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# *Constitutional Environmental Rights Worldwide*

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**Practice Tip:** This chapter addresses the worldwide phenomenon of constitutional environmental rights. Roughly five dozen countries have constitutional provisions that form individualized rights to a healthy, adequate, or quality environment. Domestic courts and international tribunals are enforcing constitutionally enshrined environmental rights with growing frequency by recognizing basic human rights to clean water, clean air, and environmental opportunity. This chapter explains how courts worldwide have viewed constitutionally enshrined environmental rights and why these rights have faced such resistance by the bench and bar. It concludes by summarizing features that influence litigation strategies for practitioners.

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Environmental rights cases are inherently complex for many reasons, some of which apply to other rights as well. First, constitutional texts may protect the environment in ways that are implicit or explicit, substantive or procedural, judicially enforceable or not. Second, even once identified, the scope of the environmental interest is ill defined because, unlike specific interests like housing or medical care, the environment may encompass everything, and almost everything that happens in society can implicate the environment. Third, unlike more familiar civil and political rights or even socioeconomic rights, environmental rights can inure to aggrieved individuals or communities small and large, to nature itself, and to future generations. On the defense side, responsibility may be directly attributable to government action or private entities, or widely dispersed among societal sectors. Fourth, vindication of environmental rights poses difficult questions about remedies and enforcement: Money damages will seldom be sufficient to correct water pollution, land toxification, or deforestation, but how can courts fashion and enforce remedies that call for broad changes in government policy, particularly where environmentally sustainable policies are likely to be more costly? Underlying all these cases are questions about the proper role of the courts in constitutional democracies: Should courts intervene to correct generalized grievances? Should they be able to force governments to adhere to environmentally sensitive policies? And how can courts enforce their orders, particularly if the issues presented are as polycentric and globally complex as sustainability and climate change?

The first section in this chapter explains the worldwide emergence of constitutionally entrenched rights to a quality environment. As explained, about five dozen countries now have adopted constitutional provisions that purport to guarantee some sort of individualized rights to a healthy, adequate, or quality environment.<sup>1</sup> The second section chronicles judicial receptivity to these provisions and observes that courts have either approached them as independent, dependent, derivative, or dormant. The common denominator is that domestic courts are engaging constitutionally embedded environmental rights with growing frequency,<sup>2</sup> mirroring to some extent greater recognition of basic human rights to water, air, and resources.<sup>3</sup> Next we examine institutional and structural factors, conceptual disjunctions, and pragmatic considerations that help to explain the range of judicial receptivity to constitutionally entrenched environmental rights. And finally, the last section suggests modalities for successful litigation of constitutionally enshrined environmental rights.

Despite the surprisingly few judicial decisions implementing constitutional environmental rights provisions,<sup>4</sup> the trend is positive and powerful.<sup>5</sup> Courts worldwide have not embraced environmental rights as enthusiasti-

cally as we would have expected, but they have made noticeable and steady progress, and the momentum is only likely to increase as courts become more comfortable with environmental rights protection and as environmental pressures grow. Moreover, the fact that environmental rights are being asserted and considered in all regions of the world amplifies the attention that they receive in public discourse. And this can also meaningfully contribute to the success of future environmental claims.

We conclude that no single reason can account for the relative dearth of cases that involve these provisions. In any given country, the reasons may be structural, institutional, political, practical, or a combination of all of these. Conversely, judicial receptivity to these types of constitutional claims also belies predictable patterns.

## **How Environmental Rights Are Protected in Constitutions**

Nations from around the globe have constitutionally entrenched environmental rights.<sup>6</sup> The list touches every region: Africa, the Middle East, Western Europe, the former Soviet bloc, Latin America, and Oceania.<sup>7</sup> The list is also legally and culturally diverse, including countries with civil, common law, Islamic, Native American, and other traditions.<sup>8</sup>

Domestic constitutions tend to reflect environmental norms in one of four ways:<sup>9</sup> (1) as a policy directive, (2) as a procedural right or duty, (3) as an explicit substantive right, or (4) as an implicit substantive right derived from another enumerated right, such as a “right to life.”<sup>10</sup>

Approximately 130 countries have constitutional provisions that reflect policy directives and/or procedural rights.<sup>11</sup> Policy directives are intended to influence governmental decision making, but are generally not directly judicially enforceable.<sup>12</sup> They may appear in constitutions in a preamble or in a section designated as “general provisions,” or “directive principles.” These include Afghanistan, Algeria, Cameroon, Comoros, India, Norway, and the Philippines. Recent examples include provisions from the constitutions of Uruguay in 2004 (“[t]he protection of the environment is of common interest”)<sup>13</sup> and Qatar in 2006 (“[t]he State endeavors to protect the environment and its natural balance, to achieve comprehensive and sustainable development for all generations”).<sup>14</sup> While constitutional policy directives are not directly judicially enforceable, they can still wield tremendous influence over legislative policy and judicial interpretation, particularly when courts read them in conjunction with substantive rights—as happened, for example, in the case of Greece’s famed Acheloos River, which was saved from being dammed beyond recognition by judicial interpretation of a policy directive.<sup>15</sup>

Environmental procedural rights normally involve requirements for environmental assessment, access to information, rights to petition or participate, and rights to be consulted. The most recent examples of countries to have constituted procedural environmental rights include Bolivia in 2009,<sup>16</sup> Kosovo in 2008,<sup>17</sup> and Thailand in 2004.<sup>18</sup> While procedural rights can be enforceable, like policy directives they do not impart a substantive right to a quality environment.

About 60 nations have included or added constitutional provisions that expressly recognize a substantive right to a quality environment.<sup>19</sup> The more recent of these include Kenya, which in 2010 amended its constitution to provide that “[e]very person has the right to a clean and healthy environment”<sup>20</sup>; the Dominican Republic, also in 2010 (“Mineral and hydrocarbon deposits and non-renewable natural resources can only be exploited . . . on the basis of environmental sustainability”)<sup>21</sup>; Ecuador, in 2007 (“[r]ight to live in an environment that is healthy and ecologically balanced”)<sup>22</sup>; France, in 2004 (“[e]veryone has the right to live in a balanced and health-friendly environment”)<sup>23</sup>; Afghanistan, also in 2004 (right to “prosperous life and sound living environment for all inhabitants of this land”)<sup>24</sup>; Rwanda, in 2003 (right of “every citizen . . . to a healthy and satisfying environment”)<sup>25</sup>; and South Africa, in 1996 (“everyone has the right to an environment that is not harmful to their health or well-being”).<sup>26</sup>

Many constitutions protect environmental rights as substantive and self-executing, akin to other basic civil or political rights.<sup>27</sup> The right is described as an express “right,” or as a “major,” “human,” “fundamental,” “basic,” or “guaranteed” right in the constitutions of Albania, Angola, Argentina, Azerbaijan, Belarus, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Chad, Chechnya, Congo, Croatia, East Timor, Ecuador, El Salvador, Estonia, Ethiopia, France, Georgia, Guatemala, Honduras, Hungary, Kyrgyzstan, Mali, Moldova, Mongolia, Montenegro, Niger, Romania, Russia, Serbia, Slovakia, Slovenia, South Africa, Sudan, Togo, Ukraine, Venezuela, and the island nations of Cape Verde and Seychelles, among others.<sup>28</sup>

Other nations treat environmental rights in a constitutional manner that appears self-executing and substantive, though as secondary “socioeconomic” nonpolitical rights like the right to food, shelter, or education. These countries include Chile, Colombia, Costa Rica, Macedonia, Mozambique, Nicaragua, Paraguay, Poland, Portugal, São Tomé and Príncipe, South Korea, Spain, and Turkey.

