

# THE CASE FOR ENVIRONMENTAL HUMAN RIGHTS: RECOGNITION, IMPLEMENTATION, AND OUTCOMES

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## TABLE OF CONTENTS

INTRODUCTION .....	984
I. RECOGNITION OF A RIGHT TO A HEALTHY ENVIRONMENT .....	987
A. <i>Recognition in Domestic Constitutional Law</i> .....	988
1. Express Constitutional Recognition of a Substantive Right ..	989
2. Implied Constitutional Recognition of a Substantive Right ..	995
B. <i>Recognition in Domestic Legislation</i> .....	997
C. <i>Recognition in International Law</i> .....	997
D. <i>Recognition in Regional Law</i> .....	1000
II. IMPLEMENTING ENVIRONMENTAL HUMAN RIGHTS.....	1004
III. OUTCOMES IN ENVIRONMENTAL RIGHTS .....	1013

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CONCLUSION .....	1018
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## INTRODUCTION

The idea that every human being has a right to a clean and healthy environment has caught the imagination of people across religious, cultural, constitutional, national, and continental divides.<sup>1</sup> What, though, is the case for environmental human rights? This question incorporates many others, including whether there is or ought to be a human right to a healthy environment; where and how it should be recognized; how to implement it; and the extent to which it causes or correlates to improvements in outcomes. Simply, the case for environmental human rights is complicated and complex. There are normative, ethical, and moral justifications that both the planet and people living on it are better off in a world that recognizes a right to a healthy environment. Reflecting this, a majority of nations already do so, and the effort for international recognition is gaining momentum. Ultimately, however, while it is compelling, the case for environmental human rights has shortcomings that warrant consideration and further analytical interrogation.

The query begins with orienting environmental rights in the vast wilderness of human rights. The field of human rights engages rights that are thought to inhere to humanness, commonly categorized as

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<sup>1</sup> James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENV'T L. REV. 113 (2006); James R. May & Erin Daly, *New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide*, 2011 IUCN ACAD. ENV'T L. E-J. 13 (2011) [hereinafter May & Daly, *New Directions*]; James R. May & Erin Daly, *Constitutional Environmental Rights Worldwide*, in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 329 (James R. May ed., 2011); James R. May & Erin Daly, *Global Constitutional Environmental Rights*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 603–04 (Shawkat Alam, Md Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury & Erika J. Techera, eds., 2012); JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2015); James R. May, *Symposium on Global Environmental Constitutionalism: An Introduction and Overview*, 21 WIDENER L. REV. 139, 140 (2015); Erin Daly & James R. May, *Comparative Environmental Constitutionalism*, 6 JINDAL GLOB. L. REV. 9, 10–11, 30 (2015); Louis J. Kotze, *The Conceptual Contours of Environmental Constitutionalism*, 21 WIDENER L. REV. 187, 188, 198 (2015); ENVIRONMENTAL CONSTITUTIONALISM (James R. May & Erin Daly eds., 2016); LOUIS J. KOTZE, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM IN THE ANTHROPOCENE (2016); James R. May & Erin Daly, *Learning from Constitutional Environmental Rights*, in THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT (John H. Knox & Ramin Pejan, eds., 2018) [hereinafter May & Daly, *Learning From Constitutional Environmental Rights*]; James R. May & Erin Daly, *Six Trends in Global Environmental Constitutionalism*, in ENVIRONMENTAL CONSTITUTIONALISM (Jochen Sohnlé ed., 2019); James R. May, *Making Sense of Environmental Human Rights and Global Environmental Constitutionalism*, in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Sumudu Atapattu, Carmen G. Gonzalez & Sara Seck eds., 2021).

either civil and political, or social, economic, and cultural. Civil and political rights include the rights to vote, assemble, and participate, as well as the rights to free speech, religion, and legal processes. Socioeconomic and cultural rights include those to dignity, education, health, food, water, sick leave, family leave, and employment, to name a few. A right to a healthy environment straddles the liminality between and among other rights.

Yet most human rights instruments all but ignore the existence of anything akin to a human right to a healthy environment. The Charter of the United Nations (1945), the Universal Declaration of Human Rights (1948), and the twin covenants on human rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) (both adopted in 1966 and entered into force in 1977), mention not at all whether being human includes such a right.<sup>2</sup> And, until fairly recently, the human rights oeuvre largely avoided the question as to whether humans are entitled to a healthy environment.

But that is changing. A human right to a healthy environment has taken hold in constitutions and courts and is of increasing cognizance under international governance regimes. As of this writing, around 136 nations grant something akin to a potentially enforceable right to a healthy environment, including about 84 expressly and at least 6 more impliedly through some other express right, such as to life, dignity, or health. Also, there is an increasing effort for global recognition of a right to a healthy environment, in part fueled by domestic developments.<sup>3</sup> Courts often lead these domestic efforts. As discussed below, judges in Argentina have ordered the clean-up of a major urban river; judges in the Philippines and Chile have ordered protection of old growth forests from clear-cutting; judges in Pakistan have ordered the creation of a climate change agency; judges in the American state of Pennsylvania have protected residents from the

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<sup>2</sup> See generally James R. May & Erin Daly, *Human Rights Developments in Global Environmental Constitutionalism*, in ENCYCLOPEDIA OF HUMAN RIGHTS AND THE ENVIRONMENT: LEGALITY, INDIVISIBILITY, DIGNITY AND GEOGRAPHY: CURRENT GLOBAL CHALLENGES 93 (2019) [hereinafter ENCYCLOPEDIA OF HUMAN RIGHTS AND THE ENVIRONMENT]; THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT, *supra* note 1; John H. Knox, *Constructing the Human Right to a Healthy Environment*, 16 ANN. REV. L. & SOC. SCI. 79 (2020).

<sup>3</sup> See, e.g., Maria Antonia Tigre & Victoria Lichet, *Update on Negotiation of a New International Environmental Agreement*, 50 ENV'T L. REP. 10818 (2020); MARIA ANTONIA TIGRE, GAPS IN INTERNATIONAL ENVIRONMENTAL LAW: TOWARD A GLOBAL PACT FOR THE ENVIRONMENT (2020) (noting inclusion of a right to a healthy environment in the draft Global Pact); Marcos A. Orellana, "The Case for a Right to a Healthy Environment", WORLD POL'Y (Mar. 1, 2018), <http://worldpolicy.org/2018/03/01/case-right-healthy-environment> [<https://perma.cc/7F7WQ-6PWW>] (advocating for a global instrument recognizing a right to a healthy environment).

environmental ravages of hydrofracking and directed revenues from oil and gas leases toward the public good, while judges in Nigeria ordered the cessation of gas flaring; and in Ecuador, Colombia, and India, judges have recognized personhood for nature, for its own sake. Courts have also been willing to bend socioeconomic rights to address climate change, as recently evidenced by major decisions issued by the Constitutional Court of Germany and the Supreme Court of Pakistan.<sup>4</sup>

Thus, there are decisions by thoughtful judges hewing closely to the words of their constitutions and choosing not to skirt engagement of provisions guaranteeing a right to a clean and healthy environment.

Recognition of a right to a healthy environment is now the subject of considerable effort and within humanity's reach, if only we can grasp it. But what is less clear is whether and the extent to which all of this is worth the coin, yet, and if so, why it is a better use of time and energy than by, say, protecting *other* established rights, working to enact and enforce environmental laws, or by implementing other regimes, such as the United Nations' Sustainable Development Goals, discussed below. It is complicated and hard to know. Ultimately, however, while the case is solid, it has shortcomings that warrant consideration and further analytical interrogation. In the end, the outcome and objective converge: the world is better off for recognizing everyone's right to a healthy environment.

Thus, this Article examines three aspects of the case for environmental human rights, and includes an associated Appendix. Part I considers the extent to which environmental human rights have been recognized in law, such as by international instrument, constitution, or court decision. Part II then examines the extent to which courts are reaching results because of an environmental right.<sup>5</sup> Part III then contemplates the extent to which recognizing environmental human rights in law improves environmental outcomes.

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<sup>4</sup> Guiding principles on the decision of the First Senate of 24 March 2021 (1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20), at 58 ("A right to the ecological minimum subsistence level is derived, inter alia, from the human minimum subsistence level guaranteed by Article 1(1) in conjunction with Article 20(1) of the Basic Law (cf. BVerfGE 125, 175)"); D.G. Khan Cement Co. v. Government of Punjab, C.P.1290-L/2019 ("The legislative policy of organized and planned growth, under the Ordinance, also synchronizes well with our constitutional values, set out in the preamble of the Constitution, as well as the Fundamental Rights and the Principles of Policy, in particular, the right to life and dignity, promotion of social and economic wellbeing of the people and safeguarding the legitimate interest of backward and depressed classes.").

<sup>5</sup> See generally JAMES R. MAY & ERIN DALY, GLOBAL JUDICIAL HANDBOOK ON ENVIRONMENTAL CONSTITUTIONALISM (3d ed. 2019); ERIN DALY & JAMES R. MAY, COMPANION TO GLOBAL JUDICIAL HANDBOOK ON ENVIRONMENTAL CONSTITUTIONALISM: SELECTED CASES AND MATERIALS (2d ed. 2019) [hereinafter DALY & MAY, COMPANION]; James R. May & Erin Daly, *Vindicating Fundamental Environmental Rights Worldwide*, 11 OR. REV. INT'L L. 365, 366 (2009) [hereinafter May & Daly, *Vindicating Fundamental Environmental Rights Worldwide*].

Last, the Appendix lists countries that currently recognize a right to a healthy environment constitutionally.

This Article concludes that although environmental human rights have found footholds about half the world over, judicial recognition has been slow in coming and mixed in results. There remain few cases issued from apex courts (that is, courts that issue controlling opinions) engaging environmental rights, leaving much opportunity for the development of legal principles. There is also sparse demonstrable evidence that legal recognition of a right to a healthy environment improves environmental outcomes, suggesting a need for further interrogation.

### I. RECOGNITION OF A RIGHT TO A HEALTHY ENVIRONMENT

Conceptually, the human right to environmental rights is deeply rooted in Anglo-Saxon law and legal traditions.<sup>6</sup> The *Magna Carta Libertatum* (Medieval Latin for “the Great Charter of the Liberties”), adopted at Runnymede in 1215 (“[t]o no one will we sell, to no one deny or delay right or justice[.]”) drew a direct link between the environment and individual liberties.<sup>7</sup> The Magna Carta produced the *Carta de Foresta*, or “Forest Charter,” in 1217, which guaranteed the “liberties of the forest and free customs traditionally had, both within and without the Royal Forests,” and obliged all “to observe the liberties and customs granted in the Forest Charter.”<sup>8</sup> The Magna Carta remains influential today, for example, informing interpretation of the U.S. Constitution: “The American colonists . . . widely adopted Magna [Carta’s] ‘law of the land’ guarantee . . . .”<sup>9</sup>

Yet recognition of a legal right to a healthy environment was a long time coming. If anything, its recognition is defined by evolution of outright denial of such a right, to hesitating acceptance in constitutions over the course of fifty years, to the present-day enthusiasm to recognize

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<sup>6</sup> Nicholas A. Robinson, *The Most Fundamental Right*, 36 ENV’T F. 46, 48 (2019) (“These environmental liberties are reserved to all people, forever. These rights exist apart from those enumerated rights in what became America’s Bill of Rights.”).

<sup>7</sup> MAGNA CARTA, cl. 40 (1215).

<sup>8</sup> DANIEL BARSTOW MAGRAW, ANDREA MARTINEZ & ROY E. BROWNELL II, *MAGNA CARTA AND THE RULE OF LAW* 423 (2014) (translating the FOREST CHARTER). William Blackstone celebrated “these two sacred charters” in his *Commentaries* and his other writings, upon which the courts at Westminster (and throughout England) relied heavily. WILLIAM BLACKSTONE, *THE GREAT CHARTER AND THE CHARTER OF THE FOREST WITH OTHER AUTHENTIC INSTRUMENTS, TO WHICH IS PREFIXED AN INTRODUCTORY DISCOURSE CONTAINING THE HISTORY OF THE CHARTER* (1759). See generally WILLIAM BLACKSTONE, *COMMENTARIES*.

<sup>9</sup> *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring).

such a right in international law. The following sections track the development of recognition of a right to a healthy environment domestically, internationally, and regionally.

#### A. *Recognition in Domestic Constitutional Law*

There are myriad arguments in support of constitutionalizing rights in the first place, including that doing so embodies “aspirational goals” and “relations between citizens,”<sup>10</sup> and “enable[s] citizens to counter constitutional challenges to their rights to sue with a constitutional right of their own, forcing federal courts to accommodate co-equal rights and principles . . . .”<sup>11</sup> In particular, constitutions can promote human and environmental rights,<sup>12</sup> procedural guarantees,<sup>13</sup> remedies,<sup>14</sup> and judicial engagement.<sup>15</sup> Such constitutionalization advances the environmental human rights of everyday people to enforce the law.<sup>16</sup>

The recognition of a right to a healthy environment has grown symbiotically with “Global Environmental Constitutionalism,” which explores the constitutional engagement, incorporation, adjudication and implementation of environmental rights, duties, responsibilities, procedures, policies, and other measures that promote the twin aims of environmental protection and a right to a healthy environment around the globe.<sup>17</sup> Environmental human rights are reflected by other

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<sup>10</sup> J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 253–54 (1999); see also Victor B. Flatt, *This Land Is Your Land (Our Right to the Environment)*, 107 W. VA. L. REV. 1, 32 (2004).

<sup>11</sup> Robin Kundis Craig, *Should There Be a Constitutional Right to a Clean/Healthy Environment?*, 34 ENV'T L. REP. 11013, 11018 (2004); see also Douglas A. Kysar, *Global Environmental Constitutionalism: Getting There from Here*, 1 TRANSNAT'L ENV'T L. 83, 87 (2012); Robert V. Percival, “Greening” the Constitution—Harmonizing Environmental and Constitutional Values, 32 ENV'T L. 809, 813 (2002).

<sup>12</sup> May & Daly, *New Directions*, *supra* note 1, at 14; STEPHEN J. TURNER, *A GLOBAL ENVIRONMENTAL RIGHT* (2014).

<sup>13</sup> James R. May, *Constitutional Directions in Procedural Environmental Rights*, 28 J. ENV'T L. & LITIG. 27, 30 (2013).

<sup>14</sup> James R. May & Erin Daly, *Constitutional Environmental Rights and Liabilities*, 3 ENV'T LIAB. 75, 76 (2012).

<sup>15</sup> May & Daly, *Vindicating Fundamental Environmental Rights Worldwide*, *supra* note 5, at 390–405.

<sup>16</sup> This is exclusive of statutory means of private enforcement of federal environmental laws, called “citizen suits.” See generally James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1 (2003).

