

# ENVIRONMENTAL RULE OF LAW

First Global Report





## 4. Rights

### 4.1 Introduction

Legal rights and duties are the heart of environmental rule of law. They provide agencies the authority to act, people the ability to seek justice, and companies the obligations to act sustainably. The legal rights and duties that animate environmental law are found in international treaties, national and subnational constitutions and laws, customary practices, and judicial decisions. They are rooted not only in environmental law, but also human rights, international, administrative, and other fields of law. Rights and duties are inextricably linked.

Much of the emphasis of environmental laws, institutions, and practice to date has focused on operationalizing duties. Laws define the duties of polluters to obtain and comply with permits that establish limits for pollution of the air, water, and soil. They also set forth responsibilities of government authorities to regulate, monitor, enforce, and otherwise govern activities that could harm the environment and public health.

When implemented, environmental laws have often proven successful at controlling pollution and sustainably managing natural resources. As noted in Chapter 1, though, too often environmental laws are not effectively implemented or enforced. It is in these circumstances that rights and rights-based approaches become particularly important as a complement to duties.

***After decades of rapid development of environment-related rights, government, companies, courts, and citizens in many places are still grappling with transforming these words on paper into meaningful and lasting environmental protections.*** This chapter focuses on the evolving and deeply interdependent interrelationship between environmental rule of law and various environmental and human rights.

Many rights are important to environmental rule of law. Human rights to transparent, participatory, and responsive governance are essential to achieving effective environmental rule of law by giving a voice

to the disadvantaged, requiring effective government, and providing access to justice. National constitutions often establish a constitutional right to a healthy environment as a fundamental right. And a growing number of countries recognize the rights of nature independent of human rights, providing rights for rivers and other environmental elements. **Increasingly, countries recognize that environmental rule of law relies both on traditional environmental laws and on protection of environment-related rights using a rights-based approach**, which is a focus of this chapter.

Environmental rule of law is important to the realization of numerous rights. The failure to effectively implement and enforce environmental law often leads to environmental degradation that impairs constitutional and human rights by infringing on the enjoyment of health, access to water, and in serious instances—as Supreme Courts in many countries have recognized—the right to life.<sup>1</sup>

This chapter reviews this evolving relationship between environmental rule of law and environment-related rights. It traces the sources of relevant rights and examines the many constitutional and human rights—such as the right to life, the right to the enjoyment of the highest attainable standard of health, the right to an adequate standard of living including adequate food, and the right to safe drinking water and sanitation—that are closely linked to the environment, as well as the various procedural rights that are essential elements of environmental rule of law. This chapter pays particular attention to constitutional and human rights, which enjoy elevated status in most legal systems. The chapter then reviews the role that a constitutional right to a healthy environment plays in many countries, and how enforcing

the rights to nondiscrimination, free association, and free expression are necessary for environmental rule of law. Finally, this chapter reviews environmental defenders' critical role in protecting the environment and the grave importance of using rights-based approaches and human rights law to protect these defenders. In sum, **just as fundamental rights cannot be enjoyed without a healthy environment, sound environmental rule of law cannot exist without the establishment of and respect for rights.**

### 4.1.1 Core Concepts

This section discusses core concepts at the intersection of rights and environmental rule of law. It (1) reviews the origins of environment-related rights and duties; (2) articulates a rights-based approach to environmental protection; (3) explores the dynamic relationship between rights and environmental rule of law; and (4) traces the expansion of rights-based approaches across the globe.

#### 4.1.1.1 Origins of Environmental Rights and Duties

**A right is a moral or legal entitlement that can be positive, meaning a person is due something (such as the right to water), or negative, meaning a person is entitled to be free from interference (such as a right to privacy).** With rights come duties,<sup>2</sup> such as the legal duty of government to provide water and the legal duty of citizens not to invade another person's privacy.

Societies have created legal duties and rights relating to the environment and natural resources for millennia. The Act of Fa Chong Ling, promulgated before 771 BCE in China,

<sup>1</sup> See Box 4.2.

<sup>2</sup> Hohfeld 1913.



prohibited the taking of trees and wildlife without permission,<sup>3</sup> and the English Magna Carta, signed in 1215, guaranteed citizens access to rivers and forests and gave rise to the English Forest Code shortly thereafter.<sup>4</sup>

The modern era of environmental law began in the late 1960s, when population growth, industrial expansion, and innovations in chemistry resulted in dramatic impacts to ecosystems, wildlife, and public health. Many industrialized nations adopted environmental national laws in the 1970s and 1980s, and the global community of nations adopted a growing number of multinational environmental agreements.<sup>5</sup> Many of these initial approaches focused on promulgating media-specific environmental laws that required the government to regulate specific industries, sectors, or environmental media and saw measurable impacts. For example, in the United States, implementation of the Clean Air Act saw reductions of approximately 70 percent of six key air pollutants.<sup>6</sup> Many of these laws relied on individuals to supplement enforcement, by empowering them to protect their rights (to health, to livelihoods, and to enjoyment of the environment) by bringing citizen suits for violations of the law. By the 1990s, many nations adopted constitutional provisions protecting the environment, which ushered in what is known as a rights-based approach to environmental protection, which is discussed below.<sup>7</sup>

#### 4.1.1.2 ***Rights-Based Approaches to Environmental Protection***

***A rights-based approach to environmental protection is one that is normatively based***

3 Dong 2017, 22-23.

4 Magraw and Thomure 2017, 10934-10940; Robinson 2015, 311.

5 Sands and Peel 2012, 22; Lazarus 2004.

6 USEPA 2018.

7 Bruch et al. 2007.

***on rights and directed toward protecting those rights.*** This approach differs from regulatory approaches where environmental statutes set forth certain requirements and prohibitions relating to the environment. A rights-based approach complements regulatory approaches—and together they can more effectively enhance environmental rule of law and environmental outcomes. In addition to national constitutions and human rights treaties, environmental statutes and international agreements other than those designated specifically as human rights instruments can often establish enforceable rights that protect human health and the environment.<sup>8</sup> As discussed below, there is often an emphasis on constitutional and human rights because, in the hierarchy of laws,<sup>9</sup> they enjoy primacy in most legal systems and inclusion of environmental provisions in constitutions and human rights instruments has the legal and political effect of placing the highest importance on protecting human health and the environment.

For example, if a mine is leaking acidic water into a community water supply in a country with a constitutional right to a healthy environment or a right to water, citizens could seek redress in court for a violation of these rights. If the country only had a mining statute that empowered an environmental agency to address acid mine drainage, then the citizens would likely have to rely on the agency to act and might have limited options in court. But if a country had both regulatory and rights provisions, then if the agency failed to act under the mining statute, the citizens would still have redress under the constitutional right. This occurred in *Marangopoulos Foundation for Human Rights v. Greece*, where the European Committee of Social Rights interpreted the European Social Charter's right to health to include environmental

8 Boyle 2007; Timbers and Wirth 1985.

9 See, e.g., Kelsen 2005; Hart 2012.



concerns.<sup>10</sup> The ruling ensured that a lignite mining operation ceased harming public health through its emissions of particulate matter and gases.

Rights that can be used to support the environment and human health can come from many areas of law, including environmental law and human rights, and can come in many forms, including treaties, constitutional provisions, and statutes. Most prominently, 150 national constitutions include environmental provisions,<sup>11</sup> as discussed in Section 4.2. These provisions are often called “environmental rights,” meaning “any proclamation of a human right to environmental conditions of a specified quality” that falls within a range of classifications: “safe, healthy, ecologically sound, adequate for development, sound, etc.”<sup>12</sup> More than

half of these provisions are framed as rights of the citizens, while remaining provisions are framed as duties of the state.<sup>13</sup> Many more national and subnational laws both provide statutory rights and protections related to the environment, even absent any constitutional environmental right.

Although environment-related rights and duties are now widespread,<sup>14</sup> an implementation gap remains between the requirements and obligations they create at multiple levels of government and the environmental results around the world.

**To address this implementation gap, many governments and citizens are using rights-based approaches to help meet environmental commitments and reinforce the importance of environmental law.** When governments recognize rights, they take on accompanying duties to ensure protection of those rights.<sup>15</sup> Such duties include ensuring that third parties, including businesses, do not violate these rights. To fulfil their duties, governments adopt policies, legislation, and regulations that mandate institutions to prevent, investigate, punish, and redress such abuse. Case Study 4.1 illustrates how communities and advocates can use rights to protect environmental values, especially when a government fails to act.<sup>16</sup>

Appealing to human rights is especially powerful because they are the most fundamental rights. They came into particular focus after World War II with the 1948 Universal Declaration of Human Rights.<sup>17</sup>

10 Marangopoulos Foundation for Human Rights v. Greece 2006.

11 For an earlier tally identifying 130 national constitutions, see UN Office of the High Commissioner for Human Rights and UNEP 2012, 19.

12 Ibid.

13 Ibid.

14 As discussed in Box 1.3, the specific environment-related rights that apply in a particular circumstance depend on the national and international law that applies to that country and context.

15 UNGA 2018a, 3 (“Duties may be viewed as the inverse side of rights. If citizens have rights, states and other actors have duties to respect and protect the rights.”).

16 Knox 2012.

17 UNGA 1948.

### Case Study 4.1: Nepal Supreme Court Orders Environmental Action Based on Constitutional Rights

In *Suray Prasad Sharma Dhungel v. Godavari Marble Industries and Others*,<sup>a</sup> citizens and nongovernmental organizations sought a writ of mandamus in Nepal's Supreme Court against a marble factory on the basis that it caused environmental degradation to the Godavari forest and its surroundings. The factory emitted dust, minerals, smoke, and sands and had polluted the water, land, and air of the area, which endangered the life and property of the local people. The Court held that Nepal's constitutional provision protecting the right to life necessarily included the right to a clean and healthy environment in which to live that life. Because environmental protection is an issue of public interest and all citizens have an interest in public issues, individuals interested in protecting the environment, including nongovernmental organizations, have standing before the Court. The Court ultimately denied the writ of mandamus because petitioners had not shown a violation of a specific legal duty. However, because effective remedies had not been put in place, the Court issued directives to the Parliament to pass legislation to protect the Godavari environment and the air, water, sound, and the environment generally, and to enforce the Minerals Act.<sup>b</sup>

a. *Dhungel v. Godavari Marble Indus*, WP 35/1992. Supreme Court of Nepal, Oct. 31, 1995.

b. For more details about the Court's judgment and the impact of this case on Nepali environmental jurisprudence, see Sijapati 2013.

Subsequently, human rights have been enshrined in numerous international and regional treaties<sup>18</sup> and are enforced and otherwise vindicated by international and regional tribunals and commissions, such as the International Criminal Court, the Inter-American Court of Human Rights, and the European Court of Human Rights, as well as by domestic courts and tribunals. **Human rights have a longer history and more diverse set of treaties and institutions in place to enforce them than do environmental statutes.**

Human rights are rights inherent to all human beings regardless of nationality, sex, ethnicity, or other characteristics. These rights are wide-ranging and fundamental to human dignity.

Figure 4.1 shows rights that relate to the environment.

Some countries are also providing rights to nature and environmental elements themselves. Not all environmental considerations are or should be framed in context of their relationship to humans. **The ecosystem and other beings have values and importance beyond their use or benefit to humans.** Conservation of natural resources and other species can be framed as a moral imperative in recognizing that other beings and nature itself have intrinsic rights. In fact, some nations recognize intrinsic rights of nature. Ecuador's 2008 Constitution refers by name to the deified representation of nature—Pacha Mama—in the Andean traditions from which many aspects of the

18 See Annex II.



**Figure 4.1: Substantive Rights Relating to the Environment**

**Non-discrimination**    **Health**  
**Life** Women's rights    Children's rights  
 Sovereignty over natural resources  
**Water**    **Sanitation**  
 Enjoyment of the benefits of scientific progress  
 and its applications    **Self-determination**  
**Indigenous rights**    **Dignity**    **Food**  
 Housing

nation's culture are derived.<sup>19</sup> Pacha Mama's "right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes" imposes obligations on communities and public authorities alike to protect those rights.<sup>20</sup> Under this provision, an Ecuadorian court ruled in 2011 that a river's right to flow had been violated by road development and ordered the river restored to health.<sup>21</sup> Respect for the intrinsic right of nature to exist is common to many indigenous worldviews.<sup>22</sup> In 2010, Bolivia's Ley de Derechos de la Madre Tierra (Law of the Rights of Mother Earth) gave Mother Earth legal rights and legal personhood that can be represented by humans in court; this law was based on a broader approach to environmental issues enshrined in the 2009 constitution.<sup>23</sup>

Just as Bolivia has done, other nations have granted natural resources legal personhood, giving them all the rights of a person, such as the right to be heard in court. This is similar to extending rights to corporations and organizations, as has been done in some countries.<sup>24</sup> In New Zealand, Te Urewera, a former national park, has been declared "a legal entity, and has all the rights, powers, duties, and liabilities of a legal person" exercisable by a board appointed on its behalf,<sup>25</sup> and the Whanganui River was given similar status.<sup>26</sup> A court in India has accorded the Ganges and Yamuna Rivers,<sup>27</sup> as well as glaciers, forests, and other natural systems, legal personhood as well.<sup>28</sup>

#### 4.1.1.3 *Virtuous and Vicious Cycles of Rights and Environmental Rule of Law*

**Rights and environmental rule of law are interdependent: neither can exist without the other.** Both substantive and procedural rights are important to realizing the environmental rule of law. Substantive rights include those in which the environment has a direct effect on the existence or the enjoyment of the right itself, such as the constitutional right to a healthy environment and the human rights listed in Figure 4.1.<sup>29</sup> In turn, the enjoyment of these substantive rights is particularly dependent upon the environment or vulnerable to environmental degradation. In fact, **the enjoyment of many rights depend**

19 Ecuador Constitution, ch. 7.

20 IDLO 2014, 36.

21 Vilcabamba River v. Provincial Government of Loja, Provincial Justice Court of Loja, No. 11121-2011-10 (30 March 2011).

22 See Global Alliance for the Rights of Nature, <http://therightsofnature.org/>.

23 Law 071 of the Plurinational State (Bolivia Law of the Rights of Mother Earth, 2010).

24 For example, the U.S. Supreme Court found that corporations and unions had First Amendment rights to free speech under the U.S. Constitution. *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010).

25 Te Urewera Act 2014, sec. 11.

26 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (2017/7).

27 The Supreme Court of India has stayed the decision.

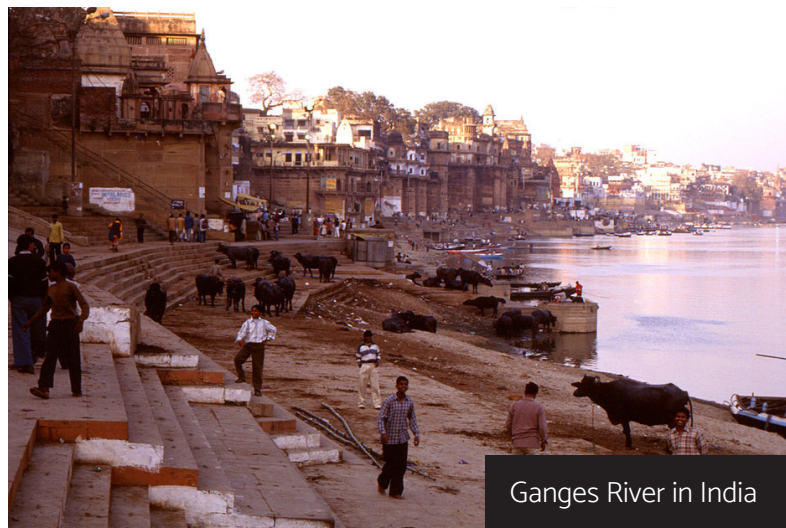
28 LiveLaw 2017a; LiveLaw 2017b.

29 Knox 2012, para. 17.

**upon the environment:** without clean air and water, food, and other natural resources, human life itself would not be possible as the environment itself provides food, water, and other necessities for life.<sup>30</sup> The environment offers the resources necessary to provide housing and to build livelihoods from which dignity and the right to an adequate standard of living can flourish. The 1972 United Nations Conference on the Human Environment—which marked the global birth of modern environmental law—found that the natural environment is “essential” to the enjoyment of basic human rights.<sup>31</sup>

**The diminishment of environmental quality directly affects many rights.** Pollution impacts human health: in 2015, pollution caused an estimated 9 million premature deaths, which directly implicates the right to life.<sup>32</sup> Climate change poses a direct risk to the identity of many island nations that might be destroyed by rising seas,<sup>33</sup> and unfair and excessive exploitation of resources harms indigenous rights and future generations.<sup>34</sup>

As discussed extensively in the Justice and Civic Engagement chapters, **procedural rights, such as access to justice, access to information, and access to effective legal remedies, are critical elements of environmental rule of law because they provide the means for achieving environmental goals and laws.**<sup>35</sup> (For more procedural rights critical to environmental rule of law, see Figure 4.2) Many procedural rights are both human rights and



Ganges River in India

constitutional rights. Without any one of these elements, legal recourse for environmental harms will be greatly impaired, if not denied. For example, without meaningful access to justice, those harmed by environmental violations cannot petition for relief. And without legal remedies that rectify the harm and make whole those adversely affected, environmental rule of law cannot be realized.