Last, even when the constitutions do not expressly protect the environment or do not expressly allow for judicial enforcement, courts have recognized such rights. Courts in southern Asia—especially in India, as well as Bangladesh, Nepal, and Pakistan—have led the way in inferring environmental rights from some other constitutionally entrenched right, most commonly a right to life.<sup>29</sup>

## Judicial Receptivity to Constitutionally Embedded Environmental Rights

Despite the prevalence of constitutionally entrenched fundamental environmental rights, relatively few courts have actually engaged the provisions. Those that have engaged have done so in remarkably varied ways. For example, courts that have enforced constitutional environmental rights provisions have transformed a notion writ large—environmental human rights—into a multitude of national narratives, sometimes about significant and distinctive features of the natural environment, including—as discussed below—the last stands of ancient forests in the Philippines, the last cold-climate forests in Patagonia, the Ganges River in India, the Acheloos River in Greece, the celebrated woodlands of Hungary, and water supplies in Africa.

At the most generic conceptual level, one might say that courts have treated fundamental environmental rights as either being independent, dependent, derivative, or dormant.

### Independent Environmental Rights

Courts in Latin America have led the way in giving force to constitutional environmental rights provisions identified above as being presumptively self-executing, particularly in Chile. For example, in the 1988 case of *Pedro Flores v. Corporación del Cobre, Codelco*, the Supreme Court of Chile vindicated a constitutional environmental right “to live in an environment free from contamination,”<sup>30</sup> in a lawsuit that aimed to stop the deposit of copper mill tailings onto Chilean beaches.<sup>31</sup> Likewise, in *Comunidad de Chañaral v. Codeco*, the court upheld the right of a farmer to bring a constitutional right-to-life claim to enjoin the drainage of Lake Chungarà.<sup>32</sup> And in the extraordinary *Trillium* decision of 1997, the Supreme Court of Chile held that the Chilean government’s approval of the Rio Condor Project, the U.S.-based Trillium Corporation’s \$350 million project to log 270,000 hectares of pristine forests in Tierra del Fuego at the southern tip of South America, violated that country’s constitutional “right to live in an environment free from contamination.”<sup>33</sup> The court said that this provision required “the maintenance of the original conditions of natural resources” designed to keep “human intervention to a minimum.”<sup>34</sup> Other Latin American countries that have enforced constitutional environmental rights include Argentina, Costa Rica, and Ecuador.

Courts elsewhere in the world have also aimed to implement newly minted constitutional environmental rights provisions.<sup>35</sup> For example, in the *Eurogold* case, the Turkish government had agreed to allow the giant French mining conglomerate to use cyanide heap-leaching to mine gold and other metals from a centuries-old olive growing region in Turkey.<sup>36</sup> Olive farmers brought a suit claiming that the government’s license contravened Turkey’s new constitutional environmental right “to live in a healthy, balanced envi-

ronment.”<sup>37</sup> Turkey’s highest administrative court agreed, stopping the olive tree removal operation in its tracks.<sup>38</sup>

Some courts, however, have declined to enforce constitutional provisions that might have been construed as providing independent environmental rights.<sup>39</sup> For example, Spain’s constitutional “right to enjoy an environment suitable for the development of the person”<sup>40</sup> has been held to fall outside the actionable private “rights” the constitution otherwise guarantees.<sup>41</sup> Only an “ombudsman” may enforce Namibia’s environmental rights provision,<sup>42</sup> and citizens of Cameroon may not pursue environmental rights before the country’s Constitutional Court.<sup>43</sup> In these countries, standing and other jurisprudential doctrines intermingle with the courts’ interpretations of the environmental rights provisions with the result that the provisions are virtually read out of the constitutions.

### Dependent Environmental Rights

Dependent environmental rights are those that, while typically expressed as a “directive principle” or the like, are nonetheless enforceable when coupled with an independently enforceable constitutional right, usually a right to life. The Supreme Court of the Philippines is the forerunner in enforcing dependent environmental rights. The celebrated case of *Minors Oposa v. Factoran* was brought to “‘prevent the misappropriation or impairment’ of Philippine rainforests.”<sup>44</sup> The Philippine Constitution provides that “[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”<sup>45</sup> In reversing the trial court, the Supreme Court upheld Oposa’s constitutional claim, and also found that the plaintiffs had standing to represent themselves, their children, and posterity.<sup>46</sup> In a sweeping pronouncement, the court determined that rights to a quality environment, when coupled with the Philippine Constitution’s right-to-life provision,

need not even be written in the constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as State policies by the constitution itself, thereby highlighting their continuing importance and imposing upon the State a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come—generations which stand to inherit nothing but parched earth incapable of sustaining life.<sup>47</sup>

More recently, in *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*, the same court upheld a request for multifaceted in-

junctive relief to prevent massive pollution discharges from choking Manila Bay, and to clean and protect it for the benefit of future generations.<sup>48</sup> In upholding the lower court's injunction, the court once again recognized the "obligation to future generations of Filipinos to keep the waters of the Manila Bay clean and clear as humanly possible," even assuming "the absence of a categorical legal provision specifically prodding petitioners to clean up the bay." The court wrote that anything less "would be a betrayal of the trust reposed in" those responsible.<sup>49</sup> These two cases serve as important models for other courts construing policy directives that purport to recognize a fundamental right to a healthy environment.

### Derivative Environmental Rights

Derivative environmental rights are those that, while having no textual expression, are found to reside in another independent constitutional right, such as a "right to health." Where environmental rights provisions are not per se judicially enforceable, courts have read environmental values into rights that are judicially enforceable, and the right to life, being one of the broadest, is often chosen to harbor environmental rights. Courts in southern Asia have led the way in enforcing environmental rights as deriving from some other constitutionally entrenched right.<sup>50</sup> Most notably, the highest courts in India,<sup>51</sup> Pakistan,<sup>52</sup> Bangladesh, and Nepal have each read a constitutional right to life in tandem with directive principles aimed at promoting environmental policy to embody substantive environmental rights.<sup>53</sup> The Supreme Court of India was one of the first to find that a "right to life"<sup>54</sup> embeds a right to a quality environment.<sup>55</sup> For example, in *Subhash Kumar v. State of Bihar*, the plaintiffs brought an action to stop tanneries from discharging into the Ganges River.<sup>56</sup> While the court dismissed the action for lack of standing, it observed that the "[r]ight to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life."<sup>57</sup> Subsequently in *M. C. Mehta v. Union of India*, the court ordered the tanneries to shut down unless effluent was first subjected to pretreatment processes approved by the governing environmental agency: "Closure of tanneries may bring unemployment [and] loss of revenue, but life, health and ecology have greater importance to the people."<sup>58</sup> Courts in Bangladesh, Colombia, Hong Kong, Nepal, and Pakistan have also found environmental rights to be embedded within those nations' constitutional right to life.<sup>59</sup>

On the other hand, national courts elsewhere have generally declined to infer that other rights, such as those to life or dignity, include a substantive right to a quality environment. In the United States, the Supreme Court has never addressed the issue directly and is not likely to do so any time soon.<sup>60</sup> However, every U.S. court that has addressed the issue has rejected the position that constitutional rights to "liberty" or "life" provide an implied or penumbral right to a clean environment.<sup>61</sup> Some nations, like the Netherlands,



have declined to infer substantive environmental rights even from constitutional provisions that impel the adoption of environmentally sound governmental policies.<sup>62</sup>

### **Dormant Environmental Rights**

Dormant rights are those that have yet to be tested judicially or have not been established constitutionally. Some provisions that purport to provide a substantive right to a quality environment have yet to produce much, if any, substantive relief. For example, while South Africa's post-apartheid constitution guarantees a fundamental right to a clean environment, functionally open standing, and access to a constitutional court, that court has not employed the provision to provide injunctive relief or damages. Brazil's constitution, with its aim to protect the Amazon rain forest,<sup>63</sup> has among the most detailed environmental provisions of all national constitutions.<sup>64</sup> Yet, it is doubtful that its promise that everyone has "the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life"<sup>65</sup> will be enforceable.<sup>66</sup>

Many countries have declined to entrench constitutional environmental rights. These include Austria, Germany, the United States (where all efforts to amend the U.S. Constitution to provide a substantive right to a clean environment have so far failed), and countries in the Caribbean. Nonetheless, the constitutions of political subdivisions in some of these countries expressly provide a substantive right to a quality environment, including, as discussed in chapter 12, several in the United States.

