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Constitutional Environmental Rights and Public Interest Environmental Litigation in Lusophone African Countries: The Angolan Model and Its Implications for China

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Abstract: Since the 1990s, Lusophone African countries have embarked on the path of constitutionalizing environmental rights. Through three waves of constitutional entrenchment, the design of environmental rights provisions in these countries has been continuously refined, and the substantive scope of these rights has gradually expanded. Countries such as Angola have even established judicial remedies for constitutional environmental rights, thereby establishing a justiciable framework. The constitutional environmental rights of African countries offer a useful comparative model for research in comparative environmental law. Angola stands out as a paradigm among African countries in constitutionalizing environmental rights: first, its constitutional provisions expressly confer on every citizen the right to an environment that is not harmful to health and well-being, and even elevate environmental rights to the level of human rights protection; second, they require and enumerate the specific duties of the state in environmental protection; and third, a series of constitutional provisions constructs a justiciable remedial mechanism for environmental rights, safeguarding both substantive environmental rights as fundamental citizens' rights and procedural rights such as the right to environmental information, making them the object of domestic environmental public interest litigation and providing a constitutional basis for broadening standing requirements in such litigation. The constitutional environmental right in Angola thus possesses considerable theoretical value and practical significance.

Keywords: Lusophone African countries; Constitutional environmental rights; Judicial remedies; Angola

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1. Introduction

The constitutionalization of environmental rights has long been a topic of vigorous debate in Chinese legal scholarship. A survey of foreign constitutional documents can inform future legislative efforts in China. In 1976, Portugal amended its Constitution, becoming one of the first countries in Europe to entrench environmental rights in its constitution. Influenced by Portugal, Brazil amended its Constitution in 1988,

incorporating environmental protection into Article 225. Lusophone African countries likewise gradually began exploring the constitutionalization of environmental rights from the 1990s onward. In 2011, Article 61 of the Constitution of Timor-Leste added an "environmental right." The author does not deny the research value of legislative examples from other members of the Community of Portuguese Language Countries (CPLP), such as Brazil and Timor-Leste, and has preliminarily collected relevant materials; given limitations of capacity, these will be addressed in separate future writings.

As the continent with the largest number of countries that have constitutionalized environmental rights, Africa offers a wide variety of constitutional environmental rights provisions, providing richer models for comparative research. Regarding constitutional environmental rights in African countries, Dr Zhang Xiaohu, a young Chinese scholar of African law, has provided a detailed discussion. This article is a further refinement of Dr Zhang's research, with its scope concentrated on the Lusophone African countries: Angola, Mozambique, Guinea-Bissau, Cape Verde, and São Tomé and Príncipe. This article does not avoid the influence of the broader environment and the larger historical context on the legislation of Lusophone African countries, and therefore inevitably draws extensively on Dr Zhang's research. On the one hand, as African countries, Lusophone African countries inevitably share the commonalities of "African states"; on the other hand, this article attempts to explore their specificities and commonalities as "CPLP states." Overall, the design of constitutional environmental rights provisions in CPLP member states has been continuously refined, and the substantive scope of these rights has gradually expanded. Countries such as Angola and Mozambique have established judicial remedies for constitutional environmental rights, rendering them justiciable.

This article contends that Angola is the paradigm of constitutionalizing environmental rights among Lusophone African countries: first, the relevant constitutional provisions expressly confer on every citizen the right to an environment that is not harmful to health and well-being, and even elevate environmental rights to the level of human rights protection; second, they require and enumerate the specific duties of the state in environmental protection. At the same time, the Angolan Constitution constructs a justiciable remedial mechanism for environmental rights. Angola safeguards both substantive environmental rights as fundamental citizens' rights and procedural rights such as the right to environmental information, making them the object of domestic environmental public interest litigation and providing a constitutional basis for relaxing standing requirements in such litigation. The constitutional environmental right in Angola thus possesses considerable theoretical value and practical implications.