<sup>17</sup> See generally JAMES R. MAY & ERIN DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM* (2015); IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES

constitutional means, including by granting rights to water, sustainable development, and a safe climate; by recognizing the rights of children, current and future generations, indigenous peoples, and nature; by imposing (sometimes reciprocal) duties to protect the environment and the climate; and by guaranteeing access to information, participation, and justice in environmental matters and/or ensuring environmental impact assessment.<sup>18</sup> The world has turned slowly if inexorably toward recognizing a right to a healthy environment, most significantly at the constitutional level by recognizing an express or implied substantive right to a healthy environment, discussed below.<sup>19</sup>

### 1. Express Constitutional Recognition of a Substantive Right

The first efforts to enshrine a substantive right to a healthy environment came from what now seems an unlikely source—the United States, where constitutional recognition first found its voice in the early 1960s.<sup>20</sup> In 1962, none other than Rachel Carson—renowned author, marine biologist, and future Presidential Medal of Freedom awardee—called for a federal constitutional amendment to protect people from chemical poisons.<sup>21</sup> Then, in 1968, a junior congressman from New York State—Richard Ottinger—took up the charge for constitutional recognition for a right to a healthy environment (or “decent,” the nomenclature of the day), reasoning that “only an

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(Erin Daly & James R. May eds., 2018) [hereinafter IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM]; NEW FRONTIERS IN ENVIRONMENTAL CONSTITUTIONALISM (Erin Daly, Louis Kotzé, James R. May, Caiphaz Soyapi, Arnold Kreilhuber, Lara Ognibene & Angela Kariuki eds., 2017); LOUIS J. KOTZÉ, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM IN THE ANTHROPOCENE (2016); James R. May, *Symposium on Global Environmental Constitutionalism: An Introduction and Overview*, 21 WIDENER L. REV. 139 (2015); ENVIRONMENTAL CONSTITUTIONALISM (James R. May & Erin Daly eds., 2016).

<sup>18</sup> James R. May & Erin Daly, *Six Trends in Global Environmental Constitutionalism*, in ENVIRONMENTAL CONSTITUTIONALISM: WHAT IMPACT ON LEGAL SYSTEMS? 45 (Jochen Sohnle ed., 2019); May & Daly, *Learning from Constitutional Environmental Rights*, *supra* note 1, at 42.

<sup>19</sup> James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENV'T L. REV. 113 (2005) (with appendices listing substantive and other rights in existence as of 2004) [hereinafter May, *Constituting Fundamental Environmental Rights*]; James R. May, *New and Emerging Constitutional Theories and the Future of Environmental Protection*, 40 ENV'T L. REP. NEWS & ANALYSIS 10989, 10990–91 (2010).

<sup>20</sup> Joseph L. Sax, *The Search for Environmental Rights*, 6 J. LAND USE & ENV'T L. 93, 100 (1990) (“[A] fundamental right to a substantive entitlement which designates minimum norms should be recognized.”); Klaus Bosselmann, *Global Environmental Constitutionalism: Mapping the Terrain*, 21 WIDENER L. REV. 171, 185 (2015) (“[G]lobal environmental constitutionalism should aim for shifting the environment from the periphery to the center of constitutions—a shift that could be termed ‘eco-constitutionalism.’”).

<sup>21</sup> RACHEL CARSON, SILENT SPRING 29 (1962).

amendment to the Constitution, guaranteeing to each citizen a wholesome and unimpaired environment, can overcome' the ease with which current conservation efforts may be evaded."<sup>22</sup> A similar bill was introduced in the United States Senate to "guarantee every person . . . an inalienable right to a decent environment."<sup>23</sup> These are, evidently, the first efforts at constitutional recognition of something resembling a right to a healthy environment.

Both support for and opposition to these bills was bipartisan. After these bills stalled, Congress enacted—and the President signed—the National Environmental Policy Act (NEPA), which is the closest the United States has ever come to recognizing a right to a healthy environment, if only with the hortatory to "encourage productive and enjoyable harmony between man and his environment."<sup>24</sup> NEPA in turn became one of Congress's most influential legislative exports throughout the world.<sup>25</sup>

Lacking an express constitutional provision, litigants tried to insinuate environmental rights within the U.S. Constitution under various theories, including the Due Process and Equal Protection Clauses and the Ninth Amendment. Nothing stuck.<sup>26</sup>

There were coincident efforts to recognize the right constitutionally at the subnational level, beginning in 1968 with Franklin Kury, a state representative from Pennsylvania.<sup>27</sup> These efforts hit paydirt in a handful of states, becoming the first places anywhere to constitutionalize rights to a healthy environment.<sup>28</sup> In 1970, the State of

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<sup>22</sup> Sam Kalen, *An Essay: An Aspirational Right to a Healthy Environment?* 34 UCLA J. ENV'T L. & POL'Y 156, 179 (2016) (quoting Richard L. Ottinger, *Legislation and the Environment: Individual Rights and Government Accountability*, 55 CORNELL L. REV. 666, 672 (1970)); see also CHARLES A. REICH, *THE GREENING OF AMERICA* 382 (1970); Rutherford H. Platt, *Toward Constitutional Recognition of the Environment*, 56 A.B.A. J. 1061 (1970).

<sup>23</sup> S.J. Res. 169, 91st Cong. (1970).

<sup>24</sup> National Environmental Policy Act (NEPA) § 2, 42 U.S.C. § 4321; see also Kalen, *supra* note 22, at 178 (quoting NEPA, 42 U.S.C. § 4321).

<sup>25</sup> See generally Tseming Yang, *The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law*, 70 HASTINGS L.J. 525 (2019).

<sup>26</sup> See Craig, *supra* note 11, at 11020–21.

<sup>27</sup> See generally FRANKLIN L. KURY, *CLEAN POLITICS, CLEAN STREAMS: A LEGISLATIVE AUTOBIOGRAPHY AND REFLECTIONS* (2011); John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, 24 WIDENER L.J. 181 (2015).

<sup>28</sup> See James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, in *PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW*, *supra* note 1, at 306; Art English & John J. Carroll, *State Constitutions and Environmental Bills of Rights*, in *THE BOOK OF THE STATES 18* (Council of State Governments ed., 2015); MAY & DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM*, *supra* note 1, at 209–35; James R. May & Erin Daly, *Standards in Subnational Environmental Constitutionalism*, in *ENVIRONMENTAL RIGHTS: THE DEVELOPMENT*



Illinois got there first with a provision reading: “Each person has the right to a healthful environment.”<sup>29</sup> Other states soon followed, led by Pennsylvania in 1971, Massachusetts and Montana in 1972, and Hawai’i in 1978.<sup>30</sup> No two provisions are the same. While most of these five provide a “right” to the “environment,” the adjectival objective—“clean” or “healthful” or “quality”—differs from state to state. For example, Hawai’i’s and Montana’s constitutions aim to afford a “clean and healthful environment,”<sup>31</sup> Illinois’s “the right to a healthful environment,”<sup>32</sup> and Massachusetts’s a “right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment.”<sup>33</sup> Pennsylvania’s provision is the most progressive of the lot, providing twin attributes of rights and public trust:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>34</sup>

The most elaborate of the bunch, this provision stayed largely dormant for forty years, until the Pennsylvania Supreme Court resuscitated it beginning in 2013.<sup>35</sup> In addition, some states in the United States have adopted legislation advancing other rights, including a right to water.<sup>36</sup> Subsequently, a right to a healthy environment has

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OF STANDARDS 367, 367–75 (Stephen J. Turner, Dinah L. Shelton, Jona Razzaque, Owen McIntyre & James R. May eds., 2019) [hereinafter *THE DEVELOPMENT OF STANDARDS*].

<sup>29</sup> ILL. CONST. art. XI, § 2.

<sup>30</sup> See May & Romanowicz, *supra* note 28, at 307.

<sup>31</sup> HAW. CONST. art. XI, § 9; MONT. CONST. art. II, § 3.

<sup>32</sup> ILL. CONST. art. XI, § 2.

<sup>33</sup> MASS. CONST. art. XCVII (superseding art. XLIX).

<sup>34</sup> PA. CONST. art. I, § 27.

<sup>35</sup> As a litigator, the author sought to enforce this provision in cases to implement the Clean Water Act in Pennsylvania. All such cases settled under federal consent decree. See James R. May, *The Rise and Repose of Assimilation-Based Water Quality: Part I: TMDL Litigation*, 34 ENV’T L. REP. News & Analysis 10247 (2004).

<sup>36</sup> Assemb. B. 685 (Ca. 2012) (codified as CAL. WATER CODE § 106.3) (“[I]t is the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.”).

been recognized at the subnational constitutional level in Brazil, Germany, Iraq,<sup>37</sup> and Bosnia and Herzegovina.<sup>38</sup>

The network of countries recognizing a constitutional right to a healthy environment has grown from none to nearly half the world. In 1976, Portugal was thought to be the first country to embed a constitutional right to a healthy environment.<sup>39</sup> Other countries followed suit. In the mid-'1990s, Edith Brown Weiss identified about fifty constitutional provisions globally that explicitly recognized a fundamental right to a quality environment.<sup>40</sup> I reported that this number had grown to around sixty by 2004,<sup>41</sup> sixty-five by 2009,<sup>42</sup> and seventy-six by 2014.<sup>43</sup>

As of this writing in mid-2021, I count 84 of 193 United Nations (U.N.) member states as recognizing an express substantive constitutional right to a healthy environment.<sup>44</sup>

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<sup>37</sup> May & Daly, *Standards in Subnational Environmental Constitutionalism*, *supra* note 28, 367, 371, 377.

<sup>38</sup> David R. Boyd (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Safe, Clean, Healthy and Sustainable Environment), *Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties: Eastern European Region*, U.N. Doc. A/HRC/43/53, annex VI (2020).

<sup>39</sup> See May, *Constituting Fundamental Environmental Rights Worldwide*, *supra* note 1, at Appendix B; ENV'T RTS. MAP, <http://envirorightsmap.org/about> [<https://perma.cc/H7QC-THRC>]. Gellers writes that Yugoslavia may have a claim to this title. The country's 1974 provision read:

Working people and citizens, organizations of associated labour, sociopolitical communities, local communities and other self-managing organizations and communities shall have the right and duty to assure conditions for the conservation and improvement of the natural and man-made values of the human environment, and to prevent or eliminate harmful consequences of air, soil, water or noise pollution and the link, which endanger these values and imperil the health and lives of people.

See JOSHUA C. GELLERS, *THE GLOBAL EMERGENCE OF CONSTITUTIONAL ENVIRONMENTAL RIGHTS* 16 (2017) (quoting CONST. OF THE SOCIALIST FED. REPUBLIC OF YUGOSLAVIA, pt. 2, ch. I, § 11, art. 87 (1974)). Regardless, Portugal can claim the crown as the country with the longest standing provision, as Yugoslavia ceased being one in 1992. See Appendix; ENV'T RTS. MAP.

<sup>40</sup> EDITH BROWN WEISS, *IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY* (1989).

<sup>41</sup> May, *Constituting Fundamental Environmental Rights*, *supra* note 19, at 137–160 (listing substantive and other rights in existence as of 2004).

<sup>42</sup> May & Daly, *Vindicating Fundamental Environmental Rights*, *supra* note 5, at 390–405.

<sup>43</sup> MAY & DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM*, *supra* note 1, at Appendix A (listing substantive rights in existence, as of 2015).

<sup>44</sup> See *infra* Appendix. As explained below, the Appendix is based on (1) The Constitute Project, <https://constituteproject.org/constitutions?key=env&lang=en>, last visited May 23, 2021; (2) ENV'T RTS. MAP, <http://envirorightsmap.org/about> [<https://perma.cc/H7QC-THRC>] [hereinafter ERM], of which the author is a co-developer with Dr. Joshua Gellers; (3) research conducted and collected by Janet Lindemuth of the Legal Information Center at Widener University Delaware Law School since 1994 (on file with author), and (4) the U.N. ENVIRONMENT

What circumstances make constitutional recognition of a right to a healthy environment more likely? A decade ago, Erin Daly and I concluded that countries are more likely to add a substantive right to a healthy environment if they have already recognized multiple other economic, social, and cultural rights in their constitutions.<sup>45</sup> In a pioneering 2012 report, the Toronto Initiative for Economic and Social Rights (TIESR) dataset measured the presence, absence, and justiciability of seventeen economic and social rights (ESRs),<sup>46</sup> including a right to a healthy environment, among constitutions worldwide.<sup>47</sup> The TIESR study determined that countries with multiple ESRs are more likely to enshrine a right to a healthy environment.<sup>48</sup>

Josh Gellers suggests that three factors contribute to constitutional instantiation of environmental rights. First, that “the likelihood that a country will adopt a constitutional environmental right is directly associated with its domestic political conditions and structures, and indirectly associated with the international normative context in which its constitution is written.”<sup>49</sup> Second, that countries with poor human rights records are more likely to adopt constitutional environmental rights: “[I]n accordance with expectations, I found that the worse a country’s human rights record in terms of its protection of civil liberties, the more likely it is to promulgate an environmental right in its constitution.”<sup>50</sup> And third, that proximity to other countries that have enshrined environmental rights has nothing to do with it: “[G]lobally speaking, the enactment of environmental rights does not appear to be influenced by the extent to which such rights have been constitutionalized elsewhere in a given region.”<sup>51</sup>

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PROGRAMME, ENVIRONMENTAL RULE OF LAW: FIRST GLOBAL REPORT 159 (2019) (published in conjunction with the Environmental Law Institute), which put the count at 88. The Special Rapporteur recently reported the number to be at or near 92, reporting: “There are 110 States where [a right to a healthy environment] enjoys constitutional protection.” Boyd, *supra* note 38, at 4. This includes 18 countries listed as “implicitly” incorporating a right to a healthy environment, *see* Boyd *supra* note 38, at Annex II, leaving the count of express provisions at 92 out of 110. Included in the Special Rapporteur’s count but not mine for reasons explained in the Appendix are: Burundi, Croatia, Finland, Gabon, Honduras, Iran, Malawi, and Sudan.

<sup>45</sup> MAY & DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 1, at ch. 7.

<sup>46</sup> Courtney Jung & Evan Rosevear, *Economic and Social Rights Across Time, Regions, and Legal Traditions: A Preliminary Analysis of the TIESR Dataset*, 30 NORDIC J. HUM. RTS. 372, 376 (2012).

<sup>47</sup> TIESR Dataset, TORONTO INITIATIVE FOR ECON. & SOC. RTS [https://web.archive.org/web/20180901081122/http://tiesr.org/data.html].

<sup>48</sup> Jung & Rosevear, *supra* note 46, at 380–81.

<sup>49</sup> GELLERS, *supra* note 39, at 19.

<sup>50</sup> GELLERS, *supra* note 39, at 94.