Although growing, the body of judicial opinions applying constitutionally entrenched environmental rights is still quite limited given the prevalence of such provisions globally. The next section examines the institutional and practical obstacles to vindicating constitutionally entrenched environmental rights.

### **Adjudicating Fundamental Environmental Rights**

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The overview of constitutions and cases described in the previous section suggests some of the problems practitioners face when seeking to enforce constitutional environmental rights. Adjudicating constitutionally entrenched environmental rights raises certain unavoidable conceptual conundrums, pragmatic considerations, and remedial challenges, some of which are prevalent in other areas of constitutional adjudication but are more pronounced with environmental rights.

## Conceptual Conundrums

Many of the problems posed by enforcing environmental rights flow from the lack of certainty about what the “environment” actually entails and how a meaningful conception of the environment can be incorporated into the structure of constitutional adjudication. First is a question of scope: Does the “environment” include everything from air pollution to access to potable water to the effects of climate change? If courts entertain suits on all these topics, what is excluded?

The Chilean Supreme Court has recognized that

the environment, environmental heritage and preservation of nature, of which the Constitution speaks and which it secures and protects, is everything which naturally surrounds us and that permits the development of life, and it refers to the atmosphere as it does to the land and its waters, to the flora and fauna, all of which comprise nature, with its ecological systems of balance between organisms and the environment in which they live.<sup>67</sup>

With this broad conception of the environment in mind, it is easy to see why admitting, or rather denying, particular claims would be difficult. As the Philippine Supreme Court famously said in *Minors Oposa v. Factoran*:

It is in fact very difficult to fashion language more comprehensive in scope and generalized in character than a right to “a balanced and healthful ecology.” The list of particular claims which can be subsumed under this rubric appears to be entirely open ended: prevention and control of emission of toxic fumes and smoke from factories and motor vehicles; of discharge of oil, chemical effluents, garbage and raw sewage into rivers, inland and coastal waters by vessels, oil rigs, factories, mines and whole communities; of dumping of organic and inorganic wastes on open land, streets and thoroughfares; failure to rehabilitate land after strip-mining or open-pit mining; kaingin or slash-and-burn farming; destruction of fisheries, coral reefs and other living sea resources through the use of dynamite or cyanide and other chemicals; contamination of ground water resources; loss of certain species of fauna and flora; and so on.<sup>68</sup>

Indeed, by definition, the environment is everything around us. The problem exists, in different guises, whether the rights are thought of as independent, dependent, or derivative of other rights.

The large and amorphous boundaries of the right to a quality environment can diminish judicial receptivity to enforcing such a claim. To some, the amorphousness of the definitional issues suggests that legislative bodies rather than courts should decide whether to recognize environmental rights. But as long as environmental rights are constitutionally guaranteed, they should be judicially protected.

So the next question is what is the “right” to which people are entitled? Does the right inure only to the benefit of humans (as is the case with every other constitutional right), or should it include ecocentric interests such as biodiversity? The Indian Constitution engages this question starkly: Under a directive principle of state policy, the state must “endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”<sup>69</sup> This seems to be as much for the benefit of the citizens as for the wildlife and even the forests themselves. Some observe that traditional liberal constitutional theory supports a strictly anthropogenic approach.<sup>70</sup> Others argue that environmental rights ought to be stretched to include nonhuman harms and biodiversity.<sup>71</sup>

But if vindicating fundamental environmental rights does not require a showing of harm to humans, it is hard to square with the concept of a constitutional right. What triggers the right? Is it violated when the environment is harmed by pollution or clear cutting? This is not only a question of standing and timing, but of the nature of the right and the purpose of judicial intervention into the policy making authority of the state. Does the right—and the obligation of judicial intervention—exist whenever a governmental policy throws out of balance the “rhythm and harmony” of nature?

Or perhaps the violation occurs, as would be the case with other constitutional rights, when the defendant’s actions caused a cognizable harm to a defined cohort of individuals who are the intended beneficiaries of the constitutional right. Perhaps when the pollution is shown to cause birth defects, or when the clear-cutting of forests impairs a group’s ability to hunt, which threatens their livelihood and their way of life. Any of these interpretations is possible under most constitutional provisions, but they obviously involve dramatically different types of inquiries and present very different types of controversies.

The answers to these questions have significant consequences for litigation. It does not require significant litigation resources to prove that a company is dumping toxic waste into a river, but it is very difficult to prove that such dumping did or will increase the incidence of cancer in the local community or in a particular person. This problem is magnified with the growing number of claims relating to climate change, of which there is abundant evidence, but the evidence tying it to specific harms suffered by specific humans within a specific nation is much more tenuous. And unfortunately, neither the

constitutional texts nor the drafting history in most countries illuminates the purpose of embedding environmental rights.

In addition to these problems of breadth, fundamental environmental rights also raise problems of depth: How much degradation is permissible before a violation is said to occur? What is the benchmark from which no more pollution is permissible? This, in part, may be the adjectival problem: What is the level of entitlement that the right guarantees? Is the right to have an environment that is “quality,” “healthful,” “clean,” “adequate,” or something else?

The simplicity of the questions belies the complexity of the answers. It is, at root, a difficult, polycentric policy-based cost-benefit problem: At what cost do we protect the environment? And what constitutes degradation? Environmental litigation may often invert the normal expectations relating to the roles of public and private parties. Whereas traditional constitutional rights litigation pits the private individual against the public authority, environmental litigation often pits members of the public against a private entity. Moreover, in many of these cases, private individuals are asserting public rights, whereas the government is facilitating private gain.<sup>72</sup>

But how can a court, with limited political authority and negligible enforcement power, actually determine the contours of the right “to live in an environment free of pollution”<sup>73</sup> and enforce that judgment against public and private actors who have different views?<sup>74</sup> Although courts of other nations do not typically expressly invoke the U.S. political question doctrine (discussed in chapter 9), their reluctance to engage with fundamental environmental rights may be attributable to the same concerns. That is, institutional bodies with frail historical legitimacy, with neither police power nor economic muscle to buttress their orders, are reluctant to try to force coordinate branches to make radical policy changes.

These problems reveal a potentially fundamental disjunction between the aspirations embodied in constitutional protection for the environment and the practical world of constitutional litigation. Typically, constitutional adjudication is defined by a particular harm that has occurred or is imminent and will injure a particular individual or discrete group. Violations of environmental policy, by contrast, may cause harm now or in the future to an individual, a discrete group, a culture, or all of humanity, born or not yet born. Thus, what starts out as a constitutional right built on high principles is often molded by the hands of courts into a distinctly pragmatic evaluation involving questions of standing, timing, and the availability of remedies.

## **Pragmatic Considerations**

### **Who Can Sue?**

Before a court reaches the merits of a constitutional claim, it will often consider the preliminary question of standing: whether the party who brought

the suit has the right to invoke the court's jurisdiction. Most constitutional traditions have a standing doctrine, although they vary widely from country to country. Some constitutional cultures limit who can sue to certain members of the government or to an ombudsperson, while others encourage any aggrieved person to seek judicial protection. But because standing is usually determined at the outset, a case may get dismissed when the plaintiff is found to lack standing. For instance, the Bangladesh Supreme Court dismissed a case in which the plaintiff, who had challenged a flood control plan, was found not to have standing to represent others.<sup>75</sup>

Standing (discussed in chapter 8) is a critical question in environmental constitutional litigation for a number of reasons. Some environmental litigation may raise abstract claims based on aesthetics or the health of a particular animal population that do not directly affect most people. Such litigation may be brought by environmental groups that have to show their commitment to environmental protection to establish standing. However, most constitutional environmental rights are asserted by individuals or groups who are directly affected by the challenged environmental degradation. In some cases, the plaintiffs not only enjoy the aesthetic value of the environment, but depend on it for their subsistence. These claims are based on the environment as it provides access to basic needs like water, arable land, food, shelter, and to the essentials to sustain a certain quality of life, including individual dignity, a cohesive community, and life itself.<sup>76</sup> In other cases, plaintiffs are palpably harmed when the environment becomes toxic.