2. A Survey of environmental protection in Lusophone African countries at the constitutional level

Owing to the enormous destruction of Africa's environmental resources by colonial activities, environmental crises in various countries gradually erupted after independence. Under the influence of the 1981 African Charter on Human and Peoples' Rights and international environmental movements, environmental rights began to be written into the constitutions of many African countries as a type of human right. To date, approximately 33 African countries have expressly provided for environmental rights clauses in their constitutions. From the initial declaratory provisions to the composite environmental rights-and-duties clauses in constitutional amendments over the past decade, constitutional environmental rights in African countries have been continuously refined and have even acquired justiciability [1]. This article contends that

the constitutionalization of environmental rights as a constitutional right in Lusophone African countries was deeply influenced by the broader historical context.

2.1. The beginning of constitutional entrenchment of environmental rights in Lusophone African countries in the 1990s

From the broader historical perspective, African countries gained independence in quick succession from the 1960s onward. Lusophone African countries were no exception. In the exploration of national independence and human rights protection, the first regional human rights convention to incorporate environmental rights was the 1981 African Charter on Human and Peoples' Rights, Article 24 of which provides that "All peoples shall have the right to a general satisfactory environment favourable to their development" [2]. In addition, this article suggests that external factors influencing Lusophone African countries may also include Portugal's constitutionalization of environmental protection. As noted earlier, "in 1976, Portugal amended its Constitution, writing constitutional environmental rights into Article 66, becoming one of the first countries in Europe to constitutionalize environmental rights." Article 66 of the Portuguese Constitution provides: "Everyone shall possess the right to a living environment that is healthy and ecologically balanced." According to the prevailing view in Portuguese scholarship, as a "third-generation human right," the constitutional environmental right provided for in the Portuguese Constitution is relatively specific; the two standards of "healthy for humans" (humano sadio) and "ecologically balanced" (ecologicamente equilibrado) are relatively clear and possess a certain flexibility.

Thereafter, beginning in 1990, African countries entered a "golden decade" of constitutionalizing environmental rights. During this period, the 1990 Constitution of Mozambique, the 1990 Constitution of São Tomé and Príncipe, the 1992 Constitution of Angola, and those of several other Lusophone African countries incorporated environmental rights into their constitutions, making them the first batch of African countries to explore constitutional environmental rights [3]. Specifically, Article 90 of the Mozambican Constitution provides that all persons have the right to live in a balanced environment and the duty to protect it. Article 49(1) of the Constitution of São Tomé and Príncipe provides: "Everyone shall have the right to reside and to live in an environment suitable for human life, and the duty to protect the environment." Article 24 of the 1992 Constitutional Law of the Republic of Angola (Lei Constitucional da República de Angola) provides: "All persons shall have the right to live in a healthy and unpolluted environment and the duty to protect and preserve the environment." It is readily apparent that, in terms of textual formulation, Lusophone African countries share much in common with Portugal. In particular, with respect to adjectives qualifying the environment, terms such as "clean," "healthy," "sustainable," and "suitable for humans" appear repeatedly.

Chinese scholarship generally holds that the human rights movement and the wave of national independence were the fundamental reasons driving African countries to constitutionalize environmental rights during this period. Influenced by Western environmental movements and amid global calls for the constitutionalization of environmental rights, African countries began exploring the inclusion of environmental rights clauses in their constitutions, thereby addressing the environmental resource crises caused by colonial plunder and attempting to restore the ecological environment. Lusophone African countries were no exception; in studying and adopting economic plans or formulating economic policies to promote economic development, they began to incorporate environmental considerations. "In the planning of relevant economic activities, environmental protection precautionary measures began to be designed, typically administrative procedures to prevent environmental pollution and to warn those who damage the environment".

