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INTERNATIONAL PERSPECTIVES ON THE ENVIRONMENT AND CONSTITUTIONS

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1 Introduction

The purpose of this paper is to highlight some of the key issues which should be discussed in the current debate on environment and the constitution in South Africa. This presentation has not benefitted from the actual debates so far conducted in South Africa and, therefore, it does not purport to appraise or comment on either the provisions of the draft constitution or the substance of the debate. Instead, this presentation will simply outline the current trends in constitutional entrenchment of matters relating to the protection or rational management of the environment and natural resources.

The first task of the paper will, therefore, be to provide a brief explanation or working definitions of the term environment and associated concepts in its management. For instance, we should provide working definitions of the term preservation and conservation. In the period following the June, 1992 United Nations Conference on Environment and Development (UNCED) environmental protection or its management must be considered in the context of sustainable development. Therefore, for completeness, the definitions as above should be juxtaposed against that of sustainability of development.

Such definitions may not sufficiently expose the basis of the constitutional entrenchment of environmental provisions. We shall, therefore, attempt to outline what we consider as the fundamental principles which should guide environmental legislation in the post-UNCED era. The same principles might, in some cases, suggest why the management of the environment and natural resources is so important that it deserves a place in the constitution each nation.

The actual outline of the national practice of entrenchment of environmental provisions in the constitutions will cover the right to a sound or healthy environment; and arrangements under federal systems where there

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is a need for differentiation of competence between the central government vis à vis the competence of the component states or provides.

2 Concepts in Environmental Management

A common understanding of the concept of environment and associated terminologies should be a prerequisite to the debate on environment and the constitution. Indeed, developing a common understanding of the term *environment* recalls the old tale of the elephant and the seven blind men: everyone characterizes it according to whichever perspective is familiar to him. Those from public health, forestry, agriculture, atmospheric science, etc, each would tend to explain the term from their basic disciplines. Elsewhere we have defined *environment* as the total context within which natural resources exist and interact as well as the infrastructure constructed to facilitate human socio-economic activities.[1] Recently, the IUCN's Commission on Environmental Law, Draft Covenant on Environment and Sustainable Use of Natural Resources define the *environment* as `the totality of nature and natural resources, including the cultural heritage and the infrastructure essential for socio-economic activities'.[2]

While the two definitions are in agreement over the basic tenets of the definition, the IUCN-CEL adds further, that central to the notion of environment was nature, encompassing the earth's geosphere, biosphere and associated processes. In that context, natural resources mean the components of nature which can be used to satisfy the needs of human beings and other living species.

The two definitions suggest three central tenets of the word *environment*. 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 constitutes *environment*. In fact, it is the knowledge of the cultural heritage

1 CO Okidi. `Management of natural resources and the environment for self-reliance' (1984) 14 *Journal of Eastern African Research and Development* 92.

2 Draft 4 of the Covenant on Environmental Conservation and Sustainable Use of Natural Resources article 1(e). Note however that for unclear reasons, the definitions were later eliminated in the drafting process. The title also changed to the *Draft International Covenant on Environment and Development* formally launched at the United Nations, New York in March 1995. See also similar discussions in CO Okidi *Environment and Development in Africa: Policy Initiatives* (1993) 1-4.

and infrastructure in the context that make physical planners and architects important environmental scientists.

In pristine settings, the environment and its various components interact, changing one another over time while maintaining an eternal balance. However, the intervention by human beings through the use and over-utilization of the natural resources as well as the discharge of emission or wastes from socio-economic activities have changed the nature of environmental processes. In many cases, the consequence is the direct degradation of the environment and its specific components. In other instances it results in the depletion of the specific components. Such are the cases with water or air pollution; extinct, endangered or extirpated species of flora and fauna or the depletion of the stratospheric ozone. Soil exhaustion is another example which in its extreme condition, including desiccation, which leads to desertification.

Environmental management may, therefore, be understood as the practice of mobilization and utilization of the natural resources while maintaining the balance as far as possible. This is the operation of the term *conservation* which, as a management concept, means `to manage the renewable natural resources sustainably and to avoid waste of non-renewable natural resources'.[4] Therefore, the concept of conservation is distinctly different from *preservation*. The latter may be defined as `to set aside and protect selected natural resources such as unique biological formations, endangered or threatened species, representative biomas or other natural or cultural sites of importance so as to maintain their characteristics in a manner unaffected by human activities to the fullest extent possible'.[5]

To use the terms *conservation* and *preservation* interchangeably would be erroneous. What they have in common as concepts in environmental management is the principle that the environment and natural resources constituting it are a national wealth to be used sustainably, or to satisfy the present development needs without jeopardizing the interests of the future generations to, likewise, enjoy the resources. To advocate a general hands-off policy or *preservation*, on all natural resources may, in fact, be idle and irrelevant, at least for the African countries.

The expressed notion of conservation or sustainable utilization of the environment and natural resources therein, is the meeting point of environmental management and development. In this context, *development* is characterized as the process by which a country provides for its entire

3 Covenant op cit n2 articles 1(i) and (h).
4 Covenenat op cit n2 article 1(c).
5 Covenant op cit n2 article 1(l).

population all basic needs of life such as health, nutrition, education and shelter and to provide every one of its population with the opportunities to contribute to that very process through gainful employment as well as scientific and technological construction. Secondly, it is the process by which the national government facilitates the construction and maintenance of the mechanism and infrastructure which diversifies and perpetuates the productive base of the country, such as agriculture and industries so as to ensure that the society overcomes the pressures and necessities of the national and related economic systems for the present and all future times.[6]

In other words then, development is a process, manifested by discrete indicators which are qualitative in character and comprising improved living standards of the entire population. Therefore, economic growth manifested by such indices as gross national product is good for development because it shows increasing generation of consumable and distributable resources. However, gross, national product is not, as such, prima facie evidence of development. Furthermore, growth may, in fact, be antithetical to development if it results in the degradation of the environment and, therefore, either endangering health or jeopardizing the sustainable utilization of the natural resources. It is submitted, for instance, that industrial growth which pollutes drinking water and poisons fish, which are a cheap source of animal proteins, is manifestly contrary to the definition of development offered here.

During the advent of the global environmental consciousness in early 1970's, there were suggestions that environmental exigencies are antithetical to, or even at war with, development needs.[7] At that time, the agenda for the United Nations Conference on the Human Environment (UNCHE) scheduled for June 1972 was already drawn. Unfortuantley, it was biased largely towards the problems of pollution and urban squalor which were viewed as problems predominantly for the Western industrialized countries. As a consequence, the devleoping countries of Asia and Africa and Latin America declared that the agenda for the UNCHE was irrelevant to them. If that were indeed the case, the developing countries would consider boycotting the UNCHE. In fact, that trend of arguments jolted the Secretary General of the United Nations Conference on the Human Environment, to convene a meeting of Experts at Founex, Switzerland, in 1971 to develop a policy paper showing the nexus between environment and development. The concept was further developed in the post-Stockholm era culminating in the globally celebrated Brundtland report. The latter now suggests near universal

6 See also Okidi op cit n1 92-93.

7 See for instance, AR Kasdan. 'Third world war - environment versus development' in 26 *Record of the Bar Association of the City of New York* 454 et seq.

unanimity that rational management of the environment and its natural resources is essential for development. That argument is well established by the results of the UNCED as expressed in details in Agenda 21 and synthesized in the Rio Declaration on Environment and Development.[8]

For Africa, there seems to be a self-evident and inextricable nexus between rational management of the environment, as defined above, and development. For instance, the mobilization and rational management of water and land/soil should lead to increased and sustained agricultural productivity, food security and the supply of raw materials for agro-based industries. Similarly the protection of water quality ensures safe drinking water for good public health, the protection and mobilization of fisheries, wildlife and livestock which, in turn, ensures availability of food proteins, raw materials for industries, tourism, and so forth. Ultimately, it is arguable that development for the present and all future generations depends on rational management of the environment and no one generation should have the right to jeopardize that process and opportunity.