Professor John Knox, the former UN Special Rapporteur on Human Rights and the Environment,<sup>36</sup> has described the relationship between substantive and procedural human rights and the environment as a “virtuous circle” whereby **“strong compliance with procedural duties produces a healthier environment, which in turn contributes to a higher degree of compliance with substantive rights such as rights to life, health, property and privacy.”**<sup>37</sup>

30 OHCHR 2017, sec. 2 (“The full enjoyment of human rights, including the rights to life, health, food and water, depends on the services provided by ecosystems.”); UNGA 2018a, prin. 1.

31 UNGA A/CONF.48/14/Rev.1, 1972, para. 1.

32 Landrigan et al. 2017.

33 Permanent Mission of the Republic of Maldives to the United Nations Office at Geneva 2008; OHCHR 2009.

34 See generally Knox 2012, paras. 18-24.

35 Ibid., paras. 25-33.

36 In 2012, the UN Human Rights Council appointed John Knox as the Independent Expert, and later as Special Rapporteur, on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment. See <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>. In 2018, Professor David Boyd became the second Special Rapporteur on the topic.

37 Knox 2012, para. 42.



### Figure 4.2: Procedural Rights Critical to Environmental Rule of Law

**Access to information**  
*Public participation*   **Access to justice**  
**Free, prior, & informed consent**  
*Mandatory environmental impact assessments*  
**Effective legal remedies**  
**Freedom of peaceful assembly**   **Free expression**  
**Freedom of association**

In the context of environmental rule of law, this analysis is incomplete without emphasizing the crucial role of a fourth element—the presence of a legal cause of action. A cause of action is a legal right or duty that protects environment-related values. Without a cause of action, which is part of the right of access to justice, procedural rights cannot produce the desired environmental outcome: a cause of action must exist to empower a court to act and the court must have access to effective methods of implementing its action.<sup>38</sup> For example, having the right to access a court has little meaning unless, once in court, the plaintiff can demonstrate that he or she has a legal right or duty to enforce by (1) showing the defendant is violating an environmental law, (2) seeking to enforce an environment-related right, or (3) citing a legal duty owed by the defendant.

This cause of action may be supplied by statutory environmental law, human rights law, the constitution, or other law. ***The ability of human rights law and constitutional law to supply such causes of action—in addition to conventional statutory environmental***

***law—enhances a rights-based approach to environmental rule of law***, as shown in Case Study 4.1. The court must have remedial powers to ensure that its order is effective in stopping the violation, making victims whole, and deterring future violations, as discussed extensively in the Justice chapter. Thus, in the environmental rule of law context, the virtuous circle has a legal cause of action paired with a legal remedy as its second of four elements, as shown in Figure 4.3.

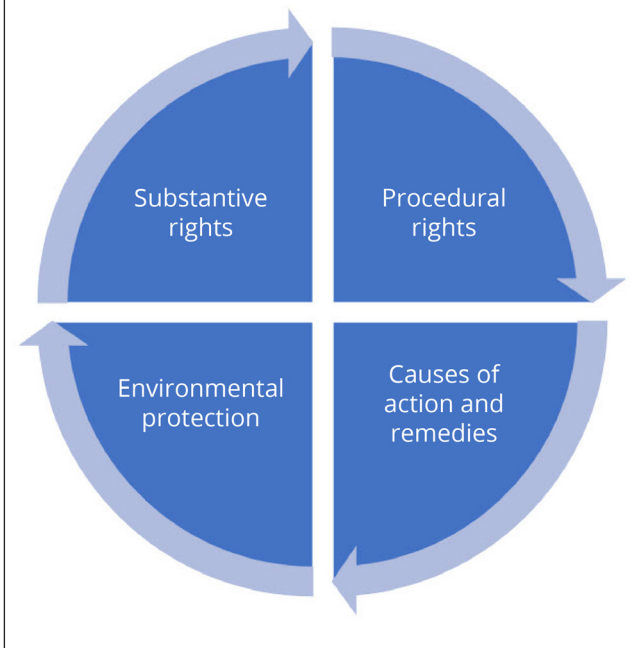
Rather than conceiving of the interrelationship of rights and the environment as a circle, it is a cycle that is an integral part of environmental rule of law. As discussed throughout this Report, improving environmental governance improves social justice and economic outcomes, which in turn strengthen human rights and environmental rule of law, which leads to further environmental improvements. These interdependent linkages of human rights and environmental rule of law form a cycle that can reinforce and build on each other's successes. Therefore, the “virtuous circle” may be more fully described in the environmental rule of law context as ***a dynamic, virtuous cycle whereby procedural rights coupled with substantive rights and legal duties lead to a healthier environment, which in turn contributes to better realization of substantive rights***,<sup>39</sup> as shown in Figure 4.3.

For example, consider a community suffering from drinking water that is contaminated by acid mine drainage. If not addressed, this situation can foment social unrest. The community wants a court to order the mine owner to stop the drainage and supply potable water. To address this crisis, the community must first have access to justice. Meaningful access to a court, which is a procedural human right and component of environmental rule of law, is critical to start the process. The

38 Professor Knox classifies legal remedies as procedural human rights. *Ibid.*

39 See UNGA 2018a, prin. 2.

**Figure 4.3:** Virtuous Cycle of Rights and the Environment



court must find a legal cause of action, which could derive from a right to clean water, a constitutional right to a healthy environment, obligations under an environmental statute, or other law or right, that empowers the court to require the mine owner to address the problem, and this must be coupled with an effective remedy to implement its directive to the mine owner. The court-ordered remedy must provide the desired environmental outcome—access to clean water. This in turn provides the third element, giving meaning and support to the community’s substantive rights to water and health.<sup>40</sup>

40 For cases where courts relied on the right to water and/or life to order government action, see *Mazibuko and Others v. City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28 and *Civil Association for Equality and Justice v. City of Buenos Aires*, Chamber for Administrative Matters of the City of Buenos Aires, 18 July 2007. See also Narain 2009-2010.

Traditional environmental laws and rights-based approaches are both potential pathways for achieving environmental justice for this community within the environmental rule of law context. If environmental law is weak, then procedural and substantive rights—statutory, constitutional, or human—may provide the basis for action, as in Case Study 4.1. If environmental laws and institutions are strong, then environmental provisions in the country’s environmental statutes and constitution may provide ready access to courts and actionable rights or duties that result in clean water and, in the end, a stronger substantive right to clean water.

Although the example above has focused on courts, agencies and the executive branch can act in the place of courts, if they have the requisite legal authority. For example, if the community had the right to petition the government for action and the government had legal authority to act and effective means to provide clean water, then the same virtuous cycle exists.

Professor Knox points out that the virtuous circle works in reverse as well: ***without procedural rights, environmental degradation will continue and substantive rights will be harmed.***<sup>41</sup> As discussed above, it is important to add that without a cause of action and remedy, the same negative implications follow. In our example, without access to the court, a meaningful legal right or duty, and the availability of a legal remedy to address the acid mine drainage, the harms to water and the community will continue. The failure of any step in this process can thwart the community’s search for justice. If any of these segments is missing, as shown in Figure 4.4, then a vicious cycle of lack of procedural human rights or lack of environmental rule of law will result in continuing environmental degradation and damage to substantive

41 Knox 2012, para. 42.

rights. This undermines environmental rule of law, social justice, and sustainable development, weakening society as a whole.

Constitutional and human rights law may supply procedural or substantive rights that allow people to address environmental harms suffered when environmental laws are not sufficient. The inadequacies may be substantive (e.g., if there are gaps in the law) or political (e.g., environmental law is not viewed as a sufficient priority to enforce). Constitutional and human rights law can fill the gaps and elevate the importance of the underlying issues, leading to greater environmental rule of law. In turn, environmental protections support the realization of many constitutional and human rights. Thus, ***rights and environmental rule of law have an interdependence that simultaneously supports progress toward greater human dignity and environmental sustainability.***

#### 4.1.1.4 Rights-Based Approaches

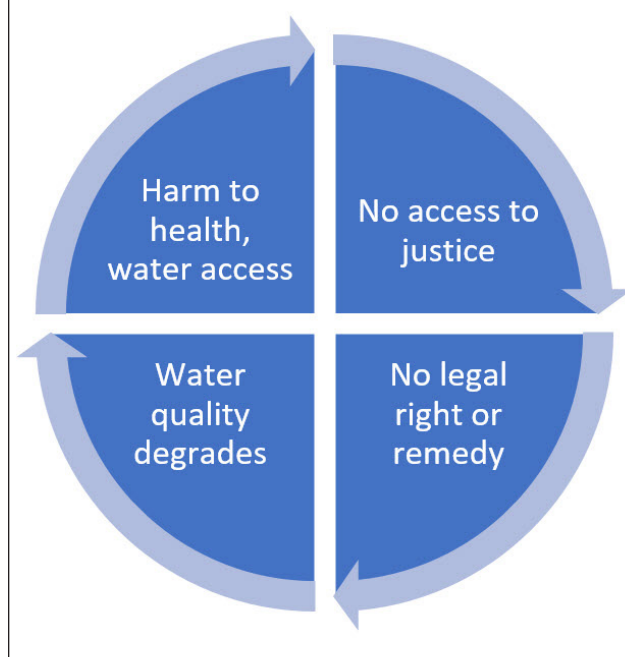
At all levels—international, regional, national, and subnational—***countries have been recognizing and expanding upon the intersection of rights and the environment.*** Countries in Africa, Europe, and the Americas have signed binding regional instruments upholding fundamental rights related to the environment. Major human rights conventions and treaties include the African Charter on Human and Peoples' Rights,<sup>42</sup> the 2004 Revised Arab Charter on Human Rights,<sup>43</sup> and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.<sup>44</sup>

42 <http://www.achpr.org/instruments/achpr/>, art. 24.

43 <http://www.humanrights.se/wp-content/uploads/2012/01/Arab-Charter-on-Human-Rights.pdf>.

44 <http://www.oas.org/juridico/english/treaties/a-52.html>, art. 11.

**Figure 4.4:** Vicious Cycle of Lack of Rights, Cause of Action, or Remedy



In an advisory opinion, the Inter-American Court on Human Rights has interpreted the American Convention on Human Rights to recognize both a human right to a healthy environment and the duty of states to avoid causing, directly or through activities over which they have control, either domestic or extraterritorial damage to the environment that infringes on the human right.<sup>45</sup> Similarly the European Court of Human Rights has held that the exercise of rights recognized by the European Convention on Human Rights<sup>46</sup> can be impaired by environmental harm and risks. In particular, the European Court of Human Rights has found that environmental risk or harm has resulted in violations of

45 Inter-American Court of Human Rights, Opinión Consultiva OC-3-17de 15 de Noviembre de 2017, Solicitado por la República de Colombia, Medio Ambiente y Derechos Humanos.

46 [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).



article 2 of the Convention (the right to life), article 1 of Protocol 1 (the right to property), and article 8 (the right to respect for family and private life and home). The Court has also found a right to a healthy environment implied from the right to life and to private and family life. In regard to procedural rights, the Court has found violations of procedural rights exercised in conjunction with efforts to protect the environment or address environmental risks, including article 10 (right to freedom of expression), article 11 (right to freedom of assembly and association), and article 13 (right to an effective remedy).<sup>47</sup>

**Since the 1970s, environment-related rights have grown more rapidly than any other human right.**<sup>48</sup> While no constitutions provided for such a right in 1946, by 2012 over 66 percent of constitutions incorporated a range of environment-related rights.<sup>49</sup> Including the right to life, which many courts have interpreted to include a right to a healthy environment, the percentage of countries with constitutional rights related to the environment is even greater.<sup>50</sup>

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),<sup>51</sup> applicable in Europe and open to countries globally, requires that parties recognize procedural rights in environmental matters. States in the Americas

have adopted a similar convention, which also provides protections to environmental human rights defenders.<sup>52</sup> Asian countries adopted the Association of Southeast Asian Nations Human Rights Declaration.<sup>53</sup>

One of the benefits of using rights-based approaches in environmental matters is that numerous national constitutions and laws enumerate both substantive and procedural rights that protect the environment, public health, and welfare. 78 percent of countries recognize a right to life in their constitutions,<sup>54</sup> and courts in at least 20 countries have held that the right to a healthy environment is implied in other constitutional rights (such as the right to life).<sup>55</sup> Many national constitutions also provide for procedural rights as basic human rights.<sup>56</sup>

### 4.1.2 Benefits

**Taking a rights-based approach to improving environmental rule of law provides a strong impetus and means for implementing and enforcing environmental protections.** Rights-based approaches are often more agile and expansive than traditional regulatory approaches to environmental protection. Rights can be held collectively as well as individually, meaning that an individual or a community may be able to seek redress for an

47 See, e.g., *Oneryildiz v. Turkey*; *Budayeva and Others v. Russia*; *Guerra and Others v. Italy*; *Lopez Ostra v. Spain*; *Taskin and Others v. Turkey*; *Fadeyeva v. Russia*; *Di Sarno and Others v. Italy*, finding violations of one or more of these provisions. ECHR 2018.

48 Law and Versteeg 2012, 775.

49 *Ibid.* (including the duty to protect the environment, civil or criminal liability for damaging the environment, right to information about the environment, right to compensation when the living environment is damaged, and the right to participate in environmental planning).

50 See Box 4.2.

51 <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

52 See Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, <https://www.cepal.org/en/subsidiary-bodies/regional-agreement-access-information-public-participation-and-justice>. The Agreement opened for signature on September 27, 2018.

53 ASEAN 2012. Principle 28 includes the “right to a safe, clean and sustainable environment” and the “right to safe drinking water and sanitation.” Principle 9 addresses public participation and non-discrimination, and principle 23 addresses access to information.

54 Law and Versteeg 2012, 774.

55 Boyd 2011.

56 See May 2006, 113.

### Box 4.1: Collective Human Rights

Historically, human rights have focused on the rights of individuals.<sup>a</sup> In the last 50 years, though, there has been a growing recognition of collective human rights by regional human rights instruments, international instruments, national law, and substantial commentary.<sup>b</sup> The first article of the two 1966 international human rights covenants (on civil and political rights, and on economic, cultural, and social rights) affirms the right of all “peoples” to self-determination. While many commentators argue that this article applies to states emerging from colonialism, indigenous peoples and ethnic minorities have embraced this language to advance their interests.<sup>c</sup>

Collective rights (sometimes referred to as “group rights” or “peoples’ rights”) may be held by indigenous peoples, traditional communities, and ethnic minorities, as well as by trade unions, corporations, and other entities.<sup>d</sup> Some of the more common collective rights include:

- Right to exist and self-determination,<sup>e</sup> often including self-governance<sup>f</sup>
- Right to “freely dispose of their wealth and natural resources”<sup>g</sup>
- Right of cultural identity,<sup>h</sup> including the right to economic, social, and cultural development<sup>i</sup>
- Right to “a general satisfactory environment favorable to their development”<sup>j</sup> or “protection of a healthy environment,”<sup>k</sup> including rights to natural resources necessary for fulfillment of other rights<sup>l</sup>
- Right to exercise free, prior and informed consent regarding decisions that affect them and the resources upon which they depend<sup>m</sup>
- Right of association, assembly, and freedom of expression<sup>n</sup>

Collective rights are particularly recognized where they are “are indispensable for their existence, wellbeing, and integral development” of a people (for example indigenous peoples).<sup>o</sup>

Criticisms of collective rights tend to focus on whether the rights asserted are actually rights, whether the rights are collective rights or individual rights, and the implications of recognizing collective rights.<sup>p</sup>

a. Dinstein 1976; Freeman 1995.

b. *See, e.g.*, Ramcharan 1993.

c. *See* Freeman 1995.

d. Jones 2016; Bisaz 2012.

e. 1948 Universal Declaration of Human Rights, art. 1; 2007 UN Declaration on the Rights of Indigenous Peoples, art. 3; 1981 African Charter on Human and Peoples’ Rights, art. 20(1); 2016 American Declaration on the Rights of Indigenous Peoples, art. III.

f. 2007 UN Declaration on the Rights of Indigenous Peoples, art. 4; 2016 American Declaration on the

- Rights of Indigenous Peoples, arts. VI, XXI-XXII.
- g. 1981 African Charter on Human and Peoples' Rights, art. 21(1).
  - h. 2007 UN Declaration on the Rights of Indigenous Peoples, arts. 5, 11-15, 33; 2016 American Declaration on the Rights of Indigenous Peoples, arts. X, XIII-XVI; Jovanovic 2005; Barzilai 2005.
  - i. 1981 African Charter on Human and Peoples' Rights, art. 22(1); 2016 American Declaration on the Rights of Indigenous Peoples, art. III.
  - j. 1981 African Charter on Human and Peoples' Rights, art. 24(1).
  - k. 2016 American Declaration on the Rights of Indigenous Peoples, art. XIX.
  - l. 2007 UN Declaration on the Rights of Indigenous Peoples, arts. 8(2)(b), 10, 25-29; 2016 American Declaration on the Rights of Indigenous Peoples, art. XXV.
  - m. 2007 UN Declaration on the Rights of Indigenous Peoples, arts. 19, 32; 1989 Indigenous and Tribal Peoples' Convention (No. 169), art. 16.
  - n. 2016 American Declaration on the Rights of Indigenous Peoples, art. XX.
  - o. *Ibid.*, art. VI.
  - p. Jones 2016; Bisaz 2012.

environmental harm (see Box 4.1). The right to water, for example, gives an individual person a right to have access to water and, therefore, to sue to enforce this right in court. Most environmental statutes impose obligations on a particular actor and charge the government with a duty to enforce this obligation. For example, most water laws require those wishing to discharge pollutants to water to obtain a permit from the government before doing so.