2.2. The development of constitutional environmental rights in Lusophone African countries

"When a new government or ruling party comes to power, it often first amends the constitution or enacts a new one to proclaim its policy agenda and governing philosophy; constitutional stability is often difficult to achieve, but this simultaneously creates opportunities for incorporating environmental rights, as a representative emerging human right, into the constitution" [4]. The constitutionalization of environmental rights is regarded as an important means for new regimes to improve citizens' living environment and gain public support. As far as Lusophone African countries are concerned, with the exception of Guinea-Bissau as a special case, all Lusophone African countries provide in the chapters of their constitutions on fundamental citizens' rights and guarantee that environmental rights are fundamental citizens' rights [5]. The environment is understood as "the interaction of all natural, human, and cultural factors suitable for the balanced development of human life," and this right is incorporated into the category of fundamental citizens' rights and guarantees. Article 39 of Angola's 2010 Constitution provides: "1. Everyone has the right to live in a healthy and unpolluted environment and the duty to defend and preserve it. 2. The state shall take the requisite measures to protect the environment and species of flora and fauna throughout national territory, maintain the ecological balance, ensure the correct location of economic activities and the rational development and use of all natural resources, within the context of sustainable development, respect for the rights of future generations and the preservation of species. 3. Acts that endanger or damage conservation of the environment shall be punishable by law" [6]. Article 73 of Cape Verde's 2010 Constitution provides: "1. Everyone shall have the right to a healthy life and an ecologically balanced environment and the duty to defend and preserve it. 2. To guarantee the environmental right, public authorities shall be responsible for: (1) formulating and implementing appropriate territorial planning policies, protecting and preserving the environment and rationally utilizing all natural resources, and protecting the environment's capacity for regeneration and ecological stability; (2) promoting environmental education, respect for environmental values, and combating desertification and drought" [7].

3. A survey of environmental protection systems in Lusophone African countries at the sectoral legislation level

In addition, to implement constitutional provisions, Lusophone African countries have enacted a series of supporting laws, which are surveyed in detail below.

3.1. The implementation of constitutional environmental rights in Lusophone countries

To better implement the provisions on "constitutional environmental rights" added by Article 39 of the 1992 Constitution, Angola adopted the Basic Environmental Law (Lei de Bases do Ambiente)—Law No. 5/98—in 1998. Article 1 of this law defines the concepts and basic principles of environmental protection, improving quality of life, and rational use of natural resources. Angola's Basic Environmental Law expressly emphasizes constitutional principles: "All citizens have the right to live in a healthy environment and the right to benefit from the state's rational utilization of natural resources." On 10 October 2000, Angola adopted Law No. 39/00, enacting the Environmental Law on Petroleum Activities. On 18 January 2006, Angola adopted Law No. 3/06, enacting the Law on Environmental Protection Associations (Lei das Associações de Defesa do Ambiente). On 13 July 2007, Angola adopted Law No. 59/07, enacting the Environmental Licensing Law.

On 13 January 2010, Angola adopted Law No. 1/10, enacting the Environmental Enforcement Law, which regulates the enforcement actions of Angolan environmental enforcement authorities. Through this series of laws, Angola has gradually formed a comprehensive supporting legal system for constitutional environmental rights. Although some sectoral laws may not appear to have a direct relationship with constitutional environmental rights, all of the above sectoral laws and regulations involve environmental interests.

This article considers noteworthy Law No. 3/06—the Law on Environmental Protection Associations—under Article 5 of which environmental protection groups have the right to participate in the formulation of environmental policy. The Angolan government highly affirms the role of environmental protection groups and associations: "Through their efforts in awakening public awareness of environmental protection and promoting environmental education, many environmental groups in Angola have become indispensable assistants to Angolan public administration." Under Article 8 of the Law, environmental protection groups have the right to bring or participate in environmental public interest litigation. The Law on Environmental Protection Associations holds that "environmental protection groups represent broad and multiple individual interests, and these individual interests possess a public character; therefore, environmental protection groups have legitimacy as plaintiffs in environmental public interest litigation" [8]. Article 13 of the Law provides that "when environmental protection groups bring environmental public interest litigation or administrative public interest litigation, they shall be exempted from all related litigation costs in accordance with law." It is readily apparent that the Angolan government highly recognizes and substantially supports environmental protection groups.