3 Basic Principles in Environmental Legislation

The evolution of environmental thought has reached a stage when it is possible to identify some fundamental principles which should govern environmental legislation. It is arguable that the trend started with the Founex Report in 1971 when environmental legislation focused on environmental degradation, particularly pollution and urban squalor, were found to be overly restrictive, rule and control-oriented and reactive as well as devoid of management imperatives.

These developments gathered a special momentum from 1987 when the Brundtland Commission released its celebrated report *Our Common Future*[9] and then climaxed in the UNCED in June 1992 with the adoption of Agenda 21 and Rio Declaration.

For the purposes of these discussions, five basic principles have been identified as follows:[10]

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8 For brief but reasonable coverage of 'The results of Rio' see (1992) 22 *Environmental Policy and Law.*

9. World Commission on Environment and Development *Our Common Future* (1987).

10. These principles were introduced and discussed at length by CO Okidi in *Review of the Policy Framework and Legal and Institutional Arrangements for the Management of the Environment and Natural Resources in Kenya,* paper presented at a Kenya National Seminar (27-9 May 1994) 156-170.

3.1 Sustainability of the Environment

The expression of the doctrine of inter-generational equity[11] that the present generation should utilize the environment and natural resources to satisfy the present development needs but without jeopardizing the interest of the future generation to enjoy the same, was the central theme of the Brundtland Commission Report. The principle takes care of the intra-generational equity in that it presupposes the satisfaction of interests of present generation while ensuring the protection of the future ones.

The principle found expression in most of the clauses of Agenda 21. But it formed part of the title in about ten out of the forty chapters. Similarly, sustainable development is specifically mentioned in ten out of the twenty-seven principles in Rio Declaration on environment and Development, perhaps more frequently than any other substantive concept. It has also been included in the two binding instruments adopted at Rio de Janeiro, namely, Article 6(a) of the Convention on Biological Diversity and Article 3 (1) of the United Nations Framework Convention on Climatic Change.

In our view, the principle is fundamental, and above all else, it has the quality of a jural postulate[12] in the domain of environmental law. In other words, other principles and legislative efforts should seek to ensure the realization of intergenerational equity.

3.2 Precautionary Measures

This principle dictates that precaution should be taken to prevent or mitigate any possible adverse environmental consequences of any socio-economic or military activities. Until the adoption of the National Environmental Protection Act in United States in 1969, the general tendency in national environmental statutes was the requirement for penalties or fixing of liability for environmental injuries, ex post facto. That tendency is still prevalent in environmental laws of many countries. But the trend is changing, fast. The United States law under reference and which became effective in January 1970 institutionalized the major precautionary measure,

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11 For a detailed discussion of the doctrine of intergenerational equity see Edith Brown Weiss *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1989).

12 This concept is adopted from the definite postulates for law governing the evolution of a civilization with its complex physical, psychological and socio-economic conditions in Julius Stone *The Province and Function of Law: Law as Logic Justice and Social Control* (1946) 337-340 and 365-368. Professor Stone traces the origins of jural postulates from the works of Dean Roscoe Pound in 1919.

namely, environmental impact assessment (EIA).Today, several African countries and all the OECD countries, China and Latin America, have institutionalized the EIA procedures.

The relationship between this principle and that of sustainability or intergenerational equity should be evident in that a precautionary measure check on any possible ignorance, recklessness or indifference to adverse environmental consequences. In its practice, EIA requires the proponent of any project to do an exhaustive analysis of possible positive or negative impacts on the environment and the measure to be taken to prevent or mitigate the adverse while enhancing the positive ones. By preventing or mitigating adverse effects environmental consequences, such precautionary measures promote the chances of sustainable utilization of environmental resources.

It is not pertinent here to give a profile of the kinds of projects or activities that should require EIA. State legislative practice actually varies. It should be submitted here as a general rule that the exercise should cover all projects provided that there is a preliminary screening process whereby projects which have no evident adverse consequences are expressly exempt.[13]

Precautionary measures include two other concepts: environmental risk assessment (ERA) and what is now well-known as the precautionary principle. While EIA seeks the broad qualitative appraisal of the impacts of an activity, the ERA is generally selective and quantitative. From an assumption that every human activity entails risks, the procedure may identify specific elements of the project which are likely to harm the environment; possible ecological consequences of such elements are identified and evaluated; quantitative estimates of the environmental risk are calculated; and the total evaluation is made to determine whether the risks to the environment are worth taking.

The concept of precautionary principle, as such, applies in instances of environmental decision-making, where there is scientific uncertainty. It requires that a substance or activity should be prevented or stopped from continuing and its impact prevented, even if there is no conclusive scientific evidence that the substance or activity will definitely harm the environment.

This principle is fully expressed in Principle 15 of the Rio Declaration and in Article 3(3) of the United Nations Framework Convention on Climate

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13 Consider for instance the small-scale project of pit latrines but which may contaminate ground water, with drastic consequences for public health. For discussions of related issues, see Horst Haust, Michael Siebenhiiner, Markus Toloczyki and Wolfgang Wagner 'Groundwater protection and selection of waste disposal site in the greater Bandung area, Indonesia' in (1994) 40 *Natural Resources and Development* 7-24.

Change.

Other forms of precautionary measures include environmental auditing by which measures are conducted to ascertain from time to time what activities are conducted according to the accepted practice and which ones can be improved upon. environmental monitoring are systematic measures to ascertain changes in the quality of the environment.

3.3 Integration of Environmental Considerations into Development Planning.

This principle requires environmental legislation which facilitates the integration of environmental exigencies into development planning and management. It reduces the traditional inordinate reliance on the state police powers characterized by rule and control mechanisms. Instead, this principle places the primary responsibility on the line ministries or departments to safeguard the threshold of sustainability in the actual management and the promotion of productivity in each sector.

The fundamental presumption here is that the experts with respect to each resource sector or functions related to environmental change are in the sectoral or functional department. In the preparation of the development plan and in the course of the development management, the experts should determine precisely what they will or actually do to protect the environment against degradation. An example is Kenya's 1994-96 Development Plan which, for the first time, attempted to incorporate the requirements for the protection of the environment.

In other words, it is the fisheries, forestry or wildlife experts, as the case may be, who are best suited to establish a priori the maximum or optimum sustainable yield. Consequently, it is the sectoral experts who should have the primary responsibility for evaluating the EIA as a precautionary measure to protect the intergenerational equity. The law should also prepare a system to shepherd the performance of these functions by the line ministries or departments. Arrangements can be made through legislative empowerment of an apex body and members of the public.

The idea of integrating environment and development in decision-making generally is the subject of Chapter 8 of Agenda 21. But it also finds expression in Chapter 10 which is on land resources. In addition, Principle 4 of the Rio Declaration declares that `[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. Essentially the Principle declares that integration of environmental

exigencies into development planning and management is a necessary condition for the realization of intergenerational equity.