***A rights-based approach can make it easier for those harmed to access courts and bring claims as well.*** Environmental statutes may allow citizens to enforce the laws' provisions, but as discussed in the Justice chapter, access to the courts can be significantly constrained. Most environmental statutes empower agencies, not citizens, to act. By contrast, citizens usually can enforce a constitutional right because the right accrues to the individual suing, meaning it will be easier for them to access justice. For example, Costa Rica's constitution, article 48, establishes the *amparo* right of action, under which any person may bring suit to defend a constitutional right, and article 50 guarantees a right to healthy and ecologically balanced environment. A 1994 ruling established the principle of *intereses difusos*, which allows

individuals to bring actions on behalf of the public interest, including environmental protection. Thousands of petitions have been filed on the basis of these rights—14,963 in 2012 alone.<sup>57</sup>

Constitutional and human rights law is more established, expansive, and flexible than environmental law. Constitutional and human rights are often recognized at multiple levels—subnationally, nationally, regionally, and internationally. ***Thus, there is typically a wider variety of remedies and fora in which to seek relief*** than those provided by a national environmental law alone. When two Romanian citizens were denied redress through local and national mechanisms for exposure to contaminants released by mining operations, they appealed to the European Court of Human Rights to enforce article 8 of the European Convention on Human Rights and Fundamental Freedoms, which guarantees the right of respect for privacy and family life.<sup>58</sup> The Court held that Romania had failed to fulfil its obligations under article 8

57 OHCHR n.d.

58 European Court of Human Rights, *Tătar v. Romania*, Judgment (Merits and Satisfaction), January 27, 2009; Shelton 2010, 106; *see also* Okyay and Others v. Turkey (relying on article 6 of the Convention, guaranteeing a right to a fair hearing).



when it did not adequately assess the possible risks of the mining operations and when it did not provide adequate access to information on the mine. And in seeking redress for the impacts of climate change, Filipino citizens and human rights and environmental civil society organizations petitioned the Commission on Human Rights of the Philippines to investigate human rights violations caused by 47 corporations due to their contribution to greenhouse gas emissions.<sup>59</sup> The Commission accepted the petition.<sup>60</sup>

Constitutional and human rights are well-established with a longer history than many environmental protections. Therefore, some courts may be more comfortable relying on long-standing legal doctrines with which they are familiar than on new and less familiar environmental provisions. Finally, countries may continue to expand constitutional and human rights, meaning new rights can emerge to strengthen environmental protection, as noted in Section 4.1.1.2.

**Constitutional law and human rights law provide an important safety net when there are gaps in existing legislation.** As discussed above, constitutional and human rights most often implicated with environmental issues include the rights to life, health, water, food, and a healthy environment, where those rights are recognized. These rights can provide the legal basis for citizens to seek redress for environmental harms for which there might not be a remedy under traditional environmental law or when the implementation of environmental law has fallen short in providing meaningful remedies.

**Rights-based approaches can provide important norms and forums for addressing climate change, especially in instances when**

**a country has yet to act.** Climate change has a wide range of impacts on constitutional and human rights, including the rights to life, food, water, health, property, livelihood, self-determination, and an adequate standard of living. The preamble to the December 2015 Paris Agreement states:

acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.<sup>61</sup>

As discussed below and in Case Study 4.2, courts have increasingly recognized that constitutional and human rights law create duties for governments to take actions to mitigate climate emissions and to adapt to climate change—measures that are necessary to protect various rights affected by climate change. For example, in a case that brought attention to the importance of government action in adapting to the impacts of climate change, citizens of Tyrnauz, Russia, brought suit against the government when mudslides killed eight people.<sup>62</sup> The government had failed to maintain city infrastructure, which contributed to the disaster. The European Court of Human Rights found that under the right-to-life provision of the European Convention on Human Rights, Russian authorities were responsible for addressing known hazards—including mudslides and other climate-related risks—and for failing to act.

59 Greenpeace Southeast Asia et al. v. Chevron et al., Case No. CHR-NI-2016-0001.

60 Commission on Human Rights, Republic of the Philippines 2018.

61 Paris Agreement, C.N.92.2016.TREATIES-XXVII.7.d of 17 March 2016.

62 Budayeva and Others v. Russia 2008.

**Linking environmental harms to constitutional and human rights also heightens the profile of environmental issues by connecting the importance of the environment to human well-being.** Then-UN Secretary-General Kofi Annan praised a rights-based approach to environmental protection because it “describes situations not simply in terms of human needs, or of development requirements, but in terms of society’s obligations to respond to the inalienable rights of individuals.”<sup>63</sup> Highlighting a human-right violation will often present a greater imperative for authorities to act and therefore may be more likely to generate action.<sup>64</sup> Numerous cases in India demonstrate the use of the constitutional right-to-life provision, article 21, to elevate environmental concerns.<sup>65</sup> Despite the existence of environmental provisions in the Indian constitution (articles 48 and 51), the violations of the constitutional right to life were the primary basis for court orders to take measures to address the environmental harms caused by private activities.<sup>66</sup>

**A human rights approach could also strengthen environmental rule of law through application of the nonregression principle.** Nonregression has its origins in human rights law, and it means that States may not allow the deterioration of these rights “unless there are strong justifications for a retrogressive measure.”<sup>67</sup> Thus, in the absence of strong justifications, environmental laws and regulations should not be weakened, but only maintained and strengthened. The Rio+20 Declaration, para. 20, states that it is “critical that we do not backtrack” from the Rio Declaration commitments, and the Paris Agreement

provides that Parties commit to progressively stringent reductions in greenhouse gas emissions.<sup>68</sup> Countries are starting to incorporate the principle of nonregression regarding environmental progress. For example, the European Union’s Lisbon Treaty, art. 2, para. 3, applies the principle to the environment,<sup>69</sup> as have several national courts.<sup>70</sup>

Use of rights-based approaches to environmental issues promises to greatly advance both the underlying rights and environmental protection by increasing legitimacy in both areas.<sup>71</sup> **Environmental laws, policies, and decisions may be strengthened when agencies and institutions integrate constitutional or human rights into their decision making and activities.**

The UN Special Rapporteur on Human Rights and the Environment has recommended that governments mainstream human rights into their development and environmental agencies.<sup>72</sup> A single law or policy may help to align and coordinate diverse interests and provide co-benefits when disparate elements, including constitutional protections, human rights, environmental principles, and anti-poverty measures, are unified into a single law, policy, or program. For example, Kenya sought to achieve the Millennium Development Goal related to water and sanitation by creating a right to water in its 2010 constitution and enacting a 2016 water law that created a holistic

63 Annan 1998.

64 Shelton 2010, 97.

65 Vellore Citizens Welfare Forum v. Union of India and Others 1996.

66 Indian Bar Association 2013.

67 OHCHR 2008a; see generally Dadomo 2004.

68 [C.N.92.2016.TREATIES-XXVII.7.d](#) of 17 March 2016, art. 4(3) (“Each Party’s successive nationally determined contribution shall represent a progression beyond the Party’s then current nationally determined contribution...”).

69 Prieur 2012.

70 *Jacobs v. Flemish Region* (1999) Council of State No. 80.018, 29 April 1999. *Venter* (1999) Council of State No. 82.130, 20 August 1999. *Constitutional Court of Hungary*. 1994. Judgment 28, V. 20 AB, p.1919, cited in Boyd 2013.

71 OHCHR and UNEP 2012.

72 OHCHR 2015a.

### Case Study 4.2: Climate Change, Rights, and Environmental Rule of Law in the Netherlands and Pakistan

Rights-based approaches are already focusing governments' attention on climate change and urging stronger action. Cases in Pakistan and the Netherlands demonstrate the impact these approaches can have.

Ashar Lghari, a Pakistani farmer, sued his national government for its failure to implement the 2012 National Climate Policy and Framework. In 2015, the Lahore (Pakistan) High Court Green Bench relied on "fundamental rights," such as the Pakistani Constitution's rights to life, dignity, and a healthy and clean environment, and on "international environmental principles," such as the precautionary principle, to order several Pakistani ministries to implement the Policy and Framework.<sup>a</sup> The Court ordered the ministries to nominate focal points to ensure implementation of the Policy and Framework and created a Climate Change Commission with representatives from ministries, civil society, and technical experts to help the court monitor progress in implementing the Court's order.

In the Netherlands, a nongovernmental organization, Urgenda, sued the Dutch government for not taking strong enough action to reduce greenhouse gas emissions to combat climate change. The Hague District Court concluded that the government's actions were insufficient and thus that it had breached the duty of care owed to Dutch citizens. In deciding, the Court looked at articles 2 (right to life) and 8 (respect for private and family life) of the European Convention on Human Rights, among other provisions in international agreements. The court ordered the Government to decrease greenhouse emissions by at least 25 percent by 2020, instead of the 14-17 percent levels that the Government had planned. In October 2018, an appeals court affirmed and reinforced the decision.

- a. Asghar Leghari v. Federation of Pakistan (W.P. No. 25501/2015).
- b. Urgenda Foundation v. The State of the Netherlands, C/09/456689/HA ZA 13-1396 (24 June 2015).
- c. Spijkers 2017.

government approach toward better water infrastructure.<sup>73</sup> And South Africa created the National Development Plan 2030, which seeks to achieve both sustainable development and rights-based goals.<sup>74</sup>

One example of such an alignment of human rights and environmental sustainability is

the Sustainable Development Goals.<sup>75</sup> In implementing the Sustainable Development Goals, nations have the opportunity to protect human rights that are integrally related to environmental protection. Governments may strengthen implementation by taking account of underlying constitutional and human rights when implementing the Goals. The Framework Principles on Human Rights

<sup>73</sup> Wekesa 2013; UNDP 2012; KEWASNET 2017.

<sup>74</sup> South African National Planning Commission 2012.

<sup>75</sup> OHCHR 2015b.



and the Environment developed by the UN Special Rapporteur on Human Rights and the Environment emphasize the duties of States under international law to ensure that human rights related to the environment are protected in the context of the Sustainable Development Goals.<sup>76</sup> Similarly, numerous international agencies, such as the United Nations Development Programme and UNICEF, have developed programmatic materials that explicitly incorporate human rights in their implementation.<sup>77</sup>

### 4.1.3 Implementation Challenges

Using rights-based approaches to environmental protection faces several implementation challenges, including those related to resource allocation, political will, capacity, and consideration of other social development goals implicit in such an approach.

**Many countries lack the resources or the political will to aggressively pursue social and economic rights.** There are myriad causes for these shortcomings, but a lack of financial resources, technical expertise, and information can be significant impediments, as discussed in Case Study 4.3. Many governments struggle to mobilize resources for core functions of environmental institutions like monitoring ambient environmental conditions, transparent development of regulations and permits, and compliance assurance. Often, governments do not have funds to adequately support human rights commissions or tribunals, and in-country experience with constitutional and human rights matters may be limited. In addition, citizens may be unaware of their rights under human rights treaties as well as under national constitutions and laws,

meaning they are unaware of the recourse they might have. The many ways in which access to justice is limited for environmental protections, which are discussed extensively in the Justice chapter, apply to pursuit of constitutional and human rights protections as well.

When a government does not implement rights protections, it often falls to courts to hear citizen complaints and order corrective actions, as discussed in Case Studies 4.1, 4.2, and 4.3. But courts are often under-resourced themselves, may lack technical expertise, and may lack the legal powers to effectively provide recourse for citizens, as discussed in the Justice chapter. Courts may also be reluctant to find government officials guilty of human rights violations due to internal ramifications of such decisions, such as political pressure and being accused of fomenting dissent. In some instances, courts might be most effective when they prod institutions responsible for environmental protection to overcome political and bureaucratic logjams and implement policy. For example, the Supreme Court of India played a central role in pushing environmental officials to develop and implement policies to reduce air pollution, particularly switching public buses to cleaner fuel.<sup>78</sup>

In some countries, although a right may appear in a constitution, the right may not be actionable by citizens or in court. Some constitutional rights, particularly environmental rights, are written as or interpreted by courts as being nonbinding statements of policy. For example, according to state courts, the U.S. state of Illinois' constitutional provision for a healthful environment is not a fundamental right and cannot be used by citizens to bring suit in court, even when government action

76 UNGA 2018a.

77 See, e.g., OHCHR and UNEP 2012; UNDP 2012.

78 Bell and Narain 2005.

threatens direct environmental harm.<sup>79</sup> Other constitutional provisions can only be made actionable through an act of the legislature. For example, Nigeria's courts have held that the constitutional directive that the state "protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria"<sup>80</sup> must be given force through legislative actions and cannot support direct citizen enforcement of it in court.<sup>81</sup> And as discussed in the Justice chapter, the concept of standing often precludes the general public from suing to enforce constitutional rights.<sup>82</sup> States like South Africa have overcome this barrier by explicitly allowing citizens to sue in their own interest, the public interest, and as a member of a group or class for violations of the constitutional right to a healthy environment.<sup>83</sup>

Another challenge with rights-based approaches is that rights tend to be broadly worded. As such, articulated rights tend to lack the specificity of standards, mechanisms, and procedures that are often found in legislation. These rights often advance a specific objective, and it is unclear how to resolve situations with competing or overlapping rights. The generality of rights means that a rights-based approach is more suitable for policy direction and for protecting people from the most egregious actions, rather than as a substitute for environmental regulation and enforcement.

***Rights-based approaches can be limited by their focus on human beings and often solely on living human beings.*** As noted above, a human rights-based approach fails to acknowledge inherent rights in nature independent of anthropocentric values

placed on resources and the environment. Moreover, historically, most human rights have focused on the rights of living individuals to a particular outcome. With growing recognition of the rights of future generations, this is slowly changing.<sup>84</sup> A defining feature of environmental rule of law is the fact that it deals with issues such as climate change, species extinction, and toxic pollution that often cause impacts over extended time horizons, as long as centuries. Environmental rule of law also often must grapple with uncertainty and risks to future generations weighed against costs to the current generation.

Despite these limitations, constitutional and human rights offer an important, often supplementary means to promote environmental rule of law, in part by offering additional venues for challenging environmental wrongs, in part by elevating the importance of the environment and environment-related rights, and in part by serving as a safety net when environmental statutes do not squarely address an environmental problem. These are discussed below.

## 4.2 Right to a Healthy Environment

Many countries now recognize a right to a healthy environment as a constitutional or statutory right.<sup>85</sup> This right asserts that the environment must meet certain basic benchmarks of healthfulness and includes affirmative substantive rights, such as the right to clean air and water, and defensive substantive rights, such as the right to be

79 Tuholske 2015.

80 Constitution of Nigeria, sec. 20.

81 Burns 2016.

82 See *infra* Section 5.2.1.

83 Constitution of South Africa (1996), ch. 2, sec 28.

84 Lewis 2017; Lawrence 2014; Page 2006.

85 Boyd 2018

### Case Study 4.3: Progressive Realization of the Right to Water in South Africa

In 1996, South Africa adopted a new constitution that includes a constitutional right to water and a requirement that the state “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.”<sup>a</sup> In order to implement this right, South Africa passed legislation, promulgated regulations, and developed a strategic framework. It has made significant progress, but has not yet fulfilled the rights to water and sanitation for an estimated 7-15 percent of the population. Those who have yet to receive basic water and sanitation services typically live in the poorest regions of the country. The South African Human Rights Commission reported in 2014 that 11 percent of households do not have any sanitation and that 26 percent of households in certain areas lack adequate services due to poor and deteriorating systems. High percentages of households in the rural former apartheid-era homelands lack any of these services.<sup>b</sup> So has the rights-based approach failed?