Compared with Angola, Mozambique and São Tomé and Príncipe have also enacted a series of sectoral laws and regulations to implement constitutional environmental rights. To implement the "constitutional environmental right" provided in Article 90 of the 1990 Mozambican Constitution, Mozambique adopted Government Decree No. 5/95 on 6 December 1995, which elaborated Mozambique's national environmental policy. This policy can be briefly summarized in the following two points: (1) The basic principles of Mozambique's national environmental policy: based on national conditions, strike a balance between socio-economic development and environmental protection, safeguard the country's sustainable development, and improve the people's quality of life. (2) The approach and direction of Mozambique's national environmental policy: fully mobilize the masses, cultivate public environmental awareness, and encourage nationwide participation in environmental protection. At the specific working level, environmental protection groups are encouraged and guided to actively participate in government decisions involving natural resource development.

In 1997, Mozambique adopted Law No. 20/97, enacting its first Environmental Law, from which point Mozambique's environmental protection finally had a dedicated sectoral law. On 29 September 2004, Mozambique adopted Decree No. 45/2004, which set out explicit provisions on environmental impact assessment procedures.

To further implement Article 49 of the 1990 Constitution of São Tomé and Príncipe, that country enacted a concentrated set of laws and regulations in 1999. These mainly include Decree No. 37/99, adopted on 30 November 1999 (concerning environmental impact assessment procedures), and Law No. 11/99 (the Fauna and Flora Protection Law) and Law No. 10/99 (the Basic Environmental Law), both adopted on 31 December 1999.

3.2. A preliminary exploration of the environmental legal protection system in Guinea-Bissau

Compared with other Lusophone African countries, Guinea-Bissau can fairly be regarded as a representative "laggard"; its environmental protection legislation lags considerably behind that of other Lusophone African countries. Unlike Timor-Leste, which fully exploited its "latecomer advantage," Guinea-Bissau is not only lagging but appears to offer little prospect. According to the 2000 country report of the International Union for Conservation of Nature, Professor Cruz observed that "Guinea-Bissau's environmental laws and regulations remain weak in their textual framework, lacking transparency and lacking the foreseeability and certainty that law should possess. At the level of supporting implementation measures, Guinea-Bissau's environmental law further lacks effective administrative control and division of labor and cooperation. There is a lack of monitoring mechanisms and a lack of evaluation mechanisms, so the implementation effects of the law cannot be regarded with optimism" [9]. To date, only two laws relating to environmental protection have been enacted—Law No. 1/2011, adopted on 2 March 2011, and Law No. 5/2100, adopted on 22 May 2001. Law No. 1/2011 is the Basic Environmental Law, while Law No. 5/2100 is the Forest Law. Article 6 of Guinea-Bissau's Basic Environmental Law provides: "The legislative purpose of the environmental law is to contribute to lasting socio-economic development, satisfy the people's basic living needs, and promote public participation in decision-making." Articles 38 and 39 of Guinea-Bissau's Basic Environmental Law provide that social monitoring bodies, local associations, and NGOs may participate in the formulation of government environmental policy. Compared with Professor Cruz's 2000 report, Guinea-Bissau appears to have made some degree of institutional improvement. Guinea-Bissau's environmental law now has a relatively complete framework, has improved legal transparency to a certain extent, and has preliminarily acquired the foreseeability and certainty that law ought to possess. At the level of supporting implementation measures, preliminary administrative control has also been undertaken, and monitoring and evaluation mechanisms have been initially established. Of course, owing to constraints in data collection, the specific implementation effects of Guinea-Bissau's Basic Environmental Law remain unknown. The author will continue to follow this issue.

4. Implications of the Angolan model for China

4.1. Equal emphasis on remedies for substantive rights and procedural rights

How to handle the relationship between economic development and environmental protection is a thorny issue in the modernization processes of African countries, and Lusophone African countries are no exception. Article 39 of the Angolan Constitution on environmental rights and related Angolan judicial practice have clearly defined the relationship between economic development and environmental protection. On the one hand, the government has a responsibility to promote economic and social development, but this is premised on the state fulfilling its environmental protection obligations—"natural resources shall not be destroyed" [10]. In Angola, remedies for substantive rights also receive considerable attention. In Angola, Article 39 of the Constitution is not merely a declaratory slogan; armed with subsequent procedural rules, it has fulfilled the original intent of the constitutional provision.

