



World Commission on Environmental Law

Webinar 5

“Judges as Guardians of Water Resources: The Brasília Declaration of Judges on Water Justice”



A Legal Understanding of the Connection between Water and the Environment

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Content

- Considerations about the Brasilia Declaration of Judges on Water Justice: principles 1 and 9.
- Case Law.

Considerations about the Brasilia Declaration of Judges on Water Justice

Principles 1 and 9

The First Paragraph

“I – WE AGREE TO BE GUIDED BY THE FOLLOWING TEN FUNDAMENTAL PRINCIPLES IN PROMOTING WATER JUSTICE THROUGH APPLICATION OF WATER LAW AND THE ENVIRONMENTAL RULE OF LAW:”

- This is an **agreement** by **judges** to be **guided** by **10 fundamental principles** in **promoting water justice** through the **application** of **water law** and **environmental rule of law**.

The First Paragraph

Prominent features of the opening statement:

- The aim is to **promote water justice**.
- This is done by **applying water law** and the **environmental rule of law**.
- Principles as guidance.
 - **Theory of principles**: principles provide for optimization, in contrast to rules (Alexy).
 - Principles dictate less precise results than rules, and **are compulsory when valid** (Dworking).
 - H.L.A. Hart.

Principle 1

Principle 1 – Water as a Public Interest Good

The **State** should exercise **stewardship** over all **water resources**, and **protect** them, in conjunction with their associated **ecological functions**, for the benefit of **current and future generations**, and the **Earth community of life**.

Principle 9

Principle 9 – Water Justice and Environmental Integration

Environmental and ecosystem considerations should be integrated into the **application and enforcement of water law**. In adjudicating water and water-related cases, **judges should be mindful of the essential and inseparable connection that water has with the environment and land uses**, and should **avoid adjudicating those cases in isolation or as merely a sectoral matter concerning only water**.

Case Law

Chile
Third Environment Court
Municipality of Rio Negro
v.
Seimura Carrasco Valdeavellano



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The Black Letter & the Environment

- The **riverbank** collapsed on a particularly rainy and windy day, flooding the pit as well as homes in the area.
- The Third Environment Court, building on its previous ruling in *Jaque Blu*, **included ecosystem services as an element of the environmental damage in this case.**
- In order to assess the damage, the Court analyzed
 - (a) the damaged environmental components,
 - (b) the ecosystem involved,
 - (c) the harm to the ecosystem consisting of its services, conservation and preservation, and
 - (d) the significance of that harm.
- The **damaged component** was defined as the **riverbank.**



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The Black Letter & the Environment

- The **ecosystem** was defined as the **river**.
- The **harm** consisted of the **inability** of the riverbank to contain the river, and its **inability to conserve and preserve its biotic and abiotic components**.
- The extension of the damage, and the **inability of the riverbank to regenerate** was considered **significant**.
- The Court ruled that **the defendant had to restore the riverbank to the same characteristics of the existing but unharmed riverbank**, promoting the restoration of structural and ecosystemic functions.
- Furthermore, the Court ordered an assessment of the current state on the harmed riverbank by using an **environmental quality index** before and after the restoration.

Brazil

Superior Court of Justice

Appeal N.º 1.782.692-PB(2018/0268767-7)

*Instituto Brasileiro do Meio Ambiente e dos
Recursos Naturais Renováveis (IBAMA)*

v.

Alberis Nunes and others

Judge Antonio Herman Benjamin, for the Court

The Facts

- Petitioner: Ibama.
- Respondents: group of people and the Municipality of Pitimbu, State of Paraíba.
- A group of people built different constructions such as a bar, a pharmacy, holiday houses, and residences, on the margins of river Acaú.
- The land over which the buildings were constructed is a permanent riverbank preservation area, according to the Brazilian Forests Code.

The Facts

- Accordingly, Ibama requested the bar of extensions and demolitions of the 11 illegal constructions.
- The trial court decided that the illegal use of the riverbank and the wastewater poured into the river amounted to environmental damage.
- The trial court ordered the demolition of the illegal buildings
- The Superior Court of Justice upheld.

The Black Letter and the Environment

- The case has, at least 2 important arguments for this presentation:
 - The area is under an absolute presumption of inviolability:
 - The area is at the **heart of the environmental-planning legal regime:**
 - The no-construction zone is in place **to protect health, security, property, and welfare** of people against **risk** of many kinds, particularly in urban areas.
 - Wittingly, Judge Benjamin recognizes the aim of the law in protecting **environmental services**, but he is quick to dismiss it as its unique aim, **as it is intertwined with health, security, property and welfare**. Although he doesn't mention it, he is viewing the whole picture as an **attack against the relation between humans and nature (ecosystem services)**.



The Black Letter and the Environment

- The absolute protection provided by the law means that **any damage accounts for its violation** (*in re ipsa*).
 - Being an **area as such protected by the law** —because of its ecosystem services I might add—, **it is irrelevant its ecological health** (it can be even derelicted). The law provides for a *propter rem* obligation to illegal occupant to “vacate, demolish and restitution”.
- Right to a healthy environment and the right to housing.
- Judge Benjamin **doubts on the equity and legitimacy of land grabbing based on the right to housing**, as usually is the case that individual interests percolate at the end.

The Black Letter and the Environment

- Right to a healthy environment and the right to housing.
 - Confronted the human right to housing against the human right to a healthy environment, the solution comes from **the public interest service of environmental provisions against particular interests**.
 - But, there is no incompatibility between both rights: **Social misery does not trump ecological misery**. The center of the issue is the disgraceful housing deficit in the country.



Thank you for your attention!

¡Muchas gracias por su atención!

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