Some constitutional courts have explicitly lowered standing requirements to permit suits to vindicate fundamental environmental rights. The Indian Supreme Court, for example, has explained that “[a] petition under Article 32 for the prevention of pollution [is] maintainable at the instance of affected persons or even by a group of social workers or journalists.”<sup>77</sup>

In addition to the normal standing questions that attend most constitutional litigation, environmental litigation also raises difficult questions of *intergenerational* standing—the right of an individual to sue on behalf of future generations—because of the long-term effects of the behavior that is being challenged. In *Minors Oposa*, as noted above, the Philippine Supreme Court recognized intergenerational standing, although on the basis of preexisting norms as much as constitutional rights. The court said that “even before the ratification of the 1987 Constitution, specific statutes already paid special attention to the ‘environmental right’ of the present and future generations.” Citing two policies that articulate a goal of “fulfil[ing] the social, economic and other requirements of present and future generations of Filipinos,” the court said these two statutes speak “of the responsibilities of each generation as trustee and guardian of the environment for succeeding generations.”<sup>78</sup>

The problem of international standing may be even more challenging than the problem of intergenerational standing. While some environmental

violations are felt locally, the consequences of others do not stop at national boundaries that limit the jurisdictions of constitutions and constitutional courts. This concern is particularly salient with challenges based on climate change, whose effects are felt not only across time but across space as well, and it is particularly true where, as noted above, the harm is felt primarily not only to individuals, but also to other species of flora and fauna and essentially to the environment itself.

The question of standing is intricately linked to the question of whether the plaintiff has suffered or will imminently suffer a cognizable injury or harm. Lowering the threshold for standing recognizes broader types of harms. When a plaintiff's health is impaired by reason of the defendant's environmental degradation, standing is clear. But a court may be less likely to find standing when the claimed injury is that the rivers and forests are no longer as pristine as they once were, or that once-potable water has become contaminated, or that thousands of acres of arable land have become desert. The mere fact of a violation may be sufficient in some courts,<sup>79</sup> but other courts might require evidence to prove that the violation caused a particular injury to the particular plaintiff. Questions concerning the proper defendant, and the problem of causation, are discussed in more detail below.

### Who Can Be Sued?

In the simplest cases, defendants are state actors who have violated their obligations to comply with constitutional mandates. In most situations, it does not matter whether the government was acting as sovereign/regulator, as licensor,<sup>80</sup> or as a "market participant"<sup>81</sup> because, in any event, it is obligated to comport with constitutional norms.<sup>82</sup> In federal systems, the local, state, or provincial government may be liable instead of, or in addition to, the federal authorities.

Under the theory of horizontal application that operates in some constitutional systems, private parties may also be held accountable for violation of constitutional norms.<sup>83</sup> Horizontal application of constitutional obligations is useful in environmental litigation because liability may be easier to ascertain: often, the private party's action is more likely to be the direct cause of the environmental degradation than the government's decision to authorize the private party's action. Aside from liability, a court is more likely to award damages against a private defendant than against a government defendant, given the likelihood that the latter is protected by principles of sovereign immunity<sup>84</sup> and given prevalent separation of powers concerns.

### Defining the State's Obligation

In addition to protecting against acts of commission, such as operating a mine in violation of the constitution or allowing a company to cut down the nation's timber resources, some constitutional systems impose affirmative obligations

to protect the environment, and therefore seem to envision liability for some acts of omission. The Dutch Constitution uses mandatory language. It states that “[i]t shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.”<sup>85</sup> Similarly, the Chilean court has used the affirmative obligation in that country’s constitution to hold the government liable for failure to protect,<sup>86</sup> as has the Turkish court.<sup>87</sup> The obligation to affirmatively protect the environment may also attach to nonstate actors.<sup>88</sup>

Some courts have gone out of their way to enforce affirmative duties. For example, the Philippine court has made clear that the State owes different levels of obligation: “a balanced and healthful ecology and health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the State a solemn obligation to preserve the first and protect and advance the second. . . .”<sup>89</sup> But of course, the greater the obligation, the more difficult it will be for the court to enforce it, particularly against the government.

### Defenses and Limitations

Most constitutional defenses and limitations apply similarly in environmental and other constitutional litigation. State and non-state defendants may assert the usual factual defenses (e.g., that they did not do what was complained of, or that their actions or omissions did not cause the complained-of injury) and legal defenses (e.g., that their actions or omissions did not violate any legal duty imposed by the constitution). Legal objections may be particularly pertinent when the fundamental environmental right falls under a directive principle of state policy and is therefore formally judicially unenforceable, though as we have seen, some courts have overcome this objection by finding that the unenforceable environmental right appertains to another enforceable right, such as the right to life or to health.

In most constitutional systems, however, environmental rights are not absolute and may be limited or overcome in at least three situations, all of which pertain equally to the enforcement of other constitutional rights. First, they may be limited if the environmental right conflicts with another right, such as the right to life or a nonderogable right like the right to dignity. Second, the environmental right is usually subject to a proportionality test; that is, the right may be limited if the limitation is proportionate to the need. Third, the right may resist vindication when it is not deemed an individual right but an obligation on the state. In that situation, a court may order the government to develop a plan for environmental protection, but will not find that a remedy to the individual claimant is due. Thus, the question of remedies is central to the definition and enforcement of fundamental environmental rights.

## Remedial Challenges

The question of remedies comprises a complex web of issues because it goes to the heart of the power and authority of the constitutional court. What authority does a court have to order a party to do something, and what power does it have to enforce its order? Constitutional courts do not typically have the power to ensure that an order will be implemented. While the force of law stands behind a court when it seeks to enforce an order against a private actor, a government actor within the executive branch may well control the forces of law.

Thus, the question of remedies, their fashioning and their enforcement, is in part a question of power: both the *de jure* power that a court actually has that creates it and determines its authority, and the *de facto* power that a court may be able to exercise, given the financial, political, and social or cultural constraints that in reality demarcate the scope of its authority. The legal limitations to hear certain cases and fashion remedies may be written into the constitution or other positive law or may be implicit.

### Fashioning the Remedy

Once a court has determined that the plaintiff has standing, that the case is otherwise justiciable, and that the defendant did violate a legal duty thereby causing the injury of which the plaintiff complains, it may choose to order the defendant to do or refrain from doing something. In contrast to common law or even most other constitutional litigation, fashioning an environmental rights remedy can be the most challenging part of the case, in part because the simplest remedies are the least likely to be effective in fixing the problem.

A declaratory judgment merely announces a violation but imposes no obligation on the government or on any private party to take action to improve the environmental situation. A writ may be similarly unavailing because, as the Supreme Court of Nepal has said, “[f]or the purpose of mandamus, the legal duty must be definite and fixed,”<sup>90</sup> which is often not the case with environmental litigation.

Sometimes, an award of damages can be helpful, though affixing a monetary amount to environmental degradation or ongoing impairment to people’s health is obviously extraordinarily difficult. In one Colombian case, where toxic fumes emanated from an open pit, defendants were required “to remediate the site and to pay past and future medical expenses to those who became sick.”<sup>91</sup> Alternatively, equitable relief may be appropriate where the source of the environmental degradation is clear and the remedy is simply to cease the offensive conduct. In all these cases, however, the remedies are much easier for a court to say than to measure or enforce.