3.4 The Promotion of Public Participation

This principle requires that there must be legal provisions for the facilitation and promotion of public participation in environmental management. Environmental conservation is essentially a welfare matter. It has been established that reliance on the state police powers of control and rule mechanisms yields ineffective and inefficacious results. It is equally true that relegation of enforcement measures to the experts in the line ministries and departments is likely to produce the same results in the long run. Essentially, the measures to ensure intra- and intergenerational equity require the direct and active involvement by an informed and vigilant public.

It is, therefore, imperative that environmental legislation must provide for public participation in at least two points. The first point is the effective implementation of the precautionary measures particularly the EIA. As originally developed in the USA, the EIA process requires full disclosure of the project; possible impact, alternatives to the project; and measures to mitigate the possible impacts. Public participation may, in fact, lead to modification or even cancellation of the proposed project. Thus, the legal empowerment of individuals and public participation is an essential condition of a good environmental law.

The second point is the legal provision for the locus standi in judicio to individuals or groups to enforce environmental rights and duties through courts of law. Traditionally, existing laws, particularly in common law jurisdictions have reserved locus standi over environmental matters only to the attorney general. Individuals may sue successfully in the restricted instances of private nuisance or where they can demonstrate exemplary injuries in matters of public nuisance or injuries to proprietary interests. The consequences is that the community at large can stand helpless when their environment and natural resources are bespoiled for the benefit of individuals. In Kenya, a recent High Court case *Lawrence Nginyo Kariuki (Applicant) v County Council of Kiambu and Another (Respondent)*[13a] offers a recent illustration. The High Court rejected the plea for an order to the County Council to protect Kamiti Forest land from destruction. Nginyo Kariuki, the court decided, lacked locus standi to complain in the matter. It is now desirable that national environmental legislation should extend to

[13a] Misc Application 1446 of 1994.

individuals not only the right to a healthy or sound environment but also the locus standi to enforce that right.

There are other philosophical but practical reasons for the legislative promotion of public participation. It is now well recognized that the involvement of local communities is essential for efficacious management of natural resources. Most likely the tradition-bound bureaucrats will resist such a suggestion unless it is provided for in law.

Such public participation and local level involvement leads to efficacious results only if the duty to take protective measures are also accompanied by specific benefits to the local community. It is in these contexts that the recent controversy of the Movement for the Survival of Ogoni People (MOSOP) in Nigeria could be understood. The Ogoni people demanded, inter alia, the control of Ogoni economic resources, and right to protect Ogoni environment and ecology from further degradation. The latter was further expressed in the demand to the powers-that-be to stop environmental devastation of all Ogoni land, e.g., gas flaring and burying of high pressure oil pipelines currently exposed.[14]

The consequences of ignoring the Ogoni complaints have been catastrophic. Clearly, debates on legislation pertaining to environment and natural resources will highlight the necessity for providing for local level public participation not only in the protection of the environment but also in reaping the economic benefits accruing therefrom. The differentiation of such controls and the distribution of benefits will reflect federal, provincial/state and local concerns. And, with the Ogoni experience, many a people will require explicit provisions in the basic law of the land to ensure the protection of the environment from degradation and to reserve certain economic benefits to the local population.

The whole of Section III of Agenda 21 (with Chapters 23 to 40) deals with `Strengthening the Role of Major Groups', including youths; indigenous people (as are Ogonis); non-governmental organizations; local initiatives in support of Agenda 21; workers and trade unions; business and industrial sector; scientific community; farmers; and questions of capacity building. In addition, Chapter 14 on `Promoting Sustainable Agriculture and Rural

14 These points were contained in an article published in 10 December 1995 *Sunday Nation* (Nairobi) 20 as an advertising feature entitled `Ken Saro-Wiwa: Myths and facts'. In logic, it does not matter now if Ken Saro-Wiwa was an angel or a devil. The damage has been done to the credibility and image of the Nigerian Government by the fact that not enough safeguards were in place and enforced to protect the local environment. He was armed by the Government which failed to ensure the provision and enforcement of the pertinent environmental law requiring the pertinent public participation, and equitable sharing of economic proceeds from the natural resources.

Development' has extensive provisions under 'B. Ensuring people's participation and promoting human resource development for sustainable development'. Principles 20, 21 and 22 of Rio Declaration also provide for the promotion of the participation of women, youth and indigenous people, respectively, in endeavours to achieve sustainable development or integenerational equity. These widespread provisions suggest a global consensus in support of this fundamental principle.

3.5 Provision of Legal and Institutional Mechanisms

It is a matter of firm principle that there must be a complete array of normative provisions as well as institutional and procedural arrangement for the enforcement of the above principles. In a number of African countries, such as Kenya, there has been firm policy decisions in favour of environmental protection. The President, as head of state and government, supports it. But there is inadequate legal and procedural provisions for the enforcement of policy. Eventually one witnesses hopeless efforts such as *Nginyo Kariuki v County Council of Kiambu* as a recent disappointment to the course of environmental conservation and intergenerational justice.

It is to be noted, finally, that not all the five principles will be reflected in existing state constitutional entrenchment of environmental protection. Existing constitutions may also reflect other fundamental principles. These are, however, useful examples and a basis of discussion in examining existing constitution provisions.

4 The Character of Environment in Constitutions

4.1 General Features

Discussions in the preceding sections have established the character of environment by ascertaining the concept of environment and the basic concepts in environmental management. Further, we have examined certain fundamental principles which should, arguably, determine proper environmental management in general and environmental legislation in particular. This section should briefly explain the character of environment in constitutions in general before we can outline the trends in the state practice in entrenchment environmental provisions.

The significance and character of constitutions is not as difficult a task to ascertain as that of the environment. It is universally understood and

accepted that the constitution of any country is the supreme law of the land. As Bandl and Bungert[15] have observed constitutional provisions promote a model character for the citizenry to follow and they influence and guide public discourse, action and behaviour. Constitutional provisions supersede all related specific statutory laws. Legislatures are prohibited from passing any laws that are in conflict with constitutional provisions. Similarly, government agencies may not enforce any regulations which are contrary to the constitutional provisions. Every such laws or regulatory actions are inherently ultra vires and, therefore, null and void.

The significance of entrenchment of environmental provisions in the constitution is captured in the following paragraph by Brandl and Bungert:

> Constitutional implementation enables environmental protection to achieve the highest rank among legal norms, a level at which a given value trumps every statute, administrative rule or court decisions. For instance, environmental protection might be considered a fundamental right retained by the individual and thus might enjoy the protected status accorded to other fundamental rights. In addition, addressing environmental concerns at the constitutional level means that environmental protection need not depend on narrow majorities in the legislative bodies. Rather, environmental protection is more firmly rooted in the legal order because constitutional provisions ordinarily may be altered only pursuant to elaborate procedures by a special majority, if at all.[16]

Whether environmental protection falls within the rubric of what are called fundamental rights is an important matter. Fundamental rights or Bills of Rights are a common feature of the constitutions of western and non-western countries. In the Constitution of the United States, these are expressed in the First Amendment as freedom of speech, the press, assembly, expression and religion and are considered sacrosanct. In Kenya, Chapter V of the Constitution expresses these as the right to life, personal liberty, protection from slavery and forced labour, freedom from inhuman treatment, protection from deprivation of property, freedom of conscience, expression, assembly,association and movement.

