THE EMERGENCE OF A FUNDAMENTAL RIGHT TO A DECENT ENVIRONMENT:
A PORTRAIT FOR KENYA

BY

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FEBRUARY 2002, NAIROBI
DECLARATION

I, KENNEDY NYABUTI OGETO, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other university.

SIGNED: KENNEDY NYABUTI OGETO

This thesis is submitted for examination with our approval as University Supervisors.

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SIGNED: DR. F.D.P. SITUMA
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CHAPTER ONE

THE ENVIRONMENT, ENVIRONMENTAL RIGHTS AND HUMAN RIGHTS: A

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- AM. J. COMP. L.
- AM J. INT’L. L.
- AM U. L. REV.
- AM. PHIL. Q.
- AIR.
- AFR. SOC’Y INT’L. & COMP. L.
- COLUM HUM. RTS. L. REV.
- DUKE J. COMP. & INT’L. L.
- DEV. HUM. RTS. & RULE L.
- ENVTL. L.
- ENVTL POL’Y. & L.
- FAO.
- FORDHAM INT’L. L. J.
- GEO 2000
- GEO. INT’L. ENVTL. L. REV.
- HARV. ENVTL. L. REV.
- HARV. INT’L. L.J.
- HUM. RTS. Q
- H.C.
- HCCC
- I.L.M.
- ICESCR.

American Journal of Comparative Law
American Journal of International Law.
American University Law Review
American Philosophical Quarterly.
All India Reports.
African Society of International & Comparative Law.
Columbia Human Rights Law Review.
Duke Journal of Comparative & International Law.
Development, Human Rights & Rule of Law.
Environmental Law.
Environmental Policy & Law.
Food & Agriculture Organization.
Fordham International Law Journal.
Georgetown International Environmental Law Review.
Harvard Environmental Law Review.
Human Rights Quarterly.
High Court.
High Court Civil Case.
International Legal Materials.
International Covenant on Economic Social And Cultural Rights.
• ICCPR.
• INT’L. J. LEGAL INFO.
• J. INT’L. AFF.
• INT’L. J. ESTAURINE & COASTAL L.
• J.E. AFR. RES. & DEV.
• K.L.R.
• KENGO
• MISC. APPN.
• MC GILL U.L. J.
• MICH. J. INT’L. L.
• NAT. RESOURCES J.
• NORDIC J. INT’L. L.
• NETH. INT’L. L. REV.
• N.Y.L. SCH. L. REV.
• O.A.U.
• O.A.S.
• OECD
• OSSREA

- REV. EUR. COM. & INT’L. ENVTL. L.
- RTS.
- S. AFR. J. ENVTL. L. & POL’Y
- STAN. J. INT’L. L.

International Covenant on Civil And Political Rights.
International Journal of Legal Information.
Journal Of International Affairs.
International Journal of Estuarine & Coastal Law.
Kenya Law Reports.
Kenya Energy And Environment Organisation.
Miscellaneous Application.
Michigan Journal of International Law.
Natural Resources Journal.
Nordic Journal of International Law.
Netherlands International Law Review.
Organization of African Unity.
Organization of American States.
Organization for Economic Co-operation And Development.
Organisation for Social Science Research in Eastern & Southern Africa.
Review of European Community & International Environmental Law.
Rights.
Stanford Journal of International Law.
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• Raila Odinga vs. Rep, High Court of Kenya, Miscellaneous Application No. 540 of 1988 (unreported).

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• Republic (Ex parte Nixon Sifuna vs. Hon. Francis Nyenze, Commissioner for Lands & National environment Council, High Court of Kenya at Eldoret, Miscellaneous Civil Application No. 38 of 2001 (unreported).

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- Berne Convention on the Conservation of European Wildlife and Natural Habitats; (Berne, 1979); E.T.S. 104.

• Convention Concerning Indigenous and Tribal Peoples in Independent Countries;
  General Conference of International Labour Organisation, Convention No. 169,
  (1989); 28 ILM 1384 (1989).

• Convention Concerning the Protection of Workers against Occupational Hazards in
  the Working Environment due to Air Pollution, Noise and Vibration, Geneva, June 20

• Convention for Co-operation in the Protection and Development of the Marine and
  Coastal Environment of the West and Central Africa Region, Mar. 23, (1981); UN

• Convention for the Protection of Birds Useful to Agriculture, Paris, Mar. 19; 30
  Martens (2d) 686; 10, 124. (1902).

• Convention for the Protection of the Mediterranean Sea, Feb. 16, (1976); UN Doc.

• Convention for the Protection of the Natural Resources and Environment of the South

• Convention for the Protection, Management and Development of the Marine and
  Coastal Environment of the Eastern Region, Nairobi June 21, 1985; 20 ILM (1985);
  UN Doc. UNEP/IG.22/7.

• Convention on Biological Diversity (CBD), (Rio de Janeiro), June 5, (1992);
  UNEP/BIO.DIV. CONF.IL.2;II.


• Convention on the Prohibition of the Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), Dec. 10 (1976); 1108 U.N.T.S. 151.


• International Convention on Civil Liability for Oil Pollution, Dec. 1992; 600 UNTS 332.

• International Convention on the Establishment of an International Fund for
Compensation for Oil Pollution Damage, adopted in Brussels, Dec. 18 (1971); 1971
UNJY B 103.

• International Covenant on Civil and Political Rights (ICCPR), U.N. Doc. A/6316/


• Ministerial Declaration Calling for Reduction of Pollution of the Second International

• Montreal Protocol on substances that Deplete the Ozone Layer, Sept. 16, 1987; 26


• Resolution on the Historic Responsibility of States for the Preservation of Nature for


• UNEP Governing Council Nairobi Declaration, U.N. GAOR, 37th Sess. Supp. No. 25,


ABSTRACT

The focus of this study is environmental rights as fundamental human rights. It presents a critical examination of the emergence, juridical nature, scope and content of an emerging human right to a decent environment, and shows the significance and rationale for constitutionalization of the right in Kenya. The central theme of this thesis is that the right to a decent environment is steadily emerging as a fundamental human right, and that it merits inclusion into the recognised human rights catalogue at both international and national levels. Ultimately, this study seeks to demonstrate why and how constitutionalization of the right should be undertaken in Kenya.

Chapter One explores the links between the environment, environmental rights and human rights, and lays the foundation for this study. It examines the theoretical and conceptual background of the right to a decent environment and provides a definition of the right to a decent environment within a human rights context. The chapter also attempts to demonstrate the significance, foundation and the philosophical and/or juridical basis for the right to a decent environment.

Chapter Two is devoted to a survey of the process of emergence and evolution of the human right to a decent environment. It focuses on the salient features of the right, its juridical nature, scope, and content. The extent to which the right is emerging as a fundamental human right at both national and international levels is also examined, alongside the formulation of the right in legal instruments.
In Chapter Three, we discuss the various problems and/or obstacles facing the emergent right to a decent environment with particular emphasis being given to the enforcement process and two countervailing norms to the right to a decent environment, that is, the right to development and state sovereignty.

Chapter Four is a discussion on Kenya. It provides a test for Kenya, critically evaluating the place of environmental rights and the human right to a decent environment in the country’s legal and constitutional order. In this Chapter we also attempt to show why and how constitutionalization of the emergent right to a decent environment should be done in Kenya.

Chapter Five gives the conclusion for the study, and suggests the way forward by way of recommendations.
Over the last two decades, the protection of the environment has become a necessity so widely recognised that environmental concerns have pervaded most fields of international law, including the international law of human rights. This has largely been the result of the realisation that the earth is threatened by a mounting environmental crisis.¹

The 1980s, for instance, were marked by increasing awareness and concern about the global environment. The decade was witness to several unprecedented disasters such as the poison gas release in Bhopal, India, in 1984,² the meltdown of a nuclear reactor at Chernobyl in the former Soviet Union,³ and the release of toxic chemicals into the Rhine River at Basel, Switzerland, in 1986.⁴ These accidents were followed in 1991, by the deliberate acts of environmental warfare Iraq perpetrated during the Persian Gulf War, namely, the dumping of millions of crude oil into the Persian Gulf and the deliberate destruction of hundreds of oil wells, sending dark, billowing smoke and soot into the atmosphere.⁵

³ The Nuclear Disaster, NEW YORK TIMES, April 30, 1986, at 1 (reporting that in 1986, a nuclear reactor in Chernobyl sent a radioactive cloud over large parts of the former Soviet Union, Eastern Europe, and Scandinavia, contaminating soil and water with radioactive iodine and threatening vital food supplies).
In addition to the concern raised by these highly publicized disasters, there is growing concern over a wide range of problems confronting the planet that, for instance, go beyond the deliberate acts of warring belligerents or the accidental releases from industrial developments. The life-support system of the earth is under enormous strain, largely due to the combined activities of people around the globe. Carbon, nitrogen, sulphur, and lead emissions from the burning of fossil fuels have created widespread air pollution and acidification. Production of refrigerants and insulations has released chemicals into the atmosphere that react with and reduce the protective ozone layer, which shields the surface of the planet from the sun’s harmful ultraviolet rays. Use of fossil fuel has increased atmospheric levels of carbon dioxide which has led to concerns about global climate change due to the “greenhouse effect.” Deforestation, loss of biodiversity, desertification, exhaustion of natural resources, and disposal of toxic chemicals and wastes all present difficult problems to human beings around the world.

The consequences of this widening environmental crisis have a tremendous impact on many of the values that human beings expect and demand for lives of dignity. Claims for well-being, including the right to the enjoyment of a high standard of physical and

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7 Id. at 4-10; GEO 2000, supra, note 1, pp. 1-20.
9 Id. at 335.
10 Id. at 13-15, 25-33, 140-45.
11 Id. at 176.
mental health, the right to liberty and security of the person, and more importantly, the right to life, are compromised by air and water pollution, ozone depletion, and toxic waste generation. Claims to wealth, including the right to own property and the right to adequate standard of living, are also threatened by deforestation and over-exploitation of natural resources as a growing population of human beings strives to eke out a decent living on ever diminishing resources. Even claims for respect, including the right to individual dignity and worth, freedom from discrimination and the right to equality and protection of the laws, are abused.

The cycle of poverty caused by environmental degradation robs people of the ability to fend for themselves, making the attainment of a life of dignity and worth even more elusive. Traditional ways of life are rapidly disappearing as the ecosystems on which indigenous peoples depend are cleared for the profit of international corporations and other development related activities. In nations around the world, both developed and developing, fundamental human rights such as the freedoms of

13 See Universal Declaration of Human Rights, art.3, U.N. Doc. A/810, [stating that everyone has the right to liberty and the security of person], (hereinafter UDHR)
14 Id. arts. 17,25. (stating that everyone has the right to own property alone as well as in association with others and that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.)
15 See Brundtland Commission Report, supra note 6, at pp. 96-8.
16 See UDHR, supra, note 14, arts. 1,2,6.
17 See Kisenge, S. et al., Environmental Rights in Africa: Current Status and Challenges; Paper prepared for the Environmental, Human Rights Care and Gender Organisation (ENVIROCARE) 3-4 (Nov.5 Dar es salaam, Tanzania 1999) (discussing the cause and effect relationship between poverty and environmental degradation).
18 See Wamicha, N.W. et al., A Study of Environmental Impact Assessment of Titanium Mining in Kwale District, (Final Draft Report) paras 15-17, 22-9) (Faculty of Environmental Studies, Kenyatta University, Nairobi, 2000).
expression, assembly and association, freedom from arbitrary arrest and detention, are violated when governments resort to violent and repressive methods in order to silence opposition to harmful development policies and suppress environmental debate. For instance, in Nigeria's Ogoniland, the military dictatorship of the late Sani Abacha worked well with Royal/Dutch Shell Company and other oil concerns “to rape the land of resources, showing no genuine concern for the environment and creating an ever worsening mess for the native peoples who inhabit the affected land.”

Consequently, there followed intense mass protests by the Ogoni people, with demonstrations championed by Ken Saro Wiwa, a human rights activist who was later executed on account of his opposition to activities harmful to the environment in their land.

The global environmental crisis affects all countries alike. Air and water pollution, for instance, do not respect political or cultural boundaries, while global climate change will potentially affect living conditions around the world. Desertification caused by, for instance, unsustainable agricultural or developmental practices has serious impact on human life while deforestation and the destruction of many species of animals and plants deprive the world of potentially important medicines and chemicals. Even international peace and security may be compromised when people seek to gain control over diminishing resources. Conflicts in the Middle East over the struggle to

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21 See Brundtland Commision Report, *supra*, note 6, at pp. 34-5.
22 Id. at pp. 291-94.
control the production of oil symbolize the kind of crises diminishing resources may inspire.  

In response to the widening global environmental crisis, various actors throughout the world have mobilized themselves to address environmental concerns. At the international level, particularly in the last two decades, agreements addressing various environmental concerns have proliferated.  

International and regional intergovernmental organisations have also developed to address environmental protection concerns. Many individual states are increasingly active in the protection of the environment, both within their borders through domestic legislation and the creation of environmental protection agencies, and through bilateral or multilateral agreements with neighbouring states.  

Non-governmental organisations, as well as

23 Id. at 292.


25 E.g., at the international level, the United Nations Environment Programme (UNEP) is a prominent organization devoted to environmental issues. Others include the Food and Agriculture Organization (FAO), the World Health Organisation (WHO), the International Labour Organisation (ILO), the World Meteorological Organization (WMO), and the International Atomic Agency (IAEA). Regional intergovernmental organisations including the Council of Europe, the European Economic Community (EEC), the Organization of African Unity (OAU), and the Organisation of American States (OAS), all have environmental programmes.

26 See Wilson, P. et al., Emerging Trends in National Environmental Legislation in Developing Countries, in Lin Sun et. al. eds., UNEP'S NEW WAY FORWARD: ENVIRONMENTAL LAW & SUSTAINABLE DEVELOPMENT 191-215 (UNEP, Nairobi 1995.)
individuals, have also been actively involved in promoting environmental issues such as protection and conservation of species and ecosystems.  

The call for the recognition of environmental rights as human rights stands out among the demands for the protection of the environment. For instance, it has been suggested that the right to a healthy or decent environment is one of several third generation or solidarity rights that seem to have emerged under international human rights law during the last two decades. The first generation of human rights includes the civil and political rights that emerged at the time of the American and French revolutions. These rights are generally negative rights or freedoms from governmental intervention. The second generation rights include the social, economic and cultural rights that emerged during the socialist revolutions of the early twentieth century. These rights are positive rights in that they represent claims to government intervention on behalf of the individual.

The solidarity rights infuse a human dimension into areas traditionally lacking such concerns, e.g., environmental law and rights. They seem to evidence continued growth, expansion and evolution of the concept of human rights. In that context,

27 Prominent NGOs include Greenpeace International, Friends of the Earth, the Sierra Club, the Environmental Liaison Centre International, Action Aid International, and the Green Belt Movement.
29 See Marks, S.P., Emerging Human Rights: A New Generation for the 1980s? 33 Rutgers L. Rev. 436-44 (1981) (suggesting that third generation/solidarity rights include the rights to a healthy environment, development, peace, the common heritage of mankind, communication and humanitarian assistance).
30 Id. at pp. 437-38.
31 Id. at p. 438. For a detailed exposition of the origins and theories of human rights, see e.g., HENKIN, L., THE RIGHTS OF MAN TODAY 1-15 (Stevens & Sons, London, 1978).
certain areas of rights have been suggested as representing the emerging third generation rights, namely, environment, development, peace, the common heritage, communication and humanitarian assistance.\textsuperscript{32}

Against the foregoing background, this thesis focuses on the emergence of an environmental human right to a decent environment. The general and specific areas of this study are environmental rights and the emergence or evolution of a new fundamental human right to a decent environment. The recognition and enforcement of the proposed human right to a decent environment is presented in this work as one approach to addressing environmental problems, whether of global or of local character.

0.2 STATEMENT OF THE PROBLEM

When the natural environment is damaged and contaminated to the extent that it threatens life, health, food, shelter and minimum work standards, it also becomes a threat to established human rights. When people must struggle to obtain the basic necessities of life, civil, economic and social freedoms or other human rights may appear meaningless to them. Therefore, one sees that when the environment is damaged, people suffer. When the suffering implicates human rights violations, relevant norms and procedures that would alleviate or minimise the problems should apply. This in turn, begs the question of what the relevant norms and procedures are, 

and also, whether and how those norms and procedures would contribute to the protection of human rights and the environment. These are some of the issues which are addressed in this study.

We propose the recognition of a new human right to a decent, clean and ecologically balanced environment as a third generation human right. The term ‘generation’ distinguishes the various conceptual groups of human rights currently recognised in international law. The use of this term does not, however, imply a hierarchical division of human rights nor does it imply that succeeding generations gain primacy over earlier generations; rather it recognises that the human rights regime is essentially dynamic and that additional human rights may be proclaimed as changing human needs are recognised and addressed.  

It is argued that maintaining an effective human rights regime presents a challenge of balancing between the need to maintain the integrity and credibility of the human rights tradition, and the need to adopt a dynamic approach that fully reflects changing needs and perspectives and responds to the emergence of new threats to human dignity and well being.

We proceed from the premise that, undoubtedly, the decency of the global environment is deteriorating and that failure to address current environmental degradation threatens human health and human life. However, it is noted that the necessary and appropriate international and national legal responses remain unclear.

34 See UNESCO, Working Group of the Standing Committee of International Non-governmental Organisations; Symposium on the Study of New Human Rights: “[The Rights of Solidarity]; An
These problems generate a host of questions and public policy issues. For instance, a fundamental question is whether traditional human rights and emerging environmental rights are premised on fundamentally different social values so that efforts to implement both simultaneously would produce more conflict than improvement, or, whether human rights and environmental protection are complementary, each furthering the aims of the other.

Some theorists suggest that environmental issues belong within the human rights category because the goal of environmental protection is to enhance the quality of human life. Opponents argue, however, that human beings are merely one element of a complex, global ecosystem, which should be preserved for its own sake. Under this approach, human rights are subsumed under the primary objective of protecting nature as a whole.

A third view, which seems to best reflect current law and policy, sees human rights and environmental protection as each representing different, but overlapping, societal values. The two fields share a core of common objectives and interests although obviously not all human rights violations are necessarily linked to environmental degradation. Likewise, environmental issues cannot always be addressed effectively


within a human rights framework, and attempts to force all such issues into a human rights rubric may fundamentally distort the concept of human rights. This approach recognises not only the potential conflicts between environmental rights protection and other human rights, but also the contribution each field can make to achieving their common objectives.\(^{38}\)

In order to contribute to environmental protection using a human rights approach, this third view suggests several alternatives. First, environmental problems may be combated through the assertion of existing human rights, such as the right to life, personal security, health and food.\(^{39}\) In this regard, a decent, safe and healthy environment may be viewed either as a pre-condition to the exercise of existing rights or as inextricably intertwined with the enjoyment of these rights. Second, is an intermediate position, which proposes a set of environmental rights (rights of the environment as well as rights to the environment) based upon existing rights to information about the environment and involvement in the political decision making.\(^{40}\) Third, a specific “right to environment” could be formulated and added to the current catalogue of human rights.\(^{41}\)

These approaches raise an important question of whether human rights law can contribute to environmental protection or, conversely, whether environmental law and policies can serve human rights concerns. An analysis of these alternative approaches

\(^{38}\) Id. at p. 105.
\(^{39}\) Id. at pp. 110-15.
\(^{40}\) Id. at p. 104.
\(^{41}\) Id. at p. 106.
therefore becomes relevant. While each approach finds some support in international and national practice and has its adherents, no one approach has emerged as dominant or has even been fully articulated. Although clear trends remain difficult to identify in this new and rapidly evolving field, recent developments of a number of national and international texts and instruments which speak of a 'right to environment' suggest that the third approach now plays a leading role. We shall seek to adopt this approach as a theoretical framework for our study and argue that this approach should acknowledge the similarities and differences of environmental and human rights objectives to enhance convergence and harmony where conflict prevails. It will be suggested that although human rights and environmental rights and protection represent separate social values, the overlapping relationship between them can be resolved in a manner which would further both their objectives. In our view, a clearly and well defined human right to a decent environment, currently emerging in international and national law, can significantly contribute to this goal.

It is, therefore, pertinent to appreciate that in this context, there is growing awareness of the links between protection of individual human rights and protection of the environment. For instance, the Stockholm Declaration on the Human Environment of 1972 first pronounced the interrelationship between the enjoyment of human rights and the quality of the environment. Since then, the conceptions of this issue have taken many forms. One has been to add a 'right to environment' to the human rights

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catalogue. The Stockholm Declaration fell short of proclaiming such a right; it emphasized that the full enjoyment of human rights required the protection and improvement of the quality of the environment. Subsequent international human rights instruments have also referred to the environmental quality aspect of the enjoyment of human rights. For instance, the Convention on the Rights of the Child provides that states are to take appropriate measures "to combat disease and malnutrition... taking into consideration the dangers and risks of environmental pollution." It would therefore appear that the relationships established by the Stockholm Declaration between the environment, development, satisfactory living conditions, dignity, well being and individual rights, including the right to life, constitute recognition of the emergent right to a decent environment.

The African Charter on Human and Peoples' Rights states that "[A]ll peoples have the right to a general satisfactory environment favourable to their development." Among the conventional instruments, only the Additional Protocol to the American Convention on Human Rights, which relates to economic, social and cultural rights, adopted at San Salvador in 1988, contains a clause concerning the right to a healthy environment. Article 11 thereof provides that everyone shall have the right to live in a healthy environment and to have access to basic public services.

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43 Id. Principle 1.
47 Id. art. 11.
Additionally, many national constitutions include provisions related to environmental protection, formulated as a right to environment or as a duty of the state to guarantee the protection of the environment and environmental rights. For the most part, these provisions are intended to emphasize the importance of environmental protection and preservation as a social value. There is often no implementation mechanism.\textsuperscript{48} However, the Philippines' Supreme Court derived a fundamental human right to a balanced and healthful ecology and a cause of action from section 16, Article II of the 1987 Constitution of the Philippines which provides that the state shall protect and advance the right of the people to a balanced ecology.\textsuperscript{49}

In a nutshell, it is apparent that the international, regional and national instruments which mention the right to a decent environment strongly evidence the evolution of a right to live in a decent safe, clean, healthy and or ecologically sound environment. However, the status of this right to a decent environment in international law as well as in municipal laws has stirred much doctrinal debate. Various questions in this context remain unanswered, for instance, whether, such a right in fact exists, what constitutes the scope, content, character or nature of the right, and how the right to a decent environment can be enforced.


Furthermore, some authors have argued for an emerging right to environment, while others have underlined the vagueness of the concept of ‘environment’ even when modified by terms like ‘decent’, ‘healthy’, or ‘safe’. Others have questioned the concept of a ‘right to environment’ altogether.\(^{50}\) Although the vagueness of the terms ‘right to a decent’ and/or ‘right to a safe or healthy environment’ is not a serious obstacle to their interpretation and application, the texts that proclaim a right to environment are either non-binding instruments or do not provide for implementation mechanisms. For example, the Rio Declaration on Environment and Development\(^{51}\) echoes the persistence of the doctrinal controversy by merely proclaiming that human beings are entitled to a healthy and productive life in harmony with nature.\(^{52}\)

Nevertheless, it is argued that the proclamation of a right to environment in many instruments does demonstrate a general acceptance of the links between human rights and environmental protection, and that both are inextricably linked fundamental values that should be promoted. It follows that such proclamation is a pointer to not only the acceptability of the concept of a right to a decent environment, but also a profound acknowledgement of the nexus between environmental rights and human rights.

Acknowledgement of the links between the environment and human rights is being

\(^{50}\) See e.g. Shelton, \textit{supra}, note 37, at p. 103.
fostered by an awareness of the complex, serious and multidimensional global problems. It is herein argued that this acknowledgement of the links between the two fields reflects a new attitude which has the potential of going beyond the limited framework and narrow vision that previously circumscribed environmental problems. It is an attitude which tackles the issue from a universal angle, involving a global, economic, social and cultural approach to which it adds the human dimension, that is, the human right to a decent environment. In other words, environmental concerns the world over (which were initially sectoral and essentially envisaged within the traditional framework of inter-state relations) have finally attained a global dimension which has made it possible to shift from environmental law to the human right to a decent environment.

From the developments at international level, it becomes imperative to examine the position in Kenya as regards environmental rights. Whether environmental issues and concerns in the above context have crystallised into solid environmental rights and consequently a right to a decent environment, is a germane question for investigation in this thesis. This investigation is crucial to enable us identify developments, indicators and evidence, if any, of the emergence, recognition, nature and/or character of the human right to a decent environment in the Kenyan environmental and human rights law arena. Ultimately, we seek to determine the place of environmental rights in the constitutional and legal order in Kenya.
CHAPTER ONE

THE ENVIRONMENT, ENVIRONMENTAL RIGHTS AND HUMAN RIGHTS: A DEFINITIONAL AND CONCEPTUAL ANALYSIS

1.1 INTRODUCTION

One of the most significant developments in international environmental law in recent years has been the attempts to create links between the protection of the environment and human rights and the inclusion of an environmental dimension in the human rights concept. This has become necessary in view of the pervasive influence of both local and global environmental conditions upon the enjoyment and realization of human rights. In this context, there are crucial conceptual aspects which constitute the basis and foundation for environmental human rights as a distinct and justiciable category of fundamental rights.

This chapter examines this theoretical and conceptual background to the right to a decent environment and shows the extent to which protection of the environment is a universal concern which warrants consideration within a human rights context. It also explores links between environment, environmental rights and human rights to show how environmental law and human rights law have common and intertwined objectives, whose ultimate concern is the enhancement of better conditions of human life.
1.2 THE CONCEPT OF HUMAN RIGHTS

The concept of human rights presupposes the existence of other rights such as animal rights, which are not 'human'. It essentially begs the question; "what is a right?" The term 'right' is shrouded in ambiguity and has confounded both legal and political philosophers for many centuries. Various attempts by different authors have been made to define the term 'right', an indication of the diversity in meaning ascribed to the term.

For instance, at about 610A.D., a Spanish Jesuit, Francisco Suarez made an analysis of the term 'right' and concluded that the just and proper meaning of the term was a kind of moral power which every man has, either over his property or with respect to that which is due to him. W.N. Hohfeld thought that 'right' means a cluster of related ideas, but in its strict sense, was a correlative of duty. According to Hans Kelsen, the term 'right' has many meanings. In defining a 'right' he said:

[T]hus to have a right to behave in a certain manner may mean to be free to behave in that manner. To be legally free to behave in a certain manner may mean not to be under a legal obligation to behave in another manner. The term right, however, may have not a mere negative but a positive significance. The statement that 'I have a right to behave in a certain manner' may mean that others are obliged not to prevent me from behaving in this manner.

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2 Finnis, id., at p. 207.
5 Id.
What this shows is that the meaning of the term "right" is not clear, and that different meanings or definitions can be given to the term. However, in this thesis, the term "right" will be used to refer to either the interests, entitlement(s), or that which a person is entitled to have, to do, or to receive from others within the limits prescribed and protected by or permissible in law. We must note here that the conception of a right is of fundamental import particularly for the purpose of enhancing our definition of the terms "human rights", and subsequently, "environmental rights".

‘Rights’ are not made any clearer by calling them ‘human’. In fact, the term “human rights” is even more curious in that it appears to be a tautology. We are bound to pose the question; what distinguishes human rights accepted or recognised as such from other rights generally? Maurice Cranston has stated that human rights are those rights which naturally attach to man by virtue of being human, while according to H.L.A. Hart, human rights are only concerned with limitation or distribution of freedom with man having only one moral right: the right to be free. Louis Henkin has opined that when a person has a right, it means that he has “an entitlement or claim which is not dependent on the goodwill, permission, benevolence or charity of another person, which other persons are under an obligation to provide or at least not to interfere with the bearer’s exercise of it, and which if denied the bearer can protest.”

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Without belaboring the point, suffice it to state that there are many definitions of the term 'human rights' which, when closely examined, are more of descriptions as opposed to strict definitions. For our purposes, we consider human rights as those claims and entitlements that a human being has, as of right, against society (usually represented by government or state) and which inhere in the holder by virtue of being a human being, and override all other claims and rights that do not have the status of human rights.

The other issue which needs to be addressed at this point is the actual nature of human rights. The relevant question to ask is: what kind of claims are envisaged by the claims to human rights? Are they legal or moral claims?

Dowrick\textsuperscript{10} views human rights as being essentially moral claims because they were built upon the ethical and political doctrines of the eighteenth century. This is because the assertion of the rights of the citizen as constituting a limitation on governmental power traces its origins to the seventeenth and eighteenth centuries. He avers that "human rights should be defined as those claims made by men, for themselves or on behalf of other men, supported by some theory which concentrates on the humanity of man, on man as a human being, a member of human kind, which would in essence be an ethical theory."\textsuperscript{11} He proceeds to argue that human rights are political and ethical rights which have been transformed into legal rights as a result of being sanctioned by

\textsuperscript{10}DOWRICK, F. E., \textit{HUMAN RIGHTS: PROBLEMS PERSPECTIVES AND TEXTS} 12 (Kettering Northamptonshire, University of Durham 1979)

\textsuperscript{11}\textit{Id.}
international treaties or documents on human rights. Henkin, on his part, holds the opinion that human rights are of transcendental nature and are not mere aspirations, or moral assertions, but increasingly legal claims under some applicable law.

Accordingly, the transformation of moral rights to legal rights is effected by the inclusion of the moral rights in legal documents. A similar argument is advanced by A.P. Rubin. However, as is the case with virtually every facet of the concept of human rights, these propositions are not universally accepted. For instance, B.H. Weston points out that:

[S]ome of the most basic questions have yet to receive conclusive answers. Whether human rights are to be viewed as divine, moral or legal entitlements; whether they are to be validated by intuition, custom, social contract theory, principles of distributive justice, or as prerequisites for happiness; whether they are to be understood as irrevocable or partially irrevocable, whether they are matters to be broad or limited in number and content – these and kindred issues are matters of ongoing debate and likely to remain so as long as there exists contending approaches [sic] to public order and scarcities among resources.

Despite this lack of consensus, Weston has identified the following broadly accepted postulates, which assist in the task of defining human rights:

i. regardless of their ultimate origin or justification, they represent individual and group demands for the shaping and sharing of power, wealth, enlightenment and other important values in community process. They limit state power;

ii. human rights refer to a wide continuum of value claims ranging from the most justiciable to the most aspirational. They represent both the is, and the ought;

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12 HENKIN, supra, note 9, at p. 2.
13 Id.
iii. a human right is general or universal in character equally possessed by all human beings everywhere;
iv. most, but not all, are qualified by the limitation that the rights of any particular group or individuals are restricted as much as necessary to secure the comparative rights of others and aggregate common interests; and
v. human rights are commonly assumed to refer, in some vague sense, to “fundamental” as distinct from non-essential claims.¹⁶

It would then appear that the process of construction of human rights is analogous to the proverbial description of the elephant by blind men. Each man, based on his sense of feeling, offers a differing account. However, all the accounts paint a complete picture when put together. Granted, human rights issues are now of universal concern. This, however, does not mean that there is consensus on the philosophical and actual underpinnings of human rights. In our opinion, the construction and definition of human rights is in reality a dynamic and continuous process. This means that even if an agreement was reached creating a universal conception of human rights, doors must remain open for further inquiry.

With regard to the issue of identification, it is imperative to examine how human rights are identified and the criteria therefor. Publicists have set out different criteria for identification of human rights. A. Edel,¹⁷ for instance, has suggested that human rights must be rights of inherent nature signifying first, the fundamental values of the society in which they are intended to operate and that their normative values flow through controlling the relations between political society and its members. Second,

¹⁶ Id. at pp. 262-63.
that human rights have four characteristics, that is, generality, importance, endurance and inalienability. These qualities therefore represent the features for identification of human rights.

It will be noted that the above is not an exhaustive definition of human rights, but more of a description of their nature. Nonetheless, a number of defining characteristics emerge. First, human rights are claims and entitlements as of right. They are not claims to love, brotherhood or charity. They are claims and entitlements recognised by law. Second, the holder has these rights purely by virtue of being a human being, hence the designation or label “human rights.” Accordingly, they are not rights conferred by legislation, contract or some other lesser law. Laws merely guarantee their recognition and protection. They are inherent in the status of being human. Consequently, and thirdly, they are overriding. They supersede all other rights. They take precedence over dictates of efficiency, expediency or convenience. The orthodox formulation is that they are inalienable, inviolable and imprescriptive.

We hasten to state, however, that they are only presumptively inalienable, inviolable and imprescriptible. National constitutions and international human rights instruments do permit derogation from certain human rights in certain circumstances. There, however, has to be a very strong justification before they are derogated from.

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18 See, e.g., CONSTITUTION OF KENYA, s.85 (Revised edn. 1998). (a state may take measures to save the very existence of the nation by exercise of emergency powers which would normally and otherwise be illegal and in violation of human rights.)
An important aspect of human rights is that they are traditionally claimable against society as represented by government although they can also be enforced against both government and private persons such as individuals, groups of natural persons and corporations. Essentially, however, human rights constitute a set of rules in terms of which a government is held accountable to citizens.

It is against this background of the human rights concept that we proceed to examine the development of human rights theories and, ultimately, explore whether the emergent right to a decent environment fits into the definition of human rights to qualify for recognition and protection as a human right.

1.3 THE DEVELOPMENT AND THEORIES OF HUMAN RIGHTS

In the historical development of human rights and the advancement of human rights theories, there are certain key developments that are useful in explaining some important aspects of international human rights theories as they relate to the concept of environmental rights. For instance, a study of the experiences of the seventeenth and eighteenth century revolutions together with the liberal philosophies of the era reveals a number of recurring themes and concepts.  

First in these themes is that certain rights belong to individuals because they are human beings, and not because they are subjects of a state’s law. These rights are by

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19 E.g., the Glorious Revolution of 1688-1689 in Britain, the American Revolution 1776, and the French Revolution of 1789.
nature inherent, inalienable and universal. The rights to life, liberty and security of the
person are paramount in this context. Second, when entering into civil society
pursuant to a “social contract” human beings surrendered to the state only the right
to enforce and protect these natural rights and not the rights themselves. The protected
rights were significantly individualistic and libertarian in character. The natural
rights theory was closely followed by the utilitarian and positivist theory of
philosophers like Bentham, Kant, Montesquieu and Austin, which gained
predominance in the nineteenth century. The positivist theory was an attack on the
natural rights theory as demonstrated by its proponents’ criticism and dubbing of
natural rights as ‘rhetorical nonsense’ and/or ‘nonsense on stilts’. According to the
positivist theory, human rights were simply those rules, which the state (had) enacted
for the protection of individuals and their property interests.

