The Undelivered Promise: Constitutional Environmental Rights and Judicial Redress in Kenya and South Africa

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Abstract:

The project of constitutionalising environmental rights is nearly complete with over two-thirds of the United Nations member states having enshrined these rights in their constitutions. Despite the widespread adoption, recent studies on environmental protection indicate that the project has not improved in commensurate terms. Environmental law scholars are now engaged in bridging the 'implementation gap'. In an attempt to locate the implementation gap problem, this paper analyses the achievements made under the environmental rights constitutionalisation project. Using Kenya and South Africa as case studies, the author finds that while substantial progress has been made, the conceptualisation of the right to a clean and healthy environment has yet to receive a harmonised meaning. The impact, this paper notes, is the differentiated interpretation and application that greatly undermine environmental protection. As a remedy, the author argues that the adoption of a country's 'fundamental value[s]' as the basis of understanding environmental rights not only provides the widest protection but also allows a harmonised application.

Keywords: Environmental Constitutionalism, Implementation Gap, Environmental Rights, Legal Harmonisation, Environmental Governance

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I. Introduction

In the year 1972, at the United Nations (UN) Conference on the Human Environment, the world linked the exploitation of environmental resources to human rights. What followed was the proliferation of environmental constitutionalism.[1] States resorted to the powerful and promising language of human rights through the constitutionalisation of environmental rights to address development and environmental issues.[2] The project of constitutionalisation of environmental rights sees constitutions as a powerful tool for achieving environmental protection and equality.[3] In constitutional law circles, constitutionalisation and entrenchment of an issue in a state's supreme law gives an issue an identity, communicates its fundamental importance to the inhabitants of a state, and saves it from political debate.[4] Recognition of an issue as a fundamental right or freedom, which is usually a protected clause incapable of amendment or capable of amendment but with relative difficulty even elevates and cements such right as a fundamental value of the concerned nation. The result of constitutionalisation of a right, its advocates believe, is better outcomes and courts can be used to protect the most vulnerable.[5] But does it? How soon? What does it take to transform it from textual declaration to tangible outcomes?

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1 The term environmental constitutionalism is used in this paper to mean the protection of the environment through invocation of national or sub-national constitutions. For a historical rise of environmental constitutionalism see May J, and Daly E, *Global Judicial Handbook on Environmental Constitutionalism*, 7; United Nations Environment Programme edns., 3rd ed, 2019; Weis L, 'Environmental Constitutionalism: Aspiration or Transformation?' 16(3) *International Journal of Corpus Linguistics,* 2018, 836-870; and Boyd D, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, 1st ed, Law and Society Series, 2011, 56.

2 Though differing in form, nature and content, United Nations Environmental Programme (UNEP) noted that as 2019, this "environmental revolution" provisions had been captured in three quarters of the United Nations members' national constitutions. Partly due to this wide recognition, the United Nations Human Rights Council in its forty eighth session in 2021 adopted a right to a healthy environment as a human right.

3 Hailbronner M, 'Transformative Constitutionalism: Not Only in The Global South, 65(3) *The American Journal of Comparative Law,* 2017, 527-565; Kibet E, and Fombad C, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa', 17(2) *African Human Rights Law Journal* 2017, 340-366; Weis L, 'Environmental Constitutionalism: Aspiration or Transformation?', 837.

4 Sunstein C, 'Constitutionalism and Secession', 58, *University of Chicago Law Review* (1991) 633-670; Barber N, 'Why Entrench?'14(2) *International Journal of Constitutional Law* 2016, 325-350.

5 Gunnarsson M, 'Constitutionalisation of the Right to Health: A Pathway to Improved Health Outcomes?' McGill Journal of Law and Health, 2019—<https://mjlh.mcgill.ca/2019/03/26/constitutionalization-of-the-right-to-health-a-pathway-to-improved-health-outcomes/> on 20 April 2022.

The exploitation of natural resources combined with industrial innovations witnessed massive economic growth in the Industrial Revolution.[6] However, the resulting environmental crisis in the form of environmental pollution threatens human existence.[7] The accruing environmental profits are unevenly distributed along, *inter alia,* racial, global south and north, and indigenous communities. Ironically, those who least benefit(ed) from environmental exploitation disproportionally bore, and continue to bear, the resulting burdens. Does the inclusion of environmental rights in national constitutions boost the environmental justice struggle for equal distribution of environmental burdens and opportunities?[8] Justiciability of rights is recognised as a powerful tool for enforcing rights. Given the widespread justiciability of environmental rights, has it led to any tangible outcomes for the environmental justice movement? If yes, what progress has been made, if not, what is derailing the promise of constitutional environmental rights to environmental justice?

This paper seeks to answer the above questions. Relying on the jurisprudence from the Kenyan and the South African courts, the author argues that although the constitutionalisation of environmental rights has contributed to some progress in the quest to achieve environmental justice, courts have, however, shied away from giving substantive environmental rights a normative interpretation. The result, this paper argues, is incoherent and limited approaches to this right, greatly disfavouring the already overburdened environmental justice seekers. As a remedy, this paper proposes the adoption of an 'inviolable or fundamental value' approach to providing normative content of the right to environment.[9] This paper further argues that approaching the issue this way is a positive step to exploiting the full potential of a constitutional environmental right in addressing complex intersectional issues faced by environmental justice seekers.

This paper contains six parts. Part one discusses the taxonomy of environmental constitutionalism with examples in each category. The idea is to demonstrate the variance in phraseology and conceptualisation across Kenya and South Africa. Part two discusses the manifestation of environmental injustice in

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6 Barbier EB, 'Natural Resource-Based Economic Development in History' 6(3) World Economics, 2005, 103-152.

7 Boyd, The Environmental Rights Revolution, 57.

8 Ruiters G, 'Race, Place, and Environmental Rights: A Radical Critique of Environmental Justice Discourse' in McDonald DA (ed), Environmental Justice in South Africa, (1ed), Ohio University Press, USA, 2002, 245.

9 The concept of inviolable or fundamental value is used here to mean a foundational constitutional value guaranteed for every person in the constitution of a country and one that provides the broadest protection of a human being. The issue is explored in the last sections of the paper.

Kenya and South Africa. Part three turns to the rationale and textual content of the Kenyan and South African constitutional environmental rights provisions. Part four identifies the environmental justice judicial gains resulting from the constitutionalisation of environmental rights and notable limitations. Part five discusses the judiciary's laxity in defining this right and the resulting important limitations to addressing environmental justice concerns. Part six explores the proposed 'inviolable or fundamental value' approach to providing normative content of the right to environment.

II. Taxonomy of Environmental Rights Constitutionalism

Although the constitutionalisation of environmental rights gained global attention in 1972 and the process began soon after, little focus was given to its scope and nature.[10] As a result, states adopted varying approaches in their constitutions.[11] This divergence, it is argued, stemmed from attempts to address key questions: should environmental rights be recognised implicitly or explicitly? Where and how should they be incorporated? And what constitutes the most effective implementation framework? And which is the 'best' implementation framework?[12] The difference, it is also argued, results from the fact that the right to a clean environment appears in different fashions, phraseology, and standards—given that a constitution reflects the cultural, historical, social, and political contexts of a state.[13] In the following section, this paper examines the world's general categorisations.

A. Substantive Environmental Rights

Substantive environmental rights in constitutions refer to the core entitlements defined by their normative content, distinguishing them from procedural or facilitative rights, which serve to reinforce and operationalise these substantive guarantees.[14] Because of their substantiveness, they tend to be general, with drafters avoiding explicit definitions to avoid restrictive interpretation thus allowing judicial officers the flexibility required in different circumstances. James

[10] May J and Daly E, Global Judicial Handbook on Environmental Constitutionalism, 16.

[11] Alfano N, Environmental Constitutionalism in the European Union: A Comparative Analysis of Environmental Legislation in Italy, France and Germany, MPIR Diss., Luiis University, 2021.

[12] May JR, 'The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes' 42(3) Cardozo Law Review, 2020, 983-1036.

[13] Alfano N, Environmental Constitutionalism in the European Union, 154.

[14] Alfano N, Environmental Constitutionalism in the European Union, 100.

