

# The Implicit Constitutional Right to Live in a Healthy Environment

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*The right to a healthy environment has rapidly gained constitutional protection around the world. In at least twenty countries, recognition of the right to a healthy environment first occurred through court decisions determining that it is implicit in other constitutional provisions, primarily the right to life. The right is now recognized explicitly in the constitutions of 90 countries spanning Europe, Asia, Latin America, the Caribbean and Africa, and is recognized as an implicit and enforceable constitutional right in at least twelve additional countries. The decisions of international courts and tribunals provide further support for concluding that the right to life necessarily includes the right to a healthy environment.*

## INTRODUCTION

Many scholars have argued that because clean air, clean water, fertile soil and functioning ecosystems are integral to human survival and well-being, they must be included in the rights to life and health.<sup>1</sup> The World Health Organization (WHO) underscores the fact that a healthy environment ought to be an essential element of these rights. According to the WHO, approximately one-quarter of the entire burden of disease globally (including mortalities, illnesses and injuries) is attributable, in whole or in part, to environmental risk factors.<sup>2</sup> Children are particularly vulnerable to environmental hazards.<sup>3</sup>

Since the 1972 Stockholm Declaration, constitutional recognition of the right to a healthy environment has spread rapidly around the world.<sup>4</sup> It has emerged in two distinctive processes: by legislators explicitly including

it in constitutions, and via courts ruling that it is implicit in other constitutional provisions. Among the 192 countries belonging to the United Nations, 90 constitutions explicitly recognize the right to a healthy environment:

*Europe:* Albania, Andorra, Armenia, Belarus, Belgium, Bulgaria, Croatia, Czech Republic, Finland, France, Georgia, Greece, Hungary, Latvia, Macedonia, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia, Spain and Ukraine.

*Latin America and the Caribbean:* Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela.

*Asia:* Azerbaijan, East Timor, Indonesia, Iran, Iraq, Kyrgyzstan, Mongolia, Nepal, Philippines, South Korea, Thailand, Turkey and Turkmenistan.

*Africa:* Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Cote d'Ivoire, Congo (Brazzaville), Congo (Democratic Republic), Egypt, Ethiopia, Gabon, Guinea, Kenya, Malawi, Maldives, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Seychelles, South Africa, Sudan, Togo and Uganda.<sup>5</sup>

For example, the Constitution of Norway states:

Art. 110(b) Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.<sup>6</sup>

The constitutional right to a healthy environment was recognized by courts in at least eight of these 90 countries prior to explicit language being incorporated into the constitution, including Argentina, Costa Rica, El Salvador, Greece, Kenya, Nepal, Peru and Romania.

<sup>1</sup> D. Weissbrodt et al., *International Human Rights Law: An Introduction* (University of Pennsylvania Press, 2007); E. Dowdeswell, 'Development of International Law', in E. Sevig et al. (eds), *International Environmental Law* (Juridisk & Forlag, 1994).

<sup>2</sup> A. Prüss-Üstün et al., *Preventing Disease Through Healthy Environments: Towards an Estimate of the Environmental Burden of Disease* (World Health Organization, 2006).

<sup>3</sup> D.T. Wagle, *Child Health and the Environment* (Oxford University Press, 2003).

<sup>4</sup> D.R. Boyd, *The Environmental Rights Revolution: Constitutions, Human Rights and the Environment* (UBC Press, 2011).

<sup>5</sup> *Ibid.*, Appendix 2.

<sup>6</sup> R. Wolfrum and R. Grote (eds), *Constitutions of the Countries of the World* (Oceana, 2011).

In at least twelve additional countries lacking an explicit constitutional right to a healthy environment, supreme or constitutional courts have held that such a right is implicit in the constitution, and enforceable. These countries include Bangladesh, Estonia, Guatemala, India, Israel, Italy, Malaysia, Nigeria, Pakistan, Sri Lanka, Tanzania and Uruguay. In general, courts from these countries have held that the right to live in a healthy environment is an essential element of the right to life, although this is not always the case as in Italy where it was held to be a vital aspect of the right to health. However, it should be noted that courts in some countries – for example, the United States – have rejected the argument that there is an implicit constitutional right to a healthy environment.<sup>7</sup>

In total, the constitutional right to a healthy environment is recognized in over 100 countries, either explicitly or through judicial interpretation of other provisions. No other second- or third-generation right (i.e., not a civil or political right) has gained such widespread constitutional recognition so quickly.<sup>8</sup> In at least twenty of these countries, the right first gained constitutional recognition through the courts before being explicitly included in constitutional texts.

Jurisprudence recognizing the right is particularly relevant for citizens, scholars, policy makers, lawyers and courts in countries where the right to a healthy environment does not yet enjoy constitutional recognition. Constitutions in many of these countries contain provisions that may be interpreted to include an implicit right to a healthy environment. For example, the right to life is almost universally recognized in national constitutions, the right to health is explicitly included in 74 constitutions and the State duty to protect the environment is found in 136 constitutions.<sup>9</sup>

## ARGENTINA

The right to live in a healthy environment was added to Argentina's constitution in 1994.<sup>10</sup> Argentine courts had already recognized that this right was implicit in the constitutional right to life. According to a prominent and oft-cited judgment, 'the right to live in a healthy environment is a fundamental attribute of people. Any

aggression to the environment ends up becoming a threat to life itself and to the psychological and physical integrity of the person, which is based on ecological balance.'<sup>11</sup>