<sup>51</sup> GELLERS, *supra* note 39, at 75; *see also* WALTER F. BABER & ROBERT V. BARTLETT, ENVIRONMENTAL RIGHTS IN EARTH SYSTEM GOVERNANCE: DEMOCRACY BEYOND DEMOCRACY

Gellers concludes that there is not a paradigmatic legal system for accommodating individual rights to a healthy environment.<sup>52</sup> To be sure, the list of those nations who have is hardly discriminating. It includes developing and developed nations, north and south, east and west. It contains nations from the four corners: Africa, the Middle East, Western Europe, the former Soviet Bloc, Latin America, and Oceania and archipelago, as well as those with civil, common law, Islamic, Native American, and other traditions. Moreover, the constitutions of many more contain “directive principles” and reciprocal “duties” to guide national policy and individual action for matters affecting the environment. The United Nations Environment Programme (UNEP) concludes that at least 150 countries recognize a right to a healthy environment in some fashion, including by regional agreement and domestic legislation.<sup>53</sup> This does not begin to count constitutional provisions addressing a wide range of environmental matters,<sup>54</sup> including rights to water.<sup>55</sup> Furthermore, nearly twenty countries expressly recognize a constitutional goal of “sustainability” or “sustainable development,” although most of these are in sections of the constitutions or written in language that suggests non-enforceability.<sup>56</sup>

Nonetheless, as Gellers and Jeffords acknowledge, constitutionalizing environmental rights is not always commendable: “The results, however, do not support unqualified constitutionalization of environmental rights without careful deliberation.”<sup>57</sup> For example, it can involve trade-offs that may be detrimental to other valued rights, such as to employment, water, fishing, farming, family, travel, and property.<sup>58</sup>

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12 (2020) (“A human rights approach can set up conflicts . . . of the same divisive and damaging arguments that play out in national political arenas.”).

<sup>52</sup> Josh Gellers, *Righting Environmental Wrongs: Assessing the Role of Legal Systems in Redressing Environmental Grievances*, 26 J. ENV'T L. & LITIG. 461, 488–91 (2011).

<sup>53</sup> Boyd puts this figure at 155 countries. David R. Boyd, *Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment*, in THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT, *supra* note 1, at 17.

<sup>54</sup> See generally MAY & DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 1.

<sup>55</sup> *Id.*; see also David Takacs, *South Africa and the Human Right to Water: Equity, Ecology, and the Public Trust Doctrine*, 34 BERKELEY J. INT'L L. 55 (2016).

<sup>56</sup> James R. May, *Sustainability Constitutionalism*, 86 UMKC L. REV. 855 (2018).

<sup>57</sup> Chris Jeffords & Joshua C. Gellers, *Constitutionalizing Environmental Rights: A Practical Guide*, 9 J. HUM. RTS. PRAC. 136, 143–44 (2017).

<sup>58</sup> BABER & BARTLETT, *supra* note 51, at 12.

## 2. Implied Constitutional Recognition of a Substantive Right

Constitutional environmental rights can be derived from other rights as well. Courts in several countries have held that other socioeconomic rights, including rights to life, health, and dignity, implicitly incorporate environmental rights, although only a handful with a controlling and durable legal presence.<sup>59</sup> In his annual Thematic Report from 2020, the UN Special Rapporteur on a Right to a Healthy Environment lists eighteen countries that recognize an “implied” right to a healthy environment: Bangladesh, Cyprus, El Salvador, Estonia, Ghana, Guatemala, India, Ireland, Italy, Liberia, Lithuania, Malaysia, Namibia, Nigeria, Pakistan, Panama, Sri Lanka, and Tanzania.<sup>60</sup>

But upon closer examination of the summaries provided by the Special Rapporteur, the list of countries to imply environmental human rights appears to be closer to six than eighteen, as a vast majority of the cases cited have been reversed, ignored, or fallen into desuetude. In *Friends of the Irish Environment CLG v. Fingal County Council*, the Supreme Court of Ireland rejected and reversed the plaintiffs’ claim that the Constitution of Ireland’s right to life and dignity provision incorporates an implied right to a healthy environment.<sup>61</sup> The case listed in support of recognition of an implied right to a healthy environment in Nigeria<sup>62</sup>—*Gbemre v. Shell Petroleum Development*—was decided fifteen years ago by a lower court, did not serve as precedent, and was not enforced.<sup>63</sup> The case from Malaysia—*Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan*—is from a lower court twenty-five years ago, and admittedly relies on “obiter dicta,” that is, a superfluous remark from the court.<sup>64</sup> The case relied upon for Cyprus—*Republic v. Pyrgon Community*—was again decided twenty-five years ago does not seem to have lasting purchase. The cases from Italy—including *Decision No. 5172/1989* (Corte di Cassazione Sezioni

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<sup>59</sup> MAY & DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 1, at 358–68; James R. May & Erin Daly, *Constitutional Environmental Rights Worldwide*, in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW, *supra* note 1, at 329.

<sup>60</sup> Annual Thematic Reports of the Special Rapporteur on Human Rights and the Environment, U.N. HUM. RIGHTS OFFICE OF THE HIGH COMM’R, <https://www.ohchr.org/en/issues/environment/srenvironment/pages/annualreports.aspx> [https://perma.cc/AF3Q-E477], Annexes II–VIII.

<sup>61</sup> See Annex VIII; *Friends of the Irish Environment CLG v Fingal County Council* [2017] IEHC 695 (Ir.), *rev’d on statutory grounds*.

<sup>62</sup> See Annex IV.

<sup>63</sup> James R. May and Tiwajopelo O. Dayo, *Environmental Dignity Rights in Nigeria*, 25 WIDENER L. REV. 183 (2019).

<sup>64</sup> See Annex V.

Unite)—are even older, although there are more of them.<sup>65</sup> Then there are cases that do not seem to be based on a determination that there is an implied right to a healthy environment. The cases relied upon for El Salvador do not appear to determine that other socioeconomic rights confer an implied right to a healthy environment and in any event were decided a quarter of a century ago and have not served as precedent.<sup>66</sup> While the case relied upon for Ghana—*Centre for Public Interest Law v. Environmental Protection Agency*—appears to comment on the governmental duties to protect the environment, it does not recognize an implied substantive right to a healthy environment.<sup>67</sup> The case from Estonia—Case No. 3-3-1-101-09—is dated and revolves around procedural rights, and in any event seems to lack precedential moment. Liberia lacks either express or implied environmental rights from other socioeconomic rights and seems to be listed solely due to membership in the African Charter on Human and Peoples' Rights.<sup>68</sup>

Of the nine countries remaining, courts in Bangladesh, India, Pakistan, and Sri Lanka regularly recognize an implied right to a healthy environment.<sup>69</sup> In addition, Guatemala and Panama appear to possess relatively strong jurisprudence in support of an implied right to a healthy environment as well.<sup>70</sup> Yet Lithuania,<sup>71</sup> Namibia,<sup>72</sup> and Tanzania<sup>73</sup> do not have sufficient (or much of any) track record to support legal recognition of an implied right. In any event, Namibia is evidently mentioned because its constitution incorporates international agreements, arguably including Article 24 of the African Charter on Human and Peoples' Rights, which includes a right to live in a healthy environment,<sup>74</sup> which is not implied recognition.

Thus, at this point only courts in Bangladesh, Guatemala, India, Pakistan, Panama, and Sri Lanka can confidently be said to recognize an implied right to a healthy environment regularly. What this suggests is not that there are eighteen countries that imply a right to a healthy environment from other socioeconomic rights, but that in eighteen countries, there is jurisprudence that could conceivably support such a

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<sup>65</sup> See Annex VIII.

<sup>66</sup> See Annex VII.

<sup>67</sup> See Annex IV.

<sup>68</sup> See Annex VII.

<sup>69</sup> See generally S. Muralidhar, *India*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* 101–24 (Malcolm Langford ed., 2009).

<sup>70</sup> See Annex VII.

<sup>71</sup> See Annex VII.

<sup>72</sup> See Annex IV.

<sup>73</sup> *Id.*

<sup>74</sup> See Annex IV.

claim, and that in all but six of these countries, the claim to an implied right has not been established.

### B. *Recognition in Domestic Legislation*

Some countries have granted a right to a healthy environment under domestic legislation, but not under that country's constitution. The Special Rapporteur reports that an additional twenty-three countries recognize a right to a healthy environment under domestic legislation that do not do so constitutionally.<sup>75</sup> Further research is needed to ascertain the extent to which this legislation is impactful.

### C. *Recognition in International Law*

The international community has taken notice of environmental human rights, initially at Stockholm in 1972, and more recently by the United Nations Human Rights Council (UNHRC), the UNEP, various regional bodies, and elsewhere.

Shortly after the initial incorporation of environmental rights at the subnational level in the United States, in June 1972, the U.N. General Assembly convened the first United Nations Conference on the Human Environment (Conference) in Stockholm, Sweden. The meeting's principal purpose was to negotiate a legal document about the environment. In the days leading up to that watershed meeting, a group of "dissidents" led by Jacques Cousteau, concerned about the meeting's lack of emphasis on a human right to a healthy environment, called a "counter-summit" across the street to encourage nations to recognize environmental rights in their constitutions if the resulting declaration did not.<sup>76</sup> Marathon negotiations ensued.

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<sup>75</sup> These countries are: Armenia, Bhutan, Bosnia-Herzegovina, Cyprus, Djibouti, Eritria, Gambia, Guatemala, Guinea-Bissau, Haiti, Kazakhstan, Lebanon, Liberia, Lithuania, Madagascar, Monaco, Nigeria, Palau, Panama, Saudi Arabia, Tajikistan, Tanzania, and Uruguay. See Boyd, *supra* note 38, at 22–27.

<sup>76</sup> 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, 305 (2008) ("However, a group of dissidents led by Jacques Cousteau, who had quit the French delegation to take a more proactive role, held a counter-summit with their own agenda, paralleling the official one, but treating each issue on the agenda the day before it would be taken up by the official event. Quickly seized on by the press, their proposals became, in effect, the agenda to which the government delegations had to respond. One of the more dramatic proposals was a declaration of a right to a healthy environment. Who could oppose that? Who even knew what it meant? And so, emerging from Stockholm was an official resolution that nations should declare a constitutional right to a clean

Then, on June 16, the Conference issued the Declaration of the United Nations Conference on the Human Environment, or Stockholm Declaration, which says: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”<sup>77</sup> The Stockholm Declaration was the first international document to recognize what has become known as a right to a healthy environment. This “most innocuous” language has changed the world.<sup>78</sup>

While initially resistant, human rights-based thinking about the environment emerged nonetheless, and has enjoyed increasing prominence at the table of human rights.<sup>79</sup>

Nonetheless, international law and especially multilateral environmental agreements do not say much about human rights to a healthy environment.<sup>80</sup> There are some exceptions, including the 1989 Hague Declaration (recognizing “the right to live in dignity in a viable global environment”),<sup>81</sup> and Principle 1 of the 1992 Rio Declaration (“Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”).<sup>82</sup> The Paris Climate Agreement also has preambulatory recognition of human rights (“Parties should, when

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and healthy environment. Most nations in attendance did just that, and little more. Of all the resolutions adopted, this one seemed the most innocuous.”).

<sup>77</sup> U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, Principle 1, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

<sup>78</sup> Houck, *supra* note 76, at 305.

<sup>79</sup> ENCYCLOPEDIA OF HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 2; James R. May & Erin Daly, *Introduction to Volume VII: New Dimensions in Human Rights and the Environment*, in ENCYCLOPEDIA OF HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 2, at 1; Naysa Ahuja, Carl Bruch, Arnold Kreilhuber, Elizabeth Maruma Mrema, & John Pendergrass, *Advancing Human Rights through the Environmental Rule of Law*, in ENCYCLOPEDIA OF HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 2, at 13; May & Daly, *Learning From Constitutional Environmental Rights*, *supra* note 1; Stephen J. Turner, *Introduction: A Brief History of Environmental Rights and the Development of Standards*, in THE DEVELOPMENT OF STANDARDS, *supra* note 28, at 1.

<sup>80</sup> Duncan French & Karen N. Scott, *International Environmental Law*, in CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES 677, 677 (Michael J. Bowman & Dino Kritsiotis eds., 2018); James R. May & J. Patrick Kelly, *The Environment and International Society: Issues, Concepts and Context*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 1, at 13.

<sup>81</sup> *Hague Declaration on the Environment*, 28 INT’L LEGAL MATERIALS 1308, 1309 (1989).

<sup>82</sup> U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. No. A/CONF.151/26 (Vol. I) (June 13, 1992).



taking action to address climate change, respect, promote and consider their respective obligations on human rights . . .”).<sup>83</sup>

There are efforts for international recognition of a right to a healthy environment. A quarter-century ago, the United Nations commissioned the influential Ksentini Report, published in 1994, which concluded that “[e]nvironmental damage has direct effects on the enjoyment of a series of human rights, such as the right to life, to health, [and] to a satisfactory standard of living.”<sup>84</sup> More recently, the UNHRC appointed an Independent Expert, and then a Special Rapporteur on Human Rights and the Environment, who, among many other things, has agitated for international recognition of such rights, issued “Framework Principles on Human Rights and the Environment,” supported a “Global Pact for the Environment,” joined judicial workshops on a right to a healthy environment, written amicus briefs advocating for recognition of such rights, and appealed to the United Nations General Assembly and the UNHRC to adopt a resolution recognizing a right to a healthy environment.<sup>85</sup>

International recognition of a right seems to be gaining traction in other ways, too. The United Nations Human Rights Committee (a treaty body overseeing the International Covenant on Civil and Political Rights) recently issued a Comment<sup>86</sup> and several important decisions connecting human rights to environmental outcomes, including the

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<sup>83</sup> U.N. Framework Convention on Climate Change, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1, at 1 (Dec. 12, 2015).

<sup>84</sup> Fatma Zohra Ksentini (Special Rapporteur), U.N. Econ. and Soc. Council Sub-Comm’n on Prevention of Discrimination and Prot. of Minorities, *Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Human Rights and the Environment, Final Report*, ¶ 248, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994).

<sup>85</sup> John H. Knox, *The United Nations Mandate on Human Rights and the Environment*, in ENCYCLOPEDIA OF HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 2, at 34; U.N. Gen. Assembly Hum. Rts. Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligation Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018); *see* U.N. Gen. Assembly Hum. Rts. Council, *Good Practices of State at the National and Regional Levels with Regard to Human Rights Obligations Relating to the Environment*, ¶ 72(a), U.N. Doc. A/HRC/43/54 (Jan. 23, 2020) (“The Human Rights Council and the General Assembly should pass resolutions in 2020 recognizing the human right to live in a safe, clean, healthy and sustainable environment.”); *see also* U.N. Secretary-General, *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment*, U.N. Doc. A/73/419 (Nov. 30, 2018).