May and Erin Daly observe that substantive rights are self-executing even in the absence of procedural rights and are less vulnerable to amendment. These features make them very common.[15] Currently, David Boyd notes, there are ninety-nine constitutions containing some form of substantive right to the environment.[16] Also, with the recognition of the right to a clean, healthy, and sustainable environment by the UN General Assembly, more adoption by member states is expected.[17]

Substantive environmental rights take different manifestations. They vary from expressing a right to some quality or standard of the environment for instance right to an 'adequate', 'clean', 'healthy', 'sound', and 'sustainable' environment among others. Such rights presuppose fundamental access to natural resources.[18] A few examples in specific countries may suffice, for example, Chile ('All persons…have the right to live in an environment free of contamination'),[19] Kenya ('Every person has the right to a clean and healthy environment'),[20] Columbia ('Every individual has the right to enjoy a healthy environment'),[21] Spain ('Everyone has the right to enjoy an environment suitable for the development of the person'),[22] Russia ('Everyone shall have the right to a favourable environment'),[23] and Venezuela ('Every person has a right to individually and collectively enjoy a life and a safe, healthy and ecologically balanced environment').[24] Environmental justice movements are likely to get more benefits in jurisdictions with this category of rights.

B. Procedural and Substantive Environmental Rights

As noted in the previous section, procedural environmental rights also known as access rights are generally taken to be facilitative to the enjoyment of substantive environmental rights. Cognisant of the importance of people's involvement in the management of a state's affairs including environmental matters as espoused in Principle 10 of the Rio Declaration, it is common to have

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15 May & Daly, *Global Environmental Constitutionalism*, 1st ed, Cambridge University Press, 2014, 64.

16 Boyd, The Environmental Rights Revolution, 13.

17 United Nations General Assembly, Resolution No. A/RES/76/300.

18 Muigua K and Kariuki F, 'Towards Environmental Justice in Kenya' 1 Journal of CMSD, 2017, 1-57.

19 Article 19(8) *Constitution of Chile*, (1980).

20 Article 42, *Constitution of Kenya* (2010).

21 Article 79, *Constitution of Colombia*(1991).

22 Section 45, *Constitution of Spain* (1978).

23 Article 42, *Constitution of the Russian Federation* (1993).

24 Article 127, *Constitution of Venezuela* (2009).

rights of access to information, public participation or consultation, and access to justice enshrined in national constitutions.[25] Of course, the mere presence of procedural rights is no guarantee of better environmental decisions. Their effectiveness depends on the weight given to the consultations in the case of public participation.[26] In countries that genuinely value public input, decision-making tends to be more robust.[27] The right of access to justice is important in seeking remedies for substantive rights and the other two procedural rights—access to information and public participation.

Analogous to substantive rights, the scope and content of procedural rights vary from one state to another. The rights may appear with direct reference to the substantive environmental rights or, where substantive environmental rights are not recognised, as general rights but which are then used in environmental contexts, such as permitting. For example, Rwanda ('freedom of access to information is recognised and guaranteed by the state'),[28] Tanzania ('every person has the right to seek, receive …. Information'),[29] and Kenya (every citizen has a right to access information held by the state, and right to information held by another person and required for protection or exercise of any right or fundamental freedom[30] and the right of access to justice).[31] Cognisant of their value in enforcing substantive rights, courts have increasingly implied procedural rights as part and parcel of the right to a healthy environment, even in the absence of their direct reference to a right to the environment (especially the right to public participation and access to information).[32]

C. *Rights of Nature*

So far, the manifestation of environmental rights has been from an anthropocentric view. According to this view, human beings are owners and beneficiaries of the natural environment, entitled to exploit this natural

[25] Muigua K, 'Reflections on ADR and Environmental Justice in Kenya'—<http://kmco.co.ke/wp-content/uploads/2018/08/Reflections-on-ADR-and-Environmental-Justice-in-Kenya.pdf> on 20 April 2022.

[26] van Bekhoven J, 'Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact' 11 NTU Law Review, 2016, 219.

[27] du Plessis A, 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' 11(2) Potchefstroom Electronic Law Journal, 2008, 1-34.

[28] Article 38, *Constitution of Rwanda* (2003).

[29] Article 18, *Constitution of the United Republic of Tanzania* (2005).

[30] Article 35, *Constitution of Kenya* (2010).

[31] Article 38, *Constitution of Kenya* (2010).

[32] May & Daly, Global Judicial Handbook on Environmental Constitutionalism, 18.

environment to serve their needs.[33] Protection of the environment, therefore, is dictated by the values that human beings derive from a clean environment.[34] Likewise, the protection of the environment is solely for its relevance to fulfil human needs.[35] As Alexandre Kiss and Dinah Shelton note, 'the environment is only protected as a consequence of, and to the extent needed to protect human well-being'.[36] This is the most widespread view of environmental rights in national constitutions.[37]

To counter the anthropocentric view of nature, scholars, especially those in nature studies led by Christopher Stone in his book 'Should Trees have Standing' saw the overemphasis on human value in the natural ecosystem as an exaggeration.[38] To them, nature has its own intrinsic value, as a full ecosystem containing other natural beings, independent of the needs of a human being. Stone argued that nature should be protected for its own good rather than for human ends.[39] These works had a notable influence in states that have Indigenous communities and countries rich in biodiversity mostly in Latin America.[40] Such states therefore guarantee environmental rights to nature in its own right. Examples include *Ecuador (*'Pachamama', or Mother Earth to exist and to 'maintain and regenerate its cycles, structure, functions and evolutionary processes').[41] In the year 2021 the Ecuador high court in *El Pleno De La Corte Constitucional Del Ecuador, En Ejercicio De Sus Atribuciones Constitucionales Y Legales, Expide La Siguiente* halted mining concessions on the basis of rights of nature to

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33 Abba PW, Constitutionalising Environmental Rights for Sustainable Environmental Protection in Nigeria's Niger Delta Region, PhD Law Dissertation, University of Exeter, 2019; Macpherson E, 'The (Human) Rights of Nature: A Comparative Study of Emerging Legal Rights for Rivers and Lakes in the United States of America and Mexico' 31 Duke Environmental Law & Policy Forum, 2020, 327-377.

34 Emmenegger S and Tschentscher A, 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law' 6(3) Georgetown International Environmental Law Review, 1994, 545-742.

35 Borràs S, 'New Transitions from Human Rights to the Environment to the Rights of Nature' 5(1) Transnational Environmental Law Journal, 2016, 113-143.

36 Kiss C and Shelton D, International Environmental Law, 1st ed, Transnational Publishers, 2004, 23.

37 Maccone C, 'Should Environmental Protection be Through Anthropocentric Rights?' 41 Pace Environmental Law Review, 2023, 78.

38 Stone C, Should Trees Have Standing: Toward Legal Rights for Natural Objects, 35th ed, W. Kaufmann, 1974.

39 Stone C, Should Trees Have Standing: Toward Legal Rights for Natural Objects, 35th ed, W. Kaufmann, 1974, 14.

40 Harden-Davies H et al, 'Rights of Nature: Perspectives for Global Ocean Stewardship' 122 Marine Policy, 2020, 3-11.

41 Article 71, *Constitution of the Republic Ecuador* (2008).

be protected.[42] Similar decisions, especially in respect of rivers, have appeared in Uganda, Columbia, and Bangladesh, among others.[43]

The utility of the eco-centric view of environmental rights to the environmental justice movement is beyond this work. However, it suffices here to say that these rights do away with locus standi hurdles because the rights are possessed by nature, and human beings as custodians, can enforce them.[44] Secondly, since the primary focus is preserving the integrity of the environment, the standard for addressing pollution is no longer solely based on its impact on human life, health, or survival. Instead, a lower threshold is adopted—one that prioritises safeguarding the integrity of nature itself.[45] Third, as humans are no longer the central focus, factors such as race, income level, land tenure systems, and gender—among other variables in environmental justice cases—would be diminished or eliminated. The full impact of these newly recognised environmental rights in national constitutions remains to be seen.