As we have seen, some courts may be willing to vindicate environmental rights for the benefit of the community as a whole, future generations, or hu-



manity in general. But other courts may be reluctant to favor the future generations at the expense of the specific individuals before them, or to protect the abstract value of a clean environment over the immediate needs for sustenance or jobs for members of a poor community. Courts seeking to avoid this intensively policy-based assessment have relied on principles of progressive realization to encourage governments to promote environmental and other socioeconomic goals, without having to draw the fine lines themselves. Some constitutions, such as South Africa's, explicitly provide for the progressive realization of some rights<sup>92</sup> while others leave it to the courts to make the inference from the constitutional text or from international law. In a recent case involving the right to water, the South African Constitutional Court explained that

it is clear that the right does not require the state upon demand to provide every person with sufficient water without more; rather it requires the state to take reasonable legislative and other measures progressively to realize the achievement of the right of access to sufficient water, within available resources.<sup>93</sup>

The court recognized that the right to progressive realization of a constitutional right does give rise to justiciable obligations by the state. The state must formulate policies to promote the right, and "policies formulated by the state will need to be reviewed and revised to ensure that the realization of social and economic rights is progressively achieved."<sup>94</sup> Thus, a litigant may always argue that the state has failed to develop a policy concerning the right, or that the policy has not been adequately revised and updated, and has been allowed to lie dormant. However, the court emphatically rejected the notion that socioeconomic rights contain a particular "minimum core" that must be respected or provided in the legislative plan.<sup>95</sup>

But, as we shall see, formulating the right to a healthy environment as a right to the progressive realization of a healthy environment, without any minimum core, reduces the attractiveness to plaintiffs attempting to vindicate such a right. The payoff is far less than might initially appear, as we discuss in the next section regarding enforcement.

### Enforcing the Remedy

When a court has made a decision to vindicate a fundamental environmental right, it still needs to ensure that its remedy is enforceable and enforced. Here the questions are who bears the obligation to comply with the order? And, just as important, who is responsible for ensuring that the order is complied with? If the order requires the parliament to develop a plan or to change the law, who will ensure that it does so effectively and in a timely fashion? And furthermore, who will ensure that the government enforces the new law?

It is usually up to the courts to ensure compliance with their orders. In most cases, of course, parties will accept the court's order and abide by it, if for no other reason than to avoid contempt of court citations and the penalties that accompany them. However, the more costly the order in financial, political, or other terms, the more incentive there is to avoid compliance. This is true as well when the court's order is unusually complex or requires an ongoing commitment, which is more likely with environmental constitutional claims. If the government is ordered to take future action, a court may need to retain jurisdiction over the defendant on an ongoing basis.

This requires a continued commitment not only by the court but also by the plaintiffs, or their successors, without any guarantee of success. In one Indian case, the court recognized this ongoing obligation and expressly ordered that the plaintiff should be given liberty to apply to the court from time to time for further direction, if necessary.<sup>96</sup> But this is problematic because continued vigilance on the part of plaintiffs privatizes the burden for securing a public good. It requires the plaintiffs to ensure, on an open-ended basis, that the government takes responsibility for the environmental violation and complies with the rule of law as mandated by the judicial branch. This requires significant resources on the part of the original litigants and their lawyers. As the Bangladeshi environmental protection organization, BELA, has said, "winning a court case is only the first step."<sup>97</sup> In Nepal, however, the non-governmental organization Pro Public "has adopted a comprehensive strategy for obtaining compliance" with court orders,<sup>98</sup> suggesting that ensuring enforcement of court orders is difficult, though not impossible, to do.

In sum, no single solution explains the lack of judicial engagement with constitutional environmental rights provisions, even where litigants and their attorneys are willing to try to vindicate them. In any given country, the reasons for the lack of receptivity may be procedural, structural, institutional, or political. Courts are generally wary of new claims that had previously been consigned to the political process, in part because these claims require specialized competence or resources that courts typically lack. In addition, vindicating environmental rights can have negative repercussions, from loss of political station to death, for courts and litigants.<sup>99</sup> The next section discusses some avenues for overcoming these obstacles.

## **Pathways to Successful Constitutional Environmental Litigation**

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Given all the hurdles discussed above, it is not surprising that there has been so little successful constitutional environmental litigation. Perhaps what is surprising is that courts have been willing to look beyond these obstacles and grant relief at all. What follows is a brief summary of strategic choices that

those seeking to vindicate constitutionally protected environmental rights should consider.

### Constitutional Culture

It is helpful if the constitutional culture, whether explicit or not, is conducive to individual claims against government and/or private actors for violation of fundamental environmental rights. This means that the constitution should protect environmental rights and that courts should have the authority to vindicate them, either because they are explicitly guaranteed in a bill of rights, or dependent on or derivative of some other explicitly protected right. This may require an explicit constitutional right to a remedy<sup>100</sup> or an accepted practice of providing a remedy when a constitutional right has been violated. If this is not made explicit in the constitutional text itself, this structure must be in place at the constitutional, statutory, or common (or customary) law level for environmental justice to be judicially enforced.

### Enabling Constitutional Litigation

Plaintiffs who seek to bring environmental rights claims must ensure that they have standing to bring the claim. Obviously, this is easier in constitutional regimes that encourage public interest litigation through practice or under special writs or jurisdictional rules. Once standing and other threshold matters have been established, the plaintiffs' claims will be scrutinized. Ordinarily, the more specifically and narrowly the claim is drawn, the more likely a court is to find it cognizable. This is true both in civil law and common law systems. The chances of success will increase if the environmental right can be buttressed by or hybridized with other constitutional claims (e.g., environmental claim *plus* dignity, life, health, housing, occupation). In the course of the litigation, plaintiffs should also pay close attention to the burden of proof. Often, if the plaintiff can make out a *prima facie* case that the government violated the constitutional right, the burden will shift to the government to defend its action. This may significantly minimize for plaintiffs the cost and difficulty of proving causation and damages.<sup>101</sup>

Moreover, seeking a remedy that is precisely and narrowly defined will increase the likelihood that it will be adopted by the court and that it will be followed by the government and subsequently enforced by the courts. Negative obligations that require the defendant to *refrain* from an action are more likely to be complied with and enforced than affirmative obligations. Orders that do not require excessive government expenditures are more likely to be issued by a court because they are more likely to be complied with by the government. Conversely, orders that require extensive ongoing judicial oversight are less attractive to courts because they involve greater judicial resources and expose the court to greater criticism from the government and the public.

Nonetheless, in some countries, plaintiffs have successfully secured novel and creative remedial orders from courts. In *M. C. Mehta v. Union of India*, for example, the court ordered curricular reform to include environmental education and ordered the showing of programs on television and radio to educate the public about environmental issues as a condition of cinema license.<sup>102</sup> In another Indian case,

the Court set a deadline for the closure of polluting tanneries, imposed a deposit fee on the price of the land, ordered the State Government to set up a unified single agency consisting of all departments concerned to act as a nodal agency, directed the State Government to appoint an authority to assess the ecological loss to the region and asked the same to frame scheme in consultation with [others] for reversing the ecological loss.<sup>103</sup>

Litigants should encourage courts to develop creative solutions to the multifaceted problem of environmental protection.

### **Tolerance of Judicial Reform**

In some countries, the judicial system and culture may not be receptive to fundamental environmental rights. In these countries, it may be worth the effort to lobby for specialized courts to deal with environmental litigation, including both fundamental environmental rights litigation and litigation based on climate change. Specialized courts could develop unique standing and evidentiary rules to facilitate the investigation of environmental claims. They would be staffed by experts in the various aspects of environmental litigation, such as the health effects, the biological and chemical implications of government or private action to the environment, or the economic effects of enhancing environmental regulation. With added expertise, the courts would benefit from increased social legitimacy, and would thereby have the power to issue broader, more creative orders to remedy environmental violations. This in turn would help avoid the problem articulated by Justice Feliciano, concurring in *Minors Oposa*:

[T]he result will be, it is respectfully submitted, to propel courts into the uncharted ocean of social and economic policy making. At least in respect of the vast area of environmental protection and management, our courts have no claim to special technical competence and experience and professional qualification. Where no specific, operable norms and standards are shown to exist, then the policy making departments—the legislative and executive departments—must be given a real and effective opportunity to fashion and promulgate those norms and standards, and to implement them before the courts should intervene.<sup>104</sup>

The observation is largely true, and promoters of constitutional environmental rights should be prepared to respond to it.