<sup>86</sup> U.N. Int’l Covenant on Civ. and Pol. Rts. Hum. Rts. Comm., *General Comment No. 36, Article 6: Right to Life*, ¶ 26, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) (Adopted by the Committee at its 124th session (8 Oct. to 2 Nov. 2018)) (imposing on the State parties the obligations to “take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity [including *inter alia*] degradation of the environment [and] deprivation of indigenous peoples’ land, territories and resources.”).

climate crisis.<sup>87</sup> The UNEP—which in part administers multilateral environmental agreements—recently launched an “Environmental Rights Initiative” to conduce constitutional rights to a healthy environment.<sup>88</sup> Environmental human rights can also help operationalize the U.N.’s Sustainable Development Goals.<sup>89</sup>

Yet, the world still lacks an overarching legal treaty recognizing the right to a healthy environment. The Global Pact for the Environment hit headwinds from several directions (political, geographic, socioeconomic). Whether a right to a healthy environment is a matter of customary international law is a difficult case to make.<sup>90</sup> Perhaps additional headway can be made as the fiftieth anniversary of the Stockholm Conference draws near, including efforts to have the U.N. General Assembly or the UNHRC issue a resolution or declaration in support of it. Time will tell.

#### D. *Recognition in Regional Law*

The story at the regional level is very different.<sup>91</sup> Since the 1992 Rio Declaration on Environment and Development, about 130 nations have endorsed regional agreements that mention a right to a healthy environment,<sup>92</sup> including the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (“Everyone shall have the right to live in a healthy

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<sup>87</sup> U.N. Hum. Rts. Comm., *Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2751/2016*, U.N. Doc. CCPR/C/126/D/2751/2016 (Sept. 20, 2019) (finding Paraguay violated international obligations to protect the rights to life and respect for private and family life and the home by neglecting to protect individuals from large-scale farms’ use of illegal chemicals); U.N. Hum. Rts. Comm., *Views Adopted By the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016*, U.N. Doc. CCPR/C/127/D/2728/2016 (Sept. 23, 2020) (finding that while deportation of people displaced by the climate crisis could contravene a right to life and dignity, there was no infraction because Kiribati had instituted sufficient protection measures).

<sup>88</sup> See *Advancing Environmental Rights*, U.N. ENV’T PROGRAMME ENV’T RTS. INITIATIVE, <https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights> [https://perma.cc/P46L-GQ9U].

<sup>89</sup> See e.g., Christopher Jeffords, “On the Relationship between Constitutional Environmental Human Rights and Sustainable Development Outcomes” (2020) (on file with author); see also James R. May, *Sustainability Constitutionalism*, *supra* note 56.

<sup>90</sup> Rebecca M. Bratspies, *Do We Need a Human Right to a Healthy Environment?*, 13 SANTA CLARA J. INT’L L. 31 (2015).

<sup>91</sup> See generally Ben Boer, *International Environmental Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ASIA AND THE PACIFIC 170, 200–02 (Simon Chesterman, Hisashi Owada, & Ben Saul eds., 2019).

<sup>92</sup> ENVIRONMENTAL RULE OF LAW: FIRST GLOBAL REPORT, *supra* note 44, at 161.

environment . . .”);<sup>93</sup> the African (Banjul) Charter on Human and Peoples’ Rights (“All peoples shall have the right to a general satisfactory environment favorable to their development.”);<sup>94</sup> the Arab Charter on Human Rights (“Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment.”);<sup>95</sup> and the Association of Southeast Asian Nations Human Rights Declaration (“Every person has . . . the right to a safe, clean and sustainable environment.”).<sup>96</sup> Neither the European Convention on Human Rights nor the European Social Charter includes an express right to a healthy environment.<sup>97</sup>

Mentioning a right to a healthy environment is not the same thing as conferring one, of course. Among the regional agreements doing so, “the African Charter on Human and Peoples’ Rights is the only human rights treaty, albeit a regional one, to include a justiciable right to a healthy environment.”<sup>98</sup> As of this writing, fifty-four out of fifty-five countries of the African Union Member States have ratified the African Charter.<sup>99</sup> Of these ratifying countries, thirty-one already recognize a right to a healthy environment.<sup>100</sup>

Thus, the African Charter provides legal basis for recognition in an additional twenty-three countries (54–31=23). Yet courts in some of these countries have held that the African Charter is not enforceable there, such as Nigeria.<sup>101</sup> Thus, it is a leap of faith to conclude that twenty-three additional countries are subject to the African Charter, but

<sup>93</sup> Additional Protocol to the American Convention on Human rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador,” Nov. 17, 1988, art. 11, O.A.S.T.S. No. 69, 28 I.L.M. 161 (1989) (entered into force Nov 16, 1999).

<sup>94</sup> Organization of African Unity: Banjul Charter on Human and Peoples’ Rights, June 6, 1981, art. 24, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986).

<sup>95</sup> League of Arab States, Arab Charter on Human Rights, May 22, 2004, art. 38, *reprinted in* 12 INT’L HUM. RTS. REP. 893 (2005) (entered into force Mar. 15, 2008).

<sup>96</sup> Association of Southeast Asian Nations, ASEAN Human Rights Declaration, Nov. 19, 2012, para. 28(f), <https://asean.org/asean-human-rights-declaration> [<https://perma.cc/CUQ8-SRRT>].

<sup>97</sup> As discussed below, the European Court of Human Rights has mentioned a right to a healthy environment in some decisions in interpreting Articles 8 (Right to Respect for Private and Family Life).

<sup>98</sup> SUMUDU ATAPATTU & ANDREA SCHAPPER, HUMAN RIGHTS AND THE ENVIRONMENT: KEY ISSUES 122 (2019).

<sup>99</sup> Morocco appears to be the holdout. *List of Countries Which Have Signed, Ratified/Acceded To The African Charter On Human And People’s Rights*, AFRICAN UNION (June 15, 2017), [https://au.int/sites/default/files/treaties/36390-sl-african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_2.pdf](https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf) [<https://perma.cc/7TVA-FWG4>].

<sup>100</sup> See *infra* Appendix.

<sup>101</sup> See generally James R. May & Tiwajopelo Dayo, *Dignity and Environmental Justice in Nigeria: The Case of Gbemre v. Shell*, 25 WIDENER L. REV. 269 (2019).

lacking an express right to a healthy environment, nonetheless recognize such a right.

Recognition of something akin to a right to a healthy environment does not make it legally enforceable. For instance, the Preamble to the 1998 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (commonly known as the Aarhus Convention) recognizes also that “every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.”<sup>102</sup> Moreover, Article 1 provides:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.<sup>103</sup>

Yet neither the Preamble nor Article I are enforceable. For example, reading the Aarhus Convention’s preambulatory mention of a “right to live in an environment” among twenty-four other such provisions as legal recognition would likely come as a surprise to those countries that have long joined international conventions that commonly contain preambulatory provisions, meaning all of them. Indeed, the United Kingdom and Ireland emphasized in signing statements their view that the seventh clause is aspirational but not enforceable.<sup>104</sup> Moreover, the Aarhus Convention’s “Compliance Mechanism” applies to procedural rights to information, participation,

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<sup>102</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, preamble, 2161 U.N.T.S 450 (entered into force Oct. 30, 2001).

<sup>103</sup> *Id.* art. 1.

<sup>104</sup> *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, UNITED NATIONS TREATY COLLECTION (June 25, 1998), [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-13&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en) [<https://perma.cc/78DW-FR2W>] (“*Declaration made upon signature and confirmed upon ratification*: “The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the “right” of every person “to live in an environment adequate to his or her health and well-being” to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.””).

and access to justice, but does not grant substantive rights.<sup>105</sup> In this vein, the former Special Rapporteur on Human Rights and the Environment, John Knox, has observed:

The rapid growth of the right to a healthy environment might suggest that it is well on its way to joining the list of generic rights. . . . However, not all recognitions are equal. . . . Becoming a party to the Aarhus Convention, for example, evidences less commitment to the right than adding it to a constitution.<sup>106</sup>

Next, as with the Aarhus Convention, the United Nations Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (also known as the Escazú Agreement)—which entered into force on April 22, 2021—mentions a right to a healthy environment among a long list of preambulatory provisions.<sup>107</sup> Again, these are not legally enforceable.<sup>108</sup>

Neither the Aarhus Convention nor the Escazú Agreement provides a basis for enforcing a right to a healthy environment. Moreover, only a minority of signatory states have seen fit to constitutionalize such a right, including only twenty of forty-seven countries that have ratified the Aarhus Convention, and just four of those that have ratified the Escazú Agreement, which would further seem to suggest that joining these important conventions does not signify legal recognition of such rights.<sup>109</sup>

Mentioning a right to a healthy environment in a legal instrument is not the same thing as legal recognition of an enforceable right. As mentioned, the Stockholm Declaration recognized “the fundamental right to . . . an environment of a quality that permits a life

<sup>105</sup> *Compliance Mechanism*, U.N. ECON. COMM’N FOR EUR., <https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/areas-of-work/envppimplemintro/compliance-mechanism.html> [<https://perma.cc/ZVV8-S7VG>].

<sup>106</sup> Knox, *supra* note 2, at 83.

<sup>107</sup> See U.N. Econ. Comm’n for Lat. Am. & the Caribbean, *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, at 14, 16, 36, LC/PUB.2018/8/\*42 (Nov. 2018), <https://www.cepal.org/en/escazuagreement> [<https://perma.cc/4E2A-4P87>].

<sup>108</sup> The agreement was ratified on January 22, 2021, and entered into force on April 22, 2021. *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, U.N.: OBSERVATORY ON PRINCIPLE 10 IN LAT. AMER. AND THE CARIBBEAN, <https://www.cepal.org/en/escazuagreement> [<https://perma.cc/JE2E-NCGE>].

<sup>109</sup> See *infra* Appendix.

of dignity and well-being.”<sup>110</sup> Yet it would misapprehend international law to contend that such mention amounts to “legal recognition” of such a fundamental right, but if so, why constitutional incorporation was necessary in the first place or took the twisted route detailed above. But assuming mention amounts to legal recognition, then it would be fair to contend that the member states that supported the Stockholm Declaration—including the United States—and the 112 countries of the U.N. General Assembly that supported the resolution adopting it therefore legally recognize a right to a healthy environment.<sup>111</sup> But that clearly was not and is not the case.

#### E. *Extent to Which Environmental Human Rights Are Recognized*

Thus, the number of countries legally subject to a right to a healthy environment would seem to be 136 as follows: 84 (express substantive right) + 6 (implied substantive right) + 23 (subject to the African Charter but lacking an express or implied right) + 23 (recognized legislatively but lacking an express or implied right (84+6+23+23=136)).<sup>112</sup> More research is needed to ascertain whether and the extent to which this recognition improves environmental outcomes.

## II. IMPLEMENTING ENVIRONMENTAL HUMAN RIGHTS

Recognizing a right to a clean and healthy environment without judicial, legislative, regulatory, and other means to implement them is tantamount to Pyrrhic victory.<sup>113</sup> Examining the extent to which recognition amounts to implementation is complex. Predictors of effective implementation include clear constitutional text, a commitment to the rule of law, respect for separation of powers, participation, democracy, and an active civil society.<sup>114</sup> For example, the

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<sup>110</sup> U.N. Conference on the Human Environment, *Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

<sup>111</sup> G.A. Res. 2995, U.N. Doc. A/RES/2995(XXVII) (Dec. 15, 1972).

<sup>112</sup> This is somewhat less than the number reported by the current Special Rapporteur on Human Rights and the Environment. Boyd, *supra* note 38, at 4 n.13 (“In total, more than 80 per cent of States Members of the United Nations (156 out of 193) legally recognize the right to a safe, clean, healthy and sustainable environment.”).

<sup>113</sup> IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17.

<sup>114</sup> Louis J. Kotzé, *Six Constitutional Elements for Implementing Environmental Constitutionalism in the Anthropocene*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17, at 13.

French system's two forms of constitutional review (procedural and substantive), may be "a model in the field of environmental constitutionalism."<sup>115</sup> And combining procedural and substantive provisions can help.<sup>116</sup> Political disruption can, perhaps unexpectedly, also foster development and implementation.<sup>117</sup> And a recent report identifies laws from 110 countries that it says expressly grant a right to a healthy environment.<sup>118</sup>

Yet the most consequential implementation thus far is judicial engagement and enforcement. Even if courts in many countries continue to be reluctant to engage environmental rights provisions,<sup>119</sup>

[T]he trend is positive and powerful. Those courts that have embraced these provisions have transformed a notion writ large—environmental human rights—into a multitude of national narratives writ small. . . . In many cases constitutionally enshrined environmental rights provided the last clear chance at vindicating a human right to an adequate environment.<sup>120</sup>

There is a small but growing body of case law engaging express environmental rights, including in the climate context.<sup>121</sup> The *Arctic Oil* case—construing Article 112 of the Constitution of Norway—was a leading example, until it was dismissed by the Supreme Court of

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<sup>115</sup> Jochen H. Sohnle, *Judicial Implementation of Environmental Constitutionalism in France: A Fertile Ground from the Charter of the Environment*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17, at 159.

<sup>116</sup> Melanie Murcott, *The Procedural Right of Access to Information as a Means of Implementing Environmental Constitutionalism in South Africa*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17, at 193.

<sup>117</sup> Carl Bruch, Aleksandra Egorova, Katie Meehan & Yousef Bugaighis, *Natural Resources, Power Sharing, and Peacebuilding in Postconflict Constitutions*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17, at 100.

<sup>118</sup> Some of the laws listed were enacted *prior to* the adoption of a constitutional right, suggesting that prior legislative recognition can contribute to subsequent constitutional incorporation. Boyd, *supra* note 38, at annex IV–VII.

<sup>119</sup> BABER & BARTLETT, *supra* note 51, at 14 (“[E]ven where broadly worded substantive environmental rights are adopted, at least early on they are likely to be applied by courts in limited doses to address specific ailments.”).

<sup>120</sup> May & Daly, *Vindicating Fundamental Environmental Rights*, *supra* note 5, at 371.

<sup>121</sup> See, e.g., ASIAN DEVELOPMENT BANK, *CLIMATE CHANGE, COMING SOON TO A COURT NEAR YOU: CLIMATE LITIGATION IN ASIA AND THE PACIFIC AND BEYOND* (2020), <https://dx.doi.org/10.22617/TCS200027-2> [<https://perma.cc/BL53-B7FV>]; Michael Burger & Jessica Wentz, *Climate Change and Human Rights*, in ENCYCLOPEDIA OF HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 2, at 198; see also John H. Knox & Christina Voight, *Transnational Climate Litigation: The Contribution of the Global South*, 114 AM. J. INT’L L. UNBOUND 35 (2020); Cesar Rodriguez-Garavito, *Human Rights: The Global South’s Route to Climate Litigation*, 114 AM. J. INT’L L. UNBOUND 40 (2020).