Research on the outcomes of environmental constitutionalism, to the best of the author's knowledge, tends to lump all environmental rights, regardless of their nature or phraseology, together.[46] The analysis of the effectiveness of environmental rights, which this paper proposes as an area of further research, should focus on phraseology and definitional content of a right as an essential aspect to determine how to generally phrase this right. This would enable constitutions to adopt phrasing that yields the most beneficial impact.

As noted in this study, substantive environmental rights are the most prevalent among world constitutions. This paper, therefore, uses Kenya and South Africa, which have both procedural and substantive rights as contained in these countries' constitutions, to assess the utility of this right to environmental justice movement.

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42 El Pleno De La Corte Constitucional Del Ecuador, En Ejercicio De Sus Atribuciones Constitucionales Y Legales, Expide La Siguiente, Caso No. 784-13-EP.

43 The Cyrus R. Vance Center for International Justice et al, 'Rights of Rivers: A Global Survey of the Rapidly Developing Rights of Nature Jurisprudence Pertaining to Rivers'—<https://3waryu-2g9363hdvii1ci666p-wpengine.netdna-ssl.com/wp-content/uploads/sites/86/2020/09/Right-of-Rivers-Report-V3-Digital-compressed.pdf> on 20 April 2022.

44 Harden-Davies H, Humphries F, Maloney M, Wright G, Gjerde K and Vierros M, 'Rights of Nature: Perspectives for Global Ocean Stewardship' 122 Marine Policy, 2020, p.104059.

45 Harden-Davies H, et al 'Rights of Nature: Perspectives for Global Ocean Stewardship', 104059.

46 Umukoro BE and Ituru O, 'Conceptual Challenges to the Recognition and Enforcement of the Right to Clean, Safe and Healthy Environment' 2 Journal of Environmental Law & Policy, 2022, 1.

III. Manifestation of Environmental Injustice

A. Environmental Injustice in South Africa

Pre-apartheid South African environmental policy was an explicit tool of racial oppression.[47] Nonetheless, it must be understood that the policy was not an isolated phenomenon; it was just a small segment of what an 'exclusively white minority hegemony' perpetrated in economic and political space through legal legislation and policy.[48] Environmental decisions, thus, did not involve blacks.

Under the apartheid regime, black South Africans were forcibly evicted from ancestral land to create game parks and moved to 'reserves' and 'homelands' without adequate water, food, or housing.[49] On residences, blacks and people of colour were confined to hostile environments lacking in amenities and green spaces.[50] Billions of dollars were spent preserving the wildlife (which appealed to the affluent, learned large white minority) at the expense of necessities for black South Africans. More disturbing, was the unwritten rules in practice where blacks were not welcome to visit national parks and were portrayed as 'homogenously in the role of poachers and whites in the role of conservationist'.[51] In soil conservation discourses, membership to the National Veld Trust, a non-governmental organisation (NGO) promoting soil conversation, was open to 'South African persons of European descent', while government conservation efforts favoured the white farmer, and additionally, the Division of Soil Conservation and Extension, a state department, was only open to white youth.[52]

In the context of urbanisation, housing policies displaced Black populations to overcrowded rural areas characterised by inadequate basic amenities and widespread poverty.[53] In education, the segregated system under the 'Bantu Education policy' enforced poor educational standards, deliberately fostering illiteracy, particularly in environmental matters.[54] On environmental pollution, blacks had no say in the location of sewage plans, industries, and land refills,

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47 McDonald, Environmental Justice, 65.

48 Carruthers J, The Kruger National Park: A Social and Political History, 1st ed, University of Natal, 1995, 34.

49 Khan F, 'Environmental Justice', 87.

50 Khan F, 'Environmental Justice', 90.

51 Khan F, 'Environmental Justice', 86.

52 Khan F, 'Environmental Justice', 87.

53 Timberlake L, Africa in Crisis: The Causes and Cures of Environmental Bankruptcy, 1st ed, Routledge, 2013, 34.

54 Adriaan N. Pelzer, Verwoerd Speaks: Speeches 7 APB (1948-1966 (1966).

predominantly among their neighbourhoods.[55] Under the Reservation of Separate Amenities, only white people could reserve public spaces.[56] The cumulative effect of the discriminatory laws and policies was to alienate black South Africans from sharing environmental benefits while bearing the brunt of the environmental exploitation burden.

The explicit manifestation of environmental racism galvanised the environmental justice movement with a more holistic outlook than in some countries.[57] The movement is currently composed of trade unions, churches, academics, NGOs, and civic organisations.[58] The South African Environmental Justice Networking Forum, established by these organisations, emerged as a prominent entity in advocating for the integration of environmental justice concerns in negotiations constitution.[59] It is in this context that environmental rights were included in the South African Constitution.

The Constitution of South Africa is largely a response to its infamous colonial and apartheid history permeating through its economic, social, legal, and political systems.[60] Such a conclusion is supported by phrases such as the constitution 'belongs to all who live in it, united in our diversity',[61] and the non-derogable nature of the right to non-discrimination based on race, among others.[62] The South African constitutional court has also, in unequivocal terms, held that the Constitution was aimed at preventing the recurrence of unjust practices, including apartheid.[63]

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55 Khan F, 'Environmental Justice', 90.

56 Khan F, 'Environmental Justice', 90.

57 Ruiters G, 'Race, Place, and Environmental Rights', 78.

58 See for example the Environmental Justice Networking Forum's definition of environmental justice in its 1997 quarterly release:
"*Environmental justice is about social transformation directed towards meeting basic human needs and enhancing our quality of life—economic quality, health care, housing, human rights, environmental protection, and democracy. In linking environmental and social justice issues the environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environ- mental damage caused by the greed of others. This includes workers and communities exposed to dangerous chemical pollution, and rural communities without redwood, grazing and water. In recognizing that environmental damage has the greatest impact upon poor people, EJNF seeks to ensure the right of those most affected to participate at all levels of environmental decision-making. (EJNF 1997)"*

59 Murcott M, 'The Role of Environmental Justice in Socio-Economic Rights Litigation' 132(4) South African Law Journal, 2015, 875-908

60 Omond R, 'South Africa's Post-Apartheid Constitution' 9(2) Third World Quarterly, 1987, 622-637.

61 Preamble, *Constitution of the Republic of South Africa* (1996).

62 Article 37, *Constitution of the Republic of South Africa* (1996).

63 O'Regan K, 'Justice & Memory: South Africa's Constitutional Court' 143(3) Daedalus, 2014, 168-178.

Make no mistake—while some progress has been made, the legacy of historical racism remains deeply entrenched. Today, the majority of Black South Africans, despite their numerical dominance, continue to live on degraded land, often in proximity to heavily polluted areas, industrial sites, incinerators, and waste dumps, with limited access to clean air, safe water, and essential services.[64] The gradual onset of toxic exposure is increasingly impacting the health and well-being of black South Africans, as evidenced by the detrimental effects of flooding, air pollution, industrial waste, and the mining sector.[65] The effects of environmental pollution on black women have accelerated the women's environmental defenders. The youth keen on inheriting an environmentally equal South Africa is shaping environmental justice through demonstration and litigation.[66] Are environmental rights easing the process of reversing the dark past and creating a better future?

B. Environmental Injustice in Kenya

Environmental injustice manifestation in Kenya is somewhat similar to the South African experience except that its principal cause is colonialism.[67] Colonial legislation racially segregated Africans from owning land in highlands and other productive areas. They were moved to native reserves, small enclosed overpopulated areas close to white farmlands to supply cheap labour.[68] Conditions in these areas lacked basic amenities such as clean water, food, and shelter. Overcrowding placed immense strain on the land, further accelerating environmental degradation. Africans depended on nature to survive. The Maasai, for example, are nomadic and depend on unrestricted access to ancestral lands for grazing their livestock. The dispossession of land from such communities stripped them of their means of livelihood. Conservation of wildlife also excluded Africans from accessing and benefiting from the natural environment.[69]

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64 Darmofal D, 'Environmental Racism in South Africa: A Sustainable Green Solution'—<https://research.library.fordham.edu/cgi/viewcontent.cgi?article=1026&context=environ_theses> accessed on 20 April 2022.
Cock J, 'How the Environmental Justice Movement is Gathering Momentum in South Africa' 1 *The Conversation,* 2015, 1-34.