Another important phase in the development of human rights theories during the
twentieth century was the contribution of the Marxist ideology, according to which
human rights were egoistic property concepts, “a product of bourgeois/capitalist
society, designed to maintain and reinforce the pre-eminent position of the ruling
class.” The rights in this perspective were not individual. Rather, the state granted
only social and economic rights to the whole communist society to assist the transfer
of the means of production to common control.

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20 Taylor, P.E., From Environmental to Ecological Human Rights: A New Dynamic in International
21 See, generally, Mbaya, W., Fundamental Rights and Freedoms in Kenya: The Extent to Which they
are Protected 21-37 (1993) (unpublished LL.M dissertation, University of Nairobi)
22 Taylor, supra, note 20, at p. 314.
23 Id.
The often-conflicting theories of human rights as represented by the foregoing themes notwithstanding, there was a general acceptance of the principle, rather than the content, of human rights by the middle of the twentieth century. However, it was not until the nations of the world witnessed the appalling humanitarian atrocities of the Second World War that international human rights law developed into a fairly universal, recognized and coherent system. When the Second World War came to an end in 1945, the world actors of the time were imbued with the spirit of idealism. They optimistically believed that they could usher in a new world order.24 In the view of the Allied Powers, international commitment to the protection of human rights was a fundamental prerequisite to the creation and maintenance of freedom, justice and international peace and security. This would then create a new world order whose foundation was supposed to be the Charter of the United Nations. Although member states of the United Nations pledged themselves to co-operate with the Organization in the promotion of the respect for human rights, the Charter itself did not spell out any human right to be protected and made no attempt to define or propose a definition of human rights.25

An attempt to spell out the human rights recognized by member states was made in the Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly on 10th December, 1948.26 This was followed by two legally binding covenants, the 1966 International Covenant on Civil and Political Rights

24 Id.
25 U.N. CHARTER art. 1(3).
(ICCPR),\textsuperscript{27} and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)\textsuperscript{28}, which did enter into force in 1976. The two Covenants constitute the most extensive corpus of international treaty law on the subject of human rights. In the years since 1966, the United Nations has also produced a proliferation of special human rights conventions and declarations aimed at dealing with particular aspects of human rights.\textsuperscript{29}

In concert with the United Nations activity, a number of human rights instruments and institutions have emerged to further ensure the protection of rights at the regional level. These include the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms,\textsuperscript{30} the 1948 Organisation of American States Charter together with the 1969 American Charter on Human Rights,\textsuperscript{31} and the 1981 African Charter on Human and Peoples’ Rights.\textsuperscript{32}

Although Article 24 of the African Charter provides for the peoples’ right to a general satisfactory environment favourable to their development, it will be noticed that both the concept of human rights as well as the development and theories of human rights did not have any reference to the environment or ecology. The rights recognised

\textsuperscript{30} 1950, Eur. T.S. No. 5; 213 UNTS 221 (1950). (hereinafter European Convention)
related to the human rights of individuals or communities by virtue of their humanity and mainly focussed on the restriction of governmental, rulers' or states' powers over the citizen or the governed to enhance respect for human life, liberty and/or freedom. They were all primarily concerned with theorizing various aspects of human relationships, that is, individuals versus individuals, individuals versus the state, and individuals in their relationship with society.

From today's perspective of concern for the environment and human survival, it would appear that human beings were, during the last three centuries, concerned more with fundamental issues of the day with relation to the human society such as the development of individuals and social order to the extent that issues like nature or environment were not accorded much attention. Consequently, human rights theory developed without recognition of "human vulnerability to environmental change and without moral concern for non-human entities, enabling rights and freedoms to exist in a vacuum isolated from ecology." The liberal and socialist traditions which emerged from the human rights theories therefore focussed on conditions of social-relations of the development of the individuals in the society at the expense of environmental concerns. This means that no due regard was had to the fact that human beings are part of the environment which is composed of an ecological ecosystem of both living and non-living organisms and components, and that man is just a part of the family of various animals or organisms that are found on the planet earth.

33 Taylor, supra, note 20, at p. 314.
In sum, environmental issues and human rights were treated separately. Traditional human rights issues exclusively drew society’s attention in the course of political, social and economic developments in the seventeenth and eighteenth centuries. These developments formed the basis of one of the basic challenges that environmental issues present for the human rights theory today. This challenge is whether new theories need to be developed or whether the existing human rights theories or formulations can be reformed or re-interpreted to take into account the value of the environment vis-à-vis the value and quality of the ecosystems generally.

In taking up this challenge, we advance the argument that a distinct fundamental human right to a decent environment is emerging from the developments of both environmental law and human rights law. This emergence should be seen as an evolutionary process, which finds its roots and further development in two fundamental values, “human rights and environmental protection.”

1.4 CLASSIFICATION OF HUMAN RIGHTS AND THE PLACE OF THE RIGHT TO A DECENT ENVIRONMENT

Human rights, as they emerged in the eighteenth century, generally consisted of those rights which could be invoked against the state. Among those rights, now known as

First generation rights, are the freedoms of expression and the press, of religion and conscience, of assembly and movement, as well as the freedoms from torture, arbitrary arrest and the right to due process of law. 36 These rights are generally negative "freedoms from" rather than positive "rights to" with liberty of the person as their core concept. Many of these rights are also set out in Articles 2-21 of the Universal Declaration of Human Rights besides being the subject of the Covenant on Civil and Political Rights. 37 The first generation rights as proclaimed in these documents inhere in all individuals, by virtue of being human beings.

However, deleterious social conditions such as hunger, poverty, inadequate health care, the lack of educational opportunities and hazardous work places, inhibit the individual’s realization and enjoyment of the first generation rights. 38 Individuals may, for instance, not be free in the sense guaranteed by first generation rights if they must labour for long hours at low wages and in poor conditions of work which fail to meet their subsistence needs. Similarly, freedom of expression and the right to life may be unrealistic without education and proper health.

In order to enhance the protection of first generation rights, additional rights were recognised through the International Covenant on Economic, Social and Cultural Rights (ICESCR). The rights promoted in this document, including the right to work

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36 See ICCPR, supra., note 27, arts. 1-15.
37 Id.
38 See ICESCR, supra., note 28, preamble, para. 4.
and a decent work place, health, education and social security, are termed second generation rights. In contrast to the first generation rights, the second-generation rights primarily originate from the socialist and human welfare traditions. It was a response to capitalist development and its concept of individual liberty, which tolerated and “even enlightened the exploitation of working classes and colonial peoples.” These rights essentially serve a dual purpose: on the one hand, as a basis for individual economic autonomy, and on the other, to secure income and welfare for individual and his dependants.

The two generations of rights exist in a paradoxical, yet symbiotic, relationship. Guarantees of economic, social and cultural rights require state intervention and yet are necessary to secure effective enjoyment of the first generation rights, which protect individuals against state intervention. While active government participation may appear antithetical to the freedoms articulated in the Covenant on Civil and Political Rights, the second generation rights are necessary for the enjoyment of the first generation rights. The second generation rights were “initially the primary concern of socialist-communist states, and more recently they have become the predominant interest of the world’s developing states in their pursuit to rid themselves of developed state exploitation and improve living standards.”

39 Id. arts. 6-7.
40 Id. art. 12.
41 Id. art. 13.
42 Weston, supra, note 15, at p. 265.
43 Taylor, supra, note 20, at p. 318.
This notwithstanding, many of the world's people continue to live under conditions which impede their exercise of basic human rights. For example, the right to a healthy environment is vital to the fulfillment of the first and second-generation rights. Human beings must have a decent and healthy environment for their survival.\textsuperscript{44} Consequently, a third generation of human rights has been proposed to facilitate a more elaborate and meaningful scheme.\textsuperscript{45} It would, therefore, appear that the evolution of human rights is progressively widening in content and scope.

The development of these various categories of rights is, however, often fraught with controversy. The scope and content of each category is often not easily discernible. Whether or not each of the categories should take precedence over the other is a question always posed, whereas in other instances the issue of inherent overlaps within the various categories puts to test the need for developing further categories.

Nevertheless, the existing catalogue of human rights is clearly not exhaustive. The gradual widening of human rights catalogues can be inferred and evidenced by the words of Henkin who states that: "In the West, at least as much as elsewhere, there is a growing tendency to see human rights even larger, at least in aspiration to include all that goes to make up a life essential to human dignity, including autonomy, privacy, idiosyncrasy, self-development, security, peace, a healthy environment and participation in decisions that affect the individual."\textsuperscript{46} Flowing from the foregoing, we

\textsuperscript{45} Id. at pp. 374-9.
\textsuperscript{46} HENKIN, supra note 9, at p. 21. Emphasis added.
can therefore talk about the emergence of ‘new envisaged rights’. The new rights mentioned are established under the rubric of “third generation” rights.

The third generation rights are commonly referred to as “solidarity rights” and, as yet, are still nascent. They demand global redistribution of power and resources and recognize that the current international system of human rights is ineffective in its attempts to solve key contemporary issues. Although still in the process of formulation and formation, Weston suggests that third generation rights include the right to political, economic and cultural self-determination, the right to economic and social development, the right to participate in and benefit from the common heritage of mankind, the right to peace, the right to a healthy environment, and the right to humanitarian relief. These rights are primarily characterised by their being essentially collective in dimension and requiring international co-operation for their achievement.

The use of the term “third generation human rights” has not been without controversy. In fact, debate has raged over whether this group of the so-called solidarity rights are in fact human rights. Some theorists take the position that human rights are static in number; any additional human rights must be inferred from existing rights rather than created or recognised outright. Other critics have voiced...

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47 Taylor, supra, note 20, at p. 318.
48 Weston, supra, note 15, at p. 266.
49 Downs, supra, note 44, at p. 362.
50 Id. Downs goes on to discuss this controversy in more detail. Id. at pp. 362-6.
concern that additional third generation rights will diminish the authority of existing human rights. On the other hand, theorists who favour a third generation of human rights argue for a dynamic view of human rights that considers and accommodates changing international situations and the increasing international capacity to cope with impediments to the enjoyment of existing rights and freedoms. For example Louis D.T. Castro comments that:

[T]here seems nothing inherently wrong in either changing concepts or expanding the list of human rights. *As our societies, technology, problems, attitudes, and expectations change, there is bound to be a corresponding change in the claims we view as basic in the order of importance in which we rank these claims and in the things we expect governments to do or not to do.* Moreover, there is perhaps something to be said for an increase alone in the number and types of broadly humanitarian claims we are prepared to call human rights, since *this will hopefully increase the pressure for their practical achievement.*

We agree with this view since it operates to buttress our position that the construction and definition of human rights is a continuous and dynamic process. It is a sound approach which would enhance the establishment of new precepts or rights that will correspond to the advances of science, and the changing realities of social, cultural, economic and political life. Otherwise, refusal to accept innovations that have logical and just basis in the area of human rights law would by implication impede the growth and progress of the law to the detriment of human beings. Consequently, the law would cease to address the changing realities of the times. We submit that a pragmatic

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and flexible attitude towards human rights is called for with regard to urgent environmental problems that may not be easily tackled within the existing technological, political and legal frameworks.

Although there exists a collective element in all the categories of human rights, the debate over the validity of third generation rights has often focused on the alleged "collective" quality or nature of such rights. Critics argue that third generation rights such as the right to a decent environment are illegitimate because they are collective as contrasted with the first and second generation rights which are largely individualistic or held by individuals. Such an argument is not sound because distinctions between individual and group rights are spurious and inaccurate. Besides, delineating too strictly between individual and collective rights is artificial. For instance, most currently accepted rights and proposed third generation rights have both collective and individual aspects. Therefore, third generation rights should be understood as individual human rights not meaningfully different from the first and second-generation rights. Ultimately, in all the generations, the individual remains the cardinal subject of human rights.

We submit that the recognition of third generation rights as human rights is well founded. The development of this generation of rights illustrates the continued growth and expansion of human rights theory to accommodate emerging demands and

55 Alston, supra., note 52, at p. 309.
56 See, e.g., THE RIGHTS OF SOLIDARITY, supra note 51, paras. 10, 12 (stating that third generation rights or solidarity rights would give effect to the creative development of every nation, community and
needs. The issue of the rights being collective or individual is neither here nor there. One notes, for instance, a collective dimension in the International Covenant on Civil and Political Rights, as well as the one on Economic, Social and Cultural Rights. The first provision of each of the Covenants which sets forth the first and second generation of rights contains the collective right to self-determination, despite the fact that this right is usually considered a third generation right. On the other hand, we consider third generation rights as individual human rights since they are for individual benefit despite the fact that they are generally attributed to groups of individuals. As L.B. Sohn argues, although certain third generation rights, such as the right to self-determination, may devolve directly upon groups of individuals, they are ipso facto individual rights because they are always ultimately destined for individuals.

From these arguments, we can distil an important aspect of all these rights, that each generation of rights has both individual and collective elements. For example, the freedoms of religion, association and expression, while considered individual in nature, clearly have a collective aspect and may be bestowed upon groups made up of individual holders of rights. Similarly, the second generation, social, economic and cultural rights have collective aspects although they are characterised as individual rights. On this basis and without more, the proposed third generation rights including every individual: Kiwanuka, R.N., *The Meaning of ‘People’ in the African Charter on Human and Peoples’ Rights*, 82 Am. J. Int’l L. 80,84 (1988).

57 *Supra*, notes 27 & 28 (the common art. I provides “All people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”).

the right to a decent environment, qualify for inclusion into the human rights catalogue. Whereas the right to a decent, environment is therefore seen as carrying with it a collective quality, it should be understood as an individual right because it is the individual who ultimately enjoys the benefits of a healthy and/or decent environment. The right should, therefore, be seen as a fundamental human right.

The need for dynamism in the development of human rights theory cannot, therefore, be gainsaid. Before we embark on a further analysis of a decent environment in a human rights context, we deem it necessary at this stage to address key conceptual and definitional issues.

1.5 THE ENVIRONMENT AND ENVIRONMENTAL RIGHTS

The term “environment” has a broad meaning. It includes air, land and water, plant and animal life, including human life; the social, economic, recreational, cultural and aesthetic conditions and factors that influence the lives of human beings and their communities; buildings, structures, machines or other devices, made by man; and solids, liquids, gases, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, and part or combination of the foregoing and the inter-relationships between two or more of them.59

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59 Kisenge, S. et al., Environmental Rights in Africa: Current Status and Challenges; Paper prepared for the Environmental Human Rights Care and Gender Organisation (ENVIROCARE) 1, 2 (Nov.5, Dar es Salaam, Tanzania 1999).
A cursory look at this definition would tend to indicate that it is all-inclusive or encompassing, and including all the components of the environment. However, when closely examined, the definition is not exhaustive. It would emerge that the definition is limited to the “factors that influence the lives of human beings and their communities,” which therefore excludes or isolates other organisms found on earth.

The term “environment” has also been defined as the totality of all those physical, chemical, biological and socio-economic factors that affect an individual, a population and a community. These factors include human ecology, public and occupational health, safety, pollution of the air, water, land, waste reduction, management of unique habitats, aesthetic and cultural preservations. This definition appears more broad in the sense that it includes human beings as one of the factors that affect or surround an individual in an ecosystem. It portrays the term “environment” as referring to the integral natural resource system. We can therefore infer that the word “environment” means the aggregate of all external conditions which affect the life and development of an organism. The external factors are therefore, generally speaking, the surroundings of an individual organism.

Specifically, and with reference to human beings, the words ‘human environment’ can be defined as the total or aggregate conditions which are usually external, and influence or affect the behaviour and development of human beings either as individuals or societies. C.O. Okidi, while stating that there are three central tenets of
the word “environment”, begins by defining environment as “the totality of nature and
natural resources, including the cultural heritage and the infrastructure essential for
socio-economic activities.”\textsuperscript{61} The three tenets are given as follows:

First, that it is actually the complete context comprising nature and
natural resources and not any specific sector or functional attribute. Second, that the various resource sectors such as water, forests,
human beings, minerals and energy are simply components of the
environment. Third, cultural heritage and infrastructure constructed
to facilitate socio-economic activities, such as settlements, factories,
transport infrastructure, are all parts of what constitute
environment.\textsuperscript{62}

The above definition represents yet another attempt at definition of the term
“environment”. It appears to summarise the various meanings attributed to the term.
But are these meanings exhaustive? Is environment only a function of physical and
biotic phenomena? We argue that whereas it would be difficult to find a satisfactory
definition of the term, any attempt should, however, take full account of human
activities on nature or the natural state of the ecosystem. Physical and biotic
phenomena are merely parts of the environment.

Herein, we adopt the statutory definition contained under section 2 of the Kenyan
Environmental Management and Co-ordination Act, 1999, namely that “environment”
includes the physical factors of the surroundings of human beings, including land,
water, atmosphere, climate, sound, odour, taste, the biological factors of animals and
plants and the social factor of aesthetics and includes both the natural and the built

\textsuperscript{62} Id.
environment”. We consider this definition as reflecting the total context within which natural resources exist and interact with human beings.

Having defined the term “environment”, we conclude by considering the term ‘decent environment’. A decent environment refers to an environment of a standard or a quality necessary for the sustenance, maintenance and protection of quality human life. A decent, secure, healthy and/or ecologically sound environment therefore means an environment sufficiently free of injurious human intervention to maintain its essential natural processes. We therefore take ‘a decent environment’ to mean an environment that can sustain its own biodiversity, and because it is a human right, it must also mean an environment that can sustain quality human life.

Turning to the question of environmental rights, we note that first, the term “environmental rights,” just like the term environment, has several meanings. If, for instance, it is interpreted in the same way as the term “human rights”, it can be understood to refer to rights of the environment. These would be, rights that the environment possesses rather than the rights of human beings. Such a view would raise certain concerns especially on the question of whether the environment or nature has rights, or whether the respect for human rights conflicts with the protection of nature or “environmental rights”. These are issues touching on questions of anthropocentrism vis-à-vis biocentrism, which will be discussed later in this thesis.

Suffice it to state that we consider human beings as the beneficiaries of environmental rights, and we argue that environmental rights are human rights. Accordingly, the term "environmental rights" is used in this study to designate human rights that are protected specifically in the context of environmental protection.\textsuperscript{64} According to A. Kiss & D. Shelton, the designated environmental rights include the "freedom of association, the right of access to information, the right to participation in government and due process rights", together with "a right to an environment of a certain quality."\textsuperscript{65} The quality of the environment refers to the standard which is necessary to sustain life and enhance quality human life. Interpreted in another way, the term "environmental rights" refers to the emergent human rights emanating from the reformation or expansion of the existing human rights in the context of environmental protection. Environmental rights can, therefore, be generally said to emanate from environmental concerns. Those concerns are usually a result of the attempts by human beings to conserve the environment and enhance its continued decency. The ultimate objective is to guarantee human survival, maintain the quality of nature, ensure intergenerational equity and institutionalize choice while at the same time securing the freedom and right of individuals to responsibly utilize environmental resources, but responsibly for long term survival.

The definition of environmental rights, however, raises a number of questions: what duties and obligations derive from them?, who holds the right and upon whom is

\textsuperscript{64} KISS, A. & SHELTON, D., \textsc{Manual Of European Environmental Law} 43 (Grotius Publications, Cambridge, 1995).
\textsuperscript{65} Id.
the correlative duty placed? These are germane questions to be addressed later in chapter two of our thesis. A brief look at certain conceptual issues is important at this stage.

1.6 CONCEPTUAL ASPECTS OF THE LINK BETWEEN ENVIRONMENTAL RIGHTS, HUMAN RIGHTS AND THE ENVIRONMENT

Environmental law and human rights have intertwined objectives and ultimately strive to produce better conditions of life on earth. The necessity to link both fields stems from the different, complementary and partial approaches each has attempted to follow. Generally, environmental law and human rights have traditionally been treated separately. However, there are many areas of significant overlap. For instance, the rights to safe food and water, to living in a decent and healthy environment and to participate in environmental decision making, bear on both human rights and environmental law.

There is need to include an environmental dimension in the human rights debate as a means of taking cognisance of the global environmental condition and its influence upon the realization of human rights. In legal terms, the new linkages enhance the protection of the environment as well as human rights. This is because protection of the environment will benefit from an established machinery of human rights

66 See Kisenge, supra, note 59, at pp. 3-6 (arguing that integration of the two concepts in now a question of international concern).
protection, while the human rights system will be enhanced by the inclusion of new interpretative elements until recently ignored. Such new elements include the human right to a decent environment which, as already indicated, is an emergent right under the rubric of third generation rights.

It is argued that such an attempt at including an environmental dimension into human rights is a new, and perhaps revolutionary approach to environmental protection. Application of human rights law and institutions to environmental problems is really no more than a new way of thinking about well-established concepts. For instance, the right to life, the right to health, the right to food and water and the right to safe working and living conditions are not radical concepts. On the contrary, they are recognised human rights which incorporate recognised environmental features. The innovation, therefore, lies in considering the environmental side of human rights as a package, or as a collection of environmental rights that can serve as a reference point for environmental harm in general. Through such an approach, we are able to easily conceptualize the linkages between human rights and environmental rights.

Flowing from the above, there are certain aspects in which the human rights theory encompasses environmental rights, and in particular the right to a decent environment. For instance, the right to life and the freedom to live in a healthy environment is an aspect represented in human rights theory. These rights give or guarantee human beings the right to live in a healthy environment, so that individuals can, for instance,
have claims against pollution of the environment that seriously affects their health. 67 Such conceptual aspects of the linkages between human rights and the environment become even clearer when particular and specific human rights now recognised in the human rights catalogue are closely examined.

The right to life, for instance, is considered to be a fundamental right of suprapositive character in that it is a norm erga omnes enforceable in respect of all persons. According to a report on Human Rights and the Environment prepared by Fatma Zohra Ksentini, 68 the Special Rapporteur of the United Nations Commission on Human Rights, the right to life "... is the most important among all human rights legally guaranteed and protected by contemporary international law." 69 The report proceeds to record that the right to life is the one which is, most of all, connected to and dependent on proper protection of the human environment, and the one which may be directly and dangerously threatened by detrimental environmental measures. The quality of life then depends on positive or negative environmental conditions. Therefore, any threats to the environment, such as serious environmental hazards directly threaten the lives of human beings. The connection between the right to life and the environment thus becomes an obvious one.

69 Id. para. 174.
The right to health, on its part, means that everyone has a right to the highest attainable standard of health.\textsuperscript{70} In an environmental context, the right to health essentially implies feasible protection from environmental hazards and freedom from pollution, including the right to adequate sanitation. This right is directly linked to the rights to water, food, safe and healthy working conditions and housing. This means that environmental hazards negatively affect human health. It would also mean that violation of environmental human rights would directly or indirectly impact adversely on the health and life of human beings. The nexus between these rights therefore becomes more evident.

Arguably, it is because of these conceptual aspects that the linkage between environment and human health has repeatedly found expression or reflection in international and domestic instruments either explicitly or under a more general expression of a right to adequate conditions of life.\textsuperscript{71} Commenting on this link, Fatma Zohra Ksentini notes that “when asserting the right to environment, current provisions express it in terms of the right to a healthy environment”, and that “qualification of the environment has been generally interpreted to mean that the environment must be healthy in itself – free from diseases” that hinder its ecological balance and sustainability – that it must be healthful, that is, conducive to healthy living.”\textsuperscript{72} There is a very crucial conceptual link between the right to health and environmental rights. This, undoubtedly, goes to the very root of human survival and, hence, realization of

\textsuperscript{70} See. UDHR, \textit{supra}, note 26, art. 25.; ICESCR, \textit{supra}, note 28, art. 12.
\textsuperscript{71} See, e.g., ICESR, \textit{id}.
\textsuperscript{72} Ksentini Final Report, \textit{supra}, note 68, para. 180.
human rights. It lends credence to the need for the new approach of rethinking the place and role of human rights in environmental law and protection.

Similar aspects of the linkage between environmental rights or the right to a decent environment and human rights can be drawn with regard to various other human rights such as the right to food, housing, safe and healthy working conditions, information, popular participation, freedom of association, cultural rights and such other rights like liberty. These aspects of the connection between the two categories of rights and the environment are important for the purpose of placing the right to a decent environment proposed in our study into its proper perspective. Its importance as a right of its own kind springs partially from these conceptual linkages.

The importance of the linkages between human rights and the proposed environmental right to a decent environment is further reflected in at least two other premises. First, full realization of individual and collective human rights enhances environmental protection. Second, a healthy and ecologically sound environment is necessary for the full enjoyment of human rights. Conversely, violations of human rights often harm the environment and environmental degradation often infringes human rights. This is well illustrated by A.F.N. Popovic & A.F. Aguilar who explain:

[Resource extraction activities in rainforest lands inhabited by indigenous peoples threaten the health, culture and survival of those peoples. Similarly, environmentally destructive pesticides (some of which are banned in their country of origin but exported to other

73 See generally, id. paras. 188-95.
75 Id.
countries with less stringent restrictions) pose health risks for legions of migrant agricultural workers. Nuclear, chemical and other industrial accidents expose multitudes to unsafe living and working conditions and deprive them safe food and water. Throughout the developing world, internationally financed projects often pose serious threats to habitat, culture and means of subsistence.\textsuperscript{76}

These types of situations show not only the inextricable links between the environment, environmental rights and human rights, but also suggest the potential for using a human rights approach in addressing environmental problems. In this context, different avenues for establishing the linkages and integration of environmental concerns in the realization of human rights (and vice versa) can be envisaged. First, a re-interpretation of human rights included in human rights instruments can be attempted. Environmental protection is hereby included as a further interpretative element widening the scope of rights. Secondly, some procedural rights developed separately in human rights and environmental law instruments could be used in conjunction to form a body of rights of an environmental nature. Thirdly, and finally, a right to environment may be formally added to the catalogue of internationally and nationally recognised and guaranteed human rights.

There is a case for the adoption and implementation of the third avenue. As discussed in the following two chapters, this approach is founded on the fact of an emerging human right to a decent environment, which has already been adopted in certain jurisdictions. Some of these jurisdictions are shown as portraying good pictures which Kenya can borrow from.

\textsuperscript{76} Id. at p. 197.
1.7 THE FOUNDATION OF THE CLAIM FOR AN ENVIRONMENTAL HUMAN RIGHT TO A DECENT ENVIRONMENT

Conservation and protection of the environment through recognition and respect for human rights are a necessary and integral part of the enjoyment of human rights. The intimate linkage between human rights and environmental rights calls for the incorporation of the latter into the core of human rights protection. It now becomes imperative to consider what may be termed the foundation of the claim for a human right to a decent environment. In so doing, it should be noted that not every social problem must result in a claim which can be expressed as a human right. Indeed, the criteria for considering a claim as human right generate extensive and intensive debates. Our concern here is not to re-visit this debate, but to attempt to establish the need for a human right to a decent environment as the foundation for the right.

First, environmental threats to human rights and human survival at the global level have largely contributed to laying a basis for the formulation of the right to a decent environment. The unprecedented increase in population and the consequences of increased human activity have given rise to deterioration of the environment and depletion of natural resources that threaten our planet. F.E. Ksentini in her report presented observations concerning the deterioration of the environment in which she stated that:

Recent sources observe that as from the beginning of the twenty-first century more than half of the world’s population will be living in urban areas. In 2025 this figure will have reached 65 per cent, or

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5 billion persons. More than 850 million people live in regions affected by desertification. The destruction of tropical forests is advancing at a rate approximately one football pitch per second. The inhabitants of the industrialised countries still consume 10 times as much commercial energy as those of the developing countries and produce 71 per cent of the world’s carbon dioxide emissions and 68 per cent of its industrial waste … more than 2 million deaths and billions of cases of disease can be attributed to pollution. Between 400 million and 700 million people, mainly women and children from poor rural areas, are affected by the smoke filled atmosphere of their homes. Between 300,000 and 700,000 premature deaths annually can be attributed to pollution in cities. The thinning of the ozone layer may cause annually 300,000 additional cases of skin cancer worldwide and 1.7 million cases of cataracts.

This passage gives a grim picture of the state of the environment at the global level. It reveals statistics which cannot be ignored by nations of the world. It is a revelation of an environmental crisis, which is a result of destruction of the environment. As a result of this wanton destruction of the earth’s life support system, mankind has almost become an endangered species. Consequently, such environmental destruction has necessitated international and national concern for proper environmental protection. One of the means through which this concern has been demonstrated is through the continuous efforts towards inclusion of a right to a decent environment in the international and national human rights instruments.

Drawing from the environmental problems of the kind described above, threats to

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79 Gormley, P.W., Human Rights and the Environment: The Need for International Co-operation 19 (A.W. Sijhoff-Leyden, 1976) (Stating that no longer can we speak exclusively of the preservation of nature or the continued existence of flora and fauna, rather, man and his institutions may vanish as have several hundreds of species of animals and plants.)
80 Trindade, C.A.A., The Contribution of Human Rights Law to Environmental Protection; with Special Reference to Global Environmental Change, in Environmental Change and International Law, supra, note 17, at p. 261.
recognized human rights are clear. Carcinogens and other toxins carried in the air and
water contaminate drinking water, cause cancer, birth defects and other diseases,
poison arable lands, sea life, and other food resources, and, as a result, threaten the
right to life, health and other human rights. Nations of the world appear to be
cognizant of these environmental problems and may consider a human right to a
healthy environment as the proper approach to addressing environmental problems.
Over the past two decades, as environmental problems become increasingly complex
and widespread, numerous international colloquia and symposia under the auspices of
the United Nations and other organisations have demonstrated international
recognition of the fact that a healthy environment is necessary for human rights and
survival. Similarly, further recognition of these threats to mankind as well as the
need for a decent environment can be found or inferred from certain United Nations
documents, the African Charter on Human and People’s Rights and several
national constitutions.

The United Nations Conference on the Human Environment, for instance, stated in its
Declaration over twenty years ago that:

We see around us evidence of man-made harm in many regions of
the earth: dangerous levels of pollution in water, air, earth, and

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81 See, Postiglione, A., A More Efficient International Law on the Environment and Setting up an
International Court for the Environment Within the United Nations, 20 ENVTL. L. 321, 323 (1990);
The Rights of Solidarity, supra note 51, paras. 62-64.
82 See, e.g., Declaration on the Human Environment, in REPORT OF THE UNITED NATIONS
CONFERENCE ON THE HUMAN ENVIRONMENT, UN. Doc. A/CONF.48/14/Rev., Sec. 1 (1972), reprinted
in 11 ILM 1416 (1972) (hereinafter Stockholm Declaration) (Principle 1 provides that man has the
fundamental right to freedom, equality and adequate conditions of life in an environment of quality that
permits a life of dignity and well being.)
83 The African Charter, supra, note 32, art. 24 (stating that all peoples shall have the right to a general
satisfactory environment favourable to their development.)
84 For a detailed list of national constitutional provisions, see Popovic, supra note 63, at p. 508.
living beings, major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources, and gross deficiencies, harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment.  

This was reaffirmed in the Rio Declaration on Environment and Development 1992 (Rio Declaration).  

The Rio Declaration further asserts that human beings “are entitled to a healthy and productive life in harmony with nature” and states have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.”  

Going by the foregoing, it is clear that there is widespread awareness that the problems threatening individuals and their environment are both immediate and significant. This explains why there is readiness or willingness at the international level to consider, accept and recognise a new human right – the right to a decent environment.

The claim to a right to a decent environment is also founded on the understanding that it would provide new lines of redress for environmental transgressions in environmental law. Environmental law, in general, has little to offer individual victims of environmental problems in the human rights context. The right thus becomes particularly useful in this context because it links environmental law claims to human rights mechanisms. The effect of this is arguably to enhance enforcement of

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85 Stockholm Declaration, supra, note 82.
87 Id. Principles 1& 2.
environmental rights as fundamental human rights through the established human rights mechanisms. For instance, when one considers the nature of international law vis-à-vis the individual victims of environmental harm, it appears that international law does give states the right to question another state’s behaviour in relation to the latter’s domestic environment policies, either in the context of general rules on state responsibility or specific provisions of environmental treaties.\textsuperscript{88} This procedure is however, rarely used. Experience has shown that governments are reluctant to point their finger at another state, or to espouse the cause of injured people through an international procedure. Moreover, because international environmental law offers little possibility of recourse for individual victims of domestic environmental problems, the usefulness of human rights mechanisms and institutions is immediately seen.

Since the mid 1940s, human rights law has been eroding what had been considered the reserved domain of states. When, for instance, the Universal Declaration of Human Rights (UDHR)\textsuperscript{89} was adopted in 1948, most governments declared that its standards were not legally binding, arguing that human rights policy is strictly an internal affair.\textsuperscript{90} Today, the view that human rights violations are essentially domestic matters

\textsuperscript{88} See, e.g., Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) reprinted in 28 ILM 657 (1989). (Article 19 allows a state to inform the Basel Convention Secretariat if it has reason to believe another state has violated the Convention, while Article 20 provides dispute settlement mechanisms for state parties regarding interpretation or application of the Convention.)

\textsuperscript{89} UDHR, supra, note 26.

receives little credence in international law.\textsuperscript{91}

The relevance of human rights mechanisms to environmentalists is all the more apparent when we recall that the worst victims of environmental harm tend to be those with the least political clout, such as members of racial and ethnic minorities, the poor or those who are isolated from the locus of political power within their country.\textsuperscript{92} We therefore hold the view that international human rights mechanisms are not used nearly as often as they could by environmentalists. A partial explanation probably lies in the fact that human rights rules and procedures are not well known in environmental circles. This situation could be reversed by the integration of environmental rights into human rights, so that the right to a decent environment may be claimed through the known human rights enforcement mechanisms.

The right to a decent environment should be recognised both as a specific human right and as an important basis for environmental claims in the pursuit of environmental justice. Some of the human rights related bodies that can serve as starting points for the purpose of addressing and seeking environmental justice are the European

\textsuperscript{91} See Alston, P., The UN's Human Rights Record From San Francisco to Vienna and Beyond, 16 HUM. RTS.Q. 375 (1994) (discussing the progress in the international response to human rights violations since the signing of the UN Charter).


One sees that the claim for a right to a decent environment is well founded in both environmental law, and human rights jurisprudence. The right, therefore warrants inclusion into recognised human rights instruments at national, regional and international levels. Such inclusion would bring with it various advantages. These have been summarised by R.B. Bilder, who states that:

To assert that a particular social claim is a human right is to vest it emotionally and morally with an especially high order of legitimacy. If public opinion can be brought to accept the human rights label for a given claim, the emotional attitudes engendered by that label can often become a valuable weapon in the struggle to secure practical satisfaction of that claim by governments or other interest groups. It must also be recognised that acceptance of the human rights label for some types of social claims while denying it to others implicitly accomplishes a sort of ordering of social values, prejudging which interests and claims are to prevail and sacrificed when different values come into conflict. Thus, the decision to include a given claim in an international list of human rights may well have very practical consequences in the unending struggle of interests in national and international political, economic and social arenas.