Norway.<sup>122</sup> Moreover, in 2018 the Constitutional Court of Colombia held that the Colombian Amazon enjoys legal rights to protection,<sup>123</sup> and in 2017 the High Court of South Africa required the preparation of a climate impact assessment prior to the issuance of a permit to build a large coal-fired power station as a means to meet constitutional demands.<sup>124</sup>

In countries where the text of the constitution is not as green, courts have looked elsewhere to advance climate justice—often in the rights of life and dignity. For example, a 2005 case from an intermediate court in Nigeria derived environmental values from that country’s constitutional right to dignity. The court held that the petroleum developers’ flaring of “waste” natural gas in the Niger Delta abridged the community plaintiffs’ constitutionally guaranteed right to dignity. The court granted “leave to the [a]pplicants . . . to apply for . . . the enforcement of their fundamental rights to life and dignity of [the] human person as provided by . . . the Constitution of the Federal Republic of Nigeria.”<sup>125</sup> Moreover, these constitutionally guaranteed rights inevitably include the right to a clean, poison-free, pollution-free, healthy environment.<sup>126</sup> Accordingly, the court issued an injunction, which was not enforced. Notice the courage of the judge who found a constitutional, actionable right to a quality environment based on the dignity of people in the situation of the petitioner.<sup>127</sup>

While *Gbmere* did not stop or even alter gas-flaring practices in Nigeria, it was among the first decisions to find that environmental degradation diminishes constitutionally-protected human dignity:

Gbemre stands as an important decision despite not ultimately diminishing the extent of flaring in Nigeria. . . . First, dignity rights provide a vocabulary for foregrounding the damage to people from environmental and climate injustices. Second, they draw attention to how environmental injustice affect all the essential aspects of a person’s life: where food security, access to clean water, and

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<sup>122</sup> James R. May, *The Norwegian Constitutional Right to a Healthy Environment in Global Context*, Mellom Jus Og Politikk, Grunnloven, Section 112, 41 (Fagbokforlaget 2019); Nerijus Adomaitis, *Norway Supreme Court Verdict Opens Arctic to More Oil Drilling*, REUTERS (Dec. 22, 2020, 4:55 AM), <https://www.reuters.com/article/us-norway-oil-environment-idUKKBN28W104> [<https://perma.cc/B5MP-JCNF>].

<sup>123</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], Apr. 5, 2018, STC4360 (p. 27) (Colom.).

<sup>124</sup> Earthlife Africa Johannesburg v. Minister of Energy, Apr. 26, 2017 (5) SA 227 (WCC) (S. Afr.).

<sup>125</sup> *Gbemre v. Shell Petroleum Dev. Co. of Nigeria Ltd.* [2005] FHC/B/CS/53/05 AHRLR 151 (Nigeria).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*



breathable air are threatened; a person's ability to design her own life plan is weakened, and her ability to live in material comfort is impossible. Third, Gbemre shows how attention to the equal worth of all those involved in environmental outcomes evidences a respect for the human dignity of each person. Perhaps most importantly, Gbemre signals a growing appreciation in jurisprudence of the connection between dignity and environmental conditions.<sup>128</sup>

Ensuring human dignity can be the basis for addressing climate change, even in the absence of other legal means. For example, while the Constitution of Pakistan lacks a specific right to a healthy environment, Article 14 provides: "The dignity of man and, subject to law, the privacy of home, shall be inviolable."<sup>129</sup> In a series of groundbreaking cases, the Lahore High Court turned to Article 14 to address climate change. First in 2015, the court established a "Climate Change Commission" (CCC) to review the threats of climate change in Pakistan, considering its effects on water resources, forestry, agriculture, and environmental, climate, and water justice. And then, in 2018, the Lahore High Court dissolved the CCC, finding it had accomplished two-thirds of its goals, and established a "Standing Committee" to help the government implement greenhouse reduction strategies.<sup>130</sup>

There also seems to be a growing recognition of the link between human dignity and the environment.<sup>131</sup> For example, the U.N. Special Rapporteur on Human Rights and the Environment determined that: "Human rights are grounded in respect for fundamental human attributes such as dignity, equality and liberty. The realization of these attributes depends on an environment that allows them to flourish. . . . Human rights and environmental protection are inherently

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<sup>128</sup> May & Dayo, *supra* note 101, at 281.

<sup>129</sup> PAKISTAN CONST. art 14.

<sup>130</sup> Leghari v. Fed'n of Pak., W.P. No. 25501/2015 (Pak.) (2018).

<sup>131</sup> See, e.g., Bernice B. Donald & Emily P. Linehan, *Dignity Rights and the Environment: Affirming Human Dignity through Environmental Justice*, 25 WIDENER L. REV. 153, 154 (2019); Erin Daly & James R. May, *Environmental Dignity Rights*, in 3 THE EFFECTIVENESS OF ENVIRONMENTAL LAW 125 (Sandrine Maljean-Dubois ed., 2017); Erin Daly & James R. May, *Bridging Constitutional Dignity and Environmental Rights Jurisprudence*, 7 J. HUM. RTS. & ENV'T. 218 (2016); Dina Lupin Townsend, *The Place of Human Dignity in Environmental Adjudication*, 3 OSLO L. REV. 27 (2016); Marcus Düwell & Gerhard Bos, *Human Rights and Future People—Possibilities of Argumentation*, 15 J. HUM. RTS. 231 (2016). See generally JAMES R. MAY & ERIN DALY, *ADVANCED INTRODUCTION TO HUMAN DIGNITY AND LAW* (2020); ERIN DALY & JAMES R. MAY, *DIGNITY LAW: GLOBAL RECOGNITION, CASES AND PERSPECTIVES* (2020).

interdependent.”<sup>132</sup> These developments suggest the inexorable relationship between human dignity and a healthy environment.

Recognizing environmental rights informs related environmental considerations, such as environmental justice.<sup>133</sup> Environmental justice recognizes that every person has equal dignity and equal rights to a clean and healthy environment and access to information, participation, justice, and remedies in environmental matters.<sup>134</sup> It aims to address and redress the disproportionate effects of environmental policies and practices on the politically underrepresented, vulnerable, and disempowered, including low-income, indigenous, minority, and other vulnerable communities.<sup>135</sup>

Courts remain essential to the implementation of environmental human rights. Nearly a decade ago Daly and I observed that “courts and international tribunals are enforcing constitutionally enshrined environmental rights with growing frequency, recognising basic human rights to clean water, air, and land, and environmental opportunity,” and that “courts are increasingly taking seriously the challenge of enforcing both substantive and procedural constitutional environmental rights, to the benefit of constitutional law generally and environmental rights in particular.”<sup>136</sup> In addition, “[t]here is also a “growing body of judicial decisions concerning constitutional rights to

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<sup>132</sup> John H. Knox (Special Rapporteur on Human Rights and the Environment), *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012).

<sup>133</sup> Melanie Murcott, *The Role of Environmental Justice in Socio-Economic Rights Litigation*, 132 S. AFR. L.J. 875, 875–77 (2015); Erin Daly & James R. May, *Exploring Environmental Justice Through the Lens of Human Dignity*, 25 WIDENER L. REV. 167 (2019); see also Brian Roewe, *Racism in Pollution and Policing: A Conversation with Robert Bullard, Father of Environmental Justice*, EARTHBEAT (June 19, 2020), <https://www.ncronline.org/news/earthbeat/racism-pollution-and-policing-conversation-robert-bullard-father-environmental> [<https://perma.cc/K8H7-DYR7>] (“That means that all communities should have a right to a clean and healthy, livable environment. That no community should somehow be targeted for things that other people don’t want. We want a healthy, livable environment.”). See generally James R. May & Erin Daly, *Constitutional Environmental Rights Worldwide*, in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW, *supra* note 1, at 329.

<sup>134</sup> See Daly & May, *Exploring Environmental Justice*, *supra* note 133.

<sup>135</sup> See, e.g., Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENV’T L.J. 338 (1996); Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENV’T L.J. 71 (2005); Carmen G. Gonzalez & Sumudu Atapattu, *International Environmental Law, Environmental Justice, and the Global South*, 26 TRANSNAT’L L. & CONTEMP. PROBS. 229 (2017); Kenneth F. McCallion, *International Environmental Justice: Rights and Remedies*, 26 HASTINGS INT’L & COMP. L. REV. 427 (2003); INTERNATIONAL ENVIRONMENTAL JUSTICE: COMPETING CLAIMS AND PERSPECTIVES (Frederick D. Gordon & Gregory K. Freeland eds., 2012).

<sup>136</sup> James R. May and Erin Daly, *Global Constitutional Environmental Rights*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 1, at 603.

participate in environmental matters[,]”<sup>137</sup> including in 2015 by the Constitutional Court of Colombia,<sup>138</sup> in 2000 by the Ecuador Constitutional Tribunal,<sup>139</sup> and in 1999 by the Supreme Court of South Africa.<sup>140</sup>

Some courts have been receptive to “harmonious construction,” that is, construing fundamental rights to life and dignity to incorporate a right to a healthy environment, as easing judicial roadblocks to public interest litigation.<sup>141</sup> For example, observing that “it cannot be imagined to live with dignity in a polluted environment,” in 2015 the Supreme Court of Nepal enjoined marble mining in a UNESCO-protected site.<sup>142</sup> Then in 2017, the High Court of Ireland construed the constitutional “right to dignity” as incorporating a right to a healthy environment.<sup>143</sup>

Environmental human rights are finding footholds under regional treaties, too, led by the Inter-American Court of Human Rights, which in 2017 issued an advisory opinion recognizing a right to a healthy environment in the context of climate change’s disproportionate impact on vulnerable persons,<sup>144</sup> and in 2020 applying a right to a healthy

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<sup>137</sup> James R. May & Erin Daly, *The Future We Want and Constitutionally Enshrined Procedural Rights*, in GLOBAL ENVIRONMENTAL LAW AT A CROSSROADS 30, 42–43 (Robert V. Percival, Jolene Lin & William Piermattei eds., 2014).

<sup>138</sup> Corte Constitucional [Constitutional Court] Sentencia T-766/15, Dec. 16, 2015 (Colom.).

<sup>139</sup> *Federación Independiente del Pueblo Shuar del Ecuador (FIPSE) c. Arco Oriente s/ Amparo*, ESCR-NET, <https://www.escr-net.org/caselaw/2006/federacion-independiente-del-pueblo-shuar-del-ecuador-fipse-c-arco-oriente-s-amparo-eng> [https://perma.cc/53EG-2ES5] (summarizing a decision of the Tribunal Constitucional de Ecuador, Sala Primera, April 2000).

<sup>140</sup> *Mineral Dev. v. Save the Vaal Env’t*, (8) BCLR 845 (SCA) (Mar. 12, 1999) (S. Afr.).

<sup>141</sup> Ngozi Finette Stewart, *Challenges and Opportunities in Implementing Environmental Constitutionalism in Nigeria*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17, at 180.

<sup>142</sup> *Pro Pub. v. Godavari Marble Indus. Pvt. Ltd.*, 068-WO-0082 (Sup. Court of Nepal 2015). The court also found that the mining activities violated Art. 35(5) of the Constitution of Nepal, which provides:

The State shall make such arrangements as required for keeping the environment clean. The State shall give priority to the prevention of adverse impacts on the environment caused by physical development activities, by increasing the awareness of the general public about environmental cleanliness as well as to the protection of the environment and special protection of the rare wildlife. The State shall make arrangements for the protection and sustainable uses and equitable distribution of the benefits derived from the flora and fauna and biological diversity.

<sup>143</sup> *Merriman v. Fingal Cnty. Council* [2017] IEHC 695, 269 (Ir.). The Supreme Court of Ireland subsequently held for the plaintiffs on statutory (not constitutional) grounds. *See Friends of the Irish Env’t v. Ireland* [2020] IESC 49 (Ir.).

<sup>144</sup> *The Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R.* (ser. A) No. 23, ¶ 48 (Nov. 15, 2017). *See generally* Maria Antonia Tigre & Natalia Urzola Gutierrez, *The 2017 Inter-American Court’s Advisory Opinion: Changing the Paradigm for International Environmental Law*, 12(1) J. HUM. RTS. & ENV’T 24 (2021).

environment in a contested (as-applied) case.<sup>145</sup> The European Union is contemplating legislation to recognize biodiversity as a basic human right.<sup>146</sup> And the Supreme Court of the Netherlands relied on rights conferred by the European Convention on Human Rights to life and family to order the government to reduce greenhouse gas emissions by twenty-five percent.<sup>147</sup>

The rights of nature have been subject to increased judicial cognizance as well. For example, the Constitutional Court of Ecuador has engaged that country's first-ever recognition of the rights of nature.<sup>148</sup> In 2016, the Colombian Constitutional Court issued a landmark decision recognizing the Rio Atrato's legal ability to assert its rights in court under that country's "Ecological Constitution."<sup>149</sup> In 2017, the High Court of Uttarakhand in India found that the Rivers Ganges and Yamuna, along with their tributaries, are juristic persons,<sup>150</sup> and declared that "Rivers, Forests, Lakes, Water Bodies, Air, Glaciers, and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology system" and have "the status of legal persons," with all corresponding rights.<sup>151</sup> However, the Supreme Court of India subsequently reversed and dismissed this decision.<sup>152</sup> Other courts followed this example, including the Supreme Court of Justice of Colombia, which, in 2018, held that the Colombian Amazon enjoys legal rights.<sup>153</sup> And in 2020, the Islamabad High Court recognized the

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<sup>145</sup> See Maria Antonia Tigre, *Inter-American Court of Human Rights Recognizes the Right to a Healthy Environment*, ASIL INSIGHTS (June 2, 2020), <https://www.asil.org/insights/volume/24/issue/14/inter-american-court-human-rights-recognizes-right-healthy-environment> [<https://perma.cc/GQF4-77L7>].

<sup>146</sup> ELISA MORGERA, BIODIVERSITY AS A HUMAN RIGHT AND ITS IMPLICATIONS FOR THE EU'S EXTERNAL ACTION (2020), [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/603491/EXPO\\_STU\(2020\)603491\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/603491/EXPO_STU(2020)603491_EN.pdf) [<https://perma.cc/GF2H-7F3H>].

<sup>147</sup> HR Dec. 20, 2019, NJ 2020, 41 m.nt. J. Spier (No. 19/00135) (State of the Netherlands, Ministry of Economic Affairs and Climate/Stichting Urgenda) (Neth.).

<sup>148</sup> CONSTITUCIÓN DEL ECUADOR, art. 71 ("Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.") was applied in Corte Constitucional del Ecuador, Sentencia No. 166-15-Sep-CC, May 20, 2015, at 9–10.

<sup>149</sup> Corte Constitucional [Constitutional Court], Sentencia T-622/16, Nov. 10, 2016 (Colom.).

<sup>150</sup> *Salim v. State of Uttarakhand* (2017) WPPIL No. 126/2014 (Uttarakhand at Nainital HC), ¶ 17–19 (India), <https://www.nonhumanrights.org/content/uploads/WPPIL-126-14.pdf> [<https://perma.cc/J6WJ-CM6H>].