65 Cock J, How the Environmental Justice Movement is Gathering Momentum in South Africa, 12.

66 Aziz G, 'Environmental Justice as an Act of Love: A Reflection on the Agency of the Youth on the Cape Flats' 77(2) HTS Theological Studies, 2021, 1-6.

67 Muigua K, Towards Environmental Justice in Kenya, 13.

68 Kanyinga K, 'The Legacy of the White Highlands: Land Rights, Ethnicity and the Post-2007 Election Violence in Kenya' 27(3) Journal of Contemporary African Studies, 2009, 325-344.

69 Ndethiu MK, Environmental Justice in Kenya: A Critical Analysis, Unpublished LLM Dissertation, University of South Africa, 2018.

This was enforced through laws that established protected areas, such as forests, where human settlement and resource exploitation were strictly prohibited.[70]

Post-colonial Kenya did not change the dynamics of colonial environmental injustices despite independence. In the year 1965, Kenya adopted a development policy which provided that development would first be carried out in 'high potential areas' with the rationale that resources from these regions would be used to develop the 'least potential areas'.[71] Unfortunately, the high potential areas were developed and resources in the least developed areas were extracted and used to further develop the 'high potential areas'.[72] In urban areas, settlement dictates environmental standards in major cities. The affluent city residence has piped water, clean rivers, and a good ambience for human habitation.[73] In stark contrast, the poor urban majority reside in overcrowded, dilapidated conditions, relying on makeshift sanitation systems like 'flying toilets', with inadequate drainage and exposure to industrial pollution. Industries discharge untreated waste into river sections near low-income communities, while affluent areas upstream remain largely unaffected by such environmental hazards.[74]

Land rights have had a significant impact on the distribution of environmental burdens.[75] Sixty per cent of land in Kenya is held communally while thirty per cent is privately owned, and the residual ten per cent is public land.[76] Colonialism introduced private and public land ownership tenure systems.[77] Traditionally, land was communally owned, granting every member of the community both the right to access its resources and the responsibility to protect them.[78] Resource utilisation was traditionally organised along communal lines, ensuring shared access and collective management. However, colonialism promoted private property as a superior land tenure system, fundamentally altering ownership structures. As a result, land ownership documents became—and continue to be—the primary

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70 Kameri-Mbote P, 'The Land Question in Kenya: Legal and Ethical Dimensions' in Governance: Institutions and the Human Condition, 2009, 219-246.

71 Government of Kenya, African Socialism and its Application to Planning in Kenya, Sessional Paper No. 10 of 1965. High potential areas were those

72 Mwangangi L, 'Reflections on Sessional Paper No. 10, 1965: A Government Policy Paper that Widened the Economic, Social and Political Divide in Kenya' 26 Yesterday and Today, 2021, 160-163.

73 Ndethiu MK, Environmental Justice in Kenya, 56.

74 Ndethiu MK, Environmental Justice in Kenya, 56.

75 Kameri-Mbote P, 'Women, Land Rights and The Environment: The Kenyan Experience' 49(3) Development, 2006, 43-48.

76 Wily AL, 'The Community Land Act in Kenya: Opportunities and Challenges for Communities' 7(1) Land, 2018, 1-25.

77 Kameri-Mbote P, Women, Land Rights and The Environment, 230.

78 Kameri-Mbote P, Women, Land Rights and The Environment, 234.

determinant of access to essential resources such as water, electricity, and other basic needs. [79] The state also enjoyed unchecked power in the allocation of natural resource extraction permits, deforestation, extreme pollution, displacement for development, and pollution of the marine environment.[80]

Due to inadequate resources, many communities rely on rivers as their primary water source. For example, the Sabaki River, which flows over 400 kilometres from the Kenyan capital to the coast, contains dangerously high levels of toxic pollutants, including lead, copper, cyanide, and ammonia.[81] Interestingly, these deposits are discharged into the river as water leaves the Kenyan capital and no significant pollution was noted in the upper area inhabited by the affluent. As a result, coastal communities that rely on the river for their livelihoods bear the brunt of the contamination, with women and children suffering the most severe consequences. How do environmental rights assist in reversing these inequities?

IV. Environmental Constitutionalism in Kenya and South Africa

A. Environmental Rights in Kenya

Agitation for the constitutionalisation of environmental rights in Kenya has a long history. The previous constitutional order presided over a regime characterised by unchecked resource extraction and unregulated pollution, with little regard for sustainability or ecological balance.[82] The most affected people were the homeless, low-income persons, indigenous communities, women, and persons living in the arid semi-arid areas.[83] The adoption of the current constitution was people-centred, and people's views largely informed its provisions. In the preparatory documents of the current constitution, the question of constitutionalisation of environmental rights was reasonably addressed with the majority of the people stating that, 'environmental protection

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79 Kameri-Mbote P, Women, Land Rights and The Environment, 230; Ndethiu MK, Environmental Justice in Kenya, 69.

80 Kameri-Mbote P, Women, Land Rights and The Environment, 230; Ndethiu MK, Environmental Justice in Kenya, 69

81 *Odando IL & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties)* (2021) eKLR.

82 Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, Government of Kenya, 2005.

83 Kenya in 1965 developed an economic model where development was concentrated in "high potential areas" wherein the resources would be used to develop the "least potential areas". Unfortunately, the high potential areas were developed and resources in lease developed areas were extracted and used to develop even further the high potential areas.

should be enshrined in the Constitution', 'Indigenous forests and endangered species, should be protected', and 'benefits and burdens of environmental utilisation should be evenly distributed and where possible burdens eliminated'.[84]

The Constitution contains environmental provisions in the preamble as a constitutional principle of national value and governance as well as a procedural, substantive, and environmental right. In the preamble, the Constitution provides that the people of Kenya are 'respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations'. Public participation, equality and sustainable development are national values and principles contained in Article 10 of the Constitution.[85] These values and principles bind all state organs, state officers, public officers and all persons when they interpret, apply, enact or implement the constitution, legislation or policy decisions.

In terms of procedural and substantive rights, Article 35 serves as an access right, guaranteeing the public's right to information. It provides that, 'every citizen has the right of access to information held by the state and information held by another person and required for the exercise or protection of any right or fundamental freedom', 'every person has a right to unimpeded access to justice' and 'institute legal proceedings alleging actual or threatened infringement of a right'.[86] As a substantive right, article 42 provides that 'every person has the right to "a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations"'.

B. Environmental Rights in South Africa

The South African Constitution provides that every person has the right to 'an environment that is not harmful to their health or well-being'.[87] Moreover, every person is guaranteed the right to 'have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures'. Under section 152 of the South African Constitution, it is the

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84 Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, Government of Kenya, 2005.

85 The utility of a national values and principles was recognised by the Kenyan Supreme Court *in the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR wherein it stated that national values and principles are important anchors of interpretive frameworks of the Constitution and are underlying the nationhood. Kenyan constitutional courts have struck down dozens of legislations for not adhering to the national values and principles.

86 Article 48, *Constitution of Kenya* (2010).

87 Section 24, *Constitution of South Africa* (1994).

objective of the local governments to promote a safe and healthy environment. For accountability, section 184 requires state organs to submit information to the South African Human Rights Commission on the state and measures taken towards the realisation of environmental rights. Section 32 also provides for the right to access information from the state or any person for purposes of enforcing a fundamental right, the right to access courts and public consultation.

Kenya and South Africa appear to have adopted substantive and procedural environmental rights. However, there is a notable difference in their phraseology with South Africa adopting a stronger language of anthropocentric view. Kenya appears to have a moderate anthropocentric view capable of incorporating weak eco-centrism. The next section addresses some of the gains and limitations.