97 Id. at pp. 560-61. Emphasis added.
1.6 IS THE RIGHT TO A DECENT ENVIRONMENT A FUNDAMENTAL HUMAN RIGHT?

Human rights are fundamental moral and legal norms which protect people, simply as "human beings", regardless of their citizenship or allegiance, from severe but common social, political and legal abuses. They are rights of inherent fundamental value to the society in which they operate.98

It would appear that the justification for a fundamental human right needs to show that abuses or violations of the right frustrate fundamental human interests. As Maurice Cranston observed, a fundamental human right protects an interest or value that is of a paramount importance.99 For instance, justification for the right against torture would be that torture imposes severe pain and suffering, threatens physical and mental health, and is an extreme form of coercion. Therefore, the critical question about environmental harm is whether it threatens human interests of paramount importance. Emerging from our preceding discussion, there is evidence that environmental problems endanger fundamental human interests. Severe pollution, for instance, kills some people, causes diseases, shortens the lives of others, and makes others recurrently sick. These interests in life, health and social welfare are already protected by a number of human rights such as the right to life and health. Therefore, environmental pollution is a significant and current threat to the fundamental interests that human rights protect. The right to a decent environment aims to protect people

98 Edel, supra, note 17, at p. 214.
99 CRANSTON, supra, note 7, at p. 67.
from such environmental hazards like pollution and its consequences, and should be acceded a position equal to other human rights. It is a fundamental human right which protects human interests of paramount importance.

Further evidence of the fundamental nature of the right to a decent environment can be seen from decisions of courts. There has been evidence emanating from courts in various national jurisdictions, whose decisions in environmental disputes strongly support the case for a new right to a decent environment. Some of these decisions not only pronounce the validity of a human right to a decent environment, but also operate to demonstrate the practical significance of the recognition and enforcement of a human right to a decent environment.

One such case decided in Colombia is *Fundepublico vs. Mayor of Bugalarande & Others* presented before the First Superior Court of Tulua-Valle, Colombia, on 19th December 1991. The plaintiffs, representing local communities in the neighbourhoods of La Planta and Cocicoinpa, in Bugalagrande, Colombia, presented an action seeking the prevention of imminent damage to themselves and their environment.

The court stated that it would grant protection to the right to a healthy environment by requiring the Mayor to suspend the operation of the asphalt plant. On appeal, the

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Constitutional Court of Colombia laid down precedential language in favour of the recognition of the right to a decent environment as a fundamental human right. The court noted that the 1991 Colombia Constitution accorded protection of the environment great significance because of its intimate link with the right to life. The court stated that the right to environment:

[\text{H}as been conceived as a group of basic conditions surrounding man, which define his life as a member of the community and allow his biological and individual survival, in addition to his normal participation and integral development in society. It therefore must be understood as fundamental for the survival of the human species.}^{101}

The constitutional rule laid down in this case is compulsory for the Colombian authorities in all similar situations in which there is a threat of contamination of the environment and environmental impact which is negative in its effects on both human life and the environment.

Finally, there is the example of judicial recognition in Philippines, where this issue of a human right to a clean, healthy or decent environment has received what we can call revolutionary treatment. The case in point is \textit{Juan Antonio Oposa & Others vs. Hon. Fulgencio S. Factoran & Another},^{102} in which the Supreme Court of Philippines announced an influential exposition of intergenerational rights in the context of environmental protection. The petitioners were a group of minors who brought this

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^{101} \textit{Id. para. 16. Emphasis added.}

action on their own behalf and on behalf of generations yet unborn, through their
parents together with the Phillippine Ecological Network Incorporated. They claimed
that the country’s natural forest cover was being destroyed at such rate that the country
would bereft of forest resources by the end of the decade if not sooner.\textsuperscript{103} They
brought this action as a taxpayers’ class suit claiming that as citizens and taxpayers,
they were entitled to the full benefit, use and enjoyment of the natural resource
treasure, that is, the country’s virgin rain forests. They also asserted that they
represented their generation as well as generations yet unborn.

Accordingly, they prayed for an order directing the Secretary to the Department of
Environment and Natural Resources (DENR) to cancel all existing timber licence
agreements and cease accepting or approving new ones. The petitioners further
pleaded that they had a constitutional right to a balanced and healthy ecology, and
were entitled to protection of ‘parens partriae’.\textsuperscript{104} They maintained that the granting
of timber licences was done with grave abuse of discretion, violated their right to a
balanced and healthful ecology, and therefore, they had a cause of action to sue and to
enforce this right.

On the other hand, the Respondents averred, \textit{inter alia}, that the petitioners failed to
show in their complaint a specific legal right violated by the respondent Secretary for
which relief was provided in law. They further argued that they saw nothing in the

\begin{footnotesize}
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\item \textsuperscript{103} \textit{Id.} at pp. 27-28.
\item \textsuperscript{104} \textit{Id.}
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complaint, but vague and nebulous allegations concerning an “environmental right”, which supposedly entitled the petitioners to the protection of the state. Such allegations, according to them, did not reveal a valid cause of action.

In the trial court, the petitioners failed to succeed on their claim, with the trial court holding and concluding that the petitioners failed to allege, with sufficient definiteness, a specific legal right of environmental nature or otherwise, or a specific legal wrong committed; and that the complaint was replete with vague assumptions and conclusions based on unverified data.

However, on appeal, the Supreme Court of Philippines recognised right from the beginning that this case had special and novel elements in that, *inter alia*, it raised the right of the people of Philippines to a balanced and healthful ecology or environment. In resolving the matter, the Court, while allowing the petitioners' application, held, *inter alia*, that the petitioners' complaint focused on one specific fundamental right, namely, the right to a balanced and healthful ecology, and the underlying duty to protect and advance the right were both clear, and gave rise to a cause of action as defined by the law.

This case is illustrative of the basis, importance, and judicial recognition of the right to a decent environment. It operates as a good example of how justiciable the right to a

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105 *Id.* at p. 28.
106 *Id.* at p. 29.
107 *Id.* at pp. 30-31.
decent environment is, and how it can be enforced. This kind of judicial treatment of the question of environmental rights represents a landmark development which is useful in laying a juridical foundation for the right to a decent environment. Besides, the decision addressed the fundamental nature of the right to a decent environment. It is to be noted that the dispute revolved around not only the issue of the existence of an environmental right, but also its specificity and importance. In addressing this issue and for the avoidance of doubt, the court in the words of F.P. Felicano, J., declared that:

*There is no question that the right to a balanced and healthful ecology is fundamental and that accordingly, it has been constitutionalized.* But although it is fundamental in character, I suggest, with every great respect, that ... it is in fact very difficult to fashion language more comprehensive in scope and generalised in character than a right to a balanced and healthful ecology.\(^{108}\)

In the light of the foregoing, we can safely conclude that the right to a decent environment is a fundamental human right. For now, it would suffice to note that some countries have witnessed a dramatic increase in the volume of judicial decisions on environmental issues.\(^{109}\) Consequently, the judiciary has responded in certain countries to this trend by re-fashioning legal tools to meet the demands of the times, but with varying degrees of success. The Philippines case represents a success story. However, such practices have hardly taken root, especially in Africa and, needless to say, Kenya, where not much judicial intervention has been witnessed.

\(^{108}\) *Id.* at p. 35. Emphasis added.

\(^{109}\) E.g., Philippines, India, Pakistan, Bangladesh, Sri Lanka, Canada, and Australia.
This chapter has attempted to give the theoretical and conceptual background to the right to a decent environment. It has endeavoured to show the nexus between the emerging right and human rights generally, while at the same time presenting definitions of various concepts which are deemed relevant to this discourse. These include the concept of rights, human rights, environmental rights and a decent and/or healthy environment.

Environmental protection has been addressed as a universal concern, which demands consideration within a human rights context. We have attempted to show that human rights and environmental protection represent important concerns of international law. They represent different, but overlapping, social values with a core of common goals. Efforts on behalf of both seek to achieve and maintain the highest quality of human life. In this regard, traditional human rights depend on environmental protection, which in turn depends upon the exercise of existing human rights. Despite this common core, the two legal subjects remain distinct, but with intimate linkages which provide legal foundations for environmental human rights.

The recognition of a right to a decent environment would add to the protection of the biosphere whose health and safety are essential for human existence. Individuals, groups or other entities, being holders of the right, would have the right to enforce the same. In practical terms, formulation of the right in constitutional instruments, for
instance, would further the interests of environmental protection as a fundamental human right. There is, therefore, room for recognition of the proposed right which fits well in the definitional framework of a fundamental human right.

A strong case exists for the right to a decent, clean or healthy environment as a fundamental human right. Having laid a basis for the emergent right to a decent environment, this study considers that the right must be carefully examined, so as to examine details as to its nature, character, and content.
CHAPTER TWO

THE EMERGENCE, NATURE AND CONTENT OF THE ENVIRONMENTAL HUMAN RIGHT TO A DECENT ENVIRONMENT

2.1 INTRODUCTION

In Chapter one, we sought to demonstrate the legal, philosophical and juridical foundations for the human right to a decent environment. One approach to addressing the problems of global environmental deterioration has been suggested. This is to recognize the right to a decent environment as a human right. It has been shown that this right is already emerging as one of the several third generation rights. This right would protect individuals, a characteristic which is shared by all human rights, by imposing more effective obligations on governments and providing remedies for environmental deprivations. Beyond this individual component, the right would also protect people collectively, a characteristic shared by all third generation rights. This would be through requiring collective action and co-operation on the part of nation states in addressing environmental problems.

The emergent right to a decent environment is a fundamental one. It is vital for the

3 Marks, supra, note 1, at p. 441.
exercise of other individual human rights and duties. It is, however, important for us to determine its nature or character as an environmental human right. Accordingly, this part of our study examines the development of the human right to a decent environment by both determining the extent to which the right has emerged in recent years and outlining its scope and content. The formulation of the right to a decent environment as an environmental human right is examined in the process.

2.2 THE JURIDICAL NATURE AND CONTENT OF THE RIGHT TO A DECENT ENVIRONMENT

The right to a decent environment is intrinsically related to a number of human rights and comes out as both a precondition and an outcome of the enjoyment of many rights. The proposed emergent right to a decent environment should, nevertheless, not be classified as a synthesis right because it embodies specific characteristics that can be distinguished from other rights. It does not constitute a “shell-right” aimed at merely enhancing the realization of other rights. By ‘synthesis right’ we mean a right embodying a number of elements that may also be found in other rights whose recognition is often seen as a precondition to the enjoyment of all other human rights. This argument is based on the consideration that criticism of the right to a decent environment would stem mainly from the difficulty one would encounter in attempting to mould it into one of the old categories of human rights.


We place little currency in the categorization of this new right, as either, a civil and political, or an economic, social and cultural right or a collective or solidarity right because it transcends the distinctions and embodies elements found in each of the three categories. According to E.B. Weiss, the right to a decent environment represents one aspect of planetary rights, which encompass both individual and group environmental rights. In her words:

[T]he right to a decent environment has been put forward by some as so-called third generation right. These rights belong neither to the individual tradition of the first generation rights (civil and political) nor to the tradition of the second-generation (economic and social) rights. They are collective rights, which are intended to acknowledge a continuing evolution of the human rights doctrine.

It would therefore appear that the right to a decent environment is not purely an individual right. One may single out the rights of future generations whose interests must be taken into account, but whose individual members cannot be identified, or focus on more precise claims relating to displaced indigenous people facing the total loss of their cultural social and physical environment. The right to a decent environment therefore shows us the inanity and futility of a tight separation between positive and negative rights, individual and collective rights or political and economic rights. These distinctions were prompted primarily by political or ideological

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7 Id. at 116
9 See Gormley, P.W., Human Rights And Environment: The Need For International Co-Operation 18-20. (A.W. Sijhoff-Leyden, 1976), (showing how indigenous peoples are threatened with extinction by destruction of the environment, and asserting the need for implementation of the right to a sound environment by international machinery).
struggles during the Cold War. They were not grounded in the nature of the rights themselves. They came to the fore as a result of the political and ideological differences between the capitalist and socialist states.\textsuperscript{10} It will be recalled, for instance, that the Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Social and Cultural Rights (ICESCR) were initially conceived as one document intended to transform the Universal Declaration of Human Rights (UDHR) into legally binding rights and to establish mechanisms and institutions for enforcement and implementation, but this proved to be an impossible task.\textsuperscript{11}

A dispute arose in the drafting committee over the relationship between civil and political rights, and economic and social rights, together with the mechanisms for implementation, supervision and enforcement. Several countries, in particular the socialist states, insisted on the inclusion of economic, social and cultural rights, while most of the capitalist states, especially the United States of America, opposed it.\textsuperscript{12} Some states argued that despite the differences in wording, all types of rights are indivisible, creating an interdependent mutually self-supporting whole.\textsuperscript{13} Others, notably those states following an individualistic, libertarian ideology, such as the United States and the United Kingdom, argued that civil and political rights demand

\textsuperscript{12} Murungi, supra, note 10, at p. 40.
\textsuperscript{13} Taylor, supra, note 11, at p. 319.
non-interference by states and are, therefore, the only rights that can reasonably be considered justiciable and not others, such as social and cultural rights.\textsuperscript{14}

As a result of these differences, the two covenants (ICCPR and ICESCR) each covering a different category of rights, were drafted. They represent a compromise between the divergent approaches and the politics of the day. Therefore, the most cogent explanation for this debate lies in the political and ideological differences than in the significance of the nature of the rights themselves or of the different approaches to their implementation.

With regard to the nature of the right to a decent environment, it is submitted that the distinctions or tight separation between the various categories of rights is immaterial and of no relevance to its practical significance. If anything, the consequences of the debate about priority, legitimacy and universality of the rights has the potential of being destructive to the whole fabric of human rights. Failure, for instance, to accept universality has the potential to undermine the commitment by states to minimum human rights standards. The debate and disagreements would serve little or no purpose besides that of negatively affecting attempts to introduce emergent human rights into the already existing catalogue of human rights.

This view finds support in international human rights instruments, as well as from the United Nations General Assembly (hereinafter, UNGA) as reflected in various UN

\textsuperscript{14} \textit{Id.}
documents and UNGA Resolutions. The position of the UNGA on indivisibility of human rights seems to be clear; that all human rights and fundamental freedoms are indivisible and interdependent, and that equal attention and consideration should be given to the implementation, promotion, and protection of all rights (whether labelled political, economic, social or cultural rights). For instance, the World Conference on Human Rights held in Vienna from 14th to 25th June 1993,\(^{15}\) provided an opportunity to reaffirm the equality and interdependence of all human rights. The objective of the Conference was, among others, to recommend improvement in the work methods and mechanisms used by the UN and in the allocation of financial resources while maintaining respect for the “universality, objectivity, non-selectivity and interdependence of all human rights.”\(^{16}\)

Ultimately, there came the Declaration of the Conference, the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights (Vienna Declaration),\(^{17}\) which reaffirmed the principles of universality, objectivity, non-selectivity, interdependence and equality of these rights. In the words of the Declaration:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states,


\(^{16}\) Id. at p. 93.

regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.\textsuperscript{18}

The thrust of the foregoing exposition of the UNGA’s position, together with the preceding analysis of the roots of the traditional distinctions drawn between the various ‘categories’ of rights is two-fold. First, that categorisation of the rights is without any sound basis or practical significance. Second, that the significance in categorizing human rights is increasingly diminishing. Accordingly, we reject any hierarchy, in theory or practice, as all human rights are fundamental rights. None should be held to be superior to the other given their pervasive interdependence. In view of this, we contend that the emergent right to a decent environment qualifies as a human right, irrespective of whether or not it fits squarely into one or more of the traditional categories of human rights.

On the basis of these assertions, the right to a decent environment can be said to be a new right interdependent and interrelated to other human rights. On the basis of the indivisible quality of human rights, the right cannot be denied its place among the other human rights. It operates to supplement and expand the already existing human rights. On the basis of the equality of all human rights, the right to a decent environment cannot be relegated to a ‘subsidiary’ or ‘corollary’ right. It emerges as an equal, emerging partner in the human rights catalogue. Like other rights, the right possesses both individual and collective aspects, which are important for the purpose of its enforcement. This right should be recognized, protected and implemented as such.

\textsuperscript{18} \textit{Id.}, at p. 450, para. 5.
The nature of the emerging right to a decent environment is, however, fraught with controversy. The claim for recognition of a substantive right to a decent environment introduces a number of new and challenging elements to the human rights theory that raise serious questions of both scope and content of environmental rights. Generally, the content and scope of environmental rights refer to the various elements or factors that, together, would constitute a package of environmental considerations within a human rights context. It means the rights that can serve as a reference point for environmental harm and protection. These elements of content and scope together constitute environmental human rights, and include the right to be free from environmental conditions that threaten health and life itself, the right to safe and healthy food and water, the right to a safe and healthy working and living environment, and the right to housing in an ecologically sound environment.

Environmental rights also encompass the rights of future generations, the right to be free from discrimination in all actions and decisions that affect the environment, the right to benefit equitably from nature and natural resources, and the rights of indigenous peoples to control their environment. Other environmental human rights are procedural components and aspects, such as the right to environmental information, the right to participate in environmental decision making, the right to freedom of expression and association about matters that relate to the environment, the right to environmental and human rights education, and the right to effective redress.

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Although it is difficult to provide an exhaustive list of what constitutes environmental rights, we are, however, able to note that the emergent right to a decent environment is an environmental human right which, encompasses at least, all the foregoing elements together with certain underlying duties and obligations.

It is submitted that the elements comprising ‘environmental rights’ are indicators of the fact that the emergent human right to environment gives rise to practicable and identifiable rights and obligations. It means that the emerging right is not merely a claim to some freedom or benefit; it is also a claim against certain parties to act so as to make that benefit available. In that context, a number of duties generated by the right to a decent environment can be identified.

First, is the duty to refrain from activities injurious to the environment or any component of it. This duty includes the obligation of an individual or group of individuals to do nothing and simply let nature take its course, and to intervene only when or where the rules of nature appear to be broken. It involves both abstention and positive action, and also evaluation and assessment of environmental relations to determine what constitutes harm or violation of environmental quality. Second, is the duty to perform specific tasks on a regular basis to ensure environmental quality and decency at all times. This entails systematic and sustained action for the purpose

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of determining what is required to be done, and to what level of satisfaction, in order to keep the environment clean, decent, healthy and ecologically balanced. It may involve either anticipatory actions, for instance, under the precautionary principle or positive action based on certain objective criteria such as scientific data, or even enforcement action through courts or other established tribunals. Third, is the duty to police, supervise, monitor and evaluate the performance of every individual, or agencies whose activities have an impact on the environment.

As regards the duties under the right, it is important to specify where these duties generally lie. The primary and most direct subject of environmental duties is the state. This is because the state not only controls enormous resources but is also best placed to take measures that can enhance the realization of the human right to a decent environment. Besides, the state is usually the single most important environmental actor. Many of its activities are likely to impact negatively on environmental human rights. Depending on how the administrative infrastructure of the state is organized, that duty would normally be discharged by delegation or through various agencies.

We can therefore aver that governments have negative duties to refrain from actions that generate environmental risks or damage to human life and health. For example, governments have a duty not to operate nuclear plants without taking adequate measures to ensure safe design, construction, maintenance, operation and waste

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22 Id. at p. 48.
disposal. Beyond this, governments also have a duty to protect the inhabitants of their territories against environmental risks generated either by governmental or private agencies.\textsuperscript{23}

Environmental duties are also imposed on individuals, communities and other private or non-state agencies who are often the direct users of environmental resources. For instance, persons, organizations, and corporations have a duty to refrain from activities that pollute or damage the environment. Individuals, for instance, have a duty to refrain from pouring dangerous chemicals into rivers or polluting the environment in any manner. Organizations, such as hospitals, have a duty to dispose of their wastes in ways that avoid risks of contamination and other injuries. Companies that transport oil and other hazardous materials have a duty to take precautions against spills and other accidents. When environmental damage occurs, individuals and organizations have a duty to restore the environment, where possible, and compensate victims. These examples of environmental duties are not exhaustive. They illustrate the nature of duties or obligations that underlie the right to a decent environment as a human right.

In the light of the foregoing, one sees that there are certain basic features of the right to a decent environment. For instance, the main beneficiary is an individual who receives a right to enjoy and use the environment. Nobody can therefore be discriminated against in his or her access to the environment, although equal

\textsuperscript{23}Nickel, \textit{supra}, note 20, at p. 286.
limitations and duties may be imposed on all in the name of its preservation. The main debtor is the state, which is obliged to organize protection, conservation and improvement of the environment, to ensure that it will be clean, healthy and ecologically balanced. Everyone is simultaneously the creditor and debtor, and has the right to a protected and decent environment together with the duty to protect and improve it. There are other principles and/or underlying obligations generated by the right to a decent environment which fall within the scope of environmental rights. Some of those rights are already detectable under both national and international law. These include the principle of intergenerational equity, the precautionary principle, and the principle of solidarity. In addition, the scope and content of the emerging right extend to several obligations respecting inter-state relations, including the duty of equitable use of shared resources, the duty to prevent transboundary pollution, the responsibility to notify of transboundary harm, and the obligation to incorporate environmental concerns into development policies. A few of these aspects are examined below to serve as examples.

24 Symonides, supra, note 4, at p. 28.
28 Id. at 132.
29 Brundtland Principles, supra, note 26, at p. 65.
2.2.1 Intergenerational Equity

The establishment of a right to a decent environment involves certain elements of content generally absent from considerations of other human rights. For instance, the environmental rights of future generations are an important ingredient of the right to a decent environment. A depleted environment harms not only the present generations, but future generations of humanity as well. For instance, an extinct species and whatever benefits it would have brought to the environment are lost forever, while economic, social and cultural rights are greatly imperilled by an irresponsible generation today. Moreover, the very survival of future generations may be jeopardized by serious environmental problems. On this basis alone, it cannot be denied that a right to a decent environment necessarily implies significant and constant duties or concerns towards persons not yet born. Consequently, the issue of intergenerational equity becomes relevant.

Intergenerational equity is a general obligation guiding international decision-makers as they attempt to confront environmental problems. This principle provides that each generation has an obligation to conserve and protect the natural resources and the environment for the use and benefit of present and future generations.

31 See Weiss, supra, note 6, at pp. 297-300.
This principle contains three elements that is, conservation of options, conservation of quality and conservation of access.\textsuperscript{32} The principle of conservation of options provides that each generation is “required to conserve the diversity of natural and cultural resource base, so that it does not unduly restrict the options available to future generations in solving their problems and satisfying their own values, and should be entitled to diversity comparable to that enjoyed by the previous generations.”\textsuperscript{33}

Conservation of quality provides that each generation must maintain the quality of the environment and pass it “on in no worse condition than that in which it was received,”\textsuperscript{34} while conservation of access provides that each generation must provide equitable rights of access to natural resources and “conserve this access for future generations.”\textsuperscript{35}

Flowing from these elements, intergenerational equity imposes five basic obligations on the present generation, namely, a duty to conserve resources, a duty to ensure equitable use of resources, a duty to avoid adverse impacts upon resources, a duty to prevent disasters, minimize damage and provide emergency assistance, and a duty to compensate for environmental harms.\textsuperscript{36} The obligation to conserve natural resources runs to present as well as future generations, implying that the needs of current generations must also be addressed. These duties should be seen as further duties generated by the right to a decent environment upon which intergenerational equity is

\textsuperscript{32} \textit{WEISS, supra}, note 30.
\textsuperscript{33} \textit{Id}.
\textsuperscript{34} \textit{Id}.
\textsuperscript{35} \textit{Id}.
\textsuperscript{36} \textit{See, generally, WEISS, supra}, note 6, at pp. 50-79.
founded.

It should also be noted that the principle of intergenerational equity has received considerable attention under international law. A clear formulation of the principle is found in Principle 1 of the Stockholm Declaration,\textsuperscript{37} which provides that “man ... bears a solemn responsibility to protect and improve the environment for present and future generations.” In recognition of the interplay between development policy and preservation of the environment for future generations, Principle 3 of the Rio Declaration\textsuperscript{38} provides that “the right to development must be fulfilled so as to equitably meet developmental and environmental needs of the present and future generations.” Other expressions of the principle are found in the World Charter for Nature,\textsuperscript{39} the Charter of Economic Rights and Duties of States,\textsuperscript{40} and the Resolution on the Historic Responsibility of States for the Preservation of Nature for the Present and Future Generations.\textsuperscript{41}

One sees that the duty of present generations to future generations to preserve the diversity and quality of the environment has been mentioned in many international instruments. This raises the question of the legal status of the principle of

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intergenerational equity. The most comprehensive document in the context of “fairness towards future generations” appears to be the Stockholm Declaration. This Declaration sets forth a set of common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment. Although not of formally binding character, the Declaration has been hailed as the first acknowledgement by the community of nations of a new principle of behaviour and responsibility which must govern their relationship in the environmental era. Therefore, formulation of this principle in the Stockholm Declaration is merely a general expression devoid of any binding legal force. The same can be said of its subsequent expression in the Rio Declaration.

However, the extent to which the principle of intergenerational equity has been invoked and reaffirmed in subsequent international agreements indicates that the principle is crystallizing into a general principle of international law. For instance, we have had expressions of the principle in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which recognises that wild fauna and flora must be protected for present and the generations to come; the Convention for the Protection of the Mediterranean Sea, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification

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43 Id. at p. 432.
44 Id.
Techniques, and in several regional and bilateral conventions. Although these instruments do not, strictly speaking, codify norms of customary international law, their recognition and expression of the principle of intergenerational equity does indicate widespread acceptance of not only the principle, but also the underlying duty of the present generation to future generations. It is therefore contended that this principle is an emerging general principle of international law.

We must, however, assert that the duty underlying the principle of intergenerational equity is a fundamental one. The responsibility to future generations envisaged within the scope of the right to a decent environment should entail not only moral duties, but also legal duties. The fundamental duty and the principle of intergenerational equity should be part of both national and international law. We need universal and unequivocal recognition of the duty to protect the interests of future generations. This recognition should not be left to the development of customary international law. To that end, it is noted that, first, although numerous documents evidence growing concern for intergenerational equity, they fail to articulate a single, clear and/or concrete legal norm. Second, environmental problems being urgent, widely varied, and dynamic would not be adequately addressed through a slow gradual evolution of a customary norm which could take many years to establish. Instead, these

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an issue of Philippine's constitutional law, and not international law as such, the Court expressly recognised the concept of intergenerational equity as part and parcel of the constitutional right of the people to a "balanced and healthful ecology." The Court recognised the capacity of the plaintiffs to sue on behalf of future generations "based on the concept of intergenerational responsibility in so far as the right to a balanced and healthful ecology is concerned." This case is a vivid demonstration that the principle of intergenerational equity inextricably forms part of one specific fundamental right upon which the petitioners' complaint was focused, namely, the right to a balanced and healthful environment.

Other examples of explicit and direct recognition of intergenerational equity also appear in national constitutions such as the 1984 Constitution of Papua New Guinea, which provides for conservation and wise use of the environment and national resources "for the collective benefit of us all, and ... for the benefit of future generations." Additional constitutions that incorporate intergenerational equity include the Andorra Constitution, Article 31 (state to ensure ecological balance and environmental protection for the sake of coming generations), Argentina Constitution, Article 41 (right to a healthy, balanced environment fit to satisfy current necessities without comprising those of future generations), and Uganda Constitution, Article 36(5) (natural resource management to meet development and environmental needs of

52 Minors Oposa case, supra, note 50, at p. 185.
53 CONSTITUTION OF PAPUA NEW GUINEA (1984), preamble, para. 4.
present and future generations). These developments pertaining to the incorporation of the principle of intergenerational equity into municipal laws are clear evidence that the principle is gradually but surely gaining legal recognition as an element of the right to a decent environment.

2.2.1 The Precautionary Principle

This is also known as the principle of prevention. From the general obligation to conserve resources for all generations discussed above, a question arises as to what principle guides decision makers in determining when to act and how to balance environmental rights with other concerns. One developing principle that has received considerable attention, however, is the precautionary principle, which affirms that substances or activities that may be harmful to the environment should be regulated even if conclusive scientific evidence of their harmfulness is not yet available.\(^{54}\) The principle emanates from the need for prevention, which is a cardinal concept of human rights and environmental protection.

The precautionary principle initially developed through various regional conferences and “soft law” declarations.\(^{55}\) The first expression of the principle appears in the 1987 London Declaration issued by the North Sea States Sea Conference.\(^{56}\) The


\(^{56}\) Id. at p. 23.
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56 Id. at p. 23.
Declaration states “in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear evidence.” Following this, it is possible to identify a number of international instruments, which contain references to aspects of precautionary principle. For instance, evidence of precautionary thinking can be found in a number of key texts. The Stockholm Declaration recognises the need to safeguard the “natural resources of the earth, including air, water, land, flora and fauna and especially samples of natural ecosystems ... for the benefit of present and future generations through careful planning or management, as appropriate.” It recognises that the “capacity of the earth to produce vital renewable resources must be maintained and, whenever practicable, restored or improved.” Principle 5 provides that “the non-renewable resources of the earth must be employed in such a way as to guard against the danger of future exhaustion and to ensure that benefits from such employment are shared by all mankind.” The 1982 UNEP Governing Council Nairobi Declaration recognised the necessity for environmental management and assessment of environmental impacts, as well as the necessity for ‘preventive action.’ The UNGA World Charter for Nature also expressly recognises precautionary thinking. While these are not legally binding instruments, their collective effect may provide evidence of recognition of precautionary principle as an emerging legal norm for

57 Id. (quoting the 1987 London Declaration issued after the Second International North Sea Conference in Nov. 1987.)
58 Stockholm Declaration, supra, note 37, Principle 2.
59 Id. Principle 3.
61 Id. para. 9.
62 WCN, supra, note 39, para. 11.
environmental protection. They may also generally encourage advocacy of a ‘precautionary principle’ as a basic restraint on environmentally sensitive activities.

Similar, but more precise, obligations can be found in a number of treaties such as the 1985 Vienna Convention for Protection of the Ozone Layer,63 the 1979 Bonn Convention on the Conservation of Migratory Species of Wild animals,64 and the 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats.65

Indeed, it could be argued that all arrangements which require environmental impact assessment and resource planning within the context of sustainable development or conservation, implicitly endorse the precautionary principle. A more recent reference to the precautionary principle is found in the Bergen Declaration,66 which provides,

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific knowledge should not be used as a reason for postponing measures to prevent environmental degradation.67

We find the speed with which the precautionary principle has been brought on the international agenda, and the range and variety of international fora which have explicitly accepted it to be significant. However, its widespread endorsement must

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63 26 ILM 1529 (1985), art. 2, para. 1. (imposing an affirmative duty on signatories to take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer).
65 56 U.N.T.S. 192.
67 Id., para.7.
prompt the question whether it should be seen as a principle of policy or whether it must now be considered as a binding rule of international law. In this context, we cannot underrate the significance of the repeated public acceptance and endorsement of the principle by government representatives during international fora or treaty making. The assertion is that such reiteration of the principle in international fora may reflect the conviction of states that precautionary action is needed, but in order to have a binding rule, additional law creating acts are necessary. This is because the precautionary approach is still in its formative stages and has not yet evolved into a practice of sufficient uniformity, generality or legal force to qualify under the definition of international custom. Where, however, the principle has been formulated in treaties, it constitutes binding legal authority to the parties, who, under the principle of good faith, are required to honour clear and precise obligations voluntarily undertaken.

Generally, it is discernible that the precautionary principle acknowledges that actual damage very often carries irreversible and unpredictable consequences harming individuals and groups. Precaution in that context includes averting environmental damage. It requires the formulation of integrated policies taking account of economic, social and cultural factors in the long term, to avoid environmental problems. Therefore, in order to achieve sustainable development, policies should be based on the precautionary principle. Consequently, it becomes important that the underlying duty to the concept of precautionary approach be integrated into the human

68 McClymonds, supra, note 25, at p. 614.
rights analysis forming the basis of the right to a decent environment. This would provide a basis for individuals or groups to take preventive measures or stop a potentially harmful activity before it gets under way, especially in cases where the potential threat has not yet been scientifically ascertained. The precautionary approach, therefore, demonstrates one way through which linkages of environmental and human rights concerns come to enhance each other. For instance, individuals or groups can assert their environmental rights through the precautionary principle when faced with imminent environmental harm which is yet to be scientifically ascertained.

The precautionary principle has been recognised in certain jurisdictions. One notable illustration is Ms Shehla Zia & Others vs. WAPDA, a human rights case decided in 1994 by the Supreme Court of Pakistan. In this case, the respondent Authority was constructing a grid station in a residential area. The petitioners, who were citizens of the republic and residents in the vicinity and having apprehension against the construction, alleged that the electromagnetic field created by the high voltage transmission lines at the grid station would pose a serious health hazard to them. The respondents argued that the concern by the petitioners over health hazards was totally unfounded, and was not backed by any concrete and certain scientific evidence.

In determining the case, the Court noted, among other things, that first, where the life of citizens is endangered or degraded, the quality of life is adversely affected and

health hazards are created affecting a large number of people. Secondly, that currently, scientific evidence regarding the possibility of adverse biological effects from exposure to power-frequency fields as well as the possibility of reducing or eliminating such effects is inconclusive. The remaining question was how the legal system including both the judiciary and the various regulatory agencies should respond to this scientific uncertainty. It was the court's view that in such a situation, the precautionary principle should be applied. In so holding, the court agreed with the arguments made on behalf of the petitioners that where there are "threats of serious damage, effective measures should be taken to control it, and it should not be postponed merely on the ground that scientific research and studies are uncertain and not conclusive." The petitioners also made reference, with the court's approval, to the Rio Declaration, and cited Principle 15, which the court agreed envisages the rule of precaution and prudence, and enshrines the principle that prevention is better than cure.

Thirdly, the court noted that energy which was the aim of the grid-station is essential for present-day life, industry, commerce and day to day affairs of a nation for the purpose of enhancing more progress and economic development. Therefore, the court ruled, a method should be devised to strike a balance between economic progress and prosperity and to minimize possible hazards. The prevention principle represents such

70 Id. at 331 (per Parvez Hassan, Counsel for the Petitioners.)
71 Supra, note 38.
72 Compendium of Judicial Decisions, supra, note 69, at p. 332.
a method, and the court endorsed it as being an important element in the scope and content of environmental human rights.

2.2.3 Rights to Information and Popular Participation

The rights to information and popular participation are fundamental to the meaningful exercise of the human right to a decent environment. Quality human life, survival and well being depends upon knowledge of environmental risks and the ability to minimize or avoid them. For instance, uninformed communities cannot adequately protect their lives, property, cultural heritage and other natural resources. Nor can they call for reforms in their governments' environmental management policies and laws. States should be held to an affirmative duty under environmental human rights to assess the environmental and public health risks associated with activities under their jurisdiction or control, and to inform those persons potentially affected.