<sup>151</sup> *Miglani v. State of Uttarakhand*, LNIND 2017 UTTAR 331 (Uttarakhand HC) (India).

<sup>152</sup> *India's Ganges and Yamuna Rivers Are "Not Living Entities"*, BBC NEWS (July 7, 2017), <https://www.bbc.com/news/world-asia-india-40537701> [<https://perma.cc/22PT-3WTG>].

<sup>153</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], STC4360-2018, Apr. 5, 2018 (Colom.).

legal personhood of an elephant, ruling that it possesses a constitutional protection to dignity.<sup>154</sup>

However, courts still have yet to engage express environmental rights as often as might be expected. As Daly and I noted in 2009, “[t]here are surprisingly few judicial decisions implementing constitutionally enshrined environmental rights provisions. Assuming the existence of litigants and lawyers and commencement of an action, there remain trenchant obstacles to judicial vindication of environmental rights, including text, meaning, judicial receptivity, and political will.”<sup>155</sup> More than a decade on, we identified fifty leading cases in a 2019 UNEP report, few of which are based on an express constitutional environmental right.<sup>156</sup> Moreover, many constitutional provisions have not been the subject of judicial examination. Of those that have, few have yielded judicial orders. Judicial orders are then often not implemented or monitored, or are ignored or neglected altogether.<sup>157</sup> Few have resulted in the relief requested and ultimate transformation of environmental conditions.

There are multiple inhibitors to implementation. One is the lack of standards, which are few and far between.<sup>158</sup> Another is enforceability. For example, while the constitutions of at least eight countries<sup>159</sup> address climate change, there is of yet no caselaw engaging these provisions,<sup>160</sup> suggesting that they are not enforceable. Implementation challenges persist, including in Brazil, owing to a host of geographic and political reasons,<sup>161</sup> and in Colombia, where an extraction-based,

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<sup>154</sup> Islamabad Wildlife Mgmt. Bd. v. Metro. Corp. Islamabad (2020) W.P. No. 1155/2019 (Islamabad High Ct.) 1, 7, 59 (Pak.), <https://www.nonhumanrights.org/content/uploads/Islamabad-High-Court-decision-in-Kaavan-case.pdf> [<https://perma.cc/KHG6-JDJL>] (“The question is whether the animals, i.e. non-human living creatures, have independent rights or, is there a duty on the part of the human race, through the State and its public functionaries, to protect, preserve and conserve such species? . . . Do the animals have legal rights? The answer to this question, without any hesitation, is in the affirmative.”); see also Melanie Murcott, “Transformative Environmental Constitutionalism’s Response to the Setting Aside of South Africa’s Moratorium on Rhino Horn Trade”, 6 HUMAN. 84 (2017).

<sup>155</sup> May & Daly, *Vindicating Fundamental Environmental Rights*, *supra* note 5, at 371.

<sup>156</sup> See DALY & MAY, COMPANION, *supra* note 5 (identifying leading environmental law cases to provide jurists with an overview of environmental constitutionalism worldwide).

<sup>157</sup> See, e.g., May & Dayo, *supra* note 101 (discussing the story of Gbemere v. Shell, which resulted in a courageous but ignored judicial order invoking dignity).

<sup>158</sup> See James R. May & Erin Daly, *Standards of Environmental Constitutionalism*, *supra* note 28, at 367.

<sup>159</sup> Boyd, *supra* note 38, ¶ 50 (reporting this number as nine).

<sup>160</sup> James R. May & Erin Daly, *Global Climate Constitutionalism and Justice in Courts*, in RESEARCH HANDBOOK ON GLOBAL CLIMATE CONSTITUTIONALISM 235 (Jordi Jaria-Manzano & Susana Borràs eds., 2019).

<sup>161</sup> Marcelo Buzaglo Dantas, *Implementing Environmental Constitutionalism in Brazil*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17, at 129.

business-friendly, and corrupt system, coupled with recovery from long-running armed conflict, provide steep challenges to implementation.<sup>162</sup>

A 2013 case in Pennsylvania shows how much difference an enforceable provision can make, finding a right to be “on par with, and enforceable to the same extent as, any other right reserved to the people in Article I,” and invalidating major aspects of a state oil and gas law designed to facilitate the development of “shale gas.”<sup>163</sup> The same provision was enforced in 2017 to hold that the government was (1) (mis)using proceeds generated from the sale of its public natural resources,<sup>164</sup> and (2) (wrongfully) transferring significant parts of a public park to a real estate developer.<sup>165</sup>

In the aggregate, these adjudicative developments show “that collectively the judiciary will continue to play a necessary, if not sufficient, role in the vindication of fundamental environmental rights worldwide.”<sup>166</sup> Caution about conclusions is warranted here, too. “No judicial order can resolve the problems of environmental degradation or climate change; in many cases, the most that a court can do is galvanise the political process to take environmental protection seriously. But this, in and of itself, is worth the effort to vindicate constitutional environmental rights.”<sup>167</sup> Thus “it is essential that new cases be brought to courts, building on the constitutional principles and the laws that make them effective. Only when jurisprudence improves can a conclusion be made on whether constitutional environmental rights [bring] real change.”<sup>168</sup>

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<sup>162</sup> Ana Lucía Maya-Aguirre, *Implementing Environmental Constitutionalism in Colombia: Tensions between Public Policy and Decisions of the Constitutional Court*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17, at 143–44.

<sup>163</sup> *Robinson v. Commonwealth*, 83 A.3d 901, 953–54 (Pa. 2013) (plurality opinion). See John C. Dernbach, Kenneth T. Kristl, & James R. May, *Recognition of Environmental Rights for Pennsylvania Citizens: Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 70 RUTGERS UNIV. L. REV. 803, 813–14 (2018).

<sup>164</sup> *Pa. Env’t Def. Found. v. Commonwealth*, 161 A.3d 911, 916 (Pa. 2017).

<sup>165</sup> *In Re Downingtown*, 161 A.3d 844 (Pa. 2017).

<sup>166</sup> May & Daly, *Vindicating Fundamental Environmental Rights*, *supra* note 5, at 372.

<sup>167</sup> James R. May & Erin Daly, *Global Constitutional Environmental Rights*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 1, at 603, 615.

<sup>168</sup> Erin Daly & James R. May, *Introduction: Implementing Environmental Constitutionalism*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17, at 6 (quoting Maria Antonia Tigre, *Implementing Constitutional Environmental Rights in the Amazon Rainforest*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17, at 82).

## III. OUTCOMES IN ENVIRONMENTAL RIGHTS

Given the evolution and implementation of environmental human rights, what difference does legal recognition make? The above tracks the recognition and implementation of environmental human rights across the globe. What is less clear is whether and the extent to which all of that effort is worth the coin, or if anything a better use of time and energy than working to recognize and implement *other* established rights, enacting and enforcing environmental laws, or implementing existing international schema, such as the U.N. Sustainable Development Goals. The results are mixed, despite a surfeit of good intentions and practices.

Evidence of implementation has various disputed inputs.<sup>169</sup> The current Special Rapporteur on Human Rights and the Environment has previously concluded that constitutionalizing environmental rights contributes to an assortment of causal and correlative outcomes, including a decrease in pollution (including emissions of greenhouse gases), and an increase in both the enactment and enforcement of environmental laws.<sup>170</sup> Others (including me) have posited that constitutionalizing environmental rights can also serve to promote human and environmental rights,<sup>171</sup> procedural guarantees,<sup>172</sup> remedies,<sup>173</sup> and judicial engagement.<sup>174</sup>

But perhaps a fair assessment is that the most common global attribute in environmental constitutionalism is under-recognition and under-enforcement. Simply, outcomes lag the feel-good narrative.<sup>175</sup> Standards designed to implement environmental rights have been few

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<sup>169</sup> For an instructive discussion of the challenges of implementing environmental law—including in Europe—see JAMES THORNTON & MARTIN GOODMAN, *CLIENT EARTH* (2017).

<sup>170</sup> See DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* 226, 273 (2012).

<sup>171</sup> See generally THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT, *supra* note 1; U.N. Doc. A/HRC/37/59, *supra* note 85; John H. Knox, *The United Nations Mandate on Human Rights and the Environment*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17; STEPHEN J. TURNER, A SUBSTANTIVE ENVIRONMENTAL RIGHT: AN EXAMINATION OF THE LEGAL OBLIGATIONS OF DECISION-MAKERS TOWARDS THE ENVIRONMENT (2008); STEPHEN TURNER, A GLOBAL ENVIRONMENTAL RIGHT (2014); May & Daly, *New Directions*, *supra* note 1, 14.

<sup>172</sup> See generally May, *Constitutional Directions in Procedural Environmental Rights*, *supra* note 13.

<sup>173</sup> See generally May & Daly, *Constitutional Environmental Rights and Liabilities*, *supra* note 14.

<sup>174</sup> May & Daly, *Vindicating Fundamental Environmental Rights*, *supra* note 5, at 390–405.

<sup>175</sup> See generally IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17.

and far between.<sup>176</sup> And while consistent with them, environmental rights constructs do not easily fit into existing international environmental frameworks, such as the U.N. Sustainable Development Goals.<sup>177</sup> Environmental rights approaches have yet to do much to address environmental injustice.<sup>178</sup> And while more and more courts are issuing opinions that engage claims or devise remedies in the service of environmental rights, courts worldwide have generally been reluctant to recognize or effectuate remedies to implement constitutionally-instantiated environmental rights,<sup>179</sup> including in the context of climate change.<sup>180</sup> Perhaps unexpectedly, much of the advancement of the idea of a human right to a healthy environment has been achieved through the enforcement of classic “first generation rights,” such as a right to life, health, or dignity.<sup>181</sup>

This result is partially explained by the limits of language. The right to a healthy environment engenders a welter of questions, including those steeped in epistemology (understanding desired ends), etymology (what words mean, including “environment,” “healthy,” etc.), and implementation (the extent to which constitutional rights are operationalized and enforced). Outcomes are also complex and fraught with interpretive challenges that are the result of a collection of actions taken over time by various actors public and private: the decision to constitutionalize environmental rights and/or values, the enactment of legislative and regulatory rules to support the constitutional right, the allocation of national resources to create judicial systems that respect the rule of law, the decision to provide broad standing to plaintiffs to sue in courts of competent jurisdiction, and the private resources that enable individuals to take advantage of all these things.

Indeed, relying on judicial decisions as indicia of outcomes is itself fraught. Adjudicative and legal tradition, engagement, activism, and interpretation vary wildly, even within a single country. Legal

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<sup>176</sup> ENVIRONMENTAL RIGHTS: THE DEVELOPMENT OF STANDARDS (Stephen J. Turner, Dinah L. Shelton, Jona Razzaque, Owen McIntyre, & James R. May eds., 2019).

<sup>177</sup> James R. May & Erin Daly, *Human Dignity and the UN Sustainable Development Goals*, in INTERNATIONAL ENVIRONMENTAL LAWMAKING AND DIPLOMACY REVIEW 2018 (Tuula Honkonen & Seita Romppanen eds., 2019); James R. May, *Sustainability Constitutionalism*, *supra* note 56.

<sup>178</sup> Daly & May, *Exploring Environmental Justice*, *supra* note 133.

<sup>179</sup> May & Daly, *Vindicating Fundamental Environmental Rights*, *supra* note 5, at 366; JAMES R. MAY & ERIN DALY, JUDICIAL HANDBOOK ON ENVIRONMENTAL CONSTITUTIONALISM (2017); May & Dayo, *supra* note 101.

<sup>180</sup> James R. May, *Climate Constitutionalism in the Courts*, in RESEARCH HANDBOOK ON GLOBAL CLIMATE CONSTITUTIONALISM, *supra* note 160, at 235.

<sup>181</sup> Erin Daly & James R. May, *Environmental Dignity Rights*, in ENCYCLOPEDIA OF HUMAN RIGHTS AND THE ENVIRONMENT, *supra* note 2.



comparativism is fraught with misinterpretation, mistranslation, cultural and class bias, and the vestiges of colonialism. Moreover, the subject field is also intrinsically unreliable, as only a fraction of constitutionally-incorporated environmental rights have been the subject of judicial examination by apex courts.<sup>182</sup> Of these, few have yielded judicial orders, and fewer yet of these have resulted in the relief requested. Simply, the causative evidence that environmental rights improve environmental outcomes is lacking.

Moreover, even judicial decrees granting relief do not secure improvements in environmental conditions. Just by way of example, nearly three decades after the celebrated *Minors Oposa* case, the government continues to permit timber harvesting largely unaffected by the case;<sup>183</sup> a decade after issuance of a remarkably ambitious judicial order in the *Manila Bay Case*, it remains heavily polluted;<sup>184</sup> the Matanza-Riachuelo River is still heavily polluted notwithstanding the issuance of another ambitious judicial decree in the *Beatriz Mendoza* case from Argentina;<sup>185</sup> and the flaring of natural gas remains virtually unabated in the Niger Delta despite a court issuing a restraining order in another pioneering case, *Gbemre v. Shell*.<sup>186</sup>

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<sup>182</sup> See generally IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17 (global examination of challenges of implementing environmental rights).

<sup>183</sup> *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.). For oppositional commentary, see generally Dante B. Gatmaytan, *The Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory*, 15 GEO. INT'L ENV'T L. REV. 457, 460 (2003).

<sup>184</sup> Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay, 595 PHIL. 305 (S.C., Dec. 18, 2008). For current information about environmental conditions of Manila Bay, see *Manila Bay*, PEMSEA, <http://pemsea.org/our-work/pollution-and-waste-management/pollution-hotspots/manila-bay> [<https://perma.cc/DQ8U-JA7B>]; and *Philippines to Rehabilitate Polluted Manila Bay*, XINHUA NEWS (Dec. 18, 2018, 11:02 PM), [http://www.xinhuanet.com/english/2018-12/18/c\\_137683039.htm](http://www.xinhuanet.com/english/2018-12/18/c_137683039.htm) [<https://perma.cc/3HF7-DTRE>] (announcing government clean-up plan, beginning 2019).

<sup>185</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, “Mendoza, Beatriz Silva y otros c. Estado Nacional y otros,” M. 1569. XL. (Arg.) [https://www.escri-net.org/sites/default/files/Sentencia\\_CSJN\\_2008\\_english.pdf](https://www.escri-net.org/sites/default/files/Sentencia_CSJN_2008_english.pdf) [<https://perma.cc/7QLZ-KL9R>]. For a discussion of the (lack of) implementation of the court’s order in this case, see remarks of Mr. Daniel Sallaberry—who represented the plaintiffs in the case—available at: Daniel Sallaberry, *The Mendoza Case and the Rights of the Poor*, GREEN INTERVIEW (Jan. 2014), <https://thegreeninterview.com/interview/sallaberry-daniel> [<https://perma.cc/T9Q2-VYTJ>]. For a study of a remedial efforts to clean up the Rio Matanza-Riachuelo in Argentina, see Martin Sigal, Julieta Rossi, & Diego Morales, *Argentina: Implementation of Collective Cases*, in RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 140–76 (Malcolm Langford, César Rodríguez Garavito, & Julieta Rossi eds., 2017). See also Daniel Gutman, “Argentina’s Never-ending Environmental Disaster”, INTER PRESS SERV. (Feb. 11, 2017), <http://www.ipsnews.net/2017/02/argentinan-never-ending-environmental-disaster> [<https://perma.cc/38F9-6B3E>].