In 2000, the South African Constitutional Court ruled that the South African government must make reasonable efforts toward the progressive realization of such rights.<sup>c</sup> It held that the Constitution’s right of access to adequate housing meant that the government had an obligation to take reasonable legislative and other measures to achieve progressive realization of this right within the confines of available resources. Therefore, the Court examined the government’s efforts toward providing housing against this standard and would apply the same analysis to the right to water.

When it examined the fact that many in South Africa remain without access to clean water, the South African Human Rights Commission recommended changes at the national, provincial, and local levels.<sup>d</sup> It called for budgets and decisions that are transparent and for the engagement of communities in budgeting and development decisions. It also noted that decision makers should consider the needs of different groups in providing access, including the safety of women and girls. The right to water and sanitation is not to be traded off against other social and economic rights, according to the Commission.

Additionally, the Commission required the national government to provide additional technical assistance and financial support to ensure that local governments are able to implement the mandate and to upgrade and repair water and waste water treatment plants that are not functional. Thus, while providing a constitutional right can provide other means towards achieving an environmental goal, it is not a panacea. Governments cannot give what they do not have, and courts will look at all of the circumstances before ordering a remedy.

a. Constitution of South Africa, sec. 27.1, 27.2.

b. South African Human Rights Commission 2014.

c. Government of the Republic of South Africa v. Grootboom [2000] ZACC 19.

d. Ibid.

free from toxic wastes or pollution.<sup>86</sup> ***A right to a healthy environment strengthens environmental rule of law by encouraging stronger environmental statutes, filling gaps in existing law, providing procedural protections, and highlighting the importance of environmental law in society.***<sup>87</sup>

The right to a healthy environment<sup>88</sup> may be referred to as a “fundamental environmental right”<sup>89</sup> and may be phrased in many ways, including a “right to a clean environment”<sup>90</sup> or the right to a “balanced environment that shows due respect for health.”<sup>91</sup> The 2007 Malé Declaration on the Human Dimension of Climate Change, adopted by small island developing states, refers to the right as “the right to an environment capable of supporting human society and the full enjoyment of human rights.”<sup>92</sup> The breadth of the right means that its particular contours are often left to interpretation by legislatures, courts, and other implementing bodies. It would be a mistake, though, to think that the generality of the right makes it merely hortatory; courts

in dozens of countries have held that the constitutional right to a healthy environment is binding.<sup>93</sup>

The right to a healthy environment is most often found in national constitutions.<sup>94</sup> As shown in Figure 4.5, 150 countries have environmental provisions in their constitutions, expressed in a variety of ways (most commonly as an individual right or a state duty).<sup>95</sup> In addition, many countries have statutory rights to a healthy environment that either give statutory meaning to the constitutional right<sup>96</sup> or exist without a corresponding constitutional right.<sup>97</sup> ***A right implemented through the national constitution has more force because it is the supreme law of the land applicable to all levels of government and trumps any national or subnational statutory law.*** A right implemented through statute is also an important right, but will be subordinate to any constitutional rights deemed at odds with the statutory right; is subject to interpretation when it is deemed at odds with other statutes; and may only apply to specified levels of government—in federal countries, national laws may bind states or provinces only in certain conditions specified by the constitution. As of 2012, courts in at least 44 nations had issued

86 *E.g.*, Constitution of South Africa (1996), sec. 24 (“Everyone has a right: (a) To an environment that is not harmful to their health or well-being” Article 35 (1) of the Constitution of the Republic of Korea reads “All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.”)

87 Knox 2012, 15 (“the recognition of such rights can lead to the enactment of stronger environmental laws, provide a safety net to protect against gaps in statutory environmental laws, raise the profile and importance of environmental protection as compared to competing interests such as economic development, and create opportunities for better access to justice and accountability”); Boyd 2012a; May and Daly 2014; Bruch, Coker, and Van Arsdale 2007.

88 Constitution of the Republic of Hungary (1949), para. 18.

89 May 2006.

90 International Institute for Democracy and Electoral Assistance 2015, para. 30.

91 French Charter for the Environment 2005.

92 Adopted November 14, 2007. [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf).

93 Bruch et al. 2007.

94 May 2006.

95 The tally includes 88 countries with constitutions enshrining a right to a healthy environment and 62 additional countries that have other environmental provisions that are not explicitly rights, for a total of 150 countries.

96 *See, e.g.*, South Africa’s National Environmental Management Act, which was born from its constitutional right to a clean environment; Kotzé and du Plessis 2010.

97 The United States’ National Environmental Policy Act provides that “each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation of the environment” but provides no way for citizens to actuate this declaration. 42 U.S.C. sec 4331(c).



decisions enforcing the constitutional right to a healthy environment.<sup>98</sup>

Courts that have enforced the right to a healthy environment have articulated and developed both substantive and procedural rights. Courts have also ruled that governments have duties corresponding to a right to the constitutional right to a healthy environment: they must (1) not act to infringe upon the right; (2) protect the right from infringement by third parties; and (3) take actions to fulfill the right.<sup>99</sup> As examples, States have been (1) prohibited from awarding forest concessions harmful to the environment;<sup>100</sup> (2) required to issue regulations or to implement and enforce existing regulations to curb behavior harmful to the environment;<sup>101</sup> and (3) ordered to clean-up entire watersheds.<sup>102</sup>

***A constitutional right to a healthy environment can support the enactment of stronger environmental laws.*** One researcher found that after adopting a constitutional right to a healthy environment, 78 of 95 nations strengthened their environmental laws.<sup>103</sup> In addition, countries often enact environmental laws to give force and meaning to the constitutional right. Enabling statutes can explicate the rights given by the constitutional provision, appoint agencies to oversee implementation of the right, and provide specific causes of actions and penalties for infraction of the right. For example, after enacting a constitutional right to a healthy environment, Argentina and its provinces passed new environmental laws, as did Brazil, Colombia, Costa Rica, France, the Philippines, Portugal, and South Africa.<sup>104</sup>

In Mexico, the 2012 constitutional reform codifying the right to water also mandated that legislators enact a general water statute within 360 days. The General Water Law helps to implement the new right by regulating and ensuring access to safe drinking water and sanitation.<sup>105</sup> The constitutional reform is also the driving force for the 2014-2018 National Water Program.

***A constitutional right to a healthy environment can provide a critical safety net for redress of environmental harms not otherwise addressed by the law.*** As discussed throughout this chapter, and as illustrated in Case Study 4.4, a rights-based approach can provide legal rights and duties, both substantive and procedural, that traditional environmental law may lack. A constitutional right to a healthy environment may provide an avenue to seek redress in court, for example spurring a government to act to mitigate or adapt to climate change (discussed in Section 4.1.2). In 2009, the Costa Rican Constitutional Court ordered the government to promulgate fishing regulations based upon the constitutional right to a healthy environment.<sup>106</sup> In addition, the constitutional right can serve as a gap-filling provision when environmental laws are found to have flaws or gaps such that certain harms are not addressed or redress is not available. Environmental laws can be quite technical and complex, and a constitutional right can guard against unintentional omissions by legislative drafters. For example, in Hungary, the constitutional right to environmental health prevented an amendment to the agricultural law from privatizing protected land.<sup>107</sup> And in India, residents subject to “slow poisoning” due to poor sanitation are protected by the constitutional right to environmental

98 Boyd 2013.

99 OHCHR 2015a, 2; Boyd 2013, 13.

100 See discussion of the Philippines Supreme Court enjoining the Philippines from awarding certain forest concessions later in this subsection.

101 See Case Studies 4.1 and 4.3.

102 See Case Study 4.4.

103 Boyd 2013.

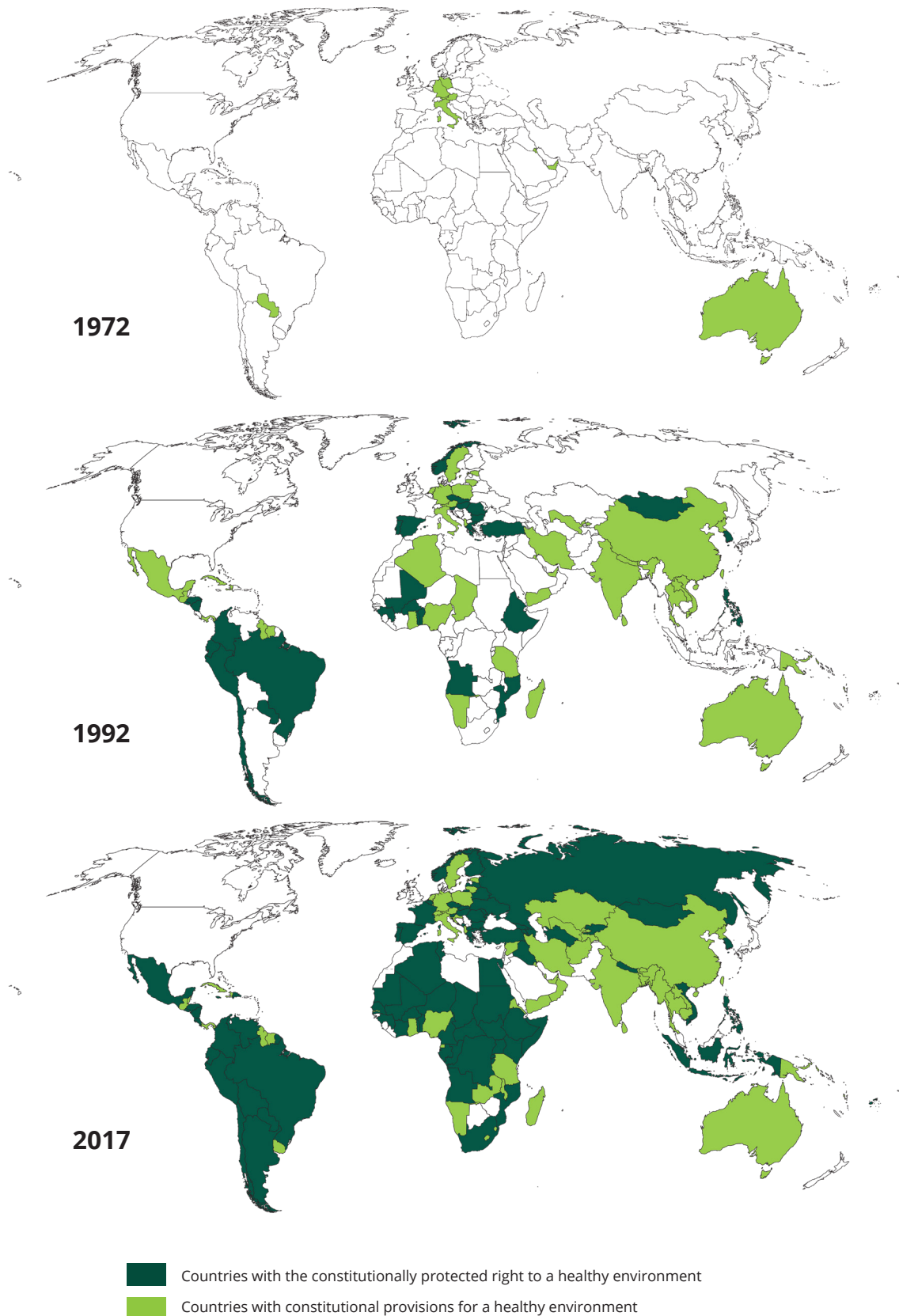
104 Ibid.

105 Diario Oficial de la Federacion 2014.

106 Asociación Interamericana para la Defensa del Ambiente y Otros, Costa Rican Constitutional Court (2009).

107 Bruch et al. 2007.

**Figure 4.5: Countries with a Constitutional Right to a Healthy Environment (1972, 1992, and 2017)**



Year	Countries with the constitutionally protected right to a healthy environment	Countries with constitutional provisions for a healthy environment
1972		Australia, Austria, Germany, Italy, Kuwait, Malta, Paraguay, United Arab Emirates
1992	Angola, Benin, Brazil, Bulgaria, Burkina Faso, Cabo Verde, Chile, Colombia, Ecuador, El Salvador, Ethiopia, Greece, Guinea, Honduras, Hungary, Mali, Mongolia, Mozambique, Nicaragua, Norway, Paraguay, Peru, Philippines, Portugal, Republic of Korea, Romania, Sao Tome and Principe, Slovakia, Slovenia, Spain, Togo, Turkey	Albania, Algeria, Australia, Austria, Bahrain, Chad, China, Cuba, Democratic People's Republic of Korea, Estonia, Germany, Ghana, Guatemala, Guyana, Haiti, India, Iran, Italy, Kuwait, Laos, Lithuania, Madagascar, Malta, Mauritius, Mexico, Micronesia, Namibia, Nepal, Netherlands, Nigeria, Palau, Panama, Papua New Guinea, Poland, San Marino, Sri Lanka, Suriname, Sweden, Tanzania, Thailand, United Arab Emirates, Uzbekistan, Vanuatu, Viet Nam, Yemen
2017	Algeria, Andorra, Angola, Argentina, Armenia, Azerbaijan, Belarus, Belgium, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Chad, Chile, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Czech Republic, Democratic Republic of the Congo, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Finland, France, Gabon, Georgia, Greece, Guinea, Honduras, Hungary, Indonesia, Iraq, Jamaica, Kenya, Kyrgyzstan, Latvia, Maldives, Mali, Mauritania, Mexico, Mongolia, Montenegro, Morocco, Mozambique, Nepal, Nicaragua, Niger, Norway, Paraguay, Peru, Philippines, Portugal, Republic of Korea, Republic of Moldova, Romania, Russia, Rwanda, Sao Tome and Principe, Senegal, Serbia, Seychelles, Slovakia, Slovenia, Somalia, South Africa, South Sudan, Spain, Sudan, The former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, Venezuela, Viet Nam	Afghanistan, Albania, Australia, Austria, Bahrain, Bangladesh, Belize, Bhutan, Cambodia, China, Croatia, Cuba, Democratic People's Republic of Korea, Equatorial Guinea, Eritrea, Estonia, Eswatini, Gambia, Germany, Ghana, Guatemala, Guyana, Haiti, India, Iran, Italy, Kazakhstan, Kuwait, Laos, Lesotho, Lithuania, Luxembourg, Madagascar, Malawi, Malta, Mauritius, Micronesia, Myanmar, Namibia, Netherlands, Nigeria, Oman, Palau, Panama, Papua New Guinea, Poland, Qatar, San Marino, Sri Lanka, Suriname, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Thailand, United Arab Emirates, Uruguay, Uzbekistan, Vanuatu, Yemen, Zambia

Source: Environmental Law Institute, based on Constitute Project 2018.

health, without having to prove specific injury.<sup>108</sup> In some instances, environmental law lags behind technological developments, so a general right to healthy environment can provide a measure of justice until the legislature enacts legislation.

***Providing for environment-related rights can help ensure better opportunities for***

***access to justice and accountability of the government and other actors.*** For example, when the Philippine government was issuing timber concessions that may have endangered the sustainability of future forests, the Supreme Court of the Philippines found that the constitutional right to a healthy environment applied to future generations and required the government to manage natural resources for the benefit of both

108 Ibid.

### Case Study 4.4: Argentina's Supreme Court Orders Comprehensive Environmental Response

Beatriz Mendoza and a group of other impoverished residents of the Matanza-Riachuelo River basin, a heavily polluted area of Buenos Aires, filed suit against the federal, provincial, and municipal governments and 44 industrial polluters. They relied in part on section 41 of the Argentine Constitution, which guarantees a right to a "healthy and balanced environment fit for human development." The Supreme Court of Argentina recognized the standing of three additional organizations that had an interest in the collective right to a healthy environment.<sup>a</sup> It ordered an environmental assessment of the watershed in 2006 and ordered the government to draft a cleanup and restoration plan to be reviewed by university scientists in 2007. In 2008, based on this plan, it issued a comprehensive cleanup order designed to improve residents' quality of life and restore the river basin environment.<sup>b</sup> The order required that the government provide for a system of public information about the cleanup; eliminate industrial pollution; improve drinking water, sewage, and stormwater systems; establish health programs for residents; and establish a committee of nongovernmental organizations together with a national ombudsman to monitor compliance. The Argentine government established a watershed authority to implement the plan, coordinate activities, and monitor and enforce compliance.<sup>c</sup> The World Bank has approved US\$2 billion to support the project.<sup>d</sup>

- a. Supreme Court of Argentina (CSJN), "Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza - Riachuelo)" (8/7/2008), Fallos 331:1622. Causa Mendoza, fs. 75/76.
- b. Ibid.
- c. Boyd 2012b.
- d. World Bank 2009.

present and future people.<sup>109</sup> In Brazil, the constitutional right to a healthy environment gave the public and nongovernmental organizations access to the independent Ministério Público to report and ask for action on environmental violations. Enforcement of environmental laws increased dramatically as a result: between 1984 and 2004, the Ministério Público filed over 4,000 public civil actions in the state of São Paulo alone on environmental topics such as deforestation and air pollution.<sup>110</sup>

109 *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources* 1993.  
110 *McAllister* 2008.