The recognition of such an obligation under the human right to a decent environment would guarantee due process rights for persons affected by government sanctioned harm to the environment. In other words, an informed public can, for instance, prevent the execution of an ill-conceived development project, lobby for the regulation of hazardous facilities, and take similar steps to protect itself from harm. Moreover, public involvement in environmental management can reduce the risk of political,

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74 Id., at p. 369.
economic and cultural conflict that may lead to violation of environmental human rights. Accordingly, we consider the right to information highly relevant to the human right to a decent environment. Public access to information on request and the obligation of public authorities to disclose it irrespective of requests are also essential for the enforcement of the right to a decent environment and hence for the protection of the environment. The right to information also constitutes an essential attribute of the democratic process and the principle of popular participation. It becomes an important factor for promoting and protecting human rights, the right to a decent environment as a human right, and the environment. The nexus between the right to information and popular participation within the context of the human right to a decent environment is very close, for one simple reason, namely, that without education or information about the environment and without access to relevant information on issues of concern, popular participation becomes meaningless.

2.3 THE EMERGENCE OF THE HUMAN RIGHT TO A DECENT ENVIRONMENT

The current inclination of the nations of the world to consider a new human right to a decent and healthy environment is a result of about twenty five years of activity at both regional and international levels. A 1973 proposal for an Additional Protocol to

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76 Id., para. 217.
the European Human Rights Convention recommending the right to a clean environment, appears to have been the first step towards promoting the emergent right to a decent environment at the regional level. Accordingly, the Council of Europe is now credited and documented as being the first international body to propose legislation of a legal right to a healthy environment. Later developments following the proposals are also significant for having, among other things, stimulated interest leading to greater calls and demands for recognition and guaranteeing of a human right to a clean, healthy and decent environment not only within the corpus of European Law, but also in international law. An example of such a development which followed is the Preliminary Draft of a Third International Human Rights Covenant on Solidarity Rights.

Generally, the Council of Europe, rather than the United Nations, was the most instrumental of the international bodies in developing early environmental policy, although very recently the United Nations has taken the initiative. In the 1960s and 1970s, the Council of Europe embarked on a number of programmes to focus attention and discussion on the state of the world environment and on environmental control mechanisms in Europe. Although the Council advocated environmental protection as early as the 1960s, it was not until the 1970s that it began to promote proposed

77 GORMLEY, supra, note 9, at p. 1.
79 GORMLEY, supra, note 9, at p. 4.
81 GORMLEY, supra, note 79 (stating that the Council of Europe sponsored a programme declaring 1970 the Conservation Year.)
amendments to the European Convention on Human Rights to take care of environmental protection and rights.\textsuperscript{82}

The Parliamentary Conference on Human Rights held in Vienna, Austria, in 1971 was another significant step towards establishing environmental protection as a human right.\textsuperscript{83} While the environment was not the sole topic of the Conference, the discussion pertained to human rights as they were to evolve in the latter portion of the twentieth century. The right to a clean and ecologically balanced environment was one of the key evolving rights meriting discussion.\textsuperscript{84} The Parliamentary Conference adopted a language reflecting favourably on the codification of new human rights and suggesting that the ramifications of proposed new rights be explored. The central goal of the Parliamentary Conference was the investigation of mechanisms for strengthening human rights protection in Europe.\textsuperscript{85} In order to further this goal, the Parliamentary Conference made suggestions for a programme of action to protect these rights which was to be carried out by the Council of Europe and member states at the national level. At the close of the Parliamentary Conference, the Consultative Assembly adopted an order which called for a study of the human rights questions which would be raised by guaranteeing individuals a healthy and livable or decent environment.

\textsuperscript{82}Id. at 4-6; Consultative Assembly, Council of Europe, Parliamentary Conference On Human Rights 110-111 (1972); Eur. Consult. Ass., 17\textsuperscript{th} Sess., Doc. No. 1526 (1972) (hereinafter Parliamentary Conference).
\textsuperscript{83}Id.
\textsuperscript{84}Id.
\textsuperscript{85}Id., at p. 111.
These early attempts by the Council of Europe to promote the recognition and establishment of a new human right to a decent environment can be juxtaposed against other significant developments at the international level and which seem to herald the emergence of a new fundamental right to a decent environment.

First, the World Commission on Environment and Development (WCED) proposed to the United Nations that the nations of the world should expressly recognise environmental rights as human rights, while the WCED’s Working Group of Legal Experts offered an express formulation of the right in Article 1 of its General Principles Concerning Natural Resources and Environmental Interferences by proposing that, “All human beings have the fundamental right to an environment adequate for their health and well-being.” This formulation sought to establish a fundamental right of human beings to an adequate and decent environment.

However, this fundamental human right has not been expressly adopted by all nations of the world. Indeed, there is no international convention or treaty recognizing the right to a healthy or decent environment. To date, the Stockholm Declaration of the United Nations Conference on the Human Environment, promulgated in 1972, is the most authoritative expression of the right to a decent and healthy environment. Principle 1 of the Declaration provides that man has the fundamental right to

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86 See Brundtland Principles, supra, note 26, at p. 40.
87 Id.
88 Stockholm Declaration, supra, note 37.
freedom, equality and adequate conditions of life, in an environment of quality that permits his dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.\textsuperscript{89}

The usefulness of Principle 1 of the Stockholm Declaration in the emergence of the right to a decent environment is clear, but it is not a statement of binding customary international law. For instance, the Declaration was never intended to be a binding international law document, but a set of guiding principles and goals towards which nation-states pledged to strive.\textsuperscript{90} Despite overwhelming support in the U.N. General Assembly,\textsuperscript{91} the acceptance of the Declaration by member states lacked the requisite uniformity to give rise to universal acceptance by all states.\textsuperscript{92} Several participants at the Conference expressed reservations regarding the principles contained within the document. For instance, some nations expressed reservations about the Declaration’s lack of ideological balance, emphasis on the human environment and its reference to internal policies,\textsuperscript{93} while others, such as the Soviet Union and other Eastern European nations, did not even attend.\textsuperscript{94}

Furthermore, the negotiations concerning the text of Principle 1 failed to indicate

\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Supra, note 43, at pp. 426-27.
\textsuperscript{92} WESTON, B.H., et al., BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 47 (Oxford University Press, London, 1990) (reporting that the Stockholm Declaration was adopted 103 for, 0 against, and 12 abstaining.)
\textsuperscript{93} CHEN, L., AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE 117 (Grotius Publications, Cambridge, 1989)
\textsuperscript{94} Id. at p. 431 (noting that the former Soviet Union and other European countries boycotted the Conference to protest the exclusion of East Germany.)
consensus over the existence of an individual fundamental human right to an adequate or decent environment. Some states, for instance, argued that the Declaration should begin with a general recognition that every human being has a “right to a wholesome environment,” while others felt that an individual right to a healthy environment was “not really compatible with some national legal systems.” Principle 1 does not, therefore, expressly recognise the right, by referring merely to the right to “freedom, equality, and adequate conditions of life,” and direct references to a right to “a safe, healthy and, consequently, wholesome environment” were omitted from the final draft of the Declaration.

Despite the experience of the Stockholm Declaration, negotiations in preparations for the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, in June 1992, suggested that nations of the world might be ready to consider and recognize, expressly, the existence of a human right to a decent environment, if only in the form of a non-binding statement of principles. For instance, the UNCED Secretariat included the duty to protect individual rights to environment and development among the duties contained in an early draft of the Rio Declaration, or the Earth Charter, as the UNCED’s written product came to be known. In addition, proposals received from both Australia and Peru included

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95 Id. at pp. 451-55.
96 Id. at p. 455.
97 Id.
express recognition of the human right to a healthy or decent environment. In its final form, however, the Rio Declaration begins with a statement of environmental rights that is even more ambiguous than the Stockholm Declaration. Principle 1 of the Rio Declaration states merely that “human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”

In spite of these imprecise statements, one sees a trend of significant activity at the international level towards recognising and consolidating the right to a decent environment. In totality, this activity and related developments constitute good evidence of the emergence of the right to a decent environment as an environmental human right.

At the regional level, the Organisation of African Unity expressly recognises the right to a healthy environment. The African Charter on Human and Peoples’ Rights provides that “all peoples shall have the right to a general satisfactory environment favourable to their development.”

However, reference to other regional legislation fails to establish similar recognition of the environmental right. Attempts to include the right in other regional human

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100 Id. Principle 3.
101 Rio Declaration, supra, note 38, Principle 1.
103 Id. art. 24.
rights documents have been unsuccessful. For example, although an amendment to
the American Convention on Human Rights expressly recognises the right to a healthy
environment, it has not yet entered into force.\textsuperscript{104} Article 11 of its Additional Protocol
states, \textit{inter alia}, that everyone shall have the right to live in a healthy environment
and have access to basic public services.\textsuperscript{105} This provision appears to be more specific
than the one made in the African Charter on Human and Peoples’ Rights and would
better enhance the human rights protection of individuals in the American states once
it enters into force.

Efforts to include the right in the European Convention for the Protection of Human
Rights and Fundamental Freedoms were unsuccessful.\textsuperscript{106} As has already been
indicated, the Council of Europe has had various proposals under study since 1970,
which would add the right to a decent human environment to the protections of the
European Convention on Human Rights. For instance, in 1970, the European
Conference on the Protection of Nature proposed a Protocol to the European
Convention that would protect the right of each person to a healthy and non-degraded
environment.\textsuperscript{107} These did not, however, succeed in amending the regional European
human rights instruments to specifically provide for the human right to a decent
environment.

\textsuperscript{104} Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social
and Cultural Rights, “Protocol of San Salvador”, Nov. 14, 1988, art. 11; O.A.S. T.S. No. 69, 28 ILM
156 (1989) (hereinafter \textit{Protocol of San Salvador}.)

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} See Desgangne, R., \textit{Integrating Environmental Values into the European Convention on Human

\textsuperscript{107} GORMLEY, supra, note 9.
At the national level, several states recognise the right to a decent and healthy environment in their constitutions. These include Albania, Australia, Bahrain, Belgium, Brazil, Bulgaria, Burma, Canada, Chile, Costa Rica, Ecuador, El Salvador, Equatorial Guinea, Ethiopia, Greece, Guatemala, Guyana, Haiti, Honduras, Hungary, India, Indonesia, Italy, Japan, Korea, Mexico, The Netherlands, Nicaragua and Panama. This practice represents evidence of the emergence and recognition of the right to a decent environment. It is submitted that the practice by such states appears sufficient as evidence that the right to a decent environment is emerging as a general practice of states which is likely to mature into a rule of international customary law.

What the above position shows is that, although the express recognition of the right to a decent environment has not been firmly established as a rule of international customary law, it is, nonetheless, emerging. Besides, the above position shows that there is a growing number of international, regional and national instruments which in one way or another mention the right to a healthy or decent environment, all of which constitute strong evidence of the evolution of a right of individuals to a decent environment. The national constitutions, for instance, whose provisions include the right to a decent environment are in themselves evidence that the right is gaining legal recognition as an emerging human right fundamental to all human beings.

108 See Popovic, supra, note 51, at p. 507.
109 Id.
2.4 FORMULATION OF THE RIGHT IN INTERNATIONAL AND
NATIONAL LEGAL INSTRUMENTS

We now wish to focus on the terminology used to define a right to a decent environment in legal instruments that have so far documented its emergence. Most of the instruments embodying this right have either qualified the word "environment", or focused their attention on some particular elements of the right.

In most instances, the right recognised is a right to a healthy or clean environment or an environment conducive to the well being and higher standards of living, all of which centre on the quality of human life.\textsuperscript{110} Some bolder formulations speak of a right to a decent environment, encompassing social and cultural aspects that take into account, for instance, the suitability of a given environment to an individual or a people according to their social and cultural needs.\textsuperscript{111} They acknowledge the interdependence of all elements of the human environment. There are also, a number of instruments which in their formulations, recognise the link between the protection of the environment and development. This is, for instance, apparent in the African Charter.\textsuperscript{112}

The processes of embracing and formulating the environmental human right to a decent environment have taken various forms. Several international and regional

\textsuperscript{110} E.g., Protocol of San Salvador, supra, note 104.
\textsuperscript{111} E.g., Stockholm Declaration, supra, note 37, Principle 1.
\textsuperscript{112} E.g., African Charter, supra, note 102, art. 24.
human rights instruments have included various statements of a right to environment. By way of illustration, the 1981 African Charter was the first human rights treaty to expressly recognise the right of “all ‘peoples’ to a generally satisfactory environment favorable to their development.” Elsewhere, the Organization of Economic Co-operation and Development (OECD) has stated that a “decent” environment should be recognised as one of the fundamental human rights. In an effort aimed at specifying environmental rights and obligations, the United Nations Economic Commission for Europe (UNECE) drafted the Charter on Environmental Rights and Obligations, which affirms the fundamental principle that everyone has the right to an environment adequate for general health and well-being.

The Organization of American States, another regional institution, has also included a right to environment in its Protocol of San Salvador. Article 11, entitled “Right to a Healthy Environment”, provides:

1. Everyone shall have the right to live in a healthy environment and to have access to basic services.
2. The State Parties shall promote the protection, preservation and improvement of the environment.

The operative parts of the Protocol of San Salvador affirm the progressive nature of the obligations undertaken. Article 1 requires states to co-operate on an international level and to adopt all necessary measures to the extent allowed by their available

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113 Id.
116 Supra, note 104.
117 Id.
resources taking into account their degree of development to protect the guaranteed rights. In addition, the parties must adopt domestic legislation or take other measures as necessary to make those rights a reality.\textsuperscript{118}

Within the United Nations framework, human rights instruments have stopped short of declaring a right to environment. Some, however, have taken a not so direct approach. The 1989 Convention on the Rights of the Child, for instance, does make reference to environmental quality in its provisions under Article 24 which provides for the right to health.\textsuperscript{119} This provision requires states to take appropriate measures to implement the child’s right to health, including efforts “to combat disease and malnutrition ... through, \textit{inter alia}, ... the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.”\textsuperscript{120} The treaty also calls for education of parents and children about hygiene and environmental sanitation.\textsuperscript{121}

In addition, the International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries,\textsuperscript{122} also adopted in 1989, makes reference to environmental protection, but does not grant a specific right to environment. The Convention requires states to take special measures to safeguard the environment of

\textsuperscript{118} \textit{Id}. art. 2.
\textsuperscript{120} \textit{Id}. Emphasis added.
\textsuperscript{121} \textit{Id}.
indigenous people. In particular, governments must provide for environmental impact studies of planned development activities, and take measures in co-operation with the people concerned, to protect and preserve the environment of the territories they inhabit. The Convention also recognises the importance of traditional activities of indigenous peoples, including hunting, fishing, trapping and gathering, as an aspect of environmental rights of such people, and which must be protected.

In addition to these international instruments, the constitutions of nearly one-third of the world states now include some formulation of the right to environment or detail environmental obligations on the part of the state. For instance, the Constitution of the Republic of South Africa, adopted on 8 May 1996, has formulated the right as follows:

Everyone has the right-

a) To an environment that is not harmful to their health or well-being; and

b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative or other measures that—

i. prevent pollution and ecological degradation;

ii. promote conservation; and

iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

From the foregoing, it would appear that at the United Nations level, the references to a right to environment have over the last twenty or so years become clearer with a great number of instruments acknowledging the relationship between human rights
and environmental protection. There also appears a detectable trend of linking environmental protection to development with the recognition of the need to balance the two concerns, for the purpose of ensuring ecologically sustainable development. Whereas people may have been able to speak of environmental protection for environment’s sake at the 1972 Stockholm Conference on the Human Environment, everything tends to be put today under the heading of sustainable development that supposedly reflects the integration of development and environmental concerns.\textsuperscript{129}

The concept of sustainable development, however welcome it may be, is ill-defined and rather ambiguous in its orientation towards environmental human rights.

In most of the recent documents, what is meant by development is not the comprehensive process involving social, economic and cultural elements that was outlined in the UN General Assembly Declaration on the Right to Development\textsuperscript{130} but mainly economic growth. Moreover, in the discussion on sustainable development, economic developments tend to take precedence over environmental protection. For instance, in the Rio Declaration, what seems to be at stake is the relationship between economic growth and environmental protection rather than development, human rights and the environment. The problem in the formulation would appear to be the emphasis placed on economic and development concerns as opposed to human rights.\textsuperscript{131}

\textsuperscript{129} Rio Declaration, \textit{supra}, note 38, Principle 4.
\textsuperscript{131} See Agenda 21, U.N. Doc. A/CONF.151/26 (1992) (which outlines in detail the policies to adopt for the realisation of a sustainable development but hardly mentions the term human rights even though they form a necessary part of the strategy proposed.)
Further, it should be noted that the formulation of the right as a plain 'right to environment' is no more imprecise than a right to a healthy, decent or a clean environment as these qualifying adjectives may be themselves vague or probably subject to divergent interpretations. What is important is that they all refer to the fundamental human right to a decent environment. In determining how to formulate the right, it is necessary to address various questions concerning the problem of definition of the right. For instance, there is the question of whether the term 'environment' needs to be qualified to give meaning to environmental human rights. This is because 'environment' can signify "any point on a continuum between the entire biosphere and the immediate physical surrounding of a person or group, and because it is a neutral term, environment can be pristine or decimated, or its condition can be defined as falling somewhere in between."\(^{132}\) A multitude of possible qualifications have been suggested by commentators as well as various relevant documents or instruments that contain formulations of the right to environment. Some of those frequently used include decent, healthful, clean, sound, liveable, ecologically balanced, safe, unspoiled, undegraded and viable.

Another important issue related to the definitional problem in the formulation of the right is whether the right should be formulated as absolute or qualified.\(^{133}\) Here, absolute means not limited "either by the resources available to the state or by reference to the means to be employed in performing them", while qualified means

\(^{132}\) Kiss & Shelton, supra, note 27, at p. 22.

limited to the maximum of the resources available or to appropriate means." In this regard, it is to be noted that just like other human rights, there would be limitations or qualifications to the proposed right to a decent environment. An illustration is the Constitution of the Republic of South Africa, which provides for qualification or limitation to the environmental human right contained in its Bill of Rights. According to section 36 of this Constitution, the environmental right may be limited only in the law of general application to the extent that such a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In limiting the right, all relevant factors must be taken into account, such as the extent of and effect of such limitation, the importance and purpose of the limitation and the availability of a less restrictive means of achieving such a purpose. These issues are germane to the formulation of a right to a decent environment.

Finally, there is the issue of whether the right should be specific as to the means of implementation or merely a general standard. One should, however, note that human rights are often expressed in general terms, leaving implementation to appropriate mechanisms. Provisions providing for specific mechanisms of implementation, whether constitutional or otherwise, would be useful.

The ultimate issue emerging is whether these definitional or formulational problems are fatal. Kiss and Shelton argue "judges are perfectly able to interpret an abstract

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134 Id. at p. 58.
136 KISS & SHELTON, supra, note 27, at pp. 22-3.
right and give it meaning within a concrete social and historical context.” They point out that definitional problems, such as those mentioned above, are pervasive in law and in human rights law in particular. For example, many of the rights in the Covenant on Economic, Social, and Cultural Rights, including the right to a satisfactory standard of living and the right to the highest attainable standard of health, have long been criticized as being too abstract. According to them, such abstract rights can, in “the public conscience of a given society”, be given sufficient precision enabling them to be applied by judges. They conclude that “… there presently exists in the public conscience a clear image of an environment which should be preserved and from which each person should benefit.” It means that problems of formulation are not fatal so long as the formulation of the right is one capable of being construed to mean an environmental right to a decent environment. Therefore, although the issue of formulation of the right may appear problematic, it nevertheless represents documentary evidence of the emergence of the human right to a decent environment.

2.5 THE RIGHT TO A DECENT ENVIRONMENT AS PART OF POSITIVE INTERNATIONAL LAW:

There are three identifiable processes through which the emergent right to a decent environment could be recognized at the international level as being part of positive international law. P. Alston states that maintaining the integrity of the current human rights regime and recognizing new rights carrying similar authority requires adherence

\textsuperscript{137} Id.  
\textsuperscript{138} Id.
to a process of quality control. Recognition of human rights in international law under such a process should proceed in three general stages, namely, identification of a particular problem and the needs which must be met to eradicate the problem; legislation by the proper national or international body to turn the needs into specific norms; and implementation by promotion and enforcement of the new norm.

With regard to the emergent right to a decent environment, it has already been demonstrated that there are environmental problems and urgent need exists to address them. The first stage as presented by Alston above would appear to have been reached. The problem now lies with the second and third stages. Towards that end, the first, and probably most important, process consists of the emergence of the right under customary international law as evidenced by state practice. The second process would involve deriving the right to a decent environment from the existing international human rights law, and, finally, the introduction of such a right into the international legal regime through a covenant or treaty.

The first process is crucial. Customary law looks to legal custom, as evidenced by bilateral and multilateral state practice, for its norms. Customary law becomes binding under international law when states subjectively believe that they are legally bound to obey them, under the *opinio juris* doctrine.

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139 Alston, *supra*, note 78, at pp. 315-16.
140 *Id.*
Further, the subjective belief usually arises after an extended period of time, during which the practice is followed extensively and consistently on the international level. Such compelling and consistent state practice is usually documented through United Nations General Assembly resolutions, state statutes, international conferences, statements from intergovernmental bodies, judicial decisions, and other public statements of policy and practice.\textsuperscript{142}

Some proponents of the right to a healthy and decent environment argue that this new and emergent right is already in existence and acceptable under customary international law. L.B. Sohn, for instance, advances this argument, on the basis that an obligation on the part of states to protect the environment can be inferred from the United Nations Charter, the Universal Declaration of Human Rights and/or the two covenants on political and civil rights as well as economic, social and cultural rights, which obligation would satisfy the necessary element under the \textit{opinio juris} doctrine.\textsuperscript{143} This argument is, however, weakened by the fact that the nations participating in the UNCED Conference in 1992, which produced the Rio Declaration, failed to agree on an accepted international legal norm of a healthy and decent environment. It translates to a denial of the existence of the requisite subjective element under the \textit{opinio juris} doctrine.

\textsuperscript{142} CHEN, \textit{supra}, note 92, at p. 361.  
\textsuperscript{143} Sohn, \textit{supra}, note 2, at p. 61.
This, coupled with the lack of careful and documented analysis of binding evidence of international acceptance of a legal norm to verify that the right to a decent environment has gained international acceptance or is actually accepted as part of customary international law, compounds the problem of identity of the emergent right at international law. From a positivist perspective, we find that there appears to be lack of international support or consensus, consistent state practice and acceptance of the norm as a rule of customary international law. However, it has to be noted that general international support does not always mean that each and every member of the community of nations should give its express and specific support to a principle for the establishment of a principle of customary international law. As J. Brierly observes:

It would hardly ever be practicable, and all but the strictest of positivists admit that it is not necessary, to show that every state has recognized a certain practice, just as in English law the existence of a valid custom or custom of trade can be established without proof that every individual in the locality, or engaged in the trade, has practised the custom. The test of general recognition is necessarily a vague one; but it is of the nature of customary law, whether national or international.\textsuperscript{144}

In view of the above, one can see that it would not be necessary for every state in the world to confirm its acceptance or recognition of the emergent right as a norm of customary international law before it can acquire binding legal status as a rule of customary international law. At present, there appears to be evidence of an emerging right to a decent environment which however, does not seem to satisfy the requirements for the creation of a rule of customary international law. However, future

\textsuperscript{144} BRIERLY, J., \textsc{The Law Of Nations} 6\textsuperscript{th} edn. 61 (Clarendon Press, Oxford 1963).
international human rights law instruments may contain additional expressions of this emergent legal norm. This is because the environmental movement continues to gather more force even as more global environmental problems are identified and, further, because the link between human rights and the environment is increasingly being recognized. In addition, the growing number of state constitutions which include the right to a decent environment as an environmental human right may lead governments to ultimately accept the norm on an international level. Even if the foundation for environmental protection suggests broader interests than human rights, the recognition that human survival depends upon a safe and healthy environment is one that places the claim for a right to a decent environment fully on the human rights agenda at the international level.

2.6 CONCLUSION

The right to a decent environment is emerging and gaining recognition under both international and municipal law. However, the right is yet to gain recognition as a norm of customary international law. Various components of the right have also emerged under international law. These flesh out the content and scope of the right. They also represent the rights and duties generated by the right as an environmental human right.

The emergent right to a decent environment comprises a unified package of environmental human rights, both substantive and procedural. The emergence of the human right to a decent environment demonstrates an increasingly refined theory of
environmental human rights. This theory treats environmental rights as a comprehensive package or concept of human rights which constitutes the content of the right.

There are many possible formulations of the human right to a decent environment. We may talk about environment as a human right, a safe, healthy and ecologically balanced environment, a satisfactory environment for the protection of everyone’s health, a clean and sound environment, and a healthy and pleasant environment. Other formulations have added the word ‘sustainable’ to the definition of the human right. However, if one puts all these phrases together, we would end up with a right to a safe, healthy, pleasant, ecologically balanced and sustainable environment, which we define briefly as the right to a ‘decent’ environment.

Although custom and general principles are valid sources of international law, they do not create immediate, specific and binding obligations on states to the same extent as a signed and ratified treaty or covenant. The emergence of the human right to a decent environment undoubtedly calls for commitment by both governments and the United Nations in their activities to take all measures necessary in ensuring the ultimate consensus and universal recognition or acceptance of the right. While the right to a decent environment is clearly emerging, it requires more recognition and acceptance. Formal adoption of the right by the UN General Assembly followed by universal ratification by world states would be a step in the right direction. It would enhance and reaffirm the integrity of the human rights recognition process, which is important
for the evolution and growth of any new human right. Nevertheless, this right to a
decent environment is emerging as a feasible human right, which warrants not only
recognition, but also protection and implementation.
CHAPTER THREE

PROBLEMS FACING THE RIGHT TO A DECENT ENVIRONMENT

3.1 INTRODUCTION

In the preceding chapter, we examined the juridical nature and content of the right to a decent environment. The chapter also looked at the extent to which the right to a decent environment has emerged at both international and national law. In this chapter, we discuss some of the problematic issues posed by the emergent right.

The emergent right to a decent environment has to contend with certain problems and challenges even as it evolves further, some of which clearly stand in the way of its development. Significant gaps, particularly in international law, continue to obstruct the effective growth and implementation of the right. The gaps generally spring from the inability of individuals to assert environmental claims and promptly receive compensation or redress for the damage they have suffered. Individuals, for instance, have no locus standi at this level because the “individual” component of the right is ill-developed. It poses a problem because the existence of a realistic and effective implementation machinery is crucial to the successful development and meaningful exercise of the emergent right. Under the rubric ‘enforcement’, this chapter deals with the issue of locus standi and implementation of the right to a decent environment.
Besides enforcement, other challenges facing the right deserve mention. First is the apparent contradiction between obligations under the right and political doctrines founded on state sovereignty, and second, the right’s potential conflict with the right to development. Other issues dealt with are questions as to whether the right to a decent environment can be enforced only at the instance of and for the benefit of human beings to the exclusion of other entities (anthropocentrivity) and how effectively the right can be balanced with other rights, norms and competing interests.

3.2 ENFORCEMENT AND IMPLEMENTATION OF THE RIGHT TO A DECENT ENVIRONMENT

One of the objections raised against the right to environment is that it is difficult to implement, particularly in the light of such conditions as development and state sovereignty.1 Whereas the enforcement of the right to a decent environment continues to pose difficulties, various mitigating factors ameliorate the situation. One way is the advancement of the rights to information, consultation in the decision-making process, and access to courts, all geared towards achieving environmental justice. As elements of the right to a decent environment, these rights are instrumental in the process of enforcement and enjoyment of this human right. This explains why they have often been referred to as procedural environmental rights.2

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It is important to note that access to information, participation in the decision-making process, and access to court can have a tremendous impact on the realisation of the emergent right to a decent environment and its effective enforcement. The importance of information, participation and access to court should further be seen from the understanding that the enforcement of environmental rights is dependant on the ability of the general public to have access to information and to be able to participate effectively in making environment related decisions. For instance, the right to know, especially when coupled with the right to environmental education as an element of the claimed right to a decent environment, has been termed a "powerful tool for the enforcement of environmental rights."

As regards the elements of individual’s right of access to courts and judicial tribunals, it should be appreciated that the issue of locus standi or legal standing regarding environmental matters is of prime importance. This refers to the competence and right of a party to claim relief in a court of law or to sue for remedies and redress. A strict application of the concept of locus standi is more often than not, seen as being ‘inimical’ to sound environmental management, for it operates to shut out both real and potential litigants, particularly in environmental cases.

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3 Id.
6 Id.
The problem usually arises because it is quite tempting for legislation to limit the categories of entities which can enforce environmental provisions to government agencies alone. The solution would be to have provisions that allow private enforcement, under defined circumstances, so as to enhance the enforceability of the right to a decent environment. Constitutions and derivative legislation can define those who have *locus standi* to include "individuals, interest groups, environmental trustees or guardians" and to include standing concerning "the interests of future generations".7

The argument would, therefore, be that since environmental matters are deemed to affect the public in general, members of the public, as individuals, should have the right to bring legal action to enforce the right to a decent environment. The ability of private citizens to enforce a public duty is central to the implementation of environmental provisions for the prime purpose of enhancing the attainment of a decent, clean or healthy environment. According to A.J. Harding, in matters of environmental concern and in the determination of *locus-standi*, any test based on the notion of private rights is insufficient for effective enforcement of public duties by individuals.8 For the purpose of vindicating environmental rights claims or the right to a decent environment, a solution would lie in the liberalisation of the standing requirements. Harding, further argues that "the important task is to rid the law once and for all of the illogical and possibly dangerous notions that public duties can only

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be enforced by the Attorney General." He proceeds to note that "the office of the Attorney General does not have an illustrious history of enforcing public duties. Attorneys General are unwilling to act against public bodies and the courts seem to be unwilling to review their reasons however poor, for failing to act."

It becomes imperative that with the growing importance of environmental rights and protection, liberalisation of the political and economic systems, it is important to extend the concept of legal standing beyond governmental agencies. Such extension of the standing requirements should be reinforced by constitutional provisions, preferably as part of the formulations of the right to a decent environment. Illustrations of such a case include the case of Portugal. The 1976 Constitution of Portugal, as revised in 1982, contains fundamental rights and duties of citizens of Portugal. It provides in part that:

1. Everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it.

2. It shall be the duty of the state, acting through appropriate bodies and having recourse to popular initiative, to:
   a) prevent and control pollution and its effects and harmful forms of erosion;
   b) have regard in regional planning to the creation of balanced biological areas;
   c) create and develop natural reserves and parks and recreation areas and classify and protect landscapes and sites so as to ensure the conservation of nature and the preservation of cultural assets of historical or artistic interest;
   d) promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability.

3. Everyone shall have the right, in accordance with the law, to promote the prevention or cessation of factors leading to the deterioration of the

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9 Id. at p. 226.
10 Id. at p. 227.
This formulation illustrates how constitutional provisions can be made granting locus standi to citizens in environmental litigation. It enables individual persons to sue in the interest of the environment. This is a powerful weapon, with sound constitutional backing which allows for 'constitutional judicial review' of decisions or actions by anybody, including the government, which directly or indirectly impact on the human right to a healthy and ecologically balanced environment.

The other way of enhancing the enforceability of the right to a decent environment is to make provisions in the constitution that give the necessary legal standing to certain natural or juristic persons. This concept of juristic persons, such as corporations, firms, associations, trusts, foundations, communities or institutions, non-governmental organisations (NGOs), and other civil institutions, is now recognised as an important contribution to the enforcement process of the right to a decent environment as well as environmental rights generally.

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11 Art. 66. Emphasis added.

12 See Brandl, E., 

13 Juma, supra, note 7, at p. 384.
Such recognition is evident in South Africa,\textsuperscript{14} where the \textit{locus standi} requirement has undergone remarkable transformation.\textsuperscript{15} Chapter 2 of the 1996 Constitution of South Africa contains provisions which recognise the \textit{locus standi} as well as the legal capacity of juristic persons to enforce constitutional provisions on the environmental rights against any person or parties whose acts or omissions are deemed to be in violation of the fundamental right to a decent environment. Section 8 thereof provides that the Bill of Rights applies to all persons and binds the executive, the judiciary and all the organs of the state, and that it binds both natural and juristic persons. The section referred to, when read together with section 38 of the Constitution, effectively establishes legal standing of the juristic persons in cases of enforcement of environmental rights. Section 38 which deals with “Enforcement of Rights” includes \textit{locus standi} provisions. It states:

Anyone listed in this section has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are:

a) anyone acting in their own interest;
b) anyone acting on behalf of another person who cannot act in their own name;
c) anyone acting as a member of or in the interest of a group or class of persons;
d) anyone acting in the public interest, and
e) an association acting in the interests of its members.


\textsuperscript{15} \textit{Id}, at p. 132 (noting that liberalization of locus standi in South Africa did not happen overnight. It was the result of demands/calls for the widening of legal standing in environmental litigation from academics, practitioners, environmental organisations as well as lessons from examples in other countries and developments in international environmental law and limited efforts by their courts in developing public interest litigation.)
These provisions represent and comprise the essentials of both private and public law claims. It means, inter alia, that where public law rights are involved, associations, representatives or persons, groups or classes, may act for persons or groups and that in its broadest sense any person can now act in the public interest. The section takes into account class action and relegates the traditional requirements of personal interest in claims over environmental issues to the periphery. Any person or organisation may enforce, in a relevant court of law, the provisions of the Bill of Rights regardless of whether that person or organisation is directly adversely affected by the alleged infringement of environmental human rights.

India is another example of a country whose legislation on the enforcement of environmental rights offers a more advanced example of representative standing. For years, the Indian courts had used the traditional narrow interpretation of locus standi. However, during the 1970s, the Supreme Court liberalised and extended locus standi by introducing class actions in the public interest, generally known as public interest litigation or social action litigation. This involves the application of highly simplified procedures for effecting the public interest litigation, thereby effecting the enforcement of environmental rights. Any citizen, group or groups of citizens, can exercise representative standing by simply sending an ordinary letter to the High Court or the Supreme Court registry, detailing environmental transgressions. Such a letter is then treated by the courts as a petition or writ on the basis of which investigations and provision of legal aid or redress through the court may follow.