V. Merits of Environmental Constitutionalism

A. Legal standing

To date, the *Maathai v. Kenya Times Media Trust Limited,*[88] a constitutional decision relating to legal standing, is a poignant reminder of the challenges faced by the environmental justice movement prior to the incorporation of environmental rights into the Kenyan Constitution. In this case, Professor Wangari Maathai, the 2004 Nobel Prize laureate, filed a constitutional petition seeking to halt the construction of the then ruling party's sixty-storey headquarters on Uhuru Park—a free recreational park in Nairobi City's Central Business District. Regular patrons of the park typically consist of two types of people: individuals from low-income backgrounds—unable to afford lunch at restaurants—seeking fresh air and a place to relax during their lunch breaks; and individuals seeking a central meeting point for the majority of human rights advocacy movements.

In striking out the petition, the court held that the petitioner, Professor Wangari Maathai, did not have personal injury to demonstrate *locus*. On her argument that the public had not been consulted in interfering with the green space, the court held that '...of course, many buildings are being put up in Nairobi without many people being consulted. Professor Maathai apparently thinks this is a special case. Her personal views are immaterial'. Having lost in the court, the applicant organised mass protests the applicant mobilised mass protests, drawing international attention and prompting intervention, ultimately leading to the project's suspension. The attempt to take over the park came under scrutiny

[88] *Maathai v Kenya Times Media Trust Ltd* (1989) eKLR.

again in 2021 when the government proposed using a significant portion of it for the construction of an overpass and this was met by demonstrations that led the government to thwart the plan.[89] A few months later, the government sought to 'renovate' the park but did not conduct an environmental impact assessment nor conduct public participation. Aggrieved, the case of *Communist Party of Kenya v Nairobi Metropolitan Services & 3 others National Environment Management Authority & another (Interested Parties)*[90] was filed in court. The Environment and Land Court (ELC) issued a preliminary injunction against the renovation and later invalidated the decision to renovate until an environmental impact assessment and public participation were conducted. Unlike previous cases, the issue of locus standi did not arise, with the court emphasising that it would be absurd for anyone to argue a lack of standing in an environmental rights suit.

The situation in South Africa pre-adoption of environmental rights in 1994 was akin to Kenya's. For instance, in *Von Moltke v Costa Areoso (Pty) Limited,*[91] a petition was filed against the construction of Sanday Bay on the basis that it constituted a public nuisance and would cause irreparable damage to indigenous vegetation and dunes which had cultural significance to the local community. In dismissing the petition on (lack of) locus standi, the court held that the applicant, despite having a petition backed by four thousand signatures and a protest, did not prove 'special damage' to him as required in public nuisance cases. Currently, legal standi in human rights and environmental rights in South Africa is generally liberalised and the issue of legal standi is rarely an objection to such proceedings.[92]

An interesting question that arose in this research is whether Kenya and South Africa have independent constitutional human rights institutions. Kenya has Kenya National Human Rights Commission while in South Africa, there is the South African Human Rights Commission. Notably, these institutions are at the heart of the issues and seem yet to concentrate on civil and political rights and social and economic rights while paying little attention to environmental rights. Research into this question should be explored.

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89 Kimiyu H, "Kenya: Government Now Says Uhuru Park to Remain Untouched by New Expressway" 20 April 2022 — <https://allafrica.com/stories/201910310360.html>.

90 *Communist Party of Kenya v Nairobi Metropolitan Services & 3 others National Environment Management Authority & another (Interested Parties)* (2022) eKLR. This case may be contrasted with Maathai case, each decided in a different constitutional dispensation.

91 *Von Moltke v. Costa Areoso (Pty) Ltd*, (1975) South Africa.

92 Amechi P, 'Strengthening Environmental Public Interest Litigation Through Citizen Suits in Nigeria: Learning from the South African Environmental Jurisprudential Development', 23(3) *African Journal of Constitutional Law*, 2015, 383-404.

B. Cost and Financial Responsibility

A large pool of empirical studies on environmental justice has identified cost award rules as the most dominant barrier to environmental justice litigation.[93] The old-time principle that 'costs shall follow the event' presents uncertainty and risks on already heavily burdened environmental justice litigants.[94] The thought of well-meaning local communities or NGOs acting in the public interest of being liable for costs for a deep-pocketed state or corporation is deterrent enough to environmental justice claims.[95] It is, thus important that the rules relating to costs be reconceptualised to encourage environmental injustice and environmental protection causes by already overburdened claimants or those seeking to enforce on their behalf.

In South Africa and Kenya, there is no constitutional or statutory settled legal provision eliminating or reducing costs risks. What is notable, however, is that courts in their discretion in constitutional environmental rights have formulated general rules against awarding costs to the detriment of persons asserting infringement or threatened infringement of their constitutional rights. In Kenya, for instance, in Harun Mwau and Others v Attorney General and Other,[96] the high court held that a party that litigates a public interest issue, such as an environmental right, should not be liable for costs. It was also held that costs should not be ordered against a party that sues a state but loses and 'there is no reason why a state should pay a successful litigant'. Environmental rights, being constitutional rights, follow a similar trend.[97]

In its landmark ruling, the court recognised that cost orders could have a 'chilling effect' on parties seeking to assert constitutional rights. It held that, as

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93 Hatten C et al, 'The environment and the law: Does our legal system deliver access to justice? A review' 6 *Environmental Law Review*, 2004, 240-272; Brooke LJ, 'Environmental justice: The cost barrier' *David Hall Memorial Lecture*, 18 *Journal of Environmental Law*, 2006, 341-400; Humby T, 'The Biowatch case: Major advance in South African law of costs and access to environmental justice: *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* (2009) Constitutional Court of South Africa' (2009) ZACC.

94 Chakrabarti S et al, *Whose Cost the Public Interest*, 20 April 2022 <https://adminlaw.org.uk/wp-content/uploads/Litigating-the-Public-Interest.pdf>.

95 It is not unusual for a corporation "affording" to pollute the environment to hire a battery of lawyers to defend it. Thus, the cost ordered against a claimant would impose untold suffering to a litigant. See Humby T, *The Biowatch Case: Major Advance in South African Law of Costs and Access to Environmental Justice: Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others (2009*) Constitutional Court of South Africa, (2009) ZACC.

96 Harun Mwau and Others v. Attorney General and Other Nairobi (2012) eKLR

97 Odote C, *Public Interest Litigation and Climate Change–An Example from Kenya: In Climate Change: International Law and Global Governance*, Nomos Verlagsgesellschaft mbH & Co. KG, 2013, 805-830.

a general principle, unless a case is *'frivolous, vexatious, or manifestly inappropriate'*, a party that succeeds in constitutional litigation against the state should be awarded costs. Conversely, if unsuccessful, each party should bear its costs. This principle has since been applied in environmental rights petitions, reinforcing access to justice for environmental litigants.

While significant progress has been made on the issue of costs, challenges persist. NGOs that challenge government decisions are often targeted through the closure of their accounts, severely hindering their ability to operate. This financial suppression impacts their capacity to meet essential expenses, including the preparation and filing of cases in court.[98] This challenge is particularly pronounced in environmental justice cases, which often involve multiple stakeholders, diverse perspectives, and extensive data collection. Gathering and organising evidence requires significant resources, especially when working with communities that may lack proper record-keeping systems or the means to travel. As a result, facilitating their participation becomes essential to ensuring comprehensive and effective litigation. Would it be plausible to provide state-funded legal aid to environmental justice? Should filing petitions in court be free or greatly reduced? Should fines and money collected from environmental justice causes be used to fund constitutional petitions? Should independent human rights commissions like the Kenya National Commission on Human Rights take up more environmental injustice cases? Should they assist in data and evidence collection for free, given that they are state-funded to reduce costs? These looming questions remain unanswered.

J. Remedial Discretion

Important decisions in environmental injustice cases invariably involve processes such as permitting, public participation, and mitigation. As a result, it is uncommon for procedural environmental rights petitions to challenge state actions through judicial review. Traditionally, judicial review has relied on common law discretionary remedies such as certiorari, mandamus, and prohibition. However, these remedies grant courts a restricted discretionary scope, which may not always align with the needs of environmental justice—such as ordering a clean-up exercise or other remedial actions essential for ecological restoration.