***Enshrining a right to a healthy environment in a constitution elevates the importance of environmental law.*** It gives the environment and public health a place alongside the rights to liberty, social justice, and property, in constitutions that recognize these rights, establishing that the environment occupies a central place in national civic life. According to former Justice Mahomed of Namibia, a country's constitution is "a mirror reflecting the national soul."<sup>111</sup>

A right to a healthy environment exists in regional and subnational legal instruments

111 *State v. Acheson* 1991 (2) SA 805 (Namibia) 813 A-B (1991 NR 1, 10A-B).



as well. More than 130 nations are party to treaties and institutions that recognize the human right to a healthy environment.<sup>112</sup> Many subnational constitutions contain environment-related rights.<sup>113</sup> The constitutions of all 26 Brazilian states contain provisions protecting the environment,<sup>114</sup> while roughly 60 percent of U.S. state constitutions contain provisions regarding the environment or natural resources.<sup>115</sup> Supranational and subnational recognition of the right to a healthy environment can be important as well.<sup>116</sup> Supranational provisions can help to encourage national governments to exercise caution when considering whether to backslide, while subnational provisions can set an example for national governments and offer legal recourse that might not otherwise be available to citizens.

National legislative rights to a healthy environment are also helpful in securing environmental rule of law. They can provide actionable rights to citizens and place duties on agencies that are the bedrock of environmental law. They can also ultimately lead to the adoption of a corresponding constitutional or human right under national law. For example, the Indonesia Environmental Management Act, enacted in 1997, recognizes the right to a healthy environment as well as the right to public access to environmental information and the

right to participate in environmental decision making.<sup>117</sup> The Act also guarantees various environmental procedural rights, such as the right of nongovernmental organizations to bring lawsuits on behalf of others. In 1988, the People's National Assembly promulgated the National Human Rights Charter, which recognizes "every person's right to a good and healthy environment."<sup>118</sup>

In addition to an explicit right to a healthy environment, other environment-related rights are often interpreted or understood to include a right to healthy environment—in recognition of the fact that environmental factors and considerations are essential to the realization of these other rights. Environment-related rights include, for example, the right to life (see Box 4.2), right to health,<sup>119</sup> rights related to family and privacy, and rights related to indigenous culture and identity.<sup>120</sup>

### 4.3 Right to Nondiscrimination and Rights of Marginalized Populations

The right to be equal before the law (often referred to as "nondiscrimination") and the rights of marginalized populations (and their members)<sup>121</sup> require governments to apply environmental law in a manner that is nondiscriminatory and does not disadvantage those who rely on natural resources most heavily. These rights help protect women and children, who can be particularly vulnerable

112 Boyd 2013.

113 May and Daly 2014. Countries referring to the environment in subnational constitutions include Austria, Argentina, Brazil, Ethiopia, Germany, India, Iraq, the Netherlands, the Philippines, and the United States. May 2017.

114 McAllister 2008.

115 Anton and Shelton 2011; *see generally* May and Daly 2014.

116 For example, the Inter-American Court of Human Rights plays an important role in enforcing national obligations to uphold environment-related rights. *See, e.g.,* Inter-American Court of Human Rights, Opinión Consultiva OC-3-17de 15 de Noviembre de 2017, Solicitado por la República de Colombia, Medio Ambiente y Derechos Humanos.

117 Indonesia Environmental Management Act (1997), art. 5(1).

118 Legislation No. 39 of 1999 Concerning Human Rights, State Gazette of the Republic of Indonesia No. 165 of 1999, ch. 3, sec. 1, art. 9.

119 Boyd (2011) reports at least 74 countries with a constitutional right to health.

120 *See* Section 4.3.2.

121 On collective rights related to the environment, *see* Box 4.1.

to environmental harms,<sup>122</sup> and can give legal recourse to disadvantaged populations who may be subject to disproportionate pollution and resource extraction. Indigenous communities are often accorded additional protections given their close economic and cultural association with the environment and their traditional disempowerment from legal and governmental systems. ***When coupled with procedural rights, such as access to justice and participation in decision making, the right to nondiscrimination is critically important in implementing meaningful environmental rule of law.***

This section reviews the right to nondiscrimination and the rights of marginalized populations and then discusses the importance of human rights and constitutional rights of indigenous peoples relating to the environment.

### 4.3.1 Nondiscrimination and Protection of Marginalized Populations

The right of nondiscrimination is recognized in the Universal Declaration of Human Rights and across a multitude of treaties and national constitutions and laws, including the International Labor Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, and the Convention on the Rights of the Child.<sup>123</sup> States are obliged to protect human rights

“without any discrimination.”<sup>124</sup> The UN Special Rapporteur’s Framework Principles on Human Rights and the Environment indicates that States should also avoid indirect discrimination “when facially neutral laws, policies or practices have a disproportionate impact on the exercise of human rights as distinguished by prohibited grounds of discrimination;” and “when measures that adversely affect ecosystems, such as mining and logging concessions, have disproportionately severe effects on communities that rely on the ecosystems.”<sup>125</sup> The right of nondiscrimination obliges States to equally protect the rights of peoples who rely on their traditional territory for subsistence and cultural identity.<sup>126</sup>

***The right of nondiscrimination is central to the equal and equitable implementation and enforcement of environmental law.*** States may reduce and regulate pollution, but too often polluting industries are concentrated in areas where traditionally disadvantaged populations live, and natural resource extraction often focuses on areas inhabited by indigenous peoples. The environmental justice movement in the United States called attention to the highly disproportionate pollution burden borne by racial minorities and lower-income communities.<sup>127</sup> The right to nondiscrimination has been used to seek redress for such situations in the Inter-American Commission on Human Rights<sup>128</sup> and under U.S. constitutional and statutory nondiscrimination provisions as well.<sup>129</sup>

122 Cutter 2012; Bearer 1995; see also discussion in Section 6.2 (on gender).

123 E.g., UDHR, art. 2; ICCPR, arts. 2, 26; OHCHR 2015c, paras. 93-102.

124 ICCPR, art. 2. The prohibition highlights an illustrative number of explicit prohibitions: “such as race, colour, language, religion, ... or other status.” See also *ibid.*, art. 26.

125 UNGA 2018a, prin. 3, para. 8; see also EUFRA 2018, sec. 2.3.

126 UNGA 2018a.

127 Cole and Foster 2000.

128 *Mossville Environmental Action Now v. United States* 2010.

129 Hill 2015; Sassman 2015.

### Box 4.2: Right to Life

The right to life is one of the most common environment-related rights enshrined in national constitutions and international law.

As of 2006, 144 of the world's countries recognized the right to life in their constitutions (78 percent).<sup>a</sup> Courts in at least 12 countries have interpreted a constitutional right to life to include a right to a healthy environment in which to live that life.<sup>b</sup>

Various international conventions and other instruments recognize the right to life, including the Universal Declaration of Human Rights (article 3), International Covenant on Civil and Political Rights (article 6), Convention on Rights of the Child (article 6), African Charter on Human and Peoples' Rights (article 4), American Convention on Human Rights (article 4), Arab Charter on Human Rights (articles 5-8), European Convention for the Protection of Human Rights and Fundamental Freedoms (article 2), and the Aarhus Convention (preamble).<sup>c</sup>

A growing number of international and regional bodies have interpreted the right to life to address environmental harms and risks. For example, the European Court of Human Rights has held that the right to life in the European Convention for the Protection of Human Rights and Fundamental Freedoms requires states to put in place a legislative and administrative framework to protect the right against dangerous activities, such as those conducted at chemical factories and waste-collection sites.<sup>d</sup> The Inter-American Human Rights Commission has found that protection of the right to life requires the protection of the environment.<sup>e</sup>

Under constitutional and international law, then, the overwhelming majority of the judicial decisions holds that the right to life extends beyond the right to not be arbitrarily killed to impose positive obligations on states to protect the quality of life. Indeed the UN Human Rights Committee has stated that the right to life enshrined in the International Covenant on Civil and Political Rights requires governments to take positive action to protect the right.<sup>f</sup>

a. Law and Versteeg 2011.

b. Boyd 2011.

c. <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>, pmb1. (referring to the right to life as a "basic human right" dependent on "adequate protection of the environment").

d. *E.g.*, Öneriyıldız v. Turkey, No. 48939/99, 30 November 2004; Budayeva and Others v. Russia, No. 15339/02, 20 March 2008.

e. Yanomami v. Brazil, 5 March 1985, IACHR Resolution No. 12/85, Case No. 7615; IACHR 1997, ch VIII.

f. OHCHR 1982, para. 5; see also OHCHR 2013c, para. 48.

***Women and other marginalized and other vulnerable groups are often more dependent on natural resources for subsistence and disproportionately affected by degradation***

***of resources.*** The UN Special Rapporteur for Human Rights and the Environment has drafted Framework Principles on Human Rights and the Environment

suggesting ways to protect vulnerable persons from environmental harm through measures such as identifying vulnerable populations, conducting environmental impact assessments, facilitating access to information and justice (including effective remedies), supporting participation in government decision making, and ensuring that the necessary normative frameworks are in place.<sup>130</sup>

When the environment is degraded, these groups are more vulnerable than groups not subject to discrimination, often because they are tasked with finding and providing natural resources such as water and firewood. The United Nations Convention on the Elimination of All Forms of Discrimination against Women, for example, imposes a duty on States Parties to ensure that women “enjoy adequate living conditions, particularly in relation to ... water supply.”<sup>131</sup> Similarly, under the United Nations Convention on the Rights of the Child, States Parties must combat disease and malnutrition “through the provision of adequate nutritious food and clean drinking water.”<sup>132</sup> A dramatic example of natural resource management’s impact on marginalized populations can be seen in Case Study 4.5.

The vulnerability of marginalized groups to environmental harms will only grow more acute as climate change affects the availability of water and increases stresses on food and social systems.<sup>133</sup> The UN Human Rights Council has adopted several resolutions recognizing the impact climate change will have on several human rights.<sup>134</sup> Thus, as the climate changes, the right to nondiscrimination will become even more

important in ensuring environmental rule of law protects the most vulnerable.

### 4.3.2 *Rights of Indigenous Peoples and Persons*

***The protections afforded by constitutional and human rights law are critical to indigenous peoples and persons, who are often closely tied economically and culturally to the environment and natural resources and who are often disenfranchised from modern political and legal systems.***<sup>135</sup> In addition, natural resource extraction often imposes pollution and livelihood disruption on disempowered local peoples and persons, with most of the benefits of extraction flowing to other persons. In many instances, human right protections may be the only recourse available to these groups and persons.

Indigenous persons often rely directly on the environment for subsistence and livelihood, and many view the environment and natural resources as integral parts of their cultural heritage and identity. When asked what destruction of sacred sites would mean, members of the Xhosa people in South Africa replied: “It means that our culture is dead.”<sup>136</sup>

The UN General Assembly has recognized “the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people.”<sup>137</sup> International instruments recognize the substantive rights of indigenous groups to culture, religious practices, property (especially traditional lands and resources), and livelihoods. They also recognize

130 Knox 2012.

131 United Nations, Treaty Series, vol. 1249, art. 14(2).

132 Ibid., art. 24(2).

133 UN Office of the High Commissioner for Human Rights and UNEP 2012, 14.

134 Ibid.

135 In this context, “rights of indigenous persons” generally refers to rights held by individuals, while “rights of indigenous peoples” refers to collectively held rights.

136 See Millennium Ecosystem Assessment 2004, 38.

137 See UNGA 1992a, para. 26.1.



### Case Study 4.5: Improved Forestry Practices Benefit Women, Widows, and Landless Poor in Niger

Niger is among the poorest nations. It suffers greatly from deforestation, which was exacerbated by colonial land management and tenure policies that discouraged responsible forestry. In 1983, Niger began experimenting with farmer-managed natural regeneration, which encouraged local farmers to regenerate existing trees and stumps to provide firewood and fodder and stabilize soils. When coupled with revised land tenure laws, a new forest code, and sector-specific policies encouraging reforestation, over five million hectares were reforested, which increased agricultural productivity, incomes, and food security.<sup>a</sup>

Notably, the reforestation program particularly helped women and other vulnerable groups. Women who lived in villages that adopted farmer-managed natural regeneration spent on average one-half hour collecting firewood while women who lived in villages that did not adopt this practice spent on average 2.5 hours collecting firewood.<sup>b</sup> Researchers report that women, widows, and the landless poor saw improved access to land and an increase in income generation opportunities and that women's social status improved due to their involvement in restoring degraded lands.<sup>c</sup>

a. See Stickler 2012.

b. Reij 2006.

c. McGahuey and Winterbottom 2007; Reij 2006; Diarra 2006.

procedural rights, including heightened rights to participate in decisions that affect their lands, environment, and livelihoods. Two of the most important instruments are the UN Declaration on the Rights of Indigenous Peoples and International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries.<sup>138</sup> Regional instruments, such as the Inter-American Convention on Human Rights, are also important sources of norms and mechanisms for investigation and enforcement.<sup>139</sup>

Because of the importance of natural resources and the environment to indigenous communities and their

traditional disempowerment under colonial governments, **many countries recognize that indigenous groups have the right to free, prior, and informed consent before development takes place on their traditional lands.** This is reflected in the UN Declaration on the Rights of Indigenous Peoples.<sup>140</sup>

International treaties also recognize that indigenous and local communities must give prior informed consent to, be involved in, and benefit from access to traditional knowledge

138 UNGA A/RES/61/295 (2007).

139 Shelton 2002.

140 See Ayana and Wiessner 2007; OHCHR 2013a.

relating to genetic resources.<sup>141</sup> Many countries, including Peru<sup>142</sup> and the Philippines,<sup>143</sup> have legal provisions to protect traditional knowledge. The protection afforded by these provisions can be critical to the livelihoods and survival of indigenous populations, as demonstrated in Case Study 4.6.

**Governments' duties to fulfill human rights obligations include ensuring that third parties in their countries or over which they have jurisdiction respect human rights.** For example, many countries recognize customary rights to land, as shown in Figure 4.6. A case from India shows how government's duty to regulate third parties (and particularly businesses) may be applied in the context of land rights. India's Forest Rights Act of 2006 recognizes a range of customary forest rights for tribal peoples and traditional forest dwellers, and it specifies procedures for communities to protect and register their traditional forest rights. Notwithstanding this recognition, a company applied to mine for bauxite in the eastern Indian state of Odisha, in the Niyamgiri hills. After a decision by the Supreme Court of India, the Indian Ministry of Environment and Forests consulted with representatives of the Dongaria and Kutia tribes concerning potential violations of tribal rights in the area. The village representatives decided against the mine development

because it could violate their religious and cultural rights after which the Ministry rejected the mine application.<sup>144</sup>

#### 4.4 Rights of Free Association, Free Expression, and Freedom of Assembly

**Environmental rule of law is not possible without freedom to associate, express views, and peacefully assemble.** These rights allow concerned individuals to work together to advance environmental protection and require governments to allow individuals to speak freely and to protect them from harm or backlash when they defend their environment. Although these rights are recognized by articles 19 and 20 of the Universal Declaration of Human Rights as well as numerous treaties and constitutions,<sup>145</sup> they only have meaning when respected and enforced. Unfortunately, many governments have not adequately developed systems for ensuring that those who speak to defend environment-related rights are themselves protected. **Between 2002 and 2013, 908 people were killed in 35 countries defending the environment and land, and the pace of killing is increasing.**<sup>146</sup> In 2017 alone, 197 environmental defenders were murdered.<sup>147</sup> There are many ways that countries, companies, and civil society can stem this bloodshed, protect environmental defenders, and thus enhance environmental rule of law.

141 Convention on Biological Diversity, arts. 8(j), 10(c), 15; Nagoya Protocol, arts. 5, 6, 7; International Treaty on Plant Genetic Resources for Food and Agriculture, art. 9. *See also* UNGA 1992b, prin. 22; UNGA 2007, art. 31. The World Intellectual Property Organization is working toward a formal agreement to protect genetic resources, traditional knowledge, and traditional culture, and is evaluating options for a legal instrument. WIPO 2017.

142 UNEP 2014, 36 ("Under its law, Peru established its own sui generis regime for the protection of traditional knowledge in Peru.").

143 *Ibid.* ("The Philippines Indigenous People Rights Act 1998 legally recognizes the rights of indigenous peoples to manage their ancestral domains according to their traditions and cultures (customary laws).").

144 Environmental Rights Database 2015.

145 UNGA 1948; *see, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, arts. 10 and 11; Constitution of South Africa, arts. 16 and 18.

146 Global Witness 2014; OHCHR 2015c, para. 51.

147 *The Guardian* 2018.