16 Id. at p. 134.
One example is the case of *Rural Litigation & Entitlement Kendra Dehradun et al vs. State of Uttar Pradesh et al.* The case arose when the Supreme Court of India directed a letter received from the petitioner alleging unauthorized and illegal mining in the Dehra Dun area which adversely affected the ecology of the region and caused environmental damage, to be registered as a writ petition under Article 32 of the Constitution, and issued notice to the Respondents. Having considered several reports made by Committees of Experts appointed by the Supreme Court to examine the environmental implications of limestone mining in the Dehra Dun Valley, the Court ordered that mining in the area should be stopped. The Court observed that the writ petition before it had been raised by way of public interest litigation in an effort to enhance social safety and for creating a hazardless environment for the people to live in. Similarly, in *Chhetriya Pardushan Mukti S.S. vs. State of Uttar Pradesh & Others*, a letter written to the Court was treated as a writ petition under Article 32 of the Constitution. The letter written by Chhetriya Pardushan Mukti, alleged environmental pollution in the Sarnath area, which posed a serious health hazard to the people.

One sees that the use of such simplified procedures in effecting or litigating environmental rights is highly beneficial to persons whose right to a decent environment has been, is being violated or is threatened with infringement.

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17 AIR 1985 SC 652
18 AIR 1990 SC 2060.
Although the persons and organizations acquire the requisite *locus standi* to enforce an environmental right where infringement or threatened infringement of such a right is alleged, one cannot overlook the important role of the courts in determining whether or not the party is ultimately successful in the action for redress. All would depend on the court’s interpretation of the relevant constitutional provisions. It is suggested that the right approach is one which comprises purposive interpretation and which enhances the constitutional principles underscoring the value system of a constitution.

At another level, the enforcement and implementation process faces other challenges which spring from the twin issues of development and the doctrine of state sovereignty. These challenges include the problematic issue of standing of individuals before international tribunals, the problem of identifying the victim(s) of environmental harm or violation of environmental rights, (the victim requirement) and the difficulty of identifying the particular author or the cause of injury to environmental rights of individuals. Besides, at the international level, the absence or lack of an effective enforcement machinery or court presents unique challenges to the implementation process for environmental rights. Addressing these problems underscores the fact that since environmental problems largely represent special challenges to the litigation process, there is need for special methods or means of tackling them.

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20 See Desgagne, supra, note 2, at pp. 284-86.
In conclusion, we suggest the need for the establishment of an efficient and effective enforcement machinery particularly at the international level, to provide avenues for enforcing environmental rights. This is in line with the calls so far made for the establishment of an International Environmental Court.\(^\text{23}\) It is, however, noted that the establishment of an Environmental Law Chamber of the International Court of Justice (ICJ) in 1993 is a positive step towards this direction. This initiative could be taken a step further through an amendment to the Statute of the ICJ making provisions to grant *locus standi* to individuals and entities other than states to bring actions before the Chamber. This would enable individuals to assert the emergent right to a decent environment at the international level. This will also be a deserved response to the increasing cases of environmental disputes. In proposing the establishment of an International Environmental Court, A. Postiglione has stated that:

> The human environment needs a structural and permanent guarantee, on an international level, in order to ensure that the right of access to environmental information, the right to participate in administrative and judicial proceedings, and the right to courts are effectively protected in the widest possible social terms everywhere, and are comparable to the global ecological systems constituted by the planet.\(^\text{24}\)

It is apparent that though the enforcement and implementation of the emergent right to a decent environment may be difficult, practical options and alternatives exist through which the fruits under the right can be realised. What is necessary is the consolidation of efforts, both at the national and international levels, towards affording necessary

\(^{23}\) *Id.*  
\(^{24}\) *Id.*
legal and constitutional guarantees to the emergent right to a decent environment as a human right.

### 3.3 ANTHROPOCENTRICITY

Emerging from the preceding discussions, one sees that the formulation of the emergent right to a decent environment as well as its scope and content are generally human centred or anthropocentric. However, there is now very real concern among environmentalists over the inherent anthropocentricity of environmental human rights.\(^{25}\) One question that arises is whether the right to a decent environment should be enforced for the benefit of human beings only or whether it is to incorporate other animals’ or nature’s rights or interests. In other words, does the right to a decent environment generate an obligation to preserve nature for its own sake?, Is it a moral right of nature?, or should we recognise legal rights of nature as opposed to human rights?

To a large extent, the very idea of environmental human rights reinforces the idea that the environment and natural resources exist for human benefit. This implies that benefit to human beings is the prime reason for respecting the environment. It depicts a utilitarian view, which contrasts with an alternative view that sees intrinsic value in

the environment. This utilitarian view can be inferred from the 1972 Stockholm Declaration of the United Nations Conference on Human Environment which suggests that human benefit is the primary reason for respecting the environment.

According to Principle 2 of the Stockholm Declaration, the natural resources of the earth, including the air, water, land, flora, and fauna must be safeguarded for the benefit of present and future generations. P.W. Gormley, commenting on the debate, suggests that while the goal of environmental law is to guarantee an environment free from contamination, along with the protection of flora and fauna, ultimately, it is mankind that must be protected.

The right to a decent environment should, therefore, be enforced and implemented for human benefit. Moreover, total ecological considerations create a hierarchy according to which humanity assumes positions of superiority and importance, distinct from other members of the natural environment. More importantly, the objectives and standards applied are human-centred, and the decency of the environment is to be seen from a primarily human perspective. Humankind, therefore, has dominance over the other constitutive entities or species found on the planet earth and, hence, the human centred approach to environmental rights.

The human centred approach or character of an environmental human right leads to philosophical tension between advocates for anthropocentrism and those for

28 Taylor, supra, note 25, at p. 352.
ecocentrism or biocentrism. As a result, some authors wholly reject the human rights proposal, while others offer a compromise position. The opponents to the human rights approach raise several concerns. First, anthropocentric approaches to environmental protection are seen as perpetuating the values and attitudes that are at the root of environmental degradation. Second, anthropocentric approaches deprive the environment of direct and comprehensive protection, as a result of which the environment is only protected as a consequence of and not to the extent needed to protect the well-being of human beings. Third, human beings are the beneficiaries of any relief for infringement of environmental rights. There is no guarantee for the utilization of such relief for the benefit of the environment.

On the other hand, the proponents of anthropocentrism put forward their arguments. First, it has been suggested that a degree of anthropocentrism is a necessary part of environmental protection mainly because humanity is the only species known which has the consciousness to recognise and respect morality of rights, and because human beings are, themselves, an integral part of nature. In other words, the interests and duties of humanity are inseparable from environmental protection. For example, D. Shelton argues that "humans are not separable members of universe. Rather, humans are interlinked and interdependent participants with duties to protect and conserve all

31 Taylor, supra, note 25, at p. 120.
32 Giagnocavo & Golden, supra, note 29.
33 Shelton, supra, note 30, at p. 108.
elements of nature ...”34 She proceeds to argue that an environmental right could be complementary to a wider protection of the sphere which recognises the intrinsic value of nature, independent of human needs.35 This approach implies that the issue of anthropocentrism vis-à-vis biocentrism is largely structural, requiring integration of human rights claims within a broader decision-making framework capable of taking into account, among other factors, the intrinsic values, the needs of future generations, and the competing interests of states and species.

Advocates for a compromise position include H. Rolston,36 who accepts the paradigm of human rights for protection of human needs for environmental integrity, but also suggests elaboration of human responsibilities for nature.37 Another related view is that of W. Nickel,38 according to which human rights are seen as playing “a useful and justifiable role in protecting human interests in a safe environment and in providing a link between the environment and human rights movements.”39 He labels his approach “accomodationist” and states that anthropocentrism is not a significant objection if it can be supplemented by other norms that will address other issues.40

Since human beings are the ultimate beneficiaries of the right to a decent environment, it means that environmental rights are founded on anthropocentrism. It is human

34 Id. at p. 110.
35 Id. at p. 111
37 Id. at pp. 259-62.
39 Id. at p. 282.
40 Id. at p. 283.
beings, as the right holders, who are burdened by obligations under the right to a
decent environment. It is for their benefit that the right to environment is claimed
since the protection of the ecological system is necessary for the enhancement of
human lives. The protection and preservation of other non-human entities is not for
any other purpose, besides that of benefiting human beings. There seems to be no
discernible objective for environmental protection that is distinguishable from, and
contrary to human benefit and interests.

3.4 BALANCING COMPETING RIGHTS AND INTERESTS

One fundamental issue in the human rights approach to environmental protection is
that of balancing environmental rights with competing rights. For instance, an
environmental human right may conflict with other human rights, such as the right to
development, and most commonly with property rights and economic interests of the
community as a whole. In other words, property rights and development rights would
be pitted against the right to a decent environment and other environmental rights
generally. It is, therefore, necessary to consider how well the right to a decent
environment would fare when viewed against such rights.

This is based on the premise that the legal doctrines that, for example, guide property
right systems may not adequately reflect ecological principles to a level which
accommodates the right to a decent environment. Such a position is likely to
undermine the efforts to implement the right to a decent environment. It will also be
recalled that in order to enhance the economic component of development, people
must have recourse to environmental resources. If, for instance, the tempo of economic activity outstrips these resources, people will, in seeking to improve their material conditions, overrun the resources and thereby undermine their very existence. In this context, the concepts of property and property rights become relevant and crucial for being at the centre of economic development and other development related activities, most of which are integrally related to the environment.

Property values, rights and interests, therefore, become part and parcel of the regime of environmental law and an important consideration in the complex issue of development, property and environmental rights. For instance, the enforcement of private property rights in land, without the corresponding duties under environmental rights, has resulted in the failure of government policies and development practices to fully integrate environmental considerations into growth strategies. According to R.S. Bhalla:

PROPERTY can be viewed as a slice of natural resources, or a fabrication therefrom, which has been appropriated by a particular person. To the lawyer, property is only a juridical symbol, which represents a person’s ownership and control of something. The law’s guarantees of property rights allow only the most limited room (in the form of police power, eminent domain and taxation) for varying such rights with public interest. This is bound to present a major obstacle for environmental goals. Moreover, property rights become crucial as property itself inheres in an overriding and long standing economic philosophy of capitalism, and a belief in the forces of

41 Juma, C., Introduction, in IN LAND WE TRUST, supra note 7, at 1-2.
42 Bhalla, R.S., Property Rights, Public Interest and Environment, in IN LAND WE TRUST, id. at p. 78. Emphasis added.
profit and free market, now dominant in the world economies. Due to this, it is now recognised that property rights, especially where they are freely traded, would create the incentives needed to facilitate the efficient utilization of natural resources. These aspects of the property doctrine must be addressed if one has to relate the current legal regime to the aspect of environmental law and environmental rights. According to J.B. Ojwang and C. Juma, whether or not environmental interests can be made part of the day to day social and economic transactions must depend on the “doctrinal setting of the operative legal order”, and on whether or not it will accommodate the “concern of environmental protection.”

The question of balancing comes in to determine how the right to a decent environment is to be balanced with the property doctrine in which the concept of private property inheres. It is an issue which basically revolves around the manner of incorporating, broadly speaking, ecological principles into property jurisprudence to ensure the viability of environmental human rights. It is to be noted that, at present, there is growing interest in the view that mankind must take responsibility for ecological concerns, because as has been stated, there is complex interdependence within and between ecosystems which warrants such action. Therefore, absolutist “private property rules that attempt to treat natural resources as temporary and

44 Id. at p. 317.
45 Id.
spatially bounded commodities make little sense.\textsuperscript{46} This constitutes the rationale for our argument that the enforcement of the right to a decent environment should also entail the incorporation of ecological principles into decisions regarding property, and particularly private property doctrines.

An example from the United States of America, where the institution of property is an entrenched aspect of their legal system, illustrates that this is possible. The case in point, \textit{Just vs. Marinette County},\textsuperscript{47} involved wetlands on the property of one Ronald and Kathryn in Wisconsin. In 1965, the Wisconsin legislature passed a Water Quality Act that introduced shoreland regulation. In 1967, Marinette County adopted Shoreland Zoning Ordinance No. 24 which divided the shoreland into three categories, namely, general purpose, general recreation, and conservancy districts. Certain uses of shorelands, like wild crop harvesting, sustained yield forestry, transmission lines, hunting and fishing, preservation, hiking or riding rails and wildlife raising were expressly permitted. The Ordinance also required permits for certain conditional uses which included farming, damming or relocation of water flow, filling, wetland drainage or dredging, and removal of soil.

In 1961, the Justs had bought 36 acres of land near Lake Noquebay in the County, with over 2000 feet of lakefront. By 1967, they had subdivided and sold five parcels retaining one, which fell under the wetlands category in the conservancy district. The


\textsuperscript{47} (1972) 56 Wis. 2d NW 2d.
use of this land for economic activity required a conditional permit. The Justs began filling this land for use without a permit and were sued by the County for violating the Ordinance. The trial court found them guilty and fined them US$100, but they took the matter to Wisconsin Supreme Court. The Supreme Court’s view was that the case represented a conflict between the public interest in stopping the despoliation of natural resources, which citizens had hitherto taken for granted, and an owners’ asserted right to use the property as he wishes. The court, in reviewing the matter, demonstrated the recognition of the importance of wetlands in general, and of ecology in particular even in the face of an assertion of a private property owner’s rights. In particular, the court stated:

What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. Swamps and wetlands were once considered wasteland, undesirable and not picturesque. But as people become more sophisticated, an appreciation is acquired that swamps and wetlands serve a vital role in nature, as part of the balance of nature and essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated possess their own beauty of nature.\textsuperscript{48}

This case illustrates the potential conflict area of environmental rights and rights to private property. It brings to the fore the question of balancing two competing interests as a way of resolving the conflict. In this regard, the court specifically dealt with the issue of supremacy of property rights over ecological interests or rights and

posed the question whether private property rights empower an owner to deal with his property in whatever manner he wishes without any regard for environmental interests. While noting that this question is fundamental, the court held that private property rights are not absolute. It stated thus: An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of police power in zoning must be reasonable and we think it is not an unreasonable exercise for that power to prevent public harm to public rights by limiting the use of private property to its natural use. 49

From this case one sees that emphasis was placed on the supremacy of ecological and environmental rights and interests. These interests, which are of a public nature, could not be destroyed by virtue of private property rights. Consequently, it is possible to conclude that the emergent right to a decent environment as an environmental right provides a sound basis for individuals to challenge certain decisions or acts which are taken by property owners for being inconsistent or incongruous with ecological principles governing environmental protection.

It would enhance the vindication of both individual and public rights over the environment by enabling holders of environmental rights to challenge actions by property owners, thereby contributing to the attainment of a sound, decent, healthy or clean environment.

49 Id. at p. 352.
This becomes possible as a result of the fact that the property doctrine has undergone significant evolution over the years, to the extent that it can and should now incorporate other concerns which include ecological or environmental considerations.\(^{50}\) This means that it is feasible to ensure that environmental rights and ecological considerations are reflected in property law regimes.

3.5 THE RIGHT TO A DECENT ENVIRONMENT AND THE RIGHT TO DEVELOPMENT

The close relationship between development and environmental human rights brings into focus the stated indivisible and interdependent nature of all human rights. The idea of indivisibility has been emphasized by the Proclamation of Tehran\(^{51}\) of 13\(^{th}\) May 1968, which states:

> Since human rights and the fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social developments.\(^{52}\)

Underlying the links between the right to development and the right to a decent environment are the indivisibility and interdependence of all human rights whether civil or political, economic, social or cultural. For this reason, it is impossible to separate the claim to a healthy and decent environment from the claim to the right to

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\(^{50}\) Juma & Ojwang, supra., note 43, at 327.


\(^{52}\) Id. para. 13. Emphasis added.
development. This implies, inter alia, a concentration of efforts to combat poverty and underdevelopment, but without transgressing on environmental human rights.

The claim to a right to development has emerged in the last two decades from the demand and concerns of the less developed countries. One major concern relates to the connection between the existing international economic order and human rights. The first addresses concern regarding the effects of poverty on conditions of life. The second concern addresses the more direct effects of the old economic order. For instance, the pursuit of militarism by ruling elites in many developing countries and use of repressive mechanisms for the control of society by many national governments with the support of the international economic order cause direct violations of human rights, including environmental human rights. Flowing from such concerns, there has been a growing awareness of the connection between development, environmental rights and environmental protection. The connection between the right to development and the right to a decent environment lies, largely, in the fact that the exercise of the right to development entails the exploitation of natural resources in the environment. Due to this relationship, there is bound to be conflict or tension between the right to development and environmental rights in their spheres of operation.

55 Id. at p. 602.
This is illustrated, for instance, by the UN General Assembly Resolution 44/228, on the United Nations Conference on Environment and Development (UNCED).  Although the Resolution stresses that poverty and environmental degradation are closely related, it concedes that the measures taken for addressing environmental damage should take into account the needs and abilities of developed nations. While recognizing the need of developing countries for new and additional financial resources with which to address environmental problems, the Resolution records that one objective of the Conference was to examine the relationship between environmental degradation and the international economic environment with a view to ensuring a more integrated approach to problems of environment and development.

Similar recognition of the relationship between environmental rights and development is illustrated by the Rio Declaration  which provides that “the right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations”, and that, “in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”

In the light of the foregoing, it is argued that despite the growing awareness of the relation between development and environmental rights, it is likely that

58 Id. preamble.
59 Id.
61 Id. Principle 3.
62 Id. Principle 4.
developing countries will continue stressing the right to development in counterpoint to demands for recognition of the right to a decent environment. This would appear to be the position where the interests conflict and compete to the extent that a developing country places more emphasis on material economic gains at the expense of environmental rights. The controversy surrounding the Titanium mining project in Kwale district of Kenya does provide evidence for this. The mining project is spearheaded by a Canadian Company, Tiomin Resources Inc., which intends to apply the open cast mining system in the extraction of titanium. The mining would involve large-scale removal of vegetation cover, and soil layers so as to expose the underlying mineral deposits to depths exceeding 30 metres below the ground surface. Application of such a system in an area estimated at 64 square kilometres (64,000 hecs.) is bound to impact heavily, and adversely, the natural systems supported by the environment in the area.

The mining project was opposed by environmentalists for various reasons. For instance, there was concern that the project would expose the residents of the area to dangerous radiation likely to be emitted by the radioactive substances in the targeted areas, that the project would adversely interfere with the environment, damage the marine ecosystem, and cause massive disruption of the social fabric and livelihoods of

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63 *Titanium: Too Many 'Facts' Do Not Add Up*, THE DAILY NATION (Nairobi), Sept. 15, 2000 at 8. (hereinafter the *Daily Nation*.)

64 See Wamicha, W.N. et al., *A Study of Environmental Impact Assessment of Titanium Mining in Kwale District*, (Final Draft Report) paras. 2,3 and 25 (Faculty of Environmental Studies, Kenyatta University, Nairobi, 2000.).

65 Id.
the affected communities. The general objection was, therefore, that the project posed serious environmental risks to Kenyans.

Despite the opposition to the mining project on environmental grounds, the Kenya Government, however, appeared not keen on giving the environmental considerations raised their due attention. In fact, it would appear that the government was keen on facilitating the progress of the project because of the material, and economic gains to be derived from the project. While dismissing the environmentalists critical of the project, the Natural Resources Ministers in the Government of Kenya stated that those opposed to the project were out to destroy a project that could bring in badly needed foreign exchange. According to them, the project had to proceed as Kenya stood to lose more than US$42 million (Kshs. 3.2 billion) annually in foreign exchange earnings. This case does demonstrate how conflict of interests can arise between the claims for environmental rights and development. It would appear that claims to development are likely to receive more recognition from developing countries in order to attract foreign investments, and earn foreign exchange.

This should not be the position. Environmental concerns should be addressed as a matter of paramount importance before development issues are considered. The better approach is to balance the two claims so that, in a case like the titanium mining in Kwale, all the necessary precautionary measures are taken to ensure that all the likely

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66 The Daily Nation, supra, note 63 (Quoting [M/s. J. Kalweo & F. Nyenze], the Ministers for Environment and Natural Resources in the Kenyan Government).
environmental risks posed by the project are controlled before the project can be undertaken. The environmental rights of the people are fundamental, and should be given due consideration. They should not be transgressed for the sake of attracting foreign investors or earning foreign exchange to the country.

However, as long as the less developed countries’ concerns and interests are taken into account in future the right to development may ultimately emerge as a complement to, rather than, a hindrance to environmental rights generally, and the human right to a decent environment, in particular. There are already certain trends in international environmental law which strongly indicate that such a process is already under way. First, we note that the need to develop a general standard for balancing the duty of environmental conservation with each nation's inherent right to development has led to the articulation of the principle of sustainable development. The concept of sustainable development is one which recognises that economic development goals in both the developing and developed countries cannot be achieved without protecting natural resources from degradation and depletion.

In its recommendation for legal principles, the World Commission on Environment and Development offered a general definition of sustainable development: “sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

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67 See Brundtland Report, supra, note 56, at pp. 43-7.
68 Id. at p. 43.
69 Id.
concept has been articulated in various United Nations Resolutions and the
declarations of international fora. For instance, a decade after the Stockholm Declaration,\textsuperscript{70} the concept of sustainable development was enunciated in the Nairobi Declaration of the United Nations Environment Programme (UNEP).\textsuperscript{71} Recognizing that "a comprehensive and regionally integrated approach that emphasizes the interrelationship between environment and development can lead to environmentally sound and sustainable socio-economic development",\textsuperscript{72} the Nairobi Declaration endorses economic processes that ensure environmental sustainability.\textsuperscript{73} The United Nations adopted the concept in the World Charter for Nature (WCN),\textsuperscript{74} which provides that "ecosystems and organisms, as well as the land, marine and atmospheric resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable productivity, but not in such a way as to endanger the integrity of those other ecosystems or species with which they co-exist."\textsuperscript{75}

The concept received more focussed attention at the United Nations Conference on Environment and Development (UNCED)\textsuperscript{76} convened in 1992. Sustainable development served as the focus of the Conference, and Agenda 21, the 800-page action plan adopted by the Conference, was designed as a blueprint nations could follow as they seek to establish environmentally sustainable economies.\textsuperscript{77} Generally,

\textsuperscript{70} Stockholm Declaration, \textit{supra}, note 26.
\textsuperscript{72} \textit{Id.} para. 3.
\textsuperscript{73} \textit{Id.} paras. 4-9.
\textsuperscript{75} \textit{Id.} art. 4.
\textsuperscript{76} Rio Declaration, \textit{supra}, note 60.
one sees a trend which could ultimately lead to better recognition of the need to incorporate environmental concerns into economic development.

In this context, it can be concluded that the continued acceptance of the concept of sustainable development and the exercise of the right to development are gradually becoming useful concepts aiding the right to a decent environment, rather than imposing bars to its growth and development. To a large extent, the right to a decent environment is emerging as a concern of paramount importance in the development – environmental protection agenda.

3.6 STATE SOVEREIGNTY AND THE RIGHT TO A DECENT ENVIRONMENT

State sovereignty is another norm conditioning the recognition of environmental rights generally and, specifically, the human right to a decent environment. It is the claim of sovereign states to control people and resources within their territorial jurisdiction.\(^78\)

An articulation of the principle is found in the Charter of the United Nations.\(^79\) Article 2, paragraph 7 of the Charter provides that:

Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.\(^80\)

\(^78\) CHEN, L., AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE 117. (Grotius Publications, Cambridge, 1989).
\(^79\) U.N. CHARTER, art. 2.
\(^80\) Id. art. 2, para. 7.
Therefore, the only exception to the scope of article 2, paragraph 7 is the allowance for enforcement measures by the United Nations Security Council for breaches of international peace and security.\textsuperscript{81}

However, it is now acknowledged that, in international law, the principle of state sovereignty is not absolute. This is particularly the position in environmental matters. According to F.D.P. Situma, there are certain international prescriptions that are required at the international level to regulate the exercise of states' sovereign rights in environmental matters.\textsuperscript{82} The prescriptions explain why, for instance, individual states in whose territories natural resources are found cannot be left to manage them according to their own environmental policies and in exercise of their sovereign rights. According to him, the prescriptions are founded on the common concern of humankind which dictates the predominance of international over national interests, the need to have defined standard norms and principles governing state conduct in the management of the environment, and the inability or unwillingness of some states in managing their domestic affairs properly to avoid transnational impacts.\textsuperscript{83}

Although these limitations to the principle of state sovereignty are acknowledged, it is lamented that problems springing from the exercise of states' sovereign rights plague

\textsuperscript{81} Id. art. 24.
\textsuperscript{83} Id.
the development of environmental rights. For instance, states have yet to extend
procedural standing to individuals to give them access to international tribunals in
environmental law claims. One explanation is that granting such access would offend
the cherished and often misused sovereignty. This explains the apparent lack of an
effective enforcement mechanism for environmental violations at the international
level.

However, under the traditional customary international law, the principle of state
sovereignty is not absolute and is gradually giving way to claims on the part of states
for jurisdiction over events that are within international concern. For example, nation
states have traditionally been held liable for acts of their nationals on the high seas, and they may be responsible for transboundary injuries that are caused by individuals
within their territories. Moreover, with the recognition of international human rights
instruments such as the international covenants on human rights, various regional
human rights regimes, and other human rights conventions dealing with particular
aspects or subject matters, states are increasingly responsible for protecting the rights of individuals within their territorial
jurisdictions and control. The expansion of the jurisdiction of human rights

84 See Sohn, supra, note 19, at 2.
85 See KISS & SHELTON, supra, note 21.
88 See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7,
89 See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women Dec.18,
90 See CHEN, supra, note 78, at pp. 205-19.
commissions and also adjudicatory tribunals over individual claims without the necessity of a state-sponsor or intermediary may further erode the notion of absolute state sovereignty. 91

Despite these developments at general customary international law, states remain reluctant to establish similar norms for environmental rights and effective implementation machinery for obligations under claims for a decent environment or environmental law generally. Implementation of such obligations founded on environmental law and rights is generally left to domestic legislatures of states. 92 Furthermore, with rare exceptions, states still refuse to submit to compulsory third-party adjudication of international disputes in which they are involved. 93 Hence, while absolute sovereignty erodes environmental protection efforts, states continue to assert sovereignty and national interests in resisting the primacy of international environmental obligations over domestic policies. This is, arguably, bound to create similar implementation problems to the right to a decent environment, since the content, scope and implementation of the right imply the due recognition and acceptance of ecological limitations to the doctrine of state sovereignty.

The imposition of these limitations, based on environmental concerns, becomes more difficult when the claims for an environmental human right to a decent environment are made against the exercise of states' right to development. For instance,

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91 Id. at pp. 219-23.
92 See Situma, supra, note 82, at p. 47.
93 See CHEN, supra, note 78, at pp. 104-13.
environmental regulations that require state-of-the-art technologies, cutbacks in
industrial production, or significant monetary resources conflict with the right to
development which seemingly tends to take priority over environmental rights. The
way forward will depend on, among other things, the extent to which states can agree
upon the implementation of sustainable development as an element of environmental
rights.

At present the issue of sustainable development remains controversial, with a lot of lip
service being given to the principle by both developed and developing countries. The
concern of developing countries has been that their development concerns are not
fairly considered in the advancement of the concept of sustainable development. In
that connection, it appears very likely that these countries may refuse to be influenced
by the concept of sustainable development and, instead, maintain the position that
ecological limitations on the right to development amount to undue attempts to
infringe on their sovereignty. This scenario would impact negatively on the claims to
an environmental human right to a decent environment. It would curtail the growth or
development of environmental human rights. Ultimately, it would amount to a
negation or denial of the fundamental human right to a decent environment.

Consequently, the issue of state sovereignty, once again, becomes problematic in two
respects. First, the issue of sustainable development is not intended as may be alleged
by some states, to encroach upon state sovereignty. This is because it creates internal
tension or definitional problems in the context of the right to a decent environment in
the sovereignty development context. As Gunther Handl\textsuperscript{94} points out, as an international legal or policy concept, sustainable development "clearly implies some measure of international accountability, yet as generally endorsed, it is also accompanied by an express disclaimer of any intended encroachment upon state sovereignty."\textsuperscript{95}

Second, is the consideration that developmental policies should be expressly declared, but be firmly placed under the control of states as an attribute of state sovereignty.\textsuperscript{96} This consideration can be derived from the perceived import of the text of the Rio Declaration on Environment and Development.\textsuperscript{97} Principle 2 of the Declaration restates Principle 21 of the Stockholm Declaration\textsuperscript{98} but adds some crucial words. It declares that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.\textsuperscript{99}

This principle is almost identical to Principle 21 of the 1972 Stockholm Declaration, except for the addition of the words "and development". There is, thus, emphasis on


\textsuperscript{95}Id.

\textsuperscript{96}See Taylor, id.

\textsuperscript{97}Rio Declaration, supra, note 60.

\textsuperscript{98}Stockholm Declaration, supra note 26.

\textsuperscript{99}Rio Declaration, supra, note 60, Principle 2.
the desire to have developmental policies remaining firmly under the control of states, as an aspect of state sovereignty.

A state's development policies, and by analogy, its right to development, have also emerged as preserved areas of state sovereignty. Hence, they give rise to the apparent contradiction between obligations founded on environmental rights and political decisions founded on state sovereignty. Nevertheless, we take the view that successful claims by individual groups or states to the right to a decent environment coupled with its effective implementation will discourage the use of state sovereignty as a shield against obligations of states under environmental rights. State sovereignty should not, therefore, be used as an excuse to rationalise decisions and activities that cause or are likely to lead to the violation of environmental human rights. The emergent right to a decent environment should be able to cut through barriers erected by the concept of sovereignty. Individual claimants, being right holders, should be recognised as proper subjects of international environmental law by granting them legal capacity or procedural standing to access international tribunals. This would accelerate the process of vindicating the right to a decent environment.

We may also point out that any exercise of sovereign rights by states which pays no due regard to environmental human rights amounts to gross violation of the human right to a decent environment. Such an exercise should not be justified on the basis of the states' independence and sovereignty. The position would probably be better if environmental protection had some specific legal status in the legal system.
Individuals or groups within a state would then be empowered to present claims at national and international tribunals in respect of violations of their right to a decent environment. It would also create opportunities through which any official state or government policies that compromise the right to environment can be challenged. This view is supported by P.E. Taylor\textsuperscript{100} who asserts that it is probably due to the jealousy with which states defend their sovereignty over natural resources that the debate in international law has focussed on a new environmental human right rather than ecological limitations to existing rights.\textsuperscript{101}

3.7 CONCLUSION

There exist various problems facing the emergent right to a decent environment. They range from the apparent lack of reliable implementation machinery and procedures to the existence of competing rights and interests. For instance, the individual component of the right as regards the enforcement process appears to remain in an embryonic stage of development. Closely related to these problems are the enormous challenges springing from the effects of the doctrine of state sovereignty and the exercise of the right to development by states. They represent perhaps the most daunting challenges or problems to the emergent right.

However, it would appear that the countervailing claim of the right to development would not obstruct the emergence and development of the right to a healthy or decent

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\textsuperscript{100} Taylor, supra, note 25.
\textsuperscript{101} Id. at p. 337
\end{flushright}
environment. The concern of the less developed countries that environmental protection regimes might present obstacles to their efforts to develop, is giving way, albeit gradually, to recognition of the interrelationship between sustainable environmental policies and development goals.

In other words, it appears that, ultimately, the countervailing right to development does not present an insurmountable obstacle to the emergence and continued growth of the right to a decent environment. This is because the growing awareness of the connection between development and environmental protection is leading to the incorporation of environmental considerations into development policies. On the other hand, the unwillingness of governments to concede their sovereign authority may be termed the greatest barrier to the growth of emergent human rights, such as, the right to a decent environment. Until states are willing to relinquish some measure of sovereignty, the right to a decent environment and environmental rights generally, will remain unrealised, particularly at the international level.

The emergent right to a decent environment can also be balanced with other competing interests without necessarily being displaced or loosing its fundamentality. It is primarily anthropocentric, hence, the prime consideration when balancing competing rights and interests should be human centred. The right is instrumental in the process of incorporating ecological principles into property doctrines so that the enforcement of private property law does not lead to infringement or gross violations of the environmental human rights of citizens. It will, therefore, ultimately enhance
the attainment and maintenance of a reasonable balance between the sanctity of property rights and the public interest in environmental protection.
4.1 INTRODUCTION

This chapter focuses on Kenya's experience in the area of environmental rights with special emphasis on the emerging right to a decent environment. It presents an examination of the emergence of environmental rights and the right to a decent environment in Kenya's policy and legal regimes. The purpose is to ascertain the actual character exhibited by, specifically, the emerging right to a decent environment and, generally, environmental rights in Kenya. We ultimately provide a test for Kenya to determine whether environmental issues and concerns have crystallized into a right to a decent environment in the human rights paradigm and to make a case for the right to find its way into Kenya's constitutional framework.

Whether the right is recognized as a mere right or as a fundamental environmental human right is a relevant question in this context. We begin with a brief exposition and overview of the historical background of Kenya's practice in environmental law.
4.2 THE KENYAN CASE: HISTORICAL OVERVIEW AND PERTINENT OBSERVATIONS

A study of the Kenya’s environmental law regime reveals that it has not been well developed. This is clear from various studies done by various writers on the state of environmental law and practice in Kenya.1 From a general and historical viewpoint, it is imperative to note that in Kenya, hardly any policy or law designed for “environmental management” in broad terms existed in the early colonial period.2 The term “environmental management” is used here to refer essentially to “the measures taken to balance the natural resources”3 which may be of two kinds, that is, “to ensure ... balanced utilization so as to prevent over-exploitation, or to restore those that have been utilized to strenuous levels,”4 and, “measures taken to prevent the introduction of any substances or energy which might immediately or in the long run, cause deleterious consequences to the natural resources.”5 During that period, a person would have had to resort generally to the law of contract and tort as the main branches of law which provided some measure of environmental protection. At that time, environmental law in Kenya was essentially a private law concern, unknown to the main branches of public law such as constitutional law, administrative law, and criminal law.6

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4 Id.
5 Id.
6 OJWANG, supra, note 2, at pp. 7-9.
It should be understood that although the modern trend in environmental law is for regulatory agencies to control the environment, usually under authority derived from statutes or constitutions, the common law has for a long time been instrumental in controlling environmental damage through the use of common law principles relating to contract or tort.\(^7\) For example, the common law of contract could provide for environmental considerations in those situations where an occupant of property was placed under contractual duty or covenant with regard to environmental impact of the use or utilization of such property. The obligations created were, however, confined to the parties to the contract. Third parties, like the members of the public who were not parties to the contract, would have no legal interest in the environmental rights or duties that arose under such contracts. Consequently, the courts could not give redress for any environmental injury suffered by members of the public as a consequence of breaches of such contractual obligations.