It is arguable, however, that the right to a sound and healthy environment underlies that right to life itself. Clearly, this is of a higher degree as *fundamental right* than most of those enumerated above. Good health or being alive which depend on a sound environment precedes freedom of expression, press, assembly, religion, liberty, etc. because such rights are only exercisable by one who is alive and in good health. Such views were aptly and more emphatically expressed by the Supreme Court of the Republic of Philippines in the celebrated case of *Oposa vs Factoran* in 1993.

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15 Ernst Brandl and Hartwin Bungert `Constitutional entrenchment of environmental protection: A comparative analysis of experiences abroad' in (1992) 16 *Harvard Environmental Law Review* 1 4.

16 Ibid.

Examining the question of standing for children all over the Philippines seeking to compel the Government to cancel timber licenses because continued clearance of forests jeopardized health of the children and generations yet unborn, the Supreme Court opined that the right to a balanced and healthful ecology did not have to be listed in the Bill of Rights to assume the status of a fundamental rights. The Court observed:

> Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation....aptly 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 the inception of humankind. If they are now explicitly mentioned in the fundamental character, it is because of a well-founded fear of its framers that unless the rights to a balanced and healthful ecology and health are mandated as state policies by the Constitution itself thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be far when all else would be lost not only for the present generation, but also for those to come - generations which stand to inherit nothing but perched earth incapable of sustaining life.[17]

Thus, the view of the court is that the necessity to entrench environment in constitutions is compelling and should in fact, be deemed obvious.

Whether a plea based on the natural legal assumption of right to a healthy environment would succeed is, of course, not certain and is beyond the scope of this enquiry. What seems clear, though, is that advocates of environmental protection have invariably sought to rely on the force of the constitution for the protection of the environment. For instance, in the United States, where the federal constitution makes no provision for a safe and healthy environment, advocates of environmental protection have, though unsuccessfully, sought remedies in other clauses such as equal protection and due process of the law.[18] It was during the same period, 1972-73 that the Sierra Club, a prominent environmental NGO in the United States took the initiative to protect the Mineral King Valley from degradation through the construction of a ski resort. In that case, the Sierra Club sought a judicial review, of the Valley, suing only as a membership cooperation with special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country. The United States Supreme Court rejected their plea on the grounds that they failed to show sufficient

17 *Oposa v Factoran* GR No.101083, 224 SCRA 793 (1993) 14-15.

18 See comments in Brandl and Bungert op cit n15 5.

19 See discussions on the so-called Mineral King Decision, *Sierra Club vs Morton* 405 US 7 27, 92, in John E Bonine and Thomas O McGarity *The Law of Environmental Protection* (1984) 858-861. The decision provoked strong reactions from advocates of environmental protection through courts. See for instance, the incisive commentary by Professor Joseph L Sax 'Standing to sue: A critical review of the Mineral King decision', (1973) 13 *Natural Resources Journal* 76-87.

interest to support the club's locus standi[19]. As a consequence of such fruitless efforts, 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 healthful environment shall not be abridged'.[20] This is to confirm that even though the character of environment and the necessity for its protection may morally supersede all other rights, the highest place for it is to have a legal effects in the constitution.

Once the decision is taken to entrench environment in the constitution, the provision should be explicit in its characterization. Reliance on interpretations has, as noted above, proved unsuccessful in the United States. It would have been expected that because environmental consciousness reached apogee in the U.S. in 1960s every judicial avenue would be open to promote the protection of the public against environmental injuries. But that was, cetainly, not the case.

That experience cautions countries which may only have residual provisions from reliance on the same. In Kenya for instance, there are two provision, which are incidental to the constitutional protection against deprivation of property in Section 75 and another under the protection against arbitrary search in Section 76. While under Section 75, the Constitution prohibits confiscation of private property by the government, such taking of property is permitted if it is deemed necessary for, inter alia, public health, town and country planning or development or utilization of property so as to promote public benefit. The government may acquire private property so as to promote public benefit. Similarly, property may be compulsorily acquired by the government if it is in a dangerous state or injurious to human beings, animals or plants. Both provisions are of environmental significance but are restrictive in their scope and, as residual constitutional provisions, do not offer sufficient environmental protection.

Within a two year period, Philippines moved from the general constitutional provisions to the one requiring a clean and healthful ecology. The Constitutions adopted on October 15, 1986 was focussed largely on state rights over and control of land and its resources, reservation of protected areas, agrarian reform and the protection of indigenous cultural communities. A change occurred in 1987 when under President Corazon Aquino, the following two explicit provisions were introduced to Article II of the Philippine Constitution:

> 'The State shall protect the right to health of the people and instill health consciousness among them' and

20. Brandl and Bungert op cit n15 5.

'The State shall promote and advance the right of the people to a balanced and healthful ecology in accordance with the rhythm and harmony of nature'.[21]

4.2 Forms of Constitutional Provisions

4.2.1 *Fundamental Rights vs Public Policy*

It is conceivable to have several permutations of environmental provisions in constitutions, depending on the purpose. For the purposes of this paper, it is sufficient to extrapolate only two generic categories adopted by Brandl and Bungert in their seminal paper.[22] They identified the two as provisions expressing fundamental rights and those denoting statements of public policy. In this discussion we shall add provisions relating to federal and provincial arrangements.

Constitutional provisions on fundamental rights are characterized by their stipulation of individuals' subjective or personal rights which are enforceable through court action. Two distinct examples are the proposals which have been placed before the U.S. Congress which state;[23]

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

'Every person has the inalienable right to a decent environment. The United States and every state shall guarantee this right'.

On the other hand, provisions expressing statements of policy are objective, requiring attention of the government, through the legislative or executive, to pay attention to a principle. Such provisions are not, on their own, to be invoked or enforced through the judiciary. In some cases, the statements of policy may urge the legislature to adopt an implementing statute. For instance, Section 1 of the Constitution of the Federal Republic of Austria reads as follows:

(1) The Republic of Austria (Bund, Länder and Gemeinden) subscribes to universal protection of the environment.

(2) 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.[24]

By their very nature statements of public policy may be recognized as not enforceable. In some instances, however, constitutional provisions specify the non-enforceability of statements of public policy. For instance, the

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21 Sections 15 and 16. See *Oposa v Factoran* (supra n17) 5.

22 Brandl and Bungert op cit n15 9-16.

23 Op cit 15.

24 Op cit 46.

Constitution of India (as amended in 1987) carries a Part 4 which reads:[25]

> The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and shall be the duty of the State to apply these principles in making laws.

Thereafter, the Part proceeded to make provisions for protection and improvement of environment and safeguarding of forests and wildlife.