<sup>186</sup> May & Dayo, *supra* note 63.

Furthermore, while embedding a right to a healthy environment in a constitution may *correlate* (or be “positively associated”) with better environmental performance (and the results here are mixed), evidence demonstrating that doing so necessarily *causes* improvement is lacking.<sup>187</sup> Jeffords and Gellers observe:

Yet much work remains in order to firm up these claims. Future research should consider a meaningful way to control for existing statutory laws and policies associated with environmental outcomes and related human rights outcomes and environmental justice concerns. . . . Going forward, it is important to consider the role of existing statutory laws and regulations as either a complement or a supplement to constitutional frameworks.<sup>188</sup>

In fact, as they note:

[S]ome countries without constitutional environmental rights often have better environmental performance records. Failing to control for existing environmental policy thus likely biases the estimated association between constitutional environmental rights provisions and environmental outcomes, human rights outcomes, and environmental justice concerns. This is a serious problem of omitted variables that has the potential effect of “making something from nothing.”<sup>189</sup>

Suffice to say that much more replicated and analytically sophisticated research is needed to support claims that constitutional entrenchment results in better environmental performance: “Future research, including case studies and quantitative cross-sectional, panel, and time-series analyses, should attempt to address the various limitations and qualifications of the existing empirical research in an effort to maximize the effectiveness of such rights while acknowledging the realities and constraints inherent to different legal and political contexts.”<sup>190</sup>

Recognizing environmental human rights can contribute to qualitative improvements, such as participation in governance. Indeed, one study found that embedding both substantive and procedural rights is “positively associated” with access to water sources and sanitation

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<sup>187</sup> Chris Jeffords & Lanse Minkler, *Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes: Constitutions and the Environment*, 69 KYKLOS 294 (2016).

<sup>188</sup> Jeffords & Gellers, *supra* note 57, at 140.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 143–44.

facilities.<sup>191</sup> Yet others argue that proceduralizing environmental rights diminishes their import: “It is becoming increasingly clear that substantive environmental rights without complementary procedural components usually fail to protect human interests (often due to a lack of justiciability) and that procedural environmental rights (by themselves) guarantee nothing more than that ecologically disastrous decisions will be made after due process.”<sup>192</sup>

Analytical frameworks could help to improve outcomes. In his role as Special Rapporteur, John H. Knox issued “Framework Principles” on a right to “a safe, clean, healthy and sustainable environment.”<sup>193</sup> More recently, the World Resources Institute recently released a comprehensive “toolkit” for advancing environmental rights through information and participation in decision-making.<sup>194</sup>

Environmental rights can improve environmental outcomes by the institution of certain “good practices.” In his prior role as the Independent Expert on Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable environment, Knox issued a report that

[D]escribes good practices of Governments, international organizations, civil society organizations, corporations and others in the use of human rights obligations relating to the environment, including (a) procedural obligations to make environmental information public, to facilitate public participation in environmental decision-making, to protect rights of expression and association, and to provide access to legal remedies; (b) substantive obligations, including obligations relating to non-State actors; (c)

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<sup>191</sup> Chris Jeffords & Joshua C. Gellers, *Implementing Substantive Constitutional Environmental Rights: A Quantitative Assessment of Current Practices Using Benchmark Rankings*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17, at 34, 37–38.

<sup>192</sup> BABER & BARTLETT, *supra* note 51, at 15; *see also* Melanie Murcott, *The Procedural Right of Access to Information as a Means of Implementing Environmental Constitutionalism in South Africa*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM, *supra* note 17, 193–208.

<sup>193</sup> Framework Principles on Human Rights and the Environment (2018), U.N. HUM. RIGHTS OFFICE OF THE HIGH COMM’R, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx> [https://perma.cc/5QYK-F585].

<sup>194</sup> *See* Elizabeth Moses & Carole Excell, “A Community Action Toolkit: A Roadmap for Using Environmental Rights to Fight Pollution”, WORLD RES. INST. (Oct. 2020), <https://www.wri.org/publication/toolkit-for-community-led-action> [https://perma.cc/G8ZQ-83Y5] (“[M]ore must be done to support the ability of civil society and local communities to engage with decision-makers. Access to information, public participation and access to justice are environmental rights fundamental to good environmental governance when properly implemented and enforced. . . . Strategically applying these rights can enable civil society and local community members to evaluate the environmental and social justice aspects of pollution, demand better compliance with laws and regulations and help build a pollution accountability movement.”).

obligations relating to transboundary harm; and (d) obligations relating to those in vulnerable situations.<sup>195</sup>

Additional good practices include having an objective, clear text, self-execution, scaffolding with other rights, access to information, participation and justice, and, most importantly, judicial and legislative engagement.<sup>196</sup>

In sum, while some studies show an association between environmental rights and environmental performance, and good practices and structures can help improve outcomes, more studies replicating these outcomes are warranted before statistically confident causal connections can be drawn.

### CONCLUSION

The case for environmental human rights is complicated and complex. There are normative, ethical, and moral justifications that both the planet and people living on it are better off in a world that recognizes a right to a healthy environment. Reflecting this, a majority of nations already recognize a right to a healthy environment, and the effort for international recognition is gaining momentum. But what is less clear is whether and the extent to which all of this is worth the coin, yet, and if so, why it is a better use of time and energy than by, say, protecting *other* established rights, working to enact and enforce environmental laws, or by implementing other regimes, such as the U.N. Sustainable Development Goals. Ultimately, however, while the case for environmental human rights is solid, it has shortcomings that warrant consideration and further analytical interrogation.

Human rights enthusiasts were slow to realize a right to a healthy environment. Environmental constitutionalism picked up the slack and has provided a consequential means for legal recognition, which now propels efforts for international recognition. Still, implementation remains challenging in ways great and small, and, most especially, judicially.

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<sup>195</sup> John H. Knox (Special Rapporteur on Human Rights and the Environment), *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/28/61 (Feb. 3, 2015).

<sup>196</sup> James R. May & Erin Daly, *Ten Good Practices in Environmental Constitutionalism: Structure, Text and Justiciability*, 22 *NOVOS ESTUDOS JURÍDICOS* 964 (2017); see also Boyd, *supra* note 38, ¶ 4, Annex III (listing more than 500 “good practices in the recognition and implementation of the human right to a safe, clean, healthy and sustainable environment” from 175 countries, such as promoting recycling, waste reduction and water conservation, and using biodegradable shopping bags, “biobars,” and good hygiene).

There is also no question that environmental human rights possess normative and moral suasion. On balance, however, questions about outcomes remain. Yet in the end, recognizing a right to a healthy environment cannot hurt, and if anything, is likely to shape positive stories<sup>197</sup> if not outcomes. In the end, the outcome and objective converge: the world is better off for recognizing everyone's right to a healthy environment.

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<sup>197</sup> See, e.g., *Launch of the Good Stories Movement*, NORMANDY CHAIR FOR PEACE (Aug. 18, 2020, 9:00 AM), <https://chairpeace.hypotheses.org/1465> [<https://perma.cc/CQY5-Z9MU>] (positive stories about efforts to protect the environment).

## Appendix:

Express Substantive Environmental Rights by Country<sup>198</sup>Key:

\* = Also member of the African Charter on Peoples' and Human Rights

+ = Also member of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention)

^ = Also member of the United Nations Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement)

# = Identified by the UN Special Rapporteur<sup>199</sup>

Included (84) (as of May 2021)  
(Those *not* included follow below.)

## Algeria (2020)\*#

Title II, Ch. I, Art. 67: "Citizens shall have the right to a healthy environment within a framework of sustainable growth."

## Angola (2010)\*#

Part II, Art. 39(1): "Everyone has the right to live in a healthy and unpolluted environment and the duty to defend and preserve it."

## Argentina (1853; reinst. 1983; rev. 1994)^#

Part I, Ch. II, Art. 41: "All inhabitants enjoy the right to a healthful, balanced environment fit for human development, so that productive

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<sup>198</sup> This is based on the following inputs: (1) THE CONSTITUTE PROJECT, <https://constituteproject.org/constitutions?key=env&lang=en> [<https://perma.cc/LWS5-RTN9>]; (2) THE ENVIRONMENTAL RIGHTS MAP, <http://envirorightsmap.org/about> [<https://perma.cc/6BQ3-DM56>]; (3) research conducted and collected by the Legal Information Center at Widener University Delaware Law School since 1994 (on file), and (4) the U.N. ENVIRONMENT PROGRAMME, ENVIRONMENTAL RULE OF LAW: FIRST GLOBAL REPORT 159 (2019) (published in conjunction with the Environmental Law Institute). The author thanks Drs. Josh Gellers and Chris Jeffords for their assistance with this list. Unless otherwise noted, all years and quotations are adapted from THE CONSTITUTE PROJECT, <https://constituteproject.org/constitutions?key=env&lang=en> [<https://perma.cc/LWS5-RTN9>].

<sup>199</sup> Boyd *supra* note 38, at Annex II..

activities satisfy current needs without compromising those of future generations, and have the duty to preserve the environment.”

Azerbaijan (1995; rev. 2016)+#

Part II, Ch. III, Art. 39(I): “Everyone has the right to live in a healthy environment.”

Belarus (1994; rev. 2004)+#

Section 2, Art. 46: “Everyone shall be entitled to a conducive environment and to compensation for loss or damage caused by the violation of this right.”

Belgium (1831; rev. 2014)+#

Title II, Art. 23(4): “Everyone has the right to lead a life in keeping with human dignity . . . [including] the right to the protection of a healthy environment.”

Bénin (1990)\*#

Title II, Art. 27: “Every person has the right to a healthy, satisfying and lasting environment and has the duty to defend it.”

Bolivia (2009)^#

Ch. V, Section I, Art. 33: “Everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way.”

Brazil (1988; rev. 2017)#

Title VII, Ch. VI, Art. 225: “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. The Government and the community have a duty to defend and to preserve the environment for present and future generations.”

Bulgaria (1991; rev. 2015)+#

Ch. 2, Art. 55: “Everyone shall have the right to a healthy and favorable environment corresponding to established standards and norms. They shall protect the environment.”

Burkina Faso (1991; rev. 2015)\*#

Title I, Ch. IV, Art. 29: “The right to a healthy environment is recognized; the protection, the defense and the promotion of the environment are a duty for all.”

Cameroon (1972; rev. 2008)\*#

Preamble: “[E]very person shall have a right to a healthy environment. The protection of the environment shall be the duty of every citizen. The State shall ensure the protection and improvement of the environment . . . .”

Part XII, Art. 65: “The Preamble shall be part and parcel of this Constitution.”

Cape Verde (1980; rev. 1992)\*#

Part II, Title III, Art. 70(1): “Everyone shall have the right to a healthy, ecologically balanced environment, and the duty to defend and conserve it.”

Central African Republic (2016)\*#

Art. 11(1): “The Republic guarantees to every citizen the right . . . to a healthy environment . . . within the conditions established by the law.”

Chad (2018)\*#

Title II, Ch. I, Art. 51: “Every person has the right to a healthy environment.”

Chile (1980; rev. 2015)#

Ch. III, Art. 19(8): “The Constitution guarantees all persons . . . [t]he right to live in an environment free of contamination. It is the duty of the State to ensure that this right is not jeopardized and to promote the preservation of nature. . . .”

Colombia (1991; rev. 2015)#



Title II, Ch. III, Art. 79: “Every individual has the right to enjoy a healthy environment.”

Comoros (2018)\*#

Title II, Ch. II, Section III, Art. 43: “All citizens have the right to a healthy and ecologically stable environment, as well as having a duty to protect and conserve it.”

Congo, Democratic Republic of the (2005; rev. 2011)\*#

Title II, Ch. 3, Art. 53: “All persons have the right to a healthy environment and [one] propitious for their integral development.”<sup>200</sup>

Congo, Republic of the (2015)\*#

Title II, Sub-Title I, Art. 41: “Every citizen has the right to a healthy, satisfying and durable environment and has the duty of defending it.”

Costa Rica (1949; reformed 1994; rev. 2020)#

Title V, Art. 50: “All persons have the right to a healthy and ecologically balanced environment. For that, they are legitimated to denounce the acts that infringe this right and to claim reparation for the damage caused.”

Côte d’Ivoire (2016)\*#

Title I, Ch. I, Art. 27: “It is recognized that everyone throughout the national territory has the right to a healthy environment.”

Cuba (2019)#

Title V, Ch. II, Art. 75: “All persons have the right to enjoy a natural environment that is healthy and stable.”

Czech Republic (1993; rev. 2013)+#

Charter of Fundamental Rights and Basic Freedoms, Ch. 4, Art. 35(1): “Everyone has the right to a favorable environment.”

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<sup>200</sup> Alteration in original source.

## Dominican Republic (2015)#

Title II, Ch. I, Sec. IV, Art. 67(1): “All people have the right, both individually and collectively, to the use and sustainable enjoyment of natural resources, to live in an environment that is healthy, ecologically balanced, and adequate for the development and preservation of the different forms of life, scenery and nature.”

## Ecuador (2008, rev. 2021)^#

Title II, Ch. 2, Sec. 2, Art. 14: “The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (sumak kawsay), is recognized.”

## Egypt (2014, rev. 2019)\*#

Ch. Two, Sec. Two, Art. 46: “Every individual has the right to live in a healthy, sound and balanced environment.”

## Ethiopia (1994)\*#

Ch. Three, Part Two, Art. 44(1): “All persons have the right to a clean and healthy environment.”

## Fiji (2013)#

Ch. 2, Art. 40(1): “Every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures.”

## France (1958; rev. 2008)+#

Charter for the Environment of 2004, Art. 1: “Each person has the right to live in a balanced environment which shows due respect for health.”

## Georgia (1995; rev. 2018)+#

Ch. Two, Art. 29: “Everyone has the right to live in a healthy environment and enjoy the natural environment and public space.”

## Greece (1975; rev. 2008)+#

Part 2, Art. 24(1): “The protection of the natural and cultural environment constitutes a duty of the State and a right of every person.”

Guinea (2010)\*#

Art. 16: “Every person has the right to a healthy and lasting environment and the duty to defend it. The State sees to the protection of the environment.”<sup>201</sup>

Guyana (1980; rev. 2016)^#

Chapter XII, Part 2, Title 1, Art. 149J(1): “Everyone has the right to an environment that is not harmful to his or her health or well-being.”