The law of tort also offered a slightly wider scope for environmental claims. It generally steered clear of conflict with the long established rights of property law and, in particular, the principle that owners of property in land have unrestricted rights of use and abuse over their land.\(^8\) In this respect, the common law rights of property are qualified by the maxim *sic utere tuo ut alienum non laedas* which means ‘use your property in a manner that does not interfere with your neighbour.’\(^9\) The import of this would be that the owners or occupiers of land may not emit from their land, noises, vibrations, smoke or

\(^7\) Id.  
\(^8\) See OiWANG, *supra*, note 2, at p. 7.  
dirt which may cause injury to their neighbours. The law of nuisance, on its part, had a broader aspect which links up the machinery and principles of public law, thereby affording better scope for environmental protection. For instance, it allows the state to prosecute persons who create nuisance to such great scale or levels that a large number of persons are inconvenienced. This may well take care of the general public interest in a safe environment, although any individual who on account of the nuisance suffers some special injury, may file a suit for damages.

In the area of criminal law, the concept of public nuisance has been incorporated in the Penal Code, which provides that it is a misdemeanor for any person to do an illegal act or omit to perform a legal duty which act or omission causes common injury, or danger to the public. This provision could apply to incidents of plain environmental damage which had direct injury to the public although it could not effectively apply to large scale degradation resulting from ecological changes caused by human activities. On the whole, one sees that not much environmental protection could have been expected from the common law because it evolved on the foundation of property rights, which provided its standards of measurement. The reason for this is that ownership of property, rather than rational use of natural resources, was the first and prime consideration.

12 Id. s. 175 (1).
13 OJWANG, supra, note 2, at p. 8.
Colonial and post-colonial Kenya further witnessed the enactment of a variety of sectoral laws dealing with specific issues of environmental conservation, improvement and protection. Some of the laws in this respect are the Agriculture Act, the Food, Drugs and Chemical Substances Act, the Cattle Cleansing Act, the Fertilizer and Animal Foodstuffs Act, the Forests Act, the Plant Protection Act, the Grass Fires Act, the Public Health Act, the Water Act, the Merchant Shipping Act, and the Factories Act. By the year 1999, Kenya had about 77 statutes relating to the conservation and management of the environment or which had an impact on the environment.

Apart from private law and public law at the domestic level, international law also contains important norms that create environmental obligations for states like Kenya. Indeed, Kenya has participated in international environmental law making process through negotiation, adoption, signature and ratification of, or accession to, various treaties. She has, in so doing, supported initiatives for the protection of biological diversity, for the limitation of environmental harm resulting from the release of deleterious energies and hazardous or toxic substances, for the prevention of marine and

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river pollution, for the preservation and prudent management of marine and coastal resources, for the protection of stability of the ozone layer, and their judicious application in development initiatives.27 Although Kenya’s record as regards the law making process of international environmental law is laudable, a lot remains to be done in Kenya’s municipal law through relevant legislative and policy actions to enhance the implementation of environmental law.28 This would involve putting in place legal and institutional mechanisms to facilitate the implementation of international environmental law in Kenya.29

In the framework of environmental law in Kenya, it is generally evident that, among other things, much of the environmental law has been somewhat obscure and largely scattered in a patchwork of legislation, most of which is sectoral, focussing on, for example, water, agriculture and forestry. Sound environmental management under such dispensation is elusive because the legislation treats the environment sectorally, thereby undermining its utility.30 While it is proper to maintain specialization, the various linkages in the sphere of environment and natural resources must be carefully articulated and respected in planning, policy making and implementation. Such linkages call for a comprehensive or an umbrella legal framework for environmental management. It is

27 Id. at p. 30.
28 Id. at p. 33.
29 See Situma, F.D.P., The Place of International Environmental Law in Kenya’s Municipal Law, in PROCEEDINGS OF THE WORKSHOP ON THE ENVIRONMENT IN KENYA’S CONSTITUTIONAL ORDER (Wamukoya, G.M. & Situma, F.D.P., (eds.) (June 4, Nairobi 1999), at p.47 (unpublished).) [Giving examples of instances where Kenya has assumed party status to environmental treaties without undertaking the concomitant legal and institutional adjustments to enable it implement and enforce the treaty provisions.)
largely as a result of this realisation that Kenya’s legislature enacted the Environmental Management and Co-ordination Act, 1999\(^{31}\) to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto.\(^ {32} \)

4.3 THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, 1999: AN ASSESSMENT

Kenya’s framework environmental law, entitled The Environmental Management and Co-ordination Act, 1999 was passed by Parliament in December of 1999. It received Presidential Assent on 6\(^{th}\) January 2000 and acquired the force of law on 14\(^{th}\) January of the same year. This was the culmination of a long and active process which started in 1993. The statute is the product of a new and informed methodology for the development of modern environmental law which is designed to provide an umbrella legal framework for environmental management in Kenya. It is also designed towards enhancing and promoting public participation in the conception and formulation of environmental law. This section attempts to explain and present the general character of the Act, highlighting its main or salient features, examining the nature of the legal framework it has introduced and the extent to which it contributes to the emergence, recognition, development and protection of environmental rights in Kenya.

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\(^{31}\) Act No. 8 of 1999 (hereinafter *Environmental Management Act*.)

\(^{32}\) *Id.* Long title.
The Act begins with an exposition of the general principles that form the foundation of environmental management and law in Kenya. Section 3 of the Act provides that every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment. This entitlement is defined as including the access by any person to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes. This provision clearly recognises the importance of a decent and healthy environment to the enjoyment of life by every individual. It is, in fact a departure from the provisions of the sectoral legislation that has for a long time governed environmental resources in Kenya.

By providing for the entitlement to a clean and healthy environment, the Act introduces, albeit in imprecise terms, the concept of environmental rights in Kenya’s environmental law regime. This, however, has only been stated as a general principle of law which is intended to govern environmental management and protection in Kenya. The provision moves a step further and incorporates some of the elements that constitute the scope and content of environmental rights such as the rights of access to environmental resources, public participation, as well as procedural rights of access to judicial redress for environmental harm.

The Act gives individuals the capacity to institute actions in the High Court whenever the entitlement to a clean and healthy environment has been, is likely or is being contravened or breached. It relaxes the *locus standi* requirement by providing that an individual may sue for real or likely damage to his entitlement to a clean and decent environment without
having to show proof of personal injury or loss. To that extent, the Act solves the problem of standing in environmental litigation which has, for a long time, frustrated spirited attempts by individuals at accessing judicial remedies for environmental harm in Kenya. Commenting on the significance and character of the Act in Kenya’s environmental law matrix, G.M. Wamukoya and F.D.P. Situma have opined that:

The Act establishes a specific link between environmental protection and the right of all individual citizens to a clean and healthy environment (section 3). The provision for the right to a clean and healthy environment derives from the fact that it combines the aspirations of society with the rights of the individual. This is an important provision as it gives every Kenyan a right to bring an action to stop environmental damage without the need to show that the environmental damage has caused or is likely to cause him or her any personal loss or injury.33

However, there is a proviso that requires that such actions should not be frivolous, vexatious or an abuse of the court process. The question that emerges is what test or criterion is to be applied in determining whether an action is frivolous or vexatious. There ought to be provision for the considerations that are to be applied so that genuine and reasonable claims are not thrown out by courts on the pretext that they are frivolous and vexatious.

It is also notable that the Act reduces some of the elements of environmental rights to mere guiding principles as opposed to enforceable and binding rights. Section 3(5) only empowers the High Court to refer to or be guided by the principles of sustainable development when adjudicating over claims touching on the entitlement to a clean and healthy environment. The guiding principles provided are public participation, cultural

33 Environmental Management in Kenya, supra, note 25, para. 4 at p. (vii).
and social principles traditionally applied by local communities in Kenya, international co-operation, intergenerational and intragenerational equity, polluter-pays principle and the pre-cautionary principle. In terms of the Act, these principles are not binding or enforceable legal provisions, but mere guiding principles. The extent to which reliance may be had on them for purposes of enforcing the other general principle entitling every individual to a clean and healthy environment is, therefore, not clear. In the same context, it is not clear what the phrase “guided” actually means. Does it firmly instruct the court to apply the stated principles of sustainable development in cases in which an individual seeks to enforce the principle giving the entitlement to a clean and healthy environment, or does it mean that courts may consider and bear in mind the principles in those cases? Professor Allot identifies three meanings which could be attributed to the word “guided” as used in statutory provisions. He is of the view that the word could mean:

i) that the courts have an unfettered discretion whether to apply the principles or not and, if they decided to apply them, they do so with whatever qualifications they think fit;

ii) that courts have no discretion whether to apply the principles or not, but in applying the principles, they need not apply them in all their vigour and detail; and

iii) that there is no discretion; courts must apply them in the cases described.

The provisions though unique and representing novel developments in the legislation that is intended to govern the environment in Kenya, do not give a clear mandate to the court to enforce the principles as fundamental human rights. The provisions do not give the High Court any constitutional authority to consider environmental rights as defined in

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this thesis. There is no clear definition of environmental rights as human rights or fundamental rights of Kenyan citizens. There is no clear definition of environmental rights as individual human rights enforceable by individuals. The stipulation of the entitlement to a clean and healthy environment as a general principle does not form a sound and adequate basis for enforcing environmental transgressions as fundamental human rights. To that extent, the Act falls far short of providing a sound legal framework for the espousal of environmental rights in Kenya.

The Act does, however, make provision for a number of other environmental concerns such as administrative and enforcement organs, environmental planning, environmental impact assessment, the National Environment Tribunal, and environmental offences.

On the whole, the Act introduces a more comprehensive and better-structured legal framework for environmental management in Kenya. However, the extent to which it provides a source of enforceable legal environmental rights capable of providing remedies for environmental harm is wanting. It, for instance, fails to define environmental rights as such, or even provide an outline of their character as fundamental human rights. It, therefore, becomes difficult to see the practical effect of the stipulation of general principles entitling every individual to a clean and healthy environment in the Act.

Further, the Act is likely to generate other problems of statutory and constitutional conflicts, as well as conflicts with existing institutional arrangements. For instance, the
Act is exposed to possible conflict between private property provisions guaranteed in the constitution and environmental provisions governing the management of certain components of the environment in it. One of the questions that remains unanswered is how one can strike a balance between conflict over private property rights which are guaranteed as fundamental human rights and public interests of environmental nature provided for under the Act.

Section 54 of the Act, for instance, empowers the Minister to declare any area of land to be a protected natural environment for the purpose of promoting and preserving certain ecological processes, species or indigenous wildlife or the preservation of biological diversity. The Minister also has power to prescribe measures for the management and protection of the protected areas. There is bound to be conflict when the areas affected by the exercise of these powers are privately owned or are subject to the protection of private property doctrines or when it adversely affects the interests of private landowners adjacent to the affected areas. To resolve such conflicts, a constitutional provision is suggested for the purpose of balancing the competing interests, otherwise the exercise of such powers by the Minister could be challenged as being unconstitutional and for being founded on statutory provisions inconsistent with the constitution. The provisions would, therefore, be liable to nullification to the extent of their inconsistency.

Section 148 of the Act provides that any written law in force immediately before the coming into force of the Act, relating to the management of the environment shall have effect subject to modifications as may be necessary to give effect to the Act. It also
provides that where the provisions of any such law conflict with any provisions of the Act, the provisions of the Act shall prevail. The effect of this provision is to give the Act supremacy over all the earlier statutes that governed environmental resources in Kenya. Whereas this is a good safeguard for the case of implementation of the Act, it would not, however, survive constitutional challenges. Certain likely scenarios are envisaged here.

For instance, what happens if the legislature at the instigation of an uncomfortable executive unsuspectingly passes subsequent sectoral enactments in conflict with the Environmental Management and Co-ordination Act? Will Section 148 still operate? Obviously, the provision would be rendered irrelevant since the subsequent statute would take precedence over the Environmental Management Act. The real danger lies in the realisation that the Environmental Management Act could be overtaken by a subsequent Act, perhaps with totally conflicting provisions to those enunciated in the Act.

Currently, the government is working on various reviews of statute laws and draft bills including some that touch on the environment. In the pipeline, we have, for instance, the Forest Bill, 2000 which is intended to provide for the establishment, development and sustainable management, conservation and utilisation of forestry resources as well as repealing the existing Forests Act.\textsuperscript{35} Similarly, the Draft Water Bill, 2000 is aimed at providing for the control, use and conservation of water resources and for the repeal of the existing Water Act.\textsuperscript{36} There is, therefore no guarantee that the legal framework for environmental management founded on the Environmental Management Act will not be

\textsuperscript{35} Chapter 385, Laws of Kenya (Revised edn., 1978)
\textsuperscript{36} Chapter 372, Laws of Kenya (Revised edn., 1986)
disturbed or totally eroded by subsequent enactments or legal provisions, given the ease with which ordinary legislation is passed, particularly in situations where the ruling party and by extension the executive has an interest. Moreover, there is the dangerous and likely scenario that parliament could easily enact amendments to the Act, which may practically take away or repeal the important provisions giving the entitlement to a clean and healthy environment or the capacity of individuals to sue for environmental injustice.

The Act is also prone to devastating constitutional challenges. Indeed, in the recent times, Kenyans have experienced an excited re-invigoration of courts in the interpretation and enforcement of the supremacy of the constitution. For instance, a constitutional court may declare certain provisions of a statute unconstitutional and, if those provisions are the key provisions, the statute may be rendered useless.

The recent decision of the High Court of Kenya in the case of Stephen Mwai Gachiengo & Albert Muthee vs. Republic illustrates the scenario. In that case, a constitutional reference was filed in the High Court under sections 67(1) and 84(3) of the Constitution of Kenya by two accused persons.

The questions for determination included whether the Attorney General’s consent to prosecute under the Prevention of Corruption Act, and whether the provisions establishing the Kenya Anti-Corruption Authority, namely Section 11B of the Prevention of Corruption Act are in conflict with the provisions of Section 26 of the Constitution.

37 High Court of Kenya at Nairobi, Miscellaneous Application No. 302 of 2000 (unreported).
The applicants argued that only the Attorney General and the Commissioner of Police have constitutional mandate to prosecute and investigate criminal offences respectively, and that the Kenya Anti-Corruption Authority (KACA) had usurped their powers. It was their further contention that the powers bestowed upon KACA under section 11B of the Prevention of Corruption Act contravened section 26 of the Constitution. The High Court found the provisions of Sections 10 and 11B of the Prevention of Corruption Act to be in conflict with those of Section 26 of the Constitution and proceeded to declare them unconstitutional. On the whole, the Court ruled that both the establishment, powers and the continued existence of KACA were unconstitutional for being incongruous with constitutional provisions of section 26 of the Constitution and incompatible with the doctrine of separation of powers.

Although the legality of the decision has been widely questioned by various commentators, yet it is testimony of an emerging re-orientation towards constitutional interpretation that may see many statutes consigned to the dustbin. Moreover, there is no provision for appeal against orders made under section 67 of the Constitution. The decisions are final and binding.

Against this background, whether or not an important enactment such as the right to a decent environment providing as it does a fundamental human right should be promulgated in the realm of ordinary legislation becomes a relevant question. Will not those enacting it have exposed it to unfavourable judicial interpretation when pitted against possible conflicting constitutional provisions? With these scenarios in mind, the practical effect and efficacy of the Act gets into serious jeopardy, in the absence of clear and well defined constitutional guarantees to the right to a decent environment.

Section 12 of the Act represents a possible area of conflict and one that would be exposed to nullification on grounds of unconstitutionality. It provides that the National Environment Management Authority may direct any lead agency to perform, within such time and such manner as it shall specify, any of the duties imposed upon the lead agency under the Act, or any other written law. A lead agency is defined by Section 2 of the Act to mean any government ministry, department, parastatal, state corporation or local authority vested with the functions of control or management of any element of the environment or natural resource. The section gives powers to the Authority to give directions outside the Act. A number of concerns arise here. Where does the provision derive the authority to give the directions outside the Act to lead agencies such as a government ministry or local authority? It is the constitution that bears and remains the sole source of such authority.

Similarly, section 118 of the Act gives the Environmental Inspectors powers to prosecute. The Inspector is empowered to institute and undertake criminal proceedings against any
person in respect of any offence alleged to have been committed by that person under the Act. The section also vests the Inspector with the immense powers to discontinue at any stage any such proceedings instituted or undertaken by himself. An analogy can easily be drawn between these provisions and those that had established the Kenya Anti-Corruption Authority and gave it prosecutorial powers that were nullified as being unconstitutional. For instance, the powers given to the Environmental Inspector to discontinue any criminal proceedings for environmental offences under the Act are akin to the Attorney General’s powers of *nolle prosequi* under section 26 of the Constitution.

Arguably, it is only the Attorney General who has constitutional mandate to control prosecutions including the function of taking over, terminating or discontinuing criminal proceedings in the context of Kenya’s constitutional law jurisprudence. It is also arguable that the Attorney General’s powers to enter *nolle prosequi* or in any other manner control prosecutions under the constitution cannot be exercised by the Environment Inspector save with the direct and express written consent of the Attorney General. They cannot be delegated to the Inspector or vested in him by statutory enactment. Consequently, one sees yet another potential conflict zone between the provisions in the Act and the Constitution. These scenarios, therefore, represent the potential pit falls in the operationalization process of the new Act generally, and the ultimate demise of the enunciated principle of entitlement of individuals to a clean and healthy environment in Kenya.
Finally, the case of the Constitution of Kenya Review Act,\textsuperscript{40} may be used to further demonstrate the necessity of entrenching fundamental provisions that pronounce individual fundamental human rights into the Constitution. The Constitution of Kenya Review Act establishes the Constitution of Kenya Review Commission, organs and agencies of the review process and provides as fundamental to the process, participation by the people. The concern that has recently arisen is the fact that the Constitution of Kenya Review Commission is established by a mere statute, being the Constitution of Kenya Review Act which is amenable to some of the devastating constitutional challenges as well as the political intrigues of parliamentary law making process that may arise from the scenarios discussed above. There is grave danger that despite the importance and centrality of the constitutional review process to the country, the whole process could be derailed or put to a standstill through an amendment or repeal of the Constitution of Kenya Review Act, or by related constitutional challenges. Accordingly, calls have been made by various actors including the Review Commission itself, religious bodies as well as the general public for the immediate entrenchment of the Review Commission into the Constitution.\textsuperscript{41} This concern succinctly underscores the sacred position that the Constitution is perceived to enjoy in the management of public affairs in Kenya. Our recommendations that the right to a decent environment be entrenched in the Constitution should thus be seen in this light.

\textsuperscript{40} See \textit{Happy Constitution Making: Issues and Questions for Public Hearings}. \textit{The Sunday Nation } (NAIROBI) Nov. 25, 2001 at 1.

The practical implications of entrenching environmental rights provisions into the constitution can be easily deciphered from a number of recent developments in Kenya’s parliamentary and legislative process. The recent move by the executive to use its parliamentary majority to force and influence a controversial departure from the provisions of the Treaty for the Establishment of the East African Community Act, 2000 requiring that at least one third of the nominees to the recently launched East African Legislative Assembly be women is instructive. The move was prompted by the president himself, who ordered the cabinet to ensure that parliament approved a motion seeking to reverse a commitment to nominate three women to represent Kenya in the East African Legislative Assembly. Such motions are in Kenya normally passed on a simple majority vote just like the ordinary legislative process. The motion seen as an effort by the ruling party to massage parochial regional and even personal egos would have failed if the process of picking the nominees had been of constitutional character. It is worthy of mention that the above manipulation of the legislative process was spearheaded by the president and dimunitive power broker, Minister Nicholas Biwott whose wife had already been nominated. This incident is testimony to the damage ordinary legislation is exposed to in the face of deep vested interests. Though unrelated but with similar overtones, the same minister is reported to have influenced the allocation of 1000 hectares of a forest to himself which would be cleared ostensibly to construct a

42 Treaty for the Establishment of the East African Community Act, 200; Art. 50 (i); and Kenya Gazette Vol.C III – No. 68, L.N. 154, Legislative Supplement No. 48 (Giving the Election of Members of the East African Assembly Rules, 2001.)

43 See Kami Wins Battle to Lock Out Women, The DAILY NATION (NAIROBI), Nov. 28, 2001 at 1. (reporting on how members were lobbied by the president to vote 89 – 78 to change the quota rules for the East African Legislative Assembly). See also, Moi Orders Cabinet to Shut Out Women, The DAILY NATION (NAIROBI) Nov. 27, 2001 at 1.

44 Id.
foundation in memory of his late mother. What would prevent such and other powerful forces from influencing the ordinary legislative process with ease, if environmental issues are not accorded constitutional safeguards?

The protective guarantee that would be afforded by a constitutional entrenchment of the right to a decent environment is manifest when one compares the above scenario with the efforts by the executive headed by the president himself to influence the passing of an unpopular constitutional amendment entrenching the outlawed Kenya Anti-Corruption Authority (KACA) in the Constitution. Thanks to the stringent procedural mechanisms in constitutional enactments and an increasingly assertive opposition, the attempt came a cropper. The situation would have been a walkover for the president and his entourage in parliament were it been ordinary legislation in issue. Without, belabouring the point, not even the unprecedented personal attendance and voting by the president could save the motion. Thus, the difference that constitutional entrenchment of the right to a decent environment would make becomes obvious. It clothes the entrenchment provisions with firm constitutional guarantees that would guard against easy repeal, in a manner unparalleled by ordinary statutes.

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45 See Biwott Fights Back in Row with Priests: But Catholics Still Query Forest Land Allocation, The DAILY NATION (NAIROBI), July 10, 2001 at 1, and Biwott Finally Speaks Out: But Catholics Say Questions on Forest are yet to be Answered, id at 4.

46 This was the Constitution of Kenya (Amendment) Bill, 2001 which sought to re-establish KACA through constitutional provisions and the Anti-Corruption and Economic Crimes Bill, 2001 which granted amnesty for economic and corruption offences. See Moi Urges MPs: Back Graft Bill to Save Economy, The DAILY NATION (NAIROBI), August 13, 2001 at 1 and Moi Braced for KACA Showdown in the House, id., August 14, 2001.

47 E.g., See MPs Plot to Shut Down Amnesty Bill, The DAILY NATION (NAIROBI), July 5, 2001 at 1, Hard Times Ahead as Moi Loses Battle for Key Vote, id., August 15, 2001. at 1 and Blow to aid as MPs Block
From the foregoing, it becomes apparent that the need to entrench environmental rights not only in the statutory legal framework but also in the constitutional legal framework cannot be over emphasized. The significance of the fundamental human right to a decent environment requires firm entrenchment into the constitution to guard against whimsical legislative manipulation of the process of enactment and or repeal of ordinary statutes intended to serve the interests of the ruling elite.

The Environmental Management and Co-ordination Act does not, therefore, lay a firm foundation for the enjoyment of environmental rights in Kenya. In the following section, we shall present a few current case examples that in a summary operate to show the difficulties attendant to the enforcement of environmental rights in Kenya within the new legal framework, and also the failure of the current statutory legal framework in providing both substantive and procedural tools for the enforcement of environmental rights in Kenya.

4.4. THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT 1999: CURRENT JUDICIAL AND LEGAL PROBLEMS

There are at least three current and on-going environmental cases that warrant consideration at this stage. First, is the case of Rodgers Muema Nzioka & 2 Others vs. Tiomin Kenya Limited. In the case, the Defendant, Tiomin Kenya Limited was a local company incorporated in Kenya and a fully owned subsidiary of a Canadian company, Rodgers Muema Nzioka & 2 Others vs. Tiomin Kenya Ltd, High Court or Kenya at Mombasa, Civil Case No. 97 of 2001. (unreported)

Anti-Graft Law, id, August 9, 2001 (reporting that the president saw only 130 MPs support the Bill, short of the 145 votes needed to push through the constitutional amendment).

48 See Rodgers Muema Nzioka & 2 Others vs. Tiomin Kenya Ltd, High Court of Kenya at Mombasa, Civil Case No. 97 of 2001. (unreported)
Tiomin Resources Inc. It had taken up licenses to prospect for and exploit titanium deposits in Kwale District. Shortly before the company could commence its mining activities, the local inhabitants, the majority of whom were peasant farmers, filed a representative suit against the company. They sought an injunction to restrain the company from carrying out mining in any part of land in Kwale District, a declaratory order that the intended mining of titanium in Kwale District was illegal, and general damages. In the pleadings, the plaintiffs averred that they eked out a living from the area targeted for mining activities, had dug up boreholes in the area to supply them with water, and that the company arm twisted them into accepting an unfair and inadequate compensation for the acquisition of their land for mining activities. The applicants also argued that they were apprehensive that the excavation of titanium was very likely to trigger multifarious environmental and health problems.

Other complaints were that the company misrepresented facts in its environmental impact assessment report, that the company was using the land before obtaining the requisite consent of the owners and the local Land Control Board, that the company had neither shown a comprehensive resettlement plan nor what plan or measures it had put into place to avoid the adverse effects of radioactivity, sulphur dioxide pollution and dust pollution. In sum, the applicants contended that the company had not submitted an appropriate environmental impact assessment report and a project report or obtained a licence under section 58 of the Environmental Management and Co-ordination Act. They urged the court to find that whereas they were not opposed to the mining *per se*, they wanted their environment to be healthy and secure.
On its part, the defendant argued that it was not mining, but was merely prospecting for the titanium and that the Commissioner of Mines and Geology had, in fact, issued it with licences under the Mining Act and that, hence, there was nothing illegal about its activities. It further contended that it had complied with all the conditions for the grant of the licences under the Mining Act and that even government provincial administration officers had been supervising its operations. The Defendant also argued that there was no evidence of the alleged harmful effects of titanium on the ecosystem or human life and further that the applicants were mere squatters without any proprietary interest in the targeted areas and, therefore, lacked the necessary standing to sue.

In addressing the action, the Court started by noting that the applicable law was the Environmental Management and Co-ordination Act, and referred to section 3(5) of the Act for guidance. The Court went further to address the apparent conflict between the Mining Act and the Environmental Management and Co-ordination Act (EMCA). It held that where the Mining Act conflicts with the EMCA, EMCA would prevail in accordance with the provisions of sections 58(1) and 148 of the Act and established judicial practice on interpretation of earlier and subsequent statutes. Accordingly, the Court held that there cannot be compliance with the Mining Act when the defendant had committed an offence under section 58 (1) of EMCA by not submitting a project report as necessary. Accordingly, the applicants had made out a case for the grant of the injunction against the defendant.

As regards the issue of damages, the Court observed that:
The issue of damages compensating anyone does not arise because environmental damage is not only an individual loss but intrinsic in the globe. Although the principle of polluter pays may be argued in aid of the second principle of Giella vs. Cassman Brown Ltd, (sic) but again without EIA it cannot be assessed.\textsuperscript{49}

According to the judge, damages could not be recovered by the applicants because environmental damage affects everybody and everywhere, and also that the polluter-pays principle was inapplicable because there was no environmental impact assessment report that could be used to show that the damage that the applicants are exposed to could not be compensated adequately in damages. This observation illustrates two key points, namely, first, that individuals could not recover damages for environmental harm or violation of their entitlement to a clean and healthy environment on the basis of the EMCA, and, second, that the High Court may, after all, choose not to apply the principles of sustainable development outlined in the EMCA. This becomes significant in that, were the entitlement or the right to a decent environment enshrined in the Bill of Rights contained in the Constitution, individuals would be able to recover damages for breach of their environmental rights as compensation for damage suffered to their fundamental right to a clean and healthy environment. The argument advanced by the judge on the applicants’ prayer for damages on the basis that environmental harm affects everybody would not withstand a constitutional right of individuals to redress for breach of fundamental human rights. All that an individual would be required to show is the likely, imminent or real breach of his fundamental human right to a decent environment.

\textsuperscript{49} ld. at p. 16.
The Court, however, granted an injunction against the defendant restraining it from carrying on with the intended mining activities and extraction of titanium pending the hearing and determination of the suit based on reasons other than the applicants’ right to a decent environment. Although the suit is still pending at the High Court of Kenya in Mombasa, the ruling on the application for the injunction is germane to the issues at hand. It marks the beginning of judicial application and interpretation of the Environmental Management and Co-ordination Act. Suffice it to note that, already, the Environmental Management and Co-ordination Act is receiving favourable interpretation by the courts. It is, however, too early to deduce any useful trend in its application and interpretation. Indeed, the decision by Justice Hayanga in the *Tiomin Kenya Limited* case seems to have been negated by another Judge sitting in Eldoret who dismissed a similar application founded on related environmental law issues.

The case of *Republic (ex parte) Nixon Sifuna vs. Hon Francis Nyenze, Commissioner of Lands & National Environment Council* presents a ruling and *ratio decidendi* contrary to the *Tiomin Kenya Ltd* case. The case sheds more light on the issue of non-entrenchment of the right to a decent environment in the Constitution. The background to the suit is that on 16th February, 2001, the then Minister for Environment and Natural Resources published in the Kenya Gazette his intention to excise over 160,000 acres of gazetted forest land in exercise of his powers conferred by section 4 (2) of the Forests

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50 *Id.*
52 *Supra*, note 45.
Act. In the notices, the Minister declared his intention to degazette various parts of the Eastern Mau Forest (35.301.01 ha), the South-Western & Southern Forests (24.109.01 ha), the Western Mau Forest (323.7 ha), the Nakuru Forest (270.5 ha), the Nabkoi Forest (37.89 ha), the Marmanet Forest (2,837.4 ha), the Mt. Kenya Forest (1,815.15 ha), the North Tinderet Forest (788.30 ha), the Mt. Londiani Forest (124.9 ha), the South Nandi Forest (10.93 ha), the Molo Forest (901.62 ha), and the Kapsaret Forest (1,194.2 ha).

The publication of the notices provoked immense and widespread objections and protests from various quarters. The scale of the excisions, quite unprecedented in Kenya’s history, drew mass protests. Official letters of objection from business groups, religious organizations and NGOs citing environmental and economic consequences and breaches of Kenyan and international laws were handed to the Minister within the 28 day notice period. The government, however, refused to formally acknowledge the objections, saying that the land was meant to settle the poor, yet to be named squatters and that, after all, much of the excision areas were already settled.

Subsequently, on 19\textsuperscript{th} October, a Kenya Gazette Supplement carried the authority to alter the forest boundaries for excision purposes, effectively giving the go-ahead for all of the excised forests to be cleared.

The applicant, Nixon Sifuna, filed the miscellaneous application under a Certificate of Urgency seeking leave to file a judicial review application for the orders of certiorari to remove into the High Court and quash the various Gazette Notices authorising the excisions, for prohibitory orders against the respondents restraining them from degazetting, altering, alienating, clearing or allocating any parts of the forests and the orders of mandamus to compel the Minister to preserve the forests for the present and future generations and to compel him to appoint and name a Director General of the National Environment Council so as to immediately embark on the implementation of the Environmental Management and Co-ordination Act. The High Court having heard the ex parte application, granted the requisite leave on 14\textsuperscript{th} March, 2001 which leave operated as a stay of execution of the intended excisions by the Minister. This application gave birth to the main or substantive motion for the grant of all the above orders and reliefs.

At the hearing of the substantive motion, the state raised an objection to the proceedings arguing that the applicant had not complied with section 9 of the Law Reform Act\textsuperscript{56} and the rules made there under, namely, Order 53 of the Civil Procedure Rules.

\footnote{56 Chapter 26, Laws of Kenya (Revised edn. 1991)}
In particular, the state contended that, among other things, the applicants had brought the motion under section 4(1) and (2) of the Forests Act, sections 3, 4, 5, 37, 47, 48, 50 and 148 of the Environmental Management Act, Order 53 of the Civil Procedure Rules and the Constitution. In this context, the state argued that in matters of judicial review, the High Court exercises its special jurisdiction within Order 53 of the Civil Procedure Rules and that other provisions of law are not to be imported into this special procedure. Accordingly, the application before the court was fatally defective and should be struck out.

In opposition to the arguments by the state, the applicant stated, *inter alia*, that judicial review process does not exclude provisions of the Constitution which is supreme and that it was his constitutional right to bring the application. The applicant, however, only cited section 79 of the Constitution that provides for the right to freedom of expression, having failed to identify a particular provision in the Constitution on environmental rights that he was basing his suit on. He also urged the court to find that in view of the importance of the case to national interests and public policy, it ought to be heard on the merits rather than be disposed of on mere points of procedural and legal technicalities.

Holding that the application was formally defective, the judge agreed with the arguments presented on behalf of the state and dismissed the application, and proceeded to strike out the entire proceedings filed by the applicant, with costs to the state.
What emerges from this case is that the applicant had a big problem with invoking judicial review jurisdiction that is granted by the Law Reform Act and the Civil Procedures Rules so as to enforce the provisions of the Environmental Management and Co-ordination Act. It is clear from the ruling that the applicant’s attempts to seek refuge in the Constitution by arguing that judicial review does not exclude the provisions of the Constitution, and that he had a constitutional right to bring the application, failed.

The arguments advanced do demonstrate, vividly, the futility of the entitlement to a clean and healthy environment outlined in the Environmental Management and Co-ordination Act without definite constitutional backing or guarantee. The applicant in the case unsuccessfully grappled with the issue of defining the constitutional right that he sought to enforce. Although he cited the Constitution generally, he was, however, unable to demonstrate the specific constitutional environmental provision and right which entitled him to bring the motion. The question that seemed to haunt his application throughout the proceedings appears to be “where is the constitutional right?” Were it possible to flesh out a definite constitutional right guaranteeing the applicant the right to a decent environment, the constitutional machinery for enforcement of fundamental rights would have been invoked and his motion would not have been bogged down in the mire of procedural technicalities. Undoubtedly, this ruling does demonstrate failure by the court to enforce the provisions of the Environmental Management and Co-ordination Act and, hence, the inadequacy of the statutory legal framework for the enforcement of the right to a decent environment as a principle entitlement founded on statutory legislation in Kenya.
Following the failure of the action, environmentalists have not rested. Subsequently, Wangari Maathai of the Green Belt Movement, together with the National Council of Churches of Kenya (NCCK), the Kenya Human Rights Commission (KHRC), the Forest Action Network (FAN) and the Mazingira Institute instituted another suit against the Minister in the High Court of Kenya at Nairobi. The case seeks the enforcement of the entitlement of the individual to a healthy and clean environment. In both the Originating Motion and the Verifying Affidavit filed in support of the case, it is argued that the excisions of the forests by the Minister will be harmful to the enjoyment and achievement of the right to a decent environment. While this case is yet to be heard, it is crucial in that it raises a number of issues that cut across the whole gamut of legal and policy frameworks on environmental protection in Kenya. For instance, it demonstrates how the Minister’s exercise of powers to excise forests lands is in violation of the government’s own policy on the environment set out in such various documents as the Sessional Paper No. 6 of 1999, the Kenya National Environment Action Plan (NEAP) 1994 and the Kenya Forestry Master Plan, 1994.