## BANGLADESH

Bangladesh's constitution contains no environmental protection provisions. The leading case on the implicit constitutional right to a healthy environment in Bangladesh involved a petition against various authorities for not fulfilling their statutory duties to mitigate air and noise pollution caused by motor vehicles in the capital city of Dhaka. The court stated:

Articles 31 and 32 of our constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, and sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life.<sup>12</sup>

The court ordered the elimination of miniature taxis using highly polluting two-stroke diesel engines, ordered the conversion of government vehicles to compressed natural gas (CNG) and required that all imported vehicles be equipped with catalytic converters. In this vein, the Bangladesh Environmental Lawyers Association has brought numerous cases based on the constitutional right to a healthy environment – attempting to address industrial air pollution, illegal shrimp cultivation, lack of compliance with environmental permitting requirements, the decommissioning of contaminated ships and commercial development in municipal green space.<sup>13</sup>

## COSTA RICA

The right to a healthy environment was added to Costa Rica's constitution in 1994. However, the Supreme Court of Costa Rica had previously affirmed the right to a healthy environment in a case concerning a municipality's practice of dumping waste in a stream in close

<sup>7</sup> J.P. Eurick, 'The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection through State and Federal Constitutions', 11:2 *Int'l Legal Persp.* (2001), 185.

<sup>8</sup> D.S. Law *et al.*, 'The Evolution and Ideology of Global Constitutionalism', *California Law Review* (2011, in press).

<sup>9</sup> Right to health: E.D. Kinney *et al.*, 'Provisions for Health and Health Care in the Constitutions of the Countries of the World', 37:2 *Cornell Int'l L.J.* (2004), 285. Right to life: D.S. Law *et al.*, *ibid.* State duty to protect the environment: see D.R. Boyd, n. 4 above.

<sup>10</sup> See R. Wolfrum and R. Grote, n. 6 above, Binder I.

<sup>11</sup> *Margarita v. Copetro* (1993), ruling of 10 May 1993, Cámara Civil y Comercial de La Plata, citing an earlier decision in *V.H. Morales et al. v. Mendoza Province* (1986), Amparo Action, Civil Court of First Instance (2 October 1986).

<sup>12</sup> *Dr. M. Farooque v. Bangladesh et al.* (1997), 49 Dhaka Law Reports, 1, at paragraph 101, cited in J. Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International, 2004) at 107.

<sup>13</sup> See Bangladesh Environmental Lawyers Association, *List of Public Interest Litigation of Bangladesh Environmental Lawyers Association* (undated), found at <<http://www.belabangla.org/html/pil.htm>>. For example, see *Bangladesh Environmental Lawyers Association v. Bangladesh et al.* (2005), Writ Petition No. 6025/05.

proximity to a poor neighbourhood.<sup>14</sup> The court stated that life 'is only possible when it exists in solidarity with nature, which nourishes and sustains us – not only with regard to food, but also with physical well-being. It constitutes a right that all citizens possess to live in an environment free from contamination. This is the basis of a just and productive society.'

In a subsequent decision, the court stated that the right to a healthy environment emanated from the right to life and from the State's obligation to protect nature. The court added that without recognition of the rights to health and to the environment, the right to life would be severely limited.<sup>15</sup>

## EL SALVADOR

Although the right to a healthy environment incorporated in El Salvador's constitution in 1983 appears limited to children, the Constitutional Chamber of El Salvador's Supreme Court of Justice has ruled that this constitutional right is held by everyone by virtue of the State's obligation to protect the environment and the importance of a healthy environment for fulfilling the rights to life and dignity.<sup>16</sup>

## ESTONIA

The Estonian constitution makes no explicit reference to the right to a healthy environment, although it does include a government duty to protect the environment. Nevertheless, Estonian courts now recognize that individuals enjoy a constitutional right to a healthy environment.<sup>17</sup> The courts reached their conclusion through an analysis of Estonia's constitution, the Aarhus Convention and jurisprudence from the European Court of Human Rights.<sup>18</sup> The recognition of an implicit constitutional right to a healthy environment has contributed to relaxation of previously restrictive standing requirements, enabling citizens

and environmental nongovernmental organizations (ENGOS) to access the courts.<sup>19</sup>

## GREECE

In 1975, Greece was among the first countries in the world to make reference to the environment in its constitution. Although the right to a healthy environment was not added to the Greek constitution until 2001, courts had already recognized that it was implicit in Article 24, which articulated the State's duty to protect the environment.<sup>20</sup>

## GUATEMALA

There is no explicit right to a healthy environment in the Guatemalan constitution. However, Guatemalan courts have allowed NGOs to bring lawsuits based on the constitutional right to a healthy environment.<sup>21</sup> Guatemala's Constitutional Court explained that the objective of environmental measures is to guarantee the right to health and the achievement of a standard of living that guarantees the survival of future generations.<sup>22</sup>

## INDIA

Among the countries whose constitutions do not recognize explicitly the right to a healthy environment, no judiciary has gone further than the Supreme Court of India. Article 48A of the Indian constitution mandates that the State 'shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country'. This provision is framed as a Directive Principle of State Policy, which 'shall not be enforceable by any court'.<sup>23</sup> While the Directive Principles are explicitly unenforceable, Article 32 guarantees all citizens the right to petition the Supreme Court when their fundamental rights are violated or threatened. There is a long line of cases in India in which the Supreme Court and High Courts have sought the 'harmonious construction' of the unenforceable Directive

<sup>14</sup> Carlos Roberto García Chacón, Constitutional Chamber of the Supreme Court, Vote No. 3705 (30 July 1993).

