanzania, Green Watch and Advocates for Development and Environment (ACODE) in Uganda, and the African Centre for Technology Studies (ACTS) in Kenya. These environmental advocacy organizations seek to improve environmental management and justice by contributing to policy and legislative reform, and ensuring compliance to environmental laws and norms. The groups use a range of approaches and tools to influence policy formation, including policy research and outreach, workshops and conferences, public debates, press releases, and litigation. This EAA project component supports efforts in organizational development, capacity building in advocacy approaches and skills, and technical competence in specific environmental matters. Federations and networks of such NGOs, joint initiatives, and South-South collaborative efforts are also facilitated and supported.

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