There is an identical provision under Article 27 of the Constitution of the Democratic Socialist Republic of Sri Lanka adopted in 1972, with amendments in 1984.[26]

Broadly speaking, there are scanty examples of constitutional provisions which are purely focussed on fundamental rights or statements of public policy. There are frequent instances of a continuum where there is a mixture of both provisions even though there may be more of one than the other. The 1976 Constitution of Portugal as revised in 1982 contains both. Its article 66 provides as follows:

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 have 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 recreational 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. Every one shall have the right, in accordance with the law, to promote the preservation or cessation of factors leading to the deterioration of the environment and, in the case of direct losses, to a corresponding compensation.
4. The State shall promote the progressive and rapid improvement of the quality of life for all Portuguese.[27]

In Turkey, Section 56 of the 1982 Constitution contains an example of a crisp provision which, nevertheless, includes fundamental rights and public policy as follows:

> `(1) Everyone has the right to live in a healthy, balanced environment.
> (2) It is the duty of the State and the citizens to improve the natural environment, and to prevent environmental pollution'.[28]

To broaden the perspectives in this line, here is the provision of Article

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25 Article 37. See `Constitutional provisions on environmental rights and duties' prepared for the United Nations University Project on International Law, Common Patrimony and Intergenerational Equity, September 1988 appearing as Appendix B to Brown-Weiss op cit n11 306.

26 Brown-Weiss op cit n11 314-315

27 Quoted in Brandl and Bungert op cit n15 65-66.

28 Quoted in Brandl and Bungert op cit 71.

255 of the 1988 Constitution of the Federal Republic of Brazil which, by contrast, deploys highly expansive language in an environmental constitutional provision:

> `Everyone is entitled to an ecologically balanced environment which is an asset of everyday use to the common man and essential to 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 essential ecological processes and arrange for the ecological management of species and ecosystems; and that the results of such study be publicized;
>
> II. Preserve the diversity and integrity of the genetic patrimony of Brazil and oversee the entities that are engaged in research and manipulation of genetic material;
>
> III. Define, in all the units of the Federation, the geographical spaces and components thereof that are to be specially 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 publicized;
>
> 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;
>
> 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 in the environment shall subject the violators, whether individuals or legal entities, to criminal and administrative penalties, apart from the obligation to repair the damages caused.
>
> 4. The Brazilian Amazonian forest, the Atlantic jungle, the Serra do Mar mountain range, the Mato Grosso Pantanal [swamp], and the Coastal Zone are part of the national patrimony and are to be utilized, pursuant to law, under terms and conditions that assure the preservation of the environment; this also applies to the natural resources.
>
> 5. Lands vacated or taken over by the States through adjudication and need in order to protect the natural ecosystems may not be made available for any purpose.
>
> 6. The location of power plants that employ a nuclear reactor must be defined in federal law; no such facility may be installed until such determination has been made' [29]

As we conclude the discussion on environmental character in constitutions, it is pertinent to offer examples from the two African countries already identified as having environmental provisions in their constitutions. The Constitution of Equatorial Guinea adopted in May 1982 in Article 60 provides that:

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29. Quoted in Brandl and Bungert op cit n15 75-77.

'The State recognizes the right to the protection of health. It is incumbent on the State to organize and to protect the public health, through the preventive measures of improvement of the environment of the cities and towns;...
and to create the suitable infrastructure, mobilizing the different organizations in charge of carrying them out, in accordance with the law'.[30]

The Constitution of the Peoples' Democratic Republic of Ethiopia adopted in February 1987 states in Article 55:

'1. Ethiopians have the duty to safeguard and care for socialist property, ...
3. Ethiopians have the duty to protect and conserve nature and natural resources, especially to develop forests and to protect and care for soil and water resources'.[31]

These two examples show the overlapping nature of the classification of public policy and fundamental rights as distinct categories. What is clear, however, is that making environmental provisions in a constitution gives environment the character of an over-riding national value. It is also clear that environmental exigencies like those rights that pertain to life and health, supersedes all other rights traditionally provided for in constitutions.

4.2.2 *Practice on Federal and Provincial Jurisdictions*

The requirement that the control of the management of natural resources and the environment should be done at federal, provincial/state or local levels is based on the fact that only the most appropriate level or machinery should deal with given management issues. In general, the machinery which is the closest to the location of the resources should have some jurisdiction over its management. Similarly, those who are likely to be affected by the management practices should enjoy an equitable share of the economic proceeds or rents from of such natural resources.

By implication, the principle underlies the requirements for proportionate level of public participation in the management of the environment and natural resources. It is now well-recognized that management of such natural resources as forests and wildlife should involve prominent community participation. Similarly, effective soil and water conservation, especially in the cultivated areas, will be assured only if there is an involvement of those who cultivate the land and who stand to enjoy the benefits or suffer adverse consequences. In this connection, one is easily reminded of the grassroots protests by the half-a-million inhabitants of the 350-square-miles of the Niger delta, called Ogoniland, who complained that the national Government ignored their complaints against effect of environmental degradation caused by activities of oil mining activities.[32]

30 See Brown Weiss op cit n11 303.

31 Ibid.

32 This widely publicized controversy is featured in November 20 1995 *Newsweek* 32-33,

They demanded an equitable share of the proceeds from hydrocarbon sales for Ogoniland. The consequences of their being ignored have been rather embarrassing tothe Federal Government of Nigeria.

But the complaints which, in this case were local, could have been over a province or state component of a federal system. The nation-wide control over the natural resources may be motivated by cynical greed. However, it is more directly justified by the unity of the environment. Because of the unity of the environment it would perhaps be ideal to base the control of environmental matters on ecological units or problem-sheds.[33] But this is often impractical because problem-sheds do not necessarily coincide with the territorial boundaries. Therefore, the search for ideal arrangements for environmental management often pose contradictions and dilemma for national governments, especially in countries with federal systems such as Canada.[34]

The Canadian Constitution of 1867, which is federal, did not address the question of environment, per se. Its focus on relevant issues was with the exploration and conservation of natural resources. The provision in Article 92 A(1) provides as follows:

> In each province, the legislature may exclusively make laws in relation of
> (a) exploration for non-renewable natural resources in the province;
> (b) development and conservation of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom'.[35]

This provision is complemented by that of Section 109 which states that 'Lands, Mines, Minerals and the Royalties' situated within the boundaries of the original provinces of the confederation belong to the provinces and that the same position was extended to the prairie provinces by the Constitutional Act of 1930.[36]

The provisions would clearly suggest that the preoccupation in the constitutional formulation was with the natural resources, their exploitation and sharing of the proceeds, all of which can conceivably be carried out up to the limit of the provincial boundaries. The concept of the unity and

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and January 1996 *New Africa* 8-14, 31.

33 For a relevant and brief discussion of the concept of problem-sheds, see CO Okidi *Regional Control of Ocean Pollution: Legal and Institutional Problems and Prospects* (1978) 165-227.

34 See an elaborate discussion in Mark Walters 'Ecological unity and political fragmentation: The implications of the Brundtland Report for the Canadian constitutional order' (1991) XXIX *Alberta Law Review* 420-449. Note that a consolidation of the Constitution of North American Acts, was done in 1982.

35 Quoted in Brown Weiss op cit n? 300.

36 See Walters op cit n34 426.

interconnectedness of the environment or the spill-over tendency of environmental behaviour was apparently ignored. Admittedly, by vesting the powers over the enjoyment of the natural resources, the constitutional provision moves in the direction of local control as well as equitable enjoyment of the economic values of the natural resources at the local level. However, the very viability and sustainability in the management and utilization of the natural resources required a recognition of the unity of ecology and provisions being made for intervention by the federal government.