In Kenya, the Constitution grants the ELC broad discretion to tailor remedies that appropriately address the specific circumstances of environmental

[98] — <https://allafrica.com/stories/201504161614.html> accessed on 20th February 2025.

rights claims.[99] Discussing the wide powers of the court in fundamental freedom and rights claims, the Kenyan Supreme Court held in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others Initiative for Strategic Litigation in Africa (Amicus Curiae)*[100] that courts are free to fashion appropriate reliefs, even in interim nature in appropriate cases to redress and protect a constitutional right. A court, the Supreme Court justices held, is free to issue injunctions, mandamus, prohibitions, structural interdicts, supervisory orders or 'any other order', provided such orders are specific, appropriate, clear, and effective remedies. Courtesy of these powers, ELCs have issued clean-up orders, closure of dumpsites around Nairobi city Eastlands occupied by poor and homeless people suffering from the cumulative effect of landfills, generous compensations, contempt of court remedies, fines, attachment orders, joinder of parties, construction of washrooms along major highways for road users, relocation of dumpsites, renovation of parks, non-acquisition of indigenous lands for construction, among others.

Courts in South Africa have demonstrated their authority by issuing 'unconventional remedies' in fundamental rights cases, including environmental injustice claims. Section 38 of the South African Constitution empowers courts to grant 'appropriate relief' in the enforcement of fundamental rights and freedoms. In a recent landmark case, *Trustees of the Groundwork Trust v Acting Director-General: Department of Water and Sanitation and Another*,[101] the court, in upholding its powers to issue appropriate remedies, stated that the phrase 'any order' is 'as wide as it sounds', serving as an injunction to do 'practical justice, as best and as humbly as the circumstances demand'. It also quoted *Fose vs Minister of Safety and Security*, where another South African court held that 'Particularly in a country where so few have the means to enforce their rights through the courts…the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be, to achieve this goal'.[102] Noting that the state had repeatedly failed to initiate and prepare regulations on air pollution in the Highveld Plan, the court proceeded to issue a deadline within which the said regulations should be prepared and published.

99 Article 23, *Constitution of Kenya* (2010).

100 *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (2021) eKLR.

101 *Trustees of the Groundwork Trust v Acting Director - General: Department of Water and Sanitation and Another* (2020) ZAWT.

102 *Fose v. Minister of Safety and Security* (1997) South Africa.

As was noted, environmental justice claims in Kenya and South Africa present themselves in many ways beyond race and income.[103] To address the myriad circumstances, it is important that courts have the flexibility to fashion remedies in environmental rights claims appropriately in order to serve justice. Merely requiring the state to formulate regulations is insufficient; imposing a clear timeline creates accountability and compels the state to implement corrective measures promptly.

The implementation of court orders relating to social and economic rights, including environmental rights, in South Africa and Kenya has not been a smooth ride.[104] While lack of constitutionalism and rule of law may contribute to this, courts in fashioning the remedy might also be facilitating the undesirable pattern thereby greatly undermining their legitimacy. Of course, a litigant seeks the most generous remedy, but courts should be cautious of the likelihood of implantability in fashioning the remedy. Incremental generosity may be desirable.

K. Liberal Interpretative Powers

In constitutional democracies, constitutions are supreme, whether they explicitly provide so or not.[105] Their supremacy is attributed to their existence stemming from a higher-making power, the people, in whom the sovereign power is reposed; a power higher than the constitutions or any of their creatures.[106] A constitutional interpretation requires going beyond a statutory interpretation.[107] It must be broadly, purposefully, and liberally interpreted, in an unrestrictive manner for it carries the values and aspirations of the people. In addition to this broad view of constitutions, it is unusual for constitutions or judicial officers in their constitutional interpretation to provide an additional layer of protection of fundamental rights and freedoms. To counter majoritarian rule, fundamental rights and freedoms are jealously protected to guarantee the

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[103] An analysis of the petitioners demonstrates that the petitioners vary from professional organisations, community-based organisations, children, women among others. Each of these groups present different perspective

[104] Arwa, J.O, Litigating socio-economic rights in domestic courts: The Kenyan experience. *Law, Democracy & Development*, *17*(si-1) 2013, 419-443.

[105] William B, *State Constitutions and the Protection of Individual Rights* 90 Harv. L. Rev, 1976, 489-540. Heun W, *Supremacy of the Constitution, Separation of Powers, and Judicial Review in Nineteenth Century German Constitutionalism* 2)16) Ratio Juris, 2003, 195-205. Moseneke D, *Striking a Balance Between the Will of the People and the Supremacy of the Constitution* 129(1) S.A.J, 2012, 9-22.

[106] Njogu v. Attorney-General (2000) HCK. Alexander L, *What are Constitutions, and what should (and can) they do?"* 1)28) Social Philosophy and Policy, 2011, 1-24.

[107] Timothy M Njoya & 6 others v Attorney General & 3 others [2004] KEHC 2645 (KLR).

enjoyment of those rights to the greatest extent, consistent with the nature of the right or fundamental freedom.[108] 'Restrictions on rights are strictly construed'.[109] Therefore, the importance of the inclusion of environmental rights as part of constitutional rights cannot be understated.

The liberal interpretative approach to environmental rights is evident when contrasting Maathai v. Kenya Times Media Trust Limited with post-2010 cases. In the Wangari Maathai case, the court took a narrow and restrictive stance on public participation in environmental conservation, stating that '...of course, many buildings are being put up in Nairobi without many people being consulted. Professor Maathai apparently thinks this is a special case. Her personal views are immaterial.' Such a dismissive approach to public participation has no place in Kenya's post-2010 constitutional framework, which recognises public engagement as a fundamental pillar of environmental governance and decision-making.

For example, courts have upheld **public participation** as a **procedural environmental justice right**, halting major projects with potential environmental harm. In *Mui Coal Basin Local Community & 15 Others v. Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR*, the court stopped the construction of a coal power plant in a marginalised rural community in Kenya. Similarly, in *Save Lamu & 5 Others v. National Environmental Management Authority (NEMA) & Another [2019] eKLR*, the court intervened in a case involving poor communities with communal land tenure systems, blocking the planned renovation of Uhuru Park. Additionally, in *Mohamed Ali Baadi & Others v. Attorney General & 11 Others [2018] eKLR*, the court halted the construction of a regional port in Lamu following claims of **threatened environmental damage**, including the destruction of mangrove forests, industrial effluent discharge, and adverse impacts on fish species and marine life. These cases illustrate the courts' growing commitment to enforcing procedural environmental rights and safeguarding ecological integrity.

The interpretation of the South African Constitution is no different. In deciding a landmark decision delivered in 2020, *Trustees of Groundwork Trust*,[110] claiming the infringement of the right to a safe and healthy environment through air pollution in Highveld Priority Area, the court interpreted Section 24(a) and

[108] Magliocca G, *The Heart of The Constitution: How the Bill of Rights Became the Bill of Rights*, Oxford University eds, 1ed, 2018. *Baitsokoli & Anor v. Maseru City Council and Others* (2005) High Court of Lesotho.

[109] Ndyanabo v. Attorney-General (2001), East African Court of Justice. Article 20 and 24, *Constitution of Kenya* (2010).

[110] *Trustees of the Groundwork Trust v Acting Director - General: Department of Water and Sanitation and Another* (2020) ZAWT.

24(b) of the South African Constitution quite liberally. The most obvious liberal interpretation is the extent to which the court was willing to rationalise why section 24(a) on the right to a safe and healthy environment and section 24(b) on the realisation of this right 'through reasonable legislative and other measures' were distinct rights. It was held that section 24(b) was 'a right to a safe environment here and now' and that section 24(a) 'was added with the clear purpose of enhancing the scope and content of the environmental rights, beyond merely protecting human beings against harmful conditions'. As such, section 24(b) was 'an addition to, not deriving from, the unqualified section 24(a) right'. This interpretation was the most appropriate in addressing the frequent delays in addressing the widespread environmental justice claims in South Africa, and in the instant case, uncontrolled air pollution in the Highveld Priority Area.

Flowing from above, it is quite clear that environmental rights have boosted the environmental justice movement in accessing courts and seeking remedies. Despite the liberal interpretative mandate, courts are yet to breathe life as to the scope, content, and nature of the right to an environment. The next section explores this laxity.