### Case Study 4.6: Land Grabbing and Indigenous Rights

In recent decades, a complex web of factors has led to land rushes and large-scale land acquisitions in Africa, Latin America, and Southeast Asia. In many instances, businesses and state bodies have obtained rights to large tracts of communities' traditional land and converted the land to large-scale agribusiness, mining, or timber operations.<sup>a</sup> While the land acquisitions are often sanctioned by government licenses and statutes, in some cases they have been held to violate the human rights of the indigenous peoples who had lived on the land—rights that take preeminence over statutory arrangements.



In a 2005 case in the Inter-American Court of Human Rights,<sup>b</sup> the Yakye Axa indigenous people in Paraguay had been displaced from their land, and third parties had converted the land to commercial use. The community was destitute and not allowed to practice its traditional subsistence activities. There was little employment. Community members lived in extremely poor housing, lacked access to clean water and sanitation, and suffered high levels of disease. Schooling was inadequate. Although the community had submitted a claim to adjudicate its communal land more than 11 years earlier, the state had not adjudicated the claim.

The Inter-American Court found several violations of the Yakye Axa community's procedural and substantive rights. Recognizing that indigenous peoples have collective land rights,<sup>c</sup> the Court relied on both article 21 of the Inter-American Convention and ILO Convention No. 169 in finding that indigenous property rights included a suite of other rights.<sup>d</sup> It stated that "protection of the right of indigenous peoples to their ancestral territory is an especially important matter, as its enjoyment involves not only protection of an economic unity but also protection of the human rights of a collectivity whose economic, social and cultural development is based on its relationship with the land."<sup>e</sup> Although the right to property could in some cases be balanced against other interests of the state, the Court held that, when making such an evaluation, the State must take into account the impact of loss of traditional territory on the people's rights to cultural identity and survival. The Court ordered the State to demarcate the traditional land, to give it to the community, and to provide the basic necessities of life to the community until it recovered its land.

a. Lee 2014.

b. Yakye Axa Indigenous Community v. Paraguay, No. 125 (2005); UNEP 2014, 110-112.

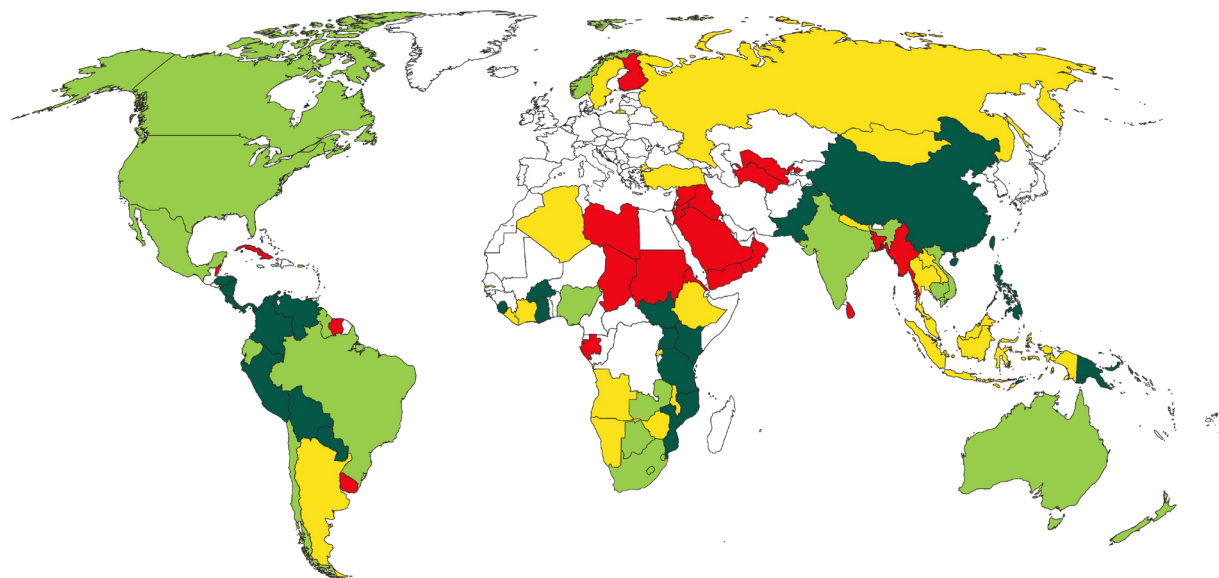
c. UNEP 2014, 107-111; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, No. 79 (2001) ("the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, and their integrity and their economic survival.").

d. Inter-American Convention on Human Rights, art. 21; ILO Convention No. 169, art. 13.

e. ILO Convention No. 169, para. 120(c).

**Figure 4.6:** Countries Recognizing Indigenous and Community Rights to Land at the National Level (2016)

Countries recognizing indigenous land tenure in national laws

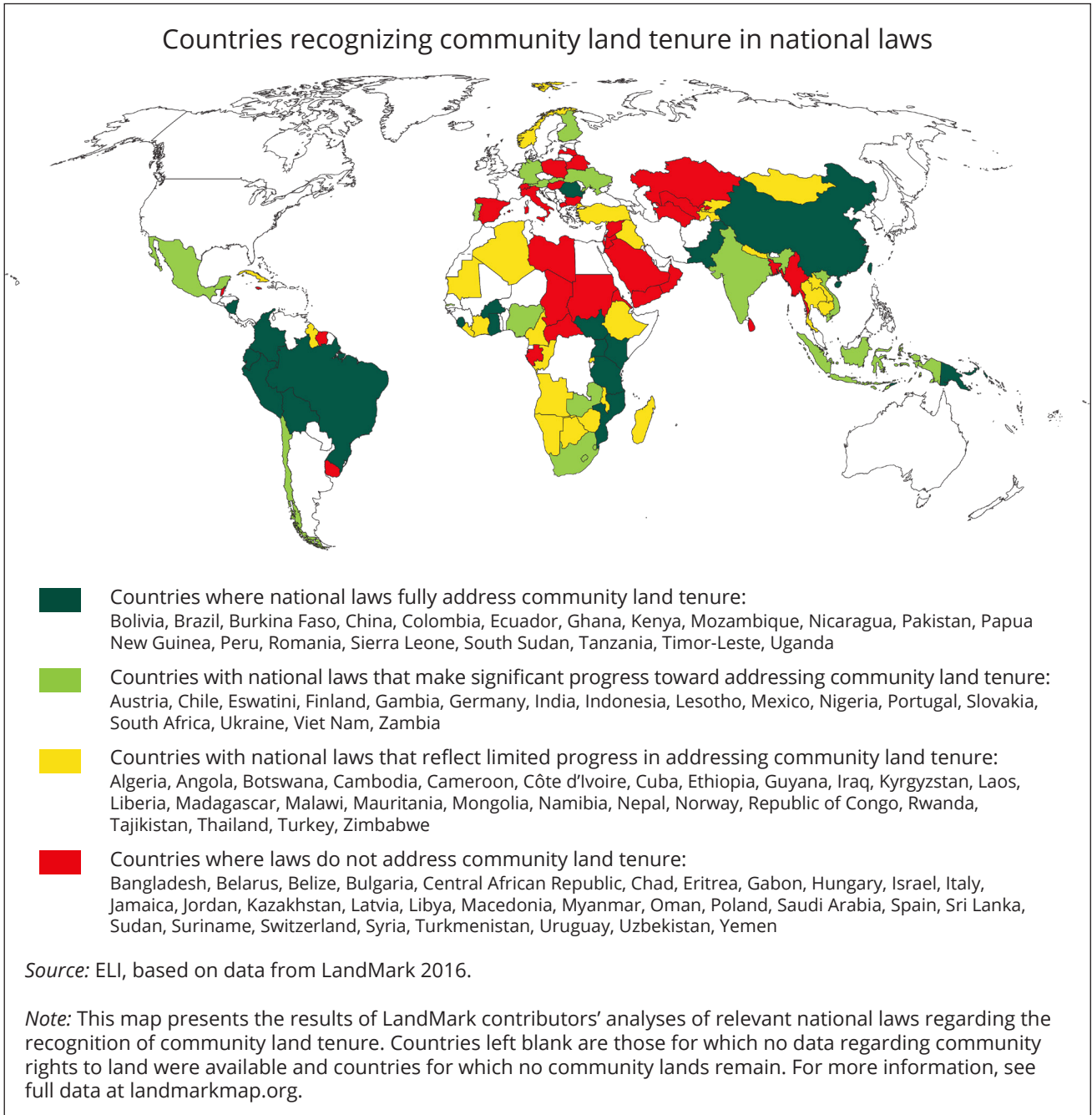


- Countries where national laws fully address indigenous land tenure:  
 Bolivia, Burkina Faso, China, Colombia, Costa Rica, Ghana, Honduras, Kenya, Mozambique, Nicaragua, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Sierra Leone, South Sudan, Tanzania, Timor-Leste, Uganda, Venezuela
- Countries with national laws that make significant progress toward addressing indigenous land tenure:  
 Australia, Botswana, Brazil, Cambodia, Canada, Chile, Ecuador, Eswatini, Gambia, Guyana, India, Lesotho, Mexico, New Zealand, Nigeria, Norway, South Africa, United States, Viet Nam, Zambia
- Countries with national laws that reflect limited progress in addressing indigenous land tenure:  
 Algeria, Angola, Argentina, Côte d'Ivoire, Ethiopia, Indonesia, Laos, Liberia, Malawi, Malaysia, Mongolia, Namibia, Nepal, Russia, Rwanda, Sweden, Thailand, Turkey, Zimbabwe
- Countries where laws do not address indigenous land tenure:  
 Bangladesh, Belize, Chad, Cuba, Eritrea, Finland, Gabon, Israel, Iraq, Jordan, Libya, Myanmar, Oman, Saudi Arabia, Singapore, Sri Lanka, Sudan, Suriname, Syria, Turkmenistan, Uruguay, Uzbekistan, Yemen

*Source:* Environmental Law Institute, based on data from LandMark 2016.

*Note:* This map presents the results of LandMark contributors' analyses of relevant national laws regarding the recognition of indigenous land tenure. LandMark was launched by the Rights and Resources Initiative, Oxfam, and the International Land Coalition. Countries left blank are those for which no data regarding indigenous rights to land were available and countries for which no indigenous lands remain. For more information, see full data at [landmarkmap.org](http://landmarkmap.org).





This section discusses (1) the close links between the substantive rights to free association and expression and those procedural rights that allow persons facing environmental wrongs to seek to avoid harm and seek redress if harmed, and (2) the critical role that the rights to freedom of association

and expression play in supporting and protecting environmental defenders globally.

#### 4.4.1 *Procedural Rights Relating to Free Association and Free Expression*

The rights to freedom of association and expression are central to environmental rule of law and include the right to participate in government and the right to information. **Communities must be able to form associations to address common concerns, express their needs, and participate in government decision making, and have access to courts in order to have meaningful environmental rule of law.** The elements necessary to ensure these basic procedural human rights are discussed at length in the Civic Engagement and Justice chapters. The existence of these basic procedural rights is critical, but the rights only create lasting impact when governments embed them in environmental rule of law through statutes, regulations, court procedures, and the provision of resources and skills necessary to make these rights available to all citizens.

A free media is also protected by these constitutional and human rights. The media informs the public and highlights violations of environment-related rights, which supports environmental rule of law by creating an informed, empowered citizenry and civic society.

The freedom of association allows people to come together to protect their common interests. They may do this through community-based organizations, nongovernmental organizations, civil society organizations, and other entities. These organizations are often local, but can also be national and transnational. And they can be very effective at protecting families and communities against illegal seizure of their property, pollution of their water and air, and efforts to suppress dissent. It is perhaps a testament to the effectiveness of these organizations and their advocates, that there

has been a backlash against them driven by political and economic elites in many countries.

There is a **disturbing trend of countries to limit the activities of nongovernmental organizations** (see Figure 4.7). In particular, between 1993 and 2012, 39 of the world's 153 low- and middle-income countries enacted laws that restricted the activities of organizations receiving foreign funding.<sup>148</sup> As civil society has used a rights-based approach to call for transparency and accountability in government, some governments have assumed these organizations are politically motivated and are siding with the political opposition.<sup>149</sup> As a result, they have cracked down on funding from foreign sources in an effort to muzzle the calls for rights-based protections. Governments are also restricting the activities of local nongovernmental organizations through new and revised nongovernmental organization registration laws.<sup>150</sup>

#### 4.4.2 *Environmental Defenders*

The interconnection between environmental rule of law and the right of free association is particularly critical in the role environmental defenders play in protecting environment-related rights and the role rights play in protecting environmental defenders.

Environmental defenders (sometimes referred to as “environmental human rights defenders”) defend communities’ substantive environmental, land, water, and subsistence rights—and advocate for sustainable development.<sup>151</sup> The UN describes them as “individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and

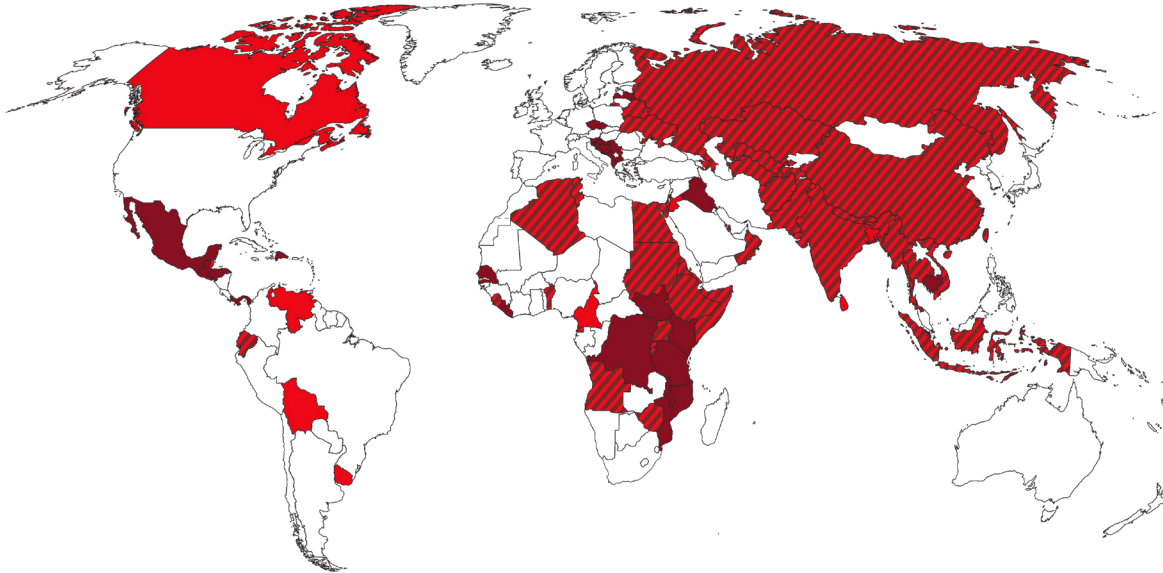
148 Dupuy, Ron, and Prakash 2017.

149 Ibid.

150 Unmüßig 2015.

151 UNGA 2016.

**Figure 4.7:** Countries with Legal Restrictions on Foreign Funding and Activities of Nongovernmental Organizations (2016)



- Countries that have adopted legal restrictions on the activities of foreign nongovernmental organizations: Albania, Bosnia and Herzegovina, Cambodia, Croatia, Czech Republic, Democratic Republic of the Congo, Dominican Republic, El Salvador, Guatemala, Honduras, Iraq, Kenya, Latvia, Liberia, Malawi, Mexico, Montenegro, Mozambique, Panama, Senegal, Serbia, Slovenia, South Sudan, Tanzania, Timor-Leste, The former Yugoslav Republic of Macedonia
- Countries that have adopted legal restrictions on foreign funding flows to locally operating nongovernmental organizations: Bahrain, Bangladesh, Belize, Bolivia, Cameroon, Canada, Jordan, Singapore, Sri Lanka, Uruguay, Venezuela
- Countries that have adopted legal restrictions on foreign funding flows to locally operating nongovernmental organizations and restrictions on the activities of foreign nongovernmental organizations: Afghanistan, Algeria, Angola, Azerbaijan, Belarus, Benin, Bhutan, Burundi, China, Ecuador, Egypt, Equatorial Guinea, Eritrea, Ethiopia, India, Indonesia, Israel, Kazakhstan, Myanmar, Nepal, Oman, Pakistan, Qatar, Russia, Rwanda, Sierra Leone, Sudan, Somalia, Tajikistan, Thailand, Tunisia, Turkmenistan, Uganda, Ukraine, Uzbekistan, Viet Nam, Zimbabwe

Source: Environmental Law Institute, based on data in Dupuy, Ron and Prakash 2016 and from Dupuy 2016.

promote human rights relating to the environment, including water, air, land, flora and fauna.”<sup>152</sup> ***Environmental defenders appear in many forms: community activists, homemakers, forest rangers, government inspectors, professionals working within corporations to enforce environmental norms, and many others.***

The most typical environment defender works in the context of large-scale natural resource exploitation, which takes place in or near local and indigenous communities in remote areas. These projects usually affect or otherwise implicate communities’ traditional lands, resources, and local ecosystems, which often include biodiversity, water, and forests.<sup>153</sup> In eight tropical forested countries, 93-99 percent of concessions given

<sup>152</sup> Ibid., 4.