Hungary (2011; rev. 2016)+#

Freedom and Responsibility, Art. XXI: “Hungary shall recognise and give effect to the right of everyone to a healthy environment.”

Indonesia (1945; rev. 2002)#

Ch. XA, Art. 28H(1): “Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment . . . .”

Iraq (2005)#

Sec. Two, Ch. One, Art. 33(1): “Every individual has the right to live in safe environmental conditions.”

Jamaica (1962; rev. 2015)#

Ch. III, Art. 13(3)(l): [Citizens have] “the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage.”

Kenya (2010)\*#

Ch. 4, Part 1, Art. 42: “Every person has the right to a clean and healthy environment, which includes the right—a. to have the environment protected for the benefit of present and future generations through

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<sup>201</sup> MAY & DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM*, supra note 1, at 73.

legislative and other measures, particularly those contemplated in Article 69; and b. to have obligations relating to the environment fulfilled under Article 70.” (allowing any person to apply to a court for redress of damage to the environment).

Kyrgyzstan (2010; rev. 2016)+#

Sec. II, Ch. II, Art. 48(1): “Everyone shall have the right to environment favorable for life and health.”

Latvia (1922; rev. 2016)+#

Ch. VIII, Art. 115: “The state shall protect the right of everyone to live in a benevolent environment, by providing information about environmental conditions and by promoting the preservation and improvement of the environment.”

Macedonia, Republic of North (1991; rev. 2011)#

Ch. II, Part 2, Art. 43: “Everyone has the right to a healthy environment to live in.”

Maldives (2008)#

Ch. II, Art. 23(d): “Every citizen [has] the following rights pursuant to this Constitution, and the State undertakes to achieve the progressive realisation of these rights by reasonable measures within its ability and resources: . . . a healthy and ecologically balanced environment.”

Mali (1992)\*#

Title I, Art. 15: “Every person shall have the right to a healthy environment. The protection, defense and promotion of the environment shall be obligations for all and for the State.”<sup>202</sup>

Mauritania (1991; rev. 2012)\*#

Art. 19: “The citizens enjoy the same rights and the same duties vis-à-vis the Nation. They participate equally in the construction [edification] of the Fatherland and have right, under the same conditions, to

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<sup>202</sup> *Mali 1992*, CONSTITUTE, [https://www.constituteproject.org/constitution/Mali\\_1992?lang=en](https://www.constituteproject.org/constitution/Mali_1992?lang=en) [https://perma.cc/6GNM-975B].

sustainable development and to an environment balanced and respectful of health.”<sup>203</sup>

Mexico (1917; rev. 2015)^#

Title One, Ch. I, Art. 4: “Any person has the right to a healthy environment for his/her own development and well-being. The State will guarantee the respect to such right. Environmental damage and deterioration will generate a liability for whoever provokes them in terms of the provisions by the law.”

Moldova (1994; rev. 2016)+#

Title II, Ch. II, Art. 37(1): “Every human being shall have the right to live in an ecologically safe and healthy environment, to consume healthy food products and to use harmless household appliances.”

Mongolia (1992; rev. 2001)#

Ch. Two, Art. 16(2): “The citizens of Mongolia shall be guaranteed to exercise . . . [t]he right to a healthy and safe environment, and to be protected against environmental pollution and ecological imbalance.”

Montenegro (2007; rev. 2013)+#

Part 2, Art. 23: “Everyone shall have the right to a sound environment.”

Morocco (2011)#

Title II, Art. 31: “The State, the public establishments and the territorial collectivities work for the mobilization of all the means available [disponibles] to facilitate the equal access of the citizens [feminine] and citizens [masculine] to conditions that permit their enjoyment of the right . . . to the access to water and to a healthy environment . . . .”<sup>204</sup>

Mozambique (2004; rev. 2007)\*#

Title III, Ch. V, Art. 90: “All citizens shall have the right [to] live in a balanced natural environment and shall have the duty to defend it.”

Nepal (2015; rev. 2016)#

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<sup>203</sup> Alteration in original source.

<sup>204</sup> Alteration in original source.

Part 3, Art. 30(1): “Each person shall have the right to live in a healthy and clean environment.”

Nicaragua (1987; rev. 2014)^#

Title IV, Ch. III, Art. 60: “Nicaraguans have the right to live in a healthy environment, as well as the obligation to maintain and preserve it.”

Niger (2010; rev. 2017)\*#

Title II, Art. 35: “Any person has the right to a healthy environment. The State has the obligation to protect the environment in the interest of present and future generations.”

Norway (1814; rev. 2016)+#

Section E, Art. 112: “Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved.”

Paraguay (1992; rev. 2011)#

Part I, Title II, Ch. I, Section II, Art. 7: “Everyone has the right to live in a healthy and ecologically balanced [equilibrado] environment.”<sup>205</sup>

Peru (1993; rev. 2021)#

Title I, Ch. I, Art. 2(22): “Every person has the right . . . to a balanced and appropriate environment for the development of his life.”

Philippines (1987)#

Art. II, Section 16: “The 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.”

Portugal (1976; rev. 2005)+#

Part I, Title III, Ch. II, Art. 66(1): “Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it.”

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<sup>205</sup> Alteration in original source.

Romania (1991; rev. 2003)+#

Art. 35(1): “The State recognizes the right of every person to a healthy, well-preserved and balanced environment.”

Russia (1993; rev. 2014)#

Section One, Ch. 2, Art. 42: “Everyone shall have the right to a favourable environment, reliable information on the state of the environment and compensation for damage caused to his (her) health and property by violations of environmental laws.”

Rwanda (2003; rev. 2015)\*#

Ch. IV, Sec. One, Art. 22: “Everyone has the right to live in a clean and healthy environment.”

Sao Tomé & Príncipe (1975; rev. 2003)\*#

Part II, Title III, Art. 49(1): “All have the right to housing and to an environment of human life . . . .”

Senegal (2001; rev. 2016)\*#

Title II, Article 25-2: “Each has the right to a healthy environment.”

Title II, Art. 8: “The Republic of Senegal guarantees to all citizens the fundamental individual freedoms, the economic and social rights as well as the collective rights. These freedoms and rights are notably . . . the right to a healthy . . . environment.”

Serbia (2006)+#

Art. 74: “Everyone shall have the right to healthy environment and the right to timely and full information about the state of environment.”

Seychelles (1993; rev. 2017)\*#

Ch. III, Part I, Art. 38: “The State recognises the right of every person to live in and enjoy a clean, healthy and ecologically balanced environment . . . .”

Slovakia (1992; rev. 2017)+#

Ch. Two, Part Six, Art. 44(1): “Everyone has the right to a favorable environment.”

Slovenia (1991; rev. 2016)+#

Section III, Art. 72: “Everyone has the right in accordance with the law to a healthy living environment.”

Somolia (2012)\*#

Ch. 2, Title Two, Art. 25: “Every person has the right to an environment that is not harmful to their health and well-being, and to be protected from pollution and harmful materials.”

South Africa (1996; rev. 2012)#

Ch. 2, Art. 24: “Everyone has the right—  
a. to an environment that is not harmful to their health or well-being; and  
b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—  
i. prevent pollution and ecological degradation,  
ii. promote conservation; and  
iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

South Korea (1948; rev. 1987)#

Ch. II, Art. 35(1): “All citizens shall have the right to a healthy and pleasant environment.”

South Sudan (2011; rev. 2013)\*#

Part Three, Ch. 1, Art. 41(1): “Every person or community shall have the right to a clean and healthy environment.”

Part Three, Ch. 1, Art. 41(3): “Every person shall have the right to have the environment protected for the benefit of present and future generations, through appropriate legislative action and other measures that:  
a. prevent pollution and ecological degradation;



- b. promote conservation; and
- c. secure ecologically sustainable development and use of natural resources while promoting rational economic and social development so as to protect genetic stability and bio-diversity.”

Spain (1978; rev. 2011)+#

Part I, Ch. 3, Art. 45(1): “Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it.”

Thailand (2017)#

Ch. III, Section 43(2): “A person and community shall have the right to . . . manage, maintain and utilise natural resources, environment and biodiversity in a balanced and sustainable manner, in accordance with the procedures as provided by law.”

Timor-Leste (2002)#

Part II, Title III, Art. 61(1): “All have the right to a humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations.”

Togo (1992; rev. 2007)\*#

Title II, Sub Title I, Art. 41: “Every person has the right to a healthy environment. The State sees to the protection of the environment.”

Tunisia (2014)\*#

Title Two, Art. 45: “The state guarantees the right to a healthy and balanced environment and the right to participate in the protection of the climate.”

Turkey (1982; rev. 2017)#

Part Two, Ch. Three, Section VIII, Part A, Art. 56: “Everyone has the right to live in a healthy and balanced environment.”

Turkmenistan (2008; rev. 2016)+#

Art. 53: “Everyone shall have the right to enabling environment for life and health, credible information on its state, [and] compensation of

damage caused to health and property as a result of violation of environmental law or natural disasters . . . Everyone shall be obliged to protect nature, take good care of the environment and natural wealth.”

Uganda (1995; rev. 2017)\*#

Ch. 4, Art. 39: “Every Ugandan has a right to a clean and healthy environment.”

Ukraine (1996; rev. 2016)+#

Ch. II, Art. 50: “Everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right.”

Venezuela (1999; rev. 2009)#

Title III, Ch. IX, Art. 127: “Everyone has the right, individually and collectively, to enjoy a safe, healthful and ecologically balanced life and environment.”

Viet Nam (2013)#

Ch. II, Art. 43: “Every one has the right to live in [a] fresh environment and has the duty to protect the environment.”

Zimbabwe (2013; rev. 2017)\*#

Ch. 4, Part 2, Art. 73(1): “Every person has the right . . . to an environment that is not harmful to their health or well-being . . . .”

Not Included, with Reason (13):

Afghanistan (2004)

Preamble: The government shall “ensure ‘a prosperous life and a sound living environment for all inhabitants of this land . . . .’”

Reason: Policy statement (not a right).

Armenia (1995; rev. 2015)+

Art. 33.2: “Everyone shall have the right to live in an environment favorable to his/her health and well-being and shall be obliged to protect and improve it in person or jointly with others.”<sup>206</sup>

Reason: Repealed 2005.

Burundi (2018)#

Title II, Art. 19: “The rights and duties proclaimed and guaranteed by the international texts concerning human rights regularly ratified constitute an integral part of the Constitution.”

Reason: Not an express substantive environmental right.

Chechnya

Section I, Ch. 2, Art. 39: “Everyone has the right to favorable environmental surroundings, reliable information about its condition and to compensation for damage caused to his/her health or property through ecological violations of the law.”<sup>207</sup>

Reason: No longer a UN-recognized country.

Croatia (1991; rev. 2013)+#

Art. 69: “The state shall ensure conditions for a healthy environment.”

Reason: Policy statement (not a right).

El Salvador (1983; rev. 2014)

Title II, Ch. II, First Section, Art. 34: “Every child has the right to live in familial and environmental conditions that permit his integral development, for which he shall have the protection of the State.”

Reason: Not a general environmental right.

Finland (1999; rev. 2011)+#

Ch. 2, Section 20: “The public authorities shall endeavour to guarantee for everyone the right to a healthy environment . . . .”

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<sup>206</sup> MAY & DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM*, *supra* note 1, at 73.

<sup>207</sup> ATAPATTU & SCHAPPER, *supra* note **ERROR! BOOKMARK NOT DEFINED.**

Reason: Policy statement (not a right).

Gabon (1991; rev. 2011)\*#

Art. I(8): “The Gabonese Republic recognizes and guarantees the inalienable and imprescriptible human rights, which are necessarily tied to the public powers: . . . The State, according to its means, guarantees to all, notably to children, mothers, the handicapped, aged workers and the elderly the protection of health, social security, a preserved natural environment, rest and leisure . . . .”

Reason: Policy statement (not a right).

Honduras (1982; rev. 2013)#

Title III, Chapter VII, Article 145: “The State shall maintain a satisfactory environment for the protection of ‘everyone’s health.’”

Reason: Policy statement (not a right).

Iran (1979; rev. 1989)#

Ch. IV, Art. 50: “The preservation of the environment, in which the present as well as the future generations have a right to flourishing social existence, is regarded as a public duty . . . .”

Reason: Policy statement (not a right).

Lesotho (1993; rev. 2018)\*

Ch. III, Art. 36: “Lesotho shall adopt policies designed to protect and enhance the natural and cultural environment of Lesotho for the benefit of both present and future generations and shall endeavour to assure to all citizens a sound and safe environment adequate for their health and well-being.”

Reason: Policy statement (not a right).

Lithuania (1992; rev. 2019)+

Ch. IV, Art. 54: “The state shall take care of the protection of the natural environment, wildlife and plants . . . .”

Reason: Not an environmental right.

Madagascar (2010)\*

Title II, Sub-title II, Art. 35: “The Fokonolona can take the appropriate measures tending to oppose acts susceptible to destroy their environment, dispossess them of their land, claim the traditional spaces allocated to their herds of cattle or claim their ceremonial heritage, unless these measures may undermine the general interest or public order.”<sup>208</sup>

Reason: Not an environmental right. Also, replaced in 2010 with Title II, Art. 37: “The State guarantees the freedom of enterprise within the limit of the respect for the general interest, the public order, morality and the environment,” also not an environmental rights.

Malawi (1994; rev. 2017)#

Ch. III, Section 13(d): “The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals— . . .

d. The Environment:

To manage the environment responsibly in order to—

- i. prevent the degradation of the environment;
- ii. provide a healthy living and working environment for the people of Malawi;
- iii. accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and
- iv. conserve and enhance the biological diversity of Malawi.”

Reason: Reason: Policy statement (not a right).

Palestine (2005)

Title II, Art. 33: “The enjoyment of a balanced and clean environment is a human right. The preservation and protection of the Palestinian environment from pollution for the sake of present and future generations is a national duty.”

Reason: Not a UN-recognized country.

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<sup>208</sup> MAY & DALY, *Global Environmental Constitutionalism*, *supra* note 1, at 68.

Sudan (2019)\*#

2005 Constitution, Ch. II, Art. 11(1): “The people of the Sudan shall have the right to a clean and diverse environment.”<sup>209</sup>

Reason: Replaced in 2019 with Ch. 2, Art. 8(14): “Play an active role in social welfare and achieve social development by striving to provide healthcare, education, housing and social security, and work on maintaining a clean natural environment and biodiversity in the country and protecting and developing it in a manner that guarantees the future of generations.” (Since suspended.)

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<sup>209</sup> *Sudan 2005*, CONSTITUTE, [https://www.constituteproject.org/constitution/Sudan\\_2005?lang=en](https://www.constituteproject.org/constitution/Sudan_2005?lang=en) [<https://perma.cc/8EDF-GSYM>].