VI. The Undelivered Promise

A. Normative Scope and Content of Environmental Rights

As was noted in the formative sections of this paper, national constitutions adopt the right to a clean environment with a modifier. The common modifiers range from 'healthy', 'clean and healthy', 'sound', 'sustainable', 'favourable', 'conducive', and 'a balanced and healthful ecology'. However, Courts have yet to comprehensively articulate a coherent normative meaning, nature, and scope of this right.[111] While courts in Kenya and South Africa have delivered numerous decisions on environmental rights, they primarily rely on the specific textual phrasing of the right in each case.

The challenge is not unique to Kenya and South Africa. Philippines' Supreme Court as far back as 1993, stated in *Minors Oposa vs Factoran* that:

[111] To arrive at this conclusion, the author went through the decisions of the superior courts of Kenya as contained in their decisions available at the official Kenyan Judiciary website http://kenylaw.org . Under the National Law Reporting Council Act, all decisions of the superior courts must be published on this website. In the case of South Africa, Du A. Plessis, *South Africa's Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty?* 27(2) S.A.J.H.R, 2011, 279-307.

> 'it is in fact very difficult to fashion language more comprehensive in scope and generalized in character than a right to 'a balanced and healthful ecology'. The list of particular claims which can be subsumed under this rubric appears to be entirely open-ended'.

The definition of the term environment is also not obvious and is dependent on the statutory or constitutional definition of a country.[112] This definitional challenge represents an especially significant obstacle to the effective utilisation of environmental rights in combating climate change and achieving climate justice at the international level due to the differing standards employed by various nations. The normative content of environmental rights also depends on the priority that each country places on environmental rights and on their commitment to ventilating the rights.

It is relatively easy for a court to arrive at a determination that the right to a clean and healthy environment has been infringed where the state has failed to carry out an obvious obligation such as enacting a law or regulation. But how and what yardstick does a court use to determine whether the construction of a road threatens the right to the environment and results in environmental injustice? Even if a statute were to prescribe the air quality regulations, would a court be able to review the sufficiency of such a statute? Does it use health as a yardstick? Human dignity? What is the acceptable level of pollution and is it acceptable for health purposes for human dignity or right to life? Or for spiritual or cultural reasons? The attractiveness of terming this as a 'policy decision' has probably encouraged courts to shy away from defining it.

The absence of a **normative determination** of the content of the right to a healthy environment—or the existence of **inconsistent standards** for defining its scope—significantly limits its potential. In the Kenyan context, the case of *Elizabeth Kurer and Detlef Heir (Suing on their behalf and on behalf of aggrieved residents of Watamu within Kilifi County) v. County Government of Kilifi & 4 Others* illustrates this challenge. The petitioners, residents of an impoverished neighbourhood experiencing a surge in commercial activity, complained that excessive noise from a newly established restaurant was harming their health and comfort. Despite multiple residents corroborating reports of discomfort and hearing issues, the court dismissed the application, reasoning that the **scientific noise measurements presented were not officially approved by the relevant state agency** to establish harm to human health.

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[112] Ole P, 'Environmental Law and Constitutional and Public Law' in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, E Lees eds., 1ed, 2019.

While the court was correct in requiring standardised scientific evidence, its insistence on **human health as the sole determinant** of a violation **narrowed the scope** of the right to a **'clean and healthy'** environment. The widespread discomfort experienced by residents should have been sufficient to warrant injunctive relief, or at the very least, compel the measurement of noise levels using the approved methodology.

The interpretative approach adopted in the *Kurer* case appears to contradict another ELC decision in *Kiluwa Limited & another v Commissioner of Lands & 3 others*.[113] In this case, the court held that the right to a clean and healthy environment is a prerequisite to a 'life worth living'. The court in this case appears to have interpreted the right more broadly to mean a right to enjoyment of life. However, the court did not state more than this. Would 'worth living' mean respect for the environment for 'spiritual or cultural reasons'? If health was to be used as the yardstick this would not cover these aspects, yet it is environmentally unjust to evict the *Ogiek* people, the Indigenous forest dwellers from Mau Forest, denying them a source of livelihood, cultural and spiritual rights, in the name of protecting the rivers flowing from the forest. A broad interpretation of this right would necessitate a balancing approach, ensuring that environmental protection is not assessed solely through economic or health-based lenses. This is particularly crucial in countries with indigenous communities, where the environment is not just a source of livelihood but also holds deep spiritual and cultural significance.

In yet another decision, *Adrian Kamotho Njenga v Council of Governors & 3 others,*[114] concerning a petition to the state authorities to construct washrooms along major highways, the same ELC held that the right clean and healthy environment protects the physical and mental state of an individual. This decision appears to adopt an even wider scope of this right but still within the human health approach. However, given these three decisions were issued by the same court but by different judicial officers, a coherent normative content of this right is required. Adopting a common broad yardstick might be useful.

In South Africa, Section 24(a) of the South African Constitution provides that everyone has the right to an environment that is not harmful to their health or well-being. Similar to the Kenyan Constitution, every South African judicial decision involving environmental protection quotes Section 24(a), but shies away from decisively presenting the normative content of this right.[115] In *HTF*

[113] *Kiluwa Limited & another v Commissioner of Lands & 3 others [2015] KEHC 2003 (KLR).*

[114] *Adrian Kamotho Njenga v Council of Governors & 3 others [2020] eKLR.*

[115] Du A Plessis, 'South Africa's constitutional environmental right (generously) interpreted: What is in it for poverty?' 27 *South African Journal on Human Rights*, 2011, 279-293.

Developers (Pty) Limited vs Minister of Environment Affairs and Tourism and Others,[116] the court had an opportunity to clarify the normative requirement of Section 24(a), but refrained from indulging in the same, remarking that the term 'well-being' is 'manifestly incapable of precise definition…'. Yet, it admitted that a definition is 'critically important in that it defines for the environmental authorities the constitutional objectives of their risks'. However, the more recent case of *Trustees of the Groundwork Trust v Acting Director - General: Department of Water and Sanitation and Another*,[117] acknowledged (without further elaboration) that the right to a healthy environment in South Africa has '…two separate descriptive modifiers namely "health" or "well-being" and the right goes beyond health and shows that the drafters of the Constitution were not only concerned with disease outcomes by seeking to protect a person's "well-being"'. Despite this acknowledgement, the court did not provide a substantive interpretation of the normative content of the 'well-being' aspect, leaving its precise legal implications undefined.

Despite the courts' hesitation in interpreting the normative content of the substantive right to environment, notable progress has been made. In *Earth Life Africa Johannesburg* vs *Minister of Environmental Affairs*,[118] the petitioners sought a review of an authorisation for a coal power plant on the grounds that climate change was not considered. The High Court agreed with the petitioner that despite the lack of an express statutory or constitutional provision requiring consideration of climate change, Section 24(a) of the South African Constitution contains a sustainable development consideration, and therefore, the obligation to mitigate the effects of climate change is self-arising. Though a procedural right litigation, it is an important judgment in connecting sustainable development, climate change, and future generations in the right to the environment. However, the court did not provide a normative meaning of the substantive right to environment. This paper argues, in the next section, that adopting a 'founding value or right' approach might assist the courts in finally providing a yardstick to assess environmental issues.

The implications of adopting an environmental rights interpretative approach that lacks comprehensiveness in addressing the environmental concerns of environmental justice seekers are significant. The normative content of a right influences the existence, extent, and nature of violations. For instance, a perspective on the right to a healthy environment that emphasises human health

[116] *HTF Developers (Pty) Limited* vs *Minister of Environment Affairs and Tourism and Others* (2006) South Africa.

[117] *Trustees of the Groundwork Trust v Acting Director - General: Department of Water and Sanitation and Another* (WT06/11/2015) [2020] ZAWT 1 (21 July 2020).

[118] *Earth life Africa Johannesburg* vs *Minister of Environmental Affairs* (2017) ZAGPPHC.

may only recognise an infringement in terms of harm to health. This approach evidently neglects other detrimental effects of infringements, such as reductions in economic productivity, the potential for pollution to cause school-aged children to miss classes, relocation expenses, declining soil productivity, material damage to clothing and housing, and the mortality of animals—critical aspects to human sustenance. For example, if pollution is considered to comply with established air or water quality standards for human consumption, an infringement may not be acknowledged even if it adversely impacts animals and crops that are intrinsically connected to human life. Furthermore, the spiritual and cultural well-being associated with indigenous communities may not be adequately considered.