<sup>153</sup> Ibid., 10.

to mining, logging, agriculture, and oil and gas companies were on land inhabited by indigenous and/or local communities.<sup>154</sup> In Peru, Liberia, and Indonesia, governments have given up to 40, 35, and 30 percent, respectively, of their country's land to private entities for exploitation.<sup>155</sup> As discussed in the Institutions chapter, corruption is frequently present and can be aggravated by large sums of money invested in and flowing from the projects, as well as poor governance and a lack of transparency.<sup>156</sup> According to the Resource Governance Index, more than 80 percent of 58 resource-rich countries do not have satisfactory governance in their extractive sectors.<sup>157</sup>

Environmental defenders step in to fill this governance gap and promote the environmental rule of law. They help families and communities protect their rights to land, to forests, to minerals, and to other resources. They may lead marches, speak in public meetings, or bring court cases to protect rights guaranteed by constitutions, statutes, and human rights instruments.

Because of their environmental and social advocacy, they are targeted. Environmental defenders have been subject to increasing threats and physical violence. Worldwide, especially in resource-rich countries, murders of defenders have been increasing. During 2015, more than three environmental defenders were killed each week.<sup>158</sup> In the Democratic Republic of the Congo, in Virunga National Park alone, 140 park rangers were killed in two decades.<sup>159</sup> Figures 4.8 and 4.9 show the extent and breadth of the threats facing environmental defenders.

In addition to violence, environmental defenders suffer intimidation, harassment, and criminalization. Environmental defenders also often suffer stigmatization and reputational attacks (for example, through public media). While attacks on environmental defenders are often illegal, anti-protest and anti-terrorism laws have been used to criminalize actions that should be constitutionally protected. The United Nations has recognized the threats to environmental defenders and called for their protection in its resolution on defenders protecting social, economic, and cultural rights.<sup>160</sup> Case Study 4.7 shows the tragic consequences that await environmental defenders when governments do not protect them.

Large-scale natural resource development often leads to conflicts with local and indigenous communities. In response to the projects, environmental defenders frequently organize communities and protests against the projects. In Peru, for instance, the ombudsman reported 211 social conflicts in a single month, February 2015.<sup>161</sup> The United Nations has noted that project developers and government entities, in turn, have stigmatized, criticized, criminalized, threatened, and killed defenders.<sup>162</sup> Industries most associated with murders of environmental defenders are the mining and extractive industries (42), agribusiness (20), hydroelectric dams and water rights (15), and logging (15).<sup>163</sup> In Latin America, government and corporate actors have been specifically identified as involved in the murders.<sup>164</sup> Most murders occur with impunity, with relatively few being independently investigated, let alone prosecuted. Private security companies, which lack public accountability, pose an additional

154 Rights and Resources Initiative 2015.

155 OHCHR 2015d, para. 7.

156 UNGA 2016, 14; OHCHR 2015d, 6.

157 OHCHR 2015d, 5-6; <http://www.resourcegovernance.org/resource-governance-index>.

158 UNGA 2016, 11.

159 Virunga National Park 2012.

160 UNGA 1999, 2011, 2015, 2018b; OHCHR 2008b, 2010, 2011b, 2013b, 2014a, 2014b, 2016, 2018b.

161 Ibid.

162 UNGA 2016, 11-12; OHCHR 2015d, 14-15.

163 UNGA 2016, 9.

164 Ibid.



risk.<sup>165</sup> The most vulnerable defenders are indigenous people, ethnic and racial minorities, and women, who have relatively little power.<sup>166</sup>

***These activists can help to defend a variety of substantive environment-related rights under national and international law, including land rights, rights to a clean and healthy environment, rights to subsistence, cultural rights, indigenous rights, and water rights,*** where these rights are recognized. Typically, rights to land and other resources are a central concern.<sup>167</sup> Article 1 of both international human rights covenants guarantees people the right to self-determination and to make decisions about their own natural wealth and resources.<sup>168</sup> Indigenous and certain other communities may have formal rights to a limited area of land, but also frequently have informal traditional rights and unresolved land claims to extensive areas of ancestral land.<sup>169</sup>

The absence of clear legal frameworks protecting and governing traditional land rights gives government and private actors opportunities for land grabbing and expropriation and increases the likelihood of social, and even violent, conflict due to uncertainty over land tenure. For example, in Peru petitions by indigenous people to resolve their claims to traditional land have gone unresolved for many years.<sup>170</sup> Yet a recent study found that granting legal title to land in Peru greatly improved forest management. Since the 1970s, 1,200 indigenous communities have been granted

title to 11 million hectares of forest. These communities reduced forest clearing by 75 percent and forest destruction by 66 percent between 2002 and 2005.<sup>171</sup>

Rights to subsistence and to sustainably use the resources of the land are intertwined with land rights. Forest peoples, for example, obtain resources that include food, water, and medicine from forests. When forests or other natural resources are destroyed or polluted as a result of logging, large-scale agriculture (including oil palm), hydroelectric dams, or extraction of nonrenewable resources, the subsistence resources themselves and access to them can also be lost.

***Procedural rights—particularly the rights to peaceful assembly, freedom of association, and freedom of expression—are critical to environmental defenders.*** Environmental defenders are frequently members and representatives of groups that organize in opposition to projects and advocate for their rights. Rights of peaceful assembly, freedom of association, and freedom of expression are exercised in the course of obtaining environmental and project information, organizing community action, and participating in decision making concerning community rights and resources. Associations can help facilitate these actions. When engaging in consultation with government and project proponents, defenders often exercise the rights of peaceful assembly and freedom of association. State restrictions or prohibitions on associations, including restrictions on the ability of groups to receive foreign funds, interfere with these human rights.<sup>172</sup>

As discussed in the Civic Engagement chapter, the rights to environmental and project information, to participation in decisions, to consultation, and to free, prior, and informed

165 OHCHR 2015d, 16-17.

166 UNGA 2016, 10-11, 15.

167 UNGA 2016, 19; OHCHR 2015d, 7.

168 International Covenant on Civil and Political Rights, art. 1; International Covenant on Economic, Social, and Cultural Rights, art 1.

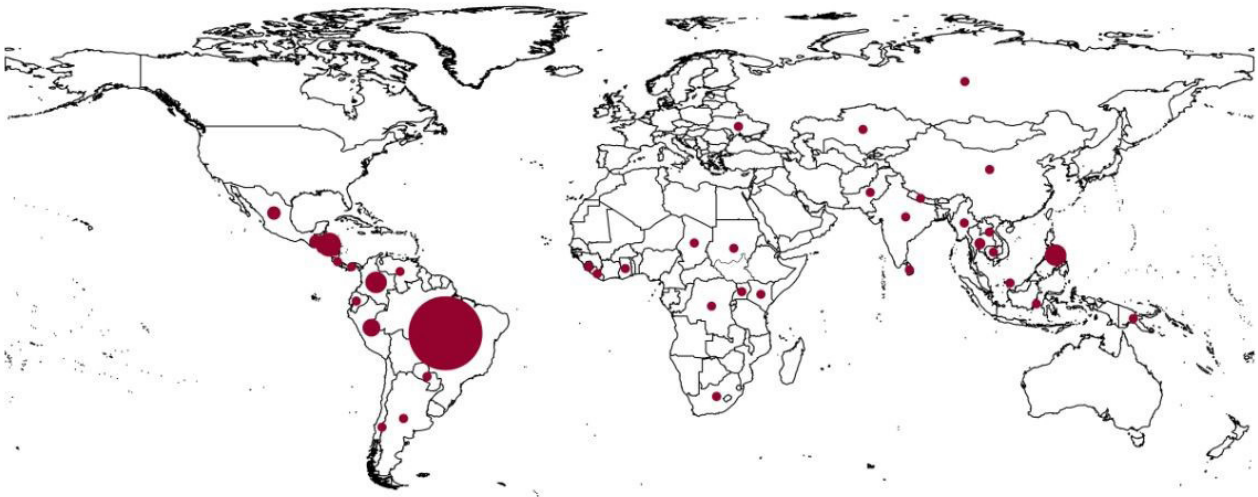
169 See, e.g., Rights and Resources Institute 2015; Landmark 2016.

170 Forest Peoples Programme 2015a; Forest Peoples Programme 2015b.

171 Blackman et al. 2017.

172 OHCHR 2015d, 17-18.

**Figure 4.8:** Countries Where Environmental Defenders Have Been Murdered (2002-2015)



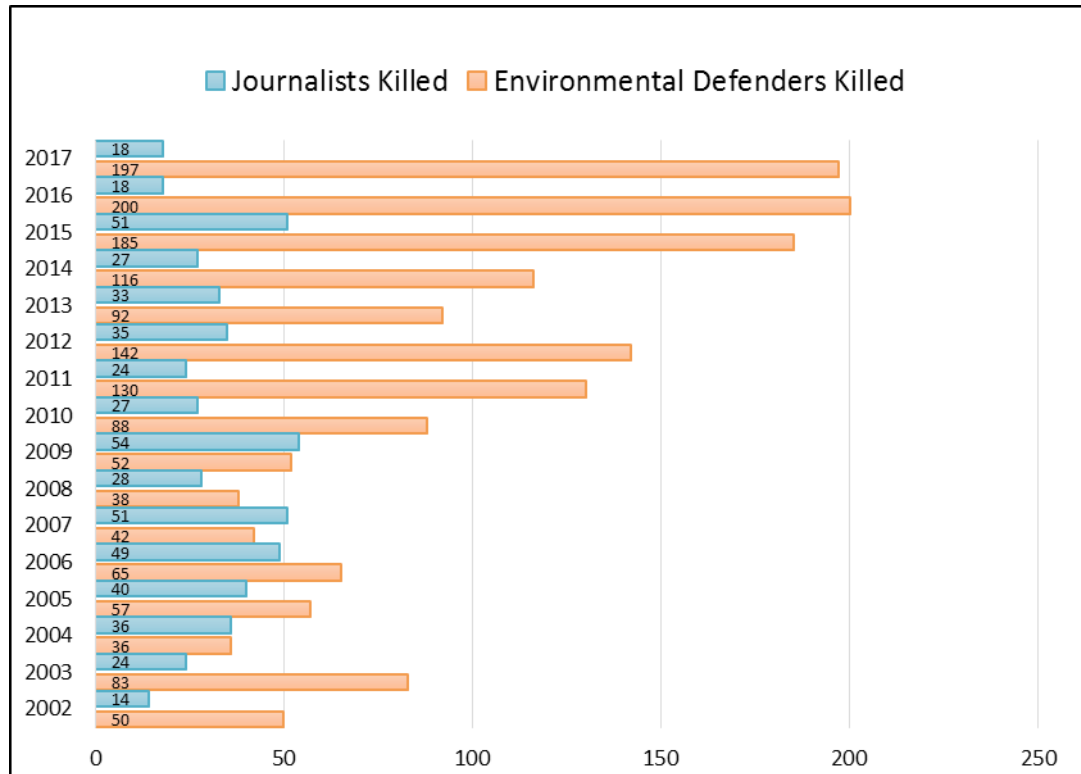
Number of environmental defenders murdered in various countries (2000-2015)		
<b>527</b> Brazil	<b>36</b> Guatemala	<b>7</b> Argentina
<b>129</b> Honduras	<b>22</b> Thailand	<b>5</b> Chad, China, Pakistan, Russia
<b>115</b> Philippines	<b>16</b> Cambodia, Democratic Republic of the Congo	<b>4</b> El Salvador, Myanmar, Papua New Guinea
<b>103</b> Colombia	<b>15</b> Nicaragua	<b>3</b> Ecuador, Sudan
<b>79</b> Peru	<b>13</b> India, Paraguay	<b>2</b> Costa Rica, Liberia, Panama, Uganda, Ukraine, Venezuela
<b>47</b> Mexico	<b>11</b> Indonesia	<b>1</b> Chile, Ghana, Kazakhstan, Kenya, Laos, Malaysia, Nepal, Sierra Leone, South Africa, Sri Lanka

Source: Environmental Law Institute, based on data from Global Witness 2014, 2015, and 2016.

consent are central to environmental rule of law. In practice, these rights tend to be integrated into the environmental rule of law of a country through laws and regulations, such as freedom of information statutes and notice-and-comment regulations. At least half of the countries of the world have adopted legislation guaranteeing access to information

in general or environmental information in particular.<sup>173</sup> The Organization of American States and the African Union have each developed model access to public information

173 Banisar et al. 2012.

**Figure 4.9: Environmental Defenders and Journalists Killed (2002-2017)**

Sources: CPJ 2018, Cox 2018, Global Witness 2014, 2016, 2017, and *The Guardian* and Global Witness 2017.

laws, for example.<sup>174</sup> But if the laws and regulations do not implement these rights, defenders need to have access to courts to obtain these protections through judicial action using procedural human rights.

Finally, ***the rights of redress and accountability are central to protection of environmental defenders.*** Frequently, murders of environmental defenders are committed with impunity.<sup>175</sup> Without strong accountability for crimes against environmental defenders, threats and killings will continue. Redress involves prompt and impartial investigation of crimes; arrest and prosecution of perpetrators, including those

ultimately responsible; compensation; and enforcement of judgments.<sup>176</sup> Thus, it is critical for strong rule of law that governments ensure swift, effective, and fair functioning of these human rights protections through the police force as well as prosecutorial and judicial services. While only 10 percent of reported crimes committed against environmental activists have been brought to justice, the Inter-American Court of Human Rights has played a role in highlighting the connection between human rights and the environment. In 2009, the Inter-American Court of Human Rights found the state of Honduras guilty of ineffectively investigating the murder of environmental activist Blanca Kawas Fernandez. The court held that the Honduran government violated her right to

<sup>174</sup> See OAS n.d.; African Commission on Human and Peoples' Rights 2012.

<sup>175</sup> Global Witness 2017.

<sup>176</sup> UNGA 2016, 6.

### Case Study 4.7: Berta Caceres

Berta Caceres was a leader of the National Council of Popular and Indigenous Organizations of Honduras, which she cofounded in 1993. She was murdered on March 3, 2016.<sup>a</sup>

Honduras has one of the highest rates of killings of environmental defenders in the world—120 activists have been killed there since 2010.<sup>b</sup> It also has very low rates of criminal justice enforcement: the vast majority of crimes are never solved.<sup>c</sup> As a development strategy, the Honduran government designated almost 30 percent of its land for mining concessions, which in turn created a demand for cheap energy. The government then approved the construction of hundreds of hydroelectric dams to supply the energy.

Two dam companies jointly planned to build the Aqua Zarc Dam across the Gualcarque River. They moved into the area in 2006 without notice, consultation, or free, prior, and informed consent of the local indigenous Lenca community. The Lenca people contacted Caceres for assistance because the dam would have interfered with their rights to safe drinking water and sanitation, an adequate standard of living, including adequate food, and the enjoyment of the highest attainable standard of health, and to sustainably use their land for their livelihoods. Caceres led a campaign against the dam, which was ignored by national and local officials. In 2013, she organized a road blockage that lasted for over a year and was effective in stopping construction. In late 2013, one of the dam companies and the International Finance Corporation withdrew from the project. In 2015, she was awarded the Goldman Prize for her advocacy.<sup>d</sup>

Although Caceres received dozens of death threats and the Inter-American Commission on Human Rights granted her emergency protection measures, the Honduran government did not implement them.<sup>e</sup> She was murdered by gunmen in her home. After her murder, several of her colleagues were also killed, and the Dutch development bank FMO and FinnFund stopped supporting the project. In response to the crime, the Honduran government arrested eight individuals, including two employees of the dam company and two members of the state security forces. After international criticism of the Honduran investigation, a group of five international experts launched an independent inquiry into the murder and issued a report concluding that high-level dam company officials were involved in planning Caceres' murder.<sup>f</sup>

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- a. The Goldman Environmental Prize 2015.
  - b. Lakhani 2016.
  - c. OSAC 2016.
  - d. The Goldman Environmental Prize 2015.
  - e. OAS 2016.
  - f. GAIPE 2017.



life and stressed the importance of protecting human rights in specifically relating to environmental human rights.<sup>177</sup>

***Environmental defenders are at great risk of physical harm unless governments not only respect defenders' substantive and procedural rights but actively protect them by ensuring their safety in the face of physical threats.*** Common approaches to protecting environmental defenders include whistleblower laws and laws preventing retaliation (including for so-called Strategic Litigation Against Potential Plaintiffs or "SLAPP Suits").