<sup>15</sup> *Presidente de la sociedad MARLENE S.A. v. Municipalidad de Tibás Marlene*, Decision 6918/94 (November 1994), Sala Constitucional de la Corte Suprema de Justicia.

<sup>16</sup> See No. 242-2001, Sala Constitucional de la Corte Suprema de Justicia: San Salvador (26 June 2003); and H.M. Mejía, 'La Tutela Ambiental en el Derecho Salvadoreño', 19 *Medio Ambiente and Derecho* (2009).

<sup>17</sup> H. Veinla and K. Relve, 'Influence of the Aarhus Convention on Access to Justice in Environmental Matters in Estonia', 14:12 *European Environmental Law Review* (December 2005), 326.

<sup>18</sup> *Ibid.*

<sup>19</sup> T.K. Andersson, 'The Role of Basic Rights in Environmental Protection: Basic Right to Environment *de lege ferenda* in the Estonian Constitution', 8 *Jurídica Internacional* (2003), 147.

<sup>20</sup> G.P. Sioutis *et al.*, 'Greece', in J. Ebbesson (ed.), *Access to Justice in Environmental Matters in the EU* (Kluwer, 2002), 261.

<sup>21</sup> See C. Bruch *et al.*, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (Environmental Law Institute, 2007), at 75.

<sup>22</sup> Concesiones otorgadas por el Ministerio de Energía y Minas a Empresas Petroleras. Resolución en Conciencia del Procurador de los Derechos Humanos de Guatemala en Materia Ambiental. Exp. 002-98/D.S. (10 October 1998); Acción de inconstitucionalidad total. Promovido contra el congreso de la República Corte de Constitucionalidad. Decision 575/98 (23 February 1999).

<sup>23</sup> See R. Wolfrum and R. Grote, n. 6 above.

Principles (which include many social, economic and cultural rights) and the enforceable Fundamental Rights (the traditional civil and political rights).<sup>24</sup> In effect, Indian courts have used the Fundamental Rights to transform Directive Principles into enforceable duties.

In 1987, two court decisions suggested, in *obiter dicta*, that there could be an implicit right to a healthy environment among the fundamental rights in the Indian constitution.<sup>25</sup> In a case dealing with limestone quarries causing deforestation, soil erosion and river siltation, the Supreme Court mentioned 'the right of the people to live in a healthy environment with minimal disturbance of the ecological balance'.<sup>26</sup> The High Court of Andhra Pradesh wrote that 'slow poisoning caused by environmental pollution and spoliation should be treated as amounting to a violation of Article 21 of the Constitution'.<sup>27</sup> In 1991, the Supreme Court clarified the state of the law, ruling that:

The right to live is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.<sup>28</sup>

In 1995, the Supreme Court expanded upon its earlier articulation of the right, stating that the right to life:

... encompasses within its ambit the protection and preservation of the environment, ecological balance, freedom from pollution of air and water, and sanitation, without which life cannot be enjoyed. Any contract or action which would cause environmental pollution ... should be regarded as amounting to violation of Article 21. ... Therefore, there is a constitutional imperative on the state government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect, and improve both the manmade and the natural environment.<sup>29</sup>

There have been hundreds of cases decided by the Supreme Court and High Courts on the basis of, or influenced by, the right to a healthy environment. Among the environmental issues addressed by these cases are: air pollution in Delhi caused by motor

vehicles;<sup>30</sup> water pollution of the Ganges River by tanneries;<sup>31</sup> protection of the Taj Mahal (292 industrial plants ordered to either switch from coke/coal to natural gas or relocate);<sup>32</sup> industrial air pollution;<sup>33</sup> groundwater management;<sup>34</sup> the right to water;<sup>35</sup> location of a plant for liquefied petroleum gas;<sup>36</sup> mining and quarrying activities;<sup>37</sup> forest conservation;<sup>38</sup> disasters caused by hazardous activities;<sup>39</sup> large dam projects;<sup>40</sup> sentencing for environmental crimes;<sup>41</sup> genetically modified organisms;<sup>42</sup> smoking in public places;<sup>43</sup> protection of wildlife;<sup>44</sup> and noise pollution.<sup>45</sup>

The Supreme Court has opened the door wide to judicial remedies by treating the right to a healthy environment as a fundamental right capable of being protected by citizens and NGOs by means of writ petitions. The procedures are relatively informal but the caseload of the court can create lengthy delays, with 12% of environmental cases taking at least a decade to reach a resolution.<sup>46</sup> The constitutional right to a healthy environment has also contributed to improvements in the recognition of procedural rights including access to information and participation in decision making.

## ISRAEL

Israel does not have a conventional constitution, but rather a series of Basic Laws with constitutional status. The Basic Laws make no reference to environmental protection. An Israeli ENGO brought a constitutional (or Basic Law) challenge to the Israeli *Law on Planning and Construction*, which was amended in 2002 to accelerate approvals for major national infrastructure

<sup>24</sup> V. Nimushakavi, *Constitutional Policy and Environmental Jurisprudence in India* (Macmillan India, 2006).

<sup>25</sup> For the judgments of the Supreme Court of India and several High Courts, Government of India, see Ministry of Information Technology, National Informatics Centre, *The Judgment Information System* (undated), found at <<http://judis.nic.in/>>.