The Angolan Constitution likewise combines environmental rights with citizens' right to information, safeguarding environmental rights from both procedural and substantive dimensions. Angolan environmental organizations have the right to request government agencies to disclose information. Angolan courts consider procedural justice to be one of the elements of greatest concern to the courts. Angolan government agencies

must comply with the principle of "procedural fairness" and fulfill the obligation of environmental information disclosure in the course of administrative enforcement and decision-making. In summary, under the Constitution, the Basic Environmental Law, and other provisions, everyone has the right to live in an environment that is not harmful to health and well-being, and everyone has the right to access information held by the state. Accordingly, every Angolan citizen has the right to obtain environmental information held by the state concerning whether the environment is harmful to health and well-being. At the same time, citizens' right to access environmental information has become a representative procedural right within the constitutional environmental right.

4.2. Environmental public interest litigation: Constitutional environmental rights as the object of environmental public interest litigation

Under Article 39 of the Angolan Constitution on environmental rights and the litigation practice of Angolan courts in remedying environmental rights, an environmental public interest litigation system has been formed in which the protection of constitutional environmental rights serves as the object of the right. The substantive environmental right not to be harmful to citizens' "health and well-being," together with procedural rights such as access to information, constitutes important content of judicial remedies for environmental rights. On the other hand, Angolan courts' interpretation of environmental rights in judicial precedents has, in turn, promoted the implementation of constitutional environmental rights and the development of environmental public interest litigation. Consequently, with respect to standing in environmental public interest litigation, existing law does not impose many restrictions. Article 38 of the Constitution provides that any individual or collective may bring litigation to defend their rights when environmental rights are infringed. Standing rules for environmental public interest litigation are likewise broadly framed, and virtually all reasonable claimants can become plaintiffs in such litigation.

In summary, as far as Lusophone African countries are concerned, Angola's model of constitutional environmental protection is probably the most worthy of reference for China. Angola has preliminarily formed a constitutional environmental rights system extending from rights to responsibilities and from legislation to remedies. Constitutional environmental rights include citizens' environmental rights, state environmental responsibilities, legislative guidance for environmental protection, and judicial remedies for environmental rights. Overall, Angola's design of constitutional environmental rights is more operational. On the one hand, it ensures active citizen participation and involvement. By combining citizens' environmental rights with environmental protection duties, it enhances public participation in environmental protection and facilitates cooperation with the state's environmental protection efforts. On the other hand, it impels the government to act proactively and fulfill its responsibilities.

4.3. Environmental impact assessment: Parallel general provisions and specific requirements

Article 10 of Angola's Basic Environmental Law provides that all projects involving community interests that may cause damage to natural resources and ecological harm must undergo environmental impact assessment before implementation, and public participation must be included in the assessment process. Article 16 provides that environmental impact assessment applies to the environmental impact study of each specific project and must contain at least: (1) a non-technical summary of the project; (2) a description of the activities to be carried out; (3) a general description of the local environmental conditions; (4) a summary of public consultation comments and suggestions; (5) a description of the environmental and social changes the

project may bring about; (6) an explanation of the measures conceived to eliminate or minimize negative social and environmental impacts; and (7) systematic measures formulated for project implementation and monitoring.

Article 10 of Angola's Basic Environmental Law contains general provisions on environmental impact assessment, while Article 16 contains specific requirements for environmental impact assessment. This fully demonstrates Angola's high regard for and strict implementation of environmental impact assessment for projects. It is evident that Angola has made environmental impact assessment an effective means of environmental management, playing a role in coordinating conflicts between the ecological environment and economic development and balancing contradictions between the two. In addition, environmental impact assessment systems generally implement the environmental protection policy of "prevention first," aimed at ex ante prevention. However, from Angola's environmental impact assessment requirements, it can be seen that the first five items are aimed at ex ante prevention, the sixth at in-process control, and the seventh at ex post remediation. In sum, Angola's environmental impact assessment system is not solely aimed at ex ante prevention but also emphasizes in-process control and ex post remediation. It can be said that Angola implements a comprehensive, broad, and multilevel "trinity" environmental impact assessment system.