One of the problematic instances of Canada's constitutional order and natural resources is in the provincial management of water resources where the respective bodies of water are actually inter-provincial. The problem has been ameliorated by federal water policies and leadership which allow for the control of inter-jurisdictional externalities while focussing on integrated watershed management.[37]

The other part of the problem arises from management of international watercourses, such as the Great Lakes, an instance which requires treaty making between Canada and the U.S. since 1909. It is noted, for instance, that in 1991 Canada and the United States committed themselves through, an agreement, to implement standards to improve the ecosystem in the Great Lakes. At the national level and as required by the Constitution, the agreement was to be implemented by the Province of Ontario. To realize the objectives of the treaty, the Federal and provincial officials negotiated Canada-Ontario Agreement Respecting Great Lakes Water Quality,[38] as an administrative arrangement prescribing the modalities for the cooperation between the two levels of government in the implementation of the international agreement.

Like Canada, the Federal Republic of Germany (as it was) had a federal system of government. In their case, the federal constitution seems explicit on matters of jurisdiction over the environment and natural resources. The Constitution of the Federal Republic of Germany, which was effective in May 1949 and amended in August 1973 provides as follows:[39]

`Everyone shall have the right to life and to inviolability of his person;[39a] and

`The Federation shall be the owner of the former Reich waterways;[39b] and

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37 For details, see Steven A Kenneth *Managing Interjurisdictional Waters in Canada: A Constitutional Analysis* (1991).

38 (1994) 8 *Transboundary Resources Report* 3-4.

39 See Brown Weiss op cit n? 302.

39a Article (2).

39b Article 89(1).

`In the administration, development and new construction of waterways and the needs of soil cultivation and of water management shall be safeguarded in agreement with the *Länder*';[39c] and

`The Federation shall participate in the discharge of the following responsibilities of the *Länder*, provided that such responsibilities are important to the society as a whole and the Federal participation is necessary for the improvement of living conditions (joint tasks):
(3) Improvement of the agrarian structure and the coast preservations'.[39d]

There is an aspect to German treaty practice on water resources which remains unclear in the context of this study. It seems evident that the federal government has jurisdiction over the management of waterways and, therefore, it would be expected that to remain consistent with the German general treaty practice, only the federal government, and not the component states, would be legally capable of entering into a treaty relation with other sovereign states. It has been found, though, that its three component states, namely, Baden, Bavaria and Wurtemberg entered into a treaty with Austria and Switzerland for the protection of waters of Lake Constance on 31 August 1857[40] and again on 22 September 1867[41] when the subject of the treaty was regulation of international navigation. If those two were too early in the evolution and differentiation of constitutional powers in the same states, (this time with the new *Länder* of Baden-Wurtemberg) signed a treaty with Austria and Switzerland for the protection of Lake Constance against pollution on 27 October 1960.[42]

One of the oldest constitutional provisions of a federal character, on environmental nature, is in the Constitution of the Swiss Confederation of May 29 1874. Its provisions which address the federal as well as cantonal powers are as follows:[43]

The Confederation has the right of supervision over the control of river-embankment and forests.

2. It shall lend support to works for the control and the embanking of mountain streams as well as the reforestation of their source-areas. It shall lay down the regulation required to maintain such works and to preserve existing forests';[43a] and

`The protection of nature and landscape is a cantonal concern...

3. The Confederation may assist efforts to protect nature and landscapes by granting subsidies and it may acquire or conserve nature preserves, historical sites and monuments of national importance on a contractual basis or by means of expropriation.

39c Article 89(3).

39d Article 91(a).

40 See United Nations *Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation* (1963) 391.

41 United Nations op cit 392

42 United Nations op cit 438. The explanation for this practice is yet to be ascertained.

43 See Brown Weiss op cit n? 315-316.

43a Article 24.

4. The Confederation is entitled to legislate on hunting and fishing, particularly in order to preserve alpine game and to protect birds which are useful for agriculture and forestry'.[43b]

The final example of federal constitutions with provisions on matters of environmental character in this series is Austria. Their Federal Constitution as revised in 1929 and amended through to 1984 has the following provisions:

'Legislation and its implementation is a federal concern in the following matters:
(10) Mining, forestry, including timber floating,; water law, regulation and maintenance of waters for the safe diversion of floods or for the purpose of shipping and rafting operations; control of wild streams; construction and maintenance of waterways
(12) Matters of public health.....; measures to defend the environment against dangerous stresses which originate from the violation of the emission limits....'[43c] and
'Legislation concerning basic principles is federal matter; the issuance of implementing laws and their execution is a matter of the *Länder* in the following affairs:
(3) land reform, especially agrarian operations and settlement;
(4) the protection of plants against diseases and pests';[43d] and
'Insofar as the legally constituted civil authority requests its cooperation, the Federal Army is furthermore charged with ...
(2) rendering aid in disaster and mishap of extraordinary scope'.[44]

It is intriguing that a number of prominent federal constitutions did not make any specific and notable provisions on the control of the environment and natural resources. Brazil, as we have seen, has rather expansive language in its constitutional provisions on rights and duties to a healthy environment. The United States constitution from the eighteenth century made no provision at all. That may be understandable. But it is not clear why there has been no constitutional amendment to include the subject despite the pertinent proposals from scholars and Congressmen leaving room for desperate, if also hopeless, court actions as discussed herein, earlier.

The age of the United States Constitution may not be the determining factor in omission of environmental or natural resources provisions. The State Constitutions within the U.S. which included natural resources cover a wide time period and includes:[45] Massachusetts - 1780; Pennsylvania - 1874; New York - 1894; Illinois - 1870; and California - 1878. Later dates include Hawaii - 1959; Michigan 1964 and New Mexico - 1911.

In practice, however, the federal standards in the United States, supersede the state ones. Other federal constitutions which have environmental provisions but presumably without jurisdictional delineation between federal

43b Article 24 series.
43c Article 10(1).
43d Article 12(1).
44 Article 79(2). See Brown Weiss op cit n11 297-298.
45 Brown Weiss op cit n11 321-324.

and state governments are the USSR and Yugoslavia.

Among the constitutional environmental provisions discussed here above, the Austrian one makes a distinction worth following up in a discussion of this kind. Reference is made in to the federal level retaining exclusive competence in promulgating the basic principles while the *Länder* issuing the implementing regulations. This would, in a way parallel the U.S. practice where the federal statutes prescribe the minimum standards leaving the state legislatures to prescribe and enforce either similar or more stringent regulations.

In practice, this permits the operation of two fundamental principles. First, it permits broad latitude of local level participation in environmental control and management which was identified earlier as one of the fundamental principles in environmental management. Second, it recognizes the unity of the environment which requires common and generally applicable protection standards.[46] In both cases, the actual operation would depend on specific local situations and other related constitutional provisions because the whole national constitution must be internally consistent.

The idea of strict and basic environmental standards vis-a-vis locally enforced and possibly more stringent requirements is now a well accepted practice. It finds broad analogy in law of the sea. There are currently several global standards adopted within the framework of competent international organizations with the understanding that regional or national legislation incorporate and enforce the same. Note for instance, that Article 211(2) of the Law of the Sea Convention provides as follows, with respect to pollution from vessels:

> `States shall adopt laws and regulations for the prevention, reduction and control of pollution of marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference'.

Another pertinent example deals with enforcement with respect to pollution from land-based sources. Article 213 provides that:

> `States shall enforce their laws and regulations adopted in accordance with Article 207 and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations and diplomatic conferences to prevent, reduce and control pollution of the marine environment from land-based sources'.

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46 Note for instance that the United States' objection to the Canadian Arctic Waters Pollution Prevention Act in 1970 was based largely on the fact that the measure was unilateral and not taking into account the on-going negotiations within the framework of IMCO (now IMO). They did not challenge the standards as such. See discussions in CO Okidi op cit n33 140-146.