<sup>26</sup> *Rural Litigation and Entitlement Kendra v. Uttar Pradesh*, AIR 1985 SC 652; AIR 1987 SC 359.

<sup>27</sup> *T. Damodar Rao v. Municipal Corp. of Hyderabad*, AIR 1987 AP 171.

<sup>28</sup> *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420.

<sup>29</sup> *Virender Gaur v. State of Haryana*, (1995) 2 SCC 577.

<sup>30</sup> *M.C. Mehta v. Union of India* (2002) 4 SCC 356.

<sup>31</sup> *M.C. Mehta v. Union of India*, AIR 1988 SC 1037; *M.C. Mehta v. Union of India*, AIR 1988 SC 1115.

<sup>32</sup> *M.C. Mehta v. Union of India*, AIR 1997 SC 735 (Taj Trapezium case).

<sup>33</sup> *M.C. Mehta v. Union of India* (1997) 11 SCC 327.

<sup>34</sup> *M.C. Mehta v. Union of India* (2004) 12 SC 118.

<sup>35</sup> *AP Pollution Control Board v. M.V. Nayudu*, AIR 1999 SC 812; (2001) 2 SCC 62; (2001) 9 SCC 605.

<sup>36</sup> *Th. Majra Singh v. Indian Oil Corporation*, AIR 1999 J&K 81 (HC).

<sup>37</sup> *M.C. Mehta v. Union of India* (1996) 8 SCC 462.

<sup>38</sup> *T.N. Godavarman Thirumulpad v. Union of India*, AIR 1999 SC 43; (1998) 6 SCC 190; (1998) 9 SCC 632; (2000) 7 SCALE 380.

<sup>39</sup> *Indian Council for Enviro Legal Action v. Union of India*, (1996) 3 SCC 247.

<sup>40</sup> *Narmada Bachao Andolan v. Union of India*, AIR 1999 SC 3345.

<sup>41</sup> *UP Pollution Board v. Mohan Meakins Ltd.* (2000) 3 SCC 745.

<sup>42</sup> *Aruna Rodrigues v. Union of India*, WP. No. 260 of 2005, Order dated 22 September 2006.

<sup>43</sup> *Murli S. Deora v. Union of India* (2001) 8 SCC 765.

<sup>44</sup> *Tarun Bharat Sangh, Alwar v. Union of India*, AIR 1992 SC 514.

<sup>45</sup> *Ramasubramnyam v. Member Secretary, Chennai Metropolitan DA*, AIR 2002 Madras 125.

<sup>46</sup> C.M. Jariwala, 'The Directions of Environmental Justice: An Overview', in S.K. Verma et al. (eds), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press, 2000), 469.

projects.<sup>47</sup> The Supreme Court of Israel wrote that there is an implicit constitutional right to a minimum environmental quality (which it did not define), based on the constitutional right to 'honor of his being and his freedom'.<sup>48</sup>

## ITALY

In Italy, there is no explicit constitutional right to a healthy environment. However, courts have interpreted the constitutional right to health as incorporating the right to live in a healthy environment.<sup>49</sup> The first recognition of this concept came from the Constitutional Court in 1987 when it held that, with regard to Articles 9 (State's duty to safeguard natural beauty) and 32 (right to health) of the Italian Constitution, '[w]e must recognize the ongoing efforts to give specific recognition to the protection of the environment as a fundamental human right'.<sup>50</sup> In 1990, the Constitutional Court held that environmental protection must take priority over economic considerations when acceptable limits for human health are exceeded.<sup>51</sup> Since then, many successful cases have invoked the right to a healthy environment.<sup>52</sup>

## KENYA

Kenya's 2010 Constitution recognizes the right to a healthy environment for the first time. However, Kenyan courts already had decided several cases based on the right, which was previously included in the *Environmental Management and Coordination Act*.<sup>53</sup> For

example, in *P.K. Waweru v. The Republic* – a case involving new residential construction without adequate wastewater treatment infrastructure – Kenya's High Court acknowledged that the right to life in section 71 of the Constitution (as it then was) necessarily includes the right to a healthy environment.

## MALAYSIA

A government committee recommended adding the right to a healthy environment to Malaysia's constitution in 1993 but the recommendation has not been implemented.<sup>54</sup> The Malaysian Court of Appeal has a mixed record in referring to the right to a healthy environment as part of the constitutional right to life. In several cases, the court followed the lead of the Supreme Court of India by interpreting the right to life in Article 5(1) of the Malaysian Constitution broadly:

Article 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself. . . . It includes the right to live in a reasonably healthy and pollution free environment.<sup>55</sup>

However, in a subsequent case, involving a proposed hydroelectric project with major environmental consequences and impacts on indigenous people, the Malaysian Court of Appeal relied upon a narrower interpretation of the constitutional right to life.<sup>56</sup> Therefore, Malaysian case law is contradictory regarding recognition of an implicit constitutional right to a healthy environment.

## NEPAL

While the current interim Constitution of Nepal (2006) explicitly recognizes the right to a healthy environment, previous Nepalese constitutions did not. Nevertheless, the Supreme Court of Nepal has repeatedly ruled that the right to a healthy environment is a prerequisite for the enjoyment of other constitutional human rights. As the Court has stated: '[S]ince a clean and healthy environment is an essential element for our survival, the right to life encompasses the right to a clean and healthy environment'.<sup>57</sup>

Land) 677; *Rodeers Muema Nzioka and Others v. Tiomin Kenya Limited* (2001), HCCC No. 97 of 2001.