## Conclusion

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Given the complexity of environmental litigation—the necessary involvement of all branches of government as well as a multiplicity of private and public actors—it is obvious that the judiciary plays a necessary, but not sufficient, role in the vindication of fundamental environmental rights. Yet judicial receptivity to fundamental environmental rights provisions seems to belie predictable patterns. Nonetheless, there are lessons to be learned. Litigation of fundamental environmental rights is useful when the causation is clear and the injury is remediable by a simple order that does not require extraordinary measures for enforcement. But when the claims are broader, one may legitimately ask whether litigation is the most effective vehicle for improving the environment. Litigation in these kinds of situations may not only distort the injury that is being experienced, but may also put courts in the untenable position of trying to fix a wrong they have no capacity to fix. Ultimately, the problem is that litigation over fundamental environmental rights requires courts to treat a public injury as if it were a private wrong.

And yet, to move the issue of environmental protection to the fore, the best course may *have* to be litigation. Even in the more complex, multifaceted, and politically sensitive situations, where judicial enforcement requires the conversion of a public injury into a private wrong, constitutional litigation can be salutary. The restrictions on authority and legitimacy that courts contend with may not enable them to protect the environment on their own, but they are nonetheless able to participate in setting the terms of the social and political debate on a particular issue. However, much about adjudicating explicit constitutional environmental rights remains to be developed.

## CASE STUDY

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### Protecting Manila Bay—To Show to the World, and to All and Sundry

Manila Bay, located in southwest Luzon in the Philippines, is a natural wonder. Its 693,983 square miles contain some of the greatest biodiversity in Southeast Asia. If ever an area could be described as “teeming” with marine and terrestrial life, it is Manila Bay.

The area has a rich strategic history. It is where the U.S. Navy, led by Commodore George Dewey, landed and fought in the siege of Manila at the

outset of the Spanish American War in 1898.<sup>105</sup> Japanese forces occupied the Philippines after prevailing in a fierce battle with U.S. and Filipino forces at the beginning of World War II. By the end of the war in 1945, nearly all of Manila lay in ruins.<sup>106</sup> Thirty years later, Francis Ford Coppola used the bay and its environs for staging his epic movie *Apocalypse Now*.<sup>107</sup>

Given its natural beauty, tropical climate, and strategic location, Manila Bay is also teeming with humans. Twenty million people live in metropolitan Manila. Indeed, Manila City is the most densely populated city in the world, with 43,079 people per square kilometer. Manila Bay's 190 kilometers of coastline also boast significant industrial, commercial, and residential development and extensive international portage.<sup>108</sup>

Understandably, then, Manila Bay is also teeming with pollution from farms, factories, urban runoff, combined sewer overflow, landfills, watercraft, cars, tankers, and trucks—you name it—coupled with poor municipal waste planning, poor plumbing, and unlawful or haphazard waste dumping along the bay's tributaries. Most of it ends up in Manila Bay, exceeding the carrying capacity of the ecological system to withstand, rebound, and recover.

In 1999, a group of fourteen young Filipinos—*sub nom.* Concerned Residents of Manila Bay—filed a lawsuit against ten executive departments and agencies for neglecting to protect Manila Bay for the benefit of future generations. As discussed in this chapter, the plaintiffs alleged that they had a constitutional guarantee to a quality environment. In *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*, the Philippine Supreme Court upheld the lower court's decisions to grant the citizen's request to enjoin the government from issuing any further permits to pollute Manila Bay.<sup>109</sup> Writing for the court, Justice Presbitero J. Velasco reasoned:

Even assuming the absence of a categorical legal provision specifically prodding petitioners to clean up the bay, they and the men and women representing them cannot escape their obligation to future generations of Filipinos to keep the waters of the Manila Bay clean and clear as humanly as possible. Anything less would be a betrayal of the trust reposed in them.<sup>110</sup>

In an astounding decision, the court ordered the government to engage in pollution prevention, control, and protection; to prosecute and punish violations; and to rehabilitate and restore the bay—all under threat of contempt of court.<sup>111</sup> The court's directives were impressively specific and included a wide range of instructions. Among these were deadlines for agencies to regulate waste treatment facilities, for school districts to educate schoolchildren about environmental protection, and

for the government to set aside adequate funds for cleanup.<sup>112</sup> The court also exercised continuing jurisdiction, ordering government officials to inform the court about their progress on a quarterly basis,<sup>113</sup> progress to be confirmed by a court-established advisory committee.<sup>114</sup>

Justice Velasco equates this decision to the civil rights and personal liberties decisions by the U.S. Supreme Court during the Warren era, and maintains that the court has not engaged in what some might call “judicial activism”: “Surely, it is not judicial activism when courts carry out their constitutionally assigned function of judicial review and in the process enjoin those charged with implementing a law to do so.”<sup>115</sup> He notes that many governmental employees welcomed the opportunity to perform their regulatory duties without being hampered by lower court injunctions previously issued.<sup>116</sup>

More than one year on, President Arroyo’s administration says that it intends to follow the court’s orders: “The Supreme Court has already ruled regarding this matter, so we urge all agencies involved to comply with the order.”<sup>117</sup> Nonetheless, compliance has come slowly and deliberately. The Concerned Residents’ attorney, Tony Oposa—the same lawyer who brought the *Minors Oposa* case discussed above—has recently urged the Philippine Supreme Court to cite government officials for contempt: “To show to the world, and to all and sundry, that the Honorable Court is truly committed, it must wield, if necessary its powers of enforcement by citing the heads of these noncompliant government agencies in contempt of court.”<sup>118</sup> No truer statement could be made about the prospects of constitutionally embedded environmental rights provisions around the globe.

## Notes

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This chapter is adapted from James R. May & Erin Daly, *Vindicating Constitutionally Entrenched Environmental Rights Worldwide*, 11 OR. REV. INT’L L. 365 (2010). The assistance of William Romanowicz, George Washington Law ’12, and Corey Bolander and Janea DeWolff, Widener Law ’12, is noted with gratitude.

1. See generally James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVTL. L. REV. 113 (2006).

2. See generally James R. May & Erin Daly, *Vindicating Constitutionally Entrenched Environmental Rights Worldwide*, 11 OR. REV. INT’L L. 365 (2010).

3. See generally SVITLANA KRAVCHENKO & JOHN E. BONINE, *HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW AND POLICY* (2008).

4. May, *supra* note 1, at 133–36.

5. See generally Barry E. Hill et al., *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 GEO. INT’L ENVTL. L. REV. 359, 382 (2004), discussed in May & Daly, *supra* note 2, at 371.

6. Unless otherwise noted, all quotations from constitutions are taken from CONSTITUTIONS OF THE COUNTRIES OF THE WORLD ONLINE, <http://www.oceanalaw.com>.

7. *Id.*

8. See generally CONSTITUTIONAL ENVIRONMENTAL RIGHTS IN AFRICA (Envtl. Law Inst. ed., 2008).

9. See TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 72–92 (2005); see also May, *supra* note 1, at 115 (citing Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 Colum. J. Env'tl. L. 131, 132 (2001) (“Constitutional provisions offer broad and powerful tools for protecting the environment. . . .”)), app. B (listing constitutional provisions recognizing environmental policies, duties and procedural rights).

10. See May & Daly, *supra* note 2, at 373.

11. See May, *supra* note 1, app. B.

12. See INDIA CONST. art. 37 (“The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down 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.”).

13. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA ORIENTAL DEL URUGUAY DE 1967 CON LAS MODIFICACIONES HASTA 1996 § II, ch. II, art. 47. In 2004, the constitution was amended to state that “water is a natural resource essential to life” and that access to piped water and sanitation services are “fundamental human rights.” *Id.*

14. PERMANENT CONST. OF THE STATE OF QATAR pt. II, art. 33, *discussed in* May & Daly, *supra* note 2, at 373–74.

15. See Oliver A. Houck, *A Case of Sustainable Development: The River God and the Forest at the End of the World*, 44 TULSA L. REV. 275, 286–87 (2008); see also OLIVER A. HOUCK, TAKING BACK EDEN: EIGHT ENVIRONMENTAL CASES THAT CHANGED THE WORLD 131–50 (2009) (Acheloo's story, with pictures), *discussed in* May & Daly, *supra* note 2, at 374.

16. See generally World Resources Institute, *Bolivia's New Pro-Environment Constitution* (2009), <http://projects.wri.org/node/1206> (describing environmental rights provisions in new constitution, including public participation in environmental decision making).