4.4. Environmental liability: Diverse types and broad scope

Chapter II of Angola's implementing regulations on environmental damage provides for four different types of environmental liability. Article 5 on liability for environmental damage provides that all persons who cause damage to the environment through intent or negligence have the obligation to repair the environmental damage or compensate the state and individuals for losses thereby caused, in the form of compensation. Article 6 on strict liability provides that any person who, in carrying out any activity, causes damage to any environmental component and thereby infringes the rights or interests of others, regardless of whether intent or negligence exists, has the obligation to repair and prevent the damage caused by such act. Article 7 on liability for environmental pollution provides that liability for compensation or indemnification arises where environmental pollution causes direct harm to health, or where the action of certain pollutants on environmental components leads to environmental degradation and thereby indirectly causes or aggravates pollution. Article 8 on liability for pollution diffusion provides that liability for compensation or indemnification arises where pollution spreads over a large area and causes damage to lawful interests or environmental components, or causes damage to a large number of people.

As set out above, Angola's environmental legal system establishes four distinct forms of environmental liability: liability for environmental damage, strict liability, liability for environmental pollution, and liability for pollution diffusion. On the one hand, environmental liability is provided for in situations causing environmental damage directly or indirectly; on the other hand, environmental liability is also established for situations causing environmental pollution on a small scale or over a large area. This highlights Angola's commitment to safeguarding the state's environmental rights and protecting citizens' environmental rights. However, this also means that citizens and enterprises, in order to prevent threats to or destruction of the environment, need to continuously regulate their own conduct and prevent human activities or project investments from causing potential pollution to the environment and thereby incurring environmental liability.

4.5. Environmental licensing: Equal emphasis on regulation and incentives

Angola's Environmental Licensing Law defines an environmental license as an administrative procedure in which the agency responsible for environmental protection reviews whether a project complies

with legal and technical conditions and authorizes the siting, installation, expansion, and operation of enterprises and activities deemed to cause or potentially cause pollution, or authorizes, in any manner, ways of preventing environmental degradation together with applicable technical standards. Accordingly, Angola's Environmental Licensing Law provides that enterprises must obtain an environmental license, an environmental installation license, and an environmental operating license in the course of production and operation, so as to rationally develop and utilize limited environmental resources and ensure coordinated economic, environmental, and social development. At the same time, Article 14 of the Environmental Licensing Law provides that an environmental operating license must include: (1) reference documents on the best methods and technologies for carrying out the licensed activity, including all measures necessary to comply with the protection of air, water, and soil, animals, and plants, and to prevent or reduce noise pollution and production waste to acceptable levels; (2) emission limits for polluting substances that may be discharged during the activity; (3) a description of measures to ensure adequate protection of soil and groundwater, noise control, and management of residues generated by the work; (4) measurement and monitoring of emissions from the work, including a description of measurement methods and frequency and the measurement evaluation process, to ensure compliance with license conditions; (5) measures for incidental operations that may affect the environment, namely start-up, leaks, breakdowns, shutdown, and final cessation of work; (6) an obligation to notify the agency responsible for environmental protection within 24 hours of any event seriously affecting the environment; (7) a license validity period of no less than three years and no more than eight years. In addition, Angola's Environmental Licensing Law also provides for a special environmental research subsidy system: any environmental research related to changes in or expansion of project activities or enterprises may serve as a subsidy for the required license application.

It can be observed that Angola has established a "three-license-in-one" environmental licensing legal system comprising the environmental license, environmental installation license, and environmental operating license. Among these, the environmental license encompasses technical documents, management measures, time limits, and other content, requiring enterprises to comply with relevant conditions, restrictions, and environmental control measures before carrying out projects or activities. For those that fail to meet requirements, endanger the environment and health, exceed environmental pollution thresholds, or have not conducted an environmental impact assessment, the agency responsible for environmental protection has the right to refuse administrative licensing, thereby continuously regulating corporate conduct. Of course, Angola's distinctive environmental research subsidy system also provides strong incentives and impetus for enterprises in their production and operation processes. Enterprises can fully exercise their subjective initiative during project implementation to research the specific requirements that must be met in enterprise development and project operation, thereby objectively improving Angola's overall environmental conditions and raising applicable environmental standards.

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