<sup>54</sup> Ministry of Science, Technology and Environment (Malaysia), *The Report of the Environmental Law Review Committee* (Ministry of Science, Technology and Environment, 1993).

<sup>55</sup> *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* (1996) 2 CLJ 771, at 801 (Court of Appeal).

<sup>56</sup> *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors* (1997) 3 MLJ 23.

<sup>57</sup> *Suray Prasad Sharma Dhungel v. Godavari Marble Industries and others* (1995), WP 35/1991 (Supreme Court of Nepal).

<sup>47</sup> T. Levinson *et al.*, 'A Constitutional (or Basic Law) Right to "Minimum Environmental Quality"', 6:1 *International Environmental Law Newsletter* (American Bar Association Section of Energy, Environment and Natural Resources) (2004), 24.

<sup>48</sup> *Adam, Teva ve'Din (Human Being, Nature and Law) v. Prime Minister of Israel et al.* (2004) No. 4128/02 (16 March 2004) (Supreme Court).

<sup>49</sup> N. de Sadeleer *et al.*, *Access to Justice in Environmental Matters. Country Reports and Case Studies, Part II: Germany, Italy and Netherlands* (ENV.A.3/ETU/2002/0030, 2002) found at <<http://www.unece.org/env/pp/compliance/C2008-23/Amicus%brief/AnnexHSadeleersReport.pdf>>.

<sup>50</sup> Review of the constitutionality of Law No. 349, Establishment of the Ministry of Environment and standards of environmental damage, 8 July 1986, Decision 210/1987, Constitutional Court (22 May 1987).

<sup>51</sup> Review of the constitutionality of Article 674 of the Penal Code and Article 2(7) of Presidential Decree No. 203, 24 May 1988 (Implementing EU Directives 80/779, 82/884, 84/360 and 85/203 on air quality rules in relation to specific pollutants, and pollution from industrial plants, under Art. 15 of Law No. 183 of 6 April 1987), Decision 127/1990, Constitutional Court (7 March 1990).

<sup>52</sup> S. Nespore, 'Italy', in N. de Sadeleer *et al.* (eds), *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal* (Europa Law, 2005), 85.

<sup>53</sup> *P.K. Waweru v. Republic of Kenya* (2006), High Court of Kenya, Misc. Civil Application No. 118 of 2004, 1 KLR (Environment and

## NIGERIA

Despite the lack of an explicit constitutional right to a healthy environment in Nigeria, several court decisions have relied on the implicit right to a healthy environment.<sup>58</sup> For example, the High Court ruled that Shell's practice of flaring gas from its oil operations in the Niger Delta 'is a gross violation of the fundamental right to life (including healthy environment) and dignity of human person as enshrined in the Constitution'.<sup>59</sup> This decision is under appeal and has not yet been implemented, and severe environmental and health problems in the region are ongoing.<sup>60</sup>

## PAKISTAN

Pakistan's constitution is silent on environmental protection, but the Supreme Court has recognized that the right to a healthy environment is implicit in the right to life. The leading case involved the potential hazard of electro-magnetic radiation from an electrical grid station and associated high voltage power lines. Local residents in a suburb of Islamabad, led by the widow of Pakistan's former ruler, filed a petition alleging violation of their constitutional right to life. The court held that the rights to life and dignity under the Constitution of Pakistan included a clean atmosphere and unpolluted environment.<sup>61</sup> The court stayed construction of the project pending the report of a court-appointed expert commission and a court-ordered public consultation process.

Another case focused on the right to clean water, threatened by effluent from coal mining operations. The Supreme Court held that 'the right to have water free from pollution and contamination is a right to life itself... the right to have unpolluted water is the right of every person wherever he lives'.<sup>62</sup> Other cases involved illegal urban development, dumping of waste in coastal areas, sewage treatment in Karachi and plastic bags (on the grounds that they were not biodegradable and burning them contributes to harmful air pollution).<sup>63</sup>

Lower courts also have applied the constitutional right to a healthy environment. For example, in a lawsuit about health problems caused by poor municipal solid waste management, the Lahore High Court stated:

Lives of tens of thousands of citizens of this country . . . are sinking in the ocean of dirt, solid waste, garbage and pollution and that too, at the hands of City District Government. It is high time that the public functionaries should realize their duties and perform their functions, keeping in view the import of [the] word 'life' as defined by the apex Court of this country in the *Shehla Zia* case.<sup>64</sup>

The courts in Pakistan have been praised for their progressive articulation of the right to a healthy environment. According to Hassan, the Pakistani judiciary is 'boldly and proactively applying international and national laws to meet local needs and in granting the widest latitude in procedural matters that may affect the vindication of environmental rights'.<sup>65</sup> However, there is relatively little public interest environmental litigation in Pakistan, despite the magnitude and urgency of the environmental problems facing large swaths of the population. Pakistan's Supreme Court has 'accorded environmental rights constitutional legitimacy and status, which is the highest legal status in Pakistan' yet the 'activism of the courts is not a substitute for proper policy-making and implementation'.<sup>66</sup>

## PERU

The right to a healthy environment was first included in Peru's constitution in 1993. Several court decisions prior to 1993 recognized the implicit right to live in a healthy environment. For example, the Supreme Court ordered a halt to shrimp farming in a coastal mangrove ecosystem based on the implicit right to a healthy environment.<sup>67</sup> In addition, the right to a healthy environment was held to enable citizens to protect collective interests despite an absence of direct harm.<sup>68</sup>

<sup>58</sup> K.S.A. Ebuku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v. Shell* Revisited', 16:3 *RECIEL* (2007), 312.