In addition it shows the lack of political will, executive influence and related impediments to the operationalisation of the Environmental Management and Coordination Act (EMCA) by the Minister and, hence, the government that ironically is charged with the duty of establishing the various administrative organs to oversee

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57 Wangari Maathai & 5 Others vs. Minister for Environment, High Court of Kenya at Nairobi, Miscellaneous Civil Application No. 334 of 2001 (unreported).
implementation of the Act. The Minister has, for example, not complied with several provisions of the EMCA. One of the principal failures in this regard is that he has not provided an environment impact assessment report and licence for the excisions of forests, as required under sections 58 and the Second Schedule of the EMCA. The predicament here stems from the fact that whereas the powers of the Minister in excising the forests are apparently lawful, they are subject to the provisions of the EMCA with which he has not complied. It would, therefore, appear that since the EMCA bears supremacy over the Forests Act, the Minister's actions are *ultra vires*. Nevertheless, and this conflict between the two statutes notwithstanding, the extent to which the EMCA operates to curtail the unlawful actions under EMCA, but lawful under the Forests Act, is an issue that remains to be seen. We submit that constitutional entrenchment of the right to a decent environment would inject a modicum of respectability to conservation efforts in the face of such statutory confrontations.

The possibility of the state taking undue advantage of conflicts between statutes to perpetrate illegalities or circumvent the provisions of the EMCA becomes quite apparent. In view of these difficulties, we submit that there is need to constitutionalize environmental rights so that statutes that violate the right of individuals to a decent environment could be challenged and nullified for violating the constitutional rights or being inconsistent therewith. Other practical effects of such entrenchment would be procedural incentives such as low costs, speedy hearings, simplified evidentiary requirements, comprehensive and unrestricted remedies, sanctity of constitutional orders
and the probability that unfavourable orders against the government are more likely to issue on the strength of constitutional authority as opposed to ordinary statutes.

Consequently, entrenchment of the right to a decent environment in the Constitution as a fundamental human right is recommended as an imperative in the provision of the necessary constitutional backing, guarantee and protection in the face of the delicate statutory legal framework governing environmental resources in Kenya. In the absence of such constitutional recognition of the regime of environmental human rights, the realisation and enjoyment of the right to a decent environment by individuals in Kenya is poised to remain a mirage, completely out of reach not only to the present generations but also future generations.

4.5. THE CONSTITUTION AND ENVIRONMENTAL RIGHTS IN KENYA

In the first two chapters, we looked at the emergence, juridical nature and content of the right to a decent environment as well as environmental rights. It was stated that the right to a decent environment includes the right to be free from environmental conditions that threaten health and life itself, the right to safe and healthy food and water, the right to a safe and healthy working and living environment, the right to housing in an ecologically sound environment, the rights of future generations, and the right to benefit equitably from nature and natural resources.
Environmental rights encompass procedural components such as the right to environmental information, the right to participate in environmental decision making, the right to freedom of expression and association about matters that relate to environment, and the right to effective redress and remedies. The relevant question then at this stage is, to what extent is the emergent right to a decent environment reflected or evident in the Kenyan legal system? In answering the question, we examine the provisions of the Constitution of the Republic of Kenya\(^{60}\), against the relevant provisions of the Environmental Management and Co-ordination Act, 1999 already looked at.\(^{61}\) This will present the ultimate determination as to whether environmental issues and concerns have crystallized into a right to a decent environment in the fundamental human rights context in Kenya.

A review of the provisions of the Kenya Constitution reveals that it does not provide for any express or direct environmental rights. The relevant part is Chapter V of the Constitution which spells out the fundamental human rights and freedoms of the individual, and which is otherwise referred to as the Bill of Rights. This Chapter is silent on the environment, environmental rights or the right to a decent environment.\(^{62}\) One can conclude from this lack of expression that the Constitution of Kenya does not take cognisance of the fundamental nature of the environment as a human right. The Constitution which was last amended in 1997, does not, specifically, recognise the environment as a fundamental human right to which Kenyans are entitled.

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\(^{60}\) CONSTITUTION OF KENYA (Revised edn. 1998)

\(^{61}\) Supra, note 31.

\(^{62}\) Supra, note 60, ss. 70-86.
However, there is evidence that in certain circumstances, some of the provisions contained in the Bill of Rights could be interpreted broadly to accommodate implied environmental rights, or the right to a decent and healthy environment. For instance, it can be argued that the most likely source of an implied right to a decent environment or environmental rights, is the right to life, liberty and security of the person.\textsuperscript{63} The right to life is one closely linked to the right to a decent environment. It is a fundamental human right whose broad interpretation in some jurisdictions has managed to include the right to a decent and healthy environment. Section 71(1) of the Constitution of Kenya contains the statement guaranteeing the right to life by providing that “no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.” Whether this provision can be interpreted to incorporate the human right to a decent environment is open to debate. A few relevant examples are, however, worth looking at.

The first illustration of an affirmative answer to the question as to whether the right to a decent environment can be derived from the right to life is the decision handed down in a human rights case heard by the Supreme Court of Pakistan in February 1994, namely, \textit{Ms. Shehla Zia & Others vs. WAPDA}.\textsuperscript{64} In this case, the Court ruled that exposure of citizens to hazards of electromagnetic field or other similar hazards which may be due to installation and construction of a grid station in their residential neighbourhood


endangered the life and health of citizens. The Supreme Court observed that Article 9 of the Pakistan Constitution provides that no person shall be deprived of life or liberty save in accordance with the law. In that context, the Court noted that the word “life” covered all facets of human existence and proceeded to explain that:

...[T]he word “life” has not been defined in the Constitution, but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. A person is entitled to protection of law from being exposed to hazards which may be due to installation and construction of any grid station or such like installations ....[T]he word “life” in terms of Article 9 of the Constitution is so wide that the danger and encroachment complained of would impinge on the fundamental rights of a citizen ... A wide meaning should be given to enable a man not only to sustain life but also to enjoy it.65

Accordingly, the Court ordered the National Electrical Power Authority to suspend the construction of the power grid until sufficient evidence was available for alternative construction which would not endanger the life of citizens. This case is useful in demonstrating how a constitutional provision similar to Article 9 of the Constitution of Pakistan can be interpreted as comprising environmental rights. The point is that liberal interpretation should be given to the right to life as stipulated under the Constitution.

The position regarding interpretation of the constitutional provisions affording protection to the right to life has been extended further to include the environmental rights of future generations which constitute part of the content of the right to a decent environment. This line of reasoning was expressed by the Supreme Court of the Republic of Phillipines

65 Id. at p. 325. Emphasis added.
in the now familiar case of *Juan Antonio Oposa vs. the Hon. Fulgencio S.Factoran*.\(^{66}\)

While examining the question of standing for children all over the Philippines to sue on their own behalf and on behalf of future generations, the Court emphasized the need for enshrining the right to a balanced and healthful ecology in a constitution so as to safeguard the interests of future generations. The Court stated:

Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation ... aptly and fittingly stressed by the petitioners – the advancement of which may even be said to predate all governments and Constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from inception of mankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of the framers that unless the right to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continued importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come ...\(^{67}\)

It can be deduced from the ruling of the Philippines Supreme Court that the right to life as enshrined in their Constitution envisages or encompasses environmental rights of both present and future generations.

The other relevant constitutional provisions in Kenya are residual in character. Section 75 of the Constitution of Kenya, for instance, prohibits compulsory acquisition of private property by the government save for reasons of public health, town and country planning and the development or utilization of property so as to promote the public benefit. These

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\(^{67}\) *Id.* at p. 29. Emphasis added.
provisions, though not strictly speaking providing environmental rights, are of environmental significance but limited in scope so that the extent to which they can be interpreted to include the right to a decent environment is extremely limited. This is because the doctrines that emerge under these provisions, namely, ‘eminent domain’ and ‘police power’, only allow narrow exceptions whereby private property may be acquired in the public interest, but those exceptions “only operate as exceptional situations and will not give a wide-enough opening for effective environmental protection initiatives by the state.” As a result, the legal position represented by the constitutional provisions on such property issues remains essentially restrictive in relation to broad based environmental goals, and hence non-inclusive of environmental rights.

The re-interpretation of existing constitutional provisions to include the right to a decent environment is a mechanism with limited efficacy particularly in legal jurisdictions like Kenya that are still mired in conservatism and rigid interpretation of constitutional provisions relating to fundamental rights of the citizens. An express provision in the Constitution on the right to a decent environment is, therefore, recommended. Whereas it is significant that the subject of environmental rights, and the emerging right to a decent environment have now found statutory legal expression and recognition in Kenya, unfortunately, however, the emergent right is only recognized as a general principle under Part II of the Environmental Management Act. While this provides evidence of the recognition of the emerging right to a decent environment, it does not, strictly speaking, define or create a justiciable fundamental human right. This means that Kenyans would

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not assert this right as a fundamental human right in the context of other human rights usually contained in the Bill of Rights.

To a large extent, the Act creates a general entitlement or a guiding principle of law as opposed to a specific and substantive fundamental human right. It is, nevertheless, a manifestation of statutory recognition of the emerging right to a decent environment and marks the genesis of evolution of the right in Kenya.

The demonstrated level of recognition, place and status of environmental rights in Kenya is, however, only but a development of limited impact. There is a serious and urgent need to constitutionalize the right to a decent environment in Kenya. But is there any conceptual basis for such constitutionalization process?

4.6. THE CONSTITUTIONALIZATION PROCESS

4.6.1. The Rationale for Constitutionalization of the Right to a Decent Environment: Conceptual Analysis

Our preceding discussion attempted to show the extent to which the Kenyan law recognises the emergent right to a decent environment. It also sought to demonstrate that the legal recognition accorded the right to a decent environment remains inadequate and unsatisfactory owing to the absence of sound constitutional recognition and basis for the right. As already noted, this calls for constitutional entrenchment of the right as a
fundamental human right. It is imperative that we examine the rationale for constitutionalization of the right in Kenya in greater detail.

The process of constitutionalizing or entrenching environmental provisions, and particularly the entrenchment of the right to a decent environment, into constitutions of states is a trend adopted by many countries in the recent years. In a 1995 study, Peigi Wilson\(^69\) analyses various developments in environmental law, particularly in developing countries, and records that there has been significant change in environmental legislation and institutions in developing countries since the Stockholm Conference of 1972.\(^70\) The study then proceeds to summarise its findings by identifying several emerging trends in the evolution as depicted by changes in environmental legislation and institutions in developing countries. These trends are identified as "the crystallisation of environmental issues in constitutional and broad policy documents;\(^71\) more comprehensive coverage of environmental issues,\(^72\) establishment of environmental standards and norms,\(^73\) environmental impact assessment (EIA),\(^74\) effective co-ordination of environmental management,\(^75\) efforts towards ensuring coherence of legislative framework,\(^76\) establishment of mechanisms for facilitating compliance with environmental regulations

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\(^{70}\) Id. at p. 191.

\(^{71}\) Id. at pp. 191-4.

\(^{72}\) Id. at pp. 194-5.

\(^{73}\) Id. at pp. 195-7.

\(^{74}\) Id. at pp. 202-5.

\(^{75}\) Id. at pp. 205-7.

\(^{76}\) Id. at pp. 207-9.
and measures for more effective law enforcement, and provisions for public participation and review.

In line with the foregoing developments and the emergence of the right to a decent environment, environmental considerations are now being integrated into national constitutions. This is premised on the understanding that the constitution of a country constitutes the first and primary level in its hierarchy of juridical norms, and outlines national priorities that determine the direction and nature of future legislative policies and executive action.

Accordingly, since the 1972 Stockholm Conference, basic principles of environmental management have increasingly been incorporated into the national constitutions of many countries due to the high profile the environment has assumed. In most cases, such constitutional provisions are declaratory of the duty of the state to strive towards environmentally sound development, the sustainable use of natural resources, and the maintenance of a safe and healthy environment for its citizens. The individual right to a clean and healthy environment and the duty to protect and conserve the environment and natural resources have also been provided for in the new and old constitutions alike.

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77 Id. at pp. 209-11.
78 Id. at pp. 211-2.
79 Id. at p. 192.
80 Id.
81 Id. (giving examples of the new Constitutions of Mali and Congo, both of 1992 and, the old Constitutions of Vanuatu, 1980 and Panama, 1972.)
In the past decade or so, developing countries, many of them in Africa, have began to explore and examine constitutional underpinnings of environmental change and management.

This is largely as a result of the growing realization of the importance of the environment. It is also recognised that environmental sustainability can be pursued and achieved if there is a national scheme of environmental governance or management that specifies the state’s responsibility to provide a clean, healthy or decent environment to its citizens.\textsuperscript{82} Such a scheme, must, of necessity, provide for individuals’ rights to speak for and protect or cause the protection of the environment.\textsuperscript{83} By so doing, a constitutional right is created for the ordinary citizen to act in pursuit of a healthful environment that is conducive to sustainable development.\textsuperscript{84} The creation of such a constitutional right, and the adoption of such an approach in environmental management in Kenya is what constitute the “constitutionalization process” as envisaged in this chapter.

The main aim of environmental law is to provide a legal basis for protecting the environment. However, the objective of environmental protection now forms part of a larger goal of promoting sustainable development. It will be recalled that Principle 4 of the Rio Declaration on Environment and Development (Rio Declaration),\textsuperscript{85} adopted at the 1992 United Nations Conference on Environment and Development (UNCED), echoes

\textsuperscript{83} Id.
\textsuperscript{84} OJWANG, \textit{supra}, note 2, at p. 18.
this by stating that in order "to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." 86 In that context, environmental law becomes the legal means for achieving sustainable development. This is further emphasized in Chapter 8 of Agenda 21, 87 the programme of action and work adopted at UNCED, which states that laws and regulations are among the most important instruments for transforming environment and development policies into action. The Chapter also recognises the need to develop and implement integral, enforceable and effective laws and regulations that are based upon sound social, ecological, economic, and scientific principles.

The scope of such laws and regulations and their cross-sectoral character require that their underlying principles be given a constitutional basis. 88 The underlying principles referred to here are basically environmental rights within which the emergent right to a decent environment occupies a central place. There are several other reasons for constitutionalizing the right to a decent environment in Kenya.

The constitution, being the country's supreme law, directly affects the degree to which a country is able to implement environmental rights and obligations. 89 It affects and influences the legislative policies, laws and institutional organisations which may be established to implement environmental laws. Since the rights and obligations of

86 Id.
89 Id. at p. 366.
individuals or groups pertaining to environmental protection spring from the human right
to a decent environment, there is need to provide a sound constitutional basis for them.
This can only be done by enshrining the right to a decent environment as a fundamental
human right in the constitution. Mere stipulation of environmental rights in an ordinary
statute does not provide a sound legal basis for the rights and obligations derived from
the right to a decent environment.

The incorporation of the right to a decent environment into the Bill of Rights would raise
environmental rights to the level and status of other fundamental human rights.\textsuperscript{90} This
would enhance the balancing of the right to environment with competing rights and
interests. Failure to include the right to a decent environment in the Bill of Rights
relegates the right to a lower and inferior echelon in the hierarchy of rights. It
demonstrates a significant lack of appreciation of the importance of the right and sends
wrong signals to enforcement agencies such as courts. Constitutionalizing the right
would operate to shape attitudes and opinions given the sacred place that the constitution
enjoys in the minds of the citizenry:

Constitutional entrenchment of the rights is also justified by the fact that “in the very
nature of environmental conservation initiatives, policies, laws and public institutions
must be brought into effect and in a place which has a significant impact on or cuts across
the recognised rights, interests and claims of ordinary people.”\textsuperscript{91} Such a place is to be
found in the constitution. In Kenya, the constitutional basis of such environmental

\textsuperscript{90} Id. at p. 367.
\textsuperscript{91} OJWANG, supra, note 2, at p. 17.
initiatives includes the state’s mandate to provide for the people’s welfare, the crystallization of specific rights out of the state’s public welfare initiatives, individual rights claims vis-à-vis public development programmes and the emergence of new public institutions with their constitutional characteristics. On this basis, a constitutional right should be created for the ordinary citizen to act in pursuit of a decent environment. This approach to legislation through constitutionalization should be adopted in Kenya.

Constitutionalizing the right to a decent environment is warranted because it would enable individuals as well as groups to invoke it as a direct fundamental human right, as opposed to an implied right, which would not readily avail itself to them. The problem regarding invocation of the right to a decent environment is bound to occur, especially where obligations to protect the environment are set out in legislation subordinate to the constitution. It can also occur where the environmental provisions providing for the right to a decent environment are set out in a statute and not provided for in the constitution of the state.

In this regard, and as already noted, legal protection of the right to a decent environment in Kenya is far from satisfactory and only represents a development of limited impact due to the absence of constitutional provisions guaranteeing every individual the human right to a decent environment. A further illustration of the problems that are likely to arise in

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92 Id.
93 Id. at p. 19.
94 Allen, supra, note 63, at p. 160.
96 Allen, supra, note 63.
the above scenario is the case of the United States National Environmental Policy Act (NEPA) 1969 whose application has been problematic.\(^97\) The right to a healthy environment provided for under section 101 of the NEPA is said to be non-constitutional, and consequently, in many states of the United States, environmental litigation dealing with the right to a healthy environment has failed to qualify under the concept of constitutional and fundamental human rights.\(^98\)

As already observed, it may sometimes be possible to establish an environmental fundamental right by interpreting existing constitutional provisions. Some commentators in the United States have generally advocated the finding of environmental constitutional rights by interpreting a specific, pre-existing constitutional guarantee.\(^99\) For instance, some provisions of the U.S. Constitution are conducive to inferring an environmental constitutional right. They include the First Amendment and the Due Process clauses.\(^100\) They may be used to justify finding an environmental right either as a "substantive right or as environmental due process."\(^101\)

Proponents of this school of thought have, therefore, sought to rely on the force of the constitution for the protection of the environment through the claim to the emergent right to a decent environment.\(^102\)

\(^97\) National Environmental Policy Act of 1969, Pub. L. No. 91-90, s. 101(a), (c).
\(^98\) See Kirchick, supra, note 95, at p. 516.
\(^99\) Id. at p. 515.
\(^101\) Id. at p. 21.
The Constitution of the U.S., however, makes no provision for a safe and healthy environment. Attempts to link the right to a decent environment to certain existing constitutional clauses, such as equal protection of the law and due process have been unsuccessful.\textsuperscript{103}

Constitutional and environmental advocates have proposed an amendment to the U.S. Constitution to provide that "the right of the people to a clean and healthy environment shall not be abridged."\textsuperscript{104} Such arguments seem to have been supported by the holding by a U.S. District Court that no legally enforceable right to a healthful environment giving rise to an action for damages is guaranteed by a provision of the U.S. Constitution in its entirety.\textsuperscript{105}

It would appear that it is the direct inclusion of such a right in the constitution that would guarantee its protection as a fundamental human right. In Kenya, the necessity, rationale and justification for the constitutionalization of the right to a decent environment can be summarised in the words of a resolution arrived at in a workshop on the Environment in Kenya’s Constitutional Order.\textsuperscript{106} The Resolution titled "Resolution on Environment in Kenya’s Constitutional Order,"\textsuperscript{107} states that it is in recognition of "the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influence of population growth, high density urbanisation,

\textsuperscript{103} Kirchick, \textit{supra}, note 95 at p. 116.
\textsuperscript{104} \textit{Id.} at p. 517.
\textsuperscript{105} Tanner vs. Armco Steel Corpn., 340 F. Supp. 532 (S.D. Tex. 1972) (Specifically rejecting the notion that the Fifth, Ninth, and Fourteenth Amendments give rise to an environmental right), \textit{cited in} Brandl \& Bungert \textit{supra}, note 100, at p. 22.
\textsuperscript{106} Wamukoya & Situma, \textit{supra}, note 29.
\textsuperscript{107} \textit{Id.} at p. 65.
industrial expansion, resource exploitation and new and expanding technological
advances and .... the critical importance of restoring and maintaining environmental
quality to the overall welfare and development of man".\textsuperscript{108} that the participants of the
workshop resolved that:

\begin{quote}
[I]t is of \textit{paramount importance to entrench the right to a clean, balanced and healthy environment in Kenya's Constitution so as to provide a Constitutional right for every citizen to take all practicable means and measures to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic and other requirements of present and future generations of Kenyans.}\textsuperscript{109}
\end{quote}

The upshot of the foregoing is that Kenya should constitutionalize the emergent right to a
decent environment. We shall now examine how this can be done.

\textbf{4.6.2. The Process of Constitutionalization: Basic Considerations}

There are various ways through which the emergent right to a decent environment could
be constitutionalized. For instance, according to I. Koppen and K.H. Ladeur,\textsuperscript{110} there are
three ways in which environmental rights could be formulated in modern constitutions.
The first and common situation is where the state assumes the obligation to protect the
environment. The second situation is the guaranteeing of individual rights to a healthy
environment. The third is the imposition of a duty on the individual to protect the
environment.\textsuperscript{111} The three approaches seem to represent the underlying duties or

\textsuperscript{108} Id.
\textsuperscript{109} Id. Emphasis added.
\textsuperscript{110} See Koppen, I. & Ladeur, K.H., \textit{Environmental Rights, in Human Rights and the European
(Cassese, A. et al., eds.), (European University Institute, Florence 1991).
\textsuperscript{111} Id.
obligations generated by the right to a decent environment. Accordingly, it is argued that the way forward is to guarantee the individual the right to a decent and healthy environment by way of a constitutional provision enshrined in the Bill of Rights of the Constitution of Kenya.

Towards this end, certain considerations have to be borne in mind. When entrenching such a provision, it is important to inculcate a constitutional spirit in the provision by providing for national objectives and guiding principles of public policy. A section in the constitution, for instance, dealing with objectives and principles helps to guide the various branches of government, as well as the general public, on how to implement or interpret the various sections of the constitution.\footnote{See Juma, supra, note 88, at pp. 370-5.} The objectives and principles reveal the underpinnings of the constitutional provision and can help in the interpretation of the laws that may be created to implement the constitution.\footnote{Id. at p. 379.} The objectives and principles can also serve as preambular statements which provide the background against which the provisions of the constitution are formulated and interpreted.\footnote{Id.} They reflect the overall goals of the constitution. It would therefore be important that such objectives and principles make reference to environmental rights so as to enhance the ultimate interpretation and implementation of the right to environment.

Where fundamental environmental rights are provided for, they must be clear and self-executing. This means that such provisions should not require additional enabling
legislation before their implementation can be achieved. Accordingly, they should provide individuals with the environmental rights while at the same time granting them a concrete right to a decent environment. In addition to granting rights, they should impose duties on citizens and government agencies to protect the environment. Moreover, in order for them to be effective, judicial mechanisms that can deal with constitutional matters should also be established since it is not enough to simply state that citizens have the right to a decent environment without providing for constitutional provisions that enable the people to have access to courts to enforce their rights.

Another important consideration relates to the decision as to what form of constitutional provisions are to be adopted. We are concerned with two generic categories or forms of environmental provisions in constitutions, namely, provisions expressing fundamental rights, and those denoting statements of public policy. The first major type of constitutional provisions that express fundamental rights are characterised by their stipulation of the individual’s rights which are enforceable through the courts. Such provisions express a fundamental human right. For instance, the following two proposals which were made in the United States in 1969 and 1970 for the purpose of inserting a fundamental right to environmental protection into the U.S. Constitution are provisions denoting fundamental environmental human rights:

The right of people to clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historical and aesthetic qualities of their environment shall not be abridged; and

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115 Id.
116 Brandl & Bungert, supra, note 100, pp. at 17-23.
117 Id. at p. 14.
Every person has the inalienable right to a decent environment. The United States and every State shall guarantee this right.\textsuperscript{118}

The second major type of constitutional provision is the statement of public policy. It contains directives and guidelines for governmental action or objective state goals.\textsuperscript{119} They encourage government action and have a dynamic character in that they are directed towards the solution to future social problems. They guide rather than limit legislative action, and because of this, they are also described as constitutional directives.\textsuperscript{120} Such provisions, however, are not on their own, to be invoked or enforced through the courts,\textsuperscript{121} although they provide considerable scope for the government to enact laws, create enabling institutions and formulate specific programmes for implementation.\textsuperscript{122}

An example here is the provision under section 1 of the Constitution of the Federal Republic of Austria\textsuperscript{123} which provides:

\begin{enumerate}
\item The Republic of Austria (Bund, Lander and Gemeinden) subscribes to universal protection of the environment.
\item Universal environmental protection means the preservation of the natural environment, being the basis of human existence from harmful influences. Universal environmental protection, in particular, consists of measures to keep clean air, water and soil as well as avoidance of nuisance caused by noise.\textsuperscript{124}
\end{enumerate}

The main difference, therefore, between an environmental fundamental right and a statement of public policy is that the former gives the individual a subjective or personal right, usually enforceable by filing a complaint before a constitutional court, whereas the latter is an objective provision that requires attention by the government, either through

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\textsuperscript{118} Id. at p. 15.
\textsuperscript{119} Id. at p. 16.
\textsuperscript{120} Id.
\textsuperscript{121} Okidi, supra, note 102, at pp. 53-54.
\textsuperscript{122} Juma, supra, note 88, at p. 380.
\textsuperscript{123} Cited in Okidi, supra, note 102, at p. 53.
\textsuperscript{124} Id.
\end{flushright}
legislative actions or by all the three traditional branches of government, but cannot be individually invoked. A brief evaluation of the two is necessary.

One of the strongest arguments in favour of the environmental fundamental right provision is that such a right is a better mechanism for resolving conflicts.\textsuperscript{125} The inclusion of environmental rights in the constitution in this form amounts to a declaration that such rights stand on an equal footing with other fundamental rights. Such a declaration also challenges the privileged position accorded economic freedoms and indicates, more than a statement of public policy, that a nation bestows upon environmental protection the same respect it grants the right to life and physical integrity.

There is also another argument based on the benefits of control by participation, in favour of fundamental environmental right provisions advanced by R. Johnston.\textsuperscript{126} According to this argument, an environmental right that allows formal participation by individuals in environmental decision making would provide an incentive for individuals to notice and bring actions to protect the environment. The individual would become the initiator of judicial supervision over administrative acts or omissions. The right may also be a means of introducing the interests of future generations into today’s politics and legislation so that even environmental interest groups, serving as agents for those generations and invoking the right on their behalf, may remind the state that it holds the environment in public trust.\textsuperscript{127}

\textsuperscript{125} Brandl \& Bungert, \textit{supra}, note 100, at p. 87.
\textsuperscript{126} Johnston, R., \textit{Water Pollution and the Public Trust Doctrine} 19 ENVTL. L. 485 (1989).
\textsuperscript{127} \textit{Id.} at pp. 490-92.
On the other hand, the adoption of an environmental fundamental right may be criticised on a number of grounds. For example, the provision of a fundamental right to a decent environment differs from other constitutional rights in that it represents power given to the majority against a polluting minority, rather than a guarantee of minority rights. This, however, may appear to be a distorted criticism. A fundamental right is generally not directed against private individuals, but against the state itself, requiring state action. The polluting minority, such as industrialists, operate under license from the state. For instance, a state may issue a permit to an industrialist to construct a chemical plant that emits toxic substances. Although the polluting individual, ultimately, will be liable and affected by an assertion of the fundamental right to environment, the state remains the ultimate subject against whom rights are asserted. It is the state which has the duty or obligation to guarantee the human rights of its citizens.

In the case of an environmental statement of public policy, a number of advantages and disadvantages have been suggested. The advantages of an environmental statement of public policy lie in its guiding role for the legislature as a criterion for discretionary decisions and as a standard for interpretation. It may, for instance, propel the legislature and the executive to act, and it may significantly influence the courts in construing statutes and interpreting other constitutional provisions. It may have positive effects on both political and societal levels, and may raise the level of environmental consciousness in the government and society as a whole.

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128 See, generally, Brandl & Bungert, supra, note 100, at pp. 88-90.
129 Id. at pp. 92-7.
130 See Juma, supra, note 88, at p. 380.
131 Supra, note 100 at p. 95.
The environmental statement of public policy can be opposed as being disadvantageous in many ways. It functions as a programmatic phrase that would require further implementing legislation. Its constitutional value is limited because it does not require the legislature to comply with specific mandates and hence serves only as an expression of political, ideological or ethical attitude. Accordingly, it is an unenforceable environmental provision which conveys nothing but public sentiment or political intent, and is a poor substitute for a specific binding environmental rights provision.\textsuperscript{132}

Having looked at the two forms of constitutional provisions, it now becomes timely to pose the question: what is the way forward? We argue that environmental constitutional provisions should be entrenched as fundamental human rights. Even if the formulation of a constitutional environmental provision falls somewhere along a continuum between the fundamental right at one extreme, and the statement of public policy at the other, it should of necessity include a declaration of the right to a decent environment as a fundamental human right. This appears to be the best approach in entrenching the right to a decent environment into the Constitution. By so doing, we would define the rightful place of the right in the constitutional order in Kenya while at the same time enhancing its protection as a human right for every person in Kenya.

\textsuperscript{132} Id. at pp. 92-93.
4.7. A COMPARATIVE ANALYSIS OF EXPERIENCES IN OTHER JURISDICTIONS

Experiences from countries which have incorporated environmental provisions into their Constitutions may be useful in helping Kenya chart the way forward. This is deemed appropriate on the basis that a comparative approach is relatively popular and appropriate in environmental law since environmental problems and related concerns are universal and not the exclusive preserve of one or a few countries. Environmental provisions are increasingly being incorporated into the constitutions of states. By the end of 1996, more than sixty countries of the world had adopted such provisions in their Constitutions.133

In South Africa, for instance, the right to a decent environment is provided for as a fundamental human right under Section 24 of the Bill of Rights, which forms Chapter 2 of the Constitution of the Republic of South Africa. The section provides that:

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

The right to a healthy environment contained in section 24 above is a fundamental one, individualistic in nature and one which has a strong anthropocentric slant. It protects the

right of the individual for the sake of his health or well being. However, with the inclusion of subsection (b), the right also acquires a strong ecocentric dimension in that the environment is protected as such and as an entity in itself.\textsuperscript{134} It also means that the anthropocentric dimension is also covered in the sense that reasonable legislative and other measures must be taken to protect the environment for the benefit of present and future generations. The fundamental human right as entrenched in the South African Constitution has both anthropocentric and ecocentric elements,\textsuperscript{135} and possesses individualistic and collective dimensions of a peoples’ right to environmental protection.

Another feature of sub-section (b) is that “as a result of the public law nature of environmental protection and government’s initiative in passing laws and drafting policies for protecting the natural environment, this provision may be regarded as a state policy directive rather than a fundamental right.”\textsuperscript{136} As a principle of state policy, sub-section (b) could play a decisive role in forcing the state to secure “ecologically sustainable development” and ensure a high priority for environmental affairs at decision making level.\textsuperscript{137} One can conclude that the constitutional provision in the South Africa Constitution has a mixture or a continuum of both fundamental environmental right provisions and environmental statement of public policy.

\textsuperscript{135} \textit{Id.} at p. 135.
\textsuperscript{136} \textit{Id.} at p. 136.
\textsuperscript{137} \textit{Id.}
The 1995 Uganda Constitution recognises environmental rights on the same level with other traditional human rights. This Constitution has also identified environmental protection as a national objective at par with political, economic, social, and cultural objectives. Article 36(1) provides that it shall be the duty of the state to ensure that all persons enjoy a clean and healthy environment.

Article 36(2) establishes a linkage between environmental protection and sustainable development by stating that in order to attain sustainable development, environmental protection and improvement shall form an integral part of the development process. Also important is the fact that the Ugandan Constitution, in its preamble, contains national objectives and directives of state policy that relate to environmental rights. For instance, paragraph 27 of the preamble requires the state to sustainably manage the environment. These provisions in the Ugandan Constitution also portray a commendable approach to entrenchment of constitutional environmental provisions since they are all founded on the recognition of the importance of the human right to a decent environment, which is firmly and specifically constitutionalised in the Constitution under its chapter on protection and promotion of fundamental human rights.

From these examples, it would appear that whether a country has adopted an environmental provision in the form of a statement of public policy, a fundamental right or both is a matter to be discerned from the language adopted. As we have seen, the

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139 CONSTITUTION OF UGANDA, 1995., art. 39. (providing that every Ugandan has a right to a clean and healthy environment).
language can take many forms. For example, in its new Constitution, Brazil incorporated an exhaustive provision regarding the right to environmental protection which can serve as an example of a long, exhaustive and detailed environmental provision which uses broad and expansive language. Article 225 of the 1988 Constitution of the Republic of Brazil, provides, in part, that:

Everyone is entitled to an ecologically balanced environment, which is an asset of everyday use to the common man and essential to a healthy quality of life; this imposes a duty on the government and the community to protect and preserve it for the present and future generations.

1. In order to assure that this right is effectively available, it is incumbent on the government to:
   i. preserve and restore ecological processes and arrange for the ecological management of species and ecosystems;
   ii. preserve the diversity and integrity of the genetic partrimony of Brazil and oversee the entities that are engaged in research and manipulation of genetic materials.
   iii. define, in all the units of the Federation, the geographical spaces and components thereof that are to be specifically protected. These may be changed or deleted only by law, and any use that compromises the integrity of the features which justify protection of such areas is prohibited;
   iv. require, pursuant to law, that an environmental impact study be made prior to the installation of a project or activity that may potentially cause significant harm to the environment, and that the results of such study be published;
   v. control the production, marketing, and use of techniques, methods, and substances that pose a risk to life, the quality of life, and the environment;
   vi. promote environmental education at all levels of instruction and help to increase public awareness of the need to preserve the environment;
   vii. protect the flora and fauna; practices that place their ecological function at risk, lead to the extinction of species, or submit animals to cruel treatment are hereby prohibited;

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2. Anyone who exploits mineral resources is obliged to restore the damaged environment by such technical means as may be required by the appropriate public agency, pursuant to law.

3. Behaviours and activities deemed injurious to the environment shall subject the violators, whether individuals or legal entities, to criminal and administrative penalties, apart from the obligation to repair the damage caused.\textsuperscript{140}

This constitutional environmental provision entrenches a fundamental human right to a decent environment in a very exhaustive way. It encompasses crucial elements of the right such as the right of participation, the right to redress and remedies, the right to environmental information, among others. The provision guarantees the right to a decent environment coupled with the underlying duties upon the individual, the state and other entities. It is an illustration of the use of language in capturing the elements of content, and scope of environmental rights. It represents a good formulation of the right to a decent environment as a fundamental human right.

4.8. THE IMPLEMENTATION PROCESS: PROBLEMS AND PROSPECTS

In discussing the implementation process of the right to a decent environment in Kenya, there are a number of pertinent issues that should be borne in mind. First, the effectiveness of both constitutional statements of public policy and fundamental rights depends on how courts implement them. In most countries, implementation is the task of either the High Court, the highest national court (Supreme Court) or a special Constitutional court.\textsuperscript{141} Second, courts may hesitate to apply environmental provisions

\textsuperscript{140} Quoted in Brandl & Bungert, supra, note 100, at pp. 75-7.