A second implication of a limited approach is that on finding a violation, remedies, especially compensation, are calculated to the extent of the violation found. In the example given above, damages would be limited to the proven effects on human health, and most generously, to the loss of life caused by environmental pollution. This limitation is evident in what is regarded as one of Kenya's most laudable environmental justice cases decided by the ELC: KM & 9 Others v. Attorney General & 7 Others. The petitioners were residents of Owino Uhuru Village, an informal settlement in Kenya's coastal county of Mombasa. They alleged that the respondents violated their right to a clean and healthy environment by setting up a lead acid batteries recycling factory that ran for decades near the neighbourhood, claiming that it produced toxic waste that seeped into the slum and caused health complications and loss of lives. Evidence was produced on the prevalence of diseases associated with lead among the slum dwellers and the consequent loss of lives. The court, in finding the violation of the right to a clean and healthy environment proceeded to award approximately twelve million US Dollars for personal injury and health and an additional six million US Dollars for soil cleanup. However, in awarding the damages, the court made no mention of the food productivity effect, house collusion, death or the effect on domestic animals that are a source of livelihood for the people, as well as the impact on the trees that attract tourists to the Kenyan coast.

The third implication, which is related to the preceding one, is that a limited approach to the right to health affects the scope and formulation of the remedies. If a human health approach is taken, remedies will reflect an infringement addressing human health, for instance, hospital and medical checkups, stoppage of pollution, and damages. Remedies related to the social and economic aspects occasioned by the 'loss of productivity', 'collusion of iron sheets and laundry' and 'loss of investments' in an area that could probably extend to other areas not considered. Such remedies would include the construction of schools and roads,

the provision of housing, and the provision of water to such households. Such, as noted in the manifestation of environmental justice in Kenya and South Africa are direct impacts of environmental exploitation.

B. Towards a 'Founding Value or Right'

As noted in this paper, constitutions reflect the cultural, historical, social, and political contexts of a state. The judicial interpretation of a right to a certain quality or standard of environment will obviously reflect the state context. However, as has been noted by the UN Special Rapporteur on Human Rights and the Environment, environmental rights serve as a vital enabler for the enjoyment of life and other fundamental rights. How would the right to a clean environment illuminate and be interpreted to encompass the fulfilment of an enjoyable right for all, notwithstanding their class, ethnicity, or economic status? Which approach would give the broadest protection of the intrinsic value to humanity? How does a coherent understanding of the right to the environment alleviate differentiated interpretations and applications highlighted above?

In this paper, a founding value or right is taken to mean the fundamental value or purpose that is founded on other human rights and whose violations awaken 'social consciousness'. While it has been argued in human rights discourses that human rights are interdependent,[119] it is submitted, that some rights touch on the very existence of a human being. It may be explicit or implicit and only discoverable from a purposive reading of a constitutional text, its history, and architecture. It may also be identified where a constitution declares a right inviolable or non-derogable. Fundamentally, this right serves as the foundation for all other rights, anchoring human dignity and worth. It is an intrinsic entitlement carried by every individual—whether imprisoned, free, or unwell.

The determination of a foundational value or right within a state is contingent upon the state. The idea of this paper is aimed at encapsulating a right or value that is fundamental and universal, without regard to an individual's race, ethnicity, class, or social status. For illustrative purposes and the advantages that may ensue, this paper utilises the right to life as a focal point. Nevertheless, a comparable argument could equally be presented concerning the right to human dignity, well-being, and other fundamental rights.

[119] Nickel J, *Rethinking indivisibility: Towards a theory of supporting relations between human rights*, 30 Hum. Rts. Q. 984-1001 (2008).

The right to life is internationally recognised as the 'necessary condition of the enjoyment of all other human rights',[120] and the 'supreme right of the human being'.[121] It is also an anchor to the indivisibility or interrelatedness of human rights. It encompasses a substantive principle (to have life respected) and a procedural principle (not to be deprived of life arbitrarily). The substantive principle necessitates the provision of adequate means for the sustenance of life.[122] Under this modern understanding of life beyond liberalism, states and every person have an obligation to take positive actions to guarantee the right to life.[123] The right to life extends beyond mere existence to encompass spiritual, cultural, economic, and political dimensions, as well as the pursuit of happiness. Fully realising this right requires active participation in society, equality in treatment, access to physical and mental well-being, and economic support, ensuring that individuals can live with dignity and fulfilment.

Thus, unlike the health-based definition of environmental rights, a standard approach would consider the economic, social, and political impacts, as well as the effect on human existence and the Earth's ability to sustain life. Under this approach, factors such as air quality, therefore, would be assessed not only by human health standards but also by their impact on all elements that sustain human well-being, including crops, animals, trees, and the Earth itself—all of which are essential to the pursuit of human life. Given the widely recognised duty of the present generation to future generations, a 'right to life' approach to environmental rights would necessitate safeguarding the world for unborn children and preserving all means essential for their future existence and well-being.

The objective of this paper is not to identify the foundational values or rights pertinent to a nation or the world at large; rather, it aims to illustrate that universally recognised rights, such as the right to life, dignity, and happiness, represent exemplars of the broadest protection. One might venture to argue

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120 United Nations University, *The Fundamental Right to Life at the Basis of the Ratio Legis of International Human Rights Law and Environmental Law,* 21st April 2022 <https://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee0p.htm>.

121 United Nations University, *The Fundamental Right to Life at the Basis of the Ratio Legis of International Human Rights Law and Environmental Law,* 21st April 2022 <https://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee0p.htm>.

122 United Nations University, *The Fundamental Right to Life at the Basis of the Ratio Legis of International Human Rights Law and Environmental Law,* 21st April 2022 <https://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee0p.htm>.

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that identifying a founding value or right is impossible. However, such a claim would be both lazy and unfounded, as judiciaries, in exercising their interpretative mandate, have often identified and reinforced foundational values or rights through jurisprudence. The suggested approach in this paper is also not radical, as it utilises the existing and accepted regime to breathe life and give substantive meaning, to the right to the environment. When used as a benchmark, human dignity, for instance, would broaden the scope of the right and allow a comprehensive interpretation beyond health, for instance, enabling a more holistic and inclusive approach to remedies that considers all facets of life.

This paper is cautious of suggesting a simple, straightforward approach because even within the international community, there is no agreement on the subject. For instance, in finding an operational meaning for human dignity, countries are free, to a large extent, to determine its application. Neither an international approach to be adopted by all countries is suggested, nor a regional approach, unless, of course, the right is envisioned in a regional treaty requiring mandatory compliance with decisions of the regional court, such as the European Union. The approach that this paper suggests, offers the broadest interpretative protection to the right to the environment—each according to the country and context. Nonetheless, with the recognition of this right under the UN, its normative content should be urgently developed to ensure its full and uniform enjoyment. Establishing a founding value or right could facilitate a greater alignment of obligations, policies, and practices in upholding the right to a clean and healthy environment.

VII. Conclusion

The constitutionalisation of the rights to the environment is now widespread across nations. As has been demonstrated, the environmental justice movement has made reaps from the constitutionalisation of environmental rights. However, its full potential is yet to be realised and more litigation, particularly those on environmental rights claims strategically aimed at inviting a constitutional interpretation of substantive normative content of the right to environment, should be actively pursued. This paper argues that a founding value or right would be a prolific interpretative approach offering the widest normative scope of this right. This way, environmental rights would offer a more nuanced tool to counter environmental injustice.

An intriguing question that emerged from this research is the role of independent constitutional human rights institutions in Kenya and South

Africa concerning environmental rights. Kenya has the Kenya National Human Rights Commission, while South Africa has the South African Human Rights Commission. Notably, these institutions, despite being central to human rights advocacy, appear to focus primarily on civil, political, and socio-economic rights, with limited attention to environmental rights. This gap warrants further research to explore their potential role in advancing environmental justice.