<sup>59</sup> *Jonah Gbemre v. Shell Petroleum Development Company Nigerian Limited and Others*, Judgment of 14 November 2005, Suit No. FHC/B/CS/53/05 (Federal High Court of Nigeria, Benin Division).

<sup>60</sup> O. Obasanjo, *Niger Delta Human Development Report* (United Nations Development Programme, 2006).

<sup>61</sup> *Shehla Zia v. WAPDA* (1994) PLD 693 (SC).

<sup>62</sup> *General Secretary West Pakistan Salt Miners Labour Union v. Director Industries and Mineral Development* (1994) SCMR 2061 (SC).

<sup>63</sup> *Syed Mansoor Ali Shah v. Government of the Punjab and Others*, Writ Petition No. 11148/1997, cited in J. Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International, 2004), at 113–14; *Environment Pollution in Balochistan*, HR case No. 31-K/92(Q), PLD 1994 SC 102; *Dr. Zahir*

*Ansari v. Karachi Development Authority*, PLD 2000 Karachi 168; and *Shehri v. the Province of Sindh*, 2001 YLR 1139.

<sup>64</sup> *Muhammad Yousof and Others v. Province of the Punjab through Secretary, Local Government and Others*, 2003 CLC 576 (Lahore HC).

<sup>65</sup> P. Hassan, 'Environmental Rights as Part of Fundamental Human Rights: the Leadership of the Judiciary in Pakistan', *Global Judges Symposium on Sustainable Development and the Role of Law at Johannesburg, South Africa, 18–20 August 2002* (United Nations Environment Programme, 2002), at 18.

<sup>66</sup> P. Hassan, *et al.*, 'Pakistan', in L.J. Kotze *et al.* (eds), *The Role of the Judiciary in Environmental Governance* (Kluwer, 2009), 381.

<sup>67</sup> *Sociedad Peruana de Derecho Ambiental v. Direccion Regional del Ministerio Pesqueria et al.*, (1993) Action No. 1058-92, Supreme Court of Justice (17 February 1993).

<sup>68</sup> *Proterra v. Ferroleaciones San Ramon S.A. et al.* (1992) Action No. 1156-90, Supreme Court (18 November 1992).

## ROMANIA

Romania's 1991 constitution included a government duty to protect the environment. In a 1997 case, Romania's Supreme Court of Justice used this government duty as the basis for finding an implicit constitutional right to a healthy environment.<sup>69</sup> The court decided that construction of a hotel in a park established to protect ecological values violated the constitution. Romania incorporated the explicit right to a healthy environment in its constitution in 2003. It was a decision of Romania's Constitutional Court, based upon a review of the proposed constitutional amendments, which directed the government to include the right to a healthy environment in the Fundamental Rights chapter of the revised constitution.<sup>70</sup> The original draft amendments had included a government duty to protect the environment in the Fundamental Rights chapter of the constitution, but not an individual right, which the court found illogical.

## SRI LANKA

Sri Lanka's constitution imposes a duty on the government and the people to protect the environment. In several cases, the Supreme Court of Sri Lanka has implicitly endorsed the right to live in a healthy environment. For example, in 1998 an environmental lawyer filed a lawsuit claiming that his constitutional right to life, including a healthy environment, was violated by the government's failure to enact standards to protect air quality from vehicle emissions.<sup>71</sup> The Minister of Forestry and Environment provided the court with an undertaking to enact regulations to control vehicle emissions, making it unnecessary to decide the legal issues related to the rights to life and a healthy environment. The promised regulations were enacted.<sup>72</sup> In another case, the Supreme Court of Sri Lanka determined that a proposal to develop a phosphate mine without conducting an environmental impact assessment violated the fundamental constitutional rights of a group of concerned local citizens. The court enjoined the government from entering into a contract to develop the phosphate mine until a comprehensive environmental assessment had been completed and all relevant environmental permits approved. In the words

<sup>69</sup> Supreme Court of Justice decision No. 1112 of 12 June 1997, cited in M. Dutu, 'Constitutionalising the Right to a Healthy Environment and its Implications in Romanian Legislation', 1:3 *RRDM* (2004), 5.

<sup>70</sup> Decision No. 148 of 16 April 2003 on the issue of constitutionality of the legislative proposal to revise the Constitution of Romania (Constitutional Court of Romania), found at <[www.ccr.ro/decisions/pdf/en/2003/D148\\_03.pdf](http://www.ccr.ro/decisions/pdf/en/2003/D148_03.pdf)>.

<sup>71</sup> *Lalanath de Silva v. Minister of Forestry and Environment* (1998), Fundamental Rights Application 569/98, Supreme Court of Sri Lanka.