\textsuperscript{141} E.g., Special Constitutional Courts exist in Austria, Germany, Spain, Portugal and South Africa.
which they perceive as hortatory. They may construe these provisions as merely encouraging legislative action, rather than guaranteeing environmental rights.\textsuperscript{142} This will depend on the court's interpretation or construction of the environmental provision, and whether it is judicially enforceable without the enactment of implementing legislation. From a practical point of view, only a self-executing constitutional provision seems to be worthy of adoption since it alone has true constitutional value.

The third issue which arises in judicial enforcement of environmental provisions is that of the standing of parties to sue to enforce environmental human rights, that is, \textit{locus standi}. Falling under this issue are three questions to be considered. The first is whether an environmental constitutional right may be enforced only by governmental agencies or by private litigants as well. Giving governmental agencies the exclusive right to enforce an environmental right poses particular problems when that governmental agency is both an addressee and beneficiary in a single case.\textsuperscript{143} The agency in such a case will be both the complainant about a particular governmental action and the body to whom the complaint is directed. Such a situation would make the governmental agency hesitate to invoke the constitutional provision against another branch of government, and have so much power over when and whom to sue. If the Constitution does, however, provide for private enforcement, the second issue would be whether a party must suffer injury in fact and be personally concerned in order to have standing. The answer would depend on the specific text of the environmental provision. In the final analysis, these issues represent some of the factors which interplay with others in the process of implementing

\textsuperscript{142} Brandl & Bungert, \textit{supra}, note 100, at pp. 19-20.

\textsuperscript{143} \textit{Id} at p. 20.
environmental rights provisions with the resultant effect of either obstructing or enhancing the realisation of environmental rights.

In Kenya, it is important to begin by noting that the issue of standing in cases of environmental litigation is an example of a problem which, for a long time, has plagued the process, and retarded both the growth and development of environmental law, environmental rights, and litigation in Kenya. However, this perennial problem of standing, or *locus standi*, which has frustrated several attempts by various enthusiastic individuals and organisations in their endeavours at vindicating environmental rights, has now been positively addressed by the Environmental Management and Co-ordination Act of 1999. This Act grants the requisite standing to any individual in Kenya whose entitlement to a clean and healthy environment has been, or is likely to be infringed or violated, to sue or bring an action for redress in the High Court without having to show that he or she is an aggrieved party, or one who has suffered or is likely to suffer injury in fact at a personal level.

Section 3 (3) of the Act states:

A person [alleging contravention of his entitlement to a clean environment] shall have capacity to bring an action notwithstanding that such a person cannot show that the defendant’s act or omission has caused or is likely to cause him any personal loss or injury.

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145 E.g., cases dismissed by courts on the basis of lack of *locus standi* include Wangari Maathai vs. Kenya Times Media Trust, High Court of Kenya at Nairobi, Civil Case No. 5403 of 1989; Wangari Maathai vs. City Council of Nairobi & Others, High Court Civil Case No. 72 of 1994; and Lawrence Nginyo Kariuki vs. County Council of Kiambu & Anor., High Court of Kenya at Nairobi, Civil Case No. 1446 of 1994. (unreported).
The only qualification laid down by this section is the requirement that any such action must not be frivolous, vexatious or an abuse of the court process. In the light of this statutory provision, one can safely assert that at least one major hurdle which previously stood in the way of the development and enforcement of environmental rights has now been removed. This is a significant step forward.

However, the express grant of standing in the enforcement of the right to a decent environment is far from satisfactory. As we have argued, constitutionalization of the right to a decent environment is what ultimately leads to successful enforcement and implementation. It will be recalled that the emergent right is a fundamental human right which requires firm constitutional guarantee and not mere statutory recognition. Towards this end, the emergent right to a decent environment is of such nature that its enforcement should not be stalled by the hindrances that have in the past adversely affected the enforcement of fundamental rights and freedoms already existing in the Constitution of Kenya. This conviction is premised on the evaluation of the main problems that in the past contributed to failed attempts at enforcing fundamental human rights in Kenya.  

In the enforcement process of an environmental constitutional provision, there might arise the problem of interpretation similar or akin to the interpretation problems that for a long time have been associated with constitutional cases founded on fundamental rights and freedoms in Kenya. The manner in which the Bill of Rights has been interpreted and

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applied by the High Court has been the critical reason for Kenya's poor history in the enforcement of fundamental human rights. Generally, a study of Kenya's experience reveals that in over thirty years of litigation, the interpretation of the Bill of Rights by the High Court has been "lean and mean, textual and strictly against the individuals." The scenario depicts a strict, restrictive and legalistic construction of the constitutional provisions under the Bill of Rights and particularly section 84 thereof, which creates the judicial machinery for enforcement of fundamental human rights.

Although this kind of construction may be required especially when the individual rights have to be weighed against the public or societal good, its application can be said to be wrong and improper on a number of grounds. Its major shortcoming is that its application operates to shut out litigants from the courts thereby denying them the right of access and due process of the law. It has, for instance, been used to support the position that section 84 of the Constitution is inoperative because no rules of procedure have been promulgated. This approach cannot be right, because section 84 itself provides the direct right of access to the High Court to litigants. It is a procedural provision which gives the manner in which to enforce fundamental human rights. The lean, mean and legalistic construction, therefore, denies even the Court the opportunity of adjudicating over complaints to determine which interests, be they individual or public, are to prevail in any particular case. Such an approach causes gross injustice to litigants simply because of

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149 Mbaya, supra, note 147, at pp. 70-95 and pp. 160-170.
mere technicalities which should not be used to defeat the purpose of the protection of any particular human right in the entire Constitutional order.

The judicial approach should be dynamic rather than static, pragmatic and not pedantic, and elastic rather than rigid. Otherwise, rigid, static or legalistic approaches are vulnerable to misuse and abuse by influential groups like the executive to protect their private or subjective interests disguised as societal good or public interest.

The position can be seen from various past decisions of the High Court in cases which have been founded on the enforcement of fundamental rights in Kenya. For instance, in the case of *Anarita Njeru vs. Republic (No. I)*,\(^{150}\) the applicant was charged with stealing by a person employed in the public service. Her application for an adjournment to enable her call a witness in her favour was refused and she was thereafter convicted. She applied for leave to file an appeal out of time, which application was refused. She then applied under section 84 of the Constitution for a declaration by the High Court that the refusal by the trial court to adjourn to enable her call a witness was a violation of her fundamental rights to a fair trial guaranteed under section 77 of the Constitution. At the hearing of the application, the High Court was called upon to interpret section 84(1) of the Constitution which provides in part:

\[...[I]f\] a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if another person alleges contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

\(^{150}\) (1979) K.L.R. 154.
While dismissing and refusing the application, the Court stated that the words ‘without prejudice’ meant ‘without derogating from’, and concluded “that you can apply under section 84(1) before and not after you have taken other action.”

According to the reasoning of the court, if the applicant has already taken some action lawfully available to him, he cannot bring an application under section 84. The taking of such alternative action was declared a forfeiture of the constitutional remedy. Despite the clear words of section 84(1) to the effect that applying for enforcement of fundamental human rights is without prejudice to any other remedy available, the effect of the above decision compelled persons seeking to enforce their human rights to elect between any other action lawfully available or the constitutional remedy. If the applicant first opts for any other action that was available to him or her, that becomes conclusively fatal to any subsequent constitutional application he or she may contemplate.

Between 1979 and 1992, this decision had the effect of restricting and obstructing the process of enforcing fundamental rights under the Bill of Rights. For instance, it was faithfully followed in David Kishushe Lengazi vs. A.G. and Koigi Wa Wamwere vs. A.G., among others. In the Koigi Wa Wamwere case, the applicant brought an application seeking a declaration and redress for several of his constitutional rights under section 72(1), 74 and 77 of the Constitution which he contended were being violated.

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151 Id at p. 160.
152 See M’Inoti, K., Enforcement of Fundamental Rights in Kenya: Righting Some Initial Wrongs, NAIROBI LAW MONTHLY, No. 42, April/May 1992 at 21 (discussing in detail the purport and impact of this decision).
154 Judgement of the High Court of Kenya, Miscellaneous Application No. 574 of 1990 (unreported).
The application failed, with the High Court holding that he had sought an alternative remedy in the magistrate’s court prior to filing the application.

The other problem which demonstrates the conservative approach and judicial attitude in the enforcement of human rights in Kenya is the manner in which the right of access to the High Court for redress under section 84 of the Constitution has been limited by the courts. There has been a number of cases in which the High Court declared the whole of section 84 inoperative on the basis that the Chief Justice had not promulgated rules under section 84(6) to regulate the practice and procedure for enforcement of fundamental human rights.\(^{155}\) In *Gibson Kamau Kuria vs. A.G.*,\(^{156}\) and *Joseph Maina Mbacha & 2 Others vs. A.G.*,\(^{157}\) the High Court held that due to the failure of the Chief Justice to make rules regulating the procedure and practice for enforcement of human rights, the Bill of Rights could not be enforced.

Considering the above scenario, one may raise a number of questions. How is the human right to a decent environment to be enforced under a Bill of Rights which has been declared inoperative? What indicators, if any, are there to show that the enforcement of the emergent right to a decent environment will be feasible or practicable under the constitutional machinery of the Bill of Rights?


\(^{156}\) Id.

\(^{157}\) Id.
To begin with, we note that recent developments in the litigation of the Bill of Rights in Kenya seem to indicate that there is a positive change, albeit gradual, in both the attitude and approach by the courts.

The change depicts a gradual departure from the strict, restrictive and conservative approach in the interpretation and enforcement of human rights to a broad, liberal and flexible approach. It is argued that the enforcement of the human right to a decent environment is poised to succeed since it may ultimately benefit from some of these developments. For instance, it now appears that the courts are ready to embrace a liberal approach to the interpretation and invocation of the constitutional right of access to the High Court for redress. This argument is fortified by the examination of the following key developments in Kenya.

First, the High Court seems to have reconsidered its previous practice and approach to the enforcement of human rights and acknowledged that it was improper for, among other things, being too restrictive and narrow. For instance, in 1990, a bench of two judges expressed the view that the decision in *Anarita Karimi Njeru case*\(^{158}\) was wrong after all, and suggested that it be reconsidered. This was in *Lawford Ndege Imunde vs. Rep.*\(^{159}\) in which the applicant sought to enforce the constitutional protection of his freedom of expression. Ultimately, in 1992, the High Court had the opportunity to reconsider its

\(^{158}\) *Supra*, note 150.

\(^{159}\) Judgement of the High Court of Kenya, Miscellaneous Application No. 180 of 1990 (unreported).
own past practice in the enforcement of fundamental human rights in the case of Harun Thungu Wakaba vs. Republic.¹⁶⁰

In that case, and in a bold departure from its tradition of narrow and strict construction of the Bill of Rights, the Court rejected the reasoning of the earlier decision in Anarita's case and proceeded to hold that it was wrongly decided. Above all, the court was not impressed by the failure of the court in Anarita's case to address itself to the nature and purpose of the court's jurisdiction under section 84 (1) for the enforcement of fundamental human rights. In this context, the Court said:

The learned Judges did not also address themselves to the fact that the section did not intend limitation to the operation of the Constitution in ensuring that all grievances are redressed and not merely glossed over as it is the inherent duty of the court to do justice unless specifically barred by law.¹⁶¹

Consequently, the Court ruled that the interpretation of the Bill of Rights in the Anarita case was too restrictive. The Court endorsed the view that the interpretation of constitutional provisions in the Bill of Rights should be undertaken in a way that is purposive and flexible so as to give effect to the human rights of individuals.

This represents a remarkable change of attitude and approach by the Court in the enforcement of fundamental rights. It is worth noting that there are a few other cases in which individual judges may be able to rise to the occasion to vindicate fundamental rights by broadly and liberally interpreting constitutional provisions.¹⁶²

¹⁶⁰ Judgement of the High Court of Kenya, Miscellaneous Application No. 34 of 1992 (unreported).
¹⁶¹ Id.
The problem of lack of rules to regulate the practice and procedure in cases seeking to enforce human rights has now been tackled or addressed at various levels. For instance, the High Court has expressly ruled in the case of *Raila Odinga vs. Republic*\(^{163}\) that once a right to apply to it is established, it could be exercised through any procedure known to law. The Court took the position that the intention of the Constitution is that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court, and is not to be defeated by the failure of Parliament or the rule making authority to make specific provisions as to how the access is to be gained. With these developments in sight, it would appear that the problem of the absence of rules under the Bill of Rights will not continue to plague the process of litigating human rights in Kenya.

Finally, the Kenyan experience in human rights litigation can be concluded by noting that the way forward has been demonstrated by the Court of Appeal. The decision in the case of *Wanyiri Kihoro vs. The Attorney General*\(^{164}\) is instructive. In the case, the applicant had filed a constitutional application praying for a declaration that his fundamental rights had been contravened, and compensation for the contravention under section 84(2) of the Constitution. His claim failed in the High Court due to the strict construction of the constitutional provisions employed, thus imposing a very high standard of proof on him. On appeal, however, the Court of Appeal adopted a liberal approach to interpretation. It reversed the decision of the High Court and proceeded to find in favour of the applicant holding, *inter alia*, that the standard of proof where there is an allegation of breach of a fundamental right or freedom is equivalent to that found in civil cases, that is, on a

\(^{163}\) Judgement of the High Court of Kenya, Miscellaneous Application No. 540 of 1988 (unreported).

\(^{164}\) Judgement of the Kenya Court of Appeal, Civil Appeal No. 151 of 1988 (unreported).
balance of probabilities. Further, the Court held that the appellant was entitled to a declaration that his human rights under sections 72 and 74(1) of the Constitution had been contravened, and awarded damages as compensation. This decision is important because it demonstrates that the right approach to interpretation of constitutional provisions on fundamental rights is the liberal one. It also shows a radical departure from the conservative attitude and position which the High Court had for a long time taken. It is also a step forward in the protection of fundamental human rights because its holding on the standard of proof is favourable and facilitative of claims of violations or breaches of environmental rights, where it is argued that proof is difficult since the "level of proof required in such cases is imprecise and cumbersome." A standard of proof based on a preponderance of evidence would be of importance in environmental litigation.

The foregoing developments indicate that environmental rights are unlikely to suffer the problem of conservative and mean interpretation by courts. The fact that even the High Court has already demonstrated willingness to change its attitude from the historical conservatism to liberalism indicates a welcome change of approach.

Away from the hypothetical, the problem of the enforcement of environmental rights should be tackled by formulating and entrenching an environmental fundamental right which is, as far as possible, detailed, exhaustive, and specific. This would help in enhancing its interpretation by courts. In view of the importance of environmental rights to human survival, it is recommended that Kenya should adopt such a formulation of

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environmental rights. Given this possibility, it is not, then, futile to talk about the enforcement of environmental rights by way of invoking the right of access to the High Court enshrined in the Bill of Rights.

The other reason why the enforcement right under the constitutional machinery is bound to be successful as compared to the case of other human rights is premised on the consideration that it would take advantage of, and thereby benefit from, public interest litigation which is gaining ground in Kenya. There has been a rising number of cases brought to Kenyan courts seeking to enforce environmental rights as well as increased awareness on environmental issues in the recent past. Although not strictly based on a specific environmental human right, most of the cases have contributed to shape the opinion of both the courts and the public as to the importance of the environment, its management, and the individual rights to live in an environment conducive to the well being of every human being. Public awareness and consciousness is also on the rise, as demonstrated by the establishment of various environmental organisations, bodies, or groups whose activities or aims are in the sphere of enhancing environmental protection and management. Considering these factors, there is the possibility that public interest litigation on environmental law in Kenya is poised to stir judicial activism which will ultimately rejuvenate enforcement of environmental rights. Constitutionalization of the right to a decent environment would further give impetus to this activism.

166 See Lumumba, supra, note 144 (Commenting on environmental law, judicial review and public interest litigation).
167 E.g., Abdikadir S. Hassan vs. Kenya Wildlife Service, High Court of Kenya at Nairobi, Civil Case No. 2059 of 1996 and supra, note 145.
168 E.g., the Centre for Environmental Policy & Law in Africa (CEPLA), the Centre for Research & Education on Environmental Law (CREEL), the Green Belt Movement and the Public Law Institute.
The Indian experience is illustrative in this regard. The most notable achievements in the protection and promotion of fundamental rights have been the development of public interest litigation in the country.\textsuperscript{169} Redress is sought in respect of injury to the public in general and for the enforcement of fundamental human rights of a class or group of people indirectly or directly injured by an act or omission complained of, but who are unable to approach the court on account of indigence, illiteracy, or social and economic disabilities.\textsuperscript{170} Such cases of public interest litigation have forced the Supreme Court of India to forge "new tools, devise new methods and adopt new strategies" leading to what is now known as "epistolary jurisdiction."\textsuperscript{171} S.J. Sorabjee, while expressing his appreciation of the impact of public interest litigation on the enforcement of fundamental rights, including environmental human rights in India, states:

\begin{quote}
Thanks to public interest litigation, enjoyment of fundamental rights has become a reality to some extent for at least some illiterate, indigent and exploited Indians ... Jurist\textsuperscript{ic} activism in the area of environmental and ecological issues, and accountability in the use of hazardous technology has been made possible and yielded salutary results.\textsuperscript{172}
\end{quote}

It is hoped that continued development of public interest litigation in Kenya will assist in the enforcement of the fundamental human right to a decent environment by either increasing the awareness and public consciousness on environmental rights or by causing judicial activism that allows effective enforcement of this human right.

\textsuperscript{169} See Sorabjee, S.J., \textit{The Role of the Judiciary, the Approach and Principle of Interpretation and Remedies: The Indian Experience}, in \textit{HUMAN RIGHTS AND DEMOCRACY IN EAST AFRICA}, supra, note 147, at p. 17.

\textsuperscript{170} Id.

\textsuperscript{171} Id. at p. 173.

\textsuperscript{172} Id.
4.9. CONCLUSION

In this chapter, it has been shown that the place of environmental rights in Kenya, as well as the right to a decent environment, are only defined at a statutory level under the Environmental Management and Co-ordination Act of 1999. We have seen that evidence of the emergence and recognition of the right to a decent environment is discernible from the Act. There is apparent lack of due recognition of the right as a fundamental human right in the constitutional order in Kenya. The place and status of the right to a decent environment is, accordingly, unsatisfactory because it lacks the necessary constitutional backing and support. It is necessary for Kenya to guarantee Kenyans the human right to a decent environment by fully embracing and constitutionalizing it. This will not only change its legal status, but also enhance its enforceability as a fundamental human right.
CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

We have argued a case for recognition and enforcement of environmental rights as human rights and sought to demonstrate the extent to which a fundamental human right to a decent environment is emerging at national, regional and international levels. In the same vein, we have examined the case of Kenya and sought to show the unsatisfactory state of affairs in as far as the recognition of environmental rights, and particularly the right to a decent environment, is concerned. This chapter highlights the principal features of our study and makes recommendations on the way forward.

In chapter one, we examined the linkages between human rights and environmental rights, and defined the legal foundations for environmental human rights. It was demonstrated that the conceptual and theoretical background of the human right to a decent environment lies in the relationship between human rights and the environment. Generally, the fundamental human right to a decent environment has been seen as emerging from the historical development of both environmental and human rights laws.

Further examination of human rights theories revealed that the right to a decent
environment satisfies the criteria by which human rights are identified. These include such elements as generality, importance, endurance, inalienability and universality of human rights.

Besides, the right to a decent environment has been recognised and judicially enforced by courts in various jurisdictions as a fundamental human right. These jurisdictions include India and the Philippines where courts have expressly declared not only the importance, but also the feasibility of the right to a decent environment as a human right. The fundamental nature and importance of this right is reiterated by J.B. Ojwang who observes that:

"A clean and healthy environment is an essential component in the totality of social welfare. So important is it to personal well-being that it may be equated to the various civil rights that often make headlines."¹

In chapter two, the right to a decent environment was shown to be of such nature that it embodies various elements or characteristics found in the orthodox categories of human rights. It defies categorisation of rights as either civil and political or economic, social and cultural or solidarity or collective rights. It effectively transcends the distinctions usually drawn between these categories, thereby acquiring an all-important character over most of them, only coming close to the right to life in terms of character and significance. The right to a decent environment has, by far, a unique character in that, by its nature, it encompasses planetary rights in respect of future human generations. In this regard, the right to a decent environment leans

heavily towards collective rights which can be claimed by groups or generations. This explains the argument by E.B. Weiss that:

[T]he right to a decent environment has been put forward by some as a so-called third generation right. These rights belong neither to the individualistic tradition of first generation rights (civil and political) nor to the tradition of second generation (economic and social) rights. They are collective rights which are intended to acknowledge a continuing evolution of the human rights doctrine.\(^2\)

Be that as it may, the ultimate beneficiary of the right to a decent environment is the individual. This then places the right at par with other traditional human rights.

The evolution of the right to a decent environment can be historically traced, most notably, to the activities of the Council of Europe way back in 1970s. Since then, there have been various developments at national, regional and international levels which recognise the right to a decent environment in various ways, either directly or indirectly. Taken as a whole, the developments evince the emergence of a new fundamental right to a decent environment, although there exists no binding instrument of international character which expressly recognises the right to a decent environment as a human right.

It appears that despite the lack of express recognition of the right to a decent environment as a principle of customary international law, evidence available points to the conclusion that the right is increasingly emerging as a recognizable norm steadily

\(^2\) WEISS, E.B., IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY 117 (UN University Press, Tokyo & New York, 1989).
moving towards universal acclamation. Furthermore, there is every indication that the right to a decent environment is poised to form part of positive international law.

Although environmental rights are not explicit in most international human rights instruments, implicit reference is evident in a few of the human rights instruments. For instance, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) contain provisions that may be interpreted as recognizing the right of individuals to a decent environment. Article 6 of the ICCPR provides that every human being has the inherent right to life while the ICESCR guarantees in a general manner the right to enjoy the highest attainable standard of health, as well as the right to a satisfactory standard of living.

Although these rights are somewhat abstract and do not concisely guarantee environmental rights, they nevertheless recognise the need to protect the environment for human survival. The same applies to the 1989 Convention on the Rights of the Child, which provides that states are to take appropriate measures "to combat disease and malnutrition taking into account the dangers and risks of environmental pollution." This Convention also makes reference to the environmental rights of children.

3 Art. 12.
4 Art. 11.
5 Art. 24, para. 2 (c)
6 This Convention explicitly refers to the need to education of the child to be directed *inter alia* to "the development of respect for the natural environment" (art. 29, para. (e)).
The 1972 Declaration of the Stockholm Conference on the Human Environment clearly stated that such a right is a fundamental human right, equivalent to the right to life. The 1992 Rio Declaration on Environment and Development reaffirmed the same principle and restated the commitment of the world states to the cause of environmental protection. In fact, Principle 1 of both Declarations recognises the right of individuals to a decent environment. Although they are non-binding, these two environmental declarations represent significant developments at the international level in the evolution of the emergent human right to a decent environment.\(^7\) Moreover, they have profound soft law effect in the process of international law making and the emergence of new norms in international law.\(^8\)

Regionally, significant developments have also been witnessed, an indicator of the profound concern for the protection of environmental rights. The American Convention on Human Rights and the African Charter on Human and Peoples’ Rights provide for the right to a decent environment. The African Charter seeks to attain, *inter alia*, a general satisfactory environment,\(^9\) while the Protocol of San Salvador to the American Convention specifically provides for the right of individuals to a healthy environment.\(^10\) The European Convention on Human Rights bears no specific provision on this right. However, unsuccessful attempts have been made to include it within the ambit of the Convention. Despite the unsuccessful attempts to enact a

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\(^9\) Art. 24. (providing that all peoples’ have the right to a general satisfactory environment, favourable to their development).

\(^10\) Art. 11, para. 1. (granting an individual human right to live in a healthy environment).
specific provision for the right to a decent environment, it should be noted that with the enhancement of regional integration in Europe, the European Union may nevertheless become an ideal forum for the implementation of environmental rights.\footnote{Koppen, I. & Ladeur, K.H., \textit{Environmental Rights, in Human Rights and The European Community: The Substantive Law; European Union-The Human Rights Challenge}, Volume III (Cassese, A. et al. eds.) 30-37 (European University Institute, Florence 1991).}

This is in view of the myriad activities undertaken under the auspices of the Council of Europe geared towards the recognition and enforcement of environmental human rights.

At the national levels, the recognition of the emergent right to a decent environment has also increased. Several national constitutions have enshrined provisions on environmental human rights and the right to a decent environment as both constitutional and human rights. This is a remarkable development because national codification and consolidation of environmental rights into constitutions will ultimately serve to provide essential safeguards for the protection of the environmental human rights. Increased national initiatives towards enhancement and recognition of environmental rights are likely to result in the universal recognition of the right to a decent environment as a binding norm of international law.

The content and scope of environmental rights is extensive. They extend to various rights and obligations claimable under the right to a decent environment. They include, for instance, the freedom from environmental conditions that threaten human health and life, rights and obligations of future generations, the right to benefit
equitably from nature and natural resources, the rights of indigenous people to control
their environment, the rights to environmental information and to participate in
environmental decision making, the right to effective redress and remedies for
environmental harm, and the various obligations and duties ranging from
intergenerational equity to state responsibility for transboundary harm or damage.
Although the examples given are not exhaustive, they operate to demonstrate the
constitutive elements of environmental rights as human rights. Breach or violation of
all or any of them, would constitute a denial of the human right to a decent
environment.

The emergent human right to a decent environment has to contend with various
problems in its development. These include the lack of an effective enforcement
machinery and the lack of procedural standing for individuals before tribunals to
enforce the right. Its potential conflict with other rights and interests at both national
and international levels represents yet another threat to environmental rights as human
rights. In this regard, the effects of the right to development and state sovereignty on
environmental rights are considered.

The first general principle proposed by the Legal Experts of the World Commission on
Environment and Development (WCED) in 1987 is the fundamental right of all human
beings to an environment adequate for their health and well-being. However, at the
United Nations Conference on Environment and Development (UNCED) convened in
Rio in 1992, almost all principles proposed by the WCED Legal Experts Group were
adopted with the notable exception of the recommendations made in respect of the status of the right to a decent or healthy environment. For instance, Principle 1 of the Rio Declaration speaks of human beings merely as a centre of concern for sustainable development. As compared to the right to development which is provided for under Principles 3 and 4 of the Rio Declaration, the right to a decent environment and, hence, environmental human rights are not substantially and adequately addressed. In the circumstances, one gets the impression that developmental objectives may override environmental human rights concerns.

Besides, the tendency of states to invoke their sovereign rights in the use and management of their resources, particularly in pursuit of development, may encroach upon the environmental human rights of their nationals. When this happens, the use of the sovereignty doctrine as a shield becomes improper and unjustified. The human right to a decent environment has to grapple with such obstacles.

With respect to Kenya, it has been established that, among other things, a trend is emerging where the legal system is gradually recognizing the right to a decent environment. The enactment of the Environmental Management and Co-ordination Act, 1999, is a step in this direction. It is apparent, however, that the right has no place in the current Constitution of Kenya. There exist no constitutional provisions entrenching environmental rights in the Constitution. Chapter Five of the Kenyan Constitution which deals with the Bill of Rights makes not mention of the right to a decent environment. Consequently, individuals cannot claim and enforce the right to a
decent environment as a fundamental human right within Kenya's constitutional framework.

The enactment of the Environmental Management and Co-ordination Act, 1999, does not operate to alleviate the need for constitutionalization of the right to a decent environment in Kenya. What compounds its deficiency is the failure to give environmental rights their deserved status as human rights capable of enforcement as fundamental human rights.

In view of the above, the following broad conclusions can be made.

First, the problems of the environment are no longer being viewed exclusively from the angle of pollution affecting the industrialised countries, but rather as a worldwide hazard threatening the planet and the whole of mankind, as well as future generations. There is now a universal awareness of the widespread, serious, and complex character of environmental problems which call for adequate action at the national, regional, and international levels.

Second, the realization of the global character of environmental problems is attested to by the progress made in understanding the phenomena that create hazards for the environment, threaten human health and life and impair their fundamental rights. A human rights dimension to environmental rights is therefore germane.
Third, by means of a global approach to these problems, including a consideration of their human aspects or dimensions, it has become possible to move from environmental law to environmental rights proclaimed, for instance, by the 1972 Stockholm Declaration which states in its Principle 1 that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations." Even though this right may not be well established under present international law, it certainly deserves to be promoted with all possible vigour. It is a part of the right to life and goes to the very core of human existence.12

Fourth, a large number of national, regional, and international instruments have helped to strengthen the legal basis and foundations of environmental rights and stressed the intrinsic linkage between the preservation of the environment, environmental rights, development and the protection and promotion of human rights.

Fifth, developments in domestic law can contribute to a bottom-up development in international law. For instance, as more and more municipal legal systems recognise the legal right to a decent environment as a human right, that recognition would support the establishment of a general principle of international law if and when accompanied by state practice. It may also contribute to the emergence of a norm of

customary international law that would bind all nations, regardless of their domestic and municipal law. Because of this, the continued development of environmental rights, and particularly the right to a decent environment, has the potential to shape the conduct of individuals, groups, governments and international organisations leading to universal acceptance of the right to a decent environment.

Sixth, the concept of national sovereignty remains an important principle of international law. There is no need for wholesale retreat from the principle since, in any event, the concept is not absolute. However, with regard to environmental rights, the challenge is for all states to recognize and appreciate that it is simply not feasible for sovereignty to be exercised unilaterally by individual states, however powerful, to the detriment of environmental human rights. There is need for states to give up, in cases of environmental rights violations, more of their sovereignty in the interests of environmental protection.

Seventh, environmental damage has direct effects on the enjoyment of a number of human rights such as the rights to life, health and food. Conversely, human rights violations in their turn, damage the environment. This is true of, for instance, the right of peoples to self-determination, the right to development, to participation in decision making, to work and to information, freedom of association and of expression. It implies that without respect for environmental human rights and, hence, protection of the environment, the basis of human survival will be eroded.
Lastly, there is ample evidence that a human right to a decent environment is steadily emerging in Kenya. The statutory recognition of the individual entitlement of every Kenyan to a clean and healthy environment contained in the Environmental Management and Co-ordination Act, 1999, is a major step towards this direction.\(^{13}\) While granting every Kenyan the right to a healthy environment, the Act establishes the important link between environmental protection and environmental human rights. This is important because it constitutes the foundation of the emerging right to a decent environment as a fundamental human right. More importantly, the Act expressly recognises that the environment constitutes the foundation of national economic, social, cultural and spiritual advancement.\(^{14}\)

The import of this recognition appears to be that environmental rights protect paramount human interests which are sought to be protected through the right to a decent environment. Besides, the Act does recognise the general principles emerging within the content of the right to a decent environment. These include intergenerational equity, public participation in planning for, and managing the environment, and precautionary principle. This should be seen as further evidence pointing to the emergence of the right to a decent environment in Kenya. As indicated earlier, however, mere statutory mention does not seem to guarantee an individual in Kenya the fundamental right to a decent environment. There is the inevitable need to constitutionalize this right, thus elevating it to the level of binding fundamental and basic human rights.

\(^{13}\) Environmental Management and Co-ordination Act, 1999, s.3(1).
\(^{14}\) Id. Long title.
5.2 RECOMMENDATIONS

Although the right to a decent environment is emerging as a fundamental human right to a decent environment, it lacks necessary and adequate recognition in the legal and constitutional order in Kenya. For instance, the Environmental Management and Co-ordination Act, 1999, provides for the right as a mere general principle. It provides for the individual entitlement to a clean and healthy environment but fails to state or define it as a fundamental human right to a decent environment.

On the other hand, the Constitution of Kenya is deficient of an explicit recognition of the right to a decent environment as a human right. In view of these shortcomings, we recommend that the right of individuals to a decent environment be incorporated in the Constitution.

In general, the effective implementation of environmental provisions in a constitution would entail significant reforms in the overall system of government and constitutional order. Protection and enforcement of environmental rights in Kenya will require changes in the existing structure of the Constitution, judicial attitudes, and, perhaps, judicial structure. It may, for example, involve the creation of special courts to deal with a wide range of issues concerning the environment and environmental rights. The Environmental Management and Co-ordination Act, 1999,
has moved a step towards this direction by creating a National Environment Tribunal under its section 125.

The Act grants legal capacity to any person to sue if his or her right to a healthy environment has been, is being or likely to be violated. This provision is likely to dramatically widen access to justice in environmental matters. However, it ought to be noted that the responsibility for effective prosecution of environmental claims still remains with the victims of environmental harm. The ability to frame effective suits and effectively prosecute them will continue to be a vital step towards vindicating environmental rights. This entails the use of funds for meeting litigation costs which, in most cases, are prohibitive to the ordinary citizen. In view of this, we recommend amendments to section 24(4) of the Act, to expand the objects of the National Environment Trust Fund established under section 24, to include the provision of legal aid to litigants in environmental claims.

These institutional reforms aside, this study has shown that by giving more thought to the scope of environmental human rights, one sees that the right to a decent environment is emerging as a compelling agenda for inclusion in Kenya’s Constitution. Towards this end, it is recommended that Kenya adopts the Brazilian model of environmental human rights provisions, which are detailed and capture the most important elements of environmental human rights. This, however, is not to mean that we should duplicate or merely adopt laws from other countries.
Experiences from other countries with similar challenges, however, provide good lessons.

Further, given the current political developments, including the on-going constitutional review process, considering that the Constitution represents the primary obligations of the state and public institutions, and further, that it provides the basic organisational scheme for public policy, there is need for the proposed review of the Kenya Constitution to encompass (i) the definition of the right to a decent environment as a fundamental human right, (ii) the definition of public interest in the Constitution to incorporate environmental human rights, (iii) provisions protecting the environment as a basic input and foundation for national, economic and social development in a sustainable manner, (iv) substantive provisions declaring the crucial role of the environment, and environmental rights as human rights to the survival of all Kenyans, and (v) specific and substantive provisions guaranteeing the enforcement of environmental human rights of the individual. Such provisions must of necessity guarantee every Kenyan the right to live in a decent environment, the fundamental right to participate in all matters relating to the environment, the right of access to environmental information, and the right to have the environment protected for the benefit of present and future generations.

The upshot of this is that owing to the developments of human rights and environmental law, environmental rights should now be considered at par with other human rights. Everyone must have a right to a decent environment. Consequently, we
consider environmental rights as juridical rights to be enjoyed by all. They are positive rights that carry a corresponding duty on the state and citizens to take steps to protect the environment and not merely to refrain from action. The need to broaden the human rights catalogue to include fundamental environmental rights and remedies is evident.
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