Although these examples are from treaty framework, analogous practices would arise in federal systems. Different forms of governments, federal (or confederate), provincial and local, would apply the concept to fit their situations *mutatis mutandis* provided that the regulations respect the primary intention to ensure a careful balance between respect for the unity and inter-relatedness of the environment on the one hand, and on the other, a proper place for local public participation in decision-making and control over the natural resources including equitable sharing of the economic proceeds that accrue therefrom.[47]

5 Global and Conceptual Distribution

The last section of this paper discussed more-or-less random examples of constitutional entrenchment of environmental management. The present section attempts to show the global and numerical distribution of states which have incorporated environmental requirements in their constitutions. In the final section, attempt will be made to show that the environmental provisions are of diverse categories by outlining the number of countries which have taken up given concepts as subjects of constitutional control. In both, the global/numerical and conceptual outlines only proximate, rather than precise, categories have been done, the intention being only to give perspectives and illustrations rather than precision.[48]

4.1 Global Numerical Distribution

Africa has the smallest number of countries with constitutional provisions on environmental management. Only two countries: Equatorial Guinea under their constitution of 1982 and Ethiopia under their Constitution of 1987.

Asia and the Pacific has a total of 16 countries with constitutional provisions on environment. The oldest practice is found in Australia, under their constitution of 1929 as amended in 1979. Four countries adopted such constitutions immediately after World War II. They are Indonesia under their 1945 as amended in 1959; Taiwan in 1947; Japan in 1949 and India under their constitution of 1949 as amended in 1985. The rest of the

47 For a related discussion, See Kenneth Orie 'Constitutional approach to sustainable environmental management: Experience and challenge' (1995) 25 *Environmental Policy and Law* 43-51.

48 For this illustrative outline we rely on the compilation prepared by the United Nations University as published in Brown Weiss op cit n? 297-327. It is worth noting that the same UNU study compiled provisions protecting cultural heritage which is the Appendix C to Brown Weiss op cit 329-343. This numerical outline is confined to the former category.

constitutional provisions were in 1970s and 1980s. These include Burma in 1974; Papua New Guinea in 1975 (amended in 1982); Sri Lanka in 1972 with amendment in 1984; Philippines in 1976 and amended in 1982. United Arab Emirates adopted its constitution in 1971; Thailand and Yemen in 1978; and Iran in 1979 constitution. Vanuatu and Vietnam both adopted their constitutions in 1980; China in 1982 and South Korea in 1988.

It would have been expected that Europe would have several such environmental provisions dating to the last century. In fact, out of the 18 countries with constitutional provision on environment, only Switzerland had the foresight having included such a provision in its constitution of 1874 with amendments in 1973. The next oldest is Austrian constitution of 1929 later amended in 1984. Italy and the Federal Republic of Germany (FRG) adopted such provisions in 1949, except that the FRG had an amendment to the constitution in 1973. Hungary included environment in their constitution of 1949 amended in 1972. Poland, another Socialist country included environment in their constitution of 1952, as amended in 1976. Czechoslovakia included such a provision in their 1960 constitution (as amended in 1978), Malta is in 1964 while the German Democratic Republic adopted the provisions in their constitution of 1968. The decade of 1970s saw a spate of constitutional developments which included environmental provisions. These include Albania in 1976; Bulgaria in 1971; Yugoslavia in 1974; Belgium in 1971; Greece in 1975; Spain in 1978; Sweden in 1975 and USSR in 1977.

In North America, only Canada and Mexico have constitutional provisions on environment. Canada included the provision in their 1867 constitution as later consolidated in 1982. Mexico has the second earliest provision being the 1917 constitution as amended in 1987.

Of the other Latin American countries, 11 have constitutional provisions, most of them rather recent. The oldest is the constitution of Costa Rica adopted in 1949 and amended in 1977. The relevant Panama constitution was adopted in 1972. Peru adopted environment in its constitution of 1979 as amended in 1980. The remaining Latin American countries adopted environment in their constitutions in 1980s. They include Chile and Guyana in 1980; Honduras in 1982; El Salvador and Ecuador in 1983 except that the latter had a 1984 amendment. Haiti and Nicaragua adopted environmental provisions in 1987. The last one, Brazil included environment in its constitution of 1988 as amended in 1990.

About fifty countries around the world today have environmental provisions in their constitutions. Africa has a particularly low number of such provisions. Otherwise, the global representation is reasonably even.

One other feature which is striking is that including environmental provisions in the constitutions do not seem to be based on any national ideological predilections. In Europe, out of the 18 countries which have the provision, eight were socialist states. Ethiopia, one of the two from Africa, had a revolutionary socialist ideology at the time of adoption of the constitution.

The list in Asia includes devoutly socialistic states like China and Vietnam. We may presume that if none of the countries, which have environmental provisions in the constitution is socialistic, the position has nothing to do with the national ideology.

5.2 Conceptual Pattern of Distribution

Environmental concepts have been taking formal shapes gradually but particularly so during the second half of 1980s especially in the run to Rio Conference in June 1982. Therefore, the clusters identified below are only rough summaries of subjects addressed in the constitutional clauses.[49]
The idea of intergenerational equity or justice was expressed by an impressive number of countries and in different forms. It has also been with states, as indicated in their constitutions for a fairly long time. The countries which have expressed the idea in their constitutions are: Japan (1947); Costa Rica (1949); Spain (1978); Peru (1979/80); USSR (1977); Iran (1979); Papua New Guinea (1975/82); Vanuatu (1980); Guyana (1980); Guatemala (1985); and Nicaragua (1987).

The flexibility in construction is illustrated by the fact that the concept of *national patrimony* was understood to infer national heritage that must be passed on from generation to generation. Thus, the expression on the protection of national patrimony in the constitutions of Spain, Peru and Nicaragua were classified under intergenerational equity.

The requirement of the promotion of education, scholarship and scientific and technical research are in the constitutions of Italy (1947); Costa Rica (1949); Peru (1979/80); Brazil (1987/88); and Haiti(1987). Whether the requirements under this rubric can infer also the promotion of public participation is debatable. Only Brazil and Haiti are clear on promotion of public participation.

The requirement for the maintenance of a healthy and clean environment expressed in a total of 17 states. These include Federal Republic of Germany (1949); Czechoslovakia (1960); Sweden (1975/78); Thailand (1977); Peru (1979/80); Equatorial Guinea (1982); Ecuador (1983); El Salvador (1983); The Netherlands (1983); Brazil (1987/88); Ethiopia

49. The illustrations are derived from Brown Weiss op cit n? 297-327.

(1987); Nicaragua (1987); and Korea (1988). The basic concept is expressed in various forms such as the maintenance of minimum standards and cultured living by the state.

A number of constitutions provide for the state power to set aside public domains, such as protected areas, which are not subject to appropriation for any purpose. It is found in the constitutions of Peru (1979/80); Philippines (1986); Portugal (1976/82); Spain (1978); and Brazil (1987/88). With the increasing population pressure on land and the need for expansion of agricultural land, this kind of provision may require more debate in African countries. There is a general practice of allocation of available public lands to individuals without any consideration for nature reserves, sanctuaries; protection of unique ecosystems; protection of water catchment areas, etc. National and transnational debates should seriously consider appropriateness of such a provision.