<sup>72</sup> *National Environmental (Air, Fuel and Vehicle Importation Standards) Regulations*, No. 01 of 2003 Gazette Extraordinary No. 1295/11 (30 June 2003).

of the court: '[D]ecisions with regard to the nature and scale of activity require the most anxious consideration from the point of view of safeguarding the health and safety of the people, naturally, including the petitioners, ensuring the viability of their occupations, and protecting the rights of future generations of Sri Lankans.'<sup>73</sup>

## TANZANIA

In Tanzania, there have been several high-profile cases involving the operation of garbage dumps near residential communities. The High Court has ruled that the right to a healthy environment is an integral part of the constitutional right to life and was violated by these dumps.<sup>74</sup> Despite these favourable court decisions, experts have expressed concern that Tanzania's constitution 'does not directly spell out the environmental rights which could prompt the development of environmental laws'.<sup>75</sup>

## URUGUAY

Uruguayan legal experts argue that the right to a healthy environment is implicit in that country's constitution.<sup>76</sup> The right to a healthy environment is recognized explicitly in Uruguay's framework environmental law.<sup>77</sup>

## INTERNATIONAL LAW RECOGNIZING AN IMPLICIT RIGHT TO A HEALTHY ENVIRONMENT

A total of 115 countries have signed legally binding regional agreements that explicitly recognize the right to a healthy environment, including the African Charter on Human and Peoples' Rights, the Additional Protocol

<sup>73</sup> *Bulankulama et al. v. The Secretary, Minister of Industrial Development et al.* (2000), S.C. Application No. 884/99 (F.R.), Supreme Court of Sri Lanka.

<sup>74</sup> *Festo Balegele et al v. Dar es Salaam City Council* (1991) Civil Appeal No. 90 of 1991 (High Court); *Joseph Kessy et al. v. Dar es Salaam City Council* (1998), 4 *IELR* 445 (High Court of Tanzania).

<sup>75</sup> D.M. Pallangyo, 'Environmental Law in Tanzania: How Far Have We Come?', 3:1 *Law, Environment and Development Journal* (2007), 26.

<sup>76</sup> M. Blengio Valdes, 'Derecho Humano a un Medio Ambiente Sano', in *El Derecho Humano a un Medio Ambiente Sano: Sexto Certamen de Ensayo Sobre Derechos Humanos* (Commission of Human Rights of the State of Mexico, 2003), 181; and E.A. Viana Ferreira, 'State, Environment and Pertinent Process: Of the Duties Assumed and of the Rights to Securing Effective Compliance', in M.E. Di Paola, (ed.), *Symposium of Judges and Prosecutors of Latin America: Environmental Compliance and Enforcement* (Fundacion Ambiental y Recursos Naturales, 2003), 149.

<sup>77</sup> *Law of Environmental Protection* (2000), Law 17,283 (28 November 2000), Section 2.

to the American Convention on Human Rights (San Salvador Protocol), the Arab Charter on Human Rights, and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.<sup>78</sup> Regional courts and commissions have actively applied the right to a healthy environment.<sup>79</sup>

Of greater interest for purposes of this article is that other international courts and tribunals, interpreting treaties and conventions that do not explicitly include the right to a healthy environment, have ruled or suggested that such a right is implicit in other human rights. These judicial bodies include the European Court of Human Rights (ECHR), the European Committee of Social Rights, the International Court of Justice and the Inter-American Commission on Human Rights (IACHR). For example, in a recent case brought pursuant to the European Convention on Human Rights, which is silent on environmental rights, the ECHR concluded that Romania's failure to take positive actions to prevent an environmental disaster caused by using sodium cyanide for gold mining violated 'the rights to life, private and family life, and more generally, to the enjoyment of a healthy and protected environment'.<sup>80</sup> The European Committee of Social Rights, which adjudicates violations of the European Social Charter, ruled that the Greek government's failure to address air pollution from coal mining violated the right to a healthy environment, which is implicit in the right to health.<sup>81</sup> While the International Court of Justice has not directly addressed the right to a healthy environment, in the *Gabcikovo-Nagymaros Case*, involving a controversial dam project in Eastern Europe, Judge Weeramantry wrote in an oft-cited separate opinion that:

The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself . . . damage to the environment can impair and undermine all the rights spoken of in the *Universal Declaration* and other human rights instruments.<sup>82</sup>

<sup>78</sup> African Charter on Human and People's Rights (Banjul, 27 June 1981); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador, 17 November 1988); Arab Charter on Human Rights (Tunis, 22 May 2004); Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998).

<sup>79</sup> For example, see *Social and Economic Rights Action Centre (SERAC) and The Centre for Economic and Social Rights (CESR) v. Nigeria* (2001), African Commission on Human and Peoples' Rights (27 October 2001) (ACHPR/COMM/A044/1, 27 May 2002).

<sup>80</sup> *Tatar and Tatar v. Romania* (2009) Application no. 67021/01 (27 January 2009).

<sup>81</sup> *Marangopoulos Foundation for Human Rights v. Greece*, Complaint No. 30/2005 (6 December 2006).

<sup>82</sup> ICJ 25 September 1997, *Hungary v. Slovakia (Gabcikovo-Nagymaros case)*, [1997] ICJ Rep. 151 at 206.