17. See KOS. CONST. art. 52 §§ 2, 3 (“2. Everyone should be provided an opportunity to be heard by public institutions and have their opinions considered on issues that impact the environment in which they live. 3. The impact on the environment shall be considered by public institutions in their decision making processes.”), *available at* <http://www.kushtetutakosoves.info/?cid=2,250>.

18. RA TTA'TAMMA NOON HA'ENG RAATCHA ANAAJA'K TAI [RA TTA'TAMMA NOON] [CONSTITUTION] pt. 12, § 67 (Thail.):

Any project or activity which may seriously affect the quality of the environment, natural resources and biological diversity shall not be permitted, unless its impacts on the quality of the environment and on health of the people in the communities have been studied and evaluated and consultation with the public and interested parties have been organized, and opinions of an independent organization, consisting of representatives from private environmental and health organizations and from higher education institutions providing studies in the field of environment, natural resources or health, have been obtained prior to the operation of such project or activity.

*Id.*



19. *See id.* at 129, app. A. *See also* EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2008, available at <http://www.earthjustice.org/library/reports/2008-environmental-rights-report.pdf>. For another compilation, see A Substantive Environmental Right, *Resources*, <http://hrge.org/en/resources> (last visited Dec. 20, 2010).

20. CONST. KENYA art. 42, which in full reads:

Every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.

[http://www.coekenya.go.ke/images/stories/Resources/the\\_proposed\\_constitution\\_of\\_kenya.pdf](http://www.coekenya.go.ke/images/stories/Resources/the_proposed_constitution_of_kenya.pdf).

Article 70 provides:

If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

On application under clause (1), the court may make any order, or give any directions, it considers appropriate—

to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment. For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

*Id.*

21. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA art. 17 (authors' translation).

22. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR, tit. II, ch. 2, art. 14.

23. 1958 CONST. tit. XVII art. 1 (Fr.) (Charter of the Environment, 2004).

24. CONST. OF AFG. pmbl.

25. CONST. OF THE REP. OF RWANDA art. 49.

26. S. AFR. CONST. 1996 ch. 2, art. 24. Even in South Africa, where volumes have been written about the writing of the constitution, relatively little attention has been paid to this provision. *See* HASEN EBRAHIM, *THE SOUL OF A NATION* (1998).

27. *See* HAYWARD, *supra* note 9, at 93–128 (examining challenges of judicial enforcement of fundamental environmental rights).

28. *See generally* May & Daly, *supra* note 2, at 383–84.

29. Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 133 (2001).

30. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE DE 1980 ch. III, art. 19(8).

31. Pedro Flores v. Corporación del Cobre, Codelco, División Salvador, Rol. 2.052 (Sup. Ct. Chile, June 23, 1988), *translated in* 2 GEO. INT'L ENVTL. L. REV. 251 (Claudia C. Bohorquez trans., 1989).
32. Comunidad de Chañaral v. Codeco, División Salvador (1988) S/Recurso de Protección. Corte Suprema (Chile).
33. The Trillium Case, Decision No. 2.732-96, at 8, Sup. Ct. of Chile, (Mar. 19, 1997), *available at* <http://www.elaw.org/node/1310> [hereinafter *Trillium*]; *see generally* HOUCK, TAKING BACK EDEN, *supra* note 15, at 151–74 (story behind the *Trillium* case, with pictures).
34. *Id.*; *see* May & Daly, *supra* note 2, at 392 (citing Houck, *A Case of Sustainable Development*, *supra* note 15, at 307).
35. *Id.*
36. *See* Aaron Sachs, *A Planet Unfree: What Do Human Rights Have to Do with Environmental Protection? Everything.*, SIERRA, Nov.–Dec. 1997, *available at* <http://www.sierraclub.org/sierra/archives/> [hereinafter Sachs], *discussed in* May & Daly, *supra* note 2, at 396.
37. *See* TÜRKIYE CUMHURİYETİ ANAYASASI [TURK. REPUB. CONST.], pt. II, ch. III, art. 56 (“Everyone has the right to live in a healthy, balanced environment.”), *discussed in* May & Daly, *supra* note 2, at 107.
38. *See* Sachs, *supra* note 36.
39. *Id.*
40. CONSTITUCIÓN [C.E.] tit. I, ch. III, art. 45 (Spain).
41. *See* Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENVTL. L. REV. 1, 65 (1992) (noting that the provision “is not enforceable through a constitutional complaint brought by an individual,” but must be brought by a state-appointed ombudsman); *see also* Alberto A. Herrero de la Fuente, *Spain*, in ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN THE EU 421, 442 (Jonas Ebbesson ed., 2002) (“The right to an adequate environment . . . is not understood as a fundamental right, but rather as a leading principle for social and economic politics.”), *discussed in* May & Daly, *supra* note 2, at 397 n.196.
42. *See* EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 417 (1998).
43. *See* Bruch et al., *supra* note 29, at 139.
44. Minors Oposa v. Factoran Jr., G.R. No. 10183, 224 S.C.R.A. 792 (July 30, 1993) (Phil.), *reprinted in* 33 I.L.M. 173, 176 (1994) (Feliciano, J., concurring) [hereinafter *Minors Oposa*].
45. *Id.* at 180–81. *See also* CONST. (1987) art. II, §§ 15–16 (Phil.).
46. *Id.* at 185.
47. *Id.* at 187, *discussed in* May & Daly, *supra* note 2, at 398–99.
48. Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay, G.R. Nos. 171947-48 (S.C., Dec. 18, 2008) (Phil.).
49. *Id.*
50. *See* Bruch et al., *supra* note 29, at 133, *cited in* May & Daly, *supra* note 2, at 399–400.

51. See Sanjay Chubai, *Environmental Law of India*, in INTERNATIONAL ENVIRONMENTAL LAW AND REGULATION, Ind-1, § 2.2 (1991); Barry E. Hill et al., *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 GEO. INT'L ENVTL. L. REV. 359, 382 (2004); HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 199–225 (Alan E. Boyle & Michael R. Anderson eds., 1996).

52. See Martin Lau, *Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, *supra* note 51, at 285–302, discussed in May & Daly, *supra* note 2, at 399–400.

53. See Bruch et al., *supra* note 29, at 166–67 (discussing constitutional interpretation in India, Pakistan, Bangladesh, Nepal, Colombia, Ecuador, Costa Rica, and some countries in Africa).

54. INDIA CONST. art. 21.

55. Bandhua Mukti Morcha v. Union of India, (1984) 3 S.C.C. 161, in DINAH SHELTON & ALEXANDRE KISS, JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW 7, 8 (UNEP 2005); Charan Lal Sahu v. Union of India, A.I.R. 1990 S.C. 1480, *in id.* at 8.

56. Subhash Kumar v. State of Bihar, A.I.R. 1991 S.C. 420.

57. *Id.*, discussed in SHELTON & KISS, *supra* note 55, at 8.

58. M. C. Mehta v. Union of India, (1987) 4 S.C.C. 463; see also Charan Lal Sahu v. Union of India, A.I.R. 1990 S.C. 1480 (interpreting the right to life guaranteed by Article 21 of the constitution to include the right to a wholesome environment).

59. See Bruch et al., *supra* note 29, at 166–67 (discussing constitutional interpretation in Tanzania, India, Pakistan, Bangladesh, Nepal, Colombia, Ecuador, Costa Rica, and some countries in Africa).

60. See Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 43A STAN. J. INT'L L. 3, 17 (2007) (“The current U.S. Supreme Court is unlikely to use a substantive due process theory to find a right to a healthful environment within those provisions of the U.S. Constitution.”).

61. See discussion in May & Daly, *supra* note 2, at 405.

62. Brandl & Bungert, *supra* note 41, at 56 (“It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.” (translating GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW] [CONSTITUTION] (Neth.) art. 21)).

63. See James Bruinsma, *Environmental Law: Brazil Enacts New Protections for the Amazon Rain Forest*, 30 HARV. INT'L L.J. 503, 503–5 (1989), discussed in May & Daly, *supra* note 2, at 406.