A number of constitutions prohibit acquisition of land by the government except for purposes of ensuring conservation, e.g. for soil conservation. The four national constitutions with such provisions are: Mexico (1917/87); Malta (1964); Papua New Guinea (1975/82); and Thailand (1977). This conceptual category offers evidence that there must be other national constitutional provisions which could be covered in these outlines. Article 75 of Kenyan Constitution (1963/1987/1992) prohibits acquisition of private property. It provides, however, that land may be acquired compulsorily `for purposes of carrying out thereon of work of soil conservation or conservation of other natural resources or work relating to agricultural development or improvement'.

The obligation to take precautionary measures such as EIA is scanty in the constitutions. Only Brazil (1987/1988) makes the requirement for EIA explicit. The constitution of Equatorial Guinea (1982) requires the deployment of preventive measures which may be construed broadly to include EIA.

Provisions for obligations to restore the environment are also scanty. Only Brazil (1987/1988) and Honduras (1982) clearly require restoration.

What seems to have captured the imagination of most governments is the general obligation to protect nature. A total of seventeen constitutions have provisions on the subject. It is also one of the oldest environmental provisions in a constitution appearing as it did in Switzerland (1874/1973). Taiwan (1947) is the only other which had a constitutional provision on the subject before 1960. German Democratic Republic adopted the concept in 1968. Others are Bulgaria and United Arab Emirates (1971); Bahrain (1973); Burma and Yugoslavia (1974); Greece (1975); Portugal and Albania

(1976); USSR and Thailand (1977); Spain (1978); Vietnam and Yemen (1980); and China (1982).

A provision establishing the institution of the Ombudsman is only found in the constitution of Sweden (1975/78). This is one of the items which require careful and detailed debates. The Ombudsman might be a highly appropriate institution because it allows the public to express views freely and without requirements of technical or procedural specifications. It remains for the Ombudsman to determine the problem and to recommend the appropriate technical and remedial measures.

The requirement for penal and administrative sanction is found in the constitution of only one country: Spain (1978).

Only one constitution, Philippines (1986) has a provision requiring the protection of indigenous communities and their culture.

In an earlier section of the paper, the distinction was made to identify the constitutional provisions which are matters of public policy. It was agreed that such statement are not justiciable. Three constitutions: India (1949); Sri Lanka and Vanuatu (1980) have such provisions and specify that they may not be raised as part of an action before a court or tribunal.

It is apparent from the foregoing that there is a wide global distribution of environmental provisions in constitutions. The range of subjects is equally wide even though they do not fall neatly within the specific categories.

6 Final Comments

The purpose of this paper is to outline international trends in the entrenchment of environmental provisions in constitutions of various nations. The survey sought to highlight both the doctrinal basis as well as trends in actual state practice as determined in the constitutions and related legal instruments.

The concept of environment as developed in the preface to the substantive survey was apt. Doctrinal and constitutional development are clear that environment is not some abstract and dispensable phenomenon which can be ignored by human choices and activities. It is nature itself and what sustains life. It is the very foundation on which development, particularly for the non-industrialized countries, must rely on.

The evolution of environmental thought in modern times found a special push in the 1972 United Nations Conference on the Human Environment held in Stockholm, Sweden, in June 1972. As the title of the Conference implies, the focus was rather anthropocentric, as contrasted against the broader concept of nature. But the conference also failed to show fully the

inextricable relation between environmental conservation and development as concepts which are built on sustainability or intergenerational equity.

Development of environmental thought over the twenty years, from 1972 to 1992 has allowed for the crystallization of principles and the recognition that intergenerational equity or justice may indeed be recognized as the jural postulate for environmental management, in general, and legislation, in particular. It is the determination that precautionary measures in its various forms such as EIA, ERA, environmental audit and monitoring must provide the guidance for the use of environment today without jeopardizing interests of the future generations. Such a practice requires broadly based public participation with plain transparency and clear probity as man ensures the protection of the threshold of sustainability by integrating environmental exigencies into development planning and management.

The realization of these principles, on which the survival of life depends requires unequivocal legal and institutional arrangement. Experience from the U.S., as discussed in this paper, for instance, has established that it is not enough to have goodwill alone over the requirements for environmental protection. The degree of public awareness and general advocacy over environmental protection reached rather fervent proportions in late 1960s. Yet attempts to use liberal construction of the U.S. Constitution was rejected by courts in early 1970s.

The United States Courts rejected the doctrinal position that the environment should be protected as such. In the *Sierra Club v Morton* it was clearly understood that had Sierra Club demonstrated that it was the interests of its members that was in jeopardy the decision would, most likely, have been different. So it is apparent that in principle the court would have no problem if environmental protection was juxtaposed against the Bill of Rights. We have argued, indeed, that the protection of the environment is of high level, preceding such freedoms as association, speech and liberty or freedom from bondage because one must be alive and in good health to be in a position to enjoy conditions in the Bill of Rights as they are in most constitutions.

It is for that reason that we conclude with the Philippine Supreme Court in *Oposa v Factoran* that the right to a sound and healthy environment are nothing less than self-preservation and self-perpetuation. Violation of the right to a sound and healthy environment is tantamount to jeopardizing the existence of the present as well as all future generations. As the Supreme Court said in that case, this is a right which predates all governments and constitutions. If there was a juridical category higher in legal order than the constitution, then environmental protection would properly belong there. As

legal systems are arranged today, environmental protection should properly find a place in the constitution of every country.

Constitutional entrenchment may be expressed as either statements of public policy or as fundamental rights. The analysis herein find that the common practice is for a mixture of the two. At the very best, the constitutional provision should specify fundamental rights which are enforceable, rather than open provisions still subject to legislative enactment.

Several countries surveyed make provision for the distribution of environmental control under federal governments. The distribution of jurisdiction between the federal, provincial and local levels is to be balanced so as to give practical recognition to the unity of the environment and the spill-over effects without jeopardizing local control. But local control should also ensure equitable sharing of the economic proceeds from the natural resources.

Austria and Canada offer two different constitutional modalities as a basis for debates. Careful formulations should reduce the structural rigidities which have forced Canada to enter into administrative arrangements for the implementation of treaties. The United States' practice seem to offer a useful example where the federal government provides the minimum standards while the component states are free to adopt and enforce more stringent regulations.

Research by the United Nations University in mid-1980s found about fifty national constitutions with environmental provisions. There could be many more such constitutions ten years later. The striking point was that only two African countries were in the list. Asia, Europe and Latin America have comparable numbers. It is also clear that there is no ideological influence over the determination of States to entrench environmental requirements in their constitutions.

Although the number of States with environmental provisions in their constitutions is steadily rising, the practice is by no means recent. Canada and Switzerland have provisions dating from 19th century. Thus, the awareness of the significance of the environment as discussed here is an old philosophy of states.

The subjects covered by the constitutional provisions are strikingly wide. It is impressive that the doctrine of intergenerational equity has found expression in over ten national constitutions. The positive right to a healthy environment is expressed in about seventeen countries as is the requirement for the protection of natural resources in general. Understandably, the requirement for public participation has not been prominent but deserves serious consideration.

It should be submitted that the question is not whether development of constitutions should include environmental requirements. Rather, it is the form in which the several subjects discussed herein, should be expressed in the constitution in order to promote national aspirations. And this paper has, hopefully, flagged adequate subject areas and options for further research and debates.