Similarly, in a report on the effects of oil and gas development on Ecuador's Yanomani people, the IACHR concluded that toxic pollution was contaminating the Yanomani's water, air and soil, jeopardizing their health and their lives.<sup>83</sup> The IACHR observed that:

The realization of the right to life, and to physical security and integrity is necessarily related to, and in some ways dependent upon one's physical environment. Accordingly, where physical contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.<sup>84</sup>

## THE GLOBALIZATION OF THE RIGHT TO A HEALTHY ENVIRONMENT

Five processes are contributing to the globalization of the right to a healthy environment: transplantation, harmonization, integration, convergence and elite networking.<sup>85</sup> Transplantation is the 'deliberate copying and adaptation of significant portions of statutes or particular doctrines of law by one country from another'.<sup>86</sup> It is clear that this has occurred in the context of the constitutional right to a healthy environment, given similar language being used around the world. For example, the phrase 'right to a healthy and ecologically balanced environment' was first used in the Portuguese constitution in 1976 and is now found in 21 other constitutions. National courts frequently cite decisions from other national courts. For example, the Supreme Court of India's decisions on the right to a healthy environment have influenced courts in Bangladesh, Pakistan, Sri Lanka, Uganda and Kenya.<sup>87</sup>

Harmonization is the adjusting and conforming of national standards to meet the requirements of an international system. Integration is the process of linking national legal systems. Both harmonization and integration are occurring, most prominently in the European Union, where new members must upgrade environmental laws and all members must comply with EU-wide environmental directives and regulations.

Convergence describes how distinct legal systems, like biological species, can evolve to become more similar not because of deliberate acts of copying but rather as a response to similar external pressures, especially

<sup>83</sup> Inter-American Commission on Human Rights (1997), *Report on the Human Rights Situation in Ecuador* (OEA/Ser.LV/II.96, Doc. 10, rev. 1, 24 April 1997), Ch. 9.

<sup>84</sup> *Ibid.*, at 88.

<sup>85</sup> T. Yang *et al.*, 'The Emergence of Global Environmental Law', 36:3 *Ecology Law Quarterly* (2009), 615.

<sup>86</sup> A. Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edn (University of Georgia Press, 1993).

<sup>87</sup> See J. Razzaque, n. 12 above.



environmental pressures.<sup>88</sup> Again, this phenomenon can be observed in the similarities between constitutions, national environmental laws and court decisions related to the right to a healthy environment. For example, the court decisions in leading cases involving Manila Bay in the Philippines and the Matanza-Riachuelo River in Argentina share many common elements.<sup>89</sup> In both cases, the courts imposed extensive duties upon multiple government agencies, employed independent scientific experts to inform their judgments and established innovative measures to ensure compliance with their orders. The judgments occurred independently in response to similar environmental pressures and ongoing failures to respond.

Liefferink and Jordan describe elite networking (i.e., sharing of ideas among individuals who interact internationally) as another process contributing to the cross-pollination of environmental law.<sup>90</sup> Elite networking has played a vital role in the globalization of the right to a healthy environment through the activities of judges, prosecutors, legislators, academics, lawyers and ENGOs.<sup>91</sup>

The Internet facilitates these processes by making constitutions, legislation and case law increasingly accessible.<sup>92</sup> As Slaughter observed, 'courts are talking to one another all over the world', especially about human rights because of their universal nature.<sup>93</sup> These developments are not without their critics. McCrudden raises concerns about cherry-picking, and fears that important cultural differences could be glossed over.<sup>94</sup>

## CONCLUSION

The right to a healthy environment is spreading across the globe in international agreements, constitutions,

environmental legislation and court decisions. Even in countries where the constitution does not explicitly include the right to a healthy environment, courts have often ruled that this right is implicit in the right to life, the right to health, or the government's duty to protect the environment. These cases provide compelling evidence that constitutions are living trees, capable of modern interpretations to address modern problems that violate human rights. The decisions of international tribunals provide additional support for recognition of an implicit constitutional right to a healthy environment.

For countries whose court systems are open to the use of comparative constitutional law, the court decisions described in this article may have value as precedents in cases asserting that environmental degradation violates constitutional rights. It is possible that the globalization of constitutional and environmental law will provoke a race to the top, with different countries adopting, adapting and building on the precedents established elsewhere. Lasser observed that in Europe, an 'inter-institutional dynamic has prompted a frantic race to the top' in terms of human rights, with the result that the 'rights revolution is transforming the judicial landscape at breakneck speed'.<sup>95</sup> Given the state of the global environmental crisis, increased recognition and enforcement of the constitutional right to a healthy environment should be seen as a positive and promising development.

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<sup>88</sup> See T. Yang *et al.*, n. 85 above.

<sup>89</sup> *Beatriz Silvia Mendoza et al. v. National Government et al. (Damages stemming from contamination of the Matanza-Riachuelo River)* (2008) M, 1569, Supreme Court of Argentina (8 July 2008); *Concerned Residents of Manila Bay v. Metropolitan Manila Development Authority et al.* (2008), G.R. Nos. 171947-48 (Supreme Court of the Philippines).

<sup>90</sup> D. Liefferink and A. Jordan, 'Europeanization and Policy Convergence: A Basis for Comparative Analysis', in A. Jordan and D. Liefferink (eds), *Environmental Policy in Europe: The Europeanization of National Environmental Policy* (Routledge, 2004), 15.

<sup>91</sup> A.-M. Slaughter, 'Judicial Globalization', 40:4 *Virginia Journal of International Law* (2000), 1103.

<sup>92</sup> A.-M. Slaughter, 'A Global Community of Courts', 44:1 *Harv. Int'l. L.J.* (2003), 191.

<sup>93</sup> A.-M. Slaughter, 'A Typology of Transjudicial Communication', 29:1 *Univ. Richmond L. Rev.* (1994), 99.

<sup>94</sup> C. McCrudden, 'Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights', 20:4 *Oxford Journal of Legal Studies* (2000), 499.

<sup>95</sup> M. de S.-O.-l'E. Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford University Press, 2009), 1.