64. See Brandl & Bungert, *supra* note 41, at 77–81 (discussing a panoply of provisions), discussed in May & Daly, *supra* note 2, at 406.

65. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] tit. VIII, ch. VI, art. 225.

66. See Brandl & Bungert, *supra* note 41, at 78 (describing “[t]he subjective, or individually enforceable, character” of the provision as “very weak”); see also Keith S. Rosenn, *Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773, 796–97 (1990), discussed in May & Daly, *supra* note 2, at 406.

67. *Pedro Flores v. Codelco*, División Salvador, Rol. 2.052 (Sup. Ct. Chile, June 23, 1988), translated in 2 GEO. INT'L ENVTL. L. REV. 251, 259 (Claudia C. Bohorquez trans., 1989).

68. *Minors Oposa*, *supra* note 44, at 175 (Feliciano, J., concurring). By contrast, the concurring justice in the *Oposa* case expressed significant reservations about the lawsuit as it went forward on remand: "My suggestion is simply that petitioners must, before the trial court, show a more specific legal right—a right cast in language of a significantly lower order of generality than Article II (15) of the Constitution. . . ." *Id.* at 203.

69. INDIA CONST. art. 48A, amended by the Constitution (Forty-second Amendment) Act, 1976.

70. May & Daly, *supra* note 2, at 381.

71. *Id.*

72. *See, e.g., id.; Minors Oposa*, *supra* note 44, at 173 (government revoked timber licenses).

73. *Pedro Flores*, *supra* note 67, at 260.

74. There are similar issues in the context of climate change litigation. *See* James R. May, *Of Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENVER U. L. REV. 919 (2008).

75. Dr. Mohiuddin Farooque v. Bangladesh, 48 Dir 1996 (S.C. Bangl. App. Div., Civ.), in U.N. ENV'T PROGRAMME [UNEP], COMPENDIUM OF SUMMARIES OF JUDICIAL DECISIONS IN ENVIRONMENT-RELATED CASES 90 (2005) [hereinafter UNEP SUMMARIES].

76. *See Soc. & Econ. Rights Action Ctr. v. Nigeria*, Commc'n 155/96, African Commission on Human and Peoples' Rights ¶ 65 (Oct. 27, 2001), available at <http://www.cesr.org/downloads/AfricanCommissionDecision.pdf>.

77. *Subhash Kumar v. State of Bihar*, A.I.R. 1991 S.C. 420.

78. *Minors Oposa*, *supra* note 44, at 191 (internal quotations and citations omitted).

79. *See Trillium*, *supra* note 33.

80. *See Minors Oposa*, *supra* note 44, at 195–96; *Soc. & Econ. Rights Action Ctr. v. Nigeria*, Commc'n 155/96, African Commission on Human and Peoples' Rights ¶ 55 (Oct. 27, 2001).

81. The phrase is borrowed from the U.S. dormant Commerce Clause cases to describe situations in which a government operates a business or functions in some capacity as would a private actor. Outside of the United States, this is far more common.

82. *See, e.g., Pedro Flores*, *supra* note 67, at 251 (successful suit for discharge of tailings from government-run copper mine).

83. *See Soc. & Econ. Rights Action Ctr. v. Nigeria*, Commc'n 155/96, African Commission on Human and Peoples' Rights ¶ 57 (Oct. 27, 2001).

84. *María Elena Burgos v. Municipality of Campoalegre (Huila)* (Const. Ct. Colom. Feb. 27, 1997), in UNEP SUMMARIES, *supra* note 75, at 79; *see* May & Daly, *supra* note 2, at 403–4 (discussing Constitutional Court of Colombia).

85. GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [GW] [CONSTITUTION] art. 21 (Neth.); *see also* A MAGYAR KOZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION], art. 21 (in the new constitution of 2011, effective as of 2012) (Hung.) ("The Republic of Hungary recognizes and shall implement the individual's right to a healthy environment.").

86. *Trillium*, *supra* note 33.

87. Senih Özyay, *translated in* 4 INT'L ENVTL. L. REP. 452 (2004), *reprinted in* SVITLANA KRAVCHENKO & JOHN E. BONINE, HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW AND POLICY 90, 93 (2008).

88. See TÜRKIYE CUMHURİYETİ ANAYASASI [CONSTITUTION] art. 56 (Turk.) (“Everyone has the right to live in a healthy, balanced environment. It is the duty of the state and citizens to improve the natural environment, and to prevent environmental pollution.”).

89. See *Minors Oposa*, *supra* note 44, at 188; *see also* INDIA CONST. art. 48A (“The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”).

90. *Dhungel v. Godawari Marble Indus.*, WP 35/1992 (S.C. Nepal, Oct. 31, 1995) (*en banc*), *reprinted in* KRAVCHENKO & BONINE, *supra* note 87, at 98.

91. Corte Constitucional, Chamber of Civil and Agrarian Appeals, Nov. 19, 1997, *Castrillon Vega v. Federación Nacional de Algodoneros y Corporacion Autonoma Regional del Cesar (CORPOCESAR)/Acción de Tutela* Case No. 4577 (Colom.), *discussed in* KRAVCHENKO & BONINE, *supra* note 87, at 70.

92. See S. AFR. CONST. §§ 26(2) (with regard to housing) and 27(2) (with regard to health care, food, water, and social security), *available at* <http://www.info.gov.za/documents/constitution/1996/96cons2.htm>.

93. *Mazibuko v. City of Johannesburg* 2009 ZACC 28, Case CCT 39/09 (CC), ¶ 50 (S. Afr.).

94. *Id.* ¶ 40.

95. *Id.* ¶¶ 53, 56.

96. *M. C. Mehta v. Union of India*, (1987) 4 S.C.C. 463 (India).

97. KRAVCHENKO & BONINE, *supra* note 87, at 99.

98. *Id.*

99. Houck, *A Case of Sustainable Development*, *supra* note 15, at 334 (discussing the fear of physical violence as a result of bringing such a suit).

100. See CONST. art. 32 (Nepal) (“The right to proceed in the manner set out in Article 107 for the enforcement of the rights conferred in this Part is guaranteed.”).

101. Where the government failed to complete environmental impact assessment, it “could not offer sufficient evidence that the logging of forests was sustainable” as required. *Trillium*, *supra* note 33, at 11.

102. *M. C. Mehta v. Union of India*, (1987) 4 S.C.C. 463 (India).

103. Shubhankar Dam & Vivek Tewary, *Polluting Environment, Polluting Constitution: Is a “Polluted” Constitution Worse than a Polluted Environment?*, 17 J. ENVTL. L. 383, 389–90 (2005) (footnotes omitted).

104. *Minors Oposa*, *supra* note 44, at 205 (Feliciano, J., concurring).

105. Presbitero J. Velasco, *Manila Bay: A Daunting Challenge in Environmental Rehabilitation and Protection*, 11 OR. REV. INT'L L. 441, 444 (2009).

106. *Id.*

107. *Apocalypse Now Film Locations*, THE WORLDWIDE GUIDE TO MOVIE LOCATIONS, *available at* <http://www.movie-locations.com/movies/a/apocalypse.html> (last visited Dec. 22, 2010).

108. Velasco, *supra* note 105, at 442.

109. Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay, G.R. Nos. 171947-48 (S.C., Dec. 18, 2008). (Phil.).

110. *Id.* Moreover, in keeping with the *Minors Oposa v. Factoran* decision, discussed in the text of this chapter, the court recognized broad standing to enforce environmental constitutional rights, allowing for citizen standing in matters that are of “paramount interest to the public” or of “transcendental significance to the people.” Velasco, *supra* note 105, at 445.

111. *Id.* at 448.

112. *Id.* at 448–49.

113. *Id.* at 444.

114. *Id.* at 455.

115. *Id.* at 452.

116. *Id.*

117. Tarra Quismundo, Norman Bordadora & Christian V. Esguerra, *Arroyo: Clean Up Manila Bay Now*, PHIL. DAILY INQUIRER, Aug. 25, 2009, available at <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20090825-221874/Arroyo-Clean-up-Manila-bay-now>.

118. *Id.*