Some environmental defenders are employees who expose wrongdoing of companies or governments by which they are employed. These whistleblowers often suffer attacks for their efforts. As such, ***whistleblower laws are critical to protecting environmental defenders.*** These laws provide protection from retribution and/or rewards to government employees and/or other persons who report violations of the law. These protections allow those who learn of malfeasance to seek not just legal protection but also financial rewards for bringing the illegal activity to the attention of the authorities. Typically, whistleblowers receive a percentage of the penalty assessed, in recognition of the benefit provided to the government, as well as their personal and professional risks incurred in doing so. In the United States, for example, while the Whistleblower Act of 1989 provides general protection to government employees who report wrongdoing, more than 25 laws—mostly related to natural resources—have provisions explicitly protecting whistleblowers. One of those laws, the 1978 Fish and Wildlife Improvement Act, as amended, provides whistleblower rewards

for more than 40 wildlife laws.<sup>178</sup> As of 2017, 32 countries had adopted dedicated laws to protect whistleblowers, and 27 more countries had adopted legal provisions in various laws to protect whistleblowers (see Figures 4.10 and 4.11).<sup>179</sup>

Although many countries worldwide have adopted at least some whistleblower laws, studies by the G20 and others report that most countries do not provide full legal protection and that many laws are clearly inadequate.<sup>180</sup> The Organisation for Economic Co-operation and Development,<sup>181</sup> Transparency International,<sup>182</sup> and the Government Accountability Project<sup>183</sup> have suggested that six essential elements of adequate legislation include:

1. protection of employees from discriminatory or disciplinary action, if they disclose in good faith and on reasonable grounds;
2. a clearly defined scope of protected disclosures and identification of the types of persons afforded protection;
3. robust and comprehensive protection of whistleblowers' identity, safety, and employment;
4. clearly defined procedures and prescribed channels for facilitating the reporting of suspect acts, including the provision of protective and easily accessible whistleblowing channels;

178 16 U.S.C. sec. 7421 (k).

179 Many countries that adopted dedicated laws to protect whistleblowers also adopted legal provisions in environmental, securities, workplace, and other laws to protect whistleblowers. In addition to the 59 countries identified in Figure 4.1, Kosovo adopted a dedicated whistleblower law in 2011.

180 OECD 2011-2012; Wolfe et al. 2014.

181 OECD 2011-2012; Wolfe et al. 2014.

182 Transparency International 2013.

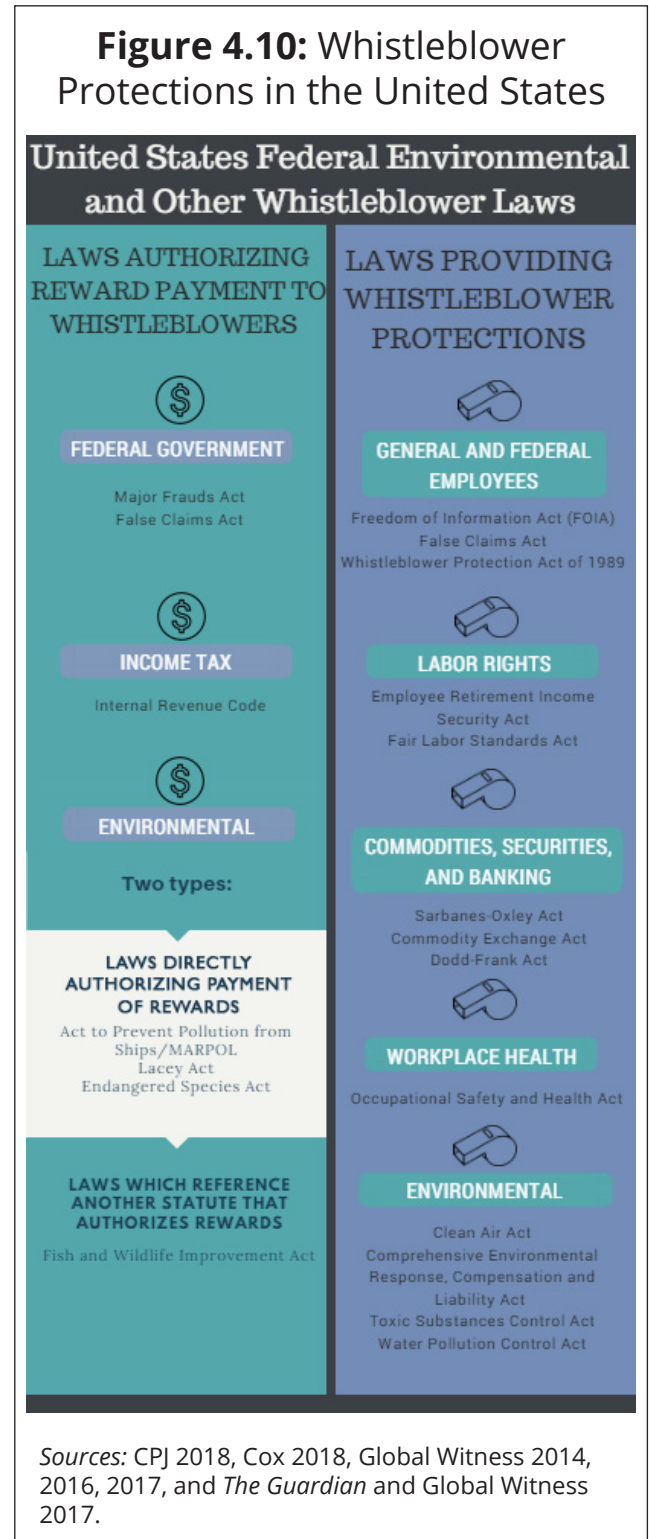
183 Devine 2016.

177 UNEP 2014.

5. effective protection mechanisms, including use of a special accountable body with the power to receive and investigate complaints; and
6. awareness-raising, communication, training, and periodic evaluation of the effectiveness of the protection framework.<sup>184</sup>

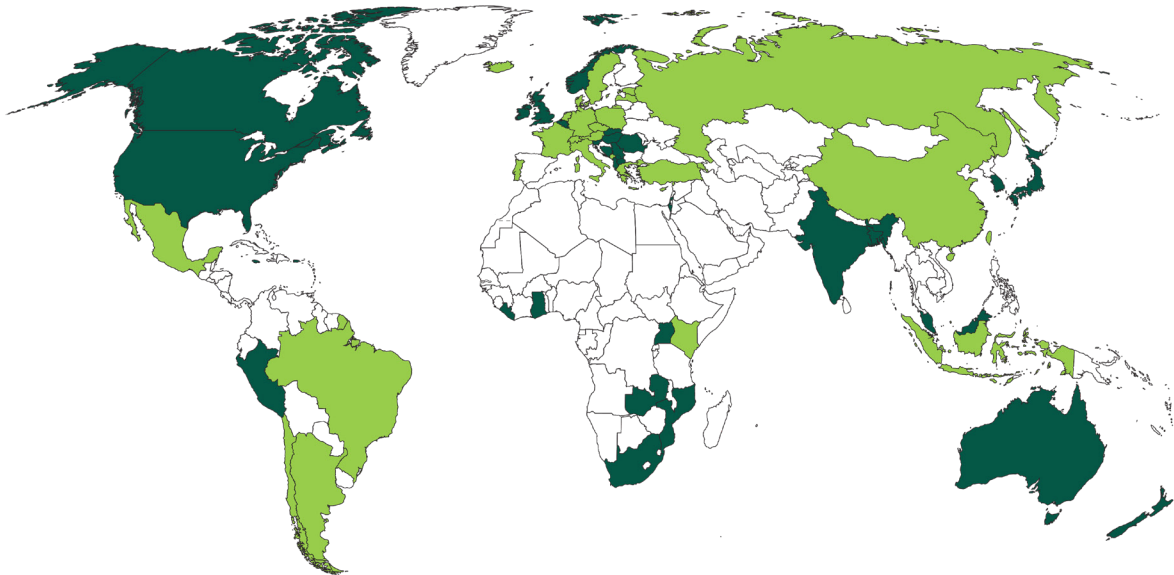
There are also practical and political elements of protecting whistleblowers. For whistleblower protection legislation to be effective, corrupt institutions and officials must not interfere with its implementation. Strong penalties for official abuse of power can help deter such behavior. Officials who immediately publicize threats against environmental defenders, especially before the conflict escalates (and defenders are killed), can help mobilize government and community resources to protect defenders. They can also prioritize prosecution of violators of environmental defenders' rights in order to show firm rule of law and deter further violations. The provision of extra damages to victims of environment-related crimes and their families is also a strong deterrent. And creation of an ombudsman to act as a trusted focal point for receiving complaints and reporting on threats and violations of constitutional and human rights can help environmental defenders feel they have an ally in government to whom they can go when needed.

The protection of environmental defenders is not just a matter for government, however. Corporations can prioritize early and frequent engagement with communities affected by their projects and operations to ensure that all voices are heard before a project takes form. **Many conflicts can be defused by according those affected by environmental issues the opportunity to be heard and to**



184 Wolfe et al. 2014; OECD 2011-2012; Transparency International 2013.

**Figure 4.11: Countries with National Laws Protecting Whistleblowers (2017)**



- Countries with dedicated national laws protecting whistleblowers:  
 Albania, Australia, Bangladesh, Belgium, Bosnia, Canada, Ghana, Hungary, India, Ireland, Israel, Jamaica, Japan, Liberia, Luxembourg, Macedonia, Malaysia, Malta, Mozambique, New Zealand, Norway, Peru, Republic of Korea, Romania, Serbia, Slovakia, Slovenia, South Africa, Uganda, United Kingdom, United States, Zambia
- Countries with other national miscellaneous laws or provisions protecting whistleblowers:  
 Argentina, Armenia, Austria, Brazil, Chile, China, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Iceland, Indonesia, Italy, Kenya, Latvia, Mexico, Montenegro, Netherlands, Poland, Portugal, Russia, Sweden, Switzerland, Turkey

Source: Environmental Law Institute.

*Note:* This map includes dedicated whistleblower laws, as well as partial whistleblower protections included in criminal codes, laws regulating public servants, and company and securities law. It excludes most other sector laws, including those related to health, safety, and the environment, which represent an additional substantial body of law in the United States. Because no single source consulted has compiled a comprehensive list of whistleblower laws worldwide, there may be additional whistleblower provisions in countries not listed. Countries with dedicated whistleblower laws are indicated in the table.

***have their concerns taken into account during the project design phase***, rather than being presented a fully-formed or almost-complete project into which they can have little meaningful input. Common approaches for engaging affected communities and reducing conflict around resource-related projects include good international practices regarding free, prior, and informed consent,

mitigation of environmental impacts, and consultation with affected populations. Companies can also join multi-stakeholder and industry-specific initiatives aimed at strengthening environmental rule of law in certain industries, such as the Extractive Industries Transparency Initiative.<sup>185</sup> Financial

<sup>185</sup> The Extractive Industries Transparency Initiative n.d.

institutions, both domestic and international, can ensure that environmental and social safeguards are in place and met as a condition for receiving funding by following internationally accepted norms such as the Equator Principles,<sup>186</sup> and businesses can follow the Guiding Principles on Business and Human Rights.<sup>187</sup> Such practices are discussed in detail in the Civic Engagement chapter.

***Civil society plays a key role in protecting environmental defenders.*** Civil society is closely involved in helping to formulate many of the multi-stakeholder and voluntary initiatives referenced above. In addition, several organizations have created awards to recognize and publicize the work of environmental defenders, including the Goldman Prize and the Right Livelihood Awards.<sup>188</sup> Organizations also provide resources and support to defenders, through efforts such as Environmental-Right.Org, a portal for environmental defenders, and organizations like the Environmental Law Alliance Worldwide, which trains and supports environmental lawyers and defenders from around the world.<sup>189</sup>

## 4.5 Opportunities and Recommendations

Environmental rights and duties have taken root around the globe through national constitutions and statutes, international and regional human rights instruments, and other international and regional legal instruments. While environmental law typically focuses on environmental duties—including, for example, the duty of regulated actors to control and report their air pollution, water pollution,

solid waste, and toxic waste; and the duty of project proponents and the government to undertake environmental impact assessments for proposed projects that could harm the environment—historically, there has not been a commensurate emphasis on environment-related rights.

There are many sources of relevant rights, including environmental statutes, constitutions, and regional and international human rights instruments, among others. Countries have adopted a wide variety of approaches for framing environment-related rights in their source and scope. A substantial number of countries and regions have adopted constitutional and human rights to emphasize the fundamental importance of public health and the environment. That said, even countries not emphasizing a rights-based approach may utilize important legal approaches to protect nature, including environmental impact assessment and efforts to ensure that decisions on development projects include consideration of the value of ecological services that the projects can impair.

Constitutional and human rights are supported and made possible by a healthy environment that enables people to realize their rights to water, health, and life, among others. Rights provide an independent basis for environmental protection using a rights-based approach. Through their interdependence, rights-based approaches and environmental rule of law can create a virtuous cycle where they reinforce each other and support general rule of law and sustainable development. Similarly, failure to respect rights can weaken the environmental rule of law and undermine environmental protection, social justice, and economic progress.

***A rights-based approach can strengthen environmental rule of law*** by elevating the importance of environmental protections

186 The Equator Principles 2013.

187 OHCHR 2011a.

188 The Goldman Environmental Prize 2015; The Right Livelihood Award, n.d.

189 ELAW n.d.



and ensuring that those protections are realized equally and equitably. Framing environmental protection in terms of constitutional or human rights can help to broaden understanding of the importance of the environment and the key role it plays in supporting society and the economy.

Rights-based approaches are still nascent in many countries, and ***the extent and nature of rights-based approaches continue to evolve***. Countries could benefit from exchanging experiences and good practices on operationalizing environment-related rights, as most countries have recognized the rights in their constitutions, but only relatively few have undertaken substantial measures to give them full force through the country's laws, regulations, institutions, and practices. Moreover, research on the effectiveness of specific rights-based approaches (such as constitutional rights-based litigation) is limited.<sup>190</sup> ***Further research and knowledge on the effectiveness of specific rights-based approaches is needed to better inform government and civil society action.***

Enshrining a right to a healthy environment in national and subnational constitutions signals to all parties that ***environmental protection is commensurate with other rights and responsibilities*** contained in the constitutions. Recognition of a constitutional right to a healthy environment can help companies and citizens alike come to see environmental protection as essential to a free and healthy society.

The right of nondiscrimination cuts across many aspects of environmental rule of law. The critical need for protection of gender and indigenous rights has been much more widely understood, but ***a significant implementation gap remains in securing nondiscrimination with respect to access to and protection of environment-related rights of disadvantaged groups***. One remedy is to consider the rights of members of marginalized populations in each government decision to act or not to act in order to help identify potential consequences for marginalized populations. By definition, marginalized populations rarely have access to and voice in government processes. Further, government may not be aware of the differential impacts that its action or inaction may have on marginalized populations. Therefore, by establishing procedures for assessing what impacts its actions might have on marginalized populations, a government can help bring to light and avoid unintended consequences.

Environmental defenders remain highly vulnerable and under attack across the globe. ***It is incumbent upon all governments to prioritize protection of environmental defenders*** from harassment and attack and to bring those who harm or threatened defenders to justice swiftly and definitively. Tolerance of intimidation of environmental defenders undermines basic human rights and environmental rule of law. One measure to improve protection of environmental defenders could be an ***annual report to the United Nations of efforts by each country to investigate and prosecute crimes against environmental defenders*** and the results of the efforts. The report could also highlight measures to try to prevent attacks on environmental defenders. Such a report could help to focus government attention and foster political will to protect environmental defenders.

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190 Conducting a global survey of the impact of constitutional provisions that guarantee environmental rights,

David Boyd (2012a) concluded that such provisions exert extensive influence on national legislation; are enforceable in most nations that have the provisions; increase public access to courts; and exist in nations with better national environmental performance.

Implementing environmental rule of law to ensure meaningful participation in government decision making and development projects can help avert controversy and opposition to development, reducing delays and associated costs. **By implementing good practices regarding free, prior, and informed consent as well as access to information and consultation with affected populations, many conflicts can be avoided before they have a chance to arise and fester.**

The provision of rights in law has little meaning if citizens are unaware of them or cannot exercise them. **Governments should publicize the rights available to the public and ensure a robust, free civil society able to help citizens actuate these rights.** Nongovernmental organizations and a free press are key actors in helping citizens learn about their rights, and government should consider them allies, not enemies, in ensuring the public knows about its rights regarding development projects, pollution, or other environmental harms.

**Creating ombudsman and whistleblower protections can provide safe, recognized channels for reporting environmental infractions while reducing potential backlash from reporting.** Provision of rewards for whistleblowing is an important element in combatting corruption and malfeasance that has worked well in many countries.

Countries are exploring how rights-based approaches can support the environmental rule of law, and how environmental rule of law can in turn support the realization of constitutional and human rights at the international, regional, national, and subnational levels. There are many opportunities to strengthen environmental rule of law by integrating a right-based approach into environmental protection. This in turn supports human rights themselves so that communities and societies can thrive

in a socially just atmosphere based upon a healthy environment and